

Property rights, nationalisation and extractive industries in Bolivia and Ecuador

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Abstract Since the election of the left-leaning leaders Morales in Bolivia and Correa in Ecuador, there have been highly contested changes regarding the role of the state in the extractive industries of these countries. While the content of these changes differ and have manifested themselves over different timescales and political approaches, they fall within the context of the politically charged and equivocal rubric of ‘nationalisation’. In both countries the place of extractive industries in socioeconomic development has been acknowledged as central to understanding the nature of the ongoing changes. While the existing literature has made sweeping generalisations about the character of these new regimes, this chapter aims to bring an empirically grounded analysis of the transformation of property rights structures associated with nationalisation in the extractive sectors of Bolivia and Ecuador. Focusing primarily on the minerals sector, the chapter demonstrates that there have been shifts and swings in the property rights regimes of both countries at the ‘operational level’. While these changes have indeed strengthened the role of the state, hence conforming to our definition of nationalisation, the most significant changes relate to changes in property rights at the level of ‘collective-choice’ rights that concern the future shape of development in these two countries.

Keywords Extractive industries, nationalisation, property rights, Bolivia, Ecuador.

7.1 INTRODUCTION

For the past decade, several Latin American nations have undergone major political and economic changes that have significantly altered their development politics and policies. Taken together, these transformations have opened up debates regarding

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the emergence of a ‘New Left’ and its ability to build a post-neoliberal development strategy. This phenomenon became evident with the election of new center-left or left governments in Venezuela in 1999, in Argentina and Brazil in 2003, in Uruguay in 2005, in Bolivia in 2006, in Ecuador and Nicaragua in 2007, in Guatemala and Paraguay in 2008, in El Salvador in 2009, and with the recent election of Humala in Peru (Cameron and Hershberg 2010; Levitzky and Roberts 2011; Wehr 2011). While the heterogeneity of the ideologies and political strategies of these leaders and the ongoing nature of the changes make it difficult to effect a coherent assessment, there is an undeniably broad process of political economic realignment in the region.

As a broad characterisation, two main trends can be observed in the development policies of these nations. On the one hand, they have made poverty alleviation and delivery of basic social protection to the marginalised communities a central plank in national development planning. On the other hand, to achieve this goal, they have aspired to make the state and the office of the president significantly stronger with the stated aim of shielding domestic political and economic structures from the detrimental influence of the neoliberal policies dominating the global level. Bolivia and Ecuador are arguably the two most important manifestations of these changes, where both trends have been deeply integrated with the changing dynamics of natural resource extraction. Specifically, the ‘nationalisation’ of extractive industries figures prominently in these projects as a means of funding ambitious social policies aimed at reducing poverty and inequality. Furthermore, ‘nationalisation’ serves both as a sphere for the exercise of heightened state power and as a symbol of the re-established sovereignty for the nation. Both the Bolivian and Ecuadorian state have made claims to being ‘renewed’, and one of the clearest articulations of the revitalisation of these states can be observed in the changing power dynamics between the state and extractive industries.

At a scholarly and political level, these changes have attracted considerable interest. Some observers have dismissed the political and economic changes taking place in these countries as autocratic attempts at power-grabbing (Colburn and Trejos 2010). Others, coming from the left of the political spectrum, have denounced these changes as insufficient at best and functional to the continuation of the neoliberal model at worst (Webber 2010). Concrete assessments that provide evidence regarding both the extent and nature of the changes taking place in the crucial extractive sector are just beginning to emerge (see Pellegrini 2011; Grugel and Ruggirozzi 2012; Molero and Paz 2012). Conspicuously absent, however, has been a discussion regarding the meaning of ‘nationalisation’. Beyond scrutinizing the empirics of policy transformations, it is necessary to situate the ‘left turn’ and its ambition of nationalisation within a broader analytical framework of critical studies of conflict and co-operation over natural resources (Arsel and Spoor 2010; Arsel and Buscher 2012).

Before taking on this task, however, we must first answer a seemingly simple empirical question: What exactly is the subject of inquiry when we speak about ‘nationalisation’? As we have demonstrated elsewhere (Pellegrini and Dasgupta, 2011; Arsel 2012; Arsel and Angel 2012; Pellegrini 2012; Radhuber 2012), the discourse of nationalisation (and its rhetorical handmaiden, ‘sovereignty’) has come with sweeping constitutional, legal, social and political changes. In this chapter we focus primarily on property rights, which lie at the heart of what nationalisation is usually understood to entail. While it is difficult to differentiate the if, how and why of nationalisation, due in large part to the fact that the goals, means and outcomes of such a profoundly

political process are fundamentally intertwined, our main focus is to lay an empirically informed groundwork for understanding exactly which changes have taken place under the rubric of nationalisation. By focusing on property rights, the chapter therefore takes an analytical step backwards from the prevailing debates on nationalisation, its relationship with populism or its role in setting a new path to post-neoliberal development policies. Building on this observation, the aim of this study is to analyse the changes taking place in Bolivia and Ecuador by focusing on the changing property rights structures concerning minerals. We do so by scrutinizing crucial aspects of relevant laws and regulations in terms of the changing role of the state and its relationship with society and nature.

The next section of the chapter provides a brief overview of the Left Turn in Latin America, highlighting the nature and significance of the changes taking place in Bolivia and Ecuador. The chapter then turns to a discussion of nationalisation and property rights, introducing Ostrom and Schlager's (1992) analytical framework, which forms the basis of the two empirically-grounded sections on the changes taking place in Bolivia and Ecuador. The concluding section returns to the question asked on the previous page (what is 'nationalisation?') and presents a set of reflections on how to theorise nationalisation in the context of the Left Turn in Bolivia and Ecuador.

7.2 THE LEFT TURN IN LATIN AMERICA

The turn to the left that marked Latin American politics in the last decade comprises political changes in a number of countries including Argentina, Bolivia, Brazil, Chile, Ecuador, Guatemala, Nicaragua, Paraguay, Peru, El Salvador, Uruguay and Venezuela. By its nature, this turn includes a diverse range of countries and political positions; consequently the meaning of this political shift is vague and this diversity has been articulated in different ways. In this sense, administrations have been divided into populist or social democratic (e.g. Castañeda 2006; cf. Cameron 2009), and a rich body of literature has developed on the significance of the turn (e.g. Meschkat 2008; Cameron and Hershberg 2010; *Latin American Perspectives* May 2010; *Latin American Perspectives* July 2010; Burchardt and Wehr 2011; Escobar 2011; Levitzky and Roberts 2011). Here we focus on developments concerning Bolivia and Ecuador, two countries whose social movements have had a crucial influence on the domestic political agenda in the past decade, not only at the societal but also at the state level. These developments have seen both countries taking a plurinational character. In this sense, the administrations of the two countries to some extent incorporated social demands and have set themselves on paths to a radical rethinking of the means and goals of development. Accompanying this ongoing process of reflection are changes to indigenous people's rights and new – often profoundly different – proposals in terms of nature and natural resources management. As a result, these two countries are often considered to be proponents of alternative development models, articulated and enshrined in various policies and legal instruments, which are to be critically scrutinised by empirical research and analysis (e.g. Lang and Mokrani 2012).

Bolivia offers a fertile ground for analysis, because the country has undergone deep transformations especially after the intensified mobilisation of the social movements

since 2000 which set a new political agenda. The country was traditionally ruled by a conservative establishment and was marked by political instability. The ascendancy of the political group ‘Movement Towards Socialism’ (Movimiento al Socialismo, MAS) – with Evo Morales, coming from the indigenous-peasant population – marked a turning point. The MAS – as the name already suggests – is not a traditional political party, but rather a political movement. Its leader, Evo Morales first became known as a trade union leader for coca farmers opposing neoliberal policies and US-sponsored anti-drug policies, rather than through electoral politics. The election of Morales and the subsequent changes to the Bolivian state have been hailed as revolutionary by some (Dunkerley 2007), including the government, which gave its policies and initiatives titles such as the ‘agrarian revolution’, the ‘ethical revolution’ and the ‘educational revolution’ (Bolivia. Ministerio de Desarrollo Rural, Agropecuario y Medio Ambiente, 2007). Before becoming Vice-President, Alvaro García Linera argued that the social conditions in Bolivia were not ripe for socialism. Post-election, however, García Linera instead set the development of a ‘Andean-Amazonian Capitalism’ that could be the basis for a transformation toward socialism in the medium-long term as the primary objective of his government (García Linera 2008). Lately, he has adopted a different discourse that establishes communitarian socialism as the goal of the political process (García Linera 2010). From this point of view, the government’s project is going through a phase where a stronger state is transferring resources from the private sector to communitarian organisations.

Ecuador similarly makes for a highly relevant location to observe the actual impact of the Latin American Left Turn. During his first inauguration ceremony in January 2007, the newly elected president, Rafael Correa, called for 21st century socialism that aimed at ‘leaving the night of neo-liberal policies behind’. Since then, Correa has enjoyed unprecedented popularity and was re-elected by a landslide in the April 2009 elections. Reconfigurations of nature-society relationships have been portrayed as both the means and ends of the ‘Citizens’ Revolution’ launched by Correa and his political vehicle, the Alianza PAIS. Since assuming power, the Correa government has forced several foreign owned oil companies to leave Ecuador, made changes to the constitution introducing the ‘rights of nature’, opened up the possibility of extensive mineral extraction (primarily of gold and copper), and made an international proposal to abandon oil extraction in the ecologically significant Yasuni National Park in exchange for approximately US\$3.5 billion. Referring to the dramatic (and often contradictory) political events taking place throughout Latin America, Arturo Escobar asserted that “Latin America is the only region in the world where some counter-hegemonic processes of importance might be taking place at the level of the State at present” (Escobar 2011: 1).

In this context, Bolivia and Ecuador have both been undergoing a highly contested nationalisation process of their extractive industries, and this process cannot be understood simply as a state takeover of private enterprises. It is more accurately described as the increased presence of the state in extractive processes, a presence that can manifest itself in numerous ways, and at different stages and scales. This increased role of the state is concomitant with the recognition and the implementation of new and old rights related to nature, as well as the use and governance of natural resources, including land. In both countries, the overall management of natural resources and the nature-society interactions are now claimed to be oriented towards the achievement of

the concept of 'buen vivir' (in Ecuador) and 'vivir bien' (in Bolivia), as opposed to the achievement of ever-growing levels of economic wealth (Esteva 2009). These concepts are drawn from Latin American indigenous cosmologies and can be considered the strongest challenge to the Western conceptions of well-being and development that have been articulated in recent years.

7.3 NATIONALISATION AND PROPERTY RIGHTS

In the context of Bolivia and Ecuador, nationalisation is a politically-charged concept. While its detractors use it pejoratively to characterise any extension of state activity that interferes with the perceived sanctity of private property rights, its proponents see it as a step towards the achievement of the twin goals of socialism and sovereignty. The diverse use of the word nationalisation creates tensions and challenges around the 'real' meaning of nationalisation and one can easily find references to attempts at nationalisation being 'false' or 'incomplete'.

In this chapter, we study nationalisation by focusing on property rights. After all, the nature of property rights is key to identifying the type of political economic system that prevails in a particular setting. We define nationalisation as a policy measure that increases the sphere of action of the state, ranging from complete take-over of a company or a sector without compensation to the establishment of regulatory powers and/or increases of taxes and royalties by the state. This definition differs from some of the stricter conceptualisation of nationalisation found in earlier literature. Francioni, for example, defines nationalisation as "the compulsory transfer to the State, by virtue of legislative or executive act of a general and impersonal character, of private property or activities" (Francioni 1975: 256). The choice of a quote from nearly three decades ago is not coincidental: little attention has been paid to the concept of nationalisation and its varieties in the recent scholarly literature. This absence can perhaps be attributed to the dominance of the neoliberal doctrine, which has of course emphasised 'privatisation' and much of the recent discussion in academia has therefore focused on this type of property relationship. In this chapter, we build on existing understandings of nationalisation that focus on property rights but reject a binary distinction of the ownership of productive resources by the state or private interests. In other words, the focus is not at a technical level of 'who owns what', though that is certainly part of the overall picture. Instead, the approach adapted here is one that scrutinises the political economy of property relations, because it is through these relations – and the ways in which they are being transformed – that we can apprehend the significance of the ongoing changes in Latin America. Furthermore, by focusing on the emerging property structures that are created by nationalisation processes, we go beyond stale discussions of whether nationalisation has taken place or not. Instead, we contribute to a re-emerging discussion of what nationalisation – both in promise and deed – seeks to accomplish, what (perhaps unexpected) shapes it takes and whose interests it ultimately serves.

The complexity of – and diatribes over – the concept of nationalisation are intertwined with the multifaceted nature of property and property rights. In fact, the understanding of nationalisation as an extension of state rights over certain properties immediately raises the question of which rights are changing hands. Here we

Table 7.1 Framework for the interpretation of property rights.

Rights	Description
Access and withdrawal	Right to physically access the geographical space occupied by the resource and to extract portions of the resource.
Management	Right to decide how the resource is going to be accessed and exploited.
Exclusion	Right to put limits on the actors who access, withdraw and manage the resource.
Alienation	Right to transfer property rights to new holders-through donation, sale, bequest.

Source: adapted from Schlager and Ostrom, 1992

introduce a property rights theory developed by the institutional and neo-institutional economics school of thought (e.g. Demsetz 1967; Ostrom 1990) as the theoretical framework for the analysis of policy changes associated with the nationalisation of minerals in Bolivia and Ecuador. In particular, we look at the multiplicity of rights that can be exercised vis-a-vis property. We follow the categorisation of Schlager and Ostrom (1992) and divide property rights into rights to access and withdraw, manage, exclude, and alienate (see Table 7.1).

Access and withdrawal rights refer to the privilege of physically entering the geographical space of the resource, and to the extraction and appropriation of portions of the resource. The management rights refer to the ability to decide how access and withdrawal are exercised. Exclusion rights refer to the faculty of deciding who can exercise rights on the resource. Alienation rights refer to the right of transferring the property rights to new holders. These transfers can happen via donation, sale or bequest.

When taken together, Schlager and Ostrom (1992), consider the aforementioned rights as ‘operational’. In doing so, they refer to the ability to exercise a particular right and differentiate from ‘collective-choice’ rights, which entail the ability to discuss and shape the definition of future rights. As such, collective-choice level rights are broader and go beyond the technical exercise of enforcing a set of rules. By virtue of their longer-term and open-ended nature, collective-choice level rights have far-reaching implications for shaping not only the means of using a particular property, but also the ends that are expected to emerge. In other words, the exercise of collective-choice rights not only deal with how development should take place, but also the direction and nature of development. In the following section, the nationalisation processes taking place in Bolivia and Ecuador are explored through the framework presented here. While the process of nationalisation has been very complex and is riddled with intentionally-created ambiguities in legislation, the section aims to present a linear narrative to render them suitable for evaluation through this analytical lens.

7.4 BOLIVIA

Bolivia has rich mineral resources and a long history of extraction and export. It has gone through various cycles of privatisation and nationalisation. The most recent privatisation process culminated in the law of 1997. Though no generalized nationalisation process took place, subsequent actions have swung the pendulum slightly back

towards a strengthening of the state. The three major adjustments to the 1997 law that lead to this shift are the decision of the Constitutional Court 0032/2006, the Supreme Decree No 29117, 2007 and the Constitution of 2009.

7.4.1 Background

The Bolivian economy has long been based on the exports of natural resources with various cycles in which different resources – e.g. silver, tin, natural gas, rubber, etc. – have played an important role. This dependence characterises Bolivia as a peripheral state in the capitalist world-system (Wallerstein 2007: 28f.), which is distinguished by highly unequal trade relations. Most added-value emerges in the post-extraction phases of refinement, commercialisation and further use, in which most resource-rich countries do not participate (Almaráz 2010: 57). Hence, countries like Bolivia do not succeed in their aspirations of mineral-led development (Allgäuer et al. 2005: 5).

Nationalisation of natural resources and its extraction is not something new to Bolivia. In 1937, Standard Oil was expropriated and the state-owned Yacimientos Petrolíferos Fiscales Bolivianos (YPFB) was created in order to manage the hydrocarbon sector. These measures mark the beginning of the nationalisation process, which culminated in the nationalisation of the tin sector and the creation of the state-owned mining company, Corporación Minera de Bolivia (COMIBOL) in 1952 (Tahbub 2008: 21f.). During the sixties, the pendulum swung towards a short period of liberalisation, marked by an influx of private foreign investment in the mining and hydrocarbon sector. However, the liberalisation process was again interrupted by the nationalisation of Gulf Oil in October 1969 (Wanderley et al. 2010).

The last privatisation period in the 1980s and 1990s was vital for the emergence of the new protest movements that surfaced in 2000 and the subsequent nationalisation processes. This privatisation period in Bolivia also affected the mining sector, and began prior to the so-called ‘stabilisation programs’ enforced by international mechanisms during the dictatorship of Hugo Banzer Suárez (1971–1978) and the respective changes in the hydrocarbon laws. However, the privatisation measures only hit their peak in 1996. This was exactly ten years after the violent suppression of the miners in the *Marcha por la Vida* (March for Life) in 1986, when approximately 30.000 demonstrators protested the massive dismissals of miners and the minimisation of the state mining sector. Additionally, the privatisation of the hydrocarbon sector in 1996 was a highly socially contested affair despite its implementation. From then on, the state only administered concessions. A few weeks after this privatisation, the new hydrocarbon law was enacted (Gandarillas 2008: 61f.).

The pendulum swung back towards nationalisation again ten years later, when the hydrocarbon sector was formally nationalised between 2005 and 2007. No nationalisation took place in the mining sector specifically, but the state’s role was strengthened by a series of policy measures. Whereas the monetary contribution of the mining sector to the Bolivian state was marginal during the privatisation period, it is currently a strategic source of income, notwithstanding the dependency on international markets and cyclical tendencies (Wanderley et al. 2010). The rising importance of the mining sector for the Bolivian economy is evinced by data from the export sector. This data shows that between 2001 to 2004 the exports from the manufacturing sector

constituted the largest share of exports, with USD 697 million out of a total value of USD 1.226 billion in 2001 (the contribution of the mining sector was USD 189 million and the hydrocarbon sector USD 287 million). By 2010, hydrocarbon had become the largest contributor to exports, with USD 2.942 billion out of USD 6.871 billion (the share of mining was USD 1.852 billion and manufacturing USD 1.779) (Bolivia Presidency of the Republic. Mensaje e Informe 2010). While the annual contribution of the mining sector to the state coffers was only USD 11 million between 1985 and 2005, these incomes are estimated around USD 230 million annually between 2006 and 2008 (García Linera 2008: 11f.).

7.4.2 The current legal mining regime

Bolivian government officials have been announcing a new mining law since the enactment of the Constitution of 2009. The Constitution states that current concessions would expire and new contracts must be established within one year of the election of the Executive and Legislative, both of which took place in December 2009 (Bolivia. Constitution 2009. “Transitional Provisions,” Eighth, III). Accordingly, the government announced that it aims to make adjustments in the sector, confirming the state as the owner of natural resources and amending the tax and royalties system. Various government officials further declared that this new law, which has yet to be submitted to parliament, will oblige all companies in the sector to shift to new contracts, eliminate private concessions, revert all territories that do not fulfil the socio-economic function to the state, and distribute royalties to the communities where extraction is taking place (FmBolivia 2010).

The Ministry of Labour made further details available in 2011: the new mining law would reestablish the state-owned mining company COMIBOL and consolidate five decentralised state companies: the Empresa Boliviana de Recursos Evaporíticos, the Empresa Minera Huanuni, the Empresa Boliviana de Oro y Piedras Preciosas, the Empresa Metalúrgica Vinto and the Empresa Metalúrgica Karachipampa. The control over the benefits, however, would remain in the hands of the national mining company in order to reinvest them. Finally, by privileging prospection and exploration, the mining frontier would be intentionally expanded (Página Siete 2011). However, the new mining law has yet to be made public.

As a result, the latest mining law, known as the Mining Code, dates back to 1997. The Constitution from 2009 is the most recent legal framework on mining that can currently be analysed. There are a number of other frameworks that must also be considered: Supreme Decree 28901 of 2006, which renationalised the mining company Huanuni; Supreme Decree 29117 of 2007, which declared the entire national territory as federal mining reserve; Supreme Decree No 29459 of 2008, which defines the mining company Huanuni as a national public and strategic company; and Supreme Decree No 861 of 2011, which approved an increase of the miners’ salaries in Huanuni. Even though they are not equally situated in the legal hierarchy, all of these legal initiatives have had a significant political impact. In the following section, the mining law from 1997 shall be compared to the Supreme Decrees from 2006 and onwards, as well as the Constitution from 2009. Special emphasis will be placed on the ownership and the role of the state.

7.4.3 A comparative analysis of legislations and legal decisions

The Mining Code of 1997 is based on the liberal model of the Supreme Decree 21060 of 1985. The decree not only eliminated the smelting monopoly and installed free trade and exports of minerals, but also liberalised prices and labour recruitment (OBIE 2008: 3). In 1986, the Supreme Decree 21298 further eliminated the federal mining areas that extended to almost 80% of the entire Bolivian territory, which were supposed to be exploited by the *Corporación Minera de Bolivia* (COMIBOL). Hence a significant reduction of the size of COMIBOL began to take place, and during the early 1990s COMIBOL was limited to the administration of joint venture contracts. In 1993, all properties of COMIBOL were tendered and its concessions were assigned to the private sector. As a result, the state-driven mining activity was reduced to a minimum and the period of mining concessions began (OBIE 2008: 3).

7.4.4 Mines, ownership and the role of the state

The Mining Code of 1997, which established the concession regime, defines the original domain of the State as all minerals in their natural state, regardless of origin and form, whether under or above ground. The code positions the state as the direct and sole owner of all minerals that exist within the Bolivian territory, with the exclusive faculty of alienation. Through alienation, the state sells or leases the right of management, exclusion, or both. Hence the state still enjoys the rights of alienation, but no longer retains control over the rights of access and withdrawal, management, and exclusion (Bolivia. Ministerio de Minería y Metalurgia. *Código de Minería*, 1997: Art. 1).

According to the law, the State, through the Executive, will grant mining concessions to individual or collective entities, national or foreign, that request these from the Superintendent of Mines (Bolivia. Ministerio de Minería y Metalurgia. *Código de Minería*, 1997: Art. 2). Article 4 defines mining concession as a property right different from the ownership of the land on which it is constituted. Furthermore, it is a property that can be transferred by inheritance. According to the present law, it can be drawn on mortgage and be subject to any type of contract. Article 10 entitles the mining concession's holder to the real and exclusive right for an indefinite period to the prospecting, exploring, extracting, concentrating, smelting, refining and marketing of all mineral substances that are within the territory, including clearing, slag, tailings and mine waste, or any other metal under the condition of the payment of dues.

According to these articles, the state formally sells or leases only the right of management, exclusion, or both, and thus property rights. However, it is possible to argue that due to the extension of these exclusive property rights, the Code actually provides the concession holder the title of owner of the concession parcel and all the minerals it contains. This right is guaranteed indefinitely as long as the dues are paid in accordance with the law. This means that the state holds full *de jure* ownership of all minerals within the country until it grants a mining concession, after which the holder of the concession obtains the *de facto* ownership of the resource and also the proportional capacity of fiscal capturing.

After almost 10 years of legal validity, the Mining Code of 1997 underwent three major adjustments that redefined the type of management for the mining sector. As part

of the policy measures to increase the state's participation in hydrocarbon and mining production, the adjustment of the Mining Code moved the legislation away from neo-liberal precepts towards being more state-centered. Nevertheless, the regimes of these natural resources significantly differ, mainly because a formal nationalisation process took place in the hydrocarbon sector, while only a slight shift towards an increased state participation took place in the mineral sector.

In 2006, the sentence of the Constitutional Court Act no. 0032, 2006 determined that several articles of the Mining Code were unconstitutional as they were contrary to the Bolivian Constitution of 1967 (reformed numerous times). This constitutes the first significant adjustment. The mining legislation essentially recognised the mining concession as a private property right in favor of the holder: the holder could have indefinite ownership over the concession and register it as a credit guarantee, as well as transmit the concession by inheritance. The sentence of the Constitutional Court, however, declared this provision void as it contravenes the Constitution. Hence, the sentence of the Constitutional Court strengthened the state's proprietor rights over the subsoil and all of its content. The sentence indicated that the state was not allowed to grant ownership of the subsoil by way of mining concessions (Moreno Baldivieso 2010). Additionally, the mining company Huanuni was reintegrated into the national mining company COMIBOL in 2006, leading to a violent conflict in October of the same year between the cooperative workers and the workers assimilated by the state company⁵ (Bolivia. Decreto Supremo 28901, 2006).

The second adjustment that significantly modified mining legislation came in 2007 with Supreme Decree No 29117. One year after the Sentence of the Constitutional Court, this Supreme Decree declared the entire national territory as a federal mining reserve, including metallic, non-metallic, precious stones, semi-precious stones, and brines mineralogical resources. In the exercise of its right of ownership of the federal mining reserve, the State was now capable of granting COMIBOL the jurisdiction and authority for exploitation and management, with the exception of the pre-established rights on mining areas granted previously in concession and those under the jurisdiction of municipalities. As a consequence of this decree, granting of new mining concessions was prohibited. Instead of granting concessions, the state proposed a mining regime of shared production contracts and leases (Moreno Baldivieso 2010). The Supreme Decree No 29459 of 2008 then defines the mining company Huanuni as a national public and strategic company. Furthermore, the Supreme Decree No 861 of 2011 approved an increase of the miners' salaries in Huanuni, aiming to prevent the violent conflict that took place in 2006 (Bolivia. Decreto Supremo 29459, 2008).

The third adjustment is of a more fundamental nature than the previous two, and it refers to the further adjustments made through the Constitution of 2009. The latter establishes that all natural resources, including hydrocarbons and minerals, are under the direct, indivisible and perpetual ownership of the Bolivian population. The state, on behalf of the Bolivian people, is in charge of their administration. However, the Constitution recognises the participation of private operators in different stages of the productive chain of the mining sector. This participation should no longer take

⁵This was followed by the approval of Supreme Decree 29025 from 2007, which should be valid for only 6 months and declared Huanuni as an emergency zone which should lead to special political measures (*Decreto Supremo* 29025, 2007).

place though concessions, but instead through the granting of mining rights or mining contracts. In addition, it establishes that the granted mining contracts cannot be transferred, are indivisible, and are not transferable by hereditary succession (Claire Veizaga 2010). From these provisions, one can conclude that within the framework of the 2009 Constitution, the holder of a mining contract is an authorised user with the rights of access and withdrawal, as conceptualised by Schlager and Ostrom (1992).

Article 369 of the 2009 Constitution states that the state is responsible for all minerals in the soil and subsoil, independent of their origin. The groups of nationalised miners, their industrial plants and complexes, and their smelteries belong to the patrimony of the people; they cannot be transferred or ascribed to property of private companies (*ibidem*: Art. 372).

In summary, whereas the Mining Code from 1997 defined the state's rights of alienation, but not the rights of management, exclusion, and access and withdrawal, three major adjustments have since redefined the type of management for the mining sector towards a more state-centered regime, re-strengthening the state's proprietor rights of the subsoil and all of its content. First, the sentence of the Constitutional Court Act no. 0032, 2006 prohibited the sale and transfer of ownership by concessions. Second, the Supreme Decree No 29117 of 2007 declared the entire national territory as a federal mining reserve and eliminated the regime of concessions, proposing a mining regime of shared production contracts and leases. Third and finally, the framework of the 2009 Constitution defined the ownership of all subsoil resources as that of the people, and the holder of a mining contract only as an authorised user with the rights of access and withdrawal in accordance with Schlager and Ostrom's framework.

These adjustments in the mining regulation and in the property rights regime evince a shift from a more liberal to a more state-centered model, though this shift is much slighter than in the hydrocarbon sector where formal nationalisation took pace. The shift was made possible by the context of intense social and political contentions and mobilisations, related to natural resources in general, and the strong demand articulated in social mobilisations to establish national sovereignty over strategic natural resources. Social and especially indigenous movements demanded further societal and state rights over the natural resources as part of a specific political project. This shift was finally possible as part of the socially demanded democratisation process towards a plurinational state.

7.5 ECUADOR

Modern mining has a much briefer history in the Ecuadorian context. Most of the extraction in recent decades has been carried out by small, often informal entities operating with varying degrees of legality. Following the World Bank's policy advice Ecuador joined the other Latin American countries in reforming their mining codes in order to encourage foreign investment in the sector in August of 2000 (De Echave 2007). The principal objective of the new approach was to make the mining sector more attractive for multinational companies seeking to explore and exploit mineral resources. To that effect, the mining law included a number of provisions to relax regulation and reduce taxation (De Echave 2007).

According to Carlos Espinosa, President of the Ecuadorian Chamber of Mines, representing pro-mining economic concerns, the mining law of the 2000s was a progressive law that benefitted the country in two ways: the abolition of royalties curtailed corruption by default, and international investment would come to the country (Santacruz 2007). Others, however, argue that the law was too permissive, that it undermined indigenous people's rights, and that it would engender conflict (Ortiz 2011). In fact, few constraints for companies were enforced by self-regulatory systems without any penalties for non-compliance (De Echave 2007). Indeed, the World Bank reviewed the cases of mining in Peru, Tanzania and Indonesia (where regulations were remarkably similar to the ones in Ecuador) and concluded that, "In spite of the World Bank's efforts to improve the social and environmental performance of extractive sectors, the expansion of these sectors within structural reform programs has resulted in unnecessarily high social and environmental costs, and in some cases, the exacerbation of macroeconomic vulnerabilities" (2010: 5).

7.5.1 A comparative analysis of the 2000 and 2009 mining acts

In this section we provide a comparison of the mining acts of 2000 and 2009, together with the provisions on mining contained in the new Constitution enacted in 2008. We will start by describing the legislation approved in 2000 and then contrast it with the changes that have occurred since 2006.

The mining law of 2000 eliminated all existing royalties on extracted values, and mining companies started to pay for licenses according to the number of years they held concessions and the number of hectares in the concession. Apart from the simplicity of the rule and its attractiveness for investors, the rationale of this measure was to avoid collusion between the mining companies and state officials in charge of estimating the value of extracted resources. In addition, concessions were afforded an extension for up to 30 years, but were eligible for renewal. Taken together, these provisions meant that mining concerns could operate in the country for long periods of time and that the Ecuadorian government would only receive minimal revenues from these activities (Varela 2010). Furthermore, when the Correa administration initiated a study on the state of concessions in 2007, a preliminary report showed that this mining law had allowed for concessions to be granted very liberally, even within national parks. As a result, nearly 4,000 mining concessions were under investigation (Arteaga and Jijón 2007).

A major breakthrough in this situation came with the approval of the new constitution in 2008. The new Constitution explicitly states that strategic sectors, including non-renewable natural resources, especially mineral resources, are under exclusive state control and management. The National Plan for Mining Development 2011–2015 (Ecuador. Plan Nacional de Desarrollo del Sector Minero 2011–2015), a plan operationalizing the constitutional provisions in the mining sector, establishes the importance of its role by stating that its purpose is to make the mining sector more important in the economy, contemplating clear procedures to promote exploration and exploitation (Plan Nacional 2011: 43).

Despite his anti-neoliberal and anti-multinational domination rhetoric, the Correa administration remained wayward about its stance on mining from the beginning. In fact, when Correa took office in 2006, mining stock prices of companies operating

in Ecuador dropped and fear of “nationalisation” of extractive industries potentially associated with expropriation of property was widespread (Santacruz 2007). By 2008, after years of mixed signals and ambiguous statements, it became clear that the Correa administration was interested in mining exploitation and welcomed foreign corporations for large-scale mining exploitation (e.g. Denvir 2008; Denvir and Riofrancos 2008). The Ministry of Mines and Petroleum (MMP), under Galo Chiriboga’s leadership, complied with the Assembly’s mandate to draft a new mining law that would attract large-scale investment and guarantee substantial state revenues at the same time. Among its highlights were: openness to large-scale and open-pit mining; establishing the state as the main actor in charge of carrying out Corporate Social Responsibility projects; royalties ranging between 5% and 8% depending on the size, investment and value of reserves of the concession; and the switch from a “mining title” to an “exploration contract” for companies. The provision for a Windfall Tax envisions charges for as much as 70% of profits (Santacruz, August 15 2008). In spite of opposition from social movements, the new mining law was finally approved on January 14th, 2009, with an overwhelming majority of 50 to 15 in the National Assembly.

7.5.2 Mines and ownership

In terms of the domain of the state over mines and deposits, the mining acts of 2000 as well as 2009 begin by establishing that the Ecuadorian state is the owner of all mineral wealth in the country. Despite this shared provision, the two laws contain several differences that emerge from the perspective of property rights theory by means of looking in detail at the entitlement of specific rights. These legal provisions stipulate that collective-choice level decisions are in the hands of the state. At the operational level, however, several bundles of rights are transferred to the private sector. Mining titleholders do not participate in any of the decision-making processes for management of their concessions, such as the organisation and granting of permits and concessions. Instead, the state is in charge of this process based on applications and a tendering process. Thus, titleholders may not decide who gets to participate or not on a tender, who has access to mining activities, or who has rights of access and withdrawal of substances. Similarly, the state has the authority to request certain management and exclusion provisions, such as labour. Under both mining acts, 80% of a company’s workforce must be comprised of Ecuadorian employees. In the 2009 mining act, on the other hand, artisanal mining is strictly regulated with a chapter for “special regimes” dedicated to stipulate its rules. To begin with, the 2009 law provides a clear, legal definition for what constitutes artisanal mining: mining that is carried out through individual, family or associative work, with the sole purpose of being used as a means of subsistence. In addition, access to mining for artisanal purposes is restricted to specific areas designated by the state, and an application process and requirements have been established in order for the Ministry to grant artisanal miners permits to conduct their work. Importantly, one of the special restrictions imposed on artisanal mining is that no foreign capital can finance its operation. Failure to comply with these rules means that citizens would be engaging in illegal mining, and specific penalties are accordingly stipulated. These regulations amount to the establishment of exclusion rights in terms of restricting both the geographical areas and the individuals that can become artisanal miners. Furthermore, in both mining acts discussed here, the laws

allow the state to authorise the exploitation of mineral resources to natural or legal persons, whether local or foreign, by granting them mineral rights and duties. These legal provisions essentially transfer access and withdrawal rights.

In spite of the similarities between both mining laws, one major point of departure between the two legal instruments relates to the power and scope of the state's role in the extractive industry. In the 2009 law, the state essentially acquires a more prominent role and has an enlarged oversight of the sector. With that goal in mind, the 2009 mining act also established a series of regulations aimed at restructuring the bodies governing and overseeing mining. Thus, the Ministry of Non-Renewable Natural Resources was established and separate entities to direct and regulate mining and oil affairs were also created: the Agency for Mining Control and Regulation, the National Institute for Geological, Mining and Metallurgic Research and the National Mining Company (known as ENAMI for its Spanish acronym).

7.5.3 Mining and land ownership issues

One of the most important property rights granted to all parties participating in mining activities under the Mining Acts of 2000 and 2009 is that, as concession titleholders, their rights of ownership are distinct and independent from the ownership of land on which the concession is located, even if both belong to the same person. This is an especially sensitive issue, because many of the mineral concessions of interest are located in areas settled by indigenous communities. This is for example the case for Intag in the Northern Highlands, as well as Zamora Chinchipe in the Southern Amazon, where Shuar Indigenous communities reside. In terms of the property rights framework, where rights correspond to duties, these regimes have essentially established a series of limits to the property rights over territories by indigenous people and farmers, who now have de facto duties to respect mining rights superimposed on their lands.

On the other hand, both the 1998 and 2006 Constitutions, as well as the Mining Acts of 2000 and 2009, contain laws and regulations for the protection of indigenous people's rights, which includes the right to their ancestral land. For example, both Constitutions ratify the ILO Convention 169 on the right to prior and informed consent. Likewise, in Article 57 of the current constitution, Indigenous people's communities and nationalities are recognised, and collective rights in order to conserve their land are guaranteed. Furthermore, the constitution declares indigenous peoples' lands as "inalienable and indivisible" and establishes that indigenous groups may not be displaced.

The Mining Act of 2009 does include a chapter dealing with "Social Management and Community Participation" to address mechanisms for citizens' right to information and consultation that apply to all communities affected by mining, independent of ethnicity. In fact, the law names the State as the responsible actor for providing information and arranging the necessary processes for participation and consultation. Article 90 calls for the compulsory consultation of communities and nationalities that may be affected by mining activities, and Article 91 names the Ministry of the Environment as the entity responsible for managing any complaints for social, cultural or environmental damages derived from mining activities.

In spite of these advances, Article 87 of the current mining law also stipulates that, "In the event that a consultation process results in the majority of opposition

from the respective community, the decision to develop the project will be adopted by resolution of the Sectorial Ministry.” Thus, although communities that may be affected by mining have the right to be informed and consulted, their opposition to a project does not necessarily result in a legally recognised resolution or action. Ultimately, local people still do not have the power to decide whether mining extraction can take place in their territory or not.

The new law further contradicts some of the provisions of the constitution and the international agreements mentioned above. The mining rights include the freedom of prospecting, but the rights to informed consultation only begin at the stage when a concession is already granted. In practice, a community can only oppose a project at a very late stage and the State has the ultimate power to decide whether a mining project takes place or not. Moreover, if the land ownership and mine ownership (or title) are distinct and independent of each other, this means that when easements are established, the lands in question are divisible, even if they are communal lands of Indigenous peoples going against their Constitutional rights. Thus, taken together, these laws suggest that the scenario for communities is more likely to be one in which companies are allowed to begin mining in their territory at any time and if they do not agree with these activities, they are not entitled to prevent it.

7.6 TOWARDS A THEORY OF NATIONALISATION AND CONFLICT IN BOLIVIA AND ECUADOR

Emerging from the above narratives of ‘nationalisation’ in Bolivia and Ecuador are several insights into the way these processes need to be theorised. It is important to ask where the ‘nation’ lies within the concept of ‘nationalisation’ and what implications the construction of plurinational states have. While the theoretical framework provided by Schlager and Ostrom (1992) suggests that this needs to be located first and foremost in property rights, the evidence presented here problematises such a straightforward conceptualisation. ‘Nationalisation’ has not resulted in take-over of property rights and the displacement of foreign corporations by economic entities owned or operated by the state, nor even by individuals who are nationals of these countries. Instead, ‘nationalisation’ has left enough space for foreign corporations to enter into various forms of agreements – concessions, joint ventures, etc. – that are blessed by the state. Such arrangements have not only been made within the legal remits of new constitutions that reinforced the sovereignty of these nations over their nature and natural resources, but they have in fact been used to demonstrate their effectiveness. In other words, a theory of nationalisation needs to move beyond simplistic notions of ownership and control by ‘the nation’, even more so in states that are or should be transformed into plurinational states.

As the preceding discussions of the changes taking place in Bolivia and Ecuador demonstrate, the significance of the ongoing ‘Left Turn’ in Latin America can be found not in its shifting articulations of property rights at the operational level, but instead at the level of collective action. In other words, the relationship between nationalisation and property rights cannot strictly be located at the level of ownership, but must be considered within broader political economic dynamics concerning decisions on development politics and processes. Specifically, the changes at hand, even when they

deal with the relatively mundane and arcane language of concessions, windfall taxes, etc. are about the ways in which collective decisions are being contested and made regarding the future shape of development in Latin America and beyond. As it has also been argued here, these changes are intimately linked to the demands of indigenous communities, as well as other groups who have been pressing their demands for radical reformulation of societal visions. To the extent that these demands have been successful, they have left an imprint on the legal design of these states – be it the shift towards a plurinational state (Radhuber 2012), granting of rights to nature (Arsel 2012), or the incorporation of civil society's demand for a post-petroleum future (Arsel and Angel 2012).

The process of contestation in which the 'nation' begins to exercise different forms of control over natural resources by using the capabilities of a strengthened 'state' is also a period of societal rethinking of the relationship between 'the nation' and 'the state'. The numerous conflicts that have emerged in Bolivia and Ecuador over extractive industries – the ongoing struggle against large scale mining in the south of Ecuador and the Tipnis road in Bolivia being just two examples – are not simply conflicts over the preservation of environmental quality or distribution of economic rents. The changing nature and significance of collective-choice rights in these new regimes make these conflicts sites in which the relationship between state and society is being contested. Therefore, nationalisation is transforming the state itself and not just its relationship with economic processes.

This is not to argue, however, that ownership is irrelevant to the study of nationalisation. Rather, the evidence coming from Bolivia and Ecuador demonstrates that it is also important to ask what is being claimed by representatives of the nation in the process of nationalisation, and furthermore what this nation actually constitutes. Thus, the focus on the stream of benefits arising from resources extraction and the associated bundles of rights must be coupled by due attention to their distribution. In fact, these rights and the new limits to their exercise that are in the hands of the State in Bolivia and Ecuador are crucially matched by changes in royalty systems and tax rates. First, these distributional changes provide new legitimacy to extraction and to the state, and are a cornerstone of the political projects of President Morales and President Correa. Second, at least at the level of ambition if not in concrete practice, new legal frameworks require that new state incomes need to be explicitly used for the further construction of plurinational states (see for example Radhuber 2012; 2013; 2014).

Such a position is underscored by the long and abusive history of extractive processes that have and continue to take place in these two countries, where foreign entities or their comprador associates essentially funnel 'national' wealth away from those who often own (e.g. indigenous communities) or operate (e.g. poor and marginalised classes) them. These new processes of 'nationalisation' have thus focused first and foremost on controlling the value generation process, whether through profit-sharing agreements, higher taxation, windfall taxes or other mechanisms, and aimed at financing not only social policies, but also the state transformation processes towards plurinational states.

Considered in this manner, a theory of nationalisation needs to engage with one further implication that emerges from the Bolivian and Ecuadorian examples. Nationalisation cannot be considered as a fixed moment in time that conveniently marks pre- and post-nationalisation phases. Instead, nationalisation, as the preceding empirical

evidence demonstrates, is a contingent and situated historical process. The ‘before’ and ‘after’ approach risks obscuring the complex and accumulative political processes that have culminated in the current ‘Left Turn’ era and that is characterised by augmented state power. In fact, the process of nationalisation can be seen as a perfectly rational strategy that should be implemented, and often is implemented independently of political leanings, when the state is capturing only a fraction of the revenues generated by resource extraction (Berrios et al. 2011). A theory of nationalisation would thus first need to focus as much on explanations of continuities as it does on breakages in historical patterns. Secondly, it always has to be seen in close relation to the political project that actually motivates the nationalisation process, assuming, according to Polanyi, that economic structures must always be embedded in broader societal structures. Doing so necessitates a move beyond simplistic arguments that ‘nothing has changed’ or ‘these are old wines in new bottles’, and instead grappling with the specificities of potential forms of political and economic control over nationalised industries and the related political or transformation process.

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Engaging Legal Systems in Small-Scale Gold Mining Conflicts in Three South American Countries

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Abstract This chapter addresses the relationship between engaging legal systems and the incidence of conflicts in small-scale gold mining. We concentrate on the conflicts that are the result of claims made by different stakeholders in their attempt to gain access to gold-rich soils and rivers and the revenues thereof. Each of the countries studies here – Suriname, Colombia and Brazil – have a complex set of laws, rules and regulations with regard to territory and natural resources. However, in many small-scale gold mining regions, the role of the state in implementing mining legislation and exercising authority has been marginal. Incompatibilities in the legal system and the lack of state laws form an important obstacle to the effective formulation and implementation of public policies for small-scale mining activities, and cause conflict in the respective local settings. By comparing the three cases, we make an inventory of the different legal systems, how these are interrelated and how people make strategic choices between them. This is what we call “engaging legal systems”: the laws and regulations that interact in a situation of legal pluralism, and the users of the laws and regulations who relate to the different legal systems. We argue that the lack of state authority can be an important reason for the engagement of different legal systems. However, engaging legal systems are a common phenomenon in small-scale gold

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