Ecuador, March 17, 2009
English version by Acción Ecológica and The Quiza Quiza Collective

JUDGES OF THE CONSTITUTIONAL COURT

I, **MARLON RENE SANTI GUALINGA,** sustainable development engineer, resident of Quito, acting as President and legal representative of the **Confederation of Indigenous Nations of Ecuador CONAIE**, as established in the letter of appointment, of which I include a certified copy, present before you the following unconstitutional act:

I Authorities petitioned.

1. The authorities that authored and sanctioned the legislation under appeal are: the FISCAL AND LEGISLATIVE COMISSION, whose legal representative is its President, Arquitect FERNANDO CORDERO CUEVA, who will be notified with the petition in the Legislative Palace located in Av. 6 de Diciembre and Piedrahita, in Quito; and the Constitutional President of the Republic, Economist RAFAEL CORREA DELGADO, who will be cited in the National Palace, located at the intersection of Garcia Moreno and Chile, in Quito.

II Legislation appealed.

2. The legislation appealed in this document is the Mining Law, published in the Supplement of the Official Bulletin 517, January 29, 2009 and the basis of the appeal consists of articles 1, 2, 15, 22, 28, 30, 31, 59, 67, 87, 88, 90, 100, 103 and 316 of this legislation.

III Constitutional norms violated.

3. The constitutional norms which are considered to be violated by the Mining Law are: Articles 11(2), 57(4), 57(7), 57(8), 57(11), 57(17), 66(4), 66(22), 66(26), 133, 316, 326, 408 and 425 of the Constitution of the Republic of Ecuador.
4. Additionally, the Mining Law violates the following international norms:
   Articles 6, 4, 13, 14, 15 and 16 of Convention 169 of the International Labor Organization regarding Indigenous Peoples and Tribes.
   Articles 8, 10, 19, 23, 25, 26, 29, and 32 of the United Nations Declaration on the Rights of Indigenous Peoples.
   Articles 1(1), 21, 24, and 26 of the American Convention of Human Rights.
   Article 1 of the Additional Protocol of the American Convention of Human Rights in Matters of Economic, Social, and Cultural Rights.
   Article 2(1) of the International Pact of Economic, Social, and Cultural Rights.

IV Legal Foundation.

IV.I Formal Unconstitutionality.

IV.I.I Violation of the Right of Pre-Legislative Previous Consultation of the Indigenous Nations.

5. Article 57, Section 17 of the Constitution establishes the right of indigenous communes, communities, peoples and nations to be consulted before any legislative measure is adopted which could affect any of their collective rights.
6. The Mining Law affects the collective rights of the indigenous nations and peoples because it regulates mining activities in areas granted or to be granted which are located within indigenous territories; and, because it regulates the procedure for consulting the nations and peoples (Art. 90 of the Mining Law). Consequently, before enacting the Mining Law, the previous consultation detailed in Constitution should have been made.
7. Furthermore, the decision to enact the Mining Law should have complied with Article 6 of Convention 169 of the ILO regarding Indigenous Peoples and Tribes, to which Ecuador is a signatory:

   "Article 6
   1. In applying the provisions of this Convention, governments shall:
   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

8. In the same manner, article 19 of the United Nations Declaration on the Rights of Indigenous Peoples prescribes:

   "Article 19
   States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

9. No previous consultation, neither of the national community nor of the indigenous nations of Ecuador, was realized by the State. Article 57(17) of the Constitution of the Republic of Ecuador establishes a procedural requirement for the adoption of a law, and without compliance with the requirement of previous consultation of the indigenous communities the Mining Law cannot be adopted.
10. As shown, the Mining Law was adopted in violation of article 57(17) of the Constitution and article 6 of Convention 169 of the ILO, and as such, for not having followed the procedure ordered by the Constitution, the Mining Law is formally unconstitutional and should be declared so by this Constitutional Court.

IV.I.II Violation of the principle of division and hierarchy of laws.

11. The Constitution of the Republic of Ecuador, chapter 2, Legislative Function, section 3, Legislative Procedure, article 133, states:

    "The laws shall be organic or ordinary.
    The following laws shall be organic:
    1. - Those that regulate the organization and function of the institutions created by the Constitution.
    2. - Those that regulate the exercise of constitutional rights and guarantees.

3. - Those that regulate the organization, competencies, faculties, and functions of the autonomous decentralized governments.
4. - Those related to the structure of political parties and the electoral system.
The adoption, reform, abolition, and interpretation of organic laws shall require an absolute majority of the members of the National Assembly.
The remaining laws shall be ordinary, and cannot modify or prevail over an organic law."

12. The article cited is directly related to Title IX SUPREMACY OF THE CONSTITUTION, Chapter 1, principles, article 425, which states:

    "The hierarchy of order of application of legislation shall be the following: *The Constitution, international treaties and conventions, organic laws, ordinary laws, regional laws and district laws; decrees and rules; orders, agreements and resolutions; other acts and decisions by the public powers."*

13. Final Disposition (2) of the Mining Law is openly unconstitutional and arbitrary. It states that the statutes of the Mining Law "shall prevail over other laws and shall only be modified or abolished through the express intent of another law specifically intended to do so." It is absurd to pretend that a law, even though it benefits powerful sectors of society involved in mining, has "privileges" with respect to other laws of equal or greater judicial category.
14. In accordance with the Constitution (Article 133), in Ecuador there are organic and ordinary laws. In accordance with its subject matter, the Mining Law is an ordinary law, and as such cannot modify or prevail over organic laws. Nor can it do so with respect to other ordinary laws, except in accordance with the general principles of law, which is to say that it shall prevail in as much as it is special regarding another general law dealing with the same subject.
15. In regard to the reform of the law, there is no legal foundation for this law having a *sui generis* regime and not being reformed in the same manner as all laws, according to the general principals of law, that is, expressly, by a law that explicitly reforms its contents, or tacitly, if a new law of equal or greater juridic category includes precepts distinct to those envisioned in this law.
16. Following constitutional intent, all laws must be defined as either organic or ordinary, and the previously cited article 133 establishes the cases in which a law is organic, but the political workings of the Legislative and Fiscal Commission and the President of the Republic have unconstitutionally imposed that this law is *de facto* organic even though it does not conform to the constitutional requirements to be so.
17. For not having defined with precision and clarity the character of the Mining Law and for having been written in the final part of the law:

    "Final Dispositions. 2. - Validity. - This law shall come into effect concurrent with its publication in the Official Bulletin. ***<u>Its statutes shall prevail over other laws</u>*** *and shall only be modified or abolished through the express intent of another law specifically intended to do so. Consequently laws or decrees which in any manner contradict this precept or those established in the Constitution shall not be applicable."*

18. As the Constitution of the Republic of Ecuador establishes in article 425, the Mining Law must obligatorily be subject to the hierarchic order to determine its application, contrary to what was legislated by the Legislative and Fiscal Commission with the

participation of the President of the Republic. What has been created is a law not recognized in the constitutional norms.

19. In imposing the character and hierarchy of the law in its Final Disposition (2), in which it is mentioned that "***its statutes shall prevail over other laws***" the intent is to invent outside of constitutional sense a denomination that does not exist and does not even correspond to the hierarchic order that the Constitution establishes. That is to say, it is legislation that, in lacking definition of its character and hierarchic order disrespects the foundation of constitutionality of the law, sufficient reason that the entirety of the Mining Law should be declared unconstitutional.
20. Therefore, the Mining Law violates articles 133 and 425 of the Constitution of the Republic of Ecuador and as such must be declared formally unconstitutional by this Constitutional Court.

IV.II Substantial Unconstitutionality.

IV.II.I Violation of the Territorial Rights of the Indigenous Nations.

21. The indigenous nations' territorial rights are guaranteed in article 57 of the Constitution of the Republic of Ecuador:

"***Art. 57.-*** *The following collective rights are recognized and guaranteed for indigenous communes, communities, peoples and nations, in accordance with the Constitution and pacts, conventions, declarations and other international human rights' instruments: […]*
4. To conserve the inextinguishable property of their communal lands, which shall be inalienable, inexpropiable and indivisible. These lands shall be exempt from taxes and fees. […]
8. To conserve and promote their practices of managing biodiversity and their natural environment. The State shall establish and execute programs, with the participation of the community, to assure the conservation and sustainable use of biodiversity. […]
11. To not be displaced from their ancestral lands."

22. The Mining Law contains precepts that permit displacement of indigenous peoples of Ecuador and the division and taxation of their lands through the establishment of obligatory and discretional easements for mining activity. These articles are:

"***Art. 15. - Public Utility. -*** *Mining activity in all its facets, within and outside of mining concessions, is declared to be of public utility. Consequently, <u>the easements necessary shall be enacted</u>, within the framework and limits established in this law, considering the prohibitions and exceptions indicated in article 407 of the Constitution of the Republic of Ecuador.*
Art. 59.- Complementary Buildings and Installations.- *The title holders of mining concessions can build and install within their concession extracting, smelting, and refining plants, waste deposits, buildings, camps, warehouses, ducts, pump stations, pipelines, workshops, electric lines, ponds, communication systems, roads, railways and other local transportation systems, canals, piers and other docking systems, as well as carry out the necessary activities for the development of their operations and installations, subject to the disposition of this law and the environmental regulations in effect and all corresponding legal norms, and to <u>prior agreement with the owner of the surface property or the granting of necessary easements</u>, in accordance with the Constitution of the Republic, this Law and its general regulations.*

Art. 100. - Classes of Easements.- *From the moment in which a mining concession is granted or the installation of extraction, smelting, or refining plants is authorized, the surface property is subject to the following easements:*
a) That of being occupied in their complete extension by the installations and buildings of the mining activity. The bearer of the mining concession must obligatorily reimburse the owner of the property a monetary sum for the use and enjoyment of the easement, as well as a corresponding payment for the damages and inconveniences that will be incurred. When an agreement cannot be reached the Regulation and Control Agency will determine this amount;
b) Those of transit, aqueducts, railways, airfields, cable cars, ramps, conveyor belts and any other system or transport and communication;
c) Those established in the Law of the Electric Sector Regimen in the case of electric installations; and,
d) All others necessary for the development of mining activities.
Art. 103.- Creation and Termination of Easements.- *The creation of the easement over properties, unoccupied areas, or concessions, is essentially transitory, and is granted through public contract and when ordered by resolution of the Mining Regulation and Control Agency can be made a matter of protocol. These instruments shall be documented in the Mining Register.*
These easements terminate with the mining rights and cannot be taken advantage of for purposes different to those particular to the respective concession or plant; and they can be extended or limited according to the requirements of the activities of the concession or plant."

23. In the Mining Law "prospecting freedom" is also granted, which permits any person to infringe on territory of the indigenous nations to realize prospecting activities:

*"**Art. 28.- Prospecting Freedom.-** All real or legal persons, domestic or foreign, public, mixed, or private, communal, associative, family-owned and self-financed, except those prohibited by the Constitution of the Republic and this law, have the right to prospect freely, with the goal of locating mineral substances, except in protected areas and those included within the limits of mining concessions, in urban areas, population centers, archeological areas, properties declared to be of public utility and in the Special Mining Areas. When the case arises, the favorable administrative acts referred to in article 26 of this law shall be made."*

24. To understand how articles 15, 28, 59, 100, and 103 of the Mining Law contradict articles 57(4), 57(8), and 57(11) of the Constitution of the Republic of Ecuador, we must first understand the content of the territorial rights of indigenous nations.
25. For the legal scholar Pedro Garcia Hierro, "(t)erritoriality is one of the conceptual axes of the platform of indigenous claims, not only in its condition of indispensable collective right, but also as a real existential dimension of each people. Therefore, its legal treatment carries importance that determines the exercise of the rest of the rights that the peoples claim"[1]

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[1] Garcia Hierro, Pedro, "Territorios Indígenas: Tocando las Puertas del Derecho" in Tierra Adentro: Territorio Indígena y Percepción del Entorno by Alexandre Surrallés and Pedro Garcia Hierro, ed., Abya Yala Editorial, Quito, Ecuador, p. 227. Pedro Garcia Hierro is an attorney for the Universidad Complutense de Madrid and

26. The idea that territorial rights are the basis of the exercise of all other collective rights of indigenous nations has been sustained by the Interamerican Human Rights' Court since its celebrated decision in the Mayagna (Sumo) Awas Tingni Community vs. State of Nicaragua (2001), in which it ruled:

"(t)he indigenous people, based on their very existence, have the right to live freely in their own territories; the intimate relation that the indigenous people maintain with the land must be recognized and understood as the foundation of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities the relation with the land is not merely a question of possession and production, but a material and spiritual element which they must enjoy fully, even to preserve their cultural legacy and transmit it to future generations."[2]

27. Ecuador ratified the San Jose Pact (American Human Rights' Convention) December 8, 1977 and accepted the contentious competency of the Interamerican Human Rights' Court (IHRC) July 24, 1984. As such, the lines of jurisprudence indicated by the IHRC are part of the Ecuadorian judicial system. In the case of Mayagna (Sumo) Awas Tingni Community, the Court established a line of jurisprudence in which:

"it has been decided that the intimate link between indigenous peoples and their traditional lands and the natural resources tied to their culture which are found in these lands, as well as the incorporeal elements which emanate from these resources, must be protected [...]. Indigenous communities' culture corresponds to a particular way of life, a way of being, seeing, and acting in the world, based on their intimate relation with their traditional lands and natural resources, not only because these lands are their principle form of subsistence, but also because they form an integral element of their cosmovision, religiosity, and, as such, their cultural identity."[3]

28. The evolution of the international system of jurisprudence lead the Interamerican Human Rights Court, in the case of Yakye Axa Indigenous Community, to determine that the state of Paraguay violated the right to life of the community in depriving it of the territory necessary for its economic and cultural subsistence.[4]

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the Pontificia Universidad Católica of Peru and has worked during the last 35 years with diverse indigenous organizations in Peru and internationally in matters related to the identification and development of collective rights and the promotion of intercultural democratic reform.

[2] Interamerican Human Rights Court, in the case of Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, August 31, 2001 *(Funds, Reparations, and Costs)* Series C n. 79, paragraph 149.

[3] Interamerican Human Rights Court, Sawhoyamaxa Indigenous Community vs. Paraguay (Funds, Reparations, and Costs), March 29, 2006, Series C n. 146, paragraph 118. See also, Interamerican Human Rights Court, Saramaka People vs. Surinam, (Preliminary Exceptions, Funds, Reparations, and Costs), November 28, 2007, Series C n. 172, paragraph 82. See also Interamerican Human Rights' Court, Moiwana Community vs. Surinam, (Preliminary Exceptions, Funds, Reparations, and Costs), June 15, 2005, Series C n. 124, paragraph 131.

[4] Interamerican Human Rights Court, Case of Yakye Axa Indigenous Community, June 17, 2005. Series C n. 125, paragraphs 160 to 177.

29. The Interamerican Human Rights Court has assimilated the right to private property with indigenous nations' right to territory. In this manner, in the jurisprudence cited in this petition, the Court has found a violation of article 21 of the American Convention on Human Rights:

*"**Article 21. Right to Property***
1.Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

30. The indigenous nations' right to their territory is included in other international instruments to which the Ecuadorian State is party, such as Convention 169 of the International Labor Organization.[5]

*"**Article 4***
1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
Article 13
1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
Article 14
1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. […]
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
Article 15
1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.
Article 16
1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

31. In the same vein, the United Nations Declaration on the Rights of Indigenous Peoples (2007), with regard to the right to territory, says:

[5] Ratified by the Ecuadorian state May 15, 1998.

*“**Article 8***
2. States shall provide effective mechanisms for prevention of, and redress for:
b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
Article 25
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
Article 26
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

32. These norms are included within the human rights recognized by the Constitution, as laid out in articles 3 and 5 of the carta magna:

*“**Art. 3.-** Fundamental duties of the State:*

1. *To guarantee the effective enjoyment of the rights established in the Constitution and within international instruments, in particular including the right to education, health, nutrition, social security and water, without any manner of discrimination for all inhabitants.*

Art. 10.- *Persons, communities, peoples, nationalities and collectives are entitled and will enjoy those rights guaranteed in the Constitution and in international instruments."*

33. It is necessary to understand that the legal status that a State grants to indigenous lands is not of central relevance to the internal perception of indigenous people. However, it affects them in an instrumental way given that the mining law establishes in Art. 15 that *"mining is declared a public utility in all phases both inside and outside of mining concessions. As a result, the necessary easements will follow...,"* eliminates the defensive strength of the legal status of the territory belonging to indigenous nationalities in whose territories mining activity tries to occur. This fact impedes the historic continuity of the relationship between people-territory and subordinates it to economic interests.
34. With regard to the relationship between indigenous peoples and their territory, Professor Pedro García points out that "the transgenerational character of the right aims to enable the historic continuity of a people and that, as a result, it transcends the will of the current generation and makes it unavailable (inalienable, unexpropriable) and conceptually indivisible (their division would affect its nature), although internally divisible by use, temporally and definitive, in accord with the practices defined by the customary rights of each people."[6]
35. In Ecuador the Shuar nation and Kichwa peoples are in a desperate situation as a result of the economic interests of the government and four large mining companies. These peoples have already been demographically reduced in numbers due to disruptions, direct or indirect, from oil extraction, mining exploration and other territorial intrusions. Some of these peoples face serious challenges for their survival, as can be seen with the Siona, Secoya and Cofan peoples who have been affected by the oil industry for the last thirty years by national and transnational companies whose activities have been publically and legally challenged (for example, the Texaco case). Cases in which mining or oil companies in the stage of production have not deteriorated indigenous territory in such a way, which they have occupied toward such ends, are unknown.
36. The 2008 Constitution declared the Ecuadorian State as a "constitutional state of law and order/rights and justice"[7] for which its precepts constitute binding legal norms of the highest level that oblige the organisms of the state to respect its precepts including in their legislative function. This legislative obligation with respect to the Constitution is purposely included in Article 84:

*"**Art. 84-** The National Assembly and every organism with legislative powers has the obligation to ensure, formally and materially, that laws and other legal norms take into account the rights foreseen in the Constitution and in international agreements, as well as*

6 Pedro García Hierro, Ibid, p. 296

7 Art. 1 of the Constitution of the Republic of Ecuador

those which are necessary to guarantee the dignity of human beings and communities, peoples and nationalities. In no situation, in neither reforms to the Constitution, laws, other legal norms or through acts of public power will rights recognized within the Constitution be threatened."

37. This obligation was neglected by the National Assembly and the President of the Republic when the mining law was approved. In the former section, we have analyzed the context of the territorial rights of indigenous nationalities, and in the following portion, we will analyze how articles 15, 28, 59, 100 and 103 do not materially consider this right for which reason they are unconstitutional.
38. The first reason they are unconstitutional is that they violate the "indivisibility"[8] of indigenous territory, given that articles 15, 28, 59, 100 and 103 of the Mining Law allow the establishment of obligatory easements in territories belonging to indigenous peoples and establish the right to receive compensation as a result. This is a legal disintegration of the natural elements (property and rights of use, usufruct, dwelling, easements, etc) that is characteristic of western law which is a system oriented toward the economic use of various resources. In the economic-oriented perspective of western law, as embodied in the Mining Law, divisibility is essential; whereas in the perspective of indigenous peoples not only the integrity of their territory is fundamental, but also its identification with the people that lives there; this relationship is qualified by Convention 169 of the ILO as essential for the cultures and spiritual values of indigenous peoples, a space which cannot be exchanged for any other. As a result, it is inconceivable that compensation be paid for the establishment of easements to an indigenous nationality whose collective rights are exercised through the integrity of their territory.
39. The second reason that the articles 15, 28, 59, 100 and 103 of the Mining Law are unconstitutional is that these articles allow for legal easements to be imposed on territories belonging to indigenous nationalities, territories which are by constitutional mandate "inalienable"[9] and "unexpropriable".[10] These laws allow the forced[11] displacement of the indigenous nations from their territories without following the exceptional procedures as dictated by the Declaration of Rights of the Indigenous Peoples, the Convention 169 of the ILO and the jurisprudence of the Interamerican Court for Human Rights, as well as through the principle of prior and informed consent. These laws were created under the western assumptions of exchange of commercial goods, a way of thinking that is not held by the indigenous nations but rather hold that their territories are irreplaceable and not susceptible to economic value systems. The declaration of indigenous territories in public use and the foundation of easementes that is established in the Mining Law to allow the development of activities in those territories free of legal barriers and not in accordance to indigenous cosmovision and practice, not only violates the principle of prior and informed consent, as analysed previously, but also the principle of superior protection of the rights of indigenous

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8 Art. 57 (4) of the Constitution of the Republic of Ecuador

9 Art. 57 (4) of the Constitution of the Republic of Ecuador

10 Art. 57 (4) of the Constitution of the Republic of Ecuador

11 Art. 57(8) of the Ecuadorian Constitution

peoples over their territories. These form part of the constitutional block which is observed in article 3 and correspondingly in Art 57 of the Constitution that states *"the collective rights of indigenous communes, communities, peoples and nations are recognised and guaranteed according to the Constitution and the agreements, conventions, declarations and other international mechanisms on human rights"*.

40. The third reason that the articles 15, 28, 59, 100 and 103 of the Mining Law are unconstitutional is the fact that these laws impose an economic activity that is not sustainable in the territories of indigenous nations, when the Constitution dictates that the activities of subsistence of the indigenous nations will be respected, in particular their management of biodiversity and territory[12]. The use of renewable natural resources in indigenous territories is their means of subsistence and is a right that is guaranteed by the Constitution and international instruments analysed. The development of an industry that requires excavation and installations of large land mass and the use of large amounts of water to process minerals is incompatible with the subsistence activities of the indigenous nations.
41. The fourth reason that the articles 15, 28, 59, 100, and 103 of the Mining Law are unconstitutional is that the Law implies that any real or legal persons, domestic or foreign "has the faculty to freely prospect in search of minerals". In other words, these entities can do mining studies when and where they want and without permission of the owners (that is the meaning of freely) in those areas that the law has specified: protected areas, mining concessions, urban areas, populated areas, archaeological areas, private property declared in public use and Special Mining Areas. Therefore, mining can be done in private rural properties (hacienda, farms and lands) of individuals, collective properties of indigenous communities, communes, peoples and nations. The "Prospection Freedom" in those terms, violates the right to property protected in article 66, number 26 of the Constitution and international bodies of human rights such as the American Convention on Human Rights (Art. 21). It also violates the inviolability right of homes protected in number 22 of article 66 in the Constitution and is discriminatory since the urban and populated areas are protected leaving the rural areas vulnerable and violating article 66, number 4 of the Constitution.
42. Without a doubt, given that the organ that regulates the Law implies complex systems, where the rights of indigenous nations and of nature coexist, it should have complied with the precepts as established in the Constitution. As it did not, a case of unconstitutionality arises that needs to be remedied by the constitutional organ in charge of interpreting the constitution, since the new constitutional model of the state means that the public and private powers are limited by the rights established by the Constitution. It should thus be understood that the legislative power, where the Mining Law emerged, is subject to constitutional control, a control that corresponds to the Constitutional Court.
43. As previously argued, the articles 15, 28, 59, 100 and 103 of the Mining Law are in friction with the articles 57(4), 57(8), 57(11), 66(4), 66(22) and 66(26) of the Constitution, with article 21 of the Americana Convention on Human Rights, with articles 4, 13, 14, 15 and 16 of the Convention 169 of the ILO and the articles 8, 10, 23, 25, 26, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, which is why they should be declared unconstitutional by this Constitutional

[12] Art. 57(8) of the Ecuadorian Constitution

Court.

IV.II.II Violation of the Indigenous Nations' Right to Prior Consultation

44. Article 57 of the Constitution states:

"The collective rights of the indigenous communes, communities, peoples and nations, according to the Constitution and international agreements, conventions, declarations and other mechanisms, are recognized and will be guaranteed:
7. ***Free, Prior and Informed Consultation*** *within a reasonable time frame regarding prospection, exploitation and commercialisation plans or programs of non renewable resources that are found in their lands and that could affect them environmentally or culturally; participate in the benefits of those projects and receive compensation for the social, cultural and environmental damage the projects cause them. The consultation, that the competent authorities shall carry out, will be obligatory and timely. If the consent of the community being consulted is not given, then one shall proceed according to the Constitution and the Law."*

45. In the same way the ILO's Convention 169 prescribes:

"***Article 6***
1. In applying the provisions of this Convention, governments shall:
(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.
Article 15
1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

46. In addition, the United Nations Declaration on Rights of Indigenous Peoples adopts the institution of prior consultation in the following terms in their articles 8, 10, 19, 23, 25,

26, 29 and 32; in terms where any given consultation should seek for the prior and informed consent of the indigenous nation that is being consulted.

47. One of the facts that make the New Mining Law unconstitutional is in regard to Prior Consultation. The new Law does not take into consideration an adequate process of prior consultation, above all the Law has severe contradictions that are nothing else but outright constitutional violations, as indicated in the following paragraphs.
48. Mining activities in all of its phases and using which ever techniques for exploration, exploitation or extraction of minerals, affect the environment and thus the lives of indigenous peoples. It is timely to clarify that the environment is entirely linked to the lives of the indigenous peoples, with their culture, their food and their cosmovision. As a result, the constitutional disposition on prior consultation, in the case of mining, should comply in an opportune, efficient and effective manner. In spite of this situation, the new mining law does not establish an adequate procedure to effectively carry out the prior consultation with the indigenous communities and it leaves it up to the discretion of the Ministerial authorities, which in the end can become both Judge and Party.
49. Article 90 of the Mining Law speaks of the Special Consultation Procedures with the Indigenous People and Nations. This special prior consultation procedure is based on the contents of Art. 398 of the Constitution. It is worth noting that Art. 398 of the Constitution refer to prior consultation for environmental cases, which is completely different to the consultation that is established in Art. 57 of the Constitution which recognizes the right to prior consultation of the indigenous communes, communities, peoples and nations "according to the Constitution, and international agreements, conventions, declarations and other mechanisms on human rights".
50. In the case of consultation as the right of indigenous nations, in the case the result of the majority consulted is negative, the decision should be resolved, by the Constitutional mandate, according to the applicable international mechanisms, among which is the United Nations Declarations on the Rights of Indigenous Peoples, approved by Ecuador, that make it necessary that consent by those consulted over an activity to be carried out should be the result of a consultation process.
51. In addition, Art. 90 of the Mining Law confuses both types of consultation and says, unconstitutionally, that the consultation with the peoples and nations will be carried out "According to article 398 of the Constitution" trying to bypass the internationally recognized right that the indigenous peoples have.
52. Neither can it be argued that other Articles of the Mining Law are in accordance to the Constitution, such as when we review Art 87, it states that:

    The right to information, participation and consultation- The State is responsible to carry out participation and social consultation processes through its corresponding public institutions according to the constitutional principles and the governing law. This responsibility is not transferrable to any private entity.
    This process shall have the objective of promoting the sustainable development of mining activity, the ration exploitation of mineral resources, respect for the environment, social participation regarding the environment and the development of the localities situated in the areas of influence of a mining project.
    In the case of a consultation process that results in a opposition by majority of the community being consulted, the decision to develop the project will be adopted by resolution put forth by the sectorial Ministry.
    All mining concession holders shall respect the right of the people to access information, participation and consultation processes within environmental management of the mining activities.

The Finance Ministry shall provide for the respective budget through the sectorial Ministry for all consultation processes.

53. From the first paragraph of the Art. 87 of the Mining Law, we observe that there is a clear commitment to social participation and social consultation. However there is no mention of community notification or consultation. It appears that the legislator uses social participation as synonymous with community participation, while in fact these are two entirely different concepts.
54. Furthermore, the prior consultation should be directed towards and take place in the community, communities, nation and/or nationalities that reside(s) within the territorial area that will be affected. Notwithstanding, the disposition of Art. 87 of the Mining Industry Law leave the consultation location and target community at the discretion of the consultant entity, thus the consultation may be carried out anywhere. This leaves the public participation process at risk of corruption particularly in light of the routine practice of the oil industry to consult the general public, but not the specific group of citizens directly impacted. The Ecuadorian State should view prior consultation as implicit to the collective rights of indigenous peoples and nations, not as a mere procedure executed to comply with a formal requirement.
55. In the chapter VII, in article 27 and those following, the Mining Law establishes the phases of mining activity. According to article 27 the first phase is prospecting, which consists of a search for traces of mineralized areas. Next article 28 of the same law reads: Freedom to prospect:

    All real or legal persons, domestic or foreign, public, mixed, or private, communal, associative, family-owned and self-financed, except those prohibited by the Constitution of the Republic and this law, have the right to prospect freely, with the goal of locating mineral substances, except in protected areas and those included within the limits of mining concessions, in urban areas, population centers, archeological areas, properties declared to be of public utility and in the Special Mining Areas. When the case arises, the favorable administrative acts referred to in article 26 of this law shall be made.

56. In other words, any person can initiate prospecting activities in any place and at any moment. This disposition of article 28 clearly contradicts with the conclusions of articles 87, 88 and 90 of the Mining Law. In the aforementioned articles the State assumes the duty to notify and consult the community regarding the possible cultural, social, and environmental impacts that could result. In cases where the location of the initial extraction activity is unknown then there is not enough information to determine the affected populations that should be consulted. Such a situation leaves the public in a state of complete defenselessness, violates the right to the prior notice and consultation outlined in article 57 of the Constitution of Ecuador.
57. Article 88 of the Mining Law states:

    From the initial grant of a mining concession and during all the following phases, the granter, through the State, should report the possible impacts of mining activities, both positive and negative, to the following: authorities, autonomous decentralized governments, communities and organizations that represent social, environmental or union interests.

58. This article drastically limits the right to community information and participation. The community or communities, peoples and/or nations are unable to participate in any

process of information or consultation before the granting of a concession; contradicting article 57 of the Constitution of the Republic, numerals 1, 4 and 7, in which the State recognizes and guarantees the right of indigenous peoples to: freely maintain, develop and strengthen their identity, sense of ownership, ancient traditions and forms of social organization; conserve and protect their common lands and property, which will remain inalienable and indivisible; obtain free, prior and informed consent, within a reasonable time frame, on plans and programs of research, development and commercialization of non-renewable resources on their lands and that could affect them environmentally or culturally.

59. In conclusion, the prior notification and consultation of the community should be carried out before the State grants a concession or awards a mining area.
60. Article 29 and following of the Mining Law, at no point indicates that prior community consultation must take place before the concession is granted. The absence of such a requirement violates the Constitutional rights of indigenous peoples and nations to ownership, tranquility and respect, and prior consultation on their indigenous territories. According to the text of the Mining Law the Ecuadorian State has the ability to grant a concession of a territory to another party without the knowledge of the ancestral inhabitants of that same territory, whether they have been notified about the existence of the concession nor the potential legal consequences of such.
61. Considering consultation as a right of indigenous nationalities the effect of the majority opposition of the consulted has to be resolved, by Constitutional mandate, according to the applicable international instruments, among them the United Nations Declaration on the Rights of Indigenous Peoples, approved by Ecuador, which makes it necessary that the result of the consultation be the consent of the consulted for the proposed activity to be developed. The Article 90 of the mining Law confuses both types of consultation and says, unconstitutionally, that the consultation to the peoples and nationalities should be carried out "according to the article 398 of the Constitution" intending to jump over the right to prior consent that have been recognized internationally for indigenous peoples.
62. We recall that in the Americas the right to free, prior and informed consent has been recognized as a standard in force and exactable from the right to property guaranteed in the Article 21 of the American Convention of Human Rights, which Ecuador is part. Thus in the sentence of the Case Saramaka against Surinam, the Interamerican Court of Human Rights have stated:

   "135. Likewise, the Court considers that, when a matter of development plans or investment at great scale, that would have a greater impact on Saramaka territory, the State has the obligation, not only to consult to the Saramakas, but should also obtain the free, prior and informed consent, according to its customs and traditions [...]" [13]

63. In conclusion, the articles 87 and 88 of the mining Law is an unconstitutional act which violates the stated in the articles 57(1), 57(4) and 57(7) of the Constitution of the Republic of Ecuador; 6 and 15 of the ILO 169; 8, 10, 19, 23, 25, 26, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples; and 21 of the Interamerican Convention of Human Rights, therefore they should be declared unconstitutional.

[13] Interamerican Human Rights Court, Saramaka People vs. Surinam, (Preliminary Exceptions, Funds, Reparations, and Costs), November 28, 2007, Series C n. 172, paragraph 82.

IV.II.III. Violation to the principle of private activity in strategic sectors

64. Article 316 of the Constitution establishes that the State is able to entrust by "exception" the development of strategic sectors, like mining, to private ventures "in the cases that the Law establishes".
65. The Articles 1, 2, 22, 30, and 31 of the Mining Law does not clarify in which cases it is able to entrust the development of strategic sectors, leaving it open for arbitrary interpretation the "exceptionality" of each concession. The legislator, when omitting in the law the cases in which the State is able to entrust by "exception" the mining activities to private ventures, violates the Article 316 of the Constitution since these should be declared unconstitutional by this Constitutional Court.

V. Proof

66. We request that the Constitutional Court, order the Ministry of Mines and Petroleum to hand over the mining land registry map, up to date that includes the concessioned mining areas, the mining concession in process of being granted and the mining areas that are to be concessioned.

VI. Petition

67. With the presented arguments and the presented a protection action in number 2 of Article 436 and article 84 of the Constitution, we ask that
    a. the Mining Law be declared unconstitutional
    b. the articles 1, 2, 15, 22, 28, 30, 31, 59, 67, 87, 88, 90, 100, 103 and 316 be declared unconstitutional

VII. Appointments and Notifications

68. I shall count with the General Attorney of the State who will be appointed in his office located on the intersection of the streets Robles and Amazonas, Building of the General Attorney of the State, in the city of Quito. Notification that corresponds to me, will be received in the constitutional postal box No. 111
69. I name as my defense lawyers Dr. Bolivar Beltran, member of the Centro Lianas; Pablo Fajardo, member of the Selva Viva Corporation; Wilton Guaranda and Alexandra Anchundia, members of the Regional Foundation of Human Rights Consultants (INREDH) and all the members of the Amazonian Judicial Network to whom I authorize to represent me, together or separately as the case may be.

Marlon Santi Gualinga
PRESIDENT OF THE CONAIE

Dr. Bolívar Beltrán
MAT. 5351 CAP.

Ab. Wilton Guaranda
MAT. 3045 CAM.