

THE
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Quarterly Report on the National Constituent Assembly of the Republic of Ecuador

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Introduction

This report by the Carter Center complements the four bi-monthly reports it has produced to date on the constituent process taking place in Ecuador. On one hand, this document synthetically reviews the information already covered in the bi-monthly reports and, on the other, deepens the focus on some aspects that were not developed in those reports. After presenting the background and political context of the constituent process, the Report provides an overview of the political composition of the National Constituent Assembly (CA) and its Rules of Operation. Afterward, it focuses on the Assembly's internal work through its three fundamental decisive bodies: the Plenary, the Working Group on Legislation and Oversight (Working Group 10) and the rest of the Working Groups (Groups 1 through 9). Next, it reviews the Assembly's relationships with the constituted powers (Executive, Legislative, Judicial and municipal powers), as well as with civil society. The last section is dedicated to four issues that have generated debates and tensions within the Assembly as well as Ecuadorian society. Finally, it offers a chronology of the main events in the constituent process and a table that summarizes the main decisive acts of the CA as an annex.

Previous errors:

- In the first report, we stated “The convocatory statute of the Assembly established gender quotas for the parties¹, with half of their members being women”. Even though the parties respected the gender quotas in their lists, this doesn't mean the final results of the election consisted of 50% women. The real percentage of female Assembly members is 35%.
- In the second report, we stated “Álvaro Noboa was removed from his position as an Assembly member for not turning in a sworn statement of earnings as required in the Assembly's Internal Rules (Art. 17).”² In exact terms, Noboa wasn't “removed” but rather lost his seat as the principal Assembly member, for violating clause 1 of article 18 of the Rules of Operation³, which alludes to obligations outlined in article 17.

¹ Ibid, Artículo 13.

² Wilson Benavides, “Noboa, fuera de la Asamblea por no entregar su declaración de bienes”, El Comercio, 13/01/08. Online: http://www.elcomercio.com/solo_texto_search.asp?id_noticia=106474&anio=2008&mes=1&dia=13

³ Asamblea Nacional Constituyente. Reglamento de Funcionamiento de la Asamblea Constituyente. Online: http://www.asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=733&Itemid=72

I. Background and context of the CA

From the beginning of 1997, Ecuador has suffered a crisis of political instability, which it has not yet overcome completely. That year, a cycle of popular protests led to the removal or overthrow of three Presidents of the Republic.⁴ Until 1998, under the mandate of Fabián Alarcón, the Ecuadorians decided to initiate a constituent process with the goal of returning to their lost political stability. The most immediate result was the 19th Constitution in Ecuador's history ("The Constitution of 1998"). Barely a year after its inception, contradictions between the expectations of the people and the concrete policies of the sitting government fostered explosive popular discontent. The years that followed bore witness to popular mobilizations, a successful coup d'état and a new presidential overthrow.⁵ In all, Ecuador had eight presidents in only ten years (1997-2007)⁶ and a deep distrust by the majority of Ecuadorians of the principal political institutions (the Congress, political parties, Judicial Branch).⁷ In this context, economist Rafael Correa's presidential campaign, representing a non-traditional political party, gain momentum in early 2006. His main campaign issue revolved around the realization of a new National Constituent Assembly with full powers, as the spearhead in a "*Citizen Revolution*" that would overcome two formidable pillars of the old order: the "*party-ocracy*" and the "*neoliberal model*".

In the first electoral round, three principal candidates faced off: the business man Álvaro Noboa, of the Partido Renovador Institucional Acción Nacional (PRIAN); Gilmar Gutiérrez, of the Partido Sociedad Patriótica (PSP);⁸ and Rafael Correa, of the new electoral coalition Patria Altiva y Soberana (PAIS). When none of the three candidates obtained an absolute majority, Noboa and Correa advanced to the second round. On November 26, 2006, the ballots were counted: Rafael Correa emerged victorious with 56.67% of the citizens' vote.⁹ Upon taking office on January 15, 2007, his first act was to convoke by decree a popular referendum to decide whether to hold the Assembly (Decree

⁴ Los presidentes y las fechas de sus derrocamientos son: Abdalá Bucarám (06/02/97); Jamil Mahuad (21/01/00); Lucio Gutiérrez (20/04/03).

⁵ Overthrow led by then Colonel Lucio Gutiérrez and supported by the Confederation of Indigenous Nationalities of Ecuador (CONAIE) on 01/21/00; with him they overthrew Jamil Mahuad; they formed a triumvirate that lasted 1 day, which eventually led to the presidency of Gustavo Noboa Bejarano.

⁶ In chronological order the presidents (constitutional and interm) between 1997 and 2007 are: Abdalá Bucarám, Rosalía Arteaga, Fabián Alarcón, Jamil Mahuad, Gustavo Noboa, Lucio Gutiérrez, Alfredo Palacio and Rafael Correa.

⁷ For example, a document from the Latinobarómetro agency reports that out of 18 countries studied between 1997 and 2005 on the public's perception of the associations between parties, congresses and democracy, Ecuador was in last place. On average, in these years 33% of Ecuadorians believed that it democracy was possible without parties and 33% also believed the Congress to be expendable. Cf. Latinobarómetro, "Informe Latinobarómetro 2005. 1995-2005", Santiago de Chile. Online: www.latinobarometro.org

⁸ Brother of former president Lucio Gutiérrez (overthrown on 04/21/04).

⁹ Tribunal Supremo Electoral. Resultados Elecciones Presidenciales. Online: http://www.tse.gov.ec/Resultados2006_2v/

No. 2)¹⁰. On April 15, 2007 the referendum passed with 81.72% in favor of the Constituent Assembly.¹¹

Prior to the referendum, the Congressional majority opposed it¹² and attempted to remove the President of the Supreme Electoral Tribunal (TSE). For its part, the TSE, in a controversial decision on March 7, 2007, assumed maximum authority during the election cycle and removed 57 Congress members it accused of serving as obstacles to the electoral process on. From that point on, institutional resistance to the constituent process was diminished.

The process of electing constituents ended on September 30, 2007. Ecuadorians elected 24 national Assembly members; 100 provincial members; and 6 representatives for migrants (2 for Latin America, 2 for the United States and Canada, and 2 for Europe). Out of the total 130 Assembly members, 45 are women.

The results of the election were strongly favorable towards the President's political movement. The PAIS coalition won 80 of the 130 seats in the Assembly. According to the statute approved in the referendum, the Assembly would make decisions by an absolute majority of its members¹³, granting the government coalition a comfortable advantage.

According to Article 23 of the Assembly Statute, as well as Article 69 of the Rules of Operation, (see below), once the constitutional text is approved by the CA, the TSE will call another referendum for the Ecuadorian people to approve or reject the new Constitution, by at least half plus one of all votes. The PAIS bloc has proposed to have the constitutional text ready by May 24, 2008, even though the mandate authorizes an extension of up to three additional months. At the moment of this report's publication, the Constituent Working Groups (see *same*) will continue to tour the country, meeting with different social sectors to collect and process their proposals and initiating the first discussions, in some working groups, of proposed articles. According to the statements of Alberto Acosta, president of the CA, *"We're already in the process of passing from the conceptual and political debate to that of the articles of the new Constitution"*.¹⁴

¹⁰ Afterwards, through Executive Decree No. 54 (Registro Oficial No. 12, 31/01/07) the original convocatory statute of the CA was revised and, finally, the text submitted to the referendum (codified version) was that of Executive Decree No. 148 of 02/26/07.

¹¹ Tribunal Supremo Electoral. Resultados Referéndum 2007. Online: <http://www.tse.gov.ec/Resultados2007/>

¹² Alianza País did not run candidates for Congress in 2006, because it considered it a useless organization for producing changes. In its place, it decided to pursue the constituent route.

¹³ Supreme Electoral Tribunal, Statute on the Election, Installation and Operations of the Constituent Assembly, Article 10. Online: http://app.tse.gov.ec/ResultadosAsamblea2007/Estatuto_Asam2007.pdf

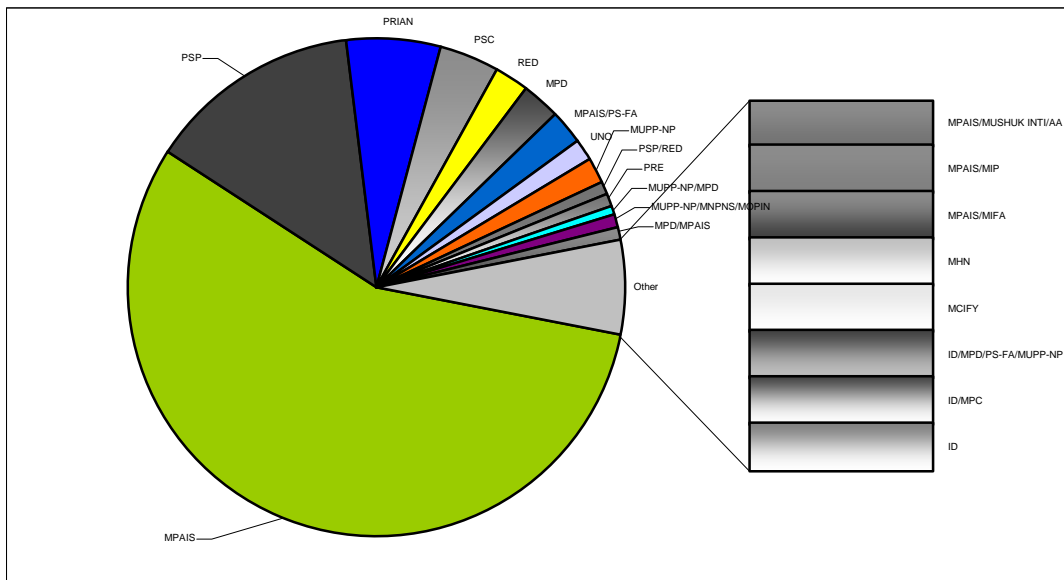
¹⁴ "Acosta da plazos para análisis de constitución", El Universo, 08/02/08. Online: <http://www.eluniverso.com/2008/02/08/0001/8/07FE7EA230B246759B5F6775A6A6C6D8.aspx>

II. Inauguration, composition and operations of the Assembly

Composition of the Assembly and the Director's Commission

The Assembly was installed on November 29, 2007 in Ciudad Alfaro, Parish of Montecristi, and Province of Manabí. Alberto Acosta (PAÍS), the most voted candidate in the national elections, was elected President of the Assembly, with the support of 121 of the 130 votes. The other leaders in the Assembly are: Fernando Cordero (PAÍS), first vice president of the Assembly; Aminta Buenaño (PAÍS), second vice president; Jorge Escala (MPD) and Martha Roldós (RED) as spokespersons and Francisco Vergara as Secretary General.¹⁵

The final political composition of the Constituent Assembly can be seen in the following graphics and table:



¹⁵ El Diario, 29/11/07. Online: <http://www.el.com.ec/noticias-manabi-ecuador/61502>

ABBREVIATIONS	TOTAL
MPAIS	73
PSP	18
PRIAN	8
PSC	5
RED	3
MPD	3
MPAIS/PS-FA	3
UNO	2
MUPP-NP	2
PSP/RED	1
PRE	1
MUPP-NP/MPD	1
MUPP-NP/MNPNS/MOPIN	1
MPD/MPAIS	1
MPAIS/MUSHUK INTI/AA	1
MPAIS/MIP	1
MPAIS/MIFA	1
MHN	1
MCIFY	1
ID/MPD/PS-FA/MUPP-NP	1
ID/MPC	1
ID	1

PAÍS, along with the other organizations that make up its electoral alliance, has 80 Assembly members. The second largest force in the Assembly is Partido Sociedad Patriótica, of former President Lucio Gutiérrez (18 Assembly members). Together with the third and fourth largest groups (PRIAN, of business man Noboa and the Partido Social Cristiano), they make up the most active opposition sector in the Assembly.

Rules of Operation

During its first week of work the Assembly discussed its extensive Rules of Operation¹⁶ which were approved on December 11, 2007 by 86 of the 130 constituents. The rules confirm the plenipotentiary character of the Assembly (Art. 1), along with the supremacy of its decisions over other constituted powers (Art. 3). The rules also indicate that the existing legal order will remain in effect, except when the Assembly resolves to the contrary (First Final Disposition). Below is a summary of some of the essential aspects of the *Rules*, to facilitate the comprehension of the CA's internal processes.

¹⁶ National Constituent Assembly. Rules of Operation of the Constituent Assembly. Online: http://www.asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=733&Itemid=72

Decisive Acts

The Assembly's decisive acts (Art.3) are:

1. The text of the new Constitution will be submitted to a national referendum.
2. Constituent Mandates will be decisions and rules that exercise its full powers. These mandates will go into immediate effect, without harm to its publication in the respective state organ.
3. Laws: Rules approved by the Assembly in exercise of its legislative faculties.
4. Resolutions and Directives, with the purpose of regulating the Assembly's operations.
5. Agreements and Statements, which are pronouncements on political, administrative, civic, social or other matters.

Organization

The Assembly is organized into the following bodies (Articles 4 to 15):

1. The Plenary, which is the maximum body of decision, composed of 130 Assembly constituents. The quorum for opening and operating is one more than half of the members. The Plenary will approve its decisions (except the approval of the constitutional text and laws) in one debate, with an absolute majority vote of its members.
2. The Director's Committee, which is composed of the president of the Assembly, two vice presidents and two officials. The Director's Committee regulates and executes the administrative, financial and methodological proceedings of the Assembly. The President of the Assembly represents it in all of its decisions.
3. The Constituent Working Groups; to organize the work of the constituents on ten selected topics (See the topics of the working groups above). The working groups choose a president and vice president, through a closed list system. The Director's Committee chooses a secretary for each working group who is not an Assembly member. Each Assembly member must join a Constituent Working Group. Each Constituent Working Group will consist of 13 members, with proportional composition. Assembly members will be able to attend other working group sessions other than their own with the prior petition and acceptance of the working group's presidents; they will have the right to speak but not vote. The working groups take decisions by absolute majority and among their functions: a) receive, analyze, systematize and discuss the proposals of their members, other Assembly members or citizens; b) draft and approve a proposal on the issues in its purview to be introduced to the Plenary. The majority report can be accompanied by one or more minority reports that include an articulated alternative proposal; and,
4. The Auxiliary Committees, which will be created at the proposal of the Assembly or its president to address topics that require special attention.

Initiatives

The Assembly will consider proposals from its members, from society and from any organ of the State (Art. 23).

Internal Procedure for Approving the Constitutional Text

The procedure for approving the constitutional text assumes previous discussion of the pertinent articles in the Working Groups (Art. 39) and the presentation of Minority and Majority Reports to the full Assembly. The Plenary will analyze these proposals and return them to the Working Groups with its observations. Afterward, each respective Working Group will analyze the comments and will prepare one or more reports or constitutional articles to be submitted to the full Assembly for a final debate (Art. 40). When the president considers the majority report sufficiently debated, he will propose a vote on its content article by article (Art. 44). For the final editing of the text of the Constitution, the presidents will form a Special Editorial Committee (Art. 47).

Procedure for elaboration of legislation

The Constituent Assembly will process legal projects originated in the Assembly (with the support of at least 5% of its members), by the President of the Republic, or those presented by a citizen initiative (with the support of at least 0.1% of the national electorate) (Art. 48). The Legislation and Oversight Working Group will debate the legal project and will produce majority and minority reports (Art. 49), which it will circulate among all the Assembly members, who will have an opportunity to offer their observations to the Working Group. The Working Group will further elaborate the legal project and send it to the President of the Republic for his observations, which may or may not be taken into account by the working group. Afterward it will submit the legal project to the full Assembly with both the Majority and Minority reports.

Approval of the constitutional text

Once the constitutional text is approved, the TSE will convoke a referendum within the following 45 days for the electorate to approve or reject the text of the new Constitution by, at least, half plus one of all voters (Art 69).

Decisive acts of the Plenary (*Mandates, Resolutions and Laws*)

Mandates

The first decree of the Assembly, released on its first day of operation, November 29, 2007, was Constituent Mandate No. 1; the articles of the mandate were approved one by one; the average vote in favor of each article was 90 out of 130 votes. The main points of the mandate are:

- a) By popular mandate, the Assembly "...assumes and exerts the constituent power with full powers" (Art. 1). Approved with 96/130 votes.
- b) Its decisions "are hierarchically superior to any other rule of legal order and demand obligatory compliance by all natural persons and legal and other public powers with no exceptions. No decision of the Constituent Assembly will be subject to the control or impugnation by any of the constituted powers. [...] The judges and courts that take any action against the decisions of the Constituent Assembly will be removed from their positions and subjected to a corresponding trial." (Art. 2). Approved with 90/130 votes.
- c) Ratifies "and guarantees the existence of the rule of law" (Art. 5). Approved with 103/130 votes.
- d) Ratifies "the economist Rafael Correa Delgado as the Constitutional President of the Republic of Ecuador and ... Lenín Moreno Garcés, as Vice President..." (Art. 6). Approved with 107/130 votes.
- e) Assumes "...the attributions and duties of the Legislative Function. Therefore, declares the primary and secondary legislators in recess [...] During this recess the legislators will not enjoy immunity, special privileges nor wages or any other compensation, nor will they be able to convoke themselves for any reason." (Art. 7). Approved with 110/130 votes, the most of any article.
- f) Declares that "as concluded the terms of office for the following officials: Comptroller, Solicitor General, Attorney General, Public Defender, and the Superintendents of Telecommunications, Businesses, Banks and Insurance" and designates provisional replacements for these positions (Art 8.) Approved with 87/130 votes.
- g) Ratifies the "judges of the Supreme Court of Justice and the officials of the National Legal Council, the Constitutional Tribunal and the Supreme Electoral Tribunal" (Art. 9). Approved with 91/130 votes.

The plenipotentiary character of the Assembly, which permits it to assume legislative projects, decree the parliament in recess and impose its decisions on other public entities, was the issue generating the most heated political debate in the country.

On January 24, 2008 the Assembly approved Constituent Mandate No. 2, which places caps on salaries, earnings and settlements for public officials. It was approved with an average of 90 out of 130 votes. The votes came from the parties PAIS, MPD, RED and Partido Roldosista Ecuatoriano (PRE). Assembly member Gustavo Darquea of PAIS said the purpose of the Mandate was to “*put an end to the gilded bureaucracy which is nothing more than those overpaid officials with disproportionate salaries that exceed the salary of the President of the Republic*”.¹⁷ The mandate stipulates the following measures: no public servant can earn more than 25 basic salaries on a monthly basis; that is to say, more than 5,000 dollars, which is the President’s current salary (Art. 1), except officials in the foreign service (Art. 3); the mandate’s provisions are not open to complaint, contest, legal protection, appeal or challenge or any other type of legal or administrative contest (Art. 9).¹⁸

On the same day, the Assembly approved Mandate No. 3, which postponed elections that had been called by the Supreme Electoral Tribunal (TSE) for the provincial representatives from Santa Elena and Santo Domingo de los Tsáchilas given that the Congress was in recess. The mandate postponed the elections until after the referendum on the new Constitution.¹⁹

Practically from the day of its approval (01/24/08) PAIS Assembly member Nelson López suspected that, due to poor editing, Mandate 2 had left a loophole that might permit the continued payment of extraordinary sums to public servants in cases of *untimely dismissal* (Art. 8). López immediately informed his party members of the omission, who agreed to present a motion to the plenary to amend the mandate. Finally, almost two weeks after its approval, on February 12, 2008 the Assembly approved Constituent Mandate No. 4 with 78 out of 130 votes, limiting compensation in the public sector for untimely dismissals. Mandate No. 4 consists of 3 articles and a final provision. Article 1 states that “*compensation for untimely dismissals, for the personnel employed in the institutions named in article 2 of Mandate No. 2 [...], agreed in collective contracts, transactional acts,*

¹⁷ Luis Moncayo, “La Asamblea busca réditos a costa de la ‘burocracia dorada’”, El Comercio, 23/01/08. Online: http://www.elcomercio.com/solo_texto_search.asp?id_noticia=107677&anio=2008&mes=1&dia=23. An approximate figure for the number of officials who would be affected by this Mandate is included in the same press statement from the National Federation of Public Servants, which sustains that Ecuador has 467,000 public servants, out of which 12% (56,000) have privileged wages.

¹⁸ Constituent Assembly “Mandato No.2”. Online: http://www.asambleaconstituyente.gov.ec/documentos/mandato_numero_dos.pdf

¹⁹ Constituent Assembly, “Mandato No. 3”. Online: http://www.asambleaconstituyente.gov.ec/documentos/mandato_numero_tres.pdf

*settlements or any other form of agreement or statement that establishes the payment of compensation, bonuses or separation pay for the termination of individual positions, under the figure of untimely dismissal, may not exceed three hundred (300) of the basic or minimum salary of a private worker.”*²⁰ This mandate sparked debate on the non-retroactive character of labor rights, as well as fears of an increase in dismissals in the public sector, particularly in the oil-related trade unions.

Resolutions

Resolution No. 1, approved on December 4, 2007 is administrative in character. It stipulates the administrative organization, hiring rules, acquisition of furniture and supplies, and the signing of contracts among other necessities for the operations of the CA. ²¹

Resolution No. 2, approved on December 10, 2008, consists of three articles. It was motivated by the controversy over a social conflict in the Dayuma parish, Orellana province (see V. Issues, debates and tensions). The resolution’s aim was to settle on a procedure for handling issues of high political, social and economic interest in the Assembly. The articles of the resolution state: “*Art. 1.- “The Constituent Working Group on Legislation and Oversight will only exceptionally assume the task of addressing topics of political, social, economic or other interest”; Art. 2.- the Director’s Commission will issue the corresponding rules that will allow article 1 of this resolution to be complied with; Art. 3.- In cases where the absolute majority of members of a Constituent Working Group agree that an issue should be handled by the Plenary, they will petition the President of the Assembly to include it, with priority, in the Order of the Day.”*²²

Laws

On December 28, 2007 a majority of 90 Assembly members (of PAIS, MPD, Pachakutik, Movimiento Honradez Nacional and Poder Ciudadano-Izquierda Democrática) approved the Law on Tax Equity. 23 members voted against it (from PSC, PSP and PRIAN); there were 6 abstentions and 11 absentees.²³

²⁰ Constituent Assembly, Mandate No. 4. Online: http://www.asambleaconstituyente.gov.ec/documentos/mandato_4.pdf

²¹ <http://www.asambleaconstituyente.gov.ec/documentos/resolucion01.pdf>

²² <http://www.asambleaconstituyente.gov.ec/documentos/resolucion02.pdf>

²³ Asamblea Nacional Constituyente. Online:

http://asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=1578&Itemid=76

The Director's Commission and the Constituent Working Group Rules

Up to the publication of this report, the Director's Commission has approved two sets of rules, as well as administrative instructions: a) the Rules of Operation for the Constituent Working Groups; b) the Rules for the Legislation and Oversight Working Group; and c) Administrative Instructions for Advisors of Assembly Members.

a) On January 7, 2008 the Commission approved the Rules of Operation for the Constituent Working Groups. The 31-article document defines the composition of the working groups and establishes some parameters for their operation. Some of the most significant provisions are that decisions will be made by absolute majority (Art. 7), there will be majority and minority reports with articulated alternatives (Art. 8) and they will name sub-working groups within themselves (Art. 9).²⁴

b) On January 11, 2008 the Director's Committee approved the Rules for the Working Group on Legislation and Oversight (Working Group 10). The 24-article rules grant the Director's Committee the power to authorize Working Group 10 to investigate and process oversight investigations for different public officials. Once authorized, this activity can be undertaken by any of the 130 Assembly members, by means of three mechanisms: a request for public information, a request for an appearance by dignitaries and officials, and a political trial. Should the Director's Commission authorize an oversight investigation, Working Group 10 will have ten days to investigate and compile the testimony of the accusers and the accused. It will then have three days to draft a report for the Director's Commission.²⁵

c) On February 6, 2008, the Director's Commission approved Administrative Instructions for the Advisors of Assembly Members. Each Assembly member can have a maximum of two advisors/assistants (Art. 1); the work week of the advisors will not fall below forty hours per week (art. 7); the advisors will not be able to hold any other public position (except University chair) while working for the Assembly (Art. 11) and they should compile periodic reports on their activities.²⁶

The activities of the Working Group on Legislation and Oversight (Working Group 10)

Draft Law on Tax Equity

On December 17, 2007, the Working Group received the Proposal for the Law on Tax Equity submitted by the Executive branch. From the 17th until the 21st of December, the Legislative Working Group welcomed different organizations from society to hear their observations on the legal project.

²⁴ Asamblea Constituyente, "Reglamento de Funcionamiento de las Mesas Constituyentes". Online: http://asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=1912&Itemid=80

²⁵ http://www.asambleaconstituyente.gov.ec/documentos/reglamento_mesa_10.pdf

²⁶ <http://www.asambleaconstituyente.gov.ec/documentos/instructivo%20asesores.pdf>

Beyond the questions of procedure, the content of the project on tax reform generated intense debates between the different parliamentary blocks as well as different groups in civil society.²⁷ The minority reports of the opposition argued that more time was necessary to review the proposal and questioned the Assembly's ability to legislate. With respect to the law's content, they argued that the sanctions proposed lacked a proportionate scale. On the issue of tax infractions, they emphasized the necessity of maintaining the universal norm of due process. On the other hand, they questioned the centralization and accumulation of power from transfers made by the Ministry of Economy.²⁸ The Law finally approved, after criticism from diverse social sectors and being substantially modified from the Executive's original proposal, contains the following stipulations: a) it creates new taxes (Tax on Foreign Exchange and Rural Properties) and modifies the rules for paying income tax, value added taxes (IVA), and special consumption taxes (ICE) b) increases the penalties for failing to comply with tax obligations by the passive subject, c) the Internal Revenue Service (SRI) will have more tools to control the tax collection process, d) taxes on inheritances, gifts and donations will take on progressive increments up to 35%.²⁹ Below we present a comparative table between the Majority and Minority Reports and the Law finally approved.³⁰

²⁷ The main objections came from the business organizations of Guayaquil, the mayor of that city (Jaime Nebot), as well as the parliamentary blocs of PRIAN and PSC.

²⁸ Asamblea Constituyente. Online: <http://asambleaconstituyente.gov.ec/documentos-oficiales/informe-de-minoria-sobre-la-ley-de-equidad-tributaria-abg-leon-roldos.do>

²⁹ "Impuestos. *Las claves de la nueva Reforma Tributaria*", El Comercio, 09.01.08, p. 1-16 y, "José Peralta", Asamblea Constituyente, 29/12/07. Online: <http://asambleaconstituyente.gov.ec/ley-para-la-equidad-tributaria.do>.

³⁰ To compile the table we consulted the following documents:

Gobierno Nacional del Ecuador. "Proyecto de Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros". Online: http://www.asambleaconstituyente.gov.ec/documentos/proyecto_ley_fondo.pdf

Mesa de Legislación y Fiscalización Asamblea Nacional. "El segundo informe de mayoría Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros". Online http://www.asambleaconstituyente.gov.ec/documentos/ley_petroleros_2_%20informe_final.pdf

Galo Lara. "Informe de minoría proyecto de Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros". Online http://www.asambleaconstituyente.gov.ec/documentos/informe_ley_fondos_petrolero_2_galo_lara.pdf

León Roldós. "Informe de minoría proyecto de Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros". Online http://www.asambleaconstituyente.gov.ec/documentos/informe_minoria_leonroldos.pdf

José Peralta. "La Mesa de Legislación remitirá un informe de mayoría y dos de minoría a la Secretaría de la Asamblea. Boletín 458". Online.

<http://asambleaconstituyente.gov.ec/boletines/aprobado-informe-sobre-la-ley-de-recuperacion-del-uso-publico-de-los-recursos-petroleros.do>

Assembly's Final Report	Majority Report 12/26/07	Minority Report (Galo Lara Yépez) 12/26/07	Minority Report (León Roldós Aguilera) 12/26/07
<p>The law is based on the idea of distributing wealth based on taxpayers' real ability to contribute.</p> <p>The tax obligation entails a surcharge of 20% on the principal.</p> <p>The taxpayer's rate of interest increases with respect to the active referential rate.</p> <p>Reforms to tax infractions are established through changes in classification and gradation in penalties and sanctions.</p> <p>Establishes the obligation of payment in advance.</p> <p>Grants a popular action to denounce tax crimes before the Public Ministry.</p> <p>Proposes changes to the time periods for tax prescriptions</p> <p>Proposes changes to the rate of income taxed. Incorporates as tax sources: inheritances, gifts or donations and discoveries of goods located in Ecuador.</p> <p>Proposes changes to the value added tax (IVA).</p> <p>Creates new taxes: tax on rural holdings, tax on foreign exchange, and tax on extraordinary holdings.</p>	<p>Tax obligation is a 20% surcharge on the principal.</p> <p>The taxpayer's rate of interest increases with respect to the active referential rate.</p> <p>Reforms to tax infractions are established through changes in classification and gradation in penalties and sanctions.</p> <p>Establishes the obligation of payment in advance.</p> <p>Proposes changes to the rate of income taxed. Incorporates as tax sources: inheritances, gifts or donations and discoveries of goods located in Ecuador. The tax on inheritances, gifts and donations is proposed at up to 35%.</p> <p>Proposes changes to the value added tax (IVA): larger number of transactions charged with a rate of 12%.</p> <p>Creates new taxes: tax on rural holdings, tax on foreign exchange, and tax on extraordinary holdings.</p>	<p>The time to discuss the law was insufficient given the type of reform it entailed. Argued for the necessity of a general debate in society prior to its approval.</p> <p>The tax obligation proposed by the project for prepayment exceeds the referential rate by 50%.</p> <p>The proposed reforms to tax infractions and grades of sanctions and penalties violate the principle of unity and concentration in matters of criminal justice.</p>	<p>Questions the different grades of penalties and sanctions.</p> <p>Objects to the tax obligation incurring a surcharge of 20%.</p> <p>The tax obligation proposed by the project for prepayment exceeds the referential rate by 50%.</p> <p>Asserts that the right to due process must be a universal norm associated with tax infractions.</p> <p>There is no clarity on the processes for confiscation and seizure.</p> <p>In the area of sanctions and punishments for tax infractions conditional freedom is eliminated when there is no punishment for exchange rate infractions.</p>

Draft Organic Law for the Recuperation of Public Use of the State's Petroleum Resources

On January 26, 2008 the Executive presented the Assembly with a draft Organic Law for the Recuperation of the State's Petroleum Resources. After producing a preliminary majority report, two preliminary minority reports and multiple proposals from Assembly members and social sectors, the final report was approved by 9 of 13 Assembly members in Working Group 10 on February 19, 2008 to be presented to the President. The report is called "*The organic law for the recuperation of public use of the state's petroleum resources and administrative rationalization of debt-related processes*". This version has been substantially modified from the government's original proposal. Below we offer a table to compare the most significant content of the draft law, the final majority report and the two final minority reports by Assembly members Galo Lara Yépez and León Roldós Aguilera.³¹

Draft law	Final majority report	Minority report (Galo Lara Yépez)	Minority report (León Roldós Aguilera)
All the public resources related to petroleum should be incorporated in the Budget of the Central Government as Capital Income to be invested.	The returns from the investments of the Sole Running Account will not be included in the running budget nor the utilities of the Central Bank of Ecuador and they will be earmarked for health and education.	The term "investment" in the law does not guarantee that the resources will be used effectively to that end. By eliminating oil-based funds we lose savings capacity. The municipalities that are assigned to those funds by law will lose income.	Proposes that 10% of petroleum-related resources be earmarked for productive investment with economic and financial loans that will serve their contingencies. The compensations should not only be for 2008 but planned for in the future as well. They should be added to the sectional government entities and educational institutions.
The undertaking of internal or external debt will not require the ruling of the	Every new loan or increase or decrease in debt will be evaluated by a Committee	Questions the elimination of all control. Granting extensive powers to the	Celebrates the creation of the Committee on Debt and Financing, and the inclusion

³¹ To compile the table the following sources were consulted:
 Gobierno Nacional del Ecuador. "Proyecto de Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros". Online: http://www.asambleaconstituyente.gov.ec/documentos/proyecto_ley_fondo.pdf
 Mesa de Legislación y Fiscalización Asamblea Nacional. "El segundo informe de mayoría Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros." Online http://www.asambleaconstituyente.gov.ec/documentos/ley_petrolos_2_%20informe_final.pdf
 Galo Lara. "Informe de minoría proyecto de Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros." Online: http://www.asambleaconstituyente.gov.ec/documentos/informe_ley_fondos_petrolo_2_galo_lara.pdf
 León Roldós. "Informe de minoría proyecto de Ley Orgánica para la Recuperación del Uso Público de los Recursos Petroleros". Online: http://www.asambleaconstituyente.gov.ec/documentos/informe_minoria_leonroldos.pdf

State Solicitor General, the Central Bank of Ecuador, nor the authorization or approval of the President of the Republic.	on Debt and Financing, composed of: the President, the MInister of Finances or his delegate, the Chief of the Secretary General of Planning, with the prior informed consent of the State Solicitor General (non-binding).	MInister of Finances, a key confidant of the President of the Republic, will “lead to abuse and pilfering in the use of these monies.” There is no limit to growth in expenditures or indebtedness.	of the Solicitor’s report. However, insists that it would be better to eliminate the portion of the law related to foreign debt.
The Minister of Finances can approve increases or reductions of loans that alter the amounts predetermined in the General State Budget.	The Minister of Finances can approve the credit increase and decreases that alter the fixed levels in the General State Budget up to a total of %15 regarding the figures approved by the legislature.		It’s important that it has not been accepted that the Minister of Finances can modify the state budget up to 100% on his own accord, and that 15% has been fixed as the maximum amount of increase or decrease in loans approved by the Minister of Finances.

Draft Law on Ground Transportation, Transit, and Highway Safety

On January 7, 2008 the Executive submitted this project to the Assembly.³² The draft aspires to regulate to different spheres of action: ground transportation and transit and highway safety. With respect to the first are, the project excludes chauffers, taxi drivers and driving schools from the directorate of the National Agency of Transit, Ground Transportation and Highway Safety (ANT. Art. 61); in its place, they will become part of Consultative Council that will advise (in an informative and non-binding capacity) the directorate of the ANT. The project also aims to regulate the provision of different types of public transit, under the figure of *concessions and operating permits* (Art. 69 and 70). With respect to the second area, the law aspires to prevent transit accidents, modify the current system of sanction, and increase the safety of citizens in the face of the risks of transit.

As soon as the Executive introduced the proposal, a group of social actors responded with their perspectives. One of the strongest objectors was the Association of Municipalities of Ecuador (AME). Essentially, the AME did not agree with the attributions proposed for the ANT because they would place the municipalities under its jurisdiction. The Confederation of Transport Workers of Ecuador (CTE) also opposed the proposed fines and the requirements for qualifying for driver’s licenses.³³ In light of these objections, the Working Group on Legislation and Oversight (Working Group 10) held

³² Online: http://www.asambleaconstituyente.gov.ec/documentos/ley_organica_transito.pdf

³³ “Los transportistas y los municipios del país se oponen a varios artículos de la nueva Ley de Tránsito”, La Hora, 16/01/08. Online: <http://www.lahora.com.ec/frontEnd/main.php?idSeccion=669329>

meetings so that different groups could offer their observations on the project. After numerous debates, the Working Group agreed to include some of the AME's proposals as well as those of the transport workers. For its part, the Executive was also willing to make changes to the proposal.³⁴ As a result of these dialogues, on February 14, 11 of 13 members of Working Group 10 approved a Preliminary Majority Report that modified the original proposal in substantial aspects. This report includes an extensive comparison (article by article) between the Executive's original project and the changes made by the Working Group.³⁵ The first significant part of the Majority Report grants the project the status of Organic Law, given its strategic importance for the economy. It also describes how the transport and transit sectors will be organized, in the following bodies: a) the Ministry of the sector; b) the National Commission on Ground Transportation; c) the National Directorate for the Control of transit and highway safety and its decentralized organs. The report also advocates modifying Art. 19 on the powers of the National Commission and its Directorate. Moreover, it proposes the modification of Art. 117 so that Institutes of Higher Education can train drivers, along with the existing driving schools.³⁶ Up to this report's publication they continued discussing this draft law and a definitive Majority Report is expected in the next few days.

The Constituent Working Groups

On December 13, 2007, with an average of 120/130 votes, the Constituent Working Groups were established and their respective presidents and vice presidents were named.

The 10 Working Groups are:

- 1) Citizen Rights
- 2) Organization and Citizen Participation
- 3) Institutional Structure of the State
- 4) Territorial Organization and Designation of Powers
- 5) Natural Resources and Biodiversity
- 6) Work and Production
- 7) Development Model
- 8) Justice and the Fight Against Corruption
- 9) Sovereignty and Latin American Integration
- 10) Legislation and Oversight

³⁴ Santiago Zeas, "El Gobierno y la Asamblea hacen lo posible para evitar conflictos", *El Comercio*, 01/02/08. Online: http://www.elcomercio.com/noticiaEC.asp?id_noticia=167713&id_seccion=3; y Andrés Alcívar, "El gobierno rectifica por presión de transportistas", *La Hora*, 01/02/08. Online: <http://www.lahora.com.ec/frontEnd/main.php?idSeccion=676479>

³⁵ Online: http://www.asambleaconstituyente.gov.ec/documentos/informe_preliminar_final.pdf

³⁶ For more details on the differences between the Preliminary Report and the Executive's draft, consult the comparative table above; see previous citation.

The majority block PAIS occupied eight of the 13 available posts on each committee. The other five are split between the minority parties. The opposition questioned the distribution mechanism, considering it a major obstacle to the possibility of minority positions ever reaching the full Assembly. In the composition of the committees gender equity was maintained in naming the presidents and vice presidents: in total, there are ten men and ten women among the leaders.

In the first days of 2008, the committees' focus was to delineate an agenda to address the identified principal problems, the objectives to approach, the pertinent issues and sub-issues, and simply forming an agenda for the first weeks of the year³⁷. Up to the present moment, the committees have been touring the country organizing town hall meetings to obtain proposals from civil society on each of the designated topics. Below we offer a brief synthesis of the main problems and objectives identified by the working groups, as well as the current state of their work and some preliminary definitions for constitutional principles.

Working Group 1: Citizen Rights

Working Group 1 has yet to reach any agreements, but it has completed two traveling sessions to consult and discuss with a wider base the designated issues. The first was held on February 2 in Guaranda on collective rights and the role of culture in developing the national identity; the second, held on February 21 in Ambato, Tungurahua, addressed several topics related to higher education: autonomy for universities, evaluation and accreditation processes, university preparation and search processes, development and innovation.³⁸

Working Group 2: Organization and Citizen Participation

The central issues agreed upon in Working Group 2's working plan are citizen participation, social organization, information, communication, and representation. On January 22, 2008 the Working Group decided the focuses of the forums now taking place to collect citizens' proposals: communication and information; the military vote; participation and participative democracy; electoral systems and political parties; representation and participation.³⁹ One of the most pressing issues facing Working Group 2 is the issue of radio and television licenses, supposedly distributed through a premeditated or opaque process.

³⁷ Asamblea Constituyente, "Síntesis general de los informes de las Mesas Constituyentes". Consulta en línea: http://www.asambleaconstituyente.gov.ec/documentos/sintesis_de_la_mesas.pdf

³⁸ Asamblea Constituyente, "Trabajo mesa itinerante en Ambato". Online: http://asambleaconstituyente.gov.ec/blogs/mesa_1/2008/02/21/mesa-itinerante-en-ambato/

³⁹ Sala de Prensa de la Asamblea, Online: http://asambleaconstituyente.gov.ec/blogs/mesa_2/2008/01/22/en-la-mesa-2-se-definieron-los-foros-y-la-lista-de-los-especialistas-invitados/

Working Group 3: Institutional Structure of the State

In Working Group 3's two-month plan, it established five areas of work to focus on: a) Organisms and dependencies of the Legislative, Executive and Judicial powers; Electoral Organisms; Organisms of Control and Regulation; Entities of the Sectional Autonomous Regions and Entities for the exercise of State Power, for providing public services or economic activities.⁴⁰ On January 22, the Working Group released a first draft for discussion that includes the following issues: the line of succession for replacing the President; the elimination of the Vice President's role; the creation of a Minister of Policy Coordination, serving as an intermediary between the Legislature and the Executive, and a presidential term of 6 years. The Working Group also held a forum about the Electoral Function, specifically on the makeup of the Electoral Court with the ability to judge elections.

Working Group 4: Territorial Organization and Designation of Powers

The main problem identified by Working Group 4 is the "*Inadequate model and system of sub national governments of the Ecuadorian state, which has impeded sustainable development, participative democracy and territorial equity*". Therefore, its central objective is "To make viable an equitable and sustainable territorial development, within a sovereign, democratic and participative, economically unified, multi-cultural and inter-cultural State".⁴¹

In this sense, on January 28, 2008 the president of the working group Tatiana Hidrovo (PAIS) stated that the focus of her working group would be restricted to defining the autonomous sectional governments that should exist in Ecuador, the territory in which they will govern, the resources with which they will execute their duties and the powers that correspond to them. The working group has yet to make any decisions; it is still in the phase of studying the proposals originating in distinct provinces and sectors.⁴²

Working Group 5: Natural Resources and Biodiversity

This working group has named the principal problem in its field to be the implementation of "*a primarily export-based economic model, based on the excessive exploitation of nature and the irrational use of resources, without planning or organization for the short or long term, which sharpens*

⁴⁰"Plan bimestral de trabajo". Online: http://asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=1419&Itemid=50

⁴¹ *Ibíd.*

⁴² José Peralta, "No jugaremos a cartógrafos en la Constituyente, y respetaremos la voluntad con un criterio de lograr consensos", 28/01/08. Online: http://asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=2888

inequality and causes severe harm to the environment".⁴³ Building upon this framework it has decided on five specific problems to address:

- 1 The irrational exploitation of hydrocarbons with high levels of contamination, by products of social and environmental harm, and an unjust distribution of benefits.
- 2 The threat to other economic activities caused by intensive mining exploitation.
- 3 Severe social and environmental impacts caused by the mining by-hand
- 4 Inefficient management, unfair distribution and severe decrease in the quantity and quality of water; energy model based solely on the use of fossil/contaminant fuels that ignores the potential alternative sources of clean energy in the country;
- 5 Absence of clear urban environmental policies, associated with growing internal migration, the loss of identity, consumerism and urban sprawl.

To date, the group has held three forums, which have already resulted in the agreement to declare water as a strategic resource, a human right and a public good. (See *infra* Developmentalism, the Right to a Healthy Environment and the Rights of Indigenous Peoples).

Working Group 6: Work and Production

The objective agreed upon by Group 6 was “*To guarantee the right to work, property in all its forms, encourage production and job creation, in conditions of dignity and justice, in a way that engages all of society’s productive capacity, guarantees social inclusion in all its forms, the rights of workers and eliminates any type of insecurity*”. The main sub-topics addressed by the group are: Work, employment and wages; Production and the productive regime; Investment; Nutritional sovereignty; Property and Social inclusion.⁴⁴ To date, Working Group 6 has met as much in Montecristi as in Quito as well as in some cities in the province (Ambato, Otavalo, Atuntaqui) with a large group of social actors. To facilitate its work, its members decided to form the following sub-working groups: Work, Employment, Wages and Compensation (Guillermo Touma, Eduardo Alcívar and Giselle Rosado); Production and the Productive Regime (Laly Caicedo, Irina Cabezas and Hilda Roca); Property, Investment and Nutritional Sovereignty (Pedro de la Cruz, Vinicio Calles, Salomón Fadul); Right to Equality and Social inclusion (Fanny Sotomayor, Anita Moser). The subgroups have already submitted preliminary reports to the Working Group, which can be consulted on the group’s blog.⁴⁵

⁴³ Online: http://www.asambleaconstituyente.gov.ec/documentos/sintesis_de_la_mesas.pdf

⁴⁴ Online: http://www.asambleaconstituyente.gov.ec/documentos/sintesis_de_la_mesas.pdf

⁴⁵ Online: http://asambleaconstituyente.gov.ec/blogs/mesa_6

Working Group 7: Development Model

The Development Model working group has asked around the country what is wanted, and through this exercise, it has fixed its objective as developing a “*country with a good life for everyone in peace and harmony with nature and the indefinite preservation of human cultures. A country that permits the development of capacities and potentialities of individuals with: justice, equity, freedom, solidarity, participative democracy, sustainability and sovereignty (...)* A country with high investment, work for everyone, high wages and basic opportunities so that every one may freely choose their style and goals in life”.⁴⁶ Towards this it has identified 5 areas of work: Productive system, human development, environmental sustainability, participative democracy and territorial development. The problems this group has identified are the following:

- 1 Development model
- 2 Inequality and the growth of inequality
- 3 Regional splits, which hinder the pursuit of a national project
- 4 Institutional weakness
- 5 Structures with strong monopolistic tendencies
- 6 Lack of environmental sustainability

Among the agreements reached by working group 7 is the recognition of the economy as having a social and human character that should be equitable and inclusive, which implies changing the social development model of the market in the current Constitution.⁴⁷

Working Group 8: Justice and the Fight Against Corruption

Working Group 8 identified 8 problematic axes related to the following fields: Institutional; Authorities of Justice; Judicial officials; Citizen Participation; Access to information; System of justice; and Discrimination. The objective settled on by the Working Group is “*To guarantee access to justice in terms of fairness, efficiency, opportunity, without charge, and inter-culturalness.*”⁴⁸ The main sub-issues identified are justice and the demand-ability of rights. The members of Working Group 8 visited 9 different provinces in February and March to collect proposals from citizens in the following cities: Portoviejo, Riobamba, Cuenca, Guayaquil, Esmeraldas and Ibarra. Unfortunately the group’s blog has yet to report the first results from these meetings.⁴⁹

⁴⁶ Online: http://www.asambleaconstituyente.gov.ec/documentos/sintesis_de_la_mesas.pdf

⁴⁷ El Universo. Mesas de Asamblea preparan articulados para debate del Plenary. 18/02/08. Online <http://www.eluniverso.com/2008/02/18/0001/8/D8E5EF6DF8FB4D1E8FADDCFE16B7B1AD.aspx>

⁴⁸ Online: http://www.asambleaconstituyente.gov.ec/documentos/sintesis_de_la_mesas.pdf

⁴⁹ Online: http://asambleaconstituyente.gov.ec/blogs/mesa_6

Working Group 9: Sovereignty and Latin American Integration

Working Group 9 proposed a series of objectives, including the following: “*To define the character of the Ecuadorian State in the new political charter founded on the principle of national sovereignty. To recognize the pre-eminence of the public over the private. To recognize the ethnic, cultural, social, economic and political diversity of the different peoples who make up Ecuadorian society. To establish the self-determination of Ecuador in its relations with the world community*”.⁵⁰ At the same time it proposed to approach these objectives through the following sub-issues: Character of the Ecuadorian State; Sovereignty in its different dimensions (political, economic, cultural, environmental, nutrition, territorial); Latin American integration; International Cooperation; and Migration Policy. To date, Working Group 9, in addition to meeting with various social groups in Montecristi, organized a forum in Portoviejo to address the issue of the right to sea access. Its blog has yet to post the results of that forum.

At the close of this report, there were very few Working Groups that had advanced past conceptual debate to legal-technical debate (drafting articles), which has been widely criticized by the opposition. However, the information compiled for this report permits us to note that the absence of technical work does not mean the absence of political work. On the contrary, the interest in stimulating debate and society’s participation in building a new frame of reference for the new Constitution is quite evident. However, one definite area of deficit is the weakness and, in some cases, a total absence of systematization of debates and participation.

IV. The Assembly’s relationships with the constituted powers

With the Executive

The Executive’s main interactions with the CA have come through the submission of three draft laws to be discussed and eventually passed by it (see *above*). In general we could say that the relationship with the Assembly members from the President’s electoral front (PAIS) has flowed without any major set backs; moreover, the President has periodically held working meetings with some PAIS Assembly members, including the presidents of working groups. The situation is different with the rest of the Assembly. Although, the relationship between the Executive and the CA has been of mutual respect, that hasn’t stopped the expression of differences between the President and opposition

⁵⁰ Online: http://www.asambleaconstituyente.gov.ec/documentos/sintesis_de_la_mesas.pdf

Assembly members. In particular, the opposition has alleged that Correa runs the Assembly at his will through the PAIS majority bloc.

On the other hand, at the beginning of December there was a moment of tension between the President and a group of Assembly members, including some from his own party. Because this case is significant, it will be analyzed below (see below Dayuma Case).

Another significant aspect to this relationship was the Government's First Report the President presented on January 15, 2008 before the CA. During his report, the President asked the Assembly to grant amnesty to different individuals the Executive considered to be unjustly held or persecuted, which is also analyzed further in this report (see *infra* The proposal for amnesties and pardons).

With the Legislative

As far as relations with the Legislative Branch are concerned, the conflict with the Assembly is based on the different legal and political complaints filed by a group of Congressional deputies placed in recess by the Assembly. In particular, this small group of Congress members in recess defied the content of Mandate No. 1 (see *above*), declaring themselves in permanent session as of January 3, 2008 and calling a session to reinstall the legislative term. The convocation failed due to a lack of quorum, which led to another attempted convocation on January 8. The second attempt also failed, with only 16 out of 100 Congress members attending.⁵¹

Since November 23, 2007 (before the installation of the Assembly) the then-president of Congress, Jorge Cevallos, had filed charges with the Attorney General against the Assembly members who impeded the operation of Congress. On January 31, 2008 the Attorney General dismissed the allegations and ordered them filed away. The complaint was dismissed because "*the statements made or allegedly made by Assembly members do not constitute sufficient cause for a trial*".⁵²

With the Judicial

The challenges to the constitutionality of Mandate No. 1 have defined the Assembly's relationship with the Judicial Branch. The first challenge was directly brought before the Constitutional Tribunal (TC) by a group of citizens who collected 1000 supporting signatures (TC),⁵³ which signaled their disapproval of the decision, and the second, b) presented before the Public Defender's Office, the

⁵¹ "Los diputados otra vez no logran reunirse", El Comercio, 09/01/08. Online: http://www.elcomercio.com/solo_texto_search.asp?id_noticia=105924&anio=2008&mes=1&dia=9

⁵² "Ciudad Alfaro. La Ley de Tránsito en Análisis", El Comercio, 01/02/08. Online: http://www.elcomercio.com/noticiaEC.asp?id_noticia=167715&id_seccion=3

⁵³ "As it is arranged in art. 277, num. 5, of the Political Constitution of the Republic of Ecuador, the demands for unconstitutionality are able to be presented to the Constitutional Court by 1,000 citizens in enjoyment of political rights or a people with favorable report of the Ombudsman on their origin."

organ that decides on the claim's admissibility to be introduced before the TC, which still has not released any statement on the matter.⁵⁴

a) On January 7, 2008 the TC rejected the charge of unconstitutionality because the decisions of the Constituent Assembly will not be subjected to the control or impugnation by the constituted powers. It also argued that Art. 276 of the current Constitution does not determine the Court's ability to decide on the constitutionality of constituent mandates. For their part, the complainants argued that the Assembly overstepped its powers – solely to write a new Constitution – when it ordered the Congress in recess via Mandate No. 1, as well as when it removed Vicente Vergara, the Attorney General and Alfredo Vergara, Superintendent of Banks.⁵⁵

b) The second complaint was filed by attorney César Montúfar and its principal argument asserts that the popular consult of April 15, 2007 was approved to “*convoke and install a Constituent Assembly with full powers in conformity with the Electoral Statute, to transform the institutional framework of the State and elaborate a new Constitution*”.⁵⁶ In this sense, he alleges the unconstitutionality of Mandate No. 1 for violating the constitutional precepts of legality and constitutional supremacy. Additionally, he argued the CA had supplanted the functions of the State and violated the constitutional procedures and obligations and essentially broke down the rule of law established in the Constitution of 1998.

With the municipal powers

The Association of Municipalities of Ecuador (AME) presented the Assembly with a proposal that emerged from the mandate of the 30th General Assembly of Ecuadorian Municipalities, held in the city of Ibarra in March 2007.⁵⁷ The AME proposed that the current political territorial divisions be maintained, but would replace the current provincial councils and governments with a provincial corporation composed of mayors, two representatives from the parroquial courts and a governor elected by popular vote. The provinces, after a popular consult, could voluntarily associate themselves to constitute autonomous regions. The municipalities and autonomous regions could establish tributary incentives for their organization and operation. The regulation of urbanism, transit and transportation would become municipal responsibilities, as would the administration of civilian airport terminals and health and education services.⁵⁸

⁵⁴ Interview with professor Cesar Montufar on 02/22.08.

⁵⁵ El Comercio, Online: http://www2.elcomercio.com/noticiaEC.asp?id_noticia=162931&id_seccion=3

⁵⁶ Interview with professor Cesar Montufar on 02/22.08.

⁵⁷ See document:

<http://www.ame.gov.ec/frontEnd/images/objetos/Propuesta%20de%20AME%20para%20la%20Asamblea.pdf>

⁵⁸ “La AME defiende su proyecto”, El Universo, 07/02/08. Online:

<http://www.eluniverso.com/2008/02/07/0001/8/0535FA6EE3424FA09109F0C98FF4CEA9.aspx>

On the other hand, the mayor of Guayaquil, Jaime Nebot, has promoted the presentation of a Mandate before the CA (The mandate of Guayaquil, as he has called it). Nebot's proposal is based on the implementation of an autonomous system that would allow municipalities to voluntarily assume powers. The objective is for the municipalities to more efficiently meet the real needs of their communities. Furthermore, it establishes the rights of cantons, provinces or regions to convert themselves in autonomous governments, in accordance with their similarities and affinities. Budgetary allowances and the donation of 25% of tax revenue would be maintained.⁵⁹

Finally, on February 12, 2008 the Secretary of Planning and Development (Senplades); the Consortium of Provincial Councils of Ecuador (Concope), the AME and the National Council of Parochial Councils of Ecuador (Conajupare) met to define a working agenda for an inter-institutional commission on the issue of new territorial demarcation. A single consensus-based document would be presented to the CA on February 29, as a result of their bilateral meetings, which would facilitate agreements, the surpassing of differences and the establishment of a proposal that would establish a new territorial organization and designation of powers.⁶⁰

V. Issues, Debates and Tensions

Developmentalism, The Right to a Healthy Environment and the Rights of Indigenous Peoples

Upon a comparative analysis of Ecuador's current economic model based fundamentally on developmental and extractive logic, and considering the general objectives of the plans of action of Working Groups 5 and 7 of the National Assembly that privilege the concept of sustainable development, based on respect and fair use of nature, as well as the demands of some rural, indigenous and afro-Ecuadorian organizations in defense of their territories, one can perceive a latent tension in the conception of development that will be adopted in the Political Constitution. Some of the main discussion points have centered on issues such as: the management of hydrocarbons, mining resources and water. Below we offer a few key points on these last two issues, which have seen greater discussion in the last month.

⁵⁹ "Nebot va por autonomía voluntaria", El Universo, 07/02/08. Online: <http://www.eluniverso.com/2008/02/07/0001/8/2194EEB525554D21BBA1B251F081BB04.aspx>

⁶⁰ Gobierno provincial de Loja "Senplades, Concope, AME, y Conajupare trabajan propuesta de ordenamiento", Loja, 12/02/08. Online: <http://www.hcpl.gov.ec/modules.php?name=News&file=article&sid=1189>

Water

In the Latacunga forum held on February 14, 2008, more than 600 delegates from citizen, popular, rural and indigenous organizations submitted a mandate on water to the Assembly. Below we outline some of the proposal's main points.⁶¹

- 1 Water is a strategic national resource for public use. "*Water is the property of the State, no form of privatization is recognized.*"
- 2 The "*right to water*" is a fundamental human right.
- 3 The State should guarantee the exercise of this right based on the principle of social equity: "*in the first place it should ensure human use and the right to life of all living beings, later the irrigation and troughs of animals for agricultural production (...) next access for public use in energy, industry, recreation, etc, and finally, public use.*"
- 4 The state's obligation is to provide public services related to water such as: potable water and sanitation, irrigation and electricity.

At the same time, during the National Forum on Water on February 14, 2008, Marlon Santi, president of CONAIE, warned that indigenous groups will hold an uprising if the mandate is ignored by the Assembly: "*The indigenous movement is here today, but we will also be in Montecristi, we will be vigilant of what happens; if we are excluded, the indigenous movement will have to resort to other methods, perhaps a mobilization,*" he said.⁶²

Mining

Galo Chiriboga, Minister of Energy, Mining and Petroleum, recently stated that in Ecuador there are currently "*a total of 5,197 concessions, 4,607 concessions in process and exploited; and 560 concessions being exploited.*" There are 4,817.510 hectares under concession including those already underway and 68,246 existing hectares in exploitation. Bearing in mind the great importance that mining has for the country, as well as the objectives established by various working groups, the Government and the Assembly have a mining mandate to create a new law on mining, which will require agreement between different Assembly members, such as Mónica Chuji, president of the group on natural resources and biodiversity, who says mining is not the future: "*To me it seems inadequate to consider mining an option for the future. Ecuadorians cannot gamble on this. We should break with colonialism once and for all.*"⁶³

The Fight for Control of the State

⁶¹ Mesa 5. "Declaratoria sobre el agua". 14/02/08. Online.

http://asambleaconstituyente.gov.ec/blogs/mesa_5/2008/02/15/declaratoria-sobre-el-agua-latacunga-14-de-febrero-de-2008/

⁶² . "Conaie entrega un mandato sobre el agua a la Mesa 5 de la Asamblea", El Universi, 15/02/08. Online:

<http://www.eluniverso.com/2008/02/15/0001/8/2CB1D5875D2643BEB4FFF252B89FF445.aspx>

⁶³ Mónica Chuji. "Comunicado de prensa". 28/01/08. Online. <http://www.lacta.org/notic/2008/not0128a.htm>

This issue has been borne out mostly through the debates between the majority bloc of PAIS and the rest of the minority party groups. It's obvious that control of the Assembly facilitates greater control of the future State. That's why issues such as the plenipotentiary character of the CA and its ability to legislate have generated so much tension among the political actors. The same has happened with laws and proposed articles for the Constitution that affect essential aspects of the distribution of power within the State or society, such as decentralization, the media or the reduction of dismissals in the public sector.

From the Assembly's first day of work (November 29, 2007) the minority parties PRIAN, PSC, PSP and UNO rejected Constituent Mandate No. 1, arguing that the statute approved in the referendum does not permit the Assembly to close Congress or remove other officials before the second referendum. With the same sentiment, some opposition Congress members placed in recess by the Mandate (from parties like Izquierda Democrática, Partido Roldosista Ecuatoriano and PSP), along with Assembly members from the same parties expressed their disapproval of the Mandate arguing that the Assembly had overstepped its bounds.⁶⁴ These same actors also rejected various provisions of the Rules of Operation because they believed the Rules put minority parties at risk of not being heard in the Assembly. For his part, Assembly member Xavier Ledesma (PRIAN) decided to resign from his seat because he believed the Assembly had divested itself of the people's mandate.

Inside the Assembly a new block with more moderate positions has been emerging between the majority party PAIS and the minorities most clearly opposed to it (PSC, PSP). For example, on December 12, 2007 a self-named Minority Left Block was formed by Assembly Members León Roldós, Martha Roldós, Luis Hernández (Red Ética y Democracia), Ximena Bohórquez (Honradez Nacional) and Diego Borja (Izquierda Democrática).⁶⁵

Another issue related to the fight for the control of the state relates to a presumed case of attempted bribery of 25 PAIS Assembly members to get them to vote against the President's proposals and the new Constitution. The scandal commenced on January 22, 2008 when a video was published showing Cao Lay Muñoz and Bolívar López Santos meeting with PAIS Assembly member Gabriel Rivera to offer him 3 million dollars in exchange for convincing 25 of his party members to vote against the government's initiatives. Rivera recorded the video with a hidden camera with the authorization of the Public Ministry and the video was released by Minister of Government, Fernando Bustamante; the Anticorruption secretary, José Luis Cortázar; the chief of police, Bolívar Cisneros, and Gabriel Rivera. The Attorney General ordered the capture of the two men implicated, who were

⁶⁴ El Universo. Online:

<http://www.eluniverso.com/2007/12/01/0001/8/0662D1B5405140798101EFB8C9723545.aspx>

⁶⁵ El Comercio. Online:

http://www.elcomercio.com/solo_texto_search.asp?id_noticia=102293&anio=2007&mes=12&dia=12

imprisoned the same day - January 22. In the video, the two individuals introduced themselves as the intermediaries of Sociedad Patriótica Assembly member Julio Logroño and former President of Ecuador and leader of that party, Lucio Gutiérrez, who denied their involvement.⁶⁶ At the time of this report's publication, the investigations were still ongoing; the participation of allegedly involved Assembly members has yet to be proved.

The controversy over the media

As background on the debate over the role of the mass media that has developed in the Constituent Assembly, we should include: a) the constant tensions and conflicts between the High Government and the main private media outlets, since the beginning of Correa's mandate, and b) the Executive's denunciation of the high concentration of ownership of the media and the Comptroller's report that revealed that the distribution of TV and radio broadcast licenses was based on political favors. Here we briefly develop these points and later describe the current state of debate on the issue, in Working Group 2.

President Correa has stated that "*the greatest danger for democracy is the concentration of the media in private hands with their own interests, because they can create nonexistent truths [...] the Constituent Assembly will have to think of how to make the media rectify its erroneous publications, as well as to regulate, in an improved way, all of the media, especially when so much of the media is concentrated in few hands, with powerful interests*"⁶⁷. For their part, the media tend to represent Correa as an authoritarian president who does not respect freedom of expression.

Beyond the mutual accusations is the fact that the property structure of the media in Ecuador is concentrated in large economic groups, as studies by academic specialists have demonstrated.⁶⁸ In the conclusion of one of these studies it is held that: "*all the most important social media [in Ecuador], with no exceptions are part of large groups with economic power*".⁶⁹ For his part, Comptroller Carlos Pólit declared that some 370 TV and radio frequencies would be annulled due to the serious irregularities in the way they were granted. "*Many frecuencies were granted without respect to the law (between 2003 and 2005) and this must be corrected*"⁷⁰. The Comptroller notified

⁶⁶ "La Asamblea se instaló para tratar supuesto intento de soborno", El Comercio, 02/23/08. Online: http://www.elcomercio.com/solo_texto_search.asp?id_noticia=107778&anio=2008&mes=1&dia=23; "Fallida 'compra' de asambleístas, denuncia PAIS", El Universo, 02/23/08. Online:

<http://www.eluniverso.com/2008/01/23/0001/8/DD134B2FCC404819A9EBF5DF8293ADD6.aspx>

⁶⁷ "Correa señala 'peligrosa' concentración de medios en manos privadas", El Universo, 15/09/07. Online: <http://www.eluniverso.com/2007/09/15/0001/8/DED96C37A24648F8BFAD46A5941E17FA.aspx>

⁶⁸ The most serious and detailed investigation on the issue is by economist Guillermo Navarro Jiménez, *Poder económico, poder político y poder fáctico. Tomo II. Los poderes fácticos*, Quito, Ediciones Zitra, 2006.

⁶⁹ *Ibid*, p. 192.

⁷⁰ El Comercio. Online: http://www2.elcomercio.com/noticiaEC.asp?id_noticia=169227&id_seccion=3

the National Council on Radio and Television Broadcasting (Conartel, the regulatory institution for telecommunications) to proceed with the annulments.

The challenge of the Assembly is to build a pluralistic and democratic model of communication that, on one hand, discourages the concentration of media ownership and operational ties to economic and political interests, and, on the other hand, doesn't substitute that structure with one concentrated in the State's hands. This appears to be the philosophy guiding the work of the Working Group on Citizen Participation and Organization (Working Group 2). In effect, there is agreement among all the members of the working group on the conceptual aspects of the new model, such as: the relevance of information, freedom of expression and communication for democracy, the constitutionalization of communication as a guaranteed right for the entire population, the incompatibility of media organizations and associations with political and economic interests, the media's obligation to act in the public interest and the promotion of community-based media⁷¹.

However, as president of the Working Group Virgilio Hernández (PAIS) recognized, the real challenge will be to maintain this conceptual agreement when they begin drafting and debating the actual articles.

The conflict in the Dayuma

On December 7, 2007 the Director's Commission of the Assembly heard testimony from the family members of some detained protestors from Dayuma, who denounced violations of their human rights. Moreover, the Director's Commission announced that it would form a commission of three assembly members to investigate cases where, according to human rights organizations, the military's conduct proved excessive.⁷²

This decision created tension between the Assembly and the President of the Republic, who made the following announcement a few days later: " If they declare an amnesty for those prisoners I will renounce the presidency, I won't permit impunity to continue in this country. [...] If the Assembly intends to govern the country, it accepts my resignation".

In response, on December 13, 2007, president of the Assembly and PAIS member Alberto Acosta publicly declared that the Assembly would not emit political resolutions that could interfere with the duties of the Executive.⁷³ The tension was finally resolved with the government's naming of a mixed Commission composed of Raúl Vallejo, Minister of Education, Juan Sebastián Roldán, Former Vice

⁷¹ Assembly Member Virgilio Hernández, Montecristi, interview 07.02.08.

⁷² El Comercio. Online:

http://www.elcomercio.com/solo_texto_search.asp?id_noticia=101759&anio=2007&mes=12&dia=8

⁷³ El Comercio. Online:

http://www.elcomercio.com/solo_texto_search.asp?id_noticia=102589&anio=2007&mes=12&dia=14

Minister of Coordination of Internal and External Security, Gustavo Jalkh, Minister of Justice and Human Rights, who headed it. Representing civil society were Anaité Vargas, Executive Director of the Permanent Assembly of Human Rights (APDH), Luis Saavedra, President of the Regional Foundation for Human Rights Advisors (INREDH) and Gualdemar Jiménez, Director of the Peace and Justice Service of Ecuador (SERPAJ).⁷⁴

Along these lines, the INREDH organization filed cautionary measures with the Interamerican Commission on Human Rights. According to this organization, facial lesions, eyes swollen shut from blows and head injuries revealed an excessive force used by the Army. In the opinion of Luis Angel Saavedra, spokesperson for the organization, "*the judges and attorneys have ceased to be independent and now issue detention orders as the Government dictates...*"⁷⁵

Also tied to the Dayuma case and the relationship with the Executive are the amnesties and pardons proposed by President Correa in his address at the start of 2008. On January 29, 2008 a Commission of attorneys was created by the PAIS bloc to revise the cases of solicited amnesties and pardons on an individual basis.⁷⁶ The cases fall into three major categories: a) cases of individuals accused of crimes against the administration, b) cases of individuals accused of small drug trafficking crimes, and c) those of the individuals who participated in the protests in Dayuma. Another issue that has yet to be resolved in this process is the classification of crimes made by the Assembly in categories a and b, given that the Constitution only permits "*the concession of general amnesties for political crimes, and pardons for common crimes*" (Art. 130) and expressly prohibits granting "*pardons for crimes committed against the public administration*" (Art. 130, num. 15).

On February 18, 2008 the organizations of the Ecumenical Commission on Human Rights (CEDHU), Ecological Action and INREDH submitted a petition to the Assembly, to include in the amnesties "*the hundreds of social and community leaders systematically criminalized for exercising their fundamental right to protest and resist against projects with a high destructive cost for the environment and that violate human rights.*" They assert that these social leaders and many citizens are also subjected to acts of harassment, persecution, torture and even murder, and in many cases are stigmatized as delinquents and terrorists.⁷⁷

⁷⁴ En "Escrito a la Comisión Interamericana de Derechos Humanos de respuesta a las observaciones del Estado de Ecuador en el marco de las medidas cautelares interpuestas en nombre de los líderes campesinos de Dayuma por parte de la organización INREDH. Referencia MC-252-07". Online:

http://www.inredh.org/boletines/derechos/index.php?modulo=contestacion_al_estado_ecuatoriano_dayuma

⁷⁵ El Comercio. En "La Justicia se subordinó al Presidente en Orellana". Online:

http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=102014&anio=2007&mes=12&dia=10

⁷⁶ "Abogados revisarán casos para amnistías", El Universo, 01/02/08. Online:

<http://www.eluniverso.com/2008/02/01/0001/8/012DCE2C6B0146FF8FE770CF9B11B847.aspx>

⁷⁷ Online: <http://www.inredh.org/noticias/noticias.php?modulo=noticiasleermas&idioma=es&id=152>

2006

11/26/06. Economist Rafael Correa is elected President of the Republic of Ecuador in the second round, with 56.47% of the vote.⁷⁸

2007

01/15/07. Rafael Correa takes office.

01/16/07. Correa calls for a referendum on a Constituent Assembly with full powers by decree.

01/23/07. The Supreme Electoral Tribunal (TSE) did not accept the decree because it considered the Congress the appropriate body to authorize it and left the referendum in the hands of the legislators.

02/13/07. Congress authorizes the referendum. The TSE set the referendum date for April 15, 2007.

02/28/07. The government presents the statute for the election of a 130-constituent Assembly, granting it the option of revoking the mandates of the Congress and the President.

03/05/07. The legislative majority, in opposition to the Government, filed a complaint against the convocation of the referendum with the Constitutional Tribunal (TC) and removed the President of the TSE, Jorge Acosta Cisneros.

03/07/07. The TSE, claiming to be the maximum authority in election cycles, removed 57 opposition Congress members, accusing them of trying to interfere with the electoral process.

04/15/07. The popular consult to decide whether to hold a Constituent Assembly ends with 81.72% of voters voting “Yes.”

07/25/07. The Constitutional Tribunal upheld the removal of the 57 deputies. 09/30/07. Elections for the 130 Assembly constituents.

11/19/07. The TSE distributes credentials to the Assembly members from the following parties: PAIS: 73; PSP: 18; PRIAN: 8; PSC: 5; RED: 3; MPD: 3; coalitions and others with less than two members: 20.

11/29/07. Installation of the National Constituent Assembly in Montecristi (Ciudad Alfaro, Manabí). The Assembly produces Constituent Mandate No. 1: the Assembly assumes full powers; ratifies President Correa; declares the Congress in recess.

11/30/07. Formal inauguration of the National Constituent Assembly. Alberto Acosta is elected its president.

12/11/07. The Assembly finishes approving the internal rules for its operations.

12/13/07. Members are selected for the ten working groups.

12/17/07. The Executive presents the Assembly with its Project on the Law on Tax Equity.

⁷⁸ Tribunal Supremo Electoral. Online: http://www.tse.gov.ec/Resultados2006_2v/

12/28/07. The Assembly approved the Law on Tax Equity with 90 votes from the parties: Acuerdo PAIS, Pachakutik, MPD, Poder Ciudadano-Izquierda Democrática and Movimiento Honradez Nacional.

2008

01/01/08. The Law on Tax Equity enters into effect.

01/03/08. Contrary to the recess established by Constituent Mandate No. 1 some Congress members called themselves into session to declare another “legislative term.”

01/07/08. The Executive submits its proposal for the Law on Transit to the Assembly.

01/07/08. The Directors Committee approves the Rules for the operations of the working groups.

01/11/08. The Director’s Committee approved the Rules for the operations of the Legislation and Oversight Working Group.

01/11/08 The President submits his draft for the Organic Law for Recovering the Public Use of the State’s Petroleum Resources to the Assembly.

01/15/08. President Correa addresses the Assembly with his first government report.

01/19/08. President Correa holds a demonstration in Guayaquil to celebrate his government’s first year. The president and vice president of the Assembly attend.

01/21/08. The Working Group on Legislation and Oversight started its review of the proposal for the Law on Recovering the Use of the State’s Petroleum Resources.

01/22/08. A video is released showing former president Gutiérrez and an Assembly member from PSP conspiring to buy votes from PAIS Assembly members.

01/24/08. The Assembly approves Mandate 2, which establishes salary and earnings caps for government employees, and Mandate 3, which postponed the election of representatives for the new provinces of Santa Elena and Santo Domingo.

01/24/08. Demonstration held in Guayaquil by its mayor and Correa opponent Jaime Nebot.

01/26/08. The Working Group on Legislation and Oversight releases one majority and two minority reports on the Organic Law for the Recuperation of Public Use of the State’s Petroleum Resources.

01/28/08. Anniversary of the death of Eloy Alfaro. The Constituent Assembly declared Montecristi, Alfaro’s birth city, as the seat of the Assembly through a Decree of National Patrimony, Culture and History.

01/31/08. The Attorney General rejected and closed the complaint presented by former President of Congress Jorge Cevallos, from November 23, 2007, against the Assembly members for impeding the operation of the Parliament.

01/31/08. The president sends the Assembly a draft project on the Reform Law on the Organic Laws on the Solicitor General of the State, the General Comptroller of the State, and the Law on Public Contracts.

02/12/08. The Assembly approved Mandate No. 4 with 78 votes, modifying article 1 of Mandate No. 2 on the limits of compensation for public servants.

Annex 2

Decisive acts undertaken by the National Constituent Assembly

Name	Body	Date	Content	Vote
Mandate No.1	Plenary	11/29/07	Definition of full powers; ratification of the president and other representatives of the constituted powers; placed the Congress in recess.	90/130
Mandate No. 2	Plenary	01/24/08	Establishes maximum compensation and limits for payments and settlements for officials in the public sector	90/130
Mandate No. 3	Plenary	01/24/08	Postpones the election of representatives from the provinces of Santo Domingo and Santa Elena	S/I
Mandate No. 4	Plenary	02/12/08	Modifies Article 1 of Mandate No. 2	78/130
Law on Tax Equity	Plenary	12/28/07	Establishes a new tax regime	90/130
Resolution 01	Director's Commission	12/04/07	Resolution on administrative and financial autonomy in the Assembly	Unanimous
Resolution 02	Director's Commission	12/10/08	Definition of procedures so the CA can address issues of pressing economic, political and social interest	Unanimous
Rules of Operation of the Assembly	Plenary	12/11/07	Defines the character, organization and other aspects of operation of the CA (discussion mechanisms, voting rules, etc)	86/130
Rules of the Working Groups	Director's Commission	01/07/08	Establishes the composition and parameters of operation for the Constituent Working Groups	Unanimous
Rules for the Legislation and Oversight Working Group	Director's Commission	01//11/08	Establishes procedures for Working Group 10 to carry out its responsibilities of legislation and oversight	Unanimous
Advisor's Instructions	Director's Commission	02/06/08	Stipulates employment issues related to the advisors of Assembly members	Unanimous
Agreement on Montecristi	Plenary	01/28/08	Declares Montecristi a site of Natural, Cultural and Historical Heritage, the birth city of Alfaro and seat of the Assembly	