The Ecuadorian Constitution from a Philosophical Perspective: Rights of Nature or Development of Non-Renewable Natural Resources?

Prof. Kirsten Anker
McGill Faculty of Law

Word Count: 14.562

Due: August 18, 2015 3 PM
TABLE OF CONTENTS

INTRODUCTION

1. HISTORICAL BACKGROUND AND THE ECUADORIAN DEVELOPMENT MODEL
   1.1. The road to the twenty-first-century socialism and the emergence of a “Green Constitution” in Ecuador.
   1.2. The Ecuadorian Economy: An oil dependent country that protects the rights of nature

2. ECUADORIAN CONSTITUTIONAL FRAMEWORK & THE SUMAK KAWSAY
   2.1. Understanding the Sumak Kawsay and identifying its link with nature and economic development.
   2.2. The rights of nature and the Ecuadorian development model within the Constitution.
   2.3. A philosophical justification for the successful cohabitation of the rights of nature and the development of natural resources.

3. CORPORATE SOCIAL RESPONSIBILITY AS THE EXTERNAL COMPLEMENT OF THE CONSTITUTION
   3.1. The importance of regulating extractive industries.
   3.2. The emergence of Corporate Social Responsibility and its definition.
   3.4. Corporate Social Responsibility and its link with the Constitution.

4. THE ISHPINGO TAMBOCOCHA TIPUTINI PROJECT

CONCLUSION

BIBLIOGRAPHY
INTRODUCTION

We are environmentalists, but not in the same sense as those naïve ones that consider human beings to be slightly less than an obstruction for nature. For us, the human being is not the only important thing but we cannot be beggars sitting on a sack of gold. – Rafael Correa

Few would have predicted that Ecuador would be the first country in the world to incorporate into its Constitutional text an indigenous philosophy that recognizes the rights of nature alongside other fundamental rights and, simultaneously, “the right to administer, regulate, monitor and manage strategic sectors such as energy in all its forms and non-renewable natural resources.” Certainly, a developing and oil-dependent country was not the likeliest candidate to propose such an innovative development model to the world. However, the Ecuadorian Constitution of 2008 (hereinafter “Constitution”) turned that apparent contradiction into reality.

When Rafael Correa struck a Constituent Assembly in 2007 to draft the Constitution, he promoted the idea that the main cause of the social, political and economic crises throughout Ecuadorian history was foreign intervention, governments and corporations that irresponsibly exploited local resources without any consideration for the environment and the society. Consequently, the proposal sought to draw from the local indigenous Andean culture, and incorporate part of its ancestral knowledge into the Constitution through the principle of Sumak Kawsay, which is a foundational term of the Andean indigenous cosmology. This was a way of recognizing the “age-old roots” of Ecuador, as the new Preamble puts it, “wrought by women and men from various

---

1 Mr. Rafael Correa Delgado is the Constitutional President of the Republic of Ecuador for the presidential period 2013-2017. He was re-elected on the presidential elections held on February 2013.

2 Constitución de la República del Ecuador (Constitution of the Republic of Ecuador), Registro Oficial (Official Gazette) No.449 (October 20 2008) ar 313 [Constitution of Ecuador].
peoples” and “the right of people to resist and free themselves from all forms of oppression.” The incorporation of the Sumak Kawsay was not only considered as an antidote to foreign intervention but also as an alternative model of development.

Consequently, the Constitution was drafted with the indigenous Quechua principle of Sumak Kawsay as a central, defining feature. The Preamble of the Constitution “celebrates Pacha Mama (Mother Earth) calling upon the wisdom of all the cultures that enrich the society” and defines Sumak Kawsay as a “new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living.” Sumak Kawsay, in its most literal interpretation, means a good life or good living and is deployed throughout the entire Constitution but, specifically, in Title II, “Rights”, that is devoted to the recognition of fundamental rights. This title recognizes, among others rights, rights to “the good way of living” in chapter two, the rights of communities, peoples and nations including the right to free prior and informed consent consultation in chapter four, the rights of freedom including the right to a healthy environment in chapter six, and most importantly the rights of nature in chapter seven.

As principle of balance, the principle of Sumak Kawsay seeks a peaceful cohabitation between the rights of nature and the right to development natural resources. On the one hand, the Constitution incorporates the rights of nature and establishes that “nature shall be the subject of those rights that the Constitution recognizes for it” in order to guarantee “its existence and the maintenance and regeneration of its life cycles,

---

3 Constitution of Ecuador, supra note 2 at Preamble.
4 Ibid art 416 (8).
5 Ibid at Preamble.
6 Ibid at Preamble.
7 Ibid art 10.
structure, function and evolutionary processes.”\(^8\) It is important to highlight that Ecuador was the first country in the world to recognize the rights of nature. Christopher Stone asserts in his book “Should Tress Have Standing” that the fact of recognizing the rights of nature means that “first, [nature] can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it.”\(^9\) On the other hand, it delineates regulatory and environmental provisions for extractive industries, mentioning that “non-renewable natural resources are part of the unalienable heritage of the State and are not subject to a statute of limitations. In the management of these resources the State shall minimize the negative impacts of an environmental, cultural, social and economic, nature.”\(^10\) However, environmentalist groups together with indigenous people such as the Confederation of Indigenous Nationalities of Ecuador\(^11\) and NGOs believe that the new development model adopted by the State as a consequence of the incorporation of Sumak Kawsay embodies a fundamental and unworkable contradiction between two sets of rights.

We need to dig deeper into the theoretical framework to understand this debate. A classical/western model of development – anthropocentrism – is a human- centered system of values that suggests that human beings are the central entities in the world and that they have absolute dominion over other living species. The roots of anthropocentrism are in the Creation story told in the Bible, in which humans are created in the image of God and are instructed to “have dominion” over all other living

---

\(^8\) *Constitution of Ecuador, supra note 2* art 71.  
\(^9\) Christopher Stone, *Should trees have standing?: Law, Morality, and the Environment* (New York: Oxford University Press, 2010) at 11 [*Should trees have standing?*].  
\(^10\) *Constitution of Ecuador, supra note 2* art 317.  
\(^11\) Confederación de Nacionalidades Indígenas del Ecuador CONAIE (Confederation of Indigenous Nationalities of Ecuador) is Ecuador’s largest indigenous organization.
creatures. Anthropocentrism holds that human life has intrinsic value while other entities such as animals or plants are resources that may be exploited for the benefit of humankind. Nevertheless, the incorporation of the Sumak Kawsay in the Constitution challenges this western conception of development through the recognition of the rights of nature. As a result, the Constitution of 2008 shifted from a classical model of development towards a more ecocentric model of development that I identify as “environmental pragmatism”.

This shift has not been well understood by some scholars and environmental activists due to the characteristics of extractive industries and the lack of understanding of the scope of Sumak Kawsay. It results difficult to conceive a “development model” that guarantees the rights of nature in a non-renewable resources dependent country. Thus, this paper will attempt to address this concerns about Constitution through philosophical lenses and show the compatibility of the rights of nature and the development of natural resources within the Constitutional text. For that purpose, it is important to have a clear understanding of the anthropocentric model of development in order to show that the Ecuadorian model does not fit into this category due to the recognition of the rights of nature. This recognition triggered a transition towards a more ecocentric model.

A theoretical justification for the cohabitation of the rights of nature and the development of natural resources - environmental pragmatism - does not make it successful in practical terms. Therefore, it is necessary to complement this theoretical

---

approach with a practical justification using the business concept of Corporate Social Responsibility (hereinafter “CSR”). CSR is the complement that the Constitution needs in order to fulfill the Constitutional provisions in relation to the rights of nature when developing extractive industries. CSR has been defined as “the continuing commitment by business to behave ethically and contribute to economic developing while improving the quality of life of the workforce and their families as well as of the local community and society at large.” This definition shows that corporate stakeholders within extractive industries are also aligned - at least in theory/on paper – with the purpose of the Constitution in terms of environmental preservation, community participation and social welfare. Including the concept that nature has rights that must be protected with legal mechanisms to support it, introduces a counterpoint to the right to exploit that can lead to more responsible development.

This paper is structured as follows. Firstly, it will detail the historical, economic and political history of Ecuador in the twentieth-century in order to have a practical sense of the anthropocentric model of development and provide the reasons that triggered the drafting of a new version of the Constitution. Secondly, it will explore the scope of the indigenous principle of Sumak Kawsay and provide a close reading of the current text of the Constitution in order to identify the provisions related to the rights of nature and the development of natural resources. This section will explore the transition from an anthropocentric model of development towards environmental pragmatism as a way of justifying the successful cohabitation of the rights of nature and the development of natural resources within the Constitutional text. Thirdly, it will use the business concept of CSR to argue for the ethical, legal and moral duty of corporations of being a

---

complement of the Constitutional provisions in order to respect the rights of nature for a more responsible development. This section will also provide some examples of international standards of CSR. Finally, the last section will present the Yasuni ITT case to illustrate the limitations, the factors that contribute to successful implementation, and argue that the Constitutional text is role model of rights recognition seeking responsible development.

By implementing the principle of Sumak Kawsay into its Constitution, Ecuador might have provided the world, especially developing countries, with a vital theoretical framework to emulate in navigating social and political conflicts. In finding new ways from old, the Ecuadorian constitution offers the promise of regeneration and renewal of an ecologically balance environment in order to forge a sustainable model and reach a “good way of living.” In order for this to work in practice, it will be necessary to see the process of adaptation of the Constitutional provisions and the ability of the stakeholders to fulfill the Constitutional provisions.

1. Historical Background and the Ecuadorian Development Model

This section will provide an overview of some historical, economic and political reasons triggers for the drafting of the new Constitution of 2008; it will also show some facts about Ecuadorian oil dependency and emphasize the lack of effective regulatory provisions within extractive industries prior to the drafting of the Constitution. Ecuador needed a Constitution based on its historical roots but also one that allowed economic
growth to overcome poverty and social inequality. Finally, being a country that is incredibly diverse, both environmentally and culturally, as well as being oil-dependent, Ecuador required norms that could be applied in practical terms.

1.1. The Road to the Twenty-First-Century Socialism and the Emergence of a “Green Constitution” in Ecuador

From 1976 to 1990, fifteen countries in Latin America moved from authoritarian regimes towards democratic regimes following severe social, economic and political crises. These crises were characterized by human rights abuses and State interference in the private sector. In Ecuador, the last dictatorial regime lasted for four years (1972-1976). The period after the fall of that regime is considered the starting point of the “Democratic Era” in Ecuador because, in 1978, it was the first country in the region to hold democratic elections.

Following this democratic transition, and influenced by growing resentment toward market-oriented policies across Latin America, a twenty-first-century version of socialism emerged. It explicitly rejected the Soviet model of socialism, seeing it not only as dictatorial and ultimately economically unviable but also as rooted in a historical context that was no longer relevant. Consequently, twenty-first-century socialism strives to build on the mistakes of both neoliberalism and twentieth-century-socialism, seeking to increase state regulation and power, but in a democratic manner.

that allocates resources more efficiently and does not stifle innovation or personal choice.\textsuperscript{15}

Unfortunately, from 1996 to 2006, the political scene was characterized by an extended period of economic and social instability that seriously damaged the legitimacy of democratic institutions.\textsuperscript{16} Ecuador had 7 different presidents in those 10 years. Following the uncertainty that this engendered, a presidential candidate in the 2006 election, Rafael Correa, used this crisis of representation to his advantage in his campaign, promising to end the reign of traditional elites that were held responsible for Ecuador’s political and economic crisis.\textsuperscript{17} In particular, the way on how it was conceived the relationship between civil society, indigenous people and nature was said to have allowed foreign extractive corporations to adopt their own self-regulation resulting in detrimental outcomes for Ecuador.

Correa’s political discourse blamed former Ecuadorian Governments for allowing a system in which the main aim was economic profit to thrive. He argued that former Presidents literally “sold the country” to international corporations signing unfair agreements for the exploitation of non-renewable natural resources. According to him, this was due to a capitalistic way of thinking where the most important thing is the accumulation of wealth without any consideration for nature.\textsuperscript{18} This political argument

\textsuperscript{16} Ibid at 8.
\textsuperscript{17} Ibid at 9.
\textsuperscript{18} Antonio Pigrau Solé, Pueblos Indigenas, diversidad cultural y justicia ambiental Un estudio de las nuevas Constituciones de Ecuador y Bolivia (Indigenous People Cultural Diversity An Study of the new Constitutions of Ecuador and Bolivia) (Valencia: Tirant Lo Blanch, 2013) at 525-556 [Pueblos Indigenas, diversidad cultural y justicia ambiental].
could also be viewed from a philosophical perspective by understanding the western conception of development that, at that time, was dominant around the world. The traditional western conception of development – anthropocentrism - states that humans have dominion over nature and are “the sole bearers of intrinsic value and all other living things are there to sustain humanity’s existence.”

Therefore, shortly after taking office, Correa signed an executive decree mandating a national vote on a proposal to hold elections for a constituent assembly, a process deemed necessary to radically redistribute political power, put an end to the economic elites, dismantle neoliberal economic reforms and restore the regulatory functions of the state. The idea was to re-found the country through a Constitution that fundamentally extended the promise of equity, rights and representation to all sectors of society, a platform that harnessed significant popular support.

The new Constitution aimed at breaking with the past and creating a social pact sometimes labeled “Sumak Kawsay Socialism”. The symbolic usage of the Sumak Kawsay concept on behalf of the Ecuadorian government thus signifies that ancient indigenous traditions are applied in new contexts to create alternatives to global capitalism. A cultural conceptual platform and profile was consequently created, merging the Sumak Kawsay proposal with the political banner of the 21st Socialism.

According to John Bellamy Foster, “Socialism cannot make any real headway unless it

---

20 Twenty-First Century Socialism? The Elusive Search for a Post-Neoliberal Development Model in Bolivia and Ecuador, supra note 15 at 9.
21 Ibid at 12.
is ecological in the sense of promoting a sustainable relation to the environment, since any other approach threatens the well-being and even survival of the human species, along with all other species with which we share the earth.»

1.2. THE ECUADORIAN ECONOMY: AN OIL DEPENDENT COUNTRY THAT PROTECTS THE RIGHTS OF NATURE

The modern constitutional reforms of Correa cannot be adequately understood without an awareness of the history of foreign involvement in the extraction of natural resources in Ecuador. The country’s economy has been dependent on oil since 1921 when Anglo, a British company, established the first productive oil well off the coast of Ecuador. In the early years of production, oil exports were marginal due to a lack of technical capabilities, and exploration itself was geographically concentrated on the coast where Anglo had engaged in exploration and drilling. However, by the 1970s, several foreign corporations such as Shell, Standard Oil, California Oil, Tennessee and the Western Geophysical Co. were exploring more than 5 million hectares of oil concessions in the Ecuadorian Amazon rainforest. In 1967, Standard Oil transferred part of its concessions to the consortium Texaco-Gulf, which founded the first commercial oil well in the Amazon region. Once Texaco-Gulf announced this discovery to the international oil market, several international oil corporations became interested in exploration of the Amazon region of Ecuador, and, in 1968, the Ecuadorian State issued more than 4

---

26 Ibid at 18.
million hectares in oil concessions to seven different international companies. By 1971, Ecuador exported around 308,283 barrels of oil daily. \(^{27}\)

Nevertheless, a weak constitutional framework and a culture of cronyism meant that these foreign concerns had very little oversight. The trend of foreign corporate self-regulation continued throughout the 1980s and 90s and allowed those foreign companies to set their own agendas in terms of regulatory and environmental standards. The fact that they operated in Ecuador with limited knowledge about extractive industries facilitated company’s taking some advantages for their benefit. \(^{28}\) For instance, a lack of appropriate environmental regulations meant that obsolete and non-environmentally friendly methods were still in use by a consortium of oil companies led by Texaco, leading to the Chevron disaster in which toxic waste was dumped in the Ecuadorian Amazon rainforest. \(^{29}\)

Consequently, lack of experience, weak institutions, and the absence of international obligations resulted in low barriers to entry for corporations. There were few compliance requirements for business practices in hydrocarbons exploitation. \(^{30}\) Ecuador was deeply dependent on external technological expertise for the design and construction of infrastructure that would facilitate the extraction, transportation, and sale of Ecuadorian oil on the global market. \(^{31}\) This provided considerable advantages for the transnational companies over the State during what was initially referred to as the

\(^{27}\) Reporte Periódico de la Empresa Pública de Hidrocarburos del Ecuador, supra note 25 at 20.


\(^{29}\) Nathalie Cely, “Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned From the Chevron Case” (2014) XXIV:353 DELPF 353 [Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned From the Chevron Case].

\(^{30}\) Ibid at 355.

“oil boom”. These legal, technical, operational, and administrative advantages made the country totally dependent on large transnational corporations; Ecuador needed their technical expertise and subsequent transfer of knowledge.  

According to Nathalie Cely, former Ecuadorian Minister of Production Employment and Competitiveness, an inadequate institutional framework, a chain of errors in economic policy decision-making during this critical period –starting from the discovery of oil in the country through the new millennium- left Ecuador in a precarious and unsustainable position by the early 2000s. For instance, she notes, “poverty was high, infrastructure was old and failing, and the social safety net for citizens was minimal and not inclusive.” As a result, “Ecuador needed drastic structural changes, strong leadership, and deep and sustainable reform to modernize its economy, society and democracy.” Correa stepped into the political vacuum created by this economic uncertainty.

The promise of the new political and economic model proposed by Correa has set the country on a path “towards a stronger and more inclusive democracy with solid institutions that protect all, including vulnerable indigenous populations and the natural environment.” According to Celi, “where the international community has lagged, Ecuador has stepped up and created its own framework to protect the environment and set standards for responsible and sustainable economic growth and development.” In other words, the Constitution provides the possibility of a harmonious cohabitation

32 Reporte Periódico de la Empresa Pública de Hidrocarburos del Ecuador, supra note 25 at 355.
33 Ibid at 357.
34 Ibid at 356.
35 Ibid at 356.
36 Ibid at 357.
37 Ibid at 357.
between the preservation of the environment and the development of extractive industries because “Ecuador aims to place the promotion of social and environmental justice on an equal footing with corporate profits.”

2. ECUADORIAN CONSTITUTIONAL FRAMEWORK & THE SUMAK KAWSAY

Sumak Kawsay is the voice of the Kichwa people for good living. Good living is a conception of life far removed from the most cherished elements of modernity and economic growth: individualism, the search for profit and the use of nature. -Pablo Dávalos

The purpose of this section is to identify the role of the Sumak Kawsay in the peaceful cohabitation of the rights of nature and the development of extractive industries within the Ecuadorian Constitution. Therefore, it is necessary to clarify this principle from the indigenous perspective and then identify its link with nature and the development of natural resources through a close reading of the Constitutional provisions devoted to the rights of nature and the development of extractive industries. As it was mentioned above, one way of understanding the Ecuadorian Constitution is from a theoretical perspective, thus, this section will draw on the transition from the anthropocentric view on natural resources to the ecocentric view on natural resources. This finding will be a first step to demonstrate, by the end of this paper, that this successful harmonization is possible.

38 Reporte Periódico de la Empresa Pública de Hidrocarburos del Ecuador, supra note 25 at 357.
39 Pablo Dávalos is an Ecuadorian University professor and advocate for indigenous people. He has been working for more than 20 years with the Confederation of Indigenous Nationalities of Ecuador.
2.1. UNDERSTANDING THE SUMAK KAWSAY AND IDENTIFYING ITS LINK WITH NATURE AND ECONOMIC DEVELOPMENT

Although, the 2008 Constitution introduced a number of changes, the most important innovation was the greater integration of indigenous populations, through the incorporation of the Sumak Kawsay, in civil society. This indigenous principle encompasses a large public policy agenda as a result of a two-decade process of social and political agency of the Ecuadorian indigenous movements.\textsuperscript{40} Sumak Kawsay in its most literal translation means “good life” or “good living” but in Quechua, Sumak means plenitude, excellence and beauty; while Kawsay is life, the dynamic and changing being.\textsuperscript{41} Marlon Santi\textsuperscript{42}, an indigenous political activist, explains that Sumak Kawsay is closely interrelated with fertile lands without bad elements (sumak allpa) and ancestral forms of knowledge and understanding (sacha runa yachay).\textsuperscript{43} Therefore, indigenous people agree that “Sumak Kawsay comes out of the communities, where mother earth produces; [Indigenous people] think about food, the environment, water, protection of land, protection of slopes. So Sumak Kawsay is integral [to all that].”\textsuperscript{44}

Although, the linguistic associations of Sumak Kawsay are important, Sumak Kawsay is every word more than just a word; it represents a way of living based on: 1) A community as a form of basic social organization, 2) A form of political organization, which compromises internal authorities, regulation of those authorities, the resolution of

\textsuperscript{40} Gabriela Ayala & Sebastian Linder, “Sumak Kawsay as Buen Vivir: Discourses and the Dilemma of Yasuni ITT” (2014) [Sumak Kawsay as Buen Vivir: Discourses and the Dilemma of Yasuni ITT].
\textsuperscript{41} Ibid at 1.
\textsuperscript{42} Mr. Marlon Santi is a well-known indigenous leader in Ecuador. He was the former President of CONAIE.
\textsuperscript{43} Sarah A Radcliff, “Development for a postneoliberal era? Sumak Kawsay, living well and the limits to decolonization in Ecuador” (2012) 43:1 Elsevier 240 at 242 [Development for a postneoliberal era?].
\textsuperscript{44} Ibid.
internal conflicts, and the creation of deliberative bodies, and, 3) An economic model, which stems from the tenet that everything is part of nature (human beings, land, water, air, animal, rocks). For instance, the Constitution guarantees, among other collective rights of indigenous people, the protection of “[their] collective knowledge; their science, technologies and ancestral wisdom; their medicine and traditional medical practices, with the inclusion of the right to restore, promote, and protect ritual and holy places, as well as plants, animals, minerals and ecosystems in their territories”.  

As the backbone of the Constitutional text, Sumak Kawsay, conceives human life as part of a wider picture considering the relationship between individual, society and nature, and understands political life as the participation in, maintenance of and reproduction of harmonious relationships. This principle implies a humble life, which is not characterized by the consumption of material goods; it seeks to maintain equilibrium and protect the environment in its whole context. The indigenous cosmology preaches that “nature is by itself able to feel, know and act.” Hence, Sumak Kawsay overcomes the subordination of nature to the human condition, recognizing the relationship between the individual, the society, the nature and everything that exists, just as a whole. Sumak Kawsay is a “civilizing project that goes against the principle of dominating nature and people and exploiting resources to the point of exhaustion.”

---

46 Constitution of Ecuador, supra note 2 art 57.
47 Fernando Huanacuni Mamami, Buen Vivir/Vivir Bien Filosofía Políticas Estrategias y Experiencias Regionales Andinas (Good Way of Living Political Thinking Experiences and Regional Andean Strategies) (Lima: Coordinadora Andina de Organizaciones Indígenas, 2010) at 35.
49 Sumak Kawsay as Buen Vivir: Discourses and the Dilemma of Yasuní ITT, supra note 40 at 1.
50 Sumak Kawsay, Interculturality and Decolonization, supra note 45.
Conversely, this principle, as a new alternative to development and economic growth is one of the most important and novel alternatives to neoliberal globalization because it proposes the “incorporation of nature within history, not as a productive factor nor as a productive force, but as an inherent part of social being.” 51

In order to do that, Sumak Kawsay encompasses collective rights in addition to individual rights because “a form of development relying just on the capitalist market is viewed as socially unjust and unsustainable, premised on scarcity and resulting in policy’s narrow focus on poverty alleviation.” 52 Thus, these sets of rights are fulfilled in an intercultural framework, respecting the diversity, and in a harmonious coexistence with nature. For that purpose, the Ecuadorian Constitution brings together a “Good Way of Living Regime” with a “Development Regime”, which leads to a novel development model within the framework and objectives of Sumak Kawsay. 53

The Ecuadorian development strategies are presented in the National Development Plan for Good Living (Plan Nacional de Desarrollo para el Buen Vivir) and consequently the principle of Sumak Kawsay is incorporated in the public strategies of progress. In the National Development Plan for Good Living, the rights of nature and its protection are established, although in a more realistic manner. For instance, concerning the harmonious association with nature it asserts that “ethical responsibility with the current and future generations and with the rest of species is a critical foundation to prefigure

52 Development for a postneoliberal era? supra note 43 at 242.
53 Should trees have standing? supra note 9.
human development.”\textsuperscript{54} In addition, the National Development Plan for Good Living mentions that “it is not about keeping [the] natural heritage unharmed – given the use of energy and materials by different societies and given the ecosystems assimilation capacity, this is impossible. It is about protecting at the adequate levels.”\textsuperscript{55} This formulations move from the classical approach where a development strategy determines and limits economic and social life. In contrast, the Ecuadorian approach requires that economic, political, social, cultural and environmental areas should be arranged to guarantee the Sumak Kawsay.\textsuperscript{56} The Ecuadorian Constitutional text clearly states, “development in line with Good Way of Living is required to fulfill the rights of nature. It recognizes intrinsic values in the environment.”\textsuperscript{57}

Undoubtedly, the Sumak Kawsay experimented a process of adaptability and transformation in the Ecuadorian Constitution. Overall, Sumak Kawsay seeks to find the way of living in harmony with nature. However, in order to fulfill the Government requirements and the national development strategies in terms of exploitation of natural resources, the Sumak Kawsay became the missing piece of a development model that intends to create an ideal sustainable scenario for the peaceful cohabitation between rights of nature and the development of natural resources. As it will see in the following section, the Constitution provisions related to the rights of nature are not opposed to the development of extractive industries from the perspective of the environmental ethics due to its pragmatic view on natural resources.

\textsuperscript{54} Plan Nacional de Desarollo para el Buen Vivir (National Development Plan for Good Living) No.78 (September 11 2013) [Plan Nacional de Desarollo para el Buen Vivir].
\textsuperscript{55} Ibid.
\textsuperscript{56} Eduardo Gudynas, “Buen Vivir: Today’s Tomorrow” (2011) 54:4 Dvlp 441 at 443.
\textsuperscript{57} Ibid.
2.2. THE RIGHTS OF NATURE AND THE ECUADORIAN DEVELOPMENT MODEL

WITHIN THE CONSTITUTION

Pursuant to the above elaboration of the significance of Sumak Kawsay, this section shows how it has been incorporated into the text of the Constitution. It is important to highlight that the indigenous organizations of Ecuador introduced the concept of Sumak Kawsay as a central point in the debates when drafting the new Constitution. However, its incorporation into the Constitutional text required a whole process of negotiations and drafting of a political discourse between different organizations in order to create an alternative option to capitalism and neoliberalism. The Confederation of Indigenous Nationalities of Ecuador presented the Sumak Kawsay to Ecuadorian society and, in particular, the Constituent Assembly on October 2007 as the center point of their proposal for the new Constitution. The subtitle of the document, “For a Plurinational, Unitarian, Sovereign, Inclusive, Equitable and Secular Country,” means that it is a general public proposal where Sumak Kawsay is the center point. In this document, Sumak Kawsay is a critique of the western capitalist model and its colonial implications as well as an alternative way of living, which promises “a moment of deep hope for the great majorities of the country that fight to build a post-capitalist and post-colonial society, a society that promotes the Sumak Kawsay transmitted from one generation to another from our parents, a society that recovers the teachings of ancestral people and find harmony with Pacha Mama”. Analysis of the text will serve two purposes: 1) Identifying the potential conflict of constitutional rights – rights of nature as opposed to the right to develop natural resources – within the Constitution, and, 2) Providing a

58 Genealogía del Buen Vivir en la Nueva Constitución Ecuatoriana, supra note 48 at 7.
legal background for the theoretical assessment of those Constitutional provisions in the next section.

Sumak Kawsay was incorporated into the Constitution as a “a new form of public coexistence in diversity and in harmony with nature, to achieve the good way of living, the Sumak Kawsay” as a way of recognizing the right of the population to “live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living, Sumak Kawsay.” According to the Ecuadorian Constitution the State has the responsibility to “upgrade ancestral wisdom to contribute to the achievement of the good way of living” as a result of the incorporation of the indigenous principle of Sumak Kawsay into the Constitutional text. Moreover, in recognition of the fact that Ecuador is one of the most biodiverse countries in the world but also one with enormous reserves of oil and minerals, the Constitution highlights that the “territory of the Amazon provinces is part of an ecosystem that is necessary for the environmental balance of the planet.” Such that special territorial district should have land use development and planning “that ensures the conservation and protection of its ecosystems and the principle of the Sumak Kawsay.” In order to protect this special territory and in general guarantee the harmonious coexistence with nature, the Constitution incorporated the rights of nature into its text.

Consequently, in relation to the rights of nature, the Constitution states that nature or “Pachamama” is the place “where life is reproduced and occurs,” and attributes to it

---

59 Constitution of Ecuador, supra note 2 at Preamble.
60 Ibid art 14.
61 Ibid art 14.
62 Ibid art 387 (2).
63 Ibid art 250.
64 Ibid art 71.
fundamental rights in the same way as those fundamental rights are attributed to citizens as well as “integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”.65 The Constitution uses the terms “Nature” and “Pachamama” alternatively and the rights of nature are mentioned in Title II, “Rights”, that is devoted to the recognition of fundamental rights, specifically, in Chapter VII “Rights of Nature”. The Constitution provides that nature has the right to be “restored” and that this restoration “shall be apart from the obligation of the State to compensate the individuals and communities that depend of affected natural systems.”66 However, “in those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences”.67

Accordingly, the State should apply “preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles”68 in order to let persons, communities, peoples and nations benefit from the environment and the natural wealth enabling them to enjoy the good way of living. Therefore, “all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature,”69 while simultaneously the State’s duty is to give “incentives to natural and legal entities and to communities to protect nature and to promote respect for all the elements comprising and ecosystem”.70

65 Constitution of Ecuador, supra note 2 art 71.
66 Ibid art 72.
67 Ibid art 72.
68 Ibid art 73.
69 Ibid art 71.
70 Ibid art 71.
Regarding to the development of natural resources, the Ecuadorean Constitution provides that the central State has exclusive jurisdiction, among others, over “natural and energy resources; minerals, oil and gas, water, biodiversity and forest resources.” 71 These resources called “strategic sectors”, which come under the decision making and exclusive control of the State are those that “due to their importance and size exert a decisive economic, social, political or environmental impact and must be aimed at ensuring the full exercise of rights and the general welfare of society.” Therefore, the State reserves the right to “administer, regulate, monitor and manage strategic sectors, following the principles of environmental sustainability, precaution, prevention and efficiency.” 72 Strategic sectors are stated to be: “energy in all its forms, telecommunications, non-renewable natural resources, oil and gas transport and refining, biodiversity and genetic heritage, the radio spectrum and water.” 73 Consequently, products coming from the ground, minerals and petroleum deposits; substances whose nature is different from that of the soil, including those that are located in areas covered by territorial sea waters, and maritime zones as well as biodiversity and its genetic assets are the unalienable property of the State, and immune from seizure. 74

As a result, in the management of those resources and in light of the Sumak Kawsay, the State shall give priority to “[the] conservation of nature minimizing the negative impacts of an environmental, cultural, social and economic nature.” 75 In practical terms, and in order to produce and benefit from these assets, the State must adopt “adequate and cross cutting measures for the mitigation of climate change, by limiting greenhouse

---

71 Constitution of Ecuador, supra note 2 art 261 (9).
72 Ibid art 313.
73 Ibid art 313.
74 Ibid art 408.
75 Ibid art 317.
gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.”

Considering the above mentioned norms in relation to the rights of nature and the development of natural resources and with the aim of meeting the Constitutional purpose of the Sumak Kawsay, the text of the Constitution foresees special provisions to make legally feasible the cohabitation of the mentioned rights. Therefore, it guarantees that, in any case, the responsibility for environmental damage is objective i.e. the reparation of damages must be done without identifying an offender. Consequently, all damage to the environment, in addition to the respective penalties, should also entail the obligation of integrally restoring the ecosystems and compensating the affected persons and communities. This particular provision opens the possibility to guarantee the realization of both rights in accordance with the Constitution.

For instance, all state decisions or authorization that could affect the environment must be taken following consultation with potentially affected communities. Those communities should be informed fully and on a timely basis about a particular project that will be held on their territories. For this consultation processes, “the consulting subject must be the State and the law should regulate prior consultation, public participation, time-limits, the subject consulted and the appraisal and objection criteria used with regard to the activity that is being submitted to consultation.” In the case of

---

76 Constitution of Ecuador, supra note 2 art 414.
77 Ibid art 396.
78 Ibid art 398.
indigenous people such as the Tagaeri Taromenane People 79 living in voluntary isolation, the Constitution provides that those territories are “an irreducible and intangible ancestral possession and all forms of extractive activities should be forbidden there.” 80 Thus, the State must adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. According to the Constitution the violation of these rights “constitute a crime of ethnocide”. 81 This Constitutional provision is very interesting especially since the Presidential decision of exploiting crude oil beneath the Yasuni National Park in the Amazon region and the Inter-American Court of Human Rights decisions in Saramaka v. Surinam 82 and Sarayaku v. Ecuador. 83 The last section of this paper will address this point and contrast it with another Constitutional provision that allows the President to exploit resources even where there are indigenous people in voluntary isolation. Although, it is important to consider that a provision like the one mentioned above

79 The Tagaeri Taromenane People are two indigenous groups belonging to the Waorani first nation living in voluntary isolation within the Napo region of the western Amazon rainforest. To protect their territory the Ecuadorian State has declared and geographically defined, by Decrees, the Zona Intangible Tagaeri Taromenane (ZITT). This zone is located within the UNESCO Yasuni Biosphere Reserve (1989), one of the most biodiverse areas in the world. Due to several hydrocarbon reserve exploitation projects running in the area and the advancing of a large-scale deforestation front, the survival of these groups is presently at risk.
80 Constitution of Ecuador, supra note 2 art 57 (21).
81 Ibid art 57 (21).
82 The Saramaka (also called Saamaka) are one of six Maroon peoples living in Suriname and French Guiana. Saramaka representative organizations lodged a complaint with the Inter-American Commission on Human Rights in 2000 alleging violations against their rights to property, cultural integrity and due process after the Suriname Government granted mining and logging concessions on their lands without consulting the Saramaka people. In 2002 the government were ordered to suspend the mining and logging activity as a precautionary measure and in 2007 the Commission ruled in favour of the Saramaka people, online < http://www.forestpeoples.org/es/tags/twelve-saramaka-clans-1%C3%B6s-case-saramaka-people-v-suriname-full-documentation >.
83 This case resumes a complaint against Ecuador for having granted a concession for oil exploration and exploitation and allowing an Argentinean company to begin seismic exploration within the Sarayaku people’s territory without having consulted with the Sarayaku or obtaining their consent. Violations of the right to prior consultation, prior consent, community indigenous land, cultural identity, life, and personal integrity, online < https://www.escr-net.org/node/364959 >.
(condemning ethnocide) needs to be celebrated as a way of guaranteeing the subsistence of indigenous people living in voluntary isolation across the Americas.\textsuperscript{84}

Last but not least, it is important to bear in mind, as part of the Constitutional provisions, the so-called development regime which is the “organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems, which underpin the achievement of the good way of living.”\textsuperscript{85} One of the State’s responsibilities in accordance with the Constitution is to plan the development of the country to assure the exercise of rights and the achievement of the objectives of the development regime as well as the principles enshrined in the Constitution. The good way of living requires persons, communities, people and nationalities to effectively exercise their rights and fulfill their responsibilities within the “framework of interculturalism, respect for their diversity, and harmonious coexistence with nature.”\textsuperscript{86} On the one hand, the State must guarantee the rights of people, communities and nature through planning and regulation in order to meet the criteria of the Sumak Kawsay.\textsuperscript{87} On the other hand, the citizens must participate in all stages and spaces of public management and national and local development planning, and in the execution and control of the fulfillment of development plans at all levels.\textsuperscript{88} This process is important for the cohabitation of rights because it assumes a real position towards the reality of the benefit for non-renewable natural resources in a globalized world. Nowadays, the western world is unthinkable without the extraction of non-renewable natural resources; however, it is possible to benefit from those resources in a sustainable

\textsuperscript{84} Bethany Horne, “After All the People We Killed, We Felt Dizzy” Newsweek (2 January 2014) online: <http://www.newsweek.com/2014/01/03/after-all-people-we-killed-we-felt-dizzy-245008.html>.

\textsuperscript{85} Constitution of Ecuador, supra note 2 art 275.

\textsuperscript{86} Ibid art 276.

\textsuperscript{87} Ibid art 277.

\textsuperscript{88} Ibid art 278.
Therefore, the development regime tries to find a balance between the sustainable extraction of non-renewable natural resources and the preservation of the nature in accordance with the principles of the Sumak Kawsay. The idea is to find a balance and benefit from those resources to the extent of satisfying the citizen’s needs in a less destructive way and more aware towards future generations.\textsuperscript{89}

Overall, to guarantee the individual and collective right to live in a healthy and ecologically balanced environment and, simultaneously, the development of natural resources the State pledges to: 1) Establish effective mechanisms to prevent and control environmental pollution, restore degraded natural spaces, and to provide for the sustainable management of natural resources, 2) Regulate the production, distribution, use and final disposal of materials that are toxic and hazardous to persons or the environment, 3) Ensure the intangibility of protected natural areas, so as to guarantee the conservation of biodiversity and the maintenance of the ecological functions of the ecosystems.\textsuperscript{90}

\section*{2.3. A Philosophical Justification for the Successful Cohabitation of The Rights of Nature and the Development of Natural Resources}

From the previous section, it is clear that the Ecuadorian Constitution presents in and of itself a contradictory premise, which is the possibility of benefit from non-renewable natural resources and, simultaneously, the guarantee for the “integral respect of

\textsuperscript{89} Pueblos Indígenas, diversidad cultural y justicia ambiental, supra note 18.

\textsuperscript{90} Constitution of Ecuador, supra note 2 art 397.
[nature’s] existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”. In order to provide a philosophical explanation to this Constitutional premise, some authors claim that the recognition of nature’s own rights in the Ecuadorian constitution reflect a transition from an anthropocentric view on natural resources to a relatively more ecocentric one. Nevertheless, it would not be accurate to label the entire constitution as ecocentric. According to George Sessions and Arne Naess’s, environmental pragmatism encompasses anthropocentrism and ecocentrism elements by acknowledging intrinsic values in all nature’s beings and allowing consuming species to benefit from what the environment offers to fulfill vital needs. For that reason, the goal of this section is to approach this apparent contradiction with theoretical lenses and beyond a mere analysis of the Constitutional text, so as to avoid the idea of concluding that the cohabitation is possible because the Constitution says so. The idea is to approach this problem from a philosophical stance in order to identify the implications of the recognition of the rights of nature that forced the transition towards a more ecocentric development model in the Ecuadorian Constitution.

The traditional western conception of development – anthropocentrism - states that humans are “the sole bearers of intrinsic value and all other living things are there to sustain humanity’s existence.” The term anthropocentric was first coined in the 1860s to represent the idea that human are the center of the universe. People who hold an anthropocentric view acknowledge themselves as being the only significant entities in

---

91 Constitution of Ecuador, supra note 2 art 71.
93 Environmental Ethics: Between Anthropocentrism and Ecocentrism, supra note 12.
94 Ethics: Theory and Contemporary Issues supra note 19 at 331.
the universe while disregarding the needs or interests of animals and plants unless they provide life necessities such as nutrition, clothing, shelter and medicine; consequently human exploitation and abuse of the natural environment has been observed on a global scale.\(^\text{96}\) In an anthropocentric ethic, nature has moral consideration because degrading or preserving nature can in turn harm or benefit humans i.e. it would be considered wrong to cut down rainforests because they contain potential cures for human diseases.\(^\text{97}\)

However, the recognition that nature is a rights-bearing entity, as in the Constitution, means that “nature” is on the same level as human beings. This recognition encompasses the respect for the nature’s existence and for the maintenance and regeneration of its life cycles. The Constitution states that nature “has the right to be restored” and in cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources the State has the duty to apply “preventive and restrictive measures.” Undoubtedly, this position is opposed to the anthropocentric model of development in which human beings are above all other living species and in which nature is important only to the extent that it serves a human purpose. The Constitution is clear on stating that the preservation of nature is important regardless its value for the human being.

As a result, in order to understand the Constitution it is necessary to move towards a more inclusive model of development that considers nature in the same level as human beings; moving away from anthropocentrism has drawn on ancient indigenous philosophies. One possible contrasting model is ecocentrism, which represent the idea

---
\(^{96}\) *Environmental Ethics: Between Anthropocentrism and Ecocentrism*, supra note 12.

\(^{97}\) *Ecocentrism and Anthropocentrism: Moral Reasoning About Ecological Commons Dilemmas*, supra note 95 at 2.
that the universe is the originator of life. It recognizes the intrinsic value and moral consideration in all living things on earth regardless of their usefulness to humans and encourages people to respect and care for animals and plants for their own sake.\textsuperscript{98} This concept emerged with the idea of sustainable development and seeks a nature-centered system of values in which all human beings should be aware of the need to preserve nature. A relative pioneer in the intellectual struggle for the rights of nature, Chilean Lawyer Godofredo Stutzin, concludes in one of his late writings that from an ecocentric standpoint, “the defense of nature means the defense of all and each of its components; nature itself as a universal entity.”\textsuperscript{99} Therefore, the defense of nature “must necessarily be based on the fact that [all living species] are integral parts of an organic whole and that the damage inflicted on any of them in some ways affects all nature; only thus the defense will have its proper force.”\textsuperscript{100} There are also more radical approaches to “ecocentrism” that view nature as “sacred” and endorse the idea of zero extractivism because it has been argued that the ecological footprint that results from the greed of humans has led over the decades to a massive alteration in nature’s balance, as well as to the many recognizable environmental crises that the world is facing today.\textsuperscript{101}

Although ecocentrism seems to be closer to the philosophical justification for the successful cohabitation of the rights of nature and the development of natural resources, it is important to consider that Ecuador is still a country dependent on non-renewable natural resources. Given the inelastic positions of both anthropocentrism and ecocentrism, the ability to make environmental decisions to satisfy both positions is difficult. Philosophers acknowledge that the conversion to ecocentrism is impossible,
especially, in developing countries because of their heavy reliance on natural resources. As a result, deep ecologists hold that people are only justified in engaging in resources extraction when their intervention in the natural wildlife is vital to human needs i.e. for survival not for luxury. In order to make the decision that would benefit humans and not harm nature, people must weigh up the possible consequences and determine which one is ought to take precedence.

It is important to highlight that both of the paradigms discussed above see humans and nature as separate rather than co-dependent. Human in western and developed countries are thought to have developed a sense of being separate from nature for a variety of reasons. The Enlightenment brought with it feelings of dominions over nature. Descartes advanced the philosophy that “human minds and bodies were separate and other forces in play made it relatively short logical link to the idea that humans were separate from nature and dominate over it.” However, with the increasing focus on a scientific and empirical approach to nature came developments in science and technology. Many of these discoveries “further enhanced people’s abilities to control of transform nature into the pristine gardens present in the biblical story of Adam and Eve”. A number of authors have argued that “humans were once psychologically and physically closer to nature than residents of industrialized nations are now. Advances in scientific knowledge drove the twin forces of industrialization and urbanization to further split humans from their environments.”

102 Environmental Ethics: Between Anthropocentrism and Ecocentrism, supra note 12.
103 Ibid.
105 Ibid.
106 Ibid.
Nevertheless, there is a third way of addressing this dilemma. Responding to a perception that ecocentrism “is too rigid, inflexible and indifferent concerning diverse moral and cultural conditions” a more pragmatic position has emerged.\textsuperscript{107} Environmental pragmatism claims to be “more efficient in solving practical environmental problems, more unbiased regarding cultural diversity, and similarly more democratic with regard to its justification of environmental policy deliberation by involved actors.”\textsuperscript{108} It is more efficient in solving practical problems because “we cannot talk about environment without talking about experience, the most basic term in pragmatism… environment, in the most basic sense, is the field where experience occurs, where my life and the lives of others arise and take place”\textsuperscript{109}; more unbiased regarding cultural diversity because “environment is as much a part of each us as we are parts of environment, and moreover, each of us as we are parts of the environment – a part of the experience- with which other beings have to contend… pragmatism commit us to treating all environments with equal seriousness, urban and rural; wilderness, park and city; ocean and prairie; housing project, hospital and mountain trail- all are places where experience unfolds”\textsuperscript{110} and more democratic with regard to its justification of environmental policy deliberation by involved actors because “pragmatism see individuals as the source of genuine insight into what is needed, and accordingly tries to maximize participation in governing.”\textsuperscript{111} For environmental philosopher, Kelly Parker, environmental pragmatism is anthropocentric as human beings are the only ones who can debate values, essentially in the context of laws and constitutions we are talking about political decisions about development, politics is about debates and simply because the human perspective is the only one we can really understand. Parker

\textsuperscript{107} Environmental Ethics: Between Anthropocentrism and Ecocentrism, supra note 12.
\textsuperscript{108} The Ecuadorian Resource Dilemma: Sumak Kawsay or Development? supra note 23 at 6.
\textsuperscript{109} Kelly Parker, “Environmental Pragmatism” (London: Routledge, 1996) at 21.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
concedes that it is also ecocentric because human beings can feel or perceive the expressions of other species, e.g. trees or animals. However, that does not mean that human beings can “speak in their voices”. The best thing that human being could do in this sense is to be the spokesman of the other non-human organisms.\textsuperscript{112} This is different to anthropocentrism because nature is in the same level as human and is not just a mean to satisfy their needs in accordance with the Ecuadorian Constitutional provisions.

As a result, this third option can be used as a solution to explain and understand, from a philosophical perspective, the cohabitation of the rights of nature and the development of extractive industries in the Constitution. It is clear that the Constitutional text seeks to preserve the natural environment and develops natural resources. In this sense, I will argue that environmental pragmatism tend to weigh more heavily than ecocentric or anthropocentric approaches in recent Ecuadorian development politics.\textsuperscript{113}

3. CORPORATE SOCIAL RESPONSIBILITY AS THE EXTERNAL COMPLEMENT OF THE CONSTITUTION

The previous section delineated the theoretical underpinnings of the harmonious relationship between the rights of nature and the development of extractive industries from a legal perspective. Nevertheless, in order to provide a practical justification for the successful cohabitation of those rights, this section will employ the corporate concept of CSR to explain how the extractive industry can exist and thrive within the Constitutional framework of Sumak Kawsay, which preserves the rights of nature.

\textsuperscript{112} The Ecuadorian Resource Dilemma: Sumak Kawsay or Development, supra note 23 at 7.

\textsuperscript{113} Ibid at 5.
3.1. **The Importance of Regulating Extractive Industries**

Given the heightened public awareness concerning environmental disasters such as the Chevron case and human rights violations such as the Sarayaku case committed by extractive corporations in Ecuador, pressure has mounted to compel them to adhere to environmental norms. Campaigning and criticism by civil society and stakeholders have also put considerable pressure on extractive corporations to adopt socially responsible behavior. As a result, it is now taken for granted that multinational corporations, including extractive corporations, have an ethical, moral and legal duty to respect human rights in the countries in which they operate. This ethical or moral obligation is generally premised on the following three grounds: 1) the expediency principle, which suggests that certain human rights practices are simply good business practices as well – there is substantial evidence to support the proposition that continuing violation of human rights by multinational corporations will increasingly provoke international condemnation. Meanwhile, respect for human rights improves and fortifies the reputation of such corporations as a whole, 2) The Societal principle, which has two components: reciprocity and compensation. Reciprocity is the idea that corporations should give something back to society, generally in proportion to what it gains. Compensation, on the other hand, is the notion that corporations should compensate society for the disturbance caused to it by the activities associated with business, and, 3) Lastly, the ethical principle, which requires that multinational corporations tend to have

---

114 In 1993, a group of Ecuadorian citizens of the Oriente region filed a class action lawsuit in US federal court against Texaco (Aguinda v. Texaco), and in 1994 a group of Peruvian citizens living downstream from the Oriente region also filed a class action lawsuit against Texaco in US federal court (Jota v. Texaco). Both complaints alleged that between 1964 and 1992 Texaco’s oil operations polluted the rainforests and rivers in Ecuador and Peru, resulting in environmental damage and damage to the health of those who live in the region.


116 Ibid.
greater power and influence in an area than the government itself and a more stable and lasting presence than a government. By virtue of this power and influence, ethical obligations dictate that corporations incur an equivalent responsibility for the people of that area.¹¹⁷

Consequently, in recent years, a wave of voluntary codes of conduct and corporate guidelines has emerged in response to this global demand. These instruments include corporate business principles, industry-wide voluntary codes of conduct, and the voluntary adoption of international standards. Some codes contain specific commitments about the corporation’s conduct towards international stakeholders such as employees, sub-contractors, suppliers and host governments. Others refer to core issues of human rights and the protection of the environment and often entail specific commitments in areas of non-discrimination, labour rights, environmental protection, and in some cases, stakeholder consultation; and the prohibition of corrupt practices.¹¹⁸ For the purpose of this paper, this section will provide an overview of CSR international standards in order to demonstrate its international stance and emphasize its crucial role within the Ecuadorian framework. This evidence will complement the theoretical justification of the previous section with a practical justification of the successful cohabitation of these Constitutional rights.

3.2. **THE EMERGENCE OF CORPORATE SOCIAL RESPONSIBILITY AND ITS DEFINITION**

There is not a universally accepted definition of Corporate Social Responsibility given the great diversity of commercial and legal contexts in which CSR has been developed. Nevertheless, there appears to be a global consensus reflected in the literature that defines CSR as “the continuing commitment by business to behave ethically and contribute to economic developing while improving the quality of life of the workforce and their families as well as of the local community and society at large.”¹¹⁹ This definition has been confirmed in my personal experience. The fact of working with indigenous communities located in the influenced areas of mining project gave me the necessary tools to assert this definition. This experience made me realize the importance of this concept for this kind of businesses and re-evaluate the idea that “profit” is the only important thing for those corporations. The idea of Corporate Social Responsibility connotes a social and ethical dimension of business, which requires that corporations should observe some social and ethical standards in conducting their business.

Corporate Social Responsibility implies that corporations must promote social betterment and fulfill societal expectations in order to be accountable to employees, consumers, governments, society and the environment for the consequences of their actions, and not only to shareholders, bankers, and creditors.¹²⁰ Thus, this concept refers to the ways in which companies adopt ethical, environmental and other standards in order to promote the public good. The movement toward self-regulation is mainly

driven by the perceived moral high ground of human rights and environmental protection.\textsuperscript{121} Although a number of attempts to formulate binding or persuasive standards at the international level have been made, their weakness is that CSR principles are not binding. However, in a legal text such as the Constitution of Ecuador, these principles could serve as an external instrument to implement the guarantee of other Constitutional rights as the Sumak Kawsay and the rights of nature. For instance, the Constitution states that in the management of non renewable natural resources the State must give priority to “responsibility between generations, conservation of nature, and minimize negative impacts of an environmental, cultural social and economic nature.”\textsuperscript{122} Evidently, this provision is a State’s duty but the State has the ability to “delegate” the development of natural resources to “private enterprises”\textsuperscript{123} and in those cases the Corporations need their own standards to meet this purpose.

Historically, the corporate response to social issues has largely been driven by mounting pressure from civil society on corporations to discharge social obligations, fear of adverse publicity following human rights abuses and environmental pollution. Many corporations now consider socially responsible behaviour as an essential element of good business practices and a means to fulfill societal expectations of the corporation, which can eventually enhance the prospects of gaining access to new licenses for exploration of natural resources.\textsuperscript{124} The main advantage of corporate self-regulation is that it is a flexible device, which can respond to the dynamic commercial needs of the market and to the size of the corporation. This means that self-regulation recognizes that

\textsuperscript{121} Regulation Vs Self-Regulation in Extractive Industries: A Level Playing Field, supra note 13.
\textsuperscript{122} Constitution of Ecuador, supra note 2 art 317.
\textsuperscript{123} Ibid art 316.
different corporations need different regulatory frameworks.\textsuperscript{125} Although, the codes of conduct for corporate self-regulation are not legally binding, they are not entirely devoid of legal significance because these codes of conduct fulfill the legal aims of local regulations.

3.3 MODELS OF INTERNATIONAL STANDARDS OF CORPORATE SOCIAL RESPONSIBILITY AND THEIR INFLUENCE IN THE ECUADORIAN FRAMEWORK

The first effort of the international community of setting Corporate Social Responsibility standards is the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the International Labour Organization in 1977 (hereinafter “ILO”). These standards intended to encourage multinational corporations to contribute to social and economic progress. The Declaration provided guidance to corporations in different areas such as working conditions, safety and health regulations, and environmental regulations.\textsuperscript{126}

Moreover, the United Nations has made several attempts to formulate codes of conduct for the regulation of multi-national corporations (hereinafter called “MNCs”). The United Nations adopted the Draft Code of Conduct on Transnational Corporations\textsuperscript{127} (hereinafter called “DCCTNC”) in 1983; it was revised in 1988\textsuperscript{128} and 1990.\textsuperscript{129} The

\textsuperscript{126}Ibid at 204.
most significance step, however, in the process of setting international standards to address unethical corporate behavior is the United Nations Global Compact launched by Secretary General Kofi Annan in 1999. This instrument invited corporations to commit themselves to a set of nine principles relating to labour rights, human rights, and the protection of the environment. The Global Compact calls on world business to respect the protection of the environment within their sphere of influence in order to face the consequences of climate change and global warming. The Global Compact urges companies to engage with human rights and environmental issues and to support its principles by adopting “corporate best practices” towards these worldwide issues. The main significance of the Compact lies in the fact that it provides a concrete set of obligations that contribute to the realization of CSR. Furthermore, the Organization for Economic Cooperation and Development OECD adopted a series of codes of conduct for MNCs in 2000. The OECD Guidelines are mainly recommendations by governments to MNCs to encourage them to act consistently with the host State’s international human rights and environmental obligations.

3.4. CORPORATE SOCIAL RESPONSIBILITY AND ITS LINK WITH THE CONSTITUTION

Although the Ecuadorian framework is advanced in comparison with those of other nations, it is nevertheless necessary to have the legal and extra-legal tools to be able to apply those norms in practice. Corporate Social Responsibility must be able to adapt to the Ecuadorian reality, demonstrate moral ethical engagement and give something back

130 Regulation Vs Self-Regulation in Extractive Industries: A Level Playing Field, supra note 13.
to the society. Corporations must evidence that their intention is that, “a portion of the capital should not be used in the corporation’s benefit but to fulfill a social function.”¹³¹

In terms of environmental issues, extractive companies are required by law to undertake environmental and social planning and impact assessment, which can identify possible negative impacts and suggest the means of remedying them.¹³² Carrying out environmental and social planning to address social, environmental and human rights issues is becoming an important factor for increasing the public acceptability of extractive operations. A social or environmental impact assessment generally includes the study of social, environment, cultural and health impacts of a given operation in a particular area and predicts the likely changes in the values and norms of the society resulting from the operation of the project.¹³³ Environmental and social impact assessments have emerged as effective strategies to assess the “potential impact of the operation on the environment as a result of extractive operations and it is a great way to identify potential areas of conflict between corporation’s business operations and the legitimate interests of local people as well as recommend ways to mitigate the negative impacts.”¹³⁴

Moreover, improving the quality of life for local communities means, among other things, access to job opportunities, improvements to civil infrastructure and a transfer of knowledge. However, improving the quality of life for indigenous people means respect for their territories and natural resources and consideration for their harmonious life in

¹³² Regulation Vs Self-Regulation in Extractive Industries: A Level Playing Field, supra note 13.
¹³⁴ Regulation Vs Self-Regulation in Extractive Industries: A Level Playing Field, supra note 13.
an ecologically balanced environment. Therefore, corporations should be engaged with local and indigenous communities to initiate constructive dialogue with them and undertake the development of programs for the affected community. Stakeholder consultation and the integration of environmental and human rights concerns early in decision-making process are now considered to be “an important means of using CSR to fulfill the Constitution. Stakeholder consultation prevents the tragic consequences of destructive resources development and integrates host communities in extractive resource management decisions, which can help improve the social environment of business.”

To sum up, social and environmental reporting, which is usually carried out after the operation of the project to assess the social or environmental impact of an extractive operation, is now considered an “important tool to regulate corporate behaviour. Reporting aims to evaluate a corporation’s social and environmental performance against a given set of standards or expectations.” The social and environmental reporting can achieve the goals of CSR by promoting: 1) improved and informed corporate decisions with full understanding of the implications of any action, 2) Accountability to the public through disclosure, 3) An understanding of the community and stakeholder expectations of business and of the evolution of those expectations, and, 4) Measurement of progress towards meeting those expectations.

Overall, “many CEOs in the extractive sector have come to believe that the future of globalization, as well as the success of particular projects, is tied to whether companies conduct business

136 Ibid.
in a manner acceptable to those affected by it.”¹³⁸ For this reason, “effective meaningful CSR policies are increasingly regarded as a necessary prerequisite to securing a social license to operate and, when appropriately implemented, to helping companies address the risk of globalization in a way that benefits all the stakeholders.”¹³⁹ As was evident throughout this section, the purpose of CSR is to humanize the corporate extractive activity in different ways and in the case of Ecuador that humanization is more clear when understanding the Constitutional provisions that protect the rights of nature but also when understanding that a responsible operation allow to protect those rights while simultaneously developing extractive industries in the country.

4. THE ISHPINGO TAMBOCOCHA TIPUTINI PROJECT

The Case of Yasuni ITT is an excellent case study to demonstrate that the successful cohabitation of the rights of nature and the development of extractive industries within the Ecuadorian Constitution is possible based on the theoretical and practical justification discussed above. On the one hand, this section will evidence the environmental pragmatic view on natural resources within the Constitution, and, on the other hand, it will help to understand how CSR is aligned with the purpose of the Sumak Kawsay and the rights of nature. By the end of this section, this paper intends to provide the reader with the necessary elements to build a personal criterion regarding the Ecuadorian development model.

¹³⁹ Ibid at 4.
In 2007, the Ecuadorian Government launched the Yasuni ITT Initiative (hereinafter called the “ITT Initiative”) during a Presidential speech at the United Nations. At the same time, Correa said that Ecuador had decided to keep the oil of the Ishpingo-Tambococha-Tiputini oil block (hereinafter called “ITT”) situated within the Yasuni National Park indefinitely underground, in order to be consistent with the Ecuadorian Constitutional provisions regarding the rights of nature. His idea was to demonstrate the enormous effort of his Government on finding other ways to benefit the country economically. The ITT Initiative appealed to the international community to share responsibility in terms of environmental protection, economic compensation and sustainability. In order to do so, the ITT Initiative highlighted some of the global benefits of the proposal such as the non-emission into the atmosphere of 407 million tons of CO2 product of burning those fossil fuels, the guarantee of non-exploitation of these petroleum reserves, the conservation of the immense biological richness within the Yasuni National Park, and the respect for the cultures of the indigenous tribes who live in isolation within the boundaries of the Yasuni National Park.\textsuperscript{140}

For that purpose, the Ecuadorian Government created the Yasuni ITT Trust Fund through the Executive Decree No. 847 of January 2, 2008.\textsuperscript{141} This fund, in part, allows Ecuador to fulfill its commitment to indefinitely refrain from extracting the 846 million barrels of heavy crude oil reserves estimated to be worth US $ 7,2 billion in 2007, and prevent the emission of 407 million metric tons of carbon dioxide. The Trust Fund was administered by the United Nations Development Programme\textsuperscript{142} and enabled the international community to channel financial contributions towards reduction of CO$_2$

\textsuperscript{140} David Gilbert, “Rainforest home to vast treasury of life” (March 13, 2012), CNN, online: <http://edition.cnn.com/2012/03/05/world/americas/rainforest-life/> .
\textsuperscript{142} Ibid at Governance.
emissions, preservation of cultural and biological diversity and poverty reduction, which are all part of the key development objectives of the Millennium Development Goals.  

Unfortunately, after several years of an exhaustive and extended campaign in order to meet the goals of the ITT Initiative, the Government organized a press conference to officially announce that the world had failed Ecuador with the ITT Initiative. Therefore, on August 15 2013, he signed the Executive Decree No. 74 for the liquidation of the Yasuni ITT Trust Fund. Furthermore, on August 23, 2013, he formally requested the Ecuadorian National Assembly to declare the exploitation of heavy crude oil within the Yasuni National Park to be of National interest in accordance to article 407 of the Constitution because according to him the money equivalent to the oil deposit was necessary to overcome poverty and social inequality in Ecuador. Consequently, the main question is how is possible to understand an authorization for an oil extraction within a natural reserve where there are also indigenous communities living in voluntary isolation and, simultaneously, guarantee the rights of nature for “the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”? In order to address this question it is necessary to highlight some of the characteristics of the project that is going to be carried out within the Yasuni National Park in order to demonstrate that a pragmatic view on natural resources plus an ethical corporate behavior towards the protection of the rights of nature probe a successful harmonization of these rights.

145 Constitution of Ecuador, supra note 2 art 71.
First of all, it is important to refer briefly to Article 407 of the Constitution, which reads as follows “activities for the extraction of non-renewable natural resources are forbidden in protected areas and in areas declared intangible assets.”\textsuperscript{146} In addition, in relation to the protection of indigenous people, which is a right closely related with the rights of nature given the indigenous principle of Sumak Kawsay, the Constitution mentions that the territories of people living in voluntary isolation are “an irreducible and intangible ancestral possession and all forms of extractive activities should be forbidden there.”\textsuperscript{147} However, the same article 407 states that exceptionally “resources [located in areas declared as intangible assets] can be tapped at the substantiated request of the President of the Republic and after a declaration of national interest issued by the National Assembly.”\textsuperscript{148} Article 407 highlights two contradictory premises: 1) Forbid the extraction of non-renewable natural resources within protected areas declared intangible assets, and, 2) Allow, exceptionally, the extraction of non-renewable natural resources in protected areas or declared intangible assets with a declaration of national interest issued by the National Assembly after a substantiated request of the President.

Undoubtedly, the transition mentioned above, from an anthropocentric view on natural resources towards an ecocentric view on natural resources is evident on this article. Initially, the idea of the Government was to leave the oil underground but the Presidential decision changed based on the necessity of those economic resources to guarantee the population’s welfare. Therefore, he chose to exploit the ITT under the strict regulatory and environmental norms of the Constitution. At a first glance, the decision of exploiting natural resources within a Natural Reserve in which there are indigenous groups living in voluntary isolation could be interpreted as a “classical

\begin{flushleft}
\textsuperscript{146} Constitution of Ecuador, supra note 2 art 405.
\textsuperscript{147} Ibid art 57 (21).
\textsuperscript{148} Ibid art 405.
\end{flushleft}
anthropocentric view” on natural resources when the only thing that matter is benefit from nature and its resources. Nevertheless, recognizing the rights of nature in a Constitutional level does not mean zero extractivism in accordance with the view on natural resources within the Constitution and the theoretical analysis of ecocentrism and environmental pragmatism. In the Ecuadorian context, recognizing the rights of nature means ideally finding the way to live harmoniously with nature but without deviating from the other Constitutional purposes of the State given the Ecuadorian and the worldwide. Under any circumstance, recognizing the rights of nature could be consider as a way of stopping extractivism but as a new model of development in which nature by itself has rights that could be invoked by anyone in case of the existence of a particular activity that threatens it. It is obvious that extractive activities and the preservation of nature are divided by a thin line, however, the existence of Corporate Social Responsibility helps to build a proper environment to develop the exploitation of those natural resources under strict standards of environmental responsibility and, simultaneously, preserve the rights of nature.

In the official request to the National Assembly, Correa detailed the conditions of the exploitation of the Yasuni National Park emphasizing that it will affect less than 1% of the surface of the Park in order to minimize environmental damage and protect the indigenous community living in voluntary isolation. In addition, this document clarifies that the exploitation activities must carried out in accordance with the environmental and regulatory provision for extractive industries of the Constitution. Correa mentions that the company in charge of the drilling activities must use the most advanced drilling technologies in order to minimize the environmental damage. Thus, this company must
also have international advisors to deal with environmental matters based on CSR standards.

**CONCLUSION**

The constitutionalization of the rights of nature is “a means to ensure that those subject to constitutional order will live, in the present and in the future, in an adequate context for the realization and enjoyment of life.”\(^{149}\) The movement towards the constitutionalization of the rights of nature should be understood as seeking to promote the existence of future generations. This view is clearly reflected in UNESCO’s 1997 Declaration on the Responsibilities of the Present Generations towards Future Generations. Each generation inheriting Earth temporarily should take care to use “natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems”, so that “future as well as presents generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity”.\(^{150}\)

As it was presented throughout this paper, the tension between the successful cohabitation of the rights of nature and the development of extractive industries might be understood from two different perspectives. From a theoretical perspective, the Ecuadorian Constitution could be interpreted through an environmental pragmatism view on natural resources, which justifies the cohabitation of the rights of nature with the development of natural resources in the Constitutional text. Environmental

\(^{149}\) Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned From the Chevron Case, supra note 30 at 148.

\(^{150}\) Ibid.
pragmatism claims to be “more efficient in solving practical environmental problems, more unbiased regarding cultural diversity, and similarly more democratic with regard to its justification of environmental policy deliberation by involved actors.” In addition, “effective meaningful CSR policies are increasingly regarded as a necessary prerequisite to securing a social license to operate and, when appropriately implemented, to helping companies address the risk of globalization in a way that benefits all the stakeholders.” As it was mentioned above, by implementing the principle of Sumak Kawsay into its Constitution, Ecuador might have provided the world, especially developing countries, with a vital theoretical framework to emulate in navigating social and political conflicts. In finding new ways from old, the Ecuadorian constitution offers the promise of regeneration and renewal of an ecologically balance environment in order to forge a sustainable model and reach a “good way of living.”

152 An Introduction to Corporate Social Responsibility in Extractive Industries, supra note 138 at 4.
BIBLIOGRAPHY

LEGISLATION: UNITED NATIONS


Ecuador Yasuni ITT Trust Fund.


LEGISLATION: ECUADOR

Constitución de la República del Ecuador [Constitution of Ecuador], Registro Oficial [Official Gazette] No.449 (October 20 2008)


JURISPRUDENCE: INTER-AMERICAN SYSTEM


SECONDARY MATERIAL: BOOKS


**SECONDARY MATERIALS: ACADEMIC ARTICLES**


Dalilie, Boushra. “Environmental Ethics: Between Anthropocentrism and Ecocentrism”.


SECONDARY MATERIAL: OFFICIAL DOCUMENTATION OF ECUADOR


SECONDARY MATERIALS: NEWS RELEASES, NEWSPAPERS AND MAGAZINE ARTICLES

Dávalos, Pablo. “Reflection on Sumak Kawsay (good living) and theories of development” (15 October 2009), Other News Information that Markets Eliminate.

Gilbert, David “Rainforest home to vast treasury of life” (March 13, 2012)

Horne, Bethany “After All the People We Killed, We Felt Dizzy” Newsweek (2 January 2014).
