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1. IMPORTANT JUDICIAL DECISIONS TO ECUADOR MINING INDUSTRY



During the month of September 2019, the Constitutional Court of Ecuador (hereinafter the “**Court**”) issued several relevant decisions for the mining industry in Ecuador.

In this issue of Mining News we present an analysis of the main legal elements of the decisions by the Court.

a) **Constitutional Court denies referendum in the province Azuay - Opinion 9-19-CP / 19 of September 17, 2019**

On July 30, 2019, Yaku Pérez, prefect of the province of Azuay, submitted a request for a constitutional opinion prior to a referendum question (hereinafter the “**Azuay Referendum**”) whose main objective was to ban metal mining activities in the province from Azuay.

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The question posed was the following:

Do you agree with the ban, without exception of prospecting, exploration and exploitation activities of metal mining in water sources, recharge, discharge and water regulation areas, highlands, wetlands, protective forests and fragile ecosystems in the province of Azuay?

On August 26, 2019, the constitutional judge Agustín Grijalva was named trial judge in charge of the case, initiating the term of twenty (20) days that the Court had to issue the opinion.

On September 17, 2019, the Court issued opinion 9-19-CP / 19, by which the Azuay Referendum was denied.

The following were the main points analyzed and resolved by the Court:

1.1 Legitimacy

The Court determined that any citizen is entitled to submit a request for a prior constitutional ruling on a referendum without the need to accompany supporting signatures, which must be collected later.

1.2 Competence and scope of the opinion

The Court established that it is competent to rule on the constitutionality of questions in referendums related to mining activities.

In addition, it determined that the constitutionality control of a referendum request must be carried out on a case-by-case basis identifying whether the formal and material requirements established in the applicable regulations are verified. This will guarantee the freedom of the voter and verify that the referendum does not incur in constitutional prohibitions or violations.

1.3 Aspects of formal and material analysis

The Court determined that there are three aspects that must be analyzed for formal and material control: (i) the relationship between direct democracy and referendums; (ii) the relationship of public participation with the development regime; and (iii) the possibility of referendums on mining matters.

1.3.1 *Relationship between direct democracy and referendums*

The Court recognized the right of citizens to access the mechanisms of direct participation recognized in the Constitution; among them, the referendum.



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Likewise, it determined that there is no constitutional provision that prohibits, in a clear and express way, referendums on issues related to the exploitation of non-renewable natural resources and specifically of mining activities.

1.3.2 Relationship of participation with the development regime

The Court determined that the legal certainty recognized for all economic activities, including mining activities, cannot be understood as excluding the environmental objectives established in the Constitution itself.

In this regard, it was established that the exploitation of non-renewable natural resources must be carried out in strict compliance with the environmental principles established in the Constitution, including: the active and permanent participation of the communities, peoples and nationalities that could be affected.

Finally, it was established that the exclusive powers of the central State in relation to these resources cannot be understood as excluding the duty of the State to consult and the right of citizens to be consulted.

1.3.3 Origin of referendums on mining matters

The Court established that decentralized autonomous governments (hereinafter the “GADs”) may request referendums on topics

of interest to their jurisdiction, without these matters being limited to the scope of their governmental powers.

Likewise, the Court recognized the power of every person, community, people and nationality to claim the fulfillment of the rights of nature.

1.4 Constitutional control of the recitals

The opinion of the Court established important guidelines regarding the formal requirements that the recitals must meet as explained below:

- The transcription or simple paraphrase of constitutional provisions does not provide the voter with specific information that allows contextualizing the specific problem addressed by the question posed for referendum, breaching the obligation of clarity and loyalty of the recitals.
- The constitutional provisions cited by the petitioner associate a socially desirable situation with the option to accept the prohibition of mining activities and do not include objective information that provides the voter a clear picture of the current state of metal mining exploration and exploitation activities in Azuay, which implies an induction to the voter.



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1.5 Constitutional control of the question posed for referendum

Regarding the question, the Court established the following guidelines:

- The Court established that the question should be on a single issue and not framed in a general way. In this case, the question encompassed all metal mining activities, causing a serious problem of accumulation and generalization.
- The Court considered that the questions should be raised in a closed manner; that is, voters should be able to answer questions only with "yes", "no" or blank or void. Therefore, questions that necessarily require a more detailed answer are not constitutional.
- Finally, it should be noted that the Court also determined that the question did not allow the public to determine whether the prohibition to mining applies only to the future or also for mining activities in concessions legally granted prior to a potential approval of the referendum.

b) The Court issued a concurrent vote on Opinion 9-19-CP / 19 of September 17, 2019 related to the Azuay Referendum

Constitutional judges Teresa Nuques and Carmen Corral issued a concurring vote on Opinion 0-19-CP / 19 (hereinafter the "**Concurring Vote**"), which emphasizes certain relevant issues for future requests for

referendums on mining activities, as is considered below:

2.1 Difference between referendums, prior consultation, environmental consultation and pre-legislative consultation

The Concurring Opinion makes a clear difference between citizen participation mechanisms in public affairs. Thus, it was determined that other mechanisms such as prior consultation, pre-legislative consultation and environmental consultation, are not equivalent to referendums. All these mechanisms have their own elements, effects and procedure.

2.2.1 Prior consultation

The Concurring Opinion reiterated that prior, free and informed consultation of indigenous communities, peoples and nationalities is provided for in article 57 (7) of the Constitution. This type of consultation applies to plans and programs for exploration, exploitation and commercialization of non-renewable resources that are found in the lands of these communities and that may produce an environmental, social or cultural impact.

Prior consultation must be carried out between the communities and the State as it is considered an exclusive right of the communes, communities, peoples and indigenous nationalities. Therefore, prior consultation is not the same as a



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referendum, which is not considered to be a right only for these groups.

In this sense, the Concurring Opinion established in the Azuay Referendum that there are no communes, communities, peoples and indigenous nationalities affected by projects in their territories.

2.2.2 Pre-legislative consultation

Likewise, the Concurring Opinion clarified that the pre-legislative consultation, provided for in article 57 (17) of the Constitution, cannot be confused with a popular consultation. On the one hand, the pre-legislative consultation is carried out before the adoption of a legislative measure that can affect communes, communities, peoples or indigenous nationalities in ways not perceived by other individuals. On the other hand, the referendum is not necessarily directed to these communities nor is it necessarily linked to legislative measures.

2.2.3 Environmental consultation

The environmental consultation is considered in article 398 of the Constitution and is foreseen for cases in which projects may affect the environment, whereby the State is obligated to consult the community on them. If there is a majority opposition of the affected community, the authority must motivate the decision whether to execute the project.

The environmental consultation - unlike other types of consultations - is not limited to the communes, communities, peoples and indigenous nationalities, but to a community in general when there may be an impact on the environment. This is a method of citizen participation that does not constitute a collective right.

The Concurring Opinion determined that this type of consultation cannot be assimilated to a referendum, since the latter has binding effects.

2.2 Spaces where metal mining is prohibited

The Concurring Opinion recalled that the Constitution already provides for areas of exception for metal mining activities: *“protected areas, urban centers and intangible areas.”*¹

In this sense, it was determined that a referendum is not the adequate way to reform this constitutional provision so as to include prohibitions to metal mining in *“water sources, recharge areas, discharge and water regulation, badlands, damp, protective forests and fragile ecosystems in the province of Azuay”*, as stated by the Azuay Referendum.

¹ Art. 407, Constitution.



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2.3 The Constitution cannot be modified through a referendum

The Concurring Opinion determined that executing a referendum that entails modifications to the Constitution would be unconstitutional as there are other mechanisms provided for this purpose in the terms of Opinion No.04-18-RC / 19 of July 9, 2019.

In the same way, it was determined that referendums must meet an essential requirement: to have a true legal effect. The purposes of a referendum must be fulfilled; *“to uphold the opposite would result in an irresponsible mobilization of the citizens consulted by encouraging unrealizable expectations in addition to the waste of public resources for the referendum”*, said the Court.

c) Opinion 10-19-CP / 19 of September 17, 2019 in response to the request of a referendum by Elías Baldor Bermeo Cabrera

On September 17, 2019, the Court issued Opinion No. 10-19-CP / 19 regarding the request for a prior constitutional opinion of the referendum question presented by Mr. Elías Baldor Bermeo Cabrera, as mayor of the municipality of the canton Camilo Ponce Enriquez, presented on August 5, 2019 (hereinafter the **“Ponce Enriquez Referendum”**).

The question posed was the following:

Do you agree that in the jurisdiction of the canton Camilo Ponce Enriquez metal mining activity is developed in all its phases legally granted by the competent authorities, respecting the environment and water resources in accordance with the Constitution [sic] of the republic [sic], related laws and regulations?

The Court denied the Ponce Enriquez Referendum.

3.1 GADs must present a decision of three quarters of their council in favor of a referendum

The Court recalled that in accordance with article 104 of the Constitution, the call for a referendum may be requested by the highest authority of the GADs only when there is the approval of three-fourths of its council members. For this reason, the Court asked the Municipal GAD of the canton Camilo Ponce Enriquez, the minutes of the session of the City Council with the record of the vote taken.

3.2 Clarity requirement

Regarding the formal and material requirements of this consultation, the Court determined:

- The requirement of clarity must be fulfilled throughout the process - in the formulation of the recitals, the questions and their



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effects - thereby allowing the voter full freedom to decide.

- The loyalty requirement derives from the responsibility of the consultant vis-à-vis the electorate. The referendum must allow the exercise of the right of participation, being transparent, neutral, viable, feasible and endowed with content.

- Recitals do not constitute a purely formal requirement but guarantee the burden of clarity and give the voter freedom. Therefore, the recitals must contain at least: (i) an objective description of factual, spatial, demographic and technical issues related to the subject consulted; (ii) official figures; and (iii) other information to understand the question.

- It was reiterated that the absence of recitals is enough reason to rule the unconstitutionality of the question, so it would be unnecessary to complete the analysis provided for in article 105 of the LOGJCC regarding the question.

3.3 Competition of the GADs

The Court, on the issue of jurisdiction of the GADs, indicated the following:

“The referendum question being analyzed asks citizens their agreement or not with the execution of legal metal mining that is responsible with the environment and water resources in the district of the Municipality. However, the question is structured in such a

way that, regardless of the results obtained, only the municipal status quo would be ratified. Whether YES or NO wins, no practical or legal effect will be produced, since mining activities are only allowed in Ecuador when it's legal and responsible, complying with the provisions of the Constitution, laws and other relevant regulations. Therefore, this referendum proposal confuses the voter into believing that it will produce effects when it is not feasible for the consultant to implement its results, since the measures to be adopted are unconstitutional. Consequently, it becomes an illusory mechanism for citizen participation, since it does not offer citizens the material possibility of choosing, nor does it have the potential to generate effects regardless of the result obtained.”



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2. ARCOM RESOLUTIONS



In August, September and October 2019, the Mining Regulation and Control Agency (hereinafter the “**ARCOM**”) issued the following resolutions:

1. Resolution number ARCOM-ARCOM-2019-0018-RES of the executive director of the ARCOM of 1 June 2019, approving the technical procedure guide of the ARCOM, published in the Official Registry special edition number 29 of 13 August 2019.

2. Resolution number 002-005-2019-DIR-ARCOM of the board of the ARCOM of 6 August 2019, whereby it issues the regulation for the control of mineral exports, published in the Official Registry number 23 of 22 August 2019.

3. Resolution number 003-005-2019-DIR-ARCOM of the ARCOM board of 29 March 2019, whereby it issues the regulations for the qualification and registration of inspection bodies and / or testing laboratories for the mining sector, published in the Official Registry number 24 of 23 August 2019.

4. Resolution number 003-003-2019-DIR-ARCOM of the ARCOM board of 2 May 2019, whereby it issues the regulations for the registration, auction, sale, free transfer, or scrapping of the goods and destination of the material mineralized or abandoned, seized by the ARCOM or ordered by judicial authority, published in the Official Registry number 46 of 24 September 2019.

5. Resolution number 002-003-2019-DIR-ARCOM of the ARCOM board of 2 May 2019, whereby it issues the regulations for the operation of the ARCOM board, published in the Official Registry number 46 of 24 September 2019.

6. Resolution number ARCOM-ARCOM-2019-0046-RES of the executive director of the ARCOM of 3 September 2019, which decides that the application of the regulation for the control of mineral exports can only be executed by the agencies of inspection and / or testing laboratories that have authorization or qualification issued by ARCOM and registered in ARCOM, published in the Official Registry number 52 of 2 October 2019.

7. Resolution number 002-002-2019-DIR-ARCOM of the board of the ARCOM of March 29, 2019 approving eight (8) technical guides, published in the Official Registry number 100 of 14 October 2019.



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The technical guides are the following:

1. Technical guide 001 for the annual report of exploration of metallic and nonmetallic minerals in medium and large-scale mining.
2. Technical guide 002 of the report prior to the change of period initial exploration to advanced exploration of metallic and nonmetallic minerals for medium and large-scale mining.
3. Technical guide 003 of the report prior to the change of period from advanced exploration to economic evaluation of the deposit.
4. Technical guide 004 of the report prior to the change from exploration to exploitation phase.
5. Technical guide 005 for the semi-annual production report.
6. Technical guide 006 of the semi-annual report on the production of beneficiary plants.
7. Technical guide 007 of the semi-annual report for mineral marketing licenses.
8. Technical guide 008 for the presentation of production reports in simultaneous exploration and exploitation.

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