

Team: 201

**2008 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

***Arizmendi et al.,***

Applicant

v.

**Chuqui,**

Respondent

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BRIEF FOR THE STATE

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## **STATEMENT OF FACTS**

### **Chuqui's Struggle to Democratize and Eradicate Poverty by Transitioning Into The Global Economy**

Chuqui is a new democracy that has struggled with poverty and political instability since its independence. Fifty-five percent of Chuqui's fifteen million inhabitants either live in poverty or extreme poverty and per capita income is around US \$ 5,500.<sup>1</sup> For decades, Chuqui had several coups d'état resulting in political instability.<sup>2</sup> However in 1988, Chuqui popularly elected a political coalition called Nuevo Renacer that has since gone on to win broad political support.<sup>3</sup> In subsequent years, Nuevo Renacer has ratified all of the U.N. Conventions and the Inter-American System of Human Rights.<sup>4</sup> Working with guidance from the international community,<sup>5</sup> Nuevo Renacer's initiative toward broad liberalization and deregulation has significantly improved living conditions by providing primary education and health coverage for children and the elderly, all as part of the government's public health system.<sup>6</sup> Since 1990, Chuqui's continued growth has increased foreign investment by over 1,000%, unemployment has fallen by more than fourteen points and per annual income has risen by more than US \$ 1,000.<sup>7</sup>

One investor attracted by Chuqui's improvements was Androwita S.A., a Canadian-American company that arrived in 1992 and employs 1,800 individuals.<sup>8</sup> Androwita produces and exports chemical products<sup>9</sup> and was required by Chuqui law to obtain environmental permits

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<sup>1</sup> Hypo ¶ 1.

<sup>2</sup> Hypo ¶ 2.

<sup>3</sup> Hypo ¶ 3.

<sup>4</sup> Hypo ¶ 3.

<sup>5</sup> Hypo ¶ 3.

<sup>6</sup> Hypo ¶¶ 3-4.

<sup>7</sup> Hypo ¶ 4.

<sup>8</sup> Hypo ¶ 11.

<sup>9</sup> Hypo ¶ 11.



to initiate its chemical production.<sup>10</sup> Such permits required environmental impact assessments to ensure health safety.<sup>11</sup> In addition, Androwita was forced to comply with Chuqui's existing environmental legislation governing chemicals use.<sup>12</sup> Androwita received environmental permits, requiring environmental impact studies for each chemical used.<sup>13</sup> Along with Chuqui's environmental legislation, Androwita was obligated to comply with the requirements of the permit, which Chuqui enforced and monitored to the best of the government's resources.<sup>14</sup>

### **Chuqui's Public Officials First Noticing Health Problems and the Subsequent Investigation Immediately Thereafter**

In November of 1998, Doctor Juan Bautista, the Director of the Public Hospital in Kinkili, was informed by the head of the pediatric department that four children had died during the past six months, all with high levels of contaminants in their blood.<sup>15</sup> In response, Dr. Bautista "immediately sent out an internal memorandum at the Hospital and asked to be informed of all cases in which elevated levels of mercury or other contaminating agents were found in blood."<sup>16</sup> He further sent a communiqué to the Minister of Health, reporting all fatalities in the past eighteen months that showed elevated mercury levels in the blood.<sup>17</sup> Dr. Bautista's report thoroughly included fatalities, but also cases of hospitalization for high levels of mercury in the blood.<sup>18</sup> The Minister of Health formed an Ad-Hoc Technical Committee to issue a report on the causes of death of the individuals identified.<sup>19</sup> He then sent the report to the Minister of the Environment in order to determine the origin of the mercury contamination, who

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<sup>10</sup> Hypo ¶ 11.

<sup>11</sup> Clarification Questions & Answers, ¶ 57.

<sup>12</sup> Clarification Questions & Answers, ¶ 57.

<sup>13</sup> Clarification Questions & Answers, ¶ 40.

<sup>14</sup> Hypo ¶ 11.

<sup>15</sup> Hypo ¶ 5.

<sup>16</sup> Hypo ¶ 5.

<sup>17</sup> Hypo ¶ 6.

<sup>18</sup> Hypo ¶ 6.

<sup>19</sup> Hypo ¶¶ 6-7.

requested that the Environmental Inspector investigate into the contamination problem.<sup>20</sup> On January 5, 2001 the Environmental Inspector announced in a report the results on the “exhaustive investigation,” concluding that the contamination was probably due to dumping of chemicals by Androwita.<sup>21</sup> An environmental investigation against the company was then instigated, ultimately concluding that Androwita was affecting the health of the individuals in the area near where the company operates.<sup>22</sup> The report stated that it was very difficult to determine where the chemical contaminants were initially deposited, and recommended the immediate opening of an environmental investigation into Androwita.<sup>23</sup>

On January 25, 2001, with the attention of other public officials,<sup>24</sup> the Minister of the Environment ordered the opening of an environmental investigation against Androwita to determine its possible liability for the health hazards caused by high levels of mercury and other contaminants.<sup>25</sup> On July 12, 2001, the administrative investigation was closed and made public. It concluded that Androwita was causing environmental pollution by mercury and other chemical agents, and this pollution was affecting the health of the inhabitants living next to the area where the company operates.<sup>26</sup> The report ordered the immediate closure of the company until it made changes to the method of disposing its chemical waste, and imposed a fine of \$25,000 against the company.<sup>27</sup> On July 20, 2001 the General Manager of Androwita met with the Minister of the Environment and decided that based on the high social cost of closing the company and displacing more than 1,800 from work, there should be a two-month suspension of the order to

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<sup>20</sup> Hypo ¶¶ 8-9.

<sup>21</sup> Hypo ¶ 10.

<sup>22</sup> Hypo ¶ 14.

<sup>23</sup> Hypo ¶ 10.

<sup>24</sup> Hypo ¶ 13.

<sup>25</sup> Hypo ¶ 12.

<sup>26</sup> Hypo ¶ 14.

<sup>27</sup> Hypo ¶ 14.

close the company.<sup>28</sup> Androwita was still required to pay the fine assessed against it immediately, and the Minister of the Environment stipulated that at the end of the two-month suspension technical personnel from the Ministry would conduct an inspection to examine whether the company had taken appropriate measures to address the waste disposal problem.<sup>29</sup> If the company did not pass the inspection, it would be closed immediately. On October 2, 2001 the inspection concluded that the company was no longer causing contamination of the land by dumping waste so it was permitted to continue operating as usual.<sup>30</sup> Chuqui and Androwita then initiated a public awareness campaign to inform affected residents of the symptoms related to contamination.<sup>31</sup> This campaign educated the residents and stressed the importance of utilizing Chuqui's public health resources for any health concern they may have.<sup>32</sup>

### **Chuqui's Prosecution of Guilty Androwita Members and Judicial Remedies Mandating Reparations to Victims**

The NGO, Organization for a Clean World requested in writing that government authorities close Androwita immediately.<sup>33</sup> The Office of the Ombudsman of Chuqui also expressed concern about the deaths occurring, and openly supported the authorities taking every possible measure to prevent new deaths and redress the harm that had already occurred.<sup>34</sup>

On October 30, 2001 the Organization for a Clean World filed a criminal complaint with the Office of the Prosecutor in order to establish who was liable for the deaths caused by the chemical contamination.<sup>35</sup> It also filed civil actions seeking compensation for damages caused to

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<sup>28</sup> Hypo ¶¶ 15-16.

<sup>29</sup> Hypo ¶ 16.

<sup>30</sup> Hypo ¶ 16.

<sup>31</sup> Clarification Questions & Answers, ¶59.

<sup>32</sup> Clarification Questions & Answers, ¶59.

<sup>33</sup> Hypo ¶ 18.

<sup>34</sup> Hypo ¶ 19.

<sup>35</sup> Hypo ¶ 30.

the deceased individuals' families as well as those individuals who were hospitalized.<sup>36</sup> The Prosecutor initiated the criminal investigation immediately, and on July 20, 2002, the Prosecutor issued an indictment against the General Manager and the Waste Management Engineer of Androwita for negligent management of chemical waste.<sup>37</sup>

On December 5, 2003 the Criminal Court sentenced the Waste Engineer of Androwita to twenty-four months in prison for “manslaughter, for failing to handle with due care the waste from the chemical agents and therefore failing to foresee the possible consequences of his actions.”<sup>38</sup> The Organization for a Clean World appealed this judgment, and the Court of Appeals upheld the Criminal Court’s sentence.<sup>39</sup> On March 30, 2004, the Civil Judge issued a judgment holding Androwita responsible for the deaths of twenty-one individuals and the harm caused to the health of another sixty-one people.<sup>40</sup> The judgment ordered Androwita to compensate each of the deceased victims’ families in the amount of \$5,000 and to compensate those that were hospitalized in the amount of \$2,000.<sup>41</sup> Finally, Androwita was ordered to clean up the contaminated area within six years. The Organization for a Clean World also appealed this order, which was upheld by the Court of Appeals.<sup>42</sup> The Organization for a Clean World stated its objection to the sentencing and compensation upheld by Chuqui’s courts, arguing that the application of law to fact by the national courts was “ridiculous.”<sup>43</sup>

### **Proceedings Before the Commission**

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<sup>36</sup> Hypo ¶ 20.

<sup>37</sup> Hypo ¶ 21.

<sup>38</sup> Hypo ¶ 22.

<sup>39</sup> Hypo ¶ 22.

<sup>40</sup> Hypo ¶ 23.

<sup>41</sup> Hypo ¶ 23.

<sup>42</sup> Hypo ¶ 23.

<sup>43</sup> Hypo ¶ 24.

On June 1, 2004 the Organization for a Clean World filed a complaint before the Inter-American Commission on Human Rights against the State of Chuqui for violation of articles 4, 5, 8, 25, 17, 19, 21 and 26 of the American Convention on Human Rights.<sup>44</sup> The State asserted that the case was a matter between private parties, that the issue had been resolved by the national courts, and that it did not give rise to the international liability.<sup>45</sup> The Commission decided that Chuqui was liable for all the violations alleged by petitioners, as well as additional fatalities that occurred during 2000, 2001, and 2002. The case was then submitted to the Inter-American Court of Human Rights.<sup>46</sup>

## **LEGAL ANALYSIS**

### **I. PRELIMINARY OBJECTIONS**

#### **A. The Commission Was Not Competent To Review This Case Because It Violates The “Fourth Instance Formula.”**

The “fourth instance formula” exists to prevent the Commission from becoming an appellate body. According to the fourth instance formula, the Commission cannot review the holdings of the courts of OAS member states. “A defendant state must be allowed to provide redress on its own and within the framework of its internal legal system.”<sup>47</sup> Thus, the Commission cannot review the judgments issued by domestic courts unless there is a possible violation of the Convention involved. Only when there exists a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right guaranteed by the Commission is the Commission competent to rule on the merits of a case.<sup>48</sup>

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<sup>44</sup> Hypo ¶ 25.

<sup>45</sup> Hypo ¶ 27.

<sup>46</sup> Hypo ¶¶ 28-29.

<sup>47</sup> *Santiago Marzióni v. Argentina*, Case 11.673, Report No. 39/96, Inter-Am. C.H.R., Report No. 39/96, OEA/Ser.L/V/II.95 Doc. 7 rev. (1997).

<sup>48</sup> *Id.*

There are two instances when the fourth instance formula does not apply: (1) when there is a violation of due process, discrimination, or a violation of other rights recognized by the Convention,<sup>49</sup> and (2) when the domestic court's evaluation of the facts and interpretation of the law are "manifestly arbitrary or amount to a denial of justice."<sup>50</sup>

This case does not fit into either of the exceptions, therefore the fourth instance formula applies and the Court should hold that the Commission's finding of admissibility was incorrect. First, Chuqui did not violate due process or any rights recognized by the Convention. During proceedings before the Commission, Chuqui asserted that this case was a matter between private parties that had been resolved by the national courts "in accordance with its legal system and within the framework of due process."<sup>51</sup> Chuqui granted both the defendants and plaintiffs in the case due process, trying the Organization for a Clean World's criminal complaint through the Criminal Court and then further appealed to the Court of Appeals. Chuqui's courts did nothing to violate the Convention. The case was not only tried, but the Criminal Court found the Waste Engineer of Androwita guilty of manslaughter, and the civil judge ordered \$5,000 in compensation to be provided the deceased victim's families and \$2,000 to the victims who were hospitalized.<sup>52</sup> In addition, there was no evidence of discrimination, nor did any of the parties involved allege discrimination.

Second, the domestic courts evaluated the claims with ample information, and their actions were neither arbitrary nor a denial of justice. The Prosecutor did not indict any authorities or officials from the Ministry of Health, the Ministry of the Environment or the Office

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<sup>49</sup> Rodríguez Pinzón, *The "Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Complaint Procedure of the Inter-American Human Rights System*, 7 ILSA J. INT'L & COMP. L. 369, 377 (2001).

<sup>50</sup> Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 95 (Cambridge University Press 2003).

<sup>51</sup> Hypo ¶ 27.

<sup>52</sup> Hypo ¶¶ 22, 23.

of the Mayor of Kinkili because they used the resources at their disposal to the best of their ability.<sup>53</sup> The Criminal Court acquitted the General Manager of Androwita “because it found he was the person who handled the environmental and health permits necessary to its proper operation, which demonstrated his care and intent not to pollute and cause harm to third parties.”<sup>54</sup> Thus, the decisions made by the domestic courts were not arbitrary, but instead supported by explanation. The Plaintiffs were not denied justice because they were afforded due process and a fair trial, and it is not for the Commission or the Court to review claims of denied justice based solely on Plaintiffs’ discontent with the outcome of a case. By prosecuting this case, the Commission will be reviewing the application of laws by Chuqui’s courts, an action expressly prohibited by the fourth instance formula.

**II. CHUQUI MET ITS DUTY TO RESPECT AND ENSURE THE RIGHTS OF ITS CITIZENS BY INVESTIGATING HEALTH PROBLEMS CAUSED BY ANDROWITA’S DUMPING WITHIN HOURS OF THE HEALTH PROBLEMS AND BY IMPOSING PENALTIES ON THE POLLUTORS.**

Chuqui exercised due diligence in investigating Androwita, and Chuqui was not complicit or informed of Androwita’s pollution. Article 1(1) requires that states, “undertake to respect the rights and freedoms recognized herein and to ensure that all persons subject to their jurisdiction the free and full exercise of those freedoms.”<sup>55</sup> State liability for the actions of third party tort-feasors applies where the petitioners show that the state did not exercise proper due diligence in investigating possible human rights abuses,<sup>56</sup> where the state knew of the abuses yet

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<sup>53</sup> Hypo ¶ 21.

<sup>54</sup> Hypo ¶ 22.

<sup>55</sup> Organization of American States, American Convention on Human Rights, Art. 1 (1), Nov. 22, 1969, O.A.S.T.S. No. 36.

<sup>56</sup> Velásquez Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 3, at ¶ 172 (July 29, 1988).

failed to act,<sup>57</sup> or (3) was complicit with the tort-feasors.<sup>58</sup> The burden rests with the petitioners in proving that these elements are present when holding a state responsible.<sup>59</sup>

States are responsible to carry out an investigation with due diligence, this encompasses ensuring that all investigative steps are undertaken and with appropriate action; states' authorities must cooperate in gathering evidence and never obstruct domestic investigations under appropriate domestic legislation.<sup>60</sup> States must discharge their duty to investigate by taking initiative<sup>61</sup> and investigating in a serious manner, not merely investigating as a mere formality.<sup>62</sup> States must carry out their obligation by applying all available<sup>63</sup> means to achieve the goal of the investigation, and have the duty to supervise the functions of certain institutions in ensuring the protections of citizen's rights as provided by domestic law.<sup>64</sup> The state must undertake a meaningful investigation into human rights abuses when they are carried out by third parties,<sup>65</sup> however the existence of a third party's violation alone is insufficient to sustain state liability.<sup>66</sup>

In this case, Chuqui is not liable for the acts of Androwita because (A) Chuqui exercised proper due diligence when the Ministry of Health and the Environment initiated investigations into Androwita's activities within hours of the first health report and (B) no evidence shows that Chuqui knew of Androwita's pollution because once Chuqui learned of the contamination it swiftly initiated domestic proceedings to prosecute Androwita employees that were responsible.

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<sup>57</sup> *Id.*, at ¶ 174.

<sup>58</sup> *Id.*, at ¶ 173; *see also* Paniagua-Morales v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) at ¶ 91 (March 8, 1998).

<sup>59</sup> *Id.*

<sup>60</sup> Garcia Prieto et al. v. El Salvador, 2007 Inter-Am. Ct. H.R. (Ser. C) No. 168, at ¶112 (Nov. 20, 2007).

<sup>61</sup> Alban-Cornejo et al. v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C.) No. 171, at ¶58 (Nov. 22, 2007).

<sup>62</sup> Miguel Castro Castro Prison v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C.) No. 160, at ¶ 255 (Nov. 25, 2006).

<sup>63</sup> Case of the Rochela Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C.) No.175, ¶156 (May 11, 2007).

<sup>64</sup> Alban-Cornejo, *supra* note 61, at ¶¶ 122-25.

<sup>65</sup> *Id.*, at ¶ 175.

<sup>66</sup> *Id.*



The petitioners bear the burden of persuasion to conclusively demonstrate Chuqui's knowledge and complicity and they fail to do so because they did not link Chuqui to Androwita's pollution.

**A. Chuqui Exercised Proper Diligence When it Used All Available Means and the Ministries of Health and the Environment Initiated Investigations Into Androwita's Activity Within Hours of Deaths, Ordered Immediate Closure of Androwita and Prosecuted those Responsible**

To prove Chuqui was liable for the actions of Androwita, the petitioners are required to show that the government disregarded due diligence when it addressed harms caused by Androwita.<sup>67</sup> While this Court has few analogous cases involving government liability for third-party environmental torts, governments are only liable where petitioners show that the government disregarded due diligence when investigating and punishing the torts.<sup>68</sup>

The Court found a failure of due diligence in the case of *Velásquez Rodríguez v. Honduras*. In that case, Honduras' investigative efforts were deemed insufficient when the government was presented with inquiries regarding the whereabouts of several missing persons suspected to be anti-government political activists. The Court concluded that the government failed to act with due diligence when it noted the government's reluctance to investigate matters that were brought to their attention by family members of the victims.<sup>69</sup> The Court emphasized Honduras' duty to investigate facts surrounding the disappearance of the individuals so long as there remained uncertainty of their whereabouts,<sup>70</sup> and that the government's reliance upon the victim's family members to present evidence was indicative of their deficient investigation.<sup>71</sup>

In this case, Chuqui exercised proper due diligence when confronted with Androwita's contamination because, upon finding any abnormal symptoms, Chuqui officials swiftly took

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<sup>67</sup> *Velásquez Rodríguez v. Honduras*, *supra* note 56, at ¶ 172.

<sup>68</sup> *Id.*, at ¶¶ 177-82.

<sup>69</sup> *Id.*, at ¶ 180.

<sup>70</sup> *Id.*, at ¶ 181.

<sup>71</sup> *Id.*, at ¶ 180.

action on their own initiative to investigate the cause of the illnesses. Officials first encountered individuals in Chuqui's public hospitals<sup>72</sup> with symptoms which, after an exhaustive investigation, were linked to Androwita's activities. Upon such an investigation, Chuqui authorities acted by immediately ordering the closure of the Androwita plant.<sup>73</sup> Only after enacting verifiable procedures, and paying penalties, did Chuqui grant Androwita a provisional two-month suspension of the Ministry's order to immediately close the plant.<sup>74</sup>

Moreover, Chuqui conducted a proper investigation as required by *Velásquez Rodríguez v. Honduras* because the investigation was handled by the Minister of Health and the Minister of the Environment,<sup>75</sup> Chuqui's two highest officials concerning matters of environmental torts. Chuqui's investigation at all times was assumed by the government and never left to private parties to investigate. At no point was the government's investigation abandoned in the hands of private citizens, as the Ministries took leadership in the investigatory findings throughout the entire process.<sup>76</sup> Unlike Honduras in *Velásquez Rodríguez*, Chuqui's investigation was adequate because it was initiated by the government officials<sup>77</sup> and carried out with Chuqui's Ministries of Environment and Health.<sup>78</sup> Unlike Honduras, where private citizens had to place pressure on the government to find the whereabouts of their family members, Chuqui undertook all the investigative efforts and carried out its investigation with a clear objective.<sup>79</sup> Moreover, the investigation always maintained an organized, readily-identifiable objective which began with

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<sup>72</sup> Hypo ¶ 14.

<sup>73</sup> *Id.*

<sup>74</sup> Hypo ¶ 15.

<sup>75</sup> Hypo ¶¶ 12-16.

<sup>76</sup> *Id.*

<sup>77</sup> Hypo ¶¶ 6-7.

<sup>78</sup> Hypo ¶¶ 12-15.

<sup>79</sup> Hypo ¶¶ 12-15.

identifying the source of the health problems, and eventually led the Ministries to ascertain that the problems were caused by Androwita.<sup>80</sup>

**B. Chuqui Did Not Participate In, Nor Did It Know Of, Androwita's Illegal Dumping and Chuqui Initiated Civil and Criminal Investigations Upon Learning of the Dumping**

Chuqui was not liable for the deaths caused by Androwita's environmental negligence because Chuqui was in no way involved with Androwita's negligent practices. To merit relief, the petitioners bear the burden of showing that Chuqui knowingly acquiesced to Androwita's dumping or that Chuqui was materially complicit in the negligent disposal of the chemicals.<sup>81</sup> Imposing liability upon the state for third party actions requires petitioners to show, "that state authorities supported or tolerated infringement of the rights recognized in the Convention."<sup>82</sup>

In this case, Chuqui acted promptly to investigate the health problems and ascertain their cause as it related to the dumping on Androwita's contaminated land. No evidence in the record indicates that Chuqui knew prior to the investigation of the activities on Androwita's property. Chuqui's Ministry of the Environment and Health both conducted prompt investigations and ascertained the Androwita's involvement just prior to ordering the plant's closing.<sup>83</sup>

**i. Petitioners Bear the Burden of Persuasion in Showing that Chuqui Was Complicit with Androwita's Environmentally Negligent Practices**

When considering state liability for third party tort-feasors, this Court places the burden on the petitioners to produce evidence showing "that state authorities supported or tolerated infringement of the rights recognized in the Convention."<sup>84</sup> In *Paniagua-Morales v. Guatemala*, the court considered the question of state liability where the state claimed the crimes were done

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<sup>80</sup> Hypo ¶¶ 12-15.

<sup>81</sup> Velásquez Rodríguez v. Honduras, *supra* note 56, at ¶ 173.

<sup>82</sup> Paniagua-Morales v. Guatemala, *supra* note 58, at ¶ 91.

<sup>83</sup> Hypo ¶ 11.

<sup>84</sup> Paniagua-Morales v. Guatemala, *supra* note 58, at ¶ 91.

by ordinary criminals.<sup>85</sup> In that case, the Court found Guatemala liable when masked individuals captured and tortured individuals because there was evidence that the government knew of the acts and that they were taking place after being prompted within a government department.<sup>86</sup> In that case, the court focused on several factors to find Guatemala liable: the individuals maintained the same modus operandi with driving the same license-plate less cars, the individuals acted with impunity and often did not even bother to conceal their identities as regular criminals would, and lastly, some of the individuals had been identified as being government employees and at times even wore police uniforms.<sup>87</sup> In this case, the petitioners have failed to make a showing anywhere near that which was brought before this Court in *Paniagua-Morales v. Guatemala*. Unlike Guatemala, Chuqui has in no way given any indicia of approval to Androwita's actions. Nowhere have the petitioner's point to any actions on the part of Chuqui which shows that state supported or tolerated infringement of the citizen's rights.<sup>88</sup>

**ii. The Petitioners Did Not Meet Their Burden to Find Chuqui Liable because Chuqui Initiated Investigations and Prosecuted Androwita Agents Who Were Negligent**

Apart from granting a two month suspension of the Ministry of the Environment's order to immediately close Androwita's plant,<sup>89</sup> nothing in the record makes a decisive showing that Chuqui was knowledgeable or complicit of Androwita's negligence. Chuqui's decision to allow Androwita to continue to operate came after receiving assurances that Androwita would operate with proper care for the environment.<sup>90</sup> In making the decision, the Minister of the Environment also placed careful consideration and balanced the social costs of closing the plant with the

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<sup>85</sup> *Id.*, at ¶ 92.

<sup>86</sup> *Id.*, at ¶ 93.

<sup>87</sup> *Id.*

<sup>88</sup> *Paniagua-Morales v. Guatemala*, *supra* note 58, at ¶ 91.

<sup>89</sup> Hypo ¶ 16.

<sup>90</sup> *Id.*

forthcoming protections of Androwita's new practices. Unlike Guatemala, Chuqui officials aggressively addressed the issue with Androwita and in no way allowed their actions to continue under the sanction of law.

### **III. CHUQUI DID NOT VIOLATE ARTICLES 4 OR 5 OF THE CONVENTION BECAUSE IT UPHELD ITS RESPONSIBILITY AS A STATE BY ENSURING THAT DILIGENT MEASURES WERE IN PLACE TO PREVENT, INVESTIGATE, PUNISH, AND REPAIR SUCH VIOLATIONS.**

#### **A. There Was No Article 4 Violation Where Chuqui's Public Health System Investigated The Source of Contamination Rapidly After One Doctor Noticed Abnormalities, where Chuqui Imposed Penalties, and where Chuqui Prosecuted and Convicted Those Individuals Responsible**

Article 4, in conjunction with Article 1(1), of the Convention states in pertinent part:

"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."<sup>91</sup>

The overall requirements applied to the state by this Court under Article 4 are:

States must adopt all necessary measures to create a legal framework that deters any possible threat to the right to life; establish an effective legal system to investigate, punish, and redress deprivation of life by State officials or private individuals; and guarantee the right to unimpeded access to conditions for a dignified life. Especially, States must see that their security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction.<sup>92</sup>

The case law of the Court has made clear that states have a duty to "guarantee the creation of the necessary conditions to ensure that violations of [Article 4] do not occur, as well as the duty to prevent the infringement of the said right by its officials or private individuals."<sup>93</sup> In order to

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<sup>91</sup> Organization of American States, American Convention on Human Rights, Art. 4 (1), Nov. 22, 1969, O.A.S.T.S. No. 36.

<sup>92</sup> *Zambrano-Vélez et al. v. Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 81 (July 4, 2007); *see also* *Montero-Aranguren et al. v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 66 (July 5, 2006); *Miguel Castro-Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 238 (Nov. 25, 2006); *Servellón-García et al. v. Honduras*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 102 (Sept. 21, 2006).

<sup>93</sup> *Zambrano-Vélez et al. v. Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 79 (July 4, 2007); *see also* *Villagrán-Morales et al. v. Guatemala*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 32, ¶ 144 (Sept. 11, 1997); *Montero-Aranguren et al. v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 63 (July 5, 2006); *Ximenes-Lopes v. Brazil*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 139, ¶ 124 (Nov. 30, 2005).

meet this obligation, the Court has required that two prongs be met: (1) states must fulfill their negative duty by ensuring that no person be arbitrarily deprived of life, and (2) states must fulfill their positive duty by adopting any and all necessary measures to protect and preserve the right to life of individuals in the state's jurisdiction.<sup>94</sup> In addition, the state has a duty to investigate human rights abuses. The Court has articulated that "once the authorities have knowledge of the event, they should initiate a serious, impartial and effective investigation, *ex officio* and without delay. The investigation should be undertaken utilizing all the legal means available and should be orientated toward the determination of the truth."<sup>95</sup>

In this case, Chuqui fulfilled both its negative and positive duties to protect its citizens' right to life. Chuqui instituted measures to prevent the arbitrary deprivation of life by requiring each foreign investor to conform to existing environmental regulations before beginning operations within Chuqui.<sup>96</sup> Specifically, Androwita had to obtain municipal, health and environmental permits to operate in accordance with the laws of Chuqui.<sup>97</sup> This meant that it was necessary to conduct an Environmental Impact Study, among other things, which the Ministry of Environment had to approve.<sup>98</sup> The standards required by these departments were similar to those standards of other countries in the region.<sup>99</sup> Moreover, Chuqui's Ministry of Health and of the Environment conducted investigations into Androwita's regulation violations

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<sup>94</sup> *Zambrano-Vélez et al. v. Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 80 (July 4, 2007); *Villagrán-Morales et al. v. Guatemala*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 32, ¶ 144 (Sept. 11, 1997); *Miguel Castro-Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 238 (Nov. 25, 2006); *Vargas-Areco v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 14 (Sept. 26, 2006).

<sup>95</sup> *García-Prieto et al. v. El Salvador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 168, ¶ 101 (Nov. 20, 2007); *Gómez-Paquiyaui Brothers v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 146 (July 8, 2004); *Cantoral-Huamání and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 130 (July 10, 2007); *Zambrano-Vélez et al. v. Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 119 (July 4, 2007).

<sup>96</sup> Hypo ¶ 11.

<sup>97</sup> *Id.*

<sup>98</sup> Clarification Questions & Answers, ¶ 4.

<sup>99</sup> Clarification Questions & Answers, ¶ 8.

and mandated that the plant be immediately shut down.<sup>100</sup> It was only after Androwita pledged to employ environmentally friendly measures in its waste disposal that the Minister of the Environment temporarily suspended the order of closure of the company, and several weeks afterwards, the Ministry of the Environment ascertained that Androwita was no longer dumping in a dangerous manner.<sup>101</sup>

**B. There Was No Article 5, 17 or 19 Violation Where Chuqui Undertook A Timely And Reasonable Investigation And Prosecution Of The Crimes Committed And Did Not Cause Additional Anguish To The Victims And Their Families.**

The Convention protects the right to humane treatment, with a particular focus on the right to be free from torture or cruel, inhuman, or degrading punishment or treatment.<sup>102</sup> Article 5 states: “Every person has the right to have his physical, mental, and moral integrity respected.”<sup>103</sup> The Court’s jurisprudence has expanded Article 5 to next of kin.<sup>104</sup>

[T]he Court has considered that the right to mental and moral integrity of the next of kin of victims has been violated based on the additional suffering they have endured as a result of the particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent acts or omissions of the State authorities in relation to the facts.<sup>105</sup>

Article 5 violations do not apply to anyone who was born after the time of the incident, or who was not directly affected by the incident in question.<sup>106</sup>

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<sup>100</sup> *Id.*, ¶ 14.

<sup>101</sup> *Id.*, ¶¶ 15-16.

<sup>102</sup> Organization of American States, American Convention on Human Rights, Art. 5 (2), Nov. 22, 1969, O.A.S.T.S. No. 36. There is no question as to whether or not these deaths constituted torture, and so this section will deal primarily with the Court’s expanding jurisprudence examining the “inhuman or degrading” treatment experienced by victims’ next of kin.

<sup>103</sup> Organization of American States, American Convention on Human Rights, Art. 5 (1), Nov. 22, 1969, O.A.S.T.S. No. 36.

<sup>104</sup> *Cantoral-Huamaní and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 112 (July 10, 2007)

<sup>105</sup> *Id.*; see also *Rochela Massacre v. Colombia*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 175, ¶ 137 (Jan. 28, 2008); *Miguel Castro-Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 335 (Nov. 25, 2006); *Vargas-Areco v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 96 (Sept. 26, 2006).

<sup>106</sup> *Cantoral-Huamaní and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 121 (July 10, 2007).

In *Cantoral-Huamaní and García-Santa Cruz v. Peru*, the Court found that the delay in Peru's proceedings led to uncertainty which resulted in damaging mental effects to the next of kin.<sup>107</sup> A defamatory character was assigned to the deaths of the victims that also affected the next of kin, and lastly the next of kin suffered threats that caused the family to isolate itself as a measure of protection.<sup>108</sup> Based on the extreme suffering that resulted from Peru's lack of diligence in prosecuting the case, the Court held that Article 5 violations had occurred.<sup>109</sup>

In this case, Chuqui took all reasonable steps to investigate and prosecute the alleged crimes. As a result of this diligence on the part of the state, the relatives of the victims have not been subjected to any additional suffering, and therefore Article 5 was not violated. In this case, the next of kin are arguing that the verdict the domestic courts presented is inadequate, but the record does not indicate any suffering that has occurred as a result. Article 5 does not exist to address the dissatisfaction of plaintiffs with a court verdict. This would not only result in the Court serving as an appellate body, but would also clog the Court's dockets.

#### **IV. CHUQUI DID NOT VIOLATE ARTICLES 8 AND 25 OF THE CONVENTION BECAUSE IT PROVIDED TIMELY AND INDEPENDENT JUDICIAL PROCEEDINGS THAT COMPLIED WITH DUE PROCESS REQUIREMENTS.**

Articles 8 and 25 of the Convention require that states provide timely, impartial, and effective judicial proceedings that comply with due process. States have an obligation to investigate, which is an obligation of means rather than results,<sup>110</sup> but “this does not signify that the investigation can be undertaken as ‘a mere formality predestined to be ineffective.’”<sup>111</sup> This Court has held that in order to comply with the obligation to investigate, states must immediately

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<sup>107</sup> *Id.*, at ¶ 113.

<sup>108</sup> *Id.*, at ¶ 114-115.

<sup>109</sup> *Id.*, at ¶ 120.

<sup>110</sup> *Cantoral-Huamaní and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 131 (July 10, 2007); *Velásquez-Rodríguez v. Honduras*, 1987 Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 177 (June 26, 1987); *Baldeón-García v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 93 (April 6, 2006).

<sup>111</sup> *Cantoral-Huamaní and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 131 (July 10, 2007); *Ximenes-Lopes v. Brazil*, 2005 Inter-Am. Ct. H.R. (ser. C) No.139, ¶ 148 (Nov. 30, 2005).



initiate a “genuine, impartial and effective investigation, using all available legal means, and involving every State institution.”<sup>112</sup> Access to justice should ensure, within a reasonable time, the right of the alleged victims or the next of kin for every necessary measure to be taken to know the truth about what happened and to sanction those eventually found to be responsible.<sup>113</sup> The state has a duty to punish when parties are found guilty, however the state has a responsibility to (1) respect the defendant’s right to the presumption of innocence, (2) grant the defendant adequate time and means to prepare their defense, (3) respect their right to legal counsel, (4) ensure that the criminal proceedings take a reasonable time, and (5) respect the defendant’s right to information about consular assistance.<sup>114</sup>

#### **A. Chuqui Addressed Plaintiffs’ Claims In A Timely Manner.**

In order to determine whether or not a state addressed a claim in a timely manner, the court looks to the three elements to determine the fairness of the time incurred in the judicial proceedings: (1) the complexity of the matter, (2) the procedural activities carried out by the interested party, and (3) the conduct of judicial authorities.<sup>115</sup> In this case, the matter was very complex. The Environmental Inspector had to undergo extensive testing of the area in order to determine whether or not the area was contaminated, where the contamination was coming from, how much of the area was contaminated, and how dangerous the contamination was. Because of these complexities, the procedural activities carried out by Chuqui were thorough and time-consuming. Chuqui was diligent in carrying out all the necessary procedures from the environmental investigation to the civil and criminal trials. In addition to the various ministries involved in these proceedings, the judicial authorities conducted themselves in a timely manner.

<sup>112</sup> *Cantoral-Huamaní and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 130 (July 10, 2007)

<sup>113</sup> This applies proceedings prior to judicial proceedings as well. *Cantoral-Huamaní and García- Santa Cruz v. Peru*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 167, ¶ 132 (July 10, 2007).

<sup>114</sup> *Chaparro Álvarez y Lapo Íñiguez. v. Ecuador*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 143 (Nov. 21, 2007).

<sup>115</sup> *Escué-Zapata v. Colombia*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, ¶ 102 (July 4, 2007).

**B. The Judicial Proceedings Were Independent, Impartial, Effective And Complied With Due Process.**

In addition to timeliness, the proceedings were independent, impartial and effective.

There is nothing in the record to indicate that the judiciary was connected to the government or was in any way politically motivated. In addition, because the judiciary considered the evidence brought before it and ruled accordingly, it was effective. Lastly, the domestic courts complied with due process requirements.

In *Villagrán-Morales et al. v. Guatemala*, the Court found that while Guatemala had judiciary processes in place, these processes were deficient. The case involved the death of five young men in Guatemala City. When the case was brought before Guatemala City's District Court, the court's ruling failed to take into account important testimony regarding the identity of those accused of murdering the victims.<sup>116</sup>

The judgment declared that the accused had denied any involvement in the crimes, that the type of weapon issued to those officers had never been ascertained and that some witnesses could not identify the accused at the identity parade. As a result, the District Court "acquitted the accused on the ground of insufficient evidence to prove that they had been involved" in the events.<sup>117</sup>

The Appeals Court and the Supreme Court upheld the District Court's judgment. The Commission upon investigating the case found that "the internal judicial process conducted in this Case 'were so deficient as to deny the victims' families due process and justice.'"<sup>118</sup> The Court found the preliminary objection brought by the State of Guatemala, specifically that the Inter-American Court was incompetent to hear the case, inadmissible. Guatemala included in its

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<sup>116</sup> *Villagrán-Morales et al. v. Guatemala*.

<sup>117</sup> *Villagrán-Morales et al. v. Guatemala*, 13(i).

<sup>118</sup> *Villagrán-Morales et al. v. Guatemala*, 16(e).

preliminary objection the argument that “the competent organs acted at once and produced the evidence needed to set in motion the criminal process against the accused.”<sup>119</sup>

Unlike Guatemala in *Villagrán-Morales et al.*, Chuqui and its organs undertook a complex and thorough process of investigation once the proper authorities were informed of the deaths taking place due to elevated levels of mercury. There is nothing in the record to indicate that the judiciary in Chuqui is deficient. The courts considered all the evidence and entered judgments for the defendants, including not only naming Androwita responsible for the harm, but holding that the company is required to pay damages to those affected by its chemical dumping as well as clean up the contaminated area within a period of six years.<sup>120</sup> Chuqui’s courts provided due process as indicated in the record: “On December 5, 2003, following due process of law, the Criminal Court handed down judgment . . .”<sup>121</sup> There is also nothing in the record to indicate that the judiciary is not independent. Because Chuqui offered Claimants an adequate and effective legal remedy, they cannot be held liable for the harm Claimants sustained.

**V. CHUQUI DID NOT VIOLATE ARTICLE 21’S RIGHT TO PROPERTY BECAUSE CHUQUI CITIZENS STILL HAVE THE USE AND ENJOYMENT OF THEIR PROPERTY AND MONETARY COMPENSATION FOR ANY DETRIMENT, COUPLED WITH RESTORATION EFFORTS, WAS ADEQUATE IN OFFSETTING THE VALUE OF ANY LOSS**

Chuqui is not liable for the damages caused to the petitioners under Article 21 Right to Property because the citizens still had use and enjoyment of their land and were adequately compensated with monetary awards and restoration efforts. Article 21, in connection with Article 1(1), protects citizens rights in “the use and enjoyment of his property” and elaborates

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<sup>119</sup> *Villagrán-Morales et al. v. Guatemala*, 15(d).

<sup>120</sup> Hypo ¶ 23.

<sup>121</sup> Hypo ¶ 22.

that “no one shall be deprived of his property except upon payment of just compensation.”<sup>122</sup>

Property as provided by the Convention encompasses more than material objects, it can include tangible and intangible elements as well as anything capable of having value.<sup>123</sup> When property is compromised, the Court looks to whether those deprived were afforded a material compensation to offset the diminished enjoyment from the action.<sup>124</sup> Any proprietary interest which is compromised in the state’s policy measures must be as narrow as possible, not arbitrary and must bear a relationship to the policy.<sup>125</sup>

Chuqui did not violate Article 21 because (A) citizens still have full access to the use and enjoyment of their land and property, as no complete expropriation took place. (B) Moreover, the monetary compensation and the restoration efforts undertaken by the government provided adequate compensation for the victims in that they restored value to the land in the use and enjoyment that occupants had. (C) Furthermore, no Article 21 violation took place because all of Chuqui’s citizens benefited from the economic presence of Androwita, thereby providing a broad societal benefit, and all policy decisions were reasonable for the societal interests involving Androwita and the citizens.

#### **A. All Citizens Still Have Full Access to the Use and Enjoyment of Their Land, As No Expropriation of Property Took Place**

Chuqui did not violate Article 21 because residents of the affected area still enjoy the use and enjoyment of their land, and still have complete control of the property. While some water contamination may have taken place, this alone is insufficient to deprive the residents the use and

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<sup>122</sup> Organization of American States, American Convention on Human Rights, Art. 21 (1);(2), Nov. 22, 1969, O.A.S.T.S. No. 36.

<sup>123</sup> Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 144 (Aug. 31, 2001).

<sup>124</sup> Baruch Ivcher Bronstein v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 130 (Feb. 6, 2001).

<sup>125</sup> Chaparro Alvarez v. Ecuador, 2007 Inter-Am. Ct. H.R. (ser. C) No. 170, ¶¶188, 196 (Nov. 21, 2007)

enjoyment of their land when they still reside on the property and use and enjoy the land for the same purposes which they did prior to the discovery of the intoxication. Moreover, the Court has found an Article 21 violation where the deprivation of property constitutes an expropriation and where the citizen is deprived of all means of earning their livelihood.

In *Ituango Massacres v. Colombia*,<sup>126</sup> the Court found a violation of Article 21 where homes were destroyed by a government-sponsored paramilitary group.<sup>127</sup> Because the paramilitary group destroyed the homes, along with cattle and other items, the Court there determined that such actions constituted a violation of the right to property.<sup>128</sup> Similarly, in *Chaparro Alvarez v. Ecuador*, the Court found a violation of Article 21 where the petitioner's had their property arbitrarily seized and confiscated for a prolonged period of time.<sup>129</sup>

Unlike in this case, the Court concluded that an Article 21 violation occurred in *Chaparro Alvarez* and *Ituango Massacres* because there was a complete deprivation of the use and enjoyment of the property. In those cases, the petitioners were deprived of all essential elements to make a living and were expropriated from their homes. In this case, any loss incurred by the citizens of Chuqui is much less severe because the residents still use their homes and enjoy their property by having the same degree of access and use to it as they did prior to Androwita's dumping. Most distinguishable is the fact that the residents still make a living and maintain their livelihood through their work for Androwita.

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<sup>126</sup> 2006, Inter. Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

<sup>127</sup> *Id.*, at ¶ 197.

<sup>128</sup> *Id.*

<sup>129</sup> *Chaparro Alvarez*, *supra* note 125, at ¶ 244.

**B. Monetary Compensation, Coupled with Environmental Restoration Efforts Afforded Citizens Adequate Compensation for any Loss Their Property Incurred**

When a citizen has part of the use and enjoyment of their land diminished, they are entitled to just compensation pursuant to Article 21(2). Just compensation requires that the compensation they receive be commensurate to the detriment that the loss that their property has suffered as a result of the state action.<sup>130</sup> In this case, the petitioners affected received monetary compensation<sup>131</sup> and also received state required assistance in cleaning the area and raising public awareness to maintain public health.<sup>132</sup> Androwita undertook cleaning the contaminated area,<sup>133</sup> and in doing so negated any damage or loss that came from the contamination. Additionally, the efforts by Chuqui and Androwita to raise public awareness of the health concerns and symptoms<sup>134</sup> associated with illness relieved any detraction from use and enjoyment because they educated the population to better care for their health.

**C. Article 21 was not Violated Because All of Chuqui's Citizens Benefited From the Presence of Androwita and Received a Societal Benefits, and Policy Decisions Were Reasonable Because Closing Androwita Would Hurt the Economy**

Androwita operated in Chuqui since 1992,<sup>135</sup> and since Nuevo Renacer is democratically elected and broadly-supported, Chuqui citizens participated and supported the government policies regarding Androwita. Had citizens disapproved of the government policies, it is reasonable to assume that they would have voted for a different government or protested such policies. However, the record indicates the opposite, in that Nuevo Renacer was broadly popular, having governed for nearly twenty years,<sup>136</sup> and that many of the Nuevo Renacer policies were also leading to economic growth. Chuqui citizens benefited from growing foreign

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<sup>130</sup> Baruch Ivcher Bronstein, *supra* note 43, at ¶ 129.

<sup>131</sup> Hypo ¶23.

<sup>132</sup> Clarification Questions & Answers, ¶ 59.

<sup>133</sup> Hypo ¶ 23.

<sup>134</sup> Clarification Questions & Answers, ¶ 59.

<sup>135</sup> Hypo ¶ 11.

<sup>136</sup> Hypo ¶ 3.

investment, dropping unemployment and rising GDP,<sup>137</sup> all commonly-accepted indicators of a country's quality of life. Moreover, Nuevo Renacer policies have lead to improvements in education and public infrastructure.<sup>138</sup> Chuqui has ensured that benefits from the land use were broadly distributed to its citizens.

After ascertaining that the Kinkili health problems arose from Androwita's dumping, Chuqui ordered an immediate closure of the Androwita plant.<sup>139</sup> Only upon assurances that safer disposal measures would be adopted and payment of fines did the Minister of Health allow for Androwita to maintain its operation functioning.<sup>140</sup> These decisions, in light of all the circumstances surrounding the economic reliance of Chuqui's economy upon the jobs generated by Androwita, were reasonable because they ensured the public safety<sup>141</sup> and prevented the economic disruption that would surely follow from having 1,800 people immediately displaced from their jobs. Allowing Androwita to maintain operations with safe chemical disposal methods was also reasonable in light of the economic importance of the plant to Chuqui's national economy, as Androwita employs 1,800 citizens,<sup>142</sup> and its closure would represent a significant depreciation in the quality of life by way of increased poverty.

## **VI. ARTICLE 26 WAS NOT VIOLATED BECAUSE CHUQUI REGULATED THE ENVIRONMENT, PROVIDED FOR THE PUBLIC HEALTH, AND HAD RISING LIVING STANDARDS**

Article 26 protects the rights of progressive development towards economic, social and cultural rights. The article requires states to "adopt measures... with a view towards achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit

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<sup>137</sup> Hypo ¶ 4.

<sup>138</sup> Hypo ¶ 4.

<sup>139</sup> Hypo ¶ 16.

<sup>140</sup> Hypo ¶ 16.

<sup>141</sup> Hypo ¶ 16.

<sup>142</sup> Hypo ¶ 15.

in the economic, social education, scientific and cultural standards...”<sup>143</sup> Article 26 determines the economic, social and cultural rights, and is subsequently interpreted in close conjunction with the Protocol of San Salvador.<sup>144</sup> Article 26 has also been interpreted to protect ones right to health and overall access to the necessities of life,<sup>145</sup> a right that Chuqui recognizes and provides for in its Constitution.<sup>146</sup> However, Article 26 has not been interpreted as an extreme obligation, and this court has recognized that oftentimes states must deal with limited resources. In *Sawhoyamaya Indigenous Community v. Paraguay*, the Court indicated that,

“[A] State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities.”<sup>147</sup>

In this case, Chuqui did not violate Article 26 and the right to progressive development because Chuqui implemented legislation and regulation with the environmental impact assessments it required when issuing Androwita a license to operate its facility.<sup>148</sup> Chuqui provided all of its citizens with access to public health<sup>149</sup> and specifically created programs to assist citizens that had been particularly affected in the aftermath of the contamination.<sup>150</sup>

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<sup>143</sup> Organization of American States, American Convention on Human Rights, Art. 26, Nov. 22, 1969, O.A.S.T.S. No. 36.

<sup>144</sup> OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also referred to as ‘Protocol of San Salvador,’ OAS Treaty Series No. 69 (1988).

<sup>145</sup> Alban-Cornejo et al. v. Ecuador, *supra* note 7, at ¶ 117.

<sup>146</sup> Clarification Questions & Answers, ¶ 29.

<sup>147</sup> *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 146, at ¶ 155 (Mar. 29, 2006).

<sup>148</sup> Clarification Questions & Answers, ¶ 40.

<sup>149</sup> Hypo ¶ 4.

<sup>150</sup> Clarification Questions & Answers, ¶ 59.



**VII. DISTURBING CHUQUI'S NATIONAL POLICIES WOULD BE AN OVEREXTENSION OF JUDICIAL POWER CONTRARY TO PRINCIPLES 2 AND 6 OF THE RIO DECLARATION RECOGNIZING "SPECIAL SITUATIONS" OF DEVELOPING STATES**

Principle 6 of the Rio Declaration<sup>151</sup> applies in this case because Chuqui is an underdeveloped country<sup>152</sup> with scarce resources<sup>153</sup> that should not be held to the same demanding standards as more developed advanced countries with more sophisticated regulation schemes. Principle 6 elaborates that, "[t]he special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority."<sup>154</sup> Principle 6 thereby requires that developing countries like Chuqui with limited resources be given special consideration when implementing policies and should not be held to the same demanding standards that would apply to more developed countries. Principle 2 of the Rio Declaration indicates that, "states have. . .the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies. . ."<sup>155</sup> Principle 2 applies to this case by recognizing Chuqui's sovereign rights to exploit its land and its natural resources when it regulates foreign investors like Androwita. In addition to being recognized in the Rio Declaration, the well-established principle that states have authority to lawfully exploit their land is also represented in the American Convention on Human Rights.

In this case, Androwita operated in Chuqui for nearly ten years prior to the environmental violations,<sup>156</sup> and prior to this time Chuqui had no reason or capacity<sup>157</sup> to anticipate Androwita would violate environmental norms in such a manner. It is undisputed that Androwita complied

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<sup>151</sup> U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1 (June 14, 1992) [hereinafter Rio Declaration].

<sup>152</sup> Hypo ¶ 1-4.

<sup>153</sup> Hypo ¶ 21.

<sup>154</sup> Rio Declaration, Principle 6.

<sup>155</sup> *Id.*, at Principle 2.

<sup>156</sup> Hypo ¶ 11.

<sup>157</sup> Hypo ¶ 11.

with all the existing health regulations for operating in Chuqui<sup>158</sup> and that no significant environmental damage had been experienced prior to the dumping. Because Chuqui is a country with limited resources and limited experience with foreign investment, any deficiencies in Chuqui's environmental regulation did not arise from willful disregard of the well-being of its citizens, but rather out of the limited resources the country possessed.<sup>159</sup> Androwita's positive contribution to Chuqui's economy provided a broad benefit to all members of Chuqui's society. Androwita provided a benefit to all citizens of Chuqui with its economic participation in creating 1,800 jobs.<sup>160</sup> Principle 2 of the Rio Declaration and Article 21 of the Convention provide no basis for disturbing Chuqui's national policies where they benefit the entire country through Chuqui's dropping unemployment, political stability, and rising GDP.<sup>161</sup> Moreover, Chuqui made attempts to protect the right to life of its citizens by way of the public health system which provided access to all Chuqui citizens. Moreover, the health conditions had seen noticeable improvement over the twenty years since Nuevo Renacer began governing.<sup>162</sup>

**VIII. INTERNATIONAL ENVIRONMENTAL POLICIES MAKE ANDROWITA SOLEY LIABLE FOR ITS POLLUTION BECAUSE LIABILITY PROPERLY RESTS WITH POLLUTERS, AND NOT CHUQUI WHO HAD NO ROLE IN THE NEGLIGENT CHEMICAL DISPOSAL**

Predominant environmental policies indicate that liability for environmental pollution rests with the polluter who negligently caused health risks by way of their actions. In this case, Androwita was solely responsible for the chemical dumping that took place on its property and the effects it had. Liability on Chuqui is improper because (A) uncertainty in environmental regulations and liabilities does not clearly delineate governmental duties towards polluters.

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<sup>158</sup> *Id.*

<sup>159</sup> Clarification Questions & Answers, ¶ 95.

<sup>160</sup> Hypo ¶ 11.

<sup>161</sup> Hypo ¶2-4.

<sup>162</sup> Hypo ¶4.

Moreover, (B) imposing liability to Chuqui is inconsistent with prevailing environmental policies such as the Polluter Pays Principle (PPP) and environmental legislation in other countries.

### **A. The Polluter Pays Principle and National Legislation Place Liability for Environmental Torts Strictly with the Polluter**

Liability for the Environmental Torts rests with Androwita because it was solely responsible for the negligent acts which resulted in the damages to the petitioners. Time-honored principles such as the polluter pays principle (PPP)<sup>163</sup> which has been recognized in the Rio Declaration<sup>164</sup> adopt the principle that the polluter is solely responsible for the liabilities of their pollution. In this case, Androwita was the sole polluter to cause environmental damage and thereby requires that Androwita uniquely liable because Chuqui did not conspire, assist or have knowledge of Androwita's negligence when it took place.

The PPP, along with other national policies,<sup>165</sup> exemplifies the well-established principle that liability for environmental damages rests with polluters places liability for environmental damages solely with Androwita because Androwita was the sole unique tort-feasor in causing the damages to the petitioners. The PPP indicates that,

“manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products throughout the product life-cycle including upstream impacts inherent in the selection of materials for the products, impacts from manufacturers’ production process itself, and downstream impacts from the use and disposal of the products.”<sup>166</sup>

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<sup>163</sup> PPP is also known as Extended Polluter Responsibility. *See generally* Environment Directorate, Organization for Economic Co-operation and Development (OECD), The Polluter-Pays Principle: OECD Analyses and Recommendations, at 9, OECD Doc. OCDE/GD(92)81 (1992).

<sup>164</sup> Rio Declaration, *supra* note 151.

<sup>165</sup> *E.g.*, The United States’ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) places environmental liability upon “any person who at the time of disposal of any hazardous substance owned or operated any facility.” 42 U.S.C. § 9607 (a)(2). This legislation contains no provision which places liability for environmental damages upon governments or state agencies.

<sup>166</sup> *See* OECD, *supra* note 163.

As adopted in the Rio Declaration,<sup>167</sup> a polluter is charged with liability regarding “the cost of pollution”<sup>168</sup> as it relates to the liabilities such pollution imposes onto the public.

**B. Chuqui Played No Role In the Polluting and Made All Reasonable Efforts To Protect The Public From Androwita’s Pollution Through Their Investigation, Closing of the Plant, and Prosecution of Androwita Officials**

In order to extend liability to Chuqui, the petitioners would be required to show that Chuqui took part in the pollution and thereby incurred liability from such participation with Androwita. In this case, Chuqui played no role in Androwita’s polluting and monitored Androwita’s activities to the best of the Ministries’ abilities and resources.<sup>169</sup> Chuqui had no role in the pollution because Chuqui took all reasonable steps to initiate investigations when the hospital noticed four deaths in six months linked to high levels of contamination.<sup>170</sup> Moreover, Chuqui imposed significant penalties when ordering the immediate closure of the Androwita plant contingent upon the plant adopting environmentally-acceptable disposal methods.<sup>171</sup> Chuqui only permitted a temporary suspension of the closure order contingent upon Androwita paying a fine, and investing money into public health and awareness,<sup>172</sup> and ensuring that the plant was no longer contaminating the environment.<sup>173</sup> Lastly, the fact that Chuqui played no role in the pollution is demonstrated by the criminal investigation immediately initiated by Chuqui<sup>174</sup> and the subsequent criminal convictions obtained.

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<sup>167</sup> See Rio Declaration, *supra* note 151, at Principle 16.

<sup>168</sup> *Id.*

<sup>169</sup> Hypo ¶ 21.

<sup>170</sup> Hypo ¶ 6.

<sup>171</sup> Hypo ¶ 14.

<sup>172</sup> Hypo ¶ 15.

<sup>173</sup> Hypo ¶ 16.

<sup>174</sup> *Id.*

**C. Uncertainty in National Environmental Liability Standards Absolves Chuqui Because Government Duties Concerning Environmental Torts Are not Clearly Delineated and Discretion to National Policies is Proper, Given Uncertainty in International Standards**

National policies regarding environmental liability represent unsettled areas of international law and thereby absolve Chuqui in this case because there is no prevailing standard of government conduct when facing an environmental tort. The uncertainty environmental policy is exemplified in United Nations Environment Program (UNEP) which recently issued recommendations for national policy regarding environmental damages.<sup>175</sup> The UNEP group agreed upon several principles which should govern in national policies regarding environmental torts, namely those of PPP and imposing liability upon operators who provoked the pollution.<sup>176</sup>

**REQUEST FOR RELIEF**

Chuqui requests this Court find Chuqui has violated none of Articles 4, 5, 8, 17, 19, 21, 25, and 26, in connection with Articles 1.1 and 2 the American Convention.

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<sup>175</sup> *Advisory Expert Group Meeting And Compensation for Environmental Damage*, United Nations Environmental Program (UNEP). January, 2007. Geneva, SZ.

<sup>176</sup> *Id.*