For those of you who do not want to or don't have the time to read through the entire decision and concurring and dissenting opinions, we pulled out these excerpts from the actual decision, just to give you a sampling of what a court decision in favor of nature would actually look like.

Los Cedros Forest Ecuador Constitutional Court Decision Highlights and Excerpts:

(Players)
ENAMI EP is a mining company that is a nationally owned company of Ecuador. They work in partnership with Chilean company Codelco. In this decision they refer to "metal mining" and not a specific metal. These companies mine for gold, copper, etc.
GAD (the Autonomous Decentralized Municipal Government of Cotacachi)
is the local municipality that sued to stop the mining in the Los Cedros Cloud Forest.

Court made up of 9 Judges - 7 Judges in favor of decision, 2 dissenting

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.

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 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.

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.”

Rights of nature and ecological justice

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.

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…

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.

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…

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…

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.

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. Both the species and biodiversity of ecosystems are intrinsically valued in the Ecuadorian Constitution.

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.*

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.

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.*

58. The Court observes that neither the trial judge nor the Provincial Court analyzed the precautionary principle or the prevention principle…

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, 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. In contrast, the prevention principle applies only when both the effects and their probabilities are known in advance.

Examples of application of the precautionary principle include human contact with substances or materials such as lead or asbestos, 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, the loss of biodiversity, climate change, genetically modified organisms, or human exposure to electromagnetic radiation, 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. 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 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*".

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.

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 effects.

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. 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.

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.

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. 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.

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.

Several paragraphs that follow then deal with specific species of birds and animals.

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.

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.

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.

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 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.*

120-124 describes why biodiversity is critical.

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.

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.

Burden of proof and Permit alone not enough

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.

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".*

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".*

137. Therefore, the environmental registration in this case must not be limited to a mere automated procedure, 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 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.

141-148 challenges the registrations (permits).

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

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.

158-161 describes how the mining company already violated the rules at the site.

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

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
Sections **168-181** are all really interesting to read. Go into detail that water must be accessible and affordable to everyone. Cannot be privatized.

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:

5.2.1 Water in the Los Cedros Protected Forest

Makes the connection between water and the trees and how trees mitigate impacts of climate change….all connected.

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”

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”.

Discussion of water intakes and the communities and their livelihoods that depend on the water.

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.

Article 411 of the Constitution establishes two priorities for water use: human consumption and ecosystem sustainability.

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.

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.*

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

Sections **213-217** about sustainability of the forest being important and protected.

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." 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" **(emphasis added).**

219-224 gets specific about how the precautionary principle must be applied.

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.**

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.

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.

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.

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.

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.

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.**

Community Consultation

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”.

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.**

Consultation of the Community - in footnotes of the decision but really good language

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".

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

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

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 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".

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.

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 rights**, which will act in accordance with the provisions of Resolution No. 21-DPE-DD-2019 of February 20, 2019. The environmental consultation should **include the participation of** public authorities of the **autonomous decentralized provincial governments, as well as those of the cantons and parishes, depending on the possible environmental impact accompanying the decision or state authorization.**

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,...

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 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. 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”.

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.

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.

On the timeliness of environmental consultation with respect to mining activities

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).**

Other features of an environmental consultation

307. The environmental consultation must be free.
308. The environmental consultation must be carried out in good faith.

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. This Court has also indicated that, "the dialogue cannot start with a previously-made decision.

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.

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.
(Interesting that the Corporations cannot run the public consultation)

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 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).

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.

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 Sections 341-346

Basically, reparations granted and the project prohibited and permits revoked.

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 Sections 347-350

Court order agencies to train employees, to follow up and report back to 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

Concurring Opinion 1 has some issues with "scientific certainty" and the precautionary principle. Need to look at each case and the facts individually.

DISSENTING OPINION 1

Constitutional Judge Teresa Nuques Martínez

"[B]y 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.

"[T]he 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 justiciable, and in their progressive development through norms, jurisprudence and public policies***, 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***,. . . . ." .. . ."[T]he 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.

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 principle, applies them to the present case, and then concludes that the environmental registration or water permits should not have been granted for mining exploration in the Los Cedros forest. 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.

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. 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…

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.

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 justiciable, and in their progressive development through norms, jurisprudence and public policies, 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.

23. Although constitutional and legal norms referring to the precautionary principle and others related to environmental consultation 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 violated.

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.

(Interpretation - She opposes giving Pachamama power to veto mining -- in other words, you can debate over parts per million but you can't give RON "omnipotent, absolute or prevailing character" over other constitutional rights - in other words, over corporations' rights. And mining, say lithium for example would be ok if it is in the "national interest".)

DISSENTING OPINION 2
Constitutional Judge Carmen Corral Ponce

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 resources.

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.

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.

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.

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.

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.

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 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.

(Interpretation of this judge's dissent is that he is basically saying that things work just fine as is. This is the corporate interest judge. There are all kinds of rules in place for "prevention" of harm, like environmental impact statements and permits issued by the agencies in charge of this and precautionary measures without scientific evidence to support them should not prohibit projects. And because of human exceptionalism, we need to consider the wealth generated by these "natural resources" and responsibly manage that. He is anti-Rights of Nature)