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Indigenous rights and extractivism in Argentina

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Sommario: **1.** Indigenous rights in Argentina. **2.** Indigenous rights on ancestral territories. **3.** The "*modelo extractivista*". **4.** Indigenous rights in the Province of Neuquén. **5.** The Campo Maripe Community and YPF-Chevron. **6.** The Wenctru Trawel Leufu Community and the Empresa Petrolera Piedra de Aguila. **7.** Conclusions.

1. Indigenous rights in Argentina

The second half of the 20th-century has represented perhaps the most important and long-awaited moment for the indigenous peoples[1] in Argentina, because the country aligned itself with the policies adopted by the other Latin American countries during the same period, in relation to indigenous rights, and since the other Latin American countries were also characterised by the so-called *emergencia indígena*[2] phenomenon.

In fact, the constitutional reform of 1994 repealed the then outdated art. 67 c. 15, drawn up for the Constitution of 1853/60, and that in the second half of the 19th century had legitimised the military campaigns against the indigenous peoples still present in some areas of the country and which had ended with the fragmentation of the communities and the loss of their lands, absorbed by the State or by the emerging Provinces - thereby becoming *tierras fiscales* - and to be then donated to those who had taken part in or financed the same military expeditions, or were sold to national or foreign investors[3].

* Articolo sottoposto a referaggio.

[1] The 2010 census estimated a total population of 40,117,096 inhabitants, of which 955,032 are indigenous (approximately 2%) who live, primarily in the following Provinces: Chubut (8.5%), Neuquén (7.9%), Jujuy (7.8%), Río Negro (7.1%), Salta (6.5%), Formosa (6.1%) and La Pampa (4.5%), refer to http://censo2010.indec.gov.ar/resultadosdefinitivos_totalpais.asp.

[2] J. Bengoa, *La emergencia indígena en América latina*, Fondo de Cultura Económica, 2008, 2° ed.

[3] Art. 67 c. 15 of the Constitution of 1853/60 attributed to Congress the task of "Proveer a la seguridad de las fronteras; conservar el trato pacífico con los indios, y promover la conversión de ellos al catolicismo" and legitimised two military campaigns: in the South the Conquista del desierto in 1880 that moved the South frontier down to the Río Negro and then other expeditions, above all, in the area of the

Whereas the new art. 75 c. 17 introduced in 1994 listed a large catalogue of indigenous rights, including the right to collective ownership of the lands[4] occupied traditionally, participation in managing the natural resources present in those territories and the right to a bilingual and intercultural education[5].

Ley 23.302 de Política Indígena y Apoyo a las Comunidades Aborígenes (hereafter referred to as *Ley 23.302*), had already been approved in 1985, and had stated "de interés nacional la atención y apoyo a los aborígenes y a las comunidades indígenas existentes en el país, y su defensa y desarrollo para su plena participación en el proceso socioeconómico y cultural de la nación, respetando sus propios valores y modalidades" (art. 1) and had specified that "á los conjuntos de familias que se reconozcan como tales por el hecho de descender de poblaciones que habitaban el territorio nacional en la época de la conquista o colonización e indígenas o indios a los miembros de dicha comunidad" (art. 2) would have been considered for indigenous communities, to which the "personería jurídica" status would have been acknowledged to be acquired by registering in the Registro de Comunidades Indígenas (hereafter, referred to as the Re.Na.Ci., art. 2) that would have enabled the territories[6] to be assigned "título gratuito" (art. 9) and that in the future it would

current Province of Neuquén, in order to consolidate the border comprising the river of the same name, and in the North the Campaña or Guerra del Chaco in 1884 that moved the frontier to the Río Bermejo, these were followed by other expeditions up to around 1911 to consolidate control of the area. The bibliography is extensive, and includes R. Mandrini, *La Argentina aborigen. De los primeros pobladores a 1910*, Siglo XXI Editores, Buenos Aires, 2008, and E. H. Mases, *Estado y cuestión indígena. El destino final de los indios sometidos en el Sur del territorio (1878-1930)*, Prometeo, Buenos Aires 2010.

[4] In this document, the term 'land/lands'includes the broader concept of 'territory/territories', as defined in art. 13.2 of the ILO 169 Convention, namely, "que cubre la totalidad del hábitat de las regiones que los pueblos interesados ocupan o utilizan de alguna otra manera". In this regard, reference is also made to the judgement passed by the CSJN *Martínez Pérez, José Luis c/Palma, Américo y otros s/ medida cautelar s/ casación*, 10 de noviembre de 2015 that is discussed in § 7.

[5] Art. 17 c. 15: "Corresponde al Congreso [...] reconocer la preexistencia étnica y cultural de los pueblos indígenas argentinos. Garantizar el respeto a su identidad y derecho a una educación bilingüe e intercultural; reconocer la personería jurídica de sus comunidades, y la posesión y propriedad comunitarias de las tierras que tradicionalmente ocupan; y regular la entrega de otras aptas y suficientes para el desarrollo humano; ninguna de ellas será enajenable, trasmisible ni susceptible de gravámenes y embargos. Asegurar su participación en la gestión referida a sus recursos naturales y a los demás intereses que los afecten. Las provincias pueden ejercer currentemente estas atribuciones". http://infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/804/norma.htm.

[6] Art. 7: "La adjudicación en propiedad a las comunidades indígenas existentes en el país, debidamente inscriptas, de tierras aptas y suficientes para la explotación agropecuaria, forestal, minera, industrial o artesanal, según las modalidades propias de cada comunidad. Las tierras deberán estar situadas en el lugar donde habita la comunidad o, en caso necesario en las zonas próximas más aptas para su desarrollo. La adjudicación se hará prefiriendo a las comunidades que carezcan de tierras o las tengan insuficientes; podrá hacerse también en propiedad individual, a favor de indígenas no integrados en comunidad, prefiriéndose a quienes formen parte de grupos familiares. La autoridad de aplicación atenderá también a la entrega de títulos definitivos a quienes los tengan precarios o provisorios". The bold type has been used by the writer. Refer to http://indigenas.bioetica.org/leyes/23302.htm for the text of *Ley 23.302*.

not have been possible to seize or sell the territories, and the beneficiaries would have been exempt from paying taxes and duties[7].

Ley 23.302[8] had also made provision to create the Instituto Nacional de Asuntos Indígenas (hereafter, referred to as the I.N.A.I.), dependent on the Ministerio de la Salud y Acción Social, currently, the Ministerio de Desarrollo Social that would have been responsible for defining and implementing the policies relating to indigenous peoples and managing the Re.Na.Ci. (articles 5-6). More recently the Consejo de Participación Indígena (C.P.I.) and the Consejo de Coordinación (C.C.) were established within its structure to guarantee the participation of the indigenous peoples, with their own representatives, in the government's decisions regarding this aspect[9].

The Re.Na.Ci. was created in 1995, and was supported by the Registro Nacional de Organizaciones de Pueblos Indígenas (Re.No.Pi.) in 2010, namely, those organisations "que ostenten la representación mayoritaria de las comunidades indígenas de un mismo o de distintos pueblos indígenas a nivel provincial, regional o nacional", specifying that "las comunidades deberán tener registrada su personería jurídica en el Registro Nacional de Comunidades Indígenas"[10].

Over the years, each Province – that corresponds to a Member State of the Argentine Confederation - developed specific legislation at a local level in this regard that was more or less detailed, and based on the percentage of indigenous people present in its territory, creating institutions for relations with the communities and a specific register of communities, and coordinating with the National register[11]. In fact, this entails a responsibility in competition with the federal responsibility, as envisaged in art. 75 c. 17 of the Constitution ("Las provincias

[7] Art. 11: "inembargables e inejecutables […] con la prohibición de su enajenación durante un plazo de veinte años a contar de la fecha de su otorgamiento"; art. 9: "los beneficiarios estarán exentos de pago de impuestos nacionales y libres de gastos o tasas administrativas".

[8] The law also established requirements with regard to "servicios y planes de educación y cultura en las áreas de asentamiento; alfabetización, planes de salud para la prevención y recuperación de la salud física y psíquica; derechos previsionales; planes de vivienda".

[9] The Consejo de Participación Indígena was established in 2004 and then reformed in 2008 with the creation of the Consejo de Coordinación (https://www.desarrollosocial.gob.ar/wp-content/uploads/2015/08/1.-INAI-Organos-de-consulta-y-participacion.pdf). Furthermore, it is important to remember: la Secretaría de Derechos Humanos that operates through the Instituto Nacional contra la Discriminación, la Xenofobía y el Racismo, la Dirección de Pueblos Originarios de la Secretaría de Medio Ambiente e il Defensor del Pueblo.

[10] Art. 4. Resolución 328/2010, http://digesto.desarrollosocial.gob.ar/normaTexto.php?Id=156&organismo=Instituto%20Nacional%20de%20Asuntos%20Ind%EDgenas.

[11] Refer to http://www.indigenas.bioetica.org. for the provincial laws and regulations.

pueden ejercer currentemente estas atribuciones") and explained in greater detail in the following judgement: *Confederación Indígena del Neuquén c/ Provincia del Neuquén s/ acción de inconstitucionalidad* passed by the Corte Suprema de Justicia de la Nación (hereafter, referred to as the CSJN) on 10th December 2013, and that established "tanto la Nación como las provincias tienen la competencia suficiente de reglamentación en materia de derechos de los pueblos originarios en sus respectivas jurisdicciones, siempre que ello no implique por parte de los estados provinciales una contradicción o disminución de los estándares establecidos en el orden normativo federal […] dichos estándares federales se encuentran contenidos y especificados tanto en el marco constitucional sub examine y el Convenio 169 de la OIT como así también en la ley nacional de política indígena y su decreto reglamentario"[12].

As recalled by the CSJN the provisions of the ILO 169 Convention regarding Indigenous and Tribal Peoples (1989) effective from 3rd July 2001[13] are also applicable in Argentina, and in the new Millennium, the country voted in favour of the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP) dated 13st September 2007[14]. Lastly, it is important to remember the recommendations and the case law - respectively - of the Comisión and the Corte Interamericana de Derechos Humanos in this regard [15].

12 http://www.infojus.gob.ar/jurisprudencia/FA13000190-confederacion_provincia_accion-federal-2013.htm.

13 Signed in 1989, rectified with law 24.071 of 1992 that substituted the ILO 107 Convention of 1957 that it had endorsed in 1959 with Ley 14.932.

14 Furthermore, with the constitutional reform of 1994 art. 75 c. 22 of the Constitution lists the international treaties and agreements to protect human rights which "tienen jerarquía superior a las leyes" and which are: "La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Sólo podrán ser denunciados, en su caso, por el Poder Ejecutivo Nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara". For the future it ordered "Los demás tratados y convenciones sobre derechos humanos, luego de ser aprobados por el Congreso, requerirán del voto de las dos terceras partes de la totalidad de los miembros de cada Cámara para gozar de la jerarquía constitucional".

15 Argentina endorsed the OEA/OSA in 1984, acknowledging the jurisdiction of the Comisión and of the Corte Interamericana de Derechos Humanos, http://www.oas.org/es/cidh/ e http://www.corteidh.or.cr.

2. Indigenous rights on ancestral territories

Three important aspects were acknowledged by the Constitution in 1994 relating to indigenous land rights: ethnic and cultural pre-existence, community ownership of the lands occupied traditionally and participation in managing the natural resources in their territories.

Armed with these rights, more and more indigenous communities, from the end of the '90s, began to claim specific territories which had been taken from them from the end of the 19th century, after the military campaigns and the policy that followed (refer to § 1), requesting a formal acknowledgement of their rights or by simply occupying the territories, despite the fact that in the meantime - in accordance with the positive law in force - the territories had become the property of another owner, (private parties or national or foreign undertakings).

The well-known problem of the concentration of land in the hands of a few owners acquired greater visibility at that time, but - above all - the 'extranjerización' process of the land and natural resources emerged, a process promoted during the presidencies of Carlos Saúl Menem (1989-1999), when approximately 10% of the country's territory where 90% of the mineral resources were concentrated had been sold to foreign investors, and which - in 1994 - was supported by the 'reconocimiento constitucional' of the indigenous rights over ancestral territories, without taking into account that the areas involved could have coincided, in whole or in part, with the areas sold or however, belonging to another owner. In fact, the acceptance of the indigenous claims by Menem was only an electoral move, to satisfy a portion of potential voters at the presidential elections of 1995. Without doubt the electoral strategy rewarded Menem and his party, in the short-term, with a victory of the presidential elections in 1995, but later revealed the difficulties - concealed or minimised up until then - for its full implementation.

However, the increase in territorial claims initially stimulated a number of initiatives[16] at a provincial level to regulate possession of the land and a case history developed - where the disputes had reached the courts – which sometimes ruled in favour of the indigenous communities, even if the judiciary proved to be quite reluctant to acknowledge both the

[16] 33 title deeds were awarded to a number of indigenous communities between 2006 and 2007 in the Province of Jujuy with the Programa de Regularización y Adjudicación de Tierras de Población Aborigen (1997); in 1991 the Province of Salta granted the community title deed to the Asociación Lhaka Honat, integrated by 60 communities, but the construction of infrastructures in the territory generated a conflict that reached the Comisión Interamericana that ruled in favour of the communities on 27th March 2012, urging Argentina to proceed, as soon as possible, to identify, mark out and assign approximately 400,000 hectares of land, but this matter is still unresolved; the Province of Neuquén created a number of reserves for indigenous communities with decree No. 737 of 1964, however, without completely resolving the territorial conflicts.

indigenous rights and the "*calidad* de indígenas – y en su caso otorgar efectos jurídicos – a quienes son parte de procesos judiciales"[17].

The profound political, economic and social crisis experienced by the country during 2001-2002 also impacted the indigenous peoples, above all, in terms of the strategies adopted in the economic sector in subsequent years by the governments lead by Kirchner (2003-2007) and by Fernández (2007-2011; 2011-2015), to revive the country, and which focused on the production and exports of agricultural products[18] and the exploitation of natural resources, in particular, gas and crude oil, first of all to satisfy the domestic energy requirements. In fact, from 2004 the government promised a number of initiatives[19] to increase investments in the research and exploitation of energy reserves of conventional fields [20], but above those of unconventional fields, which from the research point of view, led to the discovery of the Vaca Muerta field in the Province of Neuquén in 2010 [21], and - from the legislative point of view - led to the approval of *Ley 26.741 de Soberanía Hidrocarburífera* in 2012 that stated "de interés público nacional y como objetivo prioritario de la República Argentina el logro del autoabastecimiento de hidrocarburos, así como la exploración, explotación, industrialización, transporte y comercialización de

[17] M. M. Gomiz, "El derecho constitucional de propriedad comunitaria indígena en la jurisprudencia argentina", in *Dossier propiedad comunitaria indígena*, F. Kosovsky y S. L. Ivanoff (comp.), EDUPA, 2015, p. 136. In addition, D. Rodríguez Duch, "El derecho de las comunidades originarias en las deciciones jurisprudenciales" 2004, in http://indigenas.bioetica.org/not/nota20.htm, and the more recent "Apuntes sobre Propiedad comunitaria indígena", in *Dossier propiedad comunitaria indígena*, F. Kosovsky y S. L. Ivanoff (comp.), EDUPA, 2015, p. 38, 2015.

[18] Above all soy, of which it has become one of the main producers: the 10 million hectares sown in 2001 increased to 12 million in 2003, and increased to 19 million in 2010, that is to say 56% of the country's land was cultivated, and the target for 2020 is 25 million hectares, increasing from 52 to approximately 71 million tons of product (+34%). The government took advantage of the soy boom with the *retenciones*, namely, the compulsory levies fixed at 35% on the income from agricultural exports, which increased the tax revenues, making available greater public resources then used in part for social support and development policies for the country. The *Plan Estratégico Agroalimentario y Agroindustrial Participativo y Federal (PEA²)* presented in September 2011, besides reinforcing the 'modelo sojero', established the target for 2020 to increase the production of wheat (+ 60%), maize (+106%) and sunflower (+45%). Ministerio de Agricultura, Ganadería y Pesca de la Nación http://www.maa.gba.gov.ar/2010/pea2.

[19] In 2004 the government created the Energía Argentina Sociedad Anónima (Enarsa) as the body responsible for research in the energy field; in 2006 *Decreto 546/06* and *Ley Corta 26.197/06* encouraged all the Provinces of the country to attract investments in the sector and *Ley 26.190* initiated the Programa de Generación con Recursos Renovables (GENREN).

[20] However, destined to run dry, according to the forecasts of the Secretaría de Energía de la Nación, D. di Risio – H. Scandizzo, "La inseguridad jurídica tiene rostro petrolero", in Voces en el Fénix, *Tierra prometida*, 25 de junio 2013, n. 25, p. 131.

[21] In 2013 the United States EIA – Energy Information Administration estimated the production of Vaca Muerta to be 27,000 million barrels of crude oil, namely, 10 times the current reserves, and estimated 802 Trillion Cubic Feet (TCF) of gas, namely, 45 times the current reserves, ranking Argentina third after China and the United States in terms of unconventional reserves. Therefore, the *Plan Estratégico de YPF 2013-2017* envisaged a reduction of imports, achieving self-sufficiency and possibly exporting the surplus.

hidrocarburos, a fin de garantizar el desarrollo económico con equidad social, la creación de empleo, el incremento de la competitividad de los diversos sectores económicos y el crecimiento equitativo y sustentable de las provincias y regiones" (art. 1), therefore, ordering the expropriation of 51% of the assets of the Repsol YPF - Yacimientos Petrolíferos Fiscales oil company (articles 7-12) and the initiation of its nationalisation.

3. The "*modelo extractivista*"

However, the adoption of the so-called *modelo extractivista*[22] entailed the penetration of the 'extraction frontier (namely, agropecuaria, mineraria e idrocarburifera) into areas of the country which - until recently - had remained excluded or almost excluded from exploitation projects, the territories of which were dedicated to other activities or indigenous communities lived there or claimed them, with a resulting increase in tensions, which frequently degenerated into episodes of violence.

The situation that was created forced president Kirchner to announce *Ley 26.160 de Emergencia de la Propriedad Comunitaria Indígena* (hereafter, referred to as *Ley 26.160*) already in November 2006 that declared an emergency situation throughout the country for the next four years relating to the possession and ownership of lands occupied by indigenous communities registered in the Re.Na.Ci. (art. 1)[23], suspended the enforcement of judgements, procedural or administrative acts which envisaged the evacuation of the communities during the period of the emergency (art. 2)[24] and appointed the I.N.A.I. to carry out the "el relevamiento técnico-jurídico-catastral de la situación dominial de las tierras ocupadas por las comunidades indígenas" (art. 3)[25] in the next

[22] On this subject, refer to M. Svampa – E. Viale, *Maldesarrollo. La Argentina del extractivismo y el despojo*, Katz Editores, 2015, and E. Gudynas, *Extractivismos. Ecología, economía y política de un modo de entender el desarrollo y la Naturaleza*, CEDIB, Cochabamba, 2015.

[23] Art. 1: "Declárase la emergencia en materia de posesión y propiedad de las tierras que tradicionalmente ocupan las comunidades indígenas originarias del país, cuya personería jurídica haya sido inscripta en el Registro Nacional de Comunidades Indígenas u organismo provincial competente o aquellas preexistentes".

[24] Art. 2: "Suspendase por el plazo de emergencia declarada, la ejecución de sentencias, actos procesales o administrativos, cuyo objeto sea el desalojo o desocupación de las tierras contempladas en el artículo".

[25] "[…] y promoverá las acciones que fueren menester con el Consejo de Participación Indígena, los Institutos Aborígenes Provinciales, Universidades Nacionales, Entidades Nacionales, Provinciales y Municipales, Organizaciones Indígenas y Organizaciones no Gubernamentales" (art. 3). In compliance with art. 14 of the ILO 169 Convention.

three years and, in fact, the I.N.A.I. prepared the *Programa Nacional de Relevamiento de las Comunidades Indígenas - Ejecución de la Ley N° 26.160* in 2007[26].

In 2009, *Ley 26.160* was extended up to November 2013[27], two years after the law had entered into force, because many communities had reported that the evacuations had continued, while only a few territorial surveys had been initiated[28], *Ley 26.160* was extended again up to 2017, when the same situation emerged, six years after the *Programa* had started. In fact, the *Informe de la Auditoría General de la Nación* of 2012 and the *Nueva Advertencia sobre la inejecución de la ley 26.160* of the ENDEPA of 2013 had highlighted that only 12.48% of the demarcations[29] had been performed in six years, and that only 4.11% of the *Programa* had been performed in the Provinces where conflicts were high - namely, in the Salta, Jujuy, Formosa, Chaco and Neuquén Provinces, which host approximately 65% of the country's indigenous communities, whereas the performance was around 80% in the Provinces which represented approximately 2.4% of the indigenous communities, namely, in La Pampa, Córdoba, Santa Cruz, San Juan, Catamarca, Entre Ríos, La Rioja y Tierra del Fuego[30].

However, the strongest complaint concerned the penetration of the 'extraction industries' into the indigenous territories with the complicity of the same institutions, so much so as to induce James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples, after his official visit in 2011, to appeal to the Government, in his *Informe,* to supervise and ensure greater protection of indigenous rights[31].

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[26] *Decreto 1122/07* regulated *Ley 26.160* and the *Resolución 587/07* of the I.N.A.I. created the *Programa*. The "relevamiento técnico-jurídico-catastral" envisages technical and field work coordinated among I.N.A.I., the Provincial governments, academic institutions, indigenous communities and non-government organisations, and also an analysis of the social and cultural organisation of the communities (habits, traditions and ancestral occupation of the land). The data collected integrate an *Informe Cartográfico* that has to be approved by the community itself, and a *Carpeta Técnica* with practical information for the community to obtain acknowledgement of land ownership.

[27] With *Ley 26.554* of 2009 and *Ley 26.894* of 2013.

[28] In October 2008 the I.N.A.I. admitted that only 6 provincial territorial survey projects had been approved and that only 2 Provinces - Salta and Santiago del Estero - were in a position to receive the funds intended for the surveys in question.

[29] Only 197 of the 1,578 applications. ENDEPA, *Nueva Advertencia sobre la inejecución de la ley 26.160. La brecha entre las declaraciones y la realidad en materia de derechos territoriales indígenas*, 2013, pp. 16-17, in endepa.org.ar.

[30] ENDEPA, *Nueva Advertencia* cit., p. 17, in endepa.org.ar.

[31] The official mission was organised from 27th November to 7th December 2011; the Rapporteur visited the Provinces of Neuquén, Río Negro, Salta, Jujuy and Formosa, where the highest number of territorial conflicts and the main violations of indigenous rights were recorded. The first results of the visit were made public in a press conference organised in Buenos Aires on 7th December 2011 and they were later confirmed in the *Informe*, presented in 2012. J. Anaya, *Informe del Relator Especial sobre los derechos de los pueblos indígenas en Argentina*, 4 de julio de 2012, in http://acnudh.org/paises/argentina/.

Lastly, it is important to remember that in May 2010 - in the framework of the celebrations for the Bicentenary of the revolutionary insurrections - President Fernández, after having urged to "respetar las identidades culturales" and to "recuperar en conjunto los derechos perdidos"[32], on the one hand, established the creation of the Comisión de Análisis e Instrumentación de la Propiedad Comunitaria[33] with Decree 700/2010 that should have found a solution to the thorny problem of the claim to the indigenous lands, and, on the other hand, he declared that, if natural resources strategic for the country were identified in indigenous lands in the future, then the government would have privileged their exploitation at the expense of the protection of rights acknowledged or claimed on ancestral lands[34].

And, in fact, that is what happened.

4. Indigenous rights in the Province of Neuquén

Among the 23 Provinces which comprise Argentina, Neuquén[35] ranks second in terms of the density of the indigenous population (7.9%) and among the first in terms of hydrocarbon deposits [36]: in fact, the Province of Neuquén is included in the so-called Cuenca Neuquina[37], the country's most important Province in terms of conventional gas and crude oil fields and in terms of the potential of the reserves in unconventional fields, and therefore, control of the territory and of the natural resources is of strategic importance for the local and national government, with little attention being paid to the indigenous rights acknowledged by art. 53 of the provincial Constitution, reformed in 2006, in accordance with the model offered by the National Constitution (art. 75 c. 17, refer to § 1)[38].

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[32] *Fernández llama a «respetar identidades» al anunciar medidas para indígenas*, in http://www.adn.es.

[33] Composed of representatives of the National and provincial institutions and the indigenous peoples.

[34] The President issued the declaration during a meeting with an indigenous delegation in May 2010; the audio recording of the declarations was uploaded on the website of the *Mu* magazine, No. 49, 17th October 2011, http://lavaca.org by Dario Aranda, who then transcribed and published the declaration with the title "Gobierno, extractivismo y pueblos originarios", 19 de mayo de 2012, http://darioaranda.wordpress.com/2012/05/19/gobierno-extractivismo-y-pueblos-originarios/.

[35] The Province is situated in the extreme north-west of Patagonia, bordering to the north with the Province of Mendoza, to the East with the Provinces of La Pampa and Río Negro, to the South, again with the Province of Río Negro and to the West with Chile, from which it is separated by the Cordigliera of the Andes; it has a surface area of 94,078 km^2 and the 2010 census indicates a total population of 565,242 inhabitants, 7.9% of which is indigenous and divided among the mapuche (21.5%), toba (13%) and guaraní (11%). http://w2.neuquen.gov.ar/la-provincia/sobre-neuquen.

[36] The 10 producing Provinces are: Salta, Jujuy, Formosa, Mendoza, La Pampa, Neuquén, Rio Negro, Chubut, Santa Cruz and Tierra del Fuego.

[37] Includes the Provinces of Neuquén and Mendoza, Río Negro and La Pampa.

[38] Art. 53: "La Provincia reconoce la preexistencia étnica y cultural de los pueblos indígenas neuquinos como parte inescindible de la identidad e idiosincrasia provincial. Garantiza el respeto a su identidad y el

In 1989, the Province endorsed the above-mentioned *Ley 23.302* with *Ley 1800,* and the system that the government of Neuquén adopted from the '60s up to the '90s with regard to the allocation of lands on the basis of the legislation in force, was that of the *reservas*, namely, to assign by decree to the "agrupaciones indígenas […] para la utilización permanente y definitiva de las tierras que ocupan" the rural lands considered to be *fiscales,* however, in accordance with a series of well-defined requirements and conditions [39]. The "el otorgamiento de escrituras translativas de dominio"[40] was added at the end of the '80s and, lastly, the communities were acknowledged to be "personería jurídica como asociaciones civiles" as a condition "para la escrituración de las tierras a los mapuches"[41].

The 'extraction frontier' has succeeded in penetrating the indigenous territories of the Province in recent years with an increase in territorial conflicts and also a criminalisation [42] of the indigenous protest, despite the body of international, national and provincial laws in force on the matter: in 2013 the *Informe* ODHPI denounced, precisely as though "alguna disposición provincial (ley, decreto, resolución o acuerdo) [que] reglamente el respeto a los derechos indígenas" had not yet been issued and that "esta falta de normas […] se potencia porque los jueces y funcionarios encargados de decidir y aplicar el derecho en los casos concretos, no aplican directamente la Constitución Provincial o las normas federales y de derechos humanos sino que optan para remitirse a las reglamentaciones inferiores para negar o restringir en la práctica el ejercicio de esos derechos reconocidos"[43].

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derecho a una educación bilingüe e intercultural. La Provincia reconocerá la personería jurídica de sus comunidades, y la posesión y propiedad comunitaria de las tierras que tradicionalmente ocupan, y regulará la entrega de otras aptas y suficientes para el desarrollo humano; ninguna de ellas será enajenable, ni transmisible, ni susceptible de gravámenes o embargos. Asegurará su participación en la gestión de sus recursos naturales y demás intereses que los afecten, y promoverá acciones positivas a su favor". http://indigenas.bioetica.org/leyes/23302.htm.

[39] Decrees 737/64; 1608/64; 977/66; 1039/72; 3204/86; 1588/86; 3228/86; 3866/88; 4171/88; 4220/87; 3203/86; 2500/89 and 2916/93, refer to M. M. Gomiz, "La propiedad comunitaria indígena en la Provincia de Neuquén. Aportes jurídicos para garantizar el derecho a las tierras, territorios y recursos", p. 2 and note 4, report to the III Congreso Nacional de Derecho Agrario Provincial, Neuquén, 2015, in http://sedici.unlp.edu.ar/handle/10915/49724.

[40] *Ley provincial 1759* of 1988.

[41] M. M. Gomiz, "La propiedad comunitaria" cit., p. 2.

[42] Of the 42 criminal cases which involved 241 mapuche, 25 referred to the crime of "de usurpación", 10 for "desobediencia o impedimento de funciones" and 7 for "daños, lesiones, obstrucción de tránsito y coacción". 60 processes were initiated against the mapuche from 2005 to 2012 "por ejercicio de derechos colectivos y constitucionalmente reconocidos" ODHPI, *Informe de Situación de los Derechos Humanos de los Pueblos Indígenas en la Patagonia*, 2013, p. 29, in http://odhpi.org/; in addition, M. M. Gomiz, "Criminalización del pueblo Mapuche en Argentina", in *Los derechos indígenas tras la Declaración. El desafío de la implementación*, F. Gómez Isa y M. Berraondo (eds.), Deusto, Bilbao, 2013, pp. 405-423.

[43] ODHPI, *Informe* cit. p. 22, in http://odhpi.org/.

In fact, an agreement between the provincial government and I.N.A.I. to launch the *Programa Nacional de Relevamiento Territorial de las Comunidades Indígenas*, envisaged by the above-mentioned *Ley 26.160* of 2006[44] was only signed in June 2012, and two other agreements were added: one agreement had a limited impact that envisaged the suspension for 90 days (extendable for a further 90 days) of the registrations of the indigenous communities of the Province of Neuquén in the Re.Na.Ci. (that subsequently expired on 20th September 2012 and was not extended), and another wider ranging agreement that envisaged that all the registrations in the Re.Na.Ci. by the Neuquén communities were to be transmitted to the Dirección de Personas Jurídicas Provincial that would have taken responsibility for them, and where once arrived, they would probably have been blocked.

In fact, it is important to bear in mind that after the constitutional reform of 1994, the *personería jurídica* became the cornerstone for all the relations between the institutions and indigenous communities, since it represented the fundamental requirement for the indigenous communities to be able to assert their rights, but since it had to be granted by the institutions - and what is more, it had to be granted on two levels, national and provincial – it was transformed into an instrument in the hands of those same institutions that - since not acknowledging it - deprived the indigenous communities of the only means available to access the policies in their favour. The above agreements are an example of this, since they endeavoured to maintain the Neuquén government's policy, intended to slow down the concession of the *personería jurídica* at a provincial level also to those communities which had obtained the concession at a national level by registering in the Re.Na.Ci., since - otherwise - they would have acquired the judicial and legal status to be able to assert their rights.

This policy was inaugurated by the governor Jorge Sobisch in 2002 with the *Decreto provincial 1184/2002 - Personería de las agrupaciones indígenas. Reconocimiento* that had intervened on articles 1-4 of *Ley 23.302*[45] relating to the registration in the Re.Na.Ci. with the request of additional

[44] *Convenio Interjurisdiccional para la Ejecución del Programa Nacional de Relevamiento Territorial de las Comunidades Indígenas* that ordered the creation of a Comisión Ejecutora Interjurisdiccional and of an Equipo Técnico Operativo (ETO).

[45] The Province of Neuquén considered that the Federal Government did not have jurisdiction to register the indigenous communities that instead should have been the provincial government's responsibility, since attributable to the responsibilities "del poder de policia" of the Provinces and, based on this interpretation, it had submitted an application to the CSJN in 2006 to cancel the registration of 6 *personerías jurídicas* in the Re.Na.Ci. granted to the following communities in the Province of Neuquén: Lof Logko Purran, Lof Gelay Ko, Lof Wiñoy Folil, Lof Maripil, Lof Lefiman and Lof Wiñoy Tayiñ Raquizuam. M. M. Gomiz, "Personería Jurídica de comunidades indígenas: un fallo clave", in ODHPI, *Boletín*, n. 9, mayo 2014, pp. 17-22. With regard to the judgement, refer also to S. Ramírez, "Personería

requirements[46] compared to the requirements envisaged in the national law that instead had only adopted the "autoidentificación" criterion (art. 2, refer to § 1).

The consequence was that no community of the Province had managed to obtain an acknowledgement of its *personería jurídica* at a local level over the last 20 years and that, at a national level, the I.N.A.I. had no longer registered those communities of the Province of Neuquén in the Re.Na.Ci. for 7 years [47]: in brief, the communities were deprived of the instrument necessary to assert their rights, in general, and there territorial rights, in particular, while precisely the complicity among the local and national institutions enabled the oil companies to obtain permits and concessions to enter the territories still considered to be *fiscales*, but inhabited or claimed by the communities, since they could ignore the protests.

The Confederación Mapuche de Neuquén (CMN) had already submitted a Recurso Extraordinario Federal against the *Decreto provincial 1184/2002* in 2002 and - after 11 years - the CSJN issued the above-mentioned judgement on 10th December 2013[48] (refer to § 1), defined as "un fallo clave" in terms of indigenous rights, since in addition to declaring the decree to be unconstitutional[49], it then specified - for the first time - the areas of competitive federal and provincial jurisdiction in terms of indigenous rights: however, in their activity the Provinces must comply with "los estándares establecidos en el orden normativo federal […] dichos estándares federales se encuentran contenidos y especificados tanto en el marco constitucional sub examine y el Convenio 169 de la OIT como así también en la ley nacional de política indígena y su decreto reglamentario"[50]; it then confirmed the "autoidentificación" criterion as being key to recognising the indigenous identity, instead of the "criterio opuesto de identificación por el Estado"

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jurídica de las comunidades indígenas. Procesos de Consulta", in *Revista de Derechos Humanos*, 2014, año III, n. 7, in http://www.infojus.gob.ar/silvina-ramirez-personeria-juridica-comunidades-indigenas-dacf150042-2014-09/123456789-0abc-defg2400-51fcanirtcod.

[46] "Reglamentación Art. 2. Reconocimiento. Registro: […] Los requisitos necesarios que deberán acreditar los peticionantes para el reconocimiento de la personería jurídica, serán los que a continuación se detallan y los que surjan a partir del trabajo de campo a realizarse con todas y cada una de las comunidades mapuches: a) Su identidad étnica. b) Una lengua actual o pretérita autóctona. c) Una cultura y organización social propias. d) Que hayan conservado sus tradiciones esenciales. e) Que convivan en un hábitat común. f) Que constituyan un núcleo de por lo menos diez asentadas", *Decreto 1184/2002* del 10 de julio de 2002.

[47] M. Gomiz, "Personería Jurídica" cit., p. 1.

[48] CSJN, *Confederación Indígena del Neuquén c/ Provincia del Neuquén s/ acción de inconstitucionalidad*, 10 de diciembre de 2013.

[49] The unconstitutional aspect of the decree arises from the fact that the provincial government sought to regulate a national law, whereas the Constitution attributes this right to the country's President (articles 99 c. 2 and 126).

[50] CSJN, *Confederación Indígena del Neuquén c/ Provincia del Neuquén s/ acción de inconstitucionalidad*, 10 de diciembre de 2013, p. 6.

envisaged by the Decree[51] that "expresamente impone recudos y condiciones que significan una clara restricción y regresión respecto de lo establecido en materia de derechos y políticas indígenas a nivel federal" and, lastly, observed that the *Decreto* had been issued "omitiendo dar participación previa a las entidades que representan los pueblos indígenas del Neuquén"[52].

Therefore, the CSJN declared that the decree was unconstitutional "en la medida que no se adecua al 'umbral mínimo' establecido en el orden normativa federal" and urged the Province to adapt the policy and the legislation with regard to indigenous rights "a los estándares mínimos que en lo pertinente surgen del bloque normativo federal, en particular en cuanto a la identificación por vía de autoconciencia, en cuanto al asentamiento mínimo de tres familias y en cuanto a la consulta obligatoria al pueblo originario".

5. The Campo Maripe Community and YPF-Chevron.

The Campo Maripe community [53] lives in Loma Campana (Añelo), in the Vaca Muerta area, one of the largest unconventional reserves of crude oil and gas (refer to § 2), situated near the Andes and approximately 1,240 km from Buenos Aires. The area has a size of almost 30,000 km^2, of which 12,000 km^2 are controlled by the YPF-Chevron oil company[54] that conducts explorations, thanks to *Decreto 929/13* of 11th July 2013 using the fracking technique and has proceeded to

[51] One reads the following: "[…] el decreto impugnado no solo no prevé el concepto de autoidentificación establecido por el art. 2 de la ley nacional 23.302 y por el art. 1 c. 2 del Convenio 169 de la OIT como un criterio fundamental de inscripción, sino que lo sustituye por el principio opuesto de identificación del Estado". p. 7.

[52] In violation of art. 6 ILO 169, of articles 5, 18 and 19 of the UNDRIP and article 75 c. 17 of the National Constitution.

[53] The area where it lives is Paraje Vanguardia, in the Añelo district of the Departamento of the same name, in the Province of Neuquén (Ruta Provincial Nro 17 Km 14); the community is composed of around 144 persons, divided into 35 families, which returned to occupy the area from 2011.

[54] Following the nationalisation of YPF in 2012 in order to gain control of the Vaca Muerta field, the government had to create the conditions to attract the investments and technology necessary to exploit the area's potential. Therefore, *Decreto 929/13 - Régimen de Promoción de Inversión para la Explotación de Hidrocarburos* was issued that introduced some privileges for future investors in the sector that, after 5 years, will have the "derecho a comercializar libremente el mercado externo el veinte por ciento (20%) de la producción de hidrocarburos líquidos y gaseosos producidos […], con una alícuota del cero por ciento (0%) de derechos de exportación […]. Los beneficiarios que comercializaren hidrocarburos en el mercado externo […] tendrán la libre disponibilidad del cien por ciento (100%) de las divisas provenientes de la exportación de tales hidrocarburos, en cuyo caso no estarán obligados a ingresar las divisas correspondientes a la exportación del veinte por ciento (20%) de hidrocarburos líquidos o gaseosos" (art. 6), provided they invest "un mil millones (U$S 1.000.000.000)" in the first 5 years (art. 3).
The decree - known as the "Chevron decree" – is dated 11th July 2013 and precedes by five days the announcement made on - 16th July 2013 - regarding an agreement entered into with the American Chevron oil company that would have invested 1,240 million dollars to operate in the Loma La Lata and Loma Campana zones in the Vaca Muerta area, becoming the country's first foreign investor in the oil sector.

open a number of oilfields[55]. Studies have shown that exploitation of the area would enable Argentina to achieve self-sufficiency in the energy sector and also to be able to export the surplus[56], however, with impacts from the environmental[57] and social point of view, and in particular, with regard to this study, with a violation of the rights on the land of the community in question, since the field is located in its ancestral territory. However, in 2013 the community was still without the *personería jurídica* - since the local government had delayed acknowledging the *personería jurídica* on the basis of *Decreto provincial 1184/2002* - while the oil company was able to enter the territory, precisely thanks to *Decreto 929/13* (refer to footnote 54).

The positions started to change thanks to the above-mentioned judgement passed by the CSJN on 10th December 2013, that declared *Decreto provincial 1184/2002* (§ 4) to be unconstitutional: the indigenous protests increased up to 9th October 2014, when a roadblock was organised and a number of women chained themselves to the fracking towers, claiming that "1. Se regularice la seguridad de nuestras tierras comunitarias; 2. Se registre nuestra comunidad en Personería jurídica 3. Se aplique el derecho a la Consulta en todo proyecto a aplicar en nuestras tierras"[58], as could be read in the press release.

The intervention of a number of local government officials put an end to the protest, and on 24th October 2014 governor Sapag granted the "personería jurídica to Lof Campo Maripe" (art. 1) with *Decreto provincial 2407/14*. The "relevamiento técnico-jurídico-catastral" started in January 2015 and the results were made public on 21st August 2015 with the presentation of the *Informe Histórico Antropológico*, a text of around 250 pages that reconstructs the history of the lands and shows how the 11,000 hectares laid claim to are part of the territory of the mapuche community that was pre-existing to the Province, since its first recorded data date back to 1927, while the Province was created in 1955[59]. Instead, the local government refused the territory's occupation,

[55] There are also other oil companies: Exxon, Apache and EOG (USA), Américas Petrogas, Azabache, Antrim Energy, Madalena Ventures (Canada), Total (France) and Wintershall (Germany).

[56] The oil company envisages increasing the extraction of crude oil by 29% and gas by 23%. H. Scandizzo, "YPF, Nuevos desiertos y resistencias. De la privatización a los no convencionales", p. 11, in http://www.opsur.org.ar/blog/2014/04/14/ypf-nuevos-desiertos-y-resistencias/, 14 de abril de 2014.

[57] There are many reports of accidents with spills of pollutants, in addition to the concerns regarding the fracking technique, for example, pollution of the groundwater or the danger of earthquakes.

[58] *Acción directa Mapuche: cierre de caminos en Vaca Muerta*, 9th October 2014, in http://odhpi.org/.

[59] In the '70s a part of the land had been absorbed in the property of Andrés Vela, who evacuated the community, forcing it to live on the edges of the area, the community only returned to occupy its original land in 2011. Relevamiento Territorial Lof Campo Maripe, Pueblo Mapuce, Provincia de Neuquén, *Informe histórico Antropológico*, responsables Jorgelina Villareal y Luisa Meza Huencho, junio 2015, pp. 39-40, in

also withdrawing the technicians who had participated in the initial phases of the territorial survey.

The case cannot be considered concluded, because the territory's "demarcación" and "titulación" still remain to be performed, which would nullify the current *tierra fiscal* regime, namely, the land owned by the State, or by the Province, transferring ownership permanently to the Community (§ 7).

6. The Wenctru Trawel Leufu Community and the Empresa Petrolera Piedra de Aguila

The Wenctru Trawel Leufu Community lives close to Cerro Leon in the area of the Dipartimento di Picún Leufú from the early XX century, where it settled after it had dispersed and moved following the Conquista del Desierto and, in 2008, the Community was acknowledged the *personería jurídica* with its registration in the Re.Na.Ci., namely, the National register[60] (§ 1). However, a year earlier, in 2007, the Empresa Petrolera Piedra de Aguila oil company had obtained a license to perform exploration activities and to exploit the hydrocarbon resources in the El Umbral and Los Leones zones, which are located precisely in the area inhabited by the community. In fact, in the '90s, the Neuquén government had issued the Hidrocarburos del Neuquén Sociedad Anónima oil company the concession[61] to perform explorations in an area of 3,800 hectares in the Picun Leufu region, in the heart of the Province that would have impacted the community's territory, however, without informing the community and without obtaining its consent. In 2007 the exploration rights were transferred to INGENIERIA SIMA S.A. that, in turn, had transferred the rights to Petrolera Piedra de Aguila[62] that had tried to enter the community's territory in the middle of that year, however, the community had prevented the company from entering.

In that same year the oil company had submitted an *amparo* appeal (art. 43 of the National Constitution)[63], obtaining within a short time a precautionary measure that required the members

http://www.8300.com.ar/wp-content/uploads/2015/08/Informe-Hist%C3%B3rico-Antropol%C3%B3gico-presentado.pdf. The following had participated: Longko of Lof Campo Maripe, Albino Campo, Jorge Nahuel the representative of the Conferedación Mapuche.

[60] The application for registration in the Re.Na.Ci. was submitted in December 2005, and was obtained with Resolución 154/08 of the I.N.A.I. on 22nd April 2008.

[61] Government decrees 2737/95 and 1271/97.

[62] Transfers approved with Province Decree 278/07.

[63] The precautionary measure was the origin of the *Expediente Petrolera Piedra del Aguila S.A. c/ Curruhuinca, Victorino y otros s/ Acción de amparo, n. 43.907/7 del Juzgado civil n. 2 de la ciudad de Cutral Co.* 2nd July 2007. Judge Graciela Blanco upheld the appeal and ordered the precautionary measure in only 24 hours, without

of the community to refrain from any conduct that might prevent access and the performance of the oil company's activities in the area. Therefore, in subsequent years the oil company was able to operate undisturbed in the community's territory, whereas, the community had tried to obtain a revocation of the precautionary measure without success. In fact, as reconstructed by Gomiz, the dossier of appeals passed through the hands of three provincial judges who always ignored the legislation relating to indigenous rights, ordering the precautionary measure (2nd July 2007), then rejecting the application submitted by the Confederación Indígena Neuquina to assume the Community's defence (5th September 2007), on the basis of article 12 of the ILO 169 Convention, and the 'comunidad' nature of the plaintiffs, even though it had obtained the *personería jurídica* status from 2008, up to the judgement passed on 8th July 2008 that confirmed the prohibition for the members of the community to obstruct the oil company's activities, specifying the non-existence of grounds to identify a violation of indigenous rights, since the oil company's action was not aimed at the community as a whole, but only against individual members of the community[64].

In 2009 the Cámara de Apelaciones annulled the judgement due to procedural irregularities[65], and reopened the case, but in the meantime force had been used to implement the precautionary measure in the area concerned - from 2007 to 2009 - and some members of the community had even been prosecuted at the oil company's specific request or at the request of the police force[66].

After the case was reopened, the approach finally changed in 2011, when Judge Mario O. Tommasi del Juzgado Civil n. 2 del Cutral-Co rejected the application submitted by Petrolera Piedra de Aguila and ordered the operations in the indigenous territory to be suspended[67], based

any legislative reference and in violation of art. 15 of the ILO 169 Convention that envisages prior consultation of the communities involved.

[64] M. Gomiz, "Fallo de la Comunidad Wenctru Trawel Leufu", in ODHPI, *Informe de Situación de los Derechos Humanos de los Pueblos Indígenas en la Patagonia*, 2010-2011, pp. 45-48.

[65] *Expediente Confederación Indígena Neuquina en autos 'Petrolera Piedra del Aguila S.A. c/ Curruhuinca, Victorino y otros s/ Accion de amparo s/Recurso de queja* (Expediente n. 191 del año 2007 de la Secretaria Civil del Tribunal Superior de Justicia), Resolución del 28 de octubre de 2009.

[66] *Ñancucheo, Roberto y otros s/ Usurpación y desobediencia a una orden judicial* (N° 3745/07 del Juzgado de Instrucción de Cutral Co); *Curruhuinca, Juan Carlos – Curruhuinca, Rufino s/ amenazas* (N° 3868/08 del Juzgado de Instrucción 2 de Cutral Co); *Curruhuinca Juan Carlos- Curruhuinca Rufino s/ coacción agravada por empleo de arma de fuego* (N° 3383 del Juzgado Correccional de Cutral Co); *Maliqueo Velázquez, Martín s/ daño y acumulados* (N° 3423 del Juzgado Correccional de Cutral Co); *Curruhuinca, Victorino y otros s/ desobediencia a orden judicial* (N° 35859/07 del Juzgado de Instrucción N° 1 de Cutral Co). M. Gomiz, "Fallo de la Comunidad" cit., pp. 46-47.

[67] *Petrolera Piedra Del Aguila Sa C/ Curruhuinca Victorino Y Otros S/ Accion De Amparo*, (Expte. Nro.: 43907, año2.007), en trámite ante el Juzgado de Primera Instancia Nro. 2 en lo Civil, Comercial, Especial de Procesos Ejecutivos, Laboral y de Minería de la II Circunscripción Judicial con asiento en la ciudad de Cutral Có Cerca, 16 de febrero de 2011.

on the following points: "1. Reconoce a la Comunidad Wenctru Trawel Leufu como Comunidad Mapuche asentada en el paraje Cerro León Departamento Picún Leufú, provincia de Neuquén; 2. Reconoce el territorio comunitario y su carácter constitucional. Afirma que la posesión comunitaria de los pueblos indígenas no es la posesión individual del Código Civil. Que se basa en la preexistencia al Estado y en el hecho de haber conservado la ocupación tradicional"[68]. Furthermore, despite the fact that the provincial government's decrees had authorised the oil company to perform the activities in the Community's territory, Judge Tommasi stressed that Petrolera Piedra de Aguila had entered that territory without "el cumplimento cabal y adecuado de los procedimientos de consulta y participación", in violation of national and international laws[69].

The new approach was confirmed on 6th December 2012 by the Tribunal Superior de Justicia di Neuquén that rejected the appeal submitted by the oil company and by Fiscalía de Estado: acting unanimously the Tribunal considered the existence of "pruebas más que asertivas" which demonstrated that "los demandados" are members of an indigenous people, therefore, the importance of the *personería jurídica* acknowledged by the I.N.A.I. for the community concerned[70] and, after making specific reference to the articles which protect indigenous rights (art.75 c. 17 and art. 53, respectively, of the National Constitution and the Provincial Constitution, in addition to the provisions of the ILO 169 Convention), it acknowledged the existence of the indigenous settlement with respect to Petrolera Piedra de Aguila and, therefore, the respect of its rights[71].

[68] M. M. Gomiz, "Fallo de la Comunidad Wenctru Trawel Leufu", in ODPHI, *Informe de situación de los Derechos Humanos de los Pueblos Indígenas en la Patagonia, 2010-2011*, p. 47.

[69] "Determina entonces que no se ha dado cumplimiento al artículo 75 inciso 17 de la Constitución Nacional, ni al 53 de la Constitución Provincial, ni a los artículos 6, 7 y 15 del Convenio 169 de la OIT sobre Pueblos Indígenas ni de los artículos 10, 19, 29 inciso 2°, 30 inciso 2° y 32 inciso 2° de la Declaración de Naciones Unidas sobre Derechos de los Pueblos Indígenas". H. Scandizzo, *Justicia detiene proyectos extractivos en territorios indigenas*, in *Noticias Aliadas. Informe Especial. Consulta previa: derecho fundamental de los pueblos indigenas*, junio 2011, p. 23. Also refer to M. M. Gomiz, "Fallo" cited and J. Anaya in the *Informe* of 2012 that had expressed a positive opinion on the judgement.

[70] One reads the following: "para adoptar tal decisión hemos considerado que existen pruebas más que asertivas que dan cuenta que los demandados forman parte de un pueblo originario y que tal circunstancia no solo ha sido reconocida con el otorgamiento de la personería jurídica dispuesta por el I.N.A.I., sino que se debe sumar lo que trasunta de las gestiones extrajudiciales llevadas adelante por la Provincia de Neuquén, a través de su Ministro de Gobierno, Educación y Cultura".

[71] One reads the following: "Ante esta coyuntura, somos de la opinión que lo expuesto por la comunidad apelante en principio prevalecería sobre el interés perseguido por el actor, por cuanto si bien el Estado reconoció con posterioridad a la comunidad como tal, el asentamiento indígena es preexistente, imponiéndose el respeto de sus derechos". *Revés judicial para una petrolera y el gobierno de Neuquén*, http://odhpi.org/2014/03/reves-judicial-para-una-petrolera-y-el-gobierno-de-neuquen/

7. Conclusions

The complicity among the national, local institutions and the extraction companies, reported on numerous occasions for ignoring and therefore, violating the indigenous rights on the ancestral territories emerges clearly in the two cases illustrated.

In particular, in the first case that involves the Campo Maripe community (§ 5) the same provincial government had delayed acknowledging the *personería jurídica* (art. 2 of *Ley 23.302*), thereby depriving the community of the only instrument available to it to claim and to defend its rights. In this context, in addition to the unconstitutional nature of *Decreto provincial 1184/2002* (since in contrast with articles 99 c. 2 and 126 of the National Constitution), there is also the violation of national legislation regarding indigenous rights (art. 75 c. 17 of the National Constitution; art. 53 of the Neuquén Constitution; *Ley 23.302* and *Ley 26.160*) and, in particular, the failure to adopt the "autoidentificación" criterion to acknowledge the indigenous identity, the violation of art. 2 of *Ley 23.302* and also art. 1.2 of ILO 169. Furthermore, the violation of laws, at an international level, which acknowledge the indigenous peoples the right to be informed and consulted on matters which may concern them (art. 6 of ILO 169), the right to the recognition and protection of ownership and possession of inhabited lands (art. 14 of ILO 169), the right to participation and consultation regarding the management of the natural resources in their territories (articles 7 and 15 of ILO 169) and the prohibition of being moved from their own lands (art. 16 of ILO 169), principles also reiterated by the standards of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (articles 5, 8.1, 18, 19, 25, 26, 27, 28, 29 and 32).

With regard to the second case (§ 6), since the Wenctru Trawel Leufu community had obtained the registration of the *personería jurídica*, the Empresa Petrolera Piedra de Aguila had chosen the path of the *amparo* appeal envisaged in the National Constitution (art. 43) and the complicit local Court had ordered the precautionary measure - confirmed several times from 2007 to 2009 - in relation to individuals and not the community as a whole, hence, permitting the Court to ignore the legislation regarding indigenous rights on the land. Also on this occasion, in addition to the applicable national legislation (art. 75 c. 17 of the National Constitution; art. 53 of the Neuquén Constitution; *Ley 23.302* and *Ley 26.160*), the violation of laws which acknowledge the indigenous peoples the right to be informed and consulted on matters which may concern them is identified at an international level (art. 6 of ILO 169), the right to receive legal protection and assistance (art. 12 of ILO 169), the right to acknowledgement and protection of ownership and possession of inhabited lands (art. 14 of ILO 169), the right to participation and consultation regarding the

management of the natural resources in their territories (art. 7 and 15 of ILO 169) and the prohibition of being moved from their own lands (art. 16 of ILO 169) and the standards indicated by the UNDRIP relating to the rights on their territories (articles 10, 19, 25, 26, 27, 28, 29 c. 2 and 32 c. 2).

Despite the recent favourable results, it must be remembered that two important steps still remain to be completed, to ensure that the community ownership of the disputed territories is guaranteed: the "demarcación" and "titulación" of the areas claimed are also required, in addition to the "relevamiento técnico-jurídico-catastral" and, in Argentina, in contrast with the other Latin American countries[72], it should be remembered that *Ley 26.160* of 2006 only envisaged the "relevamiento técnico-jurídico-catastral" (art. 3) that is indeed important, but not sufficient, since those territories still remain exposed to the danger of intrusions by officials or private parties, who could even take them from the communities. That "brecha entre el reconocimineto formal y retórico de los derechos y su ejercicio y disfrute efectivo"[73] will be reduced when a mechanism that envisages the three phases is created.

With regard to this aspect, reference is made to the CSJN judgement of 10th November 2015 that upheld the Recurso Extraordinario Federal submitted by the Las Huaytekas community of Río Negro against the precautionary measure that ordered the evacuation from its territory - that however, had already been the subject of "relevamiento técnico-jurídico-catastral" by the I.N.A.I. -decided by the Province's Superior Tribunal de Justicia and had ordered a new ruling on the case to be made[74].

In its concise decision the CSJN upheld the contents of the *Dictamen* of 24th February 2015 made by Gils Carbo, Procuradora General de la Nación that recalled how the objective of *Ley 26.160* of 2006 had been to "evitar que se consoliden nuevas situaciones de despojo, a fin de respetar y garantizar los derechos constitucionales de los pueblos indígenas y en aras de dar cumplimento a un conjunto de compromisos internacionales de derechos humanos, asumidos por el Estado Nacional"[75]. Moreover, in the case in question, it specified that "las tierras en objeto de la medida

[72] For a concise review refer to S. Zimerman, "Aportes para una norma que garantice el derecho a la tierra y al territorio indígena", in *Dossier propiedad comunitaria indígena*, F. Kosovsky y S. L. Ivanoff (comp.), EDUPA, 2015, pp. 165-168.

[73] S. Zimerman, "Aportes" cit., p. 171. With regard to this point, also refer to J. Anaya, *La situación* cit., pp. 8-9.

[74] CSJN, *Martínez Pérez, José Luis c/Palma, Américo y otros s/ medida cautelar s/ casación*, 10 de noviembre de 2015.

[75] *Dictamen*, point V, in which reference is made to art. 75, c. 17 of the National Constitution; to art. 21 Convención Americana sobre Derechos Humanos and to articles 13, 14 and 16 of the ILO 169 Convention.

cautelar de desalojo, han sido identificadas como parte del territorio de la Comunidad de Las Huaytekas, de acuerdo con el Relevamiento Técnico Jurídico Catastral, realizado por el Instituto Nacional de Asuntos Indígenas"[76], and that therefore, "la ejecución del lanzamiento vulnera la Ley 26.160, que prohibió de modo expreso el desalojo de las tierras que tradicionalmente ocupan las comunidades indígenas" and that - and this represents an important point - "Esta posesión comunitaria, tutelada por la Constitución Nacional y los instrumentos internacionales de derechos humanos, pone en cabeza del Estado un conjunto de obligaciones, vinculadas con la protección de las tierras, de los recursos naturales y de ciertos patrones culturales"[77].

In support the Procuradora refers to the judgement of the Corte Interamericana de Derechos Humanos in the case of the *Comunidad Mayagna (Sumo) Awas Tingni vs Nicaragua* of 2001 that established - in the case in question - that the State was required to create "un mecanismo efectivo de delimitación, demarcación y titulación de las propiedades de las comunidades indígenas"[78], but above all - and this represents an important point - that the State shall "abstenerse de realizar, hasta tanto no se efectúe esa delimitación, demarcación y titulación, actos que puedan llevar a que los agentes del propio Estado, o terceros que actúen con su aquiescencia o su tolerancia, afecten la existencia, el valor, el uso o el goce de los bienes ubicados en la zona geográfica donde habitan y realizan sus actividades los miembros de la Comunidad Mayagna (Sumo) Awas Tingni"[79].

Art. 13 is important and refers to the terms indigenous "land" and "territory": F. Kosovski observed that "El fallo introduce la noción de territorio indígena al expresar que el artículo 13 del Convenio 169 de la OIT define la obligación estatal de respetar la especial relación que los indígenas tienen con las tierras y con el territorio y en particular los aspectos colectivos de esa relación". And refers to the *Dictamen* de la Procuradora General that recognised: "El término tierras incluye el concepto de territorios, lo que cubre la totalidad del hábitat de las regiones que los pueblos interesados ocupan o utilizan de alguna otra manera" (apartado V del Dictamen de la Procuradora General). De ello se desprende que no importa si las tierras están o no en conflicto y, si en caso de conflicto, si hay en los hechos dos o más sujetos en el espacio, pues coexistir las posesiones civil e indígena". F. Kosovski, "El Fallo 'Martínez Pérez': Innovaciones de la Corte Suprema en derechos de los Pueblos Indígenas", http://www.gajat.org.ar/2015/11/corte-suprema-ratifica-derechos-de-los-pueblos-indigenas-historico-fallo-a-favor-de-comunidad-las-huaytekas/.

[76] Which showed that "la Comunidad y el Lof Palma no ocuparon esas tierras de modo próximo a la fecha en que se dictó la medida cautelar, sino que ejercían desde antaño la posesión tradicional indígena". *Dictamen*, point VI.

[77] *Dictamen*, point VI.

[78] Ordered: "que el Estado debe adoptar en su derecho interno, de conformidad con el artículo 2 de la Convención Americana sobre Derechos Humanos, las medidas legislativas, administrativas y de cualquier otro carácter que sean necesarias para crear un mecanismo efectivo de delimitación, demarcación y titulación de las propiedades de las comunidades indígenas, acorde con el derecho consuetudinario, los valores, usos y costumbres de éstas" e "que el Estado deberá delimitar, demarcar y titular las tierras que corresponden a los miembros de la Comunidad Mayagna (Sumo) Awas Tingni".

[79] Refer to www.corteidh.or.cr/docs/casos/articulos/Seriec_79_esp.pdf and to F. Gómez Isa (dir.), *El caso Awas Tingni. Derechos Humanos entre lo local y lo global*, Deusto, Bilbao, 2013.

Therefore, the CSJN has recognised the evidential value of the "relevamiento técnico-jurídico-catastral" envisaged in art 3 of *Ley 26.160*, ordered in line with art. 14 of the ILO 169 Convention, and it is to be hoped that the greater attention demonstrated is the signal of a new approach adopted by Argentinian justice in recognising and protecting the indigenous rights on occupied or claimed territories and that the government is able to reconcile the objectives of economic growth and the population's well-being with a respect for indigenous rights.