



Report on the National Constituent Assembly of Ecuador

No. 11, June 2008. The Carter Center.
Quito, Ecuador

Introduction

This report covers the principal events, debates and decisions of the National Constituent Assembly of Ecuador (CA) between May 29 and June 14, 2008. In the first section we summarize the work undertaken in the Assembly's two main forums: the constituent working groups and the Plenary. In the second section we analyze the key relationships both within the Assembly as well as between the Assembly and the Executive branch and civil society. In the third section we discuss the most controversial issue over the last two weeks: the proposal for expropriation of unproductive land and the legislation on this land's social functions. In conclusion we offer a brief chronology of the CA's most important acts. Another event worthy of notice during this period was the resignation of Assembly member Julio Chactóng (PAIS) on June 4, an act that preceded a pending investigation against him for alleged improper hiring practices for public positions in the province of Los Ríos. Chactóng had been reported by Assembly member Galo Lara, who accused him of handing out positions in the Solidarity Fund of the aforementioned province. The Assembly accepted his resignation with votes from the PAIS majority bloc.¹

¹ Redacción, "2 comisiones indagarán a Lupera; Chactóng se fue", El Comercio, 06/05/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=127020&anio=2008&mes=6&dia=5

I. The Assembly's Internal Work

1. The Working Group on Legislation and Oversight (Working Group 10)

On June 2 the Legislation and Oversight Working Group approved the definitive report on the new Law on Transit. The most controversial aspects of the definitive project are: a) the inclusion of private taxis in the new regulations; b) the changes to the Guayas Transit Commission (CTG), which will maintain financial autonomy, but will be subordinated to the decisions of the new National Transit Commission, the highest authority on the subject.

On June 4 Working Group 10 released a definitive report to the Director's Commission on reforms to the Code on the Completion of Punitive Sentences².

Meanwhile, on June 6, the Ombudsman Claudio Muekay spoke to Working Group 10 in favor of the amnesty that has been requested for Wilma Salgado, former director of the Agency for the Guarantee of Deposits (AGD). In Muekay's opinion the potential amnesty recipient has been politically persecuted and among his arguments he alleges that the courts responsible for the case may have committed a breach of public duties when, after the issuing of an order to stay legal

² Press Release - José Peralta, "Mesa de Legislación remite hoy las reformas al Código de Ejecución de Penas, a la Comisión Directiva", 06/04/08. Online: <http://asambleaconstituyente.gov.ec/boletines/mesa-de-legislacion-remite-hoy-las-reformas-al-codigo-de-ejecucion-de-penas-a-la-comision-directiva.do>

proceedings in the open case against her – which would make it a matter already judged or res judicata – the order was ignored by that court as well as the second criminal division of the Court of Quito, which released illegal and unconstitutional rulings with a detention order in effect.³

Also noteworthy was the Working Group's approval on June 11 of articles for the new Organic Law on Public Contracts, which will be forwarded to the President of the Assembly to be considered by the Plenary. For César Rodríguez (PAIS), president of Working Group 10, this approval was important because it was for "*a law that will signify the arrival of modernity and "e-government." It will eliminate opacity, bolster the concept of investments to fulfill the national development strategy, and create the public sector that makes the economy more dynamic by prioritizing national industries and contracts with professionals, consultants, artisans, and micro, small and medium sized businesses*".⁴

³ Press Release - José Peralta, "A la mesa 10 llegan nuevos aportes que respaldan la amnistía para Wilma Salgado", 06/06/08. Online:

<http://asambleaconstituyente.gov.ec/boletines/a-la-mesa-10-llegan-nuevos-aportes-que-respaldan-la-amnistia-para-wilma-salgado.do>

⁴ Working Group 10, "Ley Orgánica de Contratación Pública fue aprobada", 06/11/08. Online:

http://asambleaconstituyente.gov.ec/blogs/mesa_10/2008/06/11/ley-organica-de-contratacion-publica-fue-aprobada/

2. The Work of the Working Groups

Working Group 1. Fundamental Rights and Constitutional Guarantees

On June 6, Group 1 debated four articles in relation to the Ombudsman, its jurisdiction, legal representation and main functions. The noteworthy portions of the proposed articles include: a) the Ombudsman is an institution of public law charged with protecting human rights, which will enjoy independence and administrative and financial autonomy; b) the Ombudsman will have national jurisdiction and will have decentralized operations through its provincial delegates; c) the duration of the Ombudsman's term will be five years and the position is not eligible for re-election; d) included in its main functions will be defending and enforcing human rights, providing information and guidance on rights, formulating draft laws, legal reforms, recommendations, rulings and proposals, investigating and completing independent reports on the status of human rights and the adequacy of human rights norms and practices in comparison with international standards on human rights, as well as human rights promotion and education, among others. The articles grant the Ombudsman the authority to form commissions without prior authorization to carry out preventative meetings in any instance of deprivation of rights, with the goal of collecting reliable and trustworthy information on prison conditions to help prompt timely action to

prevent violations of the human rights of individuals deprived of freedom.⁵

Working Group 2. Organization, Social and Citizen Participation, and Systems of Representation

The issue of the election calendar schedule for January 2009 was discussed on June 5; the goal was to determine the method that will be used to convoke, organize and proclaim election results. Virgilio Hernández (PAIS) stated that “*we are studying a mandate, although we are also considering the approval of some transitory provisions for the new Constitution*”.⁶

Working Group 3: Structure and Institutions of the State

On June 2 Group 3 established the foundational principles and constitutive elements of the State in two articles. The first one states that Ecuador is a social and democratic State of law, sovereign, independent and secular. The second promotes the nation as “indissoluble.” Meanwhile, on June 6 the Assembly members endorsed the creation of the Constitutional Court as the highest authority to guarantee the supremacy of the Constitution and potentially review the decisions of the judges on the National Appeals and Review Court

⁵ Ibid, *Defensoría del Pueblo a primer debate*, 06/04/08. Online: http://asambleaconstituyente.gov.ec/blogs/mesa_1/2008/06/04/ddefensoria-del-pueblo-a-primer-debate/

⁶ Political summary, “Se analiza mandato para comicios 2009”, El Universo.

which will replace the Supreme Court of Justice.⁷

The Armed Forces will no longer be the “*guarantors of the constitutional orders*,” according to the agreement reached in the working meeting between the Assembly members of Working Group 3 and the Minister of Defense, Javier Ponce; the Assistant Secretary of Defense, Miguel Carvajal, and the chief of the Joint Command of the Armed Forces, Fabián Varela. In the proposal for constitutional norms on the role of the Armed Forces, they removed the phrase “*guarantors of the constitutional order*”, which – according to the majority of the Assembly – has been a factor in political instability. “*Political problems have to be solved by politicians*,” said Assembly member Fernando Burbano.⁸

Working Group 5. Biodiversity and Natural Resources

Working Group 5 proposed that a special law should regulate the right of communities to be consulted with prior to the development of any projects that will have an environmental impact. Along these lines, on June 4 the Working Group approved a set of articles

related to Environmental Principles, which establish that “*all state decisions or authorizations that could affect the environment should consult with the community first, and the community will be fully informed in a timely manner. The consultant subject is the State*”.⁹ Meanwhile, on June 11, Working Group 5 approved 8 articles to be discussed by the Assembly Plenary, which establish six major sections related to: the management and protection of the country’s natural heritage, ecosystems, biodiversity, natural resources, land, water, biosphere, urban ecology and alternative energy sources.

Working Group 6. Work, Production and Social Inclusion

On June 7 Group 6 approved two articles on property up for their second debate. To mitigate the criticisms of opposition Assembly members on the risk of violating the constitutional right to property, 8 of the 13 Assembly members from the group proposed various changes to the original draft articles. The most important change was the deletion of the work “*expropriation*” from the article’s title. They ratified the principle of “*public use*” as a condition for evaluating property.¹⁰ They also

⁷ Political summary, “Mesa 3 avala Corte Constitucional como instancia de máximo nivel”, El Universo, 06/07/08. Online: <http://www.eluniverso.com/2008/06/07/0001/8/80FEAA062A3A4165B472F4CED6DA1C7C.html>

⁸ “Las FF.AA. ya no dirimirán en conflictos políticos”, El Comercio, 06/04/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=126851&anio=2008&mes=6&dia=4

⁹ “La Ley fijará la consulta previa”, 06/05/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=126979&anio=2008&mes=6&dia=5

¹⁰ Political summary, “La Mesa 6 establece que la ley fije una función social de la propiedad”, El Comercio, 06/08/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=127473&anio=2008&mes=6&dia=8

clarified that the State guarantees property in all its forms.

Working Group 7. Development Model

On May 30 the Plenary held its first debate on the texts introduced by Working Group 7, which refer to Title VI: Development Plan, Chapter III: Economic Policy. The projects consist of 35 articles that address 10 major issues: Economic Policy, Fiscal Policy, Public Debt, the State Budget, Treasury Fund, Tax regulations, transfers and benefits, Monetary, exchange, credit and financial policy, Trade policy, the Financial system, and Strategic sectors and Public services and businesses. Pedro Morales (PAIS), president of Group 7, stated that the proposal's central objective is *"to dismantle the social market economy of this development model that, as Robert Reich affirms, has caused the common good to be subordinated to the results of business balance sheets, has fostered a world in which governments antedate decisions to accommodate large companies, a situation that erodes the power that citizens should have in a democracy"*.¹¹

¹¹ Press Release - José Peralta. "Pasó primer debate sobre Políticas Monetaria y Comercial; Sistema Financiero y Sectores Estratégicos. Boletín 1146." 01/06/08. Online: <http://asambleaconstituyente.gov.ec/boletines/paso-primer-debate-sobre-politicas-monetaria-y-comercial-sistema-financiero-y-sectores-estrategicos.do>

3. Debates and resolutions of the Plenary of the CA

On May 30, the Plenary approved Working Group 10's report and ratified the removal of Superintendent of Companies, Francisco Arellano, by 77 votes in favor and five abstentions; the approved resolution establishes the following: *"Accepts the recommendation of Working Group 10 and declares the conclusion of the position granted by the Assembly to Doctor Francisco Arellano Raffo to fulfill the duties of the Superintendent of Companies."*¹²

On June 10 the Plenary approved (91/130 votes) a cluster of reforms to the Assembly's Internal Rules of Operation. The changes were proposed to facilitate the approval of the draft Constitution. The first change allows the Plenary and the working groups to meet at the same time; another modification relates to changes in the day's order of business: proposals for modifying the agenda will be received in writing up to an hour before the start of the session. Finally, the observations and comments on constitutional texts in second debate will pass on to a sub-committee made up of the reader of the text, a designee of the Working Group and another of the Director's Commission. The final texts will be presented

¹² National Constituent Assembly, "Resolución 4", 05/30/08. Online: http://www.asambleaconstituyente.gov.ec/documentos/resolucion_4.pdf

in two days and the reader will support and explain them to the Plenary.¹³

On June 13, the Plenary designated Pedro Solines Chacón as the interim Superintendent of Companies via Constituent Mandate No. 11 (73 votes). The Mandate's single article states that the appointment is of a provisional nature and it may be revoked at any time, and it does not entail any sort of vested rights.¹⁴ Also on June 13, with 98 votes the Plenary approved amnesty for 62 members of the Taura command groups who participated in events leading to the uprising against the government of Febres Cordero on January 16, 1987.¹⁵

II. The Assembly's Relationships with the Constituted Powers and Society

1. Assembly's Relationship with the Executive Power

On June 6, for the first time since the beginning of the constituent process, the bloc of Acuerdo PAIS Assembly members met with President Correa in the Carondelet Palace in

¹³ "Reformas al reglamento", El Comercio, 06/11/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=127985&anio=2008&mes=6&dia=11

¹⁴ Press Release - José Peralta, "El nuevo superintendente de Compañías es Pedro Solines", 06/13/08. Online: <http://asambleaconstituyente.gov.ec/boletines/el-nuevo-superde-companias-es-pedro-solines.do>

¹⁵ Press Release - José Peralta, Constituent Assembly, Bulletin 1224, *Los comandos de Taura reciben amnistía de la Constituyente*, 06/13/08. Online: <http://asambleaconstituyente.gov.ec/boletines/los-comandos-de-taura-reciben-la-amnistia-de-la-constituyente.do>

Quito instead of in Manta, as had happened in the past. According to Augusto Barrera, who serves as a liaison between the Assembly and the Government, the goal of transferring the meeting to Quito was to centralize work efforts and coordinate direct action for the final product of the Assembly. One of the issues debated by PAIS and the president was the potential reforms to the Assembly's operating statute to streamline the approval process for the constitutional articles still lacking.¹⁶

Meanwhile, on June 9, President Correa met with Augusto Barrera, the Minister of Justice, Gustavo Jalk, and the head of Working Group 8, Fernando Vega (PAIS), in the Carondelet Palace to discuss the limits of the Constitutional Court, which will be established as a new branch of the State. According to Barrera, the importance of this new institutional figure will be to guarantee "*the absolute supremacy of the Constitution over all the branches (of the State)*".¹⁷

2. The Assembly's Relationship with Society

On June 3, representatives from the Employee Association of the Superintendence

¹⁶ "Correa y sus asambleístas se reunieron en Quito", El Comercio, 06/03/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=126666&anio=2008&mes=6&dia=3

¹⁷ Political summary, "La nueva Corte Constitucional se debatió ayer", El Comercio, 06/10/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=127765&anio=2008&mes=6&dia=10

of Companies expressed their frustration with the Working Group on Legislation and Oversight, which, according to them, did not allow them to make a full case against former Superintendent Francisco Arellano. The president of the Employee Association, Santiago Bravo stated: *“Because we’re not part of the official party, they wouldn’t hear us. They knew we were coming to ask for a trial against one of their co-party members, but they wouldn’t allow it.”* In accordance with the objections of the employees, Assembly member César Rohón (PSC) asked the Plenary to initiate the process for a political trial against Arellano; however, his proposal did not receive support from the PAIS majority bloc.¹⁸

III. Actors, Debates and Points of Tension

Property and the social function of land

Over the last two weeks the debate on property and the social function of land truly stood out. The original Constitutional proposal drafted by Conesup (which was headed by the President prior to the start of the CA), included provisions for the expropriation of abandoned or unproductive land. Given the heated controversy this sparked among major property owners, towards the end of 2007 and as one of

the Assembly’s first acts, the Assembly members opted to incorporate a land tax as part of the Law on Tax Equity. However, that measure did not seal the debate on the social function of land. In this sense, Working Group 6 on *Work, Production, Equality and Social Inclusion* floated the concept of expropriating unproductive private property to serve the collective social interest and well being. For the president of Working Group 6, Pedro de la Cruz (PAIS), the purpose of this provision is to guarantee the health of the population and include marginalized rural sectors by providing them *“democratic access to the resources for production”*.¹⁹ According to the Assembly members in favor of this proposal, the highest priority is to prevent large concentrations of land and water that are not fulfilling their productive functions. However, for some opposition Assembly members, the proposal carries the hidden intention of threatening the status of private land property. For example, in his minority report, Francisco Cisneros (PSP) argues that it is impossible to regulate land tenancy with a constitutional norm. Cisneros asserts that the articles should textually express the State’s obligation to guarantee private land property. Another voice that criticized the proposal was that of Assembly member Jorge Fadul (PSP), who questioned its potential harm to the rights of individuals: *“this*

¹⁸ Political summary, “Arellano: un juicio en camino”, El Comercio, 06/04/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=126854&anio=2008&mes=6&dia=4

¹⁹ Political summary, “La soberanía alimentaria: atada a la eliminación del latifundio”, El Comercio, 06/04/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=126846&anio=2008&mes=6&dia=4

*runs the risk of affecting individual property in the name of collective rights”.*²⁰

In contrast, for Irina Cabezas, vice president of Group 6, the figure of expropriation will only be used when it was necessary for the construction of a highway, school or public work for the community; moreover, these expropriations could only be carried out after a prior study establishing the merits or not of the action.²¹

To reassure the groups with the greatest worries over these measures, on June 10 Assembly member Gustavo Darquea (PAÍS) maintained that this provision will not violate the right to private property: *“We want this to be a country of property owners and producers and not of a small group of property owners”*²².

05/30/08 The Plenary dismissed the Superintendent of Companies, Francisco Arellano.

06/02/08 The Working Group on Legislation and Oversight approved the definitive report on the new Law on Transit.

06/04/08 Group 10 sent the definitive report on reforms to the Code on the Completion of Punitive Sentences to the Director’s Commission.

06/10/08 The Plenary approved a cluster of reforms to the Assembly’s Internal Rules of Operation.

06/11/08 Working Group 10 approved the articles of the new Organic Law on Public Contracts.

06/13/08 The Plenary provisionally appointed Pedro Solines as the Superintendent of Companies, via Constituent Mandate No.11.

06/13/08 With 98 votes, the Plenary approved amnesty for 62 members of the Taura Command units.

²⁰ *Ibid.*

²¹ Business summary, “El debate sobre la propiedad se queda en la tenencia de la tierra”, El Comercio, 05/31/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=126367&anio=2008&mes=5&dia=31

²² Guayaquil summary, “Las tierras improductivas deben tener apoyo de créditos y riego”, El Comercio, 06/10/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=127794&anio=2008&mes=6&dia=10