

## Constitutional Protection Action No. 10332-2018-00640

JUDGES OF THE IMBABURA PROVINCIAL COURT OF JUSTICE:

The Ecuadorian Coordinator of Organizations for the Defense of Nature and Environment -CEDENMA-, organization legally constituted in accordance with Ecuadorian legislation, registered with No. 1791298926001, legally represented by Mrs. NATALIA ANDREA GREENE LOPEZ, entity domiciled in the City of Quito, in relation to the Appeal within the Constitutional Protection Action No. 10332-2018-00640, I appear in the most respectful manner before you, based on the provisions of Arts. 12 and 14 of the Organic Law of Jurisdictional Guarantees and Constitutional Control and I present the following Amicus Curiae:

### 1. Background:

On Monday, November 5, 2018, at 11:47 an action was filed to protect constitutional rights, protected by the Constitution of the Republic of Ecuador and the Organic Law of Jurisdictional Guarantees and Constitutional Control, by Cevallos Moreno Jomar José Efrén, Almeida Herrera Jhesica Liseth as Mayor and Procurator, respectively, of the MUNICIPAL GAD OF SANTA ANA DE COTACACHI.

The Judge of the case, in compliance with the mandates established in the Organic Law of Jurisdictional Guarantees and Constitutional Control (LOGJCC), convened the parties to ORAL and PUBLIC HEARING, on FRIDAY, NOVEMBER 09, 2018 at 11:30 am, in the hearing room of this Multicompetent Judicial Unit of the municipality of Cotacachi.

On November 9, 2018, at 08:28 am, by means of a general ruling, the judicial authority reports that: "The writings containing AMICUS CURIAE, presented in the case, form part of the file, and in accordance with the provisions of the article 12 of the LOGJCC, the relevant will be considered by this judge in respective audience"; however, despite the contents of said judicial ruling and the provisions of the Law, during the oral and public hearing, the amicus curiae were not allowed to intervene in the process.

At the hearing held on the indicated day and hours, the Judge, after hearing the arguments of the parties, decided to deny the claim of the question standing, before which, on November 16, 2018, within the term established in Art. 24 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, the legitimated party

presented the corresponding Appeal against the decision of the constitutional judge of the first instance.

## **2. The Los Cedros Protective Forest. Its location, its functions and rights,**

### **Short description.-**

The Los Cedros Protected Forest is located in the northwestern region of Ecuador, in the province of Imbabura, north of the Guayllabamba River, near its confluence with the Magdalena River, and is adjacent to the Cotacachi-Cayapas Ecological Reserve, constituting in that sense, part of the buffer area of this reserve. It is, as such, one of the most important protected areas of the country that is open to various activities such as scientific research and scientific tourism.

An important feature of the Los Cedros Protected Forest is its unique position in the south-western sector of the Cotacachi-Cayapas Ecological Reserve, since it serves, as mentioned, as a buffer zone for the aforementioned reserve.

In this area two of the most important megadiversity areas are superimposed, on the one hand, the humid forests of Chocó and on the other, the tropical part of the Andes mountain range. Both with a large number of their own species, in plants and animals, mainly amphibians and birds. It has a mild temperature that oscillates at an annual average of 15 and 18 degrees Celsius.

Los Cedros Protected Forest occupies part of the mountain range called Toisán with a high percentage of primary forest and is surrounded by three important rivers: the Manduriaco Grande, the Verde and the Magdalena Chico.

Due to these geographical and natural conditions, this Forest is considered in the scientific world as one of the jewels of the planet's biodiversity. Currently, in this Los Cedros Reserve, great efforts are made to prevent the extinction of a species that is practically endemic to Ecuador, which is the spider monkey with a brown head or also called a brown-headed "bracilargo".

The few populations of these types of bracilargo monkeys are found in the protected areas of the Cotacachi Cayapas Ecological Reserve in the montane forests that border it and in the territories of the Awá ethnic group, northeast of Esmeraldas and northwest of Carchi.

The LOS CEDROS Protected Forest has been the site of several base and camp studies for the training workshops of community parabiologists specializing in data collection of this species and others.

The LOS CEDROS PROTECTIVE FOREST reserve covers an area of 6,400 hectares and includes two life zones, the wet premontane and the lower montane. Within their limits live:

- More than 310 species of birds;
- Approximately 290 tree species;
- More than 400 species of orchids (among them, between 250 to 300 species of the Pleurithalia family, of which 14 species are dráculas, the orchids most coveted by researchers and lovers of these plants);
- Three species of primates: the howler monkey, the capuchin and the bracilargo, the latter critically endangered, in accordance with the IUCN;
- More than 960 species of moths, 320 of them registered for the first time in Los Cedros;
- More than 70 species of trees in a hectare of forest, which denotes the highest biodiversity of this area.

In the LOS CEDROS PROTECTIVE FOREST you can observe wildlife species such as: Spider monkeys, puma, jaguar, tigrillos, guanta, guatuso, among hundreds of other species mentioned above.

### **3. PREVIOUS legal recognition of the protection of the Los Cedros Protected Forest.**

Fundamentally and as a recognition of the vast biodiversity that exists in this area, the Ecuadorian State in accordance with the Constitution and the laws in force, declared this area, according to law, as "AREA OF FOREST AND PROTECTIVE VEGETATION" called LOS CEDROS , through Resolution No. 0057, published in the Official Registry No. 620 of Thursday, January 26, 1995.

Among the considerations that led the Ecuadorian State to grant this special protection to the LOS CEDROS zone, it is indicated, verbatim:

***"That, most of the area, is dominated by a steep relief to very steep, mountainous, whose slopes are greater than 70 percent, corresponding to the sectors of the middle and upper parts of the sub-basins of the rivers: Los Cedros , Magdalena Chico, Verde, Manduriyacu Chico and Manduriyacu Grande, extending to the watershed, followed by other areas with a steep relief, with slopes ranging from 20 to 50 percent; then an area of heavily wavy relief with slopes of 12 to 20 percent and, finally, an area corresponding to the undulating flat relief with slopes ranging from 5 to 12 percent.***

***That, according to the physical-chemical and biological characteristics of the soils studied, as well as its agrology, it is established that these lands must be permanently preserved for protectionist purposes.***

***That, by means of a field inspection carried out on the days between April 11 and 16 of the current year, and after the Technical Report was issued by the Interinstitutional Commission, made up of delegates from INEFAN and INERHI; recommend that 6,400 hectares of the "LOS CEDROS" property, located in the García Moreno parish, Cotacachi canton, Imbabura province, be declared Protected Forest and Vegetation Area, for complying with the constant requirements in Art. 5 of the Forestry Law and of Conservation of Natural Areas and Wildlife, and Arts. 11, 12 and 14 of the General Regulations for the Application of this Law.***

***(...)***

**Solve:**

***Art. 1.- Declare Protected Forest and Vegetation Area, at 6,400 hectares of the "LOS CEDROS" property, located in the Garcia Moreno parish, Cotacachi canton, Imbabura province, whose geographical location, administrative situation, and limits are the following : (...)***

***(...)***

***Art. 3.- To prohibit as a consequence all those activities that are not compatible with the aims pursued by the area, which will be subject to the forestry regime from the signing of this Resolution, whose administration falls exclusively to this Institute, through of the National Forestry Office, for which reason this area may not be affected by the Agrarian Reform. "***

In this sense, Mr. Judges, Art. 11 of the Constitution in its number 4 establishes that:

*"No legal norm may restrict the content of rights or constitutional guarantees";*

as well as number 8 of the same article 11 of the Fundamental Charter that orders:

*"The content of the rights will be developed progressively through the rules, jurisprudence and public policies. The State will generate and guarantee the necessary conditions for its full recognition and exercise. Any action or omission of a regressive nature that diminishes, undermines or unjustifiably annuls the exercise of rights will be unconstitutional."*

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Concomitantly, Art. 4 of the LOGJCC in its number 2 that says: "*Direct application of the Constitution: The rights and guarantees established in the Constitution and in the international instruments of human rights, will be of direct and immediate application, by and before any servant or public servant, administrative or judicial, ex officio or at the request of a party. "*

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Thus, you, as Constitutional Judges, are called to monitor the rights that Nature has as well as the implications of the declaration of public interest of biodiversity that determines the Constitution itself, through the development of relevant jurisprudence, preventing these rights to be undermined, on the one hand, by the violation of an administrative act that protects for the reasons already explained, the nature and the multiple species that inhabit the Los Cedros protective forest, as well as, on the other hand, by issuing acts of the administration itself that precisely facilitate the exploration, exploitation and subsequent potential destruction of this ecosystem.

The declaration of LOS CEDROS as a PROTECTIVE FOREST, given on October 19, 1994, is precisely aimed at maintaining a vision of an ideal environment, bearing in mind that this protection of biodiversity is aimed at the ultimate protection of the HUMAN BEING, not only of these generations but of the generations to come.

However, according to our Constitution, it must be clear that it is not enough to take into account only the HUMAN LIVES, but also, in equal conditions, in a manner favorable to the rights, and the optimization of the constitutional principles, the rights of Nature, of wildlife, of the flora and fauna that inhabit this protective forest.

It is primordial and preponderant then, Mr. Judges, to protect the environment and Nature - understood as such, the thousands of species among flora and fauna that are found in the LOS CEDROS Protected Forest - since through the exploration and exploitation of minerals, the long life of all the species that live there is guaranteed, but as already said, they imply the assurance of the well-being of future generations, thus violating the rights of Nature, and of future generations that will seriously affect their sources of Water.

#### **4. Bibliographic references regarding the importance of biodiversity in the LOS CEDROS PROTECTIVE FOREST.**

For your better comprehension of the subject, and for a better way to solve the present cause, it is important that you know some of the various researches and discoveries of flora and fauna species that have been carried out in the CEDROS PROTECTIVE FOREST, that clearly shows the rights violated with the concessions destined to mining activity that is being developed in this area.

4.1.- Anderson, R. P., and P. Jarrín-V. 2002. A new species of spiny pocket mouse (Heteromyidae: Heteromys) endemic to western Ecuador. *American Museum Novitates* 3382: 1-26.

4.2.- Arteaga, A., R. A. Pyron, N. Penafiel, P. Romero-Barreto, J. Culebras, L. Bustamante, M. H. Yanez-Munoz, and J. M. Guayasamin. 2016. Comparative phylogeography reveals cryptic diversity and repeated patterns of cladogenesis for amphibians and reptiles in northwestern Ecuador. *Plos One* 11.

4.3.- Bech, J., C. Poschenrieder, M. Llugany, J. Barcelo, P. Tume, F. J. Tobias, J. L. Barranzuela, and E. R. Vásquez. 1997. Arsenic and heavy metal contamination of soil and vegetation around copper mine in Northern Peru. *Science of the Total Environment* 203: 83-91.

4.4.- Bianchini, F., G. Pascali, A. Field, S. Orecchio, R. Bonsignore, P. Blandino, and P. Pietrini. 2015. Elemental contamination of an open-pit mining area in the Peruvian Andes. *International Journal of Environmental Science and Technology* 12: 1065-1074.

4.5.- Brehm, G., L. M. Pitkin, N. Hilt, and K. Fiedler. 2005. Montane Andean rain forests are a global diversity hotspot of geometrid moths. *Journal of Biogeography* 32: 1621-1627.

4.6.- Bronsvort, B. M. d. C. 1994. Small mammal diversity and habitat usage at Los Cedros Biological Reserve Ecuador. University of Wales, Bangor, Wales, UK.

4.7.- Brown, M., A. Mariscal, M. A. Chinchero, and A. Diaz. 2015. Biotic factors affecting the abundance of vascular epiphytic bromeliads growing in the cloud forest in Los Cedros Biological Reserve, Ecuador. *Annual Research and Review in Biology* 6: 355-363.

4.8.- Dentinger, B. T. M., and B. A. Roy. 2010. A mushroom by any other name would smell as sweet: *Dracula* orchids. *Mcllvainea* 19: 1-13.

4.9.- Endara, L., S. Dalström, and A. Reynolds. 2009. Pleurothallid orchids of Los Cedros. Field Museum, Chicago.

- 4.10.- Endara, L., D. A. Grimaldi, and B. A. Roy. 2010. Lord of the flies: pollination of *Dracula* orchids. *Lankesteriana* 10: 1-11.
- 4.11.- Freiberg, M. 1996. The flora management of the Los Cedros Biological Reserve, Northwest Ecuador, Part 1: Four new species in *Gasteranthus* (Gesneriaceae). *Phyton-International Journal of Experimental Botany* 36: 303-309.
- 4.12.- Freiberg, M. 1997. The flora management of the Los Cedros Biological Reserve, northwest Ecuador, part 2: New species in *Alloplectus*, *Dalbergaria*, *Paradrymonia* and *Pentadenia* (Gesneriaceae). *Phyton-International Journal of Experimental Botany* 37: 133-140.
- 4.13.- Freiberg, M. 1998. Two remarkable new species of *Gasteranthus* (Gesneriaceae) from central Ecuador. *Phyton-International Journal of Experimental Botany* 38: 167-173.
- 4.14.- Freiberg, M. 2000. Three new species of *Gasteranthus* (Gesneriaceae) from Ecuador. *Brittonia* 52: 203-209.
- 4.15.- Freiberg, M., and E. Freiberg. 2000. Epiphyte diversity and biomass in the canopy of lowland and montane forests in Ecuador. *Journal of Tropical Ecology* 16: 673-688.
- 4.16.- Grandjean, P., R. F. White, A. Nielsen, D. Cleary, and E. C. D. Santos. 1999. Methylmercury neurotoxicity in Amazonian children downstream from gold mining. *Environmental Health Perspectives* 107: 587-591.
- 4.17.- Guayasamin, J. M., T. Krynak, K. Krynak, J. Culebras, and C. R. Hutter. 2015. Phenotypic plasticity raises questions for taxonomically important traits: a remarkable new Andean rainfrog (*Pristimantis*) with the ability to change skin texture. *Zoological Journal of the Linnean Society* 173: 913-928.
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- 4.19.- International, B.L. 2016. Important bird and biodiversity area factsheet: Los Cedros Protective Forest (<http://www.birdlife.org/datazone/sitefactsheet.php?id=14531>).

- 4.20.- Li, Z., Z. Ma, T. J. van der Kuijp, Z. Yuan, and L. Huang. 2014. A review of soil heavy metal pollution from mines in China: Pollution and health risk assessment. *Science of the Total Environment* 468: 843-853.
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- 4.26.- Oyarzun, J., D. Castillo, H. Maturana, N. Kretschmer, G. Soto, J. M. Amezaga, T. S. Roetting, P. L. Younger, and R. Oyarzun. 2012. Abandoned tailings deposits, acid drainage and alluvial sediments geochemistry, in the arid Elqui River Basin, North-Central Chile. *Journal of Geochemical Exploration* 115: 47-58.
- 4.27.- Reserve Los Cedros eBird checklist 2016: <http://ebird.org/ebird/hotspot/L1481360>. eBird, Ithaca, New York.
- 4.28.- Shanee, S., and M. R. Peck. 2008. Elevational changes in a Neotropical Fig (*Ficus* spp.) Community in North Western Ecuador. *Iforest-Biogeosciences and Forestry* 1: 104-106.
- 4.29.- Strosnider, W. H. J., F. S. Llanos Lopez, and R. W. Nairn. 2011. Acid mine drainage at Cerro Rico de Potosi II: severe degradation of the Upper Rio Pilcomayo watershed. *Environmental Earth Sciences* 64: 911-923.

## **5. The precautionary principle.**

As you are aware, the Fundamental Charter applies in a transversal manner several environmental principles that guarantee the promotion, respect and protection of Nature, as ordered by articles 275 and 277 of the Constitution that refer specifically to the Development Regime, where one of its objectives is precisely to recover and conserve Nature, which guarantees equitable, permanent and quality access to water, air and soil, the State having to effectively guarantee the rights of people,



collectives and Nature. That is why, in the Ecuadorian constitutional context, it is not possible to accept or allow any type of economic activity when it represents a threat to ecosystems, to Nature, to water.

Art. 275. - The development regime is the organized, sustainable and dynamic set of the economic, political, socio-cultural and environmental systems that guarantee the realization of good living, of Sumak Kawsay.

(...)

Good living will require that people, communities, peoples and nationalities effectively enjoy their rights, and exercise responsibilities within the framework of interculturality, respect for their diversity, and harmonious coexistence with nature.

Art. 277.- For the attainment of good living, it will be the general duties of the State:

1. Guarantee the rights of individuals, collectives and nature.

(...)

[Emphasis out of text]

Thus, Ecuador in its Constitution and other international regulations -also applicable to this case-, introduced into its legal system the precautionary principle, precisely to protect the rights of Nature and the environment of certain human activities that generate serious and irremediable impacts on the environment-, but also to ensure the effective enjoyment of other rights of citizens, such as the right to health, healthy food, water, and in general, to live in a healthy and balanced environment.

In this regard, it is important to remind the judges of the origins of the precautionary principle, which can be traced back to the legislation of Germany that, in 1959, published the Law Regulating the Peaceful Use of Atomic Energy and Protection Against Dangers, where the first time it is mentioned that to grant an authorization to install a Nuclear Power Plant, provided that the necessary precaution has been taken according to the state of science and technology in the face of the damages that may be caused by the construction and operation of the installation".

From this first approach, the doctrine has tried to define the concept of "Principle of Caution" during the last decades:

Thus, the European Commission issued a report on the precautionary principle, which states that: "... in practice, its scope of application is much wider, and especially when the objective preliminary scientific evaluation indicates that there are reasonable grounds for fear that potentially hazardous effects on the environment

and on human, animal or plant health may be incompatible with the high level of protection chosen by the Community. "

The writer Gonzalo Figueroa Y. defines the precautionary principle as: "... the attitude that must be observed by any person and that makes a decision regarding an activity with respect to which it can be reasonably assumed to entail a serious danger to health or safety of current or future generations or for the environment".

Principle 15 of the Rio Declaration on Environment and Development, ratified by Ecuador, establishes a definition of the precautionary principle: "When there is danger of serious or irreversible damage, the lack of absolute scientific certainty should not be used as a reason to delay the adoption of cost-effective measures to prevent the degradation of the environment " .

This confirming principle has been shown to be focused on introducing elements for decision-making in a context of scientific uncertainties and impacts generated by these eventual decisions, and in spaces where decisions are regulated by States in matters such as protection of the health and life of people, animals and plants, the environment or food safety.

On the other hand, thanks to peculiar characteristics of the geography of Ecuador, we have a megabiodiversity that very few countries in the world can cover, so, as has been said, the Constitution itself recognizes biodiversity as a strategic sector of our country, and establishes as an area of public interest the following:

Art. 14.- (...) The preservation of the environment, the conservation of ecosystems, biodiversity and the integrity of the country's genetic heritage, the prevention of environmental damage and the recovery of degraded natural spaces are declared of public interest.

In these administrative processes of mining concessions of huge areas -specifically in this case 9,909 hectares- that constitute protective forests and special areas that have a high biodiversity value, -such as, in particular, the metallic mining concessions Río Magdalena 01 and Río Magdalena 02- do not the Constitution has been respected or international provisions that are part of the constitutional rights scheme, in its provisions regarding the rights of nature, the constitutional principle of precaution, rights of good living, as well as the right of all inhabitants of the Ecuador to be consulted in areas of direct or indirect influence or "influence" by metallic mining, as ordered by Articles 57.7 and 398 of the Constitution, in the manner determined in its Articles. 11, 424, 425 and 426.

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In this sense, the Judges of the Provincial Court, when the PRINCIPLE OF PRECAUTION is applied, it is not necessary to prove the existence of damage as the Ecuadorian Ministry of the Environment has mistakenly alleged in the hearing held in the first instance. Moreover, in the hearing of the Protection Action dated November 13, 2018, the Lawyer Padilla Romero Hugo Xavier on behalf of the National Mining Company of Ecuador, ENAMI EP, expressly acknowledged that "there is an environmental damage that is not ours", according to the work of the judgment that has been issued.

In this sense, based on the principle of reversal of the burden of proof in environmental matters contained in Art. 397 numeral 1, in its final part, it should be the defendant ENAMI EP itself that demonstrates according to Law, that "the harm is not yours."

Consequently, it is based on the knowledge and research of the species that inhabit there and the importance of the biodiversity of the LOS CEDROS Protective Forest that the necessary precautions must be taken to AVOID GREATER DAMAGE to the ecosystems.

## **6. Inconsistencies in the judgment of the multicompetent Constitutional Judge of Cotacachi.**

It is curious that in the sentence the alleged motivation, when the complete reading of its text shows that the judge *a quo*, does not even mention or make any reference in his analysis, to the Rights of Nature, which they have been expressly recognized in articles 10, paragraph 2 of the Constitution, Arts. 71 and 72 *ibid*, as well as in other instances of the Fundamental Charter in a transversal way. It is even more curious when these rights have been the main rights violated that have been alleged in the action, after the concession and the advance of a large-scale metallic mining project in the FOREST PROTECTOR LOS CEDROS.

The Judge mentions in his sentence the obligation to motivate his decision, but at the same time he omits from his foundation of legal argumentation to support his Resolution, any analysis regarding the Rights of Nature, which guarantee the reproduction of the life of these ecosystems, to fully respect their existence, to maintain and regenerate their life cycles, their structure, their functions and their evolutionary processes.

Consequently, the ruling violates the right of protection of the inhabitants of Cotacachi and the active subjects, in the guarantee of motivation, included in Art. 76, number 7 letter l) that says:

*"The resolutions of the public powers must be motivated. There will be no motivation if the resolution does not state the legal norms or principles on which it is based and the relevance of its application to the factual background is not explained. Administrative acts, resolutions or rulings that are not duly motivated will be considered void. The responsible servants or servants will be sanctioned."*

Consequently, regarding the motivation of the judgment, there is a deficient normative premise in the present case, which includes an analysis of legal norms (Mining Law, Environmental Secondary Regulations) that account for an analysis of legality other than the nature of the action of protection. As has been emphasized, there is no profound analysis of the constitutional rights invoked and violated, beyond a mere citation of certain articles. In the appealed judgment there is no argumentative chain that allows to reach deep conclusions regarding the violation or not of certain rights. Likewise, in this appealed judgment there is a lack of consistency, which would appear to be a mere distortion, in saying that the claim of the legitimized assets was the declaration of a right, when this is completely different from reality.

The main argument of the judge *a quo* in his sentence is that there are other ways in "ordinary jurisdiction as a primary guarantee of the same", however, as already mentioned in the preceding paragraphs, the judge *a quo* did not even consider the rights of nature, analyzed in its resolution, which are the main rights threatened and violated with the metallic mining activity in the open pit mining that is intended to be installed by force and against all logical reason in the LOS CEDROS PROTECTIVE FOREST.

In the present case, citing the same criteria of the Judge contained in his sentence in the fifth recital, we are not facing a mere discussion of "property rights", because as has been said, the main claim is the violation of rights of Nature and the necessity of its precaution based on constitutional regulations, which leads us to discuss fundamental rights that should be treated in this same constitutional way.

The ruling mentions that the right to legal security has been complied with, but it is strange, your Honors, that a thorough analysis of the validity of the Resolution declaring this area as a Protective Forest and Vegetation already in 1994 in accordance with the legislation in force at that date. The *a quo* judge, uses the argument of legal security in an arbitrary manner, without even respecting the

validity of the rules and administrative acts as that referred to in the action of protection and in the sentence itself.

This alteration of the vocation of the territory identified as "AREA OF FOREST AND PROTECTIVE VEGETATION" called LOS CEDROS, is not analyzed in a serious way, through Resolution No. 0057, published in O.R. No. 620 of Thursday, January 26, 1995, which is precisely violating the Constitution, it is not being interpreted in a manner favorable to the validity of the rights of Nature, and would be allowing unconstitutional regression of rights.

Thus, by means of this judgment today appealed by the Active Legitimist before this Provincial Court, it would be intended to denaturalize Article 88 of the Constitution regarding the object of the protection action and the mandatory precedent given in sentence No. 001-16- is being ignored. PJO-CC, within case No. 0530-10-JP that established that the protective action is not residual, in the following terms:

*"1. The judges and constitutional judges who are aware of a protection action, should conduct a thorough analysis of the actual existence of the violation of constitutional rights in the judgment, on the actual occurrence of the facts of the specific case. Judges or constitutional judges only, when they do not find a violation of constitutional rights and state it reasonably in their judgment, based on the parameters of reasonableness, logic and comprehensibility, may determine that ordinary justice is the appropriate and effective way to resolve the controversial issue.; 2. The rule issued in this judgment shall be applied with general or erga omnes effects in similar or similar cases .; Case review; 1. (...)"*

## **7. Recent binding jurisprudential background.**

Within the protective action No. 01333-2018-03145 followed against the Ecuadorian State, the Provincial Court of Azuay, in application of the guarantee provisions of our Constitution and other applicable national and international regulations, issued the following sentence, which it is applicable in the present case.

3.3.- Of the planes of fs. 642/643, from the Ministry of the Environment, it is noted that the mining concession area of the Río Blanco Project is located in the area of influence of the Cajas National Park. While, on the website of the Ministry of the Environment, it is reported that at the Cajas Massif, Unesco declared it part of the global biosphere reserve network: "after an interdisciplinary, intersectoral and inter-institutional process that began in 2010, The United Nations Organization for Education, Science and Culture (Unesco) declared El Macizo del Cajas as part of the world network of Biosphere Reserves. This inclusion was due to the fact that the area covering a total area of almost one million hectares, between continental and marine

territory, has the physical, biological and socio-economic conditions that a geographical space must have, according to the criteria established by that entity and its Program on Man and the Biosphere (MAB) for declarations of that magnitude. This new Biosphere Reserve, located in the south west of Ecuador, includes the Pacific and Atlantic slopes of the Western Andes Range, is composed of the core, buffer and transition zones, and includes territory of the provinces of Azuay (58.44%), Cañar (15.36%), El Oro (8.85%) and Guayas (17.35%). That is, it has wetlands, mangroves and marine ecosystems. Due to its geographical and climatic conditions, there is an exuberant biological diversity in this territory. In the core zone is the Cajas National Park, which has 71 endemic species, of which 16 are unique to the area. In addition, there is a great economic dynamic, which includes crops, plantations and industry. The inclusion of the Cajas Massif in the world biosphere network means the development of programs and projects of biological, ecological and socio-economic research, environmental education, among others; as well as a policy or management plan for the area in its capacity as a Biosphere Reserve. This economic development must be viewed from a sustainable approach ... The Macizo de El Biosphere Reserve has a total area of 976,600.92 ha, of which 892,161.52 ha belong to the continental territory and 88,439.4 ha belong to the marine territory. It is conformed by 65 parishes, 15 municipalities of the provinces of Azuay, Cañar, Guayas and El Oro, with a population of approximately one million inhabitants. The institutions that participated in the promotion process for the declaration of the Macizo de El Cajas Biosphere Reserve were: Ministry of Environment of Ecuador (MAE), National Secretariat of Planning and Development (SENPLADES), the Provincial Government of Azuay (GPA), the Municipal Government of Cuenca, the Municipal Public Company of telecommunications, drinking water, sewerage and sanitation of Cuenca (ETAPA-EP), GIZ, Corporation Nature and Culture International (NCI), Ministry of Foreign Affairs, commerce and integration "; in this mega-diverse zone, there is the Cajas National Park, the original water sources that form the Río Blanco tributary of the Chorro River and also the original sources that form the Canoas River (plans 642/643); where the Río Blanco mining project is also located. 3.4.- The two parties are aware that the exploration, prospecting and exploitation of the mines produces environmental impacts. The plaintiffs claim that it is affecting the watersheds, the wetlands and nature itself and proposes the suspension of the mining concession and the environmental license; these non-renewable resources are found in nature, therefore, Art. 408 of the Constitution of the Republic mandates to protect it: "Non-renewable natural resources and, in general, those that are inalienable, imprescriptible and unattachable by the State products of the subsoil, mineral and hydrocarbon deposits, substances whose nature is different from that of the soil, including those found in the areas covered by the waters of the territorial sea and the maritime zones; as well as biodiversity and its genetic heritage and the radio spectrum. These assets can only be exploited in strict compliance with the environmental principles established in the Constitution "; and, the environmental

principles are described in Art. 395: "The Constitution recognizes the following environmental principles: 2. The environmental management policies will be applied transversally and will be mandatory compliance by following collective rights: 3. The State will guarantee the active and permanent participation of the people, communities, peoples and nationalities affected, in the planning, execution and control of any activity that generates environmental impacts. 4. In case of doubt about the scope of legal provisions on environmental matters, these will be applied in the most favorable sense to the protection of nature "; These principles acquire relevance when applied to events such as the present. 3.5.- The Río Blanco mining project has an area of direct influence among others in the Molleturo parish. From the documentation provided by the operators, it appears that socialization workshops, conferences, information, assemblies and other events have been held, according to the technical reports of the Ministry of Environment with the company Minera; it is also appreciated that, since 2011, there has been opposition from communities and residents of the Molleturo parish to the activities carried out by the mining companies; moreover, in none of the documents attached by the actuators does it appear that the competent authorities have made prior, free and informed consultation for the mining exploitation, in accordance with Article 57 of the Constitution: "It is recognized and guaranteed to the communes, communities, peoples and indigenous nationalities, in accordance with the Constitution and with the pacts, conventions, declarations and other international human rights instruments, the following collective rights: 7. The prior, free and informed consultation, within a reasonable period, about plans and programs for prospecting, exploitation and commercialization of non-renewable resources that are found on their lands and that may affect them environmentally or culturally .... The consultation that must be carried out by the competent authorities will be obligatory and timely. If the consent of the consulted community is not obtained, the Constitution and the law will be followed ... .. The State will guarantee the application of these collective rights without any discrimination, in conditions of equality and equity between women and men ". 3.6.- From the documentation it is verified that, in its resolution 177, the Ministry of the Environment maintains that the mining project is "within the protective forest MOLLETURO Y MOLLEPONGO". Entity of the State that through the Undersecretariat of Natural Heritage, and through the National System of Protected Areas (SNAP) which is part of the National Parks, among which is the Cajas National Park, is in charge of guarding and preserving to guarantee the conservation of biodiversity and the well-being of all living beings, exercising stewardship, regulating and allocating the necessary economic resources, starting with the approval of the Constitution of the Republic, as these are protected areas, which tenor of Art. 397: "In case of environmental damage the State will act immediately and subsidiary to guarantee the health and the restoration of the ecosystems .... To guarantee the individual and collective right to live in a healthy and ecologically balanced environment, the State commits itself to: 1. Allow any natural or legal

person, community or human group, to take legal action and go to judicial and administrative bodies. , without prejudice to their direct interest, to obtain from them the effective protection in environmental matters, including the possibility of requesting precautionary measures that allow the threat or environmental damage to be litigated. The burden of proof of the absence of potential or actual damage will fall on the activity manager or the defendant. 4. Ensure the intangibility of the protected natural areas, in such a way that the conservation of biodiversity and the maintenance of the ecological functions of the ecosystems are guaranteed. " The constitutional norm warns the possibility, that any natural or collective person can request the effective protection in environmental matter, in defense of the rights of the nature that can request precautionary measures to stop the threat when the imminent danger exists that an injury takes place; or to cease environmental damage when it has occurred. In this case, the norm says that the burden of proof on the absence of damage falls on the activity manager. If the Ministry of the Environment maintains that the mining exploitation area is "within the protective forest MOLLETURO Y MOLLEPONGO", which forms the Cajas National Park, a protected, intangible, inalienable property, where the concession of protected areas is prohibited ( Art. 405 CRE), which is related to the content of Art. 407 "The extractive activity of non-renewable resources in protected areas and in areas declared as intangible, including logging, is prohibited". 3.7.- That, the Constitution of the Republic in force since 2008, in Art. 398 provides that state decisions or authorizations that may affect the environment will be consulted with the community, this provision leaves no doubt: "Any decision or authorization State that may affect the environment should be consulted with the community, which will be informed widely and timely. The consulting subject will be the State. The law will regulate prior consultation, citizen participation, deadlines, the subject consulted and the criteria for assessment and objection about the activity submitted for consultation "; and, if the environmental license for the exploitation of metallic minerals in the Río Blanco project is given on August 8, 2017 in favor of the company Junefield Ecuagoldmining South America SA, omitting the consultation of the citizens of the Molleturo parish, then, it does not show that this constitutional right was enforced; on the contrary, it was omitted at the time of authorizing the exploitation of the mining area of the Río Blanco Project by the Ministry of Mines and when granting the environmental license by the Ministry of the Environment. Environment, thus violating the right of participation of the people of Molleturo. 3.8.- Our Constitution is a guarantee. To what was said in the previous point, we add that, through the referendum of February 2018, citizens were consulted in question 5 of the referendum. Do you agree to amend the Constitution of the Republic of Ecuador so that it is banned without exception? metallic mining in all its stages, in protected areas, intangible zones and urban centers, in accordance with the provisions of Annex 5 ?, of the pronouncement of the inhabitants of the Molleturo parish, the result was the following: 67.80% by the SI , and 32.20% by NO; P. Electoral advice Then, there is a pronouncement, which



supports the prohibition without exception of metal mining in protected areas and as you can see the area of Cajas National Park is a protected area; and, the Ecuadorian State through its constituents is in the duty to observe, so that the popular will has the legal effects. Recall also that, Article 106 of the Constitution says: "For the approval of a proposed subject to referendum, popular consultation or revocation of the mandate, the absolute majority of valid votes will be required, except for the revocation of the President or President of the Republic in which case the absolute majority of the suffragers will be required. The popular pronouncement will be of obligatory and immediate fulfillment ". 3.9.- Regarding the aforementioned popular pronouncement, the Constitutional President of the Republic, Lic. Lenin Moreno, in Decree No. 229 of November 29, 2017 that orders the Referendum, states that the National Government "considers that it is imperative to go to the people in all those topics of special and highest economic, political and social significance for the country, as many times as necessary, so that it is this who, as the mandator and legitimizing the public power, adopt with the authority that covers him, the necessary decisions to consolidate the constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, plurinational and secular that we represent "; and, also it sustains in the literal e) of said decree, when it proposes the "Reforms in environmental matter: The new economic model proposed, is a non-extractivist process, which starts from the indigenous worldview, sustained by the principle of good living or Sumak Kawsay, that implies finding harmony between the person-community and its environment. At the same time, it wants to prevent the economic model based on extraction, which clearly attempts against nature, the same one that gives us limited resources, so it is determined that we must be aware of future generations, so that they can enjoy these resources in the same quantity and quality. This new model implies the recognition of other rights such as nature, land rights, food sovereignty, protection of biodiversity, ancestral knowledge, which clearly is a valid proposal before the neoliberal extractivist and extractivist model, where the subject of rights, that is to say the individual, indiscriminately takes advantage of the planet's resources, putting humanity at risk in exchange for their great particular profits ... By virtue of the statement, and in application of the constitutional principle of progressive rights, it is considered necessary to extend the protection of nature's rights to other areas, and, in such sense, that minerals cannot be exploited in protected areas, intangible zones and populated centers ".

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## **8. Petition.**

For all these considerations, we are going with the present Amicus Curiae before you, Mr. Judges, to support the constitutional protection action presented by the GAD Cotacachi, in favor of the effective and full recognition of the rights of Nature and the biodiversity of the LOS CEDROS Protected Forest, of the various species of birds, mammals, orchids, monkeys in danger of extinction, moths, toucans and other flora and fauna that inhabit this Natural Reserve, considering that the communities of influence areas would be seriously affected in their right to access to quality water, to access healthy food, to live in a healthy and ecologically balanced environment.

We also request that the Judges of the Court respect and abide by the right to legal security in relation to the existence of a previous administrative act of 1994, which already establishes a special protection of the State to the biodiversity of Los Cedros.

We request, for a better resolution, to hold a visit to the site in accordance with the third clause of Art. 14 of the Organic Law of Constitutional Guarantees.

Consequently, it will be necessary to declare without effect the administrative acts that grant these mining concessions and that grant the environmental permits (environmental registration) to carry out, as requested.

The metallic mining activity in the Magdalena 01 and Magdalena River 02 concessions granted to ENAMI EP and the suspension of all mining activity in these areas, as well as the violation of the rights of nature and environmental consultation, enshrined in the Constitution.

We request to be heard by this Court at the hearing convened for that purpose.