

Significant International Environmental Law Cases: 2017–18

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1. INTRODUCTION

This review of significant international environmental law cases covers the period from May 2017 to June 2018. This year has seen a number of novel issues being addressed by international courts and tribunals. Firstly, the International Court of Justice (ICJ) has dealt with the question of compensation for transboundary harm for the first time (see Section 2). Secondly, the Inter-American Court of Human Rights (IACHR) has grappled with the issue of transboundary protection of human rights, a question that has often been raised in the literature, but never authoritatively addressed by an international court or tribunal (see Section 3). Finally, investment treaty tribunals have been faced with interpreting recently negotiated treaty provisions which seek to strike a balance between investment protection and the prevention of environmental harm (see Section 5). The survey also reveals new international court and tribunals emerging onto the scene, with the first decision of the African Court on Human and Peoples' Rights in relation to environmental issues. All-in-all, the survey demonstrates the continuing dynamism and expansion of international environmental jurisprudence and the substantive contribution that international courts and tribunals are making to the development of international environmental law.

2. COMPENSATION FOR TRANSBOUNDARY ENVIRONMENTAL HARM

In December 2015, the ICJ handed down its judgment in the joined cases of *Certain Activities carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River*.¹ Whilst Costa Rica was exonerated from any violation of international law, the Court held that Nicaragua had breached its international obligations by, inter alia, excavating several canals, which had affected the rich biodiversity of the disputed area. According to the judgment, Nicaragua had an

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1 See summary in James Harrison, 'Significant International Environmental Law Cases: 2015-16' (2016) 28 JEL 533, 533–38.

obligation to compensate Costa Rica for material damages caused by the unlawful activities. The Court gave the parties an opportunity to agree on the compensation that was owed, but this was not possible and Costa Rica applied to the Court in January 2017, asking it to determine the damages. Costa Rica made claims under two broad headings, namely quantifiable environmental damage caused by the excavation of the canals and additional costs and expenses related to monitoring the activities and the associated environmental harm. The parties exchanged written pleadings, in which it became clear that they differed significantly on the methodology to be used in calculating damages for environmental harm caused by Nicaragua's unlawful activities. This issue was the focus of a second round of written pleadings and it was addressed in detail when the Court delivered its judgment on 2 February 2018.²

This judgment is significant because it is the first time that the ICJ has addressed the question of compensation for environmental harm. The judgment begins by reciting the well-known principles of international law relating to reparation, including the famous dicta of the Permanent Court of International Justice in the *Chorzów Factory Case* that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.³ The Court built upon this previous jurisprudence when it explained that 'damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law [and] such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment'.⁴ The reference here to damage to ecosystem goods and services is an important one, because it potentially covers a broad range of environmental harm. In its pleadings, Costa Rica had identified 22 types of ecosystem goods and services, falling into the three broad categories of provisioning services (eg food and other natural resources), regulating and supporting services (eg air quality, climate regulation, hydrological services, natural hazard mitigation, pollination), and cultural and recreational services.⁵ Costa Rica's claims were, however, focussed on six particular ecosystem goods and services, namely timber; other raw materials; gas regulation; natural hazards mitigation; soil formation and erosion control; and biodiversity, in terms of habitat and nursery. This latter category is particularly broad and it would allow a range of claims to be made, including for what in essence amounts to 'pure environmental damage'.⁶ In principle, the Court accepted that claims could be made under each of these headings, although the success of a claim would depend upon being able to advance specific evidence of loss. Costa Rica failed to persuade the Court that the area had lost its ability to mitigate natural hazards and it claims

2 ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica) (Certain Activities Case (Compensation))*, Judgment of 2 February 2018 <<http://www.icj-cij.org/en/case/150/judgments>> accessed 18 July 2018.

3 *Chorzów Factory Case*, 1928, PCIJ Reports, Series A, No 17, 47.

4 *Certain Activities Case (Compensation)* (n 2) [42].

5 Memorial of Costa Rica on Compensation [3.14].

6 See Separate Opinion of Judge Donoghue [3].

relating to loss of soil formation and erosion control services were also rejected on the basis that there was evidence that the canals had naturally refilled with soil.⁷ The claims relating to the other ecosystem goods and services were, however, more successful, with the Court confirming that the removal of trees and vegetation on the site had caused the 'impairment or loss of these four categories of environmental goods and services'.⁸

At the same time, the Court did not fully accept the levels of compensation that had been demanded by Costa Rica. On the key issue of valuation, the Court held that 'international law does not prescribe any specific method of valuation for the purposes of compensation for environmental damage' and 'it is necessary . . . to take into account the specific circumstances and characteristics of each case'.⁹ In particular, later in the judgment, the Court stressed that recovery times for ecosystem goods and services had to be calculated on an individual basis, as 'different components of the ecosystem require different periods of recovery and . . . it would be incorrect to assign a single recovery time [to them all]'.¹⁰ It is clear that the Court wishes to preserve as much flexibility in this process as possible. Yet, perhaps as a result, the Court's method of dealing with the claims is rather ambiguous. On the one hand, it refuses to follow any of the detailed valuations proposed by either party to the litigation, identifying particular challenges with assumptions that were made. For example, Nicaragua had suggested that levels of compensation should be assessed in light of the amount that landowners would be able to claim under Costa Rican law as an incentive to protect habitats, but the Court rejected this on the basis that 'compensation for environmental damage in an internationally protected wetland . . . cannot be based on the general incentives paid to particular individuals or groups to manage a habitat'.¹¹ On the other hand, the Court reserved itself a large degree of discretion by emphasising that it was not necessary to determine the extent of damage with absolute certainty and an approximation would suffice.¹² In this vein, the Court asserted that it would 'approach the valuation of environmental damage from the perspective of the ecosystem as a whole . . . rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them'.¹³ Of particular interest is that the Court was willing to take into account the fact that the loss of ecosystem goods and services had taken place inside an internationally protected wetland, which increased their value.¹⁴ Ultimately, the Court awarded Costa Rica US\$120,000 for the impairment and loss of the environmental goods and services in the impacted area prior to recovery, which is significantly less than the US\$2,823,111.74 claimed by Costa Rica, but also more than the

7 The Court appears that accept that the quality of soil may have decreased in this process, but this was not sufficient for the basis of a claim; *Certain Activities Case (Compensation)* (n 2) [74].

8 *ibid* [75].

9 *ibid* [52].

10 *ibid* [76].

11 *ibid* [77].

12 *ibid* [86].

13 *ibid* [78]. In this respect, caution is urged by Judge Gevorgian in his separate opinion, who suggests that there is a risk that this approach may lead to the Court awarding de facto punitive or exemplary damages; Separate Opinion of Judge Gevorgian [3].

14 *Certain Activities Case (Compensation)* (n 2) [85].

US\$34,987 suggested by Nicaragua. The Court held that no pre-judgment interest was available on this amount. Costa Rica was also awarded US\$2,708.39 for restoration costs and US\$236,032.16 for associated monitoring costs and other expenses.

The judgment was adopted by 15 votes to 1, with Judge ad hoc Dugard (appointed by Costa Rica) appending a highly critical dissenting opinion, in which he suggested that the result was ‘a grossly inadequate valuation for environmental damage caused to an internationally protected wetland, having regard to the harm caused’.¹⁵ Judge ad hoc Dugard urged the taking into account of a number of equitable considerations in order to increase the valuation, including the fact that Nicaragua had destroyed some 300 trees, which caused a loss of sequestration services, affecting the ability of Costa Rica to contribute to combatting climate change, which ‘is a matter of concern for the international community as a whole’.¹⁶ Based upon these considerations, Judge ad hoc Dugard advocated for a higher valuation of the environmental losses, although he does not suggest a precise figure and he would seem to agree that the claims advanced by Costa Rica are still excessive. Judge Donoghue was also sceptical about the methodology used by the Court, although she reached the opposite conclusion to Judge ad hoc Dugard. Whilst she admitted that ‘the valuation of “pure” environmental damage is inevitably an approximation based on just and reasonable inferences’, she did not consider that the reasoning of the Court provided a sufficient justification for the level of compensation it sets.¹⁷ Judge Donoghue would have awarded a lower figure of US\$70,000 to US\$75,000.

Whilst the judgment was supported by all other members of the bench, various views were expressed about the potential for imposing punitive or exemplary damages when determining compensation for environmental harm. For example, Judge Bhandari, noting that ‘the preservation of the natural environment is vital to the survival of mankind’,¹⁸ argued that ‘the law of international responsibility ought to be developed to include awards of punitive or exemplary damages in cases where it is proven that a state has caused serious harm to the environment’,¹⁹ although he also noted that restraint is needed to ensure that damages ‘should not be completely disproportionate with respect to the financially assessable impact of a State’s environmentally harmful activities’.²⁰ Judge ad hoc Dugard also had an opinion on this topic, arguing that, ‘without advocating the imposition of punitive damages, it is possible to take account of the gravity of Nicaragua’s conduct in seeking to fully restore Costa Rica to the position which it enjoyed prior to Nicaragua’s violation’.²¹ On the other hand, Judge Gevorgian urged caution in order to avoid the possibility of awarding punitive damages, for fear that states will be scared away from litigation, thereby jeopardising the peaceful settlement of environmental disputes.²² Overall, the

15 Dissenting Opinion of Judge ad hoc Dugard [18].

16 *ibid* [35]. He went on the say that ‘the failure of the Court to address this matter will be interpreted as an unwillingness on its part to join the global consensus determined to combat climate change’; *ibid* [39].

17 Separate Opinion of Judge Donoghue [32].

18 Separate Opinion of Judge Bhandari [17].

19 *ibid* [18]. He goes on to cite Indian law as an example where such damages are available.

20 *ibid* [21].

21 Dissenting Opinion of Judge ad hoc Dugard [46].

22 Separate Opinion of Judge Gevorgian [9].

judgment demonstrates that the law on this topic may not be completely settled and there is plenty to argue about in future cases.

3. HUMAN RIGHTS AND THE ENVIRONMENT

The majority of human rights and environment cases reported in these summaries have come from the European Court of Human Rights, which has been by far the most active international human rights tribunal in developing an environmental jurisprudence. The Inter-American Court of Human Rights (IACHR) has also decided a number of relevant cases over the years.²³ In November 2017, the IACHR issued a historic advisory opinion in which it responded to a request from Colombia²⁴ concerning the relationship between human rights under the American Convention on Human Rights and the duty to protect the environment.²⁵

In its advisory opinion, the IACHR confirmed the interdependence and indivisibility of human rights, the environment and sustainable development, emphasising that the full enjoyment of human rights depends on a favourable environment. Whilst the parties to the American Convention have explicitly recognised a right to a healthy environment in Article 11 of the San Salvador Protocol,²⁶ the advisory opinion focussed on the relationship between the rights contained in the American Convention itself and the protection of the environment. The Court noted that there were two main categories of human rights that are related to the environment. Firstly, there are those rights whose enjoyment is particularly susceptible to environmental degradation and it named the right to life, personal integrity, health and property as examples falling into this category. Secondly, there are those rights whose exercise contributes to better environmental policy-making and it identified the rights to freedom of expression, freedom of association, information, and participation in decision-making and effective remedy as falling in this category.

The core of the advisory opinion concerned the interpretation and application of the first category of substantive rights in the context of environmental protection. In relation to these rights, the Court adopted an important interpretation of the jurisdictional scope of the Convention, confirming that parties were under an obligation to not only protect the human rights of individuals within their territory from serious environmental harm, but states also have an obligation to prevent transboundary damage affecting individual rights. In this latter respect, the Court confirmed that a

23 eg *Saramaka People v Suriname*, Judgment of 28 November 2007 and *Claude-Reyes et al v Chile*, Judgment of 19 September 2006, both summarized in James Harrison, 'International Law—Significant Environmental Cases 2007-08' (2008) 20 JEL 475, 478–81.

24 For more background on the origins of the request and how the Court reformulated the questions submitted by Colombia, see Giovanni Vega-Barbosa and Lorraine Aboagye, 'Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights', *EJIL Talk! Blog* (26 February 2018) <<https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/>> accessed 18 July 2018.

25 IACHR, *Advisory Opinion OC-23/17*, 15 November 2017. The advisory opinion is only available in Spanish but an official English summary is available on the Inter-American Court's website: <http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf> accessed 18 July 2018.

26 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Organization of American States Treaty Series No 69). <<http://www.oas.org/juridico/english/signs/a-52.html>> accessed 30 July 2018.

person is subject to the jurisdiction of the state of origin, and thus entitled to protection of their human rights, if there is a causal connection between the incident that took place on its territory and the violation of human rights of persons outside its territory. Therefore, states must adopt all necessary measures to regulate and supervise activities carried out in their territory or under their control, including environmental impact assessment and contingency planning, in order to ensure that such activities do not affect the rights of individuals within or outside their territory. In doing so, states must also act in keeping with the precautionary principle so that they must prevent violation of rights caused by possible serious and irreversible damage to the environment, even in the absence of scientific certainty. This is an important recognition of precaution as a principle of international law, not operating as an independent rule, but influencing the interpretation of states' human rights obligations by lowering the threshold for action.

The African Court of Human and Peoples' Rights is one of the younger regional human rights tribunals²⁷ and it has recently addressed its first claims involving the protection of the environment. In *African Commission on Human and Peoples' Rights v Republic of Kenya*,²⁸ the Court had to decide on whether the eviction of the Ogiek community from the Mau forest in the Rift Valley of Kenya was a violation of the African Charter on Human and Peoples' Rights. In particular, the Court was faced with a claim that the eviction violated the right to property of the Ogiek community. The Court observed that the right to property as expressed in Article 14 of the African Charter was normally understood as an individual right, but it confirmed that this right may also be collective in nature. In particular, the Court held that Article 14 had to be interpreted in light of the United Nations Declaration on the Rights of Indigenous Peoples²⁹ (UNDRIPS), which itself recognised in Article 26(1) that 'indigenous peoples have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'. The Court accepted that the Ogiek community should be recognised as an indigenous population and they therefore had the right to occupy, enjoy and use their ancestral lands in the Mau forest. Thus, in principle, their eviction was an interference with that right. The Court then turned to Kenya's justification for evicting the Ogieks from the Mau forest. Whilst Kenya had claimed that the eviction was for the preservation of the natural ecosystem, the Court noted that Kenya had not provided evidence that it was the Ogiek's presence in the area that was the main cause for the depletion of the natural environment. Indeed, the Court indicated that there were many other factors such as government excisions for settlement and logging concessions. In these

27 The Court is established by art 1 of the 1998 Protocol to the African Charter on Human and Peoples' Rights (Organization of African Unity Document OAU/LEG/EXP/AFCHPR/PROT (III) (1998)), which entered into force on 25 January 2004. Thirty states are a party to the Protocol, but only eight states have agreed to accept applications from individuals or NGOs. Otherwise, applications may be made by the African Commission on Human and Peoples' Rights.

28 *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012, Judgment, 26 May 2017 <<http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>> accessed 18 July 2018.

29 United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly Resolution 61/295 (13 September 2007).

circumstances, the denial of access to, and eviction from, the forest could not be justified and the government was found to have violated Article 14 of the Charter. The Court also upheld violations of various other rights owed to the Ogiek community under the Charter, including the right to take part in community cultural life (Article 17(2)), the right to freely dispose of their wealth and natural resources (Article 21(1)) and the right to economic, social and cultural development (Article 22(1)). In the latter context, the Court again referred to the UNDRIPS, which in Article 23 recognises that indigenous peoples have the right to be actively involved in developing and determining health, housing, and other economic and social programmes. By failing to effectively consult the Ogiek community about the evictions, Kenya had violated this requirement.

Whilst a greater variety of human rights courts have been deciding environmental related claims in recent years, the European Court of Human Rights (ECtHR) continues to develop its jurisprudence on this issue. In this respect, the *Case of Jugheli and others v Georgia*³⁰ is interesting, because it dealt with an activity that had been occurring for almost 80 years, namely the operation of a thermal power plant in the city centre of Tblisi. The plant was first constructed in 1911, later rebuilt and operated under state control on and off from 1939. To further complicate matters, the plant was privatised in April 2000, but the plant ceased most of its activities in February 2001 owing to financial difficulties of the owners. The applicants were three³¹ residents of Tblisi who lived in an apartment block situated approximately four metres from the plant. The applicants complained that the pollution caused by the plant violated their rights to respect for their private life under Article 8 of the European Convention of Human Rights (ECHR). Whilst the ECtHR has consistently interpreted Article 8 as applying to situations where an individual is directly and seriously affected by environmental pollution,³² the case raises a number of interesting features, which made it more challenging to apply this jurisprudence to the facts at hand.

Firstly, Georgia only became a party to the ECHR on 20 May 1999, which limited the jurisdiction *ratione temporis* of the Court. Given that the power plant ceased operations on 2 February 2001, there was only a short period of time that the Court could therefore take into account in determining the claims. Nevertheless, the Court found that ‘the period of slightly less than a year and nine months during which the applicants were exposed to the allegedly harmful emissions from the plant was sufficient to trigger the application of Article 8’.³³ This was despite the fact that the health problems alleged by the applicants had uncontestedly been caused by the continued exposure to pollution over a much longer period, including before the Convention was applicable to Georgia. The Court’s attitude in this respect would seem to set quite a low evidential threshold and it facilitates claims by individuals

30 *Jugheli and others v Georgia*, European Court of Human Rights, Application No 38342/05, Judgment, 13 July 2017 [2017] ECHR 660.

31 One of the applicants died in the course of the proceedings and the Court agreed that it was appropriate in the circumstances to strike out the application as far as this applicant was concerned; see *ibid* [48].

32 The seminal case in this respect is considered to be *Lopez Ostra v Spain* (1994) 10 EHRR 277.

33 *Jugheli* (n 30) [65].

who may have been suffering long-term effects from pollution commencing before the Convention entered into force.

Secondly, the Court had to address the challenges of adducing evidence of harm to the applicants. The claimants had alleged that they had suffered from noise and electromagnetic pollution, as well as the effects of toxic fumes coming from the thermal power plant. In determining the validity of these claims, the Court held that it would have primary regard to the findings of the domestic courts and other competent authorities, whilst also admitting other relevant evidence where it was available. In this respect, the Court noted that the complaints regarding noise and electromagnetic pollution had been rejected by the domestic courts as they were not corroborated by the expert opinions. The Court reiterated that 'it cannot substitute its own findings of fact for those of the domestic courts, which are better placed to assess the evidence adduced before them'.³⁴ Given there was no further evidence supporting these claims, the Court did not continue its analysis in relation to these types of pollution and it limited its consideration to the effects of the air pollution emanating from the plant. In this regard, the evidence gathered at the domestic level demonstrated that the concentrated toxicity of various substances emitted by the plant was twice the norm and no preventative measures, such as the establishment of a buffer zone or the fitting of purification equipment, had been taken. One of the applicants had undergone a medical examination which had linked her symptoms to the pollution. Another of the applicants had refused to undergo a medical examination, but given that she lived in identical conditions, the Court was willing to accept that she was subject to the same environmental nuisances and health risks. This finding would also seem to point to a low evidential threshold to be met by applicants. Indeed, the Court went on to emphasise that 'even assuming that the air pollution did not cause any quantifiable harm to the applicants' health, it may have made them more vulnerable to various illnesses [and] there can be no doubt that it adversely affected their quality of life at home'.³⁵ This was sufficient to trigger Article 8.

One of the reasons that had been given by the domestic courts in rejecting claims by the applicants was that they had voluntarily moved to the apartment block located next to the power plant and thus they had accepted the associated dangers. This was given short shrift by the Court who held that:

despite settling in the building voluntarily, at a time when the thermal power plant had been operational since 1939, the applicants may not have been able to make an informed choice at the time or possibly were not even in a position to reject housing offered by the State during Soviet times.³⁶

With regard to the responsibility of the Georgian state for a violation of Article 8, the Court made clear that this provision covers both a negative duty for the state to prevent interference with the right to a private life and a positive duty to take reasonable and appropriate measures to secure these rights. The Court was of the view that the

34 *ibid* [60].

35 *ibid* [71].

36 *ibid* [72].

applicable principles were broadly similar and so the change of ownership and control of the thermal power plant did not affect its analysis.³⁷

The final issue of note raised by the case related to the fact that the power plant had been constructed and entered into operation many decades before any legal framework for environmental impact assessment or the prevention of environmental harm had been enacted. The Court acknowledged this state of affairs but it nevertheless found that the domestic authorities were under an obligation of due diligence to address the ecological discomfort of the population once it came to light. In this respect, the Court emphasised that:

States have an obligation to set in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved. They must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks.³⁸

In the case at hand, the Court criticised the virtual absence of a regulatory framework and it noted that even when the domestic courts had finally ordered filtering and purification equipment to be installed in order to prevent the nuisance, the competent authorities had not followed up on that instruction. Thus, Georgia was found to have violated Article 8 of the Convention and the applicants were awarded EUR 4,500 each in respect of non-pecuniary damage.

The recent jurisprudence of the ECtHR also reminds us that environmental protection can be invoked as a justification by states to interfere with other human rights. In *Kristiana Ltd v Lithuania*,³⁹ the applicant company had alleged a violation of its right to property under Article 1 of Protocol 1 to the ECHR because it had been refused permission to develop its property which was located in the Curonian Spit National Park. The refusal was in part justified by the development plan for the National Park, which was also designated (along with the relevant part of the Spit located in the territory of the Russian Federation) as a World Heritage Site⁴⁰ because of it being ‘an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment’.⁴¹

The Court accepted that there had been an interference with the rights of the applicant, but its analysis focussed on whether the interference could be justified as a legitimate and proportionate pursuit of public policy objectives. The Court dealt with the first point briefly, emphasising that the conservation of cultural heritage and its sustainable use were ‘an essential value’ and thus it was satisfied that the interference

37 *ibid* [83].

38 *ibid* [75].

39 *Kristiana Ltd v Lithuania*, European Court of Human Rights, Application No 36184/13, Judgment, 6 February 2018 [2018] ECHR 124.

40 See 1972 Convention for the Protection of the World Cultural and Natural Heritage (1037 UNTS 151).

41 See <<https://whc.unesco.org/en/list/994>> accessed 12 July 2018.

pursued a legitimate aim.⁴² On the second point, the Court reiterated that any measure which interfered with the protection of an individual's fundamental rights must demonstrate 'a reasonable relationship of proportionality between the means employed and the aim sought'.⁴³ The Court also underlined its previous jurisprudence that a state has a greater margin of appreciation in relation to planning and environmental conservation policies, where the community's general interest is pre-eminent. In the present case, the Court noted that this margin of discretion also depended on Lithuania's obligations under the World Heritage Convention and it accepted that 'there are no doubts that the measures that have to be taken in respect of the UNESCO territory could be rigorous'.⁴⁴ The Court also noted that the applicant was, or should have been, aware of the restrictions on using the property at the time it made the purchase and 'the applicant company thus could not reasonably have expected to obtain planning permission to redevelop the buildings, in particular to reconstruct them by changing their designation, function or size'.⁴⁵ These factors led the Court to reject the application.

4. CONSERVATION OF MARINE RESOURCES

A major development in the law relating to the conservation of marine resources has been the way in which states have agreed to limit their ability to opt-out of conservation and management measures adopted at the international level. The treaty establishing the South Pacific Regional Fisheries Management Organization (SPRFMO) offers the clearest example of this trend, by specifying that objections may only be made if 'the decision unjustifiably discriminates in form or fact against the member of the Commission, or is inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 [Law of the Sea] Convention or the 1995 [Fish Stocks] Agreement'.⁴⁶ Moreover, the treaty provides for a procedure whereby compliance with these conditions will be automatically considered by an independent panel if an objection is made. This procedure was invoked for the second time⁴⁷ in early 2018, when Ecuador objected to the allocation of catch for *Trachurus murphyi*, otherwise known as Chilean jack mackerel. Ecuador argued that its allocation of 1,377 tonnes out of the total allowable catch of 517,582 tonnes was both inconsistent with the relevant treaties and discriminatory in form and fact.

In the first place, Ecuador argued that the allocation was contrary to the relevant provisions of the treaties, highlighting that the constituent instrument of the SPRFMO required the organisation to, inter alia, 'give full recognition to the special requirements of developing State Contracting Parties'.⁴⁸ In this regard, Ecuador argued that its allocation did not allow it to develop a *Trachurus murphyi* fishery on

42 *Kristiana Ltd v Lithuania* (n 39) [104]–[105].

43 *ibid* [106].

44 *ibid* [109].

45 *ibid* [110].

46 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (2009 Convention), art 17(2).

47 For a discussion of the first panel decision, see James Harrison, 'Significant International Environmental Law Cases: 2012-14' (2014) 26 *JEL* 519, 536–38.

48 2009 Convention, art 19(1).

the high seas and therefore the Commission had failed to comply with this obligation. The panel emphasised that the interests of developing countries ‘need to be treated with utmost seriousness’,⁴⁹ but it also found that this was only one factor of many to be taken into account by the Commission, which had a ‘wide margin of discretion’⁵⁰ in determining how to allocate the total allowable catch. Thus, a member had to substantiate any claim that the Commission had breached its obligations with compelling evidence and Ecuador had failed to do so. The panel itself gave some examples of how this discretion may be exceeded, including an allocation that was based exclusively on a single factor, such as historical catch. Despite arguments by Ecuador to the contrary, the panel did not consider that the Commission had committed such an error in this case, noting that Ecuador had itself been allocated a share of the total allowable catch despite the fact that it did not have any historic catch.

Secondly, Ecuador argued that the allocation was discriminatory. The panel noted that this ground of review included ‘not only direct discrimination (including discrimination as regards procedure), but also measures which, although they are not overtly discriminatory, have an effect, substantive result, or outcome that is discriminatory’.⁵¹ Referring to the findings of the first panel convened under Article 17 of the 2009 Convention, the panel also confirmed that it was not necessary to demonstrate bad faith in order to make a finding of discrimination. Nevertheless, the panel did not consider that Ecuador had supplied sufficient evidence of discrimination in this case, as its proposals for reform had been fully considered by the SPRFMO, but had been rejected by a vote.

Based upon the above reasoning, Ecuador’s objection was found not to comply with the relevant provisions of the 2009 Convention and Ecuador was therefore bound by the relevant conservation and management measure adopted by the SPRFMO. Nevertheless, the panel sent a clear signal to the SPRFMO that care must be taken in making future allocations, saying quite clearly that ‘there may be a point at which the small size of an allocation to a developing State in the region, when compared with higher allocations to other States over a period of time, might be regarded as discriminatory in result’ and ‘a sustained failure to increase Ecuador’s allocation over a longer period of time might amount to discrimination in result absent other legitimate reasons for it’.⁵² In this respect, the panel also made some very interesting observations, which went beyond determining the compatibility of the objection with the 2009 Convention, addressing possible ways forward for the parties, including a recommendation that members of the SPRFMO ‘consider whether the interests of developing States in the region might not be better taken into account in a more deliberative and specific discussion as part of that decision-making process’⁵³ and a suggestion that the allocation transfer system might be reformed to make it

49 *Finding and Recommendations of the Review Panel*, PCA Case No 2018-3, 5 June 2018 [94].

50 *ibid* [92].

51 *ibid* [99].

52 *ibid* [108].

53 *ibid* [124].

easier for countries such as Ecuador to obtain additional quota in order to develop their fisheries.⁵⁴ Both of these issues were addressed as ‘invitations’ to the SPRFMO, indicating that they were not part of the formal findings of the panel, and they indicate that this procedure is as much about finding solutions as indicating violations of the law.

It is also interesting that the panel decided to say something about its powers to recommend changes to conservation and management measures in cases where it is found that an objection is valid. This was an issue that the panel had invited participants to address in the written and oral pleadings, with several participants arguing that it was beyond the competence of the panel to recommend anything that might alter the total allowable catch determined by the SPRFMO or the associated quota allocations. The panel was firm in rejecting this interpretation of its powers, finding that the 2009 Convention could not be interpreted in such a way as to preclude the right of a member to object and be granted relief if it satisfies the panel that its objection is valid. At the same time, the panel acknowledged that it must use any of its powers with care and it could also propose the convening of an extraordinary meeting of the SPRFMO in lieu of modifying or proposing new allocations of a TAC. This intervention is particularly significant given the finding of the first panel in 2013 that despite upholding the Russian objection, Russia was not given a distinct allocation and it was only able to fish provided that it was certain that the total allowable catch would not be exceeded.⁵⁵ Yet, these comments are not formally binding on any future panel and it will have to be seen how the issue will be addressed in subsequent cases.

5. INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT

Partly in response to certain criticisms that have been levelled at early decisions by investment treaty tribunals, states have modified the language that they employ in their investment treaties, in particular providing more specific language concerning how to distinguish a legitimate regulatory measure from an indirect expropriation. Some treaties also now incorporate explicit exceptions to investment rules with a view to protecting core societal values, such as public health and the environment. Obviously, these new treaty texts themselves raise questions of interpretation and *Bear Creek Mining Corporation v Republic of Peru*⁵⁶ is one of the first cases in which an investment treaty tribunal has had to give meaning to such language. The dispute concerned a mining concession that took place in Santa Ana in Peru, near the border with Bolivia. Bear Creek was a Canadian company that was interested in developing a silver mine in the region. However, because of constitutional restrictions on the ownership of property by foreigners, Bear Creek applied for the licence via one of its Peruvian employees, who later transferred the concessions to Bear Creek, once approval had been given by the Peruvian government. The proposed mining project was, however, highly contentious amongst the local communities in the region. Bear

54 *ibid* [126].

55 See n 47.

56 *Bear Creek Mining Corporation v Republic of Peru (Bear Creek)*, ICSID Case No ARB/14/2, Award, 30 November 2017.

Creek undertook a number of community engagement activities as required by Peruvian law. Yet, from March 2011, mass protests were organised against the environmental and social impact assessment that the company was in the process of carrying out. In May 2011, the central government intervened in order to try and find a solution. From 17 to 23 June 2011, the Prime Minister and other governmental officials met with representatives of the protesters. The result of these meetings was the issuing of Supreme Decree 032-2011-EM, which cancelled the previous authorisations issued to Bear Creek on the basis that alleged new information had come to light concerning the manner in which Bear Creek had obtained the concessions, as well as concerns about the impact of the project on social and environmental conditions in the region. The company tried to challenge the Decree in the domestic courts, but it ultimately turned to investor–state arbitration in order to defend its rights under the investment protection provisions in Chapter 8 of the Free Trade Agreement (FTA) between Canada and Peru.⁵⁷

The first claim advanced by Bear Creek was that Supreme Decree 032-2011-EM amounted to an indirect expropriation in violation of Article 812 of the FTA. The text of Article 812 expressly provided that ‘except in rare circumstances, such as when a measure or series of measures is so severe in light of its purposes that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation’. In its analysis of the measure, the Tribunal focussed on its purposes. The Tribunal addressed the two express justifications for the Decree in turn, starting with the manner in which Bear Creek obtained ownership of the concessions. The Decree itself referred to ‘new circumstances’ coming to light about the ownership of the concession and its transfer to Bear Creek. Allegedly some documents had been presented at the meetings that took place on 23 June 2011, although Peru was not able to produce these documents before the Tribunal and so they were not able to be taken into account. Indeed, the Tribunal held that the factual record supported the view that Peru was aware at the time that it gave its approval of the fact that the concessions would be transferred to Bear Creek and therefore this did not offer a valid reason for later cancelling the authorisation. The second justification given in the Decree was safeguarding the environmental and social conditions related to the proposed mining project. In this context, the Tribunal focused its analysis on whether Bear Creek had complied with its obligations imposed under Peruvian law to engage with local communities,⁵⁸ and it found that up until the meetings that took place on 17–23 June the government had supported and endorsed the engagement activities of the company. Thus, this justification also could not provide a valid basis for revoking the authorisations. As a result, the Tribunal held that Supreme Decree 032-2011-EM amounted to an indirect expropriation. Furthermore, it found that the indirect expropriation had

57 2008 Canada–Peru Free Trade Agreement. <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/background-contexte.aspx?lang=eng>> accessed 30 July 2018.

58 It is also worth noting that the Tribunal makes a passing reference to art 32 of the UNDRIPS and its requirement that consent must be obtained from all relevant communities prior to proceeding with a project that might affect their lands or livelihoods.

been undertaken without due process and no compensation had been paid, leading to a violation of Article 812 of the FTA.

This finding did not end the analysis, however. Perhaps the more significant aspect of the Tribunal's award is the manner that it dealt with the doctrine of police powers and the public policy exception in Article 2201 of the FTA. The police powers doctrine has been invoked by states in the past to justify measures that would otherwise amount to expropriation.⁵⁹ Peru had invoked the doctrine in its defence of Decree 032-2011-EM, arguing that the doctrine was recognised in customary international law and it could therefore be applied without the need to identify any relevant treaty text. Canada also supported this point of view in its third party submission, in which it argued that 'a state is not required to compensate an investment any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives'.⁶⁰ However, the Tribunal rejected these arguments, noting that Article 2201 of the FTA laid down an exclusive list of exceptions. On this point, it concluded that 'in view of the very detailed provisions of the FTA regarding expropriation (Articles 812 and Annex 812.1) and regarding exceptions in Article 2201 expressly designated to "Chapter Eight (Investment)", the interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case'.⁶¹

The Tribunal then turned to the text of Article 2201.1, which provided in paragraph 3:

For the purposes of Chapter Eight (Investment), subject to the requirements that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or as a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- a. To protect human, animal or plant life or health which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health;
- b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or
- c. For the conservation of living or non-living exhaustible natural resources.

The Tribunal did not believe that the Decree at issue was justified on any of these grounds. It re-emphasised the two grounds that were invoked to justify the Decree, neither of which related to any of the issues listed in Article 2201. Furthermore, the Tribunal speculated that even if the Decree did fall within the list of exceptions, Peru

59 See eg *Saluka Investments v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, [255].

60 See *Bear Creek* (n 56) [471].

61 *ibid* [473]. See, however, the Dissenting Opinion of Professor Sands QC [41], where he emphasises that this express treaty text cannot preclude the operation of secondary rules of international law, such as the doctrine of necessity.

had given no justification as to why it was necessary to expropriate the claimant's rights without consultation and compensation.

Given that the Tribunal had upheld the finding of indirect expropriation, it did not consider it necessary to determine the claims relating to fair and equitable treatment, fair protection and security, or unreasonable discrimination. Bear Creek was awarded US\$18,237,592 in damages, plus compound interest from the date of the Decree. It is noteworthy that this was significantly less than the amount claimed by Bear Creek (US\$224.2 million) and the Tribunal expressly rejected Bear Creek's argument that damages should be calculated according to the potential profits that could be made through the mining venture. Rather, the Tribunal emphasised that the Santa Ana project was still at an early stage and Bear Creek had not obtained many of the necessary approvals and environmental permits. Furthermore, the Tribunal noted that the local opposition to the project and the widespread unrest that occurred meant that 'there was little prospect for the Project to obtain the necessary social licence to allow it to proceed to operation'.⁶² The Tribunal therefore decided that the damages should be calculated by reference to the actual investments made by Bear Creek.

On the question of damages, one of the arbitrators (Professor Philippe Sands QC) posted a dissenting opinion. Professor Sands was of the view that the demise of the investment was in part a result of the actions of the investor itself. He opined that:

the fact that Claimant did not—on the evidence before the Tribunal—take real or sufficient steps to address . . . concerns and grievances [of certain communities], and to engage the trust of potentially all affected communities, appears to have contributed, at least in part, to some of the population's general discontent with the Santa Ana Project, ultimately crystallising in the spring 2011 protests.⁶³

He criticised the inadequate outreach programme, uneven consultation, and unequal distribution of jobs. In his opinion, Bear Creek's contributory fault should have been taken into account in determining damages and Professor Sands would have reduced the measure of damages by one half, namely to US\$9,118,796. He also believed that the costs should have been spilt equally between the parties, rather than making Peru pay 75% of Bear Creek's costs, as had been ordered by the majority.

62 *Bear Creek* (n 56) [600].

63 Dissenting Opinion of Professor Sands QC [19].