

**CASE No. 1149 -19-JP
LORDS OF JUDGES OF CONSTITUTIONAL COURT**

The Center for Democratic and Environmental Rights, (hereinafter CDER), appears before the Constitutional Court of Ecuador to present an *amicus curiae* brief in case No. 1149 -19-JP, selected for the development of binding jurisprudence on rights of nature. This brief develops the arguments raised in the public hearing convened in this case.

SELECTED JUDGMENT

The selected judgment refers to the environmental authorization for one mining project in the protected forest of Los Cedros. As stated in appeals of the judgment, this is an area with two overlapping areas of *mega diversity*: the rainforests of Choco and tropical Andes mountain range. The area is also home to cloud forest. The protected forest is also habitat of endangered, including the spider monkey (*Ateles fusciceps*) and the spectacled bear (*Tremarctos ornatus*).

CONSTITUTIONAL ASPECTS

From this background, this *amicus curiae* brief will refer to these constitutional aspects:

- Fragile ecosystems and species threatened with extinction, emphasizing their analysis from the perspective of the rights of nature.
- The state duty to protect the rights of nature, which constitutional jurisprudence concentrates on constitutional judges.
- The legal effect of the rights of nature to incorporate “higher standards of environmental protection.”[\[1\]](#)
- The content of the right of nature recognized and guaranteed by Article 71 of the Constitution of the Republic of Ecuador.

From this background, this *amicus curiae* brief raises the following legal issues:

1. Is there a legal basis to analyze the problem of mining in a fragile ecosystem that is also the habitat of critically endangered species?
2. What measures does the Constitution provide for the protection of fragile ecosystems and species in critical danger of extinction?

3. How is the protection of fragile ecosystems and species in danger of extinction integrated with the rights of nature?

MINING IN A FRAGILE ECOSYSTEM THAT IS A HABITAT FOR ENDANGERED SPECIES: A CONSTITUTIONAL LAW PROBLEM

The legal problem in this case is not limited to the differentiation legislative between protected forest and protected area; but it refers to protected forests that are home to *fragile ecosystems*,^[2] and further are *habitat of endangered species*. Hence, the evidence in this case and a normative scenario that transcends environmental law and which is located in constitutional law.

This case therefore raises a question of constitutional law relating to the activities permitted by the state in fragile ecosystems also are the habitat of species threatened with extinction.

Los Cedros: fragile and threatened ecosystems

Article 406 of the Constitution of the Republic of Ecuador establishes:

The State will regulate the conservation, management and sustainable use, recovery, and domain limitations of fragile and threatened ecosystems; among others, páramos, wetlands, cloud forests, dry and humid tropical forests and mangroves, marine and marine-coastal ecosystems.

The Organic Code of the Environment defines the ecosystems fragile as “areas with unique characteristics or resources *very susceptible to any intervention of anthropic character*, which produce therein a profound alteration in its structure and composition.”^[3] Hence, regulation in the Organic Code of the Environment plans for the adoption of “additional protective measures”^[4] to prevent impacts on natural processes and life cycles. It is, therefore, a reinforced constitutional protection, by virtue of the fragility of the forest.

The protected forest of Los Cedros is home to rainforest and cloud forest; both classified by Article 406 of the Constitution as *fragile and threatened ecosystems*.

In the appeal judgment there is no reference to additional protective measures that have been adopted by the National Environmental Authority or by the court judges to protect the fragile ecosystems within the Los Cedros protected forest; failing to observe, in this way, the standard of Article 406 of the Constitution.

Los Cedros: habitat of critically endangered species

Article 73, first paragraph, of the Constitution establishes:

The State will apply precautionary and restrictive measures for activities that may lead to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles.

The Constitution addresses this issue in the chapter on the rights of nature, which means that its scope and content should primarily be determined from a constitutional perspective of these rights.

The measures taken shall be *restrictions* on activities that could lead to the extinction of species. It is, therefore, a reinforced constitutional protection, based on the danger of extinction of the wild fauna. This constitutional perspective is collected by the Organic Code of the Environment[5] and regulations which, specifically, state: "All species are protected by the state. Native, endemic, threatened or migratory species will have a higher degree of protection." [6]

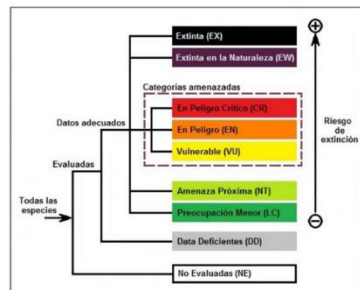
The Los Cedros protected forest is not only home to fragile ecosystems, but is also the habitat of threatened species, including spider monkeys and Andean bears. As such, the reinforced constitutional protection of these species is pertinent.

Species categorization

The categorization of species follows a scientific standard, which applies globally. It is the *Red List of Threatened Species* of the International Union for Conservation of Nature (IUCN)[7], which is the world's most comprehensive source of information on the global conservation status of animal, fungal and plant species.[8] According to this source, the *threat* is related to the *extinction* of the species, and includes species categorized as:

- a. Vulnerable.
- b. In danger of extinction.
- c. In critical danger of extinction.

Table No. 1 IUCN Categories



Countries establish their national lists based on this scientific categorization. In Ecuador, the Organic Code of the Environment attributes such establishment to the national environmental authority:

The National Environmental Authority will have the following attributions: 8. Establish lists of wildlife species with some category of threat, based on national conservation and management priorities or international instruments or treaties ratified by the State.[9]

In this framework, the Regulation of the Organic Code of the Environment indicates the sources of the categorization of wildlife species:

The categorization of wildlife species will be done through:

- a) *Lists of species of international treaties ratified by Ecuador;*
- b) *Lists of species issued by the National Environmental Authority;*
- c) *Red Lists of Threatened Species of Ecuador and their updates;*
- d) *Red Books of Threatened Species of Ecuador and their updates;*
- e) *Red List of the International Union for Conservation of Nature;*
- f) *Others recognized by the National Environmental Authority.* [\[10\]](#)

According to the *List of Mammals* issued by the National Environmental Authority, the brown-headed spider monkey is categorized as a critically endangered species in Ecuador.[\[11\]](#) The Red Book of Mammals of Ecuador confirms such categorization.[\[12\]](#)

According to the List of Mammals issued by the national environmental authority, the Andean bear is categorized as a vulnerable species.[\[13\]](#) The Red Book of Mammals of Ecuador categorizes it as an endangered species.[\[14\]](#)

Both species also are listed in the appendices of the CITES Convention, on wild species threatened with extinction, ratified by Ecuador in 1975.[\[15\]](#)

ENDANGERED SPECIES: RESTRICTIVE AND PROTECTIVE CONSTITUTIONAL APPROACH

Article 73 of the Constitution requires the *State* to apply *precautionary measures and restrictions on activities that may lead to the extinction of species*: the Constitutional Court has defined these activities as “high risk to the environment.”[\[16\]](#)

In addition, the Constitution is clear: the measures are *mandatory*: hence the Constitutional Court has stated that the adoption of such measures is a duty of the state.[\[17\]](#)

On the other hand, these measures apply to activities that *may lead to the extinction of species*. That is, no actual or true damage is required for its application. These measures can be *restrictive*. The constitutional norm does not determine them, nor does legislation, so the word *restriction* must be understood in its natural sense of encircling, circumscribing or reducing to lower limits.[\[18\]](#)

<p>In the appeal decision, no reference is made to restrictive measures that have been taken by the licensing authority or by the trial judges to protect the habitat of these species in danger of extinction; which violates the standard of Article 73 of the Constitution.</p>
--

LOS CEDROS: PROTECTED FOREST AND BUFFER ZONE

Los Cedros was declared a protected forest in 1995[19], under the Forestry and Conservation of Natural Areas and Wildlife Law of 1981, which assigned them functions of biodiversity conservation. Regulations applicable to management established an exhaustive list of permissible activities, which did not include extractive activities, of any kind, or any phase.

It should be noted that this legislation was in effect on the date it was granted environmental authorization for the mining project, December 12, 2017.[20]

Los Cedros also serves as the *buffer zone* of the Cotacachi Cayapas Ecological Reserve, part of the National Protected Areas System.

These areas contribute to the conservation of protected areas[21] and, since 2018, they are legally defined as special areas for the conservation of biodiversity[22], so the projects carried out in them must be governed by specific technical standards, which the National Environmental Authority has not issued to date.

In summary: Los Cedros is not only a protected forest, but it is also the habitat of critically endangered species; it is a buffer zone of an ecological reserve; and, it houses forests constitutionally classified as fragile ecosystems. This case, therefore, does not refer only to mining in a protected forest, but to mining in fragile ecosystems that are the habitat of critically threatened species of extinction. In this framework, the state duty to guarantee the rights of nature must be exercised from a constitutional perspective.

GUARANTEE THE RIGHTS OF NATURE: GENERAL DUTY OF THE STATE

At the time of recognizing rights of Nature, the Constitution of the Republic of Ecuador also established duties.

Thus, it corresponds to the State's *promotion*[23] and *guarantee*[24] of the rights of Nature. In this regard, constitutional judges have dictated these conceptual lines:

- a. In 2009, the First Chamber of the Constitutional Court for the transition period, in a protection resolution related to the environmental management of an agro-industrial hog farm by the river Blanco (Santo Domingo de los Tsáchilas), made the first reference to the duty of the State to **guarantee the rights of Nature** “as part of a philosophy guaranteeing rights...”[25]
- b. In 2012, the Constitutional Court for the transition period, in a ruling issued in public action of the Organic Law of the Special Regime for the Conservation and Sustainable Development of the Province of Galapagos, stated:

*Such position that the Court is obliged to maintain becomes more relevant if we consider that the Constitution of the Republic of 2008 establishes an inherent chapter on the 'rights of nature' that **the State is obliged to promote and guarantee.***[26]

- c. In 2018, the Constitutional Court issued its ruling in an extraordinary protective action regarding agro-industrial activities by the Alpayacu River (Pastaza), which ratified the fundamental duty of the State to “**respect and enforce the rights guaranteed and established in the constitutional norm.**”[\[27\]](#)

Duties of constitutional judges

In this context, constitutional jurisprudence has emphasized the duty of judges in the effective protection of the rights of nature:

- a. In 2009, the First Chamber of the Constitutional Court for the transition period, in the case of the Blanco River, made the first general reference to the duty of judges in this matter: “The principle of integrality or completeness dictates that **to exercise true justice, which is the objective of this Court**, it is necessary to look at all the elements of the case and the parties involved, one of them being Nature.”[\[28\]](#)
- b. In 2015, the Constitutional Court issued a judgment in an extraordinary protection action relative to the occupation of the Cayapas-Mataje Ecological Reserve, in which it stated: “... the constitutional character recognized to the rights of nature implicitly entails the obligation of the State to guarantee its effective enjoyment, **falling specifically within the courts the task of ensuring the guardianship and protection**, in cases submitted to it and where they can be violated.”[\[29\]](#)

LEGAL EFFECT OF THE RIGHTS OF NATURE: HIGHER STANDARDS

The jurisprudence of Ecuador has identified the first guidelines for implementation, highlighting the “importance of the rights of nature,”[\[30\]](#) whose recognition reflects a “new form of relationship between human beings and nature.”[\[31\]](#)

Hence, in an extraordinary protection action related to the unauthorized conduct of mining activities, the Constitutional Court indicated:

*“In this way, it is evident that the rights of nature radiate both to social relations and to each of the elements of the country's economic system, resulting in **production and consumption not becoming predatory processes, but rather, on the contrary, they tend to respect their existence, maintenance and regeneration** of their elements.”*[\[32\]](#)

This harmonious and balanced relationship involves the establishment of limits on the government regarding the exploitation of natural resources; and, even, limitations on the constitutional rights of individuals. Thus, the Constitution refers to the biophysical limits of nature,[\[33\]](#) the natural regeneration of ecosystems,[\[34\]](#) or the protection of fragile ecosystems.[\[35\]](#)

In this respect, the Constitutional Court noted that recognition of the rights of Nature meant the incorporation of “higher standards of environmental protection” in comparative constitutional law.^[36] The Constitutional Court also specified that the absence of analysis of the rights of Nature, in actions relating to the subject “denatures the constitutional principles that proclaim full respect for the existence and maintenance of natural areas.”^[37] In this context, the following jurisprudence stands out:

- a. Natural resources can be used for the benefit of society, “as long as their life cycles are respected without threatening their existence...”^[38]
- b. The integral and effective respect of its existence [nature] must be fulfilled “safeguarding each and every one of its systems, processes and natural elements...it being an imperative to safeguard the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes.”^[39]
- c. The guarantee of protection of Nature implies respect for “its own behavior, otherwise the validity of its rights and their effective protection would be omitted.”^[40]

In summary: the rights of nature have the legal effect of raising environmental standards: in a country, whose Constitution recognizes rights of Nature, state power must be exercised from a perspective that includes these rights.

This case, therefore, must be resolved from the perspective of fragile ecosystems that are habitat of critically endangered species; and, therefore, consider restrictive measures consisting of not carrying out mining activities, in any of its phases, within fragile ecosystems or in the habitat of threatened species.

This measure also could provide a constitutional standard that provides content to the right accorded to nature in Article 71 of the Constitution which guarantees the maintenance of its cycles, structure and functions, in a manner that the legislative environmental standards have not done.

CONTENT OF THE RIGHTS OF NATURE

The recognition of the rights of Nature shows a substantial legal difference with environmental human rights: not only is *something protected*, an object, good or resource; but *respect to someone*, a subject of constitutional rights.^[41] This is a material difference, whose antecedent is the Resolution of the United Nations General Assembly, entitled World Charter for Nature: “Nature will be respected and its essential processes will not be disturbed.”^[42] In this context, the standards to guarantee the rights of nature should be based, *inter alia* on the scientific basis of this new paradigm constitutional; and, in the adoption of measures that guarantee respect for nature.

The science

To give content to Article 71 of the Constitution, a legal approach is not enough, but rather a scientific approach is required. It is an interdisciplinary perspective that is essential to define the scope of these new rights.

This is evident in the present case, which requires a scientific determination of the fragility of the ecosystems that house Los Cedros, as well as the critical danger of extinction in which some of the species that live there face. It is science that will determine why it is important to respect the ecosystem integrity of Los Cedros. Therefore, science provides substantial elements to provide legal content to the rights of nature.

Measures that guarantee respect for nature

The Ecuadorian Constitution provides for the adoption of restrictive measures to prevent the extinction of species. It is a constitutional standard that, precisely, is aimed at guaranteeing the rights of nature.

Within the framework of environmental management; and, more specifically, in the case of activities that cause environmental risks or impacts, Article 190 of the Organic Code of the Environment establishes the legal obligation to ensure the protection of ecosystems in such a way that they do not affect the dynamics of populations, or the regeneration of vital cycles. This legal provision becomes more relevant in scenarios marked by environmental risks in fragile ecosystems and in habitats of critically endangered species, which are spaces that have specific constitutional protection.

CONCLUSIONS

1. There are express constitutional provisions to solve the problem of mining in a fragile ecosystem that is also the habitat of critically endangered species. These provisions are provided for in Articles 73 and 416 of the Constitution of the Republic of Ecuador.
2. Article 73 of the Constitution provides, in a mandatory manner, the adoption of restrictive measures for activities that: a) may lead to the extinction of species; b) may lead to the destruction of ecosystems; or, c) may lead to permanent alteration of natural cycles.
3. Protection of fragile ecosystems and endangered species are directly linked to the rights of nature, since they guarantee full respect for their existence.
4. Articles 73 and 416 of the Constitution consistent with Article 8 literal d) of the Convention on Biological Diversity refers to ecosystem protection and maintenance of viable populations of species in natural environments.
5. As such, the Constitutional Court of Ecuador must apply the constitutional norm in this case and adopt a constitutional measure consisting of the ***restriction of mining activity because Los Cedros harbors fragile and***

threatened ecosystems; and, it is the habitat of wild species threatened with extinction.

SPECIFIC APPROACH: RESTRICTIVE MEASURE IN LOS CEDROS

This case refers to mining activity, which is an activity provided for in the Constitution. However, mining - and other industrial activities - can significantly alter nature, which could mean a violation of the rights of nature.

Based on these antecedents, this *amicus curiae* brief proposes the following restrictive constitutional measure:

That mining activity be restricted in fragile and threatened ecosystems or in habitats of wild species threatened with extinction.

This measure does not prohibit the conduct of mining activities in *all* of the protected forests in the country; rather, it would only restrict such activities in those protected forests that harbor fragile ecosystems or that constitute the habitat of wild species threatened with extinction.

The restriction would consist specifically of not conducting mining activities, in any of their phases, within fragile ecosystems or in the habitat of threatened species.

It should be noted that this measure would also apply outside of protected forests, as long as they are zones or areas that harbor fragile ecosystems or are habitats for species threatened with extinction. Hence, the application of the rights of nature is not limited only to protected areas or protected forests, but applies throughout Ecuador, especially in ecosystems and habitats with specific constitutional protection. As stated in Article 73 of the Constitution, this measure would also apply in cases of involving the permanent alteration of natural cycles.

INTEREST IN THE CAUSE

Since it is a case related to the rights of Nature, which is our institutional purpose, CDER expresses interest in this case.

REQUEST

From these antecedents; and, in accordance with the provisions of Article 12 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, CDER requests the Constitutional Court of Ecuador that this *amicus curiae* brief be admitted to the file of this case, to better resolve it.

ADDRESS AND NOTIFICATIONS

For notifications, please send them to the electronic box: echejur@yahoo.ca and judicial box No. 264, of Quito, belonging to Doctor Hugo Echeverría, Lawyer with professional registration No. 17-2001-108 of the Lawyers Forum, who is appointed as the sponsoring attorney, whom I authorize and submit written arguments concerning this *amicus curiae*.

I sign together with my lawyer.

-
- [1] Constitutional Court for the Transition Period. Sentence No. 017-12-SIN-CC.
- [2] Constitution of the Republic of Ecuador. Article 406.
- [3] Organic Code of the Environment. Glossary of terms.
- [4] Regulation to the Organic Code of the Environment. Article 258.
- [5] Organic Code of the Environment. Article 35 paragraph 3.
- [6] Regulation to the Organic Code of the Environment. Article 87 first paragraph.
- [7] <https://www.iucnredlist.org/es/>
- [8] <https://www.iucnredlist.org/es/about/background-history>
- [9] Organic Code of the Environment. Article 24 numeral 8.
- [10] Regulation to the Organic Code of the Environment. Article 88.
- [11] Ministry of the Environment: <http://areasprotegidas.ambiente.gob.ec/es/documentos>
List of Mammals. Sheet 3, page 43, number 334.
- [12] Red Book of Mammals of Ecuador. <https://librorojo.mamiferosdeecuador.com/home.html#>
- [13] Ministry of the Environment: <http://areasprotegidas.ambiente.gob.ec/es/documentos>
List of Mammals. Sheet 3, page 7, number 54.
- [14] Red Book of the Mammals of Ecuador. <https://librorojo.mamiferosdeecuador.com/home.html#>
- [15] Convention on International Trade in Endangered Species of Wild Fauna and Flora.
<https://cites.org/esp/disc/text.php#I>
- [16] Constitutional Court. Judgment No. 023-18-SIS-CC.
- [17] Constitutional Court. Judgment No. 023-18-SIS-CC and Judgment No. 034-18-SIN-CC.
- [18] Royal Spanish Academy. Spanish dictionary. Tricentennial Edition. <https://dle.rae.es/restringir?m=form>
- [19] Ministerial Agreement No. 57. Official Registry No. 620: 01/26/1995.
- [20] Unified Text of Secondary Environmental Legislation. Third Book. Article 20.
- [21] Organic Code of the Environment. Article 59.
- [22] Ibid. Article 56 numeral 2.
- [23] Constitution of the Republic of Ecuador. Article 71, third paragraph.
- [24] Ibid. Article 277 numeral 1.
- [25] Constitutional Court for the Transition Period. First Room. Resolution No. 0567-08-RA.
- [26] Constitutional Court for the Transition Period. Sentence No. 017-12-SIN-CC.
- [27] Constitutional Court. Judgment No. 023-18-SIS-CC.
- [28] Constitutional Court for the Transition Period. First Room. Resolution No. 0567-08-RA.
- [29] Constitutional Court. Judgment No. 166-15-SEP-CC.
- [30] Constitutional Court. Judgment No. 166-15-SEP-CC.
- [31] Constitutional Court. Sentence No. 034-16-SIN-CC.
- [32] Constitutional Court. Sentence No. 218-15-SEP-CC.
- [33] Constitution of the Republic of Ecuador. Article 284 numeral 4.
- [34] Ibid. Article 395 numeral 1.
- [35] Ibid. Article 406.
- [36] Constitutional Court for the Transition Period. Sentence No. 017-12-SIN-CC.
- [37] Constitutional Court. Judgment No. 166-15-SEP-CC.
- [38] Constitutional Court. Judgment No. 065-15-SEP-CC.
- [39] Constitutional Court for the Transition Period. First Room. Resolution No. 0567-08-RA.
- [40] Ibid.
- [41] Echeverría, Hugo. "Rights of Nature: The Ecuadorian case." ESMAT (Palmas), 13 (2017). 81.
- [42] United Nations Organization. General Assembly. A / RES / 37/7. World Charter for Nature