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#### ABSTRACT

The Ecuadorian Constitution, oriented by guidelines of International Law, has established a multi-cultural State, and devotes one of its chapters to the collective rights of the indigenous and Afro-Ecuadorian peoples. Since approval in 1998, new possibilities have arisen regarding claims of such rights before courts, as well as their development in domestic laws.

In Ecuador's Amazonian regions, there are two cases in which indigenous peoples have made use of the new legal mechanisms to defend their collective rights against the oil industry. Both cases demonstrate the aggressiveness with which oil companies –allied with the government and the World Bank - impose their “public relations programs” in indigenous territories, applying the same divide-and-conquer dynamics historically used by the oil industry in the legal arena. (Original in Spanish.)

#### KEYWORDS

Indigenous rights – Indigenous peoples – Ecuadorian Amazon – Oil industry – Right to consultation.



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# INDIGENOUS PEOPLES VERSUS OIL COMPANIES: CONSTITUTIONAL CONTROL WITHIN RESISTANCE

Isabela Figueroa

*I would like to know how white people think, understand why they divide the land. We had never heard someone could own only a part above, because someone else owns a part below. All human beings live above, underneath lie snakes and spirits. I am worried about that.\**

## Introduction

The Ecuadorian Constitution is Latin America's most advanced in terms of acknowledgement of collective rights. Oriented by International Law guidelines, it has established a multi-cultural State and devotes one of its chapters to the collective rights of the indigenous and Afro-Ecuadorian peoples. Since its approval in 1998, the Constitution has opened new possibilities regarding claims of such rights before courts, as well as their development in domestic laws.

In the Amazonian region of Ecuador, there are two cases in which indigenous peoples from the Independent Federation of the Shuar People of Ecuador (FIPSE) and from the Kichwa community of Sarayaku have made use of some of the new legal mechanisms to defend their collective rights against the oil industry. One of the results of such actions has unveiled the aggressiveness with which oil companies impose their "public relations programs" in indigenous territories, clearly exposing that the goal of such programs is to "tame" indigenous resistance in the Jungle and make room for the extraction industry.

The present text exposes the weaknesses of the Ecuadorian Constitution, which have resulted in the mere transfer of the social conflicts among

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\*Narcisca Mashienta, Shuar from the Yuwentza community, Independent Federation of the Shuar People of Ecuador (FIPSE). Comment to the information received during a workshop on collective rights and oil activity, held by FIPSE during February 13 and 14, 1999.

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See the notes to this text as from page 72.

governments, oil companies, and indigenous peoples to the legal arena. Once the Indigenous Peoples resorted to legal strategies to defend themselves from the “public relations programs” through the courts, the Ecuadorian government, sponsored by the World Bank, elaborated and decreed regulations, tending to keep the order previously established by the oil companies in the above-mentioned programs.

Even though relations between indigenous peoples and oil companies are only a part of the extractive industry’s problems in the Amazonian region, their dynamics include global players and illustrate some of the challenges in the build-up of the multi-cultural State conceived in the Ecuadorian Constitution.

### **Ecuador: Country of the Amazon**

In a territory of 274,780 km<sup>2</sup>, Ecuador’s population of 12 million is distributed in four regions: Amazonian (to the West), Sierra, Costa, and Galápagos.

Information regarding the percentage of the indigenous population varies according to different sources. Several polls, using different “ethnic identification” criteria, have offered data ranging from 25 to 40%. Some more recent studies state that the percentage is 35%.<sup>1</sup> Indigenous populations belong to 12 different nationalities which, besides Spanish, speak 11 different languages and are organized in a politically representative network at different levels: local, regional and national. The biggest and most representative national organization is the Confederation of Indigenous Nationalities of Ecuador (CONAIE).

The Amazonian region in Ecuador, with its low demographic density, spreads over 130,000 km<sup>2</sup>, which represents almost half the geographical surface of the country. Most of the inhabitants belong to the Cofán, Secoya, Siona, Huaorani, Eastern Kichwa, Shuar, Achuar, Shiwiar and Zapara nationalities.

The communities are organized into centers and associations which, in turn, constitute federations. Most of these organizations, at a regional level, are represented by the Confederation of Indigenous Nationalities of the Ecuadorian Amazon - CONFENIAE, affiliated with CONAIE.

Since the seventies, and after an unsuccessful proposal of agrarian reform, the Amazonian region was gradually colonized, one of its objectives having been to make it safer for oil exploitation.

### **Ecuador: An oil-producing country**

The Ecuadorian economy depends largely on extraction of oil, whose reserves are mainly located in the Amazonian region. In 2000, income from oil exports represented 41.7% of the total Ecuadorian budget. The price increase of oil multiplies this figure.<sup>2</sup> The first company to operate in Ecuador was Shell, during

the thirties. After looking for large reserves unsuccessfully in the Amazonian region, it left and moved to the Coast.

Over 30 years later, Texaco discovered crude oil in the northern Amazonian region and operated there for 25 years. It is calculated that such operation caused deforestation of 700,000 to 800,000 hectares, and spilled around 300,000 barrels of crude oil, as well as causing several other ecological disasters in the area.<sup>3</sup> These problems still exist and are aggravated day by day, due to the activities of Petroecuador<sup>4</sup>, which operates with the obsolete equipment inherited from Texaco in 1992.<sup>5</sup> The impact of Texaco and Petroecuador affect indigenous peoples and settlers who moved to the region, encouraged by promises of work and government incentives.<sup>6</sup>

The central region is affected both environmentally and socially by more modern contracts, such as the concessions in Kichwa territory, including Sarayaku, but their effects cannot be compared to what Texaco caused in the North. The Southern region, mainly inhabited by the Shuar and Achuar peoples, still resists the beginning of oil activity, in spite of the huge pressure exerted by the companies and the government.

### **Ecuador: A multi-cultural country**

During the 80's, the Amazonian indigenous peoples consolidated organizational groups, which they formed with the support of religious missions. In 1986, they created the Confederation of Indigenous Nationalities of the Ecuadorian Amazon-CONFENIAE, through which they began to express their political claims on land, environment, health, and culture. During the same decade, the CONAIE grew to become a national movement, gradually imposing the indigenous agenda on government decisions.

Since 1990, when CONAIE stirred up a major insurrection in the country, the indigenous issue in Ecuador captured the attention of the international community. A critical discourse concerning continental commemoration of the Spanish conquest ended up consolidating a national political movement, the Multi-National Pachakutik Movement, which obtained 21% of the votes during the 1996 presidential elections, and actively participated in the elaboration of the constitutional text.<sup>7</sup>

The 1998 Ecuadorian Constitution is one of the results of this growing political force. The text brings together “up-to-date sociological and modern philosophical discussions regarding gender, right to difference, identity and communitarianism, but also ecological and legal anthropology issues.”<sup>8</sup>

The consolidation of a national indigenous movement compelled the Ecuadorian state to review its commitments to indigenous rights and the environment. In the Amazonian region,, indigenous peoples' and settlers'

organizations began to denounce the social and environmental impact produced by oil industry development, generating pressures to reform oil industry policies and practices. A lawsuit against Texaco presented in the district of New York was essential to the development of a rights perspective on the relations among oil companies, governments, and affected parties.<sup>9</sup>

### **The '98 Constitution – Ama quilla, ama llulla, ama shua!<sup>10</sup>**

Ecuador is a sovereign, unitary, independent, democratic, multi-cultural and multi-ethnic State, based on the rule of law. That is how the constituents decided that the first article of their Magna Carta should read. The multi-cultural and multi-ethnic concepts have been innovations brought by the 1998 text. Scholars define a multi-cultural and multi-ethnic country as one where more than one people co-exist, in the sense of a historical community, sharing a language and a differentiated culture.<sup>11</sup>

Even though most of the American countries are multi-national and multi-ethnic, very few acknowledge this reality. By declaring itself multi-cultural and multi-ethnic, the State assumes the co-existence of various claims of redistribution of power, cultural rights, and development policies, and commits to bringing them together. Instead of subordinating the interests of some ethnic groups to those of others, the State has to accommodate them under the principles of equity and participation.<sup>12</sup> The Constitution has established guidelines for the development of laws that will acknowledge such reality.

The creation of a chapter devoted to collective rights is the central key to the concept of multi-culturality in the Constitution. Articles 83, 84 and 85 describe a series of constitutional guarantees that safeguard rights such as identity of indigenous peoples, protection of their culture and territories, management of their natural resources, participation in the State, and autonomous development. Even though it is impressive at first sight, the chapter regarding collective rights is not integrated throughout the Magna Carta, since it exists almost as an appendix, defying the political and economic order established by the Constitution itself.

### **Oil activity in the Constitution**

Just as in other countries of the region, the Ecuadorian Constitution reserves the property of subsoil resources to the State. However, oil fields in the Amazonian region are located in the subsoil of lands belonging to indigenous peoples. For these peoples, the concept of land property is integral, as the various aspects of their identity and culture are connected with their feeling of mutual belonging to the land –a perspective that the Constitution also recognizes.

The conflict generated by the Constitution, between traditional property and soil dichotomy, is not only practical but legal, when different parties interpret it. In theory, the generation of this conflict is necessary to foster the creation of policies that will implement interaction processes from different perspectives. In the long run, conflicts should generate dialogue processes and, through them, negotiations that could redistribute decision making power over public policies.

Seven years have passed since the Ecuadorian Constitution came into force. During that time, some indigenous organizations have used legal resources to consolidate their rights and resist the impact of oil companies, placing day-to-day conflicts in the legal arena and demanding protection of their rights. In response, successive governments have developed a legal strategy that ignores multi-cultural rights and achievements attained by indigenous peoples, turning the unequal and abusive relationships that companies establish with indigenous communities into legal rules.

The result of this posture is the co-existence of legal instruments that deal differently with the interaction of indigenous peoples, governments, and oil companies. On the one hand, a series of national and international court decisions back the indigenous perspective. On the other, legal rules adapt to the interests of the oil industry.

In order to understand this contradiction, generated in the legal field, it is necessary to analyze the legal conflicts originating in the Constitution itself. The presentation of the cases that follow, and the answers the Ecuadorian government has found to neutralize their effects, offer an extra element to analyze this contradiction.

## **Legal strategies to resist**

### ***The FIPSE Shuar People vs. Arco, Burlington and the Ecuadorian State***

With a territory of over 184,000 hectares, the Shuar People of the Independent Federation of Ecuador (FIPSE) live close to the Kutukú mountain range, in the province of Morona Santiago. FIFPS includes 56 *centers* grouped in 10 *associations* with autonomously elected governments.

At the same time, the union of these associations constitutes the Federation, affiliated with CONFENIAE. FIPSE is a political body that represents the communal interests of its more than 7,000 members, defending their rights and interacting with external parties, such as governments and NGOs.

In 1998, the Ecuadorian government hired Arco, an American company, to exploit oil in Plot # 24 -200,000 hectares in the Southern Amazon, comprising – among others- the ancestral FIPSE territory. The contract was negotiated and signed without the knowledge of FIPSE or any other affected people. When the

news broke, and they were informed of the difficulties Northern peoples were facing due to oil exploitation, FIPSE held an Assembly and decided not to allow “any individual negotiation between the company and the communities, without the Assembly’s authorization, given that it is its highest authority.”<sup>13</sup>

Such decision was made public and presented to the Ecuadorian government and to Arco, which ignored it and offered small amounts of money and property to some families in two of the 56 FIPSE communities, without consulting the top leaders of the organization. Instead, the company asked these families to allow them entrance to their lands in order to perform “environmental studies.”<sup>14</sup>

In 1998, resorting to new possibilities brought up by the Constitution, FIPSE presented a constitutional appeal for Legal Protection against Arco, arguing that negotiations between the company and certain individuals violated the precepts of article 84, concerning their own form of political organization. The judge decided that Arco could not approach any community in or outside the FIPSE territory without prior consent by its Assembly, and ordered Arco to respect the political demands of the Federation by addressing only its designated leaders.<sup>15</sup>

Since Arco considered FIPSE’s claims excessive, it appealed the decision. At the same time, openly disobeying the Court’s decision, Arco invited another FIPSE community to sign another “agreement”, but the invitation was ignored. Later on, the Court of Appeals backed the decision in favor of FIPSE.<sup>16</sup>

In 1999, FIPSE asked the National Workers’ Confederation, the Ecuadorian Confederation of Free Unions Organizations (CEOSL) for institutional support to present a claim against Ecuador before the International Labor Organization (ILO), for violation of Convention n. 169. Two years later, the ILO issued a series of recommendations to the Ecuadorian State, aimed at guaranteeing the rights of FIPSE and other Amazonian organizations.<sup>17</sup>

In April 2000, Arco sold its rights on the resources of the Shuar territory to Burlington Resources, a Texas-based oil company. Once again, the negotiation between the State, Arco and Burlington took place without the participation of either FIPSE or other affected parties. When Burlington took charge of the operation, it sent a letter to various FIPSE families, announcing the donation of a solar panel by the Minister of Energy to the communities who decided to cooperate with their work.<sup>18</sup>

In answer to this, FIPSE demanded that the court formally extend its decision to Burlington, which was granted. Immediately after that, Burlington announced that it could not meet the contract terms due to “force majeure”, an unusual classification for the indigenous resistance.<sup>19</sup> Technically speaking, “force majeure” refers to situations that are beyond human control, such as natural disasters.

At the same time, Burlington communicated to Petroecuador that it had hired “personnel in Ecuador, whose main responsibility was to improve relations in Plot 24. Such personnel have experience in Ecuador, having dealt successfully

with tough public relations concerning other oil plots. Burlington assigned a considerable budget to facilitate this task.”<sup>20</sup>

The government accepted the “force majeure” argument. Its complicity with Burlington was evidenced in a confidential document that the oil company sent to the government, stating:

*[...] Important changes have been attained [...] federations have been urged to break the 'anti-oil pact', enabling some formerly impossible rapprochements; [...] a considerable number of communities admit that the oil activity is irreversible, in contrast with the message of a group of activists who fostered the idea that a rejection from the local groups was enough to prohibit this kind of public interest projects; we now have a favorable public opinion from most to the opinion leaders, such as local authorities, independent mass media and even some groups from the Church.*<sup>21</sup>

This document made clear that, when companies plan tactics to generate conflicts within the communities, they not only expect the government’s complicity, but also its participation. Burlington suggested that governmental missions promote agreements with the communities and offer training on “public relations” to government employees who work closely with communities, such as professors and local authorities.<sup>22</sup>

In order to obtain these confidential documents and make them public, in 2001 FIPSE, together with FICSH (Federation of the Shuar Peoples) and FINAE (Inter-provincial Federation of the Achuar Nation), presented a *habeas data* petition<sup>23</sup> against Petroecuador. Consequently, Petroecuador handed over the documentation received from the company to the Shuar and Achuar Peoples. The strategy described in the document, together with new infiltrations of the company in Shuar territory, represent such obvious violations of the constitutional injunction, that in 2002 FIPSE presented criminal claims against Burlington, which are still pending decision.

By the end of 2002, after investigating the facts in which the State, Arco, Burlington, and the affected indigenous peoples are involved, the Commission for the Civic Control of Corruption demanded “the Ministry of Energy and Mining to declare the expiration of the participation contract drawn between Arco Oriente Inc. and Petroecuador. It also demanded that the Executive President of Petroecuador declare void the acceptance of the “force majeure” declaration, notified by the contractor 28 months after the expiration of the contract. The declaration of nullity leads to the return of the Plot 24 areas to the Ecuadorian State, and execution of guarantees in favor of Petroecuador.”<sup>24</sup>

In spite of this recommendation, the contract is still in force, as well as the state of “force majeure.” The more than 7,000 members of FIPSE are still resisting the various and incessant actions carried out by Burlington.<sup>25</sup>

### *The Sarayaku people vs. CGC and the Ecuadorian government*

In the province of Pastaza, approximately 2,000 people stand in resistance against the presence of oil companies in their lands, contained in Plot 23. Sarayaku, one of the communities that integrate this plot and a member of the Kichwa Organization OPIP – Organization of the Pastaza Indigenous Peoples- has been against the oil project from the beginning.

The Sarayaku lands include a total of six community groups living on the margins of the Bobonaza River, 100 km away from Puyo, the provincial capital. The ten families who resist are the main focus of a growing international campaign against oil exploitation in the Amazonian region, as well as a violent intimidation campaign to protect the companies involved.<sup>26</sup>

In 1996, the Ecuadorian government granted the Compañía General de Combustibles (CGC) from Argentina, the rights to exploit oil in Plot 23.<sup>27</sup> In 1999, the CGC franchise went through a series of inter-company sales and purchases. The process eventually caused Plot 23 to fall in the hands of an international consortium which, in 2003, included CGC, Burlington Resources from Texas, and Perenco, an Anglo-French company.<sup>28</sup>

Making use of the same strategies adopted by Arco and Burlington in the FIPSE territory, CGC approached the OPIP communities, including Sarayaku, with money and “small projects” offers. In 2002, CGC offered Sarayaku US\$60,000 to obtain its “consent” for a seismic study. The Sarayaku Assembly told the company that it not only rejected their offer, but also decided not to hold any kind of dialogue with them.<sup>29</sup>

As the company and the government pressures on the communities of the region increased, Sarayaku increased its resolve to resist any type of exploitation and division strategy. In 2002, its decision was made public under the “March for the Jungle” slogan, together with a two-month march that began at the community and ended in a press conference in Quito.

In response, CGC offered more “help” to the neighboring communities of Sarayaku, with the purpose of isolating the community from its neighbors. Until January 2003, CGC had promised a grant of US\$350,000 for “social projects” within the OPIP communities.<sup>30</sup> To undermine Sarayaku resistance, CGC invented<sup>31</sup> a body named “independents from Sarayaku”, having some Kichwa individuals sign a document on the following terms: “the undersigned [...] hereby address your authority [the CGC manager] to kindly request all the support our communities, as independents from Sarayaku, require, by means of communitarian projects and employment to be offered during the seismic studies in Plot 23 [...]”.<sup>32</sup> A common practice among the Amazonian oil companies, this one attempted to create internal conflicts leading toward the political weakening of the community.

In December 2002, OPIP presented a Constitutional Appeal for Legal Protection against CGC. The case was based on the precedent established by FIPSE vs. Arco Oriente. Just like FIPSE, OPIP demanded from the judge that he order the oil company refrain from any negotiation or dialogue with the OPIP members, without previous consent of the organization assembly. Upon receipt of the suit, and as precautionary measure, the judge preliminarily ordered “suspension of present or imminent action affecting the herewith claimed rights.”<sup>33</sup> Even though the merits of the lawsuit should have been decided few days later, it is still unsolved.

In December 2002, a CGC worker reported several Sarayaku leaders to the police for theft and damage to the company headquarters.<sup>34</sup> A copy of the report was sent by CGC to the governor of the province by CGC, who requested that special attention be given to the case.<sup>35</sup> The criminal action that followed such report was discarded by the judge. In January 2003, CGC hired a “security group”, which entered the Sarayaku territory once again to open new exploration fields.<sup>36</sup>

The sustained resistance of the indigenous communities led the government to accept the declaration of “force majeure” also in Plot 23, thus ensuring the suspension of contractual deadlines for CGC.<sup>37</sup>

As hostilities and physical aggression by the company’s security agents and even by the Ecuadorian Armed Forces persisted, and having exhausted every domestic legal remedy, the Sarayaku community resorted to the Inter-American Commission of Human Rights (IACHR) in search of protection measures. In May 2003, the IACHR ordered the Ecuadorian State, among other actions, to take the necessary measures to safeguard the life and integrity of the members of Sarayaku. The government responded that it had no resources to make those recommendations effective.

By December, the situation within the territory had deteriorated so much that Sarayaku complemented its report to the IACHR with a plea to have all the oil activities suspended in Plot 23, plus compensation for damages, and to create a special commission to investigate the case. The IACHR extended its precautionary measures to protect Sarayaku and its members, who were increasingly exposed to a wave of violent attacks. These were later extended to include the Sarayaku lawyer. In January 2004, when the Minister of Energy and Mining was consulted on the subject, he publicly answered the media that “the OAS (Organization of American States) does not give orders here”,<sup>38</sup> and insisted on the commitment that the Ecuadorian government has with CGC and the exploitation of oil in Plot 23.

In May 2004, the IACHR requested the Inter-American Court of Human Rights to take provisional measures regarding the pending claim. In July, the Court issued a series of decisions in favor of the integrity of Sarayaku and of its right to free circulation.<sup>39</sup> Due to the Ecuadorian government’s disregard for the

OAS' jurisdiction over Ecuador, and to the fact that the growing threats against Sarayaku never stopped, in July 2005, the Court took further provisional measures, and reiterated that the state should maintain the previously-adopted measures.<sup>40</sup>

### **Oil companies – The rights of persons**

Oil companies are legal entities with rights and limitations similar to any other legal entity. By excluding the rights of communities to make deals with the mentioned companies, such prohibition also applies to any other legal entity (Provincial Council, Town Hall, Church, NGOs, Army, Tourism companies, Airlines, etc.).<sup>41</sup> This declaration was printed in an anonymous “informative leaflet,” handed out in the province of Morona Santiago, where the FIPSE territory is located just a few days after the Constitutional Injunction issued against Arco..

Although the leaflets were not signed by the company, this institutional confusion reflects its perception of its identity. Inside the Jungle, an oil company behaves as if it were the State, Church, and Army. When Texaco arrived in the Amazonian region, most of the people believed the company was good for its inhabitants. The oil that the company spilled along the roads prevented dust from rising. The company trucks offered people some crude oil for their personal use, which included using it as hair shampoo.<sup>42</sup>

Social practices by the companies have not varied much ever since, but their formats have. If at the beginning of oil exploitation the “conquest” of the Jungle took place under verbal promises, today those relationships are disguised by means of “support” or “communitarian development” agreements.

#### ***Legal entity of support and faith***

Even today, the passage of a company through an indigenous village can be as mystical as in Texaco times. This is the case of TecpEcuador, which presented to the State a copy of “the only agreement signed between communities and TecpEcuador S.A. Thanks to this agreement, and owing to the excellent relationship between communities and TecpEcuador S.A., all additional commitments were decided verbally and monitored by a tripartite follow-up commission comprised of members from the community, the company, and the Municipality of Cascales.”<sup>43</sup>

#### ***Legal entity as police***

On the other hand, the growing indigenous resistance to accept help from oil companies has compelled the latter to use coercive means to attain their goals. This is the case of Perenco Ecuador Limited which, upon signing a “support

agreement for communitarian development” with the Kichwa Balzayacu community, decided to ensure the efficiency of its donation of 50 water drums, by stating in the same document that “the community, represented by its president and the full Commission, authorizes Perenco to use public force, impose order, and arrest any member of the community who attempts to paralyze construction of the pipeline, for whatsoever reason”.<sup>44</sup>

### *Legal entity that governs*

Lately, some of these agreements are no longer treated as communitarian “support”, but rather as “consultation.” Such is the case, for instance, with the agreement between Perenco and ONHAE –Organization of the Huaorani Nationality of the Ecuadorian Amazon. The document indicates that Perenco performed the consultation, received authorization to build access roads and platforms, and reported on the necessary operations to develop the Yuralpa field.<sup>45</sup> As a result of the mentioned “consultation,” once the communitarian needs were identified and in order to compensate for possible socio-environmental impact, Perenco donated two 25x10-meter production pools, hand nets, and some fish to a community that lives on the margins of an Amazonian tributary.<sup>46</sup>

Rapprochement of companies causes misunderstandings among the communities. Uncertainty about what is being negotiated, why, with whom, and what impact it may all have, can generate tension among the communities, and between them and the local powers. This is foreseen by the companies and by the central government. One of the goals of community liaisons<sup>47</sup> is to weaken the political body of the indigenous organization and to neutralize resistance positions toward the industry. This is what Arco stated in a document addressed to Petroecuador, concerning its actions in the FIPSE lands: “[...]Within this context, the Plot 24 operator has had to plan and develop a patient and meticulous community relations program seeking, on one hand, to modify the social hostility toward the project and, at the same time, to obtain consent from the organizations and communities to begin oil exploitation.”<sup>48</sup>

The answer that both the government and the companies have given to the petitions of Amazonian peoples has been the elaboration of the “Consultation and Participation Regulations for Carrying Out Hydrocarbon-related Activities”, which only legitimizes such relations, based on the inequality of power between oil companies and indigenous communities, as will be discussed below.

Observing the development of these conflicts and the legal offensive with which the government has responded to the legal petition formulated by indigenous communities emphasizes the dimension of the breach between the multi-cultural country conceived by the Constitution and the economic structure of the State. The Constitution itself describes this structure in its text, while proclaiming collective rights at the same time.

## **Yes, but no – Constitutional schizophrenia**

The property rights of the State over the subsoil resources versus the collective rights of the peoples over their territories is one of the most conflictive legal issues in the Amazonian region, hand in hand with other matters in which governability rights of the peoples clashes with State powers. Soil dichotomy, plus practical problems, generates doctrinarian conflicts on the nature of indigenous ancestral possession.

### ***Inalienable but expropriable lands***

Unlike individual property –of patrimonial and commercial nature-, property that results from ancestral possession is perpetual and its *animus* implies cultural preservation. Its social function is to protect indigenous cultures. Accordingly, it cannot be sold and its title may not lose its validity. The Constitution acknowledged this status, but made an exception: the indigenous property may be declared of public interest, and may be subject to expropriation. If preservation of an indigenous people implies support of its territory, and if this constitutes an essential human right, it is hard to imagine which criteria would justify such exception.

However, the Kichwa community of Eden, whose territory lies within the Oxy impact area, knows quite well the powerful force of oil interests, mixed with the legal term “public interest.” In 1999, they were persuaded to negotiate an oil exploitation permit in their territory with Oxy, under verbal threats of land expropriation by government officials.<sup>49</sup>

### ***Non-displacement from their lands, though expropriated***

If the criteria used by the government to justify expropriation is not easy to understand, it is harder still to conceive of the scenario, when this possibility is confronted with the constitutional guarantee of non-displacement, which is granted to indigenous peoples.

## **Consultation, participation and the dictionary used by the government**

Whoever has witnessed a dialogue between the various government areas and indigenous organizations knows that the government’s answer to the complaints from indigenous organizations is based on the need to exploit crude oil with the dignified mission of “bringing in development.” Whether oil produces economic and social benefits to the country or not, the understanding that the government has of the meaning of development is absolutely blind to the premises of a multi-

cultural State. Regarding the issue of non-renewable resource exploitation, successive governments have shown no predisposition to work toward re-accommodation of power among the different parties that integrate the multi-cultural State. On the contrary, their actions have tended to preserve the subordination of some to others. Bearing this intention in mind, by the end of 2002, the government decreed a “Consultation and Participation Regulations for Carrying Out Hydrocarbon-related Activities”

### *Regulation, the easiest way*

The Constitution establishes the right of peoples to be consulted as a fundamental guarantee. The exercise of liberties and fundamental rights has to be regulated by law.<sup>50</sup> However, a law implies negotiations in Congress, and this process takes time. The oil industry is not interested in indigenous times and processes. Therefore, the government chose to deal with the consultation issue by means of a regulation which, due to its nature, can be decreed by the President of the Republic, saving the time it would take to get any kind of consensus in Parliament.

### *The Frankstein document*

As lawyers know, regulations are normally derived from a law, and they specify the law's provisions. In this case, there is no law. The regulations are based on the Law of Environmental Management and the Law of Hydrocarbons. Even though the Law of Environmental Management anticipated a consultation mechanism, it refers to the participation of every individual or legal entity in environmental management, and not the consultation of indigenous peoples, as specified in article 84 of the Constitution. Likewise, the Law of Hydrocarbons does not even mention the right to consultation. The result of this hybrid is a confusing, sterile, and unconstitutional document.

### *Legalizing the unlawful*

The regulations do not define what consultation means. Price Waterhouse Coopers, the company that wrote the text<sup>51</sup>, was not requested to create one that would safeguard rights, but to “establish a uniform procedure for the hydrocarbon-related sector, so that the constitutional right of consultation of indigenous peoples could be applied.”<sup>52</sup>

The jurisprudence of neighboring countries, such as Colombia, and even the few precedents within the country, suggests that the consultation process be carried out according to international guidelines that determine respect for indigenous authority and its organizational forms. This adds to the fact that

consultation, by its nature, should be carried out by the government, as representing the State.

In contrast to all this, but in accordance with the unequal jungle dynamics, Ecuador's applicable regulations determine that the companies themselves shall be the agents to conduct the "consultation" processes.<sup>53</sup> Such consultations can be made through representative organizations or directly to the affected communities.<sup>54</sup> The result of the "consultation" should be expressed in a document that shall be "of mandatory fulfillment by the consulted parties, who herewith remain subject to prosecution by administrative and judicial mechanisms in force in the country."

### *Communitarian liaisons<sup>55</sup> as state agents*

Every indigenous organization from the Amazonian region knows the figure of the "community liaison" from oil companies. His task is to gain acceptance of the presence of the company by the inhabitants of the region where it wishes to start its activities, as quickly as possible. His experience has taught him that the best way to obtain such consent is by means of deceit. And when the latter does not work, he will generate conflicts within the communities, with the purpose of dividing their political organizations.

The Appeals for Protection presented by FIPSE and Sarayaku alleged the illegality of such communitarian relations strategies. Their claims were accepted and the obligation of the companies to dialogue with the indigenous peoples solely through their assigned representatives has become case law in Ecuador.

Provisions contained in the regulations are contrary to this understanding, as they state that the mentioned community liaisons are not only permitted to walk the Jungle in search of dis-organizational strategies, but their actions now comply with the law and their offices should be called "consultation offices".<sup>56</sup>

### *Business as usual*

The result of every process described in the regulations must appear in "resolution and consensus" documents. Such resolutions, before the regulations were in force, were called "cooperation agreements", and they were considered illegal. If previously, as in the FIPSE and Sarayaku cases, leaders could resort to the Judicial Power to protect their constitutional rights, implementation of the regulations certainly obstructs these proceedings.

### *Who guards guardians?*

The Minister of Energy and Mining, who is in charge of assessing the results of the "consultation" proceedings carried out by companies, does not have to follow

any criterion when evaluating the results of said consultations. At least that is what the regulations state. The Minister of Energy and Mining can also decide what kind of information must be made available to the public and to indigenous communities and what may not.<sup>57</sup>

### **Means of taming indigenous resistance**

The Regulations for consultation were the government's second attempt to establish rules for consultation. In 2000, the Ecuadorian government had already included an article on oil consultation in the Law for Investment Promotion and Citizenship Participation, the text of which goes hand in hand with the aggressive policy of welcoming foreign investment stated in the "Opening 2000" plan. On that occasion, pursuant to several legal claims, the Constitutional Court declared article 40 of the afore-mentioned law unconstitutional, among others.<sup>58</sup>

### ***World Bank and its interest in indigenous issues***

At that moment, the World Bank had already begun its coordination with the government regarding regulation of indigenous interference with oil exploitation. As a result of its experience with the Ecuador situation, in 2002 the Bank declared that:

*One of the most serious constraints to new investments in this sector [hydrocarbon] is the prevailing socio-political situation in Ecuador. Indigenous people's mistrust due to negative past experience has so far impeded their constructive participation in new industry ventures. To overcome this constraint, indigenous people's knowledge of the industries' legal, technical, economic and environmental developments needs to be enhanced.<sup>59</sup> [note that quotes are not compatible — some are 'and others']*

The World Bank's interest in indigenous issues in Ecuador goes back to the beginning of the nineties, and increased as the national indigenous movement gained strength. In 1993, the World Bank lent "technical assistance" to the Ecuadorian government for drafting the Agrarian Development Law, and in 2000, it launched the PERPTAL program,<sup>60</sup> whose goal is to promote technical assistance for new changes to the Hydrocarbon Law and to infuse a corporate spirit into Petroecuador, thus promoting oil development by increasing foreign investment.<sup>61</sup>

Concerned with the obstacles and limitations generated by the indigenous peoples, the World Bank financed a program of "tripartite dialogue" and later a "training program," both meant to change the negative perspective of indigenous peoples toward the oil industry.<sup>62</sup> The next step was financing the drafting process of the consultation rules, which, at the beginning, involved participation of the CONFENIAE.

The regulation-drafting process received a series of criticisms and recommendations by indigenous and human rights organizations, due to the inconsistency, both of the process and the partial drafts, with the guidelines established by the Constitution and international documents.<sup>63</sup> For these reasons, the indigenous representatives eventually withdrew from the process. The result is the regulations now in force.

### ***Ethnic differences according to the World Bank***

On its website, the World Bank points out the need to neutralize “ethnic differences,, which are considered potential conflicts for their clients. In Ecuador, the chosen path toward this neutralization has been to formalize subordination of “ethnic groups” interest to those of the economic élite. The leaders of the process leading to the regulations have resorted to legal mechanisms to establish what is valid and accepted as fair vindication of indigenous rights, and what is rebelliousness and subversion. As Velasques states regarding the drafting of the Regulation in Ecuador:

*Indigenous rights become a way to manage indigenous opposition to oil development. Racialized categories are set up so that the kind of indigenous rights that insist on the right to say no to oil development becomes an unacceptable kind of right. A more acceptable version of indigenous rights is the right to participate in discussions, improvement and management of oil related projects. This includes rights to participate in Environmental Impact Assessments (EIAs), consultation processes, environmental monitoring, etc. The goal of indigenous rights under neoliberalism is to ensure that indigenous people are “recognized” and neoliberal economic reforms continue.<sup>64</sup>*

### ***For whom the World Bank works***

The World Bank Group, whose mission is poverty relief, invests 40% of its budget in non-renewable energy projects, including big hydrocarbon projects in poor countries, carried out by trans-national oil companies. In 2004, World Bank estimated that its investment in oil or coal projects would be well over two billion dollars.<sup>65</sup>

### ***The World Bank does not listen to itself***

In 2001, the President of the Bank designated a group of experts to investigate the connection between extractive industries and poverty. Some of the recommendations given by this group of experts were that the World Bank Group should immediately limit the financing of this kind of project in countries where

effective governability and an efficient legal system could not be verified, establishing a goal to cancel financing of any extractive operation until 2008 at the almost.<sup>66</sup>

Every day, for many years, several scholars and NGOs have been reporting the disastrous relationship oil has with poverty relief. In 2004, even The New York Times published an editorial stating: “It has become clear that plenty of poorly governed nations, including Nigeria, Angola, Ecuador and Venezuela, would probably have been better off had they never discovered oil or other valuable minerals. The discovery of these resources usually foments corruption, prevents the development of a diversified economy, props up dictators and fuels wars.”<sup>67</sup>

In spite of this, in August 2004, the World Bank Group decided to ignore the recommendations of its own evaluation and continue financing projects for oil development, without instituting any of the criteria identified by its group of experts.<sup>68</sup>

## Consultation – A still untrodden path

The World Bank and Ecuadorian governments call the processes imposed on communities by oil companies and governments by the name of “consultation.” In fact, consultation is a word that does not define a process *per se*, but rather the use of this word in the legal sense, as referring to the relationship between State and indigenous peoples, has more to do with a concept that implies acknowledgement of a series of guidelines and procedures generated by international law and regional experiences.

### *Consultation and its legal grounds*

It is by no means simple to uniquely define the right of consultation. *Latu sensu*, it can be said that consultation is a mechanism that provides a negotiation process between States emerging from colonization and the indigenous peoples that resisted it.

While it is not yet possible to define a concept of “consultation” that will contain all its legal implications, it can definitely be stated that one of its principles or *sine qua non* conditions is the element of good faith. Such is the understanding of Canadian Courts, as illustrated by the Haida Nation of British Columbia: “In my opinion, the roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the aboriginal people of Canada.”<sup>69</sup>

In Latin America, the Court of Colombia has developed several criteria regarding the right to be consulted, stating that “it includes the adoption of relations based on communication and understanding, marked by mutual respect and good faith between them (indigenous populations) and public authorities (...).”<sup>70</sup>

Even though the Ecuadorian Constitution expressly deals with consultation in the chapter that refers to collective rights, ILO Covenant 169 (on aboriginal and tribal peoples in independent countries) is the one that most clearly explains this right, thereby establishing the need for adequate procedures, representative institutions and, basically, the principle of good faith.

According to this Covenant, a consultation must exist before a government makes an administrative or legislative decision that will affect indigenous peoples. It exemplifies, though in no way limits, the cases where decisions imply oil or mining activities, displacement of indigenous groups, and the institution of vocational training programs. The ILO understood that, in these three cases, the impact can be so detrimental to the interests that the Covenant seeks to protect, that it chose to specifically name them.

All the criteria present in Covenant 169 have been ignored to create the rules of consultation in force. It is quite common to hear representatives of the national government and workers from oil companies say that “*the right to consultation does not give the right to say no.*” This lie, told time and again, spread rapidly among local authorities and other active players in the Amazonian region.

It is true that a consultation process alone does not determine an oil project. But that is not its purpose. As previously mentioned, the legal basis for consultation is to facilitate negotiation based on good faith. A government should take into account a series of factors before signing a public contract, one of them being its social and environmental effects. The goal of the consultation procedure must be to identify the possible positive and negative impacts of a project, collect the opinion of the potentially-affected parties and, basically, consider them when adopting a State, not a governmental position, regarding a certain project. Therefore, communities have full right to resist the undertaking of any project in their lands, even if, legally, they do not decide on it directly.

### ***The right to say no – Free, prior, and informed consent (FPIC)***

The FPIC principle is the result of advances in the rights of indigenous peoples in the international arena. It is based on the right of these peoples to decide upon their own priorities in the development process, and it is a means of safeguarding enjoyment of the mentioned right. MacKay states that FPIC implies consent given freely, prior to final authorization of a project and beginning of activities. The FPIC process should be based on the clear understanding of the full scope of the issues involved in the governmental decision to be made.<sup>71</sup>

Even though FPIC and Consultation are different, they are absolutely inter-related, as they are both means of safeguarding the human rights of indigenous peoples.

Contrary to what some State and oil company agents believe, indigenous peoples have a right to object to oil activity in their territory, if such activity can affect the autonomous development plans of the affected peoples. This does not mean that the Consultation grants indigenous peoples the power to decide upon the existence or non-existence of oil activity in their lands. Such decision, as a last resort, belongs to the government, as representative of the State interests; a multi-cultural State in the case of Ecuador.

The FPIC principle and the right of a people to object a project identified as ecologically, economically, or socially harmful, must integrate the consultation procedure in the case of extractive industries in indigenous lands. MacKay states:

*In short, without the secure and enforceable rights to land, territories and resources, including the right to control the activities affecting them, indigenous peoples' means of sustenance, identity and survival, and their socio-cultural integrity and economic security are permanently threatened. There is therefore complex of interdependent human rights all converging on an inherent to indigenous peoples' various relationships with their traditional lands and territories –lands and territories that form “the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival”- as well as in their status as self-determining entities that necessitates a very high standard of affirmative protection. That standard is the FPIC, which is all the more necessary in relation to EI that have proved in most cases to be highly prejudicial to indigenous peoples' rights and wellbeing.<sup>72</sup>*

## **Instrumentalization of human rights discourse**

The limited treatment that the Ecuadorian government gave to the right to consultation, and to its principles in the case of oil exploitation, shows that when it comes to regulating this activity, international guidelines on indigenous rights are articulated locally to respond specific economic interests.<sup>73</sup>

Thus, the right to be consulted loses its aspect of multi-cultural negotiation, its juridical grounds, and becomes a means of greening the oil companies, preventing indigenous peoples from questioning and discussing the legitimacy of the oil activity and its impact on the enjoyment of basic human rights, such as life, health, cultural integrity, or their environment.<sup>74</sup>

### ***One example will suffice***

The consultation and participation regulations are the only post-Constitutional texts issued thus far, seeking to regulate a conflict between the capitalist system and ancestral communitarian rights. A small number of other initiatives are in progress, but none has been concluded yet. The result of this first experience is far from encouraging.

If the consultation issue, which is so full of potential to offer legitimacy to the process of “conciliation” of different cultural perspectives, has been taken so lightly, and if its results simply perpetuate unequal relationships, Amazonian peoples cannot be expected to believe in the development of the trust-based relationships necessary for the construction of a multi-cultural State.

Maybe this explains to a certain extent their refusal to take part in any kind of negotiation regarding oil activity regulation, such as when CONFENIAE gave up on participating in drafting the regulations.

## **The blood of the earth**

Some Amazonian peoples define oil as the “the blood of the earth.” They explain that it should not be extracted because the Earth loses its warmth and gets cold, annoying the spirits that take care of her. Ancestral indigenous wisdom explains some effects which nowadays concern specialists on the subject. Temperature changes, wars caused by crude oil, growing dependence on oil, even for the production of food, are some of the effects caused by extracting the blood of the earth. The arrival of a pipeline raises various problems. Apart from the relation of such results with the mood of the Jungle spirits, many experts, scholars, and activists have worked on the connection between the decrease and the increase [?] of poverty with extractive activities. As already pointed out, even the World Bank has done so.

### *Governability criteria according to the World Bank*

The board of experts who reviewed the Bank’s policies regarding extractive industries, recommended that the Bank keep some minimum criteria to be fulfilled by the countries receiving oil industry financing. Such criteria can be summarized as follows:<sup>75</sup>

- Government capacity to manage income with transparency and to maintain economic stability;
- Will to allow independent audits on the income related to the extractive sector;
- Effective conditions for income distribution among local, regional, and national authorities;
- A high-quality legal structure;
- Absence of armed conflict or risk of this type of conflict;
- Respect of the government for labor rules and human rights, in accordance with its commitment to the human rights treaties that it has ratified; and
- Acknowledgement and willingness on the part of the government to protect the internationally-guaranteed rights of indigenous peoples.

None of these conditions is present in Ecuador. In view of their absence, as acknowledged by the World Bank board of experts, extractive activities are not adequate to reduce poverty, but could instead have a severely negative impact. In spite of this, fetishism concerning oil and the idea of Ecuador as an oil-producing country is powerful in the collective conscience, even though Ecuadorians' quality of life is not related to the increase in oil production or the increase in oil income; and, further, even though oil prices depend more on outside or unpredictable geopolitical factors than on the relationship between internal supply and demand

## Conclusions

### *Self-determination and disconnection from the State*

The cat and mouse game between oil companies and indigenous communities inserts a new dynamic into the society of Amazonian peoples, which, in the long run, negatively impacts the possibilities of Conciliation. On the one hand, the using legal mechanisms has been effective in consolidating the identity of the peoples and of their political organizations in face of the State but, on the other hand, it has compelled them to invest too much effort and resources in defending themselves against the strategies of the oil industry.

When an indigenous people decides to resort to legal mechanisms to stop abusive actions of oil companies over their lands, it is possible that the immediate political effect produced is positive –communities are mobilized, unity as a people is consolidated, and political alliances are constructed in different levels. This can be observed in the FIPSE and Sarayaku experiences. It can be stated that development of such strategies has contributed to the consolidation of their institutions.

Indigenous self-determination depends on a feeling of disciplined community, not of an objectively-regulated one.<sup>76</sup> When faced with an external threat, this feeling becomes evident and it strengthens the political cohesion of the people. In the FIPSE and Sarayaku cases, this feeling led them to change their historical relations with the State, adopting the precepts granted by the Constitution and resorting to the Judiciary.

They have consolidated their autonomy and explored the limits of the State, but they have gone against the interests of the oil industry. In response to that, successive governments have chosen to maintain pre-constitutional order, thus missing a good opportunity for Conciliation.

Its predictable consequence is weakening the trust that organizations may have had in legal mechanisms and in the State itself.

### *Resistance as constitutional control*

In its attempt to establish the concept of an “ideal” State, the ‘98 Constitution has generated several opportunities for debate. Many of them originate in the conflicts that the Constitution itself contains. Oil and mining industry *versus* the rights of the peoples affected by them is one of the most conflictive issues, together with other matters of governability. In this case, as analyzed throughout this paper, the government has chosen to subordinate human rights to the interests of the economic élite.

Indigenous peoples have chosen to put into practice constitutional control, as a means of resistance. This should not be understood as “resistance to oil” or “resistance to the development of the country,” although these could also be legitimate. The fact that they have resorted to legal mechanisms to redress their rights shows that their interest in resistance is directly related to the control of the Constitution, which has been violated by successive governments.

To those who observe the evolution of the indigenous rights discourse in the Americas and their contribution to the construction of a multi-cultural State, the relationship among indigenous peoples, oil companies, and governments offers an important element of analysis, due to the different forces present in such relationship. The result of tensions generated by the FIPSE and Sarayaku cases is still to be determined, and will influence the tenor in which such relations shall be held in the future. It is widely known that the tendencies in the world oil market do not favor the outlook for the indigenous peoples of the Ecuadorian Jungle. It remains to be established if, eventually, they will be able to count on the support of the government to enforce their rights, as recognized by the Constitution.

## NOTES

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1. Cletus Gregor Barié, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*, Bolivia, Instituto Indigenista Interamericano e Instituto Indigenista de México, 2nd. Edition, 2003.

2. Iván Narváez Quiñónez, document prepared for the Seminar “Repensar el Proceso Petrolero”, organized by the Latin-American School of Social Sciences in Quito, August 2005. “ [...] income of the hydrocarbon industry in 2003 represented 14% of GDP (Gross Domestic Product), 35% of exports and 42% of tax revenue. In 2004, oil produced an income of 3,500 million dollars for the State. Between January and October, the World Bank recorded external sales for 3,302.2 millions, although oil product imports and benefits have to be taken into account. However, such figure is higher than 1,407.6 millions compared to the same period in 2003 (1,893.6 millions). Such amount is close to the revenue expected by SRI in 2005 for V.A.T. – 1,795 million dollars, *El Comercio*, December 12, 2006, p. A8.”

**3.** “The environmental, social, cultural, and economic effects of the Texaco activities were devastating. Daily, Texaco dumped over 4.3 gallons of highly toxic production waters into unprotected wells all over the Oriente province, instead of burying toxic wastes in deep holes, as the company does in the USA. Texaco was also responsible for thirty important spills on the 498-long Trans-Ecuadorian pipeline, running from Oriente to the Western coast of Ecuador, spilling 16.8 million gallons of oil directly into the environment, more than 1.5 times the 10.8 million gallons spilled by the Exxon Valdez in the Prince William Sound in Alaska.” Tamara Jezic, “Ecuador: La campaña contra Texaco Oil”, in: David Cohen et al., *Incidencia para la Justicia Social - Guía global de acción y reflexión*, Quito, Abya Ayala, 2001, p. 209.

**4.** Petroecuador is the State oil company.

**5.** Joan Kruckewitt, *Oil and cancer in Ecuador: Ecuadorian villagers believe high rates of disease are tied to petroleum pollution, a contention that Chevron disputes*, San Francisco Chronicles, December 13, 2005.

**6.** “It is extremely difficult to investigate the connection between oil-produced contamination and its impact on health, partly because the effects produced by oil and their various components are diverse and scarcely known, but also for lack of information on contamination in the past, and absence of medical records. Due to such reasons, different impacts on health were examined, instead of focusing only on one of them, for instance, cancer [...]. The results of this study suggests that women living near oil wells and stations are in a worse general health condition that the ones who live farther from them. The results can be summarized as follows: General health conditions. In the two weeks prior to the study, women of the exposed communities presented a bigger frequency of skin fungi, tiredness, and other symptoms than those who live in oil-free communities. During the past 12 months, the women from the exposed communities also presented a bigger frequency of the following symptoms: nose and eye irritation, headaches, sore throat, ear-ache, diarrhea and gastritis. Reproductive Health: Women living near oil wells and stations presented 2.5 times more risk of spontaneous abortions -i.e. 150% more than women who live in uncontaminated communities. Cancer. The San Carlos population runs a much higher risk of suffering cancer than expected, due to the characteristics of its population. The risk was particularly high in larynx, liver, skin, stomach cancer, and lymphoma. It should also be pointed out that this male population runs a higher risk of dying of stomach, liver and skin cancer.” Yana Curi. *Informe sobre el impacto de la Actividad petrolera en poblaciones rurales de la Amazonía ecuatoriana*, Coca: Instituto de epidemiología y salud comunitaria Manuel Amunarriz, 2000, p. 47.

**7.** Gregor B., Cletus, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*. Bolivia, Instituto Indigenista Interamericano, 2nd. Editon, 2003, p. 307.

**8.** Idem.

**9.** “In 1993, just as Cristobal Bonifaz, an Ecuador-born US attorney, finished reading *Amazon Crude*, he happened upon a group of Oriente leaders in Massachusetts. That meeting lead to the lawsuit, *Aguinda v. Texaco*, in which 15 leaders, representing 30 thousand people affected by the company’s activities, brought their case to New York’s district court. The *Aguinda* plaintiffs charge that from 1972-1992, Texaco released massive quantities of highly toxic petroleum waste into waters used for bathing, fishing, drinking, and cooking. They also accuse Texaco of spraying the waste onto local roads. In addition, the plaintiffs claimed that Texaco’s actions have debilitated their ability to maintain their traditional cultures. The justification for a US-based case was based on a series of legal arguments that underscored how the company’s major decisions were made within the court’s jurisdiction. Had the case been presented in Ecuador, the plaintiffs could only sue Texaco’s local subsidiary, TexPet.” Jennifer Tierney, *Maria Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation, 2004,

unpublished. "The case, which went to United States Court of Appeals for the Second District, only to be sent Ecuadorian courts, could change the way American companies do business abroad." Brian Ellsworth, *Court goes to Oil Fields in Ecuador Pollution Suit*, W1, W7, The New York Times, August 27, 2004.

**10.** *¡Do not be lazy, do not lie, do not steal!* Kichwa proverb, acknowledged by the Ecuadorian Constitution, article 97, subsection 20.

**11.** Will Kymlicka, *Ciudadanía Multicultural*, Editora Paidós Ibérica et al, Madrid, 2001, p. 26.

**12.** Idem.

**13.** Minutes of the FIPSE Extraordinary Assembly, August 13, 1998, Makuma, FIPSE Archives.

**14.** Cooperation Agreement, signed by Arco and FIPSE in February, 1999, Makuma, FIPSE Archives.

**15.** Civil Law Judge, Court of Morona Santiago. *Federación Independiente del Pueblo Shuar v. Arco Inc.*, Decision, September 8, 1999: "[...] herewith ordering the immediate execution of the following measures: Arco Oriente, Inc. under contractual obligations in the so-called Bloque 24, shall not approach individuals or base organizations, in or out of the FIPSE territory, without the legitimate consent of the Federation Assembly, through its Board; 2- The defendant is hereby forbidden to promote any approach or meeting with the purpose of holding a dialogue with any individual, Center, or Association belonging to FIPSE, without the legitimate consent of the Federation Assembly, through its Board."

**16.** Gina Chavez, "Derechos indígenas y justicia social constitucional: Un estudio de caso," CDES *Tarimiat. Firmes en nuestro Territorio*, Quito, CDES, FIPSE & COICA, 2001, p. 46.

**17.** "In adopting this report, the Committee is aware that the application of the Convention is a matter of importance for the Government, which has taken legislative measures to safeguard the interests of the indigenous and tribal peoples in its territory. The Committee hopes that the Government will continue to maintain close contact with the Committee of Experts on the Application of Conventions and Recommendations and the Office to resolve any difficulties that might arise in this respect. The Committee recommends that the Governing Body approve the present report and that in the light of the conclusions in paragraphs 28 to 44: (a) it request the Government to apply fully Article 15 of the Convention, to establish prior consultations in the cases of exploration and exploitation of hydrocarbons that could affect indigenous and tribal communities and to ensure the participation of the peoples concerned in the various stages of the process, as well as in environmental impact studies and environmental management plans; (b) it urge the Government, in seeking solutions to the problems that still affect the Shuar people as a result of the oil exploration and exploitation activities in the zone of Block 24, to contact the representative institutions or organizations, including the FIPSE, for the purpose of establishing and maintaining a constructive dialogue which will allow the parties concerned to find solutions to the situation facing this people; (c) it request the Government to inform the Committee of Experts in detail, by way of the reports it is required to submit under article 22 of the Constitution of the ILO in relation to this Convention, of developments in respect of the issues on which the representation by the CEOSL is based, and in particular on: (1) The measures taken or envisaged to remedy the situations that gave rise to the complaint, taking into account the need to establish an effective mechanism for prior consultation with the indigenous and tribal peoples as provided in Articles 6 and 15, before undertaking or authorizing any programme for the prospecting or exploitation of the resources that exist on their lands; (2) The measures taken or envisaged to ensure that the required consultations are carried out in compliance with the provisions of Article 6, particularly as regards the representativeness

of the indigenous institutions or organizations consulted; (3) The progress achieved in respect of consultations with the peoples situated in the zone of Block 24, including information on the participation of these peoples in the use, administration and conservation of said resources and in the profits from the oil- producing activities, as well as their perception of fair compensation for any damage caused by the exploration and exploitation of the zone; and (d) it declare closed the procedure initiated before the Governing Body as a result of the submission of the representation." International Labor Organization, *The Committee's Recommendations*, par. 45, Geneva, April 8, 2002.

**18.** Isabela Figueroa, "Relaciones comunitarias en el Bloque 24: una estrategia de violación de derechos," *Tarimiat - Firmes en nuestro Territorio*, Quito, CDES, FIPSE y COICA, 2nd. Edition, 2002, p. 29.

**19.** *Amazonía: dos firmas no pueden perforar*, El Comercio, Quito, November 30, 2002. The Burlington representative told El Comercio newspaper that "force majeure basically means to leave the contract with the State stand-by, which is a possibility within the bilateral agreement. It can be resorted to in virtue of situations that escape the control of one of the parties –in this case, of our company-[...], we hope that this self-moratorium with no fixed deadlines is valued by the groups that still dissent from the oil activity." "This clock stop in investments does not affect the oriented policies that look forward to rapprochement and, if possible, agreements with the parties involved."

**20.** Letter sent by Burlington to Petroecuador, January 2001, and delivered to the Shuar and Achuar nationalities as a result of the *Habeas Data* petition, Court of Pichincha, Civil Law Third Judge, August 21, 2001. FIPSE Archives, Makuma.

**21.** Idem.

**22.** Document sent by Burlington to Petroecuador and delivered by Court order to the Shuar and Achuar peoples in the mentioned Habeas Data petition. FIPSE Archives, Makuma.

**23.** Centro de Derechos Económicos y Sociales, "Bloque 24: Derechos Indígenas contra intereses petroleros", *Boletín* n° 10, Quito, 2002, p. 3.

**24.** Commission for the Civic Control of Corruption (CCCC), "Presuntas irregularidades en la celebración y ejecución del contrato de participación para la exploración de hidrocarburos y explotación de petróleo crudo en el bloque 24 de la Región Amazónica," Investigation Report, Published on November 13, 2002.

**25.** "The biggest Ecuadorian indigenous organization yesterday reported that transnational oil and mining companies attempt to divide the Amazonia natives to operate freely in that area, and claimed exploitation of those territories should be prohibited. Burlington Oil Company and Lowell mining company, both of them American, promote corruption and violence in the Shuar and Achuar communities to begin with the exploitation in Cordillera del Cóndor and Transkutukú, pointed out the Confederation of Indigenous Nationalities of Ecuador (CONAIE) in a press release." CONAIE states that transnational companies attempt to divide natives, *El Comercio* AP, February 1<sup>st</sup>., 2006.

**26.** Jennifer Tierney, *Maria Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.

**27.** Idem.

**28.** Idem.

**29.** CDES, *Síntesis cronológica de la situación del Pueblo Kichwa de Sarayaku en torno a la violación de sus derechos colectivos*, Quito, 2004, unpublished.

**30.** Idem.

**31.** "On December 31, the General Assembly of the Kichwa People of Sarayaku objected to the signatures as maneuvered and used without consent, and declared that they never met either to create or give consent to any independent community of Sarayaku, the signatures only referred to a medical assistance record, and a gift of medicines, at the moment of a visit." KURAKAS Council of Sarayaku, *Situación actual de la Comunidad Indígena de Sarayaku frente a la Compañía General de Combustibles (CGC), subsidiaria de la Texaco-Chevron*, Sarayaku Archives, unpublished, p. 4.

**32.** Letter drawn by CGC and signed by 12 members from 2 communities of the Sarayaku Church on August 2, 2002, Archives belonging to Lawyer Bolívar Beltrán, ex-National Director of INDA Ecuador.

**33.** Pastaza Civil Court Judge, *Decision*, November 29, 2002.

**34.** Pastaza Judicial Police, *Denuncia por Secuestro hecha por Aragon Antonimo Marcelo*, December 2, 2002.

**35.** Jennifer Tierney, *Maria Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.

**36.** CDES, *Síntesis cronológica de la situación del Pueblo Kichwa de Sarayaku en torno a la violación de sus derechos colectivos*, Quito, 2004, unpublished.

**37.** Jennifer Tierney, *Maria Aguinda et. al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.

**38.** Amnistía Internacional, Ecuador: Temor por la seguridad/amenazas de muerte a defensor de Derechos Humanos, 2004, índice público AMR 28/014/2004, available at <<http://web.amnesty.org/library/index/ESLAMR280072004>>.

**39.** Inter-American Court of Human Rights, Caso Pueblo Indígena de Sarayaku, Provisional measures requested by the Inter-American Commission of Human Rights regarding the Republic of Ecuador, Resolution from July 6, 2004: Require the state to: " 1) adopt, without delays, the necessary measures to protect the life and personal integrity of the members of the indigenous peoples' town members kichwa of Sarayaku and of those who exercised their defense in the required proceedings before the authorities; 2) guarantee the right of free circulation to the members of the town kichwa de Sarayaku; 3) investigate the facts that motivated the adoption of these provisional measures, in order to identify the responsible persons and impose on them the corresponding sanctions; 4) request that the State give participation to the beneficiaries of such measures in their planning and implementation, and that, overall, the State keep them informed on the progress of the execution of the measures ordered by the Inter-American Court of Human Rights; 5) request the State to inform the Inter-American Court of Human Rights, within ten days following notification of the present Resolution, about the cautionary measures adopted in compliance to it; 6) request the Inter-American Commission of Human Rights that the present resolution be transmitted to the beneficiaries of the mentioned measures, and that they be informed on the fact that their observation can be presented within five days, as from the date of notification of the State report; 7) request the Inter-American Commission of Human Rights the presentation of its observations within seven days, as from notification of the State report; 8) request the State, after its first report (resolutive point 5 *supra*), to continue informing the Inter-American Court of Human Rights every two months on the provisional measures adopted, and require the beneficiaries of such measures to present their observations to the mentioned State reports within six weeks as from reception."

- 40.** Inter-American Court of Human Rights, Resolution from June 17, 2005, Provisional Measures requested by the Inter-American Commission on Human Rights regarding the Republic of Ecuador, Case of the Indigenous People of Sarayaku.
- 41.** Leaflet that circulated in the city of Macas, Province of Morona-Santiago – where the FIPSE territory is located- concerning the results of the Appeal for Legal Protection against Arco, FIPSE Archives.
- 42.** Tamara Jezic, “Ecuador: La campaña contra Texaco Oil,” in: David Cohen et al., *Incidencia para la Justicia Social. Guía global de acción y reflexión*, Quito, Abya Ayala, 2001, p. 210. Jennifer Tierney, *Maria Aguinda et al. versus Texaco Oil Company*, New York, Rainforest Foundation US, unpublished, 2004.
- 43.** Document elaborated in November, 2002, suggesting an agreement between TecpEcuador SA, an unidentified community and the Municipality of Cascales, Lawyer Bolivar Beltrán’s archives, former National Director of Agrarian Development (INDA), Quito.
- 44.** Document elaborated in July, 2003, suggesting an agreement between Perenco Ecuador Limited and the Balzayacu community, zayacu, Lawyer Bolivar Beltrán’s archives, former National Director of Agrarian Development (INDA), Quito.
- 45.** “According to article 88 of the Constitution of the Republic and articles 28 and 29 of the Environmental Management Law, the contractor informed and consulted the members of the Huaorani community of Gareno and its impact area, as well as the ONHAE management, about the mentioned project and the possible socio-environmental impact it may cause. As a result of the consultation process, the ONHAE authorized the construction of access roads and platforms of Nemoca and Waponi/ Ocatoe oil wells, as well as their perforation and further operation. Likewise, Perenco Ecuador Ltd. informed about necessary operations to develop the Yuralpa field. This document indicates an agreement between Perenco and the ONHAE, Lawyer Bolivar Beltrán’s archives, former National Director of Agrarian Development (INDA), Quito.
- 46.** *Ibíd.*
- 47.** “Relacionadores Comunitarios” in Spanish.
- 48.** Burlington, 2002 Bloque 24 Program and Annual Budget, Quito, 2002, unpublished, FIPSE Archives, Makuma.
- 49.** Interview with Lawyer Bolivar Beltrán, former National Director of Agrarian Development (INDA), November 2004.
- 50.** Ecuador, Constitution of the Republic of Ecuador, Article 141, provision 1.
- 51.** Mario Melo, *Reflexiones respecto al reglamento de consulta y Participación en Actividades Petroleras*, CDES, Quito, 2003. Unpublished.
- 52.** Ecuador, Consultation and Participation Rules for the performance of hydrocarbon-related activities, Article 1.
- 53.** “The provisions herewith contained are applicable in all the territory of the Republic of Ecuador, for contract bids related to exploration and exploitation of hydrocarbon activities, as defined by corresponding rules, to be performed by PETROECUADOR, its branch offices, and its contractors or associates, as well as by national or foreign companies legally established in the country, duly authorized to carry out the mentioned activities.” Ecuador, Consultation and Participation Rules for the performance of hydrocarbon-related activities, Article 2.

**54.** “ Consultation of indigenous peoples, which are auto-defined as Afro-Ecuadorian and as nationalities, be it pre-bidding or for Execution, shall be addressed to indigenous and Afro-Ecuadorian communities located in the direct impact area of the bidding or the project, as corresponds; for which purpose they shall act directly or through legally established organizations representing them.”

**55.** “ Relacionadores Comunitarios” in Spanish.

**56.** Ecuador, “ Consultation and Participation Regulations for Carrying Out Hydrocarbon-related Activities” , Article 27: “ Immediately after the last publication of the convocation of the prior consultation process, the organism in charge of the bidding or its delegate, shall open a Consultation Office, the full costs of which shall be their responsibility –including technical staff and necessary materials to spread information and collect criteria from indigenous and Afro-Ecuadorian communities and from citizenship.”

**57.** Article 30 – The information that, due to its nature, is considered confidential and protected by intellectual property rights, pursuant to legal and contractual regulations in force, is excepted from what has been established in previous articles, as long as confidentiality lasts, as well as information that does not specifically correspond to the criteria, comments, opinions, and proposals regarding the socio-environmental measures on hydrocarbon activity that generates the consultation.

**58.** The article proposed in such law stated the following: “ Art. 40- After General Provisions, the following numerated articles shall be added: [...] Before execution of plans and programs on hydrocarbon exploration or exploitation of lands assigned by the Ecuadorian State to indigenous, black or Afro-Ecuadorian communities, which might affect the environment, Petroecuador and its branch offices, contractors or associates, shall consult the referred ethnic groups or communities. To this end, they shall promote assemblies or public hearings in order to explain and expose the plans and purposes of their activities, the conditions in which they will be carried out, the duration and the possible direct or indirect environmental impact they might cause the community or its inhabitants. Written record by minutes or public deeds shall be kept of every act, agreement, or covenant generated, as a consequence of consultation regarding exploration and exploitation plans and programs. Once the consultation is held, the corresponding ministry shall adopt the decisions it considers most convenient to the interests of the State.”

**59.** World Bank, *Terms of reference for training program for representatives from indigenous peoples, regional organization on the social and environmental impacts of hydrocarbon projects in Ecuador*, quoted by Teresa Velazques in *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master’s thesis), Austin, The University of Texas at Austin, 2004, p. 20, unpublished.

**60.** World Bank, *Public Enterprise Reform Privatization Technical Assistance*, 2000.

**61.** Teresa Velasquez, *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master’s thesis), Austin, The University of Texas at Austin, 2004, unpublished, p. 18.

**62.** Hernán Montes, oil and gas economist for the World Bank in Ecuador, quoted by Teresa Velasquez in *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master’s thesis), Austin, The University of Texas at Austin, 2004, unpublished, p. 19

**63.** Mario Melo, *Reflexiones respecto al reglamento de consulta y participación en actividades petroleras*, Quito, CDES, 2003, unpublished.

- 64.** Teresa Velasquez, *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, p. 9, unpublished.
- 65.** Sustainable Energy & Economy Network, *Analysis of World Bank Group Management Response to the Extractive Industries Review – Climate Change and the Extractive Industries*, July, 2004.
- 66.** World Bank, *Extractive Industries and Sustainable Development. World Bank Group Experience Evaluation*, Washington, DC, 2003.
- 67.** The New York Times, "Poor Countries, Rich Resources", Editorial Desk., August 1<sup>st</sup>, 2004.
- 68.** World Bank, *Striking a better Balance – The World Bank Group and Extractive Industries: The Final Report on the Extractive Industry Review - World Bank Group Management Response*, Washington, DC, September, 2004.
- 69.** Court of Appeals, British Columbia, *Haida Nation v. B.C. and Weyerhaeuser*, Decision, 2002 BCCA 147, p. 33.
- 70.** Constitutional Court of Colombia, Decision SU-039/97.
- 71.** Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and to the World Bank's Extractive Industries Review*, Forest People Programme, 2004, p. 19, Available at <[http://www.forestpeoples.org/documents/law\\_hr/bases/fpic.shtml](http://www.forestpeoples.org/documents/law_hr/bases/fpic.shtml)>.
- 72.** Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and to the World Bank's Extractive Industries Review*, Forest People Programme, 2004, pp. 21, 22, Available at <[http://www.forestpeoples.org/documents/law\\_hr/bases/fpic.shtml](http://www.forestpeoples.org/documents/law_hr/bases/fpic.shtml)>.
- 73.** Teresa Velasquez, *Cultural Governance, Racial Dominance: World Bank and the Taming of Indigenous Activism in the Ecuadorian Amazon* (Master's thesis), Austin, The University of Texas at Austin, 2004, unpublished, p. 27.
- 74.** Idem.
- 75.** World Bank, *Extractive Industries and Sustainable Development. Evaluation of the World Bank Group Experience*, Washington, DC, 2003, pp. 48-49.
- 76.** Vine Deloria, quoted by Michael F. Brown, *Who owns native culture*, Cambridge, Massachusetts, London, Harvard University Press, 2003, p. 244: "It [self-determination] involves most of all a strong sense of community discipline and a degree of self-containment and pride that transcends all objective codes, rules and regulations."

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Translation by Maria Lucia Marques