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# THE RIGHTS OF INDIGENOUS PEOPLE AND EXTRACTIVE INDUSTRIES IN PROGRESSIVE GOVERNMENTS: A LECTURE ABOUT BOLIVIA, ECUADOR AND NICARAGUA

## I. INTRODUCTION: INDIGENOUS PEOPLES AND THEIR RIGHTS IN THE CURRENT CONTEXT OF BOLIVIA, ECUADOR AND NICARAGUA

The present article on extractive industries and indigenous peoples is limited to the context of Bolivia, Ecuador and Nicaragua, countries with a high percentage of indigenous peoples that are in the process of implementing the rights of these internationally and nationally recognized people, and are ruled by governments that are at the left of the political spectre, or are so-called progressive government lead by their presidents: in Nicaragua, Daniel Ortega, historic leader of the Sandinista National Liberation Front (FSLN), who won the presidency again in 2007; Evo Morales, leader of the social organizations of the cocaleros, the coca leaf growers, and the first president of indigenous origin, re-elected in 2009 for the Bolivian government; and Rafael Correa, economist, who defines himself as a left-wing humanist, and president of Ecuador since 2007.

Therefore, we try to approach the subject of the most important rights of indigenous peoples recognized in international treaties these three countries have ratified, and the way how they are applied in the national legal system, above all in relation to the processes of previous consultation for the cases of exploration and exploitation of natural resources by extractive industries in indigenous territories.

### The indigenous peoples in Nicaragua

The seven indigenous peoples in Nicaragua are distributed in two main regions, the Pacific coast and the central northerly part of the country (or simply the Pacific); here are the chorotega (221,000), the cacaopera or Matagalpa (97,500), the ocanxiu or sutiaba (49,000) and the nahoa or náhuatl (20,000). On the Caribbean coast (or the Atlantic) live the miskitu (150,000), the sumu-mayangna (27,000) and the rama (20,001). Other peoples that have collective rights according to the Political Constitution of Nicaragua (1987) are those of African descent, called 'ethnic communities' in the national legislation, which include the creoles or kriol (43,000) and the garífuna (2,500).

As a result of their historic fights the indigenous peoples and the people of African descent on the Atlantic coast were admitted a form of self-government and self-determination, called autonomy, a right that was incorporated in the Political Constitution of 1987, and normative and sectorial bodies which grants them the faculty to elect their own regional authorities, define the functioning of the regional public bodies, control the natural resources inside the indigenous territories, collect taxes and administer education, health and justice in accordance with their culture and traditions, have their own forms of social organization and administer their own local affairs, as well as maintain the communal forms of property of their land and the possession, use and enjoyment of their land.

However, the gap between rhetoric and reality is still big provoking that the autonomous ideals are still seen as pure aspirations and what really practically exists is the exclusion from politics and little or no decision-making power of indigenous peoples and peoples of African descent over their territory and their natural resources.

### **The indigenous peoples and nationalities in Ecuador**

In Ecuador, there are 17 indigenous peoples and nationalities that live in their ancestral territories in the Amazon, on the coast and in the Andes; they are represented by the Confederation of Indigenous Nationalities of Ecuador (CONAIE).

The CONAIE with a long trajectory of claiming the rights of its peoples unites the following peoples and nationalities: Shuar, Achuar, Siona, Secoya, Cofàn, Waorani, Zapara, Shiwiar, Andoa and Kichuas in the Amazon region. Tsachila, Epera, Chachi, Awa, Manta and Wankavilka on the coast. Peoples of the Kichua nationality: Palta, Sarakuru, Kañari, Puruwà, Chibuleo, Tomabela, Salasaca, Kisapincha, Waranka, Kitukara, Kayampi, Otavalo, Karanki, Natabuela and Pasto in the Interandean Ecuadorian sierra. These peoples are reconstituted by their self-definition, and organizational autonomy.

The political constitutions of both the Ecuadorian state and of Bolivia that had a constituent congress in the last year introduce innovative and advanced principles in relation to indigenous rights, such as the Plurinational Concept of the state, the Good Living as a general orientation for the development processes, and the Rights of Nature and Mother Earth.

In Ecuador, the right to previous consultation, indigenous territorial districts, the right to territory and self-determination of indigenous peoples in voluntary isolation, the right to recover rituals and sacred places were included among other things in the constitution.

### **The indigenous people in Bolivia**

Over the course of the last 40 years a number of rights of indigenous peoples, which they had demanded in their historic fights over many centuries, was progressively recognized. In the 1970s, different ideological movements appeared, such as indianism or indigenism, which created the foundations for the formation of political groups and parties that would years later participate in democratic elections; this incorporation into the democratic life of the country is very important for future fights and the recognition of rights by of the Bolivian state.

Thus, at the beginning of the 1980s, organizations appeared that brought together and represented indigenous peoples, such as for example the Confederation of Indigenous Peoples of Bolivia (CIDOB) or the CONAMAC, the National Council of Ayllus and Markas of Qullasuyu of the highlands.

One of the most important contemporary historical facts was the large-scale mobilization of the people in 1990 called the 'March for Territory and Dignity'. Thanks to these movements Bolivia was one of the first American countries to ratify the Convention no. 169 in the following year (1991), and to start incorporating indigenous rights in the reform of the constitution of 1993, which proclaimed the multi-ethnic and pluricultural nature of the Republic and confirmed in its article 171 the collective rights of indigenous peoples; it recognized the legal status of indigenous communities, granted jurisdictional faculties to its authorities, considered the need for special legislation and recognized the right to the 'native land of the communities'.

In 2001, the national census established that just over 62% of the population over the age of 15 confirmed that they were part of an 'indigenous or native people'; this implied the acceptance and recognition of individuals to be part of a community or an indigenous people; this identification enabled indigenous peoples to implement and legitimize a national movement in which the rights of indigenous peoples were constitutionalized.

Precisely this constituting process made it possible to establish that there are 37 indigenous people in Bolivia, of which 34 are represented by the Confederation of Indigenous Peoples of Bolivia (CIDOB) and others such as the CONAMAQ of the highlands. This aspect determined that the political constitution of the state recognizes the languages of indigenous native peoples as official languages, such as Aymara, Araona, Baure, Bésiro, Canichana, Cavineño, Cayubaba, Chácobo, Chimán, Ese Ejja, Guaraní, Guarasu'we, Guarayu, Itonama, Leco, Machajuyai-kallawaya, Machineri, Maropa, Mojeño-trinitario, Mojeño-ignaciano, Moré, Masetén, Movima, Pacawara, Puquina, Quechua, Sirionó, Tacana, Tapiete, Toromona, Uru-chipaya, Weenhayek, Yaminawa, Yuki, Yuracaré and Zamuco.

The incorporation of indigenous peoples in the constitution is one of the most relevant aspects for the conformation of the plurinational Bolivian state together with citizens in urban areas of different social classes and intercultural and Afro-Bolivian communities.

#### **Recognition of the main indigenous rights**

The three countries have ratified the ILO Convention no. 169, which is the most important and advanced body of rights for indigenous peoples and has a constitutional status in many countries, as it is an International Treaty referring to human rights; its legislative development and applicability must lie with the governments by incorporating these rights into their national set of regulations.

#### **The United Nations Declaration on the Rights of Indigenous Peoples**

In 2007, after 20 years of deliberations a historic and significant step forward was achieved, when the United Nations Declaration on the Rights of Indigenous Peoples was signed that recognizes important rights for these peoples, including the right to free determination, handling and collective control of their own traditional territories and their resources, the right to participate in decisions that affect them including the rights to free, prior and informed consent, and the right to determine their own priorities of development.

#### **The Right to Territory**

The main collective right of the indigenous peoples is the right to territory. The territory has been one of the first demands and the motor of the conformation of organizations representing indigenous people. The territory is the physical and spiritual basis that ensures the means of reproducing and the existence as peoples; it is an important reference for the individual and collective identity. For indigenous people in different continents it is the so-called Mother Earth, and it is regarded as the source of life itself; it includes the entire habitat they occupy, use, love and care about, and not only the superficial area of the land that is necessary for life and food.

The Inter-American Commission on Human Rights (CIDH) said that for many indigenous cultures, the continuous use of traditional collective systems for the control and use of the territory is essential for their survival and individual and collective well-being. The control over the land is connected to their ability to obtain resources to sustain life, and for the geographical space required for the cultural reproduction.

The most modern works related to the development of Economic, Social and Cultural Rights (ESCR) express that in the case of indigenous peoples the territory is a fundamental human right and a prerequisite to exercise other human rights. In the case of the ILO Convention no. 169, the territory has an integral, collective, transgenerational, inalienable, unlimited, indivisible, inalienable and original character. In relation to the existing natural resources in indigenous territories, the Convention no. 169 extends this right to the use, enjoyment administration and conservation of the existing natural resources, and when there are underground resources over which the states exercise their jurisdiction, the plans for their disposition must be implemented in agreement with the right to previous, free and informed consultation on everything that can affect the free exercise of the right to territory, and the right to participate in the benefits of any kind of exploration or exploitation of these resources.

#### **The Right to Free, Prior and Informed Consultation**

It is necessary to specify that according to the provisions of the ILO Convention no. 169, the exercise of the right to prior, free and informed consultation has the purpose of reaching an agreement or achieve a consent, which is understood as the declaration of a clear convincing agreement following the procedures of transparency and good will, as well as the traditional system of deliberation and decision-making of the indigenous peoples the consultation is given to. The right to Consultation and Prior Free and Informed Consent is also recognized in the United Nations Declaration on the Rights of Indigenous Peoples in its article 19.

The term Prior Consultation refers to what must be carried out before the project is started, the term Free Consent means that there must not be any pressure to take a hasty decision or in a limited period of time, and there must not be any coercion or exterior pressure, including monetary incentives.

The consultation must guarantee that all relevant information, enough time to collect information and to fully discuss the potential risks and benefits of the project, a translation into traditional languages and the opportunity that all sectors of the indigenous society participate are given.

Although it is a constitutional controlled and regulated mandate that has foundations in international law, the Prior Consultation cannot stop the exploitation or an extractive activity in indigenous territories, because the decision adopted by the people as a result of the consultation does not have a binding character and the possibility of a veto or prohibition to implement the project.

Exercising the right to Free, Prior and Informed Consultation for projects or exploration and exploitation of natural resources also includes the opportunity to prevent or mitigate potential environmental and social damage and a form of social control and transparency in the development of these operations in indigenous territories. A mechanism of dialogue between the state and indigenous peoples that exists on the basis of respect for the forms and ways in which indigenous communities take decisions about the use of their territories that is part of the foundations of the construction of any plurinational state.

#### **The right to decide about their own development**

The convention also recognizes the right to decide about their forms of development and how to actively intervene in the application of this right; this includes the participation in the formulation, application and evaluation of development plans by the State.

The Special Speaker for Indigenous Peoples of the UN observes that: '... In all sectors of the world, indigenous people feel unable, in any possible way, to proceed with their forms of development that are consistent with their own values, perspectives and interest... Generally, the economic development has been imposed by the outside, leaving out the right of indigenous peoples to participate in the control, implementation and benefits of this development.'

## **II. HYDROCARBON LEGISLATION AND THE RIGHTS OF INDIGENOUS PEOPLE**

Ecuador promulgated a new Hydrocarbon Act; its analysis that was done by Alberto Acosta (2010) specifies that certain adjustments were introduced to adjust the law to the demands to renegotiate oil contracts in order to obtain higher extraction rates and to ensure the stability and trust of private companies.

However, while things are made easier for investors, the law does not pay attention to environmental and social rights that are established in the Constitution. Thus, the regulation to remedy severe environmental and social liabilities of operations that have been active in the Ecuadorian Amazon for more than four decades are not included, neither is given priority to monitoring, investigation and environmental control systems or procedures to abandon operations, and punitive measures against those that are responsible for the damage. It also does not prescribe mechanisms to establish full or partial, permanent or temporary restrictions for interventions in ecologically and socially vulnerable zones, and it does not include prior consultation for indigenous peoples and nationalities, in whose territories oil concessions shall be granted.

In the case of Bolivia, there was a development process starting with the ratification of the ILO Convention no. 169 (1991), which established different laws and rules, such as no. 1615 and no. 1777 for the recognition of social, economic and cultural rights; however, the full exercise and earlier regulations did not admit exercising and putting means into practice for the right to previous consultation.

The Hydrocarbon Act no. 3058 of 2005 indicates in its article 114 the compliance with act no. 1257 that ratifies the ILO Convention no. 169 that peasant communities and people of indigenous origin will have to be mandatorily and appropriately consulted, before it is attempted to carry out any hydrocarbon activity. The Hydrocarbon Act no. 115 art. 115 requires that the consultation is given in good faith with the principles of veracity, transparency, information and opportunity.

The requirement that the consultation process works and is operative was established in the supreme decree no. 29033 (2007), which was promulgated by President Evo Morales; it is a consultation rule that establishes the participation of native indigenous peoples and peasant communities (PIOCs) in hydrocarbon activities. The main idea of Morales' government was to respect the peoples when they define whether the activities that are attempted to be carried out in their territories are detrimental or beneficial to them, and that they can take a decision on this matter by means of a transparent information process and adequate consultation.

Under the Environment Act, no. 1333 (1992), the general regulation of environmental management, the regulation of prevention and environmental control and the Hydrocarbon Act no. 3058, the supreme decree no. 29103 on socio-environmental regulation of Hydrocarbon activities on the territory of native indigenous peoples and peasant communities is passed with the objective to defend and/or preserve the environment.

The political constitution of the state passed in 2009 in a national referendum ratifies, incorporates and constitutionalizes in its article 352 the right to consultation, and indicates that the exploitation of natural resources in certain territories will be subject to a process of free, previous and information consultation of the people affected by it and called by the state. It also establishes and guarantees the participation of the citizens in the process of the environmental management, and promotes the preservation of the ecosystems. The same article indicates that in Indigenous Native Nations and Peoples the consultation will take place respecting their own rules and procedures.

In the case of Nicaragua, with its constitutional reforms in 1995 and the adoption of the Autonomy Statute for the Autonomous Region on the Caribbean coast, it was clearly established that concession and contracts for the exploitation of natural resources the state grants in autonomous regions on the Caribbean coast must have been approved by the respective Regional Autonomous Councils. It will also be necessary to offer the inhabitants of these communities a prior and information consultation detailing the benefits and problems these may have for their traditional form of life.

In this sense, the General Environment Act in Nicaragua (law no. 217) adopted on 2 May 1996 entails this constitutional principle and establishes clearly in its article 3 para. 7, which stipulates that indigenous people and peoples of African descent have the right to decide about the natural resources that are in their territories. Equally, the law no. 286, the Special Exploration and Exploitation of Hydrocarbons Act reconfirms this constitutional principle and makes it clear in its article 21 that for the case of Autonomous Regions contracts for the exploration and exploitation of hydrocarbons must first be approved by the Regional Autonomous Council.

In 2010, the government adopted the Act on the Legal Status of its Borders that created a new legal status for the area of up to 15 kilometres from the actual border towards the interior of the national territory affecting all people living in these territories including indigenous peoples and ethnic communities who had just achieved territorial recognition with their own autonomous administration in these areas thanks to law no. 445.

The new Border Act assigns the role of conservation, protection, renewal and sustainable use of natural resources and the environment, the development of zones of touristic interest, and other strategic plans that the president of the Republic may order to the Army of Nicaragua; and it declares that in these areas natural resources are the property and direct, indivisible, inalienable and unlimited possession of the state.

This act is considered unconstitutional and will affect indigenous territories in coastal regions on the Caribbean and the Pacific as well as along the Coco river and the San Juan river.

### **III. INDIGENOUS TERRITORIES AFFECTED BY EXTRACTIVE INDUSTRIES AND THE NON-COMPLIANCE WITH THE PRIOR CONSULTATION**

#### **Ecuador**

The oil companies in Ecuador have operated intensely in the Amazon in six protected areas and in the territory of nine indigenous Amazonian nationalities for more than 40 years: Siona, Secoya, Cofán, Huaorani, Kichwa, Shuar, Achuar, Shiwiar and the indigenous peoples of Tetetes and Sansahuari, who lived in voluntary isolation and have currently disappeared.

This year, in 2011, the government started a tender to award extractive projects in indigenous areas. It is not clear to what extent the indigenous communities were consulted with regard to this matter.

The activities of oil companies have meant a radical change in the life of indigenous peoples and the people settled in the northern Amazon of Ecuador who have suffered endless violations of their basic rights. Some of these peoples have lost a part of their ancestral territories, they have suffered from the disintegration of their communities, they have been obligated to retire to small areas where they now live surrounded by the infrastructure of the oil industry; water, air and the ground have been contaminated, which has a severe effect on their health; food resources have been reduced drastically, which limits their physical and cultural ability to sustain themselves; and they live in a state of alert and under constant tension to be able to defend themselves. Apart from generating other social problems that ruin the structure of their societies like the dependence on food, migration, divisiveness, asymmetrical negotiations of resources and even territorial spaces followed by a progressive passive and marginal integration in processes of external development and the loss of territories, resources and decisions, accompanied by a progressive loss of identification with the territory on the part of new generations.

The current Ecuadorian government has also granted new opportunities for the mining industry in indigenous territories, which is the case in the controversial project of the gold mining industry in the mountain ranges of Cónдор, Intag or Quimsacocha, habitat of the Shuar, an indigenous people in the southern Amazon. The form, in which mining operations are carried out, also causes serious damage to the environment due to the degradation and erosion of the ground, contamination due to tailings or the use of toxic chemical products that affect the ground and superficial and underground water bodies; this is worsened by the fact that these concessions are in territories of indigenous people that use these resources for their subsistence; and in many cases the affect on the people can be multiplied by the exploitation of the mountains where rivers have their source.

The Constitution of Ecuador recognizes the right of '*communes, communities, indigenous peoples and nationalities*' to '*prior, free and informed consultation*' about the '*plans and programs of prospecting, exploitation and sale of non-renewable resources that are in their land and can affect their environment and culture*', and three months after the Constitution was adopted, this precept was not complied with, when the Mining Act was promulgated, the provisions of which refer to activities that are carried out in indigenous territories, and for which the CONAIE reported its unconstitutionality before the Constitutional Court of Ecuador.

This is to say that for indigenous organizations, the processes of Prior Consultation suffer from many vices, or are not carried out. Since 2002, the Kichwa de Sarayaku, a native people of Ecuador, has been fighting for its right to be consulted with respect to extractive projects that are undertaken on their ancestral territory. In 1996, the state authorized an oil company to carry out three oil prospecting tasks in its ancestral territory without their consent. On 6 and 7 July 2011, members of the community and its legal representatives presented their case before the Inter-American Court of Human Rights. 'If they want to carry out such a damaging activity, we want to be consulted and if we tell them, no, then we want to be respected.'<sup>7</sup>

In the context of a new constitution that proclaims the Sumak Kawsay<sup>8</sup> (good living) as a principle of life and orientation, the search for an alternative to indiscriminate extractive activity, such as on the Yasuní-ITT initiative that considers leaving hydrocarbons underground in exchange for obtaining a percentage of the potential earnings via international cooperation; this is an example that there are possible ways Ecuador is exploring to revert decades of extraction that did not do the people any good.

<sup>7</sup> Patricia Gualinga, member of the Sarayaku community, in declarations to the Inter-American Court of Human Rights:

<sup>8</sup> The 'good living', the '*sumak kawsay*' '*penker pujustim*' o '*waa quiriri*', as it is expressed in some languages spoken in Ecuador, is a symbolic category denoting in the view of the world of many ancestral peoples a collection of values that give meaning to existence at the individual and collective level. *Life in harmony that combines the relation with the natural environment, the 'world without evil' and with culture or the 'ancestors' wisdom*. It is a complex concept, alien to ethnic-religious traditions western civilization is nurtured from, which is obsessed not by 'good living', but by 'living better'. Mario Melo, 'Good living, nature and nationalities in the new Ecuadorian Constitution: a hopeful lecture'



### **Nicaragua**

The government recently granted contracts for the exploration and exploitation of oil and gas to the American company MKJ Exploraciones Internacionales, S.A., a member of Noble Energy Ltd., with concession of 45,000 km<sup>2</sup> in the maritime platform of the Nicaraguan Caribbean Sea that has a great biodiversity and a fragile ecosystem. The average depth of the water is less than 30 metres, and it is also the habitat of indigenous communities and communities of African descent that mainly live of fishing and tourism. Equally, the exclusive right of indigenous and ethnic communities of the Caribbean coastline, islands and cays is recognized so that they can use maritime resources for community and private fishing within the three miles next to the coastline and 25 miles around the adjacent cays and islands.

Both the Convention no. 169 and the Demarcation and Titling of Communal Property Act, no. 445, – the latter promulgated as a result of the sentence of the Inter-American Court of Human rights for the Awas Tingni case – grant strong legal mechanisms to indigenous people to demand prior and information consultation, as well as the distribution of resources that come from the concessions to the extracting industry that were granted in the territories of indigenous peoples and peoples of African descent.

With the intention to advance the fulfilment of the Convention, the Territorial Assembly of the Rama-Kriol Territorial Government informed about the proposed regulation presented to the national government on procedures for the free, informed and prior consultation. At present, there is no knowledge about processes of consultation carried out by the state in the framework of Convention no. 169 the country has recently ratified.

### **Bolivia**

In four of the nine Bolivian departments there are operations of hydrocarbon exploitation:

Santa Cruz, Tarija, Chuquisaca and Cochabamba, and it is planned to add other departments, such as La Paz, Potosí and Beni as areas of exploration. Precisely, in the middle of 2011 information became public that the state-owned YPFB-Corporación has applied to increase the new areas of hydrocarbon exploration from 56 to 98<sup>9</sup>, which includes regions in which there is no tradition of hydrocarbon activities, for example in the Lake Titicaca and in the Bolivian Amazon, area of high biodiversity and with a fragile ecosystem, and where indigenous people and peasant communities live.

The hydrocarbon and mining deposits in Bolivia are mainly in Native Community Lands (TCO). The state-owned Bolivian company YPFB has oil operations in 56 reserved areas with an approximate surface of 14,982,589.27 hectares in which are 18 TCOs of which 12 are affected by the exploitation of hydrocarbons and mining<sup>10</sup> and 9 are located in national parks and protected areas: Madidi, Pailón Lajas, Carrasco, Isiboro Sécuré, Tariquia, San Matías, Kaa Iya, Iñaño and Aguaragüe, to which Manuripi can be added, where hydrocarbon exploration is expected.

With regard to environmental and social liabilities, the peasant communities and indigenous Bolivian peoples that live in the departments of Santa Cruz, Tarija, Chuquisaca and Cochabamba are affected by oil companies that carry out hydrocarbon activities in their territories, and abandoned about 400 wells without closing them properly and now causing permanent environmental contamination. According to oil audits<sup>11</sup> the economic damage caused amounts to USD 61 million and none of the operating companies took care of the liabilities so that the government decided to take on the expenses through the state-owned company Yacimientos Petrolíferos Fiscales Bolivianos (YPFB).

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<sup>9</sup> <http://www.cambio.bo/noticia.php?fecha=2011-06-06&idn=46945>

<sup>10</sup> An article in the press: It points out that of the 18 protected areas three areas are also affected by mining activities. Apolobamba, Eduardo Avaroa and San Matías. In total, 12 indigenous territories suffer from the effects of the exploitation of natural non-renewable resources.

<sup>11</sup> Mariaca Bilbao Enrique, Complete Report on Oil Audits, 2010.



Regarding the consultations carried out between 2007 and 2010, 21 completed processes of previous consultation were carried out in 20 Native Community Lands (TCOs) in different phases or activities, such as for example the exploration of activities, the exploitation of wells, or the hanging or extension of gas pipelines. The native community land of Alto Parapeti had four consultation processes, just like the native community land of Itika Guasu in phases of digging a well, seismic exploration or the construction of roads. For this year, 15 processes of previous consultation are planned in 13 native community lands, many of which are in the departments of Santa Cruz and Tarija; six processes have been announced for the native community lands of Itika, Guasu, Takovo Mora, Charagua Norte and other peasant communities<sup>12</sup>. The data provided by the Hydrocarbon Ministry shows successfully the processes of Prior Consultation carried out as well as the harmonic and horizontal relation to the organizations; however, there is serious doubt about the appropriate compliance, mainly with regard to true and opportune information and the real participation of the people involved in the area of the project.

The systemization carried out by indigenous and peasant organizations in Bolivia in 2009 and 2010 gives information about the feeling of the people in relation to the consultation processes carried out by the state; serious contradictions can be found regarding the compliance with this right and above all with matters linked to environmental conflicts derived from the exploration and exploitation of hydrocarbons in territories of indigenous peoples, be it because of the way the consultation was carried out, the participation of the indigenous peoples in the processes of monitoring and socio-environmental investigation of these operations, or the remediation of the environmental liabilities left by the industry<sup>13</sup>.

They declare that they feel affected by the negative, economic, social, cultural and environmental impacts that are produced by the extraction<sup>14</sup> of hydrocarbon resources and the mining in their territories; and that the executive organs establish rules without the participation of the peoples involved; they observe that public officials intervene trying to divide their organizations in order to favour the acceptance of the extractive projects; they explain that all impacts on the vital resources of subsistence that are affected – and including cultural impact – must be included in the processes of evaluation and valuation of the total of compensation and indemnification.

Therefore, in July of this year the National Council of Ayllus and Markas of Qullasuyu (CONAMAQ), the organization representing indigenous peoples, presented the 'Draft of the Law on the Framework of Prior, Free and Information Consultation and Consent of Indigenous Native Nations and Peoples mandatorily to be complied with by the Plurinational State' establishing two objectives of the law: 1) To eliminate any action of the state or of companies and private institutions that may try to carry out activities in lands, territories and resources owned ancestrally by Indigenous Nations and Peoples and Afrobolivian Communities while omitting their prior consultation, affecting constitutional rights, as well as the environment in the place and impeding that they can exercise their self-determination. 2) To avoid that violations and omissions of the legal order are consolidated that affect the rights of these Peoples emphasising that all actions against their decision will be declared null and void and without legal effect.

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12 More detailed information about Native Community Land and peasant communities on: [http://www.hidrocarburos.gob.bo/sitio/index.php?option=com\\_content&view=article&id=938](http://www.hidrocarburos.gob.bo/sitio/index.php?option=com_content&view=article&id=938)

13 'It is the environmental damage as a whole, in terms of the contamination of the water, ground, air, the deterioration of the resources and ecosystems caused by a company during its ordinary operation or by unforeseen accidents... ' Colectivo de difusión de la deuda ecológica; deuda ecológica ¿Quién debe a quién?; Barcelona, 2003.

14 Extraction is activities that move large volumes of natural resources that are not processed (or are limited), and are going to be exported. Eduardo Gudynas.

#### **IV. NEOEXTRACTIVISM AND THE RIGHTS OF INDIGENOUS PEOPLES**

In the last decades left-wing and progressive parties took office in Latin America, they had ideas to promote big changes in the societies that incorporate the claims of the majority of the people that had been put behind and including those of indigenous peoples with alternatives that would contribute to the fair redistribution of wealth. They claimed to undo neoliberal reforms, break with the dependence on the international

market, diversify production, be self-sufficient, industrialize raw materials, change the production and energy matrix, and suggested to replace the economic extraction-friendly model where the exporter comes first to become an industrialized country. This is the case of the current progressive governments in Ecuador, Bolivia and Nicaragua.

To this end, new Constitutions and laws were adopted where the changes were expressed, contracts with the extractive industries were renegotiated to raise taxes and licence fees for the exchequer, and in Bolivia nationalization processes were promoted to put an end to the 'plundering of natural resources', as president Evo Morales put it. With higher income from the oil and mining industry, the governments have substantially increased their ability for public spending and started to depend on this income to finance the national budget. And in this way, like before in past times, the state becomes an economic agent with a more active role in favour of extractive sectors, the main promoter of foreign investments for the export of raw materials, and depends more on the world market.

The next step is the legitimization of extractive industries, although it has been acknowledged that these activities can have negative environmental and social impacts; the subject is relativized by talking about an alleged contradiction between the right of indigenous peoples and the interests of the entire nation.

So, after they have been in office for several years in the three countries of this study, extraction-friendly practices are maintained, and more so, this model is deepened and widened in areas that used to be outside the extraction border in the past, such as for example socially vulnerable areas and protected areas.

In Bolivia under the two governments of Evo Morales, the policy of massive extraction of natural resources like gas or minerals is continued, and there the still experimental and not very efficient industrialization process has only started; yet at the same time, the fiscal income generated by extractive activities does not allow the government to comply with the social agenda of the National Development Plan (NDP).

In the last six years, the gross domestic product (GDP) of Bolivia went up by 4.8%, mainly due to the growth of extractive activities of the hydrocarbon and mining industry and the increase of taxes for hydrocarbon exploitation, and additionally due to the favourable context of international prices for these minerals so that the import of extractive industries into the Bolivian and Ecuadorian economies could be increased; today, they are the pillars of their respective development strategies.

In Ecuador, the dependence on oil in the national economy is elevated bearing in mind that the oil reserves show clear signs of exhaustion. This is clearly reflected in the following table showing the participation of oil in the GDP, the exports and the fiscal income.

**TABLE 1. A petroleum dependent economy**

Petroleum GDP as a percentage of total GDP, petroleum exports as a percentage of total exports and petroleum revenue as a percentage of the general State budget (USD in millions and percentage).

Year	GDP (total)	GDP of oil companies	% GDP	Total export	Export of oil companies	% of total export	State budget	Income oil companies	% State budget
1970	1,509	20	1.3	258	1	0.4	230	-18	-7.8
1972	1,874	57	3.1	395	60	15.2	391	37	9.4
1975	4,310	486	11.3	1,242	587	47.3	1,301	574	44.1
1980	10,784	1,279	11.9	2,990	1,587	53.1	2,959	1,563	52.8
1985	11,502	1,906	16.6	3,374	1,927	57.1	3,378	1,728	51.2
1990	10,579	1,486	14	3,386	1,418	41.9	2,727	1,339	49.1
1995	20,288	1,792	8.8	5,196	1,530	29.4	3,791	1,330	35.1
2000	16,283	2,820	17.3	5,906	2,442	41.4	3,828	2,186	53.0
2005	36,942	6,088	16.5	11,480	5,870	51.1	7,431	4,155	45.4
2010	56,998	8,713	15.3	17,369	9,649	55.6	17,718	5,917	27.9

Source: The Central Bank of Ecuador

In the case of the oil contract with MKJ in the Caribbean sea of Nicaragua, it was agreed that 48% of the revenue was given to the Nicaraguan state, of which 15% would be reserved to the central government and the authorities of the autonomous regions, and 3% to projects of the communities of the autonomous region of Atlántico Norte and the autonomous region of Atlántico Sur.

One part of the revenue given to the exchequer is going to finance social plans oriented at the poorest, some of which include aid programs where cash is handed out. This distribution establishes a link between poor people and the extractive industries that provide the funds, which does not only legitimize the economic extraction activity, but also the social policy of the government; and as it depends on this economic model, it is forced to continue obtaining new and more financial resources; therefore, the development model is not questions any more, or it does not matter how this wealth is extracted; instead the debate is centred around how the income of the extractive companies is divided, and the validity of the extraction-friendly model is not queried, the environmental and social impacts continue mainly in territories of indigenous people and peasants, and the sector remains to be one the most controversial.

Under these conditions it is to be expected that the situation of managing natural resources is not going to change in the next four years, but that on the contrary the areas of exploration and exploitation of hydrocarbons and minerals destined to obtain higher financial income are going to be widened at the cost of maintaining a profitable economy in the country based on the extraction and exportation of raw materials, which will affect national parks and indigenous territories with the consequential potential social conflicts this may lead to.

In this line, projects that have been started in Bolivia are the construction of the hydroelectric power station between the departments of Beni and Pando affecting

biodiversity and local indigenous communities or the Mutún for the exploitation of iron and manganese causing problems in the land of local peasant communities and the road of the second stretch between Villa Tunari and San Ignacio de Moxos (Beni and Cochabamba) cross indigenous peoples and the TIPNIS national park.

At the end of June, the president stepped forward to defend this last project against the opposition that was expressed by the march of hundreds of indigenous people and their sympathizers, and said that the road will pass through the Tipnís, no matter what.

In Ecuador, the president of Ecuador declared in a similar way in January 2009 in connection with protests and legal actions presented by indigenous people affected by the mining concessions in their territories that he was not going to reverse the Mining Act, because it was fundamental for the progress of the country, and that they would otherwise be like beggars sitting on a sack of gold.

### **A clash of visions**

The indigenous concept of Good Living, of Sumak Kawsay, Suma Qamaña (living well), Ñandereko (harmonious life) that was recognized in the Constitutions of Ecuador and Bolivia is reflected in the plans of life of many indigenous peoples. It expresses a project of life that profoundly contradicts the project of unsustainable and depending development based on non-renewable resources, which the governments favour. The clash of visions, which the left-wing governments in Latin America still do not comprehend, is expressed in the vision of plural balanced good living, in harmony with the surrounding and a healthy environment indigenous peoples aspire to against the vision of modernity development is looking for, which is understood as accumulation, consumption and growth, and where thinking and sometimes persistent resistance of indigenous peoples and peasant communities against the loss or the discreditation of their vision of the world and their vital sustenance are regarded as obstacles of this modern form of development.

Indigenous people emphasize that they do not have the intention to inhibit the development of the country, they assert their right to live according to their own models of life and demand that their rights are taken into account when decisions are made on their territory, because there in this territory they themselves, the possibilities for their future generations of the natural resources that are regarded as gift of Mother Earth that is one unit only coexist. But exactly these natural resources are the centre of the conflict, which has not been resolved yet, and where this clash of vision and the disputes are expressed most strongly. In view of this, the progressive government and their liberal preceding governments are responding in the same way to the protests and demands. Leaders and members of the communities are often victims of threats, imprisonment, intimidation and occasionally homicide in conflicts relating to their territories.

We believe that great regulatory progress has been made and indigenous peoples as right-bearer have legally become more visible in recent years in Latin America; however, there is still a lot to do to advance in the understanding of visions, the compliance with rights and in the institutionalization of the processes that are oriented towards structural changes in the relations between indigenous people and other members of society, and to achieve that the principles, values and norms are embodied in our everyday sentiment and reflected in our public policies. The challenge is there, and now it is time to sit down in an open and genuinely intercultural dialogue, to think together of the most harmoniously way of living in the future; and the future is defined by the way how we decide to live in the present, which sends us messages talking about sustainability, cultural potential and biological diversity. And the presence and the future are the responsibility of all of us.

### **CONCLUSIONS:**

1. Despite the optimistic panorama of advances in the recognition of the rights of indigenous people in the new constitutions and the secondary legislation of Bolivia and Ecuador, as well as in the constitution and in special laws for the autonomous regions in Nicaragua, there are still conflicts between indigenous people and progressive governments because these peoples still feel that their recognized rights are not respected, such as for example the rights of mother earth; that the rights of their peoples are not guaranteed; that the processes of prior consultation are not carried out or when they are complied with the results do not reflect their interests; and that they do not see the political will of the government to avoid the impunity of companies and exceed remediation and indemnifications for the severe damage caused for the people and their territories.
2. The progressive governments of the three countries that are the object of this report maintain, like their preceding more liberal governments, contradictory policies in relation to the tutelage of constitutional, environmental and human rights and on the other hand their promotion of economic extractive activities; there is no appropriate balance, which shows a prevalence in favour of these activities that damage indigenous peoples and local people socially, culturally, economically and with respect to the environment in the areas where the resources are extracted.
3. Despite initial declarations postulating a change of the model of living of the income from investments for the export of raw material, the progressive governments are deepening this model that has been called neoextractivism, they are increasing tributes and royalties to this sector, and generate a national economy based primarily on mining and hydrocarbons, and with this a stronger dependence on the resources of the exchequer coming from the exploitation of non-renewable natural resources.
4. Programs of public services in the most deprived sectors are implemented with funds of the income from extractive industries, which at the same time legitimize the current economic model, and bring about an attitude of implicit acceptance by the people; it avoids the critical analysis of the model and makes the relation with a sustainable model impossible based on communities as the indigenous people proposed and has also been inserted in the new constitutions.
5. The needs for more production of gas and oil for the increased public spending show us the clash of visions of the indigenous peoples on the one hand who value the good living and the healthy co-existence with the Pachamana, the goddess of indigenous people, as a fundamental part of the project to change society, and on the other hand the vision of earnings for the development based on more consumption and economic growth, for which it is indispensable to continue opening new areas of exploitation, even in the most fragile environments, such as protected zones as they are environmentally vulnerable, territories of isolated indigenous people and in places that are sacred to the peoples.

### **RECOMMENDATIONS:**

1. The promulgation of laws requires the development of real mechanisms to make the right to consultation and free, prior and informed consultation effective, in accordance with international regulations and the Inter-American system of human rights.
2. To abstain from granting concessions, authorising activities of prospecting and exploitation and carrying out any development project that may affect indigenous peoples without adequate consultation or by not fully carrying out the consultation in harmony with international and Inter-American regulations.
3. To take urgent measures to resolve existing disputes about the land and abstain from evicting indigenous peoples when these have not been resolved.
4. To create and maintain the necessary conditions so that indigenous leaders and the members of the communities can peacefully defend their rights without fear of reprisals; for this it is among other measures indispensable to avoid the use of the criminal justice system in order to dissuade them from carrying out their work as defenders of their human rights.
5. To recognize the contribution and experience of indigenous and peasant organizations in the processes of previous consultation carried out according to the characteristics of the community itself and the processes of the activity that is to be carried out by identifying the real dimensions of the effects of the extractive exploitation in their territories, which will allow strengthening the control, monitoring and vigilance of the process of previous consultation, but also of the extractive industry in their territories.
6. To promote the creation of processes and participatory applications of analysis and proposals of economic alternatives to replace the non-sustainable economy based on industries extracting non-renewable natural resources.
7. To develop regulations and procedures for the implementation of a participatory system that includes monitoring of the social and environmental responsibility of the extractive industry, its financial income, the fiscal yield derived and their use, as well as monitoring the transparency of tenders and contracts of extractive industries.

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**TRACE Briefings 2010-2011**

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