



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

July 25, 2014

Members of the Tribunal

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Washington, D.C.

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IcsidSecretariat@worldbank.org

Re: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12

SUBMISSION OF *AMICUS CURIAE* BRIEF ON THE MERITS OF THE DISPUTE

Dear Members of the Tribunal:

Amici respectfully request leave from the Tribunal to submit the attached *amicus curiae* brief, in the above-captioned matter, pursuant to Article 37(2) of ICSID's Arbitration Rules. We present this request in good time prior to the hearing on the merits and after having acquired knowledge of the written submissions of the contending parties, so as not to disrupt the arbitral proceedings, in accordance with the terms of cited article 37(2). *Amici* also request that the Tribunal maintains its position in favor of the transparency of this arbitration, which has witnessed how the briefs of the parties as well as the hearings and their transcripts have been open and available to the public.

As set forth in the *amicus curie* brief presented by *amici* during the jurisdictional phase and accepted by the Tribunal, *amici* are organizations members of the ***Mesa Nacional Frente a la Minería Metálica de El***

Salvador (the El Salvador National Roundtable on Mining) ("**La Mesa**"), a coalition of community organizations, research institutes, and environmental, human rights, and faith-based nonprofit organizations who collectively aim to improve public policy dialogue concerning metals mining in El Salvador.ⁱ

Similarly, as stated in the *amicus curiae* brief presented by *amici* during the jurisdictional phase, the facts underlying Claimant's claim are deeply intertwined with the social and political change that has occurred since the advent of representative democracy in post-civil war El Salvador. In this respect, there is little doubt that the Tribunal's decision over the merits of this case will impact on the communities that *amici* represent, including their lands, their livelihoods, and even their well-being and fundamental rights. Consequently, *amici* have a significant interest in the procedure, and it is critically important that their voices be heard and their perspectives be appreciated.

In addition, *amici* have particular knowledge of the complex political debate on metals mining and sustainability in El Salvador. As active participants in this social dialogue, *amici* are uniquely placed to provide the Tribunal with a different perspective from that of the disputing parties. At the same time, *amici* bring a perspective that addresses certain matters within the scope of the dispute and that would allow the Tribunal to better evaluate the dispute.

In their *amicus curiae* brief *amici* argue that the measures adopted by El Salvador regarding the mining project proposed by Pac Rim Cayman LLC find support on the State's international obligations on human rights and environment. In particular, human rights obligations relating to the environment require that El Salvador design and apply a legal framework to ensure the full enjoyment of fundamental rights threatened by risky activities of third parties. In the specific context of the hydric and environmental circumstances in El Salvador, mining imposes unacceptable risks to the population and the environment. Therefore, El Salvador's application of a domestic legal framework that provides effective protections to the rights of people threatened by the risk generated by activities of third parties is not a wrongful act; but rather the opposite. In the same way, the full implementation of the rights of access to information, participation and justice in environmental matters, enshrined in Principle 10 of the Rio Declaration on Environment and Development, requires the adoption of measures that reflect the content of the social dialogue over the use of natural resources in the country. Accordingly, *amici* argue that Claimants claims are baseless and should be dismissed.

Amici are juridical entities in El Salvador. None of the *amici* has received any financial or other support from any of the contending parties in relation to the elaboration of this *amicus curiae* submission.

Very truly yours,



Dr. Marcos A. Orellana
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)
 On behalf of *amici*

ⁱ *Amici are:*

Asociación de Comunidades para el Desarrollo de Chalatenango (The Association of Communities for the Development of Chalatenango) (“CCR”) is a nonprofit founded in 1988 that works in areas of community health, education, and human rights.

Asociación de Desarrollo Económico y Social (The Association for Economic and Social Development) (“ADES”) is a nonprofit founded in 1993 in Sensuntepeque, the nearest substantial city to the proposed El Dorado mine, that works with affected communities in the Cantón of Santa Marta.

CORDES is a non-governmental institution, nonprofit, with a goal of procuring community work, which promotes sustainable development, gender equality, and environmental conservation within communities where poverty was deepened by the civil war and those that have not been rendered attention and aid within the States policies.

Asociación para El Desarrollo de El Salvador (The Association for the Development of El Salvador) (“CRIPDES”) is a San Salvador-based development organization founded in 1984, at the height of the civil war, that now works more than 270 local women’s committees and 250 local youth committees in seven of the El Salvador’s 14 departments, including Cabañas.

Fundación de Estudios para la Aplicación del Derecho (The Foundation for the Study of the Application of the Law, “FESPAD”) is a social, legal, and political action center dedicated to protecting human rights and using the law as an instrument to help the neediest in society.

Unidad Ecológica Salvadoreña (The Salvadoran Ecological Union, “UNES”) is an NGO whose mission includes the defense of nature, improvement in quality of life, strengthening of communities, and the equal participation of men and women in the policy dialogue at the regional, national, and international levels.

AMICUS CURIAE BRIEF ON THE MERITS
By Member Organizations of
The El Salvador National Roundtable on Mining

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AMICUS CURIAE SUBMISSION

**By Member Organizations of
The El Salvador National Roundtable on Mining**

Pac Rim Cayman LLC v. Republic of El Salvador

ICSID Case No. ARB/09/12

I. INTRODUCTION

The written submissions of Pac Rim Cayman LLC (hereinafter "Pac Rim") and El Salvador in this arbitration tell two very different stories. In essence, while Pac Rim complains that El Salvador violated the terms of its Investment Law, among other legal sources, when it denied a mining exploitation concession in the area of "El Dorado", El Salvador argues that any rights Pac Rim may have had under its exploration license expired for failure to comply with the Mining Law.

At the jurisdictional stage, the Tribunal rejected Pac Rim's claims based on CAFTA-DR, but accepted its jurisdiction over the claims relating to El Salvador's Investment Law. Therefore, at this stage of the proceedings, the Tribunal has to decide on various legal issues, including the following: What laws apply to the dispute? What is the nature of the rights conferred by exploration licenses and mining concessions in El Salvador? What is the purpose of the requirements of the Mining Law and the ministerial approval of an exploitation concession? Did Pac Rim comply with the requirements established in the Mining Law to obtain an exploitation concession? Did Pac Rim have the duty to comply with the requirements established in the Mining Law regarding the authorizations or permissions from the surface landowners within the requested exploitation concession area of "El Dorado"? The answers to these and other questions will determine the outcome of this arbitration.

In this *amicus curiae* brief, *amici* do not intend to comprehensively address each and every one of these issues. Rather, *amici* present to the Tribunal a vision and perspective on the progressive development of the international law on human rights and the environment, in relation to the measures taken by El Salvador. *Amici* point out that this analysis is key to the full appreciation of the domestic legislation of El Salvador. Indeed, international human rights law has evolved and now establishes certain obligations regarding the environment that are applicable to El Salvador. Accordingly, El Salvador faces the obligation of designing and applying a normative framework to protect effectively the enjoyment of rights from the environmental, health and safety risks caused by the activities of third parties. Compliance with this international obligation does not constitute a wrongful act.

Furthermore, international law now recognizes the vital role played by the rights of access to information, participation, and justice in environmental matters, especially in the design and implementation of environmental norms. In this manner, a societal dialogue based on respect for access rights and environmental democracy is at the core of the definition of the public interest and sustainable development. The public interest is thus defined on the basis of respect for human rights and the environment, and so defined, the public interest limits and legitimates the exercise of the State's permanent sovereignty over its natural resources.

These considerations are relevant to certain issues in the arbitration, as elaborated next.

II. INTERNATIONAL HUMAN RIGHTS LAW REQUIRES A REGULATORY FRAMEWORK THAT ENSURES ENVIRONMENTAL PROTECTION AGAINST RISKS GENERATED BY EXTRACTIVE INDUSTRIES

The disputing parties are divided as to the question of the purpose of the established requirements of the Mining Law and the ministerial approval of a mining exploitation concession.

Pac Rim alleges that the holder of an exploration license is entitled to an exploitation concession if it discovers a deposit, and that approval of the concession merely serves to promote mining by confirming that the investor has the technical ability to extract minerals from the deposit found.¹

El Salvador argues by contrast that the holder of an exploration license does not have an automatic right to an exploitation concession because the Ministry of Environment and Natural Resources must first consider whether the requirements of El Salvador's Mining Law are met, and the Ministry of Economy must determine whether the exploitation concession is in the public interest.² El Salvador also alleges that legal requirements and administrative procedures relating to the granting of a mining concession fulfill the critical role of safeguarding interests and rights recognized under the Constitution of El Salvador, such as are freedom, health, culture, economic well-fare, social justice, sustainable development, protection of natural resources, and the diversity and integrity of the environment.³

Amici argue that the design and implementation of an appropriate regulatory framework to ensure the effective enjoyment of fundamental rights against the risks posed by extractive industries is an obligation under international human rights law. The Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (hereinafter, Independent Expert on human rights and environment) of the Human Rights Council of the United Nations has observed that States bear the obligation "to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights."⁴ Therefore, *amici* argue that the implementation of such a regulatory framework cannot constitute a wrongful act.

This chapter analyzes the environmental dimension of human rights. The consideration of human rights obligations relating to environmental protection, both in their procedural and substantive dimensions, reveals how the application of the internal regulatory framework of El Salvador seeks to safeguard fundamental rights against the risk generated by Pac Rim's mining project.

ii. i. International Law recognizes the integration between human rights and the environment

International law, upon the grave environmental and equity crisis facing the planet, has evolved towards recognition of the links between human rights and the environment. These links reflect the moral

¹ Pac Rim's Memorial on the Merits and Quantum (March 29, 2013), at 515-520. Hereinafter "Pac Rim's Memorial".

² El Salvador's Counter-Memorial on the Merits (January 10, 2014), at 46-54. Hereinafter "El Salvador's Counter-Memorial".

³ El Salvador's Counter-Memorial at 40, 59, 90.

⁴ John Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53, (December 30, 2013). Hereinafter, "*Mapping Report*", at 46.

conscience regarding the inter-relationship between humanity and nature. The links between human rights and environment provide new legal tools that are necessary to address the deleterious consequences of certain practices, such as extractive industries in densely populated areas that suffer from water shortages, which can generate extensive damage to biodiversity and soils as well as to the food sources upon which local communities rely.

In March 2014, the Independent Expert on human rights and environment presented his Second Report to the Human Rights Council on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (hereinafter "*Mapping Report*").⁵ This *Mapping Report* identifies the human rights obligations relating to the environment, based on a comprehensive analysis of global and regional sources. Also, this second report reaffirms the conclusion of the Independent Expert's first report: "environmental degradation can and does adversely affect the enjoyment of a broad range of human rights,"⁶ and that "[...] all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment."⁷

In light of the Independent Expert's *Mapping Report*, in its March 2014 session the Human Rights Council recognized by consensus that "human rights law sets out certain procedural and substantive obligations on States in relation to the enjoyment of a safe, clean, healthy and sustainable environment."⁸ Similarly, the Human Rights Council has also recognized that, "while human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population who are already in vulnerable situations."⁹

The implementation by the State of human rights obligations regarding the environment is effected through the design and application of a normative framework. In light of these obligations, the internal legal framework of the State must be applied in such a manner that provides effective protection to the environment and the rights of individuals.

ii. ii. In the face of environmental risk, the State must adopt suitable measures to prevent negative impacts on human rights

As stated by the Independent Expert on human rights and environment in his *Mapping Report*, "States have obligations to protect against environmental harm that interferes with the enjoyment of human rights."¹⁰ In particular, States have the obligation to take effective measures to respond to risks resulting from programs or projects, regardless of whether they are conducted by the State or third parties, so as to prevent the materialization of environmental damage that interferes with the enjoyment of human rights. In turn, the rules of international environmental law reinforce these obligations.

⁵ John H. Knox, *Mapping Report*, *supra* note 4.

⁶ Knox, John, "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", A/HRC/22/43, (December 24, 2012), at 34.
http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf

⁷ *id.* at 19.

⁸ Human Rights Council, Resolution 25/21, A/HRC/25/L.31, (March 24, 2014).

⁹ *id.*

¹⁰ John H. Knox, *Mapping Report*, *supra* note 4 at 44.

Thus for example the case *Tatar v. Romania*, heard by the European Court of Human Rights, demonstrates the State's obligation to assess environmental risks, even in situations of scientific uncertainty, and to take appropriate measures to address said risks.¹¹ In the *Tatar* case, the operations of a mining company generated serious water pollution with cyanide, and the European Court of Human Rights declared the State's responsibility for lack of a proper risk assessment and the failure to adopt suitable measures to prevent the impairment of human rights in the face of such risk.

Extractive industries pose serious risks to the effective enjoyment of human rights. The Special Rapporteur on human rights obligations related to environmentally sound management and disposal of hazardous substances and wastes has produced a report on the adverse effects on the enjoyment of human rights of the unsound management of hazardous substances and waste used in and generated by extractive industries. In that report, the Special Rapporteur notes that,

Mining for the extraction of resources generally fall within two categories of activities: excavation and beneficiation. Each of these activities generates its own waste stream and management issues. Excavation techniques entail surface, underground and solution mining. Underground (or sub-surface) mining involves the construction of tunnels or shafts to reach buried ore deposits, and can extend several miles underground. Solution mining (or in situ, leaching or recovery) involves the injection of a liquid (e.g. water, sulphuric acid, nitric acid, hydrogen peroxide or carbonates) leaching solution into porous rock through a borehole to dissolve the desired resource.¹²

The International Union for the Conservation of Nature, in a detailed examination of the context and consequences of the proposed mine project "El Dorado", prepared by Professor Richard Steiner, already evidenced in 2004 that "people living near mining exploration activities began to notice environmental impacts of mineral exploration...[such as] reduced access to water, contaminated water, impacts on agriculture, and health problems."¹³ Clearly, the negative effects felt by the people at the exploratory stage were only a preview of what they could expect if the El Dorado mine were to be developed.

ii. iii. The legal requirements for a mining concession must ensure respect for internationally recognized human rights

As stated by the Human Rights Council, "environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights."¹⁴ It is evident that to avoid the negative consequences of environmental damage, an appropriate legal framework establishing suitable legal requirements is essential. In this regard the legal requirements for a mining concession must ensure respect for internationally recognized human rights.

¹¹ App. No. 67021/01 (Jan. 27, 2009).

¹² U.N. Human Rights Council, 21st Sess., A/HRC/21/48 (Jul. 2, 2012), at 5.

¹³ Richard G. Steiner, *Gold, Guns, and Choice: The El Dorado gold mine, violence in Cabanas, CAFTA claims, and the national effort to ban mining*, "IUCN Report". Feb. 2010, <http://www.walkingwithelsalvador.org/Steiner%20Salvador%20Mining%20Report.pdf>

¹⁴ Human Rights Council, A/HRC/16/L.7, (March 24, 2011).

Under the normative framework established by international law, the principal human rights that are directly affected by extractive industries must be considered. These rights include, but are not limited, to the right to live in a healthy environment, the right to health and a life of dignity, the right to property and territory, the right to water and sanitation, and the right to food. The normative content of each of these rights imposes specific obligations on States. For example, the right to live in a healthy environment imposes obligations regarding the State's legal and institutional framework, as detailed below.

In addition to the specific obligations stemming from each protected right, international law requires the State to regulate private actors to protect against environmental damage. As noted by the then Special Representative on human rights and transnational corporations and other businesses, "the State duty to protect against non-State abuses is part of the very foundation of the international human rights regime. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations."¹⁵ Therefore, the legal requirements and administrative procedures relating to mining concessions find support on the State's obligation to protect individuals against potential or actual abuses by third parties.

ii. iv. The EIA and consultations are not mere formalities; rather, they are key elements of the legal system designed to prevent infringement of rights and environmental damage

According to the *Mapping Report* of the Independent Expert on human rights and environment of the Human Rights Council, "human rights law imposes certain procedural obligations on States in relation to environmental protection."¹⁶ The Independent Expert adds that such obligations include the duty to: "(a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm."¹⁷

These procedural rights, therefore, are not mere formalities, as the Claimant alleges. Rather, respect for access rights provides society with a peaceful channel for dialogue to hold a public conversation about issues of national importance, such as the use of natural resources and environmental protection. The denial of this space generates conflict and violence, as tensions in society cannot find institutional channels of expression. Social dialogue that enables access rights in turn also enables the development of measures to prevent environmental damage and infringement of rights. Social dialogue also allows the development of a balanced development policy, as elaborated further below.

Therefore, an incomplete or deficient environmental impact assessment, or an incomplete or deficient economic feasibility study, does not satisfy the procedural obligation of the State. In other words, the State is obliged to ensure that the public enjoys timely access to accurate environmental information, including a proper environmental impact assessment.

¹⁵ John Ruggie, Implementation of General Assembly Resolution 60/251, A/HRC/4/35, at 18.

¹⁶ John H. Knox, Mapping Report, *supra* note 4 at 29.

¹⁷ *Id.*

ii. v. *The effective implementation of the right to live in a healthy environment requires institutional and normative capacity*

The right to live in a healthy environment has gained great strength in international law, both at the global and regional levels. Globally, the Stockholm Declaration on the Human Environment proclaims that, "[M]an has the fundamental right to [...] equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".¹⁸ In a similar fashion, Principle 1 of the Rio Declaration on Environment and Development (1992) provides that "[H]uman beings are at the center of concerns for sustainable development," and they are "entitled to a healthy and productive life in harmony with nature."¹⁹

In interpreting this right, it is essential to underline the observations of the Committee on Economic, Social and Cultural Rights in respect of the right to the highest attainable standard of health. In its analysis of Article 12 of the International Covenant on Economic, Social and Cultural Rights (which El Salvador is a party to), the Committee noted the existence of an indissoluble bond between the right to health and "a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition [...], access to safe and potable water [...] and a healthy environment."²⁰ From this perspective, the realization of the highest attainable standard of health synergizes with the protection of the right to a healthy environment.

At the regional level, the additional Protocol to the American Convention on Human Rights in the subject of Economic, Social and Cultural Rights, which El Salvador is a party to,²¹ provides that "[e]veryone has the right to live in a healthy environment [...]"²² and that "[t]he party States shall promote the protection, preservation and improvement of the environment."²³ In 2013, the Organization of American States adopted indicators to monitor compliance with the right to live in a healthy environment contemplated in the San Salvador Protocol.²⁴ These indicators include among others the institutional and regulatory capacity of the State to give expression to the right in question. Therefore, the normative framework and administrative procedures established under the internal law of a State cannot be discounted as mere formalities; instead, they are essential for the effective implementation of the right to live in a healthy environment.

To sum up, in the face of the environmental hazards caused by extractive industries, the State is required to take suitable measures to prevent human rights infringements. This obligation provides strength and support both to the objectives as well as to the actual application of the legal requirements and administrative procedures established under domestic law for the issuance of a mining concession.

¹⁸ Stockholm Declaration, Declaration of the United Nations Conference on Human Environment, Principle 1.

¹⁹ Rio Declaration on Environment and Development.
<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>

²⁰ Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), at 4.

²¹ Ratification effected on May 4, 1995. See, <http://www.oas.org/juridico/spanish/firmas/a-52.html>.

²² Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"), 16 November 1999, A-52, available at: <http://www.oas.org/juridico/english/treaties/a-52.html> [accessed 25 July 2014]

²³ *id.* at Article 11.2.

²⁴ OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, (November 5, 2013).

III. FULL RESPECT TO THE ACCESS RIGHTS OF COMMUNITIES AFFECTED BY INVESTMENT PROJECTS IS THE BASIS OF SUSTAINABLE DEVELOPMENT, IN ACCORDANCE WITH PRINCIPLE 10 OF THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

The disputing parties are divided on the question of how the public interest is defined in El Salvador, as well as on the requirements under the Mining Law concerning authorizations from landowners in the area of exploitation.

Pac Rim alleges that El Salvador has established that mining is in the public interest, and therefore any restrictions on mining would stand against the public interest.²⁵ El Salvador by contrast argues that metals mining is not presumed to be in the public interest, as there is a regulatory framework established so that the pertinent administrative entities may arrive at a determination of what is in the public interest.²⁶

Amici allege that the public interest is defined on the basis of respect for human rights and the environment. An activity that impairs human rights cannot be considered of public interest. Similarly, an activity that causes environmental harm cannot be considered of public interest. Under this light, the public interest finds expression in the concept of environmental democracy constructed on the basis on full respect for the rights of access to information, participation and environmental justice, in accordance with Principle 10 of the Rio Declaration on Environment and Development (hereinafter the "Rio Declaration").

- iii. i. The requirement in the Mining Law regarding the authorizations from the landowners in the area covered by the requested mining concession gives expression to Principle 10 of the Rio Declaration*

Pac Rim alleges that the requirement under the Mining Law concerning authorizations from landowners within the area covered by the proposed concession is unconstitutional. El Salvador on its part argues that only the Supreme Court of El Salvador can declare a law unconstitutional.

Amici argue that this requirement gives expression to Principle 10 of the Rio Declaration, as the owners of the land within the concession area would be directly affected by the proposed mining; therefore they are entitled to participate in the legal process relating to the exploitation concession. One way to ensure said participation is to require the authorization of the owners of the surface pieces of land located within the mining exploitation area.

Principle 10 was adopted at the Earth Summit in 1992 and it provides that the best way to deal with environmental issues is with the participation of all concerned citizens, at the relevant level. Principle 10 thus redefines the central notion of development as a participatory process, based on a social dialogue. For this reason Principle 10 excludes purely vertical notions of governance, where development decisions are made by bureaucrats in national capitals, or in the worst case, at the offices of international financial institutions or transnational corporations, without taking into consideration the views of those individuals and communities directly affected by those decisions. In this respect, Principle 10 crystallizes a notion of governance that gives

²⁵ Pac Rim's Memorial, at 462.

²⁶ El Salvador's Counter-Memorial, at 90.

expression to a foundational democratic principle: the right of people to participate in decisions that affect them.

The democratic order deepens when fundamental rights and real processes of citizen participation are observed. This observation is particularly important for the Latin America and Caribbean region, which has witnessed the proliferation of foreign investment mega-projects that generate severe environmental impacts, uprooting the lives of many people and generating pollution and changes in the use of land and territories. Violations of environmental rights and the subsequent denial of environmental justice have generated a significant increase in the number of socio-environmental conflicts in the region, and these conflicts now threaten democratic governability and social stability.

- iii. ii. *The process in Latin America and the Caribbean toward a regional instrument on Principle 10 emphasizes the importance of strengthening mechanisms that can ensure the full implementation of access rights*

At the United Nations Conference on Sustainable Development held in Rio de Janeiro in 2012 and known as Rio+20, ten States of Latin America and the Caribbean signed the *Declaration on the Implementation of Principle 10 of the Rio Declaration on Environment and Development*. By mid-2014, nine more countries have signed the Declaration, including El Salvador. These nineteen countries represent over 500 million people and include more than half of all countries in Latin America and the Caribbean.

The signatory countries to the Declaration express their support for a process that explores the viability of having a regional instrument that will assure the comprehensive implementation of the rights of access to information, participation and justice, enshrined in Principle 10 of the Rio Declaration. This process is ongoing, according to a 2012-2014 Action Plan agreed by the signatory countries, and has already seen the successful completion of several meetings of the focal points and of working groups, the adoption of important documents, and the increase in the number of States from the region that have signed the Declaration.

Latin America and the Caribbean are heading towards the construction of a new international instrument that may enable the strengthening of environmental democracy. This instrument is expected to contribute to the full implementation of the rights of access to information, participation and environmental justice. Said regional instrument has the potential to impact the lives of millions of people in the region, as it would operationalize the rights of access enshrined in Principle 10.

- iii. iii. *The public interest is defined on the basis of the enjoyment of access rights and environmental democracy*

Effective implementation of Principle 10 is vital to the full expression of the principle of democratic inclusion, by virtue of which persons and concerned groups have the right to participate in decision-making processes. Lack of respect for access rights impedes adequate consideration of diverse cultural processes, and

prevents incorporation of existing cultural dynamics into sustainable development planning.²⁷ Consequently, the access rights enshrined in Principle 10 reflect an essential concept of democracy that is inextricably linked with the effective observance of rights, beyond simply having formal elections.

In the 21st century new legal tools are needed in order to combat the spread of socio-environmental conflicts and reverse ecological degradation, and in this way ensure peace, coexistence, and social dialogue. A regional instrument regarding access rights presents a real opportunity for empowering local communities and strengthening the organs of the State so that the debates about sustainability are conducted within the framework of institutional channels that give consideration and expression to the plurality of voices within society and the public interest. Therefore, an instrument about access rights creates the possibility for new spaces of legitimacy for the social contract and the construction of a culture of respect and inclusion.

Therefore, the public interest can only be defined on the basis of the exercise of access rights and environmental democracy. Without said space for peaceful dialogue, the concept of public interest loses its material content and becomes a risky legal and political category that has been abused in an attempt to legitimize projects or activities that threaten human rights and the environment.

iii. iv. The public interest defined on the basis of respect for human rights limits and legitimizes the permanent sovereignty of the State over natural resources

The concept of permanent sovereignty over natural resources emerges as a reaction of States that gained independence after decolonization. These States saw in the existing international public law structures an economic obstacle to their development. The concept of permanent sovereignty over natural resources sought and found support in the international law of human rights, particularly the right to self-determination of peoples, which is recognized as having the character status of *jus cogens*.

By virtue of its permanent sovereignty, the State defines its policy regarding use of its natural resources as well as its normative framework that implements said policy. Therefore, it would not stand to reason for a mining company to receive monetary compensation for the non-issuance of a permit to which it has no right under the applicable internal legal order.

The exercise of permanent sovereignty over natural resources, however, is subject to limits under the law on human rights. Initially the obligation to use natural resources for the welfare of the people and in the interest of national development was recognized.²⁸ Today it is also recognized that human rights obligations regarding the environment impose a limit on the exercise of permanent sovereignty over the State's natural resources.

In the same manner, today it is recognized that the collective property rights of indigenous communities to their lands and territories impose a limit on the exercise of the State's sovereignty. Similarly, it is recognized that the right to live in a healthy environment imposes procedural and substantive obligations on

²⁷ ECLAC, *Conference on Sustainable Development in Latin America and the Caribbean: Follow up to the United Nations development agenda beyond 2015 and to Rio+20*, pg. 71 (2013).

²⁸ Paul Peters, Nico Schrijver & Paul de Waart, *Permanent Sovereignty, Foreign Investment and State Practice*, in *PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW* 88, 104 (Kamal Hossain & Subrata Roy Chowdhury eds., 1984).

States. Furthermore, it is also recognized that the full exercise of access rights is the basis of the social dialogue in a democracy that defines the public interest. Therefore, the voice of the local communities, social movements, non-governmental organizations, and other entities in civil societies acquire central relevance in the determination of the public interest.

In a country such as El Salvador, which suffers from water scarcity and high population density, the public debate on the use of natural resources and environmental protection has led the government to protect the public from the threats posed by extractive industries. This democratic dialogue is an expression of the founding principles of sustainable development. International law on foreign investment, including investment arbitration, should not constitute an obstacle to the attainment of sustainable development.

IV. PAC RIM'S PRESENCE IN EL SALVADOR HAS GENERATED SOCIAL CONFLICT, WHICH HAS RESULTED IN ASSAULTS AGAINST ENVIRONMENTAL AND HUMAN RIGHTS DEFENDERS

Pac Rim intends to make the Tribunal believe that only a few people are opposed to its mining project in the Department of Cabañas. The testimony of ADES, one of the organizations signing this *amicus curiae* brief that works directly with local communities in Cabañas, makes clear that most of the population has opposed mining, due to the risks that mining poses on the scarce water resources in the territory.

It must be stressed that Pac Rim's project never received a social license to operate. Rather, the tactic of "divide and conquer" employed by the company has generated social conflict, which has led to assaults against environmental and human rights defenders.

iv. i. The conflict and the assaults against environmental advocates have attempted to silence the public debate on mining and sustainable development

According to a detailed report by the International Union for Conservation of Nature on the case of El Dorado mine, the company Pac Rim has attempted to buy their "social license to operate."²⁹ As noted in said report, payments in the order of \$1 million/year have funded community projects, parties, and payments have been made to several mayors of the region.³⁰ The result of Pac Rim's divide-and-conquer strategy has been the creation "of what social psychologists describe as "corrosive communities," in which "an intense sociopolitical polarity [has] developed between proponents and opponents of mining [that has led] to social tensions, emotional stress, disintegration of civil society, political turmoil, and violence."³¹ El Salvador's violent past and remaining political divisions have aggravated the conflict.

The consequences for community members who have led the opposition to Pac Rim's plans have been particularly violent—and in some cases fatal. Beginning in March of 2006 and continuing through the present, several of the most vocal opponents of the proposed El Dorado mine have been the victims of murders, abductions, torture, assaults, and threats that El Salvador's Ombudsman for Human Rights has concluded "are

²⁹ UICN Report, *supra* note 13, at 21.

³⁰ *Id.*

³¹ *Id.*, at 19.

very probably related to each other, thus enabling us to infer that they are also linked to the victims' work in defense of the environment.³² In October 2010, La Mesa documented and denounced the violence against environmental defenders opposed to mining in El Salvador at a hearing at the Inter-American Commission of Human Rights of the Organization of American States.³³

This disturbing trend took a particularly vicious turn for the worse in 2009. The first victim was Marcelo Rivera, Director of the Association of Friends of San Isidro and a member of La Mesa. Marcelo was kidnapped from a bus in the area near the proposed El Dorado mine on June 18, 2009 and whose body, which showed signs of torture that were consistent with former Death Squad tactics of the civil war, was subsequently found at the bottom of 30 meter deep dry well. Marcelo was also an outspoken opponent of the El Dorado mine. On September 22, 2010, three individuals were sentenced to 40 years each for their direct participation in Marcelo's murder. El Salvador's Ombudsman has faulted the Attorney General's office and the police for their handling of the investigation and specifically for their refusal to view the crime in the context of the struggle against mining.

The next murder of a mine opponent occurred on December 20, 2009, when Ramiro Rivera, vice president of the *Comité Ambiental de Cabañas* and a leader of local opposition to Pac Rim, was gunned down by at least four gunman armed with M-16 military assault rifles as he drove a steep road near Pac Rim's proposed Santa Rita mine site. With him in his truck at the time was José Santos Rodríguez, another outspoken Pac Rim opponent, Felicita Eschevarría, thirteen-year-old Eugenia Guevara, and two armed police guards that had been assigned to protect Ramiro. Felicita was also killed in the attack; Eugenia was severely injured. Ramiro had led actions by local people to evict exploration equipment used by Pac Rim at the Santa Rita site, and following those actions had received death threats.

Less than a week later, on December 26, 2009, another environmental defender was murdered, Dora Alicia Recinos Sorto. She was an active member of *Comité Ambiental de Cabañas*. She was shot with a rifle as she returned from a spring where she had been washing clothes. Alicia was 8 months pregnant at the time of her murder; her unborn child died with her in the attack. Her two-year-old son, who was with her when she was gunned down, was shot in the leg. A police station is located approximately 300 meters from the location of Alicia's murder, but police stationed there were apparently unable to prevent the attack or apprehend its perpetrators.

In reaction to the murders, El Salvador's Ombudsman issued a public statement before the media on December 28, 2009, condemning the acts and urging for security measures to be adopted to protect the members of the Environmental Committee of Cabañas and their families. The Ombudsman stated:

*Given the time elapsed between the homicide of Mr. Gustavo Marcelo Rivera Moreno and the constant complaints of death threats and attacks against members of the environmental defense organizations in the area, without conclusive and satisfactory results of investigations of the crimes, their motives and culprits, this could have been a principal factor that led to the subsequent acts of violence... On top of that, none of the criminal investigations in these cases has made any public mention of possible intellectual authors. This Ombudsman's Office notes that there are sufficient elements in the homicides, in the way they have been carried out and the levels of planning involved, to lead one to believe that **the homicides and other events may be related and have a common origin.***

³² *Id.*, at 34.

³³ See, Center for International Environmental Law, *Environmental Defenders in Danger: The Situation in Mexico and Central America in the Context of the Mining Industry*, (October 2010).

Among the "other events" to which the Ombudsman refers in this statement are the attacks on Father Luis Quintanilla, a Catholic priest in Cabañas and a vocal opponent of Pac Rim's plans in the area. Father Quintanilla hosts a show on Radio Victoria, a key local radio station, and has been the subject of death threats since 2006. In the summer of 2009, after being followed and photographed while driving in May of 2009 and evading masked gunman while driving on July 13, 2009, Father Quintanilla was stopped at roadblock on July 27, 2010 by masked gunman, who he overheard say to one another: "Should we kill him now? No, we are supposed to take him alive." Father Quintanilla was only able to evade capture by leaping from his car and down a ravine.³⁴ Radio Victoria itself has also been the object of intimidation and vandalism aimed at disabling its broadcast capabilities.³⁵

As the Ombudsman of El Salvador has concluded, there are several and strong leads that suggest not only that these events are linked with one another but also to the social conflict generated by the presence and activities of Pac Rim. Although assaults against environmental defenders have attempted to silence the public debate on mining and sustainable development, the work of La Mesa, including that of its members working in the Department of Cabañas, continues in defense of the environment and human rights.

iv. ii. The National Roundtable against Metals Mining is organized for the defense of the environment and human rights

The *amicus curiae* brief submitted by *amici* at the jurisdictional stage describes how "La Mesa" emerges in El Salvador from the first hand experiences of affected communities and their commendable efforts to organize and protect themselves. Here it only remains for us to underlie that La Mesa continues its work towards the strengthening of a representative democracy in El Salvador that may be sufficiently robust to safeguard the environment and human rights.

V. CONCLUSION

Contemporary international law enshrines human rights obligations relating to environmental protection. These obligations protect the right to live in a healthy environment, the right to health and a life of dignity, the right to property and lands, and the right to water and food, among other human rights. These rights are fundamental to the attainment of the sustainable development of the territory and to the protection of local communities that reside therein.

The implementation by the State of a normative framework designed to protect these rights against the risks posed by extractive industries is supported by international human rights obligations. Especially in a country like El Salvador, who suffers from high population density and scarcity of water resources, the application of legal requirements and administrative processes are indispensable tools for the State to safeguard the rights threatened by extractive industries.

³⁴ IUCN Report, *supra* nota 13, at 15.

³⁵ See *id.*, at 42-49; *Urgent Action: Denounce recent wave of death threats and crimes against El Salvadoran anti-mining movement*, SHARE et al., Jan. 31, 2011, courtesy link at <http://bit.ly/eZx6l6> (www.miningwatch.ca).

ANNEX: TESTIMONY BY ADES

What damage is known since mining companies arrived to the country, especially to the Department of Cabañas?

The inhabitants of the communities near mining projects assert that when companies arrived, enmity between the inhabitants arose; there were divisions between those who saw the exploitation of mines as necessary for the creation of jobs and those who rejected mining due to the impacts on human health and the environment that mining could generate.

In the case of Cabañas, Pacific Rim through royalties and the promise of job creation, led a sector of the population to believe that metals mining was necessary; this is why this sector of the population, which was a minority, supported the tactics of blackmail, threats and assaults against people that were opposed to mining.

In this context of conflict, in 2009 in the town of San Isidro, the environmentalist Marcelo Rivera was kidnapped and murdered. Later that same year, Ramiro Rivera, also an environmentalist, was ambushed and murdered by hired assassins. Dora Sorto was also murdered. The assassins did not respect her life despite being pregnant and having another young child in her arms; the assassins discharged their guns without any mercy.

The company has tried to silence public debate on mining and sustainable development. They have wanted to show that just ADES as an NGO opposes the exploitation of mining, when it has been demonstrated by surveys that more than 70% of the population of Cabañas opposes the exploitation of mining.

Other visible damages that are highlighted are the perforations that were made during the exploration process. These perforations dried up water sources, and animals died as a result of the dumping of toxic waste into the Department's local rivers.

In Cabañas, death threats were also recorded against community reporters from Radio Victoria. There was also persecution of community and religious leaders who opposed to mining.

The company, with its intentions to achieve the exploitation of the mine, created a strategy to obtain support for the project: it gave impulse to the creation of the *mesa de la minería verde* ("the roundtable on green mining") and of mining unions that were formed by people who did not belong to the community, people who were paid by the company with the goal of representing that the company had obtained the communities' support.

However, these strategies did not manage to intimidate the majority of the population that does not want mining.

ADES is responsible for the publication of this report, which is supported by evidence, scientific research and photographs, showing the impacts already generated as a result of the El Dorado mining exploration project.

DATED: July 25, 2014

By:

A handwritten signature in black ink that reads "Marcos A. Orellana." The signature is written in a cursive style and is underlined with a single horizontal stroke.

Dr. Marcos A. Orellana
Counsel of Record,
On behalf of *Amici*

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