

OPEN LETTER TO THE ATTORNEY ÍÑIGO SALVADOR
The Network "ECUADOR DECIDES #BETTERWITHOUTFTAs"

(translation by Kirsten Francescone, MiningWatch Canada)

Given the threat of the company INV Minerals Ecuador to sue the Ecuadorian State

On February 13, 2019, the judge of room 14 of the Family, Women, Children and Adolescents Judiciary Unit denied the precautionary measures requested by the Ministry of Energy and Mines seeking to stop the popular consultation in the canton Girón with the following question: "Do you agree that mining activities take place in the páramos or water sources of the Quimsacocha Hydrological System?".

This consultation, authorized by the current National Electoral Council, was requested by the Union of Community Water Systems of Girón in 2012. They received no response thereafter from neither the Constitutional Court or the Electoral Council. Only in 2015, the Electoral Council gave way to the collection of signatures and approved those that were submitted (equivalent to 5% of the electoral roll of Girón) within the established deadline. This process was followed by a new lengthy silence from both institutions, until the current Electoral Council, after complying with the requirements established in the relevant regulations, decided in 2018 to include the consultation in the context of the upcoming sectional elections on March 24, 2019.

However, this important achievement of social organizations in defense of the páramos, water and community agriculture, has given rise to a serious threat from the company INV Minerals Ecuador.

On February 8, 2019, the note of the newspaper *El Comercio* entitled "Popular Consultation will settle differences on Mining" includes these statements by the manager of the Canadian company INV Minerals Ecuador, Jorge Barreno: "This is just beginning. There is a long way to enforce the law, without ruling out an international demand, His statement coincides with those of the president of the Chamber of Mining of Azuay, Patricio Vargas:" to win the "no", the State must pay a large compensation. Representatives from INV assured that more than USD 70 million has been invested in technical work, environmental improvement, community relations, tax payments and purchase of services. "

It is clear that the Canadian mining company threatens to propose an international arbitration against the Ecuadorian State.

In 1996, the Ecuadorian State signed a Bilateral Investment Protection Treaty with Canada, which entered into force on June 6, 1997.

On May 22, 2017, the Government of Ecuador signed a decree to denounce the BIT between Ecuador and Canada. But this agreement has a survival clause of 15 years counted from the

complaint, so that the legal effect has just concluded in 2032. Consequently, the company INV Minerals Ecuador could qualify for the BIT and propose an international arbitration. However, the Constitution of the Republic provides in Art. 421 that "The application of international commercial instruments will not directly or indirectly impair the right to health, access to medicines, supplies, services, or scientific and technological advances."

As it is known, mining operations generate high levels of contamination of water sources due to the use of highly toxic substances, because they lead to the emergence of acid mine drainage, and due to the high level of accident rate of tailings dams. In addition, the Loma Larga project with its illegitimate concessions will cause irreparable damage in the Kimsacocha páramo, from which comes an important part of the water that supplies the population of Cuenca. The Constitution also provides in Art. 422 that "International treaties or instruments may not be concluded in which the Ecuadorian State cedes sovereign jurisdiction at the request of international arbitration, in contractual or commercial disputes, between the State and natural persons of private judicial entities."

This fact was resolved by the Constitutional Court in 2009, when responding that the current BITs are in whole, or in part, incompatible with the new paradigms formulated legally in the Constitution of the Republic.

SUPREMACY OF RIGHTS

This is a new case wherein a dispute over which legal rights are imposed.

It is clear that what the company claims is to recover its investment and ensure the economic gain it had projected. For that, it hopes to use the BIT signed between Ecuador and Canada.

On the other side, there are the Constitutional rights: to water, Art. 12; to a healthy environment, Art. 14; to participate and express freely in popular consultation and participate democratically, Art. 103 and beyond referred to Direct Democracy; to comply with the prior consultation, Art. 398. Additionally, there are the rights of Nature, Art. 71 and beyond. That is, there is a huge range of Constitutional rights that are at stake.

But they are not just national legal instruments, since the company could claim that the BIT is an international instrument.

On the one hand, it is essential to consider Article 425 of the Constitution that places the Constitution above international treaties and agreements. On the other, consider international instruments such as Art. 103 of the Charter of the United Nations, which makes it clear that Human Rights prevail over other rights.

Mr. Attorney General, your central responsibility is to defend the sovereignty of the State. Faced with the threat of a company like INV Minerals Ecuador, it is only necessary to guarantee the full exercise of the democratic rights of the population of Girón.

Waiting for a sovereign action

Sincerely,
Organizations of "Ecuador Decide"