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Contesting the national interest in Ecuador: the role of rights of nature in mining conflicts

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Scholars have urged the examination of how Nature's rights may link with other rights-claims to impact political struggles between local communities and central governments over decision-making authority. This article examines two court cases that were decided by Ecuador's Constitutional Court in order to shed light on the ability of Indigenous and non-Indigenous communities in Ecuador to employ the rights of nature in their efforts to contest the approval of extractive projects. The article contends that conjunctions between nature's rights, human rights and the precautionary principle have challenged three patterns of knowledge creation and use that have supported the primacy of the national interest. The first is the presumption of co-existence of Indigenous land uses and mining projects. The second is the state's power to classify land based on the level of protection for which it is eligible. The third is the treatment of differentiated actors as equivalent stakeholders.

Keywords: *Rights of nature, National interest, Precautionary principle, Right to consultation, Indigenous rights*

1 INTRODUCTION

The advent of 'claims made on behalf of the national interest' has been associated with the formation of modern states in the 1500s and 1600s. Its invocation has since justified processes of territorial and economic expansion and consolidation.[1] Authorities have repeatedly invoked the national interest to validate the application of varying degrees of coercive force on populations resistant to development plans.[2] Appraisals of the national interest have generally favoured those projects that promote 'development', promise socio-economic benefits and depend upon ever-intensifying exploitation of nature. Authorities have sought to remove these projects and priorities from the vagaries of political debate. As Timothy Mitchell has pointed out, calls 'for a more just and egalitarian common world' have been managed by the recognition of the legitimacy of the decisive role played by public deliberation in particular subjects, 'while

1. Scott Burchill, *The National Interest in International Relation Theory* (Palgrave Macmillan 2005) 1–2 (quote on 1).
2. Murat Arsel, Barbara Hogenboom and Lorenzo Pellegrini, 'The Extractive Imperative in Latin America' (2016) 3 The Extractive Industries and Society 880, 885.

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establishing other fields to be administered under alternative methods of control'.[3] Mitchell identified 'the economy' as one such ostensibly separate container of activity and meaning, its plausible existence serving as an instrument for managing the forms and impulses that democratic desire can take.[4]

Indeed, under the leftist governments of Ecuador's presidents Rafael Correa (2007–2017) and his successor Lenín Moreno (2017–2021), a 'reinvigorated state role in the economy' did not necessarily mean greater popular influence despite constitutional guarantees of populations' consultation rights. The state's enhanced position entailed the creation or augmentation of institutions designed to conceive and implement 'development plans' considered to further the national interest.[5] Moreover, the ability of Ecuador's president to proclaim an extractive project to be in the national interest could not be limited by the designations of land as 'protected' or 'Indigenous'.[6]

The government's pursuit of the national interest through the encouragement of extractive projects nonetheless generated fierce political contestation. Although informed by the country's experience with large-scale oil extraction – which dates to the 1960s – large mining projects constituted a relatively recent development.[7] To its advocates and its critics, the prospective place of an extractive economy in the re-founded state made disputes regarding the operation 'of democratic sovereignty' unavoidable. Both sides presented particular 'figures of "the people"' whose interests they claimed to represent.[8] In the years after the 2008 Constitution was approved by public referendum, mining became, according to political scientist Thea Riofrancos, 'an urgent site of statecraft and resistance'.[9]

This article explores how one of the features of this Constitution – the recognition of nature as a legal rightsholder – has impacted these efforts by Indigenous and non-Indigenous groups to rebalance the relationship between their communities and institutions of centralized political power. These groups hope to broaden the range of possible power relations between themselves and those institutions that claim to speak for the ostensible interests of the nation-state. Ecuador's 2008 Constitution provided the first constitutional recognition of rights of nature (RoN). It equated nature with Pachamama, an Andean 'benevolent fertility goddess' that encompasses all things and gives to humans all things necessary for life.[10] The constitution recognizes nature's rights to 'the maintenance and regeneration of its life cycles, structure, functions and

3. Timothy Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (Verso 2011) 9.
4. ibid 136.
5. Arsel, Hogenboom and Pellegrini (n 2) 884.
6. Ximena S Warnaars, 'Territorial Transformations in El Pangui, Ecuador: Understanding How Mining Conflict Affects Territorial Dynamics, Social Mobilization, and Daily Life' in Anthony Bebbington and Jeffrey Bury (eds), *Subterranean Struggles: New Dynamics of Mining, Oil, and Gas in Latin America* (University of Texas Press 2013) 149, 160.
7. Thea Riofrancos, *Resource Radicals: From Petro-Nationalism to Post-Extractivism in Ecuador* (Duke UP 2020) 55.
8. ibid 24.
9. ibid 56.
10. Andreas Gutmann, 'Pachamama as a Legal Person? Rights of Nature and Indigenous Thought in Ecuador' in Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature: A Re-Examination* (Routledge 2021) 36, 40.

evolutionary processes'.[11] More than a dozen countries have extended rights to nature in a variety of ways in the years since Ecuador's 2008 Constitution was ratified. In order to examine how rights of nature might facilitate communities' challenges to the legal supremacy and political hegemony of a majoritarian and utilitarian national interest, this article examines legal decisions that have addressed efforts by Indigenous and local communities in the Andes and Amazon regions of Ecuador to contest the approval of extractive projects with high environmental impacts on the lands in which they live. Scrutiny of these legal disputes over development illustrates how the conjunctions between RoN and other rights-claims have challenged forms of knowledge creation and use that have supported the primacy of the national interest.

More specifically, this article argues that in the court decisions reviewed below, recognition of RoN and their protean relationship with humans' rights claims has facilitated local activists' interruption of three key dynamics. These dynamics tend to contribute to the construction of a national interest that is powerful because of its capacity to set the boundaries and conditions for objectivity. The first dynamic is the presumption of co-existence of Indigenous lifeways with extractive projects. The second is the displacement of conflicts from the specific spatial context in which they occur, in favour of state prerogatives of territorial classification. Facilitating this second dynamic is a third: the treatment of differentiated actors as equivalent stakeholders.

These dynamics frame understandings of extractive projects. They facilitate the abstraction of conflict and make it more challenging for local actors to intervene in and disrupt the rationalizing project that promises to produce an identifiable national interest. They are crucial circuits in the transformation of a mining conflict into something that can both stabilize the notion of a national interest and be evaluated by it. Furthermore, they are transnational, contributing to the epistemological management of extractive activity and conflict surrounding such projects in other states as well. For example, scholars studying relations between the Swedish state, mining corporations and the Indigenous Sámi people have identified how the institutionalized presumption of co-existence, the construction of ostensibly equivalent stakeholders and the abstraction of the mining conflict from space and time have limited the opportunities of the Sámi to influence extractive development.[12]

Examination of RoN's influence in the course of these dynamics entails consideration of its embeddedness within political relations. There are political implications to the recognition of nature's rights. As Mihnea Tănăsescu has pointed out, the obligations

11. Ecuador Constitution 2008, title II art 71, Constitute Project <https://www.constituteproject.org/constitution/Ecuador_2008.pdf>.

12. Kaisa Raitio, Christina Allard and Rebecca Lawrence, 'Mineral Extraction in Swedish Sápmi: The Regulatory Gap between Sami Rights and Sweden's Mining Permitting Practices' (2020) 99 Land Use Policy 1, 9 <https://doi.org/10.1016/j.landusepol.2020.105001> accessed 3 October 2023; Rebecca Lawrence and Rasmus Kløcker Larsen, 'The Politics of Planning: Assessing the Impacts of Mining on Sami Lands' (2017) 38 Third World Quarterly 1164, 1171–72; Rasmus Kløcker Larsen and Kaisa Raitio, 'Implementing the State Duty to Consult in Land and Resource Decisions: Perspectives from Sami Communities and Swedish State Officials' (2019) 10 Arctic Review on Law and Politics 4, 14–15; Carl Österlin and Kaisa Raitio, 'Fragmented Landscapes and Planscapes—The Double Pressure of Increasing Natural Resource Exploitation on Indigenous Sámi Lands in Northern Sweden' (2020) 9 Resources 1, 4 <https://doi.org/10.3390/resources9090104> accessed 3 October 2023; Sofia Persson, David Harnesk and Mine Islar, 'What Local People? Examining the Gállok Mining Conflict and the Rights of the Sámi Population in Terms of Justice and Power' (2017) 86 Geoforum 20, 23.

that nature's rights impose may serve as a platform for altering the 'political relations between different groups of people (some of whom might understand themselves as people of particular lands)'.[13] This parenthetical comment likely gestures to the rights recognitions for nature that have involved relations between states and marginalized Indigenous communities.[14] While rights of nature have been intertwined with contests over Indigenous peoples' rights and their endeavours to gain a greater degree of self-determination, non-Indigenous people have also sought to make the recognition of nature's rights serve as a device to alter communities' relations within larger political structures. For instance, the passage of the public referendum in Toledo, Ohio, that recognized Lake Erie as a legal person in 2019 reflected, in Elizabeth MacPherson's estimation, an aspiration 'to upset the *status quo*' borne of disappointment with previous measures.[15] A common goal of Indigenous and non-Indigenous actors engaged in disparate RoN-related efforts in different parts of the world is the creation of 'more radical forms of participation in processes formerly monopolized by state environmental ministries'.[16] Indeed, in the decade following the recognition of nature's rights in Ecuador's Constitution, Indigenous and non-Indigenous activists have worked together at times in what Teresa A. Velásquez has termed 'an unprecedented alliance' to further their complementary projects of recalibrating the relations of power that connect communities and political centres.[17]

Locating nature's rights within a broader field of political contestation highlights the significance of relations between the rights of nature and the rights of humans. Eduardo Gudynas, for his part, has pointed out that the recognition of Pachamama's presence in specific places deeply shaped by human action can facilitate the meshing of the rights of nature 'with policy and management options' generated by an evaluation of the environment from the perspective of human rights.[18] Such linkages are not merely theoretical. Ignoring their mutual association occludes the full significance of nature's rights, as Erin Fitz-Henry has pointed out. Rights of nature acquired weight precisely through their implication in such expansive political debates occasioned by conflicts over extraction.[19] Particular conflicts over mining and water resources in the highland Azuay province have provided the impetus for these rights to join with 'broader social demands for both economic redistribution and democratic representation' in the procedures used to come to decisions about land use.[20] When RoN is only one component of a more extensive opposition 'to hegemonic modes

13. Mihnea Tănăsescu, 'The Rights of Nature as Politics' in Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature: A Re-examination* (Routledge 2021) 69.
14. Mihnea Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9 Transnational Environmental Law 429, 446.
15. Elizabeth MacPherson, 'The (Human) Rights of Nature: A Comparative Study of Emerging Legal Rights for Rivers and Lakes in The United States of America and Mexico' (2021) 31 Duke Environment Law & Policy Forum 327, 376.
16. Erin Fitz-Henry, 'Distribution Without Representation? Beyond the Rights of Nature in the Southern Ecuadorian Highlands' (2021) 12 Journal of Human Rights and the Environment 5, 20.
17. Teresa A Velásquez, *Pachamama Politics: Campesino Water Defenders and the Anti-Mining Movement in Andean Ecuador* (University of Arizona Press 2022) 194.
18. Eduardo Gudynas, 'Deep Ecologies in the Highlands and Rainforests: Finding Naess in the Neotropics' (2017) 21 Worldviews 262, 267–68.
19. Fitz-Henry (n 16) 8.
20. ibid 7.

of development', Fitz-Henry argues, they become more effective than if deployed by themselves.[21]

The remainder of this article explores how the mutual involvement of RoN and other rights claims in such oppositional efforts has facilitated challenges to the patterns of knowledge creation and use that have supported the primacy of the national interest. It first examines the contested meaning of the national interest in Ecuador since the Constituent Assembly of 2007 was convened. The resulting Constitution's commitments to plurinationalism and to communities' right to be consulted about development plans shaped these conflicts. The meanings of these commitments were at the centre of the appellate and Constitutional Court decisions, which the article next considers. These decisions stemmed from two cases originating in the Andes and the Amazon. The non-Indigenous and Indigenous plaintiffs in these cases each appealed to the defense of nature's rights alongside other rights claims. These different rights claims did not sit inertly alongside each other but rather enlisted and drew upon one another for meaning and application, pre-empting previous patterns of knowledge creation and use supportive of the national interest. This section additionally demonstrates the centrality of these patterns to other, non-juridical arenas of extractive activities and epistemological conflict.

2 POST-NEOLIBERAL POLITICAL AND ONTOLOGICAL CHALLENGES TO THE NATIONAL INTEREST

Conflict over state assertions of the national interest has been magnified by the 2008 Constitution's stated commitments to realize the principles of *buen vivir* and plurinationalism. As scholars have observed, these aspirations are inextricable from one another. They provide a crucial context for understanding how rights of nature may impact the hegemony of the national interest. The Constitution's Article 6 refers to the country as 'plurinational'. Additionally, as Article 257 sets out, plurinational precepts should constitute the foundation for governance of both Indigenous and Afro-Ecuadorian territories. The meaning of the term and the consequences of the constitutional recognition it received have not been settled. Indeed, the Constitution marks a waypoint in a long-running effort by Indigenous activists to transform their relationship to the state. Since at least the 1980s, they have called for the state recognition of some form of territorial autonomy.[22] Suzana Sawyer argues that through mass demonstrations and protests during the last decade of the 20th century, '[I]ndigenous politics exposed the fictiveness of nationhood in Ecuador'.[23]

Through different streams of activism, various Indigenous activists have defined what a plurinational approach has demanded of the state. In their negotiations with representatives of President Durán Ballén's government over its proposed neoliberal Agrarian Development Law in the 1990s, Indigenous leaders emphasized that the uniformity of liberal law was insufficient to deal justly with the country's diverse citizenry. Nina Pacari, the prominent head of territorial concerns for the Confederation

21. ibid 18.
22. Amalia Pallares, 'Contesting Membership: Citizenship, Pluriculturalism(s), and the Contemporary Indigenous Movement' in A Kim Clark and Marc Becker (eds), *Highland Indians and the State in Modern Ecuador* (University of Pittsburgh Press 2007) 139, 149.
23. Suzana Sawyer, *Crude Chronicles: Indigenous Politics, Multinational Oil, and Neoliberalism in Ecuador* (Duke UP 2004) 219.

of Indigenous Nationalities of Ecuador (CONAIE), held that legal measures had to address the distinctions between different people.[24] Another Indigenous representative involved in negotiations with the government noted that it was absurd to treat Indigenous territory 'under ancestral management' in the same way as land owned under other arrangements. He critiqued what he saw as the implied single model of commercialized agriculture at the bottom of the standardized law.[25] Amalia Pallares has pointed out that even before the 2008 Constitution's ratification, the long-term advocacy of Indigenous organizations had tasked the state with the responsibility of managing the relationship 'between the universal and the particular'.[26] These antecedents helped to structure expectations of Indigenous organizations regarding the meaning of plurinationalism. From this history came critiques of extractivism voiced during and after the drafting of the 2008 Constitution that undermined notions of 'the unity of state, nation, territory and resources', from which ideas of national interest draw legitimacy.[27]

Prominent amongst these critiques was the demand that the Constitution provide communities with the power to veto development projects in their territories. Previous efforts at Indigenous political mobilizations and protests had compelled President Rodrigo Borja's government by 1992 to bestow land titles to Indigenous peoples in the Amazonian province of Pastaza.[28] The total recognized area ended up being only slightly more than one-half of the total area covered by Indigenous peoples' claims.[29] Holding the title presented an obstacle to the further colonization of Indigenous lands. However, as Sawyer notes, Indigenous authority as titleholders did not extend to the 'subterranean resources', over which the state claimed sole control.[30]

Authority over subterranean resources was central to conflict over the meaning of plurinationalism. The right of Indigenous and non-Indigenous communities to be consulted and to have the opportunity to provide consent to development projects that would affect their land threatened the prerogatives generally accorded to the national interest. A prospective local veto right had the potential to 'multiply the sites of democratic decision-making and disrupt the monolithic nation presupposed by state actors who claim to represent the public good'.[31] Although the president of the Constituent Assembly responsible for the drafting of the Constitution supported providing local communities, Indigenous or otherwise, with this power of refusal, the assembly as a whole chose not to do so. Those who opposed this prospective investment of power in communities warned of an imperiled ability to implement policies in accordance with a discernable majoritarian national interest; a 'tyranny of the minority' would reign should the right of prior consultation include veto power.[32] In addition, the 2008 Constitution explicitly named 'energy resources' as being amongst the spheres that the state claimed fell within its exclusive purview.[33]

24. ibid 186.
25. ibid 190.
26. Pallares (n 22) 154.
27. Riofrancos (n 7) 6.
28. Sawyer (n 23) 41.
29. ibid 50–51.
30. ibid 54.
31. Riofrancos (n 7) 117.
32. ibid 84.
33. Ecuador Constitution (n 11) title V art 261.

Two modes of consultation, neither with a binding veto, are identified by the Constitution. The first is accorded to Indigenous and Afro-Ecuadorian communities in Article 57 of the 2008 document, providing for free, prior and informed consultation. The second, which identifies the state's duty to consult with any community regarding a decision with environmental impact, is specified in Article 398. Although these requirements are distinct, court decisions have pulled them closer together. The Constitutional Court drew equivalences and minimized differences between these articles in its *Los Cedros* decision issued in late 2021, declaring that the consultation referred to in Article 57 provided the model for the form of consultation applied to general populations potentially affected by development projects. Referring to its own decision in a previous case, the Court indicated that to the extent it was possible, consultation had to reflect features of 'the right to prior consultation with indigenous peoples, such as the prior nature and good faith'.[34] Furthermore, according to the Court, each form demanded 'constant and free access to information about projects, social participation in decision-making, consultation and the application of standards' supportive of the realization of rights.[35] In its recent *Cofán* decision, the Constitutional Court additionally noted that the state's consulting responsibility found in Article 398 also applied to Indigenous communities.[36]

The lack of a veto power attached to the consultation process harmonized with the preference of the Correa administration. In defending its controversial 2009 Mining Law, the government's legal representative counterposed the 'general interests' with 'particular interests'. The administration cited the Constitution's provision that the state was the owner of the nation's non-renewable resources as the justification for its defense of the former.[37] The absence of a veto also broadened the opportunity for Correa's government and its supporters to reframe the meaning of plurinationalism so that it not only did not threaten the primacy of the national interest but instead provided further justification for it. While noting that the country was plurinational, in 2010, Correa simultaneously insisted that calls from Indigenous and *campesino* (peasant farmer) communities for influence over water policy constituted risks to a consolidated national community.[38] His administration claimed that plurinationalism protected the 'right of "all" Ecuadorians to defend water'.[39] This contention supported the government's assertion of control over water distribution, which it sought in its proposed controversial Water Law. Indigenous rights claims were reduced to 'private-sector interests' that had to give way to the public, national interest shepherded by the state government.[40]

Even if consultation itself does not possess the power to pause a development project undertaken in the national interest, the violation of the right to be consulted has produced that outcome. Since 2018, Ecuador's courts have ordered the suspension of several extractive projects in the Amazon and southern Andes regions that had proceeded without proper protection of the right to consultation. Nevertheless, as suggested by scholars Diana Vela-Almeida and Nataly Torres, it would be mistaken to interpret

34. *Municipality of Cotacachi v Ministry of Environment* (*Los Cedros* case), Judgment No 1149-19-JP/21, 10 November 2021, Constitutional Court of Ecuador, 69, para 300.
35. ibid 62, para 270.
36. *Criollo Quenama v Perez Garcia* (*A'I Cofán* case), Judgment No 273-19-JP/22, 27 January 2022, Constitutional Court of Ecuador, 21, para 83.
37. Riofrancos (n 7) 134.
38. Velásquez (n 17) 127.
39. ibid 115.
40. ibid 127.

recent legal successes of these projects' opponents as evidence that adequate measures for popular participation were being realized.[41] Rather, these successes resulted from a confluence of events, including the presence of a 'period of transition and institutional instability' in the period after Moreno succeeded Correa as president.[42] Furthermore, as the authors point out, courts have more readily acknowledged violations of the right to consultation than violations of rights to or for nature.[43] James Nickel, however, points out that rights are rarely equally well-implemented; a better implemented one, such as the right to consultation, may buttress the recognition of a less well-implemented one, such as nature's right to the 'regeneration of its life cycles'.[44]

Indeed, other scholars have insisted that recent court decisions critical of the government's efforts to carry out its duty to consult with Indigenous peoples could have more significant consequences. In one of the decisions cited by Vela-Almeida and Torres, the *Waorani* decision of 2019, a Provincial Court held that the government's process of consultation that had preceded its distribution of land rights to oil companies had failed to respect Indigenous communities' leadership and established processes of arriving at a resolution.[45] The case illustrated how Indigenous efforts to enforce plurinational and intercultural protections have, in Rosemary Coombe and David Jefferson's estimation, successfully prompted courts to provide 'nations, nationalities, peoples and communities enhanced jurisdiction over extractivist development'.[46] Their analysis suggests that considering the right to consultation in isolation from other claims and assertions regarding autonomy and self-determination might understate the significance of this right.

Coombe and Jefferson concur with Miriam Lang that, absent a commitment to plurinationalistic practices and policies, there can be no effective *buen vivir*.[47] This second counterpoint to the hegemony of the national interest is, as these and other scholars have pointed out, closely linked to the first.[48] *Buen vivir*, which appears in Title II, Chapter 2 of the 2008 Constitution as an organizing principle for the identification and enforcement of human rights, is a translation into Spanish and into principles of state governance of the Indigenous Kichwa term *sumak kawsay.* As Arturo Escobar has observed, the Kichwa term is 'based on ontological assumptions in which all beings exist always in relation and never as "objects" or individuals'.[49] It is the condition of those relationships, in the interpretation of Lang, that *sumak kawsay* pays attention to primarily. Relationships are evaluated by a rubric of mutuality, whether

41. Diana Vela-Almeida and Nataly Torres, 'Consultation in Ecuador: Institutional Fragility and Participation in National Extractive Policy' (2021) 48 Latin American Perspectives 172, 184.
42. ibid 178.
43. ibid 182.
44. James W Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 Human Rights Quarterly 984, 994.
45. Rosemary J Coombe and David J Jefferson, 'Posthuman Rights Struggles and Environmentalisms from Below in the Political Ontologies of Ecuador and Colombia' (2021) 12 Journal of Human Rights and the Environment 177, 186.
46. ibid 187.
47. ibid 187.
48. Miriam Lang, 'Buen Vivir as a Territorial Practice. Building a More Just and Sustainable Life through Interculturality' (2022) 17 Sustainability Science 1287, 1288; Vela-Almeida and Torres (n 41) 175.
49. Arturo Escobar, 'Latin America at a Crossroads: Alternative Modernizations, Post-Liberalism, or Post-Development?' (2010) 24 Cultural Studies 1, 39.

they be between or beyond humans alone.[50] As has been the case with plurinationalism, this focus on reciprocity has drawn attention to communities as sites where these relationships reside, while implying the need to alter relations between them and the state. Such a connotation has sometimes gone unacknowledged. Amplifying criticisms levelled at work on Indigenous ontologies, Erin Fitz-Henry has criticized scholars' habits of lifting those ontologies out of their contextual conditions, thereby partitioning them from the 'demands on the settler state in which they are embedded'.[51] Eduardo Gudynas has made a similar point specifically in regard to South America, pointing out that 'Andean – Amazonian biocentrisms' were never not political.[52] The ontologies that recognize the existence of what Arturo Escobar has memorably called a 'pluriverse' of many worlds and the plurinationalism advocated by Indigenous activists substantiate one another.[53]

The 2008 Constitution's inclusion of *buen vivir* and rights of nature raised the possibility of what Marisol de la Cadena has termed a 'rupture of modern politics'.[54] However, expectations for such a cleavage have not been met. The salience of involvement in and attachment to localities nonetheless poses a challenge to the primacy of the national interest. Local actors have created opportunities to implement principles of *sumak kawsay*. Though locally based, such initiatives have at times been able to use state institutions for their own ends. For instance, upon winning the Cayambe county mayoral election in 2014, the Indigenous kayambi mayor, Guilddermo Churuchumbi and his government attempted to implement *sumak kawsay* at the local level, which involved altering 'relations between (local) state and society, the relations between humans and nature, and the relations between humans'.[55] Though the local government was an institution 'of the modern/colonial state', Churuchumbi's administration nonetheless attempted to remake the interactions between it and its constituents. The administration, for instance, introduced 'assembly-based forms of decision making'.[56] The government also brought to urban areas the collective labour requirement known as the *minga*, associated with Indigenous communities in rural areas.[57] The new arrangements changed the relations of liberal representation expected to obtain between populations and their elected officials. Municipal council members, though elected, were not 'authorities who take decisions on behalf of the people'. Instead, they were only able to confirm conclusions previously popularly arrived at and to facilitate their implementation.[58] Lang's analysis demonstrates how, in this instance, it was possible to initiate 'different logics of doing government' from within current governing structures.[59] The result was a wider distribution of power than has been common in

50. Lang (n 48) 1291.
51. Erin Fitz-Henry, 'Multi-Species Justice: A View from the Rights of Nature Movement' (2022) 31 Environmental Politics 338, 347.
52. Gudynas (n 18) 269.
53. Escobar (n 49) 9.
54. Marisol de la Cadena, 'Indigenous Cosmopolitics in the Andes: Conceptual Reflections beyond "Politics"' (2010) 25 Cultural Anthropology 334, 336.
55. Lang (n 48) 1289.
56. ibid 1291.
57. ibid 1292.
58. Miriam Lang, 'Plurinationality as a Strategy: Transforming Local State Institutions toward *buen vivir*' in Elise Klein and Carlos Eduardo Morreo (eds) *Postdevelopment in Practice: Alternatives, Economies, Ontologies* (Routledge 2019) 176, 185.
59. ibid 176.

representative arrangements.[60] The distinct coherence of governance of *sumak kawsay* effectively valued broad popular access and a blurred relationship between the governed and those charged with governing. These logics are contrary to both the reliance on expert-led abstraction characteristic of notions of the national interest and the removal of popular influence from its discussion.

Scholars argue that statewide institutions, which most often have the ability to make claims about the national interest, have been able to avoid such implications of *sumak kawsay* for governance. Lang has pointed out that at the state level, processes and institutions are liable to nullify the priorities of *buen vivir*. Efforts to implement these values at large scales had necessarily to rely on existing institutions. This reliance allowed seemingly 'neutral institutional mechanisms, procedures and regulations' to exert power themselves and to redirect momentum initially aimed toward the reconsideration of the goal of development.[61] Philip Altmann has called attention to the unwillingness of decolonial thinkers to let go of 'the structural, abstract thinking and open up to the radically local, communitarian, and relational'. The failure to foreground the local can leave intact the modernist ontology's emblematic tendency to work with and towards dis-embeddedness.[62]

The scale at which the state operates lends itself to not singularities but rather to uniformities and abstract thinking that relies on and yields particular rationalities. The processes that impel large-scale political collectives towards 'the production of the common good' honour such values as 'productive efficiency, economic growth, even sustainable development'. These are meant to draw from a single nature the requirements to satisfy a single humanity.[63] Thus, to engage at this level is to allow the plausibility of the notion of the national interest. In contrast, both plurinationalism and *buen vivir* highlight the importance of localities and concrete places rather than the abstraction necessary for both the scale of the state and the pretension of the national interest.

The Rights of Nature cases examined below can be understood as conflicts between these approaches to governance. The defendants, including extractive companies and the government authorities supporting them, spoke in a discourse of abstraction on terms set forth by the state. In contrast, the Indigenous and non-Indigenous plaintiffs centered local interdependencies between humans and non-humans, seeking to disrupt the state-authored process of abstraction with which defendants were associated.

3 CONTESTING THE NATIONAL INTEREST THROUGH LEGAL ACTION

The two cases reviewed in this section reflect these unsettled conflicts regarding the meaning of commitments to plurinationalism, consultation and the ability of communities to influence development in places with which they maintain conscious relationships. They demonstrate ways in which connections between human rights and rights of nature have been marshalled by both Indigenous and non-Indigenous actors to influence the course of these conflicts. Each case was the result of efforts by local actors to contest decisions and plans for extractive projects. Each disputed decision

60. Lang (n 48) 1293.
61. Lang (n 58) 176.
62. Philipp Altmann, '*Sumak Kawsay* as an Element of Local Decolonization in Ecuador' (2017) 52 Latin American Research Review 749, 752.
63. De la Cadena (n 54) 350.

was taken by the Ministry of Environment and Water, which was renamed the Ministry of Environment, Water and Ecological Transition (MAATE) in 2021, to grant mining concessions to particular mining companies. One set of appellate and Constitutional court decisions resulted from the ministry's grant to Empresa Nacional Minera ENAMI EP in 2017. The concession encompassed more than half of the Los Cedros reserve, an Area of Forest and Protected Vegetation that borders a protected ecological reserve.[64] The reserve, located in the northwestern region of the country, contains close to 180 species that have the status of endangered, vulnerable or near-threatened.[65] In 2018, opponents, who included the mayor of Cotacachi canton and the prosecutor for the municipality of Cotacachi, sued to halt the mining company's exploration of the concession. The other appellate and Constitutional Court decisions examined below stemmed from the opposition of the Indigenous A'i Cofán de Sinangoe people to the mining work taking place on the Aguarico River in their territory, which is located in the Sucumbios province in the Amazon. The A'i Cofán also sued to stop these mining efforts in 2018.[66]

Each of these legal actions folded allegations of violations of nature's rights together with allegations of infringement of other rights. The contested projects were undertaken in the name of the national interest, which has often trumped Indigenous, environmental and even individual rights claims. The court decisions in favour of the claimants, however, challenged the supremacy of the national interest. The cases thus demonstrate a significant shift in the valence of rights of nature. As Craig Kauffman and Pamela Martin have pointed out, initially, court decisions largely favoured the Correa government's priorities and the state's 'instrumental' application of nature's rights.[67] This was the case until 2019, when cases in defense of nature's rights brought by civil society against government action began to find success at the Court, a result that the authors largely attribute to the greater autonomy of the Court from the government after the transition from Correa to Moreno.[68] As the following cases illustrate, this recent shift in the orientation of the Constitutional Court towards nature's rights has simultaneously entailed the court's reconsideration of several power dynamics that have supported the supremacy of the national interest.

Mining conflicts have often been understood in terms that favour the national interest. The presumption that a project does not necessarily do irrevocable harm to the communities where projects are located has contributed to this tilted terrain. As Velásquez points out, disagreement regarding the scope and nature of a project's impact is common. How companies and states approach these questions represents a way of managing and framing the discussion of co-existence.[69] The production of knowledge is, therefore, essential and contested. The claims of co-existence made by companies and authorities in charge of granting permits for mining projects in Ecuador have been criticized by opponents.

The framing of an extractive project's impact shapes perceptions and assertions of co-existence between populations and the project. Narrow framing was a strategy

64. Bitty A Roy et al, 'New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador' (2018) 11 Tropical Conservation Science 1, 4.
65. ibid 7.
66. Vela-Almeida and Torres (n 41) 180.
67. Craig M Kauffman and Pamela L Martin, *The Politics of the Rights of Nature: Strategies for Building a More Sustainable Future* (MIT Press 2021) 86.
68. ibid 103–04.
69. Velásquez (n 17) 35.

that petroleum companies had employed going back to the 1990s. After securing an oil concession on Kichwa land in the province of Pastaza in the eastern region of the Amazon in 1988, the Arlington Richmond Company (ARCO) confined its interest and responsibility for the environment to a 'narrow bio-geo-technical' comprehension. This approach appeared to partition and make possible the marginalization of the 'social' impacts of its project as being distinct from the 'environmental' consequences.[70] Such studies objectified and isolated the environment as something to be studied; the possible impact that the extraction work would have on the maintenance of the relationships people maintained with the environment was outside the bounds of study. The company set about, in Sawyer's estimation, to simultaneously mask and augment its impact beyond the narrowly conceived environment on which it preferred to focus. In conjunction with government policies and through deploying 'a liberal rhetoric of work and progress', ARCO encouraged the availability and adoption of 'new senses of self, property, and resource use'.[71] From the point of view of those who adopted this emergent liberal self-regard, the project's perceived impact might itself resemble that which the company preferred.

Mining companies have similarly sought to manage what counts as impact and how to measure it. In the early 2000s – a period of neoliberal ascendancy – the mining company IAMGOLD, seeking to satisfy a requirement mandated by '"green" mining reforms enacted during this period, performed examinations of the Irquis River. This process sought to examine the condition of the water in order to resolve questions of environmental status, studies that left aside 'the political dimensions of watershed management'.[72] This insistence on tackling only the technical question acted to de-politicize mining decisions and favoured those who could most readily bring technical expertise to bear. This limitation also represented a way to create conditions favourable to claims of co-existence.

As Velásquez points out, the company study's detection of faecal matter in the Irquis River helped to justify the mining company's presence and to minimize its impact. The detection showed the antecedence of the river's contamination while inviting collaboration with the community on the company's terms.[73] The presence of waste in the water was a consequence of human habiting and dairying activities.[74] In 2005, in order to question the company's mastery of scientific knowledge and its assessment of the pre-existing environmental health of the river, people involved in managing local water systems paid for their own examination of the health of the river's water. The findings of the latter study found evidence of lead, a finding that changed the contentious discussion of the river's allegedly pre-contaminated water. By bringing this study's findings to authorities, the company and its allies in the government were compelled to show that it was not responsible for the presence of lead.[75] Velásquez notes that these differing investigations generated opportunities to dispute understandings of both what a contaminant was and where the power to establish the hazards presented by mining resided.[76]

70. Sawyer (n 23) 146.
71. ibid 86.
72. Velásquez (n 17) 28.
73. ibid 38.
74. ibid 37.
75. ibid 40–41.
76. ibid 52.

Disagreements over the application of technical knowledge to claims of co-existence have continued since the establishment of the 2008 Constitution. This ongoing conflict has been reflected in contests, for example, over the controversial Cordillera del Cóndor mine, which began production in 2019, nearly 20 years after mineral exploration began. A coalition drawn from 'peasants, ecologists and [Indigenous] Shuar communities' opposed the project and helped to produce knowledge based on participants' efforts to observe and assess the health of their environment. The ability to produce 'knowledge otherwise' countered company's estimations of environmental impact. According to Christina Espinosa, the awareness of local residents of the alterations in the colour and condition of the community's water prompted the populace's distrust of the mining company's 'official techno-scientific assessments', which had minimized the environmental consequences of extractive activities. At another extractive project in Azuay, inhabitants' awareness of the spaces that watersheds and mining concessions shared similarly reinforced local community concerns over the impact of the mining project's need for water on their own access to that necessity. Such forms of knowledge have opposed the understanding produced by mining project defenders that has aimed to minimize repercussions to the environment.[77] These examples highlight how the burden to demonstrate harm and consider possibilities for co-existence fell on inhabitants who could and did mobilize the technical knowledge necessary to counter the technical claims of extractive companies and state authorities.

RoN was one of several rights and state obligations that helped to reshape legal debates over co-existence and harm. Responding to these features of the 2008 Constitution, the Constitutional Court has strengthened the requirement that company and state authorities should demonstrate that the ecosystem would not be harmed by their work prior to work being allowed to commence. Appearing before an appellate court in a 2019 case regarding disputed mining projects in Los Cedros Protected Forest, plaintiffs seeking to stop the projects and the amicus briefs supporting them held that 'the burden of proof as to the absence of potential or actual damage shall fall on the manager of the activity or the defendant' based on the precautionary principle.[78] Nataly Yépez, representing the Ecumenical Human Rights Commission, noted that Article 397 of the constitution mandates this responsibility. The article in question permits claimants to call upon authorities to enact 'precautionary measures that would make it possible to end the threat'.[79] Consequently, Yépez held, the need to demonstrate the lack of injury or its possibility rested with the administrator of the contested action. It was not up to the plaintiff to show harm; the defendant had to show its absence.[80] Though it found that the right of prior consultation had been infringed upon, the appellate court in *Los Cedros* doubted the force of the reversal of the burden of proof and refused 'to adopt preventive or precautionary decisions' absent 'the certainty of risk or environmental damage'.[81]

77. Cristina Espinosa, 'Reducing Power Disparities in Large-Scale Mining Governance through Counter-expertise: A Synthesis of Case Studies from Ecuador' (2022) 9 The Extractive Industries and Society 1, 6 <https://doi.org/10.1016/j.exis.2021.101000> accessed 4 October 2023.
78. *Cevallos Moreno v Ministry of Environment* (*Los Cedros* case), Judgment No 10332-2018-00640, 19 June 2019, Appealed Constitutional Case, Court of the Multicompetent Chamber of the Provincial Court of Justice of Imbabura (Ecuador) 32.
79. Ecuador Constitution (n 11) title VII art 397.
80. *Los Cedros* case, Provincial Court of Justice of Imbabura (n 78) 82.
81. ibid 92.

The Constitutional Court contravened the appellate court in this case by suggesting in response to such doubts that there was not a presumption of co-existence between mining projects and established community land use, but rather the opposite. Instead of dissenters having to demonstrate projects' incompatibility with other uses of the land, the Court pointed out that it is up to the initiators of projects and the permitting agencies to demonstrate that there is in fact no conflict. For those raising concerns about the project, the absence of proof is not fatal to their case.[82] In *Los Cedros*, the Court affirmed the responsibility of the state to initiate protective action 'when there is no scientific certainty about the impact or damage that any action or omission entails for nature, the environment or human health'.[83] Defendants in the case had not shown 'any specific and substantiated scientific information' that mining would not produce irreparable injury to the forest.[84] During the appeal stage of the *A'I Cofán* case reviewed below, a delegate from the ombudsman's office also referred to this reversal of the burden of proof in their testimony. They noted that the Constitution's Article 86 requires the public authority to refute the claims of contamination of the Aguarico River made by the plaintiff. It was not up to the plaintiff to demonstrate that such had occurred.[85]

In its *Los Cedros* decision, the Constitutional Court understood the requirements necessary to satisfy the precautionary principle by reference to nature's rights. The examinations that the high court considered necessary in *Los Cedros* to rigorously assess the forest's biodiversity and potential harms to nature's rights had not been conducted.[86] This informational absence amounted to 'scientific uncertainty'.[87] Uncertainty also emerged from a recognition of the complexity of particular ecosystems and, therefore, the complexity of protecting their rights to their life cycles. The forest was fragile and biodiverse: it was an ecosystem 'of great complexity'. The Court stressed its interest in 'the medium and long term' consequences, extending the timescale and, therefore, the demands on knowledge production for those wishing to prove the feasibility of co-existence.[88]

This balance of the burden of proof, as a key feature of the precautionary principle, operates in conjunction with and consideration of RoN and environmental consultation. According to the plaintiffs in the *Los Cedros* appeal, the burden of proof should be applied to specific protections given to nature in the Constitution. They argued that the National Environmental Authority was obligated to confirm that 'the mining activities are sustainable and do not affect the rights of nature'. If the Authority did not demonstrate this absence of threat, the plaintiffs argued that the court was obligated to apply the precautionary principle identified in Article 396 of the Constitution, which states that '[i]n 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 protective measures'.[89] The Constitutional Court agreed that the precautionary

82. Craig M Kauffman and Pamela L Martin, 'How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms' (2023) 12 Transnational Environmental Law 366, 394–95.
83. *Los Cedros* case, Constitutional Court (n 34) 16, para 62.3.
84. ibid 32, para 130.
85. *Criollo Quenama v Perez Garcia* (*A'I Cofan* case), Judgment No 21333-2018-00266, 16 November 2018, Appealed Constitutional Case, Single Chamber of the Provincial Court of Sucumbios (Ecuador) 23.
86. *Los Cedros* case, Constitutional Court (n 34) 35, para 143.
87. ibid 54, para 228.
88. ibid 31, para 126.
89. *Los Cedros* case, Provincial Court of Justice of Imbabura (n 78) 15.

principle should apply to the specific constitutional protections afforded to nature, noting that 'there is a reasonable probability' of 'disruption in the life cycles' of the ecosystem which would outpace the ability of the area to 'absorb the impact' of the changes that mining would generate.[90] It thus sought to protect the ecosystem with reference to the rights of nature enumerated in the Constitution's Article 71.

The precautionary principle also generated further connections with other rights, such as the right to consultation. Consultation allows for the organization, aggregation and expression of fears of impact and harm. The plaintiffs in *Los Cedros* asserted that the purpose of the precautionary principle was to empower inhabitants' apprehensions regarding the prospective consequences of projects. Moreover, concerns 'that the alleged damage may occur' may not need to be voiced in the technical vocabulary and need not rely on 'scientific reports' for proof.[91] This claimed connection between the precautionary principle and the right to consultation was explicitly acknowledged by the Constitutional Court in its *Los Cedros* decision. The court identified a dynamic whereby consultation may generate justification for precaution: 'the adoption of effective protective measures may arise from the consultation, or it may help to identify risks'. Therefore, as the court pointed out, consultation can in some instances support the precautionary principle's use.[92] This line of reasoning opens an avenue for effective influence of consultation, as a negative opinion resulting from consultation is not itself sufficient to stop a proposed project.

The Constitutional Court in *Los Cedros* also suggested that uncertainty could trigger or necessitate consultation. The court drew out connections 'between participation, environmental consultation and the precautionary principle'. This connection was found in uncertainty. Uncertainty regarding the prospect of an effect on the environment would trigger state responsibility to engage the populace of the potentially impacted territory in the consultation process.[93] Such admitted lack of mastery would change the character of the consultation from the state providing information to the state admitting its uncertainties regarding the land over which it ostensibly holds sovereign power.

The precautionary principle, as these examples suggest, can draw rights of nature and rights of consultation together. While the amicus briefs supporting the defendants in the *Los Cedros* case emphasized how RoN conflicted with human rights, the Constitutional Court's decision posited their interdependence.[94] However, what is striking is not so much these rights' interdependence because they can be variously framed as constitutive or antagonistic to one another, with many gradations within those designations as well.[95] Instead, what is significant is how the conjunctions that the plaintiffs insisted upon and the Ecuadorian Constitutional Court accepted in this instance weakened the previously hegemonic logic of demonstrating harm in favour of the logic of demonstrating a lack of harm. In the process, the Court effectively shifted the significance of uncertainty and anchored it in nature's rights.

90. *Los Cedros* case, Constitutional Court (n 34) 52, para 220.
91. *Los Cedros* case, Provincial Court of Justice of Imbabura (n 78) 21.
92. *Los Cedros* case, Constitutional Court (n 34) 28, para 113.
93. ibid 63, paras 275–76.
94. *Los Cedros* case, Provincial Court of Justice of Imbabura (n 78) 55.
95. Daniel P Corrigan, 'Human Rights and Rights of Nature: Prospects for a Linkage Argument' in Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature: A Re-examination* (Routledge 2021) 101, 107.

A second dynamic of the mining permit process that facilitates the production of an ostensibly calculable national interest is generated by the practices of standardization and classification of land either implemented or supported by the state. This dynamic facilitates the abstraction of conflicts involving mining projects and Indigenous land use from their holistic context – and also has antecedents in the history of oil extraction. Though successfully pressured to recognize Indigenous peoples' communal titles to their lands in 1992, in constructing 'new juridical segments', the state did not take into account the external and internal boundaries which Indigenous peoples themselves perceived in their lands. Government partitions clashed with Indigenous communities' established modes of relating to both authority and land. This practice aimed to accomplish the abstraction of land from its context, where 'specific histories, mythologies, identities, and rights' permeated features of the natural landscape. By ignoring inhabitants' relationships with their surroundings, in Sawyer's analysis, the divisions 'scientifically dehumanized Amazonian worlds'.[96] The new organization of space spurred rival approaches to the use of territory held by inhabitants and emerged as a competitor to established formations of space for inhabitants' orientations, affiliations and sense of self.[97]

Several factors have worked to produce legal opportunities to intervene in this process of abstraction. First, the more-than-human figure of Pachamama has been appropriated to give prominence to local conflicts. Second, this invocation has helped to connect seemingly discrete places separated by physical distance from one another. Third, opponents of mining projects in court have successfully argued that the state's designation and sorting of spaces according to the level of protection from economic development to afforded them should not be the paramount consideration for determining judgment. What should matter, they argued, are the ecological fragility and biodiversity of particular places that are simultaneously rightsholders.

Some scholars have voiced concern that the Ecuadorian RoN Constitutional provision, with its aspiration to cover all the territory within that country's borders, reflects the 'western obsession with totality'.[98] This preoccupation would de-emphasize the relationships that peoples have with specific lands and ecosystems.[99] Designating all of nature as a rightsholder, Daniel P. Corrigan has objected, 'may be too abstract'.[100] Nonetheless, particular communities have emphasized their connections to and relationships with particular land by appropriating and anchoring Pachamama. Pachamama, non-Indigenous farmers in the Andean highlands have claimed, can be found in particular threatened places – in what is termed a 'strategic use of Andean cosmologies' by Velásquez. These farmers opposed planned water legislation that would permit mining operations in the shared drainage basin, which was under their collective administration, which they referred to 'as the embodiment of the Pachamama'.[101]

Furthermore, this invocation of Pachamama facilitated the creation of coalitions by extending the perceivable scale of effect. Water law opponents were able to knit together a coalition that extended their reach to city-dwellers who previously had been mostly unresponsive to the apprehensions voiced by peasants in the midst of

96. Sawyer (n 23) 51.
97. ibid 75–76.
98. Tănăsescu (n 14) 450.
99. ibid 451.
100. Corrigan (n 95) 103.
101. Teresa A Velásquez, 'Tracing the Political Life of Kimsacocha: Conflicts over Water and Mining in Ecuador's Southern Andes' (2018) 45 Latin American Perspectives 154, 156.

discussions of the proposed mining law.[102] Indigenous cosmologies and slogans that reflected Andean and Catholic values such as 'Water Is Life' helped to shift the scale of the protest and spread the campaign for a water management committee that would ensure local influence and plurinational representation.[103] Legal arguments have also sought to undermine the abstraction of conflict by demonstrating connections between discrete spaces. In an amicus brief supporting the plaintiffs in the *Los Cedros* appeal, biologist Elisa Levy Ortiz pointed out that as a result of their ability to absorb and redistribute moisture, montane forests such as Los Cedros are crucial to the 'water cycle over a much larger area than they cover'.[104] In a further expression of interdependence, Ortiz also emphasized that agriculture-producing places depend upon the continued existence of such woodlands, which produce precipitation, and that urban populations in their turn depend upon that agricultural production.[105] Such arguments disrupted the notion of discrete, disconnected places amenable to state categorization and differentiation.

Challenges to the state prerogative of creating categories of land deserving of greater or lesser degrees of protection have also disrupted the abstraction of space. At the appeal stage of *Los Cedros*, defendants, including the state agency MAATE, relied on state-provided definitions to argue about what measures were required and what activities were permitted. They argued that as a 'protected forest', Los Cedros did not qualify for the higher level of protection of a 'protected area', meaning that mining activities were authorized to take place there as long as companies followed the appropriate steps and permitting requirements.[106]

Amicus briefs supporting the plaintiffs disputed this conception of the power of state designations. Nataly Yépez of the Ecumenical Human Rights Commission denied that state designations should matter, illustrating how the rights of nature could trump state designations and legally mandated practices of environmental protection.[107] Yépez forwarded the claim that those rights – properly applied to every ecosystem without exception – rendered this argument about state designation obsolete.[108] Such arguments did not convince the appellate court, which agreed with the defendants that the state-decided designation of the forest in fact did matter for determining the level of protection the forest received: industrial mining could occur in Los Cedros due to its exclusion from 'the system of protected areas'.[109]

This support for the supremacy of state designations was reversed by the Constitutional Court. The Constitutional Court pointed out that while the state's designation of Los Cedros as a protected forest did not rule out mining, what in fact mattered was the place itself, in light of both human rights and the rights of nature, in determining the permissibility of mining: 'the elements that make up its ecosystem have characteristics that, by virtue of the rights of nature and the right to water, do not allow impact activities such as mining extraction'.[110] According to the Court, recognition of fragility could supplant state designations and the requirements they

102. ibid 164.
103. ibid 161–64.
104. *Los Cedros* case, Provincial Court of Justice of Imbabura (n 78) 52.
105. ibid 81.
106. ibid 23.
107. Kauffman and Martin (n 82) 381.
108. *Los Cedros* case, Provincial Court of Justice of Imbabura (n 78) 82.
109. ibid 92.
110. *Los Cedros* case, Constitutional Court (n 34) 55, para 238.

necessitated: even preliminary steps in the mining process categorized 'as having a low environmental impact' would likely be much more consequential when they occur 'in fragile ecosystems'.[111] The national scope of the constitutional recognition of rights of nature overrode the state-defined designations of areas: it did not make sense for those rights, or for that matter the human environmental rights recognized in the same Constitution to pertain to just 'protected areas'.[112]

In the *Los Cedros* case, then, nature's rights contributed to the displacement of the power of the state to classify lands based on particular levels of protection. The recent *Cofán* case similarly undermined the prerogatives of powerful state and corporate entities to define the spaces in which Indigenous communities are accorded ownership and influence. The A'i Cofán de Sinangoe community asked that the 32 pending mining concessions and 20 concessions already granted by the Ministry of Mining be cancelled due to the lack of prior consultation as well as the violation of nature's rights and human rights to water, health and food, and to a healthy environment.[113] In arguing that there was no requirement to consult with the Cofán community in this case, the Ministry of Environment held that the more than 35,000 hectares claimed by the community as ancestral rights was more than twice as large as the 15,000 hectares that the state held was the correct area.[114] As the Constitutional Court critically observed in its decision ratifying the appellate court's judgment, 'the defendants base their actions exclusively on the territorial delimitation made by the State'.[115]

Appearing for the plaintiff, the anthropologist Roberto Esteban Narvaez Collaguazo defended the relatively more expansive claim of ancestral territory, calling the state-imposed limits on those territorial claims 'arbitrary' and arguing that they were not based on the Cofán's relationships with and use of the land.[116] Another advocate for the plaintiff, Digna Maria Villegas, further argued that the state itself recognized 'the right to possession of community lands to the peoples and nationalities with the understanding that not all the lands where the peoples live have been adjudicated nor do they constitute formal title of ownership'.[117] Villegas also referred to Article 1 of the International Labour Organization's Convention 169, which maintains that claims of ownership to land by peoples who have 'traditionally had access for traditional and subsistence activities' should be recognized.[118] Villegas additionally noted that an accord between the Ministry of Environment and the Cofán Indigenous Federation identified the Cofán as 'natural guardians' of the area, making them more than simply one among many stakeholders.[119] In agreeing with the plaintiffs, the appellate court's decision consequently worked to undermine the prerogative of the state to define the proper territory of the Cofán. The decision declared that it was incorrect to suppose 'that the State granted territory to the Cofán': their presence in their claimed area

111. ibid 33, para 134.
112. ibid 35, para 142.
113. *Criollo Quenama v Perez Garcia* (*A'I Cofán* case), Judgment No 21333-2018-00266, 3 August 2018, Multicompetent Judicial Unit, Canton of Gonzalo Pizarro, Sucumbios Province, 30.
114. ibid 33.
115. *A'I Cofán* case, Constitutional Court (n 36) 20, para 77.
116. *A'I Cofán* case, Multicompetent Judicial Unit, Canton of Gonzalo Pizarro (n 113) 14.
117. *A'I Cofán* case, Provincial Court of Sucumbios (n 85) 25.
118. ibid 26.
119. ibid 25.

preceded Ecuador's establishment. An imposition of arbitrary limits would sentence the people 'to a cultural imprisonment' that threatened their existence.[120]

Testimony for the plaintiffs in part emphasized the value of the territory. It was both unique and inextricably connected with other places. This connection weighed against the state practice of conceiving of land as discrete and classifiable parcels. Biologist Nicolas Mainville referred to the ecological reserve Cayambe Coca as 'the most biodiverse' in the country on account of the tremendous variety of plant life there. Many plant and animal species were exclusive to this area. The value of the land, however, also partly lay in its contribution to environmental vitality beyond its borders; for instance, Mainville pointed out that Amazonian fish spawned in the headwaters of its Aguarico River.[121]

A third dynamic supportive of the national interest is the treatment of local populations as stakeholders with a status equal to other interested stakeholders, allowing the state to render an 'objective' judgment. This dynamic too has precedent in previous practices of extractive companies that had assumed some governing responsibilities during the neoliberal era in Ecuador.[122] In attempting to gain legitimacy for its drilling work in the Amazon region of Pastaza in the 1990s, ARCO invited a broad range of individuals and organizations, including Indigenous associations, to a conference. ARCO considered its gesture to demonstrate the company's fairness and inclusivity. The very breadth of the list of invitees, however, suggested a sort of equivalency between them. ARCO sought to create conditions conductive to 'comparability among entities, asserting equality in stature, and erasing the play of power and history'. In Sawyer's analysis, ARCO's inclusion of itself as one among many invitees on the roster was illustrative of this dynamic, since the company assumed the role of recipient in a disavowal of its own specific agency.[123] Stakeholders arrived at the table ostensibly whole and equal to one another, but this framing obscured not only power inequalities between groups but also the company's role in fomenting conflict among Indigenous peoples, such as by helping to establish an Indigenous organization to rival the established Organization of Indigenous Peoples of Pastaza (OPIP), which had taken a critical and oppositional position to oil extraction. The company invited both OPIP as well as the organization it was complicit in forming. It was, therefore, able to construct its own preferred conditions for stakeholder recognition.

In continuing negotiations with OPIP representatives, ARCO agreed to the formation of an Environmental Technical Committee peopled by members of the company itself, the state-owned oil enterprise Petroecuador, and the Indigenous Front – a coalition of Indigenous peoples residing in Pastaza. According to Sawyer, the committee had the potential to inaugurate an innovative mode of interchange between 'corporate capital and local peoples'.[124] The committee's explicit mandate was to create and oversee an evaluation of the environmental consequences of the company's preliminary activities. Were operations to proceed in the future, the committee would be responsible for crafting plans for environmental study and management.[125] Two of the key assumptions that informed the organization of this committee were faulty, according

120. ibid 28.
121. *A'I Cofán* case, Multicompetent Judicial Unit, Canton of Gonzalo Pizarro (n 113) 14.
122. Sawyer (n 23) 59.
123. ibid 72.
124. ibid 137.
125. ibid 138.

to Sawyer. The first was the concept of equal 'stakeholders' and the second was the way in which the company framed the committee's purpose – to converse about areas of 'common concern'. The implied equality of stakeholders was not matched in reality: the various actors were 'not equal, autonomous, free individuals', but instead possessed differing amounts of 'access to political, economic, and cultural capital'. Furthermore, the 'stakeholders' had dramatically different visions of what the committee should do. Indigenous activists who had sought to restrain company activities asserted that it needed to do more than monitor and minimize the environmental damage its work caused. It should additionally support different visions of advancement by underwriting trial programs on Pastaza's Indigenous lands, a suggestion that the company vehemently opposed.[126]

In this example analysed by Sawyer, stakeholder language narrowed the consideration of differences in power and position among those gathered by the company. As noted earlier, testimony for the plaintiffs in the *Cofán* case emphasized the value of the territory to biodiversity. Their testimony also focused on the relationships the Cofán maintained with the land. Anthropologist Roberto Esteban Narvaez Collaguazo argued that the Cofán people maintained 'a strong relationship with the river which is the fundamental basis of several activities'. The river was 'integrated to the national territory' of the Cofán.[127] At the appeal stage, the ombudsman's delegate called the Court's attention to the anthropologist's description of this close connection between the people and the territory, calling it an 'indissoluble relationship'. Furthermore, the delegate noted that the relationship had enabled the persistence 'of both the community and the area itself'. This long-standing reciprocity – lasting centuries – suggested that each was essential to the enjoyment of the other's rights. It was for this relationship that the plaintiffs were seeking protection.[128]

The appellate court judge, in finding for the plaintiff, also cited this threat to 'the intimate relationship of this human group [the Cofán] with nature'. This was a threatened co-existence that had developed not between rights bearer and a passive environment but rather between two rightsholders.[129] The decision maintained that concern for nature encompasses both utilitarian and intrinsic values: human needs for a healthy environment that can contribute to an existence of well-being and dignity should be put 'in relation to' other earth inhabitants that lead 'existences deserving of protection in themselves'. The judge noted that the recognition of this connection was an acknowledgement more broadly of the 'interdependence that connects us to all living beings on earth'.[130] In ordering that concessions be cancelled, the judge later referred to the active measures that the Cofán had taken to manage the land, making clear that bonds of reciprocity and interdependence did not imply passivity or the existence of some sort of state of nature. What was being impacted was the ability of the Cofán to 'conserve and promote their biodiversity and natural environment management practices'.[131] That impact was what triggered the requirement of consultation. The decision here underlined the point made by Corrigan that biodiversity could couple human rights to nature's rights.[132]

126. ibid 146.
127. *A'I Cofán* case, Multicompetent Judicial Unit, Canton of Gonzalo Pizarro (n 113) 13–14.
128. *A'I Cofán* case, Provincial Court of Sucumbios (n 85) 23.
129. ibid 29.
130. ibid 28.
131. ibid 30.
132. Corrigan (n 95) 112.

The acknowledgement that the specific relationship between humans and non-human nature that had developed in this specific place required protection created obstacles to the categorization of the Cofán as being merely one among multiple stakeholders.[133] The appellate court in *Cofán* recognized the particularity of the Cofán – their irreducibility to stakeholders on that specific land. The court suggested that the state institutions defending the issuance of the preliminary mining concessions had failed to seriously consider 'the cultural and ethnic pluralism' on which the Ecuadorian Constitution rests.[134]

Correspondingly, the appellate court also refused to settle upon a common denominator that would make for comparable, commensurable objects. To do so would be to fit Indigenous activities into a mould made with extractive activities in mind in order to weigh claims against one another. The appellate court in Ecuador instead insisted that how the Cofán lived represented a value that could not be justly translated into economic benefit. The decision was harshly critical of what it saw as the readiness of extraction advocates to ignore the interdependence of humans and 'all the phenomena of nature' and to put the 'economic interest of a few over the universal interest'.[135] Furthermore, the appellate court termed the 'customs and ancestral ways of life' to be nothing less than an 'irreplaceable wealth' for the state, again suggesting a rejection of states' assertions of their ability to make all things commensurable under the banner of a standardizing value. This interdependence was a value 'irreplaceable' by substitution.[136] The co-existence that the Cofán had created with their surrounding ecosystem was something 'that only they can fully value'.[137] This court was unwilling to attempt to create a common denominator with which these interests or land uses could be compared. These uses were incommensurate.

This judicial evaluation suggested that non-binding consultation offered inadequate protection of the Cofán's relationship to their land. In its review of the case, the Constitutional Court heightened requirements for the state to overcome its failure to secure an Indigenous community's consent to an extractive project. It did so in accordance with the standards identified by the Inter-American Court on Human Rights.[138] The court emphasized that Indigenous nationalities' lack of a veto power did not mean that the state's obligations ended with its '*compliance with formal procedure*s'.[139] For consultation to be in 'good faith', for example, there had to be a genuine possibility for the people being consulted to alter or convince the state to call off project plans.[140]

While the court could not declare a veto power that was not constitutionally present, it did suggest that the invocation of the national interest was not necessarily sufficient to overrule a negative outcome in the consultation. Perhaps aspirationally, the court characterized situations where projects went ahead despite this negative outcome as being 'exceptional'.[141] Moreover, projects could not move forward, regardless of any 'exceptional circumstances', if they were to cause 'sacrifices that are disproportionate to the rights' of Indigenous nationalities, communities, and nature'. Significantly, the

133. *A'I Cofán* case, Provincial Court of Sucumbios (n 85) 29.
134. ibid 28.
135. ibid 27.
136. ibid 31.
137. ibid 29.
138. *A'I Cofán* case, Constitutional Court (n 36) 30, para 116.
139. ibid 31, para 118 (emphasis in original).
140. ibid 31, para 117.
141. ibid 32, para 123.

court appeared to refer to the reliance on the rationale of the national interest here, noting that this prohibition was the case when a project 'may pursue the satisfaction of legitimate purposes in a democratic society'.[142] This decision also tied the rights of humans and non-humans more closely together, with the right to consultation supporting the rights of nature. The proposals for extraction that form the basis for consultation with affected communities had to incorporate plans for the protection of nature.[143] This incorporation is one way in which the state could methodically fulfill its obligations to the rights of both humans and nature.[144]

4 CONCLUSION

Prompted by various litigants, courts in Ecuador have perceived the rights of nature to combine with not only the human rights to consultation and prior consent but also with the precautionary principle.[145] This contingent, dynamic conjunction has played a role in generating opportunities for opponents of mining projects in Ecuador to intervene in the production of a calculable national interest whose disposition is up to the sovereign state. In doing so, this interplay has the potential to broaden the range of power relations possible between localities and the national state. It may enable what Tănăsescu has argued that rights of nature are really concerned with: the formation of 'new relations through which environmental concerns may be differently expressed'.[146]

As the court cases reviewed in this article illustrate, the conjunction of nature's rights and human rights can disrupt three dynamics that have shaped how knowledge has been created and used. These dynamics have supported the primacy of the national interest. The first is the presumption of co-existence between extractive projects and inhabitants' land uses. The second is the removal of conflicts from the specific spatial context in which they occur and the abstraction of conflict according to state categorization. The third is the use of a standard measure with which to judge the national interest. The linkages drawn between rights of nature and humans – that there was a presumption of harm to nature as a rightsholder, that the complexity and fragility of the ecosystem took precedence over state-generated categories of protection, and that the different forms of worth at stake are incommensurable – facilitated changes in these dynamics. These shifts can not only facilitate the ability of communities to question the primacy of the national interest but also potentially construct a different relationship between them and the political centre.

So far in Ecuador, nature's rights and its conjunction with claims based on other rights have largely played a reactive rather than pro-active role in the formulation of plans for future land use.[147] The Constitutional Court's *Los Cedros* decision, however, suggests the possibility of the development of a more proactive application of nature's rights. Particularly, the court required that the MAATE should 'promote' a collaborative management plan. The mandated plan brings into focus what Lang has noted about the potential of the 'recognition and incorporation of cultural/epistemological/

142. ibid 33, para 125.
143. ibid 35–36, para 136.
144. ibid 35, para 135.
145. Kauffman and Martin (n 82) 367.
146. Mihnea Tănăsescu, *Understanding the Rights of Nature: A Critical Introduction* (Transcript 2022) 17.
147. Kauffman and Martin (n 67) 15.

ontological diversity' that is central to *buen vivir* to reconstruct contemporary relations rather than 'being only an action to protect or conserve' traditions.[148] This plan would involve inhabitants of communities adjacent to Los Cedros, Provincial and Cantonal government authorities, and scientists who have made studies of Los Cedros. The process would be overseen by the Ombudsman's office, which had filed an amicus brief in support of the plaintiffs. Significantly, one goal of this plan is the 'promotion of economic activities for the surrounding communities that are in harmony with the rights of nature in accordance with the parameters of this judgment'.[149] The court thus moved away from static protection and towards integrating rights of nature into a plan for the future. The management plan suggests the possibility for the local population's influence at the planning stage, rather than just the possibility of attempting to use courts to exert some influence over projects already formulated. Recognizing the dignity of non-human entities draws entities like ecosystems 'into the scope of justice'. This entails not only the protection of those places but also, as Christine Winter points out, the responsibility to 'uphold, support and enhance the flourishing and right to be integrally whole of all elements within the environment'.[150] This further responsibility also implies a proactive approach – such as the one mandated by the Constitutional Court.

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148. Lang (n 58) 186.
149. *Los Cedros* case, Constitutional Court (n 34) 80, para 344, e–f.
150. Christine Winter, 'Decolonising Dignity for Inclusive Democracy' (2019) 28 Environmental Values 9, 26.