



Amicus Curiae - Piatúa River

*Approach: restriction of hydroelectric projects in rivers
that are the habitat of endangered species*

CASE No. 1754 -19-JP
LORDS OF JUDGES OF CONSTITUTIONAL COURT

The Center for Democratic and Environmental Rights (hereinafter CDER) appears before the Constitutional Court of Ecuador to present *amicus curiae brief* in case No. 1754 -19-JP, selected for the development of binding jurisprudence, on rights of the nature.

SELECTED JUDGMENT

The selected judgment refers to the grant of an environmental license for the use of the waters of the Piatúa River, without specific measures being adopted to prevent negative environmental impacts of *threatened species* inhabiting the coastal ecosystem.

CDER argues that such omission violates the rights of nature for breach of the constitutional mandate requiring *enhanced protection* to prevent the extinction of wild species. This constitutional mandate is provided for by article 73 of the Constitution.

CDER also argues that, from constitutional law, this case is framed within the rights of nature through the concept of ecological flow; and, the prohibition of hydropower projects, as a restrictive constitutional measure, in rivers that are the habitat of species threatened with extinction.

CONSTITUTIONAL ASPECTS

From this background, this brief *amicus curiae* shall refer to:

- Mandate of state protection of wildlife and rights of nature.
- Evaluation of environmental impact, and the preventive emphasis of environmental law and rights of nature.
- Water, ecological wealth and rights of nature.
- The judicial duty to guarantee the rights of nature.
- *Amicus Curiae* and the rights of nature.

MANDATE OF PROTECTION OF WILDLIFE AND RIGHTS OF NATURE

Regulations in force

The Constitution of the Republic of Ecuador declares the protection of natural heritage as a *primary duty of the State*[\[1\]](#). This duty covers protected natural areas[\[2\]](#), fragile ecosystems[\[3\]](#), water[\[4\]](#); and, in general, biodiversity[\[5\]](#). In this framework, the constitutional regulations establish a *mandate to protect* [\[6\]](#) wildlife species threatened with extinction:

“All species of wildlife are protected by the State. Native, endemic, threatened or migratory species will have a higher degree of protection.

The National Environmental Authority will identify the species or groups of species of wildlife subject to evaluation and determination of the degree of threat; as well as establish the guidelines and measures applicable to their protection.”[\[7\]](#)

This *enhanced protection* for species threatened with extinction is based on the statewide objective of biodiversity conservation, provided by the Organic Code of the Environment[\[8\]](#). This law develops the constitutional mandate of biodiversity conservation[\[9\]](#); and also it establishes the state competence to regulate, control and manage[\[10\]](#) the conservation of biodiversity[\[11\]](#). “depending on...the category of endangered species...”[\[12\]](#)

The existing regulatory framework reflects the legal significance of species threatened with extinction, which requires a *greater degree of protection* by the state.

Hence, the Constitution of the Republic of Ecuador - within the framework of the rights of nature - provides for the application of precautionary and even restrictive measures to prevent their extinction.[\[13\]](#)

Historical regulations

The wildlife protection mandate was also provided by the 1981 Forestry and Conservation of Natural Areas and Wildlife Law, in force at the time the environmental license was granted:

“Wild flora and fauna are the domain of the State and the Ministry of the Environment is responsible for their conservation, protection and administration...”[\[14\]](#)

The Forestry Law even required preventive action to “avoid the elimination of threatened or endangered species of wild flora and fauna.”[\[15\]](#) The specialized doctrine of the time indicated that this protection should be assumed by the State “as an imperative and priority obligation.”[\[16\]](#)

In 1999, the Environmental Management Law was issued, which regulated the environmental impact assessment as an instrument of national environmental management.[\[17\]](#) The objective of

the environmental impact assessment referred to the previous and mandatory determination of the environmental viability of a project, work or public or private activity.

A function of the *ecological balance* provided for by the 1998 Constitution, the environmental impact assessment included the estimation of the effects caused to biodiversity, water, and the structure and function of ecosystems "present in the foreseeable affected area."[\[18\]](#)

To ensure the ecological balance in environmental management, the regulations of this law specified the scope of the assessment of the environmental impact, include wildlife and its habitat:

"For the evaluation of environmental impacts, the following relevant variables environmental media or matrices are included, among these: b) Biotic (flora, fauna and their habitat)."[\[19\]](#)

On ecological balance, the Constitutional Court for the transition period stated:

"It is evident that all human activity and especially that which entails the execution of large-scale works, has an environmental impact, the same that must be mitigated, reduced and controlled, in such a way that it does not affect the ecological balance, framing itself within a policy of sustainable development..."[\[20\]](#)

Omission of the wildlife protection mandate

The present case deals precisely with the State's omission of the *protection mandate*. Analyzing the allegation related to the impact on the habitat of wild flora and fauna, the appeals court noted:

"...there are endemic species that return to their place and are registered in the Red Book, as well as in the banks of the river are more than 50 species...in the environmental management plan...impacts are identified on the alteration of habitat as elimination of vegetation cover and landscape alteration, displacement of terrestrial fauna...we do not observe that the company has carried out specific measures for the management of impacts to the species that are in the Red Book and that is announced in the EIA and management plan, **considering that these species have special protection by the State, since they are in danger of extinction, being an obligation of the national environmental authority to observe it...**"[\[21\]](#)

Ecuadorian law established the state mandate to protect wildlife in the 1980s. In the 1990s, this mandate was integrated into environmental management, through the environmental impact assessment. And, at present, it is also integrated into the rights of nature, to prevent the extinction of wild species.

This mandate of protection was omitted when granting of the environmental license in this case, which did not include specific measures to protect species threatened with extinction.

ASSESSMENT OF ENVIRONMENTAL IMPACT, PREVENTIVE EMPHASIS AND RIGHTS OF NATURE

This case examines the role of environmental impact assessment in the framework of the rights of nature. As such, it is necessary to present the characteristics of this instrument of environmental management.

Environmental impact assessment

Principle 17 of the Rio Declaration on Environment and Development provides:

"An environmental impact assessment, as a national instrument, should be undertaken for any proposed activity that is likely to have a significant negative impact on the environment and is subject to the decision of a competent national authority."[\[22\]](#)

This principle inspired the Environmental Management Act, the rule that legislated on the environmental impact assessment and environmental management plan, emphasizing its *protective nature*.[\[23\]](#) In this regard, the Constitutional Court of Ecuador stated:

"Environmental law is a normative subsystem which regulates and sets limits on human activities to protect nature...In environmental matters there are principles based upon the protective nature (protective character) of Environmental law that is preventive and restorative rather than repressive...

One of the ways to prevent the production of damage is through the knowledge and advance assessment of the dangers and risks, and this knowledge and assessment are carried out through the advance assessment of everything that contains dangers. The precautionary and prevention principles are implemented through environmental impact studies that aim to prevent the occurrence of environmental damage.

The Ecuadorian State establishes as an instrument prior to carrying out activities capable of degrading or polluting the environment, the obligation for the interested parties to carry out an Environmental Impact Study and a respective environmental mitigation program."[\[24\]](#)

The Inter-American Court of Human Rights has highlighted the importance of the environmental impact assessment; and, more specifically, the importance of the environmental impact study. In its Advisory Opinion OC-23/17, the Court stated:

“Without prejudice to other obligations arising from international law, this Court considers that, when determining that an activity involves a risk of significant damage, it is mandatory to *carry out* an environmental impact study. Said initial determination can be made, for example, through an initial environmental impact study or because internal legislation or some other standard specifies activities that necessarily require an environmental impact study...”[\[25\]](#)

For the Inter-American Court of Human Rights, the environmental impact studies is one of the state measure to comply with the *obligation of prevention*[\[26\]](#) of environmental damage, under a standard of due diligence:

“Similarly, by virtue of the duty of prevention in environmental law, the States are obliged to use all the means at their disposal in order to prevent the activities carried out under their jurisdiction from causing significant damage to the environment (*supra* paras. 127 to 140). This obligation must be fulfilled under a **due diligence standard, which must be appropriate and proportional** to the degree of risk of environmental damage. In this way, the measures that a State must adopt for the conservation of fragile ecosystems will be greater and different from those that correspond to those adopted in the face of the risk of environmental damage of other components of the environment...”[\[27\]](#)

While emphasizing the *suitability* and *proportionality* in prevention, the Inter-American Court of Human Rights also highlighted its importance for the conservation of biodiversity, even determining a "duty to prevent significant adverse effects on biodiversity,"[\[28\]](#) supported by the Convention on Biological Diversity, which establishes:

“Each Contracting Party, to the extent possible and as appropriate: a) Shall establish appropriate procedures requiring the assessment of the environmental impact of its proposed projects that may have significant adverse effects on biological diversity with a view to avoiding or minimizing these effects and, where appropriate, it will allow the participation of the public in those procedures.”[\[29\]](#)

Hence, the Inter-American Court of Human Rights indicates that the principle of prevention of environmental damage "not only encompasses the land, water and atmosphere, but also includes flora and fauna."[\[30\]](#) To this end, the Court referred to the judgment issued by the International Court of Justice, in the case of the pulp mills on the Uruguay River:

“The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings with respect to biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent.”[\[31\]](#)

Principles of avoidance: prevention and precaution

As the Inter-American Court has indicated, the environmental impact assessment is framed within the preventive nature of environmental law. This legal discipline, indeed, is characterized by its preventive emphasis, which is its "cornerstone."[\[32\]](#) PEÑA CHACÓN maintains:

“Prevention is the golden rule and cornerstone of environmental law. Faced with damage, the obligation to repair arises; while that compared to the risk exists the obligation to prevent. It is essential to bear in mind that, in environmental matters, the most

reasonable and beneficial thing is to prevent, rather than to restore or repair the possible damage to people or the environment."[\[33\]](#)

The preventive nature of environmental law informs the basic principles of this discipline. The doctrine classifies the principles of prevention and precaution within the so-called *principles of avoidance*. BETANCOR notes:

“Environmental damage has to be avoided; What's more, the best way to protect nature is by preventing it from being damaged. This is due to the fact that it is very difficult for the damaged resource to recover its original state, that is, the state before it suffered the damage. The importance of achieving this non-result (absence of an act) explains that, at least, two basic or structural principles of environmental law are devoted to promoting it: the principles of prevention and caution or precaution."[\[34\]](#)

These principles are essential for judicial interpretation in environmental matters. FALBO states that Argentine high court's conceptualized this as "the structural framework that informs the entire system of Environmental Law."[\[35\]](#) And, regarding its specific application in the framework of environmental management, the author adds:

"...all EIA is structured by the frame building environmental principles in all its aspects and all the way: from its beginning to its end, to the extent that as being a process of environmental law administration, is ruled – prevalently – by what the principles impose. In such a way, the environmental principles operate as the central and fundamental guidelines to interpret each of the elements, procedures, approaches, requirements and methodologies of the EIA."[\[36\]](#)

Principle of prevention

In the national legal system, the principle of prevention has a constitutional hierarchy[\[37\]](#) and covers biodiversity.[\[38\]](#) Under this principle, the State shall adopt policies and measures *necessary* "to avoid negative environmental impacts, where there is certainty of harm."[\[39\]](#) Hence, the law provides:

"Activities that cause environmental risks or impacts in the national territory must ensure the protection and conservation of ecosystems and their biotic and abiotic components, in such a way that these impacts do not affect the dynamics of populations and the regeneration of their cycles. vital, structure, functions and evolutionary processes, or that prevents their restoration."[\[40\]](#)

This provision of the Organic Code of the Environment reflects a complementary approach, that articulates this principle of environmental law with the constitutional rights recognized to nature. This articulation is evident in reference legislative to *cycles, structure, functions and processes*, that the Ecuadorian Constitution recognizes and guarantees to nature.[\[41\]](#)

Principle of precaution

In national law, the principle of prevention also has constitutional status^[42] and also includes biodiversity.^[43] By virtue of this principle, the State will adopt *protective, effective and timely* policies and measures," in case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of the damage."^[44]

LORENZETTI affirms that scientific uncertainty implies the impossibility of assessing the risk with sufficient accuracy.^[45] That is why CAFFERATTA maintains that this principle constitutes a "change in classical legal logic."^[46] because it is based on doubt and not on certainty.

The difference between the precautionary principle and the preventive principle lies in the uncertainty. This not only differentiates them, but characterizes them as distinct, yet complementary, principles.^[47] Hence, the Organic Code of the Environment signals that the precautionary principle "will strengthen the preventative principle."^[48]

BETANCOR qualifies this principle as proactive: uncertainty "is no excuse for inaction."^[49] The Ecuadorian Constitution, in effect, configures it as a proactive principle, which is specified in the adoption of *appropriate* measures; but, in addition, *protective* and *effective* measures. In this sense, the Constitution is in accordance with Principle 15 of the Rio de Janeiro Declaration on Environment and Development, which calls not to postpone "the adoption of cost-effective measures to prevent environmental degradation."^[50]

Due to its complex configuration, the measures applied in specific cases are discussed. In this regard, the Constitutional Court for the transition ruled in favor of restrictive measures:

"...the precautionary principle provides guidance for governance and management in the absence of certainty, that is, the application of the precautionary principle implies restricting human activities."^[51]

The approach of the Constitutional Court is in accordance with the Constitution, which provides for the application of *precautionary and restrictive measures* for activities that may lead to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles.^[52]

Article 73 of the Constitution provides that the *State is to apply precautionary and restrictive measures for activities that may lead to the extinction of species*: hence, the Constitutional Court has defined these activities as "high risk for the environment."^[53]

Furthermore, the measures are *mandatory*, so the Constitutional Court has specified that their adoption constitutes a "duty of the State."^[54] These measures apply to activities that *may lead to the extinction* of species. In other words, certainty or actual damage is not required for its application, but rather the *threat* of extinction.

The principle of avoiding environmental harm was not followed in this case

The principle of avoidance (avoiding harm) was not applied in this case to provide enhanced protection for endangered species. When analyzing the allegation related to the impact on the habitat of wild flora and fauna, the appeal court noted:

“...There are no differentiated measures for the mitigation of negative impacts on these species, constituting a failure of both the company and the national environmental authority, since in the first observations (clarifications) of the MAE, it orders to carry out those measures for a specific species (neotropical otter), leaving aside the others that are subject to special protection and only has to perform an analysis on the sensitivity levels of the area for the components of ornithofauna, herpetofauna, of this obligation that the company had to correct, they are satisfied that have said that the impact is manageable but without concrete measures in favor of the aforementioned species, violating article 71 of the Constitution in what corresponds to the right to have their existence fully respected and the maintenance and regeneration of their vital cycles, structure, functions and evolutionary processes, since in the absence of impact management measures, this will affect the life cycle of these species, concomitant with the precautionary principle (article 396 inc. two; and, 73 *ibid*), where in case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of the damage, the State will adopt effective and timely protective measures...”[\[55\]](#)

The omission of the preventive emphasis, within the framework of environmental management, violates the rights of nature, due to the breach of the *constitutional mandate of enhanced protection* to prevent the extinction of wild species, provided for by article 73 of the Constitution.

This protection mandate was omitted when granting an environmental license that did not include specific measures to protect species threatened with extinction.

WATER, ECOLOGICAL FLOW AND RIGHTS OF NATURE

Water

When studying the constitutional right to water, Andrés Martínez points out that "the vision of the Ecuadorian fundamental norm is eminently protectionist and *for the* rights of nature..."[\[56\]](#)

Protectionist vision

The constitutional standard includes water as part of what the Constitutional calls *strategic state sectors*, which are managed "in accordance with the principles of environmental sustainability, precaution, prevention and efficiency."[\[57\]](#) The Constitution also provides for the integrated management of water resources, prioritizing ecosystem sustainability in the use and exploitation of water.[\[58\]](#) Consequently, the Organic Law on Water Resources, Uses and Utilization of

Water elevates the protection of water to the normative scope of a principle,[\[59\]](#) which is specified – among others – through the ecological flow and water protection zones.

The object of this law is, therefore, markedly protectionist, which is ratified in the integrated and comprehensive water management model, with an ecosystem approach; and, in the establishment of state co-responsibility "in the protection, recovery and conservation of water sources."[\[60\]](#)

Vision for the rights of nature

The Constitution frames water in the development regime, which is governed by the State duty to guarantee the rights of nature.[\[61\]](#) Consequently, Article 64 of the Organic Law on Water Resources, Uses and Utilization of Water states:

“Nature or Pacha Mama has the right to the conservation of water with its properties as an essential support for all forms of life. In water conservation, nature has the right to:

- a) The protection of its sources, catchment areas, regulation, recharge, outcrop and natural water courses, in particular, snow-capped mountains, glaciers, moors, wetlands and mangroves;
- b) The maintenance of the ecological flow as a guarantee of preservation of ecosystems and biodiversity;
- c) The preservation of the natural dynamics of the integral water cycle or hydrological cycle;
- d) The protection of hydrographic basins and ecosystems from all contamination; and,
- e) The restoration and recovery of ecosystems due to the effect of imbalances produced by water pollution and soil erosion.”[\[62\]](#)

Ecological flow

Ecological flow is legally defined as the quantity and quality of water that is required to maintain an adequate level of health in the ecosystem.[\[63\]](#) To this end, the Organic Law on Water Resources, Uses and Utilization of Water establishes the state and citizen responsibility to "respect the quantity and quality required to protect biodiversity and surrounding ecosystems."[\[64\]](#)

The regulatory framework applicable to the ecological flow highlights the importance of the riparian ecosystem: hence, the law establishes *water protection zones*,[\[65\]](#) extended a hundred meters from the riverbed, in order to prevent the deterioration of the associated ecosystems.[\[66\]](#)

Ecosystem approach

As can be seen, the law develops the constitutional approach to water as a “vital element of nature,”[\[67\]](#) whose management must be *comprehensive*: "The State will guarantee the conservation, recovery and comprehensive management of water resources, hydrographic basins and ecological flows associated with the hydrological cycle."[\[68\]](#) In this framework, the

Constitution includes environmental management "to guarantee water management from an *ecosystem approach*."[\[69\]](#)

The specialized doctrine defines the *ecosystem approach* as a "strategy for the integrated management of land, water and living resources that promotes the conservation and sustainable use of biological diversity in an equitable manner."[\[70\]](#) The Conference of the Parties to the Convention on Biological Diversity integrated this definition into International Environmental Law:

"The management of living components is considered at the same time as economic and social considerations at the level of the organization of the ecosystem, not simply as the focus around which the management of species and habitats revolves."[\[71\]](#)

The ecosystem approach relies on the proper management of living components. As such, the Ecuador Constitution prioritizes the "sustainability of the ecosystem"[\[72\]](#) over the use and exploitation of water.

Impact on the ecological flow of the Piatúa River

The selected case refers precisely to the guarantee of the rights of nature in the integral management of water, emphasizing the maintenance of the ecological flow for the preservation of ecosystems and biodiversity.

When analyzing the allegation regarding the impact on the flow of the Piatúa River, the appeal court noted:

"...By not having technical precision from SENAGUA at the time of reforming the resolution for the use of water in favor of the company, it is shown that the ecological flow can be affected since there is a very minute level between the average flow, what was granted for the use of the company, and ecological flow, a fact that in times of low water can affect the river and its aquatic habitat...the single Water authority made its own technical report that served as the basis for granting the first use on October 16, 2015, but to reform the initial resolution on January 12, 2016, there was no report to support the change in the flow use authorization, hiding behind a "calculation error," which was illogical since one of the conditions for the authorization of the productive use of water, is the "verification of the certain existence of water, in sufficient quality and quantity, on the basis of the certainty of availability," a condition that is described in article 95 of the Organic Law on Water Resources, Uses and Utilization of Water, that action by SENAGUA led to **the ecological flow of the Piatúa River being put at risk, this would lead to environmental damage that under the precautionary principle it is the obligation of the State and society to avoid...**"[\[73\]](#)

It should also be noted that the protection of water also guarantees human rights. This articulation is highlighted in the recent report of the United Nations Special Rapporteur on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment:

“The report focuses on human rights and Sustainable Development Goal 6, which goes far beyond the universal supply of safe water, sanitation and hygiene. The goals of Goal 6 also refer to the increase of water quality through the reduction of pollution, the increase of the efficiency in the use and the reduction of the water scarcity, the integrated management of the water resources, the protection and restoration of water-related ecosystems, international cooperation and capacity-building, and public participation in the management of water resources.”[\[74\]](#)

The affectation of the ecological flow not only violates the human right to water, but also the rights of nature due to the breach of the guarantee of preservation of biodiversity provided for by article 64 of the Organic Law of Water Resources, Uses and Utilization of Water, since the river and its protection zone constitute the habitat of endangered species.

This guarantee of preservation was omitted in the granting of the environmental license which did not include specific measures to protect species threatened species that inhabit the banks of the river.

GUARANTEE THE RIGHTS OF NATURE: GENERAL DUTY OF THE STATE

The Constitution assigns to the State the *promotion*[\[75\]](#) and *guarantee*[\[76\]](#) of the rights of nature. In this regard, the Constitutional Court has indicated:

a. In 2009, the First Chamber of the Constitutional Court for the transition period, in resolution related to the environmental management of an agro-industrial swine activity along the Blanco River (Santo Domingo de los Tsáchilas), made the first reference to the duty of the State to **guarantee the rights of Nature** “as part of a philosophy guaranteeing rights...”[\[77\]](#)

b. In 2012, the Constitutional Court for the transition period, in a ruling issued in public action of the Organic Law of the Special Regime for the Conservation and Sustainable Development of the Province of Galapagos, stated:

"Such position that the Court is obliged to maintain becomes more relevant if we consider that the Constitution of the Republic of 2008 establishes an inherent chapter of the 'rights of nature' that **the State is obliged to promote and guarantee.**"[\[78\]](#)

c. In 2018, the Constitutional Court issued a ruling of extraordinary protective action on the use of the Alpayacu River (Pastaza) for agro-industrial activities, which ratified the "fundamental duty of the State [of] **respect and enforce the rights guaranteed and established in the constitutional norm.**"[\[79\]](#)

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

- a. In 2009, the First Chamber of the Constitutional Court for the transition period, in the case of the Blanco River, made the first general reference to the duty of judges in this matter: “The principle of integrality or completeness dictates that **to exercise true justice, which is the objective of this Court**, it is necessary to look at all the elements of the case and the parties involved, one of them being Nature.”[\[80\]](#)
- b. In 2015, the Constitutional Court issued a judgment in an extraordinary protection action related to the occupation of the Cayapas-Mataje Ecological Reserve, in which it stated: “...the constitutional character recognized to the rights of nature implicitly entails the obligation of the State to ensure its effective enjoyment, **falling specifically within the courts the task of ensuring the protection and protection of them**, in cases submitted to it and where they can be violated.”[\[81\]](#)

CONCLUSIONS

1. There are specific constitutional provisions regarding the adoption of timely, effective, and protective measures for wild species in danger of extinction, particularly those that inhabit riparian ecosystems. These provisions are found in Articles 73, 318, and 411 of the Constitution of the Republic of Ecuador.
2. Article 73 of the Constitution stipulates the obligation to adopt precautionary measures and restrict activities: a) that may lead to the extinction of species; b) that may lead to the destruction of ecosystems; or, c) that may lead to permanent alteration of natural cycles.
3. The mandate of enhanced protection for species threatened with extinction articulates directly with the rights of nature and ensuring full respect of their existence; as well as the conservation of water, the maintenance of the ecological flow, and the preservation of riparian ecosystems.
4. Articles 73, 318, and 411 of the Constitution are consistent with Article 14, paragraph 1, section d) of the Convention on Biological Diversity which refers to the requirement to evaluate the environmental impact of projects that may have significant adverse impacts on biodiversity in order to avoid or reduce those impacts.
5. The omission of timely, effective, and protective measures violates the rights of nature due to the breach of the constitutional mandate of enhanced protection to prevent the extinction of wild species.

SPECIFIC APPROACH

Hydroelectric projects cause significant damage to people, wildlife, rivers, and other natural ecosystems. CDER does not believe that these projects are compatible with the constitutional rights of nature. However, by proposing the adoption of a restrictive measure, as described in this section, the CDER recognizes that Ecuadorian law does not prohibit such projects; and, therefore, it proposes the incorporation of the mandate of *enhanced* in the environmental impact assessment of projects, works or activities associated with hydroelectric projects, for the protection for wild species threatened with extinction.

Due to this mandate for enhanced protection, this *amicus curiae* brief proposes the following restrictive constitutional measure:

That the productive use of water for the generation of electricity be restricted in rivers that are the habitat of wild species threatened with extinction.

This measure does not prohibit the productive use of water for the generation of electricity in all the rivers of the country; rather, it would only restrict such activities in those rivers that are habitat for wild species threatened with extinction.

The restriction would consist, specifically, of not carrying out electricity generation projects.

This restrictive measure, based on the mandate of article 73 of the Constitution of the Republic of Ecuador, is in accordance with the guarantee of preservation of biodiversity (article 64 Organic Law of Water Resources); and it is consistent with the state duty to ensure the protection of biotic components in activities that cause environmental risks or impacts, provided for in environmental law (article 190 Organic Environmental Code).

INTEREST IN THE CAUSE

Being a case concerning the rights of nature, which is our institutional object, CDER expressed interest in this case, expressed in the letter of *amicus curiae*.

The *amicus curiae* is an "institute of procedural law"[\[82\]](#) that allows the presentation of legal or interdisciplinary reasoning, by those who are not a procedural party, in cases whose purpose transcends the interest of the parties, in order to contribute to the realization of justice.

The purpose of the *amicus curiae* is to contribute to the realization of justice.[\[83\]](#) This has been emphasized by the Constitutional Court, which affirms that it is a *tool* that allows "to contribute with legal criteria on a specific point, in order to facilitate and contribute to justice operators ..."[\[84\]](#)

It is a voluntary, spontaneous and *bona fide* collaboration, which must contribute to the cause; never the opposite. This element is highly considered, since only the proper application of this figure will allow it to be legitimized. The reasoning provided must, therefore, be clear, concrete, complete, serious, timely, pertinent; and, always, well founded. In sum, and following the guidelines of the Organic Law of Jurisdictional Guarantees and Constitutional Control, the *amicus curiae* should contribute to *better resolve* the case.

It should be noted that, although the national standard does not refer, it is understood that whoever acts as *amicus curiae*, does so under the parameters of suitability. In this sense, the Argentine standard requires "recognized competence on the debated issue in the lawsuit."^[85]

CDER presents this *amicus curiae brief* in order to provide specialized legal criteria to better resolve the selected case regarding the constitutional rights of nature.

REQUEST

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

ADDRESS AND NOTIFICATIONS

For notifications, you will receive them in the electronic box: echejur@yahoo.ca and judicial box No. 264, of Quito, belonging to Doctor Hugo Echeverría, Lawyer with professional registration No. 17-2001-108 of the Lawyers Forum, to whom is design to a lawyer sponsor, to whom I authorize to submit written and appear at hearing to present arguments concerning this *amicus curiae*.

I sign together with my lawyer.

Mari Margil

Hugo Echeverría
CDER Registration No. 17-2001-108
Lawyers Forum

[1] Constitution of the Republic of Ecuador. Article 3 numeral 7.

[2] Ibid. Article 397 numeral 4.

[3] Ibid. Article 406.

[4] Ibid . Article 411.

[5] Ibid. Article 395 numeral 1.

[6] Yarza, Fernando. Environment and fundamental rights. Constitutional Court. Center for Political and Constitutional Studies. Madrid. 2012. Page 35.

[7] Regulation to the Organic Code of the Environment. Article 87.

[8] Organic Code of the Environment. Article 30 numeral 1.

- [9] Constitution of the Republic of Ecuador. Articles 395 numeral 1 and 400.
- [10] Organic Code of the Environment. Article 14.
- [11] Ibid. Article 24 numeral 2.
- [12] Ibid. Article 31.
- [13] Constitution of the Republic of Ecuador. Article 73.
- [14] Law on Forestry and Conservation of Natural Areas and Wildlife. Article 73
- [15] Ibid. Article 73 literal c).
- [16] Bucheli, Franklin. Regulations for the Administration of Protected Natural Areas and Wild Biodiversity of Ecuador. INEFAN. Quito. 1999. Page 103.
- [17] Environmental Management Law. Chapter II, Title III.
- [18] Ibid. Glossary of definitions.
- [19] Unified Text of Secondary Environmental Legislation of the Environment. Book VI. Article 28.
- It should be noted that current regulations also require a detail of the biotic component in the environmental impact assessment - article 434 literal d) RCODA; and, in addition, the duty to "ensure the protection and conservation of ecosystems and their biotic components ..." - Article 190 CODA.
- [20] Constitutional Court for the transition period. Third Room. Resolution No. 1212-2007-RA. Official Register Special Edition No. 91. 01/07/2009.
- [21] Provincial Court of Pastaza. Multicompetent room. Judgment No. 16281-2019-00422. The bold is added.
- [22] United Nations Organization. Rio Declaration on Environment and Development. Rio de Janeiro. 1992.
- [23] It should be noted that the current CODA maintains the annotated legal scheme: the *study identifies* the impact and the *plan* establishes *actions* to manage it.
- [24] Constitutional Court. Third Room. Resolution No. 187. Official Registry No. 357. 06/16/2004.
- [25] Inter-American Court of Human Rights. Advisory Opinion OC-23/17. Environment and Human Rights. 11/15/2017. Para. 160.
- [26] Ibid. Para. 141.
- [27] Ibid. Para. 142. Bold is added.
- [28] Ibid. Para. 134.
- [29] Convention on Biological Diversity. Article 14 numeral 1 literal a).
- [30] Inter-American Court of Human Rights. Advisory Opinion OC-23/17. Para. 129.
- [31] International Court of Justice. Case of the pulp mills on the Uruguay River (Argentina vs Uruguay). Judgment. 04/20/2010. Para. 262.
- [32] Peña Chacón, Mario. Effective environmental law [electronic resource]. Costa Rica university. Saint Joseph. 2016. Page 29.
- [33] Ibid.
- [34] Betancor, Andrés. *Environmental Law* . The Law. Madrid. 2014. Page. 250.
- [35] Falbo , Aníbal. "*The environmental impact assessment in the jurisprudence of the Supreme Court of Justice of the Nation* ." The Law. 2021-A. No. 38. 02/19/2021. Thompson Reuters. Buenos Aires. Page 2.
- [36] Ibid.
- [37] Constitution of the Republic of Ecuador. Article 396.
- [38] Ibid. Article 313.

[39] Ibid. Article 396.

[40] Organic Code of the Environment. Article 190.

[41] Constitution of the Republic of Ecuador. Article 71.

[42] Ibid. Article 396.

[43] Ibid. Article 313.

[44] Ibid. Article 396.

[45] Lorenzetti, Ricardo. *Theory of Environmental Law* . Bogota Themis, 2011. Page 84.

[46] Cafferatta, Nestor. "The principles and rules of environmental law." *Fifth Regional Training Program in Environmental Law and Policies* . UNEP, 2010. P. 50.

[47] Cafferatta, Nestor. "The principle of prevention in environmental law." *Summa Ambiental* . Volume I. Buenos Aires, Abeledo-Perrot, 2011. P.268.

[48] Organic Code of the Environment. Article 9 numeral 7.

[49] Betancor, Andrés, *op. cit.* Page 272

[50] United Nations Organization. Rio de Janeiro Declaration on Environment and Development. Principle 15.

[51] Constitutional Court for the transition period. Second Room. Resolution No. 1369. Official Gazette Supplement No. 112. 03/27/2009.

[52] Constitution of the Republic of Ecuador. Article 73.

[53] Constitutional Court. Judgment No. 023-18-SIS-CC .

[54] Constitutional Court. Judgment No. 023-18-SIS-CC and Judgment No. 034-18-SIN-CC.

[55] Provincial Court of Pastaza. Multicompetent room. Judgment No. 16281-2019-00422.

[56] Martínez, Andrés. *The right to water in Ecuador. An analysis from Political Science and Public Law* . University of Cuenca. Basin. 2017. Page 22.

[57] Constitution of the Republic of Ecuador. Article 313.

[58] Ibid. Article 411.

[59] Organic Law of Water Resources, Uses and Use of Water. Article 4 literal b).

[60] Ibid. Article 12.

[61] Constitution of the Republic of Ecuador. Article 277 numeral 1.

[62] Organic Law of Water Resources, Uses and Use of Water. Article 64.

[63] Ibid. Article 76.

[64] Ibid. Article 77.

[65] Ibid. Article 13.

[66] Regulation to the Organic Law of Water Resources, Uses and Use of Water. Article 63.

[67] Constitution of the Republic of Ecuador. Article 318.

Article 1 of the Organic Law on Water Resources, Uses and Use of Water also states that water is *a vital element of nature* .

[68] Ibid. Article 411.

[69] Ibid. Article 412.

[70] Guerrero, Eduardo; De Keizer , Otto; Cordoba, Rocío. *The Application of the Ecosystem Approach in the Management of Water Resources* . IUCN. Quito. 2006. Page 5.

[71] Convention on Biological Diversity. Conference of the Parties. Decision VII / 11 <https://www.cbd.int/decision/cop/?id=7748>

[72] Constitution of the Republic of Ecuador. Article 411, second paragraph.

[73] Provincial Court of Pastaza. Multicompetent room. Judgment No. 16281-2019-00422. The bold is added.

[74] United Nations. General Assembly. A / HRC / 46/28. Human rights and the global water crisis: water pollution, water scarcity and water-related disasters. Report of the Special Rapporteur on the question of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment. 2021. Para. 2. 3.

[75] Constitution of the Republic of Ecuador. Article 71, third paragraph.

[76] *Ibid.* Article 277 numeral 1.

[77] Constitutional Court for the Transition Period. First Room. Resolution No. 0567-08-RA.

[78] Constitutional Court for the Transition Period. Sentence No. 017-12-SIN-CC.

[79] Constitutional Court. Judgment No. 023-18-SIS-CC.

[80] Constitutional Court for the Transition Period. First Room. Resolution No. 0567-08-RA.

[81] Constitutional Court. Judgment No. 166-15-SEP-CC.

[82] Nápoli , Andrés and Vezzulla , Juan Martín. "The Amicus Curiae in environmental causes ". *Argentine jurisprudence* . 2007.

[83] *Ibid.*

[84] Constitutional Court of Ecuador. Case No. 0278-12-EP. Judgment No. 177-15-SEP-CC. 06/03/2015.

[85] Supreme Court of Justice of the nation (Argentina). Agreed 7/13. File 2439/04. Article 4.