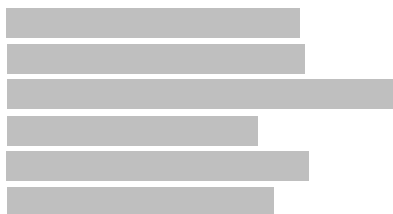


Christoph Schwarte



Mr Pablo Saavedra Alessandri
Secretary of the
Inter-American Court of Human Rights
San Jose, Costa Rica
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12 September 2016

Dear Sir,

I refer to your letter, REF. CDH-OC-23/236, dated 18 May 2016, inviting me to present a written opinion on the issues covered by the request for an advisory opinion submitted to the Inter-American Court of Human Rights by the State of Colombia on 14 March 2016.

I have read the request for an advisory opinion with interest and agree with most of its legal contentions. There may, however, be two additional legal considerations that could impact on the findings of the Court:

1. With regard to chapter 4, section 1 and, in particular, the scope of state obligations, it is a generally recognised principle of international law that states must carry out their treaty obligations in good faith (1969 Vienna Convention on the Law of Treaties, Art.26). It is an implicit rule (similar to “pacta sunt servanda” or that obligation cannot be agreed at the expense of a third state without its consent) that needs no mentioning in the relevant treaty and also applies to the American Convention on Human Rights. As a result, parties to the Convention have an obligation to refrain from acts that would prevent other parties to comply with the terms of the treaty and undermine its overall objective. If there is a risk that the construction and operation of an infrastructure project will impact on the marine environment of the Wider Caribbean Region to the extent that human rights are violated, a state under whose control or jurisdiction the project is carried out may be responsible for an internally wrongful act. While in relation to human beings states are primarily responsible to ensure the application of Convention rights to all those who are subject to their jurisdiction, this territorial limitation does not apply vis-a-vis other states. This leads to a degree of collective responsibility for the environment which appears to have been anticipated by the drafter of the Convention in recital two of the preamble (“... the essential rights of man are not derived from one's being a national of a certain state,... that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”).

2. With regard to chapter 4, section 3, and, in particular the question of an environmental impact assessment, the request for an advisory opinion states that a transboundary impact assessment is required if a proposed activity may cause serious damage to the environment of other states or in areas beyond national jurisdiction. The state under whose jurisdiction or control the activity takes

place shall notify and consult with states likely to be affected and make relevant information available. Based, for example, on the findings of the International Law Association (ILA, Principles relating to Climate Change, 2014, Draft Article 7B para.6) and the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS, Land Reclamation in and around the straits of Johor, Malaysia v. Singapore, Order 8 Oct. 2003, para.106, 1.c), it could further be argued that, in view of the particular circumstances of the case, a joint decision by the states concerned is required. In particular if the global commons (for example the high seas) are concerned, states need to carefully balance their right to economic development and exploitation of national resources with their due diligence obligation to ensure that activities within their jurisdiction or control do not cause significant damage to the environment. Additional treaty obligation to ensure that human rights can be exercised effectively across a region may narrow down an individual state's discretion to the extent that it is required to pursue multilateral negotiations until a joint decision (addressing activities and mitigation measures in a comprehensive manner) is reached.

I hope this is of some use and please do not hesitate to contact me again if you require any further information or input.

Thank you very much for the opportunity to contribute.

Yours faithfully,

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