

Quito D.M., November 10, 2021

CASE No. 1149-19-JP/20

**THE PLENARY SESSION OF THE CONSTITUTIONAL COURT OF
ECUADOR, IN EXERCISE OF ITS CONSTITUTIONAL AND
LEGAL POWERS, HEREBY ISSUES THE FOLLOWING**

OPINION

**Collateral Review Case
No. 1149-19-JP/20**

Summary: The Constitutional Court reviews the appellate decision of the Provincial Court of Justice of Imbabura in an action for injunctive relief filed by the GAD of Santa Ana de Cotacachi on behalf of the Los Cedros Protected Forest, alleging that the rights of nature, the right to a healthy environment, the right to water, and the right to an environmental consultation were violated. The Constitutional Court confirms the lower court ruling, accepts the action proposed by the GAD of Cotacachi, and develops binding jurisprudence on this matter.

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I. Proceedings before the Constitutional Court

1. On July 19, 2019, the Constitutional Court of Ecuador received a certified copy of the opinion for Case No. 10332-2018-00640, which sought an action of injunctive relief¹, the opinion being issued by the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura, on June 19, 2019. The case was assigned the number 1149-19-JP.
2. On May 18, 2020, based on paragraphs a) and b) of paragraph 4 of Article 25 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (LOGJCC), the Selection Chamber of the Constitutional Court decided to accept the case.
3. On May 27, 2020, the case was assigned to constitutional judge Agustín Grijalva Jiménez, who, by order dated August 21, 2020, acknowledged receipt of the case.
4. By order dated October 7, 2020, the judge summoned the parties, interested third parties, and *amici curiae* to a public hearing which was held on Monday, October 19, 2020 at 10:00 a.m.² In the same order, the judge requested that national or international

¹ There is no exact translation for “Acción de Protección” in English for the Anglo tradition of common law, since the action is presented in Ecuador under the Latin tradition of civil law. The literal translation is Protection Action. However, this text will use the nearest translation that is “Action of Injunctive Relieve”. It must be noted, however, that it is an action for Constitutional Rights.

² The hearing was attended by the GAD of Santa Ana de Cotacachi, Mayor Auki Tituaña Males, attorney José Proaño, attorney for the GAD of Santa Ana de Cotacachi, and attorney Jhesica Almeida Herrera, in their capacity as petitioners; and on behalf of the respondents, attorney Pablo López Vaca, Director of Judicial Sponsorship and attorney Juan Andrés Delgado Garrido, General Director of Legal Counsel of

academic institutions that had performed scientific research on the Los Cedros Protected Forest (hereinafter referred to as “Los Cedros Protected Forest”, or “Los Cedros”) to submit any information they considered relevant for the resolution of the underlying matter.

5. By order dated October 21, 2020, the constitutional judge requested information from the then-Ministry of Environment and Water (now Ministry of Environment, Water and Ecological Transition or MAATE), the Empresa Nacional Minera (hereinafter ENAMI EP), and the Autonomous Decentralized Municipal Government of Cotacachi (hereinafter referred to as GAD of Cotacachi). These institutions submitted the required information within the allotted 72 hours.

the Ministry of Environment, Water and Ecological Transition; and on the National Mining Company, the director of legal counsel, attorney Luis Araque. For the Attorney General’s Office, attorney Karola Samaniego Tello; for the Ministry of Energy and Non-Renewable Natural Resources, attorney Eduardo Andrés Chang; for the Ombudsman’s Office of Ecuador, Mélida Pumalpa and Javier Morales. As interested third parties to the case, attorney Xavier Andrade Cadena, representing the company Cornerstone Ecuador S.A. As *amicus curiae*: Bitty A. Roy, professor emerita of the University of Oregon; Dr. Andrew Roo Vandegrift, for the Institute of Ecology and Evolution; Daniel Thomas, professor at Whitman College; Merlin Tuttle, Merlin Tuttle’s Bat Conservation; Linda D’Amico, Winona State University; Elisa Levy, scientific research coordinator for the Los Cedros Research Station; Tobias Policha, Department of Biology, University of Oregon; Luis Baquero, researcher specializing in orchids; Blanca Ríos Touma, member of the Academy of Sciences of Ecuador and Research Group on Environment, Biodiversity and Health -- UDLA; Dr. Mika Peck, University of Sussex; Rafael E Cárdenas, Faculty of Exact and Natural Sciences of PUCE; Phd. Juan Manuel Guayasamin, USFQ; Sarah Jane Wilson, University of Victoria; Osman Poma Jumbo, geologist for Cornerstone Ecuador S.A.; Juan Carlos Valarezo, Executive Director for Aves y Conservación Ecuador; Inty Arcos, Biologist Mancomunidad Chocó Andino-Ecuador; Alejandro Olivera, Centro para la Diversidad Biológica, La Paz, MX; Citlalli Morelos Juárez, Fundación Jocotoco; Sebastián Kohn, Fundación Cóndor Andino del Ecuador; Ab. Juan Francisco Guerrero, for the Chamber of Mines of Ecuador; Natalia Greene López, Earth Law Center, Global Alliance for the Rights of Nature and others; Fernando Benalcázar Saavedra, consultant in non-renewable natural resources; Ab. Emilio Suárez Salazar, for the company Inv Minerales Ecuador S.A.; Esperanza Martínez Yáñez, auditor and environmental biologist; Roberto Paz y Miño and Agustín Zambrano Albuja for the Chamber of Industries and Production; Ab. Patricia Carrión for the Ecumenical Human Rights Commission; César Zumárraga, legal attorney Ecuasolid S.A.; Mónica Feria-Tinta, attorney and member of the bar of England and Wales; Oscar Vela, legal attorney for Valle Rico Resources S.A and Green Rock Resources S.A; Elizabeth Bravo, PhD, Fundación pro Defensa de la Naturaleza y sus derechos; Ab. Andrés Larrea, Condormining Corporation S.A.; Ab. David Cordero Heredia and Ab. José Valenzuela, Centro de Derechos Humanos de la PUCE; Ab. José David Ortiz for Exploraciones Mineras Andinas Ecuador S.A.; Viviana Morales on her own behalf; Ab. Santiago Yépez for Goldmine S.A.; Daniela Sánchez and María Paula Marroquín for the Observatorio de Derechos y Justicia; Ab. Carlos Andrés Izquierdo for the Observatorio de Derecho Minero Constitucional; Jorge Acero for Amazon Frontlines; Juan Carlos Herrera and Alejandra Soriano, Compañía Cóndor Gold S.A.; Dr. Hugo Echeverría, Center for Democratic and Environmental Rights; Alberto Acosta on his own behalf; Ab. Andrés Ycaza Palacios for the company Toachiec Exploraciones Mineras S.A.; environmentalist and solutionist; María Isabel Aillón, Women in Minnig [sic] Ecuador; Angel Almeida Vallejos, community leader for the García Moreno parish; Felipe Alfonso Cortes, Washu project director; attorney Gabriela Obando Balseca, on her own behalf; Ab. Verónica Potes, university professor; José Cueva Vera, agronomist for the Observatorio Social y Ambiental del Norte del Ecuador; Mery Almeida, President Comuna Brillasol; Nicholas Peter Shear, director of the Asociación de Propietarios de Tierras Rurales; Edwin Lomas López, Comuna El Paraíso; Tatiana Rivadeneira Cabezas, Movimiento Animalista Nacional; Digna del Carmen Espinoza, ASOPROARTE workers; Luis Fernando González Leiva, Comité Ecoturístico Comunitario Manduriacos; Ab. Edgar Merlo, Cielo Verde community; Olger Tabango, Comuna Magdalena Alto; Ab. Fred Larreátegui for CEDENMA; Julio Cabezas member of the Magdalena community; attorney Francisco Hurtado Caicedo on his own behalf.

6. On November 5, 2020, the Review Chamber, consisting of Judge Teresa Nuques Martínez² and Judges Agustín Grijalva Jiménez and Ramiro Avila Santamaría, approved draft opinion No. 1149-19-JP, to be heard by the Plenary of this Court.

II. Jurisdiction

7. In accordance with the provisions of Article 436, paragraph 6, of the Constitution of the Republic of Ecuador, and in accordance with Article 2, paragraph 3, and Article 25 of the LOGJCC, the Plenary of the Constitutional Court has jurisdiction to issue opinions that constitute binding jurisprudence or precedent in all constitutional proceedings received and accepted by the Court through its selection process.
8. In Opinion No. 159-11-JH/19, the Court decided that the time frame contemplated in Article 25, paragraph 6 of the LOGJCC, *“is inapplicable when the Court shows that, in a case selected for a violation of constitutional rights, the damage exists at the time of the ruling and has not been adequately addressed”*³ In this case, the Court notes that although the appellate decision under review accepted the need for injunctive relief and declared certain rights to have been violated, as discussed further below, other charges alleged by the petitioners were not analyzed. As a result, the relief granted was inadequate. Given these considerations, the Court deems the time frame contemplated in Article 25, paragraph 6 of the LOGJCC to be inapplicable in this case.

III. Preliminary information

General description of the Los Cedros Protected Forest

9. On October 19, 1994, the Ecuadorian Institute of Forestry, Natural Areas and Wildlife (INEFAN), through Ministerial Agreement No. 57⁴, declared 6.400 hectares of the property known as “Los Cedros”,--located in the García Moreno parish, Cotacachi canton, Imbabura province--as a Protected Forest and Vegetated Area. This ministerial agreement states in its preamble that *“according to the physical, chemical and biological characteristics of the soils studied, as well as their agrology, it is determined that the vegetative cover of these lands should be permanently conserved for the purpose of protection”*, and in its Article 2 sets forth:

² It is hereby stated for the record that Constitutional Judge Teresa Nuques Martínez approved the draft opinion in Case No. 1149-19-JP, with the intent that it may proceed forward and be made known to the Plenary of this Court, without prejudice to the observations made therein, particularly in the section constituting the decision in the presented draft opinion.

³ Constitutional Court of Ecuador, Opinion No. 159-11-JH, para. 11.

⁴ Ministerial Agreement 57 of INEFAN published in Official Gazette No. 620 of January 26, 1995.

The prohibition of all activities that are not compatible with the purposes of the area, which as of the signing of this Resolution will be subject to the forestry regulatory framework, whose administration is the exclusive responsibility of this Institute, through the National Forestry Directorate, and for which reason this area may not be affected by the Agrarian Reform.

10. Los Cedros is located in Imbabura province, Cotacachi canton, García Moreno parish, Valle de los Manduriacos sector, on the Chotal-Brillasol road.⁵ Its western border is shared in part with the Cotacachi Cayapas National Park, and in part with the El Madrigal Cooperative. To the south and west, it borders several communities in the Manduriacos Valley.⁶
11. In Ecuador, the existence of different ecosystems is generally tied to the meteorological records of a given region and its altitude, measured in meters above mean sea level (hereinafter “mamsl”). Parameters such as temperature, precipitation or rainfall, and relative humidity are fundamental because they determine the type of vegetation that can inhabit a region and, therefore, the animals and microorganisms associated with it.⁷
12. The elevation of Los Cedros ranges from 980 to 2,200 mamsl. In ecological terms, this means it is categorized as a **lower montane rainforest**, also known as a **cloud forest**.⁸ The Los Cedros Research Station is located at an altitude of 1,300 meters. According to its 15 years of meteorological records, the forest receives 2903 ±186 millimeters of rain per year, but at higher elevations there is considerably more precipitation.⁹ The temperature ranges between 15 and 18 degrees Celsius.
13. The characteristics of this ecosystem and the species that comprise it will be discussed further based on verified scientific information, and will be analyzed in the corresponding section, below, alongside the rights alleged to have been violated. This information of a strictly scientific nature has been submitted to this Court during the underlying proceedings; its sources have been verified and are cited in footnotes at the bottom of the page.

IV. Facts of the Case

14. Through Resolution No. MMSZM-N-2017-0041-RM, dated March 3, 2017, the Ministry of Mining granted to ENAMI EP the metallic mineral mining concession “Rio Magdalena 01”, cadastral code No. 40000339. The mining concession¹⁰ is located in the Llurimagua sector, García Moreno parish, Cotacachi canton, and consists of an area of 4920 contiguous mining hectares.

⁵ ECOLEX-MAE. 2015 Final Report. *Determinar la factibilidad de la ampliación, desarrollo del plan de manejo e identificar la tenencia de la tierra del Bosque Protector Los Cedros*.

⁶ Ibid.

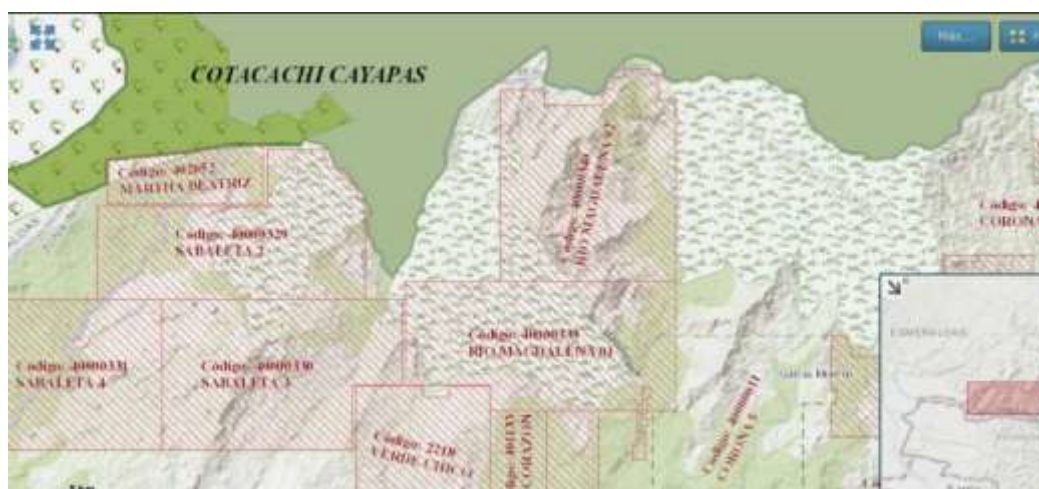
⁷ Various authors, Enciclopedia del Ecuador, Barcelona, Editorial Océano, n.d. p. 93 and following.

⁸ Jørgensen, P. León-Yáñez, S. 1999. *Catalogue of the Vascular Plants of Ecuador*. 3 January, 2012: Missouri Botanical Garden Press. In Roy, et al. 2018 *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11: 1-20.

⁹ Roy, B., Zorrilla, M., Endara, L., Thomas, D., Vandegrift, R., Rubenstein, J., Policha, T.,

15. Through Resolution No. MM-SZM-N-2017-0042 RM, dated March 3, 2017, the metallic mineral mining concession “Río Magdalena 02”, cadastral code No. 40000340, was granted in favor of ENAMI EP, located in the Llurimagua sector, García Moreno parish, Cotacachi canton, Imbabura province. It has an area of 4989 contiguous mining hectares.
16. On December 12, 2017, the Ministry of Environment, through Resolution No. 225741, granted the environmental registration for the initial exploration phase of mining concession No. MAERA 2017-3159921 Río Magdalena Mining Project, consisting of the Río Magdalena 01 (Code: 40000339) and the Río Magdalena 02 (Code: 40000340) concessions, located in Cotacachi canton, Imbabura province.¹¹

Map 1
Mining concessions in the Los Cedros Protected Forest



Source: Georeferenced mining cadastre.

Ríos-Touma, B., Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11: 1-20.

¹⁰ Pursuant to Article 30 of the Mining Law, a mining concession is an administrative act that grants a mining title over which the holder has a personal right, which is transferable in accordance with legal regulations. According to Article 31 of the same law, the mining title confers to the holder the exclusive right to prospect, explore, exploit, benefit, smelt, refine, commercialize and dispose of all mineral substances that may exist and be obtained in the area of said concession.

¹¹ This environmental registration would have been based on Articles 16, 66.14, 276.3 of the Constitution, Articles 19 and 20 of the Environmental Management Law, Articles 12, 14 and 24 of Ministerial Agreement 061, enacted April 7, 2015 of the then-existing Ministry of Environment, and Article 1 of Ministerial Agreement 026 enacted March 17, 2016, of the same Ministry.

17. On November 5, 2018, Jomar José Efren Cevallos Moreno, in his capacity as mayor of Cotacachi canton and Jhesica Liseth Almeida Herrera, the legal representative of the Municipality of Cotacachi, filed an action for injunctive relief against Manuel Humberto Cholango Tipanluisa, in his capacity as Minister of the Environment, and against Carlos Alberto Otero López, General Manager of ENAMI EP. The action for injunctive relief challenged the aforementioned administrative acts,¹² specifically the environmental registration and the environmental management plan, because, according to the petitioners, they would have affected the rights of nature by allowing mining activity within the Los Cedros Protected Forest. The petitioners also alleged that neither the constitutional requirements for an environmental consultation, nor those related to the consultation of indigenous peoples and communities, were observed.
18. According to Article 24 of Ministerial Agreement 061, dated April 7, 2015, of the then-existing Ministry of Environment and in force at the time, the environmental registration was defined as the environmental permit granted by the corresponding Environmental Authority with jurisdiction over the matter, through the Unified System of Environmental Management (SUIA), and which is mandatory for projects, works or activities considered to be of low environmental impact and risk. For projects with a higher environmental risk or impact, the regulations required an environmental license.
19. On November 13, 2018, the judge of the Multijurisdictional Judicial Chamber of Cotacachi rejected the action, holding that no constitutional rights were violated and that, in accordance with Article 40 of the LOGJCC, “this is a strictly administrative matter, and would be better suited for analysis by judges competent in that subject matter.”
20. The representatives of the GAD of Cotacachi filed an appeal against the ruling of the lower court. On June 19, 2019, the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura accepted in part the action for injunctive relief, and found there to be a violation of the right to participation as contemplated in Article 61, paragraph 4 of the Constitution. As part of the relief granted in the decision, the challenged portion of the administrative act was held to be no longer in force,¹³ and the Court ordered the respondents to publish the Court’s decision on their websites, as well as to offer public apologies to the communities that inhabit the area impacted by the project.

¹² The GAD requested the repeal of Resolution No. 225741, dated December 12, 2017, issued by the Ministry of Environment granting the environmental registration for the initial exploration phase of mining concession No. MAERA 2017-3159921 Río Magdalena Mining Project, consisting of the Río Magdalena 01 (Code: 40000339) and Río Magdalena 02 (Code: 40000340) concessions, located in Cotacachi canton, Imbabura province, as well as the repeal of the approval for the impact study and environmental management plan of the National Mining Company.

¹³ In the opinion issued by the Provincial Court of Justice of Imbabura on June 19, 2019, the right to participation is determined to have been violated as follows: “Whereas it is hereby declared as having been violated the right of participation, established in Article 61, paragraph 4, of the Ecuadorian Constitution, guaranteeing the environmental consultation established in Article 398 *ibidem*, and which should have been carried out with the communities located in the area impacted by the Río Magdalena Mining Project, consisting of the concessions Río Magdalena 01 (Code: 40000339) and Río Magdalena 02 (Code: 40000340), located within the “Los Cedros” Protected Forest, Llurimagua sector, García Moreno parish, Cotacachi canton, Imbabura province”.

21. On August 6, 2019, ENAMI EP--and on August 7 of the same month and year, the MAAE (former Ministry of Environment) and the Autonomous Decentralized Municipal Government of Santa Ana de Cotacachi--filed an extraordinary action for protection against the court order of June 19, 2019, issued by the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura. The extraordinary action for protection filed by ENAMI EP alleging the violation of the right of legal certainty, the right to the impartial administration of justice, the right to counsel, and the right to an explanation of legal reasoning, was received on February 7, 2020.¹⁴ The claims filed by the then-Ministry of Environment and the GAD of Cotacachi were deemed inadmissible..

III. Constitutional analysis

22. In this appellate decision, the Constitutional Court will divide its analysis as follows: (A) The rights of nature, (B) The right to water and a healthy environment, and (C) Environmental consultation.

A. The rights of nature

23. In the case under review, the GAD explicitly argued the violation of the rights of nature or Pachamama, on whose behalf it appeared. Specifically, in its complaint it cites Article 73 of the Constitution regarding the application of precautionary measures and the restriction of activities that may lead to the extinction of species, the destruction of ecosystems, or the permanent alteration of natural cycles.
24. The respondents asserted that the alleged violation of the rights of nature has not occurred because there is no environmental damage, given that the activity of the mining companies in Los Cedros is currently in its initial exploration phase.
25. According to Article 10 of the Constitution, nature is the subject of those rights that the Constitution recognizes. Among these rights, the Court highlights in the present case two of those included in Article 71 of the Constitution:
- i) The right to have its existence fully respected.
 - ii) The right to maintain and regenerate its cycles, structure, functions and evolutionary processes.
26. In order to resolve the underlying case, the Court considers it indispensable to analyze the rights of existence held by the animal and plant species of Los Cedros, as well as the right of this ecosystem to maintain its cycles, structure, functions and evolutionary process.
27. In order to carry out this analysis it is appropriate first to examine the rights of nature as constitutional values and principles, then examine the normative force and scope of

¹⁴ The case has been assigned case no. 2436-19-EP. It should be noted this Court has resolved appeals while other related constitutional proceedings have been pending, such as in case no. 983-18-JP/21 regarding the extraordinary action of protection no. 84-21-EP, and case no. 41-20-IS in relation to case no. 711-20-JP/21.

these rights, so that the intent of the precautionary principle, enshrined in Article 73 of the Constitution, may be considered as relate to the rights of nature, specifically in relation to the existence of the ecosystem of the Los Cedros Protected Forest, in conformance with the allegations set forth by the petitioner.

28. In its preamble, the Ecuadorian Constitution celebrates nature or Pachamama, of which we are a part and which is vital for our existence. Accordingly, the conception of nature developed by the Constitution in Article 71 includes human beings as an inseparable part of the same, and of the life that it reproduces and forms in its bosom.
29. This constituent declaration of the Ecuadorian people, weaving an intercultural convergence of the knowledge of indigenous peoples and modern Western science, draws upon the universal archetype of the mother and thus recalls the essential relationship between human beings and nature.
30. In highlighting this relationship, the Constitution, in its preamble, emphasizes that Nature, Pachamama, “*is vital for our existence*”. Here the Constitution perceives that the very existence of humanity is inevitably tied to that of nature, since it conceives humanity as part of nature. Therefore, the rights of nature necessarily encompass the right of humanity to its existence as a species.
31. This is not a rhetorical lyricism, but rather a transcendent statement and a historical commitment that, according to the preamble of the Constitution, demands “*a new form of civic coexistence, in diversity and harmony with nature*”.
32. The Court emphasizes that these values form part of the constitutional preamble in which the fundamental values of the Ecuadorian people are summarized, and which are expressed throughout the entirety of the Constitution, including those related to right living -sumak kawsay- and the model of development.

Rights of nature and ecological justice

33. The Court observes that, in the case under review, the Provincial Court of Justice concentrates its analysis on the environmental consultation, while the lower court judge reviewing the action for injunctive relief does not develop an analysis regarding the GAD’s allegation concerning the violation of the rights of nature, but rather rejects the requested precautionary measures, limits himself to affirming that the matter dealt with a matter of mere legality, and finds the action for injunctive relief to be inadmissible.
34. It is of much concern to this Court that the rights of nature, to which the Constitution grants express recognition and guarantees, are not being timely and adequately considered by some judges, public authorities and individuals.

35. The rights of nature, like all the rights established in the Ecuadorian Constitution, have full normative force. They do not constitute mere ideals or rhetorical statements, but rather legal mandates. Thus, in conformance with article 11, paragraph 9, integrally respecting- and ensuring respect for- these rights, along with all the other constitutional rights, is the highest duty of the State. This duty of the State is reiterated by the Constitution in article 277, paragraph 1, upon establishing norms for development.¹⁵
36. Along these lines, respect for the rights of nature also includes the duty of every entity with regulatory power to formally and materially adapt said norms to these rights, as well as to all the other constitutional rights, as provided in article 84 of the Constitution. Likewise, in article 84, the Constitution provides that public policies shall be intended to effectuate right living and all rights, including, by extension, the rights of nature.
37. Regarding the duties and responsibilities of citizens in general, Article 83, paragraph 6 of the Constitution expressly includes respect for the rights of nature, the preservation of a healthy environment and the rational, sustainable use of natural resources.
38. The Court notes that the normative character of the Constitution applies not only to the rights of nature, but also to all applicable guarantees and principles of constitutional interpretation. Article 71, second paragraph of the Constitution establishes that “*any person, community, people or nationality may demand from the public authority the fulfillment of the rights of nature. In order to apply and interpret these rights, the principles established in the Constitution shall be observed, as applicable*”. For an effective protection of nature, the Court highlights among these principles direct application and the *pro natura* principle.
39. In accordance with Article 11, paragraph 3, the rights and corresponding guarantees that the Constitution recognizes for nature are directly and immediately applicable by, and before, any public servant, administrative or judicial, *ex officio* or at the request of a party.
40. Regarding the *pro natura preference principle*, all public servants, in accordance with article 11, paragraph 5 of the Constitution, must apply the norm and interpretation that most favors the effective enforcement of rights and guarantees, including the rights of nature.¹⁶ In the event there are several interpretations of the same provision, the *in dubio pro natura principle* is also relevant, in accordance with article 395, paragraph 4 of the Constitution, whereby when in doubt about the specific scope and exclusive nature of environmental legislation, it should be interpreted in the most favorable to the protection of nature. This Constitutional Court additionally determined that these principles should be applied when interpreting the constitutional provisions themselves, since this is what

¹⁵ Article 277, paragraph 1 of the Constitution states: “*For the attainment of right living, general duties of the State shall be: 1. Guaranteeing the rights of persons, collectivities and nature*”.

¹⁶ Article 11, paragraph 5 of the Constitution. Article 395, paragraph 4 of the Constitution also establishes that when in doubt, environmental legislation should be interpreted in the sense most favorable to the protection of nature.

best aligns with the integrity of the Constitution and most favorably allows for the full exercise of rights, in conformance with Article 427 of the Constitution.

41. Within this framework, judges hearing actions for injunctive relief and requests for precautionary measures for possible violations of the rights of nature are obligated to conduct a careful examination of such allegations and petitions, in the same terms that this Court has established for other constitutional rights. In particular, these petitions and claims cannot be denied, as occurred in this case in the lower court, under the mere assertion that the cases deal with purely administrative matters whose adjudication corresponds to the ordinary justice system.¹⁷

Intrinsic value of nature

42. The central idea of the rights of nature is that nature has value in itself and that this should be expressed in the recognition of its own rights, regardless of the utility that nature may have for human beings. Article 71 of the Constitution expresses this in the following terms:

Nature or Pachamama, where life is reproduced and realized, has the right to full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes. (emphasis added)

43. It is a systemic perspective that protects natural processes for their own value. Thus, a river, a forest or other ecosystems are seen as life systems whose existence and biological processes merit the greatest possible legal protection that a Constitution can grant: the recognition of inherent rights to a subject. In the Ecuadorian case, there is a general recognition of rights of nature in the Constitution that--as expressed by the Court in Court Order No. 22-18-IN/21, referring to mangrove rights--can be concretized in specific holders; the specific recognition does not imply that recognition is necessary for protection, but rather helps to configure the protection in a manner appropriate to the specific holder of rights, in this case the Los Cedros Protected Forest.
44. In this regard, it is important to understand the *ecological tolerance principle*, which holds that natural systems can only function adaptively within an environment whose basic characteristics have not been altered beyond what is optimal for that system. This principle is closely related to the right to the existence and reproduction of cycles, for as an environment is modified, it becomes more and more difficult, and eventually, impossible, for the adaptive behavior of the ecosystem to function. For each particular characteristic of the environment (amount of rain, humidity, solar radiation, etc.) there are limits beyond which organisms can no longer grow, reproduce, and ultimately survive.¹⁸ Thus, when the ecological tolerance level is exceeded, it is impossible to exercise the right to reproduce life cycles. A protected forest can withstand an impact

¹⁷ See court orders in Case No. 1-16-PJO-CC, from March 22, 2016 Case No. 989-11-EP/19 from September 10, 2019; and Case No. 16-16-JC/20, from September 30, 2020.

¹⁸ Goldsmith, E., 1993. *The Way. An ecological World-view*. Shambhala Publications, Inc. Boston.

within certain limits, but beyond those it will lose its structure and be unable to continue exercising this right to reproduce its life cycles, as established in article 71 of the Constitution.

45. The cloud forest is one of several types of ecosystems in Ecuador, and is the ecosystem found in the Los Cedros Protected Forest. The Organic Environmental Code (hereinafter “COAm”) in its respective glossary defines an ecosystem as “*a structural, functional and organizational unit, consisting of organisms and the biotic and abiotic environmental variables of a determined area*”. In other words, an **ecosystem** is a community or group of organisms that live and interact in a given environment.¹⁹ This supposes that the ecosystem is defined not only by the interrelationships involved therein, but also by its biotic and abiotic components (sunlight, water, minerals and others).
46. The biotic component of the ecosystem is the species that constitute it. A species is defined as the set of organisms capable of interbreeding and producing fertile offspring, though not with members belonging to other species in a natural state.²⁰ Often, over geological time, individuals that separate from the original population and become isolated from the rest may reach a sufficient degree of differentiation to become a new species.²¹
47. A diverse ecosystem is considered to be one with a high number of interacting species. **Biodiversity** acts as a *natural insurance* for the ecosystem because it allows it to recover from the events that affect it. If there are several species that fulfill a similar function, such as feeding on plants, it is feasible that in the event that one of them decreases in population numbers due to natural catastrophes, the others can make up for this deficiency and the ecosystem will recover its stability.²² Both the species and biodiversity of ecosystems are intrinsically valued in the Ecuadorian Constitution.
48. The intrinsic valorization of nature through the recognition of rights is difficult to understand from a rigidly anthropocentric perspective, which conceives of human beings as the most valuable species, while reducing other species and nature itself to a set of objects or resources for the satisfaction of human needs, especially those of an economic character.

¹⁹Fundación Multimedios Ambiente Ecológico. (n.d.). *Ecological Dictionary*. Reviewed in 2021: <http://www.ambiente-ecologico.com/ediciones/diccionarioEcologico/diccionarioEcologico.php3>.

²⁰ UN Glossary of Environmental Statistics. Department for Economic and Social Information and Policy Analysis. Statistics Division. p. 69.

²¹Understanding Evolution. (n.d.). *Reproductive Isolation*. Reviewed at: https://evolution.berkeley.edu/evolibrary/article/0_0_0/evo_44_sp

²²Vargas Ríos Orlando. 2011. *Ecological Restoration: Biodiversity and conservation. Colombian Biological Act*. National University of Colombia. Bogotá. Vol 16, No. 221-2462.

49. This vision of nature as a simple source of resources to be exploited at will has been deeply questioned from various perspectives of the natural and human sciences. The rights of nature represent this questioning in the world of law.
50. The intrinsic valorization of nature implies, therefore, a defined conception of the human being about himself, about nature, and about the relations between the two. According to this conception, the human being should not be the only subject of rights, nor the center of environmental protection. On the contrary, while recognizing specificities and differences, a complementarity is proposed between human beings, other species, and natural systems, given that they integrate common life systems.
51. In this regard, this Constitutional Court highlights what was stated by the Inter-American Court of Human Rights (IACHR) regarding the objectives of environmental protection as stated in Advisory Opinion 23-17:

*The aim is to protect nature and the environment not only because of their connection with a utility for human beings or because of the effects that their degradation could have on other human rights, such as health, life or personal integrity, but also because of their importance for the other living organisms with which the planet is shared, also deserving of protection in themselves.*²³

52. This is a change in the legal paradigm because historically the law has functioned for the instrumentalization, appropriation and exploitation of nature as a mere natural resource. The rights of nature propose that in order to harmonize relationships with nature, it is the human being who must adequately adapt to natural processes and systems, hence the importance of having scientific knowledge and community knowledge, especially indigenous knowledge due to their relationship with nature regarding such processes and systems.
53. This adaptation must also occur within production processes. Indeed, the Constitution itself recognizes in Article 74 that “*individuals, communities, peoples and nationalities shall have the right to benefit from the environment and natural resources that allow them to live well*”.
54. In conclusion, the notion of the intrinsic valorization of nature is of particular relevance to the constitutional analysis regarding the rights of nature provided for in the Constitution. Since the petitioners claim in their lawsuit that the mining activity in Los Cedros would cause serious and irreversible damage to the species at risk which are present there and to the ecosystem as a whole, and invokes the precautionary principle to that effect, the Court will examine this constitutional principle.

²³ IACHR Court, Advisory Opinion 23-17 on Environment and Human Rights, para. 62. In the same line: IACHR Court, Case of indigenous communities members of the Lhaka Honhat Association (Nuestra Tierra) vs Argentina. Judgment of February 6, 2020, especially para. 203.

Precaution and prevention

55. The essential idea of the precautionary principle is that, even in the absence of sufficient scientific evidence, it is better not to assume certain risks when these could result in serious damage, which may be irreversible.
56. In the underlying case, the GAD expressly invoked the precautionary principle contained in Article 73 of the Constitution in its complaint, so as to argue the violation of the rights of nature. This article states:

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

57. The respondents and in particular ENAMI EP, however, claim the *precautionary principle* does not apply in this case, since it already would have been observed precisely upon the granting of the respective environmental registration. Instead, there would be certainty about the environmental impacts of the mining activity and therefore the applicable principle in this case would be the *prevention principle*.
58. The Court observes that neither the trial judge nor the Provincial Court analyzed the precautionary principle or the prevention principle, even though that this was an express allegation of the GAD relevant to this case.
59. The Court considers it essential to elucidate in this case the scope of the precautionary principle because in its article 73, the Constitution applies the precautionary principle to the risk of species extinction and the destruction of ecosystems, considering both situations as violative of the aforementioned rights of nature, and to the full respect of its existence, maintenance and regeneration. All of these concepts are relevant to the case of Los Cedros.
60. According to Article 396 of the Constitution, the *precautionary principle* determines that “*in case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of damage, the State shall adopt effective and timely Protected measures*”.
61. Article 396 includes generic references to the basic components of the precautionary principle in relation to the rights of nature and to a healthy and ecologically balanced environment. More specifically, article 73 of the Constitution applies this principle to the extinction of species, the destruction of ecosystems, and the permanent alteration of natural cycles.

62. Based on these provisions in environmental legislation and constitutional law,²⁴ this Court develops the following elements of the precautionary principle:

1) The potential risk of serious and irreversible damage to the rights of nature, the right to water, to a healthy environment or to health. In order to apply the precautionary principle, it is not enough that a risk simply exists; it is necessary that this risk refers to serious and irreversible damage. Article 73 illustrates this situation well when referring to the extinction of species, destruction of ecosystems and permanent alteration of natural cycles, since all of these are damages so serious and irreversible that the Constitution has included them in the section on the rights of nature, considering them a violation of the same.

2) Scientific uncertainty about these negative consequences, either because they are still the subject of scientific debate, or because of lack of knowledge, or because of the difficulty of determining such consequences due to the high complexity or numerous variables involved. This is the fundamental characteristic of the precautionary principle, and what differentiates it from the prevention principle. Scientific uncertainty for the purposes of the precautionary principle consists of: *lack of scientific certainty*, which refers to relatively clear or possible effects of an activity or product, but without adequate evidence to assign probabilities²⁵, or *ignorance*, which refers to the lack of knowledge both of these probabilities and of some of the possible damages or effects. In contrast, the prevention principle applies only when both the effects and their probabilities are known in advance.²⁶

Examples of application of the precautionary principle include human contact with substances or materials such as lead or asbestos²⁷, about which for decades there was no scientific certainty, but only hypotheses of their negative effects on human health, which if precautionary measures had been adopted in a timely manner would have prevented serious illnesses and numerous deaths. It has also been applied to phenomena such as the depletion of the ozone layer,²⁸ the loss of biodiversity²⁹, climate change³⁰, genetically modified organisms³¹, or human exposure to electromagnetic radiation³²,

²⁴ The precautionary principle is included in numerous international instruments, such as: The Rio Declaration in its Principle 15, the Framework Convention on Climate Change in its Principle 3, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity in Article 1, the WTO Agreement on Sanitary and Phytosanitary Measures, Article 5, the Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks in Article 6, among many others.

²⁵ “Possibility” is that which may or may not happen; “probability” is a statistical quantification of possibility.

²⁶ Holdway Aaron, *Reducing Uncertainty: The Need to Clarify the Key Elements of the Precautionary Principle*, Consilience, (20081), pp. 37-51.

²⁷ UNESCO - COMEST, *Report of the Group of Experts on the Precautionary Principle*, Paris, UNESCO, 2005, pages 10 and 11.

²⁸ Montreal Protocol on Substances that Deplete the Ozone Layer (1987)

²⁹ Rio Convention on Biological Diversity, principle 15 (1992).

³⁰ United Nations Framework Convention on Climate Change, article 3 (1994)

³¹ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, article 1 (2000)

³² Bourguignon Didier, *The Precautionary Principle*, European Parliamentary Research Service, December 2015 - PE 573.876

among many others. Although all or some of the potential harms or negative effects that these produce are known *a priori*, the specific cause-effect relationships between the activity or product and these harms have not been scientifically established, with established probabilities. This limitation of scientific knowledge may be due to the high complexity of a system or phenomenon. Scientific uncertainty may also be evidenced by unresolved scientific debates or absence or insufficiency of knowledge about these effects.

3) Adoption of timely and effective Protected measures by the State. When there is a risk of serious and irreversible damage, but also a corresponding uncertainty surrounding scientific knowledge, it is precisely due to this uncertainty that the State must not assume the risk and instead take certain measures in a timely and effective manner to avoid these possible negative effects.³³ In other words, when there is no scientific certainty about the impact or damage caused by an action or omission to nature, the environment, or human health, the State must adopt effective and timely measures to avoid, reduce, mitigate or cease such effects³⁴. Therefore, the precautionary principle favors, in the face of scientific uncertainty, the plausible hypothesis of the worst case scenario: serious and irreversible damage, even if this occurs in the long term. It should be clarified that the prohibition of a product or process is not the only Protected measure that may be adopted, although such a prohibition may be justified if the potential harm is very serious and irreversible.

63. The *precautionary principle* differs from the *prevention principle* in that the latter is applied when there is scientific certainty about the impact or harm, that is, when both the effects and their probabilities are known in advance. In terms of article 396 of the Constitution, “*The State shall adopt appropriate policies and measures to avoid negative environmental impacts, when there is certainty of damage*”. In other words, the *prevention principle* entails the State’s obligation to demand compliance with provisions, norms, procedures and measures aimed primarily at eliminating, avoiding, reducing, mitigating and ceasing the impact.³⁵
64. Consequently, Article 73 of the Constitution, concerning precaution in the fact of the risk of species extinction and destruction or serious disruption of ecosystems, constitutes a principle of application of the rights of nature, which is complemented by Article 396 of the Constitution.

³³ Other possible measures include suspension, providing information about the risk, and conducting studies, amongst others.

³⁴ Organic Environmental Code, article 9, paragraph 7.

³⁵ Organic Environmental Code, article 9, paragraph 8.

65. Article 73 also establishes a duty of the State by imperatively stating that it “*shall apply precautionary and restrictive measures*”. This is not a conditional power or option, but a constitutional obligation derived from the intrinsic value that the Constitution places on the existence of species and ecosystems through the rights of nature. In effect, the risk in this case does not necessarily relate to the effects on human beings, although they may be included, but rather to the extinction of species, destruction of ecosystems or permanent alteration of natural cycles or other types of serious or irreversible damage to nature, independently of such effects³⁶.
66. It should be emphasized that according to article 396 of the Constitution, precautionary and restrictive measures must be *effective and timely*. They are *effective* insofar as they actually fulfill, in a material and not only formalistic sense, the objective of avoiding the violation of the rights of nature implied by the extinction of species or destruction of ecosystems. They are *timely* insofar as they are announced and complied with immediately, and applied in time, such that they meet the protection objectives.
67. Application of the precautionary principle by constitutional judges must be determined on a case-by-case basis, taking into account the individual and concrete characteristics of the case, the existence of a risk of serious and irreversible damage, as well as scientific uncertainty. This uncertainty refers to the debate still existing in the scientific community about the harm generated by an activity or product, or to insufficient scientific knowledge on the issue. Therefore, these judges, even if there is no conclusive scientific information, but availing themselves of the available scientific and technical information, should identify and analyze the risk of serious and irreversible damage due to the development of an activity or a product in order to duly substantiate in each case the application or non-application of the precautionary principle.

On the extinction of species and destruction of ecosystems

68. A violation of the right of nature to the *full respect for its existence* occurs through activities that lead to the extinction of species. This is a violation of such magnitude that it would be equivalent to what genocide means and implies in the field of human rights. Once a species is extinct, the laborious process that has taken nature sometimes millions of years results in an irreparable loss of diversity and knowledge. Article 73 of the Constitution applies the precautionary principle to these cases precisely due to the serious and irreversible nature of harm occasioned by the extinction of species,
69. Likewise, given the systemic relationships that all animal and plant species maintain, the disappearance of one or more of them can lead to the extinction of others, or even the destruction of entire ecosystems or the permanent alteration of natural cycles referred to in the same article 73 of the Constitution. This destruction or alteration

³⁶ A close relationship between the precautionary principle and the intrinsic valorization of nature is made in Advisory Opinion 23-17 of the IACHR Court, when it states: “*the right to a healthy environment as an autonomous right, unlike other rights, protects the components of the environment, such as forests, rivers, seas and others, as legal interests in themselves, even in the absence of certainty or evidence of risk to individual persons*”.

could also be generated for reasons other than the extinction of species, but the Court wishes to emphasize here the systemic nature of these phenomena. Furthermore, these violations to the rights of nature may have unsuspected negative effects on human beings, which would also violate other rights, such as the right to water and to a healthy environment, as analyzed *below* in this opinion.

70. In order to analyze the situation of these rights of nature and the application of the precautionary principle in the case of the Los Cedros Protected Forest, the Court first sets forth a description of this ecosystem based on the scientific information received during the verified evidentiary proceedings of this case, including the endemic, threatened, unique and rare species present in the ecosystem.

Los Cedros is a remnant ecosystem of the northwestern forests of Ecuador.

71. Various researchers have pointed out that, in the last fifty years, Ecuador has lost almost all of its vegetative cover. In the year 2000, it was estimated that approximately 96% of the old-growth forest land in the west of the country had been deforested. Much of the remaining 4% has since been lost. Both low altitude forests (below 600 mamsl) and mountain forests, including cloud forests, typical of the foothills, have almost disappeared.³⁷
72. For further context, in 1938, in an area of approximately 70,000 km² of the Ecuadorian coast, about 60,000 km² of forests existed.³⁸ Today, the largest remnants of forest in the region, which together total less than 5,000 km², are only four in number: the Awa Ethnic Reserve (Awa), the Mache Chindul Ecological Reserve, the Chongón Colonche Protected Forest, and the Cotacachi Cayapas National Park. Only two, the Awa Ethnic Reserve and Cotacachi Cayapas National Park, maintain remnant cloud forest protected areas. These forest types, as life zones, have been poorly represented within the National System of Protected Areas.³⁹ Los Cedros, with its 6,400 hectares, is one of the last remnants of western cloud forest that remains relatively unaltered.

Los Cedros is an ecosystem at the confluence of two regions of high diversity: the tropical Andes and the Chocó Bioregion.

³⁷ Myers, N, Mittermeier, R. Mittermeyer, C. da Fonseca, G. and Kent, J. 2000. *Biodiversity hotspots for conservation priorities*. Nature, vol. 403, 853-858.

³⁸ Dodson, C. Gentry. A. 1991. *Biological Extinction in Western Ecuador*. Ann Mo Bot Gard. vol. 78, 273-95.

³⁹ Endara L., Williams N. León-Yáñez, S. 2009. *Patterns of endemism of Ecuadorian endemic orchids: perspectives and priorities for conservation*. In: Pridgeon, A. M. Suarez J.P (Eds). *Proceedings of the Second Scientific Conference on Andean Orchids*. Universidad Técnica Particular de Loja, Loja, Ecuador, 63-70.

73. Two high biodiversity zones converge in Los Cedros: the Tropical Andes Bioregion and the Chocó Bioregion.⁴⁰ Biological diversity is a measure of the genetic richness (wealth of genetic information) of a given life zone. The higher the number of species that inhabit a place, the greater its biodiversity.⁴¹
74. The Andes in Ecuador are biodiverse because in addition to being in the world's equatorial zone, which is home to tropical rainforests such as the Amazon, they are mountains of more than 4000 meters. These two characteristics are exceptional and only occur in the north, in Colombia and Venezuela, and in the south, in some areas of Bolivia and Peru, and in the northernmost regions of Argentina and Chile⁴².
75. The Chocó Bioregion extends from eastern Panama along the Pacific coast of Colombia and the Ecuadorian coastline to border the dry forests of southern Ecuador. Its extremely high levels of precipitation and humidity (3,000 to 11,000 mm per year)⁴³, its tropical condition, its unique geological history and its isolation (being separated from the Amazon basin by the barrier of the Andes mountains) have made the Chocó one of the 34 most diverse places in the world as it gathers 3% of the total number of plant species on the planet, that is some 11,000 species in less than 0.2 of the earth's surface.⁴⁴
76. Biodiversity also includes the concept of **endemism**. A species is endemic when it is only found in a certain geographical area (province, region, country or continent) due to the presence of natural barriers (rivers, mountains, canyons, oceans, etc.) that prevent populations of that species from interbreeding or reproducing with other populations of the same species. By limiting the crossing of genetic information over long periods of time, the endemic species becomes so differentiated that it is no longer possible for it to interbreed with the original species. This is the case of island species such as Galapagos or Hawaii, which originally descended from continental species but are now endemic.

⁴⁰ Roy, B. Zorrilla, M. Endara, L. Thomas, D. Vandegrift, R. Rubenstein, J. Policha, T. Rios-Touma, B. Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science, vol. 11, 1-20.

⁴¹ BYJU'S. n.d. Biodiversity and its types - Genetic Biodiversity. Retrieved from: <https://byjus.com/biology/biodiversity/>

⁴² Cuesta, F. Peralvo, M. Valarezo, N. 2009. *The Montane Forests of the Tropical Andes. A regional assessment of their conservation status and vulnerability to the effects of climate change*. Serie Investigación y Sistematización # 5. Programa Regional ECOBONA-INTERCOOPERACION. Quito.

⁴³ Gentry A. H. 1986. *Species richness and floristic composition of Chocó region plant communities*. Caldasia, vol. 15, 71-75.

⁴⁴ Christenhusz M. J., Fay M. F., Chase M. W. (2017). *Plants of the world: an illustrated encyclopedia of vascular plants*. London: Kew Publishing, 792 p. 10.

77. Scientific studies indicate that the Chocó is also a center of endemism. There, approximately 2,750 plants are endemic.⁴⁵

Los Cedros is an ecosystem with endemic species.

78. Los Cedros is not accessible by road and is one of the most remote forests in the northwest. It is this inaccessibility that has kept the Los Cedros Protected Forest almost intact, but it has also meant that it has been less scientifically⁴⁶ explored than other remnants of forest in the region, such as the Mashpi and Maquipucuna reserves.
79. Many plants in this forest are **local endemics** with small distribution⁴⁷ ranges. This means that due to a special combination of microclimate barriers and/or rugged relief within the forest, populations of a given species are less able to cross the barrier and reproduce with other similar populations of the same species. Over time, said population becomes increasingly isolated and in turn differentiates from its original population until it finally becomes a new species limited to areas as small as, for example, the western side of a ravine, the top of a hill, or the edges of a seasonally flooded area and is not in any other part of that same forest, thus becoming a local endemic. This makes them particularly vulnerable to disturbances such as earthquakes, floods and changes in land use⁴⁸.
80. This seems to be the case within the orchid group⁴⁹, about which verified information has been documented, and a record of 236 species identified. According to the catalog of the Los Cedros Reserve, there are twelve endemic species in this forest.⁵⁰ Of these twelve species, nine have been confirmed as endemic by studies carried out by specialists in the taxonomy of this group of plants. These are: *Brachionidium ingramii*, *Dracula morleyii*, *Dracula pubescens*, *Lepanthes morleyii*, *Platystele gaileana*, *Platystele cedriensis*, *Platystele rhinocera*, *Porroglossum lorenae*, *Trisetella dalstroemii*.⁵¹
81. Studies are needed to determine an approximate total number of endemic species by taxon (family, genus, etc.) in Los Cedros. However, when considering that 27% of the

⁴⁵ Mittermeier R. A., Turner W. R., Larsen F. W., Brooks T. M., Gascon C., 2011. "Biodiversity hotspots," in *Global biodiversity conservation: the critical role of hotspots*. Eds. Zachos F. E., Habel J. C. (London: Springer-Verlag).

⁴⁶ Roy, B. Zorrilla, M., Endara, L., Thomas, D., Vandegrift, R., Rubenstein, J., Policha, T., Ríos-Touma, B., Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11, 1-20.

⁴⁷ Ibid.

⁴⁸ Understanding Evolution. (n.d.). *Reproductive Isolation*. Retrieved from: https://evolution.berkeley.edu/evolibrary/article/0_0_0/evo_44_sp

⁴⁹ Roy, B. Zorrilla, M., Endara, L., Thomas, D., Vandegrift, R., Rubenstein, J., Policha, T., Ríos-Touma, B., Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11, 1-20.

⁵⁰ Los Cedros Reserve. n.d. *Orchids*. Retrieved from: <https://loscedrosreserve.org/orchids>.

⁵¹ *Amicus Curiae* filed by Luis Baquero in case no. 1149-19-JP.

total number of plants in Ecuador are endemic,⁵² and that this forest is part of the Chocó where approximately 25% of plant species are endemic,⁵³ it is reasonable to infer high levels of endemism in the organisms that inhabit the vegetative cover.

Los Cedros is an ecosystem with a high number of endangered species.

82. **Extinction** is a biological process that leads to the disappearance of species. A species is considered extinct when its last specimen dies. Extinction is certain when there is no longer any individual capable of reproducing and giving rise to a new generation. A species can also become **functionally extinct**, that is, a very small fraction of its members survive but are unable to reproduce due to factors such as health problems, age, great geographic distance between their remaining populations, lack of individuals of both sexes, and other reasons.⁵⁴
83. A species may also become **locally extinct**. In this case, the species in question ceases to exist in a given area but continues to exist elsewhere. This phenomenon is also known as **extirpation**. An example of a local extinction or extirpation in Ecuador is that of the tawny-throated dotterel (*Oreopholus ruficollis*), a bird that once inhabited the southwestern Santa Elena Peninsula but is now currently considered extinct in the country, although it still inhabits areas from Peru to Argentina.⁵⁵ As a result of industrial development and human population growth, it has been seen that local extinctions of a given species can lead to total extinction of the species.⁵⁶
84. Because of the number of relationships that a species establishes with other species in the ecosystem, its extinction can lead to what is known as an **extinction chain**. In this case, the disappearance of a single species can cause extinctions both up and down the food chain of which it is a part.⁵⁷
85. The International Union for Conservation of Nature (IUCN)⁵⁸ has established several categories that assess the probability that a known species will disappear. These are,

⁵² Leon-Yáñez, S., Valencia, R., Pitman, N., Endara, L., Ulloa-Ulloa, C. and Navarrete, H. 2012. *Libro Rojo de las Plantas Endémicas del Ecuador*, 2nd ed. Pontificia Universidad Católica del Ecuador.

⁵³ Mittermeier R. A., Turner W. R., Larsen F. W., Brooks T. M., Gascon C., 2011. "Biodiversity hotspots," in *Global biodiversity conservation: the critical role of hotspots*. Eds. Zachos F. E., Habel J. C. (London: Springer-Verlag).

⁵⁴ Holsinger, Kent. 2001. Local extinction In: *Population Viability Analysis: Bay Checkerspot Butterfly*. Internet Archive Wayback. Machine. Retrieved from: <https://archive.org/web/>

⁵⁵ Granizo, T., Pacheco, C., Rivadeneira M., Guerrero, M., Suárez, L., (Eds.). 2002. *Red Book of the Birds of Ecuador*. SIMBIOE/Conservación Internacional/Ecociencia-Ministerio de Ambiente/UICN. Serie Libros Rojos del Ecuador, Vol. 2.

⁵⁶ Holsinger, K. 2001. *Local extinction In: Population Viability Analysis: Bay Checkerspot Butterfly*. Internet Archive Wayback. Machine. Retrieved from: <https://archive.org/web/>

⁵⁷ Quince, C., Higgs, P. and Mckane A., 2005. *Deleting species from model food webs*. *Oikos* 110: 283-296

⁵⁸ The International Union for Conservation of Nature (hereafter "IUCN") is an institution currently composed of 1400 governmental and civil society entities, and 18000 experts, which was founded in 1948 with the aim of preserving biodiversity worldwide. Among its tasks is maintaining an updated list of globally endangered species (IUCN Red List of Threatened Species).

from greatest to least risk of extinction: i) EX, extinct species, ii) EW, extinct in the wild, iii) CR, critically endangered, iv) EN, endangered, v) VU, vulnerable, vi) NT, near threatened, vii) LC, least concern for this species.

86. According to the IUCN, there are two species of mammals at maximum risk of extinction in Los Cedros, level CR. These two species are the jaguar (*Panthera onca*) and the brown-headed spider monkey (*Ateles fusciceps fusciceps*).
87. With respect to the jaguar, studies in 2013⁵⁹ have shown that the species has been practically extirpated from the lowland tropical forests of the northwestern part of the country due to habitat loss and the need for large territories for breeding.⁶⁰ Its presence has only been recorded in Cotacachi Cayapas⁶¹ National Park, and in Los Cedros, less than five kilometers from the Mandariacu River.⁶²
88. The case of the brown-headed spider monkey is similar. Only two populations have been recorded in the northwestern part of the country. One within the Awa Ethnic Reserve and the other within the Cotacachi Cayapas National Park.⁶³
89. In addition, Los Cedros protects a considerable extension of the south face of the Toisán mountain range where, due to its inaccessibility, it is likely that populations of threatened birds can take refuge and thrive. Among these birds, Quito's flagship species, the black-breasted puffleg (*Eriocnemis nigrivestris*) is critically endangered on both the IUCN list and Ecuador's⁶⁴ red list of birds. The original habitat of this bird included the montane forests that extended to the northwest of Pichincha, Esmeraldas and Imbabura. Having disappeared, and with very few records of it, this bird was thought to have been extirpated from its habitat but in 2008 a small population (48-108 individuals) was rediscovered at Cayapachupa in the Toisán mountain range on the border between Esmeraldas and Imbabura⁶⁵.

⁵⁹ Zapata-Ríos, G. and Araguillin, E. 2013. *Conservation status of the jaguar and the white-lipped peccary in Western Ecuador*. Revista Biodiversidad Neotropical, 3 (1): 21-29.

⁶⁰ De la Torre, J. González-Maya, J. Zarza, H. Ceballos, G. and Medellín, R. 2017. *The jaguar's spots are darker than they appear: Assessing the global conservation status of the jaguar Panthera onca*. Oryx, 52, 300-315.

⁶¹ Zapata-Ríos, G. and Araguillin, E. 2013. *Conservation status of the jaguar and the white-lipped peccary in Western Ecuador*. Revista Biodiversidad Neotropical, 3 (1):

⁶² Jost, L. 2016. Jaguar returns to our Mandariacu reserve.

<https://ecomingafoundation.wordpress.com/2016/0921-29/19/jaguar-returns-to-our-manduriacu-reserve/>

⁶³ Tirira D. 2004. *Current status of the brown-headed spider monkey (Ateles fusciceps Gray, 1866)* (Primates: Atelidae) in Ecuador. Lyonia. Journal of Ecology and Application. Vol. 6(2).17-24.

⁶⁴ Granizo, T., Pachecho, C., Rivadeneira, M.B., Guerrero, M; Suarez, L. (Eds.). 2002. Red Book of the Birds of Ecuador. Simbioe /Conservación Internacional/ EcoCiencia/Ministerio de Ambiente UICN. Serie Libros Rojos del Ecuador, volume two. Quito, Ecuador.

⁶⁵ Jahn, O. 2008. *Rediscovery of Black-breasted Puffleg Eriocnemis nigrivestis in the Cordillera de Toisan, north-west Ecuador, and reassessment of its conservation status*. Cotinga 29, pp 31-39.

90. Other notable mammals in varying degrees of threat that have been reported in Los Cedros include the spectacled bear *Tremarctos ornatus* (VU), two species of felines: the margay *Leopardus wiedii* (NT) and the oncilla *Leopardus tigrinus* (VU), and two other primate species, the white-faced capuchin *Cebus capucinus* (VU) and the mantled howler monkey *Alouatta palliata* (EN).⁶⁶
91. The category of birds consists of 309 species recorded at Los Cedros, of which 26 face varying degrees of threat.⁶⁷ Of particular importance are the iconic long-wattled umbrella bird *Cephalopterus penduliger*, the banded ground cuckoo *Neomorphus radiolosus* and the baudo guan *Penelope ortoni*. The first two are in the vulnerable category (VU) and the third in the threatened category (EN).⁶⁸ These three birds can still be seen within Los Cedros.⁶⁹
92. In 2005, the non-governmental organization Birdlife International declared the Los Cedros Protected Forest an “Important Bird Area” (IBA).⁷⁰
93. These forests also host several species of threatened migratory birds that depend on sufficient available forest habitat to arrive after their long journeys to escape winter in Canada and the United States, such as the cerulean warbler *Setophaga cerulean* (IUCN category VU) and the olive-sided flycatcher *Contopus cooperi* (IUCN category Near Threatened - NT).⁷¹
94. The category of toads is very important because worldwide their species are suffering a significant decline due to the influence of global warming on their populations. In Los Cedros, almost all species are threatened and are only found within Los Cedros and in nearby local cloud forests (Mashpi, Maquipucuna). There are three Critically Endangered (CR) species: the longnose stubfoot toad *Atelopus longirostris*, the confusing rocket frog *Ectopoglossus confusus* and the Quito rocket frog *Hyloxalus jacobuspetersi*.⁷²

⁶⁶ Roy, B., Zorrilla, M., Endara, L., Thomas, D., Vandegrift, R., Rubenstein, J., Policha, T., Ríos-Touma, B., Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11: 1-20.

⁶⁷ Ibid.

⁶⁸ Granizo, T., Pacheco, C., Rivadeneira, M., Guerrero, M., Suárez, L. (Eds.). 2002. Red Book of the Birds of Ecuador. SIMBIOE/Conservación Internacional/Ecociencia-Ministerio de Ambiente/UICN. Serie Libros Rojos del Ecuador, Vol. 2.

⁶⁹ Freile, J. and Santander, T. (coord), 2005. *Important Areas for the conservation of Birds in Ecuador*. Aves y Conservación, Birdlife International, Conservation International and Ministry of Environment of Ecuador. Quito Ecuador.

⁷⁰ Birdlife International and Conservation International 2005 *Important Areas for the conservation of birds in the Tropical Andes: Priority Sites for Biodiversity Conservation*. Quito Ecuador

⁷¹ Roy, B., Zorrilla, M., Endara, L., Thomas, D., Vandegrift, R., Rubenstein, J., Policha, T., Ríos-Touma, B., Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11: 1-20 Online Appendix 2.

⁷² Ibid. Online Appendix 3.

95. Reptiles and bats still need to be systematically evaluated in terms of their threat categories and to confirm the species present in the forest, especially bats, given that little is known about them.⁷³
96. The threatened plants include two species of orchids, *Dracula alcithoe* and *Masdevallia ventricularia*, both of which are in the IUCN⁷⁴ EN category, as well as nine additional species, all endemic to Ecuador and in the IUCN EN category, five of which are tree species, three of which are herbaceous, and one fern.⁷⁵
97. The microorganisms studied at Los Cedros are mainly fungi that decompose organic matter, including four species that are listed in a recent IUCN initiative to identify species of this group that may disappear. These four species of fungi are: *Lamelloporus americanus*, *Hygrocybe aphylla*, *Tamnomycetes chocoensis*, and *Callistodermatium aurantium*. All of these have been collected in Los Cedros.⁷⁶

Los Cedros is an ecosystem with unique and rare species.

98. In 2018, a comparative study was published examining species occurrence in the few remaining remnants of northwestern montane cloud forest, such as the Mashpi and Maquipucuna Reserves, Los Cedros and the Intag Valley. Of the four localities studied, only in Los Cedros were 157 species identified as unique, that is to say they were not found in any of the other study sites. Of these, 106 are orchids, 33 are birds, 7 are mammals, 7 are reptiles and 4 are amphibians.⁷⁷
99. Advances in technology have also allowed the use of camera traps to study wildlife. Thanks to this and other novel remote viewing systems at Los Cedros several rarely observed animal species have been recorded, including: the Mountain Lion (*Puma concolor*), the jaguarundi (*Herpailurus yagouaroundi*), the very rare northern naked-tailed armadillo (*Cabassous centralis*), the nine-banded armadillo (*Dasypus novemcinctus*), the little red brocket (*Mazama rufina*), the lowland paca (*Cuniculus paca*), the agouti (*Dasyprocta punctata*), and the rare western dwarf squirrel (*Microsciurus mimulus*).⁷⁸ Several of these animals are nocturnal and due to the difficulties inherent to their study, the status of their populations has not been evaluated or updated in the cloud forest remnants of the northwest.

⁷³ Ibid. Online Appendix 4.

⁷⁴ Ibid. Online Appendix 5.

⁷⁵ Ibid. Online Appendix 6.

⁷⁶ Appearance of Row Vandegrift (INABIO-University of Oregon) at the hearing convened by this Court on October 19, 2020.

⁷⁷ Roy, B.A., Zorrilla, M., Endara, L., Thomas, D., Vandegrift, R., Rubenstein, J., Policha, T., Ríos-Touma, B., Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11: 1-20.

⁷⁸ Roy, B. Zorrilla, M. Endara, L. Thomas, D. Vandegrift, R. Rubenstein, J. Policha, T. Ríos-Touma, B. Read, M. 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science Vol. 11: 1-20. Online Appendix 1.

Los Cedros is an ecosystem with a rich and unknown genetic heritage.

- 100.** The **gene pool** or **genetic heritage** of an ecosystem can be defined as the totality of genes present in each and every one of the organisms that inhabit it. In recent years several new species have been discovered in Los Cedros. The following can be mentioned:
- 101.** In 2015, a frog was discovered and named *Pristimantis mutabilis*. This amphibian has a high capacity to modify the texture of its skin as it can change its appearance from smooth to granular in a few minutes.⁷⁹ Also, in this group and in the same year, biomolecular techniques were used to identify two new species of toads (*Pristimantis cedros* and *P. pahuma*), which were originally believed to be a single species. This study concluded that it is very likely that there are many more species of this type that are referred to as cryptic species and that therefore the increase in biodiversity and the conservation status of these species needs to be evaluated.⁸⁰
- 102.** Other new species exist within the group of begonias⁸¹ and the Sabiaceae family (*Meliosma gracilis*)⁸² that would have ornamental and medicinal applications. Among the Solanaceae, in Los Cedros, a species of *Cuatresia* has been discovered: *C. physalana*, which could have agricultural and/or pharmaceutical value due to its relationship with potatoes and tomatoes, since it is known that members of this genus have antimalarial compounds in their cells.⁸³
- 103.** In the plant group, orchids have made contributions such as the discovery of two new species of the *Platystele* genus: *P. cedriensis* and *P. decouxii*.⁸⁴ In Los Cedros it has been proven that in addition to contributing new species, each orchid species can be a center of biodiversity in itself, expanding the richness of the gene pool of the area. This happens because orchids are highly specialized organisms that establish multiple and complex ecological relationships with other organisms in their microecosystem such as the pollinators that visit them. One study found that more than 60 unknown species of fruit flies pollinate a single species of orchid (*Dracula lafleurii*)⁸⁵. These new fly species are related to *Drosophila melanogaster*, a model fruit fly, which has contributed immensely to the

⁷⁹ Guayasamin, J. Krynak, T. Krynak, K. Culebras, J. and Hutter, C. R. (2015). *Phenotypic plasticity raises questions for taxo-nomically important traits: A remarkable new Andean rainfrog (Pristimantis) with the ability to change skin texture*. Zoological Journal of the Linnean Society, 173(4): 913-928.

⁸⁰ Hutter, C. and Guayasamin, J. 2015. *Cryptic diversity concealed in the Andean cloud forests: two new species of rainfrogs (Pristimantis) uncovered by molecular and bioacoustic data*. 37-59.

⁸¹ Tebbit, M., Hughes, A. Perez, P. Moonlight. 2017. *Taxonomy of the Begonia tiliifolia group including descriptions of two new species*. Edinburgh journal of botany. 74(2), 199-215.

⁸² Cornejo, X. 2008. *Four new species of Meliosma (Sabiaceae) from Ecuador and Bolivia*. Harvard Papers in Botany, 13(1), 93-102.

⁸³ Orozco, C. and Canal, D. *Cuatresia nomala and Cuatresia phylasana (Physaleae, solanaceae) two new species from Colombia and Ecuador*. Caldasia vol 33 no. 1. Retrieved from <https://revistas.unal.edu.co/index.php/cal/article/view/36377>

⁸⁴ Baquero R., Luis E., and Galarza Verkovich, Denisse. 2019. *Two new species and new records of Platystele (Pleurothallidinae: Orchidaceae) from Los Cedros Reserve in Ecuador*. Lankesteriana, 19(1), 5-13.

⁸⁵ Endara, L. Grimaldi, D. and Roy, B. 2010. *Lord of the flies: Pollination of Dracula orchids*.

knowledge and development of molecular genetics and neurobiology.⁸⁶

- 104.** Another important potential is found in the decomposer fungi species of Los Cedros. These organisms, with their ability to transform substances into their simplest components, are currently being used in the field of bioremediation. Some of these organisms are being used to process oil spills, decomposition of plastic substances, and other pollutants⁸⁷. In Los Cedros several studies have been carried out in this field and some *300 genera belonging to 81 fungal families have been collected, among which there are undescribed species whose ecology is unknown*⁸⁸. This figure supposes a very high biodiversity in terms of gene pool.
- 105.** Additionally, the trichoptera or caddisflies, a group of aquatic insects that populate the waters of forest ecosystems, must be mentioned. They are usually collected as larvae in streams to determine the state of health of the ecosystem because they are very sensitive to the presence of foreign substances. A great diversity in this group assumes unpolluted waters. Their usefulness, then, is to be bioindicators, but in addition, their larvae make a type of silk fiber with which they form a waterproof cocoon that protects them during their metamorphosis to the adult stage. Due to current biotechnology, genes taken from organisms such as spiders have led to the development of fibers with exceptional flexibility, strength and light weight.⁸⁹ In Los Cedros, after three nights of collection, 40 species were found, of which more than a third, roughly 15, are likely new to science.⁹⁰ Considering that trichoptera is only one of the 11 macroinvertebrate groups in the region⁹¹, the potential number of new species at Los Cedros is high.

Lankesteriana, 10(1). 1-11.

⁸⁶ Roberts, D. 2006. *Drosophila melanogaster: The model organism*. Entomologia Experimentalis Et Applicata, 121. 93-103.

⁸⁷ Corral, M. March, 10, 2016. The bacteria that eats plastic. *El Mundo*. Retrieved from: <https://www.elmundo.es/science/2016/03/10/56e1c141e2704e7a6a8b4629.html>.

⁸⁸ Appearance of Row Vandegrift (INABIO-University of Oregon) at the hearing convened by this Court on October 19, 2020.

⁸⁹ Gomez, C. May 29, 2015. Crean una telaraña artificial casi tan fuerte como la de la Naturaleza. *Club Nuevo Mundo*. Retrieved from: https://tendencias21.levante-emv.com/crean-una-telara-na-artificial-almost-as-strong-as-nature's_a40533.html.

⁹⁰ Ríos-Touma, B. Morabowen, A. Tobes, I. and Morochz, C. 2017. *Altitudinal gradients of aquatic macroinvertebrate diversity in the Choco-Andean region of Ecuador*. Oral Presentation. Paper Presented at the Society for Freshwater Science Annual.

⁹¹ Knee, K. and Encalada, A. 2014. *Land use and water quality in a rural cloud forest region (Intag, Ecuador)*. River Research and Applications, 30(3). 385-401.

Los Cedros is a buffer zone that protects the Cotacachi Cayapas National Park from the “edge effect”.

106. In the area where Los Cedros has been deforested to make way for crops, pastures or human settlements, an ecological condition called the “edge effect” is experienced. This term is used to refer to the boundaries created between a natural environment and one artificially generated by humans. The edge of the forest that is exposed by logging begins to dry out, both because it no longer maintains the equilibrium of humidity that previously existed, and due to the entry of more sunlight. This makes forests more susceptible to fires and to the invasion of alien species that compete with native species and can displace them.⁹²
107. Additionally, since the border is closer to roads and thoroughfares, it is more likely that logging will continue and the agricultural frontier will advance, slowly but progressively diminishing the vegetative cover.
108. Los Cedros provides protection for the western edge of Cotacachi-Cayapas National Park. Long before it was declared a Protected forest in 1994, the forest has served as an area that received the brunt of the harmful effects of illegal logging on its perimeter, thereby allowing the western zone of Cotacachi-Cayapas National Park to be preserved.
109. In fact, within Los Cedros there are three areas of illegal encroachment. They were detected in 2005 by the forest’s administration and communicated to the entities in charge of the forest’s control.⁹³ In addition to being a buffer zone for the national park, Los Cedros is a barrier to land invasion into the park as well.

Los Cedros is an ecosystem that is a corridor for biodiversity.

110. Species present in the forest such as birds and mammals, insects and others require mobility to fulfill their basic functions such as reproduction and foraging. Plants and fungi, in turn, require territory to disperse and expand their range. As human actions diminish the areas they previously inhabited, it has become necessary to establish areas called **biodiversity corridors**, that is, protected areas that are at least large enough for animal and plant populations to move through them and maintain ecological viability.
111. Los Cedros is a corridor that connects with the Awá Ethnic Reserve to the northwest, and with the Mashpi and Maquipucuna reserves to the southwest. In addition, the link between Los Cedros

⁹² Murcia, C. 1995. *Edge effects in fragmented forests: implications for conservation*. Trends in Ecology and Evolution 10 (2). 52-62

⁹³ ECOLEX-MAE. 2015 Final Report. *Determinar la factibilidad de la ampliación, desarrollo del plan de manejo e identificar la tenencia de la tierra del Bosque Protector Los Cedros*.

and the Cotacachi Cayapas National Park is essential for the ecological functioning of western corridors such as the Andean Bear Corridor, the Chocó Corridor, and the recently proposed Northwestern Biosphere Reserve.⁹⁴

5.1 Precautionary Principle and the Los Cedros Protected Forest

112. Once the biodiversity present in the Los Cedros Protected Forest has been described, it is necessary to analyze whether or not the constitutional precautionary principle is applicable in the underlying case, taking into account the allegation of the GAD. The Court considers that, taking as a basis the relevant constitutional and legal provisions previously mentioned, the precautionary principle implies the identification of at least the following elements:

- i) The potential risk of serious or irreversible damage** that a product or the development of an activity may have on the rights of nature, the right to water, the right to a healthy environment, and the right to health.
- ii) Scientific uncertainty** about these negative consequences, either because they are still the subject of scientific debate, due to lack of knowledge, or because of the difficulty of determining such consequences due to the high complexity or numerous variables involved.
- iii) The adoption of effective and timely Protected measures by the State.** Faced with the risk of serious and irreversible damage for which we have no scientific certainty, measures should be adopted that best protect the rights of nature, water, a healthy environment and health.

113. Additionally, an environmental consultation is a participatory mechanism that can contribute in certain cases to the application of the precautionary principle. For example, the adoption of effective Protected measures may arise from the consultation, or the consultation may help to identify risks. This aspect will be reviewed in greater detail below when analyzing the environmental consultation.

114. The Court also clarifies and emphasizes that the application of the precautionary principle must always be carried out in a reasonable and proportional manner, that is to say, only when the effective concurrence of the aforementioned elements is effectively established, and under a careful and motivated analysis of each individual case, considering its specificities and concrete characteristics.

115. The Court now proceeds to examine the risk of serious and irreversible damage, the scientific uncertainty, and the adoption of effective and timely measures to determine whether the application of the constitutional precautionary principle to the species and biodiversity existing in Los Cedros is appropriate. It is important to note that the

⁹⁴ Roy, B. Zorrilla, M. Endara, L. Thomas, D. Vandegrift, R. Rubenstein, J. Policha, T. Rios-Touma, B. Read, M., 2018. *New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador*. Tropical Conservation Science, vol. 11, 1-20.

scientific information presented here deals exclusively with the biodiversity and hydraulic importance of Los Cedros, but not with the effects that mining activity would have on this Protected forest. There are no technical studies on the latter issue, which contributes to the element of scientific uncertainty inherent in the precautionary principle, as will be discussed below.

5.1.1. The risk of serious and irreversible damage that a product or the development of an activity may have on the rights of nature, the right to water, to a healthy environment or to health.

116. The GAD, upon invoking articles 71 and 73 of the Constitution, has asserted that the extractive activity of metallic mining in Los Cedros violates nature's right to an integral existence by causing the extinction of species. Likewise, mining activity in Los Cedros would violate nature's right to maintain and regenerate its vital cycles, structure, functions, and evolutionary processes. This right is violated by destroying the ecosystem or causing permanent alteration of the natural cycles of this forest.

117. On the other hand, the respondents claim that mining activity in this Protected forest can be carried out adequately because it would be possible to avoid, reduce, mitigate, and cease the environmental impact of mining activity by complying with the norms and measures established by the State. The following table shows the 178 species known to inhabit Los Cedros that are at high risk of extinction as of March 2018.

Table 1
Species at Risk of Extinction in Los Cedros

Group	(CR)	(EN)	(VU)	(NT)
Orchids ^a	0	2	57	12
Birds	0	4	9	13
Mammals ^b	2	2	9	4
Reptiles	0	1	3	8
Amphibians	0	6	4	5
Other plants ^c	0	9	17	11
TOTAL	2	24	99	53

CR=critically endangered; EN=threatened; VU=vulnerable; NT=near threatened.

^aUnderestimated. It is probable that there are 200 more species. (Bird Life International 2017. Important bird and biodiversity area Factsheet: Bosque Protector Los Cedros).

^bBats have not yet been studied at Los Cedros. ^cUnderestimated, the anticipated number

of plants is over 2000 species, since the reserve has never been catalogued. (*Table Adapted from data presented in Table No. 1 of Roy. et. al, 2018 p 7*)

- 118.**Based on this picture and the biological information presented *above*, the Court observes a high level of risk of irreversible damage, due to the great complexity of the ecosystem, the fragility in which this forest is found and the threat under which several of its plant and animal species run the risk of extinction, and the consequent destruction of the ecosystem or permanent alteration of its natural cycles.
- 119.**As described in detail above based on scientific sources, Los Cedros is a remnant of Ecuador's northwestern forests where two regions of high biodiversity -- the tropical Andes and the Chocó region -- converge; it includes endemic, threatened, unique and rare species. Additionally, this forest is linked to the Cotacachi-Cayapas National Park and, as will be detailed below, it is also of great hydraulic importance.
- 120.**As noted, the GAD in its complaint and in its appeal highlighted the presence of numerous endemic threatened and endangered animal and plant species in Los Cedros. On the other hand, as detailed earlier in this judgment, the higher the number of species in an ecosystem, the greater its biodiversity, and the greater its own capacity to maintain and regenerate itself. Consequently, the extinction of species in Los Cedros would diminish biodiversity, and therefore, the capacity of this ecosystem to regenerate its vital cycles, structure, functions and evolutionary processes. For example, the disappearance of a single species can cause extinctions both up and down the food chain of which it is a part, thus altering the ecosystem as a whole. Thus, biodiversity is a relevant constitutional condition in the review of the present case.
- 121.**In addition, as noted *above*, Los Cedros Protected Forest serves as a buffer zone for the Cotacachi-Cayapas National Park, with which it borders, and fulfills other functions of Protected forests,⁹⁵ particularly those related to the conservation of ecosystems and their biodiversity; the preservation of watersheds; and its status as an area of interest for scientific, environmental and forestry research.
- 122.**Another important function of Protected forests, which is also the case of the Los Cedros cloud forest, is to contribute to the conservation of fragile ecosystems, understood as areas with unique characteristics or resources that are highly susceptible to any human intervention.

⁹⁵ Article 285 of the Regulations to the Organic Code of the Environment contemplates amongst the functions of Protected forests: “a) *Conserve ecosystems and their biodiversity*; b) *Preserve watersheds, especially in areas of high rainfall and areas adjacent to water sources, springs or reservoirs*; c) *Protect mountain ridges, areas of rugged topography to prevent soil erosion due to runoff effects*. d) *Constitute areas of interest for scientific, environmental and forestry research*; e) *Contribute to the conservation of fragile ecosystems and act as buffer zones and connectivity corridors between the National System of Protected Areas, reducing the pressure of anthropogenic activities*.”

123. The Court considers that because of all these characteristics and functions of the Los Cedros forest, described based on scientific sources throughout this opinion, this forest has special importance for the conservation of biodiversity. Thus, it is evident that there are serious risks of violations to the cycles, structure, functions and evolutionary processes of Los Cedros, and therefore of the rights of nature, which are embodied and exercised in this Protected forest as a holder of the same.

124. The Court observes that the extinction of species in the Los Cedros Protected Forest necessarily leads to the destruction of this ecosystem and the permanent alteration of its natural cycles, incurring in turn the irreversible damages referred to in Article 73 of the Constitution. In sum, the Court considers plausible the hypothesis that the mining activity would generate these damages, which constitute a clear violation of the rights of nature and specifically to the existence of its species and ecosystems, as well as to the regeneration of its cycles, structure, functions and evolutionary processes.

5.1.2. Scientific uncertainty regarding these negative consequences, whether due to being the subject of ongoing scientific debate, lack of knowledge, or the difficulty of determining said consequences given the high complexity or numerous variables involved.

125. **Scientific uncertainty** is a generally accepted component of the precautionary principle. Such uncertainty not only implies the lack of data or models to assess a risk, but may also derive from the impossibility of determining the probabilities or identifying the effects of a given activity due to the high complexity of the system being analyzed.⁹⁶

126. In the case of Los Cedros, as mentioned above, while important information about its high biodiversity has been documented, much of its biological richness is still unknown. Nevertheless, scientific uncertainty stems precisely from the lack of specific information about the effects--including over the medium- and long-term--that metallic mining would have on this fragile and biodiverse ecosystem, with numerous species at risk of extinction and its corresponding complexity. This ecosystem is also an important water source and a buffer zone for the Cotacachi Cayapas National Park.

⁹⁶ Other sources of scientific uncertainty are: a) ambiguity, that is, when the existence of negative effects of a process or product are the subject of scientific debate, as in the case of the harm that may be caused by genetically modified foods, b) lack of knowledge or ignorance, whereby neither the effects, nor the probabilities of these effects, are known. Bourguignon D. 2015. *The Precautionary Principle - Definitions, Applications and Governance*. European Parliamentary Research Service. 1-28.

127. The Court identifies obstacles of an objective nature to the determination of the effects of metallic mining in Los Cedros for the following reasons: 1) the fragility, biodiversity, and endemism of the ecosystem, and, generally speaking, a level of biodiversity and complexity that implies such a high number of variables and relationships that it is impossible to study adequately the probabilities of the environmental impact of metallic mining in the forest. This results in a lack of scientific certainty. 2) the lack of knowledge regarding the ecosystem's genetic heritage, as discussed above, which makes it impossible to clearly determine the possible effects of mining activity. This lack of information gives rise to the element of ignorance. 3) The function of Los Cedros as a critical buffer zone with respect to the Cotacachi-Cayapas National Park, of which there is also no knowledge about the possible negative effects that could extend beyond the Protected forest to a reserve zone where the Constitution prohibits metallic mining activities, according to Article 407 of the Constitution. This generates, another set of unknown effects that also contribute, in this case, to the element of ignorance inherent to the precautionary principle.
128. In the event that these studies were sufficient to evaluate the environmental impact, they should be carried out in the initial exploration phase considering the aforementioned characteristics of Los Cedros, and the corresponding legal requirements⁹⁷.
129. Indeed, it should be recalled that according to Article 86.3 of the Constitution, when examining questions of standing, such as in the underlying case, *"The grounds alleged by the claimant shall be presumed to be true when the requested public entity does not prove otherwise or does not provide information."*
130. The Court observes that--assuming it is possible to determine the effects of metallic mining in Los Cedros--the respondents have not provided this Court with any specific, substantiated scientific evidence regarding the impacts the mining activity would have on the rights of nature, demonstrating that said activity will not generate irreversible harm to the Los Cedros Protected Forest, such as the extinction of species and destruction of the ecosystem.
131. Nor is the mere issuance of an environmental registration--which does not describe, consider, or evaluate in a sufficient technical manner the complex biodiversity of this Protected forest--admissible to supplant the constitutional obligations of the State to comply with the precautionary principle and the consequent protection of the rights of nature, particularly those protecting the existence of species at high risk of extinction, or those preventing the destruction or alteration of fragile ecosystems such as the one existing in Los Cedros. Environmental registration of fragile ecosystems such as Los Cedros must also fulfill a precautionary function, and, therefore, should always be preceded by studies of assessment or environmental risk that account for the biodiversity of the respective ecosystem.

⁹⁷ Article 19 of the Environmental Management Law: "Public, private or mixed works and public or private investment projects that may cause environmental impacts will be qualified prior to their execution by the decentralized control agencies, in accordance with the Central Environmental Management System, whose guiding principle shall be precautionary".

132. In previous cases discussing the rerouting of waterways, this Court has stated that the mere granting of a permit or license does not replace the obligation to conduct technical and independent environmental studies that guarantee the rights of nature: *“the authorities responsible for issuing these permits must be guarantors of the rights of nature and access to water. Therefore, they must exercise strict compliance control with constitutional, legal and regulatory requirements, and anticipate the liability that could be occasioned by issuing authorizations that give rise to violations of constitutional rights upon not having adopted the necessary provisions”*.⁹⁸
133. This obligation of public authorities to guarantee the rights of nature when issuing environmental permits is evident and indispensable when referring to fragile ecosystems such as Los Cedros, since these are, *“areas with unique characteristics or singular resources that are highly susceptible to any intervention of an anthropic nature, which produce a profound alteration in their structure and composition”*.⁹⁹
134. Based on this reality, although initial exploratory mining is defined as having a low environmental impact, the Court cannot fail to observe that said impact is much greater when such activities take place in fragile ecosystems, for which reason the Constitution itself and the law develop specific regulations.
135. Along these lines, the Court observes that, since the Los Cedros cloud forest is a *fragile ecosystem with endangered species*, it is subject to the specific regulations that the State is obliged to promulgate for its conservation, management, sustainable use, restoration, and delimitations, as provided in Article 406 of the Constitution.
136. In fact, the very same environmental registration certificate granted for initial exploration within Los Cedros cites in its fourth provision of article 19 the Environmental Management Law, in effect at the date of issuance of the environmental registration, and which establishes: *“Public, private or mixed public and private works, and public or private investment projects that may cause environmental impacts, shall be qualified prior to their execution by the decentralized control agencies, in accordance with the Central Environmental Management System, whose guiding principle shall be precautionary.”* (emphasis added)
137. Therefore, the environmental registration in this case must not be limited to a mere automated procedure¹⁰⁰, as the one that was conducted. It is observed in the environmental registration that this matter was reduced to the entry of data into a computer system and the automatic issuance of said registration, without verifying that

⁹⁸ Constitutional Court, Opinion No. 32-17-IN/21, para. 73.

⁹⁹ Glossary of Terms, COAm

¹⁰⁰ Article 424 of the COAm, which was not in effect at the time the environmental registration was granted in Los Cedros, currently requires an environmental feasibility report, when projects, works or activities intersect not only with the National System of Protected Areas and intangible zones, but also with the National Forest Heritage, which includes the Los Cedros Protected Forest.

there was an analysis by the environmental authority on the rights of nature as pertains to the Los Cedros Protected Forest, based on scientific information about its biodiversity.

- 138.** Articles 73 and 396 of the Constitution, as well as the law itself, obligated the environmental authority to consider, and if necessary apply, the precautionary principle to protect the rights of this forest, where there are threatened species in a fragile ecosystem of hydraulic importance and which is necessary for the conservation of the Cotacachi-Cayapas National Park. As has been said, in applying this principle, the environmental authority should also consider the burden of proof, which falls on those proposing the activity that could risk causing serious and irreversible harm to species and ecosystems, and therefore the rights of nature, the right to water, and the right to a healthy and balanced environment.
- 139.** The Court reiterates that the inadequate protection of a buffer zone¹⁰¹ such as the Los Cedros Protected Forest affects not only this fragile ecosystem but could also cause environmental damage to the Cotacachi-Cayapas National Park with which it is adjacent, and to whose conservation it decisively contributes, according to studies by the Ministry of Environment itself¹⁰². This park is one of the areas protected by Article 407 of the Constitution, which prohibits the extraction of non-renewable resources.
- 140.** For this reason, according to Article 59 of the COAm, the management plans for each protected area must include the delimitations, uses, and other characteristics of the buffer zones. The same provision establishes that, “*Activities carried out in the buffer zones must contribute to the fulfillment of the objectives of the National Protected Areas System*”. Likewise, Article 32 of the Unified Text of Secondary Environmental Legislation, in effect at the time of the events in the underlying case, established that the environmental management plan consisted of various sub-plans for prevention, impact mitigation, contingencies, training, safety, and waste management, amongst others concerns. In this regard, the Environmental Management Plan for the exploration phase¹⁰³ is deficient, since it is limited to a general enumeration of activities to be carried out by the respondent company, without further analysis adequately addressing the reality of the biodiversity found in the Los Cedros Protected Forest. In effect, this Plan merely transcribes legal norms without carrying out the minimum consideration of the application of these norms that would justify the authorization granted in the underlying matter.

¹⁰¹ Article 59 of the COAm establishes: “Environmental buffer zones shall be areas adjoining areas of the National System of Protected Areas or urban expansion zones, which are public, private or community property, to contribute to the conservation and integration of protected areas, balance in urban-rural development, and their ecosystemic connectivity.”

¹⁰² According to a 2006 study by MAE and Ecociencia, Los Cedros is one of the most suitable forest areas for maintaining the integrity of Cotacachi-Cayapas National Park. See MAE, Plan de Manejo Parque Nacional Cotacachi Cayapas, Proyecto GEF Ecuador: Sistema Nacional de Áreas Protegidas, 2007, p. 160.

¹⁰³ Distinct from an environmental impact study, which is carried out prior to exploitation and therefore is not applicable in the present case. In addition, see Articles 24 and 32 of the Unified Text of Secondary Environmental Legislation in force at the time.

- 141.** This eco-systemic interdependence is one of the reasons why the Court cannot accept the interpretation of the respondents in the sense that Article 407 of the Constitution--which prohibits extractive activities of non-renewable resources in protected areas, urban centers, and in zones declared as intangible--has an exclusive and restrictive character. Although it is clear that in this provision the Constitution expressly prohibits extractive activities in these areas, it does not conclude that such activities are automatically or unconditionally authorized in the rest of the national territory, or that, once the constitutional and legal conditions are verified, such activities cannot be restricted or suspended in different areas, under a case-by-case analysis.
- 142.** In effect, it would not be logical to affirm that the rights of nature, the right to water, and the human right to a healthy and balanced environment are only valid in protected areas and intangible zones. On the contrary, the obligations to protect these rights apply to public authorities throughout the national territory, and must therefore be analyzed in accordance with the Constitution and norms promulgated thereunder when authorizing, restricting or regulating said extractive activities.
- 143.** In short, in the case of Los Cedros, despite being a highly biodiverse fragile ecosystem with numerous endangered species, an area of water sources, and a buffer zone of the Cotacachi-Cayapas National Park, the technical and independent studies that this Court has considered indispensable in its jurisprudence in order to seriously evaluate the biodiversity of this ecosystem and possible violations of the rights of nature were not carried out, assuming they were sufficient, prior to the issuance of the environmental registration.
- 144.** In the same sense, as a development of the constitutional precautionary principle, article 9.7 of the COAm stipulates that it is primarily the state environmental authorities, within their respective scopes of power, who must apply the precautionary principle to avoid, reduce, mitigate or cease irreversible effects on nature.
- 145.** However, the administrative authorities did not consider this constitutional and legal principle when issuing the environmental registration. The Court recalls that according to Article 404 of the Constitution, the management of the country's natural heritage, which includes physical and biological formations of environmental and scientific value such as Los Cedros, requires its protection, conservation, restoration and support. For this purpose, according to the aforementioned article, such management must be subject to the principles and guarantees established in the Constitution and the law.
- 146.** The Court considers that the environmental authority should have examined the biological value and rights of Los Cedros and its species prior to issuing the environmental registration. Based on this and applying the precautionary principle, it should have required the respondents to comply with their obligation to submit information on the impact on the rights of nature that their activity would produce.¹⁰⁴ In the Court's opinion, this would have led the MAE to find that the scientific certainty

¹⁰⁴ According to Article 9, second paragraph of the COAm, "*Environmental principles must be recognized and incorporated in all acts of public administration, as well as in judicial decisions within the juridical sphere.*" This includes the precautionary principle.

claimed by the respondents about the nature and scale of the impact or harm of metal mining in this forest does not currently exist. This uncertainty is due to the excessive complexity implicated by the principles of cause and effect as related to the impact that metallic mining activity would have on the biodiversity of this fragile ecosystem, on its endemic animal and plant species at high risk of extinction, and even on the Cotacachi-Cayapas National Park.

147.Consequently, the scientific knowledge presented to this Court on the animal and plant species existing in Los Cedros makes plausible the hypothesis that metallic mining in this forest could have serious and irreversible consequences on these species, the ecosystem as a whole, and the Cotacachi- Cayapas National Park.

148.Absent this scientific certainty, the second element necessary for the application of the precautionary principle is met, which should be considered when issuing an environmental registration.

5.1.3. *Adoption of effective and timely Protected measures by the State*

149.In order to avoid potential serious and irreversible harm, the precautionary principle requires that the State adopt certain actions, or omits others, aimed precisely at this objective. These actions are also based on constitutional obligations that have been developed by regulations promulgated under the Constitution.

150.In this sense, due to the intrinsic and close relationship between ecosystem conservation and biodiversity, paragraph 2, article 30 of the COAm includes the following amongs the State's objectives related to biodiversity: *"to maintain the structure, composition and functioning of ecosystems, in such a way as to guarantee their resilience and their ability to generate goods and environmental services"*.

151.Therefore, in order to effectuate the rights of nature, specifically the conservation of ecosystems, the Ecuadorian Constitution gives great importance to biodiversity and establishes obligations that the State must fulfill for this objective. Starting with Article 395, the Constitution develops a complete section on biodiversity. Further on, Article 400 declares biodiversity conservation as an area of public interest, while Article 408 establishes that biodiversity is inalienable, imprescriptible and unseizable property of the State.

152.The COAm also develops a series of regulations for the conservation of biodiversity and the sustainable use of its components. Article 29 reiterates the constitutional principle that biodiversity constitutes a strategic resource of the State, and that its conservation must be included in national territorial planning and in that of the decentralized autonomous governments.

153. According to article 31 of the COAm, this conservation can also be carried out *in situ* or *ex situ*. For *in situ* protection, which is the case of Los Cedros, Article 35 imposes on natural and legal persons the obligation to “*protect all native terrestrial, marine and aquatic wildlife species with special concern for endemic species, those threatened with extinction, migratory species, and those listed in international instruments ratified by the State*”.
154. In order to protect biodiversity, the COAm creates special areas for biodiversity conservation. Among the various types of special areas are environmental buffer zones, which include Protected forests.¹⁰⁵ Buffer zones adjoin protected areas and their function is to contribute to their conservation and integration.¹⁰⁶
155. This Court observes that in the specific case of Los Cedros there are State administrative acts, described in the factual section of this opinion, which would allow mining activity in this Protected forest. In the underlying case, the granting of the environmental registration by the MAAE is especially relevant, although there are other administrative acts both prior and subsequent to said registration leading to the same result, such as the granting of the mining concessions in Los Cedros and the requirements for obtaining said registration. In addition, ENAMI EP and Cornerstone carried out exploration activities in their initial phase. In support of their position, the respondents argue that the environmental registration and other administrative authorizations for mining activity in the Los Cedros Forest were granted after following all the procedures and complying with all the requirements established in the environmental and mining legislation and in their respective regulations.
156. In this regard, the GAD alleges in its complaint that, “*the Ministry of Environment did not take into consideration that the concessions “Magdalena 01” and “Magdalena 02” are largely within the “LOS CEDROS” Protected Forest. For this reason, since the concessions overlap or intersect a protected area, they directly and seriously affect the biodiversity that inhabits this area*”.
157. In paragraph a. of its complaint, the GAD requests the judge “*declare without effect*” the resolutions of the Ministry of Environment through which the environmental registration was granted within the framework of the various mining concessions. Among the constitutional articles that the GAD considers violated, the GAD expressly refers to articles 73 and 396, relating to the precautionary principle and biodiversity.

¹⁰⁵ Organic Environmental Code, article 56, paragraph 2.

¹⁰⁶ Ibid, article 59.

158. As a result of these actions by public authorities, the companies ENAMI EP and Cornerstone, the former being public and the latter private, commenced the initial phase of mining exploration activities in Los Cedros. The GAD of Cotacachi conducted an *in situ* inspection, the report of which describes the opening of trails, construction of paths, clear-cutting of trees, and opening of spaces for temporary camps, exceeding the lengths and other delimits and conditions of the Environmental Management Plan, as well as, according to the report, ignoring the presence and impact on the local fauna and flora, such as the spectacled bear, a species listed as endangered.¹⁰⁷
159. These conclusions coincide with the technical report of the MAAE, which upon a complaint from Mr. Josef DeCoux also conducted an onsite inspection. This official report also concludes that, upon exceeding the maximum limit of 1.5 meters, *“vegetative cover removal activities were carried out for the opening of a trail of approximately 1.5 kilometers in length, where the width in some cases is greater than 1.5 meters, thereby evidencing the clearing of approximately 100 meters squared. The clearing of vegetation affects several native species of trees encountered in the area such as virola, guarumo, winter’s bark, and the sancona palm tree, including saplings and mature specimens, as well as some fruit trees in areas of extensive clear-cutting.”*¹⁰⁸
160. Consequently, ignoring the application of the precautionary principle expressly ordered in the Constitution and in the law for cases such as this one, the environmental authority issued an environmental registration that allowed mining exploration activities in a fragile ecosystem populated by numerous species at high risk of extinction, thereby violating the rights of nature and the precautionary principle itself.
161. Given these considerations, having verified the risk of serious or irreversible harm to nature in the Los Cedros ecosystem and to its endemic species under high risk of extinction, the Court considers it appropriate to apply the precautionary principle and consequently to adopt effective and timely Protected measures. In this sense, said measures should have resulted in refraining from granting the environmental registration for initial mining exploration in Los Cedros, which is related both to other previous and subsequent acts taken by the public authority, as well as to the actions of ENAMI EP and Cornerstone in the initial exploration phase.
162. Since in the original proceeding the petitioners requested not only a declaration of the violation of the rights of nature, but also precautionary measures, the Court determines that contrary to the position taken by the trial court judge, the granting of precautionary measures constitutes- provided that the respective requirements are met- a necessary and appropriate decision related to standing when those filing an action for protection from the violation of the rights of nature raise the precautionary principle in their complaint. Precautionary measures, since their purpose is to avoid or temporarily suspend a harm, may contribute to the effectiveness and timeliness of the final measures adopted within the framework of the precautionary principle, when the merits are

¹⁰⁷ Dirección Provincial del Ambiente de Imbabura. 2018. Technical Report No. 0025-UCA-DPAI-MAE-O of May 21, 2018. Ministry of Environment. fjs. 21-29 of the file for the action for injunctive relief.

¹⁰⁸ Ibid.

resolved, analyzing the serious risks and scientific uncertainty in the case.

163. Without detracting from this relationship between precautionary measures and the precautionary principle, these two concepts should not be confused. Precautionary measures are provisional, they do not resolve on the merits, they have their own legal requirements, and they do not necessarily consider scientific uncertainty. The precautionary principle is based on decisions that are in principle final, having considered the merits of an ecological risk or that of another type, and always requires a measure of scientific uncertainty. When applied within the framework of constitutional guarantees, unlike precautionary measures, the precautionary principle is adopted through an urgent but independent process leading to a final judgment.
164. In conclusion, from the preceding constitutional analysis, this Court finds that the necessary elements are present for the application of the precautionary principle with respect to the rights of nature, and specifically the right to exist and to the reproduction of life cycles, in the case of the species and ecosystem of the Los Cedros Protected Forest, in accordance with articles 73 and 396 of the Constitution. Consequently, in accordance with the application of the precautionary principle, the environmental registration granted within this Protected forest for mining activities must be declared null and void.

B. Right to water and the right to a healthy environment

165. In the action for injunctive relief, the GAD of Cotacachi asserted that the right to a healthy environment and the right to water are affected by the mining concession, stating that, *“it is the duty of the State to protect the environment, so as to ensure the conservation and protection of protected areas that are the habitat of many animal and plant species. Conserving biodiversity and ecosystems must be a priority in this case.”*
166. The Constitution, in addition to recognizing the rights of nature, also recognizes the right of individuals, communities, peoples and nationalities to a healthy environment and the right to water, rights which are interrelated. In light of these rights, the Court analyzes below the specific case of the Los Cedros Protected Forest.

5.2 The right to water

167. As regards the right to water, the petitioner asserted in its the complaint that, *“mining activity requires the use of large amounts of water and, within the environmental impact study of the Magdalena River Mining Concession Project, the study describes water contamination as a Primary Environmental Impact on page 5, paragraph 6”* The petitioner considers the aforesaid environmental impact to be contrary to Article 12 of the Constitution, in which the right to water is recognized. .

168. The respondent, ENAMI EP, asserted that in order to obtain the environmental registration, which is an administrative act prior to exploration, it is mandatory to have both the certificate of no-impact on water resources and the water use permit, both of which were issued by the corresponding authority, which at the time was the National Water Secretariat (SENAGUA).¹⁰⁹ The respondent argues that by virtue of holding these permits, the authorities observe the precautionary and prevention principles, so as to ensure that this right is not violated.¹¹⁰

169. Water is one of the elements essential to ensuring life. Upon considering its importance, and taking into account the global context, both international instruments and the Ecuadorian Constitution have consecrated water as a right in itself.

170. The Ecuadorian Constitution recognizes the right to water as part of the right to right living and the right to a dignified life¹¹¹. Article 12 enshrines it as follows:

The human right to water is fundamental and inalienable. Water constitutes national strategic patrimony for the public use, being inalienable, imprescriptible, unseizable and essential for life.

171. This Court has observed in previous decisions that the right “to water is recognized both as a right and as a strategic resource¹¹², without prejudice to the rights that the Constitution itself recognizes for nature”.¹¹³ This right that articulates human rights and the rights of nature, since its condition is an essential element, thereby converting it into a necessary aspect for the existence of all living beings on the planet and the sustainability of ecosystems. Hence, a specific constitutional recognition is appropriate.

172. Water has also been recognized as a human right through the development of international instruments, both within the United Nations System and the Inter-American Human Rights System. Within the former, the United Nations General Assembly recognized that, “the right to safe drinking water and sanitation is a human right essential to the full enjoyment of life and all human rights.”¹¹⁴

¹⁰⁹ As mentioned in previous paragraphs, in this case there was no environmental impact study, but there was an environmental registration and an environmental management plan in the exploration phase.

¹¹⁰ Appearance of attorney Luis Araque Cordovez, legal coordinator of Empresa Nacional Minera (ENAMI EP), in the hearing held by this Court on October 19, 2020.

¹¹¹ Constitution of the Republic of Ecuador, article 66, paragraph 2.

¹¹² Constitution of the Republic of Ecuador. “Art. 313.-...The following are considered strategic sectors: energy in all its forms, telecommunications, non-renewable natural resources, the transportation and refining of hydrocarbons, biodiversity and genetic heritage, the electromagnetic spectrum, water, and others as determined by law.”

¹¹³ Constitutional Court, Opinion No. 232-15-JP/21, para. 27.

¹¹⁴ United Nations General Assembly, Resolution 64/292 of July 28, 2010, para. 224

173. For its part, the Committee on Economic, Social and Cultural Rights (“ESCR Committee”), in interpreting Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, stated that:

*The human right to water is the right of everyone to sufficient, safe, acceptable, accessible and affordable water for personal and domestic uses. An adequate supply of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases, and to meet drinking, cooking, personal and domestic hygiene needs.*¹¹⁵

174. In the same sense, the United Nations Rapporteur on the human right to water established that: “as relates to *the human right to safe drinking water and sanitation, everyone, without discrimination, has the right to sufficient, safe, acceptable, accessible and affordable water for personal and domestic uses and to access, both physical and economic, in all spheres of life, to sanitation that is safe, hygienic, secure and acceptable, and which provides privacy and ensures dignity*”.¹¹⁶

175. In the Inter-American Human Rights System, the Inter-American Court of Human Rights has stated that the human right to water is protected by the article 26 of the American Convention on Human Rights¹¹⁷, and has also recognized that this right is derived from the norms of the OAS Charter insofar as they allow for the derivation of the rights to a healthy environment, the right to health, the right to adequate food and the right to participation in cultural life.¹¹⁸

176. This Court, in previous decisions¹¹⁹, has considered as part of the right to water the elements developed by the ESCR Committee:¹²⁰

1. *Availability*: continuous and sufficient supply of water for personal and domestic uses (drinking, sanitation, food preparation and hygiene), as well as additional water resources for health, climate and working conditions.
2. *Quality*: safe water, free of microorganisms or chemical or radioactive substances, with color, odor and taste acceptable for use.
3. *Accessibility*: water and its facilities should be accessible to all without discrimination, comprising the following overlapping dimensions:

¹¹⁵ ESCR Committee, General Comment 15 on the right to water, para. 2.

¹¹⁶ United Nations Rapporteur, Report on the Human Right to Water and Sanitation, 2015, para. 4.

¹¹⁷ I/A Court H.R., *Lhaka Honhat (Tierra Nuestra) v. Argentina*, para. 222.

¹¹⁸ *Ibid.*

¹¹⁹ Constitutional Court, Opinion 232-15-JP/21, para. 34.

¹²⁰ ESCR Committee, General Comment No. 15 (2002) The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), para. 12.

- i. *Physical accessibility*: sufficient physical extension of water, facilities, and services to all sectors of the population and locations.
- ii. *Economic accessibility*: the costs of supplying water must be affordable and must not compromise or jeopardize the exercise of other rights.
- iii. *Non-discrimination*: water, its facilities and services must be accessible to all in-fact and in-law, especially to the most vulnerable and marginalized sectors of the population, without any discrimination whatsoever.
- iv. *Access to information*: the right to request, receive and disseminate information on water issues is established.

177. In addition to the parameters contemplated by international instruments, the Constitution determines specific duties for the State to ensure the exercise of the right to water. Among these duties is “*guaranteeing without discrimination (...) water for its inhabitants*”¹²¹. This obligation translates, amongst other respects, into the public services¹²² that the different levels of government must guarantee¹²³, access for peasant farmers to water¹²⁴, the adequate management of irrigation water¹²⁵ and its rational¹²⁶ use with an ecosystemic approach.¹²⁷

178. The Constitution also sets forth parameters for water management, including that it shall be exclusively public or communal,¹²⁸ prohibits its privatization,¹²⁹ and considers water as part of the strategic sectors.¹³⁰

179. This Court has ruled on the constitutional obligations of the State in relation to water access as a public service, identifying “*the obligation to generate the best possible conditions for people to have access to water under equal conditions. In this sense, it must establish measures to ensure, without discrimination, the supply of clean, sufficient, safe, acceptable, accessible and affordable water for personal and domestic use in quantity, quality, continuity and coverage*”.¹³¹

¹²¹ Constitution of the Republic of Ecuador, article 3, paragraph 1.

¹²² Constitution of the Republic of Ecuador, article 314.

¹²³ Constitution of the Republic of Ecuador, article 264, paragraph 4.

¹²⁴ Constitution of the Republic of Ecuador, article 281, paragraph 4.

¹²⁵ Constitution of the Republic of Ecuador, article 282.

¹²⁶ Constitution of the Republic of Ecuador, article 415.

¹²⁷ Constitution of the Republic of Ecuador, article 412.

¹²⁸ Constitution of the Republic of Ecuador, 318.

¹²⁹ Constitution of the Republic of Ecuador, article 282.

¹³⁰ Constitution of the Republic of Ecuador, article 313.

¹³¹ Constitutional Court, Opinion 232-15-JP/21, para. 38.

180. Hence, there is a close relationship between the right to water and the management of the water resources linked to the Los Cedros Protected Forest, given that it would impact human life, as well as the ecosystem. Article 411 of the Constitution, in relation to the management of ecological flows linked to the cycles of nature, establishes:

The State shall guarantee the conservation, recovery and integral management of water resources, drainage basins and environmental flows associated with the hydrological cycle. Any activity that may affect the quality and quantity of water, and the balance of ecosystems, especially sources of water and recharge zones, shall be regulated. The sustainability of ecosystems and human consumption will be a priority in the use and utilization of water. (emphasis added)

181. According to the normative framework that recognizes the right to water, human consumption and the sustainability of ecosystems are two aspects that the Constitution protects and considers as priorities for the use of water. The Court will analyze these aspects below in the underlying matter.

5.2.1 Water in the Los Cedros Protected Forest

182. In order to analyze the right to water in relation to human consumption and the ecosystem of the Los Cedros Protected Forest, it is first necessary to review information on the hydrographic features of this region.
183. According to the submitted evidence, the western part of the Toisán mountain range feeds the drainage of the micro-watersheds that are part of the area of influence of the Los Cedros Protected Forest.¹³² The Toisán mountain range is considered an extension of the Chocó Bioregion and is also a branch of the northwestern part of the Andes. It belongs to the area of Intag, Cotacachi, in the province of Imbabura¹³³, and is bordered to the east and north by the Cotacachi Cayapas National Park, which is part of Ecuador's system of protected areas.
184. Because they are cloud forests, the forests of the Toisán mountain range recycle water over an area much larger than the area covered by the canopy of their trees. They do this due to the presence of plants known as epiphytes. These are plants that grow exclusively on the branches and trunks of the trees, well above the ground. These epiphytes act as collector panels for droplets of moisture from fog. With their long, smooth leaves like those of orchids or in the form of buds like those of bromeliads and puyas (pineapple-like plants and mosses), they trap the water that drips off, forming a slow but steady runoff that either feeds the forest floor or is held within the forest canopy, increasing

¹³² GAD Cotacachi. 2011. Plan de Ordenamiento y Desarrollo Territorial. Informe Final del PDOT. Mapa de microcuencas, pág. 32.

¹³³ Rodríguez, O., V. León, J. C. Ronquillo, S. Dillman and E. Mejía. Eds. 2000. Informe final del Proyecto Toisán "Estudio y Conservación de los bosques de la Cordillera de Toisán, al Noroccidente del Ecuador". Fundación Ornitológica del Ecuador (CECIA), Defensa y Conservación de la Zona de Intag (DECOIN), Fundación Sobreviven, Programa de Conservación de la British Petroleum-BirdLife International- Flora y Fauna Internacional, Quito.

relative humidity. This is the reason why cloud forests contribute to capturing an additional 75% of water through the continuous condensation of clouds.¹³⁴

185. In this fashion, the cloud forest can maintain a reliable flow of water downstream, even during dry periods. This contributes to mitigating the increasingly pressing impacts of global warming.¹³⁵
186. It should be noted that the forests of the Toisán mountain range is so important in the socio-environmental dynamics of this region that, in April 2019, a Municipal Ordinance was issued by which the GAD of Cotacachi delimited and created the Intag-Toisán Municipal Conservation and Sustainable Use Area. This area has the specific objective of “*maintaining the natural hydrological dynamics of the micro-watersheds and protecting surface and groundwater bodies, as well as the integrated and comprehensive management of water resources by micro-watersheds or micro-watershed systems with an ecosystemic approach.*”¹³⁶
187. In the westernmost part of the Toisán mountain range and running from north to south sits a small massif called the La Plata mountain range. The southernmost area of this massif includes the Los Cedros Protected Forest. The reserve is located on the ascending slopes of the La Plata mountain range, which includes steep river valleys and high crags. This rugged relief contributes to a continuous drainage of water that forms an intricate network of small streams and creeks. As they flow down the slopes due to gravity, these streams widen to give birth to the headwaters of the micro-watersheds.¹³⁷
188. Within the boundaries of the Los Cedros Protected Forest there are three important micro-watersheds: the Manduriacus Grande River, the Verde River, and the Mandariacus Chico River.¹³⁸ The headwaters of the Mandariacus Grande micro-watershed are the northernmost within Los Cedros. The headwaters of the Río Verde and the Mandariacus Chico are consolidated to the south in a lower area, due to drainage from the streams generated within Los Cedros.¹³⁹

¹³⁴ Bruijnzeel, L. A., Mulligan, M., and Scatena, F. N. 2011. *Hydrometeorology of tropical montane cloud forests: Emerging patterns*. Hydrological Processes, 25(3): 465-498.

¹³⁵ Rodríguez, O., V. León, J. C. Ronquillo, S. Dillman and E. Mejía. Eds. 2000. Informe final del Proyecto Toisán “Estudio y Conservación de los bosques de la Cordillera de Toisán, al Noroccidente del Ecuador”. Fundación Ornitológica del Ecuador (CECIA), Defensa y Conservación de la Zona de Intag (DECOIN), Fundación Sobreviven, Programa de Conservación de la British Petroleum-BirdLife International- Flora y Fauna Internacional, Quito.

¹³⁶ Ordinance that creates and delimits the Intag-Toisán municipal conservation and sustainable use area (ACUS-MIT). Municipal Council of the Autonomous Decentralized Municipal Government of Santa Ana de Cotacachi. Official Registry No. 879 of April 18, 2019.

¹³⁷ ECOLEX-MAE 2015. Appendix BOSQUES DEL PREDIO LOS CEDROS DEL CANTÓN COTACACHI. Ministerial Agreement 57. Official Registry 620 of January 26, 1995. In: Informe Final. Determinar la factibilidad de la ampliación, desarrollo del plan de manejo e identificar la tenencia de la tierra del Bosque Protector Los Cedros.

¹³⁸ Ibid.

¹³⁹ Ordinance that creates and delimits the Intag-Toisán municipal conservation and sustainable use area (ACUS-MIT). Table #10 Cuencas, subcuencas y microcuencas. Municipal Council of the Autonomous Decentralized Municipal Government of Santa Ana de Cotacachi. Official Registry No. 879 of April 18, 2019.

- 189.** It is also important to consider the relationship of the Los Cedros Protected Forest with the Magdalena River micro-watershed, which originates in the upper parts of Brillasol, in the foothills of the Toisán mountain range. With an area of almost 13,500 hectares, this micro-watershed is the largest in the vicinity of the Los Cedros Protected Forest. It is located on its eastern flank. It is an important micro-watershed because, due to its large extension of 14.67 km², it feeds an altitudinal range between 2,700 and 600 mamsl. This means that, as the riverbed flows downhill, various species can be cultivated, from potatoes to subtropical fruit trees, at the different altitudinal levels through which it passes. This micro-watershed provides water to communities settled along its banks (see Table 3).¹⁴⁰
- 190.** Therefore, any impact on the slopes of the Protected Forest in the area where these tributaries feed into the Magdalena micro-watershed, whether due to deforestation, land removal or acid contamination, will have repercussions on the quantity and quality of the water in that micro-watershed. The following table illustrates the size of the micro-watersheds in the area of influence of the Los Cedros Protected Forest, including the headwaters of the rivers inside and outside this Protected Forest.

Table 2.
Micro-watersheds in the Los Cedros Area of Influence

Name of the micro-watershed	Area in hectares (ha)	Headwaters in relation to Los Cedros
Magdalena	13.557,34	Outside
Mandariacus Grande	10.330,00	Within
Verde	3.587,00	Within
Mandariacus Chico	1.722,00	Within
TOTAL	29.196,34	

Prepared based on Senagua 2009, ECOPAR 2018¹⁴¹

¹⁴⁰ Salazar, R. 2017. *Etnoictiología y Diversidad de Peces de la Parte Media-Baja de la Microcuenca del Río Magdalena, Cantón Cotacachi-Imbabura*. Degree dissertation prior to obtaining the title of Engineer in Renewable Natural Resources. Technical University of the North. Ibarra.

¹⁴¹ Ordinance that creates and delimits the Intag-Toisán municipal conservation and sustainable use area (ACUS-MIT). Municipal Council of the Autonomous Decentralized Municipal Government of Santa Ana de Cotacachi. Official Registry No. 879 of April 18, 2019.

191. The headwaters of these four micro-watersheds are located within the middle and upper parts of the westernmost portion of the Toisán mountain range where, mainly due to the absence of roads and the steepness of the terrain, the forests are in a good state of conservation, which in turn determines the amount and flow of runoff. As can be seen in the table above, there are approximately 30,000 hectares of large and small streams that provide water to this area of influence of the the Los Cedros Protected Forest.
192. According to the information referred to in previous paragraphs, the Río Magdalena 01 mining concession overlaps practically the entire lower third of the Los Cedros Protected Forest, encompassing the headwaters of the Rio Verde and Mandariacus Chico micro-watersheds and the middle flow of the Mandariacus Grande river. The Río Magdalena 02 concession is located at the headwaters of the Magdalena River micro-watershed and encompasses the upper and middle third of the Los Cedros Protected Forest.¹⁴²

Water for human consumption

193. The residents of the Magdalena Alto community expressed to this Court: *“we have made our living from cattle ranching and from agriculture, we have drunk pure water, clean water that comes from the Los Cedros forest reserve. (...) We are defending nature, the right to life, which is water. More than 12 communities would be affected if the forest were allowed to be interfered with. (...) There are few people here who are in favor of mining, only the workers of the mining company”*.¹⁴³
194. The following story stands out from the community members’ comments: *“I have been raised here for more than fifty years, when I was a child here, there was water at every step, today there are only rivers in the larger streams, and if the water that comes from the Los Cedros reserve is not defended now, what is going to happen tomorrow? The most affected are going to be those in the lowlands; we are the ones who should be most concerned about the water.”*¹⁴⁴
195. Likewise, in the efforts made by ENAMI EP to approach the Brillasol community, the residents expressed their concern that mining activities *“affect the bodies of water that supply water to the communities”*.¹⁴⁵

¹⁴² Agency for Regulation and Control of Energy and Non-Renewable Natural Resources. 2021. Mining Cadastre Geoportal. Retrieved from: <https://crtwrs6520i4uvrd.maps.arcgis.com/apps/webappviewer/index.html?id=839155ec91ea43cdb604f2fdef4972db>

¹⁴³ *Amicus Curiae* in audiovisual format presented by Brígida Nogales, Susana Anrango, residents of the Magdalena Alto community in Case No. 1149-19-JP.

¹⁴⁴ Ibid.

¹⁴⁵ Ayuda Memoria No. 084-CCS-UGS-ENAMI-EP-2017", prepared by Mr. Douglas Ochoa, Social Management Supervisor of ENAMI EP, dated November 16, 2017, in the Brillasol community.

196. According to a study on Los Cedros and its area of influence, published in 2015 by ECOLEX as a result of a consultancy for the National Forestry Directorate and the Natural Heritage Secretariat of the Ministry of Environment that sought to determine the feasibility of expanding the Protected Forest, as well as to develop its management plan, it was established that the aforementioned forest:

*is bordered on the southwest, south, southeast and west by several communities settled in the Manduriacos Valley, which are **directly influenced by the presence of the Protected Forest because this is where they obtain their main water supply***¹⁴⁶. (emphasis added)

197. In fact, nine communities are situated around the Los Cedros Protected Forest, with a population of approximately 3000 people. The micro-watershed from which they draw their water supply and their individual populations are detailed below.

Table 3.
Los Cedros micro-watersheds and population
within the area of influence

MICRO-WATERSHED	COMMUNITY	# Families	No. of inhabitants	Water by pipe or stream
Magdalena River	Brillasol	60	300	Yes
	Magdalena Alto	40	200	Yes
	Sn José Magdalena	105	525	Yes
Mandariacus Grande River	Santa Rosa de los Mandariacus	40	200	Yes
	Cielo Verde	180	900	Yes
Mandariacus Chico River	El Paraíso	45	225	Yes
	El Corazón	62	310	Yes
Verde River	Pueblo Unido	-----	-----	Yes
	Green River	63	315	Yes
TOTAL		595	2975	

Prepared based on ECOLEX-MAE 2015. Table1. Number of families of the Mandariacus Valley and Table 3. Services and Infrastructure of the Communities.¹⁴⁷

¹⁴⁶ ECOLEX-MAE 2015. Appendix BOSQUES DEL PREDIO LOS CEDROS DEL CANTÓN COTACACHI. Ministerial Agreement 57. Official Registry 620 of January 26, 1995. In: Informe Final. Determinar la factibilidad de la ampliación, desarrollo del plan de manejo e identificar la tenencia de la tierra del Bosque Protector Los Cedros.

¹⁴⁷ The approximate calculation of inhabitants per community was made based on surveys conducted by ECOLEX, which establishes that “in the Mandariacus Valley, there are approximately 800 families, each with an average of 5 members per family” (3.4.1.2 Social Characteristics).

198. In rural areas, water intakes are considered infrastructure works, executed by the authority in charge, whose characteristics and size depend on the quantity and flow of water required by the community. The collection of surface water such as rivers, lakes or reservoirs can be done by gravity or by pumping. In the first case, the catchment sites are located in lower areas, sometimes far from the source in order to take advantage of the unevenness of the terrain, but this does not mean that the flow at the catchment or intake point can escape events that affect the flow at the headwaters or source of the river.¹⁴⁸

199. Regarding water for human consumption, the GAD-Cotacachi's Drinking Water and Sewerage Department, in Report No. GADMSAC-IAC-NG-01 of the "*Water Sources for Human Consumption in the Area of Influence of the Los Cedros Protected Forest*" Project establishes three water catchment sites for the communities of El Corazón and Magdalena Alto: Quebrada del Nacimiento del Río Verde Chico, Quebrada de los Monos, and Quebrada Río Negro. These points are located between the elevations of between 1020 to 1180 mamsi and benefit 800 people. The report states that:

The coordinates of the abovementioned intakes are outside the delimited area of the Los Cedros Protected Forest; however, the waters that drain superficially toward these waterways, that is, the micro-watershed, are in the area of the Los Cedros Protected Forest and are affected by any impact upstream of the intake points.

200. In addition, there is a water intake¹⁴⁹ for the communities of Cielo Verde and Santa Rosa de los Mandariacus, which receive water from the Mandariacus Grande River. In total, approximately 3,000 people receive water for human consumption from these three intake sites.

Water for the population's subsistence economic activities

201. The ECOLEX study identified that the main sources of livelihood for most of these communities are agriculture (34%) and livestock (30%), activities for which water availability is fundamental. Products intended for external sale and products intended for domestic consumption in the area are separate and distinct.¹⁵⁰

202. As a result, a wide range of edible species are cultivated in the Mandariacus Valley. This productivity is closely linked to the diverse altitudes through which the rivers flow in the area of influence of the Los Cedros forest.

¹⁴⁸ Stauffer, B. and Spuhler, D. n.d. Catchment of rivers, lakes and reservoirs (reservoirs). Retrieved from: <https://sswm.info/es/gass-perspective-es/tecnologias-de/tecnologias-de-abastecimiento-de-water/captaci%C3%B3n-de-r%C3%ADos-lakes-and-reservoirs-%28reservoirs%29>.

¹⁴⁹ Amicus Curiae submitted by José Cueva in Case No. 1149-19-JP.

¹⁵⁰ ECOLEX-MAE. 2015 Final Report. *Determinar la factibilidad de la ampliación, desarrollo del plan de manejo e identificar la tenencia de la tierra del Bosque Protector Los Cedros*. Graph 9 and 10.

203. With respect to livestock, the ECOLEX study states: *“they tend several species of animals, mainly beef cattle and dairy cows. These animals are destined for breeding and subsequent sale, although occasionally this resource is used for internal consumption.”*¹⁵¹
204. Both the sale of agricultural products and the trade of animals and milk are negotiated by the community members with intermediaries who transport them to Otavalo, Ibarra or Quito, thus contributing to the food supply in the provinces of Imbabura and Pichincha.
205. By virtue of the above information, the Court observes that the agricultural and livestock activities to which the inhabitants of these communities are dedicated depend on the conservation of water resources, which are linked to the ecosystem of the Los Cedros Protected Forest. In this sense, water also constitutes a fundamental resource for the economic subsistence of these communities.

Community water reserves

206. The GAD of Cotacachi, in response to article 12 of the Organic Law of Water Resources, which since 2001 establishes the responsibility of the decentralized autonomous governments to ensure the sustainable management, protection and conservation of water sources, has supported the creation of community water reserves. In the Aguagrun, Chalguyacu and Mandariacus Chico (Paraíso-Mandariacus) micro-watersheds that are fed by the upper slopes of the Toisán mountain range, eight water reserves have been established with an area of 103.3 hectares whose administration and care is in the hands of the closest communities. According to the same source, between 2001 and 2010 more than 40 water reserves have been created in the Intag-Mandariacus Zone in the García Moreno parish.¹⁵²
207. In conclusion, the above information shows the existence of water resources linked to the Los Cedros Protected Forest, which are used for human consumption, to sustain economic activities such as agriculture and cattle ranching, and also for community water reserves. In addition, there is a complex water system that includes the Los Cedros Protected Forest, which is closely related to the Cotacachi-Cayapas National Park. In this fashion, water is an element that makes possible the exercise of the right to exist as held by nature, and permits the reproduction of nature's cycles.

Water and the sustainability of the Los Cedros Protected Forest ecosystem

208. As seen in previous paragraphs, Article 411 of the Constitution establishes two priorities for water use: human consumption and ecosystem sustainability.

¹⁵¹ Ibid.

¹⁵² GAD Cotacachi. 2015. Actualización del Plan de Ordenamiento y Desarrollo Territorial del Cantón Santa Ana de Cotacachi 2015-2035, pgs. 68 and 69.

of the ecosystems. The first element was reviewed in the previous section; the Court shall now turn to reviewing the second element, that is, water as an element of the sustainability of the Los Cedros forest ecosystem.

209. In accordance with Article 411, Article 318 of the Constitution establishes a priority for the use of water, stating that “[t]he State, through the unified water authority, shall be directly responsible for the planning and management of water resources to be used for *human consumption, irrigation to ensure food sovereignty, ecological flow, and productive activities, in this order of priority.*” (emphasis added) The content of these articles complements and obligates the State to protect water, establishing priorities for its usage in accordance with the purpose of achieving a harmonious relationship with nature, as determined by the Constitution. Thus, the state authority, in this case the Ministry of Environment, Water and Ecological Transition, is obligated to plan and manage said resource in compliance with this priority.¹⁵³

210. In this sense, water is a necessary element to ensure the integral respect for the existence, maintenance and regeneration of the vital cycles of nature, in accordance with the rights recognized in Article 71 of the Constitution. In this line, the Organic Law of Water Resources, Uses, and Management of Water (LORHUA), within the section on the rights of nature expressly states that:

*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 the conservation of water, nature has the right to: (a) The protection of its sources, intake areas, regulation, recharge, upwelling and natural waterways, in particular, snow-capped mountains, glaciers, paramos, wetlands and mangroves; (b) The maintenance of the ecological flow as a guarantee of the preservation of ecosystems and biodiversity; c) The preservation of the natural dynamics of the integral water cycle or hydrological cycle; d) The protection of watersheds and ecosystems from all contamination; and, e) The restoration and recovery of ecosystems as a result of the imbalances produced by water contamination and soil erosion.*¹⁵⁴

211. Under the Ecuadorian constitutional framework, the right to water is not only recognized with a view to guaranteeing the health and life of human beings, but also to guaranteeing the rights of nature, and therefore, with the limitations contemplated in the Constitution, nature also has the right to the conservation of water that makes its existence possible under the terms set forth in the Constitution and as indicated in the article of the aforementioned Law.

212. This makes it necessary to consider also the integrality and complexity of ecosystems in regulations, public policies, and management of activities that may impact the exercise of these rights. From this perspective, it is reasonable to consider that an action that affects water will, in turn, impact ecosystems and the environment of communities. Therefore, the precautionary principle is applicable to the right to water is mandatory

¹⁵³ Constitutional Court, Judgment No. 32-17-IN/21, para. 80.

¹⁵⁴ Organic Law on Water Resources, Uses and Development of Water, article 64.

for all authorities that have to take decisions related to this right.¹⁵⁵

213. In this sense, a complex system such as the Los Cedros cloud forest provides itself with the substances it needs to generate its components and persist as such. It does this through a permanent recycling of water and elements such as carbon, nitrogen, and phosphorus, amongst others. This, by virtue of the characteristic of sustainability, that is, a “*system persisting in a state of its own for as long as it naturally can*”¹⁵⁶, allows for the system’s possibility of continuing to exist and conserving its essential characteristics. It shall now be explained how in the hydrological cycle, in the carbon cycle, and in the food chain, water is critical for this type of forest.
214. Regarding *water recycling or the hydrological cycle* in forests such as Los Cedros, it is important to understand that this cycle occurs when the leaves transpire and release water vapor into the atmosphere. This vapor condenses as it cools and falls as rain. This is why the tropical areas of the Earth that are home to large masses of vegetation, such as the Amazon, are also the wettest. In steep, sloping areas, such as the foothills of the Andes, forests with their roots also play an important role in retaining the soil and regulating the rate at which rainwater flows down the mountains, preventing erosion and landslides.¹⁵⁷
215. Another process that must be taken into account in forests and which is closely related to the water or hydrological cycle is *the carbon cycle*. As is well known, all living beings are made up of carbon. To guarantee the permanent supply of this element, the leaves of the canopy of the Protected Forest act as if they were solar panels that take the sun's energy, carbon dioxide from the air and water, and convert it into new leaves and stems, which, as indicated, maintain the humidity that when cooled produces rain.
216. In addition to the carbon and water cycles, the *food web* that takes place within the Los Cedros Protected Forest ecosystem is a key process in its functioning. This network is made up of a series of links that guarantee that the living beings of an ecosystem have the food they require. Simply put- as indicated above, plants transform the sun's energy into new vegetation. This vegetation is consumed by organisms called herbivores such

¹⁵⁵ Article 106 of the Organic Law on Water Resources and Water Use, for example, provides that, “*respecting the order of priority as regulated in this Law, the Unified Water Authority will grant authorizations for the productive use of water for the generation of electricity, preferentially for projects of national priority that are contemplated in the electrification master plan, incorporating the principles of environmental sustainability, precaution, prevention and efficiency.*”

¹⁵⁶ Ángel H., Andrés. 2019. Impacts in Perpetuity. The Legacy of Mining. In: Green Ideas. Heinrich Böll Stiftung, Edts. Bogota D.C.

¹⁵⁷ National Forestry Commission. March 24, 2020, Government. of Mexico. Retrieved from: <https://www.gob.mx/conafor/en/articulos/los-bosques-y-el-ciclo-del-agua?idiom=en>

as ruminants (cows, goats, sheep, etc.), and these ruminants in turn are eaten by carnivorous animals. Once plants and animals die, their bodies are decomposed by microorganisms that return their elements to the soil where plants absorb them and restart the cycle. Therefore, if vegetation disappears due to human activity, the water cycle, the carbon cycle and the ecosystem's food chain will be seriously affected or could disappear.

217. Based on the above, it can be concluded that the water that emerges from the complex water system to which the Los Cedros Protected Forest is linked is an essential element for the sustainability of its ecosystem and must be protected in accordance with the constitutional and legal norms that have been reviewed in this section.

5.2.2 The right to water and the precautionary principle

218. Following these constitutional provisions, this Court, when analyzing the claim of unconstitutionality of rules of the Environmental Regulation of Mining Activities that allowed the diversion of rivers, held that, *“the regulations that refer to the issuance of authorizations or permits must require that **these are issued on the basis of technical and independent studies and analyses that ensure that the authorization will not lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.**”*¹⁵⁸ This Court added that, *“such authorizations or permits must guarantee, in each specific case, **the application of the principles of precaution and prevention.** In particular, in each individual case, it must be evaluated, with technical and scientific information, whether or not the precautionary principle is applicable and, if the authorization or permit is appropriate, the principle of prevention must be guaranteed”*¹⁵⁹ (emphasis added).
219. Under these considerations, once it has been observed that, in the underlying matter, the water in the region is used for human consumption, agricultural activities in neighboring areas, and that it has a substantial value for the ecosystem of the Los Cedros Protected Forest, it is necessary to analyze whether the actions of the MAAE and the Secretariat of Water met the constitutional parameters, particularly in relation to the parameters of the precautionary principle: **i) the risk of serious or irreversible damage, ii) scientific uncertainty, and iii) adoption of Protected measures.**
220. Regarding (i) **risk of serious or irreversible harm**, based on the scientific information submitted in the underlying case, it is evident that there is a reasonable probability that mining activity in the Los Cedros Protected Forest will cause a disruption in the life cycles of this ecosystem that exceeds its resilience capacity, that is, its ability to absorb the impact it receives at a given rate.

¹⁵⁸ Constitutional Court, Judgment No. 32-17-IN/21, para. 80.

¹⁵⁹ Ibid.

221. Based on the known impacts caused by mining, it is possible to hypothesize that the clearing of vegetative cover in areas such as those required for mining would progressively cause a drop in the levels of evaporation and vegetative renewal in the Los Cedros Protected Forest. This could affect, in the first instance, two of its natural cycles: the hydrological cycle and the carbon cycle. When the leaves of the trees and epiphytic plants disappear, the amount of water vapor generated by them would decrease, reducing the amount of condensed water in the atmosphere, the local relative humidity, and likely affecting the amount of rainfall in the medium- or long-term.¹⁶⁰
222. The plausibility of the above hypotheses shows that there is a risk that the mining activity in the Los Cedros Protected Forest could cause ***serious and irreversible harm to the water***, which would affect the ecosystem and human activities. The first element of the precautionary principle has thus been met.
223. Regarding (ii) **scientific uncertainty**, it is noted that SENAGUA, which at that time was the entity in charge of water management, issued two resolutions corresponding to the Magdalena 01 and Magdalena 02 mining concessions, in which it was decided “*to grant the no-impact certificate on water resources for the initial exploration stage*”.¹⁶¹ These certifications were issued prior to environmental registration.
224. Nor has it been confirmed that the authorities who issued the environmental registration possessed scientific information that ruled out with certitude effects on human consumption and the ecosystem of the Los Cedros Protected Forest. On the contrary, in ENAMI EP’s environmental registration, among the main environmental impacts the expression “*water contamination*”¹⁶² is mentioned generally, without further explanation. The environmental management plan does not contain developed and technical information on water protection.
225. These administrative actions show that the authorities did not conduct an analysis of the precautionary principle based on scientific information or studies regarding water and the mining activity to be carried out in the area. They limited themselves to formally verifying ENAMI EP’s compliance with the requirements, and in the case of SENAGUA, this was limited only to the exploration phase. On the contrary, there is an inconsistency because the environmental registration expressly states that the effects of the intervention would be water contamination, while the permit granted by the water authority states that there would be no impact.

¹⁶⁰ Contamination from Mining Activities, retrieved from:
<http://edafologia.ugr.es/conta/tema16/impact.htm>

¹⁶¹ Resolution of August 9, 2018 within administrative proceeding No. 180-2017-CNA (Magdalena River Concession 02) and Resolution of August 9, 2018 within administrative proceeding No. 181-2017- CNA (Magdalena River Concession 02). Both resolutions are included in the file for the action for injunctive relief under review.

¹⁶² Environmental Record fjs 35-41 of the file of the action for injunctive relief under review.

226. No-Impact certifications must be granted prior to any phase of mining activity (Art. 26 of the Mining Law and Art. 398 of the Constitution). If a mining right is granted without this certificate, based on a technical study, a legal expectation would be created regarding an activity that may not be possible to carry out, since it is incompatible with guaranteeing the right to water and the rights of nature.
227. The information provided by the MAAE does not show the existence of scientific or technical studies upon which a detailed assessment regarding water is made, nor an analysis that considers the applicability of the constitutional principle of precaution in the face of an activity characterized by its environmental impact, such as mining.
228. Nor has said entity introduced evidence into this case that disproves that mining activity will not cause violations in the availability, accessibility, and quality of the right to water. In this way, the lack of information constitutes *scientific uncertainty* in relation to the activity to be carried out.
229. Regarding element iii), it was necessary to adopt timely and **effective measures** to protect the right to water, that is, the authority in charge should have acted with a view to protecting this right, both due to the impact on the population and on the ecosystem of the Los Cedros Protected Forest. In this sense, if there was no certain information, the permit could not proceed.
230. Thus, after reviewing the actions of the water authority, it is not evident that the decisions adopted have been formulated under the constitutional parameters reviewed, since these require greater rigor in the control of activities that may affect the rights of nature and alter the harmonious relationship of human activities with the environment, in this case in relation to water as an element that gives rise to life.
231. Therefore, the water use permit granted does not contain reasoned and scientifically based arguments that comply with the application of the precautionary principle in relation to the right to water.
232. Thus, based on the information in the case file, this Court observes that the water authority did not fulfill its role of carrying out water management based on the parameters indicated, since one of its prior obligations was to have accurate information on the water and the characteristics of the ecosystem, in order to adopt the necessary measures for its protection. On the contrary, the MAAE's argument focuses on pointing out that this ecosystem is not formally part of any of the protected areas where extractive activities are prohibited.
233. However, the scientific information on water resources that has been reviewed during the introduction of evidence of this case shows the obligation of the MAAE to adopt measures for the protection of water, and by failing to do in a timely manner, it failed to comply with the constitutional principle of precaution. Consequently, the GAD of Cotacachi should have resorted to judicial mechanisms to seek the protection of the rights of nature and water.

234. Also of note is that in the judgment under review there is no analysis of the right to water or its relationship with the precautionary principle. This is an essential aspect that judges, within the framework of environmental justice, should analyze and, by virtue of such analysis, adopt the pertinent protection measures.
235. Thus, this Court, based on the information reviewed and which has been summarized in previous paragraphs, has observed that there are reasonable grounds that show that the mining activity could seriously affect the exercise of the right to water of the populations neighboring the Los Cedros Protected Forest, as well as the ecosystem. In this scenario, the precautionary principle was not observed by the MAAE, nor by SENAGUA. Consequently, this Agency concludes that this principle applied to the right to water has been violated and **considers that mining activity should not be carried out in the Los Cedros Protected Forest.**

5.3 The right to a healthy environment

236. In the complaint, the petitioners made reference to the right to a healthy environment as part of the rights for which the action for injunctive relief was proposed. While the petitioners do not develop arguments in relation to this right other than citing Article 14 of the Constitution, this Court considers it pertinent to rule on this right, based on the facts of the specific case.
237. The arguments of the respondent entities in relation to this right are no different from those put forward with respect to the rights of nature. In this sense, they state that this right has not been violated since the Ministry of the Environment granted ENAMI EP the permit corresponding to the initial exploration phase and, therefore, the legal and constitutional requirements were met. In addition, the Los Cedros Protected Forest is not a protected area, intangible zone or urban center, and therefore mining activity would not be prohibited.
238. These arguments have been analyzed in the sections dealing with the rights of nature and the right to water, in which it was concluded that the authorities in charge did not observe the precautionary principle applicable to these rights in order to adopt effective measures to protect water and the ecosystem of the Los Cedros Protected Forest. In addition, the Court observed that even though this Protected Forest is not part of the protected areas, the elements that make up its ecosystem give it characteristics that, by virtue of the rights of nature and the right to water, do not allow for the occurrence of impact activities such as mining extraction.
239. Consequently, considering that these aspects have already been analyzed previously in this opinion, the Court deems it necessary to develop criteria on the right to a healthy environment and its relationship with the rights of nature. The Constitution recognizes

and guarantees people, both individually and collectively, this right. Thus, Article 66, paragraph 27 recognizes, “[t]he right to live in a healthy, ecologically balanced environment, free of contamination and in harmony with nature.” At the same time, as part of the right of right living in a collective sense, Article 14 of the Constitution states, “[t]he right of the population to live in a healthy and ecologically balanced environment, which guarantees sustainability and good living, *sumak kawsay*, is recognized.”

240. The constitutional right to a healthy environment is recognized for each particular person, but at the same time from a collective perspective, encompassing the population as a whole. This collective viewpoint also provides for the ownership of this right to be recognized for populations in relation to the environment to which they are linked, be they communities, towns, cities or other jurisdictions.
241. The Constitution contemplates as part of this right having an *ecologically balanced* environment, as this supposes the interaction of the beings inhabiting the environment in a way that does not provoke or endanger the existence of other beings or the elements required for their life. The human being who develops in a particular environment as a species is part of the natural cycles, and may take actions that affect the desired equilibrium of the environment.
242. Human rights and the rights of nature converge within the right to a healthy environment. In essence, the necessary interrelation and complementarity between these rights becomes evident without losing their autonomy, since the preservation of the natural environment allows human beings to exercise other rights. As indicated in previous paragraphs, the right to a healthy environment is not only a function of human beings, but also includes the elements of nature as such.¹⁶³
243. This biocentric conception of the right to a healthy and ecologically balanced environment does not eliminate the ownership that human beings have with respect to this right, nor does it ignore the effects they may suffer in relation to other human rights as a result of environmental damage. What the Constitution does in its article 14 is to *reconceptualize the health, balance and sustainability of the environment*, understanding, correctly, the human being to be part of the same, and nature as intrinsically valuable, regardless of its utility.
244. In this sense, the rights of individuals, peoples and communities are seriously compromised when the rights of nature have been affected in an arbitrary, disproportionate and unreasonable manner. Thus, for example, high levels of air, water and soil pollution, erosion, droughts or other anthropogenic impacts on nature, inevitably affect the exercise of the right to health, life, personal well-being, the right to water, food, and other economic, social, and cultural rights and, in general, to the different dimensions of human life.

¹⁶³ The United Nations Human Rights Council, through a resolution adopted on October 5, 2021, recognized the human right to a safe, clean, healthy and sustainable environment.

245. For this reason, the Constitution expressly adds as part of this right the right to a *pollution-free environment*, since pollution is one of the forms of human intervention in the environment that accelerates its degradation and makes it uninhabitable both for humans and other living beings. This constitutional parameter is in line with international instruments developed to mitigate the effects of pollution, such as the United Nations Convention on Climate Change and the Kyoto Protocol, to which Ecuador is a party.

246. Under these considerations and taking into account the scientific information on the Los Cedros Protected Forest, it is reasonable to conclude that this ecosystem is interrelated and makes possible the preservation of a healthy environment for the surrounding communities, understood both from the individual and from the collective dimension of the right to a healthy environment.

247. Therefore, all human activities, including those of a productive nature that involve the direct use of natural resources, are obligated to observe the provisions of the Constitution and international instruments on the matter. This also entails the obligation of state bodies to generate environmental regulations and public policies that regulate these activities respecting the constitutional parameters for the protection of the environment and the rights of nature.

248. In the underlying matter, it is necessary to consider the constitutional norms that expressly refer to forests. Thus, within the section referring to ecosystems and natural heritage, the Constitution provides in Article 406:

The State shall regulate the conservation, management and sustainable use, recovery, and access rights of fragile and threatened ecosystems; among others, páramos, wetlands, cloud forests, dry and humid tropical forests and mangroves, marine and coastal-marine ecosystems (emphasis added).

249. In accordance with the aforementioned article, in the section on the biosphere, urban ecology and alternative energies, the Constitution in article 414 obligates the State to take “*measures for the conservation of forests and vegetation, and to protect at-risk populations.*” This constitutional norm seeks to protect nature and the population against the different ways in which the environment is currently threatened globally, such as through deforestation or climate change, in such a way that activities like mining can only be carried out by rigorously observing Protected measures that follow constitutional principles.

250. Likewise, the Constitution requires the protection and preservation of these ecosystems considered as fragile, including forests. Although there is no express constitutional restriction on carrying out certain types of activities in these ecosystems, it does not exclude the possibility that when particular characteristics are identified, as in the case of the Los Cedros Protected Forest, these ecosystems require a higher degree of protection and the strengthening of public policies for their conservation, management, sustainable use, and the promotion of a harmonious relationship between the population and the ecosystem.

251. This requires that the governing entity in environmental matters, in this case the MAAE, fully assumes its role of preserving ecosystems, and promoting harmonious relations between human activities and the environment. To this end, it must have accurate scientific information on the real characteristics, elements and conditions of ecosystems, in order to adopt the necessary measures for their protection.
252. In the case under analysis, the Court observed that the MAAE does not have such information on the Los Cedros forest and, as seen in the previous sections of this judgment, neither has it developed a public policy for management in accordance with the characteristics of this ecosystem. This serious shortcoming resulted in the issuance of the environmental registration without the necessary precautions, affecting the right to a healthy environment.

C. Environmental consultation in the Los Cedros case

253. Next, the Court will examine the charge related to an alleged lack of environmental consultation prior to the granting of the environmental registration and whether this violated constitutional rights in the case under review.
254. Both in its action for injunctive relief and in its appeal, the GAD of Cotacachi stated that “*no prior consultation was carried out with the population of the affected area, nor with the communes*” [referring to the environmental consultation established in Article 398 of the Constitution].¹⁶⁴ The respondents, on the other hand, stated that the processes of citizen participation established in the Constitution and the law were complied with.
255. The lower court decision did not analyze the consultation, while the decision issued on June 19, 2019 by the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura (hereinafter, “Provincial Court”) examined this charge, establishing the differences between the consultations established in Article 398 of the Constitution and the environmental consultation provided for in Article 398 of the same.
256. Following the *in situ* site visit, the judges of the Provincial Court found “*that in the communes: San Roque, Chontal Alto, San Miguel de Chontal, Brilla Sol, Magdalena Alto, San José de Magdalena, El Paraíso, El Corazón, Pueblo Unido, Río Verde, Cielo Verde, Santa Rosa de los Manduriacos (...) there are no communes, communities, or indigenous peoples*”, so they concluded that what was applicable to the case was the environmental consultation of article 398 of the Constitution.

¹⁶⁴ The complaint for the action for injunctive relief states: “*d. Violation of the right to prior consultation Article 398 of the Constitution...*”. Also in its appeal, the GAD states: “*we maintain in the present case that, the population and the inhabitants of the communes of the García Moreno parish, which are settled in the area of direct and indirect influence of the mining concessions Magdalena River 01 and Magdalena River 02, should have been consulted prior to granting the environmental registration and determining the viability or lack thereof for the mining project. From the Resolution, by which the Minister of Environment granted the Mining Registration in favor of Empresa Nacional Minera (ENAMI EP), it is clear that there was no prior consultation with the population of the affected area, nor with the communities*”.

257. The Provincial Court emphasized the importance of the consultations established in the Constitution, examined the evidence provided,¹⁶⁵ and concluded that the respondent entities violated the right to be consulted.
258. Consequently, the Provincial Court concluded that the activities carried out by ENAMI EP and Cornerstone did not comply with “*the constitutional legal mandates*” and declared as violated the right to be consulted, particularly with regard to environmental consultation.
259. The MAAE, ENAMI EP and Cornerstone pointed out that the appellate court made a serious error by confusing environmental consultation, popular consultation and other types of consultation required for the implementation of extractive activities of non-renewable natural resources. They also argued that it was not appropriate to carry out the environmental consultation in the initial exploration phase.
260. With this background, the Court finds sufficient grounds to examine the charge related to an alleged failure to carry out the environmental consultation, considering the following elements: i) the right to participate in environmental matters, ii) the environmental consultation in accordance with constitutional standards and iii) whether or not in the specific case an environmental consultation was carried out in accordance with the terms set forth in the Constitution.

¹⁶⁵ The Provincial Court of Justice pointed out: “*the importance of the consultation is clearly directed toward obtaining the consent of the community, and to achieve this certain established minimum requirements must be met, such as good faith and the manner by which to carry out the consultation as appropriate for the circumstances, with the purpose of effectively guaranteeing citizen participation, taking into consideration the criteria of valuation and objections regarding the activity subject to consultation. This allows for the reaching of an agreement, or examining the proposed measures. The consultation is applicable not only when there is imminent danger, but also when there is an impact or harm to the community or the environment as a consequence of the activity intended to be carried out by the authorities or private companies holding a concession for a public work or for natural resources (...)* the State is responsible for implementing processes of participation and community consultation, a responsibility that cannot be delegated to any private entity (...) there must necessarily be a process in accordance with the Ecuadorian legal system of citizen participation and community engagement, in which the minimum democratic guarantees are fulfilled, such as: 1. Preparation of the consultation; 2. Election day; 3. Computation and results of the consultation; 4. Challenges to the results; and 5. Declaration of validity (...) it is not sufficient merely to inform the community of state decisions regarding acts that could affect people; rather, it is necessary to secure the right of participation to be consulted, established in article 61, paragraph 4 of the Constitution of the Republic, in order to achieve the participation of the community. Therefore, any communication must be provided respecting its context, dialoguing in good faith with all community leaders, and reaching agreements in which it is established in a transparent way that the criteria of the community have been considered. This is what constitutional law currently requires with respect to state decisions on the environment that may directly affect a community”.

5.4 The right to participate in environmental matters

261. The Constitution establishes citizen participation in matters of public interest as a right in itself (art. 61 CRE), as a constitutional guarantee of other rights (art. 85 CRE), an environmental principle (art. 296 CRE), and an objective that conditions the development of the constitutional framework (art. 276 CRE). This right is also included and developed in constitutional law.¹⁶⁶
262. Article 395, paragraph 3 of the Constitution obligates the State to guarantee “*the active and permanent participation of affected persons, communities, peoples and nationalities in the planning, execution and control of any activity that generates environmental impacts*”.¹⁶⁷
263. In Opinion No. 22-18-IN/21, this Court stated that “*participation is active when it enables the democratic deliberation of the citizenry, that is, when spaces are generated in which different points of view are involved and environmental public policies are created and executed within the framework of a debate that includes the voices of the citizens. The active participation referred to in the Constitution is not, therefore, a participation without debate or one that passively accepts the position of the State or companies*”.¹⁶⁸

¹⁶⁶ Principle 10 of the Rio Declaration on Environment and Development states: “*Environmental issues are best handled with the participation of all concerned citizens, at the appropriate level. At the national level, everyone should have adequate access to environmental information held by public authorities (...) as well as the opportunity to participate in decision-making processes. States should facilitate and encourage public awareness and participation by making information available to all...*”. The World Charter for Nature, adopted by the United Nations General Assembly, in turn states: “*Everyone, in accordance with national legislation, shall have the opportunity to participate, individually or collectively, in the process of preparing decisions which directly concern his environment...*”. At the international level, article 7.2 of the Escazú Agreement also obligates the Ecuadorian State to guarantee public participation on “*decisions (...) that have or may have a significant impact on the environment, including when they may affect health*”.

¹⁶⁷ Although strict observance of the principle of active participation is a necessary requirement for the development of extractive activities in light of the Constitution, this principle is by no means a sufficient or sole condition. The Constitution recognizes other environmental principles interrelated with the principle of participation such as precaution, prevention, sustainable development, biodiversity conservation and especially the rights of nature. These principles and rights must also be strictly observed when carrying out extractive activities. Article 408 of the Constitution states precisely that “*these goods [referring to non-renewable natural resources] may only be exploited in strict compliance with the environmental principles established in the Constitution*”. Citizen participation in environmental matters is closely linked to the precautionary principle. The information resulting from the participation and consultation processes, for example, can be fundamental to determining the risks of serious and irreversible harm and identifying the most effective Protected measures. As noted *supra*, these elements link participation, environmental consultation and the precautionary principle.

¹⁶⁸ For citizen participation to be active, it must have an impact on the planning, execution and control of public environmental policies. As the Inter-American Court of Human Rights has pointed out, the State has the obligation to “*allow the expression of opinions*” and “*integrate the concerns and the knowledge of*

264. That participation should be permanent means that participatory processes are not exhausted in mere sporadic and occasional gatherings, carried out after public entities adopt decisions that may affect the environment. On the contrary, it is the obligation of the State to ensure participation *“from the early stages of the decision-making process and to inform the public about these opportunities for participation”* (emphasis added).¹⁶⁹
265. In short, the Constitution and international instruments position the citizenry as the protagonist of the decision-making process that may affect the environment. In addition, they consider active and permanent participation as a fundamental element of public environmental management and, in general, of the democratic system. From this right to participate derives the obligation of the Ecuadorian State to guarantee the active and permanent participation of the people in public decision making that may affect the environment.

5.5 Consultations in the Constitution

266. The right to participate in matters of public interest is directly related to the right to be consulted.¹⁷⁰ In order to actualize the enjoyment and exercise of both rights, the Constitution establishes different types of consultation that may deal with environmental matters. Although these consultations share certain characteristics, each has its own nature, scope, and effects.
267. Article 57 of the Constitution, for example, establishes two types of consultations. In both cases, these consultations refer to the rights of the communes, communities, peoples and nationalities. The first consultation, contained in paragraph 7 of the referenced article, is the prior, free and informed consultation on plans and programs for prospecting, exploitation and commercialization of non-renewable resources *“that are found in the lands of said communities and that may affect them environmentally, socially or culturally”*. In addition, Article 57, paragraph 17, establishes pre-legislative consultation, which applies to legislative and administrative measures *“that may affect collective rights”*. These consultations have been developed by the Constitutional Court, among others, as follows in Opinions No. 20-12-IN/20, 3-15-IA/20 and 22-18-IN/21 and are operative in cases involving indigenous communities.

citizenship in public policy decisions that affect the environment”, through the various participation mechanisms.

¹⁶⁹ Ibid, para. 232. In addition, see: Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines), adopted in Bali on 26 February 2010 by the UNEP Council, Decision SS.XI/5, part A, guideline 8; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, art. 6. Likewise, the Constitution, in its article 395, paragraph 3, views participation as a transversal process in the stages of *“planning, execution and control of any activity that generates environmental impacts”*.

¹⁷⁰ Article 61 of the Constitution establishes that *“Ecuadorians enjoy the following rights: (...) 4. To be consulted”*.

268. Another type of consultation, included in article 104 of the Constitution, is the popular consultation. This consultation is a mechanism of direct democracy that can be initiated by the President of the Republic, the decentralized autonomous governments and the citizens. In this consultation, the citizenry pronounces itself in favor or against a plebiscite or referendum initiative, in an electoral process with local or national scope. The Court has developed standards for this type of consultation in matters of extraction of non-renewable natural resources in Opinions No. 9-19-CP/19, 10-19-CP/20, 6-20-CP/20, 1-21-CP/21, amongst others.
269. Article 398 of the Constitution establishes environmental consultation, which operates against any state decision or authorization that may affect the environment. The Court has developed some standards of this consultation in Opinion No. 22-18-IN/21. This consultation will be analyzed in detail in the following section.
270. These different types of consultation coexist in the Constitution as specific expressions of the general right to be consulted. In other words, the Constitution enshrines a generic right to be consulted that involves multiple mechanisms for citizen participation, but from which specific rights are also derived, such as consultations with indigenous peoples and nationalities established in Article 57, or the environmental consultation of Article 398. The Court pointed out that both environmental consultation (Article 398 CRE) and free, prior and informed consultation (Article 57.7 CRE) “*seek to involve their holders in the decision-making processes and in the decisions regarding projects that have an impact on the territory or the environment, respectively. For this reason, it is important for both rights, each with its particular characteristics, to have constant, unimpeded access to information on projects, social participation in decision-making, consultation and the application of standards that may favor the exercise of rights*”.¹⁷¹
271. In the underlying case, the Court notes that it is not appropriate to analyze the popular consultation (art. 104 CRE), as the Multijurisdictional Chamber of the Provincial Court erroneously did, nor the consultations established in article 57 of the Constitution, since the allegation of the GAD of Cotacachi refers to article 398 of the Constitution and not to the violation of collective rights.
272. As pointed out by MAAE, ENAMI EP and Cornerstone, the appellate court confused the types of consultation, imposing requirements of the popular consultation, established in article 104 of the Constitution and regulated in the Democratic Code as pertains to environmental consultation. Therefore, the Court will develop the constitutional standards for the environmental consultation and will determine if they were complied with in this case.

¹⁷¹ Opinion No. 22-18-IN/21, para. 135.

5.6 Environmental consultation in the Constitution

273. Article 398 of the Constitution establishes environmental consultation in the following terms:

Any decision or state authorization that may affect the environment must be consulted with the community, which shall be informed in a broad and timely manner. The consulting entity shall be the State. The law shall regulate prior consultation, citizen participation, deadlines, the subject consulted and the criteria for evaluating and objecting to the activity subject to consultation. The State shall evaluate the opinion of the community according to the criteria established in the law and international human rights instruments. If the aforementioned consultation process results in a majority opposition from the respective community, the decision regarding implementation of the project will be adopted by a resolution duly enacted by the corresponding higher administrative authority in accordance with the law.

274. *The holder of the right to environmental consultation or consulted entity:* Article 398 establishes the collective ownership of environmental consultation, expressly referring to “*the community*”. The ownership of this right corresponds to the community or communities, regardless of their ethnicity, whose environment may be affected by any state decision or authorization.

275. In order for a community, whether rural or urban, to be subject to environmental consultation, it is not necessary for it to have a property title, nor state recognition by means of any registration. It is only required that the decision or state authorization, as stated in the Constitution, “*may affect the environment*” of such community.

276. This shows another connection between participation, environmental consultation and the precautionary principle, because when faced with the doubt of a possible environmental impact, the State has the obligation to consult the potentially affected community.

277. Article 398 of the Constitution also states that “*the law shall regulate (...) the subject consulted*”. Article 82 of the Organic Law of Citizen Participation (LOPC) reiterates what is established in the Constitution, while article 184 of the COAm provides that “*the Competent Environmental Authority shall inform the population that could be directly affected about the possible realization of projects, works or activities, as well as the possible expected socio-environmental impacts and the relevance of the actions to be taken...*”.¹⁷² In Opinion No. 22-18-IN/21, this Court declared that:

¹⁷² The Court recalls that the Environmental Management Law (LGA) was the applicable regulation to grant the environmental registration for the initial exploration phase of the mining concessions of the Magdalena River Mining Project, comprised of the Río Magdalena 01 concession (Code: 40000339) and the Río Magdalena 02 concession (Code: 40000340) in the case under review. Article 28 of the LGA states that “*any natural or legal person has the right to participate in environmental management, through the mechanisms established by the regulations, including consultations, public hearings, initiatives, proposals or any form of association between the public and private sectors. Individuals may denounce those who violate this guarantee, without prejudice to civil or criminal liability for reckless or malicious complaints or accusations. Failure to comply with the consultation process referred to in Article*

Article 184 of the Organic Environmental Code does not apply or replace the right to prior, free and informed consultation of the communes, communities, indigenous peoples and nationalities; it will be constitutional provided that its purpose and content is interpreted and complemented by the constitutional norm that establishes the right to environmental consultation, the jurisprudence of the Court on applicable prior consultation, the rules of the Escazú Agreement and with the provisions of this judgment, which determine the elements necessary to guarantee this right”.

278. In other areas, such as the right to water, Article 68 of the Organic Law on Water Resources, Uses and Management of Water states that, “*the Unified Water Authority, through the watershed councils, shall consult in a prior, free, informed and obligatory manner and within a reasonable period of time with the users’ organizations on all relevant matters related to the integrated management of water resources that may affect them in accordance with this Law and its Regulations*”. When extractive activities have the potential to affect water bodies, environmental consultation must also deal with water issues.
279. The Court also notes that this secondary regulation does not specifically refer to the development of environmental consultation, established in article 398 of the Constitution, but rather to various mechanisms of citizen participation, such as hearings, information workshops, informative meetings, assemblies, and dissemination through web pages, amongst others.¹⁷³ By itself, the execution of one or several of these mechanisms does not constitute or guarantee environmental consultation in the terms mandated by the Constitution.
280. The Court considers that the subject of the environmental consultation must always be determined in a broad and representative manner, so as not to limit the participation of the communities potentially affected by state decisions or authorizations in environmental matters. Any person who has not been considered in the environmental consultation and who reasonably considers that the measure affects him/her should be included. The analysis of this direct impact should not be strict or rigorous. When the consulted subject is the indigenous communities, the consultation established in Article 57.7 of the Constitution must be carried out.
281. ***The obligor or consulting party:*** It is the Constitution itself, in Article 398, which expressly states: “*the consulting party shall be the State*”.

88 of the Political Constitution of the Republic [referring to the 1998 Constitution] will render the activity in question unenforceable and will be grounds for nullity of the respective contracts”.

¹⁷³ At the regulatory level, the Court notes that various regulations, such as Executive Decree No. 1040, which issued the Regulations for the Application of the Social Participation Mechanisms established in the Environmental Management Law (Official Gazette No. 332 of May 08, 2008), the Instructions to the Regulations for the Application of the Social Participation Mechanisms established in Executive Decree No. 1040 (Official Gazette No. 607 of October 14, 2015), the Unified Text of Secondary Environmental Legislation, and Articles 474 *et seq.* of the Regulations to the COAm, which regulates entities that participate in “processes of social participation” in environmental matters.

282. As stated in Opinion No. 22-18-IN/21, the obligation of the State to carry out environmental consultation is a responsibility that cannot be delegated to private natural or legal persons or international organizations. This responds to the fact that, in order to guarantee the active and permanent participation of the community, the environmental consultation must be carried out in the most objective and impartial manner possible. As anticipated, this participation must include and take into account the criteria even of those who oppose the decision or state authorization.
283. In the area of mining activities, the non-delegable nature of environmental consultation is ratified by the Mining Law, which in Article 87 establishes: *“the State is responsible for executing the processes of participation and social consultation through the corresponding public institutions in accordance with constitutional principles and current regulations. This responsibility cannot be delegated to any private entity”* (emphasis added).¹⁷⁴
284. In order to guarantee the objectivity and impartiality of the participatory process, the Court considers that public companies cannot carry out the environmental consultation on their own, since in the corresponding projects they are interested parties of the decisions or state authorizations being sought. The Court emphasizes that Article 87 of the Mining Law establishes: *“every mining concessionaire must respect the right of the people to have access to the processes of information, participation and consultation in the environmental management of mining activities”*.
285. Likewise, the Court considers that the environmental consultation should be carried out with the accompaniment and supervision of the Ombudsman’s Office as the competent entity for the protection and safeguarding of rights¹⁷⁵, which will act in accordance with the provisions of Resolution No. 21-DPE-DD-2019 of February 20, 2019.¹⁷⁶ The environmental consultation should include the participation of public authorities of the

¹⁷⁴ It should also be noted that Executive Decree No. 1040, in force at the time of the facts of the case under review, established: *“State institutions and companies, in the area of their respective competencies, are the appropriate authorities for the organization, development and application of the mechanisms of social participation, through the corresponding technical unit. In the case of activities or projects that affect the whole or part of the National System of Protected Areas, Protected Forests and Vegetation and State Forest Heritage, the competent authority shall be the Ministry of Environment”* (emphasis added).

¹⁷⁵ Article 215 of the Constitution states: *“The Ombudsman's Office shall have as its functions the protection and guardianship of the rights of the inhabitants of Ecuador and the defense of the rights of Ecuadorians who are outside the country....”*

¹⁷⁶ Article 2 of said Resolution states: *“The Ombudsman’s Office, through the General Directorate for Protection, will prepare a report monitoring the due process of prior consultation, which will include partial reports in the preparatory phase, during implementation, and in the final stage, and will be delivered to the administrative body that carries out the consultation process, that being the Ministry of the Environment, and to the petitioners, for its consideration prior to the approval of the environmental license.”*

autonomous decentralized provincial governments¹⁷⁷, as well as those of the cantons¹⁷⁸ and parishes¹⁷⁹, depending on the possible environmental impact accompanying the decision or state authorization.¹⁸⁰

286. It is worth noting that Article 184 of the Organic Environmental Code establishes that *“environmental facilitators will be involved in social participation processes and will be evaluated, qualified and registered in the Unified Environmental Information System”*. These facilitators are independent professionals, with no dependent relationship upon a public or private institution, and which the MAAE recognizes as qualified and registered for the coordination of the processes of social and citizen participation.¹⁸¹ The Court also highlights that, in Opinion No. 22-18-IN/21, it declared the conditional constitutionality of Article 184 of the COAm, stating the following: *“the challenged norm will be constitutional as long as it is interpreted and complemented with the provisions of this judgment, the jurisprudence on prior consultation as applicable, the constitutional norm that establishes the right to environmental consultation and with the norms of the Escazú Agreement, which establish the necessary elements to guarantee this right”*.

287. Without prejudice to the fact that environmental facilitators may act as collaborators in the process of carrying out the environmental consultation, in no way may they be delegated the essential activities of planning and execution of the same, as this contravenes the provisions of article 398 of the Constitution and the regulatory and administrative provisions cited above. The environmental facilitators should not take the place of the State as the consulting entity.

288. Finally, it should be noted that in the area of mining activity, Article 87 of the Mining Law provides that *“for any consultation process, the Ministry of Finance will provide the respective budget through the sectoral ministry”*.

Characteristics of the environmental consultation

289. The ***environmental consultation must broadly inform the community***. In order for the environmental consultation to be broadly informative as provided for in article 398 of the Constitution, the

¹⁷⁷ According to Article 263, paragraph 4 of the Constitution: *“The provincial governments shall have the following exclusive competencies, without prejudice to others determined by law: (...) 4. Provincial environmental management.”*

¹⁷⁸ Article 264, paragraph 8 of the Constitution establishes as exclusive jurisdiction of the municipal governments: *“8. Preserving, maintaining, and disseminating the (...) natural heritage of the canton and to build public spaces for these purposes”*.

¹⁷⁹ Article 267 establishes that the parish governments will establish the following exclusive jurisdictions: *“... 4. Incentivize (...) the preservation of biodiversity and the protection of the environment”*.

¹⁸⁰ Article 399 of the Constitution establishes that *“the integral exercise of state protection over the environment and the co-responsibility of citizens in its preservation will be articulated through a decentralized national system of environmental management, which will be responsible for the defense of the environment and nature”*.

¹⁸¹ Ministerial Agreement No. 121 issued by the then-Ministry of the Environment of Ecuador, Instructions for the evaluation, qualification and registration of environmental facilitators, Official Gazette No. 553 of March 20, 2009.

Information provided by the State to the affected community or communities must be **accessible, clear, objective and complete**, in such a way that said communities may fully understand the scope and implications of the State decision or authorization being sought prior to its adoption.

290. In order for environmental information to be **accessible**, the State must eliminate barriers of any kind that prevent the community from knowing information regarding the State's decision or authorization that may affect the environment. Access to environmental information in the possession, control or custody of the State is a right in itself.¹⁸² The right to access environmental information must be guided by the principle of maximum publicity and includes: *"a) requesting and receiving information from the corresponding authorities without the need to mention any special interest or justify the reasons for the request; b) being promptly informed as to whether the requested information is in the possession of the corresponding authority receiving the request; and c) being informed of the right to challenge and appeal the non-delivery of information and of the requirements to exercise this right"*.¹⁸³
291. In Opinion No. 22-18-IN/21, this Court has stated that *"access to public information and citizen participation are necessary to effectuate the right to live in a healthy environment, and make possible environmental justice"*. In addition, this body pointed out that the Constitution and constitutional law establish the *"duty of the State to provide access to information on policies or projects that may have an environmental impact on the community"* and added that *"the State must provide information to the entity to be consulted, to the citizens who would suffer the possible environmental impacts that the contemplated project may produce"*. The Court has also held that the provision of environmental information must comply with the principle of maximum disclosure, in order to *"generate and disclose the information necessary to make informed decisions on environmental impact"*.
292. The right of access to environmental information obligates the State to inform the consulted community through appropriate means, including written, electronic or oral means.
293. **Clarity** implies that the information presented to the community should be understandable and formulated in language that is neither technical nor obscure. If necessary, it should be translated when dealing with communities where Spanish is not the majority language.

¹⁸² Article 18 of the Constitution states: *"All persons, individually or collectively, have the right to: (...) 2. Freely access information generated by public entities, or by private entities that manage State funds or perform public functions. There shall be no reservation of information except in cases expressly established by law. In cases of the violation of human rights, no public entity shall deny information"*.

¹⁸³ Escazú Agreement, articles 5.1 and 5.2.

294. Information is **objective** when its content is formulated in value-neutral language and is not emotionally charged. That is, when it is not suggestive and does not seek to manipulate or vitiate the consent of the consulted entity.

295. Complete environmental information, according to article 7, paragraph 6 of the Escazú Agreement, includes elements such as:

the type or nature of the environmental decision in question and, where appropriate, in non-technical language;
the authority responsible for the decision-making process and other authorities and institutions involved;
the procedure envisaged for public participation, including the starting and ending dates, the mechanisms envisaged for such participation, and, where appropriate, the places and dates of consultation or public hearings; and
the public authorities involved that may be required to provide further information on the environmental decision in question, and the procedures for requesting the information.

296. The State's obligation to carry out a broadly informed environmental consultation is not limited to the duty to provide access to information, but must also ensure that the community is aware of the possible risks, including environmental and health risks, so that it can give its opinion on any decision or State authorization that may affect the environment.

297. The State, through its corresponding authorities, must ensure that the consulted community is informed of at least the following aspects: the nature, size, pace, reversibility and scope of any State decision or authorization; the reason for and purpose of the decision or authorization; the duration of the authorized project or activity; the location of the areas to be affected; a preliminary assessment of the likely environmental impacts, including potential risks; the personnel likely to be involved in the implementation of the decision or authorization; and the technical and legal procedures that the decision or authorization may entail.

298. In Opinion No. 22-18-IN/21, the Court stated that "*the Escazú Agreement, which complements what is recognized in the Constitution, establishes: a. The objective of "guaranteeing the full and effective implementation of the rights of access to environmental information, public participation in environmental decision-making processes and access to justice in environmental matters... contributing to the protection of the right of every person, of present and future generations, to live in a healthy environment and to sustainable development."* b. *The obligation to ensure the right of public participation in environmental decision-making processes (including authorizations to be issued), in reasonable times, for which it shall implement "open and inclusive participation in decision-making processes..."* c. *The obligation for public participation processes to be effective, understandable and timely; that prior to decision-making, the right of public participation must include "the opportunity to submit comments by appropriate and available means, in accordance with the circumstances of the process"; that the decision adopted, its reasoning and the ways in*

which the observations were processed of those who participated; that the information provided on environmental impacts must contain the minimum information established in the Agreement; that the process must be adapted to the social, economic, cultural, geographic and gender characteristics of the public”.

- 299. The environmental consultation must inform the community in a timely manner.** In accordance with Article 398 of the Constitution, environmental consultation is a “*prior consultation*” to the State decision or authorization. Article 7, paragraph 4 of the Escazú Agreement obligates the State to adopt measures to ensure participation “*from the initial stages of the decision-making process, so that public comments are duly considered*” (emphasis added). Paragraph 5 of the same article establishes that public participation procedures must include “*reasonable time frames that allow sufficient time to inform the public and for the public to participate effectively*”.
- 300.** As the Court has pointed out in Opinion No. 22-18-IN/21, insofar as applicable, environmental consultation “*must incorporate the elements of the right to prior consultation with indigenous peoples, such as being prior in nature and good faith*”.
- 301. Prior** environmental consultation is not limited to the fact that it is carried out prior to the decision or authorization, but that the community is given sufficient time to access the information, consider it together, and debate it internally before issuing a pronouncement.
- 302.** Therefore, it is the obligation of the corresponding public entities to carry out the environmental consultation as soon as possible and before adopting the decision or issuing the state authorization that may affect the environment, allowing the community to deliberate.¹⁸⁴

On the timeliness of environmental consultation with respect to mining activities

- 303.** The Court has indicated that mining activities are “*a highly complex matter*” because of their different processes and phases, amongst other reasons.¹⁸⁵ Regarding the phases of mining activities, Article 27 of the Mining Law recognizes the following phases: (i) prospecting, (ii) exploration, (iii) exploitation, (iv) beneficiation, (v) smelting, (vi) refining, (vii) commercialization and (viii) mine closure.¹⁸⁶ The Court has observed that, in the cases of medium and large scale mining: “*these are activities that are carried out*

¹⁸⁴ It is worth noting that Article 10 of Decree 1040 states: “*Social participation will be mandatory for the responsible environmental enforcement authority, in coordination with the promoter of the activity or project, prior to the approval of the environmental impact study*”.

¹⁸⁵ Opinion No. 9-19-CP/19 of September 17, 2019.

¹⁸⁶ Article 27 of the Mining Law states: “*For purposes of application of this law, the phases of the mining activity are: a) Prospecting, which consists of the search for signs of mineralized areas; b) Exploration, which consists of the determination of the size and shape of the deposit, as well as the content and quality of the mineral in it. Exploration may be initial or advanced and also includes the economic evaluation of the deposit, its technical feasibility and the design of its exploitation; c) Exploitation, which includes the various operations and labors dedicated to preparing and developing the mineral deposit, and the extraction and transportation of the minerals; d) Beneficiation, which consists of a set of physical,*

*in sequential order, and only in this way can the objectives pursued in developing this activity be achieved. So, in general, it is not possible to carry out exploitation without having previously developed prospecting and exploration activities; and in turn, it is not possible to reach the commercialization phase if the exploitation phase has not been previously carried out".*¹⁸⁷

- 304.** Both the Mining Law¹⁸⁸ and the Environmental Regulations for Mining Activities (RAAM) establish, among other requirements, the obtaining of an environmental registration for the initial exploration phase¹⁸⁹ and an environmental license for the exploitation phase.¹⁹⁰ According to article 426 of the Organic Environmental Regulatory Code, the environmental registration is an environmental administrative authorization for low-impact projects, works or activities, while the environmental license operates for medium and high-impact activities.¹⁹¹

chemical and/or metallurgical processes to which the minerals resulting from exploitation are subjected in order to increase their useful content or grade; e) Smelting, which consists of the process of smelting minerals, concentrates or precipitates thereof, in order to separate the metallic product to be obtained from other minerals that accompany them; f) Refining, which consists of the process of converting metallic products into high purity metals; g) Commercialization, which consists of the purchase and sale of minerals or the execution of other contracts for the purpose of converting metallic products into high purity metals; and h) Mine Closure, which consists of the termination of mining activities and the consequent dismantling of the facilities used in any of the previously referred phases, if they are not of public interest, including environmental remediation according to the closure plan duly approved by the corresponding environmental authority....".

¹⁸⁷ Opinion No. 9-19-CP/19 of September 17, 2019.

¹⁸⁸ Article 26 of the Mining Law states: "Prior administrative acts.- In order to execute mining activities, it is obligatory and required that certain administrative acts be previously carried out by the following institutions within the scope of their respective jurisdictions:

a) The respective environmental license must have been duly granted by the Ministry of the Environment; and, b) Acts required by the Unified Water Authority examining the possible impact on surface and/or subterranean water bodies and in fulfillment of the order of priority for the right to access water. Additionally, the mining concessionaire shall submit to the Sector Ministry a sworn statement made before a notary public stating that the mining activities do not affect: roads, public infrastructure, authorized ports, sea beaches and seabeds; telecommunications networks; military installations; oil infrastructure; aeronautical installations; electrical networks or infrastructure; or archeological remains or natural and cultural heritage".

¹⁸⁹ Article 11 of the RAAM states: "For the initial exploration period the National Environmental Authority, through the Unified Environmental Information System, will grant the Environmental Registration, which must contain the Registration Form and the EMP presented by the Holder of the Mining Rights". ¹⁹⁰ Article 23 of the RAAM states: "Prior to the start of activities in the exploitation, beneficiation, smelting and refining phase, the corresponding environmental impact study shall be submitted to the Environmental Authority in accordance with the provisions of these regulations and other environmental regulations in force." Article 26 of the RAAM states: "Once the corresponding fees have been paid, the respective Environmental License will be issued; an indispensable prerequisite for the mining owner to carry out the mining activities contemplated in the approved environmental studies".

¹⁹¹ At the time of the facts of the case under review, Article 3 of the Unified Text of Secondary Environmental Legislation (Executive Decree No. 3516, Official Gazette 2 of March 31, 2003) established that the environmental registration "is the mandatory environmental permit granted by the Corresponding Environmental Authority, which certifies that the developer has complied with the regularization process of its project, work or activity". The same article stated that the environmental license, "is the environmental permit granted by the Corresponding Environmental Authority to a natural or legal person for the execution of a project, work or activity. It establishes the obligation of the regulated party to comply with the applicable environmental regulations in order to prevent, mitigate or

305. Article 89 of the Mining Law, which regulates participation and consultation processes, provides that “*citizen participation (...) must be carried out in all phases of the mining activity, within the framework of the procedures and mechanisms established in the Constitution and the law*” (emphasis added).¹⁹²
306. The literal wording of Article 398 of the Constitution provides that environmental consultation must occur prior to “*any State decision or authorization that may affect the environment*”. In order to guarantee the active and permanent participation on environmental matters guaranteed by the Constitution, the Court considers that, in the case of state authorizations and decisions that may affect the environment and are related to medium and large scale mining activities, such as the case under review, the environmental consultation must take place at least prior to the issuance of the environmental registration and prior to the environmental license.

Other features of an environmental consultation

307. ***The environmental consultation must be free.*** The environmental consultation is free, that is, preserving of a state of liberty, if there is no pressure, intimidation, coercion or manipulation of the consulted community, either by public entities or third parties. Efforts in the consultation processes to attempt to direct the community’s decision through inappropriate interference such as monetary incentives, strategies of social division, threats, retaliation or criminalization are unacceptable.
308. ***The environmental consultation must be carried out in good faith.*** Another similarity between environmental consultation and other types of consultation is that they must be aimed at reaching agreements with the community, within a framework of dialogue, and transparent, full and equitable participation, thereby enabling mutual trust between the State and the consulted entity.
309. This Court has also stated that the purpose of environmental consultation, “*is that of a two-way dialogue prior to making a decision on a policy or project during the implementation of the policy and project (if it was decided on a participatory basis), and during the execution of the same.*”¹⁹³ This Court has also indicated that, “*the dialogue cannot start with a previously-made decision. If there is a prior decision, then it is not a consultation but the mere fulfillment of a formality that consists of informing,*

correct the undesirable effects that the authorized project, work or activity may cause in the environment. For the issuance of the environmental license in the mining sector, the provisions of the Mining Law shall apply”.

¹⁹² The Court likewise highlights that Article 88 of the Mining Law establishes: “*From the granting of a mining concession and during all stages thereof, the concessionaire, through the State, must adequately inform the competent authorities, decentralized autonomous governments, communities and entities representing social, environmental or trade union interests, about the possible impacts, both positive and negative, of the mining activity. The environmental authority shall give free access to formally requested environmental and social studies, as well as to reports and technical resolutions issued by the competent authority, in the manner determined by law*”.

¹⁹³ Opinion No. 22-18-IN/21 of September 9, 2021, paragraph 146.

*and it would be contrary to the good faith with which this consultation must be developed”.*¹⁹⁴

310. In the event that the consulted community opposes the State’s decision or authorization, article 398 of the Constitution expressly provides: *“If the referenced consultation process results in a majority opposition of the respective community, the decision regarding the execution of the project shall be adopted by a duly enacted resolution of the corresponding higher administrative authority in accordance with the law.”* The Court deems it necessary to point out that this decision to execute the project or not may not violate the standards developed in this opinion, and must apply the precautionary or prevention principles, depending on which is applicable.

5.7 Environmental consultation in the underlying matter

311. In the case under review, it is necessary to determine whether, prior to granting the Environmental Registration through Resolution No. 225741, issued by the Ministry of Environment on December 12, 2017 (hereinafter, “Environmental Registration”), the environmental consultation was carried out in the terms referred to in Article 398 of the Constitution.

312. The GAD of Cotacachi, as well as several communities that intervened in the public hearing, pointed out that this consultation did not take place; while the respondents indicated they complied with *“community engagement and social participation”* processes prior to the issuance of the environmental registration. Therefore, the Court deems it pertinent to review whether this process of *“community engagement and social participation”*, alleged by the respondents, complied with the parameters of the environmental consultation.

313. Pages 181 to 188 of the procedural case file contain the *“Information Meeting Attendance Record”* and two photographs, dated October 26, 2017, held in the “El Paraíso” Commune (Imbabura), from 10h00 to 12h30, in which 90 signatures are recorded. According to this document, Douglas Ochoa, for ENAMI EP; Santiago Chamorro, for the Ministry of Mining; Xavier Guerra, for MAAE and Lorena Santacruz, for SENAGUA served as *“instructors”*. In addition to the inhabitants of the Commune, Mr. Alejandro Herrera, for the company Cornerstone, participated in this meeting. Also present was the political lieutenant of the “García Moreno” parish, María del Carmen Nogales.

314. On pages 189 to 192 of the procedural case file there is an *“Information Meeting Attendance Record”* and two photographs, dated October 26, 2017, held in “Magdalena Alto”, from 16h00 to 19h00, with 41 signatures. The officials referred to in the previous paragraph participated on behalf of ENAMI EP and the Ministries.

¹⁹⁴ Ibid., para. 147.

315. In pages 193 to 200 of the procedural case file there is the “*Information Meeting Attendance Record*”, dated November 16, 2017, held in “Brilla Sol”, in which 90 signatures are recorded.

316. Pages 314 to 316 of the procedural case file contain the “*Ayuda Memoria No. 084-CCS-UGS-ENAMI-EP-2017*”, prepared by Mr. Douglas Ochoa, Social Management Supervisor of ENAMI EP, for “*Processes of community engagement for mining activity in the Magdalena mining project*”, carried out on October 26, 2017. This document shows that since July 2017, ENAMI EP and the company Cornerstone made approaches with the Parish Council of García Moreno, the governor of Imbabura, and members of the boards of the councils of the communes Brilla Sol, Magdalena Alto and El Paraíso.

317. The same document states that on October 26, 2017, “*approximately 120 inhabitants of the communities El Paraíso, Magdalena Alto participated, in which information was provided on the framework agreement signed by ENAMI EP and Cornerstone for the management and administration of the mining project, the role of each company, the scope of initial exploration activities complementing with the exercise of the Authorities in the management of processes linked to environmental (water, natural resources) and administrative aspects in the development of mining activity*”.

318. According to the analysis performed by the official of ENAMI EP:

...the Cornerstone S.A. team has been able to familiarize the villagers (...). the leadership of the Paraíso community (...) have expressed their support for the mining project (...) the existence of the protected forest of Los Cedros (...) could mean a broad and extended process of continuous positioning and community engagement (...) this does not mean a limitation for the development of the mining project (...) the Municipality of Cotacachi (...) coerces several inhabitants of the community to oppose the mining activity (...) it is anticipated that the community will continue to be divided between people who are committed to facilitating the mining activity, and a group that will maintain positions opposed to the technical team of the mining companies (...) the president of the community has the support of the community and is committed to promoting actions that will allow the positions of certain members of the community to be extended and generalized....

319. Pages 318 to 320 of the procedural case file contain the “*Ayuda Memoria No. 084-CCS-UGS-ENAMI-EP-2017*”, prepared by Mr. Douglas Ochoa, Social Management Supervisor of ENAMI EP¹⁹⁵, dated November 16, 2017, in the Brilla Sol community, in which the following is stated:

¹⁹⁵ In addition, from page 323 to 329 of the procedural case file there is Service Commission Report No. 48-CCS-UGS-ENAMI-EP-2017, dated August 24, 2017, prepared by Mr. Douglas Ochoa, on the “Community Engagement regarding the Cooperation Agreement between ENAMI EP - Cornerstone Ecuador S.A., mining concession areas of the Magdalena project”.

...the main concern raised by the residents is that mining activities are being authorized in areas that include Protected forests such as the Cedros and Chontal, and affect bodies of water that supply the communities (...) these claims were refuted by a detailed explanation of the initial exploration activities (...) the residents expressed their satisfaction with the institutional coordination achieved during the meeting (...) Cornerstone S.A. committed itself to contribute to the maintenance of the road (if necessary)...

320. This Court requested the MAAE report on the completion of the environmental consultation in the case under review. By Memorandum No. MAAE-SCA-2020-0606-M, dated October 23, 2020, signed by Mr. Oscar Zapata Olmedo, Undersecretary of Environmental Quality, said entity stated:

*...With regard to prior consultation, the Constitutional Court in Opinion 001-10-SIN-CC, of March 18, 2010, has clearly established the following with respect to Free and Informed Prior Consultation: "Therefore, this Court determines that in the event the State intends to initiate a mining activity in the territories of the indigenous communities, peoples and nationalities of the country, as of the publication of this ruling, the State, through the Ministry of the sector or any other governmental authority, must implement the processes of free and informed prior consultation established in Article 57, paragraph 7 of the Constitution: to that end, it must adapt, by means of a normative act, the provisional rules that this Court will establish hereinafter. It is made clear that the same shall be of mandatory compliance, until the National Assembly issues the law that regulates the right of prior and informed consultation recognized in the Constitution of the Republic." Therefore, and according to what is established in Ministerial Agreement No. 1040 of May 8, 2008, and Ministerial Agreement No. 103 of October 14, 2015, which indicate that medium and high-impact activities will be those that require a community engagement process, while low-impact activities (Environmental Registration) do not require social processes, **THE PROCESS OF SOCIAL PARTICIPATION** (sic) **WAS NOT PERFORMED** (sic). Therefore, this Directorate does not have the relevant files. Additionally, I must point out that, according to sectorial regulations, with the exception of the initial exploration phase, all the others will require (sic) the presentation of an environmental impact study and the corresponding social process (advanced exploration, exploitation and benefit)...*

321. In this regard, the Court will determine whether the informative meetings held in the communities "El Paraíso", "Magdalena Alto" and "Brilla Sol", by ENAMI EP and Cornerstone S.A., complied with the constitutional standards of environmental consultation.
322. Regarding the **subject consulted**, the informative meetings did not include all the affected communities. The MAAE has not presented elements confirming that, prior to the granting of the environmental registration, the active and permanent participation of communities such as "Cielo Verde" and "San José", and even the inhabitants of the "Brilla Sol" Community, which are also part of the area of influence of the Río Magdalena 01 and the Río Magdalena 02 concessions, has been heard and guaranteed. The inhabitants of these communities, as well as the general public, through their comments, indicate they were not consulted. The respondents have not presented

elements that allow contradict the allegation made and therefore the violation is presumed.¹⁹⁶

- 323.** In relation to the **consulting entity**, the informative meetings held on October 26 and November 17, 2017, were not primarily planned or carried out by the public entity that issued the Environmental Registration, that is, the then-Ministry of the Environment. These meetings were organized by ENAMI EP and the company Conerstone Ecuador S.A. Both companies are interested parties in the mining activity of the Río Magdalena 01 and 02 concessions, so the objectivity and impartiality of the citizen participation process and the environmental consultation were not guaranteed. This omission on the part of the current MAAE contravened the provisions of Article 398 of the Constitution, Articles 28 and 29 of the then-current Environmental Management Law, and article 87 of the Mining Law, amongst other norms.
- 324.** The Court highlights that Article 12 of Executive Decree No. 1040, alleged by the now MAAE in its memorandum No. MAAE-SCA-2020-0606-M, dated October 23, 2020, expressly established that *“in the case of activities or projects that affect the whole or part of the National System of Protected Areas, Protected Forests and Vegetation and State Forest Heritage, the competent authority shall be the Ministry of Environment”*. That is to say, the secondary legislation established the competence of said Ministry for the organization, development and application of the environmental consultation.
- 325.** Regarding the obligation to **provide ample information**, the Court verifies that the documents provided by the respondents do not prove that accessible, clear, complete and objective information on the nature, size, pace, reversibility and scope of the authorization issued through the Environmental Registration was distributed to the public. The information provided by the respondents also does not give an account of the reason and purpose of the environmental registration, the duration of the project or the initial exploration activity authorized, its possible risks, or the probable impacts of this environmental authorization. Therefore, the Court considers that the MAAE did not comply with the obligation to inform in a comprehensive manner, which is expressly provided for in Article 398 of the Constitution.
- 326.** In relation to the obligation to **timely report** on the Environmental Registration, the MAAE has pointed out that, pursuant to Executive Decree No. 1040 of May 08, 2020 Ministerial Agreement No. 103 of October 14, 2015¹⁹⁷, *“medium- and high-impact activities will be those that require community engagement, while activities of low-impact (Environmental Registration) do not require community engagement”*. Therefore, the MAAE points out, *“THE SOCIAL PARTICIPATION PROCESS (sic) WAS NOT PERFORMED”*.

¹⁹⁶ Appearance of Edgar Merlo Lopez, attorney for the “Cielo Verde” Community and Julio Cabezas, member of the Magdalena community at the public hearing on October 19, 2020.

¹⁹⁷ Article 10 of Executive Decree No. 1040 established that, *“social participation shall be mandatory for the responsible environmental enforcement authority, in coordination with the promoter of the activity or project, prior to the approval of the environmental impact study”*. Article 2 of the Instructions to the Regulation of Community Participation, issued by Ministerial Agreement No. 103 of the then-MAE, states: *“the Community Participation Process (PPS) will be mandatory in all projects, works or activities that require an Environmental Study for their regularization”*.

327. The Court considers that this interpretation of the MAAE is unconstitutional and limits the scope of the environmental consultation which, according to Article 398 of the Constitution, operates prior to “*any decision or state authorization that may affect the environment*” and which according to Article 89 of the Mining Law “*must be carried out in all phases of the mining activity*”. It should be noted that neither the Constitution nor the law excludes from the scope of application of environmental consultation those activities that generate a low environmental impact, as mistakenly expressed by the MAAE.
328. Furthermore, the interpretation of the MAAE restricts the right to participate in environmental matters “*from the early stages of the process of adopting decisions*” and “*from the initial stages of the decision-making process*”, as established in the Escazú Agreement, and from “*planning*”, as established in article 395, paragraph 3 of the Constitution. This aspect shows another connection with the precautionary principle, since participation must take place just before initiating a risky activity on the environment, whose impact is uncertain from a scientific perspective.
329. The Court emphatically warns that secondary environmental and mining legislation should not restrict the content of the right to participate and be consulted on environmental matters, as established in the Constitution. Neither can the interpretation made by the competent authorities. In this sense, it is the obligation of the MAAE to comply with the standards established in the Constitution itself.
330. In summary, the Court considers that the informative meetings held by ENAMI EP and Cornerstone do not imply that an environmental consultation was held in accordance with the standards of the CRE and international instruments.

On the effects of the failure to carry out an environmental consultation

331. As already stated, at the time of the facts in the underlying case, environmental consultation was regulated by the Environmental Management Law (LGA).¹⁹⁸
332. Article 28 of the LGA stated that, “*every natural or legal person has the right to participate in environmental management, through the mechanisms that, for this purpose, are established in the Regulations, which shall include consultations, public*

¹⁹⁸ Although the COAm was published in the Official Gazette on April 12, 2017, its Final Provision states, “*The Organic Environmental Code shall enter into force after twelve months have elapsed, counted as of its publication in the Official Gazette.*” The First Transitory Provision of the COAm establishes: “*the administrative procedures and other regularization procedures that at the effective date of this Code have been initiated or are in process, must be fulfilled and concluded, in accordance with the applicable laws and regulations in force at the date of initiation of the procedure*”. In the case under review, the mining concessions were granted to ENAMI EP through administrative resolutions No. MMSZM-N-2017-0041-RM and MM-SZM-N-2017-0042 RM, issued by the then-Ministry of Mining, on March 3, 2017, while the environmental registration of said concessions was granted on December 12, 2017, via administrative resolution No. 225741 of the Ministry of Environment.

hearings, initiatives, proposals or any form of association between the public and private sectors”. The same article added that “failure to comply with the consultation process referred to in article 88 of the Political Constitution of the Republic shall render the activity in question unenforceable and shall be grounds for nullity of the respective contracts” (emphasis added).

333. Article 28 of the LGA refers to Article 88 of the 1998 Constitution, which stated: “*any state decision that may affect the environment must first be based on the criteria of the community, for which purpose the community shall be duly informed. The law will guarantee their participation*”. Currently, environmental consultation is established in Article 398 of the Constitution.
334. It follows that environmental consultation, in addition to being a formal requirement, is a substantial mechanism for making public decisions that may affect the environment. Failure to comply with it results in the unenforceability of all those decisions or unconsulted authorizations that may affect the environment.
335. This was already expressed by the former Constitutional Court, in the action for injunctive relief in case No. 679-2003-RA, in which it declared the “*definitive suspension*” of the challenged acts for not complying with the provisions of Article 28 of the LGA.¹⁹⁹
336. From the above, it is clear that the legal consequence for the lack of environmental consultation in the underlying case is the unenforceability and nullity of the environmental registration issued by the MAAE through Resolution No. 225741, dated December 12, 2017.

IV. Conclusions

337. **[Conclusion on the Rights of Nature]** The rights of nature protect ecosystems and natural processes for their intrinsic value, thus complementing the human right to a healthy and ecologically balanced environment. The rights of nature, like all constitutional rights, are fully justiciable and, consequently, judges are obligated to guarantee them. To this end, they must apply the relevant principles and rules of the Constitution and the law. Regarding the precautionary principle, in order to consider its application in the framework of precautionary measures and protection actions, judges must analyze the following parameters in each specific case considering the specific conditions present: (i) The risk of serious and irreversible harm that a product or the development of an activity may have on the rights of nature, the right to water, the right to a healthy and ecologically balanced environment, or the right to health. (ii) The scientific uncertainty about these negative consequences, either because they are still the subject of scientific debate, or because of lack of knowledge, or because of the difficulty of determining such consequences due to the high complexity or numerous variables involved. (iii) The adoption of effective and timely Protected measures by the State.

¹⁹⁹ Resolution of the Constitutional Court issued in Case No. 679-2003-RA, on April 8, 2004.

- 338. [Conclusion on the right to water]** The right to water is closely related to the right to a healthy environment and to the rights of nature, since it is an element that brings forth life on the planet. The precautionary principle, in accordance with the parameters previously mentioned, is applicable in the framework of the norms, public policies, and judicial decisions that concern the exercise of this right.
- 339. [Conclusion on the right to a healthy environment]** The right to a healthy environment under the Ecuadorian constitutional framework and international instruments not only focuses on ensuring adequate environmental conditions for human life, but also protects the elements that make up nature from a biocentric approach, without losing its place as a human right. This right has an individual and collective dimension and obligates environmental authorities to adopt public policies and regulations that promote and strengthen the harmonious relationship of human activities with the environment in which they are developed.
- 340. [Conclusion on environmental consultation]** The application of environmental consultation shall observe the following parameters: (i) the decision of the consulted entity shall be the broadest and most democratic possible. In the event of doubt about a possible environmental impact, the State must consult the community(ies) potentially affected, (ii) the consultation is a non-delegable obligation of the State and must be carried out with the support of the Ombudsman's Office and local government authorities, (iii) in the case of mining activities, the environmental consultation must be carried out at a minimum prior to the issuance of the environmental registration and prior to the environmental license, and (b) according to the provisions of article 89 of the Mining Law, prior to "*all phases of the mining activity*", (iv) the environmental consultation must comply, in all applicable respects, with the parameters of prior, free and informed consultation, (v) the lack of environmental consultation results in the unenforceability of the State decision or authorization, (vi) an action for injunctive relief is the proper tool to allege and vindicate the violation of the right to be consulted on State decisions or authorizations that may affect the environment.

V. Relief

- 341.** This Court has verified that the Ministry of Environment, Water and Ecological Transition violated the rights of nature that correspond to the Los Cedros Protected Forest and the right to water, as well as the right to be consulted on decisions or authorizations that may affect the environment of the communities settled in the area of influence of the Magdalena 01 and 02 mining projects. Pursuant to article 11, paragraph 9 of the Constitution, any violation of rights has as a consequence the obligation to make full reparation for said violations. Article 18 of the LOGJCC develops this right to

relief.²⁰⁰

342. This Constitutional Court has indicated that full relief by reparation constitutes a constitutional right and a guiding principle that complements and perfects the exercise of rights. The reparation of the damage caused by the violation of a constitutional right requires, whenever possible, full restitution (*restitutio in integrum*), that is, the reestablishment of the previous condition.²⁰¹

343. Considering the violations declared, the Court considers that this judgment constitutes in itself a form of reparation.

344. The Court ratifies the decision adopted in the judgment under review issued by the Provincial Court of Justice of Imbabura, accepts the action for injunctive relief proposed by the Municipal Government of Cotacachi and provides the following reparation measures:

- a) Activities that threaten the rights of nature must not be carried out within the ecosystem of the Los Cedros Protected Forest, which includes mining and all types of extractive activities.
- b) The Court hereby confirms the reparation measure adopted in the judgment issued by the Provincial Court of Justice of Imbabura, whereby the environmental registration and water permits granted for the Magdalena 01 and Magdalena 02 mining concessions referred to in this opinion were annulled.
- c) Empresa Nacional Minera EP and allied or associated companies must refrain from carrying out any type of activity in the Los Cedros Protected Forest, remove the infrastructure that has been built in the forest, if any, and reforest the areas that have been affected by such infrastructure or by the opening of trails.
- d) The Ministry of Environment, Water and Ecological Transition, in its capacity as lead agency in environmental matters and in coordination with other national authorities and the GAD of Cotacachi must adopt all necessary measures for its preservation and respect for the rights of nature that are granted to the Los Cedros Protected Forest.

²⁰⁰ Article 18 of the LOGJCC: “In the event that a violation of rights is declared, full reparation for material and non-material damages shall be ordered. Comprehensive relief shall seek that the holder or holders of the violated right enjoy the right in the most adequate manner possible and that the condition prior to the violation be restored. Relief in the form of reparation may include, amongst other forms, restitution of the right; economic or patrimonial compensation; rehabilitation; satisfaction of a judgment; guarantees that the event will not be repeated; the obligation to refer to the competent authority for investigation and sanctions; measures of recognition; public apologies; provision of public services; and health care.”

²⁰¹ Constitutional Court, Opinion 335-13-JP/20, para. 146.

- e) The Ministry of Environment, Water and Ecological Transition will promote the construction of a participatory plan for the management and care of the Los Cedros Protected Forest. This plan should include the residents of the surrounding communities, the authorities of the Provincial Government of Imbabura, the Cantonal GAD of Cotacachi and the GAD parish governments, scientific researchers and academics who have conducted studies in the Los Cedros Protected Forest. The Ombudsman's Office will accompany and monitor this process so that the parameters on participation contemplated in this Order and in the Constitution are observed.
- f) The management plan for the Los Cedros Protected Forest, referred to in the previous paragraph must include at least: (i) indicators to measure the levels of effectiveness of the measures adopted for the protection of this forest, (ii) measures to prevent and sanction illegal mining within the Los Cedros Protected Forest and other activities that may be harmful to the forest and the inhabitants of the surrounding communities, (iii) reforestation of areas that have been affected by infrastructure, (iv) promotion of scientific, environmental and forestry research, (v) measures for the preservation of water, and (vi) promotion of economic activities for the surrounding communities that are in harmony with the rights of nature in accordance with the parameters of this court Order.

345. As guarantees of non-repetition, the Court orders the following measures:

- g) The Ministry of Environment, Water and Ecological Transition must fully comply with its role of ensuring respect for the rights of nature and the right to a healthy environment, consequently it must revise the regulatory and administrative regulations corresponding to the issuance of environmental registrations and environmental licenses and the use of water for extractive activities, in order to avoid violations to the rights of nature as in the present case. In the process of regulatory revision, coordination mechanisms should be established between the entities in charge of issuing environmental authorizations and permits and those in charge of regulating non-renewable natural resources, specifically the Ministry of Environment, Water and Ecological Transition and the Ministry of Non-Renewable Natural Resources.
- h) The Ministry of Environment, Water and Ecological Transition shall disseminate through its website the content of this ruling and train public servants in charge of issuing environmental permits, including environmental registration and environmental licenses, on the parameters of this decision.

- i) All public administrative and judicial authorities that adopt decisions related to nature, a healthy environment, and water must guarantee the rights of nature and environmental principles in the terms contemplated in the Ecuadorian Constitution, adopting the necessary measures for the preservation of fragile ecosystems in special areas, considering their concrete and specific characteristics.
- j) The Judiciary Council will disseminate this ruling amongst members of the bar.
- k) The Ombudsman's Office shall conduct on-site visits and issue compliance reports on the restrictions on extractive activities in the Los Cedros Protected Forest. This entity, within the framework of its jurisdiction, effectuates the necessary jurisdictional guarantees, as the case may be.

346. The present opinion and order, which are adopted in an extraordinary manner within the Constitutional Court's power of review, are independent, subsequent to the judicial decision under review; and prevail over all legal and regulatory authorizations granted to ENAMI EP and its concessionaires.

VI. Decision

347. Wherefore, due to the foregoing, the administration of constitutional justice and by mandate of the Constitution of the Republic of Ecuador, the Plenary of the Constitutional Court resolves:

- g) To ratify the ruling adopted on June 19, 2020, by the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura and to accept the action for injunctive relief proposed by the GAD of Cotacachi.
- h) To declare the violation of the rights of nature corresponding to the Los Cedros Protected Forest.
- i) To declare the violation of the right to water and the right to a healthy environment of the communities neighboring the Los Cedros Protected Forest.
- j) To declare the violation of the right to be consulted on decisions or authorizations that may affect the environment, established in articles 61, paragraph 4, and article 398 of the Constitution, of the aforementioned communities.
- k) To ratify the reparation measures adopted in the ruling issued by the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura on June 19, 2020, whereby the environmental registration and water permits granted for the Magdalena 01 and Magdalena 02 mining concessions referred to in this opinion were rendered null and void.

348. As comprehensive reparation measures in the underlying case the Court hereby orders:

- l)** Activities that violate the rights of nature must not be carried out within the Los Cedros Protected Forest, such as those declared to be violating rights in the present case.
- m)** Empresa Nacional Minera EP and allied or associated companies must refrain from carrying out any type of activity in the Los Cedros Protected Forest, must remove all infrastructure that has been built in connection with the Magdalena 01 and Magdalena 02 concessions, if any, and remain within the forest, and reforest the areas that have been affected by such infrastructure and clear-cutting for trails. The costs involved in the reforestation shall be borne by the companies mentioned in this decision.
- n)** The Ministry of Environment, Water and Ecological Transition, in its capacity as the lead agency in environmental matters and in coordination with other national and local authorities, must adopt all necessary measures for the preservation of, and respect for, the rights of nature to which the Los Cedros Protected Forest is entitled. To this end, experts from academic centers and scientific researchers will participate.
- o)** The Ministry of Environment, Water and Ecological Transition, in coordination with the Ministry of Non-Renewable Natural Resources and the decentralized autonomous governments, within one year from the approval of this order, shall adapt the regulations corresponding to the issuance of environmental registrations and environmental licenses and the use of water for extractive activities in order to avoid violations to the rights of nature such as those in the present case. At the end of the term, a compliance report will be sent to this Court. In the process of regulatory revision, effective coordination mechanisms must be established between these entities.
- p)** Within a period of no more than six months from the approval of this judgment, the Ministry of Environment, Water and Ecological Transition shall promote the construction of a participatory plan for the management and care of the Los Cedros Protected Forest in accordance with the provisions of the section on reparations in this judgment. The Ombudsman's Office will accompany and monitor compliance with this provision. Within 30 days of notification of this judgment, the Ministry of Environment, Water and Ecological Transition and the Ombudsman's Office shall report separately to this Court on the progress of the construction of the plan.

349. As measures of non-repetition the Court hereby orders:

- q) The Ministry of Environment, Water and Ecological Transition shall disseminate through its web portal the content of this judgment, within a period of 30 days after the notification thereof, and shall inform this Court of its compliance.
- r) Training to public servants of the Ministry of Environment, Water and Ecological Transition in charge of issuing environmental permits including the environmental license and permit based on the parameters of this decision. This training will be carried out jointly with the Ombudsman's Office, within 90 days after the notification of this decision. The Ombudsman's Office will report to this Court on compliance with this measure.
- s) All public administrative and judicial authorities that adopt decisions related to nature, a healthy environment, and water must guarantee the rights of nature and environmental principles, in the terms contemplated in the Ecuadorian Constitution, adopting the necessary measures for the preservation of fragile ecosystems in special areas, considering their concrete and specific individual characteristics.
- t) The Judiciary Council shall disseminate this judgment amongst members of the bar within 30 days after notification of this decision and shall report to this Court on compliance.
- u) The Ombudsman's Office shall conduct at least one quarterly onsite visit per year in order to confirm compliance with the restrictions on extractive activities within the Los Cedros Protected Forest. The first visit shall take place within 30 days of notification of this decision. At the end of the year following the issuance of this Order, a compliance report shall be sent to this Court. This entity, within the framework of its competencies, shall effectuate the necessary jurisdictional guarantees in cases in which the parameters developed in this Opinion and Order are not complied with.

350. The present ruling, which is adopted in an extraordinary manner within the Constitutional Court's power of review, is independent, subsequent to the judicial decision under review, and must prevail over all legal and regulatory authorizations granted to ENAMI EP and its concessionaires.

For notification, publication, and compliance.

LUIS HERNAN
BOLIVAR
SALGADO
PESANTES

Digitally signed by LUIS
HERNAN BOLIVAR
SALGADO PESANTES Date:
2021.11.30
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Dr. Hernán Salgado Pesantes
PRESIDENT OF THE COURT

Certification: I hereby certify that the above ruling, which was approved by the Plenary of the Constitutional Court with seven votes in favor by Constitutional Judges Karla Andrade Quevedo (concurring vote), Ramiro Avila Santamaría, Agustín Grijalva Jiménez, Enrique Herrería Bonnet (concurring vote), Alí Lozada Prado (concurring vote), Daniela Salazar Marín (concurring vote) and Hernán Salgado Pesantes; and, two dissenting votes by Constitutional Judges Carmen Corral Ponce and Teresa Nuques Martínez during the ordinary session of Wednesday, November 10, 2021. So certified.

AIDA
SOLEDAD
GARCIA
BERNI

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by AIDA
SOLEDAD
GARCIA BERNI

Dr. Aida García Berni
GENERAL SECRETARY

CASE No. 1149-19-JP/21

CONCURRING OPINION

Constitutional Judge Enrique Herrería Bonnet

1. Background

1. The Plenary of the Constitutional Court, in a session held on November 10, 2021, approved the review decision No. 1149-19-JP/21, which affirmed the appellate court ruling, accepted the proposed action for injunctive relief, and developed binding jurisprudence on the rights of nature, the right to a healthy environment, the right to water and the right to environmental consultation.¹
2. I concur with the decision to ratify the judgment of the appellate court, as well as to accept the action for injunctive relief; however, I present the following concurring opinion in order to articulate certain considerations regarding the analysis of the legal problem addressed by the majority vote with respect to (i) the scope of the precautionary principle.

2. Legal analysis

3. The precautionary principle, according to the majority decision, is the one that understands that, in case of scientific uncertainty regarding the harm that may be caused by an environmental decision, it is better not to take risks. In this sense, the view is that “*if we do not know the consequences, it is better not to take the risk when the harm may be very serious*”.²
4. In order to distinguish between the precautionary principle and the prevention principle, the majority opinion considers that “*the precautionary principle differs from the prevention principle in that the latter applies when there is scientific certainty about the impact or harm, that is, when both the effects and their probabilities are known in advance*” and that, under these assumptions, actors must refrain from certain conduct or activities. However, this reading is not entirely consistent with constitutional law and, beyond this, it may have problematic practical implications in the event it is considered as an absolute without making relevant clarifications. Therefore, in order to elucidate the real scope of the legal problem,

¹ The original proceeding began with the filing of an action for injunctive relief by the GAD of Santa Ana de Cotacachi in favor of the Los Cedros Protected Forest, alleging that the issuance of the Environmental Registration and approval of ENAMI EP’s environmental management plan violated the rights of nature by permitting mining activities in the ecosystem. The petitioner also alleged that the constitutional norms on environmental consultation were not observed, since the opinion of the neighboring communities was never taken into account.

² Constitutional Court. Opinion No. 1149-19-JP/21 of November 20, 2021.

three main issues need to be addressed: (i) constitutional law and the precautionary principle, (ii) the difficulty of achieving scientific certainty, and (iii) the standard of the precautionary principle.

(i) Constitutional law and the precautionary principle

5. The precautionary principle establishes that “*where there are threats of serious or irreversible harm, lack of full scientific certainty should not be used as a reason for postponing such measures* [to protect the environment]”³. In this sense, the true purpose of the principle is to strengthen the commitment and obligation of States to adopt measures that prevent environmental harm and impacts. Based on the above, it is not possible for States to justify, using arguments of scientific uncertainty regarding the lack of knowledge of harm, their omission to take concrete and effective actions, but, on the contrary, they must always tend toward responsibility in environmental matters, as well as the enforceability of the obligations present in the conventional realm of the law.
6. Based on the above, it is important to clarify that the principle, *supra*, does not mean that, in the absence of scientific certainty of an environmental consequence, any decision or activity should be avoided, but rather that, even in the face of such uncertainty, States should not “*postpone the adoption of effective measures*” to prevent “*environmental degradation*”⁴. This difference is fundamental because, otherwise, it could be considered that, according to the precautionary principle, an action that may have an impact on ecosystems must always be avoided, when, in fact, the principle is aimed at reinforcing State responsibility from the perspective of conventional law.⁵

(ii) The difficulty of achieving scientific certainty

7. As has been established, the majority opinion differentiates between the precautionary principle and the prevention principle with regards to the scientific certainty as pertains to the impact of a certain activity or the harm it may cause, referencing the fact that, in principle, prevention is based on “*knowing in advance both the effects and their probabilities*”⁶. To that extent, the majority opinion provides that when there is no scientific certainty as to the consequence of a certain activity, that is, no probabilities can be determined as to its effects or the possible harm or the effects are unknown, the precautionary principle requires that the activity in question be avoided or restricted. In contrast, the precautionary principle applies in cases in which there is a greater degree of scientific certainty regarding potential

³ United Nations Framework Convention on Climate Change, Article 3.

⁴ Rio Declaration on the Environment, principle 15.

⁵ In the words of Carmen Artigas, “*when there are threats of serious or irreversible damage, lack of absolute scientific certainty should not be used as a reason to postpone the adoption of measures to prevent environmental degradation*”. Carmen Artigas. “El principio precautorio en el derecho y en la política internacional”. ECLAC: Natural Resources and Infrastructure Series, United Nations. Retrieved from https://repositorio.cepal.org/bitstream/handle/11362/6377/1/S01050369_es.pdf

⁶ Constitutional Court. Opinion No. 1149-19-JP/21 of November 10, 2021.

harm and, therefore, measures should be taken to avoid the consequences that are actually known will occur.

8. While it is true that the majority opinion establishes elements of the precautionary principle such as the potential risk of serious and irreversible harm and scientific uncertainty about the negative consequences due to lack of knowledge, given that they are still the subject of scientific debate or because of the difficulty of determining the consequences due to the high complexity or numerous variables; the fundamental difference that determines the application of the precautionary principle instead of the prevention principle is related to the fact that the latter requires the certainty of the harm, that is to say, that the effects of an activity and the probabilities that these will materialize to a greater or lesser extent are known in advance.
9. For practical purposes, it is important to clarify that the criterion of “scientific certainty” in itself involves a high degree of indeterminacy because, in environmental matters, as well as in the scientific purview, it is not possible to establish conclusively the impact that a certain decision will have, nor is it possible to know all the effects and possible consequences of the same, at least not categorically. Likewise, it must be considered that the scientific debate on an issue is rarely exhausted and, consequently, the eventual certainty or certainty with respect to the impact of an activity could never be verified. Under this logic, the application of the precautionary principle could be considered indiscriminate and would empty its practical sense and useful effect. At the same time, if considered too broadly, it could hinder or limit certain activities necessary for a State.
10. For example, in the case *sub judice*, the environmental management plan is deemed deficient. Without prejudice to the fact that in the underlying case the insufficiency of such studies was indeed confirmed because they contained a mere transcription of norms, this does not justify, *per se*, the application of the precautionary principle. Specifically, it is necessary to note that, although the judgment issued by the Court holds that there was no scientific certainty regarding the effects of mining in the Los Cedros Protected Forest (according to the parameters referred to *ut supra*), the legislative branch, in exercise of its powers, determined that the environmental management plan--for different activities--should contain various and detailed sub-plans.⁷

⁷ Article 32 of the Unified Text of Secondary Environmental Legislation in force at the time of the facts: “The Environmental Management Plan consists of several sub-plans, depending on the characteristics of the activity or project. The Environmental Management Plan shall contain the following sub-plans, with their respective programs, budgets, responsible parties, means of verification and chronogram.

- a) Impact Prevention and Mitigation Plan;
- b) Contingency Plan;
- c) Training Plan;
- d) Occupational Health and Safety Plan;
- e) Waste Management Plan;
- f) Community Relations Plan;
- g) Rehabilitation Plan for affected areas;

11. In this sense, the parameter of scientific uncertainty cannot be used to require studies that prove with certainty a result or concrete effects of an activity; even less so, if the legislator has foreseen that in order to carry out an activity with possible harmful effects on the environment, only certain studies and plans to mitigate such effects are applicable. Therefore, it is my opinion that the precautionary principle cannot be used to unreasonably broaden the spectrum of environmental studies and plans required prior to carrying out an activity, since it would be disproportionate considering that not even the law that regulates the matter requires them, in addition to potentially violating the right to legal certainty.

(iii) The standard of the precautionary principle

12. Now, the precautionary principle applies “*in situations where the scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but there are plausible indicators of potential risks*”⁸. By extension, what this principle actually states is that in cases where the consequences of an activity on the environment cannot be elucidated, but there are elements that allow for a determination or conclusion that such activity may cause serious and irreversible harm such as “*leading to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles*”⁹, then such measure or decision must be restricted.
13. As can be seen, the application of the precautionary principle has two dimensions: an obligation in all cases arising from the provisions of constitutional law and an abstention in specific situations, as a result of the provisions of the constitutional text, which expressly provides for the term “*restriction*”.
14. Regarding the first dimension, it can be concluded that constitutional law imposes in all cases the duty of the State to protect the environment. In the Ecuadorian case this becomes an imperative with greater relevance because the Constitution recognizes nature as a subject of rights, unlike other legal frameworks.
15. On the other hand, in specific situations, for example, when there are credible indicators that an activity may generate three non-concurrent consequences, specifically: (i) extinction of species; (ii) destruction of ecosystems; and, (iii) permanent alteration of natural cycles, then the State has a duty of abstention and restriction that entails not carrying out the activity. In this sense, although the real and tangible existence of harm is not required, there must be a plausible and actual possibility that it may generate a “*great and irreparable effect [on] the environment*”

h) Area Abandonment and Surrender Plan;

i) Monitoring and Follow-up Plan”.

⁸ Inter-American Court of Human Rights. Advisory Opinion OC-23/17 of November 15, 2017, para. 177.

⁹ Constitution of the Republic of Ecuador. Official Gazette 449, October 20, 2008, art. 73.

or human beings"¹⁰, so effective measures must be adopted such as avoiding the activity that has the potential to cause harm that is “*potentially serious (in geographical scope or periods of time), irreversible and cumulative damage*”.¹¹

16. In the case at hand, I believe that there is indeed a high probability, as well as the real possibility, of irreparably affecting the Los Cedros Protected Forest, by the possible extinction of species, destruction of ecosystems, and the permanent alteration of natural cycles developed in the majority opinion issued by the Court. In this sense, I would like to specify that this is the element that I believe should be analyzed in order to determine whether the precautionary principle should be applied in a specific case or, in its absence, the prevention principle.
17. As detailed in this concurring opinion, the standard of scientific uncertainty is too broad and could be used in an excessively formalistic and literal manner, requiring the exhaustion of the scientific debate on a specific matter, when what must be verified is what is indicated in paragraph 15 *supra*, or the standard of “risk of serious and irreversible damage” contained in the judgment issued by the Court, which, in turn, will require the adoption of timely and effective measures as severe as the abstention and/or restriction of a specific activity.

3. Conclusion

18. For the above reasons, I concur with the decision issued in case 1149-19-JP; nonetheless, I believe the ruling should have addressed the precautionary principle as explained in Section 2, *supra*.

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Dr. Enrique Herrería Bonnet
CONSTITUTIONAL JUDGE

¹⁰ See, Ana Tacuri & Jimmy Valarezo. “The precautionary principle and its influence on Ecuadorian environmental law”. *Revista Metropolitana de Ciencias Aplicadas*, 2019, 2(2), 134-140. Retrieved from <http://remca.umet.edu.ec/index.php/REMCA>.

¹¹ Carmen Artigas. “El principio precautorio en el derecho y en la política internacional”. Cepal: Serie Recursos Naturales e Infraestructura, United Nations, p. 14. Retrieved from https://repositorio.cepal.org/bitstream/handle/11362/6377/1/S01050369_es.pdf

Certification: I hereby certify that the concurring opinion of Constitutional Judge Enrique Herrería Bonnet, in case 1149-19-JP, was filed with the General Secretariat, on November 23, 2021, by e-mail at 12:41 p.m., and has been processed together with the Opinion and Order.

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GENERAL SECRETARY

CASE No. 1149-19-JP/21

CONCURRING OPINION

**Constitutional Judges Karla Andrade Quevedo
and Daniela Salazar Marín**

1. Based on article 38 of the Codification of the Rules of Procedure for the Substantiation of Proceedings under the Jurisdiction of the Constitutional Court, we present our concurring opinion to majority opinion 1149-19-JP/21 (the “**Opinion**”), issued at the ordinary session of the Plenary of the Court held on Wednesday, November 10, 2021.
2. We agree with the decision adopted by the Plenary of the Constitutional Court, as well as with most of the grounds of the ruling. However, we consider it necessary to express our opinion regarding four aspects in which we deviate from the reasoning adopted in the decision: (i) the argumentation regarding the ownership of rights of specific elements of nature; (ii) the application of the precautionary principle to the facts of the case; (iii) the suitability of the application of the precautionary principle in the action for injunctive relief; and, (iv) when to carry out the environmental consultation and how to act in the event of refusal by the community.
 - i. **On the argumentation regarding the ownership of rights of specific elements of nature**
3. As we have pointed out in previous decisions¹, we agree with the ruling regarding the intrinsic value of nature. We even consider that the protection of nature in certain cases may require the recognition of specific components of nature as holders of rights. However, this jurisprudential development must be accompanied by an argument that shows why the level of protection recognized thus far would be insufficient for an effective protection of the component of nature in question.
4. Until the present ruling, the jurisprudence of the Constitutional Court, in Opinion 22-18-IN/21, had protected the rights of nature based on the understanding that nature constitutes a “*complex subject that must be understood from a systemic perspective*”².
5. In that judgment, the Court signaled that jurisdictional recognition of a given ecosystem might be necessary in order to develop with greater precision the obligations derived from the ownership of rights in specific situations³. Thus, it was established that jurisdictional recognition would have the goal of highlighting the

¹ Constitutional Court of Ecuador. Unpublished opinion No. 22-18-IN/21, September 16, 2021, para. 2.

² Constitutional Court of Ecuador. Opinion No. 22-18-IN/21, September 16, 2021, para. 26.

³ Constitutional Court of Ecuador. Opinion No. 22-18-IN/21, September 16, 2021, para. 36.

“importance of each component of an ecosystem for its systemic importance”⁴.

6. In our opinion, the fact that the Court in Opinion 22-18-IN/21 has recognized mangroves as ecosystems as holders of the rights recognized to nature⁵ has a clear basis in Article 71 of the Constitution, according to which the State must promote *“respect for all the elements that form an ecosystem”* and that nature *“has the right to have its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes fully respected”*.
7. However, we consider that the ruling with respect to which we formulate this concurring opinion does not make explicit the reasons why it is necessary to expand this conception and recognize specific holders of the rights of nature. In this sense, the opinion merely states that: *“there is a general recognition of rights of nature in the Constitution that, as expressed by the Court in Opinion 22-18-IN/21, referring to the rights of mangroves, can be concretized in specific holders; specific recognition does not imply that recognition is necessary for protection, but helps to configure the protection in a manner appropriate to the specific holder of rights, in this case the Los Cedros Protected Forest”⁶.*
8. In our opinion, in this ruling the Court is developing the constitutionally recognized content of the rights of nature. This jurisprudential development is within the powers of the Constitutional Court, but it must be preceded by an argumentative justification that evidences the reasons why the Los Cedros Forest could not be adequately protected via the systemic perspective of ecosystem protection as has been recognized by the Court thus far.
9. In developing its jurisprudence with respect to article 71 of the Constitution, it is necessary for the Court to recognize the existence of various valid interpretations with respect to the ownership of the rights of nature and to make explicit the reasons why the recognition of specific holders guarantees a better protection for the rights of nature.
10. We are not unaware that the rights of nature may indeed be violated by impacting any one of its specific components. However, we consider that in addressing this issue it was necessary for the Constitutional Court to differentiate the content of the right from its ownership and to detail the reasons why it considers indispensable the protection of the specific component of nature as part of the sphere of protection of the rights of nature.

⁴ Constitutional Court of Ecuador. Opinion No. 22-18-IN/21, September 16, 2021, para. 37.

⁵ Constitutional Court of Ecuador. Opinion No. 22-18-IN/21, September 16, 2021, para. 43.

⁶ Constitutional Court of Ecuador. Opinion No. 1149-19-JP/21, November 10, 2021, para. 43.

ii. On the application of the precautionary principle

11. We also differ from the majority opinion in regards to the applicability of the precautionary principle to the facts analyzed in the case, although we agree with the elements identified in the judgment for the applicability of this principle:

i) The potential risk of serious or irreversible damage that a product or the development of an activity may have on the rights of nature, the right to water, the right to a healthy environment, and the right to health.

ii) Scientific uncertainty about these negative consequences, be it because of a lack of certainty or a lack of knowledge.

iii) The adoption of effective and timely Protected measures by the State. Faced with the risk of serious and irreversible damage for which we have no scientific certainty, measures should be adopted that best protect the rights of nature, water, a healthy environment and health⁷.

12. In our opinion, since the indispensable element of scientific uncertainty is not met, it was not appropriate to apply it in the underlying case.
13. According to the ruling, there is scientific uncertainty regarding the effects that mining would have on Los Cedros based on the following reasons: (1) the inexistence of specific information on the effects, even in the medium- and long-term, that metallic mining would have on this complex, fragile, biodiverse ecosystem, with numerous species at risk of extinction; (2) even if specific studies were carried out, these “*could not overcome the scientific uncertainty*”; and, (3) that if it were possible to determine the effects of metallic mining in Los Cedros, the respondents did not provide any specific and substantiated scientific information on the impacts of the mining activity on the rights of nature, which would demonstrate that such activity would not generate irreversible harm in the Los Cedros Protected Forest.
14. In this regard, first, we find it contradictory to argue that there is uncertainty because the studies are not available, because it is not possible to obtain the studies, and because the respondents have not provided the studies. These three statements cannot be true at the same time.
15. Second, we consider that there is no empirical basis--nor is there any mentioned in the opinion--to conclude in a general and absolute manner that it would be impossible to determine the harm that mining activity would generate in Los Cedros, even if specific studies were carried out regarding its medium and long-term effects. The opinion does not explain why the Court, without technical support, would be able to decide *a priori* what is scientifically demonstrable and what is not.

⁷ Constitutional Court of Ecuador. Opinion No. 1149-19-JP/21, November 10, 2021, para. 113.

16. Third, if the mere fact that we are dealing with a complex ecosystem would already prevent us from obtaining scientific certainty regarding the harm that a product or activity may cause, this same logic would automatically extend to all complex ecosystems in the world.
17. From our perspective, the judgment starts from an erroneous premise in establishing scientific uncertainty: instead of analyzing whether there is scientific certainty regarding the harm that mining activity generates in this type of ecosystem, it analyzes whether there is scientific certainty with respect to the harm that mining developed in the Magdalena 1 and 2 projects would generate in the Los Cedros Protected Forest.
18. The uncertainty that requires the application of the precautionary principle is of a scientific nature, referring to the epistemic impossibility of arriving at a conclusion regarding the harm that the activity or product may generate. This uncertainty may arise because it is a new activity or product that has not been subjected to an adequate scientific study or because the existence of negative effects of a process or product is the subject of scientific debate. In other words, it refers to the certainty that exists in the scientific realm regarding the harm that an activity or product may cause to the environment or to people, and not to the uncertainty generated by the lack of technical studies on a particular extractive project.
19. If it were merely a technical uncertainty because the necessary studies have not been carried out, the precautionary principle would be applicable to any project or human activity in which an adequate environmental impact analysis of the site where it will be developed has not been performed. In our opinion, this is not the logic behind the principle.
20. The rationale of the precautionary principle is to avoid that the lack of certainty of the environmental damage of a novel activity--due to limitations of knowledge--be used as a reason to postpone preventive measures in the face of the possibility of serious and irreparable harm. The precautionary principle responds to the fact that technological advances occur at a much faster pace than the scientific studies needed to determine the harm that such advances may cause to people or nature. Faced with the risk of harm, the principle calls for precautionary measures before such information can be obtained through the scientific process with a high degree of certainty.
21. In this case, we are not dealing with a new product or activity, or one for which there have not been extensive studies on the damage it may cause to people or nature. In our opinion, there is scientific certainty that medium and large scale mining generates damage to complex ecosystems and, in particular, to cloud forests. We do not consider this to be controversial. The fact that there are no environmental impact studies with respect to the Magdalena 1 and 2 projects in the Los Cedros Forest does not change the certainty that exists regarding the harm that medium- and large-scale mining generates in this type of ecosystem.

22. Now, the fact that it can be established with certainty that mining will generate environmental damage does not imply, as the majority opinion assumes, that mining activity in Los Cedros Forest cannot be restricted. In this sense, we consider that even though the precautionary principle was not applicable, a different approach to the alleged violations would lead to the same decision that was adopted in the case. The reparation measures ordered for the protection of the Los Cedros Forest could be dictated through a direct analysis of the violations to the rights of nature generated by the Ministry of Environment, Water and Transition and, in particular, by the need to restrict mining activity in Los Cedros due to the plausible risk of extinction of species and permanent alteration of the ecosystem and the vital cycles of nature.
23. Thus, we believe that the ruling could have concluded that the prevention principle was applicable in this case, since there is a high degree of certainty of the harm that would be generated in the forest, and also reached the conclusion that the mining activity should be restricted in Los Cedros. By virtue of the norms that constitutionally enshrine the prevention principle, we consider that, in cases where the potential for serious and irreversible damage is of such magnitude as in this case, this principle can and should also serve as a basis for limiting and even restricting activities in fragile ecosystems, such as mining activities in the Los Cedros Forest.

iii. On the precautionary principle and action for injunctive relief

24. Although the precautionary principle can indeed be applied in an action for injunctive relief, we believe that due to the nature of the action and its differences with precautionary measures, it should be applied with extreme caution only when its requirements have been met without restriction.
25. All precautionary measures are by definition instrumental, provisional and essentially mutable or revocable⁸. Thus, constitutional precautionary measures allow the judge to adopt measures tending to avoid the imminent violation of a constitutional right or to halt the violation when it has already occurred, but always in a provisional manner, under defined time limits, and may be revoked at any time if its purpose has been fulfilled or if it is demonstrated that it lacked constitutional justification. Hence, in short, constitutional precautionary measures do not generate the effects of *res judicata*.
26. On the contrary, in our constitutional framework, the action for injunctive relief has a Protected and reparatory nature. According to article 88 of the Constitution, its purpose is “*the direct and effective protection of the rights recognized in the Constitution, and may be filed when there is a violation of constitutional rights*” (emphasis added). Thus, unlike precautionary measures, the action for injunctive relief is not

⁸ Constitutional Court of Ecuador. Opinion No. 8-20-CN/21, August 18, 2021, para. 32.

provisional, nor does it have a preventive purpose, but rather it seeks to protect the violation of rights and to issue the corresponding measures of reparation. Therefore, once resolved, a ruling in an action for injunctive relief is endowed with *res judicata* and cannot be revoked.

27. Nevertheless, in the present case, since mining activity in the Los Cedros Forest has been definitively prohibited based on the precautionary principle, the action for injunctive relief has been afforded a broader nature in which it ceases to be only Protected and remedial and a preventive element has been added, but without taking into consideration that due to its definitive effects it could not be revoked or reviewed.
28. This does not imply that we maintain that the precautionary principle is always incompatible with an action for injunctive relief; what we maintain is that the procedural contours of the jurisdictional actions must be analyzed and delimited by the Constitutional Court very carefully in order to safeguard their nature, scope, and range of protection. Thus, in our opinion, due to the particularities of the action for injunctive relief, the precautionary principle must be applied with extreme caution by the Constitutional Court, and only if each and every one of its requirements have been verified, taking into special consideration the definitive effects of the ruling. This is even more significant if one considers that, in general, while the limitations of knowledge and the scientific uncertainty of the precautionary principle may disappear with time, scientific advances, and appropriate studies, the definitive effects of a decision rendered in an action for injunctive relief will not.
29. Although we note the tension between the combination of the precautionary principle and *res judicata*, as we have mentioned above, we consider that, in the present case, under a correct application of the prevention principle, similar results would have been reached. Therefore, even though we disagree with the application of the precautionary principle, we agree with the decision adopted.

iv. Regarding when the environmental consultation should be carried out and how to act in the event of community refusal

30. Finally, we consider it necessary to make two clarifications regarding the standards established in the judgment for environmental consultation: (1) the moment at which the consultation must be carried out; and, (2) how the authority must act in the event the community refuses to proceed with the project.
31. First, regarding the moment at which the environmental consultation must be carried out, the majority opinion concludes that “*in the case of state authorizations and decisions that may affect the environment and are related to medium and large-scale mining activities, such as the underlying case, the environmental consultation must be carried out at a minimum prior to the issuance of the environmental*

registration and prior to the environmental license.”⁹

32. We consider that the timing of the environmental consultation is extremely relevant to guarantee its prior and effective nature. However, the ruling is not clear in setting this timing and, given that by the time the environmental registration or license is issued concessions may already have been granted, this standard generates the risk that the consultation will be carried out after there are already holders of mining rights.
33. In addition, according to article 7 of the Environmental Regulations for Mining Activities, “*Projects, works or activities within the medium- and large-scale mining operations, will require for their initial exploration phase an environmental registration, while for their advanced exploration, exploitation, and subsequent phases they will require an environmental license*”. Therefore, the majority opinion could be interpreted in the sense that each project, work or activity within medium- and large-scale mining operations will require multiple environmental consultations: one prior to obtaining the environmental registration for the exploration phase and another prior to obtaining the environmental license for the other phases of the mining activity.
34. While the Constitution requires that there be adequate environmental consultation for each decision or state authorization that may affect the environment, we are concerned that the majority opinion may lead to the need for multiple environmental consultations within each mining project.
35. Secondly, with respect to how the authority should act when the community refuses to proceed with the project, the judgment states:

In the event that the consulted community opposes the State’s decision or authorization, article 398 of the Constitution expressly provides: “If the referenced consultation process results in a majority opposition of the respective community, the decision regarding the execution of the project shall be adopted by a duly enacted resolution of the corresponding higher administrative authority in accordance with the law.” The Court deems it necessary to point out that this decision to execute the project or not may not violate the standards developed in this opinion, and must apply the precautionary or prevention principles, depending on which is applicable¹⁰.

36. Article 398 of the Constitution expressly states that the weight given by the State to the position of the community must be made “*in accordance with the law*”. In view of this express instruction, we believe that it was indispensable for the majority opinion to take due consideration of the development that the legislative branch has made on this point in article 83 of the Organic Law of Citizen Participation:

⁹ Constitutional Court of Ecuador. Opinion No. 1149-19-JP/21, November 10, 2021, para. 308.

¹⁰ Constitutional Court of Ecuador. Opinion No. 1149-19-JP/21, November 10, 2021, para. 312.

Art. 83.- Assessment.- If the aforementioned consultation processes result in a majority opposition from the respective community, the decision whether or not to implement the project shall be adopted by a duly argued and enacted resolution of the corresponding higher administrative authority; which, in the case of a decision to implement the project, shall establish parameters that minimize the impact on the communities and ecosystems; it shall also provide for methods of mitigation, compensation, and repair of harm, as well as, if possible, integration of the members of the community into the respective projects under conditions that guarantee human dignity.

37. This clarification is relevant to us since this rule establishes that, in addition to the constitutional obligation to issue a duly enacted resolution to execute the project, it is indispensable that the administrative authority: (1) foresees methods of mitigation, compensation and reparation of damages; and, (2) integrates community members into the respective projects, under conditions that guarantee human dignity.
38. For the reasons developed above, coinciding in the decision to protect the rights of nature within the Los Cedros Protected Forest, and recognizing the importance of the sentence adopted by the Plenary of the Constitutional Court, we diverge from the reasoning of the majority opinion, exclusively with regard to the four reasons set forth in this concurring opinion.

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Karla Andrade Quevedo
**CONSTITUTIONAL
JUDGE**

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Daniela Salazar Marin
CONSTITUTIONAL JUDGE

Certification: I hereby certify that the concurring opinion of Constitutional Judges Karla Andrade Quevedo and Daniela Salazar Marín, in case 1149-19-JP, was filed in the General Secretariat, on November 24, 2021, by e-mail at 9:46 a.m., and has been processed together with the Opinion and Order.

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Dr. Aída García Berni
GENERAL SECRETARY

CASE No. 1149-19-JP/21

CONCURRING OPINION

Constitutional Judge Alí Lozada Prado

1. I formulate this concurring opinion because, although I agree with the decision contained in the majority opinion, I disagree in part with its justification. The reasons for my disagreement, which were stated in the deliberations of the Plenary of the Constitutional Court, are summarized below.
2. The ruling ratified the decision of the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura in action for injunctive relief No. 10332-2018-00640, which annulled Resolution No. 225741 of the Ministry of Environment that granted the environmental registration for the initial exploration phase of mining concession No. MAERA 2017-3159921, Río Magdalena mining project, comprising the Río Magdalena 01 (Code: 40000339) and Río Magdalena 02 (Code: 40000340) concessions.
3. One of the arguments justifying this decision was that, in this case, the precautionary principle should be applied considering the possible impact on the right to water and the fact that the concessioned areas include a cloud forest, specifically, the Los Cedros Protected Forest. In this argument, it was established that the determinative requirement of scientific uncertainty for the application of the precautionary principle was confirmed by the lack of studies that establish the impact the mining activity could cause in the Los Cedros Protected Forest.
4. I must admit that doctrinally there are different ways of conceiving the precautionary principle and, in contrast, the prevention principle. However, I believe that the way to distinguish between these two principles that best fits the first paragraph of article 396 of the Constitution¹ is the following:
 - 4.1. The prevention principle prescribes that, in the face of scientific certainty of harm to nature or human health, it is *prima facie* obligatory to avoid it. It follows, contrary to what is assumed in the majority opinion, that the prevention does not necessarily imply the authorization of the harmful activity, and in fact may impede it; everything depends in a specific case on balancing the *prima facie* obligation to avoid harm and the *prima facie* justifications favoring the realization of the activity in question. And, for its part, the precautionary principle does not necessarily imply the prohibition of the

¹ *The State shall adopt appropriate policies and measures to avoid negative environmental impacts when there is certainty of harm. In case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of harm, the State shall adopt effective and timely Protected measures.*

activity; said principle, This principle, like that of prevention, only contains a *prima facie* obligation to avoid possible harm to nature or human health, an obligation that must be balanced with the justifications that favor the activity in question.

- 4.2. In other words, there is no reason to link the precautionary principle with the prohibition to carry out an activity and the prevention principle with its authorization. The opposite would be paradoxical: the less scientific certainty, wherein the precautionary principle would be applied, the more impactful the decision that could be taken with the prohibition to carry out an activity, a decision that would be excluded from the spectrum of those that can be adopted when there is greater scientific certainty, that is, when the prevention principle is applicable. But even more important: the decisions that can be taken in each specific case, whether based on the precautionary principle or the prevention principle must be open to the best possible weighing of interests, rights, principles, and values at stake in each case, so that it is not possible to associate prohibition or regulation with only one of the aforementioned principles.
- 4.3. The difference between the prevention principle and the precautionary principle thus lies in the scientific certainty and scientific uncertainty of environmental harm, respectively: the existence of the precautionary principle implies an extension of the protection radius given by the prevention principle when scientific knowledge does not allow it to be stated with certainty that a certain activity would affect nature or human health.
5. An example of scientific uncertainty is related to the harmful consequences for human health of electromagnetic waves emanating from cell phone antennas: it is possible that future scientific knowledge will tell us that such waves are harmless or that their harmfulness is negligible; hence, this is a typical example in which the precautionary principle could be applied. In contrast, in the case of the Los Cedros forest, scientific knowledge tells us that the mining activity would certainly cause environmental harm; therefore, the principle that should apply is that of prevention. The lack of environmental impact studies for this forest limits the ability to characterize and measure the damage that the mining industry would cause in the region and, therefore, the ability to accurately weigh between the prevention principle and the justifications in favor of mining. But the lack of environmental impact studies does not alter--indeed, rather presupposes--the scientific certainty that mining activity would affect the Los Cedros forest; in fact, the judgment itself contains ample information on the impacts that mining activity causes in cloud forests.
6. In short, for the reasons stated above, I believe that although the ruling adopted by the appellate court in Case No. 10332-2018-00640 should have been affirmed, it should have been adopted by applying the prevention principle instead of the precautionary principle because, in the majority opinion, more weighty reasons are given to conclude (i) that there is scientific certainty about the damage that the mining activity would cause to the environment, and (ii) that the reasons in favor of

the mining activity are not sufficient to justify the referenced harm.

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Alí Lozada Prado
CONSTITUTIONAL JUDGE

Certification: I hereby certify that the concurring opinion of Constitutional Judge Alí Lozada Prado, in case 1149-19-JP, was filed in the General Secretariat, on November 24, 2021, by e-mail at 6:05 p.m., and that it has been processed with the Opinion and Order.

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Dr. Aída García Berni
GENERAL SECRETARY

CASE No. 1149-19-JP/21

DISSENTING OPINION

Constitutional Judge Teresa Nuques Martínez

1. Based on Article 92 and 190 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (“LOGJCC”), I submit a dissenting opinion with respect to Opinion No. 1049-19-JP (“**majority opinion**”), which was approved by the Plenary of the Court in session on November 10, 2021, with deep respect for the arguments put forward by the presiding judge over the case and by the constitutional judges who voted in favor of the decision, with the background and reasons that I set forth below.

Preliminary matter

2. As a preliminary matter, it is important to mention that the majority opinion is a review decision issued by the Constitutional Court of Ecuador in exercise of the authority provided for in article 436, paragraph 6 of the Constitution, which authorizes the Court to issue rulings that constitute binding jurisprudence for the development of jurisdictional guarantees in cases selected by this Court. The procedural background of the case reports that it was selected by this Court for the issuance of a review decision¹, and that the undersigned judge was part of the Review Chamber² that heard or approved the draft ruling in order for it to be heard by the Plenary of the Court³.
3. It is thus imperative to clarify that the judges that constitute the Review Chamber, which procedurally selects constitutional cases for hearing, are made aware of draft opinions, but which--by virtue of being draft opinions--do not condition or prejudice the decision or vote of the constitutional judge in the Plenary of the Court once deliberation of the case is underway and the judge forms an opinion thereon.
4. Therefore, it is stated for the record that in the underlying case, the undersigned judge heard a draft opinion in the Review Chamber solely for the purpose of advancing the case to a hearing, but that she expressly reserved her observations and opinions, and in particular her decision regarding the underlying case⁴. Therefore,

¹ On May 18, 2020, based on paragraphs a) and b) of paragraph 4 of article 25 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (LOGJCC), the Selection Chamber of the Constitutional Court decided to select case No. 1149-19-JP.

² The Review Chamber is part of the internal structure of the Constitutional Court of Ecuador, organized by the Plenary of the Court and composed of three constitutional judges appointed at random. (Article 188, paragraph 4; Article 191, paragraph 3; and Article 199 of the LOGJCC).

³ Majority opinion, para. 6.

after collective deliberation, and because she disagrees with the views formulated in the opinion that was approved by the majority of the constitutional judges, she issues this dissenting opinion.

Background and points of divergence from the majority opinion

5. In the majority opinion, the appellate court ruling issued by the Provincial Court of Justice of Imbabura within the action for injunctive relief No. 10332-2018-00640 filed by the GAD of Santa Ana de Cotacachi in favor of the Los Cedros Protected Forest was reviewed, in which the rights of nature, the right to a healthy environment, the right to water, and the right to environmental consultation were allegedly violated. The Constitutional Court affirmed the adopted ruling, which accepted the action proposed by the GAD of Cotacachi, declared the violation of the rights of nature, the right to water, the right to a healthy environment for the communities neighboring the Los Cedros Protected Forest, and the right to be consulted on decisions or authorizations that may affect the environment. The Court affirmed the relief granted by which the environmental registration and water permit authorized for the Magdalena 01 and Magdalena 02 mining concessions were annulled, and ordered additional relief.
6. Against this background, although I agree with the invocation of the Constitution, international instruments and other constitutional values and principles that protect the rights of nature cited throughout the constitutional analysis of the majority opinion, I differ from its application to the underlying matter, mainly on the following issues:

i) Justiciability of the rights of nature

7. The 2008 Constitution⁵ recognizes in effect the rights of nature and nature as a legal subject. I also agree with the invocation of the related international instruments and that according to article 11, paragraph 4, respecting and ensuring respect for these rights, together with all other constitutional rights, is the highest duty of the State⁶. Likewise, I agree with the role of constitutional judges to safeguard such rights in the cases that are submitted to them. However, I believe that judges have the duty to remain within the constitutional framework in force, and to respect the same for entities that enjoy specific jurisdictional guarantees under consideration.

⁴ Minutes of the November 5, 2020 session of the Review Chamber of the Constitutional Court of Ecuador. It is recorded therein that Constitutional Judge Teresa Nuques Martínez approved the draft opinion in case No. 1149-19-JP, in order to continue with its processing and be brought to the attention of the Plenary of the Court, without prejudice to the observations made, particularly in the decisional part of the draft opinion presented.

⁵ 2008 Constitution, preamble, article 10, 73.

⁶ Article 277, paragraph 1 of the Constitution states: *“For the achievement of right living, general duties of the State shall include: 1. Guaranteeing the rights of persons, collectivities and nature”*.

8. In the majority opinion, violations to the rights of nature are declared in the framework of an action for injunctive relief, whose purpose is precisely the direct and effective protection of the rights recognized in the Constitution when there is a violation of constitutional rights, by acts or omissions of any non-judicial public authority⁷, that is, it is assumed that there is a violation of a constitutional right by actions or omissions of the State. Nevertheless, throughout the majority opinion, not only is the precautionary principle invoked in relation to the duty of the State to take preventive measures against environmental damage⁸, but statements are also made regarding the uncertainty or *risk* that the application of this principle presupposes⁹, creating a strong tension with the purpose of the jurisdictional guarantee underlying the present case; in contrast with the precautionary measures that can be deployed in

⁷ Article 88 of the Constitution of the Republic

⁸ Majority opinion: "54. *The essential idea of the precautionary principle is that, even in the absence of sufficient scientific evidence, it is better not to assume certain risks when these could result in serious damage that may even be irreversible.* 55. *In the underlying case, the GAD expressly invoked the precautionary principle contained in article 73 of the Constitution in its complaint, so as to argue the violation of the rights of nature. This article states: The State shall apply precautionary and restrictive measures for activities that may lead to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles.*"

⁹ Majority decision: "61. *Based on these provisions in environmental legislation and constitutional law, this Court develops the following elements of the precautionary principle: 1) The potential risk of serious and irreversible damage to the rights of nature, the right to water, to a healthy environment or to health. In order to apply the precautionary principle, it is not enough that a risk simply exists; it is necessary that this risk refers to serious and irreversible damage. Article 73 illustrates this situation well when referring to the extinction of species, destruction of ecosystems and permanent alteration of natural cycles, since all of these are damages so serious and irreversible that the Constitution has included them in the section on the rights of nature, considering them a violation of the same; 2) Scientific uncertainty about these negative consequences, either because they are still the subject of scientific debate, or because of lack of knowledge, or because of the difficulty of determining such consequences due to the high complexity or numerous variables involved. This is the fundamental characteristic of the precautionary principle, and what differentiates it from the prevention principle. Scientific uncertainty for the purposes of the precautionary principle consists of: lack of scientific certainty, which refers to relatively clear or possible effects of an activity or product, but without adequate evidence to assign probabilities, or ignorance, which refers to the lack of knowledge both of these probabilities and of some of the possible damages or effects. (...). 3) Adoption of timely and effective Protected measures by the State. When there is a risk of serious and irreversible damage, but also a corresponding uncertainty surrounding scientific knowledge, it is precisely due to this uncertainty that the State must not assume the risk and instead take certain measures in a timely and effective manner to avoid these possible negative effects. In other words, when there is no scientific certainty about the impact or damage caused by an action or omission to nature, the environment, or human health, the State must adopt effective and timely measures to avoid, reduce, mitigate or cease such effects. Therefore, the precautionary principle favors, in the face of scientific uncertainty, the plausible hypothesis of the worst case scenario: serious and irreversible damage, even if this occurs in the long term. It should be clarified that the prohibition of a product or process is not the only Protected measure to be adopted, although such a prohibition may be justified if the potential damage is very serious and irreversible.*"

the face of a threat¹⁰, the action for injunctive relief proceeds as a guarantee when known harm is present and constitutional rights are being violated¹¹.

9. It should also be noted that the majority opinion recognizes the existence of the prevention principle, conceptualizes it, and distinguishes it from the precautionary principle as follows:

*“The precautionary principle differs from the prevention principle in that the latter is applied when there is scientific certainty about the impact or harm, that is, when both the effects and their probabilities are known in advance. In terms of article 396 of the Constitution, “The State shall adopt appropriate policies and measures to avoid negative environmental impacts, when there is certainty of damage”. In other words, **the prevention principle entails the State’s obligation to demand compliance with provisions, regulations, procedures and measures aimed primarily at eliminating, avoiding, reducing, mitigating and ceasing the impact**¹².” (emphasis added).*

10. That is to say, the majority opinion accepts that the prevention principle operates when there is an *impact*; however, it dismisses its application in the underlying case and in its *ratio decidendi* analyzes the facts of the case and the actions of the Ministries or entities involved in the action for injunctive relief, concluding that the rights of nature were violated based on the precautionary principle. In fact, the majority opinion makes a detailed analysis of the elements of the precautionary principle¹³, applies them to the present case, and then concludes that the environmental registration or water permits should not have been granted for mining

¹⁰ Article 87 of the Constitution. See also Constitutional Court of Ecuador Opinion No. 16-16-JC para. 35-37: “35. This Constitutional Court has identified two situations, not necessarily sequential, in which precautionary measures may apply: (1) temporal proximity of the occurrence of a violation (threat); (...). The first situation occurs prior to the violation (...) The violation of rights has not been consummated in the first situation and only precautionary measures may be filed. If the violation of rights is taking place, harm is caused, and the corresponding jurisdictional guarantee of known harm is present, and, the action for injunctive relief may apply together with precautionary measures (...) 36. In this way, the Court makes a distinction as to when precautionary measures apply (...). Following this reasoning, if the purpose is to prevent or avoid the violation of a constitutional right, precautionary measures are appropriate when a threat is present. Whereas when the goal is to interrupt or cease a violation of constitutional rights that is already occurring, precautionary measures may be filed jointly with an action for injunctive relief, based on identified actual harm.”

¹¹ Ibid.

¹² Majority opinion, paragraph 62.

¹³ The elements of the precautionary principle imply the identification of at least the following elements: i) The potential risk of serious or irreversible harm that a product or the development of an activity may have on the rights of nature, the right to water, the right to a healthy environment and health. ii) Scientific uncertainty about these negative consequences, either because they are still subject to scientific debate, due to lack of knowledge, or because of the difficulty of determining such consequences due to the high complexity or numerous variables involved. iii) The adoption of effective and timely Protected measures by the State. Faced with the risk of serious and irreversible harm for which we have no scientific certainty, measures must be adopted that best protect the rights of nature, water, a healthy environment and health.

exploration in the Los Cedros forest¹⁴. That is, the majority opinion does not assume that the precautionary principle rests on the notion of *risk* and not *impact*, thereby generating tensions with the purpose of the original proceeding (action for injunctive relief) whose purpose is addressing an actual impact of constitutional rights. Instead, the majority opinion believes that it is possible to grant an action for injunctive relief in the face of a *risk*, a position with which I expressly disagree since this is incompatible with current constitutional law.

11. In this sense, although it is not possible to limit a constitutional principle to a specific guarantee, it is plausible to recognize close relationships between principles and guarantees. Thus, it is evident that precautionary measures can contribute temporarily to the effectiveness and timeliness of the measures adopted within the framework of the precautionary principle, but not for an action for injunctive relief; on the other hand, the prevention principle is closely related to the constitutional analysis in an action for injunctive relief in which the violation of the rights of nature can be definitively adjudicated and declared.

ii) The application of constitutional norms and principles

12. In order to resolve specific cases, it is necessary to interpret the Constitution and the legal system as a whole. In the present case, we are dealing with authorized mining concessions and the existence of a Protected Forest. Thus, it was necessary to invoke the constitutional norms and principles related to the right to nature, but also the constitutional norms and principles related to mining in Ecuador, especially article 407 of the Constitution which states:

“Art. 407.- The extractive activity of non-renewable resources is prohibited in protected areas and in zones declared as intangible, including forest exploitation. As an exception, said resources may be exploited pursuant to an evidence-based request of the Presidency of the Republic and by prior declaration of national interest by the National Assembly, which, if it deems it convenient, may call for a popular consultation. All forms of metallic

¹⁴ Majority opinion, **paragraph 160**: “(...) *“having verified the risk of serious or irreversible harm to nature in the Los Cedros ecosystem and to its endemic species under high risk of extinction, the Court considers it appropriate to apply the precautionary principle and consequently to adopt effective and timely Protected measures. In this sense, such measures should have resulted in refraining from granting the environmental registration for initial mining exploration in Los Cedros, which is related both to other previous and subsequent acts of public authority, as well as to the actions of ENAMI EP and Cornerstone in the initial exploration phase” (...); paragraph 135*: “Thus, this Court, based on the information reviewed and which has been summarized in previous paragraphs, has observed that there are reasonable grounds that show that the mining activity could seriously affect the exercise of the right to water of the populations neighboring the Los Cedros Protected Forest, as well as the ecosystem. In this scenario, the precautionary principle was not observed by the MAAE, nor by SENAGUA. Consequently, this Agency concludes that this principle applied to the right to water has been violated and considers that mining activity should not be carried out in the Los Cedros Protected Forest”; **paragraph 252**: “In the case under analysis, the Court observed that the MAAE does not have such information on the Los Cedros forest and, as seen in the previous sections of this judgment, neither has it developed a public policy for management in accordance with the characteristics of this ecosystem. This serious shortcoming resulted in the issuance of the environmental registration without the necessary precautions, affecting the right to a healthy environment”.

mining in any of its phases in protected areas, urban centers and intangible zones is prohibited”.

13. The majority opinion, after referring to article 407 of the Constitution in the analysis of the underlying matter, states:

*"This eco-systemic interdependence is one of the reasons why the Court **cannot accept the interpretation of the respondents in the sense that article 407 of the Constitution--which prohibits extractive activities of non-renewable resources in protected areas, urban centers, and in zones declared as intangible--has an exclusive and restrictive character.** Although it is clear that in this provision the Constitution expressly prohibits extractive activities in these areas, it does **not conclude that such activities are automatically or unconditionally authorized in the rest of the national territory, or that, once the constitutional and legal conditions are verified, such activities cannot be restricted or suspended in different areas, under a case-by-case analysis.***

141. In effect, it would not be logical to affirm that the rights of nature, the right to water, and the human right to a healthy and balanced environment are only valid in protected areas and intangible zones. On the contrary, the obligations to protect these rights apply to public authorities throughout the national territory, and must therefore be analyzed in accordance with the Constitution and norms promulgated thereunder when authorizing, restricting or regulating said extractive activities”. (emphasis added)

14. The undersigned judge, in her opinion, disagrees with these statements for two reasons: 1) These statements presuppose that mining activity in itself affects nature, the right to water or the right to a healthy and balanced environment; 2) These statements extend the scope of the constitutional prohibition established in article 407 of the Constitution.
15. Regarding the first point, I believe that extractive activities alone do not generate destruction of nature (species, ecosystems) nor do they violate the rights of nature. In order for extractive activities to exist as such, they must comply with various phases and studies that are amply regulated so that mining activities are carried out with environmental responsibility. Hence, this Court has recognized that, according to article 27 of the Mining Law, the expression “mining exploitation” must be understood as the execution of activities that have observed the following sequential order: “(i) prospecting, (ii) exploration, (iii) exploitation, (iv) beneficiation, (v) smelting, (vi) refining, (vii) commercialization and (viii) mine closure”,¹⁵ and only with the achievement of such activities in a sequential manner may the goals pursued with the development of mining activities be achieved with environmental responsibility. This should be understood upon observing the exceptions recognized in constitutional law regarding the prohibition of all types of metallic mining in any of its phases in protected areas¹⁶.

¹⁵ Constitutional Court of Ecuador. Opinion 1-20-CP/20. Para. 36

¹⁶ CRE: “Art. 407.- The extraction of non-renewable resources is prohibited in protected areas and in areas declared as intangible, including forest exploitation. As an exception, said resources may be exploited pursuant to the evidence-based request of the Presidency of the Republic and by prior declaration of the National Assembly, which, if it deems convenient, may call for a popular consultation.

16. In the same sense, the Court has concluded that *“it is not possible to carry out exploitation without having previously developed prospecting and exploration activities; and in turn, it is not possible to reach the commercialization phase if the exploitation phase has not been previously carried out; even though such activities are not necessarily performed by the same entity through the process of mining activity (...)”*.¹⁷
17. This Court has also emphasized that it is necessary to carry out independent technical environmental studies that guarantee the rights of nature: *“the authorities in charge of issuing these permits must be guarantors of the rights of nature and access to water. Therefore, they must exercise strict compliance oversight in accordance with constitutional, legal and regulatory requirements and anticipate the liability that could be implied by issuing authorizations that entail violations of constitutional rights for not having adopted the necessary provisions.”*¹⁸
18. Therefore, I believe that by complying with the requirements of each phase there is the possibility that the State, through its technical agencies, may authorize environmentally responsible mining activity in compliance with constitutional and legal norms, without affecting the rights of nature or others.
19. Regarding the second point, the interpretation of article 407 of the Constitution contained in the majority opinion not only recognizes the existence of the prohibition of extractive activity in protected areas established in article 407 of the Constitution--which is self-evident because the norm is clear in its text--but also broadens its scope. In the majority’s constitutional analysis, when faced with uncertainty regarding the harm that may be caused, it is stated that the constitutional prohibition may apply in *“areas distinct from”* those identified by the same constitutional norm. In my opinion, extractive activities are thus being characterized by an alleged *“uncertainty”* regarding the effects they could cause, resulting in a lack of precision regarding which territories may be subject to extractive activities. This, in my opinion, is detrimental to the State’s own exclusive¹⁹ authority to delimit protected areas or intangible zones, because it dilutes these zones’ differentiation from the rest of the territory; and it also conditions the development of a strategic sector²⁰, that being the regulated usage of the State’s natural resources, which are also owned by the State, and the consequent participation of the State in the benefits derived

All forms of metallic mining in any of its phases in protected areas, urban centers and intangible zones is prohibited.”

¹⁷ Constitutional Court of Ecuador. Opinion 6-20-CP/20, para. 43

¹⁸ Constitutional Court, Opinion No. 32-17-IN/21, para. 73.

¹⁹ Article 261.3 of the Constitution.

²⁰ Article 313 of the Constitution.

therefrom, which are constitutionally recognized and standardized²¹.

20. In the opinion of the undersigned judge, the constitutional text must be interpreted in harmony with constitutional rights, but also with the norms that regulate the strategic sector of the mining activity. While I agree with the protection of the rights of nature, the right to water, and the right to a healthy environment, in that these are justiciable²², and in their progressive development through norms, jurisprudence and public policies²³, it is not feasible to grant these rights an omnipotent, absolute or prevailing character over other constitutional rights or norms to the point of excluding all extractive activities, even more so when the constitutional norm expressly recognizes limitations. In this case, Article 407 of the Constitution recognizes that the constitutional prohibition of extractive activities in protected areas has an exception for the national interest, since it is feasible to promote a mechanism of direct democracy such as popular consultation and intervention of the Executive and the Assembly to carry out extractive activities in such areas.
21. Nor is it feasible to extend the scope of a constitutional norm to the detriment of its text and the will of the legislature, since the Constitution imposes the duty to interpret constitutional norms *“by the literal tenor that best fits the Constitution in its entirety. In case of doubt, they shall be interpreted in the sense most favorable to fully effectuating rights and which best respects the will of the legislature, and in accordance with the general principles of constitutional interpretation”*²⁴. Therefore, I dissent with the aforementioned statements of the majority opinion and consider that the application of article 407 of the Constitution must be made and applied to specific cases respecting its text and the will of the legislature.

iii) The progressive development of rights and their application to specific cases

22. As mentioned above, the development of rights is progressive. Nevertheless, within the framework of legal certainty, cases must be analyzed according to the constitutional and jurisprudential framework in force at the time of the underlying facts. In the majority opinion, important jurisprudential developments are created to define the precautionary principle and standards for the application of an environmental consultation.

²¹ Article 408 of the Constitution

²² Article 11.3 of the Constitution

²³ Article 11.8 of the Constitution.

²⁴ Article 427 of the Constitution.

23. Although constitutional and legal norms referring to the precautionary principle²⁵ and others related to environmental consultation²⁶ are cited, it must be recognized that these norms alone do not fully develop the standards or the content of these institutions and that they are rather being given substance in an important way in the majority opinion.
24. I agree with the constitutional validity of the precautionary principle for the protection of the rights of nature, in the effectuation of the environmental consultation in the terms provided in the Constitution, and in the standards that have been developed to protect the right of citizen participation; however, I disagree that such standards that are effectively being created in Ecuadorian constitutional jurisprudence at this very moment should be applied retroactively to the action for injunctive relief that took place in the underlying matter selected in the present case.
25. It is true that, in the exercise of its powers of review, the Constitutional Court of Ecuador has the possibility of developing binding jurisprudence and reviewing a specific case. Yet this last activity of reviewing a specific case is subordinated, as previously stated, to the constitutional and jurisprudential framework in force at the time of the facts; therefore, although I agree with the jurisprudential precedents that have been cited as relevant case law, mainly regarding the precautionary principle and the standards of environmental consultation, I do not agree that they should be applied to the Ecuadorian State in the present case and consequently declared as being violated²⁷.
26. In this sense, I believe that it was not feasible to reproach the State for not complying with the precautionary principle on the basis of content being created in the present ruling, nor to have declared that environmental consultation was violated with the standards developed. In my opinion, the facts and the core issues could have been analyzed on the basis of the constitutional and jurisprudential framework in force at that time and, for subsequent cases, standards established for the protection of nature through the precautionary principle and the application of environmental consultation. Even if violations that were not addressed by the lower courts in the rulings subject to review had been accredited, it was feasible to do so, taking into account that the action for injunctive relief was previously granted and that the Multijurisdictional Chamber of the Provincial Court of Justice of Imbabura of June 19, 2020 had already annulled the environmental registration and water permits granted for the Magdalena 01 and Magdalena 02 mining concessions. Moreover, it was feasible with respect to legal certainty to order reparation measures by virtue of

²⁵ Articles 73 and 396 of the Constitution, Article 19 of the Environmental Management Law in force at the date of issuance of the environmental registration, among others.

²⁶ Article 398 of the Constitution; Article 82 of the Organic Law of Citizen Participation (LOPC); Article 184 of the Environmental Code; Article 68 of the Organic Law of Water Resources, Uses and Development of Water; and Article 28 of the Environmental Management Law (LGA) were the applicable regulations to grant the environmental registration, and Article 87 of the Mining Law, among others.

²⁷ See the majority opinion, which declares that the rights of nature, the right to water and a healthy environment of communities neighboring the Los Cedros Protected Forest, and the right to be consulted on decisions or authorizations that may affect the environment, have been violated.

measures of non-repetition or comprehensive reparation, but on the basis of the application of previously-existing, public, clear laws in accordance with Article 82 of the Constitution.

For all the foregoing considerations, I dissent from the decision reached in this case.

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Dr. Teresa Nuques Martínez
CONSTITUTIONAL JUDGE

Certification: I hereby certify that the dissenting opinion of Constitutional Judge Teresa Nuques Martínez, in case 1149-19-JP, was filed with the General Secretariat on November 24, 2021, by e-mail at 8:57 p.m., and has been processed together with the Opinion and Order.

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Dr. Aída García Berni
GENERAL SECRETARY

CASE No. 1149-19-JP/21

DISSENTING OPINION

Constitutional Judge Carmen Corral Ponce

1. With the customary respect for the arguments put forward by the presiding judge and by the judges who voted in favor of the case No. 1149-19-JP of November 10, 2021, I dissent with the majority opinion with respect to the reasoning supporting the analysis of the review decision of the jurisdictional guarantee of an action for injunctive relief filed by the Autonomous Decentralized Municipal Government of Santa Ana de Cotacachi in favor of the Los Cedros Protected Forest¹. This dissent revolves around the following arguments:

General aspects:

2. Paragraph 51 of the majority opinion mentions that: “[t]he rights of nature posit that in order to harmonize its relationship with nature, it is the human being who adapts in an adequate manner to natural processes and systems”. Such an assertion, although appearing to be a mere ontological postulate, entails in itself a conceptual delimitation with minimal equilibrium between what is represented in the “human being-nature” relationship. In contrast to a utilitarian anthropocentrism, this idea is oriented toward an extreme ecocentrism in which human activity (regardless of distinctions) is conditioned toward the proscription of any modification--perhaps permanent in character--of a natural environment.
3. Therefore, it is not a matter of establishing the preeminence of nature over human beings, nor vice versa, since this incorrectly leads to a reductionist binary concept of one or the other position. There must be a balance between environmental protection, which proceeds in accordance with the procedures and rules provided for in the legal system, and the development of anthropic activities in a rational, sustainable manner. Thus, just as it is important to protect the natural environment when an ecosystem is at risk, it is also important to promote the development and equitable distribution of the wealth generated by the responsible management of natural resources².
4. Thus, constitutionally it is established that environmental protection is deployed in several forms that must be duly understood and effectuated for its operability. Article 14 of the Constitution states that: “*The right of the population to live in a healthy and ecologically balanced environment is recognized (...) The preservation of the environment, the conservation of ecosystems, the biodiversity and the integrity of the country’s genetic*

¹ Within the proceedings assigned No. 10332-2018-00640.

² Art. 3.5 of the Constitution of the Republic.

heritage, the **prevention of environmental harm** and the recovery of degraded natural spaces is declared to be in the public interest” (emphasis added). The first paragraph of article 73 of the Constitution establishes that: “The State shall apply **precautionary and restrictive measures** for activities that may lead to the extinction of species, the **destruction of ecosystems** or the permanent alteration of natural cycles” (emphasis added).

5. The location of these two constitutional provisions gives an idea of their scope and intent. Article 14 is found in Title II “Rights”, Chapter Two “Rights of right living”, Section Two “Healthy environment”, of the Constitution--that is to say, it recognizes a right of human persons. Article 73 by contrast is found in Title II “Rights”, Chapter Seven “Rights of nature” of the Constitution, and contains a recognized right for the natural environment. It follows that “prevention” is a form applicable to safeguard the right of human persons facing the risk of environmental harm, while “precaution” is a measure to safeguard nature before the danger of the destruction of ecosystems.
6. It is for this reason that in Title VI “Framework for Right Living”, Chapter Two “Biodiversity and Natural Resources”, Section One “Nature and Environment” of the first paragraph of Article 396 of the Constitution, states that: “The State shall adopt timely policies and **measures that avoid negative environmental impacts, when there is certainty of harm**” (emphasis added); and, in the second part establishes that: “In case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of harm, the State shall adopt effective and timely **Protected measures.**” (emphasis added)
7. From the systematic reading of these constitutional provisions the following is evident: i) that the mechanisms that avoid eventual environmental damage--as an impact to the right of people to a healthy environment--correspond to the concept of *prevention*. Therefore, the legal system provides means to prevent this risk, such as *ex ante* and *ex post* environmental impact studies in the stages where they may be demanded and which are based on the certainty of harm; and, ii) that the Protected measures against the danger of ecosystem destruction are part of the rights of nature, which are addressed by the form of *precaution*, enabling the intervention of the State in case of doubt or when there is no scientific evidence of damage based on the principle of *indubio pro natura*.
8. Within this context it should be noted that the *prevention* principle, which regularly operates during the course of an activity subject to authorization, is effectuated through legal mechanisms such as the environmental impact assessment or the procedure for obtaining licenses and administrative authorizations, whose purpose is to anticipate possible environmental damage and act on the basis of that information for the protection of the environment; whereas the *precautionary* principle is applied in cases where such prior knowledge is completely absent and the risk of harm that may occur is extremely uncertain, to the point that there is at least no generalized knowledge of the effects of a given activity.

9. These two figures cannot be confused, since they respond to their own rationale in such a way that if an activity regarding natural resources has been authorized and studies, plans, and permits are in hand, the means by which to prevent possible environmental harm and contingencies will undoubtedly be *prevention*, but not environmental *precaution*. That is to say, a state intervention cannot be dictated on the grounds of *precaution* of the risk, if authorizations, studies and permits have been granted on the basis of the *prevention* principle, which acts due to the prior and generalized knowledge of the certainty of the harm. These acts do not prejudice the fact that an environmental harm may nevertheless occur in spite of prevention, and objective and imprescriptible environmental liability may result according to the second to fourth paragraphs of the aforementioned article 396 of the Constitution.
10. On the other hand, it cannot be ignored, as the majority opinion does, that in the present case the respective permits have been issued, following the application of the *prevention* principle, since the exercise of mining is not an activity in recent discovery about which there is no ample record of its effects. Therefore, it is evident that the judgment does not begin--as it should--from the premise of the existence of environmental *prevention* given the existing concrete information on the impacts of authorized mining projects, instead giving way to a misunderstood *precaution* alleging the lack of specific information, which is improper.

Concrete effects:

11. At any rate, beyond these general or abstract differences, the majority opinion raises problems of practicality which come from the way in which the environmental precautionary principle is conceived. Paragraph 61.2 of the ruling mentions that scientific uncertainty applies “[even though] *all or some of the potential harms or negative effects are known a priori, the specific cause-effect relationships between the activity or product and these harms have not been scientifically established, with established probabilities. This limitation of scientific knowledge may be due to the high complexity of a system or phenomenon. Scientific uncertainty may also be evidenced by unresolved scientific debates or absence or insufficiency of knowledge about these effects*”.
12. In relation to the above, it is agreed that compliance with the precautionary principle must be subject to rigorous technical scrutiny. However, the scope with which this environmental principle is being evaluated is troubling, since the standard that would be imposed is not to overcome a threshold of scientific uncertainty (to know or have records of the possible effects of the activity, work or project in general), but to determine its consequences or impacts within a specific environment, a situation that is typical of a casuistic analysis of feasibility (environmental impact studies), which obviously is not circumscribed to a context of uncertainty of the scientific community, but to an insufficiency of concrete technical information.

13. In addition, there is a kind of bias toward extractive activities as highly pernicious and destructive, without considering the existence of other types of generalized information about mining, such as its extraction methods and the possible non-injurious effects that they could generate in highly sensitive natural environments³.
14. That said, it should be considered that given the connotations and variations in the execution of such a technical activity (such as mining), it is possible to foresee or conjecture about possible contingencies and environmental risks, but not to have an invariable scientific certainty of what may or may not occur (as seems to be the standard required); that is why these aspects (risks) are considered in environmental plans and studies for the approval of the respective permits, as well as the execution of monitoring, follow-up, inspections, and environmental audits.
15. In this sense, certainty may surround the existence of possible risks and the impact on species, but this does not mean that the execution of activities, works or projects should be prohibited in all cases, since this is where the prevention principle comes into play in order to mitigate or eliminate environmentally harmful consequences of the activity.
16. With the way in which the ruling is constructed, it gives the impression that it is enough that a risk exists for an activity to be prohibited, which may generate the erroneous perception that our model of constitutional justice contemplates a formula of absolute restriction of possible environmental risks, and may even empty the exemption contained in article 407 of the CRE of its content.
17. What has been said above are transcendental issues that have not gone unnoticed in our Constitution; it should not be forgotten that it was the legislature itself who in Article 407 of the Constitution of the Republic (“CRE”) contemplated the possibility of exceptionally authorizing “through a declaration of national interest” the exercise of extractive activities of non-renewable natural resources within the national system of protected areas (ecosystems which are more fragile than the Protected forests). Therefore, it is evident that the Ecuadorian constitutional paradigm poses a fair measure between the protection of the rights of nature and the promotion of productive activities by the State, as a suitable means to achieve an effective promotion of rights (e.g., education, health, housing, employment), as well as the achievement of development objectives⁴.

Application of the prevention principle:

18. For this particular case, it should be considered that there are some nuances that lead us

³ It should be noted that there are several methods of low environmental impact that are carried out within the exploration phase or identification of the characteristics of the deposit, for example: photogeology, gravimetry, radiometry, etc.).

⁴ Arts. 275 and 276 of the Constitution of the Republic.

to infer that that it would be more appropriate to apply the prevention principle instead of the precautionary principle. Thus, for example, in the majority opinion there is evidence and scientific certainty about the species that inhabit the area, their levels of vulnerability, and georeferencing data, as well as the identification of water resources (paras. 70 to 110); valuable information with which it would certainly be possible to generate rigorous measures to mitigate or reduce negative environmental impacts; that is, to apply the elements of prevention for the possible adverse effects of the activity.

19. However, it is of great concern that the Constitutional Court goes to the point of exceeding its authority and establishes highly complex technical conclusions such as: *“(1) the fragility, biodiversity, endemism, and in general, a level of biodiversity and complexity that implies such a high number of variables and relationships that makes an adequate study of the probabilities of the environmental impact of metallic mining in the forest impossible (...) this would have led the MAE to consider that at present there is not the scientific certainty or certainty raised by the respondents about the type and magnitude of the impact or damage of metallic mining in this forest”*; that is, this Court assumes and takes for granted that no study or environmental impact assessment could be sufficient to technically demonstrate the plausibility of carrying out mining activities in an environmentally responsible, sustainable manner within the Los Cedros forest.
20. All these considerations lead to the practical value and effectiveness of the prevention principle being undermined, leading it to a level of inapplication in which there is a tendency to prohibit, as a precaution, the exercise of activities (which do not have definitive studies), when its essence is precisely to reduce the possible contingencies that have been identified by virtue of the information that is available.
21. The majority opinion states that by the procedural principle of the reversal of the burden of proof, it fell upon the holder of the mining concession and its operators to justify with the **environmental impact studies** that there would not be a serious or irreversible impact on the ecosystem of the Los Cedros Protected Forest. This type of requirement at a stage where it is not required to have such specialized studies, contravenes the scope of protection of the right to legal certainty for those interested in the mining activity. Therefore, in this case it would not be prudent to impose as minimum evidentiary standards requiring such information to an infallible degree, even more so when the environmental and mining regulatory framework did not require “medium- and long-term” studies for a phase or activity that at that stage of the procedure was not required.
22. With these types of statements as found in the majority opinion, at least three possible troubling scenarios may arise, namely: **i)** under the pretext of carrying out a jurisdictional analysis, the technical authority of the Ministry of Environment, Water and Ecological Transition would be undermined to a certain extent; **ii)** the environmental precautionary principle would be taken as a rule of radical proscription; and, **iii)** an alleged uncertainty would be wrongly invoked to justify the absence of

specific technical information, which, by the way, according to the law on the matter, was not required for the initial mining exploration phase.

23. Regarding the adoption of reparation measures, it is observed that they are not consistent with the nature of the precautionary principle. An important discussion must be made here, since according to Article 396 of the CRE, the State must adopt effective and timely Protected measures, even when there is no scientific evidence of damage. From the exegesis of this constitutional rule, it can be deduced that State intervention is conditioned on the inexistence of “certainty of damage”; consequently, the measures imposed by virtue of this principle should contemplate at least three fundamental aspects:

- They are of a *prima facie* precautionary nature, that is, they may be subject to reviewability criteria according to subsequent information that may be provided later in the process.
- They shall be gradual in the sense that they must consider aspects that do not imply *ab initio* an absolute and perennial restriction, for example, the possibility of providing for the suspension of the activity, work or project as a first option.
- They will be used as a last resort, that is, when within the procedural guaranteeing of the protection of rights a technical or legal obstacle is identified which is manifestly unsubstantiated, such as when the implementation of a non-existent or experimental technology is required.

24. If the *ratio decidendi* of the precedent under discussion is taken as a reference, it is clear that it ratifies the appellate court ruling issued within the jurisdictional guarantee under review, but through another analysis in which the precautionary principle is applied to order--*inter alia*--that: “Activities that violate the rights of nature must not be carried out within the Los Cedros Protected Forest, which includes mining activity and all types of extractive activity (...) Empresa Nacional Minera EP and allied or associated companies must refrain from carrying out any type of activity in the Los Cedros Protected Forest, must remove all infrastructure that has been built in said forest, if any, and reforest the areas that have been affected by said infrastructure and clear-cutting for trails”⁵.

25. Therefore, in this case, where concessions have been granted, investments have been made, permits have been granted and legal positions have been consolidated, the most appropriate thing to do is not to provide for an absolute prohibition of activities, but to apply the prevention principle so that within a reasonable period of time the managers of the activity can present serious environmental impact studies or evaluations to

⁵ Paragraph 348, sub-sections a) and b).

determine if it is feasible or not to continue with the development of other phases of the mining activity, without having to subvert the normative order contemplated in the legislation in force. The undersigned judge emphasizes that there must be due harmony between the principles of precaution and environmental prevention, without the former ending up displacing the latter, demanding, as in this case, a scientific rigor that may be foreseeable, but not exact or invariable.

Additional considerations:

26. As a corollary, although **I do not agree** with the reasoning put forward in the majority opinion, it is important to make clear an issue that the majority opinion does not address, that is, that if it has been considered, under its criteria, that additional measures of reparation to those ordered in the original proceeding are appropriate, this aspect should have been clearly established, and it is not enough to provide in an indeterminate manner that mining activities are prohibited and the existing infrastructure within the "Los Cedros" forest is to be removed.
27. As has been evidenced in the case *in question*, the management of the mining activity within the forest also involves legal persons under private law⁶, so that the ruling in question should have made at least a summary pronouncement on the repercussions of such measures in relation to these third parties, which are part of the chain of mining activity⁷.
28. Therefore, if the majority ruling considered that there is a violation of human rights and nature (a position with which I do not agree), it should have warned about the application of the grounds for the expiration of mining rights prescribed in Articles 115 and 117 of the Mining Law, so that the Ministry of the Environment, Water and Ecological Transition and the Ministry of Energy and Non-Renewable Natural Resources might initiate administrative actions to revert and annul the contracts, titles, licenses, permits and mining concessions registered within the "Los Cedros Protected Forest"; and, Ministry of Energy and Non-Renewable Natural Resources to initiate the administrative actions leading to revert and annul the contracts, titles, licenses, permits and mining concessions registered within the Los Cedros Protected Forest. The aforementioned articles provide that:

"Art. 115.- Expiration due to Declaration of Environmental Harm.- (Reformed by the Ninth Reformatory Provision of the Organic Environmental Code, R.O. 983-S, 12- IV- 2017).- The Sectorial Ministry shall declare the expiration of mining concessions when environmental harm occurs, without prejudice to the obligation of the concessionaire to repair the environmental harm caused."

⁶ In paragraph 157 of the majority opinion it is recognized that: *"As a result of these acts of public authorities, the companies ENAMI EP and Cornerstone, the former public and the latter private, began mining exploration activities in Los Cedros in its initial phase (...)"*.

⁷ It is worth clarifying that mining rights do not only include the granting of mining concessions, since, as stated in Article 17 of the Mining Law, they include: *"those arising from mining concession titles, mining exploitation contracts, licenses and permits, as well as authorizations to install and operate processing, smelting and refining plants, and marketing licenses"*.

The assessment of environmental harm shall be made in accordance with the provisions of the Organic Environmental Code. When water resources are affected by mining activities, the assessment of environmental harm shall take into account the pronouncement of the unified water authority.

The procedure and requirements for the declaration of environmental harm will be contained in the general regulations of the environmental regulations in force”.

“Art. 117.- Forfeiture for Violation of Human Rights.- The Sectorial Ministry shall declare the forfeiture of a mining concession if there has been a violation of human rights, either by the concessionaire or its representatives, as well as its contractors, especially the security companies acting on behalf of the concessionaire or whoever takes its place, for which purpose it must previously have an enforceable judgment issued by a competent Judge that determines a violation of human rights”.

29. In view of the foregoing, I am submitting this dissenting opinion in the hope that the criteria reasoned herein will be considered in future debates, in order to deepen the effects and practical scope of the principle of environmental prevention, which undoubtedly is not a matter that has been fully clarified by the constitutional jurisprudence.

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Dr. Carmen Corral Ponce
CONSTITUTIONAL JUDGE

Certification: I hereby certify that the dissenting opinion of Constitutional Judge Carmen Corral Ponce, in case 1149-19-JP, was filed with the General Secretariat on November 24, 2021, by e-mail at 11:28 p.m., and has been processed together with the Opinion and Order.

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Dr. Aída García Berni
GENERAL SECRETARY