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His Excellency
Roberto F. Caldas
President
Inter-American Court of Human Rights
San Jose, Costa Rica

Ref: Request by the Republic of Colombia for an advisory opinion from the Inter-American Court on Human Rights concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights

Dear Judge Caldas:

I am pleased to write as Chair of the World Commission on Environmental Law (WCEL) of the International Union for the Conservation of Nature (IUCN) to submit the Commission's written opinion with regards to the advisory opinion request of reference.

As you may know, IUCN has had cooperative relations with the Organization of American States since 1968 (OEA/ Ser.D/v.21/70). In this framework WCEL strongly values the opportunity to participate in this process and share expert insight on the issues under consideration by the Court in the context of this request.

The rule of law in environmental protection and the sustainable development of the marine environment, are essential to human wellbeing, hence interpretation and application treaties such as the American Convention in tandem with international environmental law is critical to delivering on the rights based approach within the global commitments on sustainable development.

I trust the input being provided will serve the Courts' mission. Kindly transmit all official communications and notifications regarding this matter via the WCEL Liaison Officer at: [redacted] I look forward to furthering collaboration on this matter as well as in guaranteeing the environmental rule of law in the Americas.

Antonio Herman Benjamin

Justice Antonio H. Benjamin
Chair

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Written Opinion by the World Commission on Environmental Law of the International Union for the Conservation of Nature

Request by the Republic of Colombia for an advisory opinion from the Inter-American Court on Human Rights concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights

January 19, 2017

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List of Acronyms

AG/RES	General Assembly / Resolution (acronym in Spanish)
ABNJ	Areas beyond national jurisdiction
CARICOM	The Caribbean Community
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	The Convention on the Conservation of Migratory Species of Wild Animals
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
HRC	United Nations Human Rights Council
IAC	The Inter-American Convention for the Conservation of Sea Turtles
IACHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
IUCN	The International Union for Conservation of Nature
LME	Large Marine Ecosystem
MEA	Multilateral Environmental Agreement
MPA	Marine Protected Area
OAS	Organization of American States
SIDS	Small Island Developing States
SPAW	Specially Protected Areas and Wildlife to the Cartagena Convention
TEIA	Transboundary Environmental Impact Assessment

TWAP	The Transboundary Water Assessment Project
UNCED	The United Nations Conference on Environment and Development
UNCLOS	The United Nations Convention on the Law of the Sea
UNECE	The United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNGA	General Assembly of the United Nations
WCEL	The World Commission on Environmental Law of IUCN
WCR	The Wider Caribbean Region

I. Introduction

The Presidency of the Inter-American Court of Human Rights (hereafter "IACHR" or "the Court"), acting pursuant to Article 73, paragraph 3 of the Court's Rules of Procedure, invited all interested parties to submit a written opinion in Advisory proceedings commenced by the Republic of Columbia on March 14, 2016, pursuant to Article 64, paragraph 1 of the American Convention on Human Rights – Pact of San José (hereinafter "the Pact of San José" or "the Convention"). In response to this request, the World Commission on Environmental Law ("WCEL") of the International Union for the Conservation of Nature ("IUCN")(hereinafter referred to collectively as "WCEL/IUCN") is to address the environmental implications and ramifications arising from the Court's interpretation of Article 1, paragraph 1, Article 4, paragraph 1, and Article 5, paragraph 1 of the Pact of San José. WCEL/IUCN respectfully submits the following written opinion, as an international organization with widely recognized independent expertise, in order to assist the Court in its deliberations.

The observations contained in this written opinion have been organized in three sections. This first section, **Section I**, provides of brief introduction to the request for the Advisory Opinion by the Court and the questions presented for the Court's consideration. **Section II**, contextualizes the questions on which the Court is requested to opine. It examines the relevance of the marine environment for the inhabitants of the wider Caribbean. It considers serious threats to the wider Caribbean marine environment from the construction and operation of major new permanent infrastructure projects. Finally, it details the nexus between human rights and the environment. **Section III**, the core of this written opinion, which we emphasize, then addresses in detail the specific questions for which the Republic of Colombia has sought the opinion from the Court.

A. IUCN and WCEL

IUCN is a membership Union uniquely composed of both government and civil society organizations. It provides public, private and non-governmental organizations with the knowledge and tools that enable human progress, economic development and nature conservation to take place together. It carries out its work with the assistance of six specialized Commissions. The WCEL is one such Commission. The mission of WCEL is to assure the integrity and conserve the diversity of nature through the promotion of ethical, legal and institutional concepts and instruments that advance environmental, social, cultural and economic sustainability (hereafter "sustainability") and to strengthen the capacity of governments, the judiciary, prosecutors, law schools and other stakeholders as they develop and implement environmental law. WCEL's goal is to influence, encourage and assist societies throughout the world to employ environmental law for restoring, conserving and sustaining nature, and assuring that uses of natural resources are equitable and ecologically sustainable. WCEL pursues its objectives in concert with the integrated programme of activities adopted by the World Conservation Congress in the IUCN Programme 2017–2020[1] and the mandate given to it by the IUCN Council for the 2017-2020 period[2] in cooperation with IUCN Members and components

[1] IUCN programme 2017–-2020: approved by the IUCN World Conservation Congress, September 2016. Available at: https://portals.iucn.org/library/node/46366?dm_i=2GI3,YJR9,48BY4N,2RRWM,1

[2] IUCN Commission Mandates 2017–2020 .Approved by the IUCN World Conservation Congress.

of the Union, through the Commission members and Specialist Groups, and in partnership with relevant international entities.

WCEL is led by a Chair elected by the IUCN membership and a Deputy Chair appointed by the IUCN Council on the recommendation of the Chair. A small WECL Steering Committee[3] is also appointed by the IUCN Council on the recommendation of the Chair in accordance with the IUCN Statutes and Regulations. The Steering Committee assists the Chair and Deputy Chair in setting the strategic direction and providing oversight of the activities of the Commission. Membership of WCEL is a fundamental part of its organization. The Commission currently has more than 1000 members from throughout the World many of which have contributed to these comments.

WCEL 2017-2020 Steering Committee[4]:

Prof. Antonio H. Benjamin, Justice, High Court of Brazil (Chair).

Prof. Denise Antolini, Associate Dean for Academic Affairs at the William S. Richardson School of Law,
University of Hawai‘i at Mānoa (Deputy Commission Chair)

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Co-chair of the WCEL-IUCN Specialist Group on Oceans, Coasts and Coral Reefs for
Member of the UN International Law Commission,
Member of the Faculty of Law at Istanbul Bilgi University, Istanbul, Turkey
Deputy Director of the Istanbul Bilgi Marine Research Center for the Law of the Sea.
(Steering Committee Member)

Ms. Elizabeth Maruma Mrema, Director, UN Environment Division of Environmental law and Conventions
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Ms. Ragnhild Noer, Justice in the Norwegian Supreme Court (Steering Committee Member),

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Prof. Nicholas Bryner, Emmett/Frankel Fellow in Environmental Law and Policy
UCLA School of Law (Steering Committee Member)

September 201. Available at: https://portals.iucn.org/library/sites/library/files/documents/WCC-6th-002.pdf?dm_i=2GI3,YJR9,48BY4N,2RRWM,1#page=16

[3] IUCN Council Decision C/91/3. Appointment of Deputy Chairs and members of the Steering Committees of the IUCN Commissions (Agenda Item 5), available onlir https://www.iucn.org/sites/dev/files/decisions_of_the_91st_meeting_of_the_iucn_council_hawaii_10_september_2016_with_annex_1.pdf

[4] See: https://www.iucn.org/commissions/world-commission-environmental-law/our-work/steering-committee

The WCEL 2017-2020 Steering Committee is grateful to the General Secretariat of the OAS and Ms. Denea Larissa Trejo for their support as well as to the following WCEL members, listed in alphabetical order, that served as contributing authors of this written opinion:

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Ms. Claudia S. de Windt and **Dr. Nilufer Oral served as contributing authors** and coordinated drafting of this opinion on behalf of the WCEL/IUCN Steering Committee.

B. The Questions Posed and the Contribution of WCEL/IUCN

As stated, on March 14, 2016, the Republic of Colombia (hereinafter "Colombia" or "the Agent"), a Member State of the Organization of American States (hereinafter "OAS") and a State Party to the Pact of San José, referring to Article 64(1) of this Pact, and pursuant to Article 2(2) of the Court's Statute, requested the Court to provide an Advisory Opinion interpreting certain provisions of the Pact[5] (hereinafter "Request for Advisory Opinion"). In accordance with the provisions of paragraphs 1 and 2 of Article 70 of the Court's Rules of Procedure, Colombia requested an Advisory Opinion on the applicability of the following provisions of the Pact of San José -- Article 1(1) (Obligation to Respect Rights), Article 4(1) (Right to Life), and Article 5(1) (Right to Humane Treatment/Personal Integrity) -- in cases where there is noncompliance with obligations under international environmental law in the context of the possible impact of

[5] Request for an Advisory Opinion Presented by the Republic of Columbia concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights (hereinafter "Request for Advisory Opinion")., available at: http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_ing.pdf.

significant, grand scale projects on the marine environment or areas protected by international environmental law, particularly in the Wider Caribbean Region.

Colombia's request poses, in essence, three fundamental questions related to the applicability of the provisions listed above on which the Advisory Opinion of this Court is being sought. The first question inquires into whether "an exception to the principle of territoriality of 'jurisdiction' pursuant to the Pact of San José" exists under multilateral environmental agreements or under regional treaties for the protection of oceans and seas.[6] More specifically, the question seeks an answer as to whether a State's obligations under Article 1(1) of the Convention apply extra-territorially so as to oblige States party to the Pact of San José to respect the rights of "persons who inhabit the coasts and islands of the Wider Caribbean Region" beyond their jurisdiction.[7]

The second question adds substantive specificity to the extra-territorial aspect of the first question. It focuses on the conduct of states that might do "serious damage to the marine environment" beyond national jurisdiction. It asks about the legal consequences of such damage for the inhabitants of "the coast and/or islands of another State party" under article 4(1) (right to life), article 5(1) (personal integrity) or "any other permanent provision" of the Convention.[8] At least with the right to life and personal integrity, but perhaps more broadly, the second question addresses whether and, if so, how the Convention might allow norms of international environmental law to be leveraged extra-territorially in order to protect against the violation of human rights in the region occasioned by harm to the marine environment. It asks this Court to help the implementation of (flesh out) the self-evident statement made by the recently departed Judge Christopher Weeramantry in his separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project*. Judge Weeramantry wrote: "The Protection of the environment is … a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as … the right to life itself. … [D]amage to the environment can impair and undermine all the human rights spoken of in … human rights instruments."[9]

The third question asks this Court to grapple with the principle of precaution and the prevention of environmental harm before it occurs. It does this by posing the issue of whether, by virtue of the "respect" and "ensure" obligations entailed in Article 1(1), the duty to conduct an effective environmental impact assessment ("EIA") – including, cooperation, prior notification, and consultation – is a necessary requirement in meeting obligations under Articles 4(1) and 5(1) of the Convention when individuals beyond national jurisdiction may suffer a violation of the rights to life and to personal integrity on account of the failure to prevent

[6] *Id.*, para. 87.

[7] *Id.*, para. 95. The question imposes four cumulative environmental conditions that apply before the issue of extra-territoriality is relevant to the question posed. In particular, it is only: i) if "a person resides or is in an area delimited and protected by a treaty-based environmental protection system" and a State that has ratified the Pact of San José is a party to that treaty-based system; and ii) if the "treaty-based system establishes an area of functional jurisdiction"; and iii) if in the "area of functional jurisdiction [of that treaty-based system], the States parties have the obligation to prevent, reduce and control pollution"; and iv) if "damage to the environment … in the area protected by the [treaty-based environmental protection system]" is caused by a State party and results in the violation of the human rights of a person who is outside the territory of the State and can be attributed to that State – It is only if these four conditions are met that Columbia's question of extraterritoriality arises. Id., para. 96.

[8] *Id.*, para. 115.

[9] Case Concerning the Gabčíkovo-Nagymaros Project, [1997] I.C.J. Rep. 7, 91-92.

environmental harm; especially "as a result of the construction and operation of major new permanent infrastructure projects."[10] Further, if an EIA is required the third question asks "what general parameters should be taken into account when making environmental impact assessments in the Wider Caribbean Region, and what should be the minimum content of these assessments?"[11]

As stated at the outset, the primary purpose of this written opinion by WCEL/IUCN is to provide significant, internationally recognized expert input to the deliberations of the Inter-American Court in its exercising its Advisory functions under the Convention. Naturally, the views of WCEL/IUCN contained in this written opinion are cognizant of the IUCN Programme 2017–2020, including in all three-program areas: Valuing and conserving nature; Promoting and supporting effective and equitable governance of natural resources; and Deploying nature-based solutions to address societal challenges.

C. Provisions of the American Convention on Human Rights to be interpreted and relevant sources of International Environmental Law

Colombia's request for an Advisory Opinion implicates the following provisions of the American Convention on Human Rights:

i. Article 1(1) (Obligation to Respect Rights):

"1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons' subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

ii. Article 4(1) (Right To Life)

"1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

iii. Article 5(1) (Right To Humane Treatment/Personal Integrity)

"1. Every person has the right to have his physical, mental, and moral integrity respected."

In response to the progressive degradation of the planet, the international community has been developing rules to protect the environment, both within and outside the borders where states exercise their sovereignty. International Environmental Law may arise from various sources:

- Treaties and other forms of written agreements: "conventional international law".
- The continued practice of a custom accepted as law: "customary environmental law".

[10] Request for an Advisory Opinion. *Supra* Note 4. at paras. 38-48

[11] *Id*., para. 155.

- The general principles of law.
- Judicial decisions and doctrines prepared by experts.
- Other sources: resolutions, decisions, principles and guidelines.

The above provisions of the Convention must be interpreted in the context of a series of relevant sources of international environmental law and treaties including MEA's not limited to the following[12]:

iv. Stockholm Declaration on the Human Environment[13]

The Stockholm Conference on the Human Environment was the world's first major attempt to address environmental problems transcending the political borders of States. In terms of human rights, one of the most important principles in the Stockholm Declaration is Principle 1. This Principle, coupled with the first preambular paragraph of Part I of the Declaration, has had an important influence on the linkage between human rights and the environment in at least three ways. First, it has supported international courts and tribunals in their interpretation of well-established "substantive" human rights to include environmental protection within their ambit. Second, international lawyers have frequently invoked human rights in the form of "procedural guarantees" to promote environmentally friendly decisions. Finally, it has contributed to an emerging norm that guarantees the right to live in an environment of at least a minimum quality.[14]

Principle 1

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. …[15]

v. Rio Declaration on Environment and Development[16]

The Rio Declaration was adopted by heads of state at the U.N. Conference on Environment and Development in 1992 (UNCED). The principles adopted in the Declaration represent international environmental law both in statutory sense as well as international customary law, and have been enunciated by the International Court of Justice in relevant settings described below. Among the relevant principles are the following:

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[12] These treaties and MEAs have been included by the Supreme Court of Justice of Mexico in the list of international treaties of which Mexico is a Party that recognize Human Rights: http://www2.scjn.gob.mx/red/constitucion/TI.html

[13] Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (Stockholm, 5-16 June 1972), pp. 3-5.

[14] Anton, Mathew & Morgan, International Law 904-905 (OUP, 2005).

[15] The Part I preambular paragraph of the Stockholm Declaration provides: "… Both aspects of man's environment, the natural and man-made, are essential to his well-being and enjoyment of basic human rights – even the right to life itself."

[16] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev 1 (Vol. 1) (3-14 June 1992), Annex I, pp. 3-8.

Principle 3
The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4
In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it

Principle 13
States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Principle 14
States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

Principle 15
In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 17
Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 19
States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

vi. Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ("The Cartagena Convention")

The Cartagena Convention is a comprehensive, umbrella agreement for the protection and development of the marine environment and has direct and relevant requirements that support the government of Colombia's request. In addition to general obligations and institutional arrangements, the Convention lists the sources of pollution, which have been determined by the Contracting Parties to require regional and national actions for their control: pollution from ships, dumping, land-based sources and seabed activities together with airborne pollution. The

Convention also identifies environmental management issues for which cooperative efforts are necessary: specially protected areas and wildlife, cooperation in cases of emergency, environmental impact assessment, and scientific and technical cooperation. The provisions in the Cartagena Convention are supportive and complimentary of the Rio Principles on the issue of Environmental Impact Assessment and, in fact, go beyond it by establishing a legally binding obligation to cooperate in this context. Of the many relevant provisions in the Convention, one stands out in making clear that environmental impact assessment obligations that States must take apply to the impacts that may occur for the entire region, not only to impacts within a state's territory:

Article 12 Environmental Impact Assessment

1. As part of their environmental management policies the Contracting Parties undertake to develop technical and other guidelines to assist the planning of their major development projects in such a way as to prevent or minimize harmful impacts on the Convention area.
2. Each Contracting Party shall assess within its capabilities, or ensure the assessment of, the potential effects of such projects on the marine environment, particularly in coastal areas, so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention area.
3. With respect to the assessments referred to in paragraph 2, each Contracting Party shall, with the assistance of the Organization when requested, develop procedures for the dissemination of information and may, where appropriate, invite other Contracting Parties which may be affected to consult with it and to submit comments.

vii. Protocol Concerning Specially Protected Areas and Wildlife to the Cartagena Convention (SPAW Protocol)

The Protocol Concerning Specially Protected Areas and Wildlife To The Convention For The Protection And Development of The Marine Environment Of The Wider Caribbean Region, was created as a support for the Cartagena Convention and also has special relevance to the request for an Advisory Opinion. The purpose of the protocol is to protect, restore and improve the state of ecosystems, as well as threatened and endangered species and their habitats in the Wider Caribbean Region by, among other means, the establishment of protected areas in the marine areas and their associated ecosystems.

viii. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) has the objective to ensure that international trade in specimens of wild animals and plants does not threaten their survival. Trade regulated by CITES ranges from live animals and plants to a vast array of wildlife products derived from them. Because of the transboundary nature of trade in wild animals and plants, effort to regulate it requires international cooperation to safeguard certain species from over-exploitation. CITES was conceived in the spirit of such cooperation. Today, it accords varying degrees of protection to more than 35,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs.

ix. The Convention on Wetlands/Ramsar Convention

The Convention on Wetlands, called the Ramsar Convention, is an intergovernmental treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. Wetlands are among the most diverse and productive ecosystems. They provide essential services and supply all our fresh water. However, they continue to be degraded and converted to other uses. The Convention uses a broad definition of wetlands. It includes all lakes and rivers, underground aquifers, swamps and marshes, wet grasslands, peatlands, oases, estuaries, deltas and tidal flats, mangroves and other coastal areas, coral reefs, and all human-made sites such as fishponds, rice paddies, reservoirs and salt pans. Many of the ecosystems in the Wider Caribbean Region are wetland ecosystems, hence there are potential implications of development and large infrastructure projects in the Wider Caribbean Region on their integrity and their role in support of human well-being

x. The Convention on the Conservation of Migratory Species of Wild Animals (CMS)/Bonn Convention

CMS provides a global platform for the conservation and sustainable use of migratory animals and their habitats. CMS brings together the States through which migratory animals pass, the Range States, and lays the legal foundation for internationally coordinated conservation measures throughout a migratory range. The Wider Caribbean Region is passage to many of the species under CMS protection.

xi. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere

The purpose of this hemispheric treaty is to protect and reserve in their natural habitat representatives of all species and genera of the native flora and fauna of its Parties, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control. Also, to protect and preserve scenery of extraordinary beauty, unusual and striking geologic formations, regions and natural objects of aesthetic, historic or scientific value, and areas characterized by primitive conditions in those cases covered by the Convention. The following two articles of this Convention as well as the areas under protection as notified by the Parties to the General Secretariat of the OAS per Article II are pertinent to Colombia’s request of an advisory opinion by the Court.

Article III

The Contracting Governments agree that the boundaries of national parks shall not be altered, or any portion thereof be capable of alienation except by the competent legislative authority. The resources of these reserves shall not be subject to exploitation for commercial profit.

The Contracting Governments agree to prohibit hunting, killing and capturing of members of the fauna and destruction or collection of representatives of the flora in national parks except by or under the direction or, control of the park authorities, or for duly authorized scientific investigations.

Article V

1. The Contracting Governments agree to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves referred to in Article II hereof. Such regulations shall contain proper provisions for the taking of the specimens of flora and fauna for scientific study and investigation by properly accredited individuals and agencies.

2. The Contracting Governments agree to adopt or to recommend that their respective legislatures adopt, laws which will assure the protection and preservation of the natural scenery, striking geological formations, and regions and natural objects of aesthetic interest or historic or scientific value.

xii. The Inter-American Convention for the Conservation of Sea Turtles (IAC)

The Inter-American Convention for the Protection and Conservation of Sea Turtles ("IAC") is an intergovernmental treaty, which provides the legal framework for countries in the American Continent to take actions in benefit of these species. The Convention promotes the protection, conservation and recovery of the populations of sea turtles and those habitats on which they depend, on the basis of the best available data and taking into consideration the environmental, socioeconomic and cultural characteristics of the Parties.

xiii. United Nations Convention on the Law of the Sea (UNCLOS)

The Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to humankind's very source of life. Among the important features of the treaty, is found: navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a more unique feature, a binding procedure for settlement of disputes between States.

Appendix I includes signatures and ratifications by countries of the Wider Caribbean Region of regional and international treaties as well as MEAs and additional reference information including case law is provided for the Court's consideration in Appendix II.

II. Contextual Framework

A. Relevance of the Marine Environment for the Inhabitants of the Wider Caribbean Region

In its Request for an Advisory Opinion, the Agent stated that "[t]he Wider Caribbean Region … and, specifically, the Caribbean Sea, consists of three main ecosystems – the coral reefs, the mangroves, and the seagrass beds – which are home to an exceptional flora and fauna, essential for the sources of the livelihood of the coastal communities, such as fishing and tourism. Owing to its inherent characteristics, the Wider Caribbean Region is particularly sensitive to the environmental harm that could result from acts and/or omissions of States."[17]

This Request for Advisory Opinion is immeasurably aided through the longstanding Cartagena Convention[18] and its SPAW Protocol.[19] Through these instruments, all of the States of the Wider Caribbean Region have made clear the great importance they place on the preservation of the very special Caribbean marine environment.[20]

The protection of the marine ecosystems of the Wider Caribbean Region is one of the Cartagena Convention's "principal objectives."[21] As previously mentioned, the Cartagena Convention is a comprehensive, umbrella agreement for the protection and development of the marine environment in the Wider Caribbean Region. In the Convention, the Parties recognize "the threat to the marine environment, its ecological equilibrium, resources and legitimate uses posed by pollution and by the absence of sufficient integration of an environmental dimension into the development process,"[22] and are required to take measures to protect and preserve rare or fragile ecosystems, habitats of depleted, threatened or endangered species; and to develop technical and other guidelines for the planning and environmental impact assessments of important development projects in order to prevent or reduce harmful impacts within the Wider Caribbean Region.

The Cartagena Convention, for example, recognizes the "special hydrographic and ecological characteristics of the region and its vulnerability to pollution," the dependence of Caribbean inhabitants on the marine environment, and the "economic and social value of the marine environment, including coastal areas," of the Wider Caribbean Region.[23] The Cartagena Convention also expresses awareness of the responsibility of its Parties "to protect the marine environment" of the wider Caribbean region "for the benefit and

[17] Request for an Advisory Opinion. *Supra* Note 4.
[18] 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 22 ILM 221 (1983), 24 Mar. 1983 (entered into force 11 Oct. 1986) (hereinafter the "Cartagena Convention").
[19] Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 18 Jan. 1990 (entered into force 18 June 2000), available at http://www.cep.unep.org/cartagena-convention/spaw-protocol (hereinafter "SPAW Protocol").
[20] Under the Cartagena Convention, the Wider Caribbean Region covered by the Convention includes "the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30 deg north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in article 25 of the Convention." Cartagena Convention, art. 2(1). The SPAW Protocol covers the area covered by the Convention, and "in addition, includes e: i) waters on the landward side of the baseline from which the breadth of the territorial sea is measured and extending, in the case of water courses, up to the fresh water limit; and ii) such related terrestrial areas (including watersheds) as may be designated by the Party having sovereignty and jurisdiction over such areas." SPAW Protocol, art. 1(c).
[21] Cartagena Convention, Preamble.
[22] *Ibid.*
[23] *Ibid*.

enjoyment of present and future generations."[24] This obligation includes, but is not limited to, the protection of ecosystems such as the Southwestern Colombian mangrove system, the Colombian offshore small island reef system islands, the mixes coastal West central Colombian system, and the eastern Colombian rocky platform system.[25]

Similarly, the adoption of the SPAW Protocol reflects the importance of establishing regional co-operation to protect, restore, and improve the state of ecosystems and threatened and endangered species and their habitats in the Wider Caribbean Region.[26] The Protocol recognizes that the Wider Caribbean Region constitutes an "interconnected group of ecosystems in which an environmental threat in one part represents a potential threat in other parts."[27] Accordingly, the Protocol also recognizes that the "protection and maintenance of the environment of the Wider Caribbean Region are essential to sustainable development within the region," and that "rare or fragile ecosystems and native flora and fauna" of the Wider Caribbean Region are of "overwhelming ecological, economic, aesthetic, scientific, cultural, nutritional, and recreational value."[28] The drafters of the SPAW Protocol believed that establishing and managing protected areas and species would "enhance the cultural heritage and values of the countries and territories in the Wider Caribbean Region, and bring increased economic and ecological benefits to them."[29]

Due to their connectivity, the ecosystems in the Wider Caribbean Region form part of a Large Marine Ecosystem (LME), which is defined as a relatively large area of ocean space of approximately 200,000 km² or greater that has distinct bathymetry, hydrography, and biological productivity and whose plant and animal populations are inextricably linked to one another.[30] It is important to note that these ecosystems almost always extend beyond national jurisdiction and that an environmental threat in one part represents a potential threat in other parts of the LME.

The Caribbean Sea LME is a tropical sea bounded by North America (South Florida), Central and South America, and the Antilles chain of islands. It has a surface area of about 3.3 million km^2, of which 3.89% is protected.[31] It is home to 7.09% and 1.35% of the world's coral reefs and sea mounts, respectively.[32] The Caribbean Sea LME is bordered by 38 countries and dependent territories of the United States, France, United Kingdom, and the Netherlands. Sixteen of the independent States and 14 dependent territories are Small Island Developing States (SIDS). The population of the Caribbean Sea is approximately 107 million, with the majority inhabiting the coastal zones. In addition, each year, there is a considerable influx of tourists during the tourism season. Most of the Caribbean islands are influenced by the nutrient poor North Equatorial current that enters the Caribbean passages between the Lesser Antilles. A significant amount of water is transported northwestward by the Caribbean current through the

[24] *Ibid.*
[25]Sullivan Sealley, K. & Bustamente, G.1999. Setting Geographic Priorities for Marine Conservation in Latin-America and the Caribbean. The Nature Conservancy, Arlington, Virginia
[26]SPAW Protocol, Preamble.
[27]*Ibid*
[28]*Ibid*
[29]*Ibid*
[30]Generally Asha Singh, "Governance in the Caribbean Sea: Implications for Sustainable Development," Research Paper, United Nations - Nippon Foundation Fellowship Program (2008); NOAA, "Large Marine Ecosystems: A Breakthrough Concept for Ecosystem Management," available at http://celebrating200years.noaa.gov/breakthroughs/ecosystems/welcome.html.
[31]United Nations Environment Programme (UNEP), S.Helleman and R. Mahon. LME#12 XV- Wider Caribbean.49 Caribbean Sea LME. 2009. at p. 657Available at: http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-xv-wider-caribbean/at_download/file
[32]*Ibid*

Caribbean Sea and into the Gulf of Mexico, via the Yucatan current, as well as run off from two of the largest river systems of the world—the Amazon and the Orinoco—and numerous other large rivers dominates the north coast of South America.[33]The Caribbean Sea can be considered a Class II, moderate productivity ecosystem (150-300 gCm yr). There is considerate spatial and seasonal heterogeneity in productivity throughout the region. Areas of high productivity include the plumes of continental rivers, and nearshore habitats such as coral reefs, mangroves and seagrass beds. Relatively high productivity occurs off the northern coast of south America were nutrient input from rivers, estuaries and wind induced upwelling is greatest[34]

The Wider Caribbean Region is particularly important in terms of global biodiversity.[35] For instance, it comprises a bio-graphically distinct area of coral reef development within which the majority of corals and coral reef associated species are endemic.[36] Among its coral reefs is the Meso-American Barrier Reef, the world's second largest barrier coral reef, which sees yearly migrations of marine mammals such as the humpback, sperm, and killer whales.[37] Manatees are not as common as they once were along many of the river mouths.[38] Sea turtles, such as hawksbill, green and leatherback nest on the beaches of this LME.[39] All of these species face various threats to their survival and are included in the IUCN red list and CITES appendixes.

In light of the special hydrographic, biotic, and ecological characteristics of the Wider Caribbean Region,[40] during the Fifth Summit of the Americas, the Heads of State and Government of OAS Member States recognized, in the same spirit of the Cartagena Convention, that the Wider Caribbean Region is a marine area of unique biodiversity and highly fragile ecosystems, and committed to continue working together to develop and implement regional initiatives to promote the sustainable conservation and management of the Caribbean coastal and marine resources:

> "We recognise that the conservation of marine resources and the protection of marine ecosystems, including estuaries and coastal areas, throughout the Americas are vital for the continued economic and social well-being of those who live near or otherwise depend on the sea. We will seek to secure the wider adoption and implementation of existing regional and international marine conservation and marine pollution agreements. We further recognise that the wider Caribbean is a marine area of unique biodiversity and highly fragile ecosystems, and we will continue to work together along with other countries and relevant regional and international development partners to continue to develop and implement regional initiatives to promote the sustainable conservation and management of Caribbean coastal and marine resources. In this regard, we take note of the ongoing efforts

[33]Muller-Karger, F.E.1993. River discharge variability including satellite-observed plume-dispersal patterns in climatic change in the Intra-Americas Sea, G.A. Maule d. United Nations Environment Programme. Edward Arnold, London.

[34]United Nations Environment Programme (UNEP), S.Helleman and R. Mahon. *Supra* note 30.

[35]*Id*. at p. 657.
[36]*Ibid*.
[37]*Ibid*
[38]*Ibid*
[39]*Ibid*
[40]*Cf.* SPAW Protocol, Preamble.

to consider the concept of the Caribbean Sea as a Special Area in the context of sustainable development without prejudice to relevant national legislation and international law."[41]

The General Assembly of the OAS has reaffirmed this commitment and reiterated the importance of the marine environment in the Wider Caribbean Region in subsequent resolutions. For example, it has issued several important decisions to support the work of the Caribbean Sea Commission in mobilizing financial resources and capacity-building, developing technical and technological cooperation, and exchanging experiences.[42] In Resolution 2691 (XLI-O/11), it recognized that the "the Caribbean Sea has unique biodiversity and highly fragile ecosystems" and that Caribbean economies rely "heav[ily] … on their coastal areas, as well as on the marine environment in general, to achieve their sustainable development goals."[43] It also recalled the importance of the Cartagena Convention (and its Protocols) as a framework "to prevent, reduce and control pollution" in the Wider Caribbean Region and to "ensure sound environmental management."[44] Similarly, in Resolution AG/RES. 2779 (XLIII-O/13), the General Assembly recognized "that the conservation of the marine environment throughout the Hemisphere is vital due to the economic, social and environmental contributions of marine resources and ecosystems, in particular to islands, coastal states and those communities dependent on the sea to achieve their sustainable development goals."[45]

The UN General Assembly (UNGA) has also long recognized the importance and ecosystem fragility of the Wider Caribbean Region.[46] For example, in 2006, the UNGA recognized that "the Caribbean Sea has a unique biodiversity and highly fragile ecosystem" and noted the "heavy reliance of most of the Caribbean economies on their coastal areas, as well as on the marine environment in general, to achieve their sustainable development needs and goals."[47] The UNGA further acknowledged the challenges posed for effective environmental management in the region[48] and recommended that all relevant parties work together to promote "sustainable conservation and management of coastal and marine resources."[49]

The Caribbean countries, especially the Small Island Developing States (SIDS), are highly dependent on the marine environment for their economic, nutritional, and cultural well-being. Island economies are also highly dependent on tourism. Marine fisheries play

[41] Declaration of Commitment of Port of Spain: Securing Our Citizens' Future by Promoting Human Prosperity, Energy Security and Environmental Sustainability, dated April 19, 2009, Fifth Summit of the Americas, OEA/Ser.E, CA-V/DEC.1/09, at para. 65, available at http://www.summit-americas.org/V_Summit/decl_comm_pos_en.pdf (hereinafter "Port of Spain Declaration of Commitment").
[42] See, e.g., Resolution AG/RES. 2691 (XLI-O/11), "Support for the Work of the Caribbean Sea Commission," adopted on 7 June 2011; Resolution AG/RES. 2779 (XLIII-O/13), "Advancing Hemispheric Initiatives on Integral Development," adopted on 5 June 2013 at resolve paragraph 14. Regarding support for the work of the Caribbean Sea Commission (CSC).
[43] Resolution AG/RES. 2691 (XLI-O/11), Preamble.
[44] *Ibid.*
[45] Resolution AG/RES. 2779 (XLIII-O/13), Preamble.
[46] The UN General Assembly has adopted a series of resolutions on "Promoting an integrated management approach to the Caribbean Sea area in the context of sustainable development. See, e.g., UNGA Resolutions 54/225 (1999), 55/203 (2000), 57/261 (2002), 59/230 (2004). See also UNGA Resolution 61/197 (2006), "Towards the sustainable development of the Caribbean Sea for the present and future generations"; Resolution 65/155 (2010), "Towards the sustainable development of the Caribbean Sea for present and future generations."
[47] UNGA Resolution 61/197 (2006), Preamble.
[48] *Id.* (noting "that the intensive use of the Caribbean Sea for maritime transport, as well as the considerable number and interlocking character of the maritime areas under national jurisdiction where Caribbean countries exercise their rights and duties under international law, present a challenge for the effective management of the resources.").
[49] *Id.*, art. 1.

an important social and economic role and are an important source of protein, employment and foreign exchange earnings in many countries in the Wider Caribbean Region.[50]

B. Serious Threats to the Marine Environment of the Wider Caribbean Region from the Construction and Operations of Major Infrastructure Projects

In its Request for an Advisory Opinion, the Agent has indicated that threats of serious damage to the marine environment of the Caribbean Sea are also a serious threat to the way of life and personal integrity of all the coastal and island inhabitants in this Region.[51].

Pollution of marine and coastal areas is "a major and recurrent transboundary environmental issue" in the Wider Caribbean Region.[52] Land-based pollution and physical alteration and destruction of habitats are among the major threats to the coastal and marine environments of the Caribbean SIDS.[53] In addition, land-based sources of pollution, the discharge of solid waste, wastewater and bilge water from both commercial and cruise ships, as well as other offshore sources are of increasing concern.[54] Pollution is moderate in general and severe in coastal hotspots particularly around the large cities. The entire Caribbean region may be considered a hotspot in terms of risk from shipping and threats to coral reefs.[55]

The major threats to the marine environment of the Wider Caribbean Region, including:

- **Pollution from ships**: The Wider Caribbean Region is one of the busiest shipping areas in the world. Pollution from ships is caused by discharges in normal operations of ships such as tank or ballast water cleaning or by discharges after accidents.[56]
- **Pollution caused by dumping**, such as the dumping of wastes and other matter from ships, aircraft, or artificial structures at sea.[57]
- **Pollution from sea-bed activities**: The pollution resulting from activities on the seabed is due to the release of hazardous substances from the materials used in the exploration, exploitation, and processing of the sea-bed and its subsoil. This contamination is usually higher in areas of oil exploration.[58]
- **Pollution from land-based sources**: From a quantitative point of view, land-based pollution is the main source of pollution of the marine environment. This includes, for example, coastal disposal or discharges emanating from rivers, estuaries, coastal establishments, and outfall structures, such as pipelines.[59]
- **Airborne pollution**, such as discharges into the atmosphere from activities at sea, including from ships, and on land.[60]

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[50] United Nations Environment Programme (UNEP), S.Helleman and R. Mahon. *Supra* note 30 at p. 666
[51] Request for Advisory Opinion. Supra Note 4.
[52] United Nations Environment Programme (UNEP), S.Helleman and R. Mahon. *Supra* note 30at p. 663
[53] *Id.* at pp. 663-665.
[54] *Ibid.*
[55] *Ibid.*
[56] *Cf.* Cartagena Convention, art. 5.
[57] Cf. id. at art. 6.
[58] Cf. id. at art. 8.
[59] Cf. id. at art. 7.
[60] Cf. id. at art. 9.

Most of the marine pollution is found in the coastal zone, due to the concentration of human activity.[61] This includes discharges, agricultural runoff, spills, as well as the construction of a wide variety of coastal infrastructure, such as water reservoirs or hydroelectric dams, canals, water supply and sanitation networks, roads, highways, railways, ports, airports, sewage plants, bridges, and many other structures that involve environmental impacts. Some of the principal negative environmental impacts and threats to the marine environment that can be derived from these large development projects are the loss and fragmentation of habitats or effects due to changes in sedimentation and nutrient patterns, elimination of riparian vegetation, etc. The resulting changes in flood cycles, tidal currents and water levels can alter trophic dynamics affecting the life cycle of plankton and generating corresponding adverse effects in the rest of the food chain.

The UN General Assembly (hereinafter "UNGA")also noted "the problem of marine pollution caused, inter alia, by land-based sources and the continuing threat of pollution from ship-generated waste and sewage, as well as from the accidental release of hazardous and noxious substances in the Caribbean Sea area" and called for "the protection of the Caribbean Sea from degradation."[62] Given the challenges of managing transboundary pollution, in 2015, the UNGA resolved to develop an international legally binding instrument under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[63]To that that end, the UNGA decided to establish a Preparatory Committee and urged Member States to include the following measures in their recommendations to the General Assembly: a. the rapid identification, designation and effective management of an ecologically representative and well-connected system of MPAs, including reserves, in ABNJ;"

Furthermore, in 2016, the International Union for Conservation of Nature (IUCN) at the World Conservation Congress similarly expressed concern that certain human activities are significantly reducing the marine biodiversity in areas beyond national jurisdiction(ABNJ); it further stated that there is a need of protecting them by establishing marine reserves or other types of marine protected areas (MPA).[64]

The Inter-American Commission on Human Rights has also specifically alerted to potential environmental risks from major infrastructure projects and, by extension, to human rights. In its third report on the situation of human rights in Colombia, the Commission stated that

> "Mega infrastructure or development projects, such as highways, canals, dams, ports and similar, as well as concessions for the exploration for, or exploitation of, natural resources in ancestral territories may have particularly serious consequences for the indigenous peoples, because such projects jeopardize their territories and the respective ecosystems, and thus represent a mortal danger for their survival as peoples, especially when the ecological fragility of their territories coincides with their low population density."[65]

[61] United Nations Environment Programme (UNEP), S.Helleman and R. Mahon. *Supra* note 30 at pp. 663-665.
[62] UNGA Resolution 61/197 (2006), Preamble and art. 5.
[63] UNGA Resolution 69/292 (2015), "Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."
[64] WCC-2016-Res-047-EN, "Advancing conservation and sustainable use of biological diversity in areas beyond national jurisdiction," available at https://portals.iucn.org/library/sites/library/files/documents/IUCN-WCC-6th-005.pdf.
[65] IACHR, Third Report on the Situation of Human Rights in Colombia, Doc. OEA/Ser.L/V/11.102, Doc. 9 rev. 1, February 26, 1999, Chapter X, ¶¶ 33-35.

Thus, it is clear that marine and coastal ecosystems experience stress from a wide range of activities. These activities impact ecosystems cumulatively, in ways that are not always known, and with a combined impact that is always greater than that of the individual activities. Based on two risk indexes, the Transboundary Water Assessment Project (TWAP)[66] has established that the Wider Caribbean Region LME faces medium to high environmental risks.[67] In addition, local populations face a high degree of risk as illustrated in the map below.[68]

According to the TWAP, high levels of human well-being and ecosystem health are mutually reinforcing outcomes of sustainable ecosystems. Because the two are so interconnected, actions to enhance the well-being of coastal populations must not sacrifice ecosystem health, and vice-versa.

Figure 1. Estimating risk to coastal population from environmental degradation and climate change

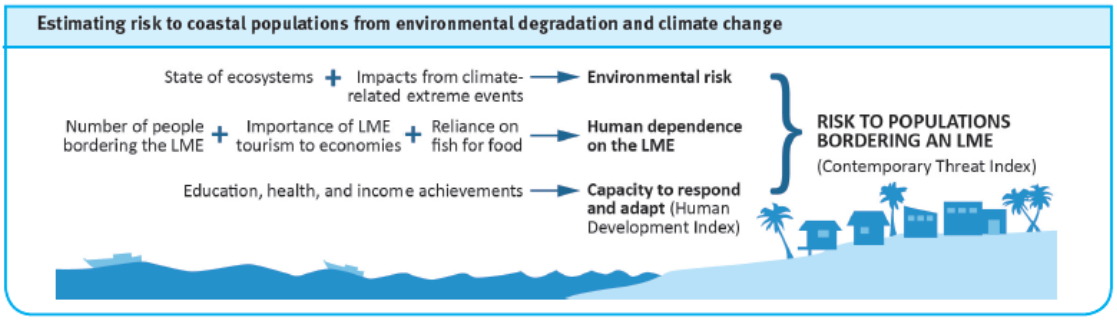
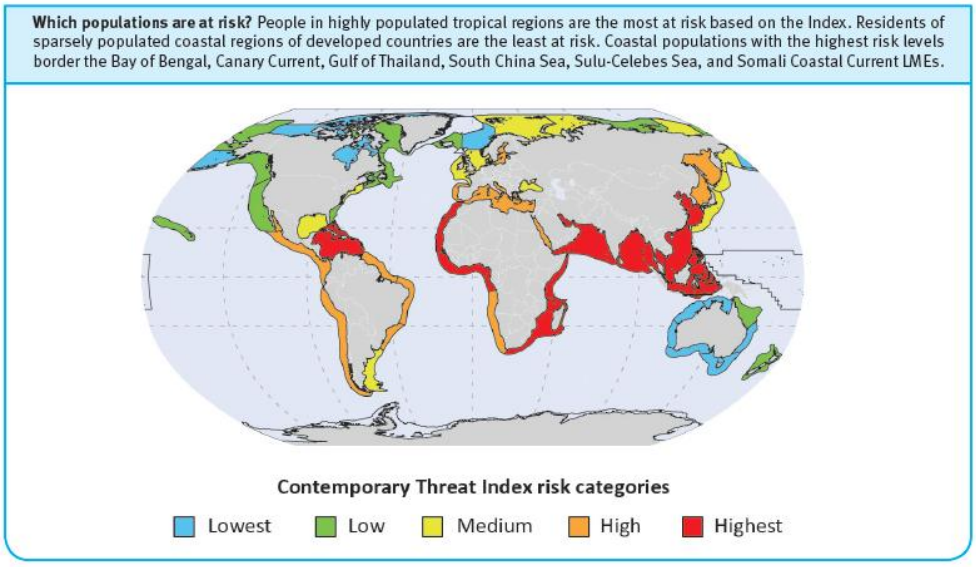


Figure 2. Population risk in current LMEs



Source: TWAP

[66] United Nations Environment Programme (UNEP), *Large Marine Ecosystems, Status and Trends: Summary for Policy Makers*, Volume 4: Large Marine Ecosystems, January 2016.
[67] The Cumulative Human Impacts Index combines 19 measures of impacts in four categories: climate change, fishing, land-based pollution, and commercial activities; the contemporary threat index assesses the vulnerability of coastal populations bordering LMEs incorporating measures of environmental risk, dependence on marine ecosystem services, and capacity to respond and adapt to threats.
[68] United Nations Environment Programme (UNEP), *Supra* Note 66

In all these projects, environmental considerations, together with technical, economic and social issues, are of fundamental importance in order to maintain the quality of life of society and to avoid the deterioration of the environment and its resources. In the case of the Wider Caribbean Region, cumulative impacts of any type of development and infrastructure project must be considered in light of the above existing threats.

The potential and current threats to the Wider Caribbean Region have served as the key rationale for the OAS and UN Member States to adopt legally binding obligations for the protection and sustainable development of the marine environment in the Region discussed above, such as the Cartagena Convention, the SPAW Protocol, and numerous resolutions and decisions over the years (*see* Section II.A above).

The legal structure of the Convention is such that it covers the various aspects of marine pollution for which the Contracting Parties must adopt measures. These measures are aimed at preventing, reducing and controlling pollution from several sources.

Furthermore, this obligation under the Cartagena Convention is complemented by various Multilateral Environmental Agreements (MEAs) and treaties such as the above, which establish a clear obligation on the Parties to develop and enforce laws relating to protected areas and designate areas of special protection. Other complementary initiatives include efforts to develop and implement regional initiatives to promote the sustainable conservation and management of coastal and marine resources including for the designation of the Caribbean Sea as a special area in the context of sustainable development, as referenced in paragraph 31 of the Mauritius Strategy and paragraph 65 of the Declaration of Commitment of Port of Spain, without prejudice to relevant international law.[69]

All of the above-mentioned commitments and initiatives highlight the efforts of the Caribbean countries and the international community to address in a more holistic manner the sectoral issues relating to the management of the Caribbean Sea area and, in so doing, to promote an integrated management approach to the Caribbean Sea area in the context of sustainable development, through a regional cooperative effort among Caribbean countries.

C. The Environment and Human Right Nexus

The nexus, or interdependence, between protection of fundamental human rights and protection of the environment is firmly established in international law, as can be seen from (a) international instruments, (b) OAS decisions, and (c) the jurisprudence from the Inter-American Human Rights System and from the ICJ.

[69] Port of Spain Declaration of Commitment, ¶ 65 ("Recognizing that the conservation of marine resources and the protection of marine ecosystems, including estuaries and coastal areas, throughout the Americas are vital for the continued economic and social well-being of those who live near or otherwise depend on the sea, we will seek to secure the wider adoption and implementation of existing regional and international marine conservation and marine pollution agreements.")

i. Human Rights and the Environment in International Law

The recognition that environmental harm can interfere with the full enjoyment of human rights dates from the very beginning of modern environmental law[70] and has been reaffirmed on numerous occasions over the past four decades, including, for example, through the UN Conference on the Human Environment (1972), the World Charter for Nature (1982), the Conference on the Environment and Development (1992), the Conferences on Sustainable Development (2002, 2012), and the Paris Agreement on Climate Change (2015).

In 1968, the UN General Assembly recognized for the first time the relationship between the quality of the human environment and the effective enjoyment of basic rights in a resolution deciding to convene the Stockholm Conference on the Human Environment.[71] In 1972, the Stockholm Declaration on the Human Environment was adopted.[72] The nexus between human rights and protection of the environment is evident from the Preamble of the Stockholm Declaration:

> "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself."[73]

Principle 1 of the Stockholm Declaration further underscores this relationship:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve` the environment for present and future generations."[74]

Although this provision does not expressly establish the right to a healthy environment, it is clear that the existence of such right is implicit in (a) the recognition that environmental quality is a prerequisite for the enjoyment of human rights and (b) the obligation to protect and improve the environment—whenever there is an obligation, there is a right.[75]

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[70] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Preliminary Report, UN Doc. A/HRC/22/43 ¶ 18 (24 Dec. 2012).
For all 16 Reports of the Independent Expert on this subject, see
http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx.

[71] UNGA Resolution 2398 (XXIII) (1968) (noting its concern about the effects of "the continuing and accelerating impairment of the quality of the human environment … on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries").

[72] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, U.N. Doc. A/CONF.48/14/Rev.1 (1972), ¶ 1 (hereinafter "Stockholm Declaration").

[73] Stockholm Declaration, Preamble.

[74] Stockholm Declaration, Principle 1.

[75] Dinah L. Shelton, "*Environmental Rights and Obligations in the Inter-American Human Rights System*" Human Rights Yearbook, Human Rights Center, University of Chile, Santiago (2010).

The Rio Declaration on Environment and Development (Rio Declaration), adopted at the 1992 UN Conference on Environment and Development in Rio de Janeiro, reaffirmed these principles[76]. It proclaimed that, "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[77] It further affirmed that human beings "are entitled to a healthy and productive life in harmony with nature."[78] At the twentieth anniversary of the Rio Declaration in 2012, the international community again renewed its commitment "to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations."[79]

In more recent years, the UN Human Rights Council (HRC) has taken up the issue of human rights and the environment and identified specific environmental threats to particular rights.[80] In Resolution 31/8, adopted in 2016, the HRC recognized that "sustainable development and the protection of the environment contribute to human well-being and to the enjoyment of human rights," whereas, "conversely, … climate change, the unsustainable management and use of natural resources and the unsound management of chemicals and waste may interfere with the enjoyment of a safe, clean, healthy and sustainable environment, and … environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of all human rights."[81] The HRC thus called on States, *inter alia*, to respect, protect, and fulfil human rights, including in actions relating to environmental challenges.[82]

The interconnection between a healthy environment and human rights protection is made explicit in several human rights treaties, including the Convention on the Rights of the Child, which states that environmental pollution poses "dangers and risks" to nutritious foods and clean drinking-water,[83] and the International Covenant on Economic, Social and Cultural Rights, which provides that the steps Parties must take to achieve the full realization of the right to health "shall include those necessary for … the improvement of all aspects of environmental and industrial hygiene."[84] Moreover, in recognition of this indelible nexus, the Paris Agreement on Climate Change acknowledges in its Preamble that parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.[85]

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[76] Rio Declaration on Environment and Development. *Supra* note 16.
[77] Rio Declaration on Environment and Development, Principle 4. *Supra* note 16.
[78] Rio Declaration, Principle 1.
[79] United Nations Conference on Sustainable Development, Resolution I: The future we want, A/CONF.216/16, ¶ 1 (endorsed by the UNGA Resolution 66/288).
[80] See, e.g., Human Rights Council (HRC) Resolution 16/11. For HRC resolutions relating to the environment, see http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Resolutions.aspx.
[81] HRC Resolution 31/8, "Human Rights and the Environment," UN Doc. A/HRC/RES/31/8 (23 Mar. 2016).
[82] *Id*. at art. 4.
[83] Convention on the Rights of the Child, art. 24, para. 2 (c)). Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[84] International Covenant on Economic, Social and Cultural Rights, art. 12, para. 2(b). Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx See also Committee on Economic, Social and Cultural Rights, General Comment No. 14, ¶ 15 (stating that this requires States "to ensure an adequate supply of safe and potable water and basic sanitation; [and] … prevent[] and reduc[e] … the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health").
[85] Paris Agreement on Climate Change adopted by the the Parties of COP 21, Preamble. Available at: http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

Not every violation or omission with regards to environmental law obligations results *per se* in a human rights violation. However, the effective enjoyment of human rights—such as the rights to life, personal integrity, health, property, and culture, amongst other rights recognized in the American Convention—may be negatively affected when certain actions that are contrary to international environmental law also have adverse impacts on ecosystems that are critical for human wellbeing.

ii. Human Rights and the Environment in the Inter-American System

The hemispheric vision in the Americas regarding the right to a healthy environment transpires from the OAS General Assembly resolutions on the matter (*see* Table 1):

Table 1. Right to a Healthy Environment, Evolution of Hemispheric Policy Vision

OAS GA Resolution title	Year	Resolution
Human Rights and Environment in the Americas	2001	AG/RES. 1819 (XXXI-O/01)
Human Rights and Environment in the Americas	2002	AG/RES. 1896 (XXXII-O/02)
Human Rights and Environment in the Americas	2003	AG/RES. 1926 (XXXIII-O/03)
Water, Health and Human Rights	2007	AG/RES. 2349 (XXXVII-O/07)
Inter-American Meeting on socio-economic and environmental issues related to availability and access to potable water.	2007	AG/RES. 2347 (XXXVII-O/07)
Declaration of Santa Cruz +10	2007	AG/RES. (XXXVII-O/07)
Declaration of Santo Domingo for the Sustainable Development of the Americas	2011	AG/RES. 2644 (XLI-O/11)
The Human Right to Potable Water and Sanitation	2012	AG/RES. 2760 (XLII-O/12)
Declaration of Cochabamba on Food Security with Sovereignty in the Americas (see paragraph 9)	2012	AG/DEC. 69 (XLII-O/12)
Social Charter of the Americas	2012	AG/DOC. 5242/12 rev. 2
Promoting Integrated Water Resource Management in the Americas	2013	AG/RES. 2780 (XLIII-O/13)

Source: OAS 2016

Multiple resolutions of the OAS General Assembly have referred to the human rights and environment nexus.[86] These resolutions have recognized the need to promote environmental protection and the effective enjoyment of all human rights and encouraging institutional cooperation in the area of human rights and the environment in the framework of the OAS. In 2001, the OAS General Assembly affirmed the principles enshrined in the Stockholm and Rio Declarations and resolved to study the link between the environment and human rights, recognizing the need to promote environmental protection and the effective enjoyment of all human rights.[87]

> "[T]he effective enjoyment of all human rights, including the right to education and the rights of assembly and freedom of expression, as well as full enjoyment of economic, social, and cultural rights, could foster better environmental protection by creating conditions conducive to modification of behavior patterns that lead to environmental degradation, reduction of the environmental impact of poverty and of patterns of unsustainable development, more effective dissemination of information on this issue, and more active participation in political processes by groups affected by the problem."[88]

In 2009, the OAS States, affirming international environmental declarations, stated that social and economic development and protection of the environment, including the sustainable management of natural resources, are "mutually reinforcing."[89] In 2010, they declared that "the deterioration of the goods and services provided by ecosystems has an impact on economies and on the livelihoods of the communities that depend on them and affects their capacity for resilience."[90]

Furthermore, the General Secretariat of the OAS[91], has established that a nexus between human rights and environment could exist in two separate but related areas:

> "First, as a matter of a right to a healthy environment – one with clean drinking water, breathable air, and natural resources managed for sustainability – which responds to a basic and recognized right to life. Where environmental degradation is not managed, and minimized, it can threaten living conditions and even life itself. International experts and agencies have linked human rights to the environmental conditions that promote food security and safe drinking water, and have linked environmental conditions to the right to health. Without these basic elements, human life is threatened just as human lives can be threatened by torture, imprisonment, and forced labor.
>
> Second, as a matter of procedural rights, the right of access to information, participation in decisions regarding environment and development, and access to justice responds to the recognized right of self-determination. By engaging citizens and affected

[86] AG/RES.1819 (XXXI-O/01). Human Rights and the Environment; AG/RES. 1926 (XXXIII-O/03) and AG/RES. 1896 (XXXII-O/02). "Human Rights and the Environment in the Americas"
[87] Resolution AG/RES. 1819 (XXXI-O/01), Human Rights and the Environment, adopted 5 June 2001, *available at* http://www.oas.org/usde/environmentlaw/trade/documents/res1819.htm.
[88] Resolution AG/RES. 1819 (XXXI-O/01), Human Rights and the Environment, adopted 5 June 2001, available at http://www.oas.org/usde/environmentlaw/trade/documents/res1819.htm.
[89] Port of Spain Declaration of Commitment, art. 57.
[90] Declaration of Santo Domingo for the Sustainable Development of the Americas, OEA/Ser.K/XVIII.2 CIDI/RIMDS-II/DEC.1/10, adopted 19 Nov. 2010, art. 10.
[91] Report of the Unit for Sustainable Development and Environment on its efforts in the field of Human Rights and the Environment(In keeping with the mandate issued in Operative paragraph 4 of resolution
AG/RES. 1926 (XXXIII-O/03), "Human Rights and the Environment in the Americas") OEA/Ser.G ORGANIZATION OF AMERICAN STATES CP/CAJP-2100/03

communities responsibly in environmental decisions, governments strengthen their democratic base at the same time that they promote sustainability." [92]

In 1988, the Americas became the first region in the world to reaffirm the right "to live in a healthy environment" in a binding international instrument, with the adoption of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, signed in San Salvador, El Salvador (Protocol of San Salvador).[93] The Protocol has been ratified by sixteen OAS Member States, and 24 Member States have included in their national constitutions a provision on the right to a healthy environment, as a basic and fundamental right.[94] In addition, some countries treat the environment as a public good leading to collective rights by virtue of environmental provisions in their national constitutions. For example, the Constitution of Colombia establishes that it is an obligation of the State and the people to protect the nation's cultural and natural wealth,[95] and sets out a duty of care applicable to both the government and its nationals.[96]

The Working Group to Examine the Reports of the States Parties to the Protocol of San Salvador (the Working Group) adopted a set of indicators in June 2013, which were further adopted by the OAS Permanent Council and the General Assembly in December 2013 and in June 2014[97]. These indicators are used by States Parties for the presentation of periodic reports on the rights contained in the San Salvador Protocol. The Working Group issued a second report in 2015, in which it included indicators that address the right to a healthy environment, including how it has been incorporated into the structure of the State, and the steps taken for its progressive realization.[98] The Working Group relied on principles of international environmental law in elucidating the content and scope of the obligations in the Protocol of San Salvador.[99] In accordance with these indicators, it explained that the reporting process regarding the right to a healthy environment is to be guided by the criteria of availability, accessibility, sustainability, acceptance, and adaptation of the distinct environmental elements.[100]

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[92] Report of the Unit for Sustainable Development and Environment on its efforts in the field of Human Rights and the Environment (In keeping with the mandate issued in Operative paragraph 4 of resolution AG/RES. 1926 (XXXIII-O/03), "Human Rights and the Environment in the Americas") OEA/Ser.G ORGANIZATION OF AMERICAN STATES CP/CAJP-2100/03

[93] The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 28 ILM 156 (1989), 17 Nov. 1988 (entered into force 16 Nov. 1999) (hereinafter "Protocol of San Salvador"), art. 11.

[94] Constitution of the Argentine Republic, article 41; Constitution of the Plurinational State of Bolivia, article 33; Constitution of Belize, preamble e) paragraph; Constitution of the Federative Republic of Brazil, 1988, article 225; Political Constitution of the Republic of Chile, article 19; Political Constitution of Colombia, article 79; Constitution of Costa Rica, article 50; Constitution of the Republic of Cuba, article 27; Constitution of the Republic of El Salvador, article 117; The Constitution of the Co-Operative Republic of Guyana, article 36; Political Constitution of the Mexican United States. article 4; Political Constitution of the Republic of Panamá, article114; Constitution of the Dominican Republic, articles 66 and 67; Political Constitution of Ecuador, article 23; Political Constitution of the Republic of Guatemala, article 64; The Constitution of Guyana, article 36; Constitution of Haiti, article 253; Constitution of Honduras, article 172; Constitution of Nicaragua, article 60; Constitution of the Republic of Paraguay, article 7; Political Constitution of Peru, article 66; Constitution of Suriname, article 6; Constitution of the Oriental Republic of Uruguay, article 47; Constitution of the Bolivarian Republic of Venezuela, article 127.

[95] Political Constitution of Colombia

[96] See also Protocol of San Salvador, arts 79, 80 and 95

[97] See AG/RES. 2798 (XLIII-O/13) Adoption of Progress Indicators for Measuring Rights under the Protocol of San Salvador. Available at: http://scm.oas.org/doc_public/ENGLISH/HIST_13/AG06222E04.doc and AG/RES. 2823 (XLIV-O/14) Adoption of the Follow-Up Mechanisms for Implementation of the Protocol of San Salvador. Available at: http://scm.oas.org/pdfs/2014/AG06712E04.doc

[98] See Progress indicators for measuring rights contemplated in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, "Protocol of San Salvador," prepared by the Working Group to examine the periodic reports of the States Parties to the Protocol of San Salvador, OEA/Ser.D, 2015 (hereinafter "2015 San Salvador Protocol Working Group Report"). http://www.oas.org/en/sedi/pub/progress_indicators.pdf

[99] *Id*. at ¶ 27.

[100] *Id*. at pp. 97-108.

The indicators, adopted by the OAS General Assembly, include a focus on at the state of forest resources and biodiversity, and they include the following:

- Percentage of areas affected by environmental degradation;
- Percentage of the total territory established as protected areas;
- Percentage of forest coverage; and
- Degree of erosion and soil degradation.

These steps within the Americas towards the recognition and implementation of a right to a healthy environment reflect how far and how fast the region has come, especially considering that the process of developing environmental legislation at the national level in some countries of the Americas is as recent as the period between 1980 and 2001. Specifically, the fact that these indicators seek to monitor specific outputs of compliance with international environmental law obligations emphasizes the intrinsic nexus that exists between compliance with human rights obligations such as those in the American Convention and compliance with international environmental treaties such as the Cartagena Convention, MEAs (such as UNCLOS) and regional treaties (such as the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere).

iii. Human Rights and the Environment in the Jurisprudence of the Inter-American System

National and international jurisprudence has clearly recognized that sound environmental conditions are a prerequisite for the enjoyment of human rights. Regional human rights tribunals, including the Inter-American Commission and Court of Human Rights, the African Commission on Human and Peoples' Rights, and the European Court of Human Rights, have all found that environmental harm can give rise to violations of rights to life, health, property, and privacy, among others.[101]

The Inter-American Court and the Inter-American Commission on Human Rights ("IACHR" or the "Commission") have recognized the "undeniable link" between a healthy environment and human rights protection.[102]

The Inter-American human rights institutions have emphasized that "a minimal environmental quality" is a "precondition" for the proper exercise of fundamental rights. For instance, in the case of *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members v. Panama*, the Commission has held that

> "it is clear that several fundamental rights enshrined [in the Convention] require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. … [T]here

[101] Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Preliminary Report, UN Doc. A/HRC/22/43 ¶ 24 (24 Dec. 2012). See also Report No. 13 on the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Dec. 2013).

[102] See, e.g., IACHR, Kawas-Fernández v. Honduras, 3 Apr. 2009, Judgment (Ser. C No. 196), ¶ 148 (recognizing the "undeniable link between the protection of the environment and the enjoyment of other human rights.")

> is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity. These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm on their ancestral territories."[103]

Similarly, in a report on the human rights situation in Ecuador, the Commission stated that

> "The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."[104]

Indeed, the Commission has affirmed that both the Convention and the American Declaration of the Rights and Duties of Man (the "American Declaration" or the "Declaration") implicitly "refer to the right to a healthy environment." In its second report on the situation of human rights defenders in the Americas, the Commission has indicated that:

> "Although the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights make no express reference to protection of the environment, the IACHR has written that a healthy environment is a necessary precondition for exercise of a number of fundamental rights, which are profoundly affected by the degradation of natural resources. The Commission's interpretation is that both the Declaration and the American Convention reflect a priority concern with the preservation of individual health and welfare, legal interests which are protected by the interrelation between the rights to life, security of person, physical, psychological and moral integrity, and health, and thereby refer to the right to a healthy environment."[105]

Indeed, the jurisprudence makes it possible to identify certain specific obligations of States, which in addition to protecting the environment, are useful for the protection of other rights, such as the adoption of prior measures to protect the security and health of the population in cases of natural resources extraction and enforcing environmental regulations.[106]

III. Observations to the Questions Presented by the Republic of Colombia

[103] IACHR, Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members v. Panama, 30 Nov. 2012, Report No. 125/12 (Merits), Case 12.354, ¶ 233 (internal citations omitted). *Cf.* IACHR, Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II. Doc. 56/09, 30 Dec. 2009, ¶¶ 190-191.

[104] IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, Chap. VIII. See also IACHR, Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia, OEA/Ser.L/V/II, 28 June 2007, ¶¶ 250-253 (expressing concern at "severe environmental pollution" caused by certain development projects and "the harmful effects they have had on the continuity of basic subsistence activities," such as fishing, and on the health of indigenous and peasant communities); IACHR, Follow-up Report—Access to Justice and Social Inclusion: the Road Towards Strengthening Democracy in Bolivia, OEA/Ser/L/V/II.135, Doc. 40, 7 Aug. 2009, ¶ 158 (finding violations of human rights stemming from the exploitation of natural resources, such as "adverse effects on health and production systems; changes in domestic migration patterns; a decline in the quantity and quality of water sources; impoverishment of soils for farming; a reduction in fishing, animal life, plant life, and biodiversity in general, and disruption of the balance that forms the basis of ethnic and cultural reproduction").

[105] IACHR, Second Report on the Situation of Human Rights Defenders in The Americas, 31 Dec. 2011, OEA/Ser.L/V/II, Doc. 66, ¶ 309).

[106] 2015 San Salvador Protocol Working Group Report, ¶ 37.

A. Pursuant to Article 1(1) of the Pact of San José, should it be considered that a person, even if he is not in the territory of a State Party, is subject to the jurisdiction of the said State in the specific case in which, accumulatively, the following four conditions are met?

i. That the person resides or is in an area delimited and protected by a treaty based environmental protection system to which the said State is a party;

ii. That the said treaty-based system establishes an area of functional jurisdiction, such as, for example, the one established in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region;

iii. That in the said area of functional jurisdiction, the States parties have the obligation to prevent, reduce and control pollution by means of a series of general and/or specific obligations, and

iv. That, as a result of damage to the environment or of the risk of environmental damage in the area protected by the convention in question that can be attributed to a State party – to that convention and to the Pact of San José – the human rights of the person in question have been violated or are threatened.

Observations on the Three Questions Presented to the Court by the Republic of Colombia

In essence, Colombia seeks the Court to opine on whether, and to what extent, the rights recognized in the American Convention provide protection to the inhabitants of the coasts and islands of the Wider Caribbean Region from activities originating outside of the territory and jurisdiction of their own State of residence that have the potential to cause severe damage to the marine or coastal environment on which their rights depend.[107] This Request, which is important and consequential for both human rights and the environment, is broken down into three specific questions. The questions are presented in a context where the world is witnessing ever-increasing threats to human rights posed by environmental harm.[108] It presents the Court with questions of first impression and an opportunity to provide essential guidance to the Parties to the American Convention.[109]

[107]Request for an Advisory Opinion. *Supra* Note 4.

[108] *See* Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, U.N. Doc. A/HRC/25/53 (30 Dec. 2013) (reporting "that one "firmly established" aspect of the relationship between human rights and the environment is that "environmental degradation can and does adversely affect the enjoyment of a broad range of human rights"). *See generally* Section II.C above.

[109] Some States may question the admissibility of Colombia's Request in this case on the basis of the principle announced by the Permanent International Court of Justice (PCIJ) in its Advisory Opinion in *Status of Eastern Carelia*, [1923] PCIJ, Ser. B, No. 5, at 7. In that case, the PCIJ indicated that an advisory opinion should not be given if it would decide the main point of a dispute existing between two or more states over which contentious jurisdiction is questionable. It said the PCIJ should decline to exercise its discretion to issue an advisory opinion when answering the question would be equivalent to deciding the dispute between the parties. To do otherwise

The crux of the first question is concerned with whether the American Convention entails extraterritorial obligations for a State when interpreted in light of international environmental protection obligations. If this question is answered affirmatively by the Court, it would seem to raise a concomitant need to consider the content of international law relating to the protection of the environment in a transboundary setting. As explained in Part III.A below, international environmental law imposes a clear duty on States to prevent transboundary environmental harm. If that duty is violated and this violation further results in the breach of rights protected by the American Convention, this would entail additional international responsibility. The Court is not being called upon to adjudicate a dispute under the Cartagena Convention. Instead, the Cartagena Convention can inform the Court's analysis of potential violations of the American Convention that arise in part from the pollution of the marine environment in the Wider Caribbean Region that the Cartagena Convention was designed to avoid.

The second question builds on the first. Its kernel is whether there are circumstances in which a State's failure to prevent transboundary environmental harm would be in conflict with its obligations under the American Convention. As section III.B below explains, such circumstances do exist. The Convention imposes clear obligations on States to both respect the

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would violate the important principle of state consent to contentious jurisdiction. *Id.*, at 27-29. Here, some States may argue that the current dispute between Nicaragua and Colombia pending before the International Court of Justice (ICJ) in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *available at*: http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=nicolc&case=155&k=37, requires the application of *Eastern Carelia*.

Such an argument should be roundly rejected. In no case since *Eastern Carelia*, decided in 1923, has the World Court declined to issue an advisory opinion on this ground. *See e.g.*, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, [1950] ICJ Rep. 65, 71-72 (Advisory Opinion); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep. 136, 157-159 (Advisory Opinion). This principle remains sound, but all requests for advisory opinions since *Eastern Carelia* – including Colombia's here – have ensured that the question put is "not directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties ...". *Interpretation of Peace Treaties*, supra, [1950] ICJ Rep. at 71. That is true here too. The case pending before the ICJ between Colombia and Nicaragua concerns a narrow, purely territorial question about alleged violations by Colombia of Nicaragua's rights in certain maritime zones. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), *available at*: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=37&case=155&code=nicolc. This case concerns a territorial and maritime dispute first brought before the ICJ in 2001. *See* Application Instituting Proceedings, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), *available at:* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nicol&case=124&k=e2&p3=0. According to Nicaragua, the ICJ delimited these boundaries in its 2012 Judgment. *Territorial and Maritime Dispute* (Nicaragua v. Colombia [2012] I.C.J. Reports 2012 (II) 624 (Judgment). In contrast, the Request for an Advisory Opinion before this Court concerns entirely different law, entirely different legal issues, and entirely different geographic scope, and can in no way be characterized as a "back door" attempt to settle a different contentious case.

Despite clear jurisdiction and admissibility in this case, it is true that the use of "may" in Article 62(2) of the Convention indicates that the Court still possesses a discretion to decline to provide an answer to a legal question it is competent to answer. *Cf. Certain Expenses of the United Nations*, [1962] I.C.J. Reports, 151,155 (Advisory Opinion). Here, everything militates in favour of providing an Advisory Opinion. A/HRC/22/43, para. 34. As the Human Rights Council has stated, "environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights." Res. 16/11, Human right and the environment, U.N. Doc. A/HRC/RES/16/11 (24 March 2011). At a time of increasing environmental decline, it is more important than ever to have judicial guidance about on the Request made by Colombia.

rights laid out in the Convention and to ensure their effectiveness, and those obligations do not stop at a State's border.

The third question is divided in several subparts. In substance, it is concerned with the interpretation of the duty to respect and ensure rights under the American Convention in the context of transboundary environmental harm and, by extension, the affirmative steps that a State must take to discharge that duty. As detailed in section III.C below, interpretation of the rights secured by the American Convention in this context should be informed by international environmental law principles. Compliance with the obligation to prevent human rights harm resulting from transboundary environmental harm requires States to assess the transboundary environmental impact in cooperation with other potentially affected States. The minimum content and parameters of that assessment process are also addressed in section III.C.

A. Interpretation of Article 1(1) of the American Convention on Human Rights (Obligation to Respect Rights)

As noted in the Introduction above, Colombia's first question requests the Court to consider whether "an exception to the principle of territoriality of 'jurisdiction' pursuant to the Pact of San José" exists under multilateral environmental agreements or under regional treaties for the protection of oceans and seas. This is also a broad question and Colombia attempts to provide greater specificity by enunciating four cumulative conditions that need to be present in connection with the question posed. The precise language of the question thus reads:

> "Pursuant to Article 1(1) of the Pact of San José (American Convention), should it be considered that a person, even if he is not in the territory of a State Party, is subject to the jurisdiction of the said State in the specific case in which, accumulatively, the following four conditions are met?
>
> (i) That the person resides or is in an area delimited and protected by a treaty-based environmental protection system to which the said State is a party;
>
> (ii) That the said treaty-based system establishes an area of functional jurisdiction, such as, for example, the one established in the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region;
>
> (iii) That in the said area of functional jurisdiction, the States parties have the obligation to prevent, reduce and control pollution by means of a series of general and/or specific obligations, and
>
> (iv) That, as a result of damage to the environment or of the risk of environmental damage in the area protected by the convention in question that can be attributed to a State party – to that convention and to the Pact of San José – the human rights of the person in question have been violated or are threatened."[110]

[110] Request for Advisory Opinion, ¶ 96.

The phrase in the chapeau of the question, "subject to the jurisdiction of the said State," in the abstract, could possibly generate concern owing to its potentially sweeping reach. It should not be unsettling. We suggest that there is an alternative, and narrower, reading of the first question that nonetheless gets at the underlying issues raised by the Request.

To start, the exercise of extraterritorial jurisdiction by a State on individuals otherwise beyond its sovereign power in Colombia's first question is not unbounded or unlimited. The question, instead, relates to whether a State has a duty to *respect* and *ensure* the human rights of persons outside its territory or jurisdiction pursuant to Article 1(1) of the Convention. Colombia is clearly not asking the Court to expand the exercise of the States' jurisdiction over persons outside of their territory or control, for the sake of expanding their power. In other words, the question is not asking the Court to tell the Parties to the American Convention when they can *impose* their jurisdiction on individuals otherwise beyond their sovereign power.

Instead, as suggested, the question should be read more narrowly. This becomes clear when the four cumulative "treaty-based environmental system" conditions contained in Colombia's question are read together and in the integral context of the request.

The question, as it is currently framed, emphasizes the idea of projecting jurisdiction outside a State's territory because of the way Article 1(1) is drafted. Article 1(1) requires States Parties to the Convention to undertake "to respect" and "to ensure" the "free and full exercise" of Convention rights "*to all persons subject to their jurisdiction*."[111] The projection of "jurisdiction" is thus the focus of the question, but given the forgoing, it does not appear to be the thrust of the question.[112] The problem is that the term "jurisdiction" as it is employed in human rights treaties is not necessarily synonymous with the concept of jurisdiction under general international law.[113] In recognizing the obligation on a State to respect the human rights of individuals outside of its territory as an incident of the exercise of "jurisdiction," what is really at issue is that State's actual power to detrimentally affect the lives and livelihoods (and thus the rights) of the inhabitants of another State.

Accordingly, perhaps a more accurate and limited way to phrase the question (without losing any of the underlying rationale), is as follows:

> Whether the human rights obligations of a State party to the American Convention under Article 1(1) apply to all people "who inhabit the coasts and islands of the Wider Caribbean Region" outside the jurisdiction of that State when: i) that State fails to

[111] American Convention, art. 1(1) (emphasis added). *See also* Section III.B below.

[112] See especially Request for Advisory Opinion, ¶ 83.

[113] See the discussion about the confusion surrounding the term "jurisdiction" within human rights treaties in MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 21-38 (2001). Milanovic's main point is that jurisdiction in human rights treaties is different from the jurisdiction of States under general international law. As he shows, to treat them synonymously can lead to absurd and contradictory results. *Id.*, pp. 26-30.

"respect" and "ensure" the full and free exercise of all rights recognized by the Convention; ii) through a breach of international environmental law, including the Cartagena Convention[114], which confers a functional jurisdiction on State Parties outside their territory; and iii) that applies to the area in which those people whose rights have been violated reside and to which that State is also a party.

In order to address this question thus framed, WCEL/IUCN believes the Court should consider the following points in its deliberations. First, human rights are not dependent on location. Second, general international law imposes on all States an obligation to ensure that activities under their jurisdiction and control do not cause environmental harm to other States or beyond their national jurisdiction. Third, the Cartagena Convention imposes specific obligations on the States Parties to prevent transboundary environmental harm, consistent with general international law. And, finally, the "extraterritorial" nature of the duties imposed on States Parties to the American Convention need careful consideration.

1. *The Scope of the State Obligation to Respect and Ensure Human Rights*

First, Human rights are not dependent on location as the Inter-American Commission on Human Rights has said, "human rights are inherent for all human beings and are not based on their citizenship or location."[115]

In considering whether the human rights obligations to respect and ensure established by Article 1(1) extend to individuals outside of a State's territory, it is also important to recall General Comment No. 31 of the Human Rights Committee on the "Nature of the General Legal Obligation." The Committee observed that the obligations to "respect" and "ensure" contained in the International Covenant on Civil and Political Rights "means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the that State party, even if not situated within the territory of the State party."[116]

2. *The Obligation of All States to Prevent Transboundary Environmental Harm*

In considering whether the human rights obligations of a State party to the American Convention under Article 1(1) apply to persons "who inhabit the coasts and islands of the Wider Caribbean Region" outside the jurisdiction of that State vis-à-vis customary international law and a "treaty-based environmental protection system" (i.e., the Cartagena Convention), it should be recognized that it has long been clear that a State's responsibilities do not end at its border. International law does not permit States to conduct or allow activities within their territory, or in common spaces, without regard for the rights of other States or for the protection of the general environment.[117] In particular, international law imposes two related duties on States: (a) a duty to prevent, reduce, and control transboundary environmental harm and (b) a duty to cooperate in

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[114] Request for an Advisory Opinion. See Supra note 4 at par.2.
[115] IACHR, Case of Franklin Guillermo Aisalla Molina, Report No.112/10, para. 91.
[116] UN Human Rights Committee (HRC), General Comment No. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, para. 10, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: http://www.refworld.org/docid/478b26ae2.html.

[117] *See generally* PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (3rd ed., 2009), at p. 137.

mitigating risks of transboundary environmental harm. . These duties are supported by the customary international environmental law that underlies all of international environmental law including treaties such as the Cartagena Convention. In particular, the Court should consider the synergies between the obligations to respect and ensure in light of every State's obligation to ensure that activities under its jurisdiction and control do not cause harm to the environment of other states or to areas beyond national jurisdiction.

a. Duty to Prevent, Reduce, and Control Transboundary Environmental Harm

In the legendary *Trail Smelter* arbitration between the United States and Canada, the U.S. exercised diplomatic protection on behalf of individuals residing in the State of Washington harmed by sulfur dioxide emissions from a smelter near the border in British Columbia.[118] The tribunal awarded the U.S. damages for injuries to the property (farms, crops, timber, etc) of those individuals caused by the smelter even though the smelter was solely on Canadian soil. In the most famous passage of the award, the tribunal said:

> "[A]ccording to the international law principles, no State has the right to use or to allow the use of its territory in a way that harm is caused by toxic or noxious fumes in the territory or toward the territory of another State or to the property or people in there, whenever it is assumed it brings serious consequences and the damage can be verified through clear and convincing evidence."[119]

Decades later, the International Court of Justice has reaffirmed this State obligation, having said that the duty to prevent environmental harm is firmly entrenched in customary international law.[120] In *Pulp Mills*, a dispute involving Argentina and Uruguay, the ICJ further explained that

> "[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.' A State is thus obliged to use all the means at its disposal in order to

[118] *Trail Smelter Case Trail Smelter Case* (U.S. v. Can.), III U.N. RIAA 1905, 1938-1966 (award of 11 March 1941); Ann. Digest (1938-40) no. 104.

[119] *Id.*, at 1965.

[120] *Legality of the Threat of Use of Nuclear Weapons*, [1996(I)] I.C.J. Reports 226, 241-42 ("The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."); *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] I.C.J. Reports 7, 67, 77-78. *See also* Principle 21, Stockholm Declaration on the Human Environment, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1, reprinted in 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development, Principle 2.Supre note 16. *See further* International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, [2001] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, VOL. II (Part Two), at 148 (para. 3).

> avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[121]

The ICJ reaffirmed these principles in a recent dispute between Costa Rica and Nicaragua.[122]

Beyond custom, this duty has been codified in a number of globally ratified treaties. For example, under the United Nations Convention on the Law of the Sea (UNCLOS), this duty is codified in positive language so that states "have the obligation to protect and preserve the marine environment."[123] It is also embedded in Article 3 of the Convention on Biological Diversity, the ratification of which has a universality approaching that of both the Charter of the United Nations and of the OAS.[124]

Customary international law pertaining to the environment, however, has influenced the courts' interpretation of treaty-based duties to protect the transboundary environment. For example, in its 2016 award pertaining to the South China Sea, the International Tribunal for the Law of the Sea (ITLOS) held that the corpus of international environmental law informs the content of the general obligation in Article 192 of the UNCLOS, which requires States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond their national control.[125] Specifically, ITLOS held that "States have a positive 'duty to prevent, or at least mitigate' significant harm to the environment when pursuing large-scale construction activities."[126]

It is now also axiomatic among leading publicists that all states have a duty to prevent environmental harm – to ensure that activities under their jurisdiction and control do not cause harm to the environment beyond their own national jurisdiction, including to that of other

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[121] ICJ, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 20 Apr. 2010, I.C.J. Reports 2010 (I), pp. 55-56, ¶ 101 (quoting *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22).

[122] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 45, ¶ 104.

[123] Art. 192, United Nations Convention on the Law of the Sea (UNCLOS), United Nations, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the sea, Introductory Material on the Convention and Conference*, U.N. Pub. Sales No. E.83.V.5 (1983). Under Article 194 and Section 5 of Part XII of UNCLOS, specific obligations to prevent pollution are imposed on states. In those areas that are beyond the limits of national jurisdiction, such as the high seas, the applicable concept is not related to sovereignty, but to common heritage and states are obliged cooperate in the conservation and share the economic benefits of such areas. UNCLOS, Part XI.

[124] Art. 3, Convention on Biological Diversity, 1769 U.N.T.S. 79. The Biodiversity Convention has 196 parties as of January 18, 2017. The United States (which has signed) and the Holy See - and perhaps Palestine - are the only States that have yet to ratify the Convention. These States are, of course, bound by the mirror Article 3 obligation reflected in customary international law, as discussed above.

[125] ITLOS, *In re Arbitration Between the Republic of the Philippines and the People's Republic of China (South China Sea Award)*, PCA Case No. 2013-19, Award (12 July 2016), ¶¶ 941, 944, 959.

[126] *Id.* at ¶ 941 (internal citations omitted).

States.[127] Early normative scepticism that has surrounded the obligation[128] no longer has a place in legal analysis.

b. Duty to Cooperate in Mitigating Risks of Transboundary Environmental Harm

In addition to the aforementioned, as concerns the exercise of sovereignty on shared resources—that is, resources that are not entirely within the jurisdiction of a State—the principal concept is the obligation of using the resource in an equitable and harmonious manner under the prism of the principle of good neighborly relations. This obligation is mainly related to cooperation based on a notification and previous consultation system, but also considering the maxim of not causing harm to third parties.

The importance of cooperation to transboundary environmental protection, including marine protection and preservation, has been recognized by the international tribunals on multiple occasions.[129] As the ICJ has stated in the *Pulp Mills* case, "by co-operating . . . the States concerned can manage the risks of damage to the environment that might be created by the plans initiated by one or [the] other of them, so as to prevent the damage in question."[130]

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[127] See e.g., Daniel Bodansky, THE ART AND CRAFT OF INTERNATIONAL LAW 28 (2010); Patricia Birnie, Alan Boyle & Catherine Redgwell, INTERNATIONAL LAW & THE ENVIRONMENT 143-145 (3rd ed., 2009); Alexandre Kiss & Dinah Shelton, INTERNATIONAL ENVIRONMENTAL LAW (3rd ed., 2004); Ved P. Nanda & George Pring, INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY 21-22 (2003); Philippe Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 241(2d ed., 2003); David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 620 (1995); P. M. Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in Daniel B. Magraw, INTERNATIONAL LAW AND POLLUTION, 61, 63 (1991); Sanford E. Gaines, *Taking Responsibility for Transboundary Environmental Effects*, 14 HASTINGS INT'L & COMP. L. REV. 781, 796-797 (1991); Rüdiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GERMAN YB INT'L L. 308, 309 (1990); Alexandre Kiss, *The International Protection of the Environment*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 1074-75 (Ronald St. J. Macdonald & Douglas M. Johnston, eds., 1986).

[128] See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 364-65 (1991). See also Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116 (1995).

[129] *See* ITLOS, *In re Arbitration Between the Republic of the Philippines and the People's Republic of China (South China Sea Award)*, PCA Case No. 2013-19, Award (12 July 2016), ¶ 985 & n. 1181. *See also* Stockholm Declaration, Principle 24; Rio Declaration, Principle 27; International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, [2001] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, VOL. II (Part Two); Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, Principle 7, 19 May 1978, 17 I.L.M. 1097 (1978).

[130]ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p.14, p. 49, ¶ 77. *See also* ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 45, ¶ 104 (discussing the requirement a State contemplating activities "to notify and consult in good faith with the potentially affected State," "in conformity with its due diligence obligation,: where that is necessary to determine the appropriate measures to prevent or mitigate the risk of significant transboundary harm); ITLOS, *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 Dec. 2001, ITLOS Reports 2001, ¶ 82 (holding that "the duty to cooperate is a fundamental principle in the prevention of pollution of

Detailed procedural obligations relating to notification, consultation, and risk assessment in cases of transboundary environmental risk have been specified in several international treaties, including the Cartagena Convention, discussed below and in Section III.C.

3. *The Requirements of the Cartagena Convention*

As discussed above, Colombia's Request for an Advisory Opinion in this case centers on the Cartagena Convention. As the Request observes, "in order to promote the effective protection of human rights, it is essential to clarify the Pact's scope of application in relation to those persons who inhabit the coasts and islands of the Wider Caribbean Region in light of the obligations assumed by the States of the region when ratifying the [Cartagena Convention] in order to protect the marine environment."[131] The Cartagena Convention, together with its three subsequent protocols on oil spills, protected areas, and land-based pollution, is one of UNEP's most comprehensive Regionals Seas Programs.

The preamble to the Cartagena Convention recites that the State parties recognize their responsibilities for the region's important and valuable marine environment, and their need to coordinate their efforts in order to preserve the environment in the development process.[132] As already noted in Section II above, the main obligations created by the Cartagena Convention with respect to pollution are: pollution from ships (Article 5); dumping (Article 6); land-based pollution of the marine environment (Article 7); sea-bed exploitation (Article 8); and air-borne pollution (Article 9). In addition, the Convention creates obligations concerning the development of specially protected areas (Article 10), the development of contingency plans (Article 11), the development of technical standards and an environmental impact assessment consultative process for major developments (Article 12), sharing of scientific information (Article 13), development of appropriate laws and the coordination of law (Article 14), and institutional development (Article 15).[133]

The general obligations imposed by Article 4 contextualize the customary duty to prevent harm discussed above in the context of the Wider Caribbean Region:

> "1. The Contracting Parties shall, individually or jointly, take all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the

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the marine environment under Part XII of the [UNCLOS] and general international law."); *Lake Lanoux Arbitration (Fr. v. Spain)*, 24 I.L.R. 101, 128 (Perm. Ct. Arb. 1957)..

[131] Request for Advisory Opinion, para. 95.

[132] *See* Cartagena Convention, Preamble. *Cf.* Benedict Sheehy, *International Marine Environment Law: A Case Study in the Wider Caribbean Region*, 16 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 441, 443 (2004).

[133] *Id.*, at 444.

Convention area and to ensure sound environmental management, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.
2. The Contracting Parties shall, in taking the measures referred to in paragraph 1, ensure that the implementation of those measures does not cause pollution of the marine environment outside the Convention area.
3. The Contracting Parties shall co-operate in the formulation and adoption of protocols or other agreements to facilitate the effective implementation of this Convention.
4. The Contracting Parties shall take appropriate measures, in conformity with international law, for the effective discharge of the obligations prescribed in this Convention and its protocols and shall endeavor to harmonize their policies in this regard.
5. The Contracting Parties shall co-operate with the competent international, regional and sub regional organizations for the effective implementation of this Convention and its protocols. They shall assist each other in fulfilling their obligations under this Convention and its protocols."[134]

The language of Article 4(1) on prevention imposes a high standard of care by requiring States to use "the best practicable means" in observing the duty to prevent environmental harm to the Convention Area, while recognizing that the duty be observed "in accordance with their capabilities." Neither the Cartagena Convention nor its three Protocols explicitly mention the "precautionary approach" or "precautionary principle." Yet, Article 10 of the Cartagena Convention—which deals with specially protected areas—"is forward looking … in its precautionary principle and 'ecosystem' approach" and "requires 'all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species.'"[135]

Article 12 mandates environmental impact assessments and builds on the duty to prevent harm. Paragraph 2 of Article 12 provides that each State shall assess "within its capabilities," or "ensure the assessment of," the potential effects of major development projects on the marine environment, particularly in coastal areas, "*so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention area.*"[136] One question raised by paragraph 2 is whether a State with limited "capabilities" to carry out an assessment must "ensure" an effective assessment in order to meet its obligation under Article 12. The answer appears relatively straightforward. Any State carrying out an environmental impact assessment that it knows, or should know, will be ineffective in identifying potential impacts, would not likely meet its obligation to prevent harm. Article 12(3) and (5) make clear that measures to assist such States should be made available in such situations. The UN Environment Regional Seas Program has made such assistance available over the course of many years[137].

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[134] Cartagena Convention, art. 4.
[135] Benedict Sheehy, *International Marine Environment Law: A Case Study in the Wider Caribbean Region*, 16 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 441, 445 (2004) (internal citations omitted).
[136] Cartagena Convention, art. 12 (emphasis added).
[137] See Regional Seas Action Plans available at. http://drustage.unep.org/regionalseas/who-we-are/regional-seas-action-plans

Additional terms related to State-to-State relations are set out in Article 11(2), which provides that if a State "becomes aware of cases in which the Convention area is in imminent danger of being polluted or has been polluted, it shall immediately notify other States likely to be affected by such pollution, as well as the competent international organizations. Furthermore, it shall inform, as soon as feasible, such other States and competent international organizations of measures it has taken to minimize or reduce pollution or the threat thereof … ."[138]

The arrangements for liability and compensation for damage resulting from pollution of the Convention area is left to a "further development" clause in Article 14. To date no liability protocol has been negotiated.

In sum, the Cartagena Convention represents a longstanding, region-wide commitment to protect the marine environment of the Wider Caribbean Region so that its fragile life-sustaining ecology is available for the health and livelihoods of current and future generations. The Cartagena Convention is an exceptionally well-founded international environmental treaty that serves as a companion instrument to be applied in conjunction with the American Convention and its protection of the human rights of those who live in the Wider Caribbean Region. Specific provisions relating to the implementation of the Cartagena Convention and the duty contained therein to prevent transboundary harm are discussed in more detail in Section III.C below.

4. *The obligation to respect and ensure human rights in the context of environmental harm beyond jurisdiction and control*

We are aware that Colombia's request for guidance on the parameters of the application of duties entailed in Article 1(1) of the Convention to persons outside of the territory or control of a State for rights violations occasions by environmental harm may appear to require the Court to go beyond its existing jurisprudence. However, a number of Reports issued by the Inter-American Commission on Human Rights (the "Commission") are instructive. For instance, in *Coard et al. v. United States,* the petitioners alleged that during military action led by the armed forces of the U.S. in Grenada they were detained by United States forces, held incommunicado for many days, and mistreated in violation of the American Declaration of the Rights and Duties of Man ("American Declaration"). Although the extraterritorial application of the Declaration had not been placed in issue, the Commission nevertheless noted that:

> [U]nder certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – 'without distinction as to race, nationality, creed or sex.' Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents

[138] Cartagena Convention, art. 11 ("Co-operation in cases of emergency").

> abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[139]

In *Armando Alejandre Jr. et al. v. Cuba*, MiG-29 military aircraft belonging to the Cuban Air Force downed two unarmed civilian light airplanes belonging to the organization "Brothers to the Rescue" in international airspace. The Petitioners alleged various breaches of the American Declaration. In finding the case admissible, the Commission observed:

> The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues--in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996.[140]

A final example of the extraterritorial application of human rights in the Inter-American system is provided by *Saldaño v. Argentina*.[141] In that case, the petitioner alleged the Argentine Republic had breached the American Declaration and the American Convention on Human Rights to the detriment of Victor Saldaño, her son. Saldaño, an Argentine citizen, was sentenced to death by the courts of the U.S. and remained imprisoned in Texas. The petitioner argued that the failure of the Argentina exercise diplomatic protection under Articles 44 and 45 of the American Convention against the U.S. renders it responsible for violations of the Declaration and Convention. Before proceeding to the merits, the Commission had to determine whether Saldaño was "subject to the jurisdiction of the Argentine State as required by Article 1(1) of the Convention."[142] The Commission held he was and stated that:

> the term 'jurisdiction' in the sense of Article 1(1) is [not] limited to or merely coextensive with national territory. Rather, … a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory. This position finds support in the decisions of European Court and Commission of Human Rights

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[139] IACHR, *Coard, et al. v. United States*, Report No. 109/99, 29 Sept. 1999, para. 37, available at: https://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm.

[140] IACHR, *Armando Alejandre Jr., et al. v. Cuba*, Report No. 86/99, Case No. 11.589, Cuba, September 29, 1999, at para. 25, available at: https://www.cidh.oas.org/annualrep/99eng/Merits/Cuba11.589.htm.

[141] IACHR, *Saldaño v. Argentina*, Petition, Report No. 38/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 289 (1998), available at: http://hrlibrary.umn.edu/cases/1998/argentina38-99.html.

[142] *Id.*, para. 15.

> which have interpreted the scope and meaning of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Duties . . .. Article 1 of that instrument, on which Article 1(1) of the American Convention was largely patterned, stipulates that the high contracting parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."[143]

Other human rights courts and bodies accept the proposition that the human rights obligations of a State can apply extraterritorially, as Saldaño demonstrates.[144] The rationale for extraterritorial application in these cases, however, rests on models based on extraterritorial jurisdiction as (effective) control over individuals or territory. These approaches should also be recognized as sufficient when considering transboundary environmental harm as in interstate matter. For instance, if harm emanates from one State and violates the sovereignty of another and an environmental treaty is breached thereby, the victim State can invoke the responsibility of the offending State. But what about the individuals who suffer harm and whose rights are breached consequently? In the traditional model, represented by the *Trail Smelter* arbitration[145], the State in which the individual resides might choose to exercise diplomatic protection and bring an inter-State claim for harm to property assimilated to that of the State, as in *Trail Smelter*. However, the number of times that has happened in practice is infinitesimally small.

What happens in the majority of cases? What happens to the individual who suffers the violation of human rights, but the State in which she resides is unwilling or unable to bring and interstate claim? Neither the territorial or effective control approach to jurisdiction is appropriate in the case of environmental harm that breaches the human rights of individuals beyond jurisdiction and control of a State, where those breaches are attributable to the State or there has been a failure to exercise due diligence over third parties.

For instance, if the Court in these proceedings were to limit the "jurisdiction" of Article 1(1) of the Convention to territory, then, as the Commission has recognized in the cases above, impunity for many human rights abuses would have to be tolerated. Environmental harm could only result in human rights abuses inside the territory of the offending State or an area outside that it effectively controlled. Similarly, limiting Article 1(1)'s "jurisdiction" to a State's effective control over the victim of human rights abuses also exculpates the actual violation of the human rights of individuals who can show a link between a State's involvement in environmental harm (either directly or indirectly) and a violation of their rights; but who cannot

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[143] http://www.cidh.oas.org/annualrep/98eng/Inadmissible/Argentina%20Salda%C3%B1o.htm#4

[144] European Court of Human Rights: *Cyprus v. Turkey*, EurComm'n (1975), para. 8; H.*R. Loizidou v Turkey* A 310 paras. 56-64 (1995) E.Comm, *HR X v UK* No. 7547/76. 12 DR73 (1977); *Bertrand Russel Peace Foundation Ltd. V UK* No. 7597/76, 14DR 117 at 124 (1978); *Mrs. W v UK* No. 9348/81, 32 DR 190 (1983). Human Rights Commission: *Israel and the OPT*; Case No. 52/79, *López Burgos v. Uruguay*; Case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay* (finding the ICCPR applicable where the State exercises its jurisdiction on foreign territory in cases of arrests carried out by Uruguayan agents in Brazil or Argentina); case No. 106/81, *Montero v. Uruguay* (case of the confiscation of a passport by a Uruguayan consulate in Germany); *Delia Saldias de López v. Uruguay* ("It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."); International Court of Justice: *Wall* case, at para. 109 *Congo v. Uganda.*

[145] Trail Smelter Case. Supra note 116.

show effective control over their person in the sense of the Commission cases. Accordingly, the linkage between environmental damage and human rights requires a different conception of "jurisdiction" under Article 1(1). We urge this Court to be a pathfinder in this regard.

We suggest this conception of jurisdiction is evident through an approach that focuses on a State's duty to respect human rights – as in Article 1(1) of the American Convention. A duty to respect rights within the territory of a State Party to the Convention clearly is only fully discharged if individuals are protected by the State, not only from violations of its instrumentalities and agents, but also against violations committed by private persons or entities over which it has jurisdiction or control. The important point here is that the duty to respect applies in connection with actions of its agents and private actors over which the State has control. There is no logical reason why obligation to ensure should not also include a duty to secure the human rights of people outside its territory from emanating from its agents and third parties over which it exercises jurisdiction or control.

This approach is consistent with the international law principles and case law cited herein. Moreover, it finds support from a number of eminent publicists. For a general view of human rights, Marko Milanovic advocates a focus on the duty to secure rights as the touchstone for a "third model" for the extraterritorial application for human rights. His model is built around the obligation to respect rights. For Milanovic, human rights obligations to respect are ordinarily owed extraterritorial application when a State has control over the agent, actors, or activities violating the rights of individuals beyond jurisdiction. The effect is that the obligation to respect is "territorially unbound." The same is not true about the obligation to ensure. In writing about how this "third model" would have applied in the Aerial Herbicide Spraying case he Milanovic observes:

> "[W]e could say that Colombia has the obligation towards the people of Ecuador to respect their right to health and food, which the herbicide spraying would in principle be capable of violating. However, Columbia would not have the obligation (other than possibly as reparation for its prior wrongful act) to actually provide food or health care services to the population of Ecuador . . .."[146]

For Milanovic, the attraction of the "third model" is found in its flexibility, clarity, predictability, as well as actual impact in stem rights violations and protecting the integrity of the human rights system as a whole.[147] Moreover, it is consistent with the discussion below concerning Trail Smelter and its adherents, which noted the obligation for compensation to an adjacent state whose residents suffered losses due to transboundary environmental damage.

Alan Boyle has advanced this same sort of approach even more directly to the obligation to respect in the context of extraterritorial breaches that are caused by environmental harm. Boyle writes:

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[146] *Id.*, at 228.

[147] *Id.*, at 219-220.

> [H]uman rights law could … have extra-territorial application if a state's *failure to control activities within its territory* affects life, health, private life or property in neighbouring countries. If states are responsible for their failure to control soldiers and judges abroad, a fortiori they should likewise be held responsible for a failure to control transboundary pollution and environmental harm emanating from industrial activities inside their own territory. … As the UN Human Rights Committee observed in *Delia Saldias de López v. Uruguay*: "It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[148]

Boyle subsequently observed:

> [w]here it is possible to take effective measures to prevent or mitigate transboundary harm to human rights then the argument that the state has no obligation to do so merely because the harm is extraterritorial is not a compelling one. On the contrary, the non-discrimination principle requires the polluting state to treat extra-territorial nuisances no differently from domestic nuisances. To deny trans-boundary pollution victims the protection afforded by human rights treaties when otherwise appropriate would for all these reasons be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment required by these precedents.[149]

Accordingly, we urge that the Court adopt this alternative approach that is open to it. The Court should take this opportunity to lead the development of international human rights law as it is increasingly intertwined with the mandate of environmental law to address continuing environmental decline. Indeed, to do so would be wholly consistent with the obligations inherent to the environmental treaty based system, including the he Cartagena Convention. Furthermore, it would be consistent with the demonstrated relevance placed by member States of the UN and the OAS to the Wider Caribbean Region[150].

B. Are the measures and the actions of one of the States parties, by act and/or omission, the effects of which may cause serious damage to the marine environment – which constitutes the way of life and an essential resource for the subsistence of the inhabitants of the coast and/or the islands of another State party – compatible with the obligations set out in Articles 4(1) and 5(1), read in relation to Article 1(1), of the Pact of San José? Or of any other permanent provision?

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[148] Alan Boyle, Human Rights and the Environment: A Reassessment, p. 27 (paper prepared for First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability, 2011), available at: http://www.unep.org/delc/portals/24151/towardsthedeclarationhumanrights.pdf.

[149] Alan Boyle, *Human Rights and the Environment: Where Next?* 23 European Journal of International Law 613, 639-640 (2012).

[150] See sections II A. and II B.

As detailed above, there is an established nexus in international law between protection of the environment and protection of human rights: environmental degradation can jeopardize the fulfilment of a number of human rights, including the rights to health, property, and life, giving rise to a State's international responsibility under international human rights treaties (*see* Section II.C).[151] The risk of harm to the environment and to human rights is particularly heightened in fragile, interconnected ecosystems, such as the Wider Caribbean Region, on whose health and conservation a large number of people rely for their economic, social, and cultural survival (*see* Section II.A). Furthermore, there is a clear duty under international law to prevent the occurrence of transboundary environmental harm and to mitigate the risk of such harm (*see* Section III.A above), including by conducting TEIAs in cooperation with other affected States (*see* Section III.C below). On that basis, a failure on the part of one State to prevent the commission of transboundary environmental harm in the territory of another State, or in common spaces, which in turn adversely affects human rights of the inhabitants of the affected territories, could give rise to State responsibility under both general international law and under the American Convention.

The American Convention, as the Court has held, imposes not only negative but also positive duties on the States Parties: duties to "respect" (guarantee) the free and full exercise of each right and freedom laid out in the Convention, as well as to "ensure" the effectiveness of those rights and freedoms.[152] The duty to "ensure" human rights under the Convention entails a further duty to prevent, investigate, and punish human rights violations[153] and to create the necessary "conditions" for the rights to flourish.[154] A State incurs international responsibility under the Convention not only where it commits illegal acts that are directly imputable to it, but also where it fails to exercise "due diligence to prevent the violation or to respond to it," including where the violation is committed by private actors.[155] The guilt or intention of the state agents or private actors responsible is not determinative of the State's responsibilities: "It is sufficient that a State obligation exists and that the State failed to comply with it."[156] The duty to prevent rights violations is also closely related to Article 2 of the Convention, which obligates States to align domestic legislation with the Convention and take other administrative, financial, and other measures to "establish a legal regime which adequately works to prevent" human rights abuse.[157]

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[151] IACHR, *Report on the situation of human rights in Ecuador*, OEA/Serv.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, ¶ 92 ("Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.").

[152] American Convention, arts. 1(1) & 2. See IACHR, Velásquez Rodríguez v. Honduras, Judgment, 29 July 1988, Series C, No. 4, ¶¶ 164-77; IACHR, Pueblo Bello Massacre v Colombia, Judgment, 31 Jan. 2006, Series C, No. 14, ¶¶ 111-14; IACHR, Mapiripán Massacre v. Colombia, Judgment, 15 Sept. 2005, Series C, No. 134, ¶ 111; IACHR, Juridical Status and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, 17 Sept. 2003, Series A No. 18, ¶ 140.

[153] IACHR, Velásquez Rodríguez v. Honduras, 29 July 1988, Series C, No. 4, ¶¶ 164-73.

[154] IACHR, Yakye Axa Indigenous Community v. Paraguay, Judgment (Merits, Reparations and Costs), 17 June 2005, ¶ 162 ("One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.").

[155] IACHR, Velásquez Rodríguez v. Honduras, 29 July 1988, Series C, No. 4, ¶ 172.

[156] IACHR, Pueblo Bello Massacre v Colombia, Judgment, 31 Jan. 2006, Series C, No. 14, ¶ 112.

[157] IACHR, Tarcisio Medina Charry v. Colombia, Case 11.221, Report Nº 3/98, 7 Apr. 1998, ¶ 108.

In the light of this jurisprudence and the principles set out in Section II above, in the event that the acts or omissions of one State Party to the American Convention (whether through its state agents or private parties) in its territory cause serious damage to the marine environment of the Wider Caribbean Region and consequently to the rights of its inhabitants protected by the American Convention, such acts or omissions would be in conflict with the State's obligations under the American Convention and would give rise to international responsibility under the Convention.[158] This includes not only the rights set out in Articles 4(1) and 5(1), read with Article 1(1), of the Convention, but also other rights that may be affected by environmental degradation, depending on the facts, such as the right to property (Article 21) and the rights of the child (Article 19).[159] The relevant principles of general international law as they relate to the American Convention are discussed in more detail in Section III.C below.

[158] See also IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, Chap. VIII ("The right to have one's life respected is not, however, limited to protection against arbitrary killing. States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.") (emphasis added).

[159] *See, e.g.*, IACHR, *Community of San Mateo de Huanchor v. Peru*, 14 Oct. 2004, Report No. 69/04 (Admissibility), ¶ 66; IACHR, *The Situation of Human Rights in Cuba–Seventh Report*, Doc. OEA/Ser.L/V/II.61, Doc. 29 rev. 1, 4 Oct. 1983.

C. Should we interpret – and to what extent – the norms that establish the obligation to respect and ensure the rights and freedoms set out in Articles 4(1) and 5(1) of the Pact in the sense that they infer the obligation of the States Parties to the Pact to respect the norms of international environmental law that seek to prevent any environmental damage which could restrict or preclude the effective enjoyment of the rights to life and to personal integrity, and that one of the ways of complying with that obligation is by making environmental impact assessments in an area protected by international law, and by cooperation with the States that could be affected? If applicable, what general parameters should be taken into account when making environmental impact assessments in the Wider Caribbean Region, and what should be the minimum content of these assessments?

This Section addresses the third question raised by Colombia in three parts: (i) interpretation of the American Convention in the light of the relevant principles of international law; (ii) the duty to conduct an environmental impact assessment in cooperation with the potentially affected States; and (iii) the general parameters and the minimum content of an environmental impact assessment.

i. Should we interpret – and to what extent – the norms that establish the obligation to respect and ensure the rights and freedoms set out in Articles 4(1) and 5(1) of the Pact in the sense that they infer the obligation of the States Parties to the Pact to respect the norms of international environmental law that seek to prevent any environmental damage which could restrict or preclude the effective enjoyment of the rights to life and to personal integrity?

It is permissible and appropriate for the Court to consider international environmental law principles in its interpretation of the rights secured by the American Convention in view of: (a) the established nexus between a healthy environment and human rights; (b) the Inter-American human rights institutions' resort to external sources of law, where appropriate; and (c) the evolutionary interpretative approach applied to the Convention.

First, an interpretation of the Convention that takes into account international environmental law flows directly from the jurisprudence of the Inter-American Court and the Inter-American Commission on Human Rights (the "Commission") that has recognized the intrinsic link between a healthy environment and human rights protection.[160] The Inter-American human rights institutions have emphasized that "a minimal environmental quality" is a "precondition" for the proper exercise of fundamental rights[161] and that both the Convention and

[160] See, e.g., IACHR, Kawas-Fernández v. Honduras, 3 Apr. 2009, Judgment (Ser. C No. 196), ¶ 148 (recognizing the "undeniable link between the protection of the environment and the enjoyment of other human rights."). See also Section II.C above.

[161] See IACHR, Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members v. Panama, 30 Nov. 2012, Report No. 125/12 (Merits), Case 12.354, ¶ 233 (internal citations omitted) (holding that "it is clear that several fundamental rights enshrined [in the Convention] require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. The [Commission] has emphasized in this regard that there is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity. These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm on their ancestral territories."). Cf. IACHR, Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II. Doc. 56/09, 30 Dec. 2009, ¶¶ 190-191. See also IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, Chap. VIII ("The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental

the American Declaration of the Rights and Duties of Man (the "American Declaration" or the "Declaration") implicitly "refer to the right to a healthy environment."[162]

In the context of economic development projects, the Commission has further stated that any such activities must be accompanied by "appropriate and effective measures to guarantee that they are not conducted at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous and tribal communities, or at the expense of the environment on which they depend for their physical, cultural, and spiritual wellbeing."[163] To be "appropriate and effective," the measures in question should arguably be informed not only by the domestic legislation of a given State, which could be lacking, but also by generally applicable principles of international environmental law.

Second, the Inter-American human rights institutions have considered external sources of law where relevant or necessary to identify standards for the protection of human rights. In emphasizing the connection between a healthy environment and the protection of human rights, for example, the Commission has referred to a number of norms developed outside the Inter-American Human Rights System.[164] Moreover, as the Commission has explained in other contexts, even though the American Declaration is the primary source of international obligation and applicable law in the Inter-American system, other sources of law may be relevant in effectuating the Commission's mandate in particular circumstances, as the Declaration (or the Convention) "was not designed to apply in absolute terms or in a vacuum."[165] In considering and applying external sources, the decisive factor is to "give effect to the normative standard which best safeguards the rights of the individual."[166] In this case, taking into account well-established international environmental principles, such as the precautionary principle, would arguably "best safeguard" the rights of the potentially affected individuals by placing the onus on the State(s) to

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contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated."); IACHR, Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia, OEA/Ser.L/V/II, 28 June 2007, ¶¶ 250-253 (expressing concern at "severe environmental pollution" caused by certain development projects and "the harmful effects they have had on the continuity of basic subsistence activities," such as fishing, and on the health of indigenous and peasant communities); IACHR, Follow-up Report—Access to Justice and Social Inclusion: the Road Towards Strengthening Democracy in Bolivia, OEA/Ser/L/V/II.135, Doc. 40, 7 Aug. 2009, ¶ 158 (finding violations of human rights stemming from the exploitation of natural resources, such as "adverse effects on health and production systems; changes in domestic migration patterns; a decline in the quantity and quality of water sources; impoverishment of soils for farming; a reduction in fishing, animal life, plant life, and biodiversity in general, and disruption of the balance that forms the basis of ethnic and cultural reproduction").

[162] IACHR, Second Report on the Situation of Human Rights Defenders in The Americas, 31 Dec. 2011, OEA/Ser.L/V/II, Doc. 66, ¶ 309 ("Although the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights make no express reference to protection of the environment, the IACHR has written that a healthy environment is a necessary precondition for exercise of a number of fundamental rights, which are profoundly affected by the degradation of natural resources. The Commission's interpretation is that both the Declaration and the American Convention reflect a priority concern with the preservation of individual health and welfare, legal interests which are protected by the interrelation between the rights to life, security of person, physical, psychological and moral integrity, and health, and thereby refer to the right to a healthy environment.").

[163] IACHR, Application to the Inter-American Court of Human Rights in the case of 12 Saramaka Clans (Case 12.338) v. Suriname, 23 June 2006, ¶ 153 (emphasis added). Cf. IACHR, Maya *Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, 12 Oct. 2004, ¶ 150.

[164] *See, e.g.*, IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 Dec. 2009, ¶¶ 159, 192 (referring to numerous international treaties and instruments, including the Amazon Cooperation Treaty, the World Charter for Nature, the Convention for the Protection of Flora, Fauna and Natural Scenic Beauties of America, the Rio Declaration on Environment and Development, the Convention on Biological Diversity, and the Protocol of San Salvador); IACHR, *Saramaka People v. Suriname* (Ser. C No. 172), 28 Nov. 2007, ¶¶ 130 31 (referring to several international treaties and policies in defining procedural safeguards for natural resource projects on indigenous peoples' territories); IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, Chap. VIII (referring to the 1994 Declaration of Principles of the First Summit of the Americas, 11 Dec. 1994 (the "Declaration of Miami") and the World Charter for Nature, UN Gen. Assembly Res. 37/7, 28 Oct. 1982, U.N. Doc A/RES/37/7).

[165] *See, e.g.*, IACHR, *Coard et al. v. United States*, Report No. 109/99, 29 Sept. 1999, ¶ 41 (citing ICJ, *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, 1980 I.C.J. 73, 76 ("[A] rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.")).

[166] IACHR, *Coard et al. v. United States*, Report No. 109/99, 29 Sept. 1999, ¶ 42.

take certain positive measures *ex ante* to identify risks—and to prevent—any potentially adverse environmental impacts that might have harmful human rights consequences.[167]

Finally, a consideration of relevant principles of international environmental law is consistent with the evolutionary and systematic interpretive approach adopted by the Inter-American human rights institutions. As the Court has stated,

> "[H]uman rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions. This evolutionary interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties. Thus, … when interpreting a treaty, it is necessary to take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also the system of which it forms part (Article 31(3) of this instrument)."[168]

This reasoning has also been applied in cases involving human rights and the environment. As the Commission has explained, provisions of treaties bearing on the environment "are directly relevant for the interpretation of the Inter-American human rights instruments, by virtue of the evolutionary and systematic interpretive approach" which applies to the American Declaration and the Convention.[169]

In this case, of particular relevance are the principles relating to the prevention of environmental harm in a transboundary context, bearing in mind the particularly fragile nature of the Wider Caribbean Region. As discussed in Sections II.C and III.A above, these principles include a duty to exercise due diligence in order to prevent and mitigate the risk of transboundary harm and the duty to cooperate with the potentially affected States in the process. These principles, which also reflect the importance of precaution in international environmental law, are based on a number of sources discussed in this Written Opinion, including:

a) Principles derived from treaties in force in the region, such as the 1983 Cartagena Convention,[170] and, where applicable, the 1988 Protocol of San Salvador,[171] and the 1982 UN Convention on the Law of the Sea;[172]
b) Principles of customary international law;
c) General principles of international law; and,

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[167] *See, e.g.*, IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 Apr. 1997, Chap. VIII ("The right to have one's life respected is not, however, limited to protection against arbitrary killing. States Parties are required to take *certain positive measures* to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take *reasonable measures to prevent such risk*, or the necessary measures to respond when persons have suffered injury.") (emphasis added). *See also id.* (recommending that the State "continue and enhance its efforts to address the risks identified … with respect to other development activities, such as gold mining … which poses a serious risk of contamination and danger to human health…").

[168] IACHR, *The Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, ¶ 161.

[169] IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 Dec. 2009, ¶¶ 192-193. *See also id.* ("Thus, both the IACHR and the Inter-American Court have articulated a set of State obligations related to the preservation of an environmental quality which allows for the enjoyment of human rights. State members of the OAS must prevent the degradation of the environment in order to comply with their human rights obligations in the framework of the Inter-American system.").

[170] 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Area, 22 ILM 221 (1983), 24 Mar. 1983 (entered into force 11 Oct. 1986) (the "Cartagena Convention").

[171] The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 28 ILM 156 (1989), 17 Nov. 1988 (entered into force 16 Nov. 1999), art. 11 (recognizing a human right "to live in a healthy environment" and a duty on States to "promote the protection, preservation, and improvement of the environment") (the "Protocol of San Salvador").

[172] United Nations Convention on the Law of the Sea, 10 Dec. 1982, 21 ILM 1261 (entered into force 16 Nov. 1984) ("UNCLOS").

d) Principles articulated in non-binding instruments, such as UN General Assembly Resolutions, relating to the Wider Caribbean Region.

(A list of the relevant sources is appended as Appendix II)

In sum, the obligation to respect and ensure rights under the American Convention entails a concomitant duty to prevent any environmental harm that could significantly affect or restrict the effective enjoyment of human rights, such as the rights to life, health, or property, and to take affirmative steps to fulfill this obligation. The kinds of affirmative steps that a State can take to discharge its international obligations in this regard are discussed below in Sections III.C(ii)-(iii).

ii. And that one of the ways of complying with that obligation is by making environmental impact assessments in an area protected by international law, and by cooperation with the States that could be affected?

An environmental impact assessment ("EIA") has been defined as a "national procedure for evaluating the likely impact of a proposed activity on the environment,"[173] while a transboundary environmental impact assessment ("TEIA") requires parties to evaluate any impact that might affect the territory of another State or in common spaces.[174] TEIAs allow authorities "to give explicit consideration to environmental factors at an early stage in the decision-making process," serve as "a necessary tool to improve the quality of information presented to decision makers," and help ensure that "environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context."[175] TEIAs help alert governments and international organization to the risk of transboundary harm. Indeed, without the benefit of a TEIA, the duty to notify and consult other States in case of transboundary risk would be "meaningless."[176]
As explained below, compliance with the obligation to prevent transboundary environmental (and human rights) harm requires States to conduct transboundary environmental impact assessments in cooperation with other potentially affected States. This flows from (a) the jurisprudence of the Inter-American human rights institutions, (b) the Cartagena Convention, which is applicable in the Wider Caribbean Region, and (c) general international law, and is further supported by (d) the practice under other international instruments.

1. Jurisprudence of the Inter-American Human Rights Institutions

The Inter-American human rights jurisprudence indicates that the obligation to conduct an environmental impact assessment is one of the basic ways in which a State can comply with its obligation to respect and ensure the human rights protected by the American Convention. While the case law has thus far focused on the domestic context, the same underlying principles should

[173] 1991 Convention on Environmental Impact Assessment in a Transboundary Context, 1989 U.N.T.S. 309 (entered into force on 10 Sept. 1997) (hereinafter the "Espoo Convention"), art. 1(vi).
[174] *See* Espoo Convention, art. 1(viii).
[175] Espoo Convention, Preamble.
[176] *See* PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (3rd ed., Oxford University Press, 2009), at pp. 165, 461. *See also* ITLOS, *In re Arbitration Between the Republic of the Philippines and the People's Republic of China (South China Sea Award)*, PCA Case No. 2013-19, Award (12 July 2016), ¶ 948 (stating that the EIA provision of UNCLOS "ensures that planned activities with potentially damaging effects may be effectively controlled and that other States are kept informed of their potential risks.").

apply in a transboundary setting to deter States from violating rights of non-citizens with impunity (*see* Section III.A. above).

As the Court, has emphasized in the *Case of the Saramaka People v. Suriname*, a "prior environmental and social impact assessment" must be carried out by "independent and technically capable entities, with the State's supervision" in the context of development projects and extractive activities in indigenous territories.[177]

Beyond EIAs, the Inter-American human rights institutions have emphasized that States have a duty to implement appropriate preventive measures. These include "adequate safeguards and mechanisms" to supervise, monitor, and avoid environmental harm,[178] as well as providing for an appropriate, participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans.[179]

While much of this jurisprudence has emerged in the context of indigenous and tribal peoples' rights, the general principles and standards elaborated in existing cases are consistent with international standards and are equally applicable in a non-indigenous context. For example, in *Taskin v. Turkey*, a case involving the operation of a gold mine, the European Court of Human Rights ("ECtHR") reiterated that,

> "Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake."[180]

In *Taskin*, the ECtHR also reiterated the importance of environmental procedural rights, i.e., "public access" to such studies and information that would permit members of the public to "assess the danger to which they are exposed," as well as access to justice (to appeal any decision, act, or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process).[181]

In this regard, the Court's distinction between negative and positive duties under the Convention is instructive: a State is required to "ensure" that the rights guaranteed by the Convention are effective, for example, by exercising due diligence to prevent violations of a right (*see* Section III.B above). Effectiveness in the context of maritime pollution in the Wider

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[177] IACHR, *Case of the Saramaka People v. Suriname*, Judgment, 28 Nov. 2007, Series C No. 172, ¶ 129. *See also* IACHR, *Community of San Mateo de Huanchor and its members v. Peru*, Report No. 69/04, Admissibility, 15 Oct. 2004 ¶ 12 (adopting precautionary measures to protect the rights to life, personal security and health of the persons affected by exposure to the toxic waste sludge, which including ordering the State to draw up "as quickly as possible an environmental impact assessment study required for removing the sludge," treating and removing the sludge in line with the EIA, and monitoring compliance).

[178] *See, e.g.*, IACHR, *Application to the Inter-American Court of Human Rights in the case of 12 Saramaka Clans (Case 12.338) v. Suriname*, 23 June 2006, ¶ 161 (finding that "the harm partly resulted from the State's failure to put in place adequate safeguards and mechanisms, or to supervise or control the concessions, as well as its failure to ensure that the logging concessions would not cause major damage to Saramaka lands and communities."); IACHR, *Maya Indigenous Community of the Toledo District v. Belize*, Report No. 40/04, 12 Oct. 2004, ¶ 147 (concluding that the logging concessions granted by the State have caused environmental damage that impacted negatively plaintiffs' communal lands in part because "the State failed to put into place adequate safeguards and mechanisms, to supervise, monitor and ensure that it had sufficient staff to oversee that the execution of the logging concessions would not cause further environmental damage to Maya lands and communities.").

[179] IACHR, *Case of the Saramaka People v. Suriname*, Judgment, 28 Nov. 2007, Series C No. 172, ¶ 129.

[180] ECtHR, *Taskin v Turkey*, App No 46117/99 (10 Nov. 2004), ¶ 119 (internal citations omitted).

[181] *Id.*

Caribbean Region might require States to adopt specific administrative mechanisms and policies to prevent and mitigate the risk of harm, for example, by adopting a transparent, participatory, and science-based permitting and authorization process; preparing an environmental impact assessment; disseminating EIA information to the affected public through public hearings and otherwise; and, ensuring adequate review and remedy procedures.

Additional standards relating to the EIA process are elaborated in treaties and general international law and can serve as further guidance in the Court's analysis.

2. Procedural Obligations under the Cartagena Convention relating to TEIAs

In the Wider Caribbean Region, which is specifically addressed in Colombia's Request for an Advisory Opinion, the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the "Cartagena Convention") provides for an EIA process for major development projects.[182]

As noted above, the Cartagena Convention imposes a number of procedural and substantive duties on the States Parties with the objective of preventing the occurrence of environmental harm in the Wider Caribbean Region—a common space with common resources and common concerns for each and every State Party in the region.[183]

First, recognizing the limits of domestic regulation in a region that has "special hydrographic and ecological characteristics" and "vulnerability to pollution,"[184] the Cartagena Convention reaffirms the duty of States Parties to cooperate in furtherance of its objectives. For example, the Convention states that—as a matter of general obligations set out in Article 4—the States Parties "shall cooperate in the formulation and adoption of protocols or other agreements to facilitate the effective implementation of this Convention,"[185] that they "shall endeavour to harmonize their policies in this regard,"[186] and that they "shall assist each other in fulfilling their obligations under this Convention and its protocols."[187]

The Cartagena Convention further specifies that cooperation is required in cases involving environmental emergencies and obligates States Parties to develop contingency plans for responding to incidents, or threats, of pollution in the Wider Caribbean Region.[188] It also envisages scientific and technical cooperation, including scientific research, monitoring, and the

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[182] Cartagena Convention, art. 12. The Cartagena Convention's territorial scope is the so-called "Wider Caribbean Region," whose limits are defined by Article 2(1). The Cartagena Convention does not apply to "internal waters" (i.e., waters under national jurisdiction) (art. 1(2)), but instead focuses on transboundary effects of activities in national jurisdiction or common space, such as pollution from ships (art. 5), pollution caused by dumping (art. 6), pollution from land-based sources (art. 7), pollution from sea-bed activities (art. 8), airborne pollution (art. 9), and pollution in specially protected areas (art. 10).

[183] *See, e.g.*, Cartagena Convention, Preamble ("Considering the protection of the ecosystems of the marine environment of the wider Caribbean region to be one of their principal objectives"; "Realizing fully the need for co-operation amongst themselves and with competent international organizations in order to ensure co-ordinated and comprehensive development without environmental damage").

[184] *Ibid.*

[185] Cartagena Convention, art. 4(3).

[186] *Id*, art. 4(4).

[187] *Id*, art. 4(5).

[188] *Id*, art. 11(1) ("The Contracting Parties shall co-operate in taking all necessary measures to respond to pollution emergencies in the Convention area, whatever the cause of such emergencies, and to control, reduce or eliminate pollution or the threat of pollution resulting therefrom. To this end, the Contracting Parties shall, individually and jointly, develop and promote contingency plans for responding to incidents involving pollution or the threat thereof in the Convention area.").

exchange of data and other scientific information, relating to the purposes of the Convention.[189] The duty to cooperate under the Cartagena Convention extends to any potential liability or compensation for damage resulting from pollution in the Wider Caribbean Region.[190]

Second, the Parties to the Cartagena Convention agreed to include an environmental impact assessment process for major development projects.[191] This is a key procedural obligation designed to ensure the Convention's effectiveness. Under Article 12(1), the States Parties "undertake to develop technical and other guidelines to assist the planning of their major development projects in such a way as to prevent or minimize harmful impacts" on the Wider Caribbean Region.[192] Article 12(2), furthermore, requires each State Party to "assess … the potential effects of such projects on the marine environment, particularly in coastal areas, so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to," the Wider Caribbean Region.[193] The Convention also requires States Parties to "develop procedures for the dissemination of information" and allows them, "where appropriate, [to] invite other Contracting Parties which may be affected to consult with it and to submit comments."[194]

These procedural obligations set out in the Cartagena Convention—a prior EIA and monitoring of environmental effects—are also encountered in a number of other regional treaties and the 1982 UN Convention on the Law of the Sea ("UNCLOS").[195] As commentators have emphasized, these obligations are particularly important in the context of regional seas, like the Caribbean, where no agreement on coordinated regulatory standards generally exists.[196] In such circumstances, these procedural duties afford "the only mechanism for limiting unilateral decisions which disregard impacts on the quality of the marine environment"[197] and, by extension, which disregard human rights extraterritorially.

Therefore, the Cartagena Convention reflects the intent of the States Parties to create a cooperative intergovernmental mechanism to "prevent, reduce and control" environmental harm in the Wider Caribbean Region, including by harmonizing internal norms and procedures for the protection of the marine environment and developing guidelines for environmental impact assessments involving major development projects.

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[189] Cartagena Convention, art. 13.
[190] Cartagena Convention, art. 14 ("The Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area.").
[191] Cartagena Convention, art. 12.
[192] *Id*, art. 12(1).
[193] *Id*, art. 12(2) ("Each Contracting Party shall assess within its capabilities, or ensure the assessment of, the potential effects of such projects on the marine environment, particularly in coastal areas, so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention area.").
[194] *Id*, art. 3(3) ("With respect to the assessments referred to in paragraph 2, each Contracting Party shall, with the assistance of the Organization when requested, develop procedures for the dissemination of information and may, where appropriate, invite other Contracting Parties which may be affected to consult with it and to submit comments.").
[195] United Nations Convention on the Law of the Sea (UNCLOS), 10 Dec. 1982, 21 ILM 1261 (entered into force 16 Nov. 1984), art. 206 (obliging States to "assess" "planned activities" under their "jurisdiction or control" that may cause "substantial pollution of or significant and harmful changes to the marine environment" and to "communicate reports of the results of such assessments."). UNCLOS further includes a duty for the monitoring and surveillance of the "effects of any effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment." Art. 204. *See also* Convention on Biological Diversity, adopted during the Earth Summit in Rio de Janeiro on 5 June 1992, 1760 UNTS 79; 31 ILM 818 (1992) (entered into force 29 Dec. 1993), art. 14 ('Impact Assessment and Minimizing Adverse Impacts').
[196] PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (3rd ed., Oxford University Press, 2009), at p. 461.
[197] *Ibid.*

As the Cartagena Convention affirms, the nature of these treaty obligations is to be interpreted in accordance with general international law.[198]

3. EIAs under General International Law

The duty to prevent significant transboundary environmental harm at a minimum requires due diligence on the part of the State and, related to that, cooperation with the affected States (*see* Section III.A above). This duty of prevention can be met, in part, by evaluating the potential risk of transboundary environmental harm from the proposed activity and taking measures to control that risk.[199] The obligation to conduct a TEIA, in cooperation with those States whose citizens might be adversely affected, is an accepted principle of general international law.[200]

As the International Court of Justice underscored in *Pulp Mills*, international law imposes a general obligation on States to undertake an environmental impact assessment in circumstances involving significant transboundary environmental risk to shared resources:

> "[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."[201]

This international obligation extends to all parties to the American Convention, and not merely parties to the Cartagena Convention: every State must conduct an environmental impact whenever the "proposed activities … may have a significant adverse impact in a transboundary context."[202]

The Court subsequently affirmed this general principle in a dispute between Nicaragua and Costa Rica, in which it further emphasized the duty to assess the potential harm, and conduct an EIA, prior to undertaking an activity:

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[198] *See* Cartagena Convention, art. 3(2) ("This Convention and its protocols shall be construed in accordance with international law relating to their subject-matter."). *See also id.* at art. 4(1) ("The Contracting Parties shall, individually or jointly, take all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the Convention area and to ensure sound environmental management, using for this purpose the best practicable means at their disposal and in accordance with their capabilities."); art. 4(4) ("The Contracting Parties shall take appropriate measures, in conformity with international law, for the effective discharge of the obligations prescribed in this Convention and its protocols … ").

[199] *See, e.g.*, ICJ, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 20 Apr. 2010, I.C.J. Reports 2010 (I), pp. 55-56, ¶ 101 (explaining that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.").

[200] ICJ, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 20 Apr. 2010, ¶¶ 204-205; ITLOS, *In re Arbitration Between the Republic of the Philippines and the People's Republic of China (South China Sea Award)*, PCA Case No. 2013-19, Award (12 July 2016), ¶ 948 (reiterating that "the obligation to conduct an environmental impact assessment is a direct obligation under [UNCLOS] and a general obligation under customary international law"). *See also* the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme, UNEP/WG.152/4 Annex (1987) (adopted by UNEP Governing Council, 14th Sess., Dec. 14-25, 1987).

[201] I.C.J. Reports 2010 (I), p. 83, ¶ 204.

[202] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 45, ¶ 104.

> "[A] State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity. …
> Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment."[203]

The duty to assess the existence of a risk of significant transboundary harm prior to the initiation of the activity must be discharged "on the basis of an objective evaluation of all the relevant circumstances."[204] One of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm is by conducting a preliminary assessment of the risk posed by an activity.[205] In deciding whether an EIA, or a preliminary risk assessment, is required in a given case, resort can be had to the precautionary principle.[206]

The corollary principle under international law is that of cooperation with the potentially affected States: "If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."[207]

International law does not stipulate the content of an EIA. Instead, that determination "should be made in light of the specific circumstances of each case."[208]

However, "the obligation to carry out an environmental impact assessment is a continuous one, and … monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project."[209] In *Gabcikovo-Nagymaros*, where it was alleged that an EIA had not been carried out prior to the construction of a

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[203] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), ¶ 104. *See also id.* at ¶ 153. The Parties broadly agreed on the existence in general international law of an obligation to conduct an EIA concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions. *Id.* at ¶ 101.

[204] *Ibid.*

[205] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 57, ¶ 154.

[206] *See* Rio Declaration on Environment and Development, Principle 15 ("In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.").

[207] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 45, ¶ 104. *See also id.* at p. 60, ¶ 168. In this case, the Parties concurred on the existence in general international law of an obligation to notify, and consult with, the potentially affected State in respect of activities which carry a risk of significant transboundary harm. *Id.* at ¶ 105.

[208] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 45, ¶ 104.

[209] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica/Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)*, Judgment, 16 Dec, 2017, I.C.J. Reports 2015 (I), p. 60, ¶ 161 (citing *Pulp Mills*, I.C.J. Reports 2010 (I), pp. 83-84, ¶ 205).

hydroelectric project, the International Court of Justice further stated that States must integrate latest scientific knowledge in their analysis:

> "Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions [in the environment] at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[210]

In so holding, the Court observed that, "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."[211]

Accordingly, a failure to institute an EIA in appropriate circumstances, or to continue monitoring a project that may have transboundary effects, in line with the latest available standards, may give rise to international responsibility. Additionally, where appropriate, the content of an EIA may be determined by reference to applicable treaties or procedural human rights (*see* Section III.C below).

It should be noted that the EIA requirement under international law does not give the potentially affected States "veto power" over the proposed activities; rather, it gives them the right to be notified, informed, and consulted, and the possibility of being engaged in joint assessment and monitoring efforts. However, should a State initiating an activity fail to take due account of the EIA findings, or proceed with a project that ultimately results in transboundary environmental harm, it does so "at its own risk" and may incur international responsibility as a result.[212]

4. TEIA Practice under Other International Instruments

The obligation to conduct an EIA/TEIA is a common feature of a number of regional conventions and international instruments, and not merely the Cartagena Convention.[213] While the practice from other regional contexts may not be binding on the Parties to the American Convention, it may nonetheless be instructive for the Court's analysis by providing concrete guidance on how the general duty to conduct an EIA under international law can be operationalized. Of particular interest in this regard is the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter the "Espoo Convention"), which is in force, *inter alia*, in the European Community and Canada.[214]

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[210] ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports (1997), 25 Sept. 1997, at p. 78.
[211] ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports (1997), 25 Sept. 1997, at p. 78.
[212] ICJ, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 20 Apr. 2010, I.C.J. Reports 2010 (I), ¶¶ 154, 157 (finding that Uruguay did not bear any "no construction obligation" after the negotiation period with Argentina, but that Uruguay, as "the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.").
[213] *See, e.g.*, United Nations Convention on the Law of the Sea (UNCLOS), 10 Dec. 1982, 21 ILM 1261, art. 206, entered into force 16 Nov. 1984 (obliging States to assess activities under their jurisdiction that may cause "significant and harmful changes to the marine environment and [to] communicate reports of the results of such assessments.").
[214] 1991 Convention on Environmental Impact Assessment in a Transboundary Context, 1989 U.N.T.S. 309 (entered into force on 10 Sept. 1997) (hereinafter "Espoo Convention"), and UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kiev, 2003 (entered into force on 11 July 2010).

The Espoo Convention requires States Parties to take, either individually or jointly, "all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."[215] The relevant parameters and content of this obligation are discussed below in Section III.C.(iii)(b). Amidst concerns about transboundary environmental impacts, including health impacts, of activities within domestic jurisdiction, Parties to the Espoo Convention signed an additional Protocol on Strategic Impact Assessment in Kiev, in 2003 (hereinafter the "Kiev Protocol").[216] The Kiev Protocol furthers the objectives of the Espoo Convention by ensuring that individual Parties integrate environmental assessment into their plans and programs at the earliest stages, thus helping to lay down the groundwork for sustainable development.[217] This includes plans and programs that are prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use, among others.[218]

In conclusion, international environmental law imposes an obligation on States to conduct a transboundary environmental impact assessment whenever there is a risk of significant transboundary harm, in consultation with all affected States.

iii. If applicable, what general parameters should be taken into account when making environmental impact assessments in the Wider Caribbean Region, and what should be the minimum content of these assessments?

The general parameters for environmental impact assessments in the Wider Caribbean Region (a) are supplied by existing jurisprudence of the Inter-American human rights institutions and (b) can be further guided by international practice.

1. The Inter-American Human Rights System

The Inter-American human rights institutions, often drawing on best international practices, have already set out a number of parameters for EIAs that are equally applicable in the Wider Caribbean Region.

Based on these parameters, an EIA must, at a minimum,

a) "[C]onform to the relevant international standards and best practices" [219];
b) Be conducted by "independent and technically capable" agencies (in indigenous contexts, subject to the supervision of the State);

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[215] Espoo Convention, art. 2(1).
[216] UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, 2003 (entered into force on 11 July 2010) (hereinafter the "Kiev Protocol").
[217] Kiev Protocol, Preamble & art. 1. *See also id.* at arts. 2(6)-2(7) (defining "strategic environmental assessment" as "the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying-out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme," where the relevant effects include "any effect on the environment, including human health, flora, fauna, biodiversity, soil, climate, air, water, landscape, natural sites, material assets, cultural heritage and the interaction among these factors.").
[218] Kiev Protocol, art. 4(2).
[219] IACHR, *Saramaka People v. Suriname*, Interpretation of the Judgment, 12 Aug. 2008, ¶ 41.

c) Be objective, impartial and technically verifiable;
d) Be carried out before any development activities are approved;
e) Identify possible alternatives or, failing such alternatives, measures to mitigate the negative impacts of the investment or development plan;
f) Be of both a "social and environmental" nature, in the indigenous context, which includes evaluating and mitigating direct or indirect impacts on the way of life of indigenous peoples who depend on the ecosystem for their survival; and,
g) Consider the cumulative impact of existing and proposed projects.[220]

Moreover, as the Commission has recognized, "the content of environmental impact assessments as such is already considerably standardized in international practice," and it includes, among other things, the basic need to "identify and assess the potential environmental impacts of a proposed project, evaluate alternatives, and design appropriate mitigation, management, and monitoring measures."[221] International environmental law can thus provide additional guidance in this regard, as described below.

2. International Practice relating to TEIAs

The Espoo Convention sets out in detail a number of procedural duties relating to the conduct of TEIAs.[222] These include, for instance, provisions on:

a) *Timing.* An EIA must be undertaken "prior to a decision to authorize or undertake" an activity that is likely to cause a significant adverse transboundary impact.[223]
b) *Notification.* The potentially affected Parties must be "notified of a proposed activity … that is likely to cause a significant adverse transboundary impact."[224] To ensure adequate and effective consultations under the Espoo Convention, notification must be given "as early as possible and no later than when informing its own public about that proposed activity,"[225] and it must include "any available information" on possible transboundary impacts.[226]
c) *Public Participation.* The Party proposing the activity must provide an opportunity for public participation in the relevant EIA process in the areas likely to be affected; the requirement of public participation must be applied on a non-discriminatory basis as between the affected domestic and foreign publics.[227]
d) *EIA Documentation.* The Party proposing the activity must provide the affected Parties with the EIA documentation, including, *inter alia*, a description of the project and its purpose, a description, where appropriate, of reasonable alternatives (including the "no-action alternative"), a description of the environment "likely to be significantly affected

[220] *See generally* IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 Dec. 2009, ¶¶ 252-259; IACHR, *Case of the Saramaka People v. Suriname*, Judgment, 28 Nov. 2007, Series C No. 172, ¶ 129; *see also Saramaka People v. Suriname*, Interpretation of the Judgment, 12 Aug. 2008, ¶¶ 40-41.
[221] IACHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 Dec. 2009, ¶ 257 (citing the definition of EIAs incorporated into the World Bank Operational Policy OP 4.01).
[222] *See also* 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme, UNEP/WG.152/4 Annex (1987) (adopted by UNEP Governing Council, 14th Sess., Dec. 14-25, 1987), Principle 4 (describing elements of an EIA).
[223] Espoo Convention, art. 2(3).
[224] *Id*, art. 2(4).
[225] *Id*, art. 3(1).
[226] *Id*, art. 3(2).
[227] *Id*, art. 2(6).

by the proposed activity and its alternatives," and an estimation of the significance of the impacts.[228]

e) *Consultation.* The Party proposing the activity must, "without undue delay," enter into consultations with affected Parties concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact.[229]
f) *Post-Project Analysis.* The Parties are required to conduct post-project analysis in some circumstances and conduct surveillance of the activity.[230]

These duties are reaffirmed and elaborated in the Kiev Protocol, which makes further reference to the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter the "Aarhus Convention")[231] and emphasizes the importance of public participation in strategic EIAs.[232]

The provisions in the Espoo Convention and the Kiev Protocol relating to consultation with affected States and public participation of the affected members of the public are instructive in this case. In particular, they reflect the recognition that the effectiveness of the EIA process, including in a transboundary setting, fundamentally rests on respect for other procedural rights, i.e., the affected States (and public's) right to access to participation, information, and justice in environmental decision-making.

At a global level, it is worth nothing the international financial institutions have long recognized the requirement to provide for transboundary impact assessment. World Bank Environmental Assessment Operational Policy 4.01 is fully harmonized with the procedural and substantive requirements set forth in the regional Espoo and Kiev instruments noted above. Moreover, the Bank policy states that environmental assessment "takes into account… transboundary and global environmental aspects"[233] and requires "measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance." [234] On August 4, 2016, the World Bank approved a new Environmental and Social Framework which expands and reiterates these requirements related to transboundary and global impacts.[235] The new Framework includes the requirement to keep project affected stakeholders informed at the design stage of the project and, if the project is financed by the Bank, to be engaged throughout the life cycle of the project.[236] The Bank will only support projects that are able to "meet the requirements of the Environmental and Social standards in a manner and within a timeframe acceptable to the Bank."[237]

Indeed, compliance with international human rights law necessitates public notification, participation, and access to remedies in an "informed process" where environmental impacts

[228] *Id*, art. 4 & Appendix II.
[229] *Id*, art. 5.
[230] *Id*, art. 7.
[231] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 (hereinafter the "Aarhus Convention").
[232] Kiev Protocol, art. 1(d) (stating that "[t]he objective of this Protocol is to provide for a high level of protection of the environment, including health, by … Providing for public participation in strategic environmental assessment").
[233] World Bank Operational Policy 4.01, (1999), paragraph 3.
[234] *Id* at paragraph 8(a).
[235] https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies
[236] *Id*. World Bank Environmental and Social Standard Ten, Stakeholder Engagement and Information Disclosure.
[237] *Id*. World Bank Environmental and Social Policy for Investment Project Finance, Paragraph 7.

may significantly affect health, private life, property, or life.[238] The importance of such environmental procedural rights is enshrined in the Inter-American human rights jurisprudence, which has recognized that States Parties to the American Convention have a duty to ensure and protect procedural rights and duties of their own publics—i.e., to provide access to relevant environmental information, to facilitate the public's participation in the relevant decision-making processes, and to provide effective judicial or administrative recourse to affected individuals and groups—as a key means of protecting human rights in the context of potential environmental harm.[239] While these procedural rights are more difficult to implement in a transboundary setting, they are necessary to protect the integrity of the EIA process and, in so doing, respect and ensure human rights under the American Convention. Moreover, they provide a clear and workable connection between the American Convention and the Cartagena Convention – instruments that protect a strong and harmonized legal foundation for the environment and human rights.

[238] *See, e.g.*, ECtHR, *Taskin v Turkey*, App No 46117/99 (10 Nov. 2004), ¶ 119.

[239] *See, e.g.*, *Report on the Situation of Human Rights in Ecuador*, Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 Apr. 1997, Chap. VIII ("protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse."). *See also* IACHR, *Claude Reyes et al. v. Chile* (Ser. C No. 151), 19 Sept. 2006, ¶ 76 (reiterating that the right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds," and finding that a refusal by a State to disclose State-held information relating to deforestation projects to its nationals amounts to a violation of the right to freedom of thought and expression embodied in Article 13 of the Convention, as well as the general obligation to respect and ensure the rights and freedoms established in Article 1(1)); *id.* at ¶¶ 78-82 (citing resolutions issued by the OAS General Assembly, the Inter-American Democratic Charter, and other regional and UN declarations as evidence of "regional consensus among the [OAS Member States] … about the importance of access to public information and the need to protect it"); *Community of La Oroya v. Peru*, Report No. 76/09 (Admissibility), 5 Aug. 2009, ¶ 75 (finding that "the alleged lack and/or manipulation of information on the environmental pollution pervasive in La Oroya, and on its effects on the health of its residents, along with the alleged harassment toward persons who attempt to disseminate information in that regard, could represent violations of the right enshrined in Article 13 of the American Convention").

IV. Appendix List

A. Appendix I Signatures and ratifications by countries of the Wider Caribbean Region of International/Regional Treaties and Multilateral Environmental Agreements (MEA's)

B. Appendix II: Reference information and case law for the Court's consideration

Appendix I

Signatures and ratifications by countries of the Wider Caribbean Region of International/Regional Treaties and Multilateral Environmental Agreements (MEA's)

State	Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region[1]		Protocol Concerning Specially Protected Areas and Wildlife to the Cartagena Convention[2]		Convention on Biological Diversity[3]		Convention for the Protection of Natural Flora, Fauna and Natural Beauties of the Countries of America[4]		Inter-American Convention for the Protection and Conservation of Sea Turtles[5]		The Law of the Sea Convention 1982[6]	
	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs
Antigua and Barbuda		11-Sep-86	18-Jan-90		5-Jun-92	9-Mar-93	-	-	-	-	7-Feb-83	2-Feb-89
Bahamas		24-Jun-10		24-Jun-10	12-Jun-92	2-Sep-93	-	-	-	-	10-Dec-82	29-Jul-83
Barbados	5-Mar-84	28-May-85		14-Oct-02	12-Jun-92	10-Dec-93	-	-	-	-	10-Dec-82	12-Oct-93
Belize		22-Sep-99		4-Jan-08	13-Jun-92	30-Dec-93	-	-	21-Dec-98	3-Feb-03	10-Dec-82	13-Aug-83
Colombia	24-Mar-83	3-Mar-88	18-Jan-90	5-Jan-98	12-Jun-92	28-Nov-94	17-Jan-41	-	-	-	10-Dec-82	-
Costa Rica		1-Aug-91			13-Jun-92	26-Aug-94	24-Oct-40	2-Dec-66	31-Jan-97	17-Apr-00	10-Dec-82	21-Sep-92
Cuba		15-Sep-88	18-Jan-90	4-Aug-98	12-Jun-92	8-Mar-94	12-Oct-40	-	-	-	10-Dec-82	15-Aug-84
Dominica		5-Oct-90			-	6-Apr-94	-	-	-	-	28-Mar-83	24-Oct-91
Dominican Republic		24-Nov-98		24-Nov-98	13-Jun-92	25-Nov-96	-	-	-	-	10-Dec-82	10-Jul-09
France	24-Mar-83	13-Nov-85	18-Jan-90	5-Apr-02	13-Jun-92	1-Jul-94	-	-	-	-	10-Dec-82	11-Apr-96
Grenada	24-Mar-83	17-Aug-87		5-Mar-12	3-Dec-92	11-Aug-94	-	-	-	-	10-Dec-82	25-Apr-91
Guatemala	5-Jul-83	18-Dec-89	18-Jan-90		13-Jun-92	10-Jul-95	9-Apr-41	28-Jul-41	-	15-Aug-03	8-Jul-83	11-Feb-97

*Rtf = Ratific Rtf = Ratification, Acs = Accession, Acp = Acceptance, Apv = Approval, Scs = Succession

[1]The Caribbean Environment Programme. (2016). 'About the Cartagena Convention'. [WWW document] URL http://www.cep.unep.org/cartagena-convention

[2]id

[3]Convention on Biological Diversity (2016). 'List of Parties'. [WWW document] URL https://www.cbd.int/information/parties.shtml#tab=1

[4]Organization of Americas States (OAS). Department of International Law (2016). 'Multilateral Treaties'. [WWW document] URL http://www.oas.org/juridico/spanish/firmas/c-8.html

[5]Inter-American Convention for the Protection and Conservation of Sea Turtles. 2016. 'Countries Parties'. [WWW document] URL http://www.iacseaturtle.org/paises.htm

[6]United Nations Convention on the Law of the Sea. 2014. 'Status of the United Nations Convention on the Law of the Sea'. [WWW document] URL http://www.un.org/depts/los/reference_files/status2010.pdf

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Guyana		14-Jul-10		14-Jul-10	13-Jun-92	29-Aug-94	-	-	-	-	10-Dec-82	16-Nov-93
Haiti					13-Jun-92	25-Sep-96	29-Apr-41	30-Dec-41	-	-	10-Dec-82	31-Jul-96
Honduras	24-Mar-83				13-Jun-92	31-Jul-95	-	-	29-Dec-98	1-Feb-01	10-Dec-82	5-Oct-93
Jamaica	24-Mar-83	1-Apr-87	18-Jan-90		11-Jun-92	6-Jan-95	-	-	-	-	10-Dec-82	21-Mar-83
Mexico	24-Mar-83	11-Apr-85	18-Jan-90		13-Jun-92	11-Mar-93	20-Nov-40	26-Feb-42	29-Dec-98	11-Sep-00	10-Dec-82	18-Mar-83
Netherlands	24-Mar-83	16-Apr-84	18-Jan-90	2-Mar-92	5-Jun-92	12-Jul-94	-	-	24-Dec-98	29-Nov-00	10-Dec-82	28-Jun-96
Nicaragua	24-Mar-83	25-Aug-05			13-Jun-92	20-Nov-95	12-Oct-40	27-Apr-46	4-Mar-97	-	9-Dec-84	3-May-00
Panama	24-Mar-83	6-Nov-87	16-Jan-91	27-Sep-96	13-Jun-92	17-Jan-95	16-Dec-65	24-Feb-72	-	15-Feb-08	10-Dec-82	1-Jul-96
St. Kitts and Nevis		15-Jun-99			12-Jun-92	7-Jan-93	-	-	-	-	7-Dec-84	7-Jan-93
Saint Lucia	24-Mar-83	30-Nov-84	18-Jan-90	18-May-00	-	28-Jul-93	-	-	-	-	10-Dec-82	27-Mar-85
St. Vincent and the Grenadines		11-Jul-90		26-Jul-91	-	3-Jun-96	-	-	-	-	10-Dec-82	1-Oct-93
Suriname					13-Jun-92	12-Jan-96	30-Apr-85	23-Jan-85	-	-	10-Dec-82	9-Jul-98
Trinidad and Tobago		24-Jan-86	18-Jan-90	10-Aug-99	11-Jun-92	1-Aug-96	24-Apr-69	12-Apr-69	-	-	10-Dec-82	25-Apr-86
United Kingdom	24-Mar-83	28-Feb-86	18-Jan-90		12-Jun-92	3-Jun-94	-	-	-	-	-	25-Jul-97
United States of America	24-Mar-83	31-Oct-84	18-Jan-90	16-Apr-03	4-Jun-93	-	12-Oct-40	15-Apr-41	13-Dec-96	21-Feb-01	-	-

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	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs	Date of Signature	*Rtf/ Acs/ Acp/ Apv/ Scs
Venezuela	24-Mar-83	18-Dec-86	18-Jan-90	28-Jan-97	12-Jun-92	13-Sep-94	12-Oct-40	9-Oct-41	16-Dec-96	20-Aug-98	-	-
European Economic Commission	24-Mar-83	-	-	-	-	-	-	-	-	-	-	-

Appendix II:
Reference information and case law for the Court's consideration

Multilateral and Regional Bodies Resolutions

General Assembly of the Organization of Americas States

Support for the Work of the Caribbean Sea Commission, General Assembly Res AG/Res 2691 (XLI-O/11). Link: http://www.oas.org/en/council/AG/ResDec/

Advancing Hemispheric Initiatives on Integral Development, General Assembly Res AG/Res 2779 (XLIII-O/13). Link: http://www.oas.org/en/council/AG/ResDec/

Human Rights and the Environment, General Assembly Res AG/RES. 1819 (XXXI-O/01). Link: http://www.oas.org/en/council/AG/ResDec/

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