

12 October 2021

Mr. Felipe Bulnes Serrano,
Dr. Stanimir Alexandrov,
Prof. Philippe Sands,
Ms. Anna Toubiana,

By email: [REDACTED]

Re: Joint application seeking authorization for the Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L. and the Center for International Environmental Law to act as *amicus curiae* in Arbitration proceedings Odyssey Marine Exploration, Inc. v. United Mexican States (ICSID Case No. UNCT/20/1)

Dear Members of the Arbitral Tribunal, Dear Secretary of the Tribunal,

Pursuant to Procedural Order No. 1 of 13 April 2021¹, Annex 1 (revised)² and the Joint Statement of NAFTA Free Trade Commission on Non-Disputing Party Participation dated 7 October 2003,³ the Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L. (the “**Cooperativa**”) and the Center for International Environmental Law (“**CIEL**”) hereby respectfully submit this application for leave to file a non-disputing party submission (*amicus curiae*) (the “**Application**”) in the arbitration case Marine Exploration, Inc. v. United Mexican States (ICSID Case No. UNCT/20/1). Specifically, the *amici* request that the tribunal (the “**Tribunal**”) admit and consider the submission attached hereto as Annex (the “**Submission**” or “**Annex**”).

In accordance with paragraph 12 of Procedural Order No.1,⁴ the proposed *amici* file the Application and its Annex simultaneously in English and Spanish.

The Cooperativa is an association of fishermen incorporated voluntarily in order to collectivize work efforts and thus enhance their activities. The Cooperativa’s equitable and solidarity-based labor relationship in the Gulf of Ulloa region has been carried out for more than 60 years, since it was legally incorporated on 7 July 1958. Currently, the Cooperativa is made up of 128 members, with Mr. Florencio Aguilar Liera acting as the President of the Board of

¹ Procedural Order No. 1 dated 13 April 2020, ¶ 25: “25. Non-Disputing Party Submissions. Article 1128 of the NAFTA; FTC Statement on Non-Disputing Party Participation dated 7 October 2003 25.1. The Governments of Canada and the United States of America may make submissions to the Tribunal pursuant to the procedure and requirements set forth in NAFTA Article 1128 and in accordance with the schedule set out in Annex A. 25.2. Any non-disputing party, other than a NAFTA Party referred to in Article 1128 of the NAFTA, that wishes to file a written statement to the Tribunal shall apply for leave from the Tribunal to file such a submission in accordance with the schedule set out in Annex A. The Tribunal shall consider non-disputing party submissions in a manner consistent with the recommendations of the North American Free Trade Commission on non-disputing party participation, issued on 7 October 2003. As recognized therein, the disputing parties shall have the right to respond to all applications and submissions by non-disputing parties”.

² Procedural Order No. 1 – Annex A (revised) dated 12 of January 2021.

³ Statement of the Free Trade Commission on non-disputing party participation dated 7 October 2003.

⁴ Procedural Order No. 1, ¶ 12: “12. Procedural Language(s), Translation and Interpretation. Article 17 of the UNCITRAL Rules 12.1. English and Spanish are the procedural languages of the arbitration. 12.2. Routine, administrative, or procedural correspondence addressed to or sent by the ICSID Secretariat may be in either procedural language. For Parties’ Pleadings 12.3. Any written requests and applications over three pages long shall be submitted simultaneously in both procedural languages as long as it does not exceed ten pages. If the request or application exceeds ten pages, it may be submitted in either procedural language with a translation to follow within 10 business days. 12.4. Pleadings, witness statements and expert reports shall be submitted in one procedural language, provided that a translation to the other procedural language is filed within 20 business days thereafter. 12.5. Any accompanying documents, such as exhibits and legal authorities, shall be submitted in one procedural language, provided that a translation to the other procedural language is filed within 20 business days thereafter. If the document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any party or on its own initiative. 12.6. Translations need not be certified unless there is a dispute as to the translation provided and the party disputing the translation specifically requests a certified version. 12.7. Documents exchanged between the parties under §17 below (Production of Documents) shall be produced in the original language and need not be translated”.

Directors. The Cooperativa has an interest in the present arbitration due to the fact that the concessions to develop the Don Diego project (i) are located within the same area where the fishing refuge zone has been established, (ii) overlap with the fishing concession granted to the Cooperativa currently valid until 2035⁵, and (iii) would have a severe impact on fishing activity that provides the source of income for the 128 families of the Cooperativa as well as the hundreds of people in the Gulf of Ulloa area whose economic, social and cultural activities depend on fishing. Because the Cooperativa has specific knowledge regarding the fishing activity in the Gulf of Ulloa and is a witness to the impact that the Don Diego project has had so far, as well as the socioeconomic consequences that such a project would have in the future, the Cooperativa is in a unique position to provide the Tribunal with a relevant perspective that is different from that of the disputing parties.

CIEL is a public interest organization, founded in 1989 to protect the environment, promote human rights and ensure a just and sustainable society through the use of the law. CIEL aims to achieve its mission by contributing to the development of international environmental and human rights law, drawing upon its experience developed through conducting legal analysis, litigation, and accompaniment of movements dedicated to promoting the public interest and sustainable development. This experience includes acting as *amicus* before investment arbitration tribunals and national jurisdictions.⁶ CIEL has specific experience and knowledge of human rights issues and international environmental law matters in the context of international investment law and international arbitration. In the case at hand, CIEL has an interest in ensuring that international environmental and human rights law is fully enforced and applied. As an active participant in the development and application of international environmental and human rights law and standards, CIEL is in a unique position to provide the Tribunal with a relevant perspective that is different from that of the disputing parties.

No member of the organizations comprising the proposed *amici* has received any financial support or support of any other kind in relation to this Application and Submission, or regarding any future participation in this arbitration. Neither organization is directly or indirectly affiliated with any disputing party.

Amici's Submission covers several factual and legal matters that fall within the scope of the dispute and has been prepared solely to assist the Tribunal in reaching its decision in the case at hand. *Amici* specifically present factual and legal elements of particular importance to determine whether the decision of the United Mexican States (the "**Mexican State**") to deny Odyssey Marine Exploration ("**Odyssey**") an environmental permit necessary for the development of the seabed mining project located in the Gulf of Ulloa (Baja California Sur, Mexico) (the "**Don Diego Project**") is justified by the environmental and socio-economic risk that the project represents or whether, to the contrary, such a decision amounts to a breach of NAFTA.

In this context, *amici* consider that it is neither appropriate nor necessary for *amici* to present an analysis of the different standards of protection of foreign investment under NAFTA, as this falls within the remit of the parties; nevertheless, *amici* consider that the factual and legal elements presented will assist the Tribunal in reaching its decision. In particular, the factual and legal elements presented are of particular relevance in assessing whether or not the contentious measure is justified in the given context. In this regard, *amici* consider that the Mexican State had an obligation to reject the authorization of the project due to the risk it poses both to the marine environment of the Gulf of Ulloa and to the population.

Additionally, *amici* emphasize that the United Nations Convention on the Law of the Sea ("**UNCLOS**"), the Rio Declaration on Environment and Development (the "**Rio Declaration**"), the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"), the American Convention on Human Rights ("**ACHR**") and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the

⁵ Extension of Concession Title for Commercial Fishing for small boats, Key: CP-002/2014 File No. I00.6/4/2/BCS-C-021, Expedited 21 January 2015, Concession holder: S.C.P.P. PUERTO CHALE, S.C.L.

⁶ As an example, CIEL's lawyers requested to participate as *amicus curiae* in the proceeding between Methanex Corporation and the United States under Chapter 11 of the North American Free Trade Agreement and UNCITRAL rules, see Award of 3 August 2005, ¶ 28, available at <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>.

"Protocol of San Salvador") are all part of both (i) the rules of international law applicable to the dispute and (ii) the corpus of rules of particular relevance in interpreting NAFTA.

In this context, *amici* consider that the Mexican State's decision is fully supported by international law and involves the application of the precautionary principle and of international human rights law. In contrast, *amici* consider that if the environmental permit had been granted and the Don Diego Project consequently authorized, such a decision would have resulted in a violation of international environmental law, as well as of international human rights law.

Amici also wish to highlight that the dispute touches on an issue of public interest, since the Don Diego Project, which is the subject of the dispute, would: (i) overlap and be incompatible with both the fishing refuge zone dedicated to the protection of certain species and the fishing concession zone that is the basis for the livelihoods of the fishermen who are members of the Cooperativa, (ii) have serious adverse impacts on the flora and fauna comprising the region's biodiversity, and (iii) infringe human rights.

Sincerely yours,

FOR AND ON BEHALF OF THE SOCIEDAD COOPERATIVA DE PRODUCCIÓN PESQUERA PUERTO CHALE, S.C.L.

Address:

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INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

CASE NO. UNCT/20/1

ODYSSEY MARINE EXPLORATION, INC.

Claimant

VS.

UNITED MEXICAN STATES

Respondent

**AMICUS CURIAE SUBMISSION OF THE SOCIEDAD COOPERATIVA DE
PRODUCCIÓN PESQUERA “PUERTO CHALE” S.C.L. AND THE CENTER FOR
INTERNATIONAL ENVIRONMENTAL LAW**

12 October 2021

Before:

Sr. Felipe Bulnes Serrano (President)

Dr. Stanimir Alexandrov

Prof. Philippe Sands

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1 INTRODUCTION

- 1 The Don Diego Project is a mining project that would dredge 91 thousand hectares of the Gulf of Ulloa seabed (in the State of Baja California Sur, within the Exclusive Economic Zone (“EEZ”) of the Mexican State),⁷ extracting 7 million tonnes of sand and phosphate rock each year (the “Don Diego Project”). Inter alia, the dredging and pumping of materials would involve a continuous 24-hour process, carried out seven days a week, 52 weeks a year, over a 50-year period.
- 2 The process described in the Don Diego Project involves a serious alteration to the marine ecosystem off the western coast of the Baja California peninsula, violating international environmental law and international human rights law due to the fact that phosphate extraction from the Gulf of Ulloa would result in severe damage to the region, in addition to the fact that the project area would overlap and be incompatible with the fishing concession granted to the Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L. (the “Cooperativa”):
 - a) **First:** The Don Diego Project is located in the area known as the Gulf of Ulloa, a region characterized by its high productivity and biodiversity, which represents the main source of livelihood for the surrounding fishing communities, namely Punta Abreojos, El Delgadito, San Juanico, El Chicharrón, Las Barrancas, La Poza, Santo Domingo, Puerto Adolfo López Mateos, among others. As a result of the ecological and economic significance of the Gulf of Ulloa, on 10 April 2015 the Agreement establishing the “fishing refuge zone and measures to reduce potential interactions of fish with sea turtles along the western coast of Baja California Sur” located off the coast of the municipality of Comondú, B.C.S., was published in the Official Federal Gazette (“OFG”).⁸ This Agreement to create the fishing refuge zone came into force the day after its publication in the OFG and consists of a set of complementary management measures applicable to the conservation and sustainable use of species of fishery interest, as well as special protected species. On 23 June 2016, some of these measures were modified, the protected area was expanded, and a new agreement was published with a duration of two years.⁹ The term of the agreement was extended for 5 years on 25 June 2018.¹⁰
 - b) **Second:** The area of the aforementioned project is located within the polygon where the fishing refuge previously described was established and where the concessions for the Don Diego Project¹¹ overlap and

⁷ Odyssey Marine Exploration, “Projects,” available at <https://www.odysseymarine.com/exo-project>, accessed on 23 September 2021.

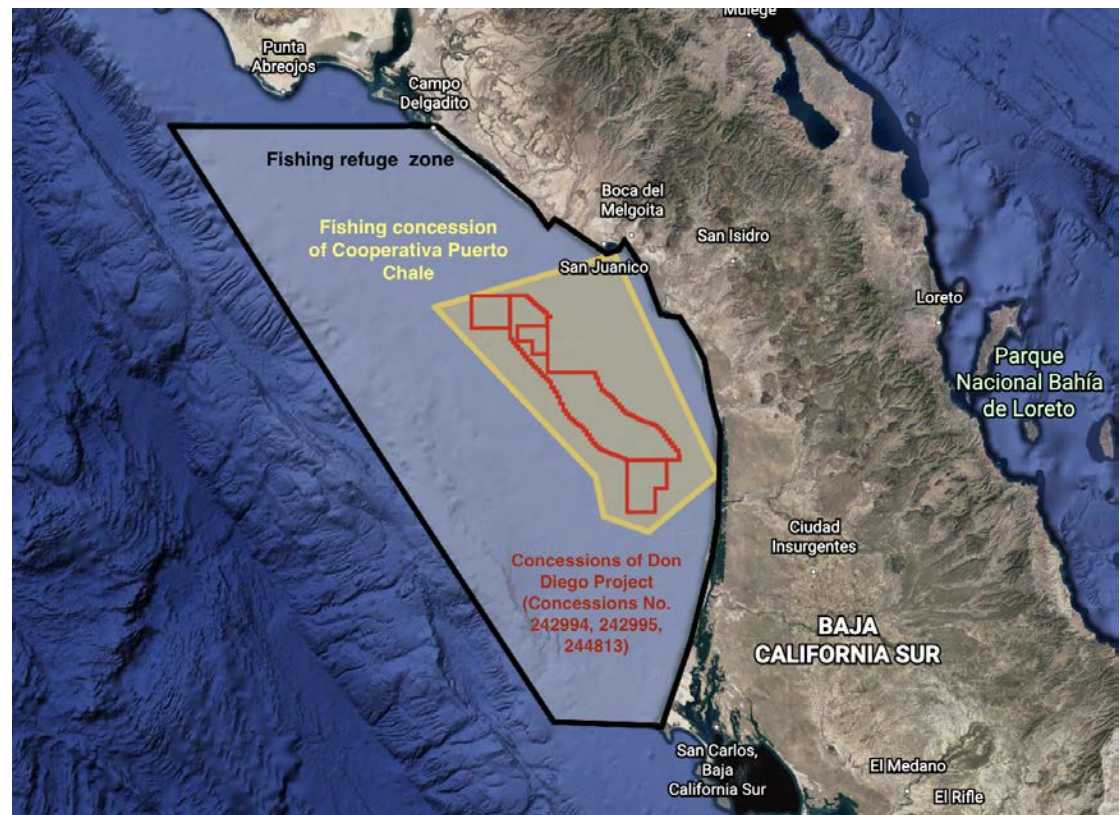
⁸ Acuerdo por el que se establece una zona de refugio pesquero y medidas para reducir la posible interacción de la pesca con tortugas marinas en la Costa Occidental de Baja California Sur, published in the Diario Oficial de la Federación on 10 April 2015, accessible at https://www.dof.gob.mx/nota_detalle.php?codigo=5388487&fecha=10/04/2015.

⁹ Acuerdo por el que establece la zona de refugio pesquero y nuevas medidas para reducir la posible interacción de la pesca con tortugas marinas en la costa occidental de Baja California Sur, published in the Diario Oficial de la Federación on 26 June 2016, accessible at https://www.dof.gob.mx/nota_detalle.php?codigo=5442227&fecha=23/06/2016.

¹⁰ Acuerdo por el que se amplía la vigencia del similar por el que establece la zona de refugio pesquero y nuevas medidas para reducir la posible interacción de la pesca con tortugas marinas en la Costa Occidental de Baja California Sur, published in the Diario Oficial de la Federación on 23 June 2016, accessible at http://dof.gob.mx/nota_detalle.php?codigo=5528971&fecha=25/06/2018.

¹¹ The disputed concessions are (i) concession No. 240744 dated 28 June 2012, subsequently modified by concession No. 244813 dated 15 February 2016, (ii) concession No. 242994 dated 29 April 2014, and (iii) concession No. 242995 dated 29 April 2014.

are incompatible with the fishing concessions granted to the Sociedad Cooperativa de Produccion Pesquera Pescadores de la Poza, S.C.L. and to the Cooperativa Puerto Chale until the year 2035.¹²



(Map of the Gulf of Ulloa: the fishing refuge zone border is marked in black, the Cooperativa's fishing concession marked in yellow¹³ and the Don Diego Project border marked in red).¹⁴

- c) **Third:** Aside from the area's particular importance for fishing, of note is the fact that several species that are subject to special protection or that are in danger of extinction reside within the Gulf of Ulloa.¹⁵ The creation of a fishing refuge zone, in which fishermen must implement special measures such as the use of

¹² Extension of Concession Title for Commercial Fishing for small boats, Key: CP-002/2014 File No. I00.6/4/2/BCS-C-021, Expedited 21 January 2015, Concession holder: S.C.P.P. PUERTO CHALE, S.C.L ("Extension of Concession Title for Commercial Fishing").

¹³ References to the location of the fishing refuge zone are available in the Acuerdo por el que establece la zona de refugio pesquero y nuevas medidas para reducir la posible interacción de la pesca con tortugas marinas en la costa occidental de Baja California Sur, published in the Diario Oficial de la Federación on 26 June 2016 (https://www.dof.gob.mx/nota_detalle.php?codigo=5442227&fecha=23/06/2016) and those of the Cooperativa's fishing concession in the Extension of Concession Title for Commercial Fishing.

¹⁴ On 19 April 2021 the Cartography and Mining Concessions Directorate of the Mexican Ministry of Economy responded to the request for access to information No. 0001000071321 with a RAR file with the specific location of concessions No. 242994, 242995 and 244813. The information is accessible through the National Transparency Platform accessible at <https://www.infomex.org.mx/gobiernofederal/moduloPublico/moduloPublico.action>.

¹⁵ For example, the project will have serious and potentially irreversible negative impacts on marine mammals, particularly whales (humpback whales, Bryde's whales, and gray whales) and sea turtles. These whale species are listed in NOM-059-SEMARNAT-2010 (<https://www.dof.gob.mx/normasOficiales/4254/semarnat/semarnat.htm>), under the category of "Subject to special protection (Pr)", while the loggerhead sea turtle is in the category of "In danger of extinction (P)", and according to Art. 35, section III, paragraph b), of the General Law of Ecological Balance and Environmental Protection, the Ministry of Environment and Natural Resources ("SEMARNAT") must deny the environmental impact authorization when the work or activity in question may cause one or more species to be declared as threatened or in danger of extinction or when one of such species is affected, see General Law of Ecological Balance and Environmental Protection, Art. 35 fraction III, paragraph b), accessible at http://www.diputados.gob.mx/LevesBiblio/pdf/148_180121.pdf.

distinct types of fishing nets to ensure the protection not only of species of fishing interest but also those under special protection, occurred as a result of a logical long-term management and protection decision by the Mexican State. To carry out a marine mining project, such as the Don Diego Project, in which the extent of the damage the project could cause to the marine ecosystem is unknown, runs counter to this measure.

- d) **Fourth:** The proposed marine phosphate mining operations would use large vessels to dredge the seabed, extracting rock, sand, and organisms found in the area. Dredging materials are transported onto a vessel, where they are subsequently separated to obtain the phosphate sand. The remainder of the dredged material that is deemed to be unusable is discharged into the sea. In other words, the accumulated fauna and flora dragged along the seabed are thus exterminated and the waste materials are subsequently returned to the sea, becoming a source of pollution and sedimentation that threatens the marine ecosystem. Today the importance and value of such mega-diversity for sustainability and overall ecosystem health is a well-known fact. At this time, it is not possible to evaluate with certainty the extent of the impacts on biodiversity and ecosystems from marine mining projects. Nevertheless, the scientific community has clearly stated on multiple occasions that “preliminary evaluations [of seabed mining] show considerable and irreversible impacts on the marine ecosystems and fishing resources”.¹⁶ It is therefore impossible to argue that underwater dredging from the Don Diego Project would not have negative impacts on the biodiversity in the Gulf of Ulloa.
- e) **Fifth:** Not only is seabed mining especially harmful to the ecosystem and marine biodiversity, but phosphate extraction activities are also a potential source of radiation pollution given the presence of elements such as uranium and thorium.¹⁷ During the phosphate extraction process, sediments and discharges that are released into the sea can contain high levels of these radioactive elements.¹⁸ Additionally, air emissions resulting from these processes have also been known to contain radioactive particulates. These toxic pollutants can endanger the health of the population due to the inhalation of radioactive particulates or the consumption of fish that have ingested radioactive elements.
- f) **Sixth:** While phosphorus extract is hazardous, phosphate per se is a vital element for marine ecosystems: Phosphorous is an essential nutrient that increases the formation of phytoplankton, which, being the

¹⁶ S. Roux, C. Horsfield, *The Law of the Seabed*, Chapter 13 Review of National Legislations Applicable to Seabed Mineral Resources Exploitation, S. 4.1. Environmental Impacts, 2020, accessible at <https://brill.com/view/book/edcoll/9789004391567/BP000028.xml?body=fullHtml-43184#FN280056>; see also 069 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining, 2021, World Conservation Congress, Marseille, accessible at <https://www.iucncongress2020.org/motion/069>: “biodiversity loss will be inevitable if deep-sea mining is permitted to occur, that this loss is likely to be permanent on human timescales, and that the consequences for ocean ecosystem function are unknown”.

¹⁷ M. S Al-Marsi, S. Marmish et al., *The Impact Of Phosphate Loading Activities On Near Marine Environment: The Syrian Coast*, *Journal of Environmental Radioactivity*, 2002, p.1.

¹⁸ It should be noted that in its reply memorial, the Mexican State also highlights the concern about the radioactive potential of phosphate dredging, see memorial in reply of the Mexican State dated 23 February 2021, ¶ 220: “Una de las preocupaciones del Consejo Consultivo consistía en que las actividades de dragado podían liberar elementos de traza con altos grados de toxicidad. Además, enfatizó el hecho de que la MIA 2014 no explicaba si el uranio detectado en algunos análisis era radiactivo, siendo esto una gran omisión en el estudio realizado por ExO. De igual forma, el Consejo Consultivo señaló que la operación del Proyecto podía incrementar mareas rojas en la zona debido a la liberación de altas cantidades de fosfato en el mar”.

primary basis of the marine food chain, supports the existence of fish and other marine life.¹⁹ As a result, the region's rich fisheries are supported by phosphorus that has been deposited for hundreds of years on the seafloor. By extracting it, the fishing capacity on which so many people in the Gulf of Ulloa depend could be severely affected.

- g) **Seventh:** Fishing in the State of Baja California Sur is not only an activity that has direct benefits for the population of Comondú, but it also produces revenues that have an effect on the local and regional economies. At the national level, capture fisheries represent 85% of Mexico's total fishery production, producing 1.2 million tonnes per year with profits of around US\$550 million.²⁰ The area with the highest capture fisheries' production is the Northwest region, producing 78% of the annual average.²¹ Given that Baja California Sur is the third largest producer of fish in the country in terms of total capture and production value, it is clear that this activity is of fundamental importance for the region. At the state and national levels, fishing is a primary activity with significant economic and social value; it is part of a productive chain that generates direct and indirect employment, added value, foreign currency, raw material for other industries and, above all, constitutes a key factor in food security.

- 3 Due to the fact that the Don Diego Project poses a specific environmental and economic risk to thousands of fishermen²² and their families, who depend exclusively on that business activity for their livelihoods, a large variety of civil society actors have opposed the Don Diego Project in Baja California Sur. These include, inter alia, fishing cooperatives, environmental groups, ecotourism organizations, the scientific community within the state, the State Congress, and state and municipal authorities.²³
- 4 Given the implicit dangers of developing seabed mining projects, authorities in most countries where this type of project has recently been proposed have refused permits or declared a moratorium on this type of activity. Proposals for seabed mining, both exploration and exploitation, within the exclusive economic zones of coastal states have been concentrated in five nations or zones, as follows, i.e. New Zealand, Australia, Namibia, Mexico, and the Pacific Islands (including Fiji, Papua New Guinea, Tonga, Vanuatu, and the Solomon Islands).²⁴ In summary, in all of these cases there has been considerable resistance to seabed mining proposals and, in most cases, governments have opted for a cautious approach to seabed mining in the form of moratoria, permanent bans, or rejection of project

¹⁹ See Legislative Information System, "ppa a denegar cualquier autorizacion del proyecto don diego", 2015, accessible at http://sil.gobernacion.gob.mx/Archivos/Documentos/2015/09/asun_3265621_20150910_1441900928.pdf.

²⁰ About 11 billion Mexican pesos, A. Melgoza-Rocha, S. Domínguez, C. López-Sagástegui, Panorama de la Pesca en México. dataMares. InteractiveResource, 2017, accessible at <https://datamares.org/stories/panorama-de-la-pesca-en-mexico/?lang=es>.

²¹ *Ibid.*

²² It is estimated that the number of employees needed to operate the vessel will be 80 people between the barge and the dredge, divided into 2 shifts of 40 people, see Legislative Information System, "ppa a denegar cualquier autorización del proyecto don diego", 2015, accessible at http://sil.gobernacion.gob.mx/Archivos/Documentos/2015/09/asun_3265621_20150910_1441900928.pdf. Meanwhile, the number of people affected by the project is much higher, with a minimum of 128 members and some 128 families in what corresponds exclusively to the Cooperativa.

²³ See for example, Excelsior, 'Podadora' submarina se enfila hacia Baja California Sur", 2015, accessible at: <https://www.excelsior.com.mx/nacional/2015/01/18/1003281#>; Piedepagina, "Cazatesoros norteamericanos promueven mina submarina de fosfato en México," 2016, accessible at <https://piedepagina.mx/cazatesoros-norteamericanos-promueven-mina-submarina-de-fosfato-en-mexico-2/>.

²⁴ RepRisk Special Report, Deep Sea Extractive Activities: Seabed Mining and Deep Sea Drilling, 2015, accessible at <https://cer.org.za/wp-content/uploads/2016/08/RepRisk-Special-Report-Deep-Sea-Extractive-Activities.pdf>.

proposals.²⁵ By way of example, the New Zealand Court of Appeal ruled in a recent decision that "if the lack of information and resulting uncertainty about the effects of a proposed activity mean that the [Environmental Protection Authority] is left uncertain whether the s 10(1) objectives [i.e. protecting the environment from pollution caused by marine discharges] will be met if a consent is granted, then the information principles **require that consent to be refused**" (emphasis added).²⁶

- 5 Recently, the World Conservation Congress of the International Union for the Conservation of Nature (the "**IUCN World Conservation Congress**") passed a motion calling on all members (more than 170) to establish a moratorium on seabed mining exploitation. The motion was approved with overwhelming support on 8 September 2021. Among the governments and government agencies that spoke on the motion, 81 voted in favor of the moratorium (including the Mexican State), with 18 against and 28 abstentions.²⁷
- 6 In short, the Gulf of Ulloa is under latent threat, since the project jeopardizes all the elements that make up the area's marine ecosystems. For the reasons set out above, *amici* consider that the decision by the United Mexican States (the "**Mexican State**") to deny the required environmental permit to develop the Don Diego Project is duly supported by international law. Furthermore, had that decision not been reached, the Mexican State would have breached its obligations acquired under international environmental law, as well as international human rights law, as set out below.

2 THE TRIBUNAL MUST DECIDE THE DISPUTED ISSUES IN ACCORDANCE WITH NAFTA AND THE APPLICABLE RULES OF INTERNATIONAL LAW

- 7 An arbitral tribunal established under chapter eleven of the North American Free Trade Agreement ("**NAFTA**") must decide disputed issues in accordance with NAFTA and with applicable rules of international law.

2.1 International environmental law and international human rights law are applicable to the dispute

- 8 Within the plethora of rules of international law, it is up to the arbitrators to define which apply to a specific case (*da mihi factum, dabo tibi ius*).²⁸ The *iura novit curia* principle is applicable in international investment law through the principle of *iura novit abiter*.²⁹ Investment arbitration tribunals are not limited to the application only of the rules invoked by the parties.³⁰ Whenever the investment treaty explicitly or implicitly refers to international law, it is specifically the facts, the legal issues, the circumstances of the dispute, as well as the context in which the dispute

²⁵ See for example, the case of the measures taken in the Northern Territory of Australia, ¶¶ 18-19 *infra*.

²⁶ New Zealand Court of Appeal decision *TRANS-TASMAN RESOURCES LIMITED v TARANAKI-WHANGANUI CONSERVATION BOARD* [2020] NZCA 86 [3 April 2020] CA573/2018, ¶ 128.

²⁷ 069 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining, 2021, World Conservation Congress, Marseille, accessible at <https://www.iucncongress2020.org/motion/069>: "**The IUCN World Conservation Congress, at its session in Marseille, France: CALLS on all State Members**, individually and through relevant international fora, to: a. **support and implement a moratorium on deep seabed mining** [...]" (emphasis added).

²⁸ The popular aphorism of roman law translates as "give me the facts, and I will give you the law".

²⁹ The principle *iura novit abiter* (the arbitrator knows the law) is an adaptation to international investment arbitration of the principle *iura novit curia*; see *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, ¶ 92; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, ¶ 118.

³⁰ *Jan Oostergetel v. The Slovak Republic*, UNCITRAL, Award of 23 April 2013, ¶ 141.

arose, that guides and limits the authority of an arbitral tribunal when defining the set of rules that apply to the dispute.

- 9 When deciding the case at hand, the Tribunal should apply NAFTA in light of the obligations that the Mexican State has assumed by acceding to relevant international treaties, including international environmental treaties and international human rights treaties. This is in accordance with the applicable law in Article 1131 of NAFTA, which provides that a “Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. Equally, the Tribunal should apply NAFTA in a manner that is consistent with the general rule on interpretation of treaties established in the Vienna Convention on the Law of Treaties (“**Vienna Convention**”), which provides that the interpretation of any international treaty must take into account “any relevant rules of international law applicable in the relations between the parties”.³¹ *Amici* consider that both international environmental law and international human rights law are relevant to the resolution of this dispute, as set out in greater detail below.

2.2 Under NAFTA, the Mexican State can adopt measures it considers necessary to fulfil its duty to protect the environment and public well-being

- 10 Within the NAFTA framework, there is full recognition that each State party, and consequently the Mexican State, has the right to establish its own national environmental protection standards, policies, and development priorities, as well as to ensure that its laws and regulations establish strict environmental protection standards.³² *Amici* further highlights that it is recognized and agreed upon that each NAFTA party is fully entitled to adopt, maintain, or enforce all appropriate measures to ensure that any decision on a potential investment in its territory is made with a clear view to environmental issues.³³
- 11 Moreover, the arbitral tribunal in *Bilcon* already highlighted how important it is that NAFTA party States have full discretion to exercise their authority regarding the protection of the environment in their own territories, stating that “under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish. Errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors”.³⁴
- 12 Similarly, the Preamble of NAFTA states the need to preserve the ability of the States parties to “safeguard the public welfare”.³⁵ It is worth recalling at this point that the Vienna Convention establishes that, for purposes of treaty

³¹ Vienna Convention, Art. 31(3, c).

³² North American Agreement on Environmental Cooperation (“**NAAEC**”), Art. 3.

³³ Article 1114 of NAFTA provides that “1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement”.

³⁴ *Bilcon de Delaware et al. v. Canada*, PCA Case No. 122204, Award on Jurisdiction and Liability of 17 March 2015, ¶ 738.

³⁵ NAFTA, Preamble.

interpretation, the text of the treaty includes its preamble.³⁶ One of the main ways in which States ensure the welfare of the people in their territories is through the ratification and implementation of international human rights treaties, including through the incorporation of the provisions of such treaties into their domestic legal frameworks.

- 13 Along these lines, it should be noted that other arbitration tribunals have taken international human rights law into account when deciding cases in the past. By way of example, the arbitral tribunal in *Urbaser* highlighted the importance of interpreting the investment treaty applicable to the case in light of the principles set forth in the Vienna Convention mentioned above, recognizing that the treaty should not be interpreted in isolation, but "in harmony with other rules of international law of which it forms part, including those relating to human rights".³⁷

3 THE PRECAUTIONARY PRINCIPLE ESTABLISHED IN INTERNATIONAL LAW AFFIRMS STATES' MANDATE TO PROTECT THE ENVIRONMENT

- 14 *Amici* consider it useful to emphasize that the precautionary principle is particularly relevant in the context of seabed mining and consequently to the scope of rules applicable to this case.

3.1 The precautionary principle is a recognized principle of international law

- 15 The precautionary principle is a fundamental element of international law that dictates the adoption of a cautious approach in matters relating to the environment when there is scientific uncertainty about the possible negative impacts of a given project, business activity, or program. As described by the Court of Justice of the European Union, the principle justifies the adoption of preventive measures "without having to wait until the reality and seriousness of [the threats] become fully apparent".³⁸
- 16 The precautionary principle is widely used in international environmental law and has been applied in areas such as climate change, hazardous waste, biodiversity, fisheries management, and sustainable development.³⁹ One of the fundamental pillars of the precautionary principle is contained in the Rio Declaration, which states that: "[I]n 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".⁴⁰
- 17 On the evolution of the precautionary principle, the Wingspread Consensus' Statement provided that "[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the Precautionary Principle must be

³⁶ Vienna Convention, Art. 31 (2).

³⁷ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of December 8, 2016, ¶ 1200.

³⁸ Case T-13/99, Pfizer Animal Health SA/NV v. Council [2002] E.C.R. II-3305, ¶ 139, accessible at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999A0013:EN:HTML>.

³⁹ See, for example, the United Nations Framework Convention on Climate Change, 1992, Art. 3; the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1993, Art. 2(a).

⁴⁰ Rio Declaration on Environment and Development, 1992, Principle 15.

open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action".⁴¹

- 18 In the context of seabed mining, the case of the Northern Territory of Australia - where the government issued in 2012 a moratorium against seabed mining in territorial waters off the coast⁴² - is a clear example of the application of the precautionary principle and the type of measures necessitated by the uncertainty and risk involved in this type of activity.⁴³ In this context, the Northern Territory Government of Australia stated that a moratorium is justified by the fact that seabed mining is a relatively new industry where there is little information available (i) on the impacts such type of activity on the environment and (ii) on the methods available to adequately manage those impacts or (iii) even regarding methods available (if any) to rehabilitate the seabed from mining activities.⁴⁴
- 19 Notably, the Australian decision evolved from a moratorium to a total ban, with the promulgation of the "Prohibited Action Statement" on seabed mining on 4 August 2021 by the Minister for the Environment. The reasons given to support the prohibition include the following description: "(a) the coastal environment of the Territory is of substantial cultural, economic, biological and social value and should be protected; and (b) the mining activity specified [...] poses real risks of significant impacts that are adverse to the value of this environment and due to the risks and uncertainty, mining activity at this time is unable to be adequately assessed and regulated appropriately [...] in a manner consistent with the objects of the Environment Protection Act 2019; and (c) it is necessary to make this Declaration to further the objects of the Environment Protection Act 2019".⁴⁵
- 20 In the case at hand, the Mexican State is bound by international law obligations that require the application of the precautionary principle for the protection of the marine environment. Among the countless international treaties that establish the precautionary principle, the Mexican State is party to the United Nations Convention on the Law of the Sea ("UNCLOS"), which requires countries to protect the marine environment.⁴⁶
- 21 In this context, it is noteworthy that the International Tribunal for the Law of the Sea ("ITLOS") strengthened the role of the precautionary principle under "responsibilities and obligations" of the International Seabed Authority, States and private contractors. According to the 2011 ITLOS Advisory Opinion,⁴⁷ UNCLOS transforms this "non-binding

⁴¹ Wingspread Consensus Statement on the Precautionary Principle, 1988, accessible at <https://www.sehn.org/sehn/wingspread-conference-on-the-precautionary-principle>.

⁴² Declaration of the Minister for the Environment, Northern Territory of Australia to ban seabed mining, Northern Territory of Australia of 4 August 2021 accessible at https://nt.gov.au/_data/assets/pdf_file/0004/1032295/S30-4-August-2021.pdf.

⁴³ ¶¶ 26-36 *infra*.

⁴⁴ The moratorium came into effect in March 2012 and lasted until March 2021, see Moratorium on Exploration and Mining in Coastal Waters of the Northern Territory, March 2012, ¶ 3(b), accessible at <https://ntepa.nt.gov.au/publications-and-advice/advice-to-minister/seabed-mining>.

⁴⁵ Declaration of the Minister for the Environment, Northern Territory of Australia to ban seabed mining, Northern Territory of Australia of 4 August 2021 accessible at https://nt.gov.au/_data/assets/pdf_file/0004/1032295/S30-4-August-2021.pdf.

⁴⁶ Effective protection of the marine environment from harmful activities as well as the protection and preservation of the marine environment is required in international law under Parts XI and XII of UNCLOS. Addressing the environmental problems generated by seabed mining would raise the question of how to correctly apply the unconditional requirement of Art. 192 of UNCLOS, which states that "States have the obligation to protect and preserve the marine environment", and Art. 208, concerning pollution from seabed activities under national jurisdiction, which states that "1. Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80. 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution".

⁴⁷ Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion dated 1 February 2011, p. 10, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf.

statement of the precautionary approach in the Rio Declaration into a binding obligation"⁴⁸ for seabed mining and exploitation. Moreover, it should be pointed out that according to UNCLOS, national legislation "shall be no less effective than international rules, standards and recommended practices and procedures".⁴⁹ Thus, the duty to apply the precautionary principle also applies to States deciding whether or not to carry out seabed mining activities in their own EEZs.

22 Following the evolution in the development and implementation of the precautionary principle, the following have been established as its main attributes:

- a) it requires the authorities to take preventive measures when there is a risk of serious and irreversible damage to the environment or to human beings; and
- b) it requires taking preventive measures even in the absence of certainty about the damage and without having to wait for scientific proof of the cause-effect relationship.

23 For that reason, the process of applying the precautionary principle must consist of an open, transparent, and democratic process, and it should include all potentially affected parties. Additionally, the application of the precautionary principle must involve an examination of the full range of alternatives, including discontinuation or no action.⁵⁰

24 In Mexican law, the precautionary principle is an integral part of the national legal framework, where the precepts contained in the General Wildlife Act ("**LGVS**" - Ley General de Vida Silvestre) are well known for first establishing wildlife and habitat objectives in national policy. According to the LGVS, the national authority must provide "preventive measures for the maintenance of the conditions that favor the evolution, viability and continuity of the ecosystems, habitats and populations in their natural environments" and that "[i]n no case may lack of scientific certainty be used as a justification for postponing the adoption of effective measures for the conservation and integral management of wildlife and its habitat".⁵¹

25 In a country of such megadiversity as the Mexican State, the onus of adopting and implementing the precautionary principle lies with a variety of public officials and government agencies. It should be highlighted in this regard that in November 2014, the Advisory Council for Sustainable Development of SEMARNAT ("**Advisory Council**") issued a technical opinion recommending that the Don Diego Project not be approved. The Council applied a precautionary approach in this regard and referred to Principle 15 of the Rio Declaration in the application for refusal. The stated consideration was that the type of mining proposed by the Don Diego Project is not authorized in other markets.⁵² Once again,⁵³ the issue of dredging activities and the emission of highly toxic substances into the marine ecosystem was of sufficient concern for the Advisory Council to make this recommendation. To put it another way, and as will

⁴⁸ *Ibid.*, p. 45 (¶ 127).

⁴⁹ UNCLOS, Art. 208.

⁵⁰ R. Cooney, *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners*, 2004, IUCN y Cambridge, p. 5.

⁵¹ General Wildlife Act, Art. 5-II. https://www.senado.gob.mx/comisiones/medio_ambiente/docs/LGVS.pdf.

⁵² Counter-Memorial of the Mexican State of 23 February 2021, ¶ 219.

⁵³ ¶ 2 *supra*.

be set out in greater detail below, the absence of scientific certainty, combined with suspected damage and the undeniable need to protect the Gulf of Ulloa, undoubtedly means that the precautionary principle must be applied.

3.2 The precautionary principle is of particular relevance in the case of the Don Diego Project

- 26 In the case of the Don Diego Project, *amici* consider that the precautionary principle is of particular importance and that it supports the Mexican State's decision to deny the environmental permit necessary for the development of the project.

3.2.1 The protection of the Gulf of Ulloa's marine environment is essential

- 27 As the Tribunal is fully aware, the Gulf of Ulloa is a region whose rich marine biodiversity is unparalleled on the Pacific coast.
- 28 The Gulf of Ulloa is the Cooperativa's fishing zone,⁵⁴ and the fishing activity in the area forms part of a production chain that generates direct and indirect employment, added value, foreign currency, raw materials for other industries and especially constitutes a key element of food security.⁵⁵ If approved, the Don Diego Project would not only pose a serious risk to the region's fishing capacity on which so many people depend, but it would also affect the quality of fishing and endanger the local population's health, since phosphate extraction involves the serious risks of radiation, pollution,⁵⁶ and sedimentation.⁵⁷
- 29 Apart from the important social and economic value of fishing, the Gulf of Ulloa is also an area where multiple species that are subject to special protection or in danger of extinction reside.⁵⁸ The incalculable value of the presence of marine mammals whose breeding and reproduction occurs and depends directly on the conservation status of their habitat in Laguna San Ignacio and Magdalena Bay is well known at the national level. It is for this reason that the National Commission for the Knowledge and Use of Biodiversity ("**CONABIO**" - Comisión Nacional para el Conocimiento y Uso de la Biodiversidad) established the "Program of Marine Priority Regions of Mexico", identifying Magdalena Bay as an Important Marine Region.⁵⁹ The Magdalena Bay is one area that would be affected by the Don Diego Project. This means that the migration routes, nesting, and reproduction of whales would be endangered by the presence of boats, dredging operations, and the constant discharge of toxic and potentially radioactive substances that could settle in the area.

⁵⁴ ¶ 2b) *supra*.

⁵⁵ ¶ 2g) *supra*.

⁵⁶ ¶¶ 2d), 2e), 2f) *supra*.

⁵⁷ M. Allsopp, C. Miller, R. Atkins, S. Roccliffe, I. Tabor, D. Santillo, P. Johnston, Review of the Current State of Development and the Potential for Environmental Impacts of Seabed Mining Operations, Greenpeace Research Laboratories Technical Report (Review), 2013, pp. 12-13, accessible at <https://cer.org.za/wp-content/uploads/2016/08/Greenpeace-Potential-for-Environmental-Impacts-of-Seabed-Mining.pdf>.

⁵⁸ ¶ 2c) *supra*.

⁵⁹ L. Arriaga Cabrera, E. Vázquez Domínguez, J. González Cano, R. Jiménez Rosenberg, E. Muñoz López, V. Aguilar Sierra (coordinators), Priority Marine Regions of Mexico, National Commission for the Knowledge and Use of Biodiversity, 1998, information accessible at <http://www.conabio.gob.mx/conocimiento/regionalizacion/doctos/marinas.html>.

3.2.2 The Don Diego Project involves serious and potentially irreversible damage to the marine ecosystem

- 30 To date, there is insufficient information on seabed mining technology and operations, their potential effectiveness, the necessary safety measures, or the impacts that may result from the process. In addition, the deep-sea environment is a unique and diverse field that has not yet been fully explored or researched. This uncertainty warrants unprecedented caution and attention before proceeding with large-scale deep seabed mining development.
- 31 The Don Diego Project case is no exception.
- 32 Even though there is insufficient information to assess (i) the actual or potential impacts of seabed mining on the environment and other resource industries and (ii) the methods for managing these impacts, it is worth recalling⁶⁰ that the scientific community has clearly and repeatedly stressed that “preliminary assessments [of seabed mining] outline considerable and irreversible impacts on marine ecosystems and fishery resources”⁶¹ and that **“biodiversity loss will be inevitable if deep-sea mining is permitted to occur, that this loss is likely to be permanent on human timescales, and that the consequences for ocean ecosystem function are unknown”** (emphasis added).⁶²
- 33 Promoters of deep seabed mining often claim that the precautionary principle can be met simply by monitoring mining activities as they occur and taking action to remediate impacts on the marine environment when they are observed. This is an incorrect interpretation of the precautionary principle, since the precautionary principle seeks to prevent environmental damage before it occurs. A similar “learning-by-doing” approach was rejected by the ITLOS in a dispute over the catch of southern bluefin tuna in the Pacific.⁶³
- 34 In short, allowing seabed mining activities with the expectation that impacts can be controlled or remedied along the way is a direct contradiction of the precautionary principle.
- 35 The level of response that must be adopted to comply with the precautionary principle varies depending on the risks and uncertainties presented by a given activity. In the case of seabed mining, as stated above, States have limited and even prohibited the development of such activities.⁶⁴ In a more general context, the international community has called on States to establish a moratorium on deep seabed mining.⁶⁵
- 36 Given the significant risks and uncertainties involved in the Don Diego Project, *amici* consider that strict application of the precautionary principle is necessary and that by denying the environmental permit necessary for the

⁶⁰ ¶ 2d) *supra*.

⁶¹ S. Roux, C. Horsfield, *The Law of the Seabed*, Chapter 13 Review of National Legislations Applicable to Seabed Mineral Resources Exploitation, S. 4.1. Environmental Impacts, 2020, accessible at <https://brill.com/view/book/edcoll/9789004391567/BP000028.xml?body=fullHtml-43184#FN280056>.

⁶² 069 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining, 2021, World Conservation Congress, Marseille, accessible at <https://www.iucncongress2020.org/motion/069>.

⁶³ Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), 1999, accessible at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

⁶⁴ ¶¶ 4, 5, 18, 19 *supra*.

⁶⁵ 69 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining, 2021, World Conservation Congress, Marseille, accessible at <https://www.iucncongress2020.org/motion/069>.

development of the Don Diego Project mining project, the Mexican State acted in accordance with the precautionary principle.

4 THE DISPUTE IN THIS CASE INVOLVES THE MEXICAN STATE’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

37 As stated above, *amici* consider that the Tribunal should give special consideration to the Mexican State’s obligations under international human rights law when resolving this dispute, in light of the fact that if the Mexican State had approved the Don Diego Project, it would have put at risk a broad range of human rights set forth in and protected under international treaties to which the Mexican State is a party.

4.1 International human rights law is relevant to the resolution of this dispute

38 International human rights law establishes the human rights obligations of States, including the obligations to respect, protect, and fulfill the rights enshrined in international and regional treaties, such as the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), the American Convention on Human Rights (“**ACHR**”), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“**Protocol of San Salvador**”). It is worth emphasizing that these obligations of the Mexican State were fully in force before the first preparatory expeditions for the Don Diego Project began.⁶⁶

39 As a party to the aforesaid conventions, the Mexican State assumed a series of obligations that require the State not only to refrain from interfering with the enjoyment of human rights but also to protect these rights, including through the adoption of measures to prevent the violation of these rights by third parties.

40 In particular, the Mexican State has an obligation to protect human rights from possible violations in the context of business activities,⁶⁷ such as the potential operations of the Don Diego Project. With respect to States’ obligations in the context of business activities, the United Nations Committee on Economic, Social, and Cultural Rights (“**ESCR Committee**”), the body charged with monitoring compliance with ICESCR by the States parties, has underscored that “[t]he obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification”.⁶⁸

41 Furthermore, following the 2011 constitutional reform, the “human rights recognized [...] in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection”,⁶⁹ were given constitutional

⁶⁶ Mexico acceded to the International Covenant on Economic, Social and Cultural Rights and to the American Convention on Human Rights in 1981. Mexico ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights in 1996.

⁶⁷ See United Nations Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 2011, ¶ I(A)(1) (affirming that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises”).

⁶⁸ United Nations Committee on Economic, Social, and Cultural Rights, General Comment No. 24, 2017, on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Doc. E/C.12/GC/24, ¶ 12.

⁶⁹ Political Constitution of the United Mexican States, Art. 1 ¶ 1.

status in Mexico. Likewise, it was established that “[a]ll authorities, in their areas of competence, have the obligation to promote, respect, protect and guarantee human rights”.⁷⁰

- 42 On the basis set out above, *amici* will argue below that if the Mexican State had granted the environmental permit necessary for the Don Diego mining project, several human rights of the Gulf of Ulloa residents would have been at risk, thereby breaching its international duty to protect human rights in accordance with the international treaties to which the Mexican State is a party.

4.2 The decision issued by the Mexican authorities in this case was consistent with the Mexican State’s international human rights obligations

- 43 The dispute in this case bears upon the human rights of persons living in the Gulf of Ulloa due to the fact that if the Don Diego Project had been approved, it would have put at risk various economic, social, cultural, and environmental rights,⁷¹ which are protected under the ICESCR, the ACHR, the Protocol of San Salvador, and/or other international treaties to which the Mexican State is a party. *Amici* would highlight the following rights as being particularly relevant⁷² in the context of this case:

- a) The ICESCR affirms that the **right to work** encompasses “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”.⁷³ Similarly, the Protocol of San Salvador recognizes that the human right to work includes “the opportunity to secure the means for living a dignified and decent

⁷⁰ *Ibid*, Art. 1 ¶ 3.

⁷¹ The Inter-American Court of Human Rights has affirmed that “damage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment.” Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia on the issue of the Environment and Human Rights, ¶ 64.

⁷² In addition, it is of utmost importance to point out that in the context of the Don Diego Project, the rights of the Cooperativa and its members to promote and strive for the protection and realization of human rights have been put at risk. As mentioned in the Counter-Memorial dated 23 February 2021, several members of the Cooperativa have been victims of harassment and criminalization, including criminal charges arising from their opposition to the Don Diego Project (¶ 233: “Subsequently, in 2015 ExO filed criminal charges against local fishermen and against a local journalist who reported on the activities carried out by ExO which alarmed fishermen in the area. Some international organizations such as Article 19 considered that ExO sought to criminalize and harass the residents and the journalist in question through these criminal processes, which in English are referred to as “SLAPP” suits or “strategic lawsuit against public participation”). It should be noted that the work of the Cooperativa in defense of its rights and participation activities with regard to decision-making processes by the Mexican State constitute rights that are fully protected under the Mexican legal framework and international human rights law. As affirmed by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, approved by the UN General Assembly in 1999, “[e]veryone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs. [...] This includes, inter alia, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms” (Art. 8). This confirms precepts of the Rio Declaration on Environment and Development from 1992 regarding the recognition of the right of every citizen to actively participate in decision-making on environmental issues, prescribing that this requires sufficient information on materials and activities that could generate a danger to their communities, and that the State must also facilitate such participation on the part of the population. Later, the access principles from the Rio Declaration were firmly established in Mexican law through the 1996 reform of the General Law on Ecological Equilibrium and Environmental Protection. The Mexican State has continued to strengthen these commitments and obligations through new and more recently issued international agreements, such as the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean that recognize and protect “all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression” as well as the State’s duty to protect defenders. On those grounds, it is evident that the Mexican State has participated in the evolution of this international legal framework, promoting the work of human rights defenders not only in the implementation of human rights but also in the existence of democratic systems and the consolidation of the rule of law.

⁷³ ICESCR, Art. 6(1).

existence”.⁷⁴ Elaborating upon the content of this right, the ESCR Committee has stated that the right to work is “essential for realizing other human rights and forms an inseparable and inherent part of human dignity”, affirming that the “right to work contributes at the same time to the survival of the individual and to that of his/her family, and [...] to his/her development and recognition within the community.”⁷⁵ In this case, the relationship of equity and solidarity that forms the basis for the Cooperativa’s work, as well as its six decades of cooperative, voluntary work in pursuit of a secure and advantageous economic future for its members and the families of the region, are a clear example of the right to work being exercised in the Gulf of Ulloa. *Amici* recall that the Don Diego Project would have been developed in the same area as the location of the fishing concession granted to the Cooperativa,⁷⁶ and that this concession is the basis on which the communities in the Gulf of Ulloa have exercised their fundamental right to work for six decades. Moreover, if the Don Diego Project had been approved, it would have irreversibly changed the environment on which these communities depend to make a living. Accordingly, if the Mexican State had permitted the development of the project that is the subject of this dispute, the State would have been in breach of its obligation to protect the right to work of the members of the Cooperativa and the communities of the Gulf of Ulloa.

- b) In the same way, both the ICESCR and the Protocol of San Salvador recognize **the right of every person to take part in cultural life**⁷⁷ and establish that the measures that States parties should adopt to guarantee this right include those necessary for the conservation of culture.⁷⁸ Elaborating on the meaning of culture for the purposes of the ICESCR, the ESCR Committee has affirmed that culture “encompasses, inter alia, ways of life [and] methods of production” and that it “shapes and mirrors the values of well-being and the economic...life of individuals, groups of individuals and communities”,⁷⁹ adding that the right to take part in cultural life also encompasses the right “to follow a way of life associated with the use of cultural goods and resources such as land, water, [and] biodiversity”.⁸⁰ The Cooperativa and the families that make up this fishing community have undertaken the work of fishing not only as a form of livelihood but also as a way of life, and they have developed a distinctive culture in order to ensure that the community has a dignified way to earn a living and to pass on their practices and knowledge from generation to generation. Given that the Don Diego Project would have endangered that lifestyle and the cultural expression that it embodies, *amici* consider that the Mexican State would have been in breach of its obligation to protect the cultural rights of this community, had it approved the project in this case.

⁷⁴ Protocol of San Salvador, Art. 6(1).

⁷⁵ See United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 18, 2005, on the right to work, Doc. E/C.12/GC/18, 6 February 2006, ¶ 1; see also International Labour Organization, Convention No. 168 on Employment Promotion and Protection against Unemployment, 1988, Preamble (recognizing “the importance of work and productive employment in any society not only because of the resources which they create for the community, but also because of the income which they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them”).

⁷⁶ ¶ 2b) *supra*.

⁷⁷ ICESCR, Art. 15(1)(a); Protocol of San Salvador, Art. 14(1)(a).

⁷⁸ ICESCR, Art. 15(2); Protocol of San Salvador, Art. 14(2).

⁷⁹ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21, 2010, on the right of everyone to take part in cultural life, Doc. E/C.12/GC/21, ¶ 13.

⁸⁰ *Ibid*, ¶ 15(b).

- c) With respect to the **right to health**, both the ICESCR and the Protocol of San Salvador enshrine the right of every person to enjoy the highest attainable level of health.⁸¹ The ESCR Committee has recognized that the right to health is “fundamental” and “indispensable for the exercise of other human rights”,⁸² affirming that States are “required to adopt measures against environmental [...] health hazards [...] For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil”⁸³ in addition to adopting measures aimed at “the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”⁸⁴ *Amici* would emphasize that, had the Mexican State approved the project, it would have permitted a series of impacts on the environment as a result of toxic and possibly radioactive emissions into the air and the marine environment,⁸⁵ with potentially grave repercussions for the well-being and health of the population. For this reason, *amici* consider that, if the Mexican State had permitted the Don Diego Project, it would have been in breach of its international obligation to protect the right to health in the context of business activities.
- d) The Protocol of San Salvador recognizes the **right to a healthy environment**⁸⁶ and requires States to protect and preserve the environment.⁸⁷ In addition, this right is one of the economic, social, and cultural rights protected under Article 26 of the ACHR.⁸⁸ With respect to this right, the Inter-American Court of Human Rights has recognized that “[e]nvironmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.”⁸⁹ The Court has also reaffirmed that this right confers specific obligations on States, including the obligation to guarantee every person a healthy environment in which to live, as well as obligations to promote the protection, preservation, and even improvement of the environment.⁹⁰ *Amici* reiterate the fact that seabed mining is especially dangerous for the marine environment and that the process of extracting phosphate is a potential source of toxic pollution that can even generate waste and emissions containing radioactive particulates.⁹¹

⁸¹ ICESCR, Art. 12; Protocol of San Salvador, Art. 10.

⁸² United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, on the right to the highest attainable standard of health, Doc. E/C.12/2000/4, ¶ 1.

⁸³ *Ibid.*, ¶ 36; see also ¶ 51 (affirming that “[v]iolations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; [...] and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries”).

⁸⁴ *Ibid.*, ¶ 15 (noting the Stockholm Declaration of 1972, the Rio Declaration, and the Protocol of San Salvador, among other sources of international law).

⁸⁵ ¶¶ 2d), 2e), 2f) *supra*.

⁸⁶ The Mexican Constitution also recognizes the right of every person “to a healthy environment for their development and well-being”, and obliges the State to “guarantee respect for this right”. Political Constitution of the United Mexican States, Art. 4. In addition, it is important to note that on 8 October 2021 the human right to a healthy environment was recognized at an international level by the United Nations Human Rights Council through the adoption of Resolution A/HRC/48/L.23/Rev.1 on the human right to a safe, clean, healthy, and sustainable environment (as orally revised), with a vote of 43 in favor, 0 against, and 4 abstentions.

⁸⁷ Protocol of San Salvador, Art. 11.

⁸⁸ Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia on the issue of the Environment and Human Rights, ¶ 57.

⁸⁹ *Ibid.*, ¶ 59.

⁹⁰ *Ibid.*, ¶ 60 (referring to the Working Group to examine the periodic reports of the States Parties established in the Protocol of San Salvador).

⁹¹ ¶ 2e) *supra*.

For that reason, *amici* consider that if the Mexican State had approved the Don Diego Project, it would have allowed the environment in the Gulf of Ulloa to be endangered; the Mexican State would therefore have been in breach of its obligation to protect the human right to a healthy environment.

44 In light of the Mexican State's international obligation to protect these rights against potential violations by third parties, including private companies and foreign investors, *amici* consider that the decision not to grant the environmental permit for the Don Diego Project was consistent with its international human rights obligations.

45 Further, on the basis of the above, *amici* consider that the decision of the Mexican State in this case was necessary to avoid the negative consequences of the Don Diego Project on the human rights of Gulf of Ulloa residents, and thus to comply with international human rights obligations of the Mexican State.

5 CONCLUSION

46 As *amici* have highlighted in this Submission, allowing the development of the Don Diego Project would, among other things: (i) involve a serious and irreversible impact on the marine ecosystem; (ii) involve a severe impact on the fishing activity that provides livelihoods not only for the members of the Cooperativa, but also for the members of other fishing cooperatives and numerous families that depend on fishing-related activities in the region; (iii) result in overlapping concessions or designations for incompatible uses in the same area, given that the Don Diego Project would undermine the very purposes for which the fishing refuge zone and the Cooperativa's fishing concession zone were created; and (iv) endanger an activity that is particularly important for the food security of the Mexican State.

47 It stands out from the above elements that the decision of the Mexican State to deny Odyssey an environmental permit necessary for the development of the Don Diego Project is not only justified due to the environmental and socioeconomic risk of allowing such project, but it is also necessary in order not to contravene a series of obligations under international environmental law and international human rights law. In other words, if the Mexican State had granted such a permit, it would have put at risk several rights and principles that the Mexican State is obligated to protect.

48 For this reason, *amici* consider that the measure taken by the Mexican State finds full support in these areas of international law and, further, that by refusing the permit, the Mexican State avoided breaching its obligations under international law.

49 Based on the foregoing, *amici* respectfully request that the Tribunal take these elements of fact and law into consideration when making its decision.

50 Respectfully submitted,

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