

# **Security for Costs Orders in the Bahamas as a Barrier to Access to Justice in Public Interest Litigation**

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## Introduction

This briefing paper provides an overview of the international and regional framework relevant to the consideration of applications for security for costs in environmental and other public interest judicial review challenges in Latin America and the Caribbean. Requests for protective orders, such as security for costs, in very large amounts can and are routinely used in public interest cases with the goal to discourage litigation. These dissuade small organizations, communities, and other actors that do not have those funds available and are unable to fundraise them from continuing cases or even bringing them forward in the first place. This briefing paper was conducted as part of research for an appeal before the Judicial Committee of the Privy Council in the case of Responsible Development for Abaco (RDA) Ltd. v. the Rt. Hon. Perry Christie et al. concerning security for costs orders against plaintiffs challenging permits for the development of a marina on a small island in the Bahamas.<sup>1</sup> This briefing paper aims to provide an overview of the ways in which security for costs prevents plaintiffs with limited financial resources, particularly public interest litigants, from accessing the courts, infringing on their right to access justice. As a result, courts must remove security for costs as a financial barrier that prevents such cases from being heard, especially given regional and international standards toward waiving these financial burdens in public interest litigation cases.



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<sup>1</sup> *Responsible Development for Abaco (RDA) Ltd (Appellant) v The Right Honourable Perry Christie and others* (Respondents) (Bahamas) JCPC 2020/0061

## Access to Justice is Critical to Democratic Governance and Environmental Justice

### International Norms and Commitments Binding The Bahamas

As a Member State of the United Nations and a signatory to multiple international human rights treaties, The Bahamas is bound to uphold the right to access justice and its practices and policies are subject to the oversight of various human rights bodies. Relevant provisions of the international legal framework applicable to The Bahamas in relation to the right to access to justice include, but are not limited to, Article 8 of the Universal Declaration of Human Rights which provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”, and Article 2(3) of the International Covenant on Civil and Political Rights, which provides that

Each State Party . . . undertakes: . . . (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy . . . .

Further, Article 23 reads: “all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.”<sup>2</sup>

While recognizing the sovereignty of each State to manage natural resources, the Charter includes a duty that the principles set forth in it “shall be reflected in the law and practice of each State, as well as at the international level.”<sup>3</sup>

In 1987, the World Commission on Environment and Development, an expert Group on Environmental Law, adopted legal principles for environmental protection and sustainable development establishing: “States shall grant equal

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at para. 14.

access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by trans-boundary interference with their use of a natural resource or the environment.”<sup>4</sup>

### **Sustainable Development Goals**

The Sustainable Development Goals (SDGs), adopted by the United Nations in 2015, are a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. The Bahamas has been an active participant in the SDGs process, and in 2021 was part of the voluntary national review of the High-level Political Forum on sustainable development.<sup>5</sup> With relation to the environment, sustainable development, and access to justice, Goal 16 on the promotion of peaceful and inclusive societies for sustainable development makes mention of the provision of access to justice for all and to building effective, accountable, and inclusive institutions at all levels. Relatedly, Goal 12.2 on sustainable management and efficient use of natural resources, Goal 12.7 on the promotion of sustainable public procurement practices, and Goal 13 calling to take urgent action to combat climate change and its impacts are also informative with regards to the duties The Bahamas holds towards access to justice and its commitments towards sustainable development and protection of the environment.<sup>6</sup>

Thus far tangible and concrete actions from The Bahamas to meet its commitments under the SDGs agenda have been lacking. In early September 2022, The Bahamas Prime Minister Phillip Davis recognized these shortcomings while addressing the SDGs Forum, stating that when it came to The Bahamas “there are goals that have remained stagnant or indeed have regressed.”<sup>7</sup>

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<sup>4</sup> *Report of the World Commission on Environment and Development*, 29 October 1987, U.N. Doc. A/42/427, para. 20, <https://digitallibrary.un.org/record/139811?ln=en>.

<sup>5</sup> UN Sustainable Development Goals web page on The Commonwealth of The Bahamas, <https://sustainabledevelopment.un.org/memberstates/bahamas>.

<sup>6</sup> UN Sustainable Development Goals web page on the SDGs, <https://sdgs.un.org/goals>.

<sup>7</sup> *Caribbean National Weekly*, “Bahamas PM acknowledges that SDGs have regressed,” 7 September 2022, <https://www.caribbeannationalweekly.com/news/caribbean-news/bahamas-pm-acknowledges-that-sdgs-have-regressed/#:~:text=Bahamas%20Prime%20Minister%20Phillip%20Davis,stagnant%20or%20indeed%20have%20regressed%E2%80%9D>.

## Regional Framework in Latin America and the Caribbean Guaranteeing the Right to Access to Justice

As a Member of the Organization of American States (OAS),<sup>8</sup> The Bahamas is held to the duties set by the Charter of the OAS<sup>9</sup> to uphold the rights found in the American Declaration of the Rights and Duties of Man, as well as to have its rights policies and practices align with the authoritative guidance and monitoring done by the Inter-American Commission on Human Rights (IACHR).<sup>10</sup>

The IACHR has consistently admitted petitions presented before it with regard to human rights violations in OAS member states which are not parties to the American Convention on Human Rights; recognizing the human rights obligations contained in the American Declaration, in accordance with Article 23 of the Commission's Rules of Procedure.<sup>11</sup>

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<sup>8</sup> Inter-American Commission on Human Rights, Organization of American States, Signatory Countries, [https://www.cidh.oas.org/basicos/english/Basic22b.CharterOAS\\_ratif.htm](https://www.cidh.oas.org/basicos/english/Basic22b.CharterOAS_ratif.htm).

<sup>9</sup> Organization of American States (OAS), Charter of the Organization of American States, 30 April 1948, [https://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp](https://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp)

<sup>10</sup> The Commission has established the binding nature of the Declaration to member states of the OAS. See *Andrew Harte v. Canada*, where the Commission established that: "Pursuant to the terms of Article 23 of the Commission's Regulations, the petitioner is empowered to file complaints for violations of the rights protected by the American Declaration of the Rights and Duties of Man. Mr. Harte is a person whose rights are protected by the American Declaration, whose provisions the State is obliged to respect in accordance with the OAS Charter, Article 20 of the Commission's Statute and Article 49 of the Commission's Regulations. Canada submits to the jurisdiction of the Commission as a member state of the OAS that deposited its instrument of ratification of the OAS Charter on 8 January 1990. The Commission observes that the American Declaration became the source of legal rules applicable by the Commission when Canada became a member of the Organization of American States in 1990." Report No. 81/05, Petition 11.862, *Andrew Harte and Family, Canada*, 24 October 2005 (hereinafter "*Harte*"), para. 52, <http://cidh.org/annualrep/2005eng/Canada.11862eng.htm>.

<sup>11</sup> See *Harte*, para. 71 ("While Canada is not a party to the American Convention, the Commission, for purposes of analysis, refers to the Inter American Court's Advisory Opinion OC-11-90 in which the Court construed the exceptions to the exhaustion of domestic remedies under Article 46(1), (2)(a) and (2)(b) of the American Convention with particular regard for petitioners who may be denied access to domestic remedies due to indigence or lack of access to legal assistance."). See also Report No. 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.*, United States of America, 21 July 2011 (hereinafter "*Lenahan*"), para. 115, <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2014-HRC-IACHR-JessicaLenahan-Report.pdf>, ("[A]ccording to the well-established and long-standing jurisprudence and practice of the inter-American human rights system, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of

In a 2014 case pertaining to The Bahamas, the IACHR explained that

[a]ccording to the jurisprudence of the inter-American human rights system, the provisions of its governing instruments, including the American Declaration, should be interpreted and applied in the context of developments in the field of international human rights law occurring since those instruments were first composed, and with due regard to other relevant rules of international law applicable to Member States against which complaints of human rights violations are properly lodged.<sup>12</sup>

The IACHR continued that it would, “interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.”<sup>13</sup>

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Member States under the OAS Charter. Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration, as well as the customary legal status of the rights protected under many of the Declaration’s core provisions.”)

<sup>12</sup> Report No. 12/14, Case 12.231, *Peter Cash*, Commonwealth of The Bahamas, 2 April 2014, para. 59, <http://www.oas.org/en/iachr/decisions/2014/bapu12231en.pdf>.

<sup>13</sup> *Id.* at 61. The Commission also highlighted how “the organs of the Inter-American system have considered developments in the corpus of international human rights relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments. This includes the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. Pertinent developments have also been drawn from the provisions of other international instruments adopted inside and outside of the framework of the inter-American system.” *Id.* at para. 60. See also Report No. 8/16, Case 11.661, *Manickavasagam Suresh*, Canada, 13 April 2016, para. 50, <https://www.oas.org/en/iachr/decisions/2016/capu11661en.pdf> (referring to the evolving nature of international norms, emphasizing the necessity “to consider the provisions of the American Declaration in the broader context of the Inter-American and international human rights systems” since the “Declaration was adopted and having regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged”); Report No. 50/16, Case 12.834, *Undocumented Workers*, United States of America, 30 November 2016, at para. 68, <https://www.oas.org/en/iachr/decisions/2016/USPU12834EN.pdf> (stating “relevant applicable international instruments include the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD), to which it is a Party” adding that “[p]ursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris* of international human rights law over time and in present-day conditions”).

In 2020, the IACHR reaffirmed this same consideration in two other cases pertaining to the United States, bringing forth other norms of international human rights law, including importantly the American Convention, in its interpretation of allegations of human rights violations contrary to the American Declaration.<sup>14</sup>

In *Lenahan*<sup>15</sup> the Commission stated that

Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations. This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.<sup>16</sup>

In that same decision, the IACHR highlighted that “[t]he inter-American system has affirmed for many years that it is not the formal existence of such remedies that demonstrates due diligence, but rather that they are available and effective.”<sup>17</sup> Failure to comply with the positive duties that the right to access a remedy includes situations where “a State allows private persons to act freely and with impunity to the detriment of the rights recognized in the governing instruments of the inter-American system.”<sup>18</sup>

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<sup>14</sup> Report No. 29/20, Case 12.865, *Djamel Ameziane*, United States of America, 22 April 2020: Report No. 26/20, at para. 113, <https://www.oas.org/en/iachr/decisions/2020/uspu12865en.pdf>; Report No. 26/20, Case 12.545, *Isamu Carlos Shibayama, Kenichi Javier Shibayama, and Takeshi Jorge Shibayama*, United States of America, 22 April 2020, at para. 49, [https://www.oas.org/en/iachr/decisions/2020/US\\_12.545\\_EN.PDF](https://www.oas.org/en/iachr/decisions/2020/US_12.545_EN.PDF).

<sup>15</sup> *Supra*, note 14.

<sup>16</sup> *Id.* at para. 172.

<sup>17</sup> *Id.* at para. 173.

<sup>18</sup> *Ibid.*

In its 2007 review on “Access to Justice as a Guarantee of Economic, Social, and Cultural Rights,” the IACHR highlighted the system’s case law and interpretation of this right around four core issues that it has regarded as priorities for the judicial protection of economic, social and cultural rights: 1) the obligation to remove economic obstacles to ensure access to the courts; 2) the components of due process of law in administrative proceedings concerning social rights; 3) the components of due process of law in judicial proceedings concerning social rights; and, 4) the components of effective judicial protection of individual and collective social rights.<sup>19</sup> When it comes to costs, the Commission has stated that “judicial remedies created to review administrative decisions must be not only prompt and effective but also ‘inexpensive.’”<sup>20</sup> This is a recognition that questions of process and costs (ancillary in a sense to the “main event”) can, in practice, dictate the enforcement of legal rights.

This includes a recognition by the IACHR of an obligation of States “to remove any obstacles in access to justice that originate from the economic status of persons.”<sup>21</sup> Both the Inter-American Court and the IACHR have established that

procedural costs, whether in judicial or administrative proceedings . . . are factors that may also render access to justice impossible and, therefore, result in a violation of the right to a fair trial. The organs of the IASHR have found that a proceeding in which the costs are prohibitive violates Article 8 of the American Convention. In this regard, the Commission has held that judicial remedies created to review administrative decisions must be not only prompt and effective, but also "inexpensive" or affordable.<sup>22</sup>

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<sup>19</sup> Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, 7 September 2007, OEA/Ser.L/V/II.12, para. 3, <https://www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodescii.eng.htm#:~:text=Access%20to%20Justice%20as%20a%20Guarantee%20of%20Economic%2C%20Social%20and%20Cultural%20Rights&text=1..against%20violations%20of%20human%20ri ghts>.

<sup>20</sup> *Id.* at para. 93; see also paras. 8, 73-72.

<sup>21</sup> *Id.* at para. 89.

<sup>22</sup> *Id.* at para. 8.



Citing decisions by the Inter-American Court with regard to access to justice, the IACHR reported that “real inequality between the parties in a proceeding engages the duty of the State to adopt all the necessary measures to lessen any deficiencies that thwart effective protection of the rights at stake.”<sup>23</sup> Going further, the Commission notes,

that the particular circumstances of a case may determine that guarantees additional to those explicitly prescribed in the pertinent human rights instruments are necessary to ensure a fair hearing. For the IACHR this includes recognizing and correcting any real disadvantages that the parties in a proceeding might have, thereby observing the principle of equality before the law and the prohibition of discrimination.<sup>24</sup>

Ensuring access and exercise to the right to effective judicial protection, the report notes,

creates an obligation for states to provide suitable and effective judicial remedies for the protection of social rights, in both their individual and their collective dimension[...]. Most countries in the hemisphere have created and enacted regulations on simple and prompt judicial remedies to protect rights in serious and urgent situations. However, often these remedies are not adequate for protecting social rights. Sometimes this is due to limits on the standing of groups or collectives of victims of violations, or to bureaucratic delays in judicial proceedings, which render them ineffective. In some cases there are problems in accessing these remedies because the protection does not extend to certain social rights owing to the fact that they are not considered fundamental rights, or because the procedural requirements for their admission are excessively onerous.<sup>25</sup>

The Commission highlights that “the right to effective judicial protection also requires that judicial procedures intended to protect social rights do not impose conditions or obstacles such as to render them ineffective for accomplishing the purposes for which they were designed.”<sup>26</sup>

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<sup>23</sup> *Id.* para. 20.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Id.* at para. 27.

<sup>26</sup> *Ibid.*

When focusing on the analysis of access to justice rights, contextualized in Article 25 of the Convention, the Commission points to the “duty of states parties to provide a simple, prompt, and effective recourse for the protection and assurance of rights. Thus, the organs of the IACHR have set about drawing up standards on the scope of that obligation in the area of economic, social, and cultural rights.”<sup>27</sup>

The Commission points to the recognition and importance of the collective dimension of the protection of rights, outlining,

standards on judicial protection mechanisms designed to ensure access to collective litigation and, in particular, on the scope of the obligation of states to make available grievance procedures of this type. The inter-American system has clearly evolved in this area insofar as it has expressly recognized the collective dimension of certain rights and the need to draw up and put into practice legal mechanisms in order fully to ensure that dimension. Thus, the greater scope that the organs of the inter-American system have recognized to the guarantee provided in Article 25 of the American Convention, in order to include effective judicial protection of collective rights in its framework, is plainly visible.<sup>28</sup>

In the *Cantos* case, the Court held that

States shall not obstruct persons who turn to judges or the courts to have their rights determined or protected. Any domestic law or measure that imposes costs or in any other way obstructs individuals’ access to the courts and that is not warranted by what is reasonably needed for the administration of justice must be regarded as contrary to Article 8(1) of the Convention.<sup>29</sup>

This right in turn reflects the guarantees of justice rights as prescribed in the American Declaration. In that case, the Court found the amount charged to the petitioner obstructed his access to the courts in violation of the Convention, by being

unreasonable, even though in mathematical terms they do represent three percent of the amount of relief being claimed [...] while the right of access to a court is not an absolute and therefore may be subject to certain

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<sup>27</sup> *Id.* at para. 28.

<sup>28</sup> *Id.* at para. 31.

<sup>29</sup> IACtHR, Case of Cantos. Judgment of 28 November 2002. Series C No. 9, para. 50, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_97\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_97_ing.pdf).

discretionary limitations set by the State, [...] the means used must be proportional to the aim sought. The right of access to a court of law cannot be denied because of filing fees. [...] The fact that a proceeding concludes with a definitive court ruling is not sufficient to satisfy the right of access to the courts. Those participating in the proceeding must be able to do so without fear of being forced to pay disproportionate or excessive sums because they turned to the courts. The problem of excessive or disproportionate filing fees is compounded when, in order to force payment, the authorities attach the debtor's property or deny him the opportunity to do business.<sup>30</sup>

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<sup>30</sup> *Id.* at paras. 54-55.