Case. No 2002-2006-PC/TC
LIMA
PABLO MIGUEL FABIÁN MARTÍNEZ
ET AL.

JUDGMENT ISSUED BY THE CONSTITUTIONAL COURT

In Lima, on the 12th of May of 2006, the Second Chamber of the Constitutional Tribunal, composed of Judges Gonzales Ojeda, Bardelli Lartirigoyen and Vergara Gotelli, deliver the following judgment:

MATTER

A constitutional action was brought by Mr. Carlos Eduardo Chirinos Arrieta, in representation of the plaintiffs, against the judgment issued by the First Civil Chamber of the Superior Court of Justice of Lima, at page 770 of the record, dated October 11, 2005, dismissing the complaint filed by the plaintiffs.

BACKGROUND

On December 6, 2002, Messrs. Pablo Miguel Fabián Martínez, Digna Ortega Salazar, Alfredo Peña Caso, Rosalía Tucto Ortega, José Chuquirachi Anchieta, and María Elena Cárdenas Soto filed a request for a writ of mandamus against the Ministry of Health and the General Environmental HealthDirection (DIGESA) requesting the design and implementation of an "emergency public health strategy" for the city of La Oroya, pursuant to articles 96, 97, 98, 99, 103, 104, 105, 106, and 123 of Law 26842 (General Health Law); and requesting adoption of the following measures: a) recovery of the health of the persons affected via the protection of vulnerable groups, implementation of measures to prevent harm to health and monitoring thereof and the performance of a survey of information regarding the risks to which the community is exposed; b) declaration of a State of Emergency in the city of La Oroya pursuant to articles 23 and 25 of Supreme Decree 074-2001-PCM, National Environmental Air Quality Standard Regulations; and, c) establishment of epidemiological and environmental monitoring programs as provided by article 15 of Supreme Decree 074-2001-PCM, Regulations for National Air Quality Standards.

They claim that the North American company, Doe Run Company, acquired the Metallurgic Complex of La Oroya in 1997 and that the company has been operating in this city through its subsidiary, Doe Run Peru. This company pledged tofulfill all obligations in the PAMA (Adjustment and Environmental Management Program) that was developed by the previous owner of the metallurgic center, Centromín Perú S.A.; that, despite this commitment, Doe Run Peru filed a request for an amendment of the PAMA in December 2008, pursuant to which it pledged to perform a certain number of environmental improvements in 2006 and begin carrying out the main investments that were necessary to treat emissions and air quality in 2004. However, the PAMA submitted by this new company does not effectively assure the rights to public health and a balanced and adequate environment, or the enjoyment of physical and mental health by La Oroya's residents; on the contrary, during the most recent years, its activities have increased the levels of lead considerably as well as the levels of other

components in the bloodstreams of children and pregnant mothers in La Oroya, as proven by certain investigations such as "Study of lead in the bloodstreams in a selected population of La Oroya," performed by Digesa in 1999. This study proved, *inter alia,* that 99.1% of the persons analyzed had contents of lead in their bloodstream that exceeded the levels recommended by the World Health Organization (WHO).

The plaintiffs cite other studies, such as the one conducted by Doe Run Peru, called "Study of lead in the bloodstreams in the population of La Oroya 2000-2001," which analyzed 5062 samples of children and adults. This report concluded that the main sources of exposure were lead accumulated in the surroundings of the metallurgic complex, car emissions and other sources such as varnishes on ceramics, lead paint and canned products. They also mention a study performed by *Consorcio Union para el Desarrollo Sustentable (UNES)* titled "Evaluation of levels of lead and exposure factors in pregnant women and children under three years of age in the city of La Oroya," which shows high levels of lead in the bloodstream of the children of La Oroya and that also suggests the existence of a health problem among the area's pregnant women and children. In turn, they claim the presence of other components that affect the resident's health, such as arsenic, cadmium and sulfur dioxide which cause, among other illnesses, nausea, burning pain in hands and feet, affectations of the central nervous system and lung disease, or disease in vital organs such as the liver and kidneys.

Once the complaint was admitted for processing, the defendants were served with the complaint, and they answered it within the term established by law.

The Twenty-second Civil Court of Lima sustained the complaint on April 1, 2005, arguing that the defendant entities have not assumed the duties and actions established by the respective provisions (General Health Law and Supreme Decree 074-2001-PCM), either directly or through other public or private entities.

On April 14, 2005, the Public Prosecutor in charge of the Ministry of Health's legal affairs– General Environmental Health Direction (Digesa) appealed this judgment and requested that the judgment be dismissed; claiming that all the provisions of Law 26842 and Supreme Decree 074-2001-PCM had been satisfied.

The appellee, on October 11, 2005, revoking the appeal, requests dismissal of the complaint, arguing, "(…) the writ of mandamus sought by the plaintiff does not satisfy the minimum requirements that are necessary to be enforceable (…)." The appellee also claims that "we observe that the matter under discussion is not the public administration's reluctance to perform a legal mandate, but rather […] the relevance and suitability of the measures adopted by the Ministry of Health; thus, the unresolved dispute requires a complex evidentiary analysis, and this is not possible in a constitutional proceeding (…)."

ARGUMENTS

§1. Breakdown of the petition

1. The plaintiffs request that the Ministry of Health and General Environmental l Health Direction (Digesa) satisfy the following requirements:

a. Design and implement an *Emergency public health strategy* for the city of La Oroya, pursuant to articles 96, 97, 98, 99, 103, 104, 105, 106, and 123 of Law 26842 (General Health Law); adopt the following measures: recovery of the persons affected via the protection of vulnerable groups, implementation of measures to prevent harm

to health and monitoring thereof as well as a survey of information regarding the risk to which the community is exposed;

b. Declaration of a *State of Emergency* in the city of La Oroya pursuant to articles 23 and 25 of Supreme Decree 074-2001-PCM, National Environmental Air Quality Standard Regulations;

c. Establishment of *epidemiological and environmental monitoring programs* as provided by article 15 of Supreme Decree 074-2001-PCM – t National Environmental Air Quality Standard Regulations.

2. In the instant case, taking into account that the plaintiffs' claim as to the request for a writ of mandamus for the above legal and regulatory provisions is not only related to the regulation of an administrative omission but also claims that said omission violates the rights to health and to a balanced and adequate environment, we must first analyze said rights, as the challenged administrative omission contains a claim regarding the violation of the invoked fundamental rights.

3. As shown below, the above matters assume that although the rights to health and a balanced and adequate environment cannot be "directly" protected via the writ of mandamus, they can be "indirectly" protected provided that there is a clear, concrete and current mandate in a law or administrative act this is inextricably linked to the protection of these fundamental rights.

§ 2. Satisfaction of Law 26842 and Supreme Decree 074-2001-PCM and the protection of health

a) Essential elements of a democratic and social State of Law

4. The Constitutional Tribunal has held in repeated case law that the Peruvian State, defined by the 1993 Constitution, shows the features that identify a Democratic and a Social State of Law, under a joint interpretation of articles 3 and 43 of the Fundamental Rule. Further, this is supported by the essential principles of freedom, security, private property, popular sovereignty, separation of the supreme duties of the State and recognition of fundamental rights.

5. A democratic and social State of Law

> (…) does not ignore the fundamental principles of the Rule of Law, such as liberty, security, private property and equality before the law; instead, it attempts to obtain its greatest effectiveness, using them as a basis and substantive content, based on the theory that the individual and society are not isolated and competing categories, but two reciprocal terms instead, Thus, there is no possibility of creating freedom if its establishment and procedural guarantees are not accompanied by one of the minimum existential conditions that enable a real enjoyment (…), this implies the existence of a set of principles to develop political institutions, to underlie the legal system and support its functions."[1]

6. Thus, the Constitutional Tribunal has established that the creation of a democratic and a social State of law requires two fundamental elements:

> a. The existence of substantive conditions to reach its elements, which require a direct relationship with the State's real and objective possibility, with an active civic participation of its citizens, and
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> b. The State's identification with the purposes of its social content, so as

[1]Case Record 0008-2003-AI/TC, claim 11.

> to prudently assess the contexts that justify its actions and omissions, ensuring that it is not an obstacle for social development.[2]

7. Specifically, the *right to health* is one of the societal purposes that identify this State model, as well as the right to work and the right to education, among others. Therefore, in order to optimize the enjoyment of these rights, as mentioned by the preceding paragraphs, the State has both an "obligation to perform" (perform actions geared to achieving the greatest enjoyment of the right) as well as "obligations not to perform" (abstain from interfering with the exercise of rights). Therefore, those views that limit themselves to classifying civil and political rights (liberty, security, property, among others), as state obligations to "not do" and social obligations (work, health, education) as obligations to "do" are invalid.

8. In a democratic and social State of Law, the State must "perform actions" with the active participation of its citizens in the democratic system, to guarantee an effective enjoyment of rights such as liberty, security, property (for example, optimizing the security services, the jurisdictional function or property registries), *to health*, to work and education (for example, improving health services, creating more jobs and eliminating illiteracy), among others; and the State must "abstain" from affecting these rights (for example, by not interfering unreasonably and disproportionately with liberty or property, or affecting or harming the existing educational and health services).

9. In *Meza García*, the Constitutional Tribunal held, when referencing the effectiveness of social rights

> Thus, this is not about simple programmatic, medium-term rules. They have been distinguished from immediately enforceable civil and political rights. Specifically, the minimum satisfaction of [social] rights is a necessary guarantee for the enjoyment of civil and political rights. Thus, without education, health, and a dignified quality of life in general, we could not speak about liberty and social equality. Therefore, the legislator and the justice administrator must seek the joint and interdependent recognition of these rights.[3]

10. Moreover, in actuality, some of the rights that have been classically considered civil and political rights have acquired an undoubted social influence. On this specific matter, the Court has stated, "the loss of the absolute nature of the right to property, on the basis of social concerns, is the closest example of this, although it is not the only one. The current trends in damages law assign a central place to the social distribution of risks and benefits as a standard to determine the obligation to redress. The impetuous birth of consumer law has significantly transformed contractual relationships in cases with consumers and users. The traditional consideration of freedom of expression and the press has acquired a social dimension that take form through the creation of freedom of information as the right of every member of the society (…)."[4]

11. Therefore, in a Democratic and social state of Law, social rights (*such as the right to health)* are created as an extension of civil and political rights and thus, they seek to become guarantees for the individual and for society, in such a way as to

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[2]Case Record 0008-2003-AI/TC, claim 12.

[3]Case Record 2945-2003-AA/TC, claim FJ 11.

[4]ABRAMOVICH, Víctor and COURTIS, Christian, *Los derechos sociales como derechos exigibles*. Madrid, Trotta, 2002, p.26.

achieve the respect for human dignity, an effective civic participation in the democratic system and the development of all sectors that compose society, especially those that lack the physical, material or other conditions that ensure the effective enjoyment of fundamental rights.

b) The enforceability of social rights such as the right to health

12. The Constitutional Tribunal has previously established that

> Although the dignity of a person is an ontological assumption that is common to all fundamental rights, it is no less true that this includes the possibility of establishing various differences. The heterogeneity of fundamental rights does not only lie in theoretical, historical matters; instead, these differences can have significant practical consequences." Certain rights "are a part of social fundamental rights with a differentiated nature, rights to the provision of certain matters, or progressive or programmatic rights."[5]

13. Certainly, this differentiation does not imply disregarding social rights, or that the recognition of a social right as a fundamental right will depend on their level of enforceability (that they have jurisdictional protection mechanisms). As we shall see further along, social rights are fundamental rights, due to their relationship and how they identify with the dignity of the person and because this is how they are enshrined in our Constitution. Moreover, the Fundamental Rule provides, in its article 3, that

> The enumeration of the rights established in this chapter does not exclude the other rights guaranteed by the Constitution, or others with a similar nature, or rights based on the dignity of man, or the principles of sovereignty of the democratic State of law and the Republican form of government."

14. Enforceability, then, becomes a category that is linked to the enjoyment of fundamental rights, but it does not determine whether a right is fundamental. Therefore,

> (…) In the social and democratic State of law, the *ratio fundamentalis* cannot exclude the referenced right to a defense. In other words, such rights whose full enjoyment is, in principle, guaranteed by a state conduct that requires abstention, but is also shared by rights to provision of services claimed from the State in a concrete, dynamic and efficient action, in order to ensure the minimum conditions for a life that is commensurate with the principle – right to human dignity."[6]

15. Further, in this judgment, the Tribunal specified:

> (…) holding that social rights are reduced to a link of political responsibility among the constituent and the legislator is not only naïve as to the existence of said relationship, but it is also an obvious distortion of the meaning and coherence of the Constitution (…). As a result, the judicial requirement of a social right shall depend on factors such as the seriousness and reasonableness of the case, its relationship to or affectation of other rights and the availability of the State's budget, provided that there are concrete actions to implement these social policies."[7]

c) The proceedings for the writ of mandamus, administrative omission and "indirect" protection of the right to health

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[5]Case Record 0011-2002-AI/T, FJ 9.

[6]Case Record 1417-2005-AA/TC, claim 19.

[7]Case Record 2945-2003-AA/TC, claims 18 and 33.

16. The Constitutional Tribunal has also held that the constitutionally protected content of the right to health

> (…) covers the power of every human being to maintain organic functional normalcy, both physical as well as mental; and to recover in the event of a disturbance of the organic and functional stability of his being. This implies, therefore, actions towards preservation and recovery– actions that the State must protect, seeking a better quality of life for all, every day. To do so, the State must invest in modernizing and strengthening all the institutions in charge of providing health care, adopting relevant policies, plans and programs."[8]

17. This means that the protection of the right to health is related to the State's obligation to carry out all the actions that are geared towards preventing harm to persons' health, preserving the necessary conditions to assure the effective enjoyment of this right and responding, with urgency and efficacy, to situations that affect the health of all, especially those related to children, adolescents, mothers and the elderly, among others.

18. With respect to the "indirect" protection of the right to health via the writ of mandamus, it is worth noting that it will apply when there is a clear, concrete and current mandate that is contained by a legal rule or an administrative act. This mandate is inextricably lined to the protection of the referenced fundamental right.

19. Pursuant to article 200, subparagraph 6 of the Constitution:

> "The writ of mandamus (…) applies against any authority or officer who is reluctant to abide by a legal rule or administrative act, without prejudice to his or her legal responsibilities," the purpose of this proceeding is to control administrative omissions, caused when an authority or officer is reluctant to abide by a rule that he or she is obligated to fulfill.

20. Developing this precept, the legislator established, in article 66 of the Constitutional Procedural Code, that the proceedings for a writ of mandamus seek to order the reluctant public officer or authority

> 1) To fulfill a legal rule or enforce a final administrative act; or
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> 2) To issue an order when legal rules order him or her to issue an administrative resolution or issue regulations.

21. In this manner, the proceedings for the writ of mandamus do not limit themselves to assessing: a) whether the public officer or authority has omitted fulfilling an administration action that is required by mandate of a law or administrative act, but also, b) whether the public officer or authority has omitted performing a *legal* act that is due, whether it is the issuance of administrative resolutions or regulations, in a joint or unilateral manner.

22. Therefore, the proceedings for the writ of mandamus seek to control the omissions of public officers or authorities, to identify their omissions, their passive or inert acts, or their failure to observe the duties imposed by law and, as a result, to order fulfillment of the omitted act or the effective fulfillment of the apparent or defectively satisfied act, and to determine the level of liability, if any.

23. This is because public agents, by virtue of the principle of legality of the executive function, must support all of their actions with current law. "The principle of positive connection of the Administration of the Law requires that the certainty of

[8]Case Record 2945-2003-AA/TC, claim 28.

an administrative act's validity must depend on the extent that said act can be linked to a legal precept, or, its enforcement through this legal precept. The regulatory framework for its administration is irrenouncible, and cannot be waived."[9]

24. Specifically, subparagraph 1.1 of article IV of the Preliminary Title of Law 27444, of the General Administrative Proceedings provides that "All administrative authorities must act with respect to the Constitution and the law, within the powers attributed to them, and according to the purposes for granting the powers."

25. Thus, this shows how, in public administration, public officers and authorities must act within the regulatory framework provided by the law and theConstitution. This framework contemplates their powers, as well as the limits thereof. Thus, any actins that deliberately omit fulfillment of a mandate contained by a law or an administrative act is considered arbitrary, as well as the failure to issue administrative resolutions or regulations or when such actions only partially or defectively satisfy these mandates.

26. The requirement for said officers and authorities to fulfill the respective mandateswithin assigned terms, under legal responsibility is directly related to the above matter. When said terms have not been set, the mandates must be observed within a reasonable and proportional term, and the level of urgent attention required by certain rights must always be taken into account, especially fundamental rights that can be affected by the failure to perform mandates.

§ 2. Fulfillment of Law 26842 and the protection of the right to a balanced and adequate environment for the development of life

27. Considering that the instant case is related to the fulfillment of a legal mandate to protect the right to a balanced environment that is adequate of the development of life, we must review certain elements that make up the constitutionally protected content of this right.

28. Article 2, subparagraph 22 of the Constitution, recognized every person's right

> (…) to peace, tranquility, the enjoyment of free time and leisure, as well as the enjoyment of a balanced and adequate environment for the development of life.

29. On this matter, in *Regalías Mineras*,the Constitutional Tribunal specified the following

> The following elements determine the content of the fundamental right to a balanced and adequate environment for the development of the individual: 1) the right to enjoy the environment, and 2) the right to preservation of the environment.
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> In its first expression, i.e. the right to enjoy a balanced and adequate environment covers the power of all persons to be able to enjoy an environment in which its elements develop and relate to each other in a natural and harmonious manner; and, in the event that man intervenes, this should not imply a substantive alteration of the interrelationship between environmental elements. Therefore, this impliesthe enjoyment, not of any environment, but of the right environment for the person's development and his or her dignity (article 1 of the Constitution). Otherwise, its enjoyment would be frustrated and the right would be devoid of any content.
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> However, the right under analysis is also enforced via preservation of the environment. The right to preservation of a healthy and balanced environment implies unavoidable

[9]MORÓN URBINA, Juan Carlos. "Comentarios a la Ley del Procedimiento Administrativo General". *GacetaJurídica*, Lima, 2001. p. 26.

> obligations for public authorities. They are required to maintain environmental assets in adequate conditions for their enjoyment. In the judgment of this Tribunal, this obligation also includes private parties, and even more so, those whose economic activities affect the environment either directly or indirectly.[10]

30. In turn, with respect to the existing connection between economic production and the right to a balanced and adequate environment for the development of life, the Constitutional Tribunal specifiedthat the following principles must coexist, among others, to best ensure the protection of this right:

> As to the existing connection between economic production and the right to an adequate environment for the development of life, it comes about by operation of the following principles: a) the principle of sustainable development (…); b) the principle of conservation, pursuant to which one seeks the preservation of environmental assets; c) the principle of prevention, that requires safeguarding the environmental assets from any danger that could affect their existence; d) the principle of restoration, with respect to the cleansing and recovery of deteriorated environmental assets; e) the principle of improvement, pursuant to which one seeks to maximize the benefits of environmental assets in favor of human enjoyment; f) the principle of precaution, that requires adopting caution and reserve measures when there is scientific uncertainty and indicia of the threat of the real size of the effects of human activities on the environment; and, g) the principle of compensation, that implies the creation of redress mechanisms to exploit non-renewable resources.[11]

31. One of the principles that is worth mentioning is the *principle of sustainable development* that constitutes a foundational guideline for human actions to be able to create a greater quality of life and improved conditions of life in favor of the current population, preserving the environment to satisfy the needs and aspirations of future generations. Therefore, this requires the use of environmental assets for consumption must not be "financed," thereby incurring in social "debts" for the future.

32. Further, it is worth noting that the *principle of precaution* operates in situations of a threat of harm to health or the environment or where there is no scientific certainty that said threat could create serious harm. Our domestic framework recognizes this principle is recognized, among others, in article VII of the Preliminary Title of the General Law of the Environment 28611, as well as article 10, subparagraph f of Supreme Decree 0022-2001-PCM which states that:

> The rules, strategies, plans and actions that CONAM establishes and such rules that the public sector, the private sector and civil society entities propose and provide, as applicable, at each level – national, regional and local, are instruments of the Environmental National Policy. The following comprise the support for the policy and its instruments: (…) f) the application of the standard of precaution, in such a way that, when there is a danger of serious or irreparable harm, the absence of absolute certainty will not be used as a reason to suspend adoption of effective measures to prevent environmental deterioration.

33. Finally, the Rio Declaration on the Environment and Development, issued in June 1992, included the integrity of the environmental system and environmental development as one of its main purposes. It proclaims the following series of principles, among others:

> Principle 1

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[10]Case Record 0048-2004-AI/TC, claim 17.

[11]Case Record 0048-2004-AI/TC, claim 18.

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of nationaljurisdiction.

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmentalneeds of present and future generations.

Principle 4

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

Principle 5

All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living andbetter meet the needs of the majority of the people of the world.

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countriesacknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Principle 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

Principle 9

States should cooperate to strengthen endogenous capacity-building for sustainable development byimproving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Principle 10

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activitiesin their communities, and the opportunity to participate in decision-making processes. States shall facilitate and

encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Principle 12

States should cooperate to promote a supportive and open international economic system that wouldlead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13

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

Principle 14

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

Principle 15

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

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Principle 17

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

§ 2. Analysis of the concrete case. The Ministry of Health's actions given the serious health condition of the residents of La Oroya

a) The process of the writ of mandamus and the demand for an 'effective' action of the administration

34. Having confirmed the legal assets subject to the demand for protection under the provisions of Law 26842, General of Health and Supreme Decree 074-2001-PCM, Regulations for the National Air Quality Standards and subject to the demand for writ of mandamus in the present case, we must examine the plaintiffs'three claims.

35. It is worth specifying, in the first place, that, pursuant to articles 200, subparagraph 6 of the Constitution and 66 *et seq.* of the Constitutional Procedural Code, in order to demand fulfillment of the legal rule, the enforcement of the administrative act and the order for issuance of a resolution, in light of the public officer or authority's reluctance, the mandate contained therein must meet the following minimum common requirements, among others:[12]

a.Being a current mandate that is in force.

b. Being a definite and clear mandate, in other words, it must be undoubtedly inferred from the legal rule or the administrative act.

c.Not be subject to a dispute or conflicting interpretations.

d. Having an unavoidable and obligatory fulfillment.

e. Being unconditional. In exceptional circumstances, the mandate can be conditional, provided that it has been proven to satisfy the conditions and its satisfaction must not be complex or require evidence.

36. Further, the Constitutional Tribunal emphasized in this judgment

(…) the most important evidence of assimilation of a legal rule or administrative act is its level of effectiveness."[13]

Thus, as mentioned previously, the writ of mandamus seeks to protect the effectiveness of legal rules and administrative acts. It would lack purpose if the fulfillment of mandates were "apparent," "partial" or "deficient".

37. In other terms, the proceedings for a writ of mandamus cannot pursue a review of the "formal" satisfaction of a legal rule or administrative act. Instead, the assessment is of the*effective* satisfaction of said mandate and thus, if in a concrete case, we were to confirm the existence of apparent, partial, incomplete or imperfect satisfaction, the writ of mandamus would demand that the administrative authority effectively fulfill the matters required by the mandate.

b) The health condition of the population of La Oroya and the lead poisoning in their bloodstreams

Lead in bloodstream (µg/100 ml)	**Recommended Action**
Under 9	A class 1 child is not intoxicated by lead. Routine lead analysis is recommended.
From 10 to 14	Periodic analysis of lead. If several children are affected, primary prevention activities should be considered.
From 15 to 19	Periodic analysis of lead. Review history to assess possible sources of lead. Review diet and cleanliness of family members. Analyze the level of iron. An environmental

[12]Case Record0048-2004-AI/TC, claim 14.

[13]Case Record 0048-2004-AI/TC, fundamento 14.

	investigation should be considered if levels persist
From 20 to 44	Requires a complete medical evaluation. Identify and eliminate environmental source of lead
From 45 to 69	Begin medical treatment, environmental assessment and resolution in the next 48 hours
Over 70	Hospitalization, begin medical treatment, environmental assessment and resolution immediately.

38. Prior to analyzing the plaintiffs' claims, as well as the actions of the Ministry of Health, and, specifically, those of the General Environmental Health Direction (Digesa) we must specify the health condition of the residents of La Oroya, as this analysis will be dispositive to determining the level of "effectiveness" of the measures adopted by the referenced administrative bodies under Law 26842, General Health Law and Supreme Decree 074-2001-PCM, Regulation for National Air Quality Standards.

39. Page 48 of the record contains the classification of lead levels in bloodstreams and the respective recommended steps, prepared by the United States Center for Disease Control, also attached as an appendix to the "Study of lead in the bloodstreams in the population of La Oroya 2000-2001," performed by Doe Run Peru, pursuant to which:

40. The following results were arrived at by the reports included in the record, "Lead Study in samples of a selected population in La Oroya" carried out in 1999 by the General Environmental Health Direction (Digesa) of the Ministry of Health.

> Considering that the average permissible limit of lead in the bloodstreams of children, as contained in the guidelines of the World Health Organization (WHO) is 10 μg/100 ml:

Age groups	**Average**
From 2 to 4 years of age	-> 38.6 μg/100 ml
From 4 to 6 years of age	-> 34.1 μg/100 ml
From 6 to 8 years of age	-> 36.3 μg/100 ml
From 8 to 10 years of age	-> 30.6 μg/100 ml
Total	-> 38.6 μg/100 ml

41. Further, the referenced public Digesa report found the following lead levels in the bloodstreams of 346 tested children (μg/100 ml):

Number of children	**Range of lead in bloodstream (μg/100 ml)**
3 (0.9%)	0 to 10 μg/100 ml
45 (13.3%)	10.1 to 20 μg/100 ml
234 (67.0%)	20.1 to 44 μg/100 ml
62 (18.3%)	44.1 to 70 μg/100 ml
2 (0.6%)	over 70 μg/100 ml

42. In turn, the Report by *Consorcio Unión por el Desarrollo Sustentable de la Provincia de Yauli, La Oroya* (UNES) titled "Evaluation of Levels of Lead and

Exposure Factors in Pregnant Women and Children under 3 years of age in the City of La Oroya," prepared in March 2000, at pages 80 to 114 of the record, concluded that the levels of blood poisoninginpregnant mothers between the ages of 20 and 24 was an average of 29.49 mg/dl. This value, it states, is well above the limit established as safe by the World Health Organization (WHO), which is 30 mg/dl (p. 90).

43. This very report (p. 95), with respect to the results of the analysis of children between 0 and 2 years of age, concludes that "The results of levels of blood poisoning in children (…) obtained an average of 41.82 mg/dl and a standard deviation of 13.09; these values are truly alarming, as they are well above the value of 10 ug/dl that was established as safe by the CDC [Center for Disease Control of the United States for children] and ANP [North-American Academy of Pediatrics]."

44. In turn, it is worth mentioning some of the conclusions from the ENP 2000-2001 at page 44 that was performed by company Doe Run Peru, as follows:

> 4.1.1. The study performed on the residents of La Oroya shows that the average levels of lead in the bloodstreams of children are above those recommended by the guidelines of the World Health Organization and the U.S. Center for Disease Control (10 µg/100 ml). Nonetheless, we did not observe any signs or symptoms attributable to the hazardous effects of lead, or deterioration of academic performance. The following are the average results of the total 5,062 samples are:
>
> - 0 to 3 years: 26.1 µg/100 ml
>
> - 4 to 5 years: 23.7 µg/100 ml
>
> - 7 to 15 years: 20.3 µg/100 ml
>
> - Over 16 years: 13.7 µg/100 ml
>
> 4.1.2. The highest levels of lead in bloodstreams were found in La Oroya Antigua. Children between 0 and 6 years old had the highest levels. The average bloodstream lead in the area was as follows:
>
> - 0 to 3 years: 36.7 µg/100 ml
>
> - 4 to 6 years: 32.9 µg/100 ml
>
> - 7 to 15 years: 27.8 µg/100 ml
>
> - Over 16 years: 18.0 µg/100 ml

45. Further, as per page 553, the Ministry of Health, via the Regional Health Direction of Junín, in the document called "2005 Operating Plan for the Control of Levels of Lead in the Blood of the Child Population and Pregnant Women Population of La Oroya Antigua," prepared in February 2005, concluded that "The environmental situation in La Oroya has been deteriorating since the beginning of the smelting operation, with the ongoing accumulation of environmental liabilities in the area of influence, deteriorating soil, flora, and fauna, as well as the absorption of lead by the population that resides in La Oroya."

46. Page 623 *et seq.* contains the document prepared by the Ministry of Health, titled "Dosage of lead in the blood of children under 6 years of age. La Oroya Junín Perú," prepared between November 2004 and January 2005, which concludes the following:

No. of children	**Levels of lead in children µg/dl**
1 (0.127%)	Under 10 µg/dl
16 (2.03%)	10 to 15 µg/dl

54 (6.85%)	15 to 20 μg/dl
646 (81.98%)	20 to 45 μg/dl
66 (8.38%)	45 to 70 μg/dl
5 (0.63 %)	70 or more μg/dl

47. Pages 774 *et seq.* contain the document called "Development of a Comprehensive Intervention Plan to Reduce the Exposure to Lead and other Contaminants at the Mining Center of Law Oroya, Peru," prepared in August 2005 by the technical assistance team of the U.S. Center for Disease Control and Prevention (CDC), for the U.S. Agency for International Development (U.S. AID), in order to support the General Environmental Health Direction (Digesa) of Peru. It concludes the following:

> 1. *There is a minimum regulation of lead.* (…) There is no independent government authority that regulates the effectiveness and impact of the government's interventions. The presence of lead in the soil, lead, water and air will probably continue causing elevated levels of lead in the bloodstreams of the people of La Oroya and its surroundings. Interminable discussions delay the protection needed by small children at La Oroya.
>
> 2. *There is a fragmentation between authorities that are responsible for controlling lead.* (…) DIGESA's team reports that it does not have the resources or authority to address the problem in La Oroya (…).
>
> *5. The environmental and health impacts have not been determined.* The government has not established a baseline with measures and impacts on human health and the environment, for the region, (…)".

48. Finally, pages 91 and 92 of the Constitutional record include the "Study on the environmental contamination in the homes of La Oroya and Concepción and its effects on the health of its residents," prepared in December 2005 for the consortium constituted by the University of Saint Louis, Missouri, United States and the Archbishopricof Huancayo. This study concluded as follows, among other matters:

> The levels of lead in the bloodstreams found at La Oroya are similar to those found in previous monitoring studies performed by DIGESA and MINSA (…).
>
> Form the perspective of community health, these levels once again illustrate the serious degree of lead poisoning in the population of La Oroya, especially among the most vulnerable groups – infants and young children.

The referenced studies show that the General Environmental Health Direction itself (Digesa) as well as other institutions have confirmed the existence of excess air contamination in La Oroya since 1999. Further, in the case of lead contamination in blood, especially among children, the maximum limit established by the World Health Organization (WHO) was surpassed (10 μg/ 100 ml). For example,

> the 1999 DIGESA report even detected, *2 cases of children with levels over 70 μg/100 ml, 62 children who tested at between 44.2 and 62 μg/100 ml and 234 who tested between 20.1 and 44 μg/100 ml, among other results.* This required that the Ministry of Health, in its condition as governing body for the Health sector (article 2 of Law 27657 of the Ministry of Health), adopt immediate protection, recovery and rehabilitation measures for the residents of the city, among other actions.

c) Review of the first claim: Implementing an emergency public health strategy for La Oroya

49. The plaintiffs demand satisfaction, among other matters, of the following articles of Law 26842, General Health Law:

> Article 103: Environmental protection is the State's responsibility and that of natural and legal persons. They have the obligation to preserve it within the standards established by the competent Health Authority to preserve the health of the people.
>
> Article 105: The competent Health Authority must issue the measures that are necessary to minimize and control the risks to the health of persons that derive from the elements, environmental factors and agents, pursuant to the law on the matter, as applicable.
>
> Article 106: When environmental contamination implies a risk or harm to the health of persons, the national Health Authority shall issue the indispensable measures for prevention and control to stop the acts or facts that cause said risks or harm.

50. Further, the plaintiffs demand satisfaction, among other matters, of the following articles of Supreme Decree 074 – 2001- PCM, Regulation of National Air Quality Standards:

> Article 11: Diagnosis of Baseline. – The diagnosis of the baseline seeks to comprehensively assess the quality of the air in an area and its impact on the health and environment. This diagnosis shall be used to make the respective decisions to prepare air quality action and management plans. The baseline diagnoses shall be prepared by the Ministry of Health, through the General Environmental Health Direction – DIGESA – in coordination with other public sectorial, regional and local entities as well as the respective private entities, on the basis of the following studies, that will be prepared pursuant to articles 12, 13, 14 and 15 of this rule:
>
> a) Monitoring
>
> b) Emissions inventory
>
> c) Epidemiological studies

Plaintiffs' Arguments

51. The plaintiffs claim that the Ministry of Health and General Environmental Health Direction (Digesa) has failed to fulfill the referenced legal provisions, including those concerning the health prevention and control in the city of La Oroya. This omission has caused an extremely critical and emergency situation that, above all, harms the most vulnerable sectors, in other words, children and pregnant women. The referenced regulatory framework, they argue, requires that the defendantsdesign and implement a health strategy that could be titled " Emergency Public Health Plan for the city of La Oroya and critically affected populations." This plan should seek to protect and recover the health of the population; define remediation measures; establish a healthier environment and seriously and consistently inform about the risks to health thatthe La Oroya residents are exposed to.

Defendant's Arguments

52. The defendants, in their appeal at pages 707 *et seq.* claim that they have satisfied all of the mandates established by articles 103 *et seq.* of Law 26842, as well as those stipulated by article 11 of Supreme Decree 074-20010-PCM, performing the Monitoring studies as well as Inventory of Emissions and Epidemiological Studies.

53. They state that, in compliance with Supreme Decree 074-2001-PCM, they performed two two-step air quality monitoring studies. The first was performed between March 4th and 12th of 2003 and the second was performed between September 3rd and 9th of 2003. They state that the air quality has been monitored at the city of La Oroya since 2000, via a Monitoring Program. With respect to the inventories of emissions, they state that the 13 studies performed in the prioritized cities (including La Oroya) are currently in their final stage, with progress of 95%.

54. Further, they claim that, among other actions, Agreement 008-2003-MINSA has been signed. This agreement requires cooperation between the Ministry of Health and Doe Run Peru S.R.L. and it seeks to jointly develop a "Comprehensive Plan to Reduce Environmental Contamination at La Oroya," geared to achieving an ongoing reduction of the levels of lead in the bloodstreamsof the population subject to the greatest risk of exposure (children under 6 years of age and pregnant women).

Considerations of the Constitutional Tribunal

55. On this matter, the Constitutional Tribunal considers that the plaintiffs'' claim must be sustained in part, because although the Ministry of Health has adopted certain measures established in Law 26842, General Health Law and Supreme Decree 074-2001-PCM, Regulation for National Air Quality Standards, its actions have not been effective, but rather, partial and incomplete.

56. Indeed, a review of the record shows that since the entry into force of the referenced articles of Law 16842 (January 21, 1998(and the referenced Regulations (June 25, 2001) more than a reasonable term has passed for the Ministry of Health, especially the General Environmental Health Direction (Digesa) to effectively satisfy the mandates of the referenced provisions.

57. It is worth noting that, although it is true that pursuant to article 20 of the Supreme Decree 074-2001-PCM,*GESTA Zonal del Aire* (Technical Environmental Study Group for the Quality of Air in charge of preparing and evaluating action plans to improve air quality in a Priority Treatment Area) is responsible for developing the *Action Plan* and not the Ministry of Health directly, it is no less true that for this group to develop the referenced Action Plan, it needs the diagnosis of the baseline. And that the referenced ministry, through General Environmental Health Direction (Digesa) must prepare this diagnosis, pursuant to article 11 of the referencedSupreme Decree. Thus, because it has not satisfied this mandate in a reasonable term, immediate fulfillment must be demanded such that it can urgently implement the respective Action Plan and quickly recover the health of the affected population.

58. Notwithstanding the foregoing, we must keep in mind that the mandate contained by article 106 provides that " When environmental contamination implies a risk or harm to people's health, the *National Health Authority* shall issue the prevention and monitoring measures that are necessary to stop the acts or facts that cause said risk or harm." The plaintiffs' complaint (pp. 13 and 15) also demands fulfillment of Article 2 of Law 27657, which provides "The Ministry of Health … is the governing entity of the Health Sector that drives, regulates and promotes the intervention of the National Health System, in order to achieve the human person's development, through the promotion, *protection, recovery and rehabilitation* of his or her health and the development of a healthy environment, with full protection for a person's fundamental rights, from the moment of conception to his or her natural death."Jointly, said rules require that the Ministry of Health, in its capacity as

governing body of the National Health System, protect, recover and rehabilitate the health of the persons, not just through the implementation of an "ordinary system" but also through the implementation of an "emergency system" that establishes immediate actions in cases of serious affectations to the health of the population [emphasis added].

59. In the concrete case involving the population of the city of La Oroya, above all, children and pregnant women, over 7 years have transpired since 1999 when the first studies determined the existence of a population contaminated with lead in their bloodstreams and the Ministry of Health has not implemented an emergency system that would protect, recover and rehabilitate the health of the affected population. Thus, it is worth asking: how much longer must we wait for the Ministry of Health to fulfill its duty to issue the measures that are immediately necessary to grant specialized medical treatment to the residents of La Oroya who present lead poisoning?

60. The mandate contained in the referenced provisions—a responsibility of the Ministry of Health—is inextricably linked to the protection of the fundamental right to health of the children and pregnant women of La Oroya whose blood is contaminated by lead, as proven by the record. The defendants cannot claim that the protection of this fundamental right, because it is a social right, can take longer, awaiting certain State policies. This protection must be immediate because the serious situation faced by contaminated children and pregnant women demands the State's concrete, dynamic and efficient intervention. Inthis case, the right to health is an enforceable right and as such, the State cannot ignore it. Thus, the Ministry of Health must be ordered to implement an emergency system within 30 days to treat the health of people contaminated with lead, in the case of the city of La Oroya, in order to achieve their immediate recovery.

d) Review of the second claim: declaring the city of La Oroya in a State of Emergency

61. The plaintiffs also request fulfillment of articles 23 and 25 of Supreme Decree 074-2001-PCM, Regulation of National Air Quality Standards. These provisions, among others, provide:

> Article 23. – The declaration of states of emergency seek to immediately trigger a set of measures geared to preventing the risk to health and avoid the population's excessive exposure to air pollutants that could cause harm to human health.
>
> The Ministry of Health is the competent authority to declare the states of emergency, when the concentration of air pollutants is excessive or severe, as well as to establish and confirm the fulfillment of these immediate measures that should be applied pursuant to current legislation and subparagraph c) of Art. 25 of these regulations. Once the state of emergency has been created, the Ministry of Health shall publicly disclose this and trigger the measures contemplated to decrease the health risk.
>
> The Ministry of Health proposes National State Alert Levels to the Presidency of the Council of Ministers, which shall be approved via Supreme Decree.
>
> Article 25. – Regarding the Ministry of Health. – The Ministry of Health, without prejudice to the legally attributed duties, shall have the following:
>
> (…)
>
> d) declare the states of emergency referenced by article 23 of these regulations (…).

Plaintiffs' Arguments

62. The plaintiffs claim that, despite the serious health condition of the residents of La Oroya, proven by three reports performed in the area, the defendant ministry has not declared the state of emergency in the area, pursuant to article 23 of Supreme Decree 074-2001-PCM. They claim that the states of emergency would immediately trigger a set of measures geared to preventing the health risk of the La Oroya population.

Defendants' Arguments

63. The Ministry of Health claims that it approved the Regulations for the Levels of National States of Emergency for Air Pollutants in 2003, through Supreme Decree 009-2003-SA. It seeks to regulate the levels of states of emergency for air pollutants in order to immediately trigger a set of pre-established short-term measures that are geared towards preventing the health risk and avoiding the population's excessive exposure to the air pollutants, during acute contamination events.

Further, it argues that these measures are contemplated by the Action Plans to be developed by *GESTA Zonal* of each of the five cities specified in the Regulations, including the city of La Oroya; and that the Third Complementary Provision provides that the National Environmental Council (Conam), along with the General Environmental Health Direction (Digesa) must issue guidelines for the application of these regulations. In this manner, they hold, they prepared the draft guidelines, but the Conam Board has yet to approve them. Thus, there is a legal obstacle to issuing the States of Emergency established in article 23 of Supreme Decree 074-2001-PCM.

Considerations of the Constitutional Tribunal

64. On this matter, the Constitutional Tribunal considers that the plaintiffs' claims must be sustained, as the Ministry of Health has not implemented the effective actions required to declare the city of La Oroya in a state of emergency with the requisite urgency, despite the obvious existence of a concentration of air pollutants at the referenced location; thereby, failing to fulfill the mandate contained by article 23 of Supreme Decree 074-2001-PCM, as well as article 105 of Law 26842.

65. Indeed, it is worth mentioning, in the first place, that the mandate contained in Supreme Decree 074-2001-PCM (published on June 24, 2001) is clear when it provides, first, that the Ministry of Health is the competent authority to declare states of emergency (articles 23 and 25, subparagraph c). In second place, in order to declare such states of emergency it must confirm "an excess or forecast of severe excess of the concentration of air pollutants" (article 23). In third place, the Ministry of Health is the competent authority to "establish" and "confirm" the satisfaction of immediate measures that must be applied. In fourth place, once the state of emergency has been created, the Ministry of Health must publicly disclose this state and trigger the measures contemplated, in order to decrease the risk to health.

66. Although the declaration of states of emergency must be performed pursuant to an assessment that concludes the *existence of excess or a forecast of severely exceeding the concentration of air pollutants*, in the instant case, the Ministry of Health has not performed the actions necessary to protect the health of the residents of the city of La Oroya in a reasonable term, in particular, children and pregnant women,

considering that Supreme Decree 074-2001-PCM was published on June 24, 2001.

67. Per the record, the Ministry of Health has performed certain studies and actions that seek the fulfillment of articles 015 and 106 of Law 26842 and 23 of Supreme Decree 074-2001-PCM. Nonetheless, despite the fact that the Ministry of Health itself confirmed the existence of lead contamination in the bloodstreams of the residents of the city of La Oroya in 1999, it has not performed the actions to SOLVE the serious situation that exists in this city, despite the fact that two years have transpired between the issuance of Supreme Decree 074-2001-PCM and the issuance of Supreme Decree 009-2003-SA, Regulation of the Levels of National States of Emergency for Air Pollutants (published on June 25, 2003).

68. Moreover, per public knowledge, over 2 years have transpired from the issuance of the referenced Supreme Decree 009-2003-SA for the National Environmental Council (CONAM) and the General Environmental Health Direction (Digesa) of the Ministry of Health to issue the Board's Decree 015 – 2005- CONAM-CD – a guideline that applied the Regulation for the Levels of National States of Emergency for Air Pollution (published on September 28, 2005). Although the Ministry of Health was not the sole party responsible for issuance of the referenced order, it was partly so, as the Third Complementary Provision of Supreme Decree 009-2003-SA ordered Digesa to coordinate the issuance of these guidelines with Conam, *within a 60 – calendar day term* from the issuance of Supreme Decree 009-2003-SA. Furthermore, article 2 of Law 27657 provides thatthe Ministry of Health is the governing entity of the Health sector and, as such, it must lead, regulate and promote the intervention in the National Health System (emphasis added).

69. In this case, the documents attached to the complaint show that the levels of lead poisoning and contamination from other chemical agents in the city of La Oroya have surpassed minimum internationally-recognized standards, causing serious affectations of the rights to health and a balanced and adequate environment for this city's population and for this reason, the Ministry of Health must urgently perform the actions that are necessary to implement a system to declare the respective state of emergency and thus, treat the affected population, pursuant to articles 23 of Supreme Decree 074-2001-PCM and 105 of Law 26842.

70. The Ministry of Health and Doe Run Peru signed an Agreement (Agreement 008-2003-MINSA, signed on July 4, 2003), attached at pp. 363 *et seq.*, that seeks to establish a "culture of prevention, to facilitate the population's adoption of healthy habits to decrease their lead exposure […]," "implement an environmental monitoring system in the city of La Oroya that prioritizes La Oroya Antigua […[," "continuously reduce the levels of lead in the bloodstreams of the children in the city of La Oroya (…)" and "encourage and propose the signature of cooperation and management agreements with various public and private institutions, as the purpose of this agreement cannot be achieved without their participation […]."

71. Further, the section that states Doe Run Peru's obligations establishes the following actions as priority: "[actions geared towards] providing logistical support […]," "performing a chemical analysis of biological and environmental samples […]," "performing educational and prevention campaigns that include strategies to search for the population's behavioral changes, in order to decrease their levels of intoxication and facilitate their adoption of healthy lifestyles, protecting children and pregnant women," among others.

72. On this specific matter, this Court believes that, while joint actions of the

Ministry of Health and private companies are important to the population's health treatment, in the case of serious alterations to health, such as lead poisoning, as in the case of the children and pregnant women of La Oroya, the Ministry of Health, as governing body of the Health sector, is the main party responsible for the immediate recovery of the health of affected residents and it must prioritize children and pregnant mothers. As a result, considering the excess in the concentration of air pollutants in the city of La Oroya, as proven by the preceding paragraphs, the Ministry of Health must be ordered to perform all the actions that are geared towards declaring a state of emergency, pursuant to article 23 of Supreme Decree 074-2001-PCM, to establish the immediate measures in order to decrease the health risk in this location.

e) Review of third claim: establishing epidemiological and environmental monitoring programs in the city of La Oroya.

73. The plaintiffs require fulfillment of article 15 of Supreme Decree 074-20010-PCM that provides the following:

> Article 15. – Epidemiological and Environmental Monitoring Programs. – *As a supplement* to Articles 11 to 14 of these Regulations, DIGESA shall establish epidemiological and environmental programs in such areas with a justifiable difference between national air quality standards and the values found therein, in order to avoid risks to the population, with the participation of the respective public and private entities [emphasis added].

Plaintiffs' arguments

74. The plaintiffs claim that, according to the referenced rule, the epidemiological and environmental programs must be established in those areas with a justifiable difference between their values and national air quality standards. In other terms, these programs should be established "(…) when the situation of contamination and harm to health is highly critical, as is the case of La Oroya and it seeks to avoid these risks."

Defendants' arguments

75. The Ministry of Health claims, "the baseline epidemiological study was performed at La Oroya in order to determine the prevalence of asthma, allergic rhinitis and pharyngitis and identifyexternal and internal factors according to levels of exposure to sources of emission of air pollutants. DIGESA and local authorities were informed of the preliminary results. Currently, the final report is under review prior to publication." In summary, they argue that the Ministry of Health authorities "have adopted the applicable actions to protect the residents' health."

Considerations of the Constitutional Tribunal

76. On this matter, the Constitutional Tribunal considers that the plaintiffs' claim should be sustained, as the Ministry of Health has failed to "effectively" apply actions geared towards establishing epidemiological and environmental monitoring programs, failing to satisfy article 15 of Supreme Decree 074-2001-PCM.

77. Indeed, in principle, it is worth taking into account that pursuant to Supreme Decree 074-2001-PC certain differences existed between "epidemiological studies"

(article 14) and "epidemiological and environmental monitoring programs" (article 15). The latter are *complementary* studies that the Ministry of Health must perform when there is a justifiable difference between the values found in a certain area and the national air quality standards, so as to avoid the risks to the respective population.

78. In the present case, the plaintiffs have not proven their complete fulfillment of the referenced article 15, as they have failed to perform the epidemiological and environmental monitoring programs in the city of La Oroya. As a result, this Court must sustain this claim and order the Ministry of Health to implement the referenced monitoring programs.

In light of the foregoing, the Constitutional Tribunal, with the authority granted by the Political Constitution of Peru

RESOLVES

To partially SUSTAIN the demand for a writ of mandamus filed by Pablo Miguel Fabián Martinez*et al.;* as a result:

1. It orders the Ministry of Health to implement an emergency system within thirty days to treat the health of persons poisoned by lead in La Oroya. It must prioritize specialized medical treatment for children and pregnant women, to achieve their immediate recovery, pursuant to paragraphs 59 to 61 of this judgment. The coercion measures established in the Constitutional Procedural Code shall be applied to the parties responsible.

2. It orders the Ministry of Health, through General Environmental Health Direction (Digesa) to adopt all such actions geared towards the issuance of a baseline diagnosis within thirty (30) days, pursuant to article 11 of Supreme Decree 074-2001-PCM, Regulation of National Air Quality Standards, such that the respective action plans to improve air quality in La Oroya can be implemented as early as possible.

3. It orders the Ministry of Health to perform all actions geared towards declaring a State of Emergency in La Oroya within a thirty-day term, pursuant to articles 23 and 25 of Supreme Decree 074-2001-PCM and article 105 of Law 26842.

4. It orders the General Environmental Health Direction (Digesa) to perform all actions geared towards establishing epidemiological and environmental monitoring programs within a thirty-day (30) term in the area that covers La Oroya.

5. Once the terms referenced in the preceding points have transpired, the Ministry of Health is ordered to inform the Constitutional Tribunal of the actions performed to fulfill this judgment.

6. It exhorts the Regional Government of Junín, Provincial Municipality of Yauli – La Oroya, Ministry of Energy and Mines, National Environmental Council and private companies such as Doe Run Perú SRL, among others, to perform their mining activities in the geographic area that covers La Oroya, to urgently participate in the relevant actions to protect he health of the residents of this location, as well as La Oroya's environment. They must always prioritize the treatment of children and pregnant women.

7. It DISMISSES the rest of the complaint.

Publication and service is hereby ordered.

SS.

GONZALES OJEDA
BARDELLI LARTIRIGOYEN
VERGARA GOTELLI