



Report on the National Constituent Assembly of the Republic of Ecuador

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Introduction

This report covers the principal events, debates and decisions of the National Constituent Assembly of Ecuador (CA) between June 30 and July 13, 2008. Unlike in our previous reports, this one does not go into detail about the discussions within the working groups because the bulk of the Assembly's activity took place in the Plenary. In the last two weeks, that body approved two Mandates, one Pardon, two Amnesties and more than 120 constitutional articles. In the second section, we analyze the key relationships between the Assembly and the Executive and Judicial branches. In the third section we introduce the most controversial issue of the two week period: the controversial Mandate that makes ironclad a decision by the Agency for the Guarantee of Deposits (AGD) to seize the assets of the Isaías bank to collect on a debt it maintained with the Ecuadorian state. At the end of the Report we also offer a brief chronology of the most important events.

It's important to point out that as of July 5 the Plenary concluded with the first round of debate for all 534 articles that will be in the new Constitution; after this date it concentrated on holding second debates as well as approval votes for pending articles.

Another noteworthy issue was the announcement of the names of the members of the Editing Commission for the new Constitution. The original nominees were: Consuelo Yáñez (professor at the Real Academia de la Lengua), Teresa Viteri (professor at Catedrática de Lingüística), Tarquino Orellana (constitutional expert); Ramiro Ávila (constitutional expert) and Fausto Aguirre (constitutional expert). However, a few days later both Consuelo Yáñez and Fausto Aguirre declined their nominations. María Augusta Vintimilla Carrasco and Xavier Andrés Flores Aguirre will participate in their place. The Commission should submit the entire text of the Constitution to the Assembly

members by July 18 so that, on the 19th, they may begin reading it in order to finish within the 5 days set aside in the Assembly's Internal Rules. On July 24 the Assembly will proceed with the final approval of the document.

Correction from Report No. 12. In our previous report, in the first paragraph on page 2, we incorrectly reported that the Working Group on Legislation and Oversight's approval of the amnesty petition for former President Gustavo Noboa included a group of collaborators (Jorge Gallardo Zavala, Alonso Pérez Kakabadse, Francisco Arosemena Robles and Carlos Carrera Nortiz) *"who were part of the team that renegotiated the foreign debt payments during Noboa's government"*. In actuality, although the accused individuals were in effect the members of that debt negotiating commission, that group of citizens was not actually chartered due to debt negotiation but rather *"for using the surplus from the Global Bonds to provide liquidity to the Estado Pacífico Bank and Filanbanco Bank by transferring funds to them,"* as is stated in the text of Article 1 of the Amnesty finally approved by the National Constituent Assembly on July 4, 2008.

I. The Assembly's Internal Work

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

The Assembly members of Group 10 reconsidered the vote that denied the petition for amnesty for the former directors of the Agency for the Guarantee of Deposits (AGD), and on June 30, they approved the reports to begin processing amnesties for Luis Villacís, Carlos Arboleda and Wilma Salgado Agencia.¹

Meanwhile, between July 7 and 9, various meetings were held between the party leaders of the Assembly. The meetings, led by María Paula Romo, president of Working Group 10, were called in order to reach an agreement on the possible activities for a Legislative Commission that will begin operating once the Assembly concludes its task of writing the new

Constitution. The opposition parties objected to this proposal. Since no agreement was reached, over the next few days they will hold additional meetings to reach a consensus on the issue. However, within the PAIS party, a proposal for a "Transitional National Assembly" has been gaining support. President of the CA Fernando Cordero (PAIS) explained that this body would assume the functions of the Legislature until the new members take office, in 2009. The installation of a Transitional Assembly will be submitted to a vote in the referendum in September and will be made up in one part by current Assembly members, who may participate in the general elections after resigning their posts.²

Along the same lines, on July 11, it was announced that a five-member commission of Assembly members would work on a proposal

1 Working Group 10, "Amnistía a exgerentes de la AGD", 06/30/08. Online: http://asambleaconstituyente.gov.ec/blogs/mesa_10/2008/06/30/amnistias-a-exgerentes-de-la-agd/

2 Press Room of José Peralta, "El tema del 'Congresillo' iría a referéndum", 07/11/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=132372&anio=2008&mes=7&dia=11

for a “*transitional regime*” between the end of the CA and the new National Assembly. The Commission will consist of: María Paula Romo, Virgilio Hernández, María José Carrión, Fernando Salazar and Trajano Andrade (all from PAIS).³

2. Debates and resolutions of the CA Plenary

On July 1, the Plenary rejected the resignation of Francisco Vergara from the CA Secretariat (81/93 votes); Vergara had turned in his resignation on June 24 arguing his loyalty to the former Assembly president, Alberto Acosta. On the other hand, the resignation of Martha Roldós (RED) was accepted by the Director’s Commission of the Assembly (88/93 votes). In her resignation letter Roldós explained that she objected to the way in which issues are being processed by the Plenary in the Assembly’s final stage.⁴

On July 2 the Plenary approved the second series of articles on economic policy, strategic sectors and public services and companies. A total of 41 articles were approved. One of the most controversial articles contained a provision that prohibited groups from the financial or banking sectors from investing in other sectors, such as the

mass media. Meanwhile, the PAIS Assembly members relaxed their original position by referring to the financial system as a “delegable public service.” They also replaced the “market economy” concept from the 1998 Constitution with the concept of a “compassionate, social economy.” In the final articles it is called a “service of public order.” Below we include some of the articles from this batch:⁵

3 Political Summary, “Cinco gobiernistas definirán la transición”. El Comercio, 07/12/08. Online:
http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=132527&anio=2008&mes=7&dia=12
4 EFE, “Asamblea rechaza la renuncia de Francisco Vergara, secretario del organismo”, in El Comercio, 07/02/08. Online:
http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=131187&anio=2008&mes=7&dia=2

5 The following is the link to a table put together by the CA which lists all the articles approved thus far, along with the date of their approval; the table also provides access to the content of the approved articles:
http://asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=5838&Itemid=102

Art. 1. - The economic system is social and compassionate; it recognizes the human being as its subject and purpose; it facilitates balanced and dynamic relationships between society, the State and the market, in harmony with nature...

Art. 29. - Financial activities are a service of public order, and may be carried out, with prior authorization from the State and in accordance with the law. They serve the fundamental objective of maintaining deposits and meeting the financial requirements of the country's development objectives...

Art. 34. - Financial groups or entities may not own total, partial, or permanent holdings in businesses outside of the financial sector. It is prohibited that financial groups or entities, their legal representatives, directors or shareholders participate in the control of the capital, investments, wealth or assets of the mass communications media.

Art. 36. - The State reserves the right to administer, regulate, control and manage strategic sectors, in accordance with the principles of environmental sustainability, caution, prevention and efficiency.

Also on July 2 the Plenary approved 3 articles and 4 temporary provisions on food sovereignty (with an average of 90 votes).

During the debate the opposition demanded the last-minute elimination of a paragraph from article 3 related to territorial access, which originally stated: *"... the State may expropriate land in the agricultural and livestock sectors that is not fulfilling its social and environmental functions in compliance with the law, given prior and fair valuation and compensation"*.⁶

6 Days later the president of Working Group 6, Pedro de la Cruz (PAIS), revealed to the press that fellow party members César Rodríguez, as well as the coordinator between the Executive and the Assembly Augusto Barrera asked him to remove this paragraph. Cfr. Political Summary, "El tema del aborto preocupa políticamente al Gobierno", El Comercio, 07/05/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=131566&anio=2008&mes=7&dia=5

Art.- (1) Food Sovereignty.- The Ecuadorian state recognizes, guarantees and supports the right of individuals, communities and peoples to exercise Food Sovereignty, to achieve self-sufficiency in healthy and culturally appropriate nutrition, fundamentally maintained by small and mid range rural and family production.

Art.- (3) Access to land and irrigation.- The State will regulate the use and access of land, which should be fulfilling its social and environmental functions with respect to the right to food sovereignty, with the participation of organizations of small and medium sized rural producers. Large estates and the concentration of land ownership are prohibited, as are hoarding and the privatization of water and its sources. The State will regulate the use and management of irrigation water for the production of sustenance, based on the principles of equity, efficiency, and environmental sustainability.

On July 2 the Plenary also approved an article on Latin American integration (with 92/120 votes): *“Integration, especially with the countries of Latin America and the Caribbean, is a strategic objective of the Ecuadorian state...”*⁷

On July 3 the Plenary finalized its approval of 5 temporary provisions for the chapter on economic policy approved on July 2 (*see above*). The temporary provisions establish: the cancellation of debts for water usage incurred by users in extreme poverty; a 2 year period for legal entities, directory members and legal representatives of the financial sector who are acting participates in the mass media to transfer their commitments; a 1 year period from the date the new Constitution goes into effect for the State to recuperate the assets of the businesses within the Solidarity Fund that

are state-owned corporations governed by private law.⁸

On July 3 the Plenary also approved 5 articles on the rights of the environment (by 76/82 votes). Of these articles the first and second ones stand out:

7 Online:
http://asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=5838&Itemid=102

8 Political Summary, “La banca tendrá dos años de plazo para vender sus medios”, El Comercio, 07/04/08. Online:
http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=131419&anio=2008&mes=7&dia=4

Art. 1.- The natural environment or Pachamama, where life reproduces and takes place, has a right to exist, maintain itself, and regenerate its own vital cycles, structure, functions and evolutionary processes. Any individual, people, community or nationality may demand the observance of the rights of the natural environment before public bodies. To apply and interpret these rights, the principles established in the Constitution (in the proceeding clauses) will be observed.

Art. 2. - The natural environment has a right to be completely restored. This complete restoration is independent of the obligation of natural persons, legal persons or the State to compensate individuals or collective groups that depend on natural systems.

On July 4 the Plenary approved 19 articles on the Executive Branch, of which the following deserve special attention:

Art. 4. - The term of office for the President of the Republic will begin within 10 days of the installation of the National Assembly, the body before which the President will be sworn in. In case the National Assembly has already been installed, the term of office will begin within forty five days of the declaration of the official election results. The President of the Republic will serve a term of four years and may be reelected for only one term.

Art. 10. - The President of the Republic may dissolve the National Assembly when, by his judgment, he or she determines that it has assumed powers that do not constitutionally pertain to it, with a prior favorable ruling from the Constitutional Court, or if it obstructs the execution of the National Development Plan in a repeated and unjustified manner, or in times of grave political crisis or internal chaos.

On July 4, with 76/84 votes, the Plenary approved a pardon in favor of around 1200 people who had been detained for being carriers for drug traffickers; the pardon was supported in a report presented by the Working Group on Legislation and Oversight, which argued that the sanction imposed on the crime of carrying small amounts of narcotics was disproportionately harsh. The pardon was granted to individuals who had transported a quantity less than or equal to 2 kilograms of whatever drug or illegal substance; have received a final sentence and have completed

10% of its term, with a one year minimum, and additionally are not repeat offenders.⁹

9 CA. Online:

http://www.asambleaconstituyente.gov.ec/documentos/indulto_transporte_drogas.pdf

On the same day, the Plenary approved amnesty for former president of the Republic, Gustavo Noboa (67/96 votes).¹⁰ However, within the government party PAIS there was disagreement on the issue. For example, the minister of Policy Coordination, Ricardo Patiño, and former Assembly president, Alberto Acosta, spoke out against the amnesty. Prior to voting against the amnesty resolution in the PAIS meeting, the latter recalled that during Noboa's term as Vice President of the Republic – while Jamil Mahuad served as President – 161 million dollars were illegitimately transferred to the country's external debt creditors.¹¹ Along the same lines, the Assembly also granted amnesty to the former director of the AGD, Wilma Salgado (81/95 votes), due to its characterization of the charges and judicial processes brought against her as being political in nature and without legal merit. Salgado's amnesty permanently closed the files on all the criminal judicial processes that were initiated against her for her performance as director of the AGD.¹² At the release of this report, Wilma Salgado had been designated the Minister of Economy of Ecuador.

10 CA.. Online:

http://www.asambleaconstituyente.gov.ec/documentos/amnistia_gustavo_noboa.pdf

11 Political Summary, "La Asamblea dio la amnistía a Gustavo Noboa y a W. Salgado", El Comercio, 07/05/08. Online:

http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=131569&anio=2008&mes=7&dia=5

12 CA. Online:

http://www.asambleaconstituyente.gov.ec/documentos/resolucion_final_wilma_salgado.pdf

On July 7 the Plenary approved six articles guaranteeing the rights of speech. The PAIS Assembly members made some adjustments to the originally proposed articles. One of these modifications was removing state control over the content of publicity and programming of private media. They also excluded the proposal of PAIS Assembly member Pilar Núñez (PAIS), which proposed the creation of a state Communications System. One of the most noteworthy approved articles was Article 2:

Art. 2. - To promote plurality and diversity in communication, the State:

- a. Guarantees the assignment of broadcast frequencies of the radio electric spectrum through transparent methods and under equal conditions for the operation of public, private and community radio and television stations, and access to bandwidth for the use of wireless networks, while cautioning that the collective interest must take precedence in their utilization, in accordance with the Constitution.
- b. Facilitates the creation and strengthening of public, private and community media, as well as universal access to communication and information technologies, especially for persons and groups who, for whatever reason, have limited access or find themselves deprived of them.
- c. Does not permit direct or indirect oligopolies or monopolies of media property or the use of frequencies, in accordance with the law.

On July 7 the Plenary approved Mandate 12 (82/113 votes), which suspended the sectional elections planned for October 19 until after the proclamation of the results from the referendum on the approval of the Constitution.¹³ Assembly member César Rohón (PSC) criticized the measure, arguing that *“they may not interfere with the elections in any way,”* as this would imply political speculation on the outcome of the referendum.¹⁴

Mandate 13¹⁵, approved on July 9 (87/103 votes), determined that the procedures for seizing assets should be applied to all the

banking institutions being audited by the Agency for the Guarantee of Deposits (AGD). This decision arrived shortly after the AGD’s recent seizure of the assets of the former stockholders in the bank Filanbanco S.A., to collect a debt it maintained with the State in the amount of \$661.5 million. The mandate also made the AGD’s recent resolution essentially “ironclad” to prevent appeals for constitutional protection or other special acts: *“and if such action has already been filed, it will be immediately shelved without being able to suspend or avoid compliance with this resolution”*.¹⁶

13 CA. Online:

http://www.asambleaconstituyente.gov.ec/documentos/mandato_electoral_12.pdf

14 Political Summary, “Las elecciones de octubre se suspenden”, El Comercio, 07/08/08. Online:

http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=131993&anio=2008&mes=7&dia=8

15 CA. Online:

http://www.asambleaconstituyente.gov.ec/documentos/mandato_13_AGD.pdf

On July 11 the Plenary approved four groups of articles. The first one, consisting of 7 articles, refers to the so-called fifth branch of the State: Transparency and Citizen Monitoring; it will consist of a Council for Citizen Participation and Monitoring, the

16 *Ibid.* See *below*: “Actors, Debates and Points of Tension.”

Ombudsman, the General State Comptroller and the Superintendents. The purpose of this branch will be strengthening the citizens'

capacity to effectively monitor the government. The first article establishes that:

Art. 1. - The people are the first authority and entity to exercise oversight over the State. Each and every citizen has the right to participate and control acts of public interest in accordance with the law.

In another group of articles, the Plenary sanctioned 18 articles related to Methods for Alternative Conflict Resolution, Justices of the Peace, a System of Protection for Victims, Witnesses and Participants in the Penal Process, Public Defenders, Social Rehabilitation and Judiciary Council. For Gina Godoy (PAIS), vice president of Working Group 8 (Justice and the Fight against Corruption), the principle behind the approval of these articles was that of "*offering guaranteed access to defense for those who cannot access it*". The average vote in favor of each article was 90.¹⁷

A third group of articles (23) on Territorial Organization and Autonomous Governments addressed the following issues: general principles, territorial organization, decentralized autonomous governments and specialized regimes, the powers of autonomous governments, and principles and criteria for the participation and distribution of resources to

decentralized autonomous governments. The articles stipulate that the decentralized autonomous governments will enjoy political, administrative and financial autonomy and they will govern based on the principles of solidarity, territorial equity, integration and participation. Additionally, they specified the different levels of government: Parochial Boards, Municipal Councils, Metropolitan Councils, Provincial Councils and Regional Councils. The articles also create a National System of Responsibilities, which will define the policies and mechanisms to compensate for territorial imbalances. Meanwhile, they also guarantee that governments at the levels of district, region, province and canton will have a legislative ability in the scope of their powers and responsibilities.¹⁸

Finally, the fourth group of articles is made up of 3 articles on the Ombudsman, approved

17 Press Room of José Peralta, "Aprobados 18 artículos de Medios Alternativos de Solución de Conflictos, Jueces de Paz", 07/11/08. Online: http://www.asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=16235&Itemid=1

18 Press Room of José Peralta, "Aprobados 23 artículos y 2 transitorias sobre Organización del Territorio y Gobiernos Autónomos", 07/11/08. Online: http://www.asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=16288&Itemid=1

with an average of 95 votes. The first two articles stand out:

Art. 1. - The Ombudsman is an organ of public law, with national jurisdiction, legal personality and administrative and financial autonomy. Its chief position is the Ombudsman.

Art. 2. - The Ombudsman is responsible for protecting and guarding the observance of the human rights of Ecuador's inhabitants and the defense of the rights of Ecuadorian men and women who are outside of the country...

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

1. The Assembly's Relationship with the Executive Power

On July 4 the Plenary decided to designate Karina de Lourdes Sáenz Quintuña as a member of the Directorate of the Central Bank, as the replacement for Eduardo Cabezas, who resigned the post.

On a different note, on July 9, the Executive sent the Assembly a draft proposal of an Organic Law for the Creation of a Financial Security Network, which proposes a new operation for the national financial system. The draft law's objective is to "*demonstrate the commitment of the State with a public good such as stability in the financial system.*" Moreover, the proposed network "*seeks to reduce the systemic risks [in the system] and provide more confidence to the financial institutions so they can better fulfill their social function of facilitating savings and investment*".¹⁹

2. The Assembly's Relationship with the Judicial Power

On July 4 the Plenary held its first debate of 25 articles that modify the orientation of the Judicial Branch. The first of the changes has to do with the name of the new Court, which will become the National Court of Justice (CNJ). This reformed Court will have three functions: resolving requests for higher appeals, developing a system of jurisprudential precedents, and trying officials of the State. With the proposed changes, the possibility remains open that the future Constitutional Court (CC) could review the decisions of the CNJ, in cases where the latter failed to respect due process and basic rights. In PAIS member María Paula Romo's view, the new constitutional provisions will allow greater autonomy and independence in the activities of both Courts. However, for some Assembly members from minority parties, the proposal seems to have an ulterior political motive. For example, in the opinion of Mae Montaña (who

19 Press Room of José Peralta, "Ejecutivo envió propuesta de Ley Orgánica de Seguridad Financiera", 07/09/08. Online:

http://www.asambleaconstituyente.gov.ec/index.php?option=com_content&task=view&id=15849&Itemid=1

recently renounced her political affiliation with the UNO party), the fact that the Judicial Branch is ultimately subordinate to the CC serves to practically immortalize the political agenda of Correa's government: "An Assembly member from Acuerdo País said that the Constitutional Court will serve to protect the gains made by the citizen revolution".²⁰

III. Actors, Debates and Points of Tension

Mandate 13 and the asset seizure of the Isaías brothers.

On July 8, the AGD, via its resolution AGD-UIOGG-2008-12, ordered the seizure of around 190 businesses held by former stockholders and administrators of the bank Filanbanco S.A. (brothers Roberto and William Isaías, who are currently seeking asylum in the United States), to be put toward paying the debt the former bankers still owe to the Ecuadorian state. Within a day of the asset seizure taking place, the Assembly approved (97/103 votes) Mandate No.13, consisting of 3 articles. The first one ratifies the legal validity of the mandate, supported by the Executive. However, the second article has been the subject of various criticisms by legal scholars with diverse political tendencies for being unconstitutional and undermining the rights of

the accused to defend themselves. This much discussed Article 2 literally reads: "*Article 2. - Declares that resolution AGD-UIO-GG-2008-12 of July 8 of 2008, issued by the Officer in Chief of the Agency for the Guarantee of Deposits, is not susceptible to appeals for constitutional protection or other special acts, and if such action has already been filed, it will be immediately shelved without being able to suspend or avoid compliance with this resolution. The judges who may receive appeals for any type of constitutional action related to this resolution and those issued to fulfill it, implement it and complete it, should reject them, under penalty of removal without prejudice of criminal responsibility where it exists.*"²¹

According to some jurists interviewed by the press, the mandate was not only unnecessary, but could also represent a valid legal argument (by violating the right to a defense) for the accused to allege political persecution and avoid being deported to Ecuador; they could even go so far as to file claims against the Ecuadorian state in international courts. For Ernesto López (former president of the Tribunal for Constitutional Rights), the Mandate "*It's a mistake, you cannot deny an Ecuadorian his or her right to a*

20 Political Summary, "Acuerdo País insiste en su idea de renovar la Corte Suprema", El Comercio, 07/05/08. Online: http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=131564&anio=2008&mes=7&dia=5

21 CA. "Mandate No. 13". Online: http://www.asambleaconstituyente.gov.ec/documentos/mandato_13_AGD.pdf

legitimate defense".²² Along the same lines, another respected jurist, Mauricio Gándara, argued that "*The Constituent Assembly did them a favor. With this mandate they will avoid extradition because no country in the world will return a citizen to his country when it is known beforehand that he will not be allowed to defend himself*".²³ Even the acting director of the AGD, Carlos Bravo, recognized that the Mandate approved by the Assembly wasn't necessary. Meanwhile, one of the attorneys for the Isaías brothers, José Guerrero, had this to say about the Mandate: "*We are talking about a violation of the legal principles governing all of society, given that one cannot legislate with individual intent nor does the Assembly have the authority to do so*".²⁴

However, in contrast to these opinions, María Paula Romo (PAIS), president of the Working Group on Legislation and Oversight and one of the resolution's promoters, argued that the mandate does not limit the rights of the accused to a defense: "*The defense may present whatever arguments it deems necessary before any legal bodies it proposes. What they are blocked from doing is making appeals for constitutional protection*". According to this interpretation, the accused would maintain their rights to administrative

and ordinary judicial appeals but not to special appeals such as constitutional protection.

²² Political Summary, "El Mandato 13 podría ayudar a los Isaías", El Comercio, 07/12/08. Online:

http://www2.elcomercio.com/solo_texto_search.asp?id_noticia=132525&anio=2008&mes=7&dia=12

²³ *Ibid.*

²⁴ *Ibid.*

Chronology

Organization and Autonomous Governments;
and the Ombudsman.

07/02/08. the Plenary approved the second series of articles on economic policy, strategic sectors and public services and companies; three articles on food sovereignty and one on Latin American integration were also approved.

07/03/08. Five articles are approved on the rights of the natural environment.

07/04/08. 19 articles are approved on the Executive Branch.

07/07/08. They announce the names of the citizens who will make up the Editing Commission for the new Constitution.

07/07/08. A pardon is granted for carriers of small quantities of illegal drugs (“drug mules”; amnesties are accepted for Gustavo Noboa and Wilma Salgado.

07/07/08. Six articles were approved on the right to speech, as was Mandate 12 which suspends regional elections until October.

07/09/08. Mandate 13 on the actions of the Agency for the Guarantee of Deposits.

07/09/08. The Executive sends the Assembly a draft proposal for an Organic Law for the Creation of a Financial Security Network.

07/11/08. 4 groups of articles are approved dealing with the following issues: the Branch for Transparency and Citizen Monitoring; Alternative Conflict Resolution Methods, Justices of the Peace, a System of Protection for Victims, Witnesses and Participants in the Penal Process, Public Defenders, Social Rehabilitation and Judiciary Council; Territorial