

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS***

OF JULY 1, 2011

**PROVISIONAL MEASURES
WITH REGARD TO THE REPUBLIC OF PERU**

CASE OF WONG HO WING

HAVING SEEN:

1. The order of the acting President of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") of March 24, 2010, and the orders of the Court of May 28 and November 26, 2010, and March 4, 2011, in which it was decided, *inter alia*, to require the Republic of Peru (hereinafter also "the State" or "Peru") to abstain from extraditing Wong Ho Wing. In the last order, the Court decided, *inter alia*:

1. To require the State, in accordance with the provisions of the [...] order, to abstain from extraditing Wong Ho Wing until July 15, 2011.
2. To require the State to forward to the Inter-American Court of Human Rights, by April 14, 2011, at the latest, the report and documentation indicated in the seventeenth considering paragraph of the [...] order.
3. To ask the representative of the beneficiary and the Inter-American Commission on Human Rights to present their observations on the report of the State mentioned in the preceding operative paragraph, within two and four weeks of receiving it, respectively.

2. The brief of March 30, 2011, and its attachments, in which the State sent a report on the alleged annulment of the death penalty for the crime of smuggling commodities in the People's Republic of China (hereinafter also "China"), and forwarded answers to the questions posed by the judges of the Court during the public hearing held on February 25, 2011. In addition, it asked the Court to lift the provisional measures in favor of Wong Ho Wing immediately.

3. The briefs of April 18 and 27, 2011, in which the representative of the beneficiary (hereinafter also "the representative") forwarded observations on the

* Judge Diego García-Sayán, a Peruvian national recused himself from hearing this matter, in accordance with Articles 19 of the Court's Statute and 21 of its Rules of Procedure, and this was accepted by the Court. Consequently, Judge García-Sayán ceded the presidency to the Vice President of the Court, Judge Leonardo A. Franco, acting President for this matter, in keeping with Article 4(2) of the Rules of Procedure. Also, judge Alberto Pérez Pérez advised the Court that, for reasons beyond his control, he could not be present for the deliberation and signature of this order.

State's report and answers respectively. Furthermore, he asked the Court to keep the provisional measures in force.

4. The brief of May 10, 2011, in which the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission" or "the Commission") transmitted observations on the report and the documentation forwarded by the State and asked the Court to "extend the time limit established in the order [of the Court] of March 4, 2011, in order to complete its evaluation of the merits of the case in compliance with the regulatory procedural time frames."

5. The briefs of May 27, 30 and 31, 2011, and their attachments, in which the State forwarded Report No. 271-2011-JUS/PPES and, with the last brief, it attached an unofficial translation of the "Report on the protection granted by Chinese law to the rights of defendants and suspects."

CONSIDERING THAT:

6. Peru ratified the American Convention on Human Rights (hereinafter "the American Convention") on July 28, 1978, and, in accordance with its Article 62, accepted the compulsory jurisdiction of the Court on January 21, 1981.

7. Article 63(2) of the American Convention establishes that "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent, in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission." This provision is, in turn, regulated by Article 27 of the Court's Rules of Procedure.¹

A. Arguments of the parties

8. The State considered that, in the extradition procedure against Wong Ho Wing, the principle of the similarity of norms has been observed, because the offenses that he is accused of in the People's Republic of China "are consistent with their equivalents in Peruvian law where they are codified as offenses of evasion of customs duties and [...] general active bribery." Furthermore, it affirmed that "there is no possibility of the [death penalty] being imposed on Wong Ho Wing, if the Peruvian State declares that extradition is in order and if, following the criminal proceedings against him in China, his criminal responsibility is determined," owing to a recent reform of the law that has annulled the death penalty for the offense of smuggling commodities, and to the inexistence of this punishment for the offense of bribery, based on which the Supreme Court of Peru had also declared the extradition admissible. In addition, the State provided a copy of a communication from the Chinese Ambassador to Peru in which the latter advised that "on February 25, [2011,] the People's National Assembly of the People's Republic of China approved the annulment of the death penalty for the offense of commodity smuggling," and also the translation into Spanish certified by the Chinese Consul in Peru "of the articles corresponding to the Eighth Amendment to the Penal Code of the People's Republic of China," which lists "the articles of the Chinese Penal Code applicable to the passive extradition procedure followed against Wong Ho Wing [...] expressly indicating the annulment of the death penalty."

¹ Rules of Procedure approved by the Court during its eighty-fifth regular session held from November 16 to 28, 2009.

9. The representative stated that the extradition procedure in this case did not “comply with the principle [...] of double jeopardy, because it is not a case of different names for the same content of the matter typified, but of totally distinct situations, [because,] under Peruvian law, ‘evasion of taxes or customs duties’ is not an offense, but rather an administrative omission,” contrary to the case in China where it could be punished with the death penalty. In addition, he indicated that “the fact that the death penalty has been annulled under Chinese law [...] does not offer any guarantee as to the way in which Wong Ho Wing would be dealt with if the provisional measures were lifted” because, “although, in the beginning, the Chinese Government offered guarantees to the Peruvian Government that it would not apply the death penalty in his case [...], these guarantees were never reliable,” owing, *inter alia*, to the existence of “previous instances of non-compliance by China of guarantees offered to abstain from applying the death penalty in case of extradition.” Lastly, he stated that “it would not be surprising that [...] China failed to comply with the commitments it had made to Peru, using the argument of sovereignty, because once under Chinese jurisdiction, [Wong Ho] Wing will be totally unprotected.”

10. The Inter-American Commission considered that Peru’s request to lift the provisional measures “was inadmissible, because Peru did not have sufficient information to consider that the circumstances that justified the provisional measures had changed.” The Commission observed that the translation of the supposed annulment of the death penalty for the offense of commodity smuggling was provided by the Chinese diplomatic authorities in Peru and “it is unclear if it constitutes a certified translation.” The said document “merely transcribes the respective provisions underlining those that were supposedly amended.” In this regard, the Commission observed that “the available information gives rise to a series of concerns about the relevance of the amendment to the law in [...] China in relation to the specific situation of Wong Ho Wing.” On the one hand, “the available information does not directly reflect the State’s assertions in its brief and, on the other hand, irrespective of the information available, the Peruvian State has not provided basic information such as the text of the amendment, its entry into force, the duration of its application, and information on the context of the application of the death penalty in China.”

B. Considerations of the Court

11. The Court recalls that these provisional measures were granted at the request of the Inter-American Commission in the context of petition P-366-09, merely in order “to permit the Commission [...] to examine and rule on the [said] petition,” which was declared admissible in Report No. 151/10 of November 1, 2010.² Consequently, in this order, the Court will not deal with any arguments of the parties that fall outside the duly defined purpose or which relate to the merits of the dispute.

12. The Court reiterates that, regarding the preventive aspect, the object and purpose of these measures is to preserve the rights that are possibly at risk until the dispute is resolved. Their object and purpose are to ensure the integrity and effectiveness of the decision on merits and, thus, avoid harm to the rights in litigation, a situation that could render useless or nullify the *effet util* of the final decision. With regard to the protective nature of the provisional measures, they represent a real

² Admissibility Report of the Inter-American Commission on Human Rights No. 151/10, of November 1, 2010, para. 46.

jurisdictional guarantee of a preventive nature, because they protect human rights, inasmuch as they seek to avoid irreparable harm to the beneficiary.³

13. In its order of March 4, 2011, the Court granted an extension so that the State could “complete and deliver to the Court the information that was pending, [including] official copies with their certified translation of the definitions in the Penal Code, together with the respective updated sanctions, of the offenses of tax evasion and bribery for which the Peruvian Supreme Court of Justice has considered the extradition of Wong Ho Wing admissible.”⁴

14. The Court assesses positively the information and documentation forwarded by the State (*supra* second having seen paragraph) concerning the alleged changes in the law that have taken place in the People’s Republic of China (*supra* eighth considering paragraph). However, the Court does not have an official text that reflects the possible annulment of the death penalty for the offense of commodity smuggling in China. Indeed, the Court has not received an official copy of the Eighth Amendment of the Chinese Penal Code that was supposedly approved on February 25, 2011, by the People’s National Assembly of China, but merely a copy, in Chinese and in Spanish, of the articles of the said Penal Code, as they were drafted before the reform, and with the parts of the articles supposedly derogated underlined in the text, with the indication that “the content underlined has been derogated in the new Amendment to the Chinese Penal Code” in brackets. In addition, the Court does not have enough information on the entry into force of the said reform, whether it would be applicable to this case, or the possible specific effects with regard to Wong Ho Wing. Peru merely reaffirmed the guarantee given to it by the People’s Republic of China, that the death penalty would not be applied to Wong Ho Wing if he received a final criminal judgment convicting him.

15. Additionally, the Court finds that, from the information forwarded by the parties, it is not evident that there has been a change in the circumstances that, at one time, justified the adoption of these provisional measures, which continue in force in this matter.

16. Moreover, to enable the Inter-American Commission to comply with its convention-based mandate, and considering that the proceedings relating to petition P-366-09 are at the merits stage and that the Commission anticipates issuing the corresponding report this year,⁵ the Court finds it pertinent to order that these provisional measures should remain in force until December 15, 2011, as established in its orders of May 28, 2010, and March 4, 2011. Furthermore, the Court reiterates that, if, when this time limit expires, the Commission has not reached a decision on the merits of the case, it can be presumed that the alleged urgency has ceased to be applicable.

17. Lastly, the Court decides not to admit the briefs, or the corresponding attachments, forwarded by the representative on April 27, 2011 (*supra* third having seen paragraph), and by the State on May 27, 30 and 31, 2011 (*supra* fifth having seen paragraph), because the Court had not requested the first brief, and because the

³ *Case of Wong Ho Wing*. Provisional measures with regard to the Republic of Peru. Order of the Inter-American Court of Human Rights of March 4, 2011, tenth considering paragraph.

⁴ *Case of Wong Ho Wing*, *supra* note 3, seventeenth considering paragraph.

⁵ *Cf. Case of Wong Ho Wing*, *supra* note 3, seventh and fifteenth considering paragraphs.

others were forwarded with a delay of more than a month in relation to the time limit granted by the Court in the second operative paragraph of the order of March 4, 2011.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

pursuant to the authority conferred by Article 63(2) of the American Convention and Article 27 of its Rules of Procedure,

DECIDES:

1. To require the State, in accordance with the provisions of this order, to abstain from extraditing Mr. Wong Ho Wing until December 15, 2011.
2. To require the Secretariat to notify this order to the Inter-American Commission on Human Rights, the representative of the beneficiary, and the Republic of Peru.

Leonardo A. Franco
Acting President

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Leonardo A. Franco
Acting President

Pablo Saavedra Alessandri
Secretary