



INTERNATIONAL  
RIGHTS OF NATURE  
TRIBUNAL

**FINAL VERDICT**  
**FIFTH INTERNATIONAL RIGHTS OF NATURE TRIBUNAL,**  
**GATHERED IN THE CITY OF SANTIAGO DE CHILE,**  
**DECEMBER 05, 2019.**  
***Resolution No. 5/2019***

**Judges:**

Yaku Pérez - President of the Tribunal (Ecuador)  
Maristella Svampa (Argentina)  
Nancy Yáñez (Chile)  
Alberto Acosta (Ecuador)  
Antonio Elizalde (Chile)  
Raúl Sohr (Chile)

**Prosecutor of the Earth:**

Enrique Viale (Argentina)

**Secretary General:**

Natalia Greene (Ecuador)

**FINAL VERDICT**  
**5th INTERNATIONAL RIGHTS OF NATURE TRIBUNAL**

In the city of Santiago de Chile on the fifth day of the month of December of the Andean-Panamazonic year 5.527/colonial 2019, the Tribunal is aware of the requests of the representatives of ancestral communities, organizations defending the Rights of Nature and the Rights of Water, as well as environmentalists, Human Rights Defenders and other social sectors. After hearing the affected persons and the expertise of respectable experts in the field at the public hearing, as well as the Prosecutor of the Earth, the judges proceed to analyze the cases reported in the order of their presentation at the hearing, and issue their judgment:



## LITHIUM MINING CASE IN THE DESERT OF ATACAMA (CHILE)

### CASE BACKGROUND

The extraction of lithium, along with the extraction of other precious metals (such as copper) and minerals (such as potassium) are consuming unsustainable amounts of water in the Atacama Desert of Chile, putting the fragile desert ecosystem, its wildlife and the livelihoods of the Indigenous Peoples who live there at risk.

This territory is part of the ancestral heritage of the Atacameño people or Lickanantay, which has established its jurisdiction through the immemorial occupation of said territory, recognized through the rights granted by the Indigenous Law of Chile (19.253) and the Convention 169 on Indigenous and Tribal Peoples, hereinafter Convention 169, of the Labor Organization (ILO), ratified by the State of Chile and in force in the domestic legal system. This is a territory that has always been inhabited by the Atacameño people, whose survival and way of life depends on sustainable agriculture, livestock and harvest (hunting and gathering of the products of their lands). The Atacameño people, their way of life and their lands are now threatened, as mining takes unsustainable amounts of water and pollutes the local environment.

The vegetation cover of the Salar de Atacama is drying and dying, and the water is disappearing, as well as the Nature on which local wildlife and people depend.

These facts, provided to the Tribunal by the presenters, experts and affected person of the Atacameño People, have been corroborated by different government actors who have declared that the Salar de Atacama currently faces water scarcity and water stress. Government agencies have reported that six times more water is extracted from the basin than it can naturally regenerate.

Given this state of crisis, it is urgent and necessary to enact policies to preserve this valuable territory and water; but public policies currently prioritize the economic benefits of lithium extraction over the protection of the ecosystem and the people of Atacama.



Recently, there has been much talk in the global north about the strategic role of lithium in the framework of an energy transition, from the exit of the matrix linked to fossil fuels, towards a “zero carbon society”. These debates have had an impact in South America, as it is estimated that 85% of the proven reserves of lithium in brines are in what has been called “the lithium triangle”, which extends north of Chile, south of Bolivia and northwestern Argentina. This unleashed the el doradista fever of lithium, but, as a counterpart, it did not imply opening the necessary debates about the enormous economic and technological challenges, as well as the social and environmental risks and costs, presented by the extraction of lithium as strategic natural good and common good of humanity; much more in a commercialized context like that of Chile, in relation to the water that is privatized.

In the search for alternative energy sources to oil or coal, the governments of traditional and emerging powers point to a paradigm of energy production that reduces CO2 emissions and is based on renewable energy. In this context, lithium batteries play an important role, since their energy storage capacity gives them greater levels of autonomy, power and less need for recharges. This demonstrates the paradox in which the exploitation of lithium is perceived; on the one hand, it seems necessary to carry out these extractive activities to sustain world development and contribute to the sustainable energy revolution, but to achieve these ends, on the other hand, the Salar de Atacama is being sacrificed and with it, the entire ecosystem, affecting the people who inhabit it.

The Atacameños Peoples reinforced in the Tribunal that “their intention is the care and protection of their own territory and everything in it. Therefore, they are alert to mining and tourism extractive projects that develop on their land, which stalks and predated water and its ecosystems.”

## **CASE ANALYSIS**



Mother Earth is a unique, indivisible and self-regulated community of interrelated beings that sustains<sup>1</sup>, contains and reproduces all the beings that compose it. Hence, any affectation to some of her elements, life cycles, structure, functions or her evolutionary processes, generate an affectation to her ability to reproduce life on the planet.

Lithium is an alkali metal, rapidly oxidized with water or air, which has differential properties in terms of heat and electricity conduction. It is present in different types of mineral deposits, as well as in natural brines. As mentioned, the main use of lithium in final products is in batteries for the production of electric cars, personal computers, cell phones, MP3 players and related products, but also continues to be used for the production of lubricating greases, glass, aluminium, polymers and the pharmaceutical industry, among other uses. According to USGS (2019), in 2017 Chile accounted for 33% of global lithium production.

Lithium mining presents its specificities, with respect to metal mining, in terms of the extraction method. Lithium is found in an aqueous liquid called brine, along with other evaporitic resources (potassium, magnesium, among other chemical and potentially marketable elements) below the surface of the salt flats. The extraction process has as its predominant method the disposition of the brine in large pools in which the water evaporates until the evaporitic resources achieve different degrees of concentration. After that they are mixed with other compounds, mainly lime, to obtain higher degrees of refinement. The circumstance that lithium is extracted from salt brine by evaporation process demonstrates the magnitude of the environmental impact on salar ecosystems, affecting the nucleus of the salar and its water sustainability. The testimonies from the Tribunal assure that studies have corroborated that groundwater, which is now affected, has been recharged for approx. 30,000 years, period of the Earth known as Pleistocene.

The input found in the first step of the value chain, lithium carbonate, is extracted from the lithium deposits in brines. The evaporitic method is used in the Atacameño

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<sup>1</sup> Universal Declaration of the rights of Mother Earth, article 1, number 2.



salt flats, the application of which also includes the use of fresh water to purify the salts and the generation of waste volumes.

In Chile, there are four companies that carry out the exploitation of salt flats, SQM and Albemarle, Zaldívar and Minera Escondida (operated by BHP Billiton). On the part of the State, the parties involved are: the Superintendence of the Environment, the Environmental Assessment Service and the National Water Directorate of the Ministry of Public Works of the State of Chile.

At present, the use of freshwater is very worrying, in a region where the quantity of freshwater is scarce. It is added that the information on the use of groundwater and the characteristics of aquifers is confidential of the companies. Along these lines, the use of water and waste generated by this type of exploitation affects both Nature and the populations that are guaranteed their rights. According to the testimonies presented before the Tribunal, there are already observed effects on the surface of the Salar such as increases in soil temperature, decrease in vegetation cover, decrease in soil moisture, degradation of the Salar de Atacama and a water balance that evidences stress since there is more exit than entrance of the vital liquid exceeding its capacity of recovery in a particularly arid region of the planet, as well as descent of the piezometric levels.

In this particular case, mining activity severely affects the rights of the Atacameño people Lickanantay, whose survival and way of life depends on sustainable agriculture, livestock and harvest (hunting and gathering of the products of their land). The Lickanantay people, their way of life and their lands face a constant threat to the mining activity produced in the area, especially due to the amount of water used in these projects that in turn affects their way of life.

On the other hand, it is necessary to leave open the question about whether or not lithium occupies a place in the socio-ecological transition, in the construction of a post-fossil paradigm.



Along these lines, the Tribunal considers it necessary to question whether there is a single possible transition.

On the one hand, the transition proposed today through the exploitation of the Salaries of Atacama, is the transition associated with transnational corporations, which consolidates an energy model that reproduces the domination of nature and populations. In this sense, the great risk is that, in the framework of the current model of transnational mining that has been consolidated, lithium and the questions that it entails are no more than a big fiasco, a kind of fat fire that will serve to justify the looting, fueling the paradigm shift in the countries of the global north (while in the south it insists on strongly contaminating energies, as now with unconventional hydrocarbons); and based, once again, on the dispossession of local communities and the destruction of Nature.

Meanwhile, if there is another possible socio-ecological transition, within the framework of respect for the Rights of Nature and populations, then we must leave raised if the question about lithium does not acquire other dimensions, more complex, of an integral nature, which is necessary to at least state in this verdict. From this perspective, what the current exploitation of lithium comes to endorse is that not every post-fossil society leads to post-development, and that there is no post-development without social justice and environmental justice.

In sum, the Tribunal is aware that the issue of lithium encompasses a multidimensional debate on the energy transition<sup>2</sup> (what transition do we want, what place do renewable energies occupy to sustain a just society both environmentally and socially, what challenges do geopolitics and civilization face as peripheral societies, under what conditions is lithium extraction possible or not, how and how much). The socio-ecological transition under a paradigm that articulates other social relations and another energy system, is undoubtedly a great challenge, a path to travel through uncertainties and ambivalences, which cannot be carried out without the participation from below of the communities involved.

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<sup>2</sup> [https://www.tni.org/files/publication-downloads/transicionenergetica\\_resumen\\_ejecutivo\\_final.pdf](https://www.tni.org/files/publication-downloads/transicionenergetica_resumen_ejecutivo_final.pdf)



## Violated Rights of Nature:

According to the Universal Declaration of the Rights of Mother Earth, Nature has the right to<sup>3</sup>:

- a) Right to life and to exist;
- b) Right to be respected;
- c) Right to the regeneration of its biocapacity and continuation of its cycles and vital processes free of human alterations;
- d) Right to water as a source of life;
- f) Right to clean air;
- g) Right to integral health;
- h) Right to be free from contamination, pollution and toxic or radioactive waste;
- i) Right not to be genetically altered and modified in its structure threatening its integrity or vital and healthy functioning;
- j) Right to full and prompt restoration for violations of the rights recognized in this Declaration caused by human activities.

From the aforementioned rights, it can be concluded that any human activity that affects any of the rights recognized in favor of Mother Earth produces an ecological imbalance, seriously damaging its biocapacity, as well as the regeneration of cycles and vital processes of Mother Earth, expressly contravening the rights recognized in article 2 of the Universal Declaration of the Rights of Mother Earth, (hereinafter DUDMT). In this case, it is demonstrated that water, fauna, or “brothers” are directly affected — as the Atacameños call the flamingos, the extremophilous microorganisms, the heleobia (small freshwater snails), among others.

In particular, mining activity affects the health of surrounding communities, produces pollution and highly toxic wastes harmful to nature and humans; and, in turn

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<sup>3</sup> Ibid article 2



generating structural effects on ecosystems threatening their integrity and functioning.

In the case brought to the attention of this Tribunal, it is evident that mining activity generates serious effects on the Atacama desert ecosystem, its water sources, life cycles, structure and functioning of the area's ecosystem, putting the life of the local communities and the high Andean salt flats that fulfill irreplaceable environmental functions for the preservation of Nature.

**International human and environmental rights instruments violated:**

From the perspective of the indigenous riverside communities to the Atacama salt flat, the exploitation of lithium in their ancestral territory violates the rights recognized in various international instruments that guarantee the close relationship that Indigenous Peoples have with Nature and their territories. One of the main sources of the state's obligation to protect the environment and indigenous peoples is found in articles 4 and 7 of ILO Convention No. 169, international human rights treaty ratified by Chile on September 15, 2008, which entered into force on September 15, 2009.

The agreement is based on respect for the cultures and ways of life of Indigenous Peoples, and recognizes their rights over land and natural resources, as well as the right to decide their own priorities regarding the development process.

In accordance with article 4.1 of the same, the States must take the special measures required to safeguard the environment of the peoples concerned. For its part, article 7.3 establishes that the States must, together with these peoples, take the measures aimed at protecting and preserving the environment of the territories they inhabit. The protection of the Indigenous Environment under Convention 169 imposes on the governments the duty to respect the importance of cultures and spiritual value of indigenous people and the relationship to their territory (article 13.1).



The Convention also recognizes the subsistence rights of Indigenous Peoples, article 23; the protection of natural resources, article 15.1; measures to protect and preserve the territories of Indigenous Peoples, article 15.2, through: Consultation, with appropriate Free, Prior and Informed Consent and participation concerning the benefits of exploitation and compensation for damages.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of Indigenous Peoples to self-determination and specifies the contents and scope of this right in what corresponds to self-government and self-management of own resources (Article 3). It recognizes the Indigenous right to determine and develop priorities and strategies for the exercise not only of their right to development, but they are also expressly recognized the right to use their lands, territories and other resources, in particular the right to demand from States to obtain their consent, expressed with freedom and full knowledge before approving any project that affects their lands, territories and other resources, especially in relation to development, use or exploitation of mineral, water or other resources (Article 32).

The American Declaration of Indigenous Rights adopted in 2016 expressly recognizes the right of Indigenous Peoples to a healthy environment, Article XIX.

Likewise, these rights are guaranteed in the Convention on Biological Diversity, ratified by Supreme Decree No. 1963 of the Ministry of Foreign Affairs, and published in the Official Gazette of May 6, 1995.

This Convention establishes various commitments of the contracting States, among others the "Conservation in situ", whose purpose is to promote the protection of natural ecosystems and environments and the species that inhabit them.

The Convention states that "biological diversity" means variability of living organisms from any source, including, among other elements, terrestrial and marine ecosystems and other aquatic ecosystems and the ecological complexes of which they are part. This also includes the diversity within each species, between species and ecosystems.



This same instrument in Article 8, paragraph J, imposes on the States a specific obligation to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities that involve traditional lifestyles relevant to conservation and the sustainable use of biological diversity with participation.

Other instruments adopted in the framework of the Earth Summit of Rio de Janeiro are pronounced on Indigenous environmental rights and the obligations assumed by the State to guarantee them. Indeed, Chapter 26 of Agenda 21 is dedicated exclusively to Indigenous Peoples and, as its title indicates, it aspires to the recognition and strengthening of the role of Indigenous Populations and their Communities in the definition of sustainable development.

The obligation of States to consult Indigenous Peoples prior to the adoption of measures likely to directly affect their rights and interests is firmly established in international human rights law. Failure to comply with the consultation standard, or its performance without observing its basic standards, compromises the international responsibility of the States<sup>4</sup>. Also, in various legal systems - in countries such as Colombia, Costa Rica and even Chile, the jurisprudence of the Courts and Superior Courts of Justice has determined that the breach of the consultation implies the nullity of public law or the invalidation of the procedures, acts and decisions taken<sup>5</sup>.

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<sup>4</sup> IDH COURT 2007. Case of the Saramaka People v. Surinam. Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs). Series C. No. 172.

<sup>5</sup> CONSTITUTIONAL ROOM OF THE SUPREME COURT OF JUSTICE OF COSTA RICA. 2008. Judgment No. 13832 of September 11, 2008, optional file No. 08-011089-0007-CO; CONSTITUTIONAL COURT OF THE REPUBLIC OF COLOMBIA. 2008. Judgment C-030 of 2008. An analysis of the jurisprudence of the Chilean Courts regarding the implementation of the right of indigenous consultation in the framework of the administrative procedure of Environmental evaluation, can be found at: CORDERO VEGA, L. 2013. "Administrative Law and Agreement 169: The proceduralization of conflicts as a result of incomplete solutions". In Olea, H., (Editor), Law and Mapuche People: Contribution for Discussion. Santiago de Chile: Center for Human Rights, Diego Portales University, pp. 69-85. In the case of Chile, the failure of the State to implement an indigenous consultation process regarding an administrative decision that could directly affect indigenous peoples, or that of implementing its standards, implies a defect of foundation of administrative acts, rendering them invalid. . An analysis of the jurisprudence of the Environmental Courts in this regard can be found in: GUERRA-SCHLEEF, F.



One of the main sources of the state obligation to consult Indigenous Peoples is found in articles 6 and 7 of ILO Convention No. 169, cited above. As the ILO has invariably argued, the principle of consultation - together with that of participation - constitutes the “cornerstone” of ILO Convention No. 169, on which the application of the other provisions of the same are based and rests<sup>6</sup>. In this sense, the elaboration of the principles of consultation and participation in international instruments and jurisprudence responds to the history of systematic denial of which the Indigenous Peoples have been victims, as have been prevented from participating in decision-making that has profoundly affected them, many times to the detriment of their fundamental human rights and, sometimes, even of their own survival as peoples. In this way, these principles, together with that of consent, try to reverse this historical pattern in order to, in the future, avoid the imposition of new living conditions on Indigenous Peoples, materializing their right to self-determination.

Article 6 of ILO Convention No. 169, as relevant, establishes the general obligation of States to consult Indigenous Peoples:

- 1. In applying the provisions of this Convention, governments shall:
  - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

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2017. “The Environmental Courts in the implementation of indigenous rights during the environmental evaluation of investment projects in Chile”. Environmental Justice Magazine, 9.

<sup>6</sup> ILO. 2013. Understand the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO tripartite constituents. Geneva: ILO, Department of International Labor Standards.



- (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
- 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Notwithstanding the foregoing, this general duty is specified with respect to a series of measures<sup>7</sup> that ILO Convention No. 169 itself determines, stating that they have the peculiarity of being able to directly affect Indigenous and tribal peoples. In this case, measures to safeguard or benefit Indigenous Peoples are especially relevant (Article 4, paragraphs 1 and 2)<sup>8</sup>, and those related to the undertaking or authorization of prospecting or exploitation programs for existing resources in the lands of Indigenous Peoples (article 15, paragraph 2), which, as will be developed later, applies in the case under analysis.

However, as it has been supported by the ILO, the state obligation of “[...] the consultation must be considered [a] in the light of the fundamental principle of participation, expressed in paragraphs 1 and 3 of article 7 [. ..] [of Convention No. 169] ”, which states that:

1. “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and

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<sup>7</sup> As an example, some of the measures that should be consulted are: 1) those that consider their ability to dispose of or otherwise transfer their lands outside their community (article 17, paragraph 2); 2) vocational training programs of general application (article 22 paragraph 3); 3) minimum standards for indigenous peoples to create their own institutions and means of education (article 27, paragraph 3); 4) those that allow children of indigenous peoples to be taught to read and write in their own language.

<sup>8</sup> Article 4, paragraphs 1 and 2, of ILO Convention No. 169, states: “1. Special measures must be taken to safeguard the persons, institutions, assets, work, cultures and the environment of the peoples concerned. 2. Such special measures shall not be contrary to the wishes freely expressed by the peoples concerned.”



cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities”<sup>9</sup>.

In addition, the principles of consultation and participation established in articles 6 and 7 of ILO Convention No. 169, must be understood in the context of the general policy expressed in paragraph 1 and paragraph 2 (letter b) of Article 2, which provide that:

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:  
[..]  
(b) promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions<sup>10</sup>.

Finally, it should be noted that the right of Indigenous Peoples to be consulted is stipulated in the United Nations Declaration on the Rights of Indigenous Peoples (DNUDPI) (articles 27 and 32, among other articles<sup>11</sup>), and in the American Declaration

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<sup>9</sup> ILO. 2001. Report of the Committee established to examine the claim alleging the breach by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), filed under article 24 of the ILO Constitution by the Ecuadorian Confederation of Free Trade Unions (CEOSL), para. 32

<sup>10</sup> OIT. 2001. Ob. Cit., paragraph 33.

<sup>11</sup> The UNDCP, was adopted on September 13, 2007 by the General Assembly of the United Nations, after two decades of debate, with the favorable vote of 144 member states, including that of Chile. It is a milestone in building an international consensus on the human rights of



on the Rights of Indigenous Peoples (Article XXIII<sup>12</sup>). Likewise, the control bodies in the context of the Inter-American System for the Protection of Human Rights have indicated that the right to consultation and the corresponding state duty are linked to multiple rights recognized in the American Convention, in particular with those enshrined in the articles 1.1 (general obligation to guarantee the free and full exercise of rights<sup>13</sup>), 21st (property right)<sup>14</sup> and 23rd (right to participation in public affairs)<sup>15</sup>.

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indigenous peoples. Although, the legal value of DNUDPI in domestic law is a matter of debate, since, under the point of view of Public International Law, a declaration does not have the same legal status of an international convention or treaty - since in the case of the former, its norms do not have binding legal effects, as in the case of the latter. However, the adoption of this international instrument implies a serious issuance of wills resulting from a consensus. This implies that it is an agreement that is intended to be applied and assumed by the member states of the United Nations Assembly. Notwithstanding this, at present, the Inter-American Court has applied the DNUDPI in several of its judgments when it has had to rule on violations of rights to indigenous peoples in the Americas, which turns out to be an argument in favor of recognizing it as integral part of jus cogens. Another important point is how DNUDPI is linked to ILO Convention No. 169. Indeed, Article 35 of the Convention is set in the event that there are other legal instruments, whatever their Nature, whether national or international, more favorable than the Convention, in which case this may not imply a detriment to the rights and advantages guaranteed in those instruments. See: UNITED NATIONS. 2007. United Nations Declaration on the Rights of Indigenous Peoples. A / RES / 61/295.

<sup>12</sup> ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. 2016. Declaración Americana sobre los Derechos de los Pueblos Indígenas. AG/RES. 2888 (XLVI-O/16).

<sup>13</sup> IDH COURT 2012. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Judgment of June 27, 2012 (Merits and Reparations). Series C No. 245, para. 166.

<sup>14</sup> The Inter-American Court has interpreted Article 21 of the American Convention in the light of the obligations contained in the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the case of the Saramaka people vs. Suriname, the Court determined that Suriname, despite not being part of ILO Convention No. 169, had ratified both the ICCPR and the ICESCR. Consequently, the Inter-American Court went to the text of these instruments, as they had been interpreted respectively by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, in order to determine the content of Article 21 of the American Convention in its application to Suriname in this case, stating that the safeguards related to "effective participation and benefit-sharing with respect to development or investment projects within the traditional indigenous and tribal territories, are consistent with the Committee's observations of Human Rights, the text of different international instruments and the practice of several States Parties to the Convention "(para. 130). IDH COURT 2007. Ob. Cit.

<sup>15</sup> As the Inter-American Court held in the Yatama v. Case. Nicaragua, the right to political participation in the context of indigenous peoples includes the right of indigenous and tribal peoples to "[...] participate in decision-making on issues and policies that influence or may influence their rights [ ...] from their own institutions and according to their values, uses, customs



The testimonies of the Tribunal demonstrate the violation of human rights in the case of lithium mining in the Atacama desert, especially the rights to healthy environment and prior, free and informed consultation and consent that has not occurred with the Indigenous Atacameños People, according to their statements.

**The 5th International Rights of Nature Tribunal recommends and resolves:**

- 1) Accept the case of lithium mining in the Atacameño or Lickanantay territory before the International Rights of Nature Tribunal.
- 2) This Tribunal dictates that there are affected subjects (ecosystems, human and non-human beings) and those responsible are both companies (which have private capitals of national and transnational origin), and the State at its different levels (local, regional, state).
- 3) Request the suspension of the current Environmental Qualification Resolutions to the extractive companies in the Salar de Atacama basin.
- 4) Declare a zone of prohibition for the lithium industry and water extractivism in the Salar de Atacama and the Alta Cordillera.
- 5) Demand that it be allowed to really verify the state of health of Laguna Chaxa.
- 6) This Tribunal rules that there has been a direct violation of the Rights of Nature, specifically stating that:

Article 3 of the Universal Declaration of the Rights of Mother Earth establishes obligations of human beings towards Mother Earth, which in the present case, and based on testimonies presented by experts in the field, the Council of Atacameño Peoples and Representatives of the affected indigenous communities, as victims, have been violated. Indeed, breaches of the following duties have been incurred:

1. Respect and live in harmony with Mother Earth: mining activities in themselves are not a harmonious activity with Nature and, specifically, the extraction of brine from the high Andean salt flats for the exploitation of lithium implies putting

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and forms of organization ". See: IDH COURT. 2005c. Case of Yatama vs. Nicaragua. Judgment of June 23, 2005 (Preliminary Objections, Merits, Reparations and Costs). Series C No. 127, para. 225.



Wetlands risk that constitute a fundamental source for natural life in these territories.

2. Acting in accordance with the rights and obligations recognized in this Declaration: mining activities carried out in sensitive areas such as the Atacama Desert, generate a serious impact on the terrestrial, aquatic and atmospheric ecosystem that affect not only Mother Earth but also All who inhabit and use the ecosystem in their daily lives.
3. Ensure that the search for human well-being contributes to the well-being of Mother Earth, now and in the future: mining activities do not contribute to the well-being of Pachamama or her living beings; they only satisfy economic rights of multinational companies that profit from the extraction of the mineral without observing the minimum parameters of environmental quality turning it into an activity that does not contribute to sustainable development, nor does it worry about the quality of life of future generations.
4. Establish and effectively apply rules and laws for the defense, protection and conservation of the Rights of Mother Earth: in spite of having all the environmental permits, the government authorities themselves have corroborated and expressed their concern about water scarcity in the area, and the effects on the different water sources, superficial as well as underground, also recognizing that quantities of water that far exceed the recharge capacity of the aquifers are extracted.
5. Respect, protect, conserve, and where necessary, restore the integrity of the cycles, processes and vital balances of Mother Earth. The mining activities carried out in this area in particular do not respect the life cycles, evolutionary processes and ecosystem balances. On the contrary, it affects them severely by provoking or interrupting the aforementioned elements, so this Tribunal declares a violation of these rights.
6. Establish precautionary and restrictive measures to prevent human activities from leading to the extinction of species, the destruction of ecosystems or alteration of ecological cycles. Although the authorities themselves have noticed the serious problems that have occurred as a result of mining activity in the area, they have not applied the precautionary principle and even worse that of restriction for those activities that lead to the extinction of species or ecosystems.



7. Promote economic systems in harmony with Mother Earth and in accordance with the rights recognized in this Declaration. Regarding this obligation of human beings towards Mother Earth, it is clear that mining activity responds to an antagonistic economic system in terms of respect for the Rights of Nature and the communities that inhabit the area, generating effects on the ecosystem and to the health of their inhabitants.

Based on all of the foregoing paragraphs, this Tribunal finds that the mining activity produced in the Atacama Desert does not respect and is incompatible with the rights of Mother Earth and that in turn is breached by the obligations of human beings towards it, so that the violation of their rights and those of the communities affected by these activities is declared, as their quality of life is deteriorated, affecting their health, their traditional ways and customs of survival.

7) The Tribunal claims that lithium mining endangers a fundamental and scarce asset - water - whose control is ensured by a few companies (which even handle confidential information about aquifers that are used for mining), depending on the current water code. As a result, it appeals to the Precautionary Principle, which operates on uncertainty, given the possibility of a danger of serious or irreversible damage, in this case, referred to water.

8) The Tribunal also maintains that the privatization and control of water by companies is a reflection of Chile's inequality structure, controlled by a political and economic minority, consolidated by an entire legal architecture that has been in force since the time of the Pinochet dictatorship, and which is consolidated in the Political Constitution of the Republic.

9) This Tribunal underlines the absence of a prior, free and binding consultation of the Atacameño or Lickanantay People. Indigenous law does not apply, nor has Indigenous ancestral property been regularized and the delivery of community lands for immemorial use has been arbitrarily postponed.

10) Likewise, this Tribunal considers that the current extraction and exploitation of lithium threatens the life of the Atacameño populations and their worldview. There is usually a miserabilistic vision of arid deserts, as is the case with salt flats. The Atacameño or Lickanantay People teach us that the vision of these ecosystems



requires less of a telescopic look which speaks of exuberance or overabundance, and of a microscopic look, closely, which speaks of the existing flora and fauna, of its emblematic birds or ceremonial as the flamingo, but also of the microorganisms that we do not see at first sight, and that undoubtedly contribute in an essential way to the balance of ecosystems. The salt flats are an ecosystem with its vegetation, its own life, its waters, its tutelary hills, its non-human beings, those that are called “younger brothers” by the Atacameño or Lickanantay People.

11) Based on the evidence presented, referring both to the violation of the rights of Nature, the integral health of the basin, the increasingly serious water crisis, the affectation of the Atacameño population and their worldview, this Tribunal proposes **the moratorium on lithium mining in the Atacameña region.**

12) Given this state of crisis, it is urgent and necessary to enact public policies to preserve this valuable territory and the water on which it depends.

13) This Tribunal recognizes that the problem of lithium is broader, as it encompasses the discussion about the energy transition. Along these lines, this Tribunal maintains that the transition proposed today by the exploitation of the Salaries of Atacama, is an unsustainable transition, associated with transnational corporations, which consolidates an energy model that reproduces the domination of Nature, and its populations. The current model of transnational mining that has been consolidated will only serve to justify the looting, fueling the change in the energy paradigm in the countries of the global north (while in the south, strongly polluting energies are insisted, in the hands of non-conventional hydrocarbons); based, once again, on the dispossession of local communities and the destruction of nature.

14) Regarding the role of lithium in the energy transition<sup>16</sup>, whose discussion transcends the verdicts presented here, the Tribunal is aware that this transition runs a serious risk of being appropriated by large companies, of being banalized and placed at the service of the current social reproduction system. Because of this, it considers that it is necessary to approach the discussion from a non-corporate, multidimensional and critical perspective which contemplates both environmental justice and the needs of the peoples. It is about responding what transition we want, what place renewable energies occupy to sustain a just society from both an

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<sup>16</sup> [https://www.tni.org/files/publication-downloads/transicionenergetica\\_resumen\\_ejecutivo\\_final.pdf](https://www.tni.org/files/publication-downloads/transicionenergetica_resumen_ejecutivo_final.pdf)



environmental and social point of view, what geopolitical and civilizational challenges we face as peripheral societies, what place does lithium have in that framework and in what terms. Consequently, this Tribunal recommends holding multidisciplinary and multi-actor meetings and forums to discuss this issue, from a popular and counter-hegemonic perspective.

## **CASE: THREATS TO PATAGONIA: WATER AND LIFE RESERVE (CHILE)**

### **CASE BACKGROUND**

The case addresses the level of destruction, ecocide and intervention of water cycles in Patagonia and how this affects different scales (local, territorial and core), under a global vision of making urgent actions visible in the face of the severity of the destruction of Nature and how the Rights of Mother Earth and the vital element such as the water of glaciers, forests and sea of one of the three estuarine areas of the planet are valued.

As the case presenter points out, Patagonia comprises an immense geo and biodiverse territory that covers the southern tip of South America. The part under control of Chile, 25.8 million hectares, includes the so-called Western Patagonia, that is, the Patagonian Andes, with ice fields (18,000 km<sup>2</sup>), the third pole of the planet, cut by some valleys. In this territory, there are over 300 lakes, including the largest in the country and with the best water quality on the planet, as well as its rivers. In its western sector, there are one of the three estuarine and archipelagic areas of the planet, 74 thousand kilometers, of world conservation importance. In addition, this territory includes the largest area of temperate rainforest and steppes in the country, both ecosystems in a vulnerable state and conservation priority. In sum, exceptional environmental qualities of global importance for conservation (WWF-World Bank, 1995).

Half of the surface of this ecosystem mosaic is declared a protected area and in its maritime part, there are 3 marine areas of multiple uses and the Francisco Coloane Marine Park. There are also three (3) UNESCO Biosphere Reserves and the Patagonia World Heritage initiative, presented to the Council of National Monuments which



ended in a record for the World Natural Heritage site Archipelagos and Patagonian Ice, which covers four national parks, and one more national reserve of another fiscal land in the process of self-destination by the Ministry of National Assets.

The water cycle in Patagonia is closely linked to the famous western winds and the Patagonian Andes. This is how large amounts of water are transported from the ocean to collide with that mountain range, where they precipitate up to 7000 mm per year, which, among other consequences, form ice fields, large rivers and relict lakes of the last glaciation (12,000 years ago) that covered almost the entire territory. It also allows the existence of evergreen forests and a large area of wetlands that regulate runoff. On the other side of the mountain range, rainfall is lower (around 2000 mm per year), the weather is cold and the wind acts as a dryer. This is how the famous Patagonian steppes or cold desert are formed at the eastern end of the territory. Another peculiarity is that the watershed is not in the high peaks as in the rest of Chile, and the rivers that drain to the great eastern lakes cross the mountain range towards the fjords. This estuarine area in turn is fed by the rivers and consists of thousands of rocky islands, canals and deep fjords with a great biodiversity under study, highlighting species such as cold water corals and sponges. Both the water of lakes, rivers and inland sea are considered of high purity and their life of high fragility, which makes them very susceptible to pollution, erosion, eutrophication and biological alteration.

During the colonization of Chilean Patagonia, its ancestral peoples, Aonikenk, Selknam, Chonos, Kaweskar and Yagan were taken to the brink of extinction, and half of their forests were burned (over 3 million Ha, world record at the time), exterminating an unknown biodiversity, destroying almost all the basins and their water quality with galloping erosion and the loss of soil and water quality, embankment of rivers and ports, and the alteration of life in the fjords and canals. A whole collection of attacks on the rights of Mother Earth.

In the decade of the 80s, the so-called “fishing boom” takes place which together with the previous intervention of international factory ships lead to the collapse of all fisheries (among them the Southern Hake, the Loco, the Pelillo) of a virtually unknown



biodiversity, to the point that just recently in 2000, scientists discover that this was the main area of blue whales in the southern hemisphere, the largest animal on the planet.

In the 80s-90s, Patagonia goes from being a livestock colony of Chile to the frontier of globalized development and projects of transnational forestry, fisheries, salmon farms, mining and refining of aluminium, using hydroelectric potential, with its usual political support.

After the fishing boom and its sequel to poverty came the colonization of the inland sea by concessions and salmon ponds. While the salmon boom with large capitals was advancing in the sea of Chiloé, in Aisén, there were some regional companies grouped into an organization that self-imposed a sanitary barrier, and everything was going more or less well. Until the sea was copied further north and large companies such as Salmones Unimarc and Los Fiordos made their appearance in Aisén. The local group warned them about the sanitary barrier so they were denounced to the Antitrust Prosecutor's Office which sided with the outsiders. A few months after the large companies were installed, salmon diseases rose from two to twelve, skyrocketing costs, which led international companies to monopolize local companies. There began the "Salmon State" protected by the entire state and the corporate political system which hoped to make Chile the leading salmon exporter in the world. In recent years, when the Aisén Sea took over, the industry went to colonize Magallanes, where they are behaving even worse, with anaerobic records and depend on the transport of inputs and production to the Los Ríos Region. That, at the expense of an unknown sea that has only been lightly studied biologically. Not only did the sea become a landfill, but there were also problems with waste on land for a decade.

Salmon farming works with the conversion of wild fishery into low-priced fishmeal and its consequent ecological and environmental effects, converted into pellets for the export of Atlantic salmon (US market), or export to the Pacific (Japan market) with high cost. Salmon are fattened in cages in which toxic antifouling is used, and because of the high density (above what is usually declared), Caligus diseases and parasites



(sea louse) appear. These are treated with profusion of antibiotics and pesticides which obviously also affect and kill the surrounding wildlife. The remains of food and feces go to the seabed and float in the surrounding water as it erases with the tides up to kilometers away, with pollution that desertifies the seabed and causes eutrophication. In addition, salmon often escape or are released, sometimes thousands, predated their surroundings, including rivers in protected areas. It should be noted that all endemic freshwater species of Chile are in conservation problems, mainly due to the introduction of salmonids, and unaltered bodies of water are almost nonexistent. Overpopulation in rafts causes anaerobic, killing life in the sector, a situation that is quite common. The pollution and effects of boat traffic and the killing of sea lions is also worth adding here.

The transport of smolts and harvesting in wellboats has expanded the red tide, which among other consequences, is the cause of death of over 300 Sei whales in the Gulf of Penas. In recent years, there have been concessions and hundreds of salmon rafts located in the Agostini National Park, in Magallanes, the Quitalco Nature Sanctuary, the Pitipalena Añihué Multiple Coastal Marine Protected Area, near Isla Magdalena National Park, Las Guaitecas National Reserve, in Aisén and Alacalufes National Reserve (now Kawéskar National Park) in Magallanes. All of them with fraudulent Environmental Impact Statements, which are usually produced in series and with little credibility in view of the fact that the audit practically does not exist. This despite the opinions of the Comptroller General of the Republic and an audit that confirmed the habitual transgressions. Another impact of that industry is its slaughter plants and wastewater.

Today, the sector has been transnationalized and concentrated in huge holdings such as Super Salmon - Aqua Chile-Friosur, MOWI (transnational Marine Harvest), Australis of the Chinese Joyvio-Lenovo, Cermaq of Mitsubishi and Multiexport of Mitsui. Famous are also the transnational Cooke Acuaculture, the Norwegian Nova Austral, the Spanish Pesca Chile. The national production is 490,000 tons. round and moves US \$ 2,200 million. A large part of the company is grouped in Salmon Chile. North American and Japanese consumers know little or nothing about how salmon is produced.



The existing hydroelectric potential has attracted several megaprojects. The first was Alumysa (1990-2002), from Projects of Aisén (Walker) and then Noranda (Can.), which sought to dam the Cuervo, Blanco and Lagunillas rivers in the Aisén fjord area to have energy for refining of aluminium. This project was withdrawn after the request to be relocated by President Lagos, before citizen pressure (Aisén Reserva de Vida Citizen Committee and the Aisén Reserva de Vida Alliance, affected fishermen and salmon farmers). In 2007, a part of this megaproject, the dam and hydroelectric plant in El Cuervo, reappears in the hands of Energía Austral (transnational mining company Xstrata, then Glencore). One among its impacts was the flooding of 5,000 ha of pristine high ecological value forest and wetlands, with the endangered species: huillin (*Lontra provocax*), darwin's frog (*Rhinoderma darwinii*), peladilla (*Apoichiton zebra* o / and *taeniatus*). The plan was to leave the river with 3% of its flow and alter the life of the fjord where there is recruitment of Southern Hake (*Merluccius australis*). After a complex campaign in which the issue of geo-volcanic risk prevailed and ended in the Environmental Court, Glencore tried to sell the project and, not being able to, abandoned it in 2017. It's water rights are in the process of auction and return to the Treasury.

On the other hand, in 2005, Endesa announces a megaproject that later becomes HidroAysén (ENEL –Colbún) with five dams on the Baker and Pascua rivers, flooding 6000 Ha, including part of the San Rafael Biosphere National Park and Reserve in which they projected one of the dams. The project also threatened endemic endangered species (*Apoichiton*, *Diplomystes*), as well as Huemul (*Hippocamelus bisulcus*), as well as large areas of forest and peatlands. This project, after the great Patagonia campaign without Dams, whose main actor was the Patagonia Defense Council, and with 74% of Chileans against it, ended up being rejected by the government in 2014, and after going to court, abandoned the 2017, returning its rights to use water to the Treasury. It is worth adding that these megaprojects were to supply energy to the large transnational mining of the north center, while in the energy matrix of Aisén, the imported oil still prevails. As long as Chile continues to consider this vital element as a commodity in its Water Code and Constitution, Aisén's



hydroelectric potential will continue to be an attractive business and a risk for water and Nature.

From the state mining of the time of colonization, its environmental liabilities (tailings) were inherited, which lead to contamination of the waters and life of General Carrera Lake. Recently, there have been attempts at phytoremediation. In 1990, the Freeport transnational appears in this area, then Couer D'Alene (then Mandalay Resources) with gold / silver mining and the first Environmental Impact Study of Aisén, in which they assured that their tailings caused no damage since the Laguna Verde, to which one could seep, was dead which eventually turned out to be a lie. And the lagoon, now that it is dead, along with two miners who paid for one of the mines to be expanded for 2 years under that lagoon without authorization nor control. Another of its mines abandoned it and it was filled with water, which they now intend to empty into a lagoon which is part of a Priority Biodiversity Conservation Site, with state consent. For another of its mines, now abandoned, they got the state to build the access road by avoiding environmental assessment and destroying paleontological remains, and affecting an archeological site.

In this same sector, and also in the Priority Biodiversity Conservation Sites Mallín Grande-Furioso and Estepas del Jeinimeini-Lagunas de Bahía Jara, with archaeological and paleontological sites, Equus Mining is prospecting gold for which it got the current government in complicity with the Mayor of Chile Chico and regional parliamentarians. This would imply that the Patagonia National Park will be cut by 4,900 hectares. Those sites, already affected by livestock, should be protecting the lagoon bird fauna (Black-necked Swan and Coscoroba among others), the Martinet (*Eudromia elegans*), the Tuco Tuco (*Ctenomys magellanicus*), endemic cacti (*Maihueniopsis darwinii*), the Colo Colo cat, Guanaco and Huemul and temperate forest remnants. In the Baker Basin - General Carrera Lake, there are also huge exploration concessions of 50,000 Ha by the mining company Newmont.

The other mining company located in the Aisén Region is called el Toqui (managed by the Australian Laguna Gold until 2018), in Alto Mañihuales. This mining company was taken by the Walker family in the 80s and has subsequently gone from one



transnational to another, the latter has just broking. Meanwhile, common complaints of dumping of tailings turned into streams and fields of the sector have occurred. In that, apart from the death or contamination of life in the river with lead, arsenic and mercury (the most serious since 2015), some cattle poisoned with lead and arsenic died, so the neighbors finally managed to be examined, resulting all with lead in their blood, several above the norm.

The shipment of concentrated ore in Puerto Chacabuco is also polluting. A few years ago, Japan rejected a shipment of salmon because it was contaminated with lead.

In Magallanes, famous is the case of the Winter Mine, with coal, located on the Riesco Island next to the Kawéskar National Park of a national consortium, which, when attempting to breach its environmental assessment using blasting, was sanctioned by the Environmental Court. The government in response, together with announcing the decarbonization of the energy matrix, supported the mining company in its claim before the Supreme Court.

Climate change (climate-ecological emergency) has resulted in the rapid decline of Patagonian ice. According to the latest report of the General Directorate of Water, in its measurements of the last four years, 93% of the surface of glaciers in the country is found in Patagonia and 1,761 km<sup>2</sup> have melted. If you to that add the loss of 70% of permafrost and drought periods, the situation becomes serious. This situation has been causing GLOFs and floods, unforeseen changes in geography. In these circumstances, it is unrepresentable that the government (CONAF) continues without submitting the record of the World Heritage Site of the Archipelago and Patagonian Ice to UNESCO, which has the support of citizen, regional government, Senate and National Monuments Council.

As for tourism, the last promise of development in Patagonia, once again the power of wild capitalism is demonstrated without planning, preparation of local actors and without respect for Nature nor local culture. This is how we already find places with excess load and water pollution affecting heritage, such as in Torres del Paine



National Park, the Typical Zone of Cta. Tortel (where they now announce the cruise landing) and the Nature Shrine Marble Chapels.

Tourism has increased in recent years in North and South Patagonia. There are no regulatory plans and the areas are not prepared to absorb the impact generated by this activity.

In 2013, the Belgian mining company Nyrstar, whose previous owner was Canadian Breakwater Resources, produced 23,100 tons of zinc concentrate, 1,200 of lead, 41,900 ounces of gold and 142,200 ounces of silver. Emanations of pollutants caused discomfort to the population, which has generated alarm in the area, suspecting that these symptoms are a product of contaminant poisoning. Since Patagonia is a sector that dazzles through its virgin forests and rivers, free of high population density, all eyes were on the mining company. Mining is blamed for contamination of water, land, air and intoxication of the seas. Today, mining aims to continue advancing in Aisén. Transnational corporations are in the process of prospecting, with the support of the government and without citizen participation. There have been problems with the Aysén mining company, the Cerro Bayo mining company, and almost 5,000 Ha of the Patagonia National Park have been cleared for mining.

There are innumerable mining and aquaculture concessions for salmon farmers in protected areas, and the cases with the greatest environmental impact are those in the Alberto De Agostini National Park, where eight salmon farms have been installed, of which seven have problems with hydrotransmittable diseases and three operate illegally outside the concession areas located in the Multi-Use Protected Coastal Marine Area (AMCP-MU) Pitipalena-Añihue created in 2015. 9 others, located in the Estero de Quitalco Nature Sanctuary, also show environmental sustainability problems, all of which have been documented in reports from the National Commission for the Defense of Flora and Fauna (CODEFF Aisén) which also denounced the existence of dozens of salmon farms in the Las Guaitecas National Reserve and near the Isla Magdalena National Park. Another case is the tricks to open the new Kawésqar National Park, heritage of this original town, to salmon farming, and there are already several concessions in that area.



Another aspect that threatens Patagonia is the climatic emergency with the melting of glaciers in square kilometers of surface and cubic kilometers of volume. Authorities from different parts of the world have begun discussing public policies and measures to stop the causes and effects of climate change, and one of the biggest consequences is the melting of glaciers in Chile. It is necessary to pass a Law on the protection of glaciers (the one that already exists in Argentina), a project that currently has stagnated in the Chilean Congress, as it clashes fully with the extractive interests in the region (Draft Law on glacier protection bulletins n ° 11.876-12 and 4.205-12).

In 2002, a file was prepared for the declaration of the Natural World Heritage Site Archipelagos and Patagonian Ice for presentation to UNESCO, and the Ministry of Foreign Affairs made some observations in that file that were never corrected and CONAF has disregarded the issue. In 2017, because of the creation of the Kawésqar National Park, it was discovered that the Ministry of Economy, taking care of salmon interests, is the one that prevented said declaration.

The affected Indigenous People who witnessed in the Tribunal, coming from the Yagán People, and Kawésqar, almost gone, appeared demonstrating some gains, thanks to the collective organization of the peoples, but also demonstrated the great threats to their territory, especially by the expansion of Salmiculture.

## **CASE ANALYSIS**

According to the Universal Declaration of the Rights of Mother Earth (DUDMT), Nature is recognized as a living being, in addition to a unique, indivisible and self-regulated community, which sustains the life of living beings that interrelate, whose rights are inalienable, inherent of all living beings<sup>17</sup>.

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<sup>17</sup> Universal Declaration of the Rights of Mother Earth, article 1.



Among the rights inherent to Mother Earth, enshrined in the Declaration, her right to life and existence is recognized<sup>18</sup>; the right to be respected<sup>19</sup>; to the regeneration of her biocapacity and continuation of her cycles and vital processes, free of any human intervention<sup>20</sup>; to the maintenance of her integrity with respect to her capacity for self-regulation and interrelation of her beings<sup>21</sup>, the right to water as a source of life<sup>22</sup>, her right to integral health and free from contamination, pollution and toxic waste<sup>23</sup>, unless genetically altered and modified in its structure that threatens its integrity or its vital and healthy functioning<sup>24</sup>; and, the right to restoration against violations caused by human activities, among others recognized in the aforementioned instrument<sup>25</sup>.

Along these lines, every living being has the right to its place in the ecosystem and to play its role in the ecosystem for the harmonious functioning of Mother Earth; also recognizing the welfare of the beings that inhabit it, free from any cruel treatment caused by human activities.

In the present case denounced before this Tribunal, a series of human interventions have been expressed which have affected the rights set forth above. For example, the presence of mining activities that produced 23,100 tons of zinc concentrate, 1,200 of lead, 41,900 ounces of gold and 142,200 ounces of silver have generated pollution in water, soil, air and even reaching and affecting ocean waters. In addition, the advance of the extractive frontier has been denounced, especially for mining exploration activities in Aisén, without due citizen participation under the eyes of the competent authorities. The support received from the government towards the mining companies (Aysén and Cerro Bayo) has implied the cutting of large quantities of hectares that belonged to the Patagonia National Park.

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<sup>18</sup> Ibid, article 2, numeral 1, literal a)

<sup>19</sup> Ídem, literal b)

<sup>20</sup> Ídem, literal c)

<sup>21</sup> Ídem, literal d)

<sup>22</sup> Ídem, literal e)

<sup>23</sup> Ídem, literals g) and h)

<sup>24</sup> Ídem, literal i)

<sup>25</sup> Ídem, literal j)



On the other hand, the large number of concessions for salmon farming has been denounced even within National Parks (as in Alberto De Agostini) - eight in total - of which, seven of them have detected problems of hydrotransmittable diseases, in addition to the Illegal operation of three salmon farming companies, outside the concession area located in the Pitipalena-Añihue Coastal Marine Protected Area (AMCP), which was created in 2015. There are also nine concessions for this activity that operate within the Nature Sanctuary of Quitalco, which has been duly documented and denounced by the National Commission for the Defense of Flora and Fauna (CODEFF Aisén), also identifying the existence of dozens of salmon farms in the Las Guaitecas National Reserve and places near the Isla Magdalena National Park . Likewise, the intentionality of the government in complicity with these companies has been exposed, to allow this type of activities in the Kawésqar National Park, heritage of the original people that bears the same name.

Similarly, the current problems caused by tourism in Chilean Patagonia have been denounced, against which there are no regulatory plans regarding this activity, areas that are not prepared to face the impact produced by tourism activities.

In addition to what was reported before this Tribunal, there is knowledge about the severe impacts produced by climate change on this delicate ecosystem such as the Chilean Patagonia, related to the melting of glaciers, considerably increasing the water level. It is pointed out that in 2002, CODEFF, Peaceboat and the Presidents of the Environment Commissions of the Congress, tried, unsuccessfully, to get the National Monuments Council to open a record for the declaration of the Natural World Heritage Site Archipelagos and Patagonian Ice, to effects of being presented to UNESCO, a proposal that has been boycotted by the government itself.

In this regard, the Tribunal must specify that Chilean Patagonia comprises a territory of great proportions with great biodiversity, mega diverse, with ice fields and the largest lakes in the country. It is also an area that includes various water resources, in addition to being one of the three estuarine and archipelagic areas of the planet, also being an ecosystem of global importance for conservation. Additionally, it includes



the largest area of temperate rainforest and steppes in the country, both ecosystems in a vulnerable state and conservation priorities.

Therefore, and based on the testimonies presented by experts in the field both by the presenter, the various experts and the Indigenous People directly affected, this Tribunal finds that the productive activities carried out in the area such as mining and salmon farming represent a great danger on the ecosystem, becoming important threats for the entire region. In addition, the effects produced by climate change that affect the melting of glaciers lead to a great danger for terrestrial and aquatic species of the place, as well as for the human being. It should be noted that, for this Tribunal, instead of discouraging human activities that have repercussions in the face of climate change, the Chilean State becomes the object of promotion and encouragement.

It should be noted that, for this Tribunal, the Chilean State has been complicit and permissive with the industries dedicated to these activities, favoring extractivism and concessions for salmon farming activities which, according to the testimonies provided, represent a danger to the survival of other aquatic species. The act of reducing the areas for environmental conservation such as national parks and other conservation regimes, contravenes express international provisions, such as the precautionary and preventive principle that govern environmental law, and must also be extrapolated to protect the Rights of Nature.

In addition, the Inter-American Court of Human Rights itself has been clear in the obligation of the State to carry out prior consultation processes with the communities that may be affected by the development of productive activities. However, and as evidenced, by omitting this procedure, the Chilean State has breached fundamental duties related to the protection of the environment and Nature. In this regard, the Inter-American Court of Human Rights in its CONSULTATIVE OPINION OC-23/17 of November 15, 2017 determined the importance of social participation, within the framework of the protection of Nature and the environment in general, in turn which guarantees the exercise and protection of human rights:



*“... Public participation represents one of the fundamental pillars of instrumental or procedural rights, since it is through participation that people exercise democratic control of state efforts and thus can question, investigate and consider compliance with the public functions. In that sense, participation allows people to be part of the decision-making process and have their opinions heard. In particular, public participation makes it easier for communities to demand responsibilities from public authorities for decision-making and, at the same time, improves the efficiency and credibility of government processes. As mentioned on previous occasions, public participation requires the application of the principles of publicity and transparency and, above all, must be supported by access to information that allows social control through effective and responsible participation (... ) In the context of Indigenous communities, this Court has determined that the State must guarantee the rights of consultation and participation in all phases of planning and implementation of a project or measure that may affect the territory of an Indigenous or tribal community, or other essential rights for their survival as peoples, in accordance with their customs and traditions. This means that, in addition to accepting and providing information, the State must ensure that the members of the community are aware of the possible risks, including environmental and health risks, so that they can comment on any project that may affect their territory within a process of voluntarily consultation, with knowledge. Therefore, the State must generate sustained, effective and reliable channels of dialogue with Indigenous Peoples in consultation and participation procedures through their representative institutions. With respect to environmental issues, participation represents a mechanism to integrate citizens' concerns and knowledge in public policy decisions that affect the environment. Likewise, participation in decision-making increases the capacity of governments to respond to public concerns and demands in a timely manner, build consensus and improve acceptance and compliance with environmental decisions... ”*

It should be noted that while this advisory opinion was issued under the protection of the right to a healthy environment, it is perfectly applicable to the Rights of Nature, considering also that it is the same people in the area where economic activities are performed, and where they constitute the main protectors of nature. The same works with the Precautionary Principle, and the same is recognized in the Universal



Declaration of the Rights of Mother Earth, which, in Article 3, lays down the obligation to humans, and obviously the state, to "establish precautionary and restrictive measures to prevent human activities from causing species extinction, the destruction of ecosystems or the disruption of ecological cycles"<sup>26</sup>.

Patagonia being a place of great ecosystem importance for biodiversity, it represents the importance of water resources, and it is incomprehensible that the State promotes productive activities related to mining and salmon farming because of the dangers they pose to areas as ecologically sensitive and important for conservation as these.

**Violated Rights of Nature:**

In view of the foregoing, this Tribunal considers that, under Article 3 of the Declaration (DUDMT), human beings and the State have transgressed the following norms contained in this instrument in addition to the aforementioned precautionary principle:

- (d) ensure that the pursuit of human wellbeing contributes to the wellbeing of Mother Earth, now and in the future;
- (e) establish and apply effective norms and laws for the defence, protection and conservation of the rights of Mother Earth;
- (h) empower human beings and institutions to defend the rights of Mother Earth and of all beings;
- (k) promote and support practices of respect for Mother Earth and all beings, in accordance with their own cultures, traditions and customs;
- (l) promote economic systems that are in harmony with Mother Earth and in accordance with the rights recognized in this Declaration.

In addition, this Tribunal considers that there have been several violations of the Rights of Mother Earth in the present case, contained in Article 2 of the DUDMT, especially numeral 1 in its literals:

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<sup>26</sup> Ibid. Art. 3: Human beings, all States, and all public and private institutions must: (i) establish precautionary and restrictive measures to prevent human activities from leading to the extinction of species, the destruction of ecosystems or alteration of the ecological cycles.



- (a) the right to life and to exist;
- (b) the right to be respected;
- (c) the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions;
- (d) the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
- (e) the right to water as a source of life;
- (f) the right to clean air;
- (g) the right to integral health;
- (h) the right to be free from contamination, pollution and toxic or radioactive waste;
- (i) the right to not have its genetic structure modified or disrupted in a manner that threatens its integrity or vital and healthy functioning;

In the same way, the violation of the right enshrined in the second numeral of the aforementioned article is acknowledged, by which it is recognized that each being has the right to a place and to play its role in Mother Earth for her harmonious functioning.

Finally, this Tribunal considers that the abuse to which salmon are exposed during the salmon farming process violates the provisions of the third paragraph of the same article that states: "Every being has the right to wellbeing and to live free from torture or cruel treatment by human beings".

Based on all of the foregoing paragraphs, this Tribunal finds that the mining and salmon farming activity that is carried out in Chilean Patagonia are contrary to the Rights of Mother Earth and that, in turn, there is a breach of the obligations of human beings towards it. Hence, this Tribunal declares the violation of their rights and those of the communities affected by these activities, to the extent that their quality of life has been violated by the absence of a prior consultation that allowed to express the feelings of the surrounding communities with respect to the activities.

### **The 5th International Rights of Nature Tribunal resolves:**

1. Considering:



- A. The condition of Patagonia as a reserve of water and life with its lacustrine, archipelagic and estuarine characteristics, with more than 74,000 kilometers of marine edge, being at the same time one of the most pristine areas of the planet, endowed with a huge biodiversity part of which is still unknown by science and, also a very important water reserve in the form of abundant glaciers and extensive ice fields;
- B. The increasing levels of human intervention through the development of mining and salmon farming activities which seriously and directly affect ecosystems, and have even led to the disappearance of endemic marine biomes and species;
- C. The levels of intervention historically promoted by the Chilean State itself, through the promotion of an extractivist model of a centralist, authoritarian, patriarchal and even colonialist character, implanting real productive enclaves oriented towards global markets, disconnected from the territories and human communities that inhabited them ancestrally, in the Patagonic territory;
- D. Although the Chilean State has acted nominally, welcoming the civilizational advances of the whole of humanity in the scientific and legal field, it has in fact developed an ambiguous and absolutely functional regulation to the extractive model that it promotes. Hence, its permanent action has been to breach the environmental regulations themselves, turning a blind eye and ignoring the repeated and systematic evasion of mining and salmon companies, from complying with the requirements imposed on productive activities by existing environmental legislation;
- E. The exploitation of the marine edge through the development of salmon farming has substantially affected the endogenous marine ecosystem by massively introducing the exploitation of an exogenous species typical of the northern hemisphere of the planet, carnivorous, whose repeated massive escapes from the breeding cages have made different species of fish of the ecosystem disappear. In parallel, the extreme abuse in the use of antibiotics by the salmon industry is affecting even local people, while the nutrients used to feed the population of salmon crowded in cages that contain up to 30 kilos per cubic meter of water generate thousands of tons of pollution of the seabed, thus producing processes of eutrophication and anoxia that absolutely destroy marine life;
- F. The Chilean State has openly violated the law, thus creating, with its omission and inaction, or with its direct actions, true areas of sacrifice, including deserts or marine cemeteries, thus allowing the almost complete destruction of local ecosystems;



G. At the end of the 19th century and the beginning of the century, the Chilean State allowed a true genocide of the original inhabitants of the southern tip of the country through the mass extermination of the peoples that had inhabited that territory for millennia, to develop the exploitation of sheep livestock. It even allows, to this day, the historical falsification and veneration of the businessmen responsible for such genocide. Despite this, these peoples still resist preserving their memory, language and traditions while the Chilean State continues to sell their territories to make extractive development possible, thus violating local communities.

2. This Tribunal decides to accept the case and decides to recommend, suggest and urge the Chilean State to:

A. Change its complicit and permissive attitude towards the ecocidal economic activities of extractive nature carried out in Patagonia;

B. Strictly respect areas for environmental conservation such as national parks and other conservation regimes;

C. Strictly comply with prior consultation processes, through free and informed consent, to the communities affected by the development of new productive activities;

D. Establish precautionary and restrictive measures to prevent human activities from leading to the extinction of species, the destruction of ecosystems or alteration of ecological cycles in Patagonia;

E. To study and introduce elements of restorative justice, norms and legislation conducive to the reparation of the enormous damages done to the original inhabitants of Patagonia and the Southern Territory;

F. Get the National Monuments Council to open a record for the declaration of the Natural World Heritage Site Archipelagos and Patagonian Ice, for the purpose of being presented to UNESCO;

G. Comply with the current Constitution, international conventions and existing laws (eg Chile / Argentina Water Resources Protocol) in order to cancel concessions in protected and Indigenous areas, and study ecosystems before intervening;

H. Carry out a process of participatory planning and effective regulation of the development of tourism activities so that they are compatible with the preservation



of the natural and cultural heritage of Patagonia. Therefore, review load capacity and plan and regulate tourism;

I. Have real, independent and participatory Environmental Impact Studies for protected areas and demand environmental repairs, especially to restore burned basins with environmental liabilities;

Likewise, it condemns (morally and politically) mining and salmon companies to bear the cost of repair and restoration for the damages caused by externalities generated by their productive activities in Patagonia, within a period to be determined, reserving this Tribunal the right to develop communication campaigns to denounce their ecocidal actions.

The Tribunal considers that the plebiscitary event that may culminate in a new constitution emerging from the exercise of popular sovereignty, is a propitious moment to introduce the unrestricted respect for life in all its expressions as a founding element of the new social pact, incorporating in it the Rights of Nature, the right to existence and the restoration of Nature, and water, as a tool to protect Patagonia.

## **WATER PRIVATIZATION CASE: WATER AS AN OBJECT (CHILE)**

### **CASE BACKGROUND**

In Chile, Nature and its elements are treated as simple goods, without their own value, available and tradable in the market for goods and services, at the mercy of extractive economic looting. The greatest expression of that vision is expressed in the privatization of water. Indeed, Chile is the only country in the world with the sources and management of totally privatized waters where rivers - rivers in private hands - which common merchandise, are diverted, dammed and finished off. The basins are dried, the Seas are polluted, wetlands are clogged and glaciers are destroyed without legislation that guarantees their environmental and social functions.



Since 1980, the Political Constitution of the Republic formulated by the military board of Augusto Pinochet established that water rights grant ownership to their owners, through article 19 No. 24 in the final subsection. In turn, the aforementioned water rights are created by the Water Code in 1981, a code that legally separated the water from the land, granted certain individuals, free and perpetual, the “right of use” of the waters (DAA), in accordance with its provisions. Now, despite this privatization, and in a totally contradictory manner, water is in that code still considered as a “national good for public use” in Chile, that is, a good whose domain and use “belongs to the entire nation”, but which is ultimately privatized because the right of use granted to the individual is not an administrative license for use subject to expiration rules, but a real right that is granted in perpetuity, and for which the holder has a right to constitutionally guaranteed property.

In this way, water is another object of human dominion, which can even be inherited. Resource paradigm that also violates the ancestral worldviews that inhabit Chile, which include the waters as part of the vital cycles of the Pacha Mama and source of the existence of all lives.

The privatization of water in Chile, through the establishment of a real right of free use, perpetual and protected by the property right, established by the Water Code DFL 1,122 of 1981, has imposed a legal structure that collides with collective rights with Indigenous ancestral base, and also with the rights of other traditional non-Indigenous users (peasants, fishermen, pirquineros, rural settlers, etc.) on the waters, from which they have taken advantage according to customs. Even this reality is in open contrast with the rights of future generations, while water should be considered a heritage asset and, as such, strategic for any society. This legal regime exclusively favors the productive use of water, imposes a water market for the reallocation of a resource and does not include environmental protection mechanisms that allow a sustainable management of the river basins and associated ecosystems, resulting in serious social and environmental conflict.

Chronologically, the new constitution was drafted in 1980 in Chile and included Article 19 MN.24 final paragraph. In 1981, the new water code Art. 5 was approved,



leaving no use priorities or water cycles. Water is regularized and delivered in perpetuity to private parties at the expense of native peoples. In 1998, the health services were privatized, and in 2012, the fishing concessions at sea with the Fisheries Law were delivered to 7 families.

## CASE ANALYSIS

As warned of the exposed background, the privatization of water in Chile is allowed under its legal and constitutional regime. While water is considered a resource that is privatized, its legal consideration as a national good for public use, belonging to the entire nation, are dead letters. The legal system itself, through the privatizations granted by the Chilean government, has opted for considering water an appropriable asset under a concession regime for which property rights are granted in perpetuity. The Civil Code establishes water as a public object (BNUP).

This ambiguity has not prevented the processes of granting property rights and those derived from them (real rights), to favor companies engaged in productive or extractive activities. What underlies the Chilean water model is the paradigm that the market guarantees a more efficient use of water because it would allow its reallocation in the market of goods and services to those who are willing to pay more for water and, therefore, ensures its beneficial use through productive use. It should be noted that the State grants the right to use water for free, but subsequently it is freely traded in the market for goods and services at exorbitant prices determined by the scarcity of the resource. Water is even subject to speculative transactions when rivers are sold, that do not contain the flow of water that was the object of sale in the market, as happened with the Copiapó River.

Particularly, and according to the testimonies by presenters and experts during the Tribunal hearing, extreme violations occur with the overloading of the Copiapó River and the overexploitation of water reserves (75% delivered to agribusiness). In relation to the year 1987, the water balance shows a negative variation of the flows (which house rivers, lakes and lagoons), in the Copiapó, Elqui, Aconcagua, Maipo, Rapel and Maule basins. Water scarcity zone has been decreed in 88 communes of the country.



More than 70% of the glacial surface of South America is at risk and 625 of the fisheries are overexploited or depleted. More than 85% of the water rights over the rivers were handed over to private owners before 2005 and only 10% or less of the flow rate was not warmed, and the serious drought situation related to the reduction of rainfall was not projected. Nature, the rivers, like the human being cannot survive in this way; it is as if 10% of the blood is taken from a human being, pretending that the human being continues to function in the same way. When considering Nature as a legal entity, the considerations with it must be different. A set of critical processes for the functioning of ecosystems and their renewal-reproduction and recovery capacity within the river basins has been seriously altered, affecting the rights of reproduction and existence of multiple species, including endangered species. According to the latest "State of the Environment Report in Chile 2019 (Chile / ECLAC)", 90% of Chile's soils suffer erosion processes, and 24% have severe or severe erosion.

From the testimonies received by this Tribunal, it is noted that the privatization of water has generated significant effects on both terrestrial and aquatic ecosystems, since the model favors the concentration of water rights, allows monopolies for their exploitation and tends to intervention of surface and underground aquifers which are diverted, dammed and auctioned according to private interests. Likewise, the privatization of water has caused serious effects on river basins and aquatic ecosystems that depend on it for their survival, that is, the life cycle of the water itself is at serious risk of extinction, as is the case with glaciers. However, this fact not only implies a direct impact on terrestrial or aquatic ecosystems, but also for human beings who depend on water resources for their daily activities.

It is important to highlight that Chile is a seemingly privileged country in terms of the availability of water resources, when there, in reality, are serious problems as water is geographically distributed unevenly. Likewise, its privatization has resulted in major conflicts over access and ownership of water, mainly visible between indigenous communities and mining companies. This model of water resources management, in addition to generating socio-environmental conflicts, has caused strong pressure especially in areas where there is a greater shortage of these resources, resulting in a



conflict between traditional uses of the resource with respect to the rights of property that has been granted by the State, in favor of mining companies and the electricity sector, to the detriment of the population's needs. In addition to the above, and as noted, the privatization of water has favored the creation of a “water market” where economic dynamics of supply and demand prevail over the interest and needs of the population, as well as environmental protection that should be given to this precious resource.

According to the testimonies collected before this Tribunal, the privatization of water in Chile, in addition to causing major social conflicts between companies and communities as analyzed in previous lines, has generated important effects on Nature. For example, the existing pressure in relation to the supply and demand of this resource has resulted in the loss of the ecological flow in the river basins, some of them facing a critical situation due to pollution. All these effects are generated as a result of the struggles for the use of the water flow. There is also the fact that there is a total lack of control and supervision by the competent state entities, which has led to problems related to the contamination and discharge of waste, many of them of high toxicity from mining activities.

The people affected, both in Alto Maipo and Paine, reflected the worrying situation they are facing with respect to water. The San José de Maipo region is highly threatened, especially by hydroelectric plants, agriculture and the melting of glaciers causing the drought of the Maipo River that provides water to the Metropolitan region of Santiago. For its part, Paine is a commune located 42 km south of Santiago, has approximately 70,000 inhabitants, of which half is supply themselves with well water. For almost a decade, water levels have dropped considerably, due to the indiscriminate extraction of this element from entrepreneurs for agribusiness.

Water from the Aculeo Lagoon also appeared before the Tribunal:

“Since the beginning of this year they tirelessly look for me in Aculeo, that small sector surrounded by sclerophyllous forests and large hills, unfortunately they have taken me to other places through which I had never traveled, ran from the estuaries to the large hectares that guarded a small island and various species of fish and birds until the Cherry and Brown Farmers began using me to irrigate their businesses. The auleguan animals were supplied by my passing, and when seeing that I no longer



exist, there they die of thirst and hunger, they die in the same ground in which I once was. I am the water of the Aculeo Lagoon”.

“People didn't have what to drink either, and they knew this at the other end of Paine, in Chada, where it also quenched thirst and cooled many other animals and forests, there they noticed that my presence was also disappearing and that it appeared in places where I never went before. They took me there to water other “parrones” (vineyards) whose wine would be for export. Many crops were lost because I did not arrive in time to water them. Many other animals die day after day of thirst. Many native forests are consumed in the fire because they did not take me to extinguish it. I am the water of Chada, the water that still remains and struggles to stay there for the species of the sector.”

“Four days ago, I was still running timidly along the Angostura River, until a new company arrived with their machinery and began to remove me from the place, the trout drowned in the mud that was left, the horses can no longer cool in me, I will not be able to water Don Juanito's lettuce or keep the bed as a true oasis for my inhabitants. It was the Water of Angostura, which covered half of Paine and that I will no longer house the “pejerreyes” or the birds that were in me. They got me out of there while my people lamented, because they couldn't defend me; They did not have the resources, the machinery had permits. ”

“I want to run free through the towns of Paine, I want to go down quietly from Chada and flow into the rivers, I want to go back to my lagoon and see the gleaming green vegetables. ”

The inhabitants of Paine also want the same. Representatives of all the species that die of thirst in their commune have been declared today. They are the voice of the native forest that dries up and disappears during the wildfire season.

In this case, there is responsibility by omission since the State, and the governments and parliamentarians, to maintain a model of privatization established in the military dictatorship accompanied by administrative bodies with poor abilities to protect glaciers, wetlands, marine ecosystems and fragile environments

#### Violated Rights of Nature:

In general, the privatization of water leads to a number of problems, among which are:



- a) Affection to Nature and ecosystems;
- b) Inefficient management of the resource, which affects its quality;
- c) Affection on the majority of the population that cannot freely take advantage of the water and the consequent dispossession of peasants and farmers from the use of this resource;
- d) Public institutional inefficiency to control water quality above all;
- e) Increase of national and local social conflicts.

This Tribunal warns that to reverse this situation, a profound change in the Chilean legal system is necessary in relation to the use and use of water resources, which prioritize human consumption and the satisfaction of the needs of people, local and indigenous communities over the interests of private companies dedicated mainly to extractivism, always keeping in mind the need to guarantee the cycle of regeneration and restoration of the water itself.

The dramatic situation in Chile regarding water management serves as an example not to be followed for countries to protect and design a legal system in order to favor the use and use of this resource for people who need it most in their daily lives, closing the door to its privatization. That is, it is necessary that water be recognized as a key element of the Rights of Nature in the sense that it is a basic resource for life and ecosystems. It is also essential that people and communities be recognized and given space in decisions related to the proper use of this resource; when talking about its non-privatization, its nationalization is not considered, but the increasing control of water and its sources by the communities themselves. That also leads us to redefine water as a human right and an essential element of the Rights of Nature to ensure the life and functioning of the planet.

Based on the above, this Tribunal finds that the privatization of water, as an indispensable element for the survival of ecosystems, transgresses the following rights of Mother Earth recognized in the Universal Declaration of the Rights of Mother Earth:

Article 2 numeral 1:

“(a) Right to life and to exist;

(b) Right to be respected;

(c) Right to the regeneration of its biocapacity and continuation of its cycles and vital processes free of human alterations;



- (d) Right to maintain their identity and integrity as differentiated, self-regulated and interrelated beings;
- (e) Right to water as a source of life (the highlights belong to the Tribunal)
- (g) Right to comprehensive health;
- (h) Right to be free from contamination, pollution and toxic or radioactive waste;
- i) Right not to be genetically altered and modified in its structure threatening its integrity or vital and healthy functioning; (the highlight belongs to the Tribunal)
- (j) Right to full and prompt restoration for violations of the rights recognized in this declaration caused by human activities”.

In addition to the above, human beings, including the Chilean government, have violated their obligations to Mother Earth, through private concessions of water resources in favor of mining companies and other private productive activities in accordance with the provisions in article 3 of the Universal Declaration of the Rights of Mother Earth:

- “1) All human beings are responsible for respecting and living in harmony with Mother Earth;
- 2) Human beings, all States, and all public and private institutions must:
  - (a) act in accordance with the rights and obligations recognized in this Declaration;
  - (b) recognize and promote the full application and implementation of the rights and obligations established in this Declaration;
  - (c) promote and participate in learning, analysis, interpretation and communication on how to live in harmony with Mother Earth in accordance with this Declaration;
  - (d) ensure that the search for human well-being contributes to the well-being of Mother Earth, now and in the future;
  - (e) effectively establish and apply rules and laws for the defense, protection and conservation of the Rights of Mother Earth;
  - (f) respect, protect, conserve, and where necessary restore the integrity of the cycles, processes and vital balances of Mother Earth;
  - (g) ensure that the damages caused by human violations of the inherent rights recognized in this Declaration are rectified and that those responsible are held accountable to restore the integrity and health of Mother Earth;
  - (h) empower human beings and institutions to defend the rights of Mother Earth and all the beings that comprise it;
  - (i) establish precautionary and restrictive measures to prevent human activities from leading to the extinction of species, the destruction of ecosystems or alteration of ecological cycles;



- (k) promote and support practices of respect for Mother Earth and all the beings that compose it, according to their own cultures, traditions and customs;
- (l) promote economic systems in harmony with Mother Earth and in accordance with the rights recognized in this Declaration.”

Therefore, this Tribunal concludes that the Chilean State - represented by its governments in power - is the main actor and accomplice of the violations identified above because it has failed to respect the obligations established in this document, and must make the necessary adjustments to its legal system to recognize water as an essential element for the functioning of life in Chile and on the planet itself, which forces us to modify the current property regime on it. By virtue of this, this Tribunal declares that the privatization of water, as a vital element for the functioning of the life of the planet, is a legal regime that attempts against the rights of Nature previously identified, and also notices the breach of the duties of human beings, (companies and State) as established in the Universal Declaration of the Rights of Mother Earth.

#### Violated human and collective rights:

With regard to indigenous rights, international law recognizes the right of property of indigenous peoples over their ancestral territories and as a consequence, the right over existing natural resources in those territories, which have been traditionally used for their survival, development and pursuit of its system of life and custom, which obviously includes water<sup>27</sup>. This is expressed in Convention 169 of the International Labor Organization (ILO), which recognizes specific rights in this area to indigenous peoples, the Universal Declaration of Indigenous Rights and other human rights instruments of general application, such as Covenant on Civil and Political Rights (PDCP), the Covenant on Social and Cultural Economic Rights (PDESC), the American Convention on Human Rights, on the basis of which indigenous territorial rights have been protected through their evolutionary interpretation have been carried out by international Tribunals and the bodies responsible for their application<sup>28</sup>.

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<sup>27</sup> Inter-American Commission on Human Rights, Report “Rights of Indigenous and Tribal Peoples on their ancestral lands and natural resources, Norms and jurisprudence of the Inter-American Human Rights System”, OAS/Ser.L / V /II., Doc. 56/09, December 30, 2009.

<sup>28</sup> The Inter-American Tribunal, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, para. 148, established this jurisprudential trend that implies an evolutionary interpretation of the American Convention on Human Rights (CADH) in the light of other Human Rights Instruments, based on Article 29 b) of the ACHR that prohibits a restrictive interpretation of rights.



Convention 169, generates a regulatory framework that links the right of indigenous peoples to water with the right to the environment, subsistence, development and protection of natural resources. Convention 169, articles 4,1 and 7,4, imposes on the States the obligation to adopt measures to protect the indigenous environment. At this level, it is the obligation of governments to ensure that studies are carried out, in cooperation with indigenous peoples, that allow determining the social, spiritual, cultural and environmental impacts that development activities may generate in these peoples, article 7,3 The subsistence rights of indigenous peoples are recognized, in particular, it is provided that handicrafts, rural and community industries and traditional activities related to the subsistence economy of the peoples concerned, such as hunting, fishing and collection, among others, are recognized as important factors for the maintenance of culture, its economic self-sufficiency and development, being the obligation of governments to ensure that these activities are strengthened and encouraged, article 23. The right to development of indigenous peoples, according Article 7,1 of Convention 169, is structured around the right to self-determination safeguarding the power of these peoples to establish their development priorities, a matter of extreme relevance when this model collides with which the State intends to impose, on its own or on behalf of individuals, and in which control over natural resources which are essential for life in indigenous territories is disputed. Article 15,1 recognizes the rights of indigenous peoples to the natural resources existing in their lands and imposes on the State the obligation to protect especially these rights and guarantee indigenous participation in the use, administration and conservation of said resources. It is provided, however, that if ownership of these resources belongs to the state under domestic law, measures must be taken to protect and preserve the territories of indigenous peoples, such as: prior, free and informed consultation, participation in the benefits of exploitation and compensation for damages, article 15,2.

The Inter-American Court of Human Rights has recognized indigenous communal property to lands and natural resources, applying Article 21 of the American Convention on Human Rights<sup>29</sup>. This recognition has been given in the framework of

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<sup>29</sup> The Inter-American Tribunal. Case of the Mayagna (Sumo) Awas Tingni Community v . Nicaragua Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79 para. 148, recognized the value of communal property of indigenous peoples in light of Article 21 of the American Convention on Human Rights. Likewise, he recognized the validity of the possession of the land based on indigenous custom, even in the absence of title, as the basis of his ownership of them; and, finally, it established the need for the close relationship that indigenous people have with their lands to be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. This jurisprudence has been ratified



disputes generated by the control of natural resources, forests, water and minerals, among others, existing in the territories where indigenous and tribal peoples live in. This dispute is accentuated due to the collision of rights that is generated between the recognition of indigenous property and the rights of the States, to whom the constitutional or legal norms in domestic law assign ownership of the natural resources of the subsoil and of the Water<sup>30</sup>.

The Inter-American Human Rights System takes over this assumption, to the according situation with the provisions of Article 15,2 of Convention 169, mentioned above, even if it may be legitimate for states to claim ownership formally reserved for the subsoil and water resources, this does not imply ignoring the right of indigenous or tribal peoples to be respected in relation to the process of exploration and extraction of subsoil resources or water resources, nor does it imply that state authorities have full freedom to dispose of such resources at its discretion. On the contrary, it is argued, Inter-American jurisprudence has identified the rights of indigenous and tribal peoples that States must respect and protect when they intend to extract resources from the subsoil or exploit water resources and that includes the right to a safe and healthy environment, the right<sup>31</sup> to prior consultation and, in certain cases, to informed consent, the right to participation in the benefits of the project, and the right of access to justice and reparation. The right to consent is enforceable precisely when indigenous peoples may see their existence at risk, which occurs precisely when their water sources are confiscated.

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in a multiplicity of cases: I / A Tribunal HR. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, para. 137. I / A Tribunal HR. Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121. I / A Tribunal HR. Case of the Saramaka People v. Suriname. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 120. I / A Tribunal HR Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, para. 85. I / A Tribunal HR Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012, Series C No. 245, para. 145.

<sup>30</sup> Inter-American Commission on Human Rights, Report "Rights of Indigenous and Tribal Peoples on their ancestral lands and natural resources, Norms and jurisprudence of the Inter-American Human Rights System", OEA / Ser.L / V / II., Doc. 56/09, December 30, 2009, para. 179 and 180.

<sup>31</sup> Inter-American Commission on Human Rights, Report "Rights of Indigenous and Tribal Peoples on their ancestral lands and natural resources, Norms and jurisprudence of the Inter-American Human Rights System", OAS / Ser.L / V / II., Doc. 56/09, December 30, 2009, para. 180



The property rights of indigenous and tribal peoples extend to the natural resources present in their territories, as a necessary consequence of territorial property rights<sup>32</sup> and in clear correspondence with the notion of indigenous territoriality coined by ILO Convention 169 and the Universal Declaration on the Rights of Indigenous Peoples<sup>33</sup>. The Inter-American Tribunal has determined that the protection of indigenous property over natural resources is necessary to maintain their ways of life and custom, so protection also extends to cultural rights and imposes the obligation to guarantee indigenous activities related to natural resources, such as fishing, hunting or gathering<sup>34</sup>.

In the year 2005<sup>35</sup> the Inter-American Court of Human Rights established that indigenous territorial rights encompass a broader concept than property, which is related to the collective right to survival as an organized people, with the control of their habitat as a necessary condition for the reproduction of their culture, for their own development and to carry out their life plans<sup>36</sup>. The ruling concludes that the petitioners, members of the Yakye Axa Community, live in conditions of extreme

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<sup>32</sup> Inter-American Court of Human Rights. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, para. 124 and 137. I / A Tribunal HR. Case of the Sawhoymaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121. I / A Tribunal HR. Case of the Saramaka People v. Suriname. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 122, subtitle D. Inter-American Court of Human Rights Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012, Series C No. 245, para. 146.

<sup>33</sup> Inter-American Commission on Human Rights, Report "Rights of Indigenous and Tribal Peoples on their ancestral lands and natural resources, Norms and jurisprudence of the Inter-American Human Rights System", OAS / Ser. L / V / II., Doc. 56/09, December 30, 2009, para. 182.

<sup>34</sup> Inter-American Commission on Human Rights, Report "Rights of Indigenous and Tribal Peoples on their ancestral lands and natural resources, Norms and jurisprudence of the Inter-American Human Rights System", OEA / Ser. L / V / II., Doc. 56/09, December 30, 2009, para. 184. I / A Tribunal HR Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, para. 154, Case of Xkamok Kasek v. Paraguay, Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, para. 113. Case of the Kichwa Indigenous People of Sarayaku vs. Ecuador. Merits and Reparations. Judgment of June 27, 2012, Series C No. 245, para. 148.

<sup>35</sup> Inter-American Court of Human Rights. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125.

<sup>36</sup> Inter-American Court of Human Rights. Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, para. 146. At the same conclusion, above, the Inter-American Tribunal in Case of the Kichwa Indigenous People of Sarayaku vs. Ecuador. Merits and Reparations. Judgment of June 27, 2012, Series C No. 245, para. 147.



misery as a result of the lack of land and access to natural resources, and that as a result they are unable to access adequate housing equipped with minimum basic services, as well as clean water and sanitary services, which constitutes an infraction by the State of Paraguay in the light of the rights guaranteed by the convention<sup>37</sup>.

The IACHR has also ruled on the right to environmental integrity. In this regard, the IACHR states that while the protection of the environment is not expressly recognized in the American Declaration of the Rights and Duties of Man or in the American Convention on Human Rights, several fundamental rights such as the right to life, to safety and physical integrity and to health, requires as a necessary precondition for its exercise a minimum environmental quality, so that pollution and degradation of the environment threatens these rights<sup>38</sup>.

The Human Rights Pacts, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights recognize that the right of peoples over their natural resources is linked to the exercise of the right to self-determination and that This constitutes the cornerstone to articulate their development strategies.

In effect, article 1, subsection 2, of the Covenant on Civil and Political Rights and the same precept of the Covenant on Economic, Social and Cultural Rights, recognize the right to self-determination of all peoples and link it to the right to resources natural, pointing out that: "For the achievement of their ends, all peoples can freely dispose of their natural wealth and resources, without prejudice to the obligations derived from international economic cooperation based on the principle of reciprocal

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<sup>37</sup> Inter-American Court of Human Rights. Case of the Yakye Axa Indigenous Community v . Paraguay. Merits, Reparations and Costs. Judgment June 17, 2005. Series C No. 125, para. 164.

<sup>38</sup> The IACHR has ruled on this matter in a multitude of reports on the human rights situation in the countries that are part of the IACHR. See, IACHR, The Situation of Human Rights in Cuba, Seventh Report. Doc. OEA / Ser. L / V / II.61, Doc.29 rev. October 1, 4, 1983, in paras. 1, 2, 41, 60, 61, ruled on the relationship between environmental protection and the right to health, for whose realization the provision of water, hygiene and sanitation and waste disposal services is necessary; IACHR, Report on the Situation of Human Rights in Ecuador. Doc. OEA / Ser.L / V / II.96, Doc. 10 rev. 1, April 24, 1997; IACHR, Third Report on the Situation of Human Rights in Colombia. Doc. OEA / Ser.L / V / II.102, Doc. 9 rev. 1, February 26, 1999; IACHR, Third Report on the Situation of Human Rights in Paraguay. Doc. OEA / Ser. / L / VII.110, Doc. 52, March 9, 2001; IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA / Ser.L / V / II, Doc. 34, June 28, 2007; IACHR, Democracy and Human Rights in Venezuela. Doc. OEA / Ser.L / V / II, Doc. 54, December 30, 2009. The Inter-American Tribunal has ruled on the right to environmental integrity in the Case of the Saramaka People v. Suriname. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172.



benefit, as well as the international right. In no case may a people be deprived of its own means of subsistence.”

The 5th International Tribunal for the Rights of Nature resolves:

As a complement to the above, the Tribunal proposes to broaden the search for solutions inspired by the Constitution of Ecuador, which is the only one that until now, consecrates Nature as a subject of rights.

The validity of the Rights of Nature raises profound changes. We must move from current anthropocentrism to biocentrism. Transit that requires a sustained and plural mutation, as a fundamental requirement to achieve a great transformation. The task requires organizing society and the economy, ensuring the integrity of natural processes, guaranteeing the flows of energy and materials in the biosphere, while preserving the planet's biodiversity.

Therefore, the pioneering definition worldwide, that Nature is a subject of rights, is an avant-garde response to the current civilizational crisis. By recognizing Nature as a subject of rights, in the search for that indispensable balance between Nature and human needs, the traditional constitutional version of the rights to a healthy environment is overcome, long present in Latin American constitutionalism. Strictly speaking, it is urgent to specify that the rights to a healthy environment are part of Human Rights, but they are not Rights of Nature. The classical formulations of Human Rights, that is, of the rights to a healthy environment or quality of life, are anthropocentric, and must be understood separately from the Rights of Nature.

In the Constitution of Montecristi (Ecuador), of the rights related to the environment, that is to say, the fourth generation Human Rights, fundamental constitutional mandates are derived. One key is the processes of demercantilization of Nature, such as the prohibition of commercial criteria for environmental services. Specifically, “environmental services will not be subject to appropriation; its production, provision and use will be regulated by the State,” says article 74 of the Constitution. But we must take a civilizing step: the transition from anthropocentrism to biocentrism is urgent. And in that line, water was declared in the Constituent Assembly of Montecristi as a fundamental human right. Water, then, cannot be seen as a business.

Therefore, at the beginning of the constitutional text it was established, in article 12, that “the human right to water is fundamental and inalienable. Water constitutes strategic national heritage for public use, inalienable, imprescriptible, unattachable



and essential for life.” Moreover, in article 318, all forms of water privatization are prohibited.

It is also important to note that in that article 318 the priority is set in the use of water: first for the human being, second for food sovereignty, third to ensure the life cycle of water and fourth for productive purposes. Article 282 ratifies the prohibition of privatization of water and prohibits the hoarding of water and land.

The significance of these constitutional provisions is multiple:

- As a human right, the commercial vision of water was overcome and that of the “user”, that of the citizen was recovered instead of the “client”, which refers only to who can pay.
- As a strategic national asset, the role of the State in providing water services was rescued.
- As heritage was thought in the long term, that is to say in future generations, freeing water from the short-term pressures of the market and speculation, which risk its sustainability. The prioritization of its use poses a responsible management in terms of ecological justice and social justice, which must be complemented with the establishment of intangible areas for any type of extractive activity that affects water sources: rivers, lagoons, glaciers, moors, wetlands, salt.
- And as a component of Nature, the importance of water was recognized in the Montecristi Constitution as essential for the life of all species, since the Rights of Nature point there.

This achievement was an advanced position worldwide. Two years after incorporating this constituent mandate referring to water, on July 28, 2010, the General Assembly of the United Nations approved the proposal of the Bolivian government, declaring “the right to safe water and sanitation as a human right.” This is an “essential right for the full enjoyment of life and all Human Rights,” according to that statement.

The representation of these rights corresponds to people, communities, peoples or nationalities. In spite of those who reject this avant-garde proposal, the Constitution is categorical in this regard in its article 71:

“Nature or Pacha Mama, where life is reproduced and realized, has the right to have its existence fully respected and the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. Any person, community, people, or



nationality may require the public authority to comply with the rights of Nature. To apply and interpret these rights, the principles established in the Constitution will be observed, as appropriate”.

The 5th Nature Rights Tribunal demands that the Chilean State adopt the necessary measures to guarantee and protect the right to life, and to exist for the various species belonging to the territories affected by the privatization of water.

Promote a new Constitution via a Constituent Assembly in Chile, plurinational and feminist, that recognizes Nature as a subject of Law, recognizes the Law of Water and establishes a fair priority of water use.

Repeal the Water Code and the other privatizing instruments that transform water into merchandise and that encourage its hoarding, pollution and growing scarcity.

Promote a new water and soil law that recognizes community and ancestral water management, agroecology, fair use priorities, the water cycle and safeguards cycles and the conservation / restoration of natural ecosystems.

Legally and materially protect all glacial ecosystems, native forests, wetlands and fragile environments.

Water is life and has rights that must be recognized in Chile.

## CASES FOR ADMISSION BY THE TRIBUNAL

### VACA MUERTA CASE (ARGENTINA)

#### CASE BACKGROUND

The set of sedimentary formations of the Neuquén Basin that concentrate the greatest potential of unconventional hydrocarbons in Argentina is known as the “Vaca Muerta Region”. Located in northern Patagonia, it is considered by the Energy Information Administration of the United States the largest reserve of gas shales outside North America. As of 2011, interest in this type of reservoirs increased in the area and today it is the Latin American region where the hydraulic fracturing or



fracking technique has been applied with greater intensity. This unconventional extension of the extractive border is concentrated in three provinces: Neuquén, Río Negro and Mendoza.

The expansion of the exploitation of unconventional hydrocarbons complicates the already problematic conventional exploitation of hydrocarbons. There are multiple negative impacts on the territories and their populations, this time we focus on water, since this exploitation could seriously affect one of the main water basins of the country - the one formed by the Limay, Neuquén and Negro rivers - on which the main urban and fruit and vegetable conglomerates of the region settle.

Before the 5th Tribunal of Nature Rights, the Petroleum Sur Observatory (OPSur), as an institute of civil society, appeared to make visible the impacts of the hydrocarbon industry and the diversification of the energy matrix. Its main lines of work are the investigation and production of contents that serve as a tool to interpret and debate the hydrocarbon policy of the national and provincial states. In this regard, it has published several books, among which are: *Sacrifice Zones*, 2012; *Alto Valle Perforado*, 2015; *Vaca Muerta. Construction of a strategy*, 2016; *Temptation of Shale*, 2016; and *Energy Sovereignty: proposals and debates from the popular field*, 2018.

Before the Tribunal, the institute raised its investigation on the problems related to the expansion of the hydraulic fracture since 2011. Opt Sur has presented the serious consequences of the technique of hydraulic fracturing in shareholders' meetings of transnational companies, such as Total, Shell and BP, and international human rights instances, such as that of the United Nations. Finally, it has done field work with local populations and public officials in Chile, Mexico, Colombia, England and the United States, among others.

The presentation before the Tribunal made it clear that Vaca Muerta is a transnational megaproject of unconventional hydrocarbons that damages the Rights of Nature. It is known as "Vaca Muerta" to the set of unconventional hydrocarbon formations of the Neuquén Basin located in the north Patagonia Argentina. Coined from a geological stratum of 30,000 km<sup>2</sup>, the site is, according to the Energy Information Administration of the United States, the one with the greatest potential worldwide, outside of North America. Since 2011, this position has caused a true boom in an area with a vast hydrocarbon history that also impacts areas where historically its usual use had been another. This basin partially corresponds to four Argentine provinces, jurisdictions that own the control of the subsoil resources, in three of which progress is made with exploitation: Neuquén, Río Negro and Mendoza.



During the 2000s, the extraction of HNC was progressively positioned as a strategic objective of the National State's energy policy. Different estimates place the country among the main reservoirs of shale gas and oil worldwide (EIA, 2011 and 2013). From a state perspective, the massive extraction of these resources would contribute to the achievement of two intertwined objectives: first, it would ensure the provision of energy in quantities and prices according to the needs of the prevailing mode of development; Secondly, it would generate a flow of foreign exchange by attracting international investments and exporting surplus production, necessary for the external sustainability of the macroeconomic scheme. The partial expropriation of YPF in 2012 - triggered by the investment reluctance of the main oil capitals and their effects on the performance of the sector - expresses the strategic nature of both purposes, as well as the conditionalities imposed by their entanglement.

At the level of the provincial states producing hydrocarbons, the promotion of the "unconventional" takes on a similar meaning. In economies of low productive diversification, such as the province of Neuquén, the highest income comes from the development of the enclave. The perception of oil income provides the subnational state with the resources necessary to sustain its "autonomy" on two levels: on the one hand, by neutralizing the tendency to the fiscal crisis of other provinces, it tones the capacity for arbitration of the social conflict; on the other, it counteracts mechanisms of political subordination to the federal government, given the need to resort to transfers or financial assistance programs, as is the case with other jurisdictions.

So, the extraction of HNC is a joint objective in which interests of the different levels of the State are articulated. Currently, all efforts point to the development of Vaca Muerta, a name that over time has become polysemic. On the one hand, "Vaca Muerta" refers to a geological formation that extends below the surface of the provinces of Neuquén, Río Negro, Mendoza and La Pampa. Currently, more than thirty areas of "unconventional exploitation" have been granted through fracking, of which nine are in the mass development stage.

On the other hand, in its current use, "Vaca Muerta" also names another type of unconventional farms - mainly tight gas - that take place in different geological formations of the Patagonian northwest. From this perspective, the quantity of massively exploited areas is expanded, among which is the Fernández Oro Station (EFO) in Río Negro, where the exploitation of HNC progresses between centenary plantations of pears and apples. Likewise, the productive links that go from obtaining



basic inputs to the industrialization of resources and waste disposal are visible. In this sense, what is called “Vaca Muerta” is not reduced to a hydrocarbon extraction zone, but it takes on a megaproject (Álvarez Mullally et al., 2017) dependent on the articulation of a dense network of capitals and agencies and levels of the State and transnational institutions.

The presentation was very clear to show that hydraulic fracture is an experimental technique. Each drilling and fracture process has particularities that make it impossible to anticipate how they will behave, both the fractures caused and the displacement of fluids.

Some of the main component of the hydraulic fracture process - even the underground geological landscape - simply cannot be controlled. In spite of the monitoring that is done on the surface to control the evolution of the fractures, some of them cannot reach porous and permeable areas, outside the formation to fracture. Water and chemical leaks that run through the pipes or faulty cementations, cannot be avoided, these flows run at very high-pressure levels. As a consequence, both fracture fluids and formation hydrocarbons can communicate with freshwater layers or even with the surface.

The New York State Department of Environmental Protection (USA) stated: “Even with the implementation of an extensive series of mitigation measures [...] the significant adverse impacts on public health and the environment derived from authorizing that the hydraulic fracture develops in any scenario cannot be adequately avoided or minimized as much as possible”<sup>39</sup>.

### Rights of Nature and Violated Human and Collective Rights:

According to the testimony and evidence presented to the Tribunal, the exploitation of hydrocarbons in unconventional formations through hydraulic fractures damages health and the environment, and there is clear evidence of violations of the Rights of Nature.

Although in Argentina the complaints of the population multiply, there is no official data to reliably verify by scientific methods the level of damage caused in Argentina

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<sup>39</sup> New York State Department of Health (December 2014). “A public health review of high volume hydraulic fracturing for shale gas development.” Available at: [http://www.health.ny.gov/press/reports/docs/high\\_volume\\_hydraulic\\_fracturing.pdf](http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf).



by the exploitation of unconventional hydrocarbons. The national and provincial states have not carried out epidemiological studies that contemplate hydrocarbon exploitation. However, as a starting point you can resort to the research that international organizations and local communities have carried out around conventional exploitation.

In this sense, the work entitled “Environmental emergency, hydrocarbons, compensation and sustainable development in Neuquén. Project ARG / 024/97” is an evaluation of environmental liabilities carried out by the United Nations Development Program (UNDP) in 1997, on hydrocarbon extraction using conventional techniques. This investigation confirms the damage caused by hydrocarbon farms in the vegetation cover, the elevation of the ground water, surface waters and soil degradation, among others and that this damage was estimated in economic terms at US \$ 946.8 million (US \$ 542.8 million corresponding to alterations caused by infrastructure and cost to dismantle abandoned facilities, losses and soil treatment, use and recovery of river basins, and loss of fauna and flora; US \$ 314 million for lost profits caused to surface areas where the oil companies were installed; and US \$ 90 million for debts with the provincial State). The estimate was based solely on the survey of the Pehuenches and Añelo departments of the province of Neuquén that cover 2 million hectares and concentrate most of the hydrocarbon activity in that province<sup>40</sup> (Sejenovich, et al, 1998). Although the study quantifies and monetizes the impact, many of these damages are irreversible.

In 2001, a study requested by Mapuche communities Paynemil and Kaxipayiñ whose territory coincides with the gas field which was published, was considered the most important of Argentina, during the 1990s, called Loma La Lata. In this research, environmental damage was quantified and the results were: 630,000 m<sup>3</sup> of contaminated soil were found with high concentrations of chromium, lead, arsenic, naphthalene, pyrene and aromatic compounds in layers up to six meters deep. In the water, heavy metal, hydrocarbon and phenolic values higher than the legal values that were recorded. The clinical studies of 42 people, out of a total of 98 members of the community, resulted in the detection of symptoms of chronic hydrocarbon poisoning: vertigo, weakness, nervousness, limb pain and dermatitis. They also reflected symptoms of heavy metal poisoning: irritability, headache, insomnia,

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<sup>40</sup> Sejenovich, Héctor et al. (1998): Environmental emergency, hydrocarbons, compensation and sustainable development in Neuquén. Project ARG / 024/97. United Nations Development Program.



disturbed dreams, fatigue and interruptions of involuntary pregnancies<sup>41</sup>. In this case also the investigation coordinated by Carlos Falaschi<sup>42</sup> gives an account of the impacts suffered by the community members.

These liabilities and impacts already proven by investigations in the conventional stage of oil exploitation, are also found in the new unconventional period of exploitation of the Neuquén Basin. The exploitation by means of the technique of the hydraulic fracture multiplies the critical instances of the conventional extraction, implies a much greater number of perforations than in the conventional stage, which results in an amplification of all the risks<sup>43</sup>. In turn, unconventional exploitation increases the risk and uncertainties due to the technique used for drilling that, in general, these perforations reach greater depths and horizontally can exceed 3000 meters.

The hydraulic fracture not only multiplies the risks that were already present in conventional farms, but also implies new ones because this technique needs<sup>44</sup>:

- Millions of liters of water: the amounts vary between 7 and 30 million per fracture process.
- Many quantities of hazardous chemicals, many of which remain in the subsoil (70% approximately), Not knowing exactly what their destination may be. From the return water (also called "flowback") that returns to the surface only one part is recovered to be reused in the extraction, while the rest is injected back into the subsoil in receiving sinkholes that house the residue at depths ranging from 1,000 to 2,000 meters exposing aquifers.

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<sup>41</sup> Umweltschutz (2001): Evaluation of cultural/environmental damage due to oil activity in the Loma La Lata / Neuquén region. Paynemil and Kaxipayiñ Territory.

<sup>42</sup> Falaschi, Carlos (coordinator) (2001): Evaluation of the socio-environmental impact of hydrocarbon activity in the Mapuche communities and their territories. Loma de La Lata, Neuquén, Argentina. Report submitted on July 7, 2001. Mimeo.

<sup>43</sup> The decline curve in the production of unconventional wells is very pronounced. Three years after the fracture, production is practically nil. So, it is necessary to perform new refractive processes before each decline while the life of the well subsists. In addition to multiplying the number of perforations that maintain the extraction levels.

<sup>44</sup> Bertinat, Pablo, et al (2014). 20 Myths and realities of fracking. Buenos Aires: The Collective. Chico Mendes Collection. Available at: <http://www.opsur.org.ar/blog/wp-content/uploads/2015/06/2014-20-Mitos-Final.pdf>



- Thousands of tons of silica sand for each fracture process. This sand when inhaled can generate silicosis, a disease that is usually characterized as occupational but due to the large amounts used for this extraction, it is becoming a problem for those who live in the immediate vicinity of the processing and collection plants. And that, according to some studies, generates greater predisposition to tumors. In the case of Vaca Muerta, the road made by the sands requires thousands of kilometers that travel from the provinces of Entre Ríos and Chubut and in projection by rail line from Bahía Blanca (Buenos Aires) to Añelo (Neuquén). All of these roads run through densely populated cities.
- Greater incidence area than conventional extraction. This hinders the sustainability of other productive developments, not linked to hydrocarbons and may involve the displacement of populations.

The greater amounts of perforations, depths and inputs also cause a correlate in waste whose treatment and final disposal becomes a serious inconvenience for the populations<sup>45</sup>.

Research from other countries certifies that the exploitation of hydrocarbons in unconventional formations through hydraulic fractures damages health and the environment. In the last decade, the method of directional drilling has been combined with new technologies such as high volume hydraulic fracturing and multi-well platform groups to extract natural gas and oil, mainly from shale deposits and compact sands. While this method of unconventional extraction is expanding, in the United States, where it has advanced the most, an important amount of evidence has been collected that demonstrates that these activities are dangerous for individuals, communities and Nature in a way that is difficult -and perhaps impossible- mitigate the damage they cause, and worse still fully restore.

There is a multiplicity of academic research carried out in the United States of America, where the massive use of the hydraulic fracture technique has been developing for more than a decade, where socio-environmental, sanitary and climatic degradation is observed. This is certified by the "Compendium on scientific, medical and media findings that demonstrate the risks and damages of fracking." This study disaggregates the axes: impacts on air and water pollution, inherent engineering problems that worsen over time, radioactive emissions, occupational health and safety risks, effects on public health, noise, light pollution and stress, earthquakes and

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<sup>45</sup> Álvarez Mullally, Martín et al (2017). Mega Vaca Muerta project. Externalities report. AXLES Available at: <http://ejes.org.ar/InformeExternalidades.pdf>



seismic activity, threats to agriculture and soil quality, threats to the climate system<sup>46</sup>. Some of the risks are: harmful effects on water, air, agriculture, health, public safety, earthquakes, excessive increase in the value of land and climate change.

The studies reveal problems inherent in the process of extracting natural gas and oil, such as structural failures attributable to the aging of the materials or to the pressures of the hydraulic fracture. These problems can lead to pollution, atmospheric pollution with carcinogens and other toxic chemicals, and a range of critical factors for the environment and communities.

An evaluation conducted by the US Environmental Protection Agency (EPA) of the impacts of hydraulic fractures on water resources confirmed specific cases of water pollution generated by drilling and hydraulic fracturing and related activities and identified the various paths by which such pollution occurred. According to the EPA, documented cases of water pollution due to spillage of wastewater and fluid from the fracture originated in waste spills in rivers and streams; and underground migration of the chemicals needed to perform the hydraulic fracture, including gas, to wells destined for drinking water<sup>47</sup>.

Drilling and hydraulic fracturing activities may bring to the surface natural radioactive material known for its English acronym NORM. Exposure to higher levels of radiation derived from this material is a risk for both workers and those residing in the vicinity of farms and waste treatment plants.

The risk of premature birth is increased by 40% when mothers live near drilling and hydraulic fracturing sites in Pennsylvania (USA), according to a study by Johns Hopkins University<sup>48</sup>.

Several relevant studies have confirmed a causal link between injection of effluents from hydraulic fractures in disposal wells and increased seismic activity. Several

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<sup>46</sup> Concerned Health Professionals of New York and Physicians for Social Responsibility (CHPNY and PSR) (2015). Compendium on scientific, medical and media findings that demonstrate the risks and damages of fracking. Available at: <http://www.opsur.org.ar/blog/2016/05/27/compendio-cientifico-sobre-fracking/>

<sup>47</sup> Environmental Protection Agency (EPA) (2016). [Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States](http://www.epa.gov/epaospr/oa/tpr/20160527-hydraulic-fracturing-for-oil-and-gas-impacts-from-the-hydraulic-fracturing-water-cycle-on-drinking-water-resources-in-the-united-states) . Available at: [http://ofmpub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=530159](http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=530159)

<sup>48</sup> Casey, JA, Savitz , DA, Rasmussen, SG, Ogburn, EL, Pollak, J., Mercer, DG, & Schwartz, BS (2015). Unconventional natural gas development and birth outcomes in Pennsylvania, USA. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4738074/>



studies carried out in the United States by Anthony Ingraffea, an engineering professor at Cornell University report the leaks and migrations of hydrocarbons generated by faults in the well lining.<sup>49</sup>

Gas emissions from the compressor stations are constant and potentially extreme periods of exposure may exist. In Argentina, despite the short experience with fracking, a large part of the impacts indicated by the scientific literature are already visible: increased spills, proliferation of landfills with toxic waste, intensive occupation of the territory and displacement of populations and other economies, emission of gases and lubrication of seismic failures, among other risks and damages.<sup>50</sup>

At present, in the Neuquén basin there is an average of two spills per day. According to information obtained from the Ministry of Environment of Neuquén between January and October 2018, 934 pollution events were recorded, while in 2015 there were 863.<sup>51</sup> One of the most serious spills occurred in October 2018 in Bandurria Sur (11 kilometers from Añelo), which affected between 40 and 80 hectares of land. The spill went 36 hours out of control and was not informed by the company but by the workers. Also, in Allen, between March 2014 and January 2018 there were at least fourteen accidents, including explosion of wells, fires with flames up to 15 meters high and spills in areas of pear production, irrigation canal breaks and 240 thousand liters of toxic water spilled on farms. In June 2019, the first spill occurred in Malargüe, at the El Mollar deposit.<sup>52</sup>

Another big problem is the storage of toxic waste generated by the activity. The existing oil dumps in Vaca Muerta reveal huge deficiencies, as exemplified by the Treater company, whose landfill, located five kilometers from Añelo, which occupies 13.6 hectares (equivalent to 15 football fields), was denounced in 2018 before the justice for not respecting the minimum distance of an urban nucleus (eight kilometers), and for having waste disposal pools without adequate drainage channels

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<sup>49</sup> Ingraffea, A., et al (2013). " Assessment and risk analysis of casing and cement impairment in oil and gas wells in Pennsylvania, 2000–2012 ". Proceedings of the National Academy of Sciences of the United States of America. <http://www.pnas.org/content/111/30/10955.full>

<sup>50</sup> M. Svampa, 2019, <https://latinta.com.ar/2019/11/promesa-eldoradista-cruda-realidad-impactos/>

<sup>51</sup> Cited in <https://www.pagina12.com.ar/156412-los-derrames-de-vaca-muerta>

<sup>52</sup> See Daily left, 02/07/2019, <http://laizquierdadiario.com/Denuncian-un-derrame-en-un-pozo-de-fracking-en-Malargue>



or protective meshes that prevent contamination of soils and water sheets, as required by national legislation. Treater's clients include YPF, Shell and Total.

Another impact is the intensive use of the territory. The oil locations occupy between one and one and a half hectares, where several wells are grouped. A single well, drilled vertically up to 2,000 meters and horizontally up to 1,200 meters removes about 140 m<sup>3</sup> of land, so that an average platform removes about 830m<sup>3</sup>, nearly ten times more than a conventional borehole, 2,000 meters deep. Each platform can only access a small area of the site that is intended to be exploited, so it is common to have multiple platforms on it, which requires a surface large enough to allow the deployment and storage of fluids and equipment.<sup>53</sup>

All this accentuated the dispute over the territory with the original peoples, since in Vaca Muerta some twenty Mapuche communities settled in a dispersed way. In 2014, the Neuquén government had to recognize the community of Campo Maripe, settled in the area since 1927. Although the territory in dispute is about 10,000 hectares, the government only accepted 900 hectares as part of the community. In April 2019, this community was brought to trial for "usurpation," and despite the fact that the judge in charge ruled his acquittal, two months later, in a clear political signal, the ruling was annulled. Thus, the advance of the locations ostensibly pushes the native peoples that are in the area and aggravates the historical process of criminalization of the Mapuche communities.

Likewise, the problem is visible in Allen, where the decline in fruit activity is evident: with more than 150 fracking wells and 93 in the folder, already approved by the municipality, the data reveals that between 2009 and 2014 the town lost 409 hectares, which is 6.3% of the cultivated area.<sup>54</sup>

Finally, among the palpable impacts is the increase in seismicity. From the beginning, the seismic records cover the global mapping of fracking, affecting geologically stable regions before the arrival of extreme energies; from Arkansas to Texas, to the Sichuan Province, in China, where in February 2019 the temporary cessation of operations was ordered, after the last earthquake caused two deaths and several

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<sup>53</sup> See AAVV (2014), 20 Myths and Realities of Fracking , <http://www.opsur.org.ar/blog/wp-content/uploads/2015/06/2014-20-Mitos-Final.pdf>

<sup>54</sup> The data on territorial regression are from Diego Rodil. See M. Svampa, Chacra 51. Return to Patagonia in the times of fracking , Buenos Aires: South American.



injuries.<sup>55</sup> In Neuquén, together with the increase in environmental and occupational accidents, one of the main concerns is the increase in seismicity, which affects the town of Sauzal Bonito, although it has also been extended to Cutral Co. According to recent studies Sauzal Bonito would settle on the Huincul Dorsal, a system of geological faults, although it is not ruled out that the constant movements are also anthropogenic, related to fracking.<sup>56</sup> As a result, the province ordered the installation of seismographs to monitor the movements.<sup>57</sup>

Thus, the current scenario of the Neuquén Basin clearly denies the existence of a “safe and responsible fracking”, a formula spread globally and repeated locally and nationally by oil companies and governments. It should be added that the information on the environmental and territorial impacts of fracking was already available in 2013, the year in which the operation in Vaca Muerta started. The difference between 2013 and 2019 is that the impacts, in their multidimensional nature, are already visible and palpable. If we add that, in reality, Vaca Muerta has barely taken off from an economic point of view, since only 3% has been exploited.<sup>58</sup> It is worth asking what the scale of the impacts will be, when the large scale becomes a reality.

Finally, in a context of global warming, Vaca Muerta is considered a potential carbon pump. Far from being a “transition fuel”, as the oil corporations have been sustaining, shale gas and tight gas generate higher greenhouse gas emissions than conventional ones during the production stage; since more wells are needed per cubic meter of gas produced; operations use energy, usually from diesel engines, which increases CO<sup>2</sup> per unit of useful energy produced. Likewise, hydraulic fracturing requires greater energy consumption and even greater volume of gas venting or burning during the well completion phase. On the other hand, methane gas emissions contribute very strongly to the greenhouse effect. It is no accident that in 2018 the UN DESC committee made it clear that, if Vaca Muerta made progress, “the total exploitation, with hydraulic fracturing, of all shale gas reserves would consume a significant percentage of the world budget for carbon to achieve the objective of a warming (not greater) of 1.5 degrees Celsius, stipulated in the Paris Agreement”, and

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<sup>55</sup> <http://www.opsur.org.ar/blog/2019/02/27/china-suspenden-fracking-en-rongxian-luego-tres-sismos-en-dos-dias/>

<sup>56</sup> <https://www.lavoz.com.ar/sucesos/un-sismo-con-epicentro-pocos-kilometros-de-vaca-muerta-hizo-temblar-neuquen>

<sup>57</sup> <https://www.lavoz.com.ar/sucesos/un-sismo-con-epicentro-pocos-kilometros-de-vaca-muerta-hizo-temblar-neuquen>

<sup>58</sup> <https://www.lanacion.com.ar/politica/vaca-muerta-se-despierta-gigante-va-milagro-nid2235660>



will therefore recommend that the Argentine State reconsider exploitation in Vaca Muerta, in the light of the commitments adopted.<sup>59</sup>

For all these reasons and violations, the exploitation of hydrocarbons of unconventional formations has been banned in national, provincial and municipal states worldwide. The technique of hydraulic fracture has been banned or has a moratorium in countries such as France, England, Bulgaria, Scotland, Wales and Ireland. It has also been banned in subnational states such as New York, Maryland and Vermont in the US. In states like Pittsburgh, Pennsylvania, hydraulic fractures were banned precisely because Nature's rights are recognized at the municipal ordinance level, and thus they manage to protect Nature. It has also been banned in Victoria in Australia, as well as in local governments, reaching hundreds in the United States, and some jurisdictions in Mexico, Colombia, Uruguay and Spain.

At the Argentinian level, the province of Entre Rios in 2017 banned fracking conducted on its territory. Law 10.477 in its first article prohibits "prospecting, exploration and exploitation of conventional and unconventional fossil hydrocarbons."

Meanwhile, there are more than 60 municipalities that banned this technique in Argentina. Here is a non-exhaustive enumeration of those communes organized by province.

Mendoza: Gral. Alvear, San Carlos, Tunuyán, Tupungato , Rio Negro: Allen, Cinco Saltos, Conesa, Colonel Belisle, Chimpay, Choele Choel, Fernández Oro, Lamarque, Luis Beltrán, Pomona, Viedma, Villa Regina . Neuquén: Aluminé, Junín de los Andes, Vista Alegre and Zapala. Entre Ríos: Basavilbaso, Bovril, Cerrito, Colón, Colonia Avellaneda, Concepción del Uruguay, Concordia, Chajarí, Crespo, Diamante, Federacion, Federal, General Campos, General Ramírez, Gualeguaychú, Ibicuy, La Paz, Los Conquistadores, María Grande, Nogoyá, Paraná, Rosario del Tala, San Jaime, San José, San Pedro (Government Board), San Ramón (Government Board), San Salvador, Urdinarrain, Viale, Victoria, Villa del Rosario, Villa Elisa, Villa Mantero and Villaguay. Buenos Aires: Patagones, Colonel Dorrego, Colonel Suárez, Guaminí, Saavedra, Tornquist. Chubut: Epuyen

Water, is one of the commons put at risk in Argentina. It should be noted that the water basin of the Limay, Neuquén and Negro rivers, around which most of the

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<sup>59</sup> <https://www.lanacion.com.ar/politica/vaca-muerta-se-despierta-gigante-va-milagro-nid2235660>



unconventional exploitation is based, is the main non-border basin of Argentina. In its valleys, the main populations of the north of Patagonia settle (a little less than a million people) and the most important fruit and vegetable production area of the country.

Although a series of impacts were listed, found in the region and recorded elsewhere, on the Rights of Nature, by the exploitation of unconventional hydrocarbons in Vaca Muerta. We focus our demand on water as a fundamental good for life. Unconventional gas and oil extraction uses larger volumes of water than conventional. In the first half of this decade it was estimated that per well the amount used could vary between 7 and 20 million liters<sup>60</sup>, however, consumption of up to 30 million liters has been recorded in the province of Neuquén.

On a social level, in the territory affected by the Vaca Muerta megaproject, the defense of water became one of the main demands of the population that opposes fracking. Since 2013 neighbors from different locations in the provinces of Neuquén and Río Negro began to organize in assemblies for the defense of water. Currently, in the province of Mendoza, which has been in a water emergency for several years, there is a deep social dispute in favor of passing a fracking prohibition law, whose main argument is the protection of water, both due to the high demand for the industry as per the risk of contamination.

These demands have been little met by the government authorities. The official speech argues that, in relation to the volume of water resources available in the provinces of Neuquén and Río Negro, the demand for the exploitation of unconventional deposits would not cause any disruption to the competition of current use. It can be read in a report published by a technical body made up of hydrocarbon companies<sup>61</sup> that the demand for hydrofracture is insignificant in relation to the demand for provincial water (residential use, fruit and agricultural production, other industries) and that it is a false concern that emphasizes access or competition for water.

On the other hand, beyond the use of surface water to be injected into hydraulic fracture projects, drilling in the vicinity of water courses adds a particular complexity

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<sup>60</sup> Bertinat, P .; D'Elia, E .; Ochandio, R .; Svampa, M .; Viale, E .; Opsur (2014). 20 Myths and realities of fracking. Buenos Aires: The Collective. Chico Mendes Collection.

<sup>61</sup> López Anadón, Ernesto (2015). The ABC of Hydrocarbons in Non-Conventional Reservoirs. 4th ed. revised. Autonomous City of Buenos Aires: Argentine Institute of Oil and Gas.



to the well-being of a watershed that is fundamental to the life of norpatagonia. Possible spills put water at risk.

### Responsible organizations or institutions

#### **National government and the provincial governments of Neuquén, Río Negro and Mendoza**

For promoting the exploitation of unconventional hydrocarbons by turning a deaf ear to the criticisms and risks that the application of the hydraulic fracturing technique has caused in other latitudes.

#### **U.S. government**

The United States government has made deep efforts to boost fracking in Argentina. Official visits by US and Argentine authorities to both countries add up to at least ten in the last two years, six of them at the ministerial level, have focused on increasing the presence of US oil companies and investors in Patagonia.

The State Department considers the promotion of shale gas extraction in Argentina of strategic interest, as evidenced by the multi-year training program in which academics and officials based in the United States make recommendations on tax regimes, negotiations with local communities and environmental security to their Argentine counterparts.

On the other hand, there are two projects linked to the unconventional exploitation of hydrocarbons that the OPIC development agency evaluates to finance for a total amount of US \$ 800. The combination of diplomatic and financial efforts is an impulse to release one of the largest “carbon bombs” in the world. From what we understand that also the US government is responsible for the violation of the Rights of Nature that generates the exploitation of Vaca Muerta.

#### **International Monetary Fund**

The International Monetary Fund used Vaca Muerta as a guarantee of Argentina's economic strength in its reviews of the agreement signed with the country in 2018. It argued that: “The net negative impact on exports is expected to be small, since it is the measure is likely to be offset by an increase in the productive capacity of last year's strong investment in export industries, a rebound in agricultural exports after



drought and an expected increase in energy exports as production is recovered in the Vaca Muerta basin”<sup>62</sup>.

Today the overwhelming foreign debt, which generates a significant need for foreign exchange - which economists of all sectors argue that it will be difficult but impossible to achieve - presses for the exploitation of Vaca Muerta.

### **Hydrocarbon companies:**

YPF

Tecpetrol

Pan American Energy (Bridas, Cnnoc and BP)

Shell

Total

Vista Oil & Gas

Wintershall

Equinor

Phoenix Global Resources (constituted by Andes Energía and Petrolera El Trébol in the United Kingdom, is controlled by the Swiss Mercuria)

Petronas

Pampa Energy

Chevron

Pluspetrol

ExxonMobile

Dow

### **The 5th International Tribunal for the Rights of Nature resolves:**

According to the Universal Declaration of the Rights of Mother Earth, this is a living being, holder of inalienable rights derived from its own existence, which represents a unique, indivisible and self-regulated community, where all beings are interrelated and that have rights that are specific and appropriate for their role and function within the communities in which they exist.

Due to the above, considering that the hydraulic fracture process causes serious effects on Nature and its ecosystems as well as on the health of human beings; taking

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<sup>62</sup> IMF, (2018). First review under the stand-by arrangement. Country Report No. 18/297. October 2018. International Monetary Fund. Available at: <https://www.imf.org/~media/Files/Publications/CR/2018/cr18297-ArgentinaBundle.ashx> (Last visit: 01/30/2019)



as the main source the Universal Declaration of the Rights of Mother Earth (DUDMT), it is considered that the following recognized rights in favor of Pachamama have been violated:

- (a) Right to life and to exist;
- (b) Right to be respected;
- (c) Right to the regeneration of its biocapacity and continuation of its cycles and vital processes free of human alterations;
- (d) Right to maintain their identity and integrity as differentiated, self-regulated and interrelated beings;
- (e) Right to water as a source of life;
- (f) Right to clean air;
- (g) Right to comprehensive health;
- (h) Right to be free from contamination, pollution and toxic or radioactive waste;
- (i) Right not to be genetically altered and modified in its structure threatening its integrity or vital and healthy functioning;
- (j) Right to full and prompt restoration for violations of the rights recognized in this Declaration caused by human activities.

In addition, both the aforementioned companies, such as the Argentine government and other actors interested in exploitation through this destructive technique for Nature, have violated the duties of human beings and governments, in accordance with the provisions of article 3 of the DUDMT, among which we can highlight:

- Obligation to respect and live in harmony with Mother Earth (Art. 3 numeral 1)
- Act in accordance with the rights and obligations recognized in this Declaration; (Art. 3 numeral 2 literal a)
- Recognize and promote the full application and implementation of the rights and obligations established in the Declaration; (Art. 3 numeral 2 literal b)
- Ensure that the search for human well-being contributes to the well-being of Mother Earth, now and in the future; (Art. 3 numeral 2 literal d)
- Establish and effectively apply rules and laws for the defense, protection and conservation of the Rights of Mother Earth; (Art. 3 numeral 2 literal e)
- Respect, protect, conserve, and where necessary, to restore the integrity of the cycles, processes and vital balances of Mother Earth; (Art. 3 numeral 2 literal f)
- Ensure that the damages caused by human violations of the inherent rights recognized in this Declaration are rectified and that those responsible are held accountable to restore the integrity and health of Mother Earth; (Art. 3 numeral 2 literal g)



- Establish precautionary and restrictive measures to prevent human activities from leading to extinction of species, destruction of ecosystems or alteration of ecological cycles; (Art. 3 numeral 2 literal i)
- Promote and support practices of respect for Mother Earth and all the beings that compose it, according to their own cultures, traditions and customs; (Art. 3 numeral 2 literal k)
- Promote economic systems in harmony with Mother Earth and in accordance with the rights recognized in the Declaration. (Art. 3 numeral 2 literal l)

Based on the foregoing, the Tribunal considers that:

1. There is an obvious violation of the Rights of Nature in the exploitation of this megaproject of unconventional hydrocarbons; and that these evidences must be investigated, developed and sustained,
2. To that end, the Tribunal proposes to establish an investigative commission to analyze the use and condition of water as a fundamental asset for the support of the rest of Nature as we know it today.
3. The parties are requested to present to the Tribunal the expert evidence that they have in their possession regarding the environmental and social impacts generated by the project, emphasizing the impacts of the project regarding collective rights and the self-determination of indigenous peoples.

## AMAZON CASE: ECOCIDE IN THE AMAZON AND CHIQUITANIA

### CASE BACKGROUND

On December 5, 2019, the International Tribunal for the Rights of Nature, meeting at its fifth session in Santiago de Chile, became aware of the complaint filed on behalf of trees, animals, fish, plants and other non-human living beings and life systems that are being exterminated mainly by fires in the Amazon, Chiquitania, Pantanal and other surrounding forests.

The petitioners ask the Tribunal to consider a series of relevant antecedents for their decision.

- The Amazon is the largest rainforest on the planet. In the Amazon and surrounding forests such as Chiquitania, the largest number of non-human living beings on Earth



are concentrated. It is estimated that 1 in 10 known species of plants and animals in the world live in the Amazon. 75% of Amazon plants are exclusive to this region.

- The Amazon rainforest accounts for 50% of the planet's tropical forests. Its trees are very important for air purification: while, in the Mediterranean, a tree kidnapped about 7 kg of CO<sub>2</sub> per year, a tree in the Amazon sequestered about 15 kg of CO<sub>2</sub> per year. In addition, many indigenous peoples currently live in this rainforest and, although they represent only 5% of the world's population, they help preserve 82% of the world's biodiversity. The Amazon also releases more than 20,000 million liters of water into the atmosphere every 24 hours, which scientists have called flying rivers, through perspiration.

- The Amazon covers 6.7 million km<sup>2</sup> in nine countries and houses 40,000 species of plants, 1,300 species of birds, 3,000 kinds of fish, 430 mammals, 2.5 million different insects and around 400-500 people indigenous to deeper relationships and strongly interconnected with the forest and Mother Earth.

- In these countries, it is important to recognize three legal aspects for the protection of the Amazon: first, Ecuador recognized the Rights of Nature in its Constitution in 2008, becoming the first country in the world to apply the Rights of Nature at the national level; two years later, the World People's Conference on Climate Change and the Rights of Mother Earth (in Bolivia, Cochabamba) launched the Universal Declaration of the Rights of Mother Earth; and more recently, in 2018, the Supreme Tribunal of Justice of Colombia, judgment STC3460-2018, of April 5, 2018, is in favor of the lawsuit filed by a group of 25 children and youth between 7 and 25 years living in the cities most at risk due to the effects of climate change, who ask for the protection of their fundamental rights to life, health, food and a healthy environment. The appellants with the guardianship action sought to curb the degradation of the environment, because of the deforestation of the Colombian Amazon rainforest that makes it impossible for them to enjoy a healthy environment, they also claim to be the future generation that will face the effects of climate change.

- The Amazon rainforest is essential for everyone on Earth through its rich biodiversity and evolutionary ecological processes, which benefit not only those who live in the Amazon but the entire world. However, the Amazon technically belongs to sovereign states and strong aggressions occur daily. The global extractivist model inevitably results in violations of the inherent rights of the Amazon rainforest as a whole and decreases the quality of life of all organisms in the region.

- Due to the limits of international law, it would be a challenge to ensure the full implementation of the Rights of Nature in the Amazon context. In addition, each country is committed to its sovereignty and is not necessarily open to foreign international interference. Therefore, recognizing the Rights of Nature at the national level and collaborating for the protection of the Amazon at the regional level could



allow governments and relevant actors to think about solutions and implement real actions to save the Amazon.

- The agro-export model, soybean crops, livestock, deforestation, the wood industry, and weak protection policies are threatening the Amazon, and this year, as noted in the repertoire, these became important fires that devastated thousands of hectares in the Brazilian Amazon, in the Bolivian Chiquitanía and in Paraguay.
- As it was already mentioned, Ecuador has incorporated the rights of Nature at the constitutional level. Thus, the Ecuadorian Constitution expressly determines that "... Nature will be subject to those rights recognized by the Constitution." In that sense, the Ecuadorian supreme norm has recognized as rights of the Pachamama, that "... its existence is fully respected and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes." In addition to this, it is also enshrined Nature's right to restoration, which is "... independent of the obligation of the State and the natural or legal persons to indemnify the individuals and groups that depend on the affected natural systems". Additionally, it incorporates as an obligation of the State to establish effective mechanisms to achieve the restoration of affected ecosystems, as well as to issue public policy and regulations to "... eliminate and mitigate harmful environmental consequences." For this, the Ecuadorian Constitution recognizes as an obligation and a right to Any person, community, people or nationality, demand compliance with any public servant.
- For its part in Colombia, the Supreme Tribunal in its ruling STC 4360-2018, cited above, declared the Amazon as "... entity, 'subject of rights', holder of protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it... ", after noticing the alarming 44% increase in deforestation in the region - and the inefficient performance of the State in the face of this problem, so it also ordered the adoption of an action plan to Protect the Colombian Amazon. This, given a lawsuit filed by minors for their own rights and to protect future generations.
- Likewise, Bolivia issued Law No. 71 in 2010, known as The Law of Mother Earth. This legal body is intended to "...recognize the rights of Mother Earth, as well as the obligations and duties of the Plurinational State and of society to guarantee respect for these rights." This law recognizes Mother Earth as a collective subject of public interest as well as all its components including human beings (art. 5).
- Among the rights recognized in favor of Mother Earth we find the right to life, to the diversity of life, to water, to clean air, to balance, to restoration, and to live free from contamination. (Art. 7). In addition, this law establishes the duty of the State to adopt public policies aimed at enforcing these rights and establishing balanced forms of production and consumption patterns to meet the needs of the population



“safeguarding the regenerative capacities and integrity of the cycles, processes and vital balances of Mother Earth.”

- In addition to this, through this law, obligations are established for the human being related to the protection and defense of the rights of Mother Earth and to actively participate in the development of programs and public policies aimed at the effectiveness of rights (art .9) Finally, through this law, the Defense of Mother Earth Tierra is created “... whose mission is to ensure the validity, promotion, dissemination and fulfillment of the rights of Mother Earth...”.

- Despite these individual efforts by these countries, there is still concern about the policies adopted by these nations regarding the promotion of extractive activities or development of works that apparently contradict their own intentions to protect Nature and its rights. Ecuador, for example, is promoting mining and oil activities as a means of obtaining resources to finance works and payment of debts to external actors; especially in places like the Amazon. In Bolivia, the construction of hydroelectric works has been prioritized, the exploration of hydrocarbons and other extractive activities has been promoted, and agricultural expansion has been promoted, also affecting the Amazon rainforest.

- There are even countries that also have important extensions within the South American Amazon, which have not developed specific laws to protect Nature or its recognition as a subject of rights and on the contrary, the public policy adopted by countries such as Brazil encourage and promote activities timber, mining and agricultural, which constitute a threat to the Amazon rainforest.

- Damages to the Amazon affect differently the rights of the Isolated People or in Initial Contact that inhabit it, whose rights are recognized in the norms of the American Declaration of Rights of the Indigenous Peoples (DADPI), recently approved<sup>63</sup>. Indeed, article XXVI numeral 1 explicitly recognizes that “[I] indigenous peoples in voluntary isolation or in initial contact have the right to remain in that condition and to live freely and according to their cultures.”

- On the other hand, numeral 2 of Article XXVI of the DADPI, in order to guarantee the protection of the rights of Indigenous Peoples in Voluntary Isolation or Initial Contact, provides that: “The States shall adopt appropriate policies and measures, with knowledge and participation of indigenous peoples and organizations, to recognize, respect and protect the lands, territories, environment and cultures of these peoples, as well as their individual and collective life and integrity.”

- It should be borne in mind that the Political Constitution of the Plurinational State of Bolivia imposes on the State the obligation to protect indigenous peoples in situations of voluntary and uncontacted isolation, respecting their individual and collective ways of life. This is established in Article 31. I., of the constitutional text that

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<sup>63</sup> AG / RES. 2888 (XLVI-O / 16), June 14, 2016.



provides: "Indigenous nations and indigenous peoples in danger of extinction, in situations of voluntary isolation and not contacted, will be protected and respected in their individual and collective life forms. "

- Provided, moreover, that they have the right to remain in a condition of uncontacted and isolated and as a guarantee thereof to safeguard their territory. The aforementioned article 31 in its numeral II expressly provides: "Indigenous nations and peoples in isolation and who are uncontacted enjoy the right to remain in that condition, to the delimitation and legal consolidation of the territory they occupy and inhabit."

- On the other hand, Law 450/2013, Law on the protection of indigenous nations and indigenous peoples in situations of high vulnerability, provides prevention mechanisms in different areas.

- Analyzed the international and national legislation that regulates these matters, it follows that to guarantee the cultural integrity of these peoples, it is necessary to adopt protective measures that directly affect the protection of the territories inhabited by isolated peoples or in initial contact of the Amazon and in its cultural integrity, such as:

- Respect and guarantee of the right over their lands, territories and resources: demarcation of traditional land; definition of protection statutes that guarantee the intangibility of territories; delimitation of buffer land; and, the ability of states to reduce threats to the territory, as a result of formal and informal mining, exploration and exploitation of hydrocarbons, megaprojects, logging, drug trafficking or other criminal acts such as intentional fires.

- Respect and guarantee of the right to health: creation of health protection cords; food sovereignty; environmental conservation; state preparation in situations of contact with people in isolation; participatory design of emergency or contingency plans, health policies and practices and anthropological advice for contact care.

- Regarding and guaranteeing the right to participation, consultation and prior, free and informed consent in its specificity, including the decision not to use this type of participation and consultation mechanisms if it conspires against the decision to remain in isolation and safeguard its integrity by middle of the guiding principle of no contact.

Violated Rights of Nature: The following complaints were filed in this Tribunal regarding the crisis in the Amazon:

- 1) The Amazon and surrounding forests such as Chiquitania suffer extreme deforestation every year, which represents a permanent ecocide. So far more than a fifth of the Amazon has already been deforested. Millions of trees, animal plants and



fish die every year. In the Amazon, Chiquitania, the Pantanal and other neighboring ecoregions millions of non-human living beings are burned each year by fire in one of the most terrifying actions against life on the planet.

2) The Amazon is essential for life not only in that region but for life on the planet as a whole. The Amazon is essential for the entire planet because of the provision of oxygen, water and the capture of greenhouse gases that contribute to cooling the Earth. The ecocide of the Amazon accelerates the sixth extinction of life on earth.

3) In 2019 the deforestation situation has been aggravated by a significant increase in the burns for expansion of the agricultural frontier. The heat sources have doubled. In some regions such as the Bolivian Chiquitania the burned area reached 5.3 million hectares. In this region alone, 40 million trees would have been lost and millions of vertebrate animals have been burned. One of the expressions of the magnitude of these fires is the migration of animals that escape the fire.

4) The fires and deforestation of the year 2019 are not the product of natural factors such as climate change. The increase in temperature contributes to the dryness of the environment and the expansion of fire but it is not climate change that starts fires in most cases.

5) Forest fires and clearings occur to expand the agricultural frontier for the benefit mainly of agribusiness and livestock. Agribusiness and a group of national and transnational companies are the main promoters and drivers of these burns and deforestation. According to FAO studies, 60% of deforestation in the Amazon today is the product of bovine livestock activities. In the Bolivian case, it is denounced that the beginning of the export of meat to China and the production of agro-fuels based on sugarcane and soybeans are causing a perverse incentive for deforestation.

6) The governments of the countries that comprise the Amazon, the Chiquitania and the surrounding forests are favoring the interests of agribusiness without preserving the right to the environment of human beings and without taking into account the terrible impacts of their policies on other living nonhuman beings and the whole planet ecosystem. In the Bolivian case, it is denounced that the previous government of Evo Morales approved a set of incendiary laws in alliance with the opposition parties to favor the agribusiness sector. These regulations include, among other issues, responsibility for illegal deforestation, reduction of fines, extension of the clearing area from 5 to 20 hectares without the need for land planning, authorization for human settlements in areas of forest vocation, approval of the law that authorizes agricultural production to generate fuel, known as the Ethanol Law and the start of exporting meat to China without conducting environmental impact assessment studies, and facilitating procedures for the approval of GM soybeans.

7) Likewise, in the different countries that comprise the Amazon there are processes of deinstitutionalization and dismantling of the entities in charge of managing and



supervising human settlements, forest concessions, clearance authorizations, carrying out environmental impact assessment studies, and others.

8) The processes of deforestation and burning in some countries cause extreme situations of confrontation that lead to the murder of indigenous leaders and environmental defenders at the hands of mercenaries financed by economic elites.

9) The murder of forests does not end with burning and deforestation but is consolidated with the implementation of settlement policies, land distribution, reforestation of tree plantations, and the non-preservation of ecological breaks so that the forests have the Time to recover.

10) The defense of the Amazon and forests is closely linked to the promotion of agroecological, agroforestry practices that allow us to live with the forest and not destroy it to obtain a temporary and suicidal economic revenue in the long term.

11) Similarly, the issue of the defense of the Amazon, the Chiquitania and the neighboring ecoregions is not only a matter of the States and societies of the countries that comprise the Amazon. In this sense, it will not be possible to save the Amazon if the world population as a whole does not take concrete measures to, for example, limit the consumption of meat, guaranteeing, above all, the right to food of the most disadvantaged population.

12) Finally, it is established that in some where there are legal and constitutional provisions to guarantee the Rights of Nature, these are not made effective and guaranteed. In the case of Bolivia, it is noted that after nine years so far, the Defensoría de la Madre Tierra established by Law 71 on the Rights of Mother Earth has not been put into operation. It is also pointed out that it is vital to stop the ecocide of the Amazon and Chiquitania to approve national provisions that extend the advances in the recognition of the rights of Nature at the level of specific cases and municipalities.

13) There is also another set of extractive activities such as mining, hydroelectric, road construction, oil exploration and exploitation, timber extraction and others that further aggravate deforestation and destruction of the Amazon.

### **The 5th International Tribunal for the Rights of Nature resolves:**

Based on the background indicated in the preceding paragraphs, the International Tribunal of Nature Rights in the face of the extreme gravity of the facts and background set forth, resolves:

a) Accept the case of ecocide in the Amazon, Chiquitania and other surrounding forests and begin treatment at the next Tribunal session. They accept this request on behalf of non-human beings who are being exterminated and of the communities and



people who are also being affected and in some cases killed to promote this deforestation.

- b) Urge that the entire Amazon be recognized and declared as a subject of law.
- c) To urge countries that do not have specific laws related to the protection of Nature as a subject of rights, to recognize it as such.
- d) Exhort that all countries that share the Amazon rainforest develop special programs and policies to conserve it and stop promoting productive and extractive activities that threaten the integrity of the Amazon.
- e) Urge to adopt specific measures of protection of the uncontacted peoples or in voluntary isolation that inhabit the Amazon.
- f) Convene all organizations and entities involved in the problem to send information, studies, testimonies and any documentation that contributes to this case.
- g) Point out the responsibility and guilt of the governments of Jair Bolsonaro, Evo Morales/Jeanine Añez, Martin Vizcarra, Mario Abdo Benítez, Lenin Moreno and Iván Duque Márquez in the aforementioned events, generated during and after the fires of the forests of the Amazon, Chiquitania, Pantanal and other adjoining places.
- h) Adopt the precautionary measures requested at different levels:
  - Repeal immediately the legal provisions of the legislative and executive bodies that favor and encourage burning and deforestation (i.e. exemption of responsibility "Forgiveness", extensions of the clearing area, reduction of fines, approval of transgenic events and others).
  - Apply the precautionary principle and demand that governments stop agribusiness activities in particular those that were initiated without environmental impact assessment studies, such as the case in Bolivia of exporting meat to China and producing ethanol and biodiesel.
  - Requiring governments to declare and carry out an ecological pause in burned and deforested areas to allow the recovery of these ecosystems and not adopt measures for reforestation of monocultures and land allocations that would only end up killing such forests.
- i) Send a commission to carry out on-site views to recover evidence and collect information from the different actors involved, especially the Bolivian Chiquitania and the regions of the Brazilian Amazon most affected by the fires (Acre, Amapá, Amazonas, Rondonia, Mato Grosso and Pará) in order to verify in the place the seriousness of the facts, gather evidence and dialogue with the different state and non-state actors.



Once these visits have been made, the Tribunal will formulate a set of recommendations of an integral nature (economic, legal, institutional, social, political, environmental and others) to save the Amazon and stop the ongoing ecocide.

Due to the magnitude of the case, the causal factors involved and the extension of the territory, the Tribunal will address the case in phases starting with the problem of forest fires and fires in Bolivia and Brazil.

j) The Tribunal asks more organizations and affected people to send their evidence, emphasizing the damage to mother earth, indigenous communities and the differentiated impact on peoples in voluntary isolation or not contacted.

### **CLOSURE OF THE TRIBUNAL AND FINAL CONCLUSIONS**

The Fifth International Tribunal of the Rights of Nature urges the rulers, companies and other officials identified in this verdict to accept and follow the recommendations made by this respected Ethical Tribunal in the name of Nature. As a general recommendation for Chile, a country that receives this edition of the Tribunal, it strongly recommends signing the Escazú Agreement that will allow participation in the definition of environmental public policies, transparent information for civil society and protection of human rights defenders. nature.

On behalf of the Pachamama (Mother Nature), inspired by the wisdom of grandfathers and grandmothers, aware that indigenous peoples are millenary, pre-state communities, with rights to difference and equality among other peoples: reaffirming, that all ideas and practices based on the superiority of certain peoples or individuals for reasons of origin, gender, racial, religious, ethnic or cultural are racist, scientifically false, legally illegitimate, ethically unacceptable and socially unfair: convinced that resistance is a right irrevocable of the peoples and before as now it allows the natural community survival, recovering and strengthening the legal, political, economic, social, cultural institutions, as well as our traditions, identities, memories and cosmovivencias; and celebrating life with deep kuyay pachamama - love the mother nature- we come and to which we become one.