time of the alleged breach of the treaty, which should have resulted in the tribunal lacking jurisdiction *ratione temporis* under the BIT.

The award in *Zaza Okuashvili v. Georgia* illustrates that, while corporations have long been strategists in matters of nationality, individuals are increasingly adopting this role, seizing opportunities that states have inadvertently created for them. Investors like Mr. Okuashvili now enjoy the benefit of having different passports that can be used to make and operate the investment and, when it becomes convenient, to access an investment treaty. This decision can also be considered as creating an incentive for investors with one nationality to "internationalize" their claims through the acquisition of a second nationality to benefit from the investment treaty regime. These practices are the result of broad definitions of individual investors and a permissive approach toward claims by dual nationals. States that find these practices objectionable are advised to narrow the personal scope of their treaties. In the meantime, it remains to be seen whether the current (and future) arbitral tribunals deciding claims by dual nationals will follow the approach adopted in this case.

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European Court of Human Rights—environmental damage—Article 8—positive obligations—industrial pollution—public health risks—fair balance

Case of Pavlov and Others v. Russia. App. No. 31612/09. *At* https://hudoc.echr.coe.int/fre?i=001-219640.
European Court of Human Rights, October 11, 2022.

The recent decision of the European Court of Human Rights (ECtHR or Court) in *Pavlov v. Russia* is significant for two reasons.[1] First, the decision expands the scope of the due diligence obligation under the European Convention on Human Rights (ECHR) in response to environmental risks. The Court's decision represents a significant step in terms of developing the positive obligations of contracting states in relation to environmental risks. Second, the decision adds some clarity to the question of what level of risk triggers application of states' positive obligations under the ECHR, and in doing so, contextualizes the willingness of the Court to engage with the causality between an alleged risk and a claimant's suffering. Taken together, these two points hold potential relevance for the Court's docket as it grapples with climate change. At present, there are ten climate change claims before the Court, three of which have been deferred to the Grand Chamber.[2] Leaving aside the exclusion of Russia from the Council of Europe with effect from September 2022, meaning that Russia ceased to be a party to the ECHR, the Court's decision in *Pavlov* has relevance outside the confines of

[1] Pavlov v. Russia, App. No. 31612/09 (Eur. Ct. Hum. Rts. 2022) (final as of Jan. 11, 2023).

[2] Registrar of the European Court of Human Rights Press Release, Status of Climate Applications Before the European Court (Feb. 9, 2023), *at* https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7566368-10398533&filename=Status%20of%20climate%20applications%20before%20the%20European%20Court.pdf.

the European human rights system, as the Court often acts as a driver of developments in the context of environmental human rights, influencing doctrines in other human rights systems.[3]

The central question before the Court in *Pavlov* was whether the Russian authorities had failed in their positive obligation under Article 8 (right to respect for private and family life) of the ECHR to prevent the applicants from being exposed to significant environmental harms beyond the minimum threshold of what is tolerable. The applicants' claim centered around the environmental legacy from a privately owned industrial complex, which included five major plants producing steel, pipes, cement, and tractors, among other things, in the city of Lipetsk. Some of the plants had been operating in the vicinity since the early 1900s, and others were presently inactive. Before the domestic courts, the applicants launched proceedings against a range of regional and federal agencies, alleging that the industrial activities resulted in consistent breaches of domestic environmental standards aimed at securing safe drinking water and clear air. In their submissions, the applicants argued that the buffer zones, so-called sanitary protection zones, which regional authorities had ordered to be put in place in 1996 around the plants, were never implemented (para. 14). Relying on a comprehensive body of official environmental reports, the applicants also argued that although overall levels of pollution had come down significantly over the years, they were still persistently over the daily maximum permitted levels (MPLs) (para. 17). The same reports pointed to an increase in the rates of morbidity, cardiovascular disease, tumors, and respiratory diseases all linked to the pollution. A 2007 report by a federal agency identified Lipetsk as one of the most polluted towns in the country (para. 22).

In response to this, the Russian government submitted that several environmental improvement programs had been put in place and that some exclusion zones had been created for a subset of the plants operating in the industrial complex (para. 32). The initiatives put in place to improve the environmental conditions included a national clean air project and a clean water program. The national clean air project incorporated provisions for funding for technical improvements and for upgrades to equipment in the affected areas, the upgrading of monitoring stations, the construction of wastewater treatment facilities, and the investment in less polluting public transport (*id.*). The clean water project included a range of remedial measures aimed at increasing the rate of the population receiving safe drinking water so that it was increased to 98.5 percent (para. 33). Significantly, the government also pointed to inspection and enforcement activities undertaken by the authorities. These included dozens of inspections and enforcement notices, and disciplinary and administrative proceedings taken against executives of the plants (para. 39).

The Court ultimately found in favor of the applicants, ruling that a violation of Article 8 of the ECHR had taken place. The applicants were able to substantiate their claims with extensive data from public authorities and government agencies showing that: (1) the actual levels of air and water pollution were substantial; and (2) this had a likely effect on the applicants' health. On causality, the Court noted that the high levels of pollution contributed

[3] The ECtHR's environmental case was cited extensively in the advisory opinion of the Inter-American Court of Human Rights. *Cf.* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17 (Inter.-Am. Ct. Hum. Rts. Nov. 15, 2017).

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to an elevated risk of harm to the applicants. The high levels of pollution were, at various points in time, also in excess of the domestically enacted limit values. Moreover, from the evidence before the Court, it was not actually possible to ascertain whether the sanitary exclusion zones were fully established around all the polluting facilities. A key focal point of the Court was consequently whether the domestically enacted responses were sufficient when held against the due diligence obligation developed by the Court over the years.

The fact that the Russian authorities had taken active steps to (1) implement domestic improvement plans containing specific measures and (2) actively sought to enforce these are highly significant beyond this specific case. Many of the earlier environmental cases before the ECtHR relate to situations where the domestic legal responses are clearly insufficient. *Pavlov* stands apart from this case law because the domestic authorities had evidently undertaken a significant degree of control through the enactment of the clean air and clean water programs and through a series of domestic regulations, providing limit values and maximum permitted levels for a range of pollutants. These programs had a real and detectable effect on the overall levels of pollution even if the maximum permitted levels were still exceeded. Moreover, the domestic authorities had taken steps to enforce these regimes through several inspections and the issuing of enforcement notices.

The Court's engagement with the domestic responses appears, moreover, to represent an increased level of scrutiny of domestic measures to satisfy the due diligence obligations. This is because the positive obligations that flow from Article 8 in response to environmental risks ordinarily entail obligations to put in place regulatory initiatives that regulate the start-up, operation, and control of the activity (the same applies to the right to life in Article 2, which the Court has ruled overlaps with Article 8 in respect to application and scope of obligations when it comes to environmental harms).[4] These administrative control functions must also be accompanied by publicly available surveys and impact studies, which allow individuals to assess the risk posed by a given operation.[5] Aside from the obligation to respond to specific risks, a related feature in many of the environmental claims before the Court is the responding state's own domestic regime set up to deal with environmental risks. That is, once the state has enacted a legislative framework in response to a risk, the scope of that framework becomes central. In a significant number of cases, the responding state's application and enforcement of this system is so obviously lacking that the Court has little hesitation in finding a violation. Examples of this include particularly egregious cases where the responding state has failed to enforce judicial decisions ordering the cease of harmful activities or examples where the responding state has simply ignored its own legislation.[6] Much more intriguing are the cases where the Court is forced to scrutinize the domestic legal regimes adopted in response to specific environmental risks and weigh these against the interests of applicants in the realization of their rights.

In the cases where the domestic legislative and administrative framework of the responding state is not clearly insufficient, but instead takes on a more comprehensive form, the actual

[4] Tatar v. Romania, App. No. 67021/01 (Eur. Ct. Hum. Rts. July 17, 2000).

[5] *Id.*

[6] Taskin and Others v. Turkey, App. No. 46117/99 (Eur. Ct. Hum. Rts. Nov. 10, 2004); Fadeyeva v. Russia, App. No. 55723/00 (Eur. Ct. Hum. Rts. June 9, 2005); Gioacomelli v. Italy, App. No. 59909/00 (Eur. Ct. Hum. Rts. Nov. 2, 2006); Gómez v. Spain, App. No. 4143/02 (Eur. Ct. Hum. Rts. Nov. 16, 2005).

requirements that the Court has developed for satisfying the due diligence obligation are to date minimal. In these cases, the Court has often deferred to the responding state. For example, in *Hardy and Maile v. UK*, the Court considered risks arising from the construction of two terminals for the handling of liquified natural gas (LNG). The applicants' claim that the construction, authorized by a series of domestic approval processes, had not sufficiently minimized the overall risk posed by the development was rejected by the Court. The Court relied in its decision on the breadth of the domestic framework, which included at least three separate legislative regimes, as well as a string of voluntary industry guidelines, and the requirement that the vessels landing the LNG were separately regulated to ensure safety.[7] Similarly, in *Hatton*, the Grand Chamber relied on the numerous mitigating measures implemented by the UK government in response to noise nuisances from aircrafts when finding that no violation had taken place.[8] Specifically, the Court has noted expressly that it is not its function to substitute its own view of what might be the most appropriate measure for that of the responding state but that the state enjoys a wide margin of appreciation.[9] Thus, where a responding state has pointed to an extensive system of domestically enacted environmental legislation, even if a potential residual risk persists, the Court has defaulted to its function as an international court exercising a supervisory jurisdiction. This supervision is restricted by the not unreasonable assumption that the domestic authorities are better positioned to strike a reasonable balance between competing interests.

The decision in *Pavlov*, however, reflects greater judicial scrutiny. In closely probing the responses adopted by the Russian authorities, the Court questioned not only whether these were effective but also specifically whether the technical measures adopted were up to date. In respect to the technical measures implemented to lower emissions, the Court thus directly noted that the equipment in use appeared to be outdated, contributing significantly to the excess levels of pollution (paras. 24, 87). This emphasis on the specific details of the technological responses is unusual and stands apart from the Court's traditional approach. Ordinarily, the Court refrains from querying the technical details of the measures adopted, allowing the responding state a wide margin of appreciation.[10]Although the emphasis on applying so-called best-available and up-to-date techniques in response to pollution control is an approach well-established in environmental regulation, it represents a significant add-on to the Court's normally restrained scrutiny of domestic environmental legislation.

The Court's willingness to intensify the scrutiny of the domestic responses is, moreover, brought out considerably in respect to the assessment of the domestic judicial proceedings. Here, the Court went on to consider whether the domestic court had done enough to accommodate the applicant's interests in having their rights protected (para. 85). The ECtHR, again unusually for environmental claims, called into question whether the funding allocated by the authorities and the fines handed down in response to the enforcement actions were indeed proportionate to the harm inflicted on the applicants (*id.*). The Court specifically admonished the domestic district court for not exploring "lines of inquiry" relating to whether the measures and enforcement actions resulted in improvements in the equipment and

[7] Hardy and Maile v. United Kingdom, App. No. 31965/07, at 225 (Eur. Ct. Hum. Rts. Feb. 14, 2022).
[8] Hatton and Others v. United Kingdom, App. No. 36022/97 (Eur. Ct. Hum. Rts. July 8, 2003).
[9] *Id.*
[10] *Id.* at 98–100.

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technological processes used by the polluters (*id.*). In respect to the enforcement actions taken by the domestic authorities, the Court emphasized the insignificant size of the fines imposed whilst noting that the authorities made no use of suspension and closure notices (para. 87).

This is in effect a heightened level of scrutiny when it comes to assessing the regulatory responses adopted by domestic authorities in respect to environmental risks. It is a level of scrutiny that goes beyond the one applied in *Hardy and Maile*, where the responding environmental risk arose in a context that was heavily regulated by the responding state. The difference is in many ways justifiable by reference to the significant levels of pollution encountered by the applicants in *Pavlov*, but nevertheless stands in contrast to the approach traditionally applied by the Court in environmental claims. The consequence is that the ECHR, as interpreted by the Court in *Pavlov*, requires a heightened level of assurance that the legislative and administrative measures taken by domestic authorities are not just comprehensive, but also effective and proportionate, and actually achieve the outcomes they aim to address. This emphasis on the regulatory responses being successful arguably pushes the traditional obligation of due diligence developed by the Court in environmental claims away from one of conduct toward one of result. In other words, with *Pavlov*, there is now a focus on whether the domestic environmental provisions actually achieve the substantive outcome they aim to achieve rather than on the extent to which a state has merely enacted a comprehensive legislative framework.

* * * *

In a point of potential relevance to the pending climate change cases, the Court repeated its observation from its *Dubetska* decision that distinguishing the effects that environmental pollution has on each individual applicant from other risk factors (e.g., lifestyle factors) is a significant challenge (para. 61). The Court will, however, pay particular attention to the decisions and reports of the domestic authorities (para. 62). In *Pavlov*, the Court thus relied on the findings by the domestic District Court that the emissions from the industrial complex had *contributed* to a serious degradation of the air quality (para. 66). This point is significant for two reasons in respect to the ongoing climate change cases.

First, the ECtHR cannot be said to rely on an overly formalistic approach to causality between a given risk and the alleged harm to which applicants are exposed. For example, the claimants had not submitted any medical evidence in support of their claims. Without much detailed discussion or scrutiny, the ECtHR accepted the observation of the domestic court that the pollution from the industrial complex had *contributed* to the deteriorating of the local environment by *elevating* the risk (para. 68). In *Pavlov* this is specifically coupled with the Court's findings that the lack of proximity between the applicants and the industrial complex does not in and of itself disable their claim: the Court expressly noted that the fact that some of the applicants lived several kilometers away from the complex is "not sufficient to exclude their claim" (para. 64). Consequently, where applicants can show that a given environmental risk *contributes* to the interference with an applicant's home and family life and that the circumstances *elevate* the risk, this potentially triggers application of the ECHR even if there are other significant contributing factors. This has obvious implications for the climate change claims before the Court where a central argument is that the lack of effective domestic measures contributes to and significantly increases the overall risk of climate-induced harms. Even if the Court, in making this point, arguably overlooks a considerable degree of

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complexity involved in assessing and understanding the interplay between environmental risks and the accumulating contribution of one risk factor alongside others, it is a significant step toward a more capacious application of the ECHR. In one of the pending climate change cases, *Klimaseniorinnen*, there is, moreover, ample scientific evidence that climate change elevates and increases the risk of individual harm and contributes to increased morbidity and mortality among the applicants.[11]

Second, while the willingness merely to identify a contributing risk factor might seem as lending a helping hand to the climate change claims, there is a key limitation in assuming that any factor that elevates a particular risk triggers application of the ECHR. The ECtHR still tends to rely on domestic proceedings and findings of fact to guide its own conclusions. It need not engage in an in-depth assessment and weighing of the various contributing risk factors, if the domestic courts had already done so (even if in a simplified form). In *Pavlov*, the fact that the Court could refer to and rely extensively on domestic judicial examinations "on the merit" as an underlying basis for its own decision played an important role (paras. 67, 76). In other words, the domestic proceedings might both dispense with the admissibility requirements and provide an evidentiary basis for key issues contested between the applicants and the responding state. The upshot of this is that where applicants have few or no domestic proceedings, laying the groundwork on which the Court can rely, their claim will be weaker. This applies even if the failure to rely on domestic proceedings does not result in a claim being dismissed as inadmissible. The domestic proceedings influence not just the admissibility question but also the merit of the claim.

This argument draws out three separate yet related points in respect to the climate change claims before the Court. First, where an elaborate legal regime has been put in place by domestic authorities aimed at minimizing the risk posed to applicants, this regime must be effectively and proportionately enforced and achieve the desired outcome. Related to this, a somewhat perverse consequence of this is that where a state does respond proactively to environmental risks and enact domestic responses, these are more likely to be subjected to strict scrutiny by the Court. Second, even where this is the case, risk factors that *contribute* to and *elevate* a particular risk may still trigger responsibility under the ECHR. Third, in the absence of domestic judicial fact-finding proceedings that can help the Court in striking a balance between the different risk factors, there are likely to be limits to the utility of a claim before an international human rights court like the ECtHR. In other words, it is, all things being equal, easier for the Court to find in favor of an applicant where there is a basis of domestic proceedings to rely on. Consequently, some of these claims are perhaps more fruitfully pursued in domestic systems where domestic courts, to varying degrees, are less reluctant to emphasize the margin of appreciation, which is otherwise so central to the ECtHR's environmental case law.

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[11] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20 (Eur. Ct. Hum. Rts.).