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## **LEGAL FRAMEWORK FOR TOURISM ACTIVITIES: MALECÓN TAJAMAR CASE, CANCUN, MEXICO**

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## ABSTRACT

Environmental law is one of the foundations for sustainability, which is why the full realization of its objectives are urgently increasing due to growing environmental pressures. Violations of environmental law hamper the achievement of all dimensions of sustainable development. The objective of this work is to design an alternative legal route that contributes to the protection of Mexican ecosystems and the social right to a healthy environment based on the existing legal framework. Under a qualitative research approach and the case study method, documentary research is anchored in a legal framework related to environmental law. Everything indicates that there was an environmental devastation, which caused damage to the flora and fauna, favoring foreign investment for mass tourism activity, undermining the right to a healthy environment and its repercussions on the social environment of Cancún, México.

## KEY WORDS

Environmental law, environmental impact, aquatic ecosystem, tourism.

**Summary:** I. Problematic situation. II. Background. III. Legal framework. IV. Methodology. V. Conclusions. Bibliography.

## I. PROBLEMATIC SITUATION

The protection of natural resources and species of fauna and flora that inhabit planet earth is a mandate by governments that was manifested in various global forums. The representatives of the peoples of the world, meeting at the World Summit on Sustainable Development in Johannesburg,<sup>1</sup> reaffirmed their commitment to sustainable development. This means ensuring that future generations can have dignified access to the planet's resources by meeting their own needs without detriment to the present.

To achieve this, countries have to establish national and state policies that have as their primary objective the preservation of flora and fauna. As well as the

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<sup>1</sup> United Nations: World Summit on Sustainable Development (2002), Johannesburg. Retrieved from: [https://www.un.org/spanish/conferences/wssd/cumbre\\_ni.htm](https://www.un.org/spanish/conferences/wssd/cumbre_ni.htm)

incorporation into laws or codes of the right to enjoy a healthy environment, which contributes to the good development of human life. However, many times it becomes an impossible task to materialize due to the political and economic interests that are imposed at the cost of everything, regardless of the consequences and environmental deterioration that this may generate.

Any growth within a society has to comply with certain normative provisions; This will contribute to have a sustenance of all the actions that are carried out by the different levels of government, attached to the legal norm. Despite the above, when there are strong economic interests, the law does not always prevail. On many occasions to favor private initiative, investors who arrive with sufficient economic resources, some authorities are forcing the rules established by the legislative power, to seek to justify as legal their decisions or authorizations to build in places, despite the effects on the human rights of people.

The main factors currently threatening the existence of mangroves are those related to climate change (especially sea level rise), urban developments, overexploitation of natural resources and changes in land use<sup>2</sup>. This has been supported by studies that have assessed and classified the vulnerability to anthropogenic threats to marine ecosystems<sup>3</sup>; the threat to the mangrove ecosystem due to the effects of climate change and the adaptation options for this important species<sup>4</sup>. Without neglecting the evaluation of the degree of resilience of the mangrove ecosystem against the most common forms of degradation and its future in the framework of the global era<sup>5</sup>.

Serving a purely economic objective, uncontrolled tourism real estate development is contributing to another common form of devastation of the mangrove ecosystem. In this regard, “it is not realistic to think that in countries with poor economies it

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<sup>2</sup> Uribe, J. & Urrego, L. E. (2009). Environmental management of mangrove ecosystems. Approach to the Colombian case. *Management and Environment* 12 (2). Retrieved from <https://revistas.unal.edu.co/index.php/gestion/article/view/14254>

<sup>3</sup> Halpern, B. S., Selkoe, K. A., Micheli, F., & Kappel, C. V. (2007). Evaluating and ranking the vulnerability of global marine ecosystems to anthropogenic threats. *Conservation Biology*, 21(5), 1301-1315. DOI: <https://doi.org/10.1111/j.1523-1739.2007.00752.x>

<sup>4</sup> Gilman, E., Ellison, J., Duke, N. & Field, C. (2008). Threats to mangroves from climate change and adaptation options: a review. *Aquatic botany*, 89(2), 237-250. DOI:<https://doi.org/10.1016/j.aquabot.2007.12.009>

<sup>5</sup> Alongi, D. M. (2008). Mangrove forests: resilience, protection from tsunamis, and responses to global climate change. *Estuarine, Coastal and Shelf Science*, 76(1), 1-13. DOI:<https://doi.org/10.1016/j.ecss.2007.08.024>

will be possible to conserve most of the forests, if they are not used productively. Mangrove management involves much more than timber production and must include a knowledge of all the resources and benefits that can be derived from the total mangrove ecosystem and other ecosystems with which they are associated.”<sup>6</sup>

In the case of the Tajamar Malecon in Cancun, Quintana Roo, everything indicates that there was environmental devastation, which caused damage to the flora and fauna of that area, but before pronouncing on the matter, it will be necessary to analyze the legal framework of mangroves in Mexico.

The mangrove is a tree characteristic of coastal wetlands of tropical zones, of flooded forests. They generally have modified roots to absorb water and air. Many excrete salts through the leaves and their fruits germinate on the tree before falling. They form ecosystems that spend much of the year flooded by saline water, as they are associated with tides and are classified as estuarine wetlands. The different types of mangroves form the mangrove ecosystem. Therefore, we must remember that the mangrove is a forest that keeps the leaves all year round, dense, composed of a small group of tree species (mangroves) that mark the transition between sea and land<sup>7</sup>. “There is probably no other group of plants with such marked adaptations to extreme conditions as the mangrove<sup>8</sup>,” due to the load of ocean water and fresh water that flows from rivers, terrestrial streams, underground, as well as nutrients and sediments.

Mangroves are plant formations of dense and well-defined structure, they are one of the most productive ecosystems and the starting point of the trophic chain; they are also the result of the interaction between the terrestrial and aquatic environment<sup>9</sup>.

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<sup>6</sup> Field, C. (1996). The restoration of mangrove ecosystems. *International Society for Mangrove Ecosystems*. Okinawa, Japan. 227 p. *Cit. by.*, Uribe Pérez, J. & Urrego Giraldo L. E. (2009). Environmental management of mangrove ecosystems. Approach to the Colombian case. *Management and Environment* 12 (2). Retrieved from <https://revistas.unal.edu.co/index.php/gestion/article/view/14254> p. 67.

<sup>7</sup> Moreno-Casasola, P., & Infante Mata, D. M. (2016). *Getting to know mangroves, flooded forests and herbaceous wetlands*. INECOL-ITTO-CONAFOR. Veracruz, Mexico, p. 33.

<sup>8</sup> Calderon, C.; Aburto, O. & Ezcurra, E. (2009). The value of mangroves. *Biodiversitas*, 82, 1-6. p. 2.

<sup>9</sup> Tovilla Hernández, C. (1998). *Ecology of mangrove forests and some socioeconomic aspects of the coastal zone of Barra de Tecoaapa, Guerrero, Mexico* (No. TE/583.42097275 T6). *Cit. by.*, Linares Mazariégoz, R. M., Tovilla Hernández, C. & De la Presa Pérez, J. C. (2004). Environmental education: an alternative for mangrove conservation. *Wood and Forests*, 10(Es2),105-114. p. 106.

Mangroves are one of the most productive ecosystems on the planet (24 tons/ha/year) with an annual yield similar to the most productive of our crops such as sugarcane (20 tons/ha), and even eight times higher than the most efficient cattle pastures (3 tons/ha). As a consequence of this high productivity, mangroves support important fisheries in the coastal lagoons, as well as in the adjacent marine area<sup>10</sup>.

As can be seen, mangroves are living spaces that favor not only fauna and flora, but also human beings by providing protection against hurricanes, as well as generating a better environment and climate.

Many of the decisions that are currently taken have been in favor of everything that can generate income or foreign exchange for the country, sacrificing rights that today have a very important role, and that by not respecting these rights negatively impact the different ecosystems, thus contributing to climate change.

## II. BACKGROUND

Throughout the history of countries, there have been moments of great relevance in relation to their legal systems, within a field where all the behaviors of people should be regulated by laws, including the acts carried out by administrative and jurisdictional authorities when exercising their functions. All with a view to maintaining order within a state of law.

Today, the substantive rights that are embodied in the Political Constitution of the United Mexican States, as well as in the international treaties signed and ratified by the Mexican State, are spearheads. All the governed, without exception, may enjoy without any authority being able to violate these rights, which enjoy a constitutional supremacy, except in the cases provided for in the same law, may be temporarily restricted. Some examples of these substantive rights are: the right to life, liberty, privacy, free movement, access to justice, a healthy environment, freedom from discrimination, among many others.

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<sup>10</sup> Lieth, H. & Whittaker, R. H. (1975). Primary Productivity of the Biosphere. *Ecological Studies (Analysis and Synthesis)*. In: Whittaker Robert H., Marks Peter L. (eds) *Methods of Assessing Terrestrial Productivity*, vol. 14. Springer, Berlin, Heidelberg. *Cit. by.*, Flores-Verdugo, F. J., Agraz-Hernández, C. M. & Benítez-Pardo, D. (2006). Creation and restoration of mangrove ecosystems: basic principles. *Strategy for Integrated Coastal Management: The Municipal Approach*, 1093-1110. p. 1093.

However, not at all times or in all parts of the world human rights have been sufficiently recognized or protected by the one who has the greatest obligation of respect and protection, that is, the State<sup>11</sup>.

This makes it possible to establish that in a State governed by the rule of law such as Mexico, a series of legal instruments must be involved that guarantee protection to individuals. That is to say, that any human being who affects his legal sphere due to the violation of a right enshrined in the Federal Constitution or in international treaties, by an administrative or jurisdictional authority, can activate it and make use of it; with the purpose of restoring or re-establishing the enjoyment of that right that has been suppressed to the detriment of the governed. One of the legal instruments that people have to defend themselves is the amparo trial, as a means of protection, when a human right has been affected or violated by the acts or omissions of any authority.

It is based on the premise that all the human rights recognized by the Mexican Constitution, as well as in the international treaties on the same subject to which Mexico is a party, which have been signed by the President of the Republic and approved by the Congress of the Union, play a role of vital importance and transcendence in the lives of Mexicans. They are necessary for the growth and development of people, since the idea of living without free movement, or freedom of expression, or respect for physical integrity, etc. is not conceived. Which means that these rights have to be available to all people from the moment of their birth until their death. But given the conditions and characteristics of modern societies, it is necessary to determine that many other rights begin to have an importance and transcendence in the lives of all, such is the case of developing as people within a healthy environment, as indicated in the fifth paragraph of Article 4 of the Magna Carta.

At present, there has been significant progress in Mexican legal norms; Now we have a different way of dispensing justice in criminal matters, having an accusatory criminal system that came into force in 2008. These are new rules for the protection

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<sup>11</sup> Political Constitution of the United Mexican States, (1917). *Chamber of Deputies, H. Congress of the Union*. Article 4 (Last reform published DOF 27-01-2016). Retrieved from: [http://www.diputados.gob.mx/LeyesBiblio/pdf\\_mov/Constitucion\\_Politica.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf)

of substantive rights through the amparo trial, embodied in the Law Regulating Articles 103 and 107 of the Federal Constitution of 2013. As well as the privilege enjoyed today by all human rights attached to the pro-person principle, indicated in the second paragraph of article 1 of the Constitution, which states that the norm that most favors the governed will be applied. Whether it is in the supreme law or in an international treaty to which Mexico is a party, addendum reform was made in 2011.

Today we can speak of a constitutional rank that international treaties on human rights have, compared to the Magna Carta. The above is indicated in the contradiction of thesis 293/2011 issued by the Supreme Court of Justice of the Nation<sup>12</sup>. In this way, it is evident that the Mexican State, since 2008, has managed to consolidate an avant-garde legal framework, according to the current needs of the country.

For this reason, one of the human rights that begins to have a useful life and of great scope in the case of Mexico is the right to an environment. The Federal Constitution was able to express this right for the first time in the 1999 reform in which the fifth paragraph was added to article 4 of the Constitution, and which was drafted as follows: “Everyone has the right to an adequate environment for their development and well-being”.<sup>13</sup>

In this right to an environment, something very incipient and ambiguous is embodied; First, because the word “adequate” was not clearly specified, since it can have different nuances or scopes. Second, because it was not added the way to protect this right in the event that someone violated it since it was not specified who would have the responsibility to ensure compliance. As a consequence of the lack of legislative vision that was had when drafting this fifth paragraph at that time, it became a decorative right of the Federal Constitution. It was totally limited to cover the purpose of preserving and prioritizing the protection of the environment against urban development, regardless of what the secondary laws indicate. These,

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12 “SCJN determines that the norms on human rights contained in International Treaties have constitutional rank.” Retrieved from: <https://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientooid=556>

13 Political Constitution of the United Mexican States, (1917). *Chamber of Deputies, H. Congress of the Union*. Article 4 (6th reform published DOF 28-06-1999). Retrieved from: [http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM\\_ref\\_141\\_28jun99\\_ima.pdf](http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_141_28jun99_ima.pdf)

in turn, also present limitations and ambiguities to achieve a healthy environment that contributes to the harmonization that must be taken in everything related to the human right to an environment.

However, in 2012 the fifth paragraph of article 4 of the Federal Constitution had a reform with a greater legal scope and protection, being as follows:

“Everyone has the right to a healthy environment for his or her development and well-being. The State shall guarantee respect for this right. The damage and environmental deterioration will generate responsibility for whoever causes it in terms of the provisions of the law.<sup>14</sup>

From this reform, not only is the “adequate environment” modified by that of a “healthy environment”, but also, the Mexican State is instructed to be the guarantor of this right. Which will have the task of guaranteeing, on the one hand, that the environmental rights that every person must enjoy are not violated, and on the other, that of imposing sanctions on those who affect it.

But despite the fact that this article of the Constitution is very clear and with sufficiently important scope of protection, it is rarely complied with. An example of this is the case of the destruction of the mangrove swamp on the Tajamar Malecon, in Cancun, Quintana Roo, the reason for this research work. Although today, the laws in Mexico are at a level that has been advancing in their consolidation, it is necessary to start from the existing legal framework to achieve full respect for a healthy environmental right. It is possible to achieve respect for this right with the current regulations, without having to wait for other constitutional reforms. Perhaps, one of the biggest problems that may arise, beyond having perfect regulations, is the lack of commitment of some authorities to comply and enforce what the laws indicate, thus affecting human rights.

The reason why emphasis is placed on the protection of the mangrove, and very specifically in the case of the state of Quintana Roo, is precisely because of the great importance they have for human life, flora and fauna, so it is intended to avoid an ecological imbalance.

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<sup>14</sup> Political Constitution of the United Mexican States, (1917). *Chamber of Deputies, H. Congress of the Union*. Article 4 (13th reform published DOF 08-02-2012). Retrieved from:[http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM\\_ref\\_200\\_08feb12.pdf](http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_200_08feb12.pdf)



The mangrove is an irreplaceable ecosystem, from which human communities extract various resources to survive. It is essential to disseminate the importance of this ecosystem as a refuge for many species of flora and fauna, as well as its rational use<sup>15</sup>.

What happened on the Tajamar Malecon is considered an irreversible ecocide to the environmental impact on an area near the Nichupté lagoon and which has an access through Bonampak Avenue. Since in that area that has been privatized, the intention to build roads, buildings, parks, shopping centers, all with the approval of the authorities operates. It is important to note that urban development is vital for all those people living in society. However, growth has to take place within an order and harmony, not only with the rights of people, but also with the environment, because the earth and all natural elements are transcendental for human life and must be taken care of.

The surface of land where the mangrove is located belongs to the National Fund for Tourism Promotion (FONATUR), later the faculties it has will be analyzed. It should be noted that although tourism is an important source of foreign exchange for the country, we can no longer afford that their interests are above environmental protection, which did not happen with the Malecón Tajamar.

### **III LEGAL FRAMEWORK**

Tourism in Mexico has been fundamental to achieve economic growth, which must occur in an orderly manner, taking into account social impacts, but also those related to flora and fauna.

One of the tourist centers that nationally and worldwide has stood out for its beautiful turquoise blue waters and its fine white sands is undoubtedly the City of Cancun, which has rebounded with a series of recreational activities for national and foreign tourists. The attractions of Cancun have motivated people to establish their domicile there and work in the tourism industry. Others are attracted by the opportunity that represents the tourist destination of international stature for real

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<sup>15</sup> Linares Mazariegos, R. M., Tovilla Hernández, C. & De la Presa Pérez, J. C. (2004). Environmental education: an alternative for mangrove conservation. *Wood and Forests*, 10(Es2),105-114

estate investments in: shopping centers, hotels, restaurants, theme parks and other businesses that demand national and foreign tourists. This has led to the focus on this tourist destination and the use of land for commercial purposes.

Cancun has seas, lagoons, cenotes and along the Caribbean Sea you can see mangroves that are important to house a number of species of flora and fauna, and also serve as protection in case of hurricanes; But these natural enclosures are often affected as a result of favoring urban growth for tourism purposes.

To refer to the configuration of the right to the environment as a human right in Mexico, it is necessary to consider that, “constitutional recognition in our country is brief and disjointed, perhaps because it has been the product of several constitutional reforms produced at different times, without having had the opportunity to do so in a comprehensive and uniform manner. The articles that are directly related to the right to the environment are, namely: 4th, 27 and 73, and their content, let me tell you, is not wordy. In the last two, only mention is made of the preservation and restoration of the ecological balance, establishing a concurrence between federation, states and municipalities. The first article regulates the environment as a human right, since it establishes: everyone has the right to an environment adequate for their development and well-being.<sup>16</sup>

It is worth mentioning, despite the fact that mangrove species are protected by Official Mexican Standard 059, several offenders who have destroyed mangrove areas have been forced to develop reforestation projects with mangroves or to restore these ecosystems in nearby sites (ecological compensation). Examples include cases of various tourist developments in Quintana Roo and other sites in the Pacific and Gulf of California<sup>17</sup>.

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<sup>16</sup> Corzo Sosa, E. (2015). Right to an adequate environment as a human right. Its normative configuration. In: Carmona Lara, M. C. and Acuña Hernández, A. L., (Coordinators). *The Constitution and Environmental Rights*. National Autonomous University of Mexico, Institute of Legal Research, National Council of Science and Technology, Mexico. Page 3.

<sup>17</sup> Agraz Hernández, C. M. (1999). *Experimental reforestation of mangroves in estuarine lagoon ecosystems of the northwest coast of Mexico* (Doctoral dissertation, Autonomous University of Nuevo León). *Cit by.*, Flores-Verdugo, Francisco Javier, Agraz-Hernández, Claudia Maricusa, & Benítez-Pardo, Daniel (2006). Creation and restoration of mangrove ecosystems: basic principles. *Strategy for Integrated Coastal Management: The Municipal Approach*, 1093-1110.

Many of the decisions that are currently taken have been in favor of everything that can generate income or foreign exchange for the country, sacrificing rights that today have a very important role. Failure to respect these rights negatively impacts different ecosystems, thus contributing to climate change.

On April 10, 2003, the Official Mexican Standard NOM-022-SEMARNAT-2003 (Ministry of the Environment and Natural Resources) was published in the Official Gazette of the Federation. This standard establishes the specifications for the preservation, conservation, sustainable use and restoration of coastal wetlands in mangrove areas, which states: “That the Ministry of Environment and Natural Resources through the General Law of Ecological Balance and Environmental Protection in terms of environmental impact, establishes that for the realization of works or activities that may cause ecological imbalance or exceed the limits and conditions for protect the environment and preserve and restore ecosystems, prior authorization from SEMARNAT is required. That it is urgent to implement measures and programs that protect the integrity of coastal wetlands, protecting and, where appropriate, restoring their hydrological functions, contiguity, maintenance of biodiversity, and coastal stabilization, with measures that restore their vegetation cover and hydrological flow avoiding their deterioration due to land use change, indiscriminate channeling, opening of mouths in lagoons and estuaries, and interruption or diversion of fresh water or circulation in the coastal wetland that increases desolvation, increase in salinity, reduction of productivity, loss of habitat for reproduction and rearing of larvae of marine species, and desolvation. That the coastal wetlands regulated by this norm that are found on the banks of lagoons, rivers, estuaries, estuaries and other bodies of water, whose runoff comes from a basin to which pollutants of urban, industrial, and agricultural origin are discharged and in the face of the negative experiences of other countries, it is necessary to adequately guide industrial development, urban, tourism and shrimp of high impact, with a comprehensive vision, which includes the hydrological basin to avoid putting at risk the natural conditions of coastal wetlands.”<sup>18</sup>

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<sup>18</sup> Official Journal of the Federation, (2003). *NOM-022-SEMARNAT-2003*. Retrieved from: [http://dof.gob.mx/nota\\_detalle.php?codigo=697013&fecha=10/04/2003](http://dof.gob.mx/nota_detalle.php?codigo=697013&fecha=10/04/2003) paras. 2-4.

This Official Mexican Standard NOM-022-SEMARNAT-2003, mentions that it is possible to cause ecological imbalance, as long as there are environmental impact studies and authorization from SEMARNAT, which at first seems reasonable. However, it is not being taken into consideration that on the other hand there is also a right to a healthy environment, inherent to the human being, as indicated in article 4, of the Federal Constitution embodied above.

The law has to be the means to regulate all the behaviors of people living in a society, which means that it must be above any personal interest of governmental or private groups. But there are times when economic elements manage to position themselves on a plane that causes the subordination of legal norms, where they are forced to fulfill the interests of those people who condition the investment in exchange for omitting some rules indicated by the codes. If we add to this the bad legislative technique, then the legal norm will not be able to efficiently establish the guidelines that must be followed in environmental matters. In addition, the lack of ethics and commitment of the authorities, cause an impairment of environmental law, where actions aimed at favoring minority groups are presented.

In addition to the above, it is also necessary to mention the additional protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the “Protocol of San Salvador”. Recognized by all States Parties, including Mexico, which signed and ratified, and which was subsequently published in the Official Gazette of the Federation on September 1, 1998, becoming effective for the Mexican State, and that Article 11 of this Additional Protocol states:

1. Everyone has the right to live in a healthy environment and to basic public services.
2. States Parties shall promote the protection, preservation and improvement of the environment<sup>19</sup>.

In contrast, “international environmental law can be defined as the set of principles and legal norms aimed at the preservation, conservation and improvement of

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<sup>19</sup> Protocol of San Salvador, (1998). *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, “Protocol of San Salvador”. Retrieved from: <https://www.oas.org/juridico/spanish/tratados/a-52.html> Art.11

the environment within and beyond the territorial limits of States. This right is eminently functional, preventive and instrumental. Its functional nature is clear in that it has emerged to satisfy an urgent objective of the international community: the exploitation of natural resources in a context of respect for the human environment and preservation of the ecological. It is preventive because it tries to avoid the deterioration of the environment.”<sup>20</sup>

In view of article 4, Constitutional and article 11 of the Protocol of San Salvador, it is clear that the right to a healthy environment must be enjoyed by all people. It should be taken into consideration that, as a result of the constitutional reform of 2011, which modifies article 1 of the Magna Carta, as well as the jurisprudential criterion issued by the Supreme Court of Justice of the Nation, international instruments related to human rights enjoy a Constitutional hierarchy. That is, these instruments such as treaties, conventions, pacts, are in the same rank as the Mexican Constitution.

In this way, enjoying a healthy environment is a human right that was already expressed in international treaties such as the one indicated in the previous paragraph and today are at the top of Mexico’s regulations. The only reason that can explain the reason for not fully complying with this right is, on the one hand, the lack of commitment of those responsible authorities that must ensure compliance and execution of the laws, a task that they are not carrying out formally. On the other hand, the gaps or deficiencies that secondary or regulatory laws may present, which opens the door for decisions to be made favoring the economic interests of some groups of investors, sacrificing a primordial right such as the environment, which is vital for the development of life not only human, but also of flora and fauna.

The right to a healthy environment is a right that has supremacy over any other legal provision, including the Official Mexican Standard already indicated, or obligation found in a regulatory or secondary law. The authorities must maintain the normative order, fulfilling the specific purposes pursued by the legal norms, on which they must focus to favor the highest hierarchy of law. In case of violation

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<sup>20</sup> Soberanes, J. L., Treviño, F., Bugada, D., Carmona B., & Flores, M. (1997). *Environmental law in North America and the Mexican electricity sector*. National Autonomous University of Mexico, Institute of Legal Research. Federal Electricity Commission, Mexico. Page 4.

of this substantive right, the governed have a means to demand respect for it and, where appropriate, reinstate its enjoyment and exercise.

Within the right to a healthy environment, the human being has to enjoy what we still have today around the environment, since much of it has been destroyed by the poorly controlled construction of housing complexes, where foreign investment prevails, indiscriminately sacrificing forests, jungles, rivers, lagoons, mangroves, among other natural resources.

The protection of the environment also has a relevant character, because through the recognition of this right it seeks to protect the environment that will be inhabited by future generations and their right to develop in a favorable environment<sup>21</sup>.

The administrative and jurisdictional authorities will have to carry out a balancing exercise, between a right to a healthy environment, and a right that any person may have to invest in private initiative. Without losing sight of what constitutional and international norms establish, not only as guarantors of protection of fundamental and human rights, but as supreme norms of the Mexican State.

This will necessarily lead to having to analyze and weigh the right that will bring more benefit. Depending on the specific case, it is possible that at some point urban constructions can be privileged over mangrove areas, but in a harmonious way, and based on previous environmental studies.

In the case at hand, of the urbanization project known as Malecón Tajamar, in 2003, FONATUR obtained the registration to carry out the construction on the Malecón Tajamar. In February 2006, it obtained authorization from SEMARNAT with a validity of 5 years, to start the works and all this with the endorsement of the Federal Attorney for Environmental Protection (PROFEPA).

With all the permits, as well as the various environmental studies, the Malecón Tajamar project was already a reality to carry it out and start the works within the 5 years that the validity of the authorization lasted. Something that was not the case,

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<sup>21</sup> Political Constitution of the United Mexican States, (1917). *Chamber of Deputies, H. Congress of the Union*. (Last reform published DOF 27-01-2016). Retrieved from:[http://www.diputados.gob.mx/LeyesBiblio/pdf\\_mov/Constitucion\\_Politica.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf)

which is why, when the validity expired, an authorization had to be requested again in March 2011, but now for an extension of the validity in favor of FONATUR, and that this validity was extended until February 2016.

At the time SEMARNAT authorized the extension of the validity in March 2011, this Secretariat had to take into consideration article 60 TER of the General Wildlife Law, which was added in February 2017 and which states: “The removal, filling, transplanting, pruning, or any work or activity that affects the integrity of the hydrological flow of the mangrove is prohibited; the ecosystem and its area of influence; of its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; nesting, breeding, sheltering, feeding and fingerling areas; or interactions between mangroves, rivers, dunes, adjacent marine area and corals, or that lead to changes in ecological characteristics and services<sup>22</sup>.

In the Mexican legal system, the principle of non-retroactivity of the law operates, which means that any legal norm must always be regulating facts or behaviors from the moment of entry into force, towards the future and not towards the past. Something that did not happen with article 60 TER indicated in the previous paragraph, violating the effective application of this norm, by ignoring its content, provoked of course, by the authorities who were in charge of this unit and who had the responsibility to adhere to what the law established.

At first it seems that SEMARNAT did not infringe the General Wildlife Law, since the authorization of the project in favor of FONATUR was in February 2006, and that the authorization of expansion is part of that first authorization, and that article 60 TER of the Law in question, entered into force in February 2007, for that reason it may be established that it did not have to comply with the provision of Article 60b.

However, we are dealing with two acts; On the one hand, we have the authorisation, and on the other the enlargement which, although it is true, are intimately related, are two totally different acts. This leads us to conclude that the extension of the authorization to develop the Malecón Tajamar by FONATUR should not have been

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<sup>22</sup> General Wildlife Law (2015). *General Wildlife Law*. New Law in the Official Gazette of the Federation. Retrieved from: [https://www.profepa.gob.mx/innovaportal/file/5779/1/ley\\_general\\_de\\_vida\\_silvestre.pdf](https://www.profepa.gob.mx/innovaportal/file/5779/1/ley_general_de_vida_silvestre.pdf) p. 26.

authorized in accordance with article 60 TER of the General Wildlife Law, since this law was in force when an extension of the authorization was authorized and had to be subject to current regulations. As for the authorization granted to FONATUR in 2006, it was in accordance with the law, since the General Wildlife Law was not in force; Subsequently, a reform was made to the law, establishing clear parameters of care for the mangrove ecosystem.

In addition to the above, it should be mentioned that one of the reasons why, despite the fact that Mexico is a party to the Protocol of San Salvador, this international convention did not have the force to impose its normative mandates. This is because, in 2006, although it is true, it enjoyed a supralegal status, that is, it was above federal laws and below the Constitution, there was no legal mechanism that would allow it to intervene in case any authority did not comply with it. In other words, international conventions or treaties lacked mandatory force, so it explains that this convention has not been taken into account, since it was until June 2011 that Article 1, Constitutional, was reformed, adding the amparo trial to protect and restore human rights found in international treaties when they have been violated by the State. through the authorities.

What emerges from the previous paragraph allows us to point out that the authority, by adhering to the law and complying with what it expresses, will be acting within a legality. This leads to the determination that the authorization, despite the fact that a part of the mangrove in Tajamar was damaged, the decision was made based on what the legal norms allowed at that time. In addition to this, international treaties did not yet enjoy a constitutional hierarchy as already expressed. Today, and according to the Supreme Court of Justice of the Nation (SCJN), when ruling in September 2013, the contradiction of thesis 293/2011, they agreed that international treaties on human rights are on a par with the Constitution. If we add to this that Article 1, Constitutional, states that: “In the United Mexican States all persons shall enjoy the human rights recognized in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, the exercise of which may not be restricted or suspended, except in the cases and under the conditions established by this Constitution.”<sup>23</sup>

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<sup>23</sup> Political Constitution of the United Mexican States, (1917). *Chamber of Deputies, H. Congress of the Union*. (Last reform published DOF 11-03-2021). Retrieved from: [http://www.diputados.gob.mx/LeyesBiblio/pdf\\_mov/Constitucion\\_Politica.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf)Art. 1.



This means that today, when people suffer an infringement of their human rights, they will be able to count on a guarantee for their protection, and that this guarantee is the amparo trial. Therefore, regardless of the authorizations granted by the authorities for construction in areas where mangroves exist, anyone who believes that their right to a healthy environment is being affected, can file an injunction to stop any construction and thereby protect the irreversible damage that may be caused to the mangrove ecosystem.

The foregoing is based on article 5, section I, of the Amparo Law, since <sup>24</sup>it states that, in order to be a party to the amparo proceedings as a complainant, persons may establish in their claim a legal or legitimate interest; and in the case of the right to the environment, since there is no direct and personal affectation, The interest you will have to express will be the legitimate one. With the Amparo Law of 1936, it was not possible for the governed to file an injunction against environmental affectations. But with the one of 2013, it is already possible to resort to the trial of guarantees to challenge the acts of the authorities that affect the right to a healthy environment and avoid irreparable damage.

In this regard, it is necessary that “expectations about the contribution that judges can make to stop and reverse the damage that human activities are causing to life support systems on the planet, occupy an increasingly important place in the global agenda on the sustainability of development and human rights. Both at the international level and in domestic legal systems, the creation of effective avenues of access to justice to resolve conflicts related to the use of biological diversity and the quality of the environment is considered an imperative on which both the exercise of fundamental rights of individuals depends, as the very permanence of nature and the quality of life of future generations.”<sup>25</sup>

Increasingly and gradually, the protection of environmental law is ceasing to be an isolated function and responsibility among countries, and is becoming a policy

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<sup>24</sup> Chamber of Deputies of the H. Congress of the Union (2013). Amparo Law, Regulations of Articles 103 and 107 of the Political Constitution of the United Mexican States. Retrieved from: [http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp\\_150618.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_150618.pdf) article 5 section I.

<sup>25</sup> Rabasa, A., Camaño, D., Carrillo, J.A., Medina, R.G., (2020). Content and scope of the human right to a healthy environment. *Jurisprudence Notebook No. 3*. Center for Constitutional Studies of the Supreme Court of Justice of the Nation, July 2020, Mexico, p. XI.

where States are joining efforts to contribute and maintain an environment where ecosystems such as mangroves are respected and that positively impact flora and fauna. But for this, the participation of judges is required so that through the laws, they can impart justice, which makes them important elements to enforce Mexican regulations, within their scope of competence.

It is logical and reasonable that when two fundamental rights are colliding, on the one hand, the right to a healthy environment, and on the other, a right to have recreational spaces and private initiative to acquire land. It seems that the scope and transcendence of these two rights that are important, in the specific case of the Malecón Tajamar, the right to a healthy environment must be preferred and protected. It is possible to live without having a space for recreation or property, and that these can be found in other lands where it does not affect the mangrove. However, the right to a healthy environment plays an important role, because the life of human beings, as well as flora and fauna, depends on an adequate preservation of ecosystems.

The weighting that must be carried out when there are two rights at stake, will be subject to each specific case. However, in the case of Tajamar, there is a right that directly impacts life, which is a healthy environment. If for any reason any ecological balance is destroyed, they will put at risk not only the development and growth of the person, but also life itself. Derived from this, it is logical to understand that the reasonable thing is to preserve, above all, the right to a healthy environment, otherwise it can gradually lead to the destruction of the human being, by adding the devastation of the mangrove, not only in Mexico, but also in the whole world.

On the other hand, Article 99 of the General Wildlife Law establishes the path to be followed when non-extractive activities are carried out in mangrove areas, this article mentions that: “The non-extractive use of wildlife requires prior authorization from the Secretariat, which shall be granted in accordance with the provisions established in this chapter, to ensure the welfare of wild species, the continuity of their populations and the conservation of their habitats. The works and activities of non-extractive use that are carried out in mangroves must be subject to the provisions provided for in article 28 of the General Law of Ecological Balance and Environmental Protection.”<sup>26</sup>

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<sup>26</sup> General Wildlife Law (2015). *General Wildlife Law*. New Law in the Official Gazette of the Federation on July

This article makes it clear that in order to carry out an extraction of wild species, an authorization from SEMARNAT must be recorded, provided that an environmental impact assessment has been carried out, as indicated in article 28 of the General Law of Ecological Balance and Environmental Protection, and when it is for the purpose of carrying out activities indicated in section IX that says: “Real estate developments that affect coastal ecosystems<sup>27</sup>.” For this reason, FONATUR made and made decisions in accordance with the legal norms that govern them when environmental issues are involved.

It should be noted that the conduct of citizens and authorities may be classified in the Federal Criminal Code, as they are considered crimes. In this regard, article 420 bis, section I, of the Title of Crimes Against the Environment and Environmental Management of the Federal Criminal Code, stipulates that, “a penalty of two to ten years’ imprisonment and a fine of three hundred to three thousand days shall be imposed on anyone who: I. Damages, drains or fills wetlands, mangroves, lagoons, estuaries or swamps<sup>28</sup>”.

From this article it is derived as one of the requirements, that the environmental affectation must be carried out illegally, but in the process of the Malecón Tajamar, there were the permits granted by the instances empowered to do so, which leaves out the power to apply the Federal Criminal Code for these behaviors. Now, what would have to be analyzed is whether the authorities in charge of granting permits acted within the framework of legality, and that is where some acts can be identified in which they incurred when authorizing the real estate development, when there were legal impediments.

In the case of the Malecón Tajamar, the path followed by the affected people was the correct one when seeking to suspend through the amparo the act of the authority,

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3, 2000 (*Last reform DOF 26-01-2015*). Retrieved from: [https://www.profepa.gob.mx/innovaportal/file/5779/1/ley\\_general\\_de\\_vida\\_silvestre.pdf](https://www.profepa.gob.mx/innovaportal/file/5779/1/ley_general_de_vida_silvestre.pdf) art. 99.

<sup>27</sup> General Law of Ecological Balance and Environmental Protection (2015). *Official Journal of the Federation*. (*Last reform published DOF 09-01-2015*). Retrieved from: [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5378251&fecha=09/01/2015](https://www.dof.gob.mx/nota_detalle.php?codigo=5378251&fecha=09/01/2015) article 28, section IX.

<sup>28</sup> Federal Criminal Code (1931). *Chamber of Deputies, H. Congress of the Union*. (*Last reform published on February 19, 2021*). Retrieved from: [http://www.diputados.gob.mx/LeyesBiblio/pdf/9\\_190221.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/9_190221.pdf) article 420 bis, section I.

which in this case was the authorization to urbanize and start the real estate project in that area. This is despite a set of laws such as: the General Law of Ecological Balance and Environmental Protection, the General Law of Wildlife, the General Law of National Assets, the Official Mexican Standards 022-SEMARNAT-2003 and 059-SEMARNAT-2010, all linked and focused on the preservation and conservation of the environment. This last Official Standard has as its objective and field of application: “to identify the species or populations of wild flora and fauna at risk in the Mexican Republic <sup>29</sup>...”; However, a fundamental right with greater scope must be privileged over other rights.

In this regard, it should be questioned whether non-jurisdictional authorities such as SEMARNAT, FONATUR, PROFEPA and the General Directorate for Wildlife; They must observe the norms that come from international sources such as treaties, conventions, pacts, etc. If the answer were affirmative, then SEMARNAT should not have granted authorizations, so that it can preserve the right that the inhabitants of Cancun have to a healthy environment. This being a right of constitutional rank, in other words, it is a supreme right that must be above any personal interest. Another element that has in its favor the right to a healthy environment is that it can never be individual, but will always benefit a community. In the event that this right is violated, then the affectation also impacts the collective interests, causing a greater scope of protection that the authorities must have, which by law, have the responsibility to conserve and preserve the environment.

When making a decision and resolving with respect to an authorization where an ecosystem is affected, it is necessary to take into account not only the current national and international regulations; but now we must take care of the areas where we live and that serve so that human beings can have a harmonious development of life, and to achieve this we must also preserve the flora and fauna. All this to continue avoiding an imbalance or environmental destruction, which tomorrow makes it impossible to inhabit planet earth.

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<sup>29</sup> SEMARNAT (Ministry of Environment and Natural Resources), (2010). Official Mexican Standard NOM-059-SEMARNAT-2010, *Environmental protection-Native species of wild flora and fauna-Risk categories and specifications for inclusion, exclusion or change-List of species at risk*. Official Journal of the Federation, 110. Retrieved from: <https://www.dof.gob.mx/normasOficiales/4254/semarnat/semarnat.htm>

As mentioned above, the damage to the environment is being irreversible, which means that the house where we are living (earth) we are affecting it, and tomorrow many will not have the opportunity to choose or move to another planet, so today is the time to take seriously the adequate protection of the place where we live. Therefore, legislative work must pay more attention to have effective laws that contribute to correctly regulate the areas that require special care, and in this case, the mangrove.

For this reason, when a fundamental or human right is violated by an authority, natural or legal persons can make use of amparo, which is a protective means par excellence of these rights. In April 2013, when the Amparo Law came into force and replaced the 1936 Law, it contemplates that, to access the amparo, it is not required to demonstrate a legal interest. It is enough to have a legitimate interest, as was the case of the organization “Salvemos Malecón Tajamar” that filed an indirect amparo before a District Judge to provisionally suspend the works, and then achieve in a sentence the definitive suspension. The main thing is that the jurisdictional authorities must attend and analyze the arguments of the complainants, as well as the responsible authority, and also assess the impact on investors, to comply with the principle that every person must be heard and defeated in court (STC 12/1987, of February 4).<sup>30</sup>

It should be noted that, although it is true that cities are becoming increasingly large and complex, they must do so in an orderly manner and harmonized with the environment. Fortunately, there are currently legal mechanisms that can be enforced at any time by one or more people who feel an affectation in the violation of a human right. In order to avoid its irreparable consummation and restore the right affected by the authorities and by some individuals as referred to in the Amparo Law, suspending the act of authority provisionally, and later in the sentence seek the definitive suspension.

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<sup>30</sup> Effective judicial protection implies, among other guarantees, the fact that no one can be convicted without being heard and defeated in court. However, this principle has been reformulated by the Constitutional Court in terms that “no one can be convicted without having had the opportunity to be heard and defeated in trial”. Retrieved from: <https://www.expansion.com/diccionario-juridico/principio-de-audiencia-de-partes.html>

Next, the methodological strategy followed by the work of this manuscript is presented in a reasoned manner.

#### IV. METHODOLOGY

The items that were part of the methodological strategy, which guided the research work, are presented in Table 1., as follows:

**Table 1.**

*Methodological strategy of research*

Item	Activity
<b>Scope of the investigation</b>	Descriptive study
<b>Epistemological approach</b>	Critical theory
<b>Approach</b>	Qualitative
<b>Method</b>	Case Study
<b>Information Sources</b>	Documental investiga
<b>Observables</b>	Social actors involved with the object of study; Malecón Tajamar project area in Cancun.

**Source:** Authors.

There are different types of research that are divided according to the purpose of each one, the management of information, the object of study and the place where it will be developed<sup>31</sup>. For much of the academic community, the classification of research types is based on the criteria of purpose, time, medium, manipulation of variables and nature of the data<sup>32</sup>.

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<sup>31</sup> Martínez Miguélez, M. (2011). *Science and art in qualitative methodology*. D.F, Mexico. Trails.

<sup>32</sup> Tejada, J. (1997). *The process of scientific research*. Barcelona, Spain.: Santa Madrona.

Descriptive studies seek to define the characteristics of people, communities, groups, processes or any other phenomenon that is involved in an analysis<sup>33</sup>.

According to the level of deepening in the object of study, the scope of this work is descriptive since the goal was to detail a situation that generated events and effects on the environment and people.

For the development of the theoretical framework, the position offered by critical theory was privileged, given its propositional intention and its transformative character. By virtue of the questions expressed in this work, it is the critical stance that is useful in a broad sense since it allows a dialectical reflection from an intellectual exercise and that aims to offer alternative ways or paths to the problematic situation presented in the first section of the work.

On the other hand, the qualitative approach meant collecting data and non-numerical information in order to refine the research questions and deepen the field intervention process. The case study was the method of choice in the research; “Case study is empirical research that studies a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and its context are not clearly apparent<sup>34</sup>.”

From documentary research as an information search technique, first-hand data and information were obtained that were subsequently stored and processed systematically to be presented in a new scientific document in a reasoned manner and under a critical paradigm.

## V CONCLUSIONS

It is necessary to value the mangrove ecosystem for its enormous ecological and economic importance, considering all the direct and intangible benefits for both fisheries and aquaculture, water quality, its environmental contributions as carbon

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<sup>33</sup> Danhke, G. L. (1989). Research and communication. In: Carlos Fernández-Collado and Gordon L. Danhke (Eds.). *Human communication: Social science*. (pp.385-454). Mexico: McGraw-Hill

<sup>34</sup> Yin, R. K. (2003). *Case study research: Design and methods*. Thousand Oaks: Sage. *Cit. by.*, Jiménez Chaves, Viviana Elizabeth, & Comet Weiler, Cornelio (2016). Case studies as a methodological approach. *ACADEMO Journal of Research in Social Sciences and Humanities*, 3(2). p. 4.

stores, permanent and temporary shelter of species of commercial and scientific value, stabilizers and protectors of the coastal zone, among others<sup>35</sup>.

As a consequence of climate change, states have to take measures beyond what is currently indicated by law, to take care of and prevent everything that may generate an environmental imbalance. In the case of Mexico, tourist areas are important for the economic spillover they mean, benefiting the development of companies, the city itself, as well as the reinforcement in the generation of jobs for certain or indeterminate times. However, these benefits no longer have to be above fundamental or human rights, and more so when they are supreme rights that enjoy superiority over any interest, related to investment as in the case of the Malecón Tajamar that is intended to urbanize, sacrificing the right to a healthy environment.

Although it is true, within the formality authorizations have been granted to carry out the real estate project and build in Tajamar; The right to a healthy environment is superior to this right to invest, so it is necessary for a judge to pronounce valuing and weighing these rights so that in a sentence it is pronounced in favor of the complainants when they are right. During the amparo proceedings, the judicial authority must take into consideration the parties in a balanced manner, and in the case of requesting a guarantee from the complainant, it must be reasonable in accordance with the characteristics of the person filing the application for amparo, as well as the right violated.

That it does not happen as the first amparo that was filed against these real estate works, by 113 children who, within their legitimate interest, present before a District Judge a request for amparo, but the same requested a guarantee close to 21 million pesos in case of causing effects to investors, And of course, not having that money and not being able to continue with the trial, the judge had to dismiss the

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<sup>35</sup> Gaxiola, J. M. D. (2011). A review on mangroves: characteristics, problems and their legal framework. Importance of mangroves, the damage of anthropogenic effects and their legal framework: case of the Topolobampo lagoon system. Ra Ximhai. *Scientific Journal of Society, Culture and Sustainable Development*, 7(3), 355-369.



matter. Here we can see a disproportion of the guarantee that was requested to be able to grant the protection of federal justice.

The case of the Malecón Tajamar continues to be a coin in the air, because the matter has not yet been definitively resolved, but the authority that knows how to resolve, has to take into account Article 4, Constitutional, as well as the Protocol of San Salvador, valuing and weighing the rights involved, and linking them with the normative hierarchy that these rights have.

SEMARNAT began making rights-based decisions in 2006 when it was granting authorizations to FONATUR to undertake tourism development. It did so subject to what the rules authorized it, but, on the other hand, at the time of giving SEMARNAT an extension of the authorization for having expired the permit it had given, it had to take into consideration the provisions of article 60 TER of the General Wildlife Law. It did not do so on the grounds that the authorization it gave was subject to an act of 2006. The extension of the authorization was another act of the authority, for this reason, it should be considered the added article 60 TER of the LGVS, which entered into force in 2007.

The administrative and jurisdictional authorities have a primary task, to resolve promptly the case of the Malecón Tajamar. They must put on the table and analyze the capacity of destruction of companies, within a right to invest and contribute to a real estate project, or preserve the right to a healthy environment that impacts a community, the receiving community and its socio-cultural environment.

It should be noted that the Supreme Court of Justice of the Nation states: “The Court’s interpretation of effective access to justice in environmental matters has incorporated emerging principles in international environmental law into the Mexican legal system such as non-regression and *in dubio pro natura*. Issues related to standing have also been extensively addressed; the elimination of barriers such as economic guarantees that discourage collective action in defense of the environment; the treatment that should be given to environmental information under a principle of general publicity; public participation when it is still possible to have a real impact on decision-making that may affect the environment, or the precautionary principle, which requires having the best information available to

deal with uncertainty and even reverse the burden of proof on the authorities that must prove the absence of risks to the environment.”<sup>36</sup>

Further progress is still needed to achieve an adequate regulatory consolidation, as well as a culture of respect for the environmental rights of people, where the active actor necessarily has to be the authorities in turn, followed by all the governed. But the important thing is that the foundations are on the table and with the current laws it can be effectively achieved to be an instrument that allows to achieve the conservation of mangroves, flora and fauna, without detriment to the communities that inhabit, and foreign investment.

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<sup>36</sup> Rabasa, A., Camaño, D., Carrillo, J.A., Medina, R.G., (2020). Content and scope of the human right to a healthy environment. *Jurisprudence Notebook No. 3*. Center for Constitutional Studies of the Supreme Court of Justice of the Nation, July 2020, Mexico, p. 3.

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