Mining in Peru

Benefiting from Natural Resources and Preventing the Resource Curse
Capstone Workshop - Spring 2015

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The recommendations and content of this Report are the sole responsibility of the 12 authors and do not represent the views of Columbia University or its affiliates, nor the Ministry of Culture, Government of Peru or other stakeholders.
EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

Peru is poised to achieve unprecedented economic success, political stability, and social inclusion after decades of elusive development and periodic relapses into conflict and crises. Recent economic growth can be attributed in part to a vigorous mining sector, as Peru is a global leader in the production of copper, gold, and silver. Peru has been able to avoid detrimental resource revenue dependence through sound policies and legislation and investment management, but mining activities can still destabilize the trajectory of success. Social conflicts fueled by the consequences of mining continue to take place, the slump in economic growth in 2014 has been attributed in part to overreliance on mining outputs, and Law 30230 passed in 2014 to bolster foreign investment has the bearings of a retrograde policy decision, weakening regulations that had been implemented to assure sustainable development. Analysis of laws for mining, investment, and corruption and transparency shows that the Government of Peru has space to continue its growth path while closing gaps through which the destructive impacts of mining might seep in through economic, social, or environmental channels.

Devolution of centralized state authority in Peru has been ongoing. Regional governments now have greater responsibility for local development, inviting investments, the provision of public services, and the management of natural resource revenues, all in accordance with the national agenda. Considerable asymmetries in capacity exist, however, and regional governments are perceived to be unable to effectively manage these responsibilities. Conceptually, strong regional institutions should build community involvement and participatory frameworks that permit more inclusive development planning, foster transparency, and allow for mitigation of the true costs of mining. These true costs include social and environmental impacts that can be assessed using contextual proxies and estimates. Regional and local governments are currently unable to consistently deliver these essential services. Current scholarship surrounding transnational investments posits that investors are driven primarily by the availability of resources and market factors, and pro-investment legislation might only have ancillary effects. A lax regulatory environment might even deter investors if the government cannot confer adequate social acceptance of mining activities, which implies greater risk of unrest or interruption to operations.

Peru has been implementing second-generation investment laws since 2000, which prioritize sustainability, and have a markedly different scope from the preceding generation of laws, which focused on attracting transnational investments. These second generation laws, and the relatively more stringent regulations they stipulate, have not impeded foreign investments in Peru, which have consistently grown in the past decade. Consulta Previa, the Law of the Right to Prior Consultation for Indigenous and Native People (Consulta Previa), was passed by the Government of Peru in 2011 and is a highly progressive application of international human rights standards to protect the interests of indigenous communities. Coupled with the Citizen Participation Law passed in 1990 (Participacion Ciudadana), these laws are intended to provide space for dialogue and participation of all stakeholders in mining activities, reducing conflict and increasing mutual gain. While the laws exist, their implementation has been uneven, and social unrest persists as community members continue to feel exploited by the mining sector. Insufficient consultation of local communities, social and environmental impact assessments whose outcomes don’t have decision-making power, and the absence of sustainable, meaningful enforcement measures can all reverse the positive gains that have been made thus far.

Parts 1 and 2 provide the research design and implementation of this Report, a snapshot of the current political landscape, and an overview of the Peruvian legal system and branches of Government. Part 2 also analyzes the legal framework for Mining Concessions in Peru, which is predicated on providing a facilitating environment for mining companies. Part 2 argues for a strict declaration of the duties and obligations of mining companies. Amongst others, the Part includes recommendations on stringent qualification criteria for grant of Mining Concessions and approval requirements for transfer of Mining
Concessions. Importantly, this Part recommends community engagement even prior to the grant of the Mining Concessions and extensive information sharing with the public and establishment of appropriate grievance redressal mechanisms to address public concerns on the grant of Mining Concessions. Finally, while the titling process in Peru has achieved some positive results, this Report argues that the land registration and titling procedures in rural areas of Peru need greater formalization, so landowners who are impacted by subterranean mining activities can be adequately compensated.

Parts 2(III) and (IV) discuss issues of corruption and lack of transparency, which are estimated to cost Peru USD 3.5 billion a year in market distortions and foregone revenue. Peru has signed on to international anti-corruption measures, in addition to implementing national frameworks. Recommendations in this Part include greater public access to information, self-reporting rules for mining companies, and greater activities in anti-corruption programs, organizational transparency and disclosure of beneficial ownership, and financial and operational reports.

Part 2(VI) scrutinizes foreign investment law, and the balance between foreign investor rights and the Government’s obligations to the welfare of the people. In the event of disputes between the Government of Peru and its foreign investors, this Part discusses what recourse the Governments could pursue to protect its interests. Recommendations in this Part include legal provisions that give the Government clear authority to administer to the people’s needs without accusation of expropriation, and clauses on arbitration proceedings that ensure domestic settlements where possible, and prevents the risk of double counting.

Part 3 provides an overview of the economic implications of mining. It discusses the general state of the economy in Peru, the impacts of foreign direct investment and international trade, unmet infrastructure needs, the distribution and usage of mining revenues (the Canon Minero,) the ‘natural resource curse’, possible tax abuses, and the importance of full cost accounting throughout the entire life of a mining project. Key recommendations in this Part include possible approaches to infrastructure development, a more inclusive design in mining revenue allocation, tax laws with less loopholes, and higher standards for financial disclosure by mining companies.

Part 4 provides an in-depth treatment of the highly nuanced social implications of mining in Peru. It examines past, present, and possible future social unrest as a product of irresponsible mining practices. Rich empirical evidence is provided to demonstrate linkages between mining and conflict, and the dimensions of social license to operate and what that confers is also discussed. Legislation concerning civic inclusion in mining activities is also presented, and recommendations on how the implementation of this kind of legislation, including Consulta Previa, could be strengthened and expanded are also provided. This Part puts forth the need to make Consulta Previa and Participacion Ciudana laws more consistent, the need for consent in certain instances and the execution of an Environment and Social Risks Agreements with respect to certain aspects of the process, and changes in parameters of parent company liability and personal liability for board of directors and managers of the Concessionaire (and its parent company). Recommendations fall within the sphere of social impact assessment and cumulative impact assessment procedures, the responsibilities of different stakeholders, enforcement processes, conflict resolution mechanisms, social risk management, and overall, a comprehensive map of what all the implicated actors need to consider in mining arrangements so as not to threaten social order.

Part 5 examines the environmental impacts of mining in Peru, including the legacy of practices from the past and ameliorative measures that can be taken in the present. Mining in Peru has had detrimental effects on water, air, soil, deforestation, and biodiversity loss, and has worsened carbon emissions. Water receives additional attention, because it has direct channels to social unrest, and mismanagement of water resources has created pre-existing tensions. Recommendations contained in this Part pertain to environmental impact assessment parameters, the implications of Law 30230 of 2014, provisions for how mines should be closed or phased out, and the streamlining and capacity enhancement of monitoring agencies. Part 6 concludes the Report with ending remarks.
METHODOLOGY

The contents of this Report were developed through extensive literature review and desktop research, interviews in New York and Peru, and collective group discussion, all under the guidance of Professor Jenik Radon, Esq. From late December 2014 to April 2015, the seven graduate student authors from the SIPA at Columbia University, New York, studied large scale mineral and metal mining in Peru using economic, social and environmental frameworks, while the five LL.M. students from Columbia Law School (CLS) at Columbia University, New York, studied the governance and legal framework of mining and foreign investments in Peru.

The Capstone project client is the Ministry of Culture, Government of Peru (Ministry of Culture or Client), which oversees the implementation of the Consulta Previa, in all activities that impact indigenous populations, including mining activities. Professor Radon liaised with officials at the Ministry of Culture to refine the scope of the Report.

In March 2015, the Capstone team traveled to Peru for 10 days, where the CLS students conducted interviews with stakeholders in Lima and the SIPA students conducted fieldwork in Arequipa, Espinar, and Cusco, all cities in southern Peru with strong mining presence. These sites were chosen based on research conducted by the students, and were later agreed to by the Client. Fieldwork consisted of interviews, a tour of an active mining site, interactions with and travel to directly impacted communities.

Data collected firsthand during the trip to Peru were analyzed within the existing canon of research, and new insights were developed by the authors to create a report that would be useful to the Ministry of Culture in developing a strategic plan for its mining sector and recommending legal and policy amendments. The strengths of the research methodology include the diversity of perspectives that inform this Report, the refined focus of the Report, and the engagement of primary and secondary sources. The authors hail from professional and academic training in human rights, environmental science, investment and trade, civil rights law, and many other fields, which confers rich nuance to this Report.

The research would have been further strengthened if the team could have met with a larger number of multinational mining companies, in particular those with more recent mining concessions, and if the team had been able to work in mining sites with more organized indigenous community presence. The Capstone team intentionally chose not to use surveys or polls or similar instruments, in the interest of full commitment to rigorous qualitative data collection. In future research, outcomes from this kind of analysis will be highly telling about the perceptions surrounding the various issues in the mining sector in Peru. The Capstone team also faced some logistical challenges due to the brevity of time spent in Peru, and the varying degrees of Spanish language ability of its members. Many primary sources are only available in Spanish, and the team worked internally to translate these documents. Some of the recommendations relating to provisions in legal instruments, statutes etc. contained in this Report have been drafted in English. The Government of Peru (or the relevant ministry) may adapt such recommendations to Spanish language, as required.

Artisanal, informal, and small-scale mining comprise a large part of mining activity in Peru, but are fraught with political complexity and lack of documentation. Peru also has oil and gas mining operations, and state owned enterprises and government actors remain highly involved in these activities. This Report focuses its analysis on large-scale mineral and ore mining exclusively, and the outcomes contained herein are for application in large investments and multinational mining concession contexts only.
## List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form / Description</th>
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<tbody>
<tr>
<td>AIDA</td>
<td>Asociación Interamericana para la Defensa del Ambiente, Inter-American Association for Environmental Defense</td>
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<tr>
<td>ANA</td>
<td>Autoridad Nacional de Agua, National Water Authority, Government of Peru</td>
</tr>
<tr>
<td>ARMA</td>
<td>Autoridad Regional Ambiental, Regional Environmental Authority</td>
</tr>
<tr>
<td>APR</td>
<td>Aporte por Regulación, Contribution for Regulation</td>
</tr>
<tr>
<td>BCRP</td>
<td>Banco Central de Reserva de Peru, Central Reserve Bank of Peru</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
</tr>
<tr>
<td>CAN</td>
<td>La Comisión de Alto Nivel Anticorrupción, High Level Anti-Corruption Commission, Government of Peru</td>
</tr>
<tr>
<td>CDA</td>
<td>Community Development Agreement</td>
</tr>
<tr>
<td>CDP</td>
<td>Carbon Disclosure Project</td>
</tr>
<tr>
<td>CLS</td>
<td>Columbia Law School, Columbia University, New York</td>
</tr>
<tr>
<td>CSO</td>
<td>Civil Society Organization</td>
</tr>
<tr>
<td>DCM</td>
<td>Directorate of Mining Concessions, Ministry of Energy and Mines, Government of Peru</td>
</tr>
<tr>
<td>DGAAM</td>
<td>Dirección General de Asuntos Ambientales Mineros, General Bureau of Environmental Affairs in Mining, Government of Peru</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<tr>
<td>EITI</td>
<td>Extractives Industry Transparency Initiative</td>
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<tr>
<td>FET</td>
<td>Fair and Equitable Treatment</td>
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<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
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<tr>
<td>FPIC</td>
<td>Free and Prior Informed Consent</td>
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<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>HDI</td>
<td>Human Development Index</td>
</tr>
<tr>
<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<tr>
<td>ICMM</td>
<td>International Council on Mining and Metals</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>INDECOPI</td>
<td>Instituto Nacional de Defensa de la Competencia y de la Proteccion de la Propiedad, National Institute for the Defense of Competition and Protection of Intellectual Property</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labor Organization</td>
</tr>
<tr>
<td>IZA</td>
<td>Institute for Study of Labor</td>
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MEF  

MIDIS  
*Ministerio de Desarrollo e Inclusión Social*, Ministry of Development and Social Inclusion, Government of Peru

MILA  
*Mercado Integrado Latino Americano*, Integrated Market of Latin America

MIM  
*Mejorando la Inversión Municipal*, Improving Municipal Investments

MINAG  
Ministry of Agriculture, Government of Peru

MINAM  
*Ministerio del Ambiente*, Ministry of the Environment, Government of Peru

MINCETUR  
*Ministerio de Comercio Exterior y Turismo*, Ministry of External Commerce and Tourism, Government of Peru

MINEM  

MMR  
Modified Mining Royalty

NGOs  
Non-governmental organizations

NRGI  
Natural Resource Governance Institute

OEFA  
*Organismo de Evaluación y Fiscalización Ambiental*, Agency for Assessment and Environmental Control

ONDS  

OSINERGMIN  
*Organismo Supervisor de la Inversión en Energía y Minería*, Supervising Body of Energy and Mines Investment, Government of Peru

PCM  
*Presidencia del Consejo de Ministros*, Presidency of the Council of Ministers, Government of Peru

PETT  
Special Land Titling and Cadastre Project created by the Property Registry, Government of Peru

SEIA  
National System for Environmental Impact Assessment

SENACE  
*Servicio Nacional de Certificación Ambiental*, National Service of Environmental Certification

SIPA  
School of International and Public Affairs, Columbia University, New York

SMB  
Special Mining Burden

SMT  
Special Mining Tax

SNIP  
*Sistema Nacional de Inversión Público*, National System of Public Investment, Government of Peru

SNMPE  
*Sociedad Nacional de Minería, Petróleo, y Energía*, National Association of Petroleum and Energy, Government of Peru

SUNAT  
*Superintendencia Nacional de Administración Tributaria*, National Tax Association, Government of Peru

UNDP  
United Nations Development Programme
<table>
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<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous People</td>
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<tr>
<td>VSL</td>
<td>Value of a Statistical Life</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<tr>
<td>WWF</td>
<td>World Wildlife Fund</td>
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PART 1. INTRODUCTION

Peru’s riches extend from skyscrapers in Lima to environmental reserves in the northern Amazon to miles of Pacific coastline to UNESCO World Heritage site Machu Picchu in the southern Andes. Peru has been leading the South American region in GDP growth rate and investment inflows since 2008 and has shown notable improvements in indicators of civil liberties and human development. For a country where the institutionalization of democratic governance has been marked by false starts, uneven support, and lack of clarity for decades, Peru’s recent achievements are highly promising.

Durable political stability and resilient economic development have been elusive in spite of vast natural resources, human capital, and infrastructure. When the Spanish arrived in Peru in 1531, the Inca Empire had already been established for three centuries, and Lima was easily co-opted as a base for expansion into the rest of the continent. Following independence from Spain in 1821, Peru was governed by a succession of generals and oligarchs until the rise of the military regime in 1968. Under authoritarian military rule, already frail political systems and an economic growth model of import-substitution industrialization were failing, and so the 1979 Constitution was brokered to reestablish democratic governance. Key attributes of this Constitution included systematic devolution to the 25 regions and 196 provinces that comprise the country and appointments of sub-national authorities by popular election.

In the decade following the return to democracy, however, the country struggled with sovereign debt crisis, hyperinflation, social unrest and terrorism at the hands of the Sendero Luminoso Communist extremist movement. In 1990, Alberto Fujimori was elected president, a position he held until 2000 through corruption and manipulation, and in violation of term limits and statutes of civil liberties and freedom of the press. Fujimori is currently in prison for these crimes. Under Fujimori’s structural reforms and fujishock (a bundle of inflation reduction, contractionary monetary policy, and austerity measures) the Peruvian economy stabilized and made a vigorous recovery. It was under Fujimori that state owned companies were privatized, the Central Reserve Bank of Peru (Banco Central de Reserva del Peru) (BCRP) was established, the exchange rate was allowed to float, capital controls were lifted, and the country began its ongoing policy of trade openness.

It has been said that when Alejandro Toledo was elected president in 2001, Peru had “returned to the starting point of the democratic consolidation it had begun in 1980.” In spite of access to information laws passed in 2002 to increase transparency and decentralization reforms passed in 2003 to increase citizen participation in local and regional government, social and political fragmentation deepened and fueled greater tension. In 2006, former president Alan Garcia Perez was elected to serve a second term, and his


3 Id.


5 Id. at 26.


7 Id. at 3.

8 ICMM, Case Study, supra note 2, at 41.

9 Stiftung, supra note 6, at 4.

10 Id. at 3.

administration further cemented the structure of Peru’s free market economy. During this time, in spite of high economic growth rates, the informal sector remained large, and inequality persisted.\textsuperscript{12}

President Ollanta Humala was elected into office in 2011 after a campaign promising a pragmatic leftist approach to addressing inequality through social and economic transformations in the style of former Brazilian president Lula da Silva.\textsuperscript{13} While in office, President Humala has shifted right, like his predecessors, and his administration has experienced high turnover in several key positions.\textsuperscript{14} As of April 2015, the Government has created many social service instruments and pro-poor institutions while maintaining economic stability and inviting greater investment, but unfortunately it has also gone through six prime ministers in four years,\textsuperscript{15} which prevents the institutionalization of stable administration.

Macroeconomic indicators and performance on business climate indices for the country remain strong, but Peru still falters in other areas, including socioeconomic equality and education, transparency, and quality of governance. In 2014, Peru received a 73.7\% score on the United Nations Development Programme’s (UNDP) Human Development Index (HDI), a composite measure based on health and longevity of the population, access to information and education, and economic opportunity.\textsuperscript{16} This score puts Peru in the high HDI category, and is an improvement from years past, but compared to the Latin America and Caribbean regional average the country is still catching up. In further UNDP analyses, Peru performs well in gender development, but poorly in socioeconomic equality.\textsuperscript{17} Since 2005 extreme poverty has been dramatically reduced, but it still persists in rural areas, where infrastructure, education, and the provision of public goods have also remained the least developed.\textsuperscript{18}

While Peru’s political structures and institutions have been regaining public support over the past decade, social unrest persists. The largest driver of this unrest has been socio-environmental disputes over activities in mining and other industries in the extractives sector, and the perceived failure of state institutions to provide protection for impacted communities.\textsuperscript{19} It is well documented that resource rich developing countries have to achieve balances between growing per capita income and fostering national economic development while meeting public infrastructure and financing needs in a volatile world market, and mining companies are increasingly aware of the importance of community acceptance to their continued operations and viability.\textsuperscript{20} As Government, mining company, and community member actors develop more inclusive practices for representation and involvement, there is much benefit that can be more sustainably captured from Peru’s natural resources. As the largest cocaine producer in the world, with cocalero civil society undermining rule of law in several provinces, reform in the natural resources sector is imperative.\textsuperscript{21} The World Bank’s Worldwide Governance Indicators give Peru low scores in ‘government effectiveness’, and the country has been unable to improve its low ‘political stability’ and ‘absence of violence and terrorism’ score over the past decade.\textsuperscript{22} National security could be a concern, given the history of conflict in the

\begin{thebibliography}{22}
\bibitem{supra} ICMM, Responsible Mining, supra note 4, at 40.
\bibitem{Id.} \textit{Id.}
\bibitem{Id.2} \textit{Id.}
\bibitem{Id.3} \textit{Id.}
\bibitem{supra2} ICMM, Responsible Mining, supra note 4, at 11.
\bibitem{Bl} Bland and Chirinos, supra note 11, at 75.
\bibitem{St} Stifting, supra note 6, at 8.
\end{thebibliography}
country, unresolved social discontent, systemic inequality, and the large illicit revenue coming from cocaine and unmonitored activities in the informal sector.

Peru is rich in copper, gold, silver, lead, zinc, natural gas, and petroleum deposits, and the economy continues to be dominated by mining output and investments.\(^{23}\) The country continues to show improvement in the World Bank Doing Business indicators, and investors continue to be drawn in by the strong financial services sector, the clear regulatory environment, and investment friendly tax regimes.\(^{24}\) There is concern, however, that there is weak enforcement of environmental protection laws and that local authorities might not be able to contain social conflict that arises from discontent over the direct and indirect impacts of mining.\(^{25}\) There is general agreement that Peru has been able to avoid the Natural Resource Curse, which posits that resource rich countries are often unable to sustain economic development because it is difficult to channel revenues from volatile commodity prices and boom-bust cycles to meet long-term development and infrastructure needs.\(^{26}\) This asymmetry is worsened by the low per capita income, scarce capital, and limited access to credit that often characterize resource rich developing countries.\(^{27}\) While the ‘natural resource curse’ is generally applied to economic channels, it also has significant implications for society and the environment. Resource dependence can lead to erosion in public trust, exacerbation in regional inequalities, distortion in migration and talent and labor movements, neglect of other environmental resources such as water systems or biodiversity, and other negative consequences that can arise because of natural resource abundance.

By drawing on primary government sources, private and public research, and interviews with relevant actors, this Report expands upon the economic, social, and environmental implications of the future of mining in Peru, and the legal framework that currently regulates mining investments. President Humala has demonstrated commitment to more equitable economic and social development, and reeling from the sharp contraction in GDP growth in 2014, there should be greater awareness that the country needs economic diversification. Policy reactions, however, have been shortsighted: Law 30230 was enacted in 2014, and in trying to reinvigorate foreign investment, relaxes regulations and threatens to reverse gains in sustainable development in mining. Sound policy has guided Peru out of crises in the past, and will be important to fortifying recent gains and reinforcing development for the future. This Report provides legal and policy guidance in establishing more inclusive development strategies for the mining sector in Peru so that benefits can be captured, and the negative impacts minimized.

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\(^{25}\) Peru – Selected Issues, supra note 1, at 11.

\(^{26}\) Id. at 5.

\(^{27}\) Id.
PART 2. PERUVIAN LEGAL FRAMEWORK

This Part explores some of the key areas of Peruvian law that relate to mining. It first provides an overview of the Peruvian legal system, setting out the powers of the various arms of the state, as well as explaining the system of decentralization. Second, it reviews the Mining Law, with a particular focus on mining concessions and reforms that could be made in that area. Third, this Part analyzes Peru’s corruption and transparency laws, and identifies potential issues of concern relating to both the framework and to corruption and transparency within Peru. Finally, it concludes by looking at Peru’s foreign investment law, focusing in particular on its obligations under various international treaties. This Part sets the legal context in which the later chapters of Economics, Social, and Environment aspects of mining in Peru operate.

I. Overview of Peruvian Legal System

Peru is a unitary state, that is, a state governed by one Central Government.28 The Government is representative and decentralized, and organized pursuant to the principle of separation of powers. 29 Decentralization is “a form of democratic organization and a mandatory, continued policy of the State” of which the “essential purpose is the comprehensive development of the country.”30 The Political Constitution of Peru 1993 (Constitution), mandates that the decentralization process be carried out in stages “following criteria that permit the proper distribution of jurisdictions and transfer of resources from the national government to local and regional governments.” Peru is a monist system, that is, international treaties become a part of Peruvian law once ratified and do not require transformation.31 Further, it has a civil law country legal system based in which the following hierarchy of laws applies (See Figure 1.1).32

Decentralization: Regional and Local Government Capacity

An issue that arose repeatedly in discussions with stakeholders during the fieldtrip was that of regional and local government capacity. The decentralization process requires the transfer of powers and functions from the Central Government to local and regional governments. One of the biggest concerns is that regional and local governments lack capacity to properly implement these powers and functions they are receiving. Examples of this lack of capacity are raised through various Parts of this Report. More broadly, this Report emphasizes the need to ensure that regional and local governments have the funding, training, and expertise to properly deal with the mining-related responsibilities they are receiving through decentralization.

Note: For a discussion of some of the problems related to sub-national revenue mobilization in Peru, see Gustavo Canavire-Bacarreza, Jorge Martínez-Vázquez & Cristián Sepúlveda, “Sub-national Revenue Mobilization in Peru,” Inter-American Development Bank, 2012.

29 Constitution, art. 43.
30 Constitution, art. 188.
31 Treaties that concern human rights; sovereignty, dominion, or integrity of the state; national defense; and financial obligations of the state must be approved by Congress prior to ratification. Constitution, art. 55.
32 For references see Constitution, art. 51; José A. Honda, Energy Law in Peru (The Netherlands: Wolters Kluwer Law & Business, 2010), 30, 32-3 [hereinafter Honda].
Peru’s official languages are “Spanish and, wherever they predominate, Quechua, Aymara, and other native tongues, in accordance with the law.” According to one Government source, there are some 47 Indigenous languages in Peru. One of the fundamental duties of the Peruvian state is to “promote general welfare based on justice and the comprehensive and balanced development of the Nation.” The state comprises legislative, executive and judicial branches.

**Legislative Branch**

The Legislative Branch is vested in Congress. The duties of Congress include passing laws and legislative resolutions; interpreting, amending and repealing existing laws; and confirming treaties according to constitutional process. Congress is able to “delegate the power to legislate to the Executive Branch through legislative decrees on specific matters” pursuant to the authorizing law.

**Executive Branch**

The Executive Branch is headed by the President, who is the head of state. Presidential terms are five years in duration. The duties of the President include managing the general policy of the government; exercising the power of regulating laws without violating or distorting them and issuing decrees and resolutions; formalizing and ratifying treaties. The Cabinet, comprising of ministers, administers and manages public services. Regulations, which are approved by relevant ministries, are enacted through supreme decrees. Cabinet is charged with approving bills submitted to Congress by the President.

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33 Constitution, art. 48
35 Constitution, art. 44.
36 See Constitution, Title IV.
37 Constitution, art. 90.
38 Constitution, art. 102. See Constitution, arts 55-56 for the treaty ratification process.
39 Constitution, art. 104.
40 Constitution, art. 110.
41 Constitution, art. 112.
42 Constitution, art. 118.
43 Constitution, art. 119.
44 Honda, supra note 32, at 32-3.
approving legislative and emergency decrees enacted by the President, as well as bills, decrees, and resolutions as set forth by law, and deliberating on matters of public interest.

While the Peruvian Government is unitary, the Constitution delegates some functions to the regions in the interests of efficiency and a reduction of terms in procedures. 45 The nation is divided into regions, departments, provinces, and districts. 46 At each level, a government is exercised and organized at national, regional and local levels. 47 The regional level of government consists of regions and departments, while the local level of government comprises provinces, districts and villages. 48 Regions are created on the basis of “contiguous areas with historical, cultural, administrative, and economic relations.” 49 Regions and their provinces have different functions and, while each level of government has autonomy, they must all coordinate and make decisions according to a National Plan. 50

Regional governments exercise “political, economic, and administrative autonomy on pertinent matters within their jurisdiction.” 51 The structure of regional governments includes “the Regional Council as the regulatory and oversight body, the President as the executive organ, and the Regional Coordination Council formed of provincial mayors and representatives of civil society as a consultative body to coordinate with municipalities, with their functions and authorities set forth in the law.” 52 Regional governments are tasked with promoting “regional development and economy; encourage investments, activities, and public services within their jurisdiction, in harmony with national and local development plans and policies.” 53 The property and revenue of regional governments includes resources resulting from natural resource royalties. 54

As bodies of local government, provincial and district municipalities exercise “political, economic, and administrative autonomy on the matters within their jurisdiction.” 55 The purposes of local governments are to “stimulate development, the local economy, and the delivery of public services within their responsibility, in harmony with national and regional development plans and policies.” 56 Municipalities promote, support, and regulate citizen participation in local development. 57

Figure 1.2 provides an overview of the various functions of the regional and local governments. 58

45 Id. at 32.
46 Constitution, art. 189.
47 Constitution, art. 189.
48 Constitution, art. 189.
49 Constitution, art. 190.
50 Honda, supra note 32, at 32.
51 Constitution, art. 191.
52 Constitution, art. 191.
53 Constitution, art. 192.
54 Constitution, art. 193.
55 Constitution, art. 194.
56 Constitution, art. 195.
57 Constitution, art. 197.
58 See Constitution, arts. 192, 195.
The Judicial Branch

The Judicial Branch comprises “hierarchical entities”, namely, “the Supreme Court of Justice (Supreme Court) and the other courts and tribunals as determined by their organic acts.” In descending hierarchy below the Supreme Court, the judicial branch comprises the Superior Specialized Courts in each of the regions, the Specialized Courts, and the Justices of the Peace. The Chief Justice of the Supreme Court is the head of the Judicial Branch. The Supreme Court is the court of last resort. In judicial determination of incompatibility, the following hierarchy applies:

- constitutional rule;
- legal rule;
- any other rule of lower rank.

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59 Constitution, art. 138.
60 Constitution, art. 143.
61 For information see the government website “Poder Judicial del Perú,” Inicio, http://www.pj.gob.pe/wps/wcm/connect/CorteSuprema/s_cortes_suprema_home/as_Inicio/ (accessed March 16, 2015); for the Constitutional provisions on the Justices of the Peace see Ch IX, art 152.
62 Constitution, art. 144.
63 Constitution, art. 141.
64 Constitution, art. 138.
The Constitutional Court—the body assigned to hear writs of unconstitutionality, orders refusing constitutional petitions, and disputes over jurisdiction or powers assigned by the Constitution—is made up of seven members who are elected by the Congress to serve five-year terms.65

Having a basic understanding of the Peruvian legal system and, in particular, the powers of the various arms of government, is important for considering the various legal and policy reforms that this Report recommends. This Part will now detail the laws applicable to mining in Peru and mining concessions.

A. General Overview of Mining Legal Framework

The Peruvian state is constitutionally mandated to promote the creation of wealth and free enterprise, trade and industry, with the limitation that the exercise of these freedoms must not be harmful to the public morals, health, or safety.66 Mining exploration and extraction activities are governed by a number of laws and regulations. The General Mining Law (Mining Law) is the key legislation that governs all mining activities in Peru.67 In addition to the Mining Law, a number of other laws and regulations enacted by Congress and the Executive regulate mining in Peru.68

The country has undergone a contradicting series of developments with respect to its regulation of mining. Initially enacted in 1992, the Mining Law aimed to attract foreign investment.69 Between 2000 until 2014, the trends and developments in international law, increasing concerns for the negative impacts of mining raised by booming activity, the privatization of state mining companies, and practices (and requirements) brought by international organizations involved in legal reform, resulted in the enactment of a number of laws and regulations with a focus on sustainable development.70 In 2014, however, the Government enacted a raft of laws in Law 30230, “Law that establishes tax measures, simplifies procedures and permits for the promotion and revitalization of investments in the country,”71 (Ley Que Establece Medidas Tributarias, Simplificación de Procedimientos y Permisos Para la Promoción y Dinamización de la Inversión en el País) (Law 30230) that signal a reversion to its formerly pro-investment, and weaker environmental regulation, stance. Enacted in response to slowing annual growth rates and production of key metals, Law 30230 seeks to stabilize the country’s economy and maintain investor confidence. However, it is extremely concerning in terms of environmental standards and protection.72 This legislative development is discussed further in the context of environmental issues in Part 5 of this Report.

Figure 1.3 provides a snapshot of some of the relevant laws that apply to mining in Peru that are considered in this Report.

Figure 1.3 Map of Select Mining-Related Laws

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65 Constitution, art. 201.
66 Constitution, art. 59.
69 Id.
The Mining Law encompasses “all matters relating to the exploitation of minerals found on and below the surface of the national territory, as well as deep-sea resources.” The types of concessions permitted by the Mining Law, specifically the Mining Concessions are discussed further in this Part. The Ministry of Energy and Mines, Government of Peru (MINEM) is empowered to regulate mining activities and is a part of the Executive Branch of the Government.

Under the Mining Law and the Mining Concession, mining companies are required to pay annual, ongoing concession fees, and to submit environmental impact studies for all exploration and development activities. Independently of the environmental impact assessment (EIA) process, mining companies must also obtain water rights and surface land rights.

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73 Mining Law, Preliminary Title, I.
75 Id., at 3, 9.
76 Id.
B. Mining Concessions

As in other Latin American countries, Peru follows a “domain system” of ownership of natural resources, that is, the Peruvian state is the original owner of all mineral resources. Rights to conduct mining activities are granted through concessions in Peru. While the Mining Law permits the following four types of concessions, the focus of this Report will be on Mining Concessions, as most of the issues discussed in this Report relate only to the exploration and exploitation of mineral resources:

<table>
<thead>
<tr>
<th>Concession</th>
<th>Rights under the Concession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mining Concession</td>
<td>Rights to explore and exploit mineral resources.</td>
</tr>
<tr>
<td>Beneficiation Concession</td>
<td>Rights to extract or concentrate valuable metals and to smelt,</td>
</tr>
<tr>
<td></td>
<td>purify or refine metals.</td>
</tr>
<tr>
<td>General Works Concession</td>
<td>Rights to provide support services to two or more mining</td>
</tr>
<tr>
<td></td>
<td>concessions.</td>
</tr>
<tr>
<td>Mineral Transportation Concession</td>
<td>Rights to install and operate transportation systems between</td>
</tr>
<tr>
<td></td>
<td>mining centers and ports, processing plants and refineries.</td>
</tr>
</tbody>
</table>

C. Grant of Mining Concessions

Under Peruvian law, a Mining Concession is an administrative title with proprietary features: it can be recorded, registered, transferred, mortgaged, and has no expiration date, if the holder meets the obligations set forth by the Mining Law. A Mining Concession is granted by an administrative procedure conducted...

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77 Terminology used by the personnel at INGMMET, MINEM. Interview with INGEMMET, Interview by Nandini Ravichandran, Ruthia Yi, Kazumasa Ueda, March 19, 2015. In Peru, the domain system had its origins with the Viceroyalty legislation. The Ordinances of Viceroy Toledo in 1574 and the Ordinances of Peru of 1776 established that the minerals belonged to the King of Spain, and they could be granted to the subjects of the Crown for their exploitation in exchange for the payment of a tribute to the Royal Treasury. See José Antonio Olaechea, “Resolution of Conflicts between Surface Owners and Mining Concessionaires: The Peruvian Case,” 2003-2 RMMLF-INST 12C (2003), available at https://lawschool.westlaw.com/ (accessed on March 21, 2015) [hereinafter Olaechea].

78 Art. 66 of the Constitution, which reads as follows: “Natural resources, renewable and non-renewable, are patrimony of the Nation. The State is sovereign in their utilization”. See also Mining Law, Preliminary Title, II.

79 See Mining Law, Preliminary Title, II: “The exploitation of mineral resources is carried out through State and private enterprises, by the use of the system of concessions”. (emphasis supplied). To clarify, there is no contract executed between the Government and the private party and the private party is granted an administrative title.

80 Mining Law, Second Title, Concessions.

81 A Mining Concession is granted for a minimum of 100 hectares and a maximum of 1,000 hectares.

82 Mining Law, Second Title, art. 9.

83 Beneficiation Concessions cover mechanical preparation (crushing, classification and washing) of minerals, metallurgy (the processes used to extract or concentrate substances from ore) and refining (purification of metals from products obtained through metallurgical processes). See Mining Law, Second Title, art. 17.

84 Mining Law, Preliminary Title, art. 18.

85 General works concessions concern all mining activities that provide support services. These include ventilation, draining, hoisting, and extraction. See Mining Law, Second Title, art. 19.

86 Mining Law, Second Title, art. 20.

87 Mining Law, Second Title, art. 22.

88 Mining Law, Second Title, art. 23.

89 Mining Law, Second Title, art. 10.
by INGEMMET, which is an agency under MINEM, on a first-come, first-serve basis. In the application for a Mining Concession, the applicant is required to clearly specify as to whether it is seeking a concession for metallic or non-metallic minerals. A single concession is sufficient from both exploration and exploitation activities. Foreign investors and Peruvian nationals are generally afforded equal treatment with respect to the grant of Mining Concessions. Figure 1.4 sets out the entire process of applying for and grant of a Mining Concession:

Figure 1.4: Process for applying for and grant of a Mining Concession

1. An individual or a company can request a Mining Concession by making a petition to INGEMMET.
2. The DCM has seven working days to review the request and if it meets all the requirements notify the applicant posters.
3. The applicant has 30 working days to publish the posters in newspapers showing the DCM, and 60 calendar days to submit the entire original page news publications attesting to the INGEMMET.
4. The DCM has 30 working days to issue reports and five working days to refer the case to the President of INGEMMET.

90 While INGEMMET is in charge of granting regular mining concession, the regional governments have the authority to grant mining concessions for small and artisanal miners. Information provided by the personnel at INGEMMET, MINEM. Interview with INGEMMET, Interview by Nandini Ravichandran, Ruthia Yi, Kazumasa Ueda, March 19, 2015.

91 Note that a public auction should be undertaken in certain specified instances. Further, when there are competing claims for a Mining Concession, auction may be conducted to allot the Concession.

92 In discussions with personnel with INGEMMET, it was highlighted that while a mining company can request for a change in the category, i.e., metallic to non-metallic and vice versa, a mining company cannot hold a concession for both metallic and non-metallic minerals at the same time over the same area of land. Further, there are some restrictions on mining over agricultural land etc. Information provided by the personnel at INGEMMET, MINEM. Interview with INGEMMET, Interview by Nandini Ravichandran, Ruthia Yi, Kazumasa Ueda, March 19, 2015.

93 Contrast this to the legal framework in Chile, where a mining concession is granted either for exploitation or exploration. An exploration concessionaire does not have the right to exploit minerals and the exploration concession is valid for an initial period of 2 years, which can further be extended for an additional period of two years.

94 However, within a distance of 50 kilometers from the borders, foreigners may not acquire or possess under any title, directly or indirectly, mines, lands, woods, water, fuel, or energy sources, whether individually or in partnership, under penalty of losing that so acquired right to the State. The sole exception involves cases of public need expressly determined by executive decree and approved by the Cabinet, in accordance with the law. See Art. 71 of the Constitution. For e.g., in 2007, the Canadian company, Bear Creek was granted the mining concession over the Santa Ana project, by a Supreme Decree, as the mineral rights were located within the 50 km border regions of Peru. However, in 2011, the permission granted vide a Supreme Decree was rescinded (by another Supreme Decree). Public reports suggest that the permission was withdrawn on account of conflicts in the area. Bear Creek is now initiating arbitration proceedings before the ICSID against Peru under the Canada Peru FTA. See generally Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/2.

5. The President of INGEMMET to approve the title no earlier than 30 calendar days from the last publication of the poster.
6. The INGEMMET shall publish the title within 15 days of the following month granted.

Some commentators have raised concerns about the administrative processes involved in the granting of mining concessions. In the context of private concession contracts, it has been argued that government officials treat concession contracts as bilateral agreements and tend to make inefficient choices in the absence of any consultation with the local stakeholders.\footnote{Nicholas Miranda, “Concession Contracts: From Private Contracts to Public Policy,” 117 Yale L.J. 510, December 2007, available at https://lawschool.westlaw.com/ (accessed on March 23, 2015) [hereinafter Miranda, Concession Contracts]. The author argues that the insular administrative process provides an increased opportunity for malignant corruption, short-term prioritization that undermines long-term gain, and non-optimal levels of tariff creation.} Theoretically, permit based concession systems, such as in Peru are intended to bring clarity and provide for a uniform system. However, concerns relating to arbitrariness and inefficient choices can become applicable even in the case of an administrative process.\footnote{According to the legal framework in Chile, mining concessions, both for exploration and exploitation, are granted by a judicial resolution from the civil courts in a voluntary and non-contentious judicial proceeding. The main consideration behind this judicial nature of the concession is the non-intervention of any other authority (lack of administrative interference) with the technical support provided by the National Mining and Geologic Service. “Mining in Chile,” Latin Lawyer, available at http://latinlawyer.com/reference/topics/46/jurisdictions/3/chile/ (accessed on March 23, 2015).} Apart from a real threat of misuse of the state machinery by political elites, the eagerness of the Government to attract investment in the mining sector coupled with issues of corruption and secrecy could result in misuse of the administrative process. Especially in light of the fact that there are no qualification criteria relating to technical or financial capacity of the applicant for the grant of Mining Concessions, concerns arise on the fairness of the administrative procedure for grant of Mining Concessions in Peru. Currently, absence of any qualification criteria is justified on the basis of the fact that a Mining Concession by itself does not guarantee a company the right to explore and exploit minerals in the allotted area.\footnote{A Concessionaire that intends to start operations must obtain a series of authorizations and permits from different central, regional and local government entities. For e.g., in order to start up the Antamina project in the Ancash region, in Peru, the Concessionaire had to obtain more than 370 authorizations and permits from different administrative entities. See Antonio Pinilla Cisneros, “The Impact of Sustainable Development of Mining Projects: The Peruvian Experience,” 2007 NO. 2 RMMLF-INST PAPER NO. 6A, https://lawschool.westlaw.com/ (accessed on March 22, 2015). In addition, mining concessionaires have to obtain environmental authorizations to carry out exploration and exploitation activities. Peruvian law requires having an EIA approved by the General Bureau for Environmental Affairs, an agency that reports to the MINEM, as a basic requirement to carry out these activities. The EIA preparation process includes participatory mechanisms to foster the participation of communities located in the vicinity of the projects. See Part 5 for more details in this regard.}

Notwithstanding the detailed procedure for permits and licenses at a later stage in the mining project development, even at the stage of application for a Mining Concession, the Government should introduce specific qualification criteria. An applicant should be required to provide proprietary information and demonstrate technical and financial ability at the time of making the application for a Mining Concession. Proprietary information is relevant to ensure that the Government can pursue company shareholders for recourse, if required and is also essential to avoid the phenomenon of hidden owners and beneficiaries, including powerful political players, whose involvement would raise concerns relating to the reputation of such a company. (see \textbf{Part 2(V)(C)} for further discussion on disclosure of Beneficial Ownership).

It is important to ensure that the applicant (or its controlling owners) has the necessary technical and financial ability to undertake the proposed mining operations. These requirements eliminate concerns related to subjectivity from the grant process and would ensure that the administrative agency has all information required by it to make efficient choices in the grant of the Mining Concessions. Furthermore, the experience of the applicant in undertaking mining operations, its technical and financial capacity, expertise and prior experiences, shareholders’ profile, operation methods, and access to technology should be specifically reviewed to ensure that it has the capacity to undertake and fund the mining operations and to eliminate any suspect entities from the process. The applicant should provide adequate representations...
on its technical and financial ability and shall ensure that the capacities continue to available through the entire period of the mining operations.

Currently, there are no restrictions on who can make applications for a Mining Concession. Prior activities of a mining company in Peru should be a relevant consideration for the grant of Mining Concession. In the grant of a Mining Concession, the agency should check if an applicant has a poor track record on operations in Peru, that is, if the company caused considerable environmental harm or had negative relationships with communities. Moreover, if a mining company has a pending issue in relation to a previous Mining Concession or the Government previously terminated a Mining Concession granted to the company, due consideration should be given to this aspect as well. All of this will ensure that the legacy of the applicant does not impede sustainable and inclusive development from the Mining Concession.

**RECOMMENDATIONS**

The Government should include the following provisions in the Mining Law:

As a part of the application for a Mining Concession, the applicant shall provide the following:

(i) a summary of the preliminary proposal for the Mining Concession,
(ii) details of projects undertaken / being undertaken by the applicant company and / or its Controlling Owners across the world and their technical capabilities— it is important for an applicant to submit such information as would demonstrate the technical capability of the applicant in undertaking projects of similar nature,
(iii) details of the financial ability of the applicant company and / or its Controlling Owners and ability to raise funds to cover the project costs,
(iv) details of any prior termination of Mining Concessions arising from a default by the applicant company or its Controlling Owners, and
(v) details of its Beneficial Owners.

In addition to the above, the applicant shall also timely provide such other information as may be reasonably required for the considering the application for the Mining Concession.

As a part of the application for the Mining Concession, the applicant shall provide a representation and warranty on its technical and financial capacity. Further, the applicant shall provide an undertaking that should it be granted the Mining Concession, it will continue to maintain the requisite technical and financial capacity through the term of the Mining Concession. For the purposes of this provision, the applicant can include the technical and financial capacity of the Controlling Owners, provided the Controlling Owners shall furnish a guarantee to the effect that it will ensure that the applicant remains technically and financially sufficient to undertake the mining operations.

For the purposes of this Part, a person shall be a ‘Controlling Owner’: if it / she owns more than 50% of the capital of the applicant, and /or has the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of its / her shareholding or management rights or shareholders agreements or voting agreements. Provided where the applicant is a partnership firm, complete details of all the partners shall be provided and where the partners are corporate entities, the details of the ultimate owners and / or the controlling shareholders of such entity shall be disclosed.

The lack of consultation with communities prior to the grant of Mining Concessions is a further point of concern.99 When applying for a Mining Concession, applicants are required to publish a notice in the local newspaper of the area where the concession is being sought. However, such a notice is required to be published only once and the notice is posted in the local government’s office in very limited circumstances, Miranda in his article argues that the vantage point of the local communities gives such communities more information in relation to the concession (and any repercussions thereof) as opposed to government officials granting such concessions. Absence of any engagement with the local population prior to the grant of mining concession could result in no recourse being available to the communities, which could result in community conflicts. See Miranda, Concession Contracts, supra note 96.
that is, where there is no local newspaper. The local government or the prospective concessionaire is not required to proactively inform the community of the proposed concession. Consequently, the requirement for publication seems to be a mere formality and there does not seem to be any tangible engagement with the community or local landholders prior to the grant of a Mining Concession. In this context, due consideration must be given to the geographical terrain of Peru and the fact that certain populations may not be living in the vicinity of the local governments’ offices or may not have access to newspapers. This raises concerns relating to the transparency of the process and also acts as a barrier to effective participation by the communities in the consultation process. See Part 4(VI) for further discussion on the issue of community engagement in mining in Peru and recommendations that expand on the principle of free, prior informed consultation and consent in the laws on community engagement (in particular, the Consulta Previa and Participacion Ciudana).

**RECOMMENDATIONS**

The Government should increase transparency and accountability in the process of awarding a Mining Concession. The following steps should be taken:

Require that notice of an application for a Mining Concession be published in the local newspaper of the community that is in the vicinity of the proposed Mining Concession. The notice shall be made in the local indigenous language, if any, as well as Spanish for a minimum period of 30 consecutive days.

Require that the notice (in the local indigenous language and Spanish) be posted in the local governments’ offices in a position where it is easily viewable by members of the public.

Require the applicant and the local government to proactively engage with the relevant local population and inform them of the application for a Mining Concession. For example, the company and the local government should be required to furnish to the identified community leaders and other key members of the relevant communities information on the application for the Mining Concession, including details on the lands that will be affected by the proposed mine; a senior representative of the local government and the applicant company should be required to travel to the local areas of the communities and inform them of the application for the Mining Concession and other details relating to the proposed mine.

The authors are currently not aware of any mechanism for dealing with any objections raised pursuant to the publication of the notice of application for a Mining Concession. Facilitating access to effective grievance redressal mechanism is an integral part of the state’s duty to protect against corporate related abuse. This Report argues that Peru should establish a targeted redressal mechanism to deal with any complaints relating to the application for Mining Concessions. Doing so would provide means for persons who believe that they will be harmed by the proposed Mining Concession to bring their complaints before the authorities and seek remediation.

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100 Information provided by the personnel at INGEMMET. Interview with INGEMMET, Interview by Nandini Ravichandran, Ruthia Yi, Kazumasa Ueda, March 19, 2015.

101 The applicant company is required to sign a declaration stating that it will comply with environmental and social standards. Based on the discussions with the personnel from INGEMMET, the authors understand that this undertaking is a basic undertaking and there are no specific conditions included in such undertaking. Interview with INGEMMET, Interview by Nandini Ravichandran, Ruthia Yi, Kazumasa Ueda, March 19, 2015. A Spanish version of the undertaking can be accessed on the website of INGEMMET.

RECOMMENDATIONS

A targeted redressal mechanism for dealing with complaints in relation to applications for Mining concessions should be instituted in the local governments.

All complaints and objections shall be escalated to INGEMMET and INGEMMET should not approve a Mining Concession, pending resolution of such objections. The following provision should be included in the Mining Law:

Upon a publication of a notice of application for a Mining Concession, if the local government or the applicant company or INGEMMET receive any reasonable and non-frivolous objections from the members of the communities in the vicinity of the proposed Mining Concession, such complaints shall immediately be escalated to the relevant personnel at INGEMMET. The aggrieved persons shall be provided a reasonable opportunity of being heard and INGEMMET shall not approve a Mining Concession till such time any objections have been resolved in a manner acceptable to the persons, raising such objections. Members of the relevant communities shall have a period of [90] days to raise objections to any application for a Mining Concession.

D. Concerns Relating to Limited Irrevocability of Mining Concessions

The concerns discussed above are exacerbated by the fact that a Mining Concession is not limited in time and can be terminated only for non-payment of mining good standing fee or not achieving certain production targets within the periods specified in the Mining Law.\(^1\) This Report argues that the Mining Concession should not be irrevocable in nature and should automatically terminate in certain circumstances:

Bankruptcy

A Concessionaire has specific financial responsibilities, both in terms of the annual royalty payments under a Mining Concession and specific obligations arising from its operations. Consequently, it is important to ensure that the Concessionaire and its Controlling Owners continue to remain financially viable. If the Concessionaire is bankrupt, not only will it affect its ability to carry on mining operations, it may also result in abandonment of the mine by such Concessionaire. In such a scenario, the Government will have the responsibility of financing the cleanup and other issues relating to the abandoned mine. Furthermore, lenders of the Concessionaire, may, upon a bankruptcy, require the enforcement of the security interest created over the Mining Concession. Finally, given a Concessionaire is normally dependent on its Controlling Owners for financial resources, a bankruptcy of its Controlling Owner should also trigger a termination of the Mining Concession. Consequently, this Report argues that provisions for termination of the Mining Concession on the occurrence of a bankruptcy event of the Concessionaire or its Controlling Owners should be introduced.

Compliance with Legal Obligations

There are a number of legal obligations that are imposed on a Concessionaire under the Mining Law and the Mining Concession. Some key legal obligations relate to obligations under environmental laws (See Part 5, filing of an annual consolidated statement (see Part 2(V)(C) for further discussion on this), and other similar obligations. This Report argues for a stringent penalty, i.e., the termination of the Mining Concession.

\(^1\) Currently, there are two main obligations necessary to maintain a mining lease in good standing: (a) payment of an annual Mining Good Standing Fee per hectare claimed (US$3 U.S. dollars per hectare); and (b) achievement, by the end of the first semester of the eleventh year after the granting of the title, of a target annual production per hectare set forth by the Mining Law. If the target annual production is not obtained in the legal term, a penalty of 10% of the production target per hectare shall apply until the year in which such production target is reached. Failure to pay in a timely manner either the Mining Good Standing Fee or the Mining Penalty for two consecutive years is cause of forfeiture of a mining lease. See Mining Law for further information. Based on discussions with stakeholders in Peru, the authors understand that mining companies allow informal miners to use the land of their mining concession and subsequently, purchase the mined minerals from such informal miners. Informal / illegal mining is not within the scope of this Report. In future, research should be undertaken on the connection between informal / illegal miners and the mining companies and its effect on Mining Concessions.
Concession, for non-compliance with legal obligations by the Concession. This would be an effective deterrent for mining companies and would ensure greater compliance with the legal obligations. An argument can be made that termination of the Mining Concession for all breaches of legal obligation is disproportionate and therefore, unjust. This Report, however, argues that certain legal obligations, such as compliance with payment obligations under the Mining Concession, filing of the annual consolidated statement, adherence to the terms of the EIA/SIA, Environment and Social Risk Agreement (See Part 4(VI)(G) for further discussion on this) are fundamental obligations. Consequently, violation of such fundamental obligations should automatically result in a termination of the Mining Concession.

RECOMMENDATIONS

The following provisions should be included in the Mining Law:

The State may terminate a Mining Concession, without prejudice to any other rights that the State may have, if: the Concessionaire dissolves, liquidates, becomes insolvent, commits an act of bankruptcy, makes an assignment for the benefit of creditors, petitions or applies to any tribunal for the appointment of a trustee or receiver for itself, or commences any proceedings concerning itself under a law concerning bankruptcy, or insolvency other than for the purposes of corporate reorganization; or the Controlling Owner of the Concessionaire dissolves or liquidates (other than for the purposes of corporate reorganization) or becomes unable to perform its obligations and does not provide a financially responsible third party to accept those obligations with the consent of the State, which consent must not be unreasonably withheld or delayed.

If a Concessionaire breaches or fails to comply with or observe:

(a) a provision in the [Mining Law], or any license or permit granted to the Concessionaire, or
(b) terms of any leases / license agreements executed by the Concessionaire for surface rights relating to the Mining Concession, or
(c) its obligations to pay compensation to land owners for the surface rights (the obligation shall extend to ensuring that the landowners actually receive the compensation),
(d) terms of a EIA or SIA, as approved by the relevant government authority from time to time, or
(e) terms of the Environment and Social Risk Agreement that may have been executed by the Concessionaire, or any terms agreed by the Concessionaire pursuant to the consent / consultation process, or
(f) the obligations in relation to the Annual Corporate Information Report, including filing and auditing requirements,

The State shall provide a notice of breach to such Concessionaire. If the Company fails or neglects to diligently and consistently pursue a course of action that is reasonably intended to remedy that breach or failure within a period of [60] days from the date of the notice, the State shall forthwith terminate the Mining Concession. Provided that if the breach relates to a fundamental term of the Mining Concession or is of a grave nature, the Mining Concession shall terminate immediately and the requirements of notice shall not apply.

See also Part 4 and Part 5 for termination provisions linked to approval of EIA / SIA.

Notwithstanding the termination or revocation of the Mining Concession, the Concessionaire and its Controlling Owners shall not be exempt from the liability, irrespective of whether such liability is apparent or hidden at the time of termination or revocation, to comply with any obligations arising out

104 The clauses included in the recommendation have been adapted from the provisions included from the Model Mine Development Agreement “Model Mine Development Agreement,” International Bar Association, available at http://www.eisourcebook.org/cms/Dec%202012/Model%20Mine%20Development%20Agreement.pdf (accessed on March 24, 2015).
E. Transfer of Mining Concessions

Currently, there are no restrictions on the transfer of a Mining Concession and the only requirement is an ex post facto intimation of a transfer to INGEMMET. It is understood that the transferee acquires all the liabilities associated with the Mining Concession.

A concern in relation to transfer of a Mining Concession primarily arises from an apprehension that the transferee may not have the financial capacity to meet the obligations and responsibilities under and pursuant to the Mining Concession, including under the SIA/EIA or community agreements. In addition to ensuring the transferee’s liability, it is important to ensure that the transferor continues to remain liable for liabilities arising from the activities undertaken prior to the transfer. Doing so would not only ensure that the transferor continues to remain liable for the environmental or social issues, which arose primarily from the actions of the transferor, any future debate on the apportionment of liability (especially for any hidden liabilities) can also be avoided.

De Beers in South Africa: Holding a company accountable for the legacy from its mining operations

In 2011, De Beers entered into an agreement with a consortium led by Trans Hex Diamonds for sale of its Namaqualand diamond mine in South Africa. Hondeklipbaai, a small community located in the vicinity of the mine, voiced its concerns in relation to the transfer of the mine by De Beers. The community had filed some land claims against De Beers and the concerns raised against the transfer of the mine primarily arose from the doubts over the financial ability of the Trans Hex Diamonds consortium to carry out the rehabilitation program. The transfer was completed in 2014. Complete details of the contractual arrangement between De Beers and Trans Hex Diamonds are not available, although De Beers reports that it has taken on some responsibility in relation to the rehabilitation. In September 2014, a Western Cape Court ordered De Beers to release information relating to the transfer of the mine.

Sources:
Allan Seccombe, “Trans Hex Clinches De Beers Mine”
John Ahni Schertow, “Community wants to hold De Beers accountable for legacy at Namaqualand.”
Court gives De Beers deadline in NGO bid to access Namaqualand Mines records (September 2014)

It is also important to ensure that the transfer does not in affect any remediation measures being undertaken/agreed to by the transferor prior to the transfer. For example, if a transferor had agreed to build a water treatment plant and proposes to transfer the Mining Concession prior to the completion of the

105 Interview with INGEMMET, Interview by Nandini Ravichandran, Ruthia Yi, Kazumasa Ueda, March 19, 2015.
106 Based on discussions with private sector stakeholders in Lima, Peru during March 18-20, 2015.
construction of the plant, the transferee should specifically agree to complete the construction in the manner originally presented and agreed to by the Government authorities.

**RECOMMENDATIONS**

*The following provision should be included in the Mining Law:*

“Approval of [MINEM] shall be obtained prior to any direct or indirect transfer of Mining Concession by a Concessionaire. As a condition of such transfer, the transferee company should provide an undertaking that it would assume all liabilities (both apparent and hidden liabilities) pursuant to and relating to the Mining Concession and the mine. Such undertaking shall clearly confirm that any specific remediation / rehabilitation measures undertaken / promised by the transferor prior to the transfer shall be continued / completed in the manner previously agreed by the transferor.”

Prior to the transfer, as a part of the approval procedure, the transferee company shall be required to provide all relevant information, including information on its Beneficial Ownership and Controlling Owners.

Further, the transferee company or its Controlling Owners should be able to demonstrate its financial and technical capability to efficiently conduct the mining operations and carry on all other actions, including rehabilitation programs relating to the mining project that the transferor company has undertaken to perform. The transferee company shall provide representations and warranties to this effect. For the purposes of this provision, the transferee company can include the technical and financial capacity of the Controlling Owners, provided the Controlling Owners shall furnish a guarantee to the effect that it will ensure that the transferee company remains technically and financially sufficient to undertake the mining operations and other actions that the transferor company has undertaken to perform.

Any changes to the EIA / SIA pursuant to the transfer should be presented to and approved by the relevant Governmental authority prior to the completion of the transfer.

Notwithstanding the transfer, the transferor company shall not be discharged from any liability, irrespective of whether the liability is apparent or hidden at the time of transfer, under and pursuant to the Mining Concession, which arise from the actions undertaken or omissions by the transferor company prior to the transfer as well as for any claims against damages or injuries by bona fide third parties.

II. **Rights of the Concessionaire and Surface Land Rights**

While a Mining Concession gives the Concessionaire the right to explore and exploit minerals, it does not grant the Concessionaire any rights over the surface lands. Article 9 of the Mining Law clearly states that, “[t]he mining concession is a distinct and separate property from the land where it is located.”

Article 37 of the Mining Law contemplates certain ancillary rights to the Concessionaire pursuant to a Mining Concession. Amongst other rights, a Concessionaire can request for the Government to authorize easements over private land and expropriation of surface lands with compensation.

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107 Olaechea, *supra* note 77. Most countries in Latin America adopt this approach of separate surface ownership rights from rights in the underlying minerals.

108 It has been pointed out the mandatory easementary rights have been provided only in a handful of cases due to the transaction costs, delays, and unpopularity of this legal tool. See Patrick Weiland, “Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries Through Middle Ground Policies,” 20 N.Y.U. ENVTL. L.J. 199 (2013), available at https://lawschool.westlaw.com/ (accessed on March 26, 2015).

109 Mining Law, Second Title, art. 37. However, under the Constitution, expropriation of private property is allowed under very limited circumstances, i.e., national security and public necessity. Commentators note that though mining has been declared a
The legal dichotomy created under the Peruvian law poses some challenges for the Concessionaire in relation to acquiring rights over the surface land. Specifically, given that over 93% of the total land for which private companies have been granted Mining Concessions is inhabited, this issue assumes significance.

Based on discussions with private sector stakeholders in Lima, Peru, the authors understand that the Concessionaire is required to execute separate agreements with the private landowners and the Government does not participate in these discussions. The private arrangements may be in the form of a lease or a sale transaction – many companies prefer to lease the land in the exploration stage, given the uncertainty on the availability of resources at that stage. In addition to difficult negotiations with private landowners, the absence of clear land title in rural areas significantly increases the complexity of the issue. A number of key questions on land acquisition arise from the dynamics discussed above, namely:

- When is the best time to engage with individual landholders in relation to the land acquisition process?
- How the impact of business uncertainty (arising from factors external to the company or the project, that is, commodity prices, etc.) on the landholders be managed?
- How should a company handle the relocation of the individual landholders?

From the perspective of the landholder, while the inability to prove title has significant impact, concerns relating to adequate compensation for the land and issues relating to relocation are also important factors for consideration.

**RECOMMENDATIONS**

It is recommended that the following provision be specifically included in the Mining Law:

At the time of making an application for a Mining Concession, in addition to the information obligations vis-à-vis the general communities, the applicant shall have special obligation to identify the areas that will be required by it for the mining operations. Upon identification of such areas, the applicant shall have the obligation to specifically inform each of the landowners who own lands in the identified area.

The Government shall annually release guideline values, setting out details of the highest value that will be required to be paid for acquisition of land in different areas in Peru. For the purposes of calculating the guideline value, the following factors shall be considered:

(i) land use,
(ii) future value of land or other resources that the land might have generated,
(iii) lost income and assets.

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111 Discussions with law firms / consultancy firms (during the period March 12, 2015 to March 20, 2015) advising international mining companies on their investment in Peru.

112 Commentators have noted that the private negotiation process is complex on account of dispute over the compensation amounts (there have been instances, where the landholders have sought a percentage participation in the future mining revenues) and in cases where there is community ownership; approval of a supermajority of the community members is a pre-requisite.

113 Emphasizing the importance of a written, formal, legal property rights system and the need to incorporate the informal, or extralegal, sector within the established legal sector, the Peruvian economist, Hernando De Soto advocated for secure land rights by government titling. This became the basis of the property rights reform in Peru.
and the value shall be the full replacement costs and not just the market value. Provided that the guideline value need not include the value of the underlying minerals in the calculation of the guideline value.

To the extent there is any relocation of landowners pursuant to the land acquisition for mining activities, it shall be undertaken only with the consent of the landowners and on the terms agreed between the landowner and the Concessionaire. Such terms shall specifically provide for replacement housing, compensation for displacement (physical and economic) and also provide other facilities as may be required by the landowners.

To the extent the compensation is a land-based compensation, the Concessionaire shall have an obligation to ensure that the replacement land has the same or higher potential as the original land. The landowners should be able to undertake the same or substantially similar activities performed by them on the original lands.

If a Concessionaire were to lease the land from a landowner, there should be an obligation on the Concessionaire to restore the land to its original usable form at the time of termination of the lease. The following clause should be included in the Mining Laws (environment and land laws):

Upon any partial or total termination, surrender or forfeiture of a lease, the Concessionaire shall, within a period of [6] months from the such termination or surrender or forfeiture, restore the leased land to substantially its original condition and provide sufficient monetary compensation to the extent the leased land cannot be restored to its original form (fully or partially). In this regard, the Concessionaire shall use the highest and best remediation technology and shall have an obligation to dedicate the best human resources and shall not be limited by financial or operational constraints. For the sake of clarification, the calculation of monetary compensation shall be done on the basis of the standard of living applicable at the time of termination, surrender or forfeiture of the lease. The final decision on whether the restoration has been successfully completely by the Concessionaire and / or the quantum of the monetary compensation shall be entirely within the control of the landowner.

In July 2014, the Government of Peru introduced Law 30230 that substantially pared down environmental standards for mining companies with a view to boost investment in the mining sector (See Part 5 for further discussion on this law). Some community interest groups in Peru argue that in addition to the impact on environmental standards, Law 30230 also significantly impacts the land rights of indigenous and rural communities. For example, certain provisions in the law allow the Government to provide lands for mining projects through “special procedures.” The law does not define the “special procedures” that can be used by the Government in this regard. Another worrying aspect of the law is that it grants investors rights to not only the immediate area of their project, but to any area that may be indirectly impacted. As a result, commentators argue that Law 30230 significantly impacts the constitutional right to property available to citizens of Peru.

**Recommendations**

The Government should clearly define “special procedures” as used in Law 30230 and must provide for adequate compensation or resources for relocation and a viable alternate source of income for the families relocated from their lands.

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116 See Rights+Resources, supra note 114.

117 Id.
Law 30230 should be modified to confine the investors’ rights of occupation to the immediate area of the project. The mining company should have the obligation to identify such areas upfront.

Corporate power and privatization of land in Peru

Yanacocha Mine, located in the Cajamarca region of the Peruvian Andes, is the largest gold mine in Latin America and one of the most profitable in the world. Since Yanacocha began operations in the early 1990s, significant social, political and legal conflict has ensued. The primary focus of this conflict is the land occupied by Campesino Communities. Yanacocha requested the Peruvian state for mandatory easements and expropriation of the lands held by the Campesino Communities. In the expropriation process, the State assigned a monetary value to the land to be expropriated, summoned the parties to meet, and approved the expropriation by way of a resolution. In the easement process, Yanacocha determined the amount of compensation and the State’s role was limited to summoning the parties to meet. The private contracts contained shockingly beneficial terms for Yanacocha. Documents suggest that in 1993, 609.44 hectares of Negritos land was expropriated in favor of Yanacocha in return for approximately USD 30,000. In 1995, according to documents, 800.10 hectares of Negritos land was subject to the easement requested by Yanacocha in return for approximately USD 18,000. Unknown to the community, one month after receiving title, Yanacocha mortgaged the expropriated land for USD 50 million to the International Finance Corporation and a German Bank. A year later in 1994, Yanacocha obtained a second mortgage over the expropriated land to the amount of USD 35 million from the same two financial institutions. There is no evidence that the compensation amounts were transferred to the members of the communities.


The inefficient titling procedures and lack of governmental oversight over the land acquisition process, coupled with absence of specific guidelines on the rights of the landholders, creates the risk of dispossession of legitimate land claims with inadequate or no compensation. Presence of transnational mining companies has resulted in a re-ordering of land tenure regimes in Peru. In some instances, the mining company has assumed the role of the state in the absence of effective state mechanism to clarify the legal title over the lands for which the company was granted a Mining Concession. Corporate power strengthened by government indifference has resulted in significant costs for landholders and community as a whole.

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119 Id. The author notes that the mining company in review initiated a series of land-titling measures in the community; the company employees organized community meetings, transported people to the city in mine vehicles, and ushered them through the land-titling process so that the mine could then purchase their land.

120 See e.g., the La Granja concession located in the Cajamarca region has some negative legacy in relation to land acquisition and relocation programs initiated by Cambria, a Canadian mining company that held the concession from 1993-99. The concession was subsequently, purchased by Rio Tinto. In discussing the land access strategy, Rio Tinto appointed social consultants and the company reports that the community members recounted allegations of abuse to such consultants. Among other things, a number of community members alleged that they were mistreated during the relocation process, recounting experiences of forced negotiations, confiscation of land titles by company lawyers, government-supported closures of the schools and health clinics, suicide, destruction of agricultural land, and families being worse off after the relocation. See Sharon Flynn and Liz Vergara, “Land Access and Resettlement Planning at La Granja,” available at https://www.csrm.uq.edu.au/publications/land-access-and-resettlement-planning-at-la-granja (accessed on March 30, 2015).
The Government of Peru has undertaken specific steps to formalize land title in both urban and rural areas. In 1992, pursuant to Decree-law No. 667, the Rural Property Registry created a Special Land Titling and Cadastre Project (PETT) that was established as a specialized institution of the Ministry of Agriculture, Government of Peru (MINAG). While the progress in urban areas has showed promise, studies suggest that the titling process has not had its intended effect in rural areas of Peru. In addition to the concerns relating to the inability to provide adequate proof of title or possession, inadequate accommodation of dual land tenure system and the lack of institutional capacity at the local and regional levels are considered key shortcomings of the project. Further, the social construction of gender roles in Peru has resulted in an unequal gender distribution of land ownership in Peru.

Given these difficulties, it is important for the Government of Peru to focus its efforts on increasing institutional capacity to carry out and complete the land-titling project in Peru. Furthermore, there is a need to incorporate a gender-sensitive approach to the land-titling process. There are some ongoing land titling projects in Peru, for example, an IDB-funded Rural Land Titling and Registration Project has been approved in order to set up a “Proyecto Especial de Registro y Titulación de Tierra (PETT)” This project aims to consolidate the work of the second phase of land titling in Peru, particularly in relation to the registry of property, and will further the communal titling of native and campesino communities, together with activities to ensure the sustainability of the rural cadastre.

RECOMMENDATIONS

It is recommended that the Government take measures to:

(i) strengthen institutional capacity to carry out land-titling in rural areas,
(ii) update and maintain the rural cadastre in rural land registry offices,

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121 The Project was intended to formalize private property rights through titling, to encourage the development of an efficient and transparent rural land market and to promote investment in agriculture. The targeted beneficiaries were farmers who could prove possession and economic exploitation in a direct, continuous, peaceful and public manner for a period longer than 1 year for state land or 5 years for individual land. PETT was run over two phases: Phase 1 (PETT 1) ran from 1993-2000 and Phase 2 (PETT 2) ran from 2000-2006. A third phase started in 2007 when PETT was merged with the Commission on Formalization of Informal Property (Organismo de Formalización de la Propiedad Informal, COFOPRI), adding to the latter the responsibility of dealing with rural in addition to urban land. See “Land titling in Peru: What Future for Women’s Tenure Security?,” Food and Agricultural Organization, available at http://www.fao.org/3/a-i4008e.pdf (accessed on March 29, 2015) [hereinafter FAO Land Titling].

122 Carrie B. Kerekes & Claudia R. Williamson, “Propertyless in Peru, Even with a Government Land Title,” American Journal of Economics and Sociology, Vol. 69, No. 3 (July, 2010), 1011-33, available at http://www.claudiawilliamson.com/Claudia_Williamson/Research_files/Williamson%20Kerekes%20AJES%202010.pdf (accessed on April 1, 2015). This is not to say that the efforts of the Government of Peru in relation to titling of land have been unsuccessful. According to some report, under the PETT, more than 1.5 million of plots were titled in less than a decade and the program helped increase investment opportunities for the beneficiaries while reducing transaction costs at the regional level. See FAO Land Titling, supra note 121.

123 Two levels of proof of ownership over land is considered under the PETT project – proof of ownership and proof of possession. Proof of title includes previous titles issued by the MINAG, private transfer contracts certified by a notary, or judicial resolutions. If the farmer could not present any document to prove his/her rights over the parcel or had only other documents not considered as proof of ownership, the procedure consists in issuing first a certificate of possession, and transform it later on into an ownership certificate. In order to get a Certificate of Possession, the farmer must prove direct, continuous, peaceful, and public possession of the parcel for a minimum of one year for state land or five years for private land.

124 Please note that significant issues arise from communal ownership in a lot of rural areas in Peru. These issues relate to the representation of the community in the negotiation with the mining company, payment of compensation to the individual community members. These issues warrant a research paper in their own right and are not within the scope of this Report.

125 See FAO Land Titling, supra note 121.

126 Id.


128 Id.
(iii) raise awareness of land title rights and encourage participation by men and women alike in the land surveying and titling process, and  
(iv) establish a grievance mechanism in regional land registry offices whereby landholders (including women) whose land occupancy rights have not been upheld may lodge formal complaints so that this injustice may be rectified.129

III. Legal Framework for Corruption

Citizens of developing countries are demanding better performance from governments, and they are increasingly aware of the costs of poor management and corruption. Accordingly, countries are working to identify governance failures and to find solutions for these issues.

While Peru is one of Latin America’s fastest growing economies, recent estimates by the Peruvian Comptroller General, as reported by local media, indicate that corruption is costing the country USD 3.5 billion per year.130 According to the Corruption Perceptions Index 2014, which is a composite indicator made up of distinct component data sources that assess a wide and differing range of concepts,131 Peru has a low score of 38 out of 100, on a scale from zero (highly corrupt) to 100 (very clean).132 It is the 85th least corrupt country/territory out of 175, with the same score and rank as Burkina Faso, India, Jamaica, Philippines, Sri Lanka, Thailand, Trinidad and Tobago and Zambia (See Annex A).133 The Global Competitiveness Report also cites corruption as the second most serious obstacle to doing business in Peru.134

From a local perspective, the 8th Corruption Perception Survey of Proética, Transparency International’s Peru chapter, found that Peruvians perceive corruption as the country’s second most serious problem after crime.135 According to the survey, more than 50% of Peruvians believe that in five years corruption will worsen, while 82% believe that the efficiency of the government’s leadership in the fight against corruption is limited or non-existent.136 It also found that 90% of people do not report graft as they do not have faith in authorities, institutions, or the law, and due to the perception that nothing will change.137

The prevalence of corruption in Peru is costing both individuals and corporations. According to the World Bank, evidence suggests that Peruvians dedicate up to 14% of their income to pay bribes in exchange for accessing basic services to which they are entitled by law.138 Moreover, studies have shown that companies

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132 A poor score “is likely a sign of widespread bribery, lack of punishment for corruption and public institutions that don’t respond to citizens’ needs.” Transparency International, Corruption Perceptions Index 2014 (Germany: Transparency International), 1-2 [hereinafter CPI 2014].
133 Id.
135 Id.
136 Id.
137 Id.
138 Perez and Benavides, supra note 134.
Corruption, Transparency, and Governance

Corruption is an ambiguous concept, and is difficult to define. There is no international consensus on the meaning of the term “corruption;” in fact, the UN Convention Against Corruption does not prescribe a single definition for the term. Nevertheless, the most popularly used definition is “the abuse of public office or public position for private gain.” It may also be categorized in levels as “petty corruption,” which refers to street-level, “everyday corruption” that ordinary citizens experience as they interact with low or mid-level public officials, or “grand” (or “political”) corruption, which generally involves much larger sums of money and normally affects the country as a whole, as well as the legitimacy of the national government and elites.

Two terms that are often used in association with corruption are “governance” and “transparency.” “Governance” is defined by Open Society Foundations as a new way of governing in coordination with different societal actors and promoting their participation in public decision-making, based on a series of principles. These principles include: planning processes, policies, plans and programs; management capacity; coordination between government and intersectoral levels; accountability from authorities towards citizens; citizen participation; public integrity which promotes ethical behavior and prevents corruption; and transparency and access to public information. “Transparency” is described by Open Society Foundations as “the capacity of public agencies in making information publicly known.” Such information includes data, documents, policies and decision-making processes, as well as providing the opportunity for citizens verifying their accuracy.

Sources:

may dedicate as much as 5% of their turnover to paying bribes in order to facilitate procedures and obtain contracts.\(^{139}\)

Given that there appears to be pervasive view that one of Peru’s biggest challenges to development is corruption, it is necessary to study how the country addresses issues of corruption and transparency, especially from the perspective of the mining industry. This Part discusses Peru’s corruption framework and its efforts to improve its corruption laws. It also deals with the Peruvian transparency law, and recommendations on how the same can be improved to provide meaningful information to the public, especially in relation to mining companies and the revenues received from mining (See Part 3(II) for further discussion on the Mining Canon). This Part does not deal with petty corruption and concentrates on other forms of corruption.

A. International Obligations

\(^{139}\) Id.
Peru ratified the United Nations Convention against Corruption in 2004 and the Inter-American Convention Against Corruption in 1997. According to Transparency International, the country also intends to become a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and for such purposes has been amending its legislation to satisfy the requirements of OECD. For instance, Peru amended its Criminal Code in August 2013 to allow the confiscation of instruments and proceeds of crimes. The developments in Peru’s local corruption laws are discussed below.

B. Local Laws

Corruption is criminalized through Decree No. 635 of the Peruvian Penal Code (Penal Code), which covers attempted corruption, extortion, passive and active bribery, money laundering and bribery of foreign officials. The Penal Code criminalizes bribery of foreign and domestic public officials or servants, and provides that corruption of public officials may be divided into passive bribery, where the offender is a public official or servant, and active bribery, where the offender is a civilian.

To better implement the Peru-United States Trade Promotion Agreement, which has been in force since February 2009 and which aims to eliminate obstacles to trade and foster private investment between both countries, the Penal Code was amended to (a) incorporate the offense of “transnational active bribery”, which regulates bribery of public officials or servants from other states, as well as officials of international public organizations, and (b) to incorporate fines and sanctions applicable to individuals violating foreign bribery rules. However, the Penal Code does not address passive transnational bribery or criminal liability of legal entities. The Penal Code does not make provision for permissible gifts and gratuities, and the Code provides no exceptions which would permit facilitation or “grease” payments.

In response to serious incidents of corruption, in 2002, Peru enacted the Law on the Public Service Code of Ethics (Public Service Code). The Public Service Code seeks to ensure accountability and


141 Id.


According to reports, OECD considers Peruvian law insufficient on three fronts: First, the responsibility of legal entities for bribery of foreign officials is currently limited to cases in which the individuals who commit the wrongdoing are also sanctioned. In other words, the responsibility of the legal person is conditioned on the liability of individuals. Second, the level of authority of the person who commits the conduct creating liability of the legal entity should be more flexible. Third, Peruvian law does not set forth monetary sanctions for bribery of foreign officials. Carlos Henrique da Silva Ayres, “Will Peru Join the OECD Anti-Bribery Convention?,” FCPAmericas Blog, October 13, 2013, http://fcpamericas.com/english/fcpa/peru-join-oecd-anti-bribery-convention/#stash.muqHQ6a.dpuf (accessed on April 8, 2015).


144 Moyer, supra note 140.


146 Moyer, supra note 140. Active transnational bribery occurs when “someone offers, gives, or promises, directly or indirectly, to a public official or servant of another state or of a public international organisation, a donation, promise, advantage or benefit, which benefits him or a third party, in order to make the public official perform or omit any act, in violation or not of his duties, which, in any form, helps obtaining or retaining a business transaction or gives an advantage in the realisation of international commercial and economic businesses.” The Penal Code, Article 397-A (1991).

147 Martini, supra note 141.

148 See Moyer, supra note 140. Facilitation payments are “low value payments designed to speed up routine government actions.” Clement Chui, “Global trend in facilitation payments law: implications for companies in Asia Pacific,” Lexology (Blog), February 19, 2014, http://www.lexology.com/library/detail.aspx?g=65e269b2-42b8-4ba2-9b69-d0868d672c0a

transparency of Peru’s public service. The Public Service Code regulates conflicts of interest and government ethics, and public officials face eight to 18 years imprisonment for illicit enrichment.

To continue with the development of Peru’s anti-corruption laws, in 2010 the Peruvian government created the High-Level Anti-Corruption Commission (La Comisión de Alto Nivel Anticorrupción) (CAN). The CAN was established by Supreme Decree 016-2010-PCM and enacted in January 2013 by Law No. 29976. The CAN seeks to combine efforts, coordinate actions, and propose medium- and long-term policies geared towards preventing and combating corruption in Peru. PCM chairs the CAN. Details of its membership are set out in Annex B.

The CAN developed the National Plan to Combat Corruption 2012–2016, (the Corruption National Plan) which defines corruption as “the misuse of power to obtain irregular profit, economic or non-economic in nature, through the violation of a duty at the expense of legitimate authority and the fundamental rights of the individual.” The Corruption National Plan is “a comprehensive and strategic approach marked by the need to generate institutional and policy changes that strengthen the links between the entities to combat corruption”. The plan has five specific objectives, 15 strategies and 55 actions to be implemented at national level, with a view to reduce vulnerability to corruption within the public sector and promote transparency.

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150 Article 425 of the Penal Code defines public officials or public servants as: (a) an individual who has a career in public administration; (b) an individual who holds a political office or a position of trust, including one resulting from a popular election; (c) anyone, regardless of the specific labor regime under which he may be, as long as he maintains a labor or contractual link of any nature with a government entity or agency, including government-owned companies or mixed industry entities within the commercial activities of the government, provided his functions are conducted by way of such agencies or entities; (d) administrators and custodians of assets that have been seized or deposited by the competent authority, even if such assets belong to private parties; (e) members of the army and national police; (f) individuals appointed, elected, or proclaimed by competent authority to perform activities or functions on behalf of or at the service of the state or its entities; and (g) all others indicated by the Constitution and the law. Moyer, supra note 140, at 179-80.

151 Business Portal, supra note 143. Article 401 of the Penal Code deals with “illicit enrichment,” which is evinced when, taking into account the public official’s sworn assets and income, his personal assets and/or personal expenditures are notably superior to that which he would normally would have been able to obtain by virtue of his wages and emoluments or any other legal source of income. The Supreme Court of Justice of the Republic has explained that, in cases of illicit enrichment, “the evidence presented during the criminal proceeding must undeniably prove the disparity or the notable contrast between the assets acquired and their economic value held unlawfully by the public official or public servant during or after assuming public office in relation with what they would have had prior to the assumption of office.” Nd’iva Kofélé-Kale, Combating Economic Crimes: Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment (New York: Routledge. 2012).


157 Corruption National Plan, supra note 155.

158 Id.

159 Perez and Benavides, supra note 134.
The CAN has taken considerable steps in improving Peru’s anti-corruption laws, including drafting amendments to existing laws relating to corruption and transparency to improve institutional efficiency, citizen commitment, effective transparency, and enforcement. Annex C describes some of the proposals of the CAN to strengthen the anti-corruption laws of Peru.

IV. Legal Framework for Transparency

To successfully and sustainably invest in resource-rich countries, partnerships among the government, mining company, and the community must be forged and strengthened at the beginning and throughout the life of the project. On account of a history of corruption, mismanagement of resources, environmental impact, social conflict and displacement, and human rights abuses in the extractives industry, partnerships have been difficult to maintain, and each party regards the others with suspicion. According to Global Witness, an organization advocating sustainability and transparency in the extractive industry, such suspicions “can only be dispelled by making information publicly available.” Trust is key, and the quality of information and its use, production, flow, accessibility, and credibility affect the interaction of all actors in the sector. Transparency has the potential to build and enhance trust among the parties involved.

The need for transparency is more well-defined in resource-rich countries, where information asymmetry is rampant and power imbalance and conflict of interest abound. Freedom of Information (FOI) laws can help provide access to important information on activities throughout the lifecycle of a mining project, which allows communities to “organize themselves in an effective manner and shape public policy to the benefit of the most,” and pave the way for them to take control of the impact that the investments had within their areas. For instance, in India, a group used information obtained from the Right to Information Act to expose violations by major mining companies of their permitted production levels. Property owners in South Africa whose rights were potentially threatened by the construction of a large steel mill were able to gain access to copies of the Minister of Environmental Affairs’ records concerning the proposed rezoning and planning permission, which protected community rights. Providing citizens with access to information empowers them to participate in the economic process, and holds mining companies and governments (and, in effect, private and public officials) accountable for their respective obligations throughout the investment cycle.

In addition to increased trust and public participation, transparency facilitates the strengthening of institutions by shedding light into the weaknesses and gaps of the concerned institution. Such information, in turn, encourages capacity building and focuses resources on addressing these limitations. Weak governance and ineffective institutions shape the conditions in which corruption can thrive; hence, improving transparency should be Peru’s priority especially in light of the country’s efforts to combat corruption.

160 See Perez and Benavides, supra note 134.
165 Enforcing the Rules, supra note 163.
166 Id.
167 See Etter, supra note 164.
There is also a business argument for improving transparency. Transparency has the potential to make markets work more effectively. From the government’s standpoint, compliance with transparency initiatives, such as Extractive Industries Transparency Initiative (EITI), may improve a government’s reputation in the international sphere. Governments have been using tax incentives or “racing to the bottom” to attract foreign investors, to the detriment of their population. On the contrary, governments should focus on implementing robust transparency standards and promoting their countries’ efforts for good governance to invite investment. Strengthening transparency would thus serve a dual purpose: (a) attract investors and (b) encourage dialogue and participation amongst its people. From an international perspective, transparency may minimize information asymmetry across governments, which strengthens countries’ negotiating positions vis-à-vis companies and results in better deals. Accordingly, governments should not only seek to improve their domestic standards for transparency, but also cooperate with other governments to improve the information that is available internationally. Governments should support current efforts by CSOs, to publicize concessions, so that they can learn from the experiences of other jurisdictions.

From the investors’ standpoint, disclosure of commercial terms, operations, and other information relating to the mining project allows the public to better understand the government’s relationship with the investor, which reduces suspicion and the perception that the concession is detrimental to public interest. Such an atmosphere encourages contractual stability by minimizing the risk of renegotiation, and may also reduce the probability of conflict with the impacted community. Finally, an open legal and contractual framework should serve as a signal to investors that a country is making efforts to move towards good governance, which promotes a sound business environment. All of these have an effect of improving the company’s bottom line and overall profitability.

Peru has a relatively robust framework on transparency. In fact, NRGI reports that when Peru published all of its Mining Concessions, Grupo Propuesta Ciudadana, a CSO, was able to launch a website that displays concessions, including the following information:

- location,
- ownership stakes,
- investment terms,
- production and rent generation, and
- with natural protected areas and indigenous territories.

NRGI ranks Peru’s reporting practices sixth out of 58 countries (with a score of 83 out of 100). Figure 1.5 provides information on the matters published by different institutions in Peru.

Figure 1.5: Information Published by Peru

<table>
<thead>
<tr>
<th>MINEM</th>
<th>MEF (semi-annual reports)</th>
<th>EITI Reports</th>
</tr>
</thead>
</table>

169 See Etter, supra note 164.
171 Natural Resource Governance Institute, Promoting Transparency and Monitoring of Contracts (Parliamentary Briefing, 2015) [hereinafter NRGI, Parliamentary Briefing].
172 Such as www.resourcecontracts.org.
173 See Rosenblum and Maples, supra note 161, at 11 - 12.
174 Id.
175 See Enforcing the Rules, supra note 163, at 19.
177 Id.
• licensing requests, 
• awarded licenses, 
• stability contracts, 
• contracts for investment in exploration, and 
• monthly data on reserves, export values, company-by-company production and revenue streams.

| • production volumes, 
• prices, and 
• royalties received. | • disaggregated revenues, 
individual population stream values, and 
• subnational transfers. |

Source: NRGI, Resource Governance Index 2013

V. Public Access to Information

In Peru, public access to information is recognized in the Constitution and by the Law of Transparency and Access to Public Information (Transparency Law), which came into effect in January 2003. The Constitutional Court also protects the right to information under the habeas data provision, and the Ombudsman has the power to investigate acts of non-compliance and to issue recommendations to public officers.

Article 3 of the Transparency Law promotes the “Principle of Public Disclosure,” which requires that officials responsible for releasing information in their jurisdiction should “plan an adequate infrastructure with organization, systematization, and publishing of information.” It further provides that:

• all information owned by the State is presumed public with the exception of the exemptions established in the Transparency Law;
• the State will adopt basic measures that guarantee and promote transparency in the activities of the public administration entities; and
• the State is obliged to submit the information requested by the people in accordance with the Principle of Public Disclosure.

The Transparency Law mandates that maximum transparency should be given to the management of public finances so that citizens can supervise the management of public finances and ensure accurate accounting for the finances. Specifically, “information relating to this norm can be published through the [p]ublic [a]dministrative entities’ websites, major local newspapers or other media according to the infrastructure of the municipality.” Article 22 of the Transparency Law requires public administrative entities to publish the following on a trimester cycle:

• budget;
• in-progress public investment projects;
• employee information, including wage range and total expenditure in remunerations, bonuses, and any other remunerative information;
• information regarding the selection process for contracting and acquisitions; and

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178 Constitution art. 2, § 5.
181 Id.
182 Transparency Law, supra note 179, Article 20.
183 Transparency Law, supra note 179, Article 21.
progress made by performance indicators established by the institutional strategic plans or other indicators to be applied.

The foregoing information must be transferred to the MEF, which should publish such information on their website within five days.

The Transparency Law also requires the MEF,\textsuperscript{184} the National Fund for the Financing of State Entrepreneurial Activities,\textsuperscript{185} the Office of Provisional Standards,\textsuperscript{186} and the High Council for State Contracts and Acquisitions to publish information relating to their budget and financial operations.\textsuperscript{187} The law also mandates fiscal transparency in the national budget, the macroeconomic framework, and accounting for actions.\textsuperscript{188}

On the basis of the foregoing legal requirements, the MEF publishes information on public finances, economic baselines, and transfers to regional governments under the Mining Canon on the Economic Transparency Portal.\textsuperscript{189} This is an open-access information platform that allows users to access financial and budgetary information.

Transparency on revenue management from mining is discussed in detail in Part 3 of this Report. In addition to the Transparency Law, the citizen participation laws, such as Consulta Previa and Participation Ciudana, also enhance public access to information. These laws, along with recommendations that aim to encourage greater access to information through an expansion of the principle of free, prior informed consent, are discussed in Part 4 of this Report.

**A. Transparency in concessions / contracts**

As discussed in Part 2(I)(C) of this Report, Mining Concessions in Peru are granted administratively; hence, there are no mining contracts. Legal stability agreements (discussed in Part 2(VI) of this Report) for mining concessions, however, are reported on the MINEM website. Nevertheless, the arguments in this Part in favor of contract transparency applies to strengthen and support the country’s current efforts to disclose all necessary information to the public.

When conducting business, governments have duties, obligations, and interests that go beyond profit maximization, and they must be held accountable for all contracts they enter into.\textsuperscript{190} This accountability is particularly important in the extractives industry, given the history of governmental corruption and mismanagement of extractives, along with environmental degradation, community displacement, violent conflict, and human rights abuses.\textsuperscript{191}

Contract secrecy creates an environment of weak accountability and facilitates illegal activity, which erodes the legislature’s ability to scrutinize revenues flowing from contracts.\textsuperscript{192} The inability to scrutinize contracts may (a) result in deals that are negotiated for personal, rather than public, interest, (b) prevent the detection and deterrence of bad deals, and (c) decrease public trust.\textsuperscript{193} Hence, transparency is necessary to address these concerns, and will coordinate the efforts of various government agencies to manage and enforce these

\textsuperscript{184} Transparency Law, supra note 179, Article 23.

\textsuperscript{185} Transparency Law, supra note 179, Article 24.

\textsuperscript{186} Transparency Law, supra note 179, Article 25.

\textsuperscript{187} Transparency Law, supra note 179, Article 26.

\textsuperscript{188} Transparency Law, supra note 179, Chapter II.

\textsuperscript{189} The Economic Transparency Portal is accessible at http://transparencia-economica.mef.gob.pe/.

\textsuperscript{190} Rosenblum and Maples, supra note 161, at 11.

\textsuperscript{191} Id.

\textsuperscript{192} NRGI, Parliamentary Briefing, supra note 171.

\textsuperscript{193} Id.
In addition, contract transparency may minimize information asymmetry across governments, which strengthens countries’ negotiating positions vis-à-vis companies and results in better deals.\textsuperscript{195} In addition to governmental benefits, investors also benefit from contract transparency. Transparency encourages contractual stability and minimizes the risk of renegotiation.\textsuperscript{196} Through the disclosure of the complex terms and provisions of extractive agreements, the deal can be better understood, and the perception that the same is suspicious or detrimental to public interest is minimized.\textsuperscript{197} This results in more stable and durable contracts, because they are less subject to calls for expropriation or renegotiation in cases where it is not merited.\textsuperscript{198} Note, however, that similar to the discussion in Part 3(II) of this Report in relation to transparency in revenue management, mere disclosure of contract terms is not sufficient. There is still a need to educate the community on the implications and impact of the terms of extractive agreements and its allied documents (such as the EIAs) to make transparency meaningful and effective.

Recent studies show that contract disclosure is feasible and desirable for a wide range of countries.\textsuperscript{199} For example, according to the United Nations, disclosing contracts, particularly biddable contracts, creates a “race to the top,” instead of a “race to the bottom.”\textsuperscript{200} This is illustrated by Peru’s experience in the hydrocarbons sector. Since Peru adopted a transparent, public bidding system, requiring disclosure of winning hydrocarbon contracts, there has been a consistent increase in royalty rates bid by the companies.\textsuperscript{201}

According to the studies of NRGI, more than 20 countries publish all or some of their extractive contracts, including Guinea, Mozambique and Sierra Leone.\textsuperscript{202} Some countries, such as Mexico and Niger, have enshrined executive contract transparency as constitutional requirements.\textsuperscript{203} Other countries, such as Liberia and Guinea, have embedded contract transparency requirements in legislation governing mining sectors.\textsuperscript{204} In accordance with the transparency requirement in Guinea’s new Mining Code, Guinea has set-up a website, the purpose of which is to inform “Guinea’s citizens, the investor community, and all of Guinea’s partners about the review process, and to publish outcomes of the review as they are achieved, in the context of transparency and accountability.”\textsuperscript{205} It also includes summaries of key contract terms for easier understanding and monitoring.\textsuperscript{206} Based on NRGI’s views, the Guinean website is a good model for others to follow.

Governments and companies should publish all essential information for monitoring mining projects, including all concession agreements (with contracts, permits or licenses), project-specific assessments and reports, including EIAs, environmental management plans, work programs, SIAs and local development

\begin{footnotesize}
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\begin{itemize}
\item \textsuperscript{194} Id.
\item \textsuperscript{195} NRGI Parliamentary Briefing, \textit{supra} note 171.
\item \textsuperscript{196} Rosenblum and Maples, \textit{supra} note 161, at 11.
\item \textsuperscript{197} See Rosenblum and Maples, \textit{supra} note 161, at 11.
\item \textsuperscript{198} Id. at 12.
\item \textsuperscript{199} NRGI Parliamentary Briefing, \textit{supra} note 171.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} NRGI Parliamentary Briefing, \textit{supra} note 171.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} “Guinea - Website publishes all contracts to strengthen governance of the mining sector,” \textit{Comité Technique de Revue des Titres et Conventions Miniers}, February 15, 2013, http://www.contratsminiersguinee.org/blog/021513-communique-eng.html.
\item \textsuperscript{206} NRGI Parliamentary Briefing, \textit{supra} note 171.
\end{itemize}
\end{footnotesize}
plans, ongoing data on implementation and monitoring, including production figures, tax and royalty payments, and inspection reports.\textsuperscript{207}

\begin{center}
\textbf{RECOMMENDATION}
\end{center}

The Government should establish a website in which it publishes all essential information for monitoring mining projects, including all concession agreements, project-specific assessments and reports, ongoing data on implementation and monitoring, and inspection reports. Such a website could be based on the Guinean model which can be found at www.contratsminiersguinee.org.

In addition to publication, the Government should ensure that the community knows how to use such information, and should include a section in such a website that seeks to educate the public on the meaning and implications of the documents and information presented.

\begin{center}
B. Private Bodies’ Transparency Obligations
\end{center}

While Peru’s legislative framework relating to access to public information is relatively strong, at least on paper, private bodies are not legally obligated to provide the public with access to information. For communities to have the necessary information to monitor mining activities within their areas, private bodies should have the obligation to provide access to their information, upon proper demand and for the protection or exercise of a right of a group or an individual. Providing two sources of information (i.e., the government and the company) will allow communities to have a more complete and accurate picture of the revenue flow, operations, and environmental and social impacts of the project. This will pave the way for people to create more responsive action and development plans that will both respond to and complement the operations of the extractives sector.

An example of legislation that includes the right to have access to records held by private bodies can be found in South Africa.

To further strengthen Peru’s commitment to transparency and to provide communities with more sources of information, it is recommended that the Transparency Law be amended to include the right to access records held by private bodies, similar to South Africa’s Information Act.

\textsuperscript{207} Enforcing the Rules, supra note 163, at 19.
South Africa’s Promotion of Access to Information Act

Under South Africa’s Promotion of Access to Information Act (Information Act), private bodies are required to publish a manual on how to use the Information Act to access the private body’s records, which must be made publicly available through various distribution centers to enable any person to obtain access to the manual.

The Information Act defines a “private body” as (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business, or profession, or (c) any former or existing juristic person, but excludes a public body. In line with this, a “public body” is defined as (i) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; (ii) any other functionary or institution when: (y) exercising a power or performing a duty in terms of the Constitution or provincial constitution; or (z) exercising a public power or performing a public function in terms of any legislation.

Certain information must be included in the manual, including the following:

(a) contact details of the head of the private body;
(b) the categories of records of the private body which are readily available to the public without having to request for access using the procedure laid down in the Information Act;
(c) a description of the records which the private body keeps in compliance with any other legislation;
(d) information to assist a person to request for access to records held by the private body; and
(e) a description of the subjects on which the private body holds records, and the categories of records held on each subject.

A request for access to a record is made by submitting a form to the head of the private body, who must respond to the request within 30 days. Provided that (a) the record is required for the exercise or protection of any rights, and (b) the request complies with the formal or procedural requirements of the Information Act, the private body must provide the information requested, unless the refusal is made on the following grounds:

(a) mandatory protection of privacy of a third party who is a natural person;
(b) mandatory protection of commercial information of a third party;
(c) mandatory protection of certain confidential information of a third party;
(d) mandatory protection of safety of individuals, and protection of property;
(e) mandatory protection of records privileged from production in legal proceedings;
(f) commercial information of a private body; or
(g) mandatory protection of research information of a third party, and protection of research information of a private body.

Despite these exceptions, the private body must grant the request for access if the disclosure would reveal evidence of substantial contravention of, or failure to comply, with the law, or an imminent and serious public safety or environmental risk, and the public interest in the disclosure of the record outweighs the harm contemplated under the ground for refusal. An aggrieved requester may apply with the court for appropriate relief.

RECOMMENDATIONS

The Government should include the following provisions in relation to access of information relating to private bodies, which are modeled after the Information Act, in the Transparency Law:

A “private body” is defined as: (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business, or profession, or (c) any former or existing juristic person, but excludes a Public Administration entity.

“Every individual must be given access to any record of a private body if (a) that record is required for the exercise or protection of any right, (b) that person complies with the procedural requirements in this law, relating to a request for access to that record, as outlined in Title III, Article 11 of this Law, and (c) access to that record is not refused in terms of any ground for refusal contemplated in the Law.

The right to access of information shall not include the following:

(a) Personal information that constitutes an invasion of personal and family privacy when published. Personal health information is included under private matters. In this case only a judge can order the publication without prejudice to what is established in Section 5 of Article 2 of the Constitution.

(b) Mandatory protection of certain confidential information of a third party. Access must be refused if the disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.

(c) Mandatory protection of commercial information of the private body or of a third party. Access must be refused if the record contains (i) trade secrets of the private body or of a third party, or (ii) financial, commercial, scientific, or technical information, other than trade secrets, of the private body or of a third party, the disclosure of which would likely cause harm to the commercial or financial interests of the private body or of that third party, unless (x) the third party has consented in writing to its disclosure, or (y) the information relates to the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of the private body or of a third party and its disclosure would reveal public safety or environmental risk.

(d) Mandatory protection of safety of individuals, and protection of property. Access must be refused if (i) its disclosure could reasonably be expected to endanger the life or physical safety of an individual, or (ii) its disclosure would be likely to prejudice or impair (x) the security of a building, structure, or system, including computer or communication systems, means of transportation, or any other property, (y) the methods, systems, plans, or procedures for the protection of an individual in accordance with a witness protection scheme, the safety of the public, or any part of the public.

(e) Mandatory protection of records privileged from production in legal proceedings, unless the person entitled to the privilege has waived the privilege.

(f) Mandatory protection of research information of a third party, and protection of research information of the private body. Access must be refused if the record contains information about research being or to be carried out by or on behalf of a third party, the disclosure of which would be likely to expose (i) the third party, (ii) a person that is or will be carrying out the research on behalf of the third party, or (iii) the subject matter of the research, to its serious disadvantage.

Access may be refused if the record contains information about research being or to be carried out by or on behalf of the private body the disclosure of which would be likely to expose (a) the private body, (b) a person that is or will be carrying out the research on behalf of the private body, or (c) the subject matter of the research, to its serious disadvantage.

Despite the foregoing exceptions, the private body must grant a request for access to a record of the body if (a) the disclosure of the record would reveal evidence of (i) a substantial contravention of, or failure to comply with, the law; or (ii) imminent and serious public safety or environmental risk; and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the exception in question.
C. Self-Reporting Obligations for Mining Companies

In addition to a country’s efforts to combat corruption, companies must also implement their own programs to mitigate and avoid corruption. Mandated self-reporting by mining companies can assist in reducing monitoring burdens, as it involves obligating mining companies to gather their own information such as tax payments, conduct their own investigations, and report to the government on their operations and compliance with their own obligations. This leads to greater transparency by companies, which ultimately helps combat corruption, promote citizen trust, and encourage a country’s development. For meaningful self-reporting, governments should require that these reports be (a) based on internationally accepted reporting standards, (b) regular and timely, (c) transparent, and (d) open to auditing and requests for additional detail.

Internationally accepted reporting standards

Transparency International

Transparency International advocates a position that companies have both a “legal and an ethical obligation to conduct their business honestly,” and measures a company’s commitment to combatting corruption using three categories: (a) presence of anti-corruption programs, (b) organizational transparency, and (c) country-by-country reporting. In Transparency International’s view, this level of transparency is needed to soundly manage a country’s resource wealth, effectively prevent corruption, and improve broader governance for the benefit of both the country and the company.

Anti-corruption programs. Public reporting by companies of their anti-corruption programs allows for increased monitoring by stakeholders and the public at large. This monitoring makes companies more accountable. Transparency International recognizes that, although public reporting of anti-corruption programs cannot be equated with actual performance, reporting does focus the attention of companies on their practices, drives improvement, and reflects real efforts to combat corruption. Based on Transparency International’s studies, the weakest reporting areas are on the following: (a) prohibition of facilitation payments, (b) anti-corruption training for business partners, and (c) corruption-related incidents.

Organizational transparency. Acts of corruption are often aided by the use of opaque company structures and secrecy jurisdictions, or tax havens. The use of offshore companies and their lack of transparency are posing increasing risks for transnational corporations, their shareholders, employees, and local communities. Shell companies, secrecy jurisdictions, and opaque corporate ownership structures represent the primary methods used by corrupt individuals to hide their stolen funds. Complex corporate structures spanning multiple countries allow individuals to successfully and secretly launder large amounts

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208 Enforcing the Rules, supra note 163, at 38.
210 Enforcing the Rules, supra note 163, at 38.
212 Fagen, supra note 209.
213 Transparency in Corporate Reporting, supra note 211, at 8.
214 Id.
215 Fagen, supra note 209.
216 Transparency in Corporate Reporting, supra note 211, at 8.
217 Id.
of dirty money.\textsuperscript{219} Money is largely laundered with impunity due to the lack of information about who ultimately owns and controls these legal structures; the beneficial owners.\textsuperscript{220} The concept of beneficial ownership refers to the “ultimate” control of a legal entity, independently of the formal ownership structure.\textsuperscript{221} However, few jurisdictions require companies to report information on beneficial ownership to their national authorities and, currently, no country makes this information freely available to the public.\textsuperscript{222}

\textit{Country-by-country reporting.} Country-by-country reporting involves determining whether companies make basic financial information publicly available on a country- and project-level basis to measure whether the revenues from natural resources are used to foster economic and social development, rather than line the pockets of elites.\textsuperscript{223} This type of reporting provides a basic level of transparency needed for companies to be held accountable for their activities in a particular country,\textsuperscript{224} and for fair competition among companies.\textsuperscript{225}

On the basis of its three categories, Transparency International measures the transparency reporting of the world’s 124 largest publicly listed companies on a scale of zero to 10, with zero being the least transparent and 10 being the most transparent. Each category carries a score based on the unweighted average of the results in all three categories.\textsuperscript{226} Of the 124 companies, three have mines operating in Peru: BHP Billiton, Rio Tinto and Vale. The following table provides a breakdown of their transparency reporting scores according to Transparency International:

<table>
<thead>
<tr>
<th>Company</th>
<th>Score</th>
<th>Anti-corruption Programs</th>
<th>Organizational Transparency</th>
<th>Country-by-country reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>BHP Billiton</td>
<td>6.1</td>
<td>92</td>
<td>69</td>
<td>21</td>
</tr>
<tr>
<td>Rio Tinto</td>
<td>5.4</td>
<td>96</td>
<td>50</td>
<td>15</td>
</tr>
<tr>
<td>Vale</td>
<td>3.9</td>
<td>62</td>
<td>50</td>
<td>7</td>
</tr>
</tbody>
</table>

Based on their scores, all companies require some form of improvement in their organizational transparency and country-by-country reporting. Vale must also firm up its anti-corruption programs in order to improve its score in this category. While these scores are measured on a global basis and not specific to Peru, improving on these key points are likely to have a ripple effect and improve the transparency standards implemented by these companies in Peru.

To strengthen Peru’s position with regard to transparency, it is recommended that Peru require mining companies to self-report in order to reduce monitoring burdens,\textsuperscript{227} and to incorporate the standards advocated by Transparency International into its mining framework.

Specifically, mining companies should have the legal obligation to report the following:

1. \textit{Anti-corruption programs.} It would be ideal to require mining companies to implement a specific type of anti-corruption framework to safeguard against incidents of corruption. Nevertheless, this

\textsuperscript{219} Matteo de Simone and Craig Fagan, eds. \textit{Ending Secrecy to End Impunity: Tracing the Beneficial Owner} (Germany: Transparency International, 2014), 1 [hereinafter de Simone and Fagan].

\textsuperscript{220} Id., at 2.

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} Transparency in Corporate Reporting, supra note 211, at 8.

\textsuperscript{224} Id. at 7.

\textsuperscript{225} Fagen, supra note 209.

\textsuperscript{226} Transparency in Corporate Reporting, supra note 211, at 6.

\textsuperscript{227} Enforcing the Rules, supra note 163, at 38.
may not be commercially feasible, and may clash with investors’ goals and business discretion. To balance Peru’s need to combat corruption and the mining companies’ method of preventing corruption, Peru should consider including a requirement for mining companies to report the anti-corruption programs that are being implemented. Should there be no such programs, the mining company should be required to (a) expressly state that it has chosen not to implement anti-corruption mechanisms, (b) provide its reasons for the same, and (c) include a sworn statement that it has not and will not engage in corrupt measures or actions defined as corrupt under Peruvian law.

2. **Organizational transparency.** Adding information on beneficial owners to existing reporting obligations would be the most cost-effective and efficient choice. Under the EITI, information relating to the beneficial ownership of companies should be reported, and that the country should maintain a publicly available register of the beneficial owners of the corporate entities that bid for, operate or invest in extractive assets, including the identities of their beneficial owners and the level of ownership. For complete information on beneficial owners, the following definition should be adopted:

3. **Country-by-country reporting.** The mining framework should include a requirement for mining companies operating in or registered in Peru to specifically carve out financial and operational information relating to its activities in the country.

4. **Third-party verification of company reporting.** To minimize the risk that the information that the company provides is inaccurate or that the same may not be compliant with legal obligations, the Mining Law should require third-party verification of company reports. Peru should specify the types and credentials of third parties who are capable of verifying the results, to ensure meaningful, quality reviews. To incentivize third parties from conducting accurate reviews, the third party must be required to certify the company’s report.

The foregoing information should form part of the Mining Concession, which it should represent and warrant as true, accurate, and complete as of the time of application for the license. Furthermore, the Concessionaire shall have an obligation to provide such information on an ongoing basis.

As many of the mining companies in Peru are publicly listed companies and already make comprehensive disclosures to stock exchanges, including these disclosures should not pose an onerous burden on the investors and should not be administratively difficult to comply with.

**Extractive Industries Transparency Initiative**

One of the most popular initiatives for transparency in extractive sector is the EITI standard. While the EITI is set up as a voluntary code of conduct, a country that decides to join is expected to implement all EITI criteria, “which, at its core, aim at the “[r]egular publication of all material oil, gas and mining payments by companies to governments and all material revenues received by governments from oil, gas and mining companies to a wide audience in a publicly accessible, comprehensive and comprehensible manner.” The Peruvian government published an Executive Decree in May 2006 which approved the Action Plan for the Implementation of the EITI (Action Plan). This Decree also created an EITI Working Committee in charge

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228 De Simone and Fagan, supra note 219, at 3.
230 Enforcing the Rules, supra note 163, at 39.
231 Id.
232 Id.
233 Etter, supra note 164, at 13.
of implementing the Action Plan, and provided a legal basis for the implementation of EITI in Peru. The EITI Working Committee was given permanent status in 2011 by Decree No.28-2011-EM. In February 2014, EITI published a report covering the year 2012.

These legislative developments mark an improvement in Peru in three fronts: (a) the implementation of a more rigorous standard for company reporting, (b) government transparency, and (c) engagement of other stakeholders in the discussion on transparency. This improvement could, however, have more impact if EITI reporting were required even in the subnational level.

**RECOMMENDATIONS**

The Government should include the following provision in the Mining Law:

“Concessionaires are required to submit an annual report, containing the following information:

the Concessionaire’s anti-corruption programs. Should there be no anti-corruption programs, the Concessionaire must (a) expressly state that it has chosen not to implement anti-corruption programs, (b) provide its reasons for the same, and (c) include a sworn statement that it has not and will not engage in corrupt measures or actions defined as corrupt under Peruvian law.

the Concessionaire’s organizational structure and details of Beneficial Owners.

“Beneficial Owner” shall mean:

a. each and every corporate, or other legal, entity and/or natural person(s) who, directly or indirectly, owns or controls any share or equity interest of a privately held company, including the mining company; and/or

b. each and every corporate entity or natural person(s) who, directly or indirectly, owns or controls, by itself or together with any corporate or other legal entity/ies and/or natural person/s who act as a syndicate or other group holding, controlling, or directing, by vote, contract, or otherwise, at least five per cent (5%) or more of the issued share capital of a company whose shares are listed on a regulated stock exchange/market; and/or

c. each and every corporate or other legal entity or natural person(s) who possesses or exercises de jure or de facto management of the corporate entity.

In respect of any corporate or other legal entity, including the mining company, the term “Ultimate Beneficial Owner(s) shall mean all of the Beneficial Owners which so own or control any or all the corporate, or other legal, entities in the chain of corporate or legal entities owning or controlling the corporate or other legal entity in question, here the mining company.

The legal entity in question is the consortium leader, or the holder of the title, license, or concession of the mining company.

“Ultimate Beneficial Owner” shall have the meaning set forth in the definition of Beneficial Owner.

the Concessionaire’s financial and operational information relating its mining activities and operations in Peru.

Such reports must be verified by an independent third-party auditor, who must certify to the contents of the report.

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234 Id.
236 Id.
237 Definition developed by and adapted from Radon Law Offices.
The foregoing information will be included in the Concessionaire’s Mining Concession, and the Concessionaire shall be required to represent and warrant that the foregoing are true, complete, and accurate as of the time of the filing of the application for the license or concession. Furthermore, the Concessionaire shall have an ongoing obligations to provide the reports and the representation as set out herein above."

The Government may also consider implementing EITI in the subnational level, and requiring local governments to establish regional working committees to oversee the implementation of the EITI action plan on a local level.

D. Strengthening of Penalties

Under the Mining Law, Concessionaires are required to submit an Annual Consolidated Statement each year, which must include the following information: (a) company data; (b) production processes; (c) atmospheric emissions; (d) liquid, solid, and other wastes produced; (e) treatment and final disposal procedures used; (f) site-location; (g) industrial wastes produced; and (h) description of measures to comply with the EIA.\textsuperscript{238} Non-compliance with the requirement is subject to a fine.\textsuperscript{239}

Failure to comply with these reporting requirements should not entail a penalty, but should come with a heavier consequence. Please refer to Part 2(I)(D) for a discussion on the penalties that may be included under the Mining Law.

VI. Investment Law and Dispute Resolution

A. Domestic Investment Law

Peru has established a stable and attractive legal framework for foreign investors. The Constitution guarantees equal treatment of national and foreign investments.\textsuperscript{240} In addition to the Constitution, the two major laws concerning foreign direct investment (FDI) in Peru are the Foreign Investment Promotion Law (Legislative Decree 662 of September 1991) and the Framework Law for Private Investment Growth (Legislative Decree 757 of November 1991). The laws allow FDI in most sectors of the economy and guarantee foreign investors various rights, including the right to property,\textsuperscript{241} the right to trade and engage in economic activities,\textsuperscript{242} the right to transfer money abroad in a freely convertible foreign currency without previous authorization,\textsuperscript{243} the right to acquire shares, interest shares, or property rights from local or sub-regional investors,\textsuperscript{244} and the right to use the most favorable purchase exchange rate at the time of an exchange transaction.\textsuperscript{245} The Foreign Investment Promotion Law also provides for the possibility of negotiating legal stability agreements, which guarantee investors stability with regard to taxes as well as other rights, such as the right to remission of total capital and dividends or the right to national treatment, for a period of up to ten years.\textsuperscript{246} With respect to foreign investors, international investment treaties apply and disputes are generally settled by international arbitration in accordance with international investment law and international treaties executed by the relevant host country. Therefore, the primary focus of this Report will be the international investment regime applicable in Peru.

\textsuperscript{238} Mining Law, art. 50.
\textsuperscript{239} Mining Law, art. 50.
\textsuperscript{240} Constitution, art. 63..
\textsuperscript{241} Art. 4 and 5, Legislative Decree 662; Art. 8, Legislative Decree 757.
\textsuperscript{242} Art. 6, Legislative Decree 662; Art. 2 and 3, Legislative Decree 757.
\textsuperscript{243} Art. 7, Legislative Decree 662.
\textsuperscript{244} Art. 8, Legislative Decree 662.
\textsuperscript{245} Art. 9, Legislative Decree 662.
\textsuperscript{246} Art. 10, Art. 15, Legislative Decree 662 (10 year term).
In the light of the debate on the value of entering into international investment agreements in many developing countries and the growing movement towards connecting FDI with sustainable development goals, it pays to examine the benefits and risks of Peru’s current international investment treaties. Signaling its commitment to a stable investment environment for foreign investors, Peru has signed and ratified a number of international investment treaties over the past 20 years. Currently, Peru is party to 32 Bilateral Investment Treaties (BITs) and 25 other international investment agreements, which are mainly Free Trade Agreements (FTAs) with investment chapters. For the purposes of this Report, BITs and other international investment agreements are collectively referred to as “Investment Agreements.”

FDI has been a major driver of the Peruvian economy. Coming from a period of political and economic isolation in the 1980s, Peru’s Investment Agreements have served their purpose well by signaling an atmosphere of stability and certainty to foreign investors. However, today we know that the link between heightened investor protection and increased FDI inflows is doubtful at best. Research has shown that Investment Agreements are a peripheral factor in an investor’s decision to enter a foreign market. Evidence even suggests that companies will invest in a country regardless of its investment regime as long as there are significant amounts of natural resources to exploit.

In the past few years, the Investment Agreements executed by Peru attempt to strike a balance between investor protection, on the one hand, and the preservation of Peru’s ability to adequately address public policy concerns, such as health, safety, or economic isolation in the 1980s, Peru’s Investment Agreements have served their purpose well by signaling an atmosphere of stability and certainty to foreign investors. However, today we know that the link between heightened investor protection and increased FDI inflows is doubtful at best. Research has shown that Investment Agreements are a peripheral factor in an investor’s decision to enter a foreign market. Evidence even suggests that companies will invest in a country regardless of its investment regime as long as there are significant amounts of natural resources to exploit.

In the past few years, the Investment Agreements executed by Peru attempt to strike a balance between investor protection, on the one hand, and the preservation of Peru’s ability to adequately address public policy concerns, such as health, safety, or...
environmental protection, on the other. Today, Peru can be called a leading example amongst developing countries in relation to the negotiation of more balanced and sophisticated Investment Agreements that not only focus on investor rights, but also take non-economic public welfare interests into account. Peru’s experience with Investment Agreements can be categorized in the following two categories:

(a) **First-generation agreements** – these agreements were mainly executed in the early 1990s and tend to focus solely on investor rights, often containing broad provisions, which facilitated investor challenges to non-discriminatory public policy measures, such as health, social, or environmental protection policies.

(b) **Second-generation agreements** – these agreements were mainly executed in the 2000s and seek to balance investor rights with Peru’s ability to govern its public policy space and pursue sustainable development goals.

As a step forward in providing explicit guidance to arbitral tribunals on how to balance investment protection with other public policy concerns, most of the second-generation agreements include a provision stating that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives do not constitute an indirect expropriation. Other second-generation agreements include general exceptions to the protection of investor rights, such as measures necessary to protect human, animal, and plant life or health. Moreover, some of the second-generation agreements refer to corporate social responsibilities and anti-corruption obligations. Acknowledging Peru’s progressive international investment regime, this Report encourages Peru to continue on its successful path and to consider the following recommendations to minimize the risks and maximize the benefits of FDI in the future.

**C. Issues for consideration**

**Treaty Shopping**

Peru should consider amending its Investment Agreements in order to guard against the phenomenon of treaty shopping. Investors often attempt to structure their investments in a way that allows them to benefit from the most favorable Investment Agreement executed by the host country rather than the one signed by Peru.

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253 See e.g. Annex 812.1, Canada-Peru FTA (2008); Annex IV, Japan-Peru BIT (2008).

254 Art. 10, Canada-Peru BIT (2006).

their home country.\textsuperscript{256} They may do this by structuring an investment through a subsidiary in the country with the best Investment Agreement. This practice is called treaty shopping. Treaty shopping is problematic because it allows companies to circumvent more progressive provisions in certain Investment Agreements.

Tribunals have found the restructuring of an investment with the sole purpose of gaining access to an Investment Agreement once a dispute has arisen or become foreseeable to be an abuse of process and voidable.\textsuperscript{257} In \textit{Mobil v. Venezuela}, for example, a case concerning the nationalization of oil and gas projects by Venezuela, the tribunal found that Mobil, a U.S. company, had abused the investor protection system by restructuring its investment with the sole purpose of gaining access to ICSID arbitration through the Netherlands-Venezuela BIT after a dispute had arisen.\textsuperscript{258} Similarly, the arbitral tribunal in \textit{Greencite v. Peru} held that an attempt to benefit from the France-Peru BIT through a restructuring of Greencite at a time when the dispute was already foreseeable and by backdating notary documents was an abuse of process.\textsuperscript{259}

Structuring investments through third countries before disputes arise or become foreseeable, however, is legal. In order to prevent such forms of treaty shopping, Peru could either adopt a definition of “investor” that requires investors to have “substantial economic activities” in their alleged home jurisdiction at the time of the investment or include a provision in its Investment Agreements that allows Peru to deny the benefits of an Investment Agreement to any investor that did not have “substantial economic activities” in the alleged home jurisdiction at the time of the investment.\textsuperscript{260}

\begin{tcolorbox}
\textbf{RECOMMENDATIONS}

It is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified to include a specific provision to avoid “treaty shopping” by investors. Such provision could use the following wording:

“Notwithstanding anything contained in this Agreement, a contracting Party may deny the benefits of this Agreement to an enterprise that does not have any real and substantial economic activities in the territory of the other Party.

Such real and substantial economic activities require that at least 10\% of the global employees of the enterprise (by headcount or compensation), of its annual profits, and its currently held assets are located in the territory of the other Party.

The provisions of this Agreement shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds.”
\end{tcolorbox}

Peru’s sovereign right to take measures to address public policy concerns

Investment Agreements should not make a government liable for measures undertaken in the best interests of its citizens and in a non-discriminatory way. In the context of mining, there exists a significant degree of tension between investor interests and public policy concerns, such as health, safety, social conflict prevention, and environmental protection concerns. The ability of governments to adopt and implement measures to address such concerns is paramount.


\textsuperscript{257} See for a discussion of cases William Lawton Kirtley, supra note 256, at 458.

\textsuperscript{258} Mobil Corporation, Venezuela Holdings B.V.; Mobil Cerro Negro Holdings, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, June 10, 2010, ICSID Case No. ARB/07/27, para. 190.

\textsuperscript{259} Renée Rose Levy and Greencite S.A. v. Republic of Peru, ICSID Case No. ARB/11/17, Award, 9 January 2015, paras. 155-161.

\textsuperscript{260} See e.g., 1113.2, NAFTA.
There have been instances in the past where public policy measures undertaken by a host country in a non-discriminatory way have been challenged by foreign investors.\textsuperscript{261} Foreign investors mainly argue that the public policy measures adopted by the host country amount to indirect expropriation and also violate the fair and equitable treatment provision because they could not be reasonably expected at the time of the investment.\textsuperscript{262}

The public policy carve-out that is contained in the expropriation clauses of many of Peru’s more recent Investment Agreements\textsuperscript{263} is of indispensable importance. It could, however, be strengthened with regard to human rights violations, the protection of cultural heritage, in particular indigenous culture, and social welfare. Currently, Peru’s more recent Investment Agreements only provide for a public policy carve-out with regard to health, safety, and environmental measures. By explicitly including other important public policy goals and clarifying that measures taken in response to social conflicts do not constitute indirect expropriation, Peru would strengthen its ability to effectively react to public concerns.

\section*{Lessons from Australia: The Importance of a Public Policy Carve-Out}

In 2011, Australia enacted a plain packaging law for tobacco products as part of a health policy aiming to cut smoking rates in Australia. Philip Morris Asia, a leading cigarette manufacturing company, brought an international arbitration claim against the legislation enacted by Australia, claiming expropriation of its intellectual property rights as well as a violation of the fair and equitable treatment standard. The case was brought under the Australia-Hong Kong BIT, which does not provide for a public policy carve-out in its expropriation clause, and is currently pending before a UNCITRAL tribunal. The case has received worldwide media attention and is an excellent example of how public policies can be challenged by investors under Investment Agreements.

\textbf{Sources:}


\section*{Recommendations}

With regard to the expropriation clause, it is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified in the following way:

\begin{quote}
“Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-
\end{quote}

\textsuperscript{261} For example, in Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Italian mining investors brought a claim against South Africa for a policy that aimed to tackle the consequences of apartheid by encouraging more black ownership in the mining sector. The case was discontinued after the claimant received partial relief. In Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) an international cigarette manufacturer is currently challenging measures undertaken by Uruguay to cut smoking rates. The case is pending.

\textsuperscript{262} See e.g., Renco’s arguments in The Renco Group, Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1, Claimant’s Notice of Intent to Commence Arbitration, December 29, 2010, paras. 48 – 53, 57.

\textsuperscript{263} Annex 1V(c), Japan-Peru BIT of 2009; Annex 812.1, Canada-Peru FTA of 2009; Annex 10-B(3)(b), Peru-U.S. FTA of 2009; Annex 9(6), China-Peru FTA of 2010.
discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, human rights protection, culture, labor, social welfare, indigenous rights protection, and the environment, do not constitute indirect expropriation. The enactment of such measures supersedes any and all provisions of this Agreement.

For the sake of clarification, the objective to prevent or resolve existing or reasonably expected social conflicts that could pose a threat to human life or health with regard to a specific investment project falls within the scope of the legitimate public welfare objectives mentioned in this Article. Measures for the purposes of this Article shall be deemed to include legislative, regulatory, judicial, and administrative measures on all levels of government, including the federal, regional, and municipal level.”

In addition to public policy carve-outs, the Government’s public policy space should also be protected through clauses requiring the parties not to derogate from their domestic health, safety, human rights, labor, and environmental protection standards in order to attract FDI. For example, the Japan-Peru BIT clarifies specifically that it is inappropriate to encourage FDI by relaxing domestic health, safety, and environmental measures or by lowering labor standards and that “each Contracting Party should not waive or otherwise derogate from such measures and standards as an encouragement for the establishment, acquisition or expansion of investments in its area.”

State obligation provisions are important in two ways. First, they make sure that investors cannot argue that they had a legitimate expectation of the adoption of less stringent standards. Second, they discourage investors from pressuring host governments into lowering standards (race to the bottom). This Report recommends that the Government continue to include a state obligations clause in its Investment Agreements, but makes the language binding by using the word “shall” instead of “should.” Second, the Government should consider changing the wording of the clause in a way that not only preserves the status quo of domestic protection, but also allows for the adoption of higher standards and more progressive policies in the future.

**RECOMMENDATIONS**

It is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified in the following way:

“Obligations of States on Health, Safety, Human Rights, Environmental Protection, and Labor Standards”

(1) The Contracting Parties recognize that it is inappropriate to encourage investment by Investors of the other Contracting Party and of a non-Contracting Party by relaxing domestic health, safety, human rights, cultural and indigenous rights, or environmental protection measures, or by lowering its labor standards. To this effect each Contracting Party shall not waive or otherwise derogate from such measures and standards as an encouragement for the establishment, acquisition, or expansion of investments in its area.

(2) Each Contracting Party has the right to adopt more progressive health, safety, human rights, cultural and indigenous rights, and environmental protection measures as well as higher labor standards in the future. In the exercise of this right, each Contracting Party shall ensure that it provides for high levels of health, safety, human rights, cultural and indigenous rights and environmental protection and high labor standards, taking into account internationally accepted standards.” (Emphasis added)

In order to maintain public policy space, this Report further suggests that Peru considers including a definition of “fair and equitable treatment” (FET) in the minimum standard of treatment provision. It has

264 Art. 26, Japan-Peru BIT (A similar provision is Art. 809, Canada-Peru FTA of 2009 (not addressing labor standards).


266 Id.
been noted that the FET standard contained in the minimum standard of treatment clause can function as an "expropriation light."\textsuperscript{267} In other words, measures that lack the severity to render them an expropriation may nevertheless be deemed a violation of the FET standard.\textsuperscript{268} Therefore, restricting only the scope of the expropriation clause might not always result in a commensurate decrease in state liability.\textsuperscript{269}

\textbf{RECOMMENDATIONS}

\textit{It is recommended that the fair and equitable treatment provision in Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified in the following way:}

\begin{quote}
"Under this Agreement, a breach of the fair and equitable treatment obligation only arises in the following cases:

• denial of justice in criminal, civil or administrative proceedings;
• fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
• manifest arbitrariness;
• targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; and
• abusive treatment of investors, such as coercion, duress and harassment.

In addition, a breach of legitimate expectations is limited to situations where the investment took place only because of a promise made by the State that was subsequently not honored."\textsuperscript{270}
\end{quote}

Corporate Social Responsibility and anti-corruption

Peru has included a corporate responsibility clause in its FTA with Canada.\textsuperscript{271} Corporate responsibility clauses generally provide that parties should encourage enterprises operating within a host state’s territory to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as labor, environmental protection, human rights, community relations, or anti-corruption policies.\textsuperscript{272} The Japan-Peru BIT provides for an anti-corruption clause that encourages the Contracting Parties to adopt measures aimed at preventing and combating corruption with regard to foreign investment.\textsuperscript{273}

This Report recommends that Peru take both the corporate responsibility and anti-corruption clauses a step further and make it obligatory for foreign investors to comply with Peru’s current and future domestic laws, in particular with regard to anti-corruption. The anti-corruption obligations of the investor should also be

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\textsuperscript{268} Id.
\textsuperscript{269} For example, the FET standard has supported a successful claim by an investor against a decision adopted by the government of Mexico not to renew a one-year permit for a hazardous waste facility in response to public concerns about the proximity of that facility to the local population, Tecnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, paras. 154 - 164, 166, referred to in Lise Johnson, The Impact of Investment Treaties on Governance of Private Investment in Infrastructure, EUI Working Paper RSCAS 2014/32, 22, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411575 (accessed on April 15, 2015).
\textsuperscript{271} Art. 810, Canada-Peru FTA (2008).
\textsuperscript{273} Art. 10, Japan-Peru BIT (2008).
\end{flushright}
stated explicitly in the Investment Agreement for greater legal certainty. In the event that the foreign investor does not comply with its domestic legal obligations, in particular in relation to anti-corruption, Peru’s Investment Agreements should provide that a breach of any domestic legislation, in particular with regard to anti-corruption, shall result in the automatic revocation of the investor’s operating license and loss of all assets in respect of which such corruption has been occurred.

**Recommendations**

*It is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified to include the following provision:*

“Compliance with Domestic Laws

(1) The Investor and the Investment shall comply with any federal, regional, and municipal, existing and future, law and regulation of the Contracting Party concerning the establishment, acquisition, management, operation, and disposition of Investments.

(2) Investors and the Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official’s family or business associate or other person in close proximity to an official, for acting in relation to the performance of official duties, in order to achieve any favor in relation to a proposed Investment or any license, permit, contract or other right in relation to an Investment.

(3) A breach of subsection 2 of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Contracting Party concerning the establishment and operation of an Investment.

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A breach of the domestic law of the Contracting Party concerning the establishment, acquisition, management, and operation of Investments shall result in the revocation of the operating license as well as a loss of any rights under this Agreement.”

Investor-State Dispute Settlement

Peru’s Investment Agreements include compulsory arbitration clauses. A compulsory arbitration clause commits the host country government to enter directly into arbitration, without the prior exhaustion of local remedies, in case a dispute arises. Foregoing the right to settle disputes in domestic courts involves certain risks for the host government. First, it risks erroneous decisions. Currently there is no general review mechanism for international arbitration cases. Second, it risks incoherent and unpredictable decisions. Precedent does not bind arbitral tribunals and rulings might deviate greatly. Third, it risks costs much higher than in local courts. The OECD estimates that investor-state arbitration costs average at around USD 8 million per case and have occasionally exceeded USD 30 million. Fourth, it risks that its domestic courts do not develop the expertise and reputation in settling complex international disputes that they could if foreign investors brought their claims in domestic courts first. Peru should address these risks by amending its arbitration clause to require investors to exhaust local remedies before having access to international arbitration.

RECOMMENDATIONS

It is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified to include the following provision:

“Exhaustion of Domestic Remedies

An Investor or Investment may submit a claim to arbitration pursuant to this Agreement, provided that:

- It has first submitted a claim before the domestic courts of the Contracting Party for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies relating to the measure underlying the claim under this Agreement, and after a resolution has not been reached within a reasonable period of time from its submission to a domestic court of the Contracting Party; or
- It demonstrates to a tribunal established under this Agreement that there are no reasonably available legal remedies or the possibility of such remedies in a reasonable period of time."

An additional point for consideration with regard to investor-state dispute settlement relates to the risk of multiple claims arising from the same set of facts. Tribunals have found that shareholders can claim reflective loss, meaning loss that is incurred as a result of the injury to “their” company, and that those

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276 Article 52(1) of the ICSID Convention enumerates the following grounds for annulment: (a) improper constitution of the arbitral Tribunal; (b) manifest excess of power by the arbitral Tribunal; (c) corruption of a member of the arbitral Tribunal; (d) serious departure from a fundamental rule of procedure; or (e) absence of a statement of reasons in the arbitral award.


claims are autonomous from the one of the company. In other words, claims of the investor company can co-exist with claims of the shareholders for the same loss, creating the risk of double recovery. Tribunals have also found that minority and majority shareholders can each submit their own claims. This may lead to a significant drain on resources, both monetary and in terms of human resources, on the side of the host government. It also causes legal uncertainty for the host government that could still be sued by a minority shareholder where the investor company and the controlling shareholders have decided not to bring a claim. Currently, Peru’s Investment Agreements do not guard against multiple claims and minority shareholder claims.

**RECOMMENDATIONS**

It is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified to include the following provision:

“Claims Brought by Minority Shareholders and Multiple Claims

(1) It is clarified that for the purposes of disputes under this Agreement, any shareholder of an Investor, having ownership of less than 25% equity shareholding, shall not have a claim separate from that of the Investor and shall not be entitled to bring an arbitration claim under the terms of this Agreement, either for itself or as a derivative claim for the Investor.

(2) It is acknowledged and agreed between the Contracting Parties that a Contracting Party shall not be subject to multiple claims for arbitration arising from the same set of facts. To the extent there are multiple shareholders of an Investor or multiple joint venture partners of an Investor, all such shareholders or joint venture partners shall consolidate their claims and bring one arbitration claim against a Contracting Party.”

Finally, Peru should strengthen transparency in arbitral proceedings. Under most arbitration rules, hearings are only public and awards only get published where the disputing parties either agree so or do not agree otherwise. Arbitration cases such as the Renco case involve affected communities that have a direct interest in the outcome and development of the case, in particular where they are preparing cases before human rights tribunals or domestic courts of the investor’s home country.

**RECOMMENDATIONS**

It is recommended that Peru’s existing Investment Agreements, and any prospective Investment Agreements, be modified to include the following provision:

“Transparency of Proceedings

(1) The Contracting Party that is party to the arbitration shall, after receiving the following documents, promptly make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memoranda, and briefs submitted to the tribunal by a disputing party and any written submissions submitted in the form of amicus submissions; (d) minutes or transcripts of the hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal.”

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281 *Id.* at 35.


283 Under the UNCITRAL Arbitration Rules, hearings shall be held in private unless the parties agree otherwise (Article 25(4)) and the award may be made public only with the consent of the parties (Article 32(5)). The ICSID Arbitration rules allow for public access to hearings unless either party objects (Rule 32(2)).
VII. Conclusion

This Part provided a general overview of the legal system in Peru, setting a context for the latter chapters in this Report. Part 2(I) set forth some of the gaps and challenges present in the legal framework for mining in Peru. Primarily, the mining legal framework in Peru is predicated on providing a facilitating environment for mining companies. However, the duties and obligations of mining companies are ill defined. Given this, there is a critical need for the Government to examine and overhaul the mining framework to ensure that the duties and obligations of the mining companies are clearly established. Finally, while Part 4 will detail the need for community engagement and include policy recommendations in this regard, Part 2(II) recommends improving the process of acquisition of surface land rights by mining companies.

Part 2(III) set out some important aspects for consideration in the context of anti-corruption and transparency laws. While Peru has certain laws in place in this regard, as detailed in Part 2(III), there is a need for further strengthening and enlarging the scope of such laws. Additionally, there is a need to include specific reporting obligations on mining companies to ensure that communities and the Government can readily access information in relation to their activities in Peru. In the spirit of such access to information of private bodies, Part 2(V) also advocates the inclusion of a provision in relation to right to information vis-à-vis private bodies and their activities in the Transparency Law in Peru.

Peru is a role model for the drafting of progressive Investment Agreements in the region. While Peru’s second-generation agreements already strike a good balance between investor rights and the preservation of public policy space, Part 2(VI) argues that these Investment Agreements can and should be strengthened. The recommendations in Part 2(VI) are not meant as an exhaustive list, but rather highlight some of the changes that Peru should give a high priority. It is recommended that Peru appoint a commission to review its existing Investment Agreements and identify how they could be strengthened. Where it is appropriate, changes to existing Agreements could be made through the exchange of diplomatic notes instead of a termination and re-negotiation of the Agreements. This approach can be taken with regard to first and second generation Investment Agreements that contain broad provisions that leave too much discretion to tribunals to interpret the scope of investor rights and exceptions. Finally, Peru is a prospective member of the Trans-Pacific Partnership (TPP), a proposed FTA with an investment chapter, currently under negotiations between 12 countries located in the Asia-Pacific, North- and South-American region. The above-mentioned recommendations should also guide Peru’s negotiation efforts in the context of TPP.
PART 3. ECONOMICS

This Part of the Report presents an analysis of the economics of large-scale mineral and ore mining in Peru. It opens with a general overview of the Peruvian economy, including examination of the economic impacts of FDI and international trade. An in-depth investigation of mining follows, including an overview of the mining industry and analysis of FDI in mining, the allocation of mining revenues and resources, the risk of resource dependence, and corporate tax abuses that occur in mining related activities. These discussions include explanations of the Mining Canon and the National System of Public Investment, Peruvian institutions that guide the aforementioned revenue allocation processes. The Part concludes with approaches for measuring the true costs of social conflict and environmental degradation associated with mining, the implications of which are addressed in subsequent Parts of this Report. Key recommendations, based on literature review, interviews with stakeholders, and field visits, are included throughout the analyses.

I. Overview of the Peruvian Economy

Peru practiced import substitution industrialization up until the 1970s, when irreversibly worsening economic crises confirmed that this strategy was no longer viable. The subsequent two decades were marked by increased political disorder and economic mishaps as the country struggled with debt, inflation, and civil unrest under Presidents Fernando Belaunde Terry and Alan Garcia Perez. When President Alberto Fujimori was elected into office in 1990, his administration’s sweeping reforms—liberalizing trade and the financial sector, and imposing restrictive monetary and budgetary policy—were instrumental in restoring economic stability and reinstating growth. In the years since 2002, through sound policy and a favorable global commodities market, Peru has maintained high economic growth rates and is forecast to continue surpassing its Latin American neighbors in Gross Domestic Product (GDP) growth, in spite of the dip that took place in 2014 (See Figure 2.1).

Figure 2.1: Projected GDP Growth Rate for Peru Compared to All of Latin America and the Caribbean, and Peru’s GDP in Billions of USD from 2003 to 2013

284 Economic growth strategy whereby highly interventionist policies are used to grow domestic industry so that local products can replace foreign imports. See Akram Esanov, Economic Diversification: Dynamics, Determinants, and Policy Implications, Revenue Watch Institute (New York, NY: Natural Resource Governance Institute, 2012).

285 Stiftung, supra note 6, at 3.

286 Id.

287 Peru is expected to maintain GDP growth rates higher than those of Colombia, Chile, Mexico, Brazil, Argentina, and Venezuela according to ProInversion, “Macroeconomic Results,” available at http://www.investinperu.pe/modulos/JER/PlantillaStandard.aspx?are=1&prf=0&jer=5753&sec=17 (accessed on April 12, 2015) [hereinafter Macroeconomic Results]. Data provided by FMI and prepared by ProInversion.
Peru demonstrates strong performance in other macroeconomic indicators as well (See Figure 2.2). Ongoing countercyclical spending and fiscal prudence on part of the BRCP and President Humala’s administration have kept inflation and exchange rates stable and have led to current account surpluses and reductions in public debt since 2011. These achievements are especially notable given high inflows of foreign investment, the unlimited convertibility of the Peruvian Nuevo Sole, and export revenues that are largely fixed by global commodity prices and are collected in foreign currencies—all channels through which economies with large mining sectors can be destabilized. Peru returned to the global bond market in late 2014, which will ease the reduction of the country’s dollarized debt and increase domestic asset and securities trading.

Banking services in Peru are globally competitive, in soundness and resilience, and are International Monetary Fund (IMF) and Basel II compliant. Other recent economic successes include reductions in extreme and moderate poverty and greater levels of employment in salaried and self-employed work, attributable in part to growth in the manufacturing and services sectors and in part to effective policy measures. Empirical evidence indicates that countries with abundant natural resources face greater difficulty in diversifying their economies and maintaining stable exchange rates, an argument that is discussed later in this Part, but Peru seems to have avoided these traps.

**Figure 2.2: Peru Prosper: Key Macroeconomic Indicators**

<table>
<thead>
<tr>
<th>Indicator and Unit of Investment</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014 (forecast)</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP, current USD</td>
<td>170 billion</td>
<td>192 billion</td>
<td>202 billion</td>
<td>208 billion</td>
</tr>
<tr>
<td>GDP per capita, current USD</td>
<td>5,684</td>
<td>6,322</td>
<td>6,540</td>
<td>6,625</td>
</tr>
<tr>
<td>GDP growth rate, percentage</td>
<td>5.19%</td>
<td>4.63%</td>
<td>4.43%</td>
<td>5.50%</td>
</tr>
<tr>
<td>Public debt, percentage of GDP</td>
<td>22.1%</td>
<td>20.4%</td>
<td>19.6%</td>
<td>19.7%</td>
</tr>
<tr>
<td>Unemployment rate, percentage of total labor force</td>
<td>7.72%</td>
<td>6.79%</td>
<td>7.52%</td>
<td>6.00%</td>
</tr>
<tr>
<td>Population below poverty line, percentage of total population</td>
<td>27.8%</td>
<td>25.8%</td>
<td>23.9%</td>
<td>No data</td>
</tr>
<tr>
<td>Foreign Direct Investment, current USD</td>
<td>8.1 million</td>
<td>12.3 million</td>
<td>9.3 million</td>
<td>9.26 million</td>
</tr>
</tbody>
</table>


289 Macroeconomic Results, supra note 287.

290 ICMM, Responsible Mining, supra note 4, at 24.


292 The Basel Accords, issued by the Bank for International Settlements, sets the global framework for financial stability and bank regulation. Basel II compliance ensures that the banking and finance sector in Peru is resilient, stable, and adequately monitored. Peru has yet to achieve Basel III standards, however, which are the most stringent. See Akram Esanov, Economic Diversification: Dynamics, Determinants, and Policy Implications, Revenue Watch Institute (New York, NY: Natural Resource Governance Institute, June 6, 2012) [hereinafter Esanov].

293 ICMM, Responsible Mining, supra note 4, at 11.

294 Esanov, supra note 292, at 6.
<table>
<thead>
<tr>
<th>Inflation rate, percentage change</th>
<th>3.37%</th>
<th>3.65%</th>
<th>2.81%</th>
<th>3.22%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest rate, percentage</td>
<td>12.85%</td>
<td>16.8%</td>
<td>16.12%</td>
<td>No data</td>
</tr>
<tr>
<td>Public investment, percentage of GDP</td>
<td>25.73%</td>
<td>26.71%</td>
<td>28.29%</td>
<td>27.76%</td>
</tr>
<tr>
<td>Current Account Balance, USD</td>
<td>-3.18 billion</td>
<td>-6.28 billion</td>
<td>-9.12 billion</td>
<td>-10.88 billion</td>
</tr>
<tr>
<td>International Reserves, current USD</td>
<td>48.8 million</td>
<td>64.0 million</td>
<td>65.7 million</td>
<td>62.3 million</td>
</tr>
</tbody>
</table>


There is still concern that structural imbalances persist in spite of reforms, and will continue to undermine the permanence of Peruvian economic development. The International Labor Organization (ILO) estimates that 70% of the labor force is employed by the informal sector, constituting 30% of GDP, and the national economy is increasingly bifurcated between the wealthier coastal regions and the more impoverished interior.\(^{295}\) A third of deposits and half of credits in the Peruvian banking system are in U.S. dollars, which renders the system vulnerable to exchange rate shocks and capital flight.\(^{296}\) A large part of GDP growth over the past 15 years was due to high global commodity prices. As those prices decline, Peru’s projected growth rates, and investor confidence, might waver.\(^{297}\) Analysts speculate that the 2014 slump in GDP growth rate was due to lackluster activity in mining, construction, and manufacturing.\(^{298}\) If GDP growth is to both rebound and remain high, policies for economic and export expansion and diversification need to be more comprehensive and implemented with greater exigency.\(^{299}\)

The most significant concern, however, might be what macroeconomic data on the government’s fiscal position imply about the Government’s capacity to collect taxes and manage spending. Compared to other Latin American countries, Peru has maintained low public debt, a low public tax burden, and fiscal surplus, but it also has a low rate of resource mobilization, which is suggestive of weak administrative authority and competence.\(^{300}\) While Government expenditures have grown, especially at subnational levels, the continued fiscal surplus in the face of infrastructure needs and rural poverty concerns might be a consequence of public sector ineffectiveness to implement projects.\(^{301}\) Peru is a regional leader in public investments, but this is due in part to laws surrounding mining revenue spending, discussed later in this Part.

**Figure 2.3: Composition of the Peruvian Economy**

<table>
<thead>
<tr>
<th>Sector</th>
<th>Value, 2012 USD</th>
<th>Percentage of total GDP, 2012</th>
<th>Percentage change from 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>6,547 million</td>
<td>7.2%</td>
<td>5.1%</td>
</tr>
</tbody>
</table>

\(^{295}\) ICMM Case Study, *supra* note 2, at 17.

\(^{296}\) Stiftung, *supra* note 6, at 19.

\(^{297}\) *Id.*


\(^{299}\) ICMM Responsible Mining, *supra* note 4, at 34.

\(^{300}\) *Id.* at 24.

\(^{301}\) *Id.*
<table>
<thead>
<tr>
<th>Industry</th>
<th>Value</th>
<th>Percent Change</th>
<th>Year-Over-Year Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fishing</td>
<td>332 million</td>
<td>0.4%</td>
<td>-11.9%</td>
</tr>
<tr>
<td>Mining</td>
<td>4,256 million</td>
<td>4.7%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>12,798 million</td>
<td>14.2%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Electricity and Water</td>
<td>1,804 million</td>
<td>2.0%</td>
<td>5.2%</td>
</tr>
<tr>
<td>Construction</td>
<td>6,353 million</td>
<td>7.0%</td>
<td>15.2%</td>
</tr>
<tr>
<td>Trade</td>
<td>13,844 million</td>
<td>15.3%</td>
<td>6.7%</td>
</tr>
<tr>
<td>Other services</td>
<td>35,909 million</td>
<td>39.8%</td>
<td>7.4%</td>
</tr>
<tr>
<td>Taxes, and fees</td>
<td>8,531 million</td>
<td>9.4%</td>
<td>6.6%</td>
</tr>
</tbody>
</table>

Source: Swiss Chamber of Commerce in Peru, with data compiled from BCRP 2013 Annual Report

A. Foreign Direct Investment and Trade

Since departing from import-substitution industrialization, Peru continues to integrate into the global economy as it enters free trade agreements, coordinates reforms with international organizations such as the IMF and the World Bank, and increases cooperation with social and environmental actors such as the World Wildlife Fund (WWF) and the EITI. Since Fujimori, administrations have made policies that invite foreign investment and increase international trade, and the Humala administration today has been deepening these practices through cutting rates, maintaining macroeconomic stability and credit-worthiness, and creating a pro-investment business climate.303 Government agencies such as MEF, MINEM, ProInversion, INGEMMET, and the Ministry of Foreign Commerce and Tourism (Ministerio de Comercio Exterior y Turismo) (MINCETUR) all facilitate foreign investment and commercial activity and grant of Mining Concessions.

As discussed in Part 2(VI) of this Report, national and legal instruments such as the legal stability agreements exist to extend protection to foreign investors, and which are intended to further enhance the attractiveness of Peru as an investment destination. In 2013, BCRP recorded USD 9.3 million in FDI and USD 42.0 billion in private investments, and these inflows are playing an increasingly important role in the Peruvian economy.304

Legal Stability Agreement Clauses (Legislative Decree no. 662)

- Stability in non-discriminatory treatment regulation
- Income tax regime stability
- Free disposal of currencies
- Right to use most favorable market exchange rate
- Right of free remittance, dividends, and royalties and access to foreign exchange


Peru’s investment grades are a solid A3 from Moody’s, and BBB+ from S&P, as well as from Fitch-narrowly underperforming Chile, but surpassing Brazil, Colombia, and other neighbors as a promising destination for business and investment.305 Peru has demonstrated historically high performance across all

304 Macroeconomic Results, supra note 288.
305 PwC, Doing Business, supra note 298, at 12.
of the World Bank’s *Doing Business* indicators, although recent rankings have shown a downturn.\(^{306}\) From 2014 to 2015 Peru saw only declines or no changes across the *Doing Business* indicators.\(^{307}\) The country is still ranked 35\(^{th}\) in the world for doing business, out of 189 measured countries, and Peru is still a regional leader, second only to Colombia (Colombia is ranked 34\(^{th}\)).

Figure 2.4: Foreign Direct Investment in Peru, by Sector

<table>
<thead>
<tr>
<th>Total Investments: 10,172 million USD</th>
<th>Direct Investments by Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mining 24%</td>
</tr>
<tr>
<td></td>
<td>Finance 19%</td>
</tr>
<tr>
<td></td>
<td>Communications 17%</td>
</tr>
<tr>
<td></td>
<td>Industry 14%</td>
</tr>
<tr>
<td></td>
<td>Energy, trade, oil, services, and others 26%</td>
</tr>
</tbody>
</table>


Peru is a regional leader in free trade, and a signatory of several Investment Agreements (See Part 2(VI) of this Report). Since the Fujimori administration, Peru has lowered tariff rates on imports from nearly 70% of monetary value to 3% in 2013, and trade is quickly becoming an important component of GDP.\(^{309}\) “National treatment,” or the principle of equal conditions for foreigners and locals, is a constitutional guarantee that informs policies surrounding international trade as well as investment and has been used to bolster investor interest.\(^{310}\) Direct links between investment and trade agreements and growth in FDI are lacking. Empirical studies indicate that FDI decisions are most influenced by market size and potential, institutional stability, openness to trade, and infrastructure conditions.\(^{311}\) Investment and free trade agreements might signal trade openness, or effective institutions, but as discussed in Part 2(VI) of this Report, it is unlikely that the treaties lead to greater FDI inflows, especially in the case of resource-seeking FDI.\(^{312}\) Increased trade and increased capital inflows have fueled Peru’s rapid economic growth, but improving total factor productivity, greater macroeconomic resilience, and comprehensive institutional support have also been crucial to sustaining that growth.

Figure 2.5: Trade in Goods and Services, 2013

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307 Id.

308 Id.

309 Stiftung, *supra* note 6, at 19.


Peru is renowned for its natural resources as one of the world’s top producers of copper, gold, and silver. Figure 2.6 depicts Peru’s global metals production standing.

Figure 2.6: Peru’s Competence in Mineral Commodities

<table>
<thead>
<tr>
<th>Mineral Commodity</th>
<th>Peru’s competence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copper</td>
<td>2nd after Chile; 2nd largest copper reserves in the world</td>
</tr>
<tr>
<td>Silver</td>
<td>2nd after Mexico</td>
</tr>
<tr>
<td>Tin</td>
<td>3rd after China and Indonesia</td>
</tr>
</tbody>
</table>

Source: Data compiled from WTO Statistics Database

Peru is also a member of the Mercado Integrado Latino Americano (MILA), a cross-border equities market between Chile, Colombia, Mexico, and Peru that permits investors to purchase and sell shares from the three other stock markets through local brokers. Strengths of MILA include greater diversification and new investment and portfolio opportunities, access to a larger market, and channels for regional stabilization and economic integration. Similarly, Peru’s membership in the Alianza del Pacifico, also with Chile, Colombia, and Mexico, is thought to be crucial to increasing open trade even further and supporting regional economic growth, to improving social inclusion, and to gaining leverage against other economic blocs, in particular those from the Asia-Pacific.

B. Mining in Peru

Peruvian Mining Industry Overview

Peru is renowned for its natural resources as one of the world’s top producers of copper, gold, and silver. Figure 2.6 depicts Peru’s global metals production standing.

Figure 2.6: Peru’s Competence in Mineral Commodities

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<tr>
<td>Tin</td>
<td>3rd after China and Indonesia</td>
</tr>
</tbody>
</table>

314 PwC, Doing Business, supra note 298, at 23.
Peru also has significant reserves of coal, iron ore, silver, sulfur, and zinc. \(^{318}\)

Peru’s mining sector has been forecasted to see an average annual growth of 3.4% in the period 2015-2018. \(^{319}\) There are currently a number of mining projects at various stages of development in Peru. From discussions with private sector consultants in Peru, the authors understand that the project pipeline is one of the key features of the mining sector in Peru. **Figure 2.7** shows Peru’s mining projects categorized by its respective development stages.

*Figure 2.7: Mining Project Pipeline for Peru*

<table>
<thead>
<tr>
<th>Metal</th>
<th>Rank</th>
<th>After Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zinc</td>
<td>4th</td>
<td>China and Australia</td>
</tr>
<tr>
<td>Lead</td>
<td>4th</td>
<td>China, Australia and the United States</td>
</tr>
<tr>
<td>Molybdenum</td>
<td>4th</td>
<td>China, the United States and Chile</td>
</tr>
<tr>
<td>Gold</td>
<td>6th</td>
<td>China, Australia, the United States, Russia, and South Africa</td>
</tr>
</tbody>
</table>

Source: KPMG International \(^{317}\)


\(^{318}\) See KPMG Country Mining Guide *supra* note 24.

Peru’s attractive resources have garnered approximately USD 57 billion worth of planned investment through to 2020.\(^{321}\) Figure 2.8 maps out details of Peru’s total investment by value in the mining sector.

Figure 2.8: Peru’s Total Mine Investment by Value (2012-2017)

Source: MINEM\(^{320}\)

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Notably, the mining sector accounts for over 13% of FDI in Peru. By comparison, the mining sector accounts for approximately 44.9% of FDI in Chile as of 2013. While the current value of mining investment in Peru is estimated to be approximately USD 10 billion, Business Monitor International predicts that the value of mining investments in Peru will more than double by 2018. Figure 2.9 illustrates how the mining sector in Peru contributes significantly to the global output of mineral resources.

**Figure 2.9: Peru’s Share of Global Output by Mineral (2013)**

Source: U.S. Geological Survey and Business Monitor International

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322 Id. at 16.
326 BMI Mining Report, supra note 319, at 7.
327 Id., at 8.
Peru’s mining investment is concentrated in four geographic regions: Apurimac (20.70%), Arequipa (16.65%), Cajamarca (15.03%) and Moquegua (9.50%), with the remaining 38.12% scattered throughout the country. Figure 2.10 describes the mining investment portfolio of different regions in Peru.

Figure 2.10: Regional Mining Investment Portfolio

![Regional Mining Investment Portfolio](image)

Source: MINEM

**FDI in Mining**

The opportunity to extract rich and high-quality resources in Peru has generated significant interest by several international mining companies. Some key international players in the industry include Barrick Gold Corporation, BHP Billiton, Chinalco, Freeport McMoRan Copper & Gold, Newmont Mining Corporation, Rio Tinto, Teck Resources, Vale, and Glencore Xstrata. Buenaventura is the largest publicly traded mining company in Peru. Figure 2.11 shows that as of 2014, China is the leading foreign investor in the country.

Figure 2.11: Details of the FDI Received from Different Countries (as of June 2014)

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331 *Id.*, at 50.
As the country continues to pursue policies to attract FDI in the mining industry and seek development for its citizens, significant challenges remain. Despite the economic growth over the last decade, there continues to be an infrastructure gap. Specifically, there is a need to ensure that the local and national infrastructure can sufficiently meet the demands made by the rapidly expanding mining industry. Given its geographical terrain, ground transportation and electricity could be difficult to establish and scale up for larger projects, especially in the Andean mountains. Realizing the infrastructure gap and the need to reduce logistics costs, the Government of Peru, is seeking to make significant investment in the infrastructure sector. For the period up to 2016, the Ministry of Transport and Communications has forecasted a total investment in transport infrastructure to be USD19,290. Figure 2.12 includes the details in this regard.

Figure 2.12: Projection of New Investment in Transport Infrastructure (2014-2016)

<table>
<thead>
<tr>
<th>Infrastructure</th>
<th>Investment Amount (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Road Infrastructure</td>
<td>11,534</td>
</tr>
<tr>
<td>Rail</td>
<td>6,601</td>
</tr>
<tr>
<td>Airports</td>
<td>538</td>
</tr>
<tr>
<td>Port Infrastructure</td>
<td>538</td>
</tr>
<tr>
<td>Waterways Infrastructure</td>
<td>69</td>
</tr>
</tbody>
</table>

Source: MINEM


Source: Ministry of Transport and Telecommunications, Government of Peru

Peru’s approach to developing infrastructure will go a long way in supporting its fast-growing mining industry. Given the specific needs of infrastructure by the mining companies, this Report, argues that the mining companies should also have the responsibility to develop infrastructure in Peru. Large mining companies have sufficient financial backing and technological knowledge, to develop and implement modern and durable infrastructure in the country.

Building better infrastructure would not only facilitate mining in Peru, but the quality and quantity of infrastructure can promote national growth and reduce poverty levels in the country. It is important for Peru to prioritize its investments in the different infrastructure sectors on the basis of a good cost-benefit analysis and invest first in sectors with greater productive value. Furthermore, it is also important for Peru to ensure that its population and all enterprises, other than mining companies, also have access to the infrastructure being developed by the Government.

With the aim of diversifying its economy, the Government of Peru should also utilize a portion of the mining revenues to develop non-extractive industry related infrastructure. In this regard, the Government of Peru should leverage its relationship with multinational mining companies, many of who have multiple businesses and extensive expertise in developing all kinds of infrastructure to work with it on such infrastructure projects.

**RECOMMENDATION**

*The Government of Peru must ensure that, wherever possible, the existing and projected infrastructure are accessible to its population (specifically rural populations) and for enterprises other than mining companies. The Government should also undertake studies to determine the most convenient location for the infrastructure projects, taking into account its population’s need for access to local trade centers and linking isolated areas of the country with schools, health facilities and economic clusters.*

*The Government of Peru must compel the Concessionaires to implement a modern infrastructure system for the purposes of meeting the infrastructure demands of the mining companies. This means constructing a state-of-the-art infrastructure and purchasing the latest rolling stock technology. The infrastructure shall be operated as a shared-use infrastructure for use by the communities and other enterprises, as well.*

*The Government of Peru should focus on developing non-extractive industry related infrastructure. Investment in different sectors of infrastructure should be prioritized on the basis of a good cost-benefit analysis.*

In addition to the infrastructure needs of the country, there is also a need for the Government to undertake capacity building measures to efficiently support the mining projects across the country. In interviews with private sector representatives in Peru, confidence in Peru as an investment destination was often tempered on account of bureaucratic inaction and the lack of capability at the local government level.

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336 “That infrastructure matters to growth is now relatively well recognized and widely understood among practitioners and policymakers. There is, indeed, a plethora of anecdotal and more technical evidence that better quality and quantity of infrastructure can directly raise the productivity of human and physical capital and hence growth (e.g., by providing access, roads can: (i) improve education and markets for farmers’ outputs and others by cutting costs, (ii) facilitate private investment, (iii) improve jobs and income levels for many).” See Antonio Estache and Grégoire Garsous, “The Impact of Infrastructure on Growth in Developing Countries,” IFI Economic Notes, April 2012, available at http://www.ifi.org/wps/wcm/connect/054be8804db753a6843aa4b7d7326c0/INR+Note+1+++The+Impact+of+Infrastructure+on+Growth.pdf?MOD=AJPERES (accessed on April 30, 2015) [hereinafter Estache and Garsous].

337 See Estache and Garsous, supra note 336.

338 Ground transportation and electricity can be difficult to establish and scale up for larger project given the Andean mountains.
Government should take immediate steps to rectify this situation. One way to address bureaucratic inaction is to conduct extensive training for local governmental officials. Such training should be commensurate with the sophistication of the foreign investors. This is not only relevant to ensure that the foreign investors have a favorable environment in the country but it is also necessary to ensure that the officials, specifically at the local government level, are able to handle complaints against foreign investors in an effective manner. Delinking the government appointments from political allegiances would also go a long way to improving local government capabilities.

**RECOMMENDATION**

The Government should conduct extensive training to its officials – at the national and local levels – and it is important that the training is commensurate with the sophistication of the foreign investors.

Comprising more than half of Peru’s exports, the mining sector is Peru’s primary revenue-generating sector.³³⁹ In 2012, the mining industry accounted for 13% of government revenues.³⁴⁰

Revenue from taxes and mining royalties make up the mining revenues in Peru. In September 2011, Peru enacted three new mining-specific tax legislation bills: a Modified Mining Royalty (MMR),³⁴¹ Special Mining Tax (SMT), and Special Mining Burden (SMB).³⁴² Figure 2.13 provides a snapshot of the fiscal regime applicable to the mining sector in Peru.

Figure 2.13: Fiscal Regime for the Mining Sector in Peru

<table>
<thead>
<tr>
<th>Income tax³⁴³</th>
<th>30%³⁴⁴</th>
</tr>
</thead>
<tbody>
<tr>
<td>MMR</td>
<td>1% to 12% imposed on operating mining income.³⁴⁵ A minimum royalty of 1% of sales is applicable.</td>
</tr>
<tr>
<td>SMT</td>
<td>2% to 8.4% imposed on operating mining income</td>
</tr>
<tr>
<td>SMB³⁴⁶</td>
<td>4% to 13.12% imposed on operating income</td>
</tr>
</tbody>
</table>


³⁴⁰ Id.

³⁴¹ The legal nature of the Modified Mining Royalty became controversial at the time of the 2011 enactment. For some, mining royalties are a “compensation” for the exploitation of the minerals while for others it is in fact a “tax.” The determination of its nature has implications regarding to whom the amendment will be applicable. In the scenario of a “compensation” companies that have signed stability agreement would be found liable for payment according to the new regime and, conversely, in the scenario of a “tax” it would be very questionable whether or not companies with stabilized regimes are caught by the modification or not. Mining companies with stabilized regimes are nonetheless not affected by the new rules as their stability agreements guarantee not only tax stability, but some many other benefits that makes the new legislation not applicable to them. Please note that this debate and other aspects of the mining royalty amendment do not fall within the scope of this Report. These aspects have been discussed in other scholarly work. See Maria Jose Espantoso Bedoya, *An Analysis of the Recent Reform to the Peruvian Mining Sector from a Tax Perspective*, 2012, Dissertation Thesis, University of Toronto, available at https://tspace.library.utoronto.ca/bitstream/1807/33405/1/Espantoso_Bedoya_Maria%20Jose_201211_LLM_thesis.pdf, (accessed on April 04, 2015).


³⁴³ Additionally, mining companies are required to pay VAT and import taxes. A detailed discourse on the taxation system for the mining companies in Peru is not within the scope of this Report.

³⁴⁴ Mining companies with tax stabilization agreements are subject to a 2% premium. Further, mining companies are required to pay a tax on the dividends.

³⁴⁵ Operating income is defined as revenues generated from the sale of mineral resources less cost of goods sold and operating expenditures. See EY, *Peru, supra* note 23, at 47.

³⁴⁶ The SMB is considered a voluntary payment for mining companies with fiscal stabilization agreements that elect to the SMB with rates ranging from 4% to 13.12%. Royalty payments can be credited against SMB payments.
<table>
<thead>
<tr>
<th>Good Standing Fee</th>
<th>USD 3/ha/yr</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital Allowances</td>
<td>Accelerated depreciation, exploration write-offs.</td>
</tr>
<tr>
<td>Investment Incentives</td>
<td>Tax losses can be carried forward for 4 years or indefinitely; stabilization agreements; VAT recovery.</td>
</tr>
</tbody>
</table>

**Source:** EY\(^{347}\)

It is laudable that Peru has been able to leverage its potential as a resource-rich country and has created a progressive fiscal system for mining related royalties and taxes.\(^{348}\) The profitability of mining companies is affected by the dynamic global commodity prices. By adopting a progressive fiscal system, Peru is now able to adjust its share of the royalties to the actual profitability of mining companies. Consequently, if the profitability of the mining companies increases on account of favorable global commodity prices, Peru’s Government would also be able to partake in this increased profitability of the mining companies.\(^{349}\)

**II. Mining Revenues and Resource Allocation**

Decentralization is a relatively new phenomenon in Peru.\(^{350}\) By design, the local governments are entirely dependent on the national government for their revenues. Article 77 of the Constitution mandates that the respective local constituency is entitled to receive an appropriate share of the total revenues received by the Government in the exploitation of natural resources. This share of the local constituency is known as the ‘Mining Canon’. The introduction of the Canon system and other transfer arrangements was designed to fund decentralization, and was a “welcome initiative that helped foster more democratic government.”\(^{351}\)

The decentralization of local government finance went hand-in-hand with innovative proposals to create spaces at the local level for citizen participation in budgeting and in the oversight of the funds used.\(^{352}\)

The distribution of the Mining Canon is based on 3 factors: (a) profits of the mining firms, which depend on international mineral prices, (b) population of a district, which means that districts with a higher population receive more transfers, and (c) poverty of a district, which is measured by the Unsatisfied Basic Needs Indicator.\(^{353}\) The rules by which the Canon is distributed under the Canon Law\(^{354}\) is as set out in Figure 2.14. The amount of Mining Canon is determined as 50% of the corporate income tax paid by the mining company.

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\(^{347}\) EY, *Peru*, supra note 23, at 47.

\(^{348}\) Id. at 43.

\(^{349}\) Id.

\(^{350}\) Part 2(I) of this Report also discusses decentralization.


\(^{352}\) Id.

\(^{353}\) Chantal Toledo, “Natural Resource Rents and Redistribution: The Effect of Mining-Based Transfers on Local Populations in Peru,” Presentation for the Latin American and Caribbean Environmental Economics Program, (June 21, 2011) [hereinafter Toledo].

The Unsatisfied Basic Needs Indicator (UBN) is comprised of the following:

- Homes with in appropriate physical characteristics;
- Overcrowded houses (three or more people per room);
- Homes without waste pipes;
- Homes with at least one child that is in school age that is not going to school;
- Homes with high pressure or economic dependence.

The indicator is a number between zero and one and reflects the percentage of the population or homes that have one or more unsatisfied needs. The higher the UBN, the poorer the district, and the greater amount of canon it receives. *Id.*

Figure 2.14: Rules by which the Mining Canon is Distributed

<table>
<thead>
<tr>
<th>District municipality where the resource is extracted</th>
<th>10% of the Mining Canon</th>
</tr>
</thead>
<tbody>
<tr>
<td>Municipalities of the province where the resource is extracted</td>
<td>25% of the Mining Canon</td>
</tr>
<tr>
<td>Municipalities of the department where the resource is extracted</td>
<td>40% of the Mining Canon</td>
</tr>
<tr>
<td>Regional government where the resource is extracted</td>
<td>25% of the Mining Canon</td>
</tr>
<tr>
<td></td>
<td>20% of this allocation is distributed to the national universities in the regional government’s jurisdiction</td>
</tr>
</tbody>
</table>
A. Limitations on the Use of the Canon and the National System of Public Investment

Regional and local governments use the funds from the Canon to finance or co-finance public investment projects or services aimed at providing universal access to public services that fall within the competence of their level of government.\(^{355}\) Proposals for the use of Canon funds have to be approved through the National System of Public Investment (Sistema Nacional de Inversion Publico) (SNIP). Through SNIP, the Central Government retains a degree of discretion over how the funds are spent by local governments.\(^{356}\) The Canon specifies that the resources have to be spent on physical infrastructure, and has been primarily spent for the construction of highways, education and health infrastructure, public health infrastructure (such as drainage), administrative buildings, and general urban improvements.\(^{357}\) Money to fund activities that take place within educational and health establishments has to be found from other budgets.\(^{358}\) Funds that are not spent can be saved and used in a later year.\(^{359}\)

As the Mining Canon can only be used through SNIP, the tool is seen as restricting the projects where the Canon may be spent. According to the International Council on Mining & Metals (ICMM), the flagship CEO-led organization to take forward the extractive industry’s responsibilities on sustainable development,\(^{360}\) SNIP is viewed as putting up “too many and too narrow conditions around public investment approvals, hindering sub-national governments from spending” the Mining Canon transfers.\(^{361}\)

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\(^{357}\) Id.

\(^{358}\) Id.

\(^{359}\) Toledo, supra note 353.

\(^{360}\) MMSD+10, supra note 162, at 5.

\(^{361}\) ICMM, Responsible Mining, supra note 4, at 25.
Based on ICMM’s studies, some mining regions are unable to spend their Mining Canon transfers because of their inability to “present investment projects that comply with the SNIP system,” which defines investment narrowly and prohibits spending on non-public investment projects, such as investments in human capital formation.362

While the Mining Canon is a well-intentioned arrangement, it has had unequal impact and has contributed to an increase in regional disparities. By way of illustration, in 2011, the Ancash region (where the Antamina copper mine is located) received the equivalent of USD 227.08 million, and the next three largest mining areas (Arequipa, La Libertad, and Cajamarca) were granted over S/ 315 million.363 However, out of the 22 regional governments in Peru, six of them did not receive any of the funds gained from the tax and three regions received only between S/ 2 and 7 million.364 Though many argue that the regions where mining occurs deserve to gain more from the tax collected from the mining companies, as they are the ones who are directly affected, the calculations surrounding the division of funds additionally isolates rural regions that do not immediately benefit from any economic development through mining operations.365 The Institute for the Study of Labor (IZA) based in Bonn, Germany, found that after controlling for socioeconomic variation among producing and non-producing regions (both districts and provinces), the Mining Canon had little impact on development.366 IZA’s findings call into question the usefulness of revenue sharing agreements without backing from strong government monitoring of finances and capacity.367

Additionally, it has been argued that increased government revenue from mining has led to increased levels of spending, but has not resulted in significant improvements in public goods and services for the country as a whole.368 This conclusion is consistent with our interviews with several representatives from mining companies operating in Peru.369 During these interviews, representatives from the private sector expressed worry about the government’s ability—at all levels—to effectively manage funds to lead to improved socioeconomic and infrastructure for Peruvians.

Finally, funds can only be applied to finance infrastructure projects. This restriction on the allocation of funds has caused inefficiencies within the scheme.370 The revenue re-distributed to the local governments has failed to adequately provide necessary social structures, such as health care, education, and other public investment to improve living conditions in regional areas.371 Consequently, despite the influx of mineral

362 Id. at 39.
364 Id.
365 Id.
367 Id.
369 During meetings with representatives from mining companies on March 17, 2015 and March 21, 2015, respectively, representatives revealed that payments to government authorities were used insufficiently to meet the social and infrastructure needs of the community. Representatives expressed that the company preferred to set aside their own internal budgets to address these needs (e.g. bridges, roads, water treatment plants, etc.).
371 Boland, supra note 363.
wealth, the local population is not reaping the benefits – often, resulting in social conflicts. Please see Part 4 for a discussion of social conflicts in Peru.

The lack of institutional capacity in the local government only exacerbates the issue. Governance challenges and limited institutional capacities appear to be limiting mining’s benefits at the regional and local levels.\textsuperscript{372} and those governments that receive large payments from the canon are unable to spend revenues adequately; on average, the governments only utilize \textbf{57\%} of the funds.\textsuperscript{373} As of December 2011, regional and local governments had USD 3.5 billion worth of unutilized funds,\textsuperscript{374} and, on average, less than half the money available to spend in 2011 was actually spent, contributing to anti-mining protests and depriving poor communities of necessary water treatment, roads, education, and health care spending.\textsuperscript{375} An unintended consequence of the local governments’ lack of capacity to utilize the influx of canon revenue is corruption.

The absence of government capacity in local areas has resulted in the local governments being substituted by mining companies, with the local communities demanding development initiatives from the mining companies. This has resulted in discontent in the investor community.\textsuperscript{376} From an investor’s perspective, while making revenue payments is an essential condition of the approval to conduct mining activities in Peru, undertaking government-like functions may prove to be burdensome, and it is often difficult to define where corporate social responsibility stops and government responsibilities start.\textsuperscript{377} According to Jonathan Hobbs, Senior Policy Advisor of Natural Resource Governance at WWF, “the threshold [for this] will be context specific. In addition to paying taxes, developing infrastructure, assisting with social services, companies often have to do more than their fair share in situations of poor governance. It is in their interests as much as anyone else’s that governments are effective in managing their natural resources.”\textsuperscript{378} Because of the growth of the conversation on sustainable development, society’s understanding of what businesses are expected to contribute has advanced, and companies now play a bigger role in partnering for sustainable development by creating and sharing value and responsibility across a complex set of economic, social, and environmental issues.\textsuperscript{379}

In response to these issues and to assist governments in maximizing the canon and the benefits brought by mining projects in the community, IFC developed the program Improving Municipal Investment (known as MIM from its Spanish name, Mejorando la Inversion Municipal),\textsuperscript{380} which is designed to promote greater social accountability for the local governments in relation to the Mining Canon received by them. The program not only aims to provide the communities with greater information, it also provides training and support to local government to formulate and execute public benefit projects and utilize the Mining Canon effectively. The MIM Initiative is described in detail in Annex D.

**B. MIM Implementation**

The Government of Peru should promote the MIM initiative and require regional and municipal governments that receive the Mining Canon to engage with CSOs under the MIM framework. Specifically, under the oversight of MIM, local and national governments, companies, and communities must participate...

\textsuperscript{372} Alana Wilson, “Peru’s Social Conflict is About More Than Mining,” \textit{Fraser Forum}, September / October 2012, 16 [hereinafter Wilson].

\textsuperscript{373} Boland, supra note 363.

\textsuperscript{374} Wilson, supra note 372, at 16.

\textsuperscript{375} \textit{Id}.

\textsuperscript{376} Interview with Fernando Ruiz Mier, IFC. Interview conducted on March 19, 2015 at Lima, Peru.

\textsuperscript{377} MMSD+10, supra note 162, at 12, quoting Jonathan Hobs, Senior Policy Advisor, Natural Resource Governance at WWF).

\textsuperscript{378} \textit{Id}.

\textsuperscript{379} \textit{Id}. at 26.

in regular (that is, at the minimum, monthly) public hearings to share information, provide fiscal updates, and provide feedback on the uses of royalties and mining taxes.

**RECOMMENDATION**

The Government of Peru should implement the MIM initiative and require regional and municipal governments that receive the Mining Canon to engage with CSOs under the MIM framework. Moreover, the Government should require local and regional governments, companies, and communities to participate in, at a minimum, monthly public hearings to share information, provide fiscal updates and provide feedback on the uses of the Mining Canon.

In addition to implementing mechanisms that will allow the concerned parties to monitor the revenues received from mining, Peru must take steps to address the gaps of the Canon system *ex ante*, or prior to the time when the subnational governments receive the Mining Canon, to manage the way the revenues are spent and invested. Specifically, the Canon system should be improved by requiring subnational governments to plan ahead and create a detailed, costed, and comprehensive development plan that responds to the needs of the population and the geographic area. Implementing a development plan will allow Peru to maximize the Mining Canon by ensuring that local governments spend the revenues with a specific vision in mind. Development goals cut the risk of short-term or wasteful spending, incentivize governments to prioritize projects that will sustainably fuel growth beyond the availability of the minerals, and stimulate the use of the funds through ways that may benefit neighboring regions.

According to the UN Sustainable Development Solutions Network, a plan that is formulated through open public debate will expose errors, constrain self-dealing and corruption, and make inevitable course corrections less disruptive. Furthermore, a transparent and participatory process for creating the development plan enables the government to have a clear understanding of the challenges and opportunities, which allows planning to transcend short-term thinking; hence, expectations are managed, and next generations are also taken into account. Accordingly, the participation of the local government and the community is crucial in order to achieve a responsive and inclusive development plan. In addition, the mining companies must also take part in the process to help manage expectations regarding their operations and their intentions towards to the community, given the mine’s footprint and prolonged presence in the area. The Report outlines the ways through which these three actors can participate in creating the development plan.

**RECOMMENDATION**

The subnational governments must be required to create a development plan, which should be drafted with the cooperation of the community and the mining companies. The development plan should be detailed, costed, and comprehensive, and should respond to the needs of the population and the geographic area.

To develop a plan, the Government must interact more directly with mining companies and the affected communities to properly identify and agree on public projects to be funded by natural resource revenues. Each subnational government must include clear development goals, and determine specific projects to achieve such goals, and prioritize and sequence construction and implementation. Planning must also involve inter-jurisdictional cooperation, given that several regions will share the Mining...
Cooperation will also ensure that the infrastructure goals of each region will intertwine, allowing Peru to benefit from shared and coordinated infrastructure. Moreover, cooperation and coordination will allow subnational governments to learn from the experiences of other communities.

To fully maximize the ability of the development plan to stimulate proper use of the Mining Canon, the Canon law should be further amended to require that a bulk of the Mining Canon received must be spent on projects specified in, or in line with, the development plan.

**RECOMMENDATION**

*Each subnational government must include clear development goals, and determine specific projects to achieve such goals, and prioritize and sequence construction and implementation. Further, subnational governments must cooperate with other subnational jurisdictions to ensure that regional goals will intertwine.*

*The Government should also amend the Canon law to require that a bulk of the Mining Canon received must be spent on projects specified in, or in line with, the development plan.*

Mining companies should make information regarding their operations readily available to the community and local governments. Specifically, the EIAs / SIAs should be made available for review, so that the local and national governments and the community can incorporate possible responses to the impact that the mining company expects to have on the area into the development plan. This ensures that any environmental and social protection mechanisms that the Government may implement ties well into the expected consequences of the operations.

In addition to impact assessments, mining companies should also circulate their annual revenues and tax payments, to allow the local governments to forecast or estimate the Mining Canon that they will be receiving for the coming years. This allows the local and national government to more accurately match their proposed development programs with a forecasted budget.

Once the company receives the development plan from the local government, it should seek to integrate any of its infrastructure requirements for the viable operation of the mine into such framework. Any decisions on the investor’s infrastructure use and requirements should be made in the context of the development plan, so that the company can consider the particular needs and nuances of the impacted community. Nevertheless, any infrastructure that the company requires should be shared, because shared-use infrastructure lead to economies of scale and scope. It also increases economic development in the region, which ultimately translates to a better bottom line for mining companies. Moreover, shared infrastructure results in the reinforcement of the social license to operate because “shared use can foster social trust in the potential contribution of mining to development,” thereby minimizing the risk of social conflict and distrust between the community and the investor.

Apart from the benefits that shared-use investments can bring to a corporation’s bottom line, ventures of this nature also allows the investor to contribute to the sustainable and inclusive development of Peru. This ultimately ripples back to the company in the form of a more streamlined and stable business environment.

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387 See Bauer, *supra* note 381, at 18.

388 Revenue Watch Institute, *“Mining Contracts: How to Read and Understand Them,”* (US: Revenue Watch Institute, 2013), 169 [hereinafter RWI, Mining Contracts].


390 RWI, Mining Contracts, *supra* note 388, at 169.

391 Id.

To aid in the crafting of development plans, mining companies should make all information regarding their operations, including the EIAs/SIAs, and annual revenues and tax payments, available for review. This will allow subnational governments to consider such information in making the development plan.

Mining companies should also operate any infrastructure that it requires for its mining operation as shared-use infrastructure. Investors should seek to completely integrate its operational and infrastructure needs into the development plans of subnational governments to optimize its investments, minimize the risk of social conflict and distrust, and contribute to the overall growth of the local economy.

The active participation of citizens is an important aspect of development planning, which has several benefits. First, it reduces the risk of increased corruption that excess revenues often bring. Second, it keeps stakeholders involved in local decision-making over the long term, which helps shape accountability between citizens and government. Third, it opens lines of communication between the various stakeholders in the community, encouraging the formation of partnerships and trust across the public and private sectors.

Given these benefits, community participation in crafting the development plan is imperative. Community leaders, including NGOs and CSOs, must actively engage with the government to communicate the needs and demands of the people on the ground, and to integrate these, as far as possible, into the development plan.

To continue to foster dialogue between these three actors and to promote an atmosphere of trust and partnership, it is recommended that a tripartite committee be created for each municipality that will bring together representatives from the local government, the community, and the mining companies. Through this committee, each party will have an avenue to air grievances and engage in productive discussions about the current state of affairs in the municipality and the mine.

Community leaders, including NGOs and CSOs, must engage with local and national government officials to communicate the needs and demands of the people on the ground, and to integrate these, as far as possible, into the development plan. Further, a tripartite committee, composed of community leaders, local officials, and representatives from the mining companies, should be created, in order for each party to have an avenue to air grievances and engage in productive discussions on the current state of the municipality and the mine.

Peru should also focus on building the capacity of municipalities to govern themselves. As discussed, the inability of the subnational governments to properly utilize the Canon is due, in large part, to their lack of capacity to handle the large influx of funds. This was confirmed during the team’s various interviews in Peru. Hence, as part of the Government’s pursuit for decentralization, the Central Government, together with the local governments, should allocate resources to strengthen regional and municipal capacity. To ensure that sufficient funds are available for this objective, it is recommended that a portion of the Mining Canon be earmarked both in the national and subnational levels dedicated solely for educating local policy leaders.

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393 Bauer, supra note 381, at 18.
394 Id.
makers and civil servants to analyze and prioritize the needs of their communities, and to design, plan, and implement policies to address these needs.\footnote{Ciudadanos al Dia, “CAD’s Citizen Vigilance Programme: Addressing the Demand-Side Causes of Bad Use of Canon Minero Resources,” (undated), available at: http://50.57.111.125/revenuewatch_archive/training/CAD%20Canon%20Minero%20Brief.pdf (accessed on April 12, 2015).}

**RECOMMENDATION**

To achieve true decentralization, the Government should invest in building the capacity of the subnational governments to govern themselves. Hence, a portion of the Mining Canon should be earmarked in both the national and subnational levels dedicated solely for educating local policy makers and civil servants to analyze and prioritize the needs of their communities, and to design, plan, and implement policies to address these needs.

**Improving Transparency**

Peru is EITI-compliant, and also makes available information on public finances, economic baselines, and transfers to regional governments on the Economic Transparency Portal.\footnote{The Economic Transparency Portal is accessible at http://transparencia-economica.mef.gob.pe/.} Availability of information is one thing. Having the ability to use such information in a useful and meaningful manner, however, is another. Just as important as making information available is determining how to use such information to produce results.\footnote{Oxfam America, “Unblocking Bottlenecks to Effective Resource Revenue Management in Peru,” Oxfam expert meeting report, November 2014, available at: http://policy-practice.oxfamamerica.org/static/media/files/Unblocking-Bottlenecks-Meeting-report-OUS.pdf (accessed on April 12, 2015).} Information must be coupled with an informed, educated and vigilant civil society, to promote effective engagement at all levels, and to minimize incidents of corruption. To begin building a strong civil society sector, national universities, especially those supported by the canon, should integrate within their curricula programs aimed at educating the community regarding resource revenue management. A portion of the Mining Canon must also be earmarked nationally, regionally and locally to support programs that seek to enforce transparency and to educate the people on efforts to improve transparency.

**Recommendation**

National universities, especially those supported by the canon, should educate the community regarding revenue resource management. Moreover, a portion of the Mining Canon must also be earmarked nationally and subnationally to support programs that seek to enforce transparency and to educate people on efforts to improve transparency.

**III. Reducing the Risk of Resource Dependence**

NRGI reports that natural resource dependent countries are often able to achieve diversification in economic activity, but not in the composition of their exports, which can be problematic because countries that export higher value manufactured goods demonstrate more rapid, more sustained growth than those that export raw materials and commodities.\footnote{Akram Esanov, “Economic Diversification: Dynamics, Determinants, and Policy Implications,” Revenue Watch Institute (New York, NY: Natural Resource Governance Institute, June 6, 2012), 6} Furthermore, although resource dependent countries can achieve economic diversification, this is only feasible in the context of quality governance and infrastructure, which might be absent because of instability, corruption, conflict, or any other hurdles to development. Resource dependence is unfavorable for growth, and thus, far, Peru has been able to minimize the risk of falling into this situation.
Economic Mechanisms of the Natural Resource Curse

As discussed in the Introduction to this Report, the ‘natural resource curse’ has multiple dimensions, and the economic impacts take these channels:

- **Dutch Disease**: Inflows of foreign currency in payment for natural resource exports cause the local currency to appreciate, which makes the country less competitive in global markets for other exports, and can suppress growth in other sectors of the economy and deepen inefficiencies in productivity and investment.
- **Revenue Management Challenges**: Revenues from natural resources can be volatile, and governments might not have the capacity or political will to use stabilization measures to better manage inflows.
- **‘Labor Market Distortions**: High-paying jobs in natural resources might draw scarce talent away from other sectors, fuel greater socio-economic inequality through overvalued wages, and stunt human capital development by suppressing training in other skills.

Sources:


As discussed earlier, Peru has managed to keep exchange rates and inflation rates stable, in spite of vast foreign capital inflows and investments. Some analysts, however, have interpreted the 2014 dip in GDP growth rate, as an indication of the country’s dependence on mining, and as evidence of structural weaknesses in the economy.\(^{399}\) **Figure 2.15** provides a snapshot of the contribution of mining to various economic indicators in the Peruvian economy.

There is concern about *Cholo Disease* in Peru, whereby high wages in public infrastructure due to *canon* investments are drawing employment away from agriculture and other livelihoods.\(^{400}\) According to interviews with sustainability experts in Lima, an increasingly larger aspiration for Peruvian youth is to secure high-paying jobs with the government.\(^{401}\) Consistent with the traditional iteration of Dutch Disease, the mining sector has also been drawing in labor from other sectors and regions, although to varying degrees of benefit and harm for local community members.\(^{402}\)

<table>
<thead>
<tr>
<th>Figure 2.15: Contributions of Mineral Resources to GDP (2012)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mineral value added as percent of real GDP</strong></td>
</tr>
<tr>
<td><strong>Resource revenue as percent of nominal GDP</strong></td>
</tr>
</tbody>
</table>

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\(^{399}\) ICMM, Responsible Mining, *supra* note 4, at 23.


\(^{401}\) Interview in Lima with Centro de Estudios Sobre Minería y Sostenibilidad at Universidad del Pacífico, March 20, 2015

\(^{402}\) ICMM, Responsible Mining, *supra* note 4, at 28
### Resource revenue as percent of total fiscal revenue
- Metal minerals only: 14%
- Hydrocarbons only: 7.6%
- Hydrocarbons only: 6.4%

| Resource revenue from taxes as percent of total tax revenue | 19.1% |
| Metal minerals revenue as percent of total resource revenue | 54.3% |
| Hydrocarbons revenue as percent of total resource revenue | 45.7% |

### Resource exports as percent of GDP
- Only metal minerals: 15.5%
- Only hydrocarbons: 67.7%
- Only hydrocarbons: 56.8%
- Only hydrocarbons: 10.9%


President Humala’s administration has notably taken measures to increase social inclusion, primarily through improved public sector and policy coordination and efforts at re-establishing trust. To that end, the Ministry of Development and Social Inclusion (Ministerio de Desarrollo e Inclusion Social) (MIDIS) was created in October 2011, the National Office of Dialogue and Sustainability (Oficina Nacional de Dialogo y Sostenibilidad) (ONDOS) in October 2012, and the Ministry of Culture was given the authority to implement Free, Prior and Informed Consent (FPIC) regulation in September 2011 to deepen the relationship between communities and the Government. In September 2014, the Ministry of Production (Ministerio de la Produccion) outlined an approach to development that integrates education, health, infrastructure, crime reduction, modernization of the government, and productivity diversification, and is implementing a multi-year National Plan for Productive Diversification (Diversification Plan) which will raise GDP per capita, increase non-traditional exports, reduce regional and sector based gaps in economic performance, and reduce the informal sector through diversifying and increasing production and improving regulatory institutions. The Diversification Plan envisions greater education and innovation and the growth of medium and small enterprises to fuel future economic growth in a post-mining environment.

### IV. Corporate Tax Abuse: Specific Tax Considerations

#### A. Transfer Pricing Concerns

An important consideration in the extractive sector relates to the under-declaration of revenue by companies, as a tool to reduce their tax liability. These may be termed transfer-pricing considerations. Typically, extractive companies structure transactions for the sale of the extracted goods to their affiliates at less

*If a company avoids tax or transfers the money to offshore accounts what they lose is revenues; here on our continent, it affects the life of women and children – in effect in some situations it is like taking food off the table for the poor.*

**Kofi Annan**

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403 ICMM, Responsible Mining, supra note 4, at 33


406 Id.
than the fair market value of these resources.\textsuperscript{407} Such a structure can reduce the tax base for the corporate taxes payable by the mining companies to the host countries harming the poorer economies.\textsuperscript{408} This can have a direct effect on the benefits that can be made available to the public in the host country.

Peru has taken into account the issues relating to transfer pricing and has enacted rules to monitor and avoid such transactions.\textsuperscript{409} In all transactions subject to tax, the value attributed to the transaction should meet market value standards, that is, be an arms-length transaction. If the value assigned is different from the market value, whether it is overvalued or undervalued, the National Tax Administration (\textit{Superintendencia Nacional de Administración Tributaria}) (SUNAT) adjusts it for both the acquiring party and the conveying party.\textsuperscript{410} Further, in any transaction with a related party\textsuperscript{411} or transactions with tax haven residents,\textsuperscript{412} there is an obligation to undertake a transfer pricing study for transactions exceeding specified transaction values.\textsuperscript{413} In the context of transfer-pricing, market value is considered the price or consideration that unrelated parties in comparable transactions will have used under the same or similar conditions.\textsuperscript{414}

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Peru takes action to counter loss of tax revenues

Transfer pricing has become a critical issue for SUNAT because it is estimated that commercial transactions involving transfer-pricing mechanisms in Peru have an aggregated annual value equivalent to 26 percent of GDP. Consequently, SUNAT is actively prompting public debate on assessing the impact of transfer pricing in less developed economies and the need for capacity building.

During 2013, the tax administration managed to audit only a fraction (27 cases) of all transactions involving transfer pricing, and detected evaded taxes equivalent to USD 105 million; almost enough to fund the whole maternal neonatal public program. Assuming that authorities could duly monitor and audit all transfer pricing operations and that the evasion ratio was the same as in the 2013 sample, the Peruvian government could collect an estimated USD 3.36 Billion in additional tax revenues, equivalent to 84 percent of the country’s education budget.


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\textsuperscript{413} PwC, \textit{Doing Business, supra} note 298, at 37.

\textsuperscript{414} B&M Transfer Pricing Handbook, \textit{supra} note 410, at 139.
Under the applicable rules, companies operating in Peru are required to maintain adequate documentation and information that support the transfer pricing calculations. In interviews with stakeholders in Peru, the authors were informed that transfer-pricing rules are enforced strictly in Peru.\textsuperscript{415} Accordingly, multinational companies operating in Peru ensure that they have the necessary documentation to support transactions executed by them.\textsuperscript{416}

Currently, if an adjustment made, a penalty of 50\% of the tax omitted plus interest from the date on which the tax should have been paid is levied on the defaulting party.\textsuperscript{417} Any misstatement (with or without intent) deteriorates the tax base for Peru and the various issues discussed above become applicable. This Report argues that Peru should have the ability to impose taxes on the basis of the actual market value of the products. Consequently, this Report recommends imposition of higher penalties if the SUNAT makes a transfer pricing adjustment.

\textbf{RECOMMENDATION}

Peru should introduce restrictions on the extent and scope of related party transactions. Such restrictions should be in terms of the value and volume of extracted goods.

Any adjustment by the SUNAT pursuant to a transfer pricing assessment shall be sustained unless it is clearly arbitrary. The taxpayer shall have the burden of proof to establish that its transfer pricing arrangements conform to the transfer pricing rules in Peru.

The penalties structure for transfer pricing adjustments should be modified as under:

\textbf{If an adjustment is made:}

(i) and the taxpayer violates the transfer pricing rules for the first time, the entire amount of tax omitted plus Interest, shall be payable,

(ii) and the taxpayer violates the transfer pricing rules for the second time, two times the entire amount of tax omitted plus Interest shall be payable,

(iii) and the taxpayer violates the transfer pricing rules for the third time, three times the entire amount of tax omitted plus Interest shall be payable.

For the purposes of calculation of penalties, Interest shall be calculated at applicable rates from the date on which the tax should have been paid originally till the date of payment by the taxpayer.

The transfer pricing penalties will be imposed unless the taxpayer is able to demonstrate reasonable cause and good faith without any doubt. In order to establish reasonable cause and good faith, the taxpayer should provide complete and contemporaneous documentation and demonstrate that that based upon reasonably available data, it had a reasonable basis for concluding that its analysis of the arm’s-length character of its transfer pricing was the most reliable. In such cases, the SUNAT may consider reducing the applicable penalty. However, under no circumstances shall the penalty levied be less than 50\% of the tax omitted.

Notwithstanding anything contained herein above, one or more Mining Concessions held by the Concessionaire shall terminate automatically for any further violation of the transfer pricing rules by the

\textsuperscript{415} Interviews with private stakeholders, interviews conducted in Lima, Peru in March 2015.

\textsuperscript{416} Id. The Peruvian tax authority made some changes in December 2013 to the transfer pricing rules. For more information see http://www.pwc.com/en_GX/gx/tax/newsletters/pricing-knowledge-network/assets/pwc-peru-apa-provisions.pdf (accessed on April 13, 2015). While the authors are not aware any specific transgressions by any of the multinational mining companies operating in Peru, this issue is being discussed to highlight the significant implications of transfer pricing practices in the mining industry. Notably, transfer-pricing considerations on account of service arrangements between the parent and subsidiary or affiliate companies is not being discussed in this Report.

Importantly, this Report does not undertake a detailed review of the taxation regime in Peru. Readers should review other available literature in this regard.

B. Taxation of Indirect Transfer of Assets in the Extractives Sector

One important factor in the general taxation of capital gains in the extractives industry is the extent to which a capital gains tax should be imposed on a transfer of assets, that is, transfer of shares holding the concession or the concession itself. Given the wide-ranging corporate structuring options available to multinational companies, an issue for consideration is the taxation of indirect sale of assets. The sale of an asset need not be structured as full transfer of ownership in the concessionaire and may also be structured as a “farm out”\textsuperscript{418} transaction, that is, a transfer of a percentage stake in the concessionaire.

The logic of taxing indirect transfer of assets is that if the direct transfer of assets would result in an imposition of capital gains tax, an indirect transfer should have similar consequences, even if the immediate concessionaire remains the same. Currently, Peru imposes taxes on a direct transfer of the mining asset as well as on an indirect transfer of shares issued by the companies in Peru.419

**RECOMMENDATION**

Peru should impose a capital gains tax on an indirect transfer of a Mining Concession. The following provision should be included in its income tax laws.

“All gains resulting from a direct or indirect, gratuitous or onerous transfer of shares (than on account of transfer of shares listed on a recognized share exchange) and other interests or rights involving [assets] located in Peru or assets that derive their value from [assets] situated in Peru will be considered income generated in Peru and will attract capital gains tax at the applicable rates. The capital gains tax shall be

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imposed regardless of the tax residence of the transferee, the holding period of the asset or the place of the execution of the sale.”

V. Costs of Social and Environmental Impacts

Quantitative costs such as new infrastructure, outreach staff, and higher wages are generally easier to calculate and input into traditional capital expenditure considerations. However, costs arising from qualitative concerns, that is, concerns relating to interaction of mining activities with social, cultural and environmental aspects are traditionally more difficult to quantify. Nonetheless, since the mining industry has significant potential to transform economies, communities and environments, it is essential that stakeholders work together to identify, anticipate, and manage these costs.

A. Importance of Identifying True Costs of Conflict and Environmental Degradation

Mining inevitably results in economic, community and/or environmental change. However, different stakeholders understand and experience such changes independent of one another. Mismatched interests, costs, and benefits between mining companies and stakeholders, and among stakeholders themselves, can fuel conflict.\(^{420}\)

These conflicts, which can result in increased tensions and conflict, are addressed in detail in the Social and Environment chapters of this Report.

Companies are now increasingly incorporating community consent-related considerations in their project mandate.\(^{421}\) Several major financial firms have also highlighted the costs of conflict with local communities. In 2008, Goldman Sachs issued a study on 190 major extractive projects (including hydrocarbons).\(^{422}\) The study concluded that delays in projects resulted in substantial increase in costs. It is of particular interest to note that the delays identified in the study did not relate to technical or financial issues, but mainly related to stakeholder-related risks.\(^{423}\)

A 2014 report issued by EY concluded that not obtaining a ‘social license to operate’ (see Part 4(IV) for further discussion on this aspect) was one of the more important business risks facing companies in the mining and metals sector.\(^{424}\) EY acknowledges that companies need to find the “inherent value in being a socially and environmentally reliable operator.”\(^{425}\) Stakeholders also expect the mining company to deliver

\(^{420}\) Rachel Davis and Daniel M. Franks, “The costs of conflict with local communities in the extractive industry,” First International Seminar on Social Responsibility in Mining (Santiago, Chile: October 19-21, 2011) [hereinafter Davis and Franks].

\(^{421}\) Community issues are increasingly being tackled by companies as a part of its corporate social responsibility mandate. Recognizing the uniqueness of this issue, corporations are training their employees on effective community engagement policies and tools. Towards this end, corporate officers are participating in courses structured to achieve public acceptance for corporate social responsibility principles in the extractive industries (See e.g., the two-day master class offered by Valiant Business Media on “Effective stakeholder dialogue with the objective for achieving public acceptance” and “Energy Projects Public Acceptance & Dialogue Masterclass (London),” Research and Markets, available at http://www.researchandmarkets.com/publication/mkiejwo/ energy_projects_public (accessed on February 13, 2015).

Additionally, during the Capstone Team’s interviews with mining company representatives on March 17, 2015 and March 21, 2015, respectively, it was revealed that the company has dedicated between 30-50 staff for this purpose.

\(^{422}\) This study is not publically available in full, but its research has been reported on and referenced in various sources, including the Rachel Davis and Daniel M. Franks report (see Davis and Franks, supra note 420) and Vincent Bernard and Mariya Nikolova, Interview with John G. Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, Harvard Kennedy School, International Review of the Red Cross, Vol. 94, No. 887 (Autumn 2012).

\(^{423}\) As part of the Goldman study, one participating company revealed that it had lost $6.5 billion over a two-year period due to stakeholder-related risk. See Vincent Bernard and Mariya Nikolova, Interview with John G. Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, Harvard Kennedy School, International Review of the Red Cross, Vol. 94, No. 887 (Autumn 2012), 901.

\(^{424}\) EY, Business risks, supra note 20, at 2. The study concluded that obtaining a Social License was the third most important consideration in the list of top 10 business risks facing companies in the extractive industry.

\(^{425}\) Id. at 4 -5.
on their commitments to the community, and to provide an equitable share of benefits, including addressing issues of land access, environmental changes, and impacts of multinational companies on the local economy.\textsuperscript{426} When these commitments fall through and are highlighted with protests, negative media and press coverage and sometimes violence, mining companies suffer from significant reputational damage.\textsuperscript{427} These costs, in addition to missed sales, absorption of management’s time, loss of productivity, increased security costs and difficulties in recruiting talent, encompass major costs of company-community conflict.\textsuperscript{428}

As part of the Harvard Kennedy School Corporate Social Responsibility Initiative, Rachel Davis and Daniel M. Franks sought to better identify costs associated with company-community conflicts and how to better account for these costs in corporate documents.\textsuperscript{429} For the purposes of their survey, the authors of the report conducted confidential interviews with extractive companies. Most interviewees identified project delays as the most frequent cost associated with company-community conflicts. According to the results of the survey, these costs arise from “the inability to pursue future projects and/or opportunities for expansion or for sale.”\textsuperscript{430} With regard to lost productivity during times of conflict, a major mining project with a capital expenditure of between USD 3-5 billion would lose approximately USD 20 million per week of delayed production in Net Present Value (NPV) terms.\textsuperscript{431} It is important to point out that the losses can be significant even during the exploration stage (that is, where a mine has not yet gone into the production stage). For instance, Davis and Franks’ report concluded that the losses due to delays in the exploration stage are estimated at USD 10,000 per day in terms of wages and idle machinery.\textsuperscript{432}

Davis and Franks also note that companies consistently overlooked certain costs during periods of company-community conflicts. According to their report, the most overlooked expense is staff time dedicated to managing conflict. In their interviews with companies operating in the extractive sector, it was found that the management time spent in dealing with community conflicts could range from 5% to 35-50% of the manager’s time.\textsuperscript{433} Consequently, the need to identify and address community conflicts cannot be emphasized enough. The data described above establish that companies will be exposed to significant costs if this aspect of mining is mismanaged.

While costs associated with company-community conflicts have a direct impact on the bottom line of companies and, consequently, government revenues, it is also important to note that project delays, tension among stakeholders, inadequate grievances processes, and related issues could result into negative consequences for the communities themselves. After the shutdown of Newmont’s Conga mine, the company estimated that it was losing USD 2 million a day and had to lay off 6,000 workers.\textsuperscript{434} Protests over the Conga mine left 33 people dead, and even though the mine contributed US$45 million in mining taxes during its operating period in 2011 to the region of Cajamarca, about half its residents still live in

\textsuperscript{426} \textit{Id.} at 16.
\textsuperscript{428} EY, \textit{Business risks}, \textit{supra} note 20, at 18.
\textsuperscript{430} Davis and Franks, \textit{supra} note 420, at 3.
\textsuperscript{431} \textit{Id.}
\textsuperscript{432} \textit{Id.} at 3-4.
\textsuperscript{433} \textit{Id.} at 4.
poverty, with many lacking access to water and sanitation. Moreover, concerns about potential contamination of the local water supply would only further hinder the community’s already limited access to clean water. These kinds of political, social, and environmental impacts are much more challenging to address and are generally ignored by corporate balance sheets.

Responsible companies should work towards identifying potential costs arising from failures in their health and safety, and environment systems. Understanding these costs as they affect entire communities for long periods of time, however, makes the issue more nebulous. Moreover, it is difficult to effectively analyze these costs during a mining project’s life cycle.

While the foregoing examples are not exhaustive and are primarily corporate-centric, they clearly show that social and environmental issues can no longer be ignored and have been deemed as costly enough to warrant additional corporate resources. Companies are beginning to see that pursuing positive engagement with communities towards sustainable business and growth practices as financially beneficial, which should also influence governments seeking their business. There is a need to increase understanding of externalities incurred through mining, and companies need to contribute to that collective understanding.

**Recommendations**

*Companies holding a Mining Concession must report on the externalities and, notably, costs. This information should be incorporated into the company’s annual report. A third party auditor must provide adequate representations and warrants with regard to this report.*

**B. How to Account for True Costs of Conflict and Environmental Degradation**

Not enough research attention has been dedicated to considering the long-term impacts and costs, which are not traditionally quantified in corporate financial statements. Companies suffer financial losses, but communities also experience financial, political, social, cultural, and environmental losses. These additional costs can be difficult to quantify using traditional accounting methods. Nonetheless, current accounting challenges are not an excuse for inaction. In order to be part of the information-sharing solution, companies should be required to list all costs related to the mining project.

Several noteworthy organizations have taken steps to propose alternative mechanisms that attempt to account for and incorporate consideration of social, cultural, and economic costs in a company’s financial statements. The Indigenous Rights Risk Report of November 2014 serves as a tool for measuring social risks that have been traditionally overlooked or underestimated by extractive businesses. This tool is meant to address indigenous rights issues in numerous country contexts, including Peru. Billions of dollars are extracted from indigenous peoples’ land, while the impacts from these activities have resulted in loss of culture, traditional knowledge, and livelihoods. These losses can lead to conflict, displacement, increased poverty, and a decline in peoples’ health. These types of losses are difficult to represent in a dollar figure. That said, the report attempts to quantifiably evaluate risk of projects on or near indigenous territories against five indicators (Country Risk, Reputation Risk, Community Risk, Legal Risk, and Risk

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437 A mining project’s life cycle includes the period of exploration, construction/development, production, and shut down.
439 Id. at 10-11.
Management), which are each rated on a scale of 1 (low risk) to 5 (high risk). The higher the risk level, the more likely the project in question has not adequately considered, consulted, and engaged with the indigenous communities and will likely face project delays and other development issues. A project’s lower risk rating is associated with policies that not only facilitate engagement among stakeholders but are also being implemented effectively to create measurable results. The report found that 89% of the 330 projects assessed had high or medium risk of indigenous community opposition or violations of their rights. Furthermore, governments that disregard commitments to indigenous peoples and communities are subject to volatile business environments that threaten the success of extractive investments. Governments need to require companies to account for these risks in their regular reporting.

Most interestingly, the methodology described above features weighted sub-indicators within each of the five indicators. This structure separates out public relations ploys and broad policy announcements from concerted efforts on the ground. For instance, Consultation is a sub-indicator under the Country Risk indicator, which has a weighted risk assessment structure as follows:

<table>
<thead>
<tr>
<th>Risk Level</th>
<th>Consultation</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>The country has no legal framework that recognizes the need to consult with Indigenous Peoples and communities.</td>
</tr>
<tr>
<td>4</td>
<td>The country has a legal framework for consultations with Indigenous Peoples but there is a regular pattern of actions taken on Indigenous Peoples’ land without consultations.</td>
</tr>
<tr>
<td>3</td>
<td>The country has a legal framework for consultations but there are some instances of the government not consulting with Indigenous Peoples.</td>
</tr>
<tr>
<td>2</td>
<td>The country has a legal framework for consultations that is consistently implemented.</td>
</tr>
<tr>
<td>1</td>
<td>The country has a well-established policy for obtaining Indigenous Peoples’ FPIC in accordance with UNDRIP and ILO Convention 169.</td>
</tr>
</tbody>
</table>


Harvard Medical School has also developed a cost accounting method for the lifecycle of coal. In particular, it accounts for health- and environmental-related externalities. The study estimates health and

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440 Each risk category included several sub-indicators that addressed legal, social, political, cultural and environmental issues including recognition, land rights, consultation, civil liberties, presence of negative attention, scope of negative attention, timeliness of negative attention, identification, status and tenure, self-governance, community development, external influence, community opposition, presence of legal action, status of legal actions, policy, governance, reporting, consultation and agreement, social investments and social impact assessments.

441 Adamson, supra note 438, at 14.

442 Id. at 24.

443 Id. at 33.

444 The United Nations Declaration on the Rights of Indigenous People.

445 International Labor Organization’s Indigenous and Tribal Peoples Convention of 1989 (No. 169)

446 Adamson, supra note 438, at 16.


448 These externalities include land disturbance, methane emissions from mines, carcinogens, public health burden of communities, fatalities in the public due to coal transport, emission of air pollutants from combustion, lost productivity from
environmental costs related to coal to be about USD 345.3 billion (within a range of USD 175 billion to USD 523.3 billion). In general, the study quantifies these health and environmental costs by using academic research and statistical analyses. For instance, public health impacts were calculated using the value of statistical life (VSL) mechanism, which is a statistical tool commonly used by the U.S. Environmental Protection Agency (EPA). The study used the VSL mechanism to estimate that the health damages of carcinogens emitted due to coal mining and combustion to be approximately $11 billion per year. In another example, to calculate the cost of climate change, the study used the rising costs of extreme weather events. The study revealed that the cost of weather-related disasters increased from an average of USD 4 billion per year in the 1980s to USD 40 billion per year in the 1990s. This study illustrates the possibility of employing such tools in health and environmental analyses. These examples demonstrate the tangible possibility of developing quantitative tools that consider the true costs of community and environmental conflict. It is very possible for companies to report, with representations and warranties, on these costs.

The Government should require companies pursuing a mining concession to conduct a comprehensive risk analysis that addresses potential financial, political, social, cultural, and environmental impacts for the short-, medium- and long-term periods (that is, five years, 10 years and 20 years). The analysis should calculate costs using innovative quantifying methods to evaluate this wide range of categories in addition to traditional financial analysis. It should also include detailed information on the company’s previous and current efforts to directly engage with the community, and detailed policies on how to company works on resolving community issues, including in relation to establishing and utilizing grievance redress mechanisms. The analysis will be a required aspect in any mining project proposal. The Government of Peru should also require that this risk analysis to be made publicly available and easily accessible for the local communities, investors and other interested stakeholders. Companies must also be required to provide regular hearings for affected communities regarding the risk assessment.

**RECOMMENDATION**

The Government should require companies applying for a Mining Concession to conduct a comprehensive risk analysis, with representations and warranties, that addresses potential financial, political, social, cultural, and environmental impacts for the short-, medium- and long-term periods (5 years, 10 years and 20 years, respectively). The analysis will be a required aspect in any mining project proposal. This risk analysis should be made publicly available.

**VI. Conclusion**

The economic research and analysis demonstrates Peru’s strong macroeconomic performance and its ability thus far to avoid the natural resources curse. Peru remains one of the world’s most important sources for metals, especially copper, silver, and gold, and the country is poised to hold this position for years to come. Nonetheless, in order to ensure that the benefits of mining are to be shared among the country as a whole, several developments are recommended. The national and local governments, companies, and communities must work together to address issues regarding improvements in infrastructure, capacity building, transparency and accountability mechanisms, the tax regime, and risk assessments that fully address social and environmental costs.

449 Epstein, et al., supra note 447, at 91.
450 Id. at 75.
451 Id. at 82.
452 Id. at 88.
PART 4. SOCIAL

Mining lies at the heart of the economic boom in Peru in the last decade. Resources from the mining sector can be leveraged to foster training and education, enhance governance capacities at the local level, strengthen communication links with and within communities, and increase employment, wealth and commerce.\(^{453}\) However, over the years, Peru has faced social obstacles and conflicts as the Government attempts to harness the potential of mining. Amidst rising community conflicts over unequal benefits from resource extraction, at the time of taking office in 2012, President Humala pledged greater social spending to share the economic prosperity from mining as well as a dialogue process to deal with social conflicts.\(^{454}\) While the overall trend from August 2013 to August 2014 showed a decrease in social unrest,\(^{455}\) social conflicts in the context of mining continues to be an issue in Peru.

This Report argues that the emphasis on investment in the mining sector should be accompanied by sound social, as well as environmental policies and requires enhanced government capacity. This will ensure that there is a positive correlation between mining and the social and environment structures of communities in the vicinity of mines. While the environmental concerns arising from mining in Peru are discussed in Part 5, this Part will elaborate on the nature of social unrest in Peru and its relationship with mining. Further, this Part will present a case for a shift in the paradigm vis-à-vis community involvement in the mining sector in Peru. Notwithstanding the present state of affairs, it is possible to mitigate the social harms caused by mining and prevent future social conflicts in Peru. This Report advocates for incorporation of stricter social standards and safeguards and effective implementation and compliance of such standards. It also presents a business case for companies to obtain a social license to operate and undertake social impact assessments. The authors believe that these tools can be an effective mechanism to encourage community engagement, responsibility, and accountability in the mining sector while achieving the bottom line objectives of a company. Finally, conflict management systems available in Peru and strategies for conflict prevention will also be discussed.\(^{456}\)


\(^{456}\) This Report is limited to the issues discussed in this Part. However, there are other social issues that are not dealt with in this Report, such as the management of social protests by police and issues of gender and employment. Readers should refer to other literature available in this regard.
Underlying Causes of Social Instability in Peru

Between 1980 and 2000, Peru experienced the most intense and violent period in its history. The effects of conflict were uneven, both geographically and in terms of the social strata affected. The two-decade conflict mainly affected rural areas and indigenous and mix-raced communities in the lower socioeconomic echelons. The conflict spoke to the historical isolation of rural areas vis-à-vis Lima’s symbolic, political and economic power. Also, it revealed social inequality, and regional, racial and ethnic discrimination. The Peruvian state was unable to ease social tensions during conflict due to weak government institutions and limited state capacity. Moreover, authoritarianism further weakened Peruvian institutions.

Conflict took a high toll on Peru. It is very possible that in the two decades that the conflict lasted more people died than in all of Peruvian history after Independence. The economy was also severely affected. In 1998, the Senate’s Special Commission for the Investigation of the Causes of Political Violence and Pacification (Comisión Especial del Senado Encargada de Investigar las Causas de la Violencia Política y la Pacificación) concluded that in the period of conflict comprised between 1980 and 1988 alone, the economic cost of conflict was approximately $9,184,584,648, which was equal to 66% of Peru’s external debt in 1998, or 45% of GDP that year.

Today, Peru is a far cry from what it was in the 1980s and 1990s. These changes have to do not only with the end of authoritarianism, but also with the country’s steady economic growth since 2006, largely driven by the mining sector.

The economic boost provided by the mining sector has enabled a steady decrease in the number of Peruvians living below the poverty line. According to the World Bank, as of 2013, 23.9% of the population in Peru lived below the poverty line. This is a considerable improvement to the situation in 2001 when the population living below the poverty line was 54.8%.

However, the historic power asymmetries between Lima and the provinces, as well as regional, ethnic and social inequalities remain in place. Wealth and opportunities remain highly concentrated in the urban areas, which perform better than rural areas on the aspect of poverty levels in Peru (16.1% in urban areas as compared to 48% in rural areas). The mismatch between the amounts of riches produced by the mining companies and the hardship faced by the population in the neighboring cities and communities is a structural driver of social conflicts in the context of mining in Peru. If used effectively, however, economic resources from mining can help bridge the development gap between Lima and the provinces.

Sources
“Datos: tasa de incidencia de la pobreza, sobre la base de la línea de pobreza nacional (% de la población),” Banco Mundial, http://datos.bancomundial.org/indicador/SI.POV.NAHC
I. Setting the Context

The normative framework on the social aspect of mining is based on guiding principles such as a rights-based approach to development, FPIC, joint decision-making, shared benefits, and the responsibility of companies to mitigate adverse environmental and social impacts from their projects.

The genesis of social conflicts rests on the inherent desire of communities to benefit from the resources that accrue from such projects. Generally speaking, most of the mining projects in Peru are located in or near areas that are predominantly inhabited by indigenous or rural communities. The inherent powerlessness of such communities may result in a feeling of discontent especially when the benefits from such projects are channeled towards national centers, such as Lima or the mining companies.

II. Defining Social Conflict

According to the National Ombudsman Office (Defensoría del Pueblo) (Ombudsman), whose mission includes conflict resolution related to mining issues, a social conflict is a “complex process in which sectors of the society, the government and the companies realize that their goals, interests values or needs are contradictory and this contradiction can generate violence.”

Figure 3.1 depicts the different phases of a conflict, as defined by the Ombudsman:

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457 The National Ombudsman Office was created by the Constitution to defend the fundamental guaranteed rights, supervise the fulfillment of the duties of state administration as well as to monitor the efficient provision of public services in the national territory. While it is a national institution headquartered in Lima, it counts with departmental offices, which deal with specific issues on the ground. “Nuestra Institución,” Defensoría del Pueblo, available at http://www.defensoria.gob.pe/defensoria.php (accessed on April 14, 2015).


The Peruvian Presidency of the Council of Ministers has crafted its own definition of social conflict, which is based on four criteria: 1) The type of request made by the social actors (economic, productive, social, cultural, environmental); 2) The belonging to a certain economic activity; 3) The way the conflict affects the rights of social actors as well as the environment and; 4) The dispute among peoples and regions for the use of resources or definition of limits. Please refer to the conflict resolution section of this Report for further information. “Tipología,” available at Oficina Nacional de Diálogo y Sostenibilidad, http://onds.pcm.gob.pe/tipologia/ (accessed on April 14, 2015).
ONDS (under the PCM) was established in 2012 as a standalone government institutional framework to handle social conflicts in Peru, has its own definition and classification of social conflicts (the functions of the ONDS are discussed at length in a subsequent section of this Part). The ONDS classifies social conflicts in the following manner:

- **Difference:** One of the parties publicly and explicitly disagrees with the actions of another party,
- **Controversy:** Two or more parties publicly and explicitly hold contradictory positions on an issue,
- **Social Conflict:** The actions of parties with divergent views can threaten governance.

**A. Underlying Causes for Social Conflict**

Based on our interviews with communities in Peru and a review of the literature available in this regard, the reasons for social conflict in Peru can broadly be categorized under the following:

- inequitable distribution of benefits to communities – the issue of unmet expectations;
- government absenteeism; and
- social trauma from the conduct of mining companies.

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461 See “Mining Conflicts in Peru: a Critical Condition,” OXFAM America, March 2009, available at http://www.oxfamamerica.org/static/media/files/mining-conflicts-in-peru-condition-critical.pdf, 5-7 (accessed on April 2, 2015). The report notes the following: “The local communities receive very few benefits created by the mines established in their respective regions; The Peruvian Government could invest more capacity and political will to regulate and monitor the development of mining activities in the country – constructively manage local conflicts and deal with complaints; The mining companies committed important mistakes in dealing with community relations”.
Emblematically, the three issues aptly depict the trust deficit in the mining sector in Peru. Lack of institutional transparency, coupled with mining companies’ inadequate efforts to fulfill their obligations is at the root cause for this trust deficit. The three aspects mentioned above incrementally contribute to a larger problem facing the mining industry in Peru: the lack of a Social License to Operate (Social License).

Inequitable distribution of benefits to communities – the issue of unmet expectations

The correlation between economic growth and poverty reduction is not straightforward in Peru. Vulnerable and grossly inadequate institutional structures and the inability of the mining sector to generate more local benefits have resulted in an inequitable distribution of benefits to communities. In 2014, Peru ranked 82 out of 187 countries ranked in the UN Human Development Index. While large cities, such as Lima, have seen significant improvement, the mountainous regions in Peru, where a number of the copper mines are located, have poverty levels that are significantly more than the larger cities in Peru. Needless to say, poverty continues to remain a major concern for communities in rural areas in Peru. The authors visited the Espinar community in the Cusco region in Peru (Espinar) and found that the situation on the ground there reinforced this perception. Alongside a community that lacks basic infrastructure, for example, the community did not even have access to running water for most part of the day, and faces other development constraints, a large multinational company reaps the benefits of a Mining Concession.

The issue is intensified by the institutional failure of the Canon law (See Part 3(II) for detailed discussion and recommendations on the Canon law). According to Oscar Mollehuaca, a former Mayor of Espinar, both regional and national governments lack the capacity to invest mining revenues in ways that harness the well-being of local communities. In this context, the lack of a community-based participatory mechanism to monitor the investment of the resources from the Mining Canon adds to the distrust in the communities.

462 A qualitative assessment (interviews) conducted with the community leaders of Ocoruro, Huisapata, and Hancollahua, which are affected by the Antapaccay mine, shows that the level of trust in the government is very low and that the public administration is often seen as an agent that does not safeguard the best interest of the population. Conversely, members of the bureaucracy (who chose to remain anonymous) affirm that some civil society organizations operating on the ground deliberately foster conflict, in order to protect their very raison d'être. This disconnect naturally works against a conciliation between government and people on the ground and widens the trust gap. Community leaders in the Cusco region, interviews by Isabella Cunha, Maya Srikrishnan, and Ruthia Yi, March 15-18 2015.

463 Please refer to Part 4(II) for more information on the Social License to Operate.


466 The highlands in Peru represent are poorest areas in the country, with 52.9% of its population living below the poverty line as of 2013, while the percentage in the Lima metropolitan region was of 12.8% in the same year. “Evolución de la Pobreza Monetaria” in Perú: Perfil de la Pobreza por Domini Geográficos (Lima: Instituto Nacional de Estadística en Informática, INEI, 2014), available at http://www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/EstLib1169/cap03.pdf (accessed on March 3, 2015), 63. Furthermore, the United Nations International Fund for Agricultural Development (IFAD), highlights that approximately 20% of these 52.9% face conditions of extreme poverty. “Dar a la población rural pobre de Peru la oportunidad de salir de la pobreza”, IFAD, available at http://www.ifad.org/operations/projects/regions/pl/factsheet/peru_s.pdf, (accessed on April 10, 2015).


468 Mr. Mollehuaca was the Mayor of Espinar during the conflict that erupted in May 2012, which mainly arose from concerns of pollution of water sources and the resultant death of livestock) in the region by the mining operations. The Espinar region is currently dealing with the transition between two mining projects, i.e., from Tintaya to Antapaccay (the mining area is being expanded under the Antapaccay project). The mining companies and communities do not enjoy a good relationship The primary demand of the protesters in the 2012 social protest was increase in the mining taxes paid by the mining company (from 3% to 30%). The conflict resulted in four deaths and wounded several others, including members of the police force. Following the protests, a state of emergency was declared in the region and a dialogue table was established by the Oficina Nacional de Diálogo...
The absence of tangible benefits for communities perpetuates the belief that the mining companies are not sharing the benefits of mining activities with them, resulting in a conflict between communities and mining companies. Not only does mining alter the existing and future economic alternatives for the community (on account of the harmful effects of mining on air, water and soil in the community), but also the capital-intensive nature of the mining sector does not result in significant employment opportunities for the local population. This widens the gap between expectations and real benefits received from the mining activity. Rendered helpless by the inefficacy of the government machinery, communities resort to protests as a mechanism to extract their share of the benefits. This sentiment was evident in an interview with a community leader in Espinar. Speaking on the issue of conflicts with mining companies, the community leader opined that “the only way to obtain economic benefits from mines is through protests.”

### Government absenteeism

As the debate on the interplay between mining and development has evolved, there has been a convergence of views on a direct correlation between quality of institutions and mining-based development. Arguing that institutional arrangements are difficult to design on an ex post facto basis, scholars such as Joseph Stiglitz are of the opinion that if the institutional conditions are not appropriate, it is better to for the natural resources to be left in the ground. ICMM enunciates the mining industry position on this aspect. ICMM insists that mining is good for growth but still acknowledges that poverty impacts have been disappointing because of poor government capacity and broader governance issues.

Theoretically speaking, the government is expected to play a crucial role in mediating between mining companies and communities. As elected representatives of the people, local government actors should take necessary steps to protect communities’ rights. While investment in the mining sector is important for furthering the economic growth of the country, there is a need to maintain a fine balance between attractive investment policies and the environmental and social rights of communities. The concentration of decision-making in relation to Mining Concessions at the Central Government and the relatively inadequate capability of local governments makes achieving this balance difficult.

In interviews with community leaders in Peru, the authors found a divergence of views between the Central Government in Lima and the mining communities. Communities living in the vicinity of the mines believe that their well-being is not among the priorities of the Central Government. For instance, while the Central Government considers the dialogue table in Espinar successful, leaders of the Peasant Federation claim that conflict could spark soon given that the government has not fulfilled its commitments in the framework of this table. Although the Government of Peru has established regulatory agencies such as ANA and OEFA, at the regional level such agencies do not possess the capital (both political and financial) to regulate...
the mining sector and mitigate its impacts. At best, these regulatory agencies merely give a false sense of security to the population.474

Some stakeholders in Peru opine that social conflicts in Peru could be tackled better if there was a stronger presence of government machinery at the regional and provincial levels.475 Communities affected by mining perceive the state as a biased actor prioritizing the interests of multinational corporations to the detriment of communities. The disproportionate use of force by security officers in the management of social protests and lack of accountability for such officers476 further exacerbates communities’ concerns.477

The weakmess of government institutions and their perceived lack of legitimacy and independence, oftentimes, result in communities and multinational companies resorting to informal arrangements.478 These arrangements can be worrisome, given the power asymmetries between communities and multinational companies. Further, these do not normally address the concerns of communities in a manner beneficial to them.

Social trauma from conduct of mining companies

The importance of a good relationship between mining companies and affected communities cannot be emphasized enough. Unfortunately for Peru, in many cases community engagement by mining companies is seriously lacking.479 The interviews conducted with communities in Peru reiterate a culture of apathy when it comes to community engagement by mining companies at every stage of the project.480 In an interview with the Peasant Federation in Espinar, the authors were informed that communities often do not feel involved, engaged or consulted by the mining companies and this results in conflicts with the mining companies.481 Even where there is engagement, it is shrouded in company bureaucracy and is inaccessible

474Regulatory agencies are often morose in taking action and as a result fail to provide the protection and safeguards enshrined in their mandate. The 14th Report of the Mining Conflicts observatory provides the example of the Tomorocho copper mine, owned by the Chinese company Chinalco. This mine was established in December of 2013 and started to create negative environmental impacts from its very inception. By the time that OEFA managed to order the halting of Tomorocho, it had already damaged substantial damage to the local hydric resources (mainly the Huacrococha and Huascacocha lagoons) “14º Observatorio de los conflictos mineros en Perú”, Cooperación, available at http://www.cooperaccion.org.pe/OCM/XIV_OCM_2014-07-15.pdf, 30-31 (accessed on April 10, 2015).


476 Under Peruvian law nº 30151, police officers injuring or killing people as a part of management of social protests are granted immunity from prosecution.

477 In March 2013, the Inter American Court of Human Rights expressed concern about the “disproportionate” response to social protests. Similarly on July 3 2012, in Cajamarca, four civilians were shot dead and 16 wounded by gunfire when police officers attempted to disperse protestors demonstrating against a gold mining project. Based on witnesses’ reports and hospital records, Human Rights Watch reported that the shooting of the civilians occurred more than an hour after the police officers had allegedly been shot at by the protesters. The use of force, in instances such as the protest in Cajamarca, could be perceived as vindictive rather than reactive and only serves to fuel further conflict. See “Peru: Prevent unlawful killings of Protesters,” Human Rights Watch, available at http://www.hrw.org/news/2012/09/20/peru-prevent-unlawful-killings-protesters (accessed on April 10, 2015); “Mining conflicts in Peru: condition critical” Oxfam America, available at http://www.oxfamamerica.org/static/media/files/mining-conflicts-in-peru-condition-critical.pdf (accessed on April 10, 2015).


479 While it is not possible to conclusively establish how many companies score as a having a ‘good’ or ‘bad’ relationship with communities, the endemic number of conflicts is a good proxy to the community engagement in the country. One can argue that should the companies have a better relationship with the communities, the level of conflict would not be so significant.

480 EIAs are not monolithic and unchangeable documents. Assessments made in advance of the exploitation phase (all of them) will most likely change, as new information about a certain region’s environment is unveiled during operations. This dynamic requires adaptability by the mining company, which can only be satisfactorily fulfilled if communities are engaged in the process of discussing and producing EIA outcomes. Cheryl Wasserman, “Application of Public Participation in EIA,” USA Environmental, Protection Agency, available at http://www2.epa.gov/sites/production/files/2014-05/documents/application-pp-eia.pdf (accessed on May 1, 2015).

481 Julio Roger Huillca, General Secretary, and Ruben Haneco Ccama, President, Federación de Campesinos, interview by Isabela Cunha, Maya Srikrishna, and Ruthia Yi, March 15, 2015.
to the community members living in the rural areas.\textsuperscript{482} Lack of engagement with local communities is aggravated by the general apathy and the dismissive mindset of some government actors and mining companies towards the affected communities.\textsuperscript{483} In an interview with MINEM, Cusco, the interviewed official pointed out that communities have to “understand that mining is their everyday bread.”\textsuperscript{484}

Often, mining companies substitute community engagement for CSR initiatives.\textsuperscript{485} This approach is inherently problematic. CSR activities are normally characterized by unilateral decision-making by the mining companies. Further, these activities may not address the concerns at the crux of the social conflicts in Peru and may be used by companies as mere window dressing (the features the social license to operate are discussed subsequently in this Part).

### III. Social conflicts: Current state of affairs

The divergence in the definition of social conflict (as discussed above) results in a variance on reporting of social conflicts in Peru.

Since 2007, there has been a significant increase in social conflicts in Peru. According to the Observatory of Conflicts in Peru (Observatorio de Conflictos mineros), which is a report published by Cooperación, a leading NGO in Peru dealing with socio-environmental conflict, the number of conflicts started to steadily decrease both in number and intensity since mid-2012.\textsuperscript{486} Violence and protests are very common in the context of social conflict in Peru. After the exacerbation of conflicts in the Conga project and Espinar, the strategy of some social actors seems to have changed. Resistance has been replacing confrontation as one of the main tools embraced by actors in many places touched by conflict.\textsuperscript{487} The situation has been stable since 2014 with no significant variation in the number of conflicts through the year and till date.\textsuperscript{488} Figure 3.2 depicts the social conflicts for the period between 2006 and 2014.

**Figure 3.2**: Number of social conflicts between 2006 and 2014

\textsuperscript{482} In the case of Espinar’s rural area, community leaders affirmed never having the opportunity to access an actual complete EIA document. This situation clearly breaches the requirements of the Participacion Ciudadana.

\textsuperscript{483} In reference to an interview with a MINAM officer in Cusco, who explained that community members should not have autonomy on the investments pursuant to the Mining Canon, as they lack information and level of education to join decision-making, interview by Isabela Cunha, Maya Srikrisha, and Ruthia Yi, March 17, 2015.

\textsuperscript{484} MINEM officer in Cusco, Interview by Isabela Cunha, Maya Srikrisha, and Ruthia Yi, March 17, 2015.

\textsuperscript{485} According to the European Commission, Corporate Social Responsibility refers to “refers to companies taking responsibility for their impact on society. As evidence suggests, CSR is increasingly important to the competitiveness of enterprises. It can bring benefits in terms of risk management, cost savings, access to capital, customer relationships, human resource management, and innovation capacity.” See “Corporate Social Responsibility”, \textit{European Commission}, available at http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm (Accessed on May 1, 2015). In the Espinar case, the \textit{Fundación Tintaya} was set up with the mission of “designing and executing programs and projects to strengthen and develop capacities, capabilities and skills of the Espinar population.” Not one does this mission statement mention the inclusive participation of the population in decision-making regarding these projects. This is a very illustrative example of unilaterally executed CSR initiatives, which can spark tensions instead of fostering development in given region.


\textsuperscript{487} The report provides the Guardians of the Lagoons in the Bambamarca region as an example of this trend. See Cooperacion, Observatorio, supra note 486.

\textsuperscript{488} The data provided by the Ombudsman Office’s Social Conflicts Report No. 131, offers a retrospect of the situation in 2014, i.e., 213 conflicts registered in January; 212 in February; 211 in March; 212 in April and May; 214 in June 2014, 208 in July 2014; 205 in August 2014, 201 in September 2014; 217 in October 2014; 212 in November 2014 and 210 in December 2014. It is evident from these numbers that the situation has more or less been stable for the past year and continues to be so until date: “Reportes de Conflictos sociales n° 131”, Defensoría del Pueblo, January 2015, available at http://www.defensoria.gob.pe/modules/Downloads/conflictos/2015/Reporte-Mensual-de-Conflictos-Sociales-N-131--Enero-2015.pdf (accessed on April 14, 2015).
Number of Social Conflicts 2006-2014

Source: Observatory of Conflict in Peru Mining, 14th Report (2014)\(^\text{489}\)

\(^{489}\) Cooperaccion, Observatorio, supra note 486, at 3.
According to the Ombudsman, Peru witnessed 211 social conflicts in March 2015. As of April 1, 2015, the ONDS had identified and was intervening in 43 social conflicts in Peru. While adopting different strategies to measure conflict, both the Ombudsman and the ONDS are consistent in confirming the relationship between extractive activities and social conflict.

Social Conflict and Mining in Peru: Tía María Copper Mine

Southern Copper’s $1.4 billion Tía María copper mine is a prime example of social conflicts in the context of mining in Peru. Conflicts in Tía María go back to 2009, when Southern Cooper submitted its first EIA. That year a consultation was conducted in the districts near the proposed mine and an astounding majority (90%) of the community voted against the project. The United Nations Office for Project Services (UNOPS) reviewed the aforementioned EIA and made over 100 observations. In the midst of a social conflict that led to the death of three people and left dozens wounded, MINEM rejected the EIA in 2011. Two years later, Southern Copper presented a new EIA largely based on the previous one with updated information and new parts. Although the company argues that issues in the first EIA were addressed, the community and CSOs rejected the EIA, arguing that major issues remain unattended.

Southern Copper has a negative environmental track record, which has led to mistrust by communities around Tía María. In the mid-19th century, Southern Copper established copper refining and smelting facilities in Ilo, Peru. These facilities contributed to large amounts of water and pollution in the area and it severely affected the health of the community members. Southern Copper, which was previously in the hands of American companies Asarco Inc., Phelps Dodge Corporation, and Marmon Group, is now in the hands of a Mexican Conglomerate. However, communities around Tía María are not oblivious to the catastrophic history of Southern Cooper. The negative legacy of the company has colored the perception of the company and its parent, Grupo Mexico, by the local communities. To make matters worse, Southern Copper has not handled the community relations effectively.

MINAM has confirmed that the copper mine will not cause any adverse environmental effect that could affect agriculture in the region. In spite of such reassurance by MINAM, on March 23, 2015 communities began an indefinite strike against Tía María, where protests left people wounded in clashes between the community and the police officers. Notwithstanding the obvious lack of Social License for Southern Cooper’s operation of the Tía María mine, the Government of Peru is in favor of it. President Humala has publicly stated his support for the project and has mentioned that the Government should work to convince the protestors to give the Tía María project a chance.

The consequences of cancelling the Mining Concession for the Tía María project are high for the Government. Experts argue that the cancellation of the project could significantly reduce Arequipa’s growth rate. Moreover, the Government’s goal to double the production of cooper by 2017 would not be met if the Mining Concession for the Tía María mine were to be cancelled. Recent reports suggest that Southern Copper will continue with its plans for the Tía María mine and expects a construction permit for the mine in the next few months.

Sources:
“Hay que convencer a la gente de darle oportunidad a Tía María,” El Comercio, April 7, 20015, http://elcomercio.pe/economia/peru/hay-que-convencer-gente-darle-oportunidad-tia-maria-noticia-1802571
IV. Social License to Operate

A. Defining Social License to Operate

In 2002, the IIED released a report (IIED Report) on a crucial aspect of the mining and minerals industry, which would later become the basis for the notion of the ‘social license to operate.’

While the levels of community engagement vary widely across different countries, a common ethos for the role and rights of communities affected by extractive projects has emerged. Communities in different parts of the world are increasingly becoming players in this process by demanding a greater role in the decision-making process, advocating for receiving a share of the benefits resulting from mining and making their voices heard. Denial of participatory process, which causes mistrust and discontent amongst communities, were a recurring theme in the various interviews conducted in Peru.

According to the Fraser Institute, a Social License is “the level of acceptance or approval by local communities and stakeholders of mining companies and their operations.” Communities are demanding transparency and accountability from mining companies and a Social License has now become a relevant consideration for companies. Mines can not only change the pattern of life of those working for it, but can potentially modify (sometimes, irrevocably) the whole landscape of a region. For example, they can change the economic and social landscape of a community on account of the influx of migrant labor. Some key factors that justify the involvement of communities in the mining process are:

- environmental effects of mining and the effects on water, air and soil in the community area;
- voluntary and involuntary impact on health patterns, demographics, economics, labor and political relations in the community;
- loss of lands and livelihoods and relocation of local communities; and
- increases in cost of living and housing speculation (on account of influx of migrant labor).

Additionally, in the authors’ discussion with some stakeholders, an important theme of unequal opportunities for the community members and resulting chasm in the community was also discussed.

V. Business Case for Social License


494 Jason Prno, “2013: An analysis of factors leading to the establishment of a social license to operate in the mining industry,” Elsevier Resources Policy 38, 577-90 (2013).

495 For instance, two representatives from the Peasant Federation in Espinar have expressed their disappointment at the government and their belief in a crisis of representation. On the dialogue table set up in 2012: “The population is tired, and doesn’t have any trust left in the authorities. Ministers came from Lima for the talks, and it was a big deal, but nothing came of it.” Ruben Haneo Ccama, interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 15, 2015.


497 Fernando Ruiz-Mier, IFC, Interview conducted on March 19, 2015 in Lima, Peru.
Companies are increasingly recognizing that good community relations are important from a business perspective. Moreover, they are acknowledging that acceptance of a project by local communities should not be assumed. In a recent study on business risks facing the mining and metals industry, Social License was identified as the third most important business risk for extractive companies. Not having a Social License is a very expensive risk to business and has the potential to completely disrupt business operations. Research shows that community conflicts over environmental and social concerns can cost up to USD 20 Million a week in operating expenses for large-scale operating mines.

The failure to obtain and maintain a Social License could result in significant financial and reputational impacts to businesses. Furthermore, restoring the credibility to regain acceptance by stakeholders can result in further delays and impacts.

### Costs of Social Conflicts

The costs of social conflicts are both tangible and intangible in nature. The following are identified as key costs of social conflicts:

- Missed sales
- Damage to reputation as a reliable supplier
- Absorption of senior management’s time
- Lost productivity
- Damages to life and property
- Increased security costs
- Costs of settlement
- Difficulties in recruiting talent

**Source:**

### Accounting for costs of social conflicts

Assigning a dollar value to the costs that arise from mining-related conflict is difficult. Firstly, some of the negative externalities from mining do not have economic value. Resources are culturally constructed in different ways, thus landscape resources can take on multiple values. For example, a mountain can have a sacred value for a community. Moreover, data collection to assess costs is challenging. Cost assessments are ‘only as good as the data’, and this varies by project and by the ability to isolate causal factors.

Accounting for the costs of social conflicts poses a methodological challenge. Many companies are familiar with costing various potential areas of conflict in their operations, such as employee, consumer, ‘business-to-business’ and ‘business-to-government’ disputes. Moreover, some companies have a good understanding of potential costs arising from health, safety and environmental

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498 EY, Business risks, supra note 20, at 2.
500 EY, Business risks, supra note 20, at 16.
501 Id.
504 Davis and Franks, supra note 420, at 4.
505 Id. at 2.
issues associated with their operations. However, it is not clear that companies are advanced in their understanding of the costs of social conflicts with local communities in a project’s life cycle and recognizes the opportunity costs involved. See Part 3(V) of this Report for further discussion on accounting for social costs.

The concept of Social License is an evolving one and some companies are now explicitly recognizing it in their corporate practices. Companies are now pursuing early engagement with communities and are employing a collaborative, trust-based model that includes effective engagement with stakeholders. These strategies can achieve a greater level of credibility, a stronger sense of legitimacy and acceptance, and a healthier legacy than those offered by a formal license.

A 2012 report on the relationship between corporate culture and community engagement and conflict management found that (the surveyed) mining companies in Peru generally recognize the importance of good community relations. In addition to elevating the function of Community Relations to a leadership level, these companies also established cross-functional collaborative meetings on issues relating to community engagement. Further, the more successful companies involved other technical departments (exploration/construction/operations) as well as other functions (legal, safety, security, environmental, social development etc.) in the discussions on community engagement policies. Also, social performance metrics were an important component of staff performance evaluations in these companies.

The report further noted that companies are trying to evolve a partnership-based approach to corporate-community relationship, which hitherto was characterized by paternalism. Some approaches to building relationships and trust with communities focused on ‘educating’ communities on technical ‘facts,’ while others involved dialogue and participatory processes. The optimal approaches appear to be those “least ‘owned’ by the company alone, and least ‘transactional’ in their objectives (that is, not timed around or predicated primarily on a desire by the company to extract an agreement from a community).”

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506 Id.
507 Id.
509 Id. at 18.
510 Id.
511 Id. at 14.
512 Id. at 12-15.
513 Id. at 1.
514 Id. at 11.
515 Id. at 3.
516 Id. at 3.
517 Rees, supra note 511, at 3.
Cerro Verde in Peru: Community Engagement Practices

Cerro Verde is an open-pit copper and molybdenum mining project located approximately 20 miles southwest of Arequipa. The company is known for its brand and efforts to establish good relationship with local communities. Cerro Verde has generally maintained a positive image with the community in Arequipa, albeit some controversy, most recently over traffic caused by the installation of pipes for a new wastewater treatment plant. The company runs a well-staffed community relations office and maintains generally good relations with the local and regional governments.

Cerro Verde was one of the 40 mining companies in Peru that joined MINEM’s Mining Program for Solidarity with the People (Programa Minero de Solidaridad con el Pueblo), by which companies created voluntary funds to be administered by an independent entity. The Cerro Verde Civil Society Association (Asociación Civil Cerro Verde) was responsible for Cerro Verde’s fund. Throughout the program (2007-2011) and to this date, the Association provides a forum for the coordination of local and regional development between the company and government actors. A committee that includes representatives from the regional government, the municipality of Arequipa, the Archdiocese of Arequipa, and the company administer the Association.

Sources
Gladys Márquez, interview by Stephanie Ashton, Lara Pham and Kazumazu Ueda, March 16, 2015.

A. Features of a Social License

As discussed above, trust of the community (or lack thereof) is an important factor contributing to social conflicts. In intergroup settings, such as those between communities and mining companies, scholars refer to two types of trust:\textsuperscript{518}

\begin{itemize}
  \item integrity-based trust, i.e., the community’s perception that the mining company is adhering to a set of principles; and
  \item competence-based trust, i.e., the mining company’s perception that the local mining company has the skills and knowledge necessary to manage the particular issues of interest to community.
\end{itemize}

Violating either type of trust may lead to negative relational consequences, as trust-building is important in de-escalating conflict and enabling members of both groups to accept being vulnerable to one another.\textsuperscript{519}

Most studies on Social License are descriptive in nature and seek to provide companies with guidance for securing a Social License.\textsuperscript{520} For instance, strategies such as ongoing communication with affected operational stakeholders, transparent disclosure of information to host communities, and strengthening community development agreements have been recommended as practical ways for obtaining a social license with local communities.\textsuperscript{521} An all-inclusive approach, based on a high level of information sharing and dialogue with communities is the central premise of a Social License. In order to be successful, the process to gain a Social License should be comprehensive and transparent, involve all interested stakeholders, and reflect the needs and priorities of the community.\textsuperscript{522}

Notwithstanding the fact that the concept of Social License is now firmly established in the general public and business psyche,\textsuperscript{523} it is often voluntary in nature and is not legally enforceable in a number of countries. In the context of obtaining a Social License, power asymmetries between communities and multinational companies are often ignored. Local communities often perceive a disregard for their needs and priorities by companies, especially in cases where there is non-compliance with the terms of the Social License. The lack of legal enforcement of a Social License results in no accountability for companies and weakens the notion of a Social License. Companies tend to comply with obligations only to the extent that the business benefits of compliance outweigh the business costs.

Consequently:

- in the absence of a legal obligation to obtain a Social License and if there are no legal consequences for a company not obtaining a Social License, the mining company does not have an incentive to obtain such license; and
- if the legal consequences of a company not complying with a Social License are not high, the mining company would choose to breach the Social License as the costs of compliance exceed the penalties.

This Report argues that a Social License should be included as a fundamental legal obligation for mining companies in Peru.

**B. Social License does not deter investments**

In the competition for attracting and retaining foreign investments, developing countries, such as Peru are presented with hard choices. Conventional political economy theory assumes that multinational companies would be inclined to invest in countries that have lenient environmental and social standards for such companies. Consequently, in choosing between encouraging foreign investment in the country and protecting the rights of its communities, countries such as Peru get caught in a ‘race to the bottom’ whereby they emphasize the former to the detriment of the latter. In this context, issues such as Social License are often seen as an impediment to attracting foreign investment in the country. This Report argues otherwise.

\textsuperscript{519} Id.
\textsuperscript{520} Id.
\textsuperscript{521} Id.
\textsuperscript{522} According to the Fraser Institute, a leading resource for Canadian mining information, the process to obtain a social license to operate entails the acceptance “ granted by all stakeholders that are or can be affected by mining projects (e.g. local communities, indigenous people) and other groups of interests (e.g. local governments, NGOs).” SLOs are innovative because they bring to the table the mining companies, the government officials and the community representatives. Differently from a license issued by the government, the SLOs are often non-binding documents based on the mutual trust with the population. Actually, trust and legitimacy are the two elements which can guarantee the ability of conducting operations without facing tensions. “What is the Social License to Operate?” Fraser Institute, available at http://www.miningfacts.org/Communities/What-is-the-social-licence-to-operate/ (accessed on April 10, 2015).
\textsuperscript{523} EY, Business risks, supra note 20, at 16-17.
A recent report on the issue of indigenous rights and business highlighted the importance of “the direct correlation between country risk and projects’ overall risk scores. In other words, projects in countries with weak or nonexistent legal protections for Indigenous Peoples were far more likely to receive high-risk scores. These numbers indicate that poor governance is bad for business. Governments that disregard their commitments to UNDRIP (often with the justification that they are obstacles to development) actually propagate volatile business environments that threaten the viability of investments in their countries.”

Though in the context of indigenous peoples’ rights, the observation mentioned above is telling. This Report argues that a lack of emphasis on Social License would be to the detriment of developing countries. In the specific context of Peru, this Part has previously discussed the large number of social conflicts in the country, resulting in a volatile and uncertain environment for the multinational companies operating in Peru. If Peru is unable to create a stable environment for the foreign investors there will be a chilling effect on foreign investment in the country’s mining sector. Creating and enforcing a framework for a Social License is the first step to create stability. Peru has made significant strides in this direction in the last few years. There are legal provisions for community engagement in mining projects, including a specific consultation law for indigenous people. It is commendable that Peru is one of the few countries in the world to legally recognize the rights of indigenous people under the ILO Convention on the Rights of Indigenous People (ILO Convention 169) and codify such rights in a standalone legal instrument. The following section describes the approaches adopted by Peru in relation to community engagement in mining projects in Peru.

C. Social License in Peru through community engagement

In Peru, two conceptually different approaches are applicable to community engagement in mining projects. It should be emphasized that the laws discussed below generally do not mandate consent of the communities, indigenous or otherwise. **Table 3.1** summarizes the key features of the laws on community engagement in Peru.

VI. The Law of the Right to Prior Consultation for Indigenous and Native Peoples (Consulta Previa)

Consulta Previa is applicable where the mining project affects one or more indigenous communities. Consulta Previa was a significant turning point in the Peruvian Government’s engagement with indigenous communities, and initiated a new form of interaction between indigenous people and the Peruvian state based on the recognition of indigenous rights. Consulta Previa owes its genesis to a series of judgments by the Constitutional Courts in Peru with regard to the implementation of ILO Convention 169 in Peru. This is particularly interesting in light of the fact that traditionally, jurisprudence has not been the source of law in Peru.

Peru ratified the ILO Convention 169 in 1994 and was the first country in Latin America to incorporate the ILO Convention 169 into its domestic legislation by enacting Consulta Previa in 2011. The law was enacted to give greater domestic legal effect to the ILO Convention 169 and to reduce social conflicts

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525 The Law of the Right to Prior Consultation for Indigenous and Native Peoples (Law No. 29785).
528 Id.
529 Sanborn and Paredes, supra note 404.
relating to mining projects in Peru.\textsuperscript{530} It is complemented by the regulations issued pursuant to the Supreme Decree No. 001-2012-MC. The regulation guarantees the right to consent in the relocation of indigenous people and the transportation and storage of toxic wastes, as well as in situations where indigenous peoples’ lives or their means of subsistence are threatened.\textsuperscript{531} These notable achievements are generally unknown.\textsuperscript{532}

Consulta Previa successfully incorporates various aspects of the ILO Convention 169, for example, it mandates good faith consultations with indigenous people and the absence of coercion in consultation, requires appropriate communication methods to be used in the consultation process etc. The Ministry of Culture has the mandate to conduct consultations with indigenous peoples under the ambit of Consulta Previa. The Ministry of Culture views previous consultation as the collective right of indigenous people to be consulted by the State before any measures affecting their collective rights are taken by the State.\textsuperscript{533} In this spirit, the scope of Consulta Previa extends beyond mining and other extractive projects. Consultations with indigenous people are mandated on all administrative and legislative measures that can directly affect the collective rights of indigenous people.


\textsuperscript{531} Salmon, supra note 526, at 388.

\textsuperscript{532} Id.

Prior Consultation of Indigenous Communities in Latin America: Peru vis-à-vis its neighbors

45 million people in Latin America are indigenous, distributed in over 800 different indigenous groups. Overall, Latin American countries have made significant strides towards the improvement of the socioeconomic status of indigenous peoples. 15 of the 22 states that have ratified ILO Convention 169 are in Latin America. Furthermore, countries like Bolivia, Brazil, Chile, Guatemala, and Peru voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples.

Since the 1980’s almost all states in Latin America with significant indigenous populations have acknowledged indigenous peoples in their constitutions and made provisions to guarantee fundamental rights such as participation, consultation and autonomy. Most Latin American countries, with the notable exception of Bolivia, do not recognize the right to prior consultation at a constitutional level. However, the rights associated to with prior consultation are included in a number of countries, for example, the Constitution of Peru contains articles regarding the rights of indigenous peoples that lend support to prior consultation, such as cultural identity, communal property, autonomy and political participation.

Implementation of the prior consultation rights is the biggest challenge in realizing the spirit of ILO Convention 169 to its fullest. In this regard, there is no consensus on the ideal mechanism for prior consultation of indigenous population.

The authors reviewed the legal provisions/laws in Peru, Chile and Colombia to provide a comparative perspective on the practices in Latin America (See Annex E for details). Irrespective of the different provisions/laws used by Peru, Chile and Colombia, these countries face similar implementation challenges, including establishing criteria for determining the indigenous population, timing of engagement, and government capacity.

This Report argues that regardless of the mechanisms chosen by each country, indigenous peoples must be consulted on the implementation of these mechanisms. None of the above countries are exempt from criticisms in this particular regard, either because no consultations were undertaken or because there were large asymmetries in the representation of indigenous peoples.

Sources:


A. The Regulation regarding Citizens’ Participation Process in the Mining Sector (Participación Ciudadana)\textsuperscript{534}

Participacion Ciudadana is applicable where a mining project affects communities, regardless of whether they are indigenous or not. It is interesting to note that at the time of its introduction, the Peruvian state and lawmakers intended this public participation process to be the mechanism through which FPIC would be implemented in Peru.\textsuperscript{535}

Broadly speaking, citizen participation is a basic democratic attribute.\textsuperscript{536} In Peru, however, in the context of mining, the term citizen participation enjoys an additional specific status. Participacion Ciudadana envisages a comprehensive engagement process with the communities affected by mining activities, with the purpose of informing these communities on the results of the EIA.\textsuperscript{537}

Participacion Ciudadana first became applicable through an “explicit” legal provision the Environment and Natural Resources Code of 1990 (\textit{Environmental Code}). Article VI of the Environmental Code established that “[a]ll persons have the right to participate in the definition of the policies and in the adoption of measures of national, regional, or local measures related to the environment and natural resources. In the same manner, [all persons have the right] to be informed of the measures or activities that may directly or indirectly affect the health of persons or the integrity of the environment and natural resources. Everyone is obliged to provide to the authorities the information that the latter may require for exercising their powers to control and monitor the environment.”

When conducted well, the citizen participation process can be a “tool for conflict resolution, since it provides dialogue spaces and allows the knowledge of the real interests of the different involved actors. An efficient application of it allows not only the development and empowerment of a responsible citizenship, but also favors investment sustainability in both environmental and social aspects and benefits all involved actors.”\textsuperscript{538}

Citizen participation pursuant to Participacion Ciudadana is linked to the EIA to be undertaken by the mining companies. Under the law, mining companies have the responsibility to provide all information in the EIA to the community. The authors are of the view that Participacion Ciudadana does not go the full stretch, as community members do not have the prerogative of accepting or rejecting the establishment of a mine. The final decision on the establishment of a mine is taken by MINEM based on reports submitted by the mining companies. While members of the community have the right to file complaints contesting the findings of EIAs,\textsuperscript{539} the mining company is not required to correct the contentious issue. Companies can either accept the complaint or dispute its claims, based on the EIA.

Table 3.1: Summary of Community Participation Laws in Peru

<table>
<thead>
<tr>
<th>Key Attributes</th>
<th>Consulta Previa</th>
<th>Participacion Ciudadana</th>
</tr>
</thead>
<tbody>
<tr>
<td>Implemented by (Ministerial Resolution 304-2008-MEM-DM).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>O’Callaghan, supra note 527, at 35.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>According to the Peruvian portal “Public administration and development”, the “The citizen participation is defined by a set of systems or mechanisms through which the citizens, or the civil society as a whole, can join the decision-making, or influence it, seeking that these decisions represent their interests, may that be as private individual actors or as a social group”. Mitchell Valdiviezo Del Carpio, “La Participación Ciudadana en el Perú y los Principales Mecanismos para Ejercerla,” \textit{Gestión Pública y Desarrollo} 66, A9 (2013), available at <a href="http://www.gestionpublica.org.pe/plantilla/twst4/1029474941/en4ce/2013/enel/revges_1736.pdf">http://www.gestionpublica.org.pe/plantilla/twst4/1029474941/en4ce/2013/enel/revges_1736.pdf</a> (accessed on May 2, 2015).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As explained in Part 5, the companies are responsible not only for elaborating the EIA report, but also to publiclyize it to the affected communities. This process involves informative workshops, advertising in the media (normally widely known radios and newspapers), as well as the wide of the physical report to the community. It is overseen by MINEM.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>These disputes are entertained by MINEM, which monitors the company’s duty of response.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Legal Provision</strong></td>
<td>Law of the Right to Prior Consultation for Indigenous and Native Peoples</td>
<td>Regulation regarding Citizens’ Participation Process in the Mining Sector</td>
</tr>
<tr>
<td>---------------------</td>
<td>---------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Responsible Person</strong></td>
<td>Government agency planning to implement the measure in question (usually MINEM in the case of mining projects). The Ministry of Culture provides technical assistance in the process. In practice, the Ministry of Culture runs the consultations.</td>
<td>Relevant mining company and overseen by MINEM⁵⁴⁰</td>
</tr>
<tr>
<td><strong>Aims</strong></td>
<td>To consult indigenous peoples on legislative or administrative measures that directly affects them. In the context of mining, the consultation is in relation to the mining project and its impacts.</td>
<td>To share information with the local community, promote dialogue and build consensus</td>
</tr>
<tr>
<td><strong>Who gets consulted or participates?</strong></td>
<td>Indigenous people. To identify people as indigenous, four objective criteria are considered: (a) where the people are direct descendants of the country’s native population; (b) the lifestyle, spiritual and historical ties to the territory that the people traditionally use or occupy; (c) their own social institutions and customs; and (d) a cultural pattern and a lifestyle different from those of other sectors of the country's population. There is also a subjective criterion – the indigenous people must identify themselves as indigenous.</td>
<td>People who are in the area of influence of the project, regardless of whether they are indigenous or not.⁵⁴¹</td>
</tr>
<tr>
<td><strong>Timing of engagement</strong></td>
<td>Not specifically addressed in legislation, but in practice consultation can be held after the Mining Concession is granted.⁵⁴²</td>
<td>Engagement in in 3 stages: The exploration stage prior to the filing of the EIA, During the project development stage before and during the preparation and evaluation of the EIA, and</td>
</tr>
</tbody>
</table>

⁵⁴⁰ For a description of the MINAM’s role in the process, see Part 5.

⁵⁴¹ For the purposes of this Report, the authors have reviewed the unofficial translation of the relevant laws (which are originally available in Spanish). Participacion Ciudadana does not define ‘area of influence’.

<p>| <strong>Type of information</strong> | All information necessary for the indigenous community to express their point of view on the legislative or administrative measures (or in the context of mining, the mining project). The information should include the reasons, implications, impacts and consequences of the measure (or in the context of the mining project, the mine). Information should be provided in the language spoken and understood by the indigenous community and in a culturally appropriate manner. The consultation process must have the support of trained interpreters. | During the exploitation and processing stages. Information is from the EIA study undertaken by the mining company. Information should be prepared in simple language and should be in a language spoken by the community. |
| <strong>Responsibility of providing information</strong> | The government agency planning to implement the measure in question (usually MINEM in the case of mining projects). | Mining company |
| <strong>How is information disseminated</strong> | Publicity and an intercultural dialogue process | Public workshops, dialogue tables and public hearings. Companies are required to publicize the workshops through local means of communication. |
| <strong>Decision making</strong> | Final decision is at the discretion of MINEM. However, the legislation provides for the aim of reaching an agreement. Agreement is required in cases of relocation. | Community does not have the right to say ‘no’ Mining company is required to submit a report with the observations and recommendations of the community. If the mining company does not inculcate any observations or recommendations into its project plan, it has to justify the non-inclusion. Community members may also independently submit their feedback to MINEM. Based on the mining company’s report, MINEM has the final authority to decide whether to approve the project and the conditions that should be in place to mitigate potential project impacts. |</p>
<table>
<thead>
<tr>
<th><strong>Who bears the cost of consultation or participation?</strong></th>
<th>The government agency planning to implement the measure and the Ministry of Culture.</th>
<th>Costs of participation are borne by the mining company</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Monitoring and implementation</strong></td>
<td>No specific monitoring and implementation mechanism specified</td>
<td>Law requires mining company to propose monitoring and participation mechanisms in its Citizen Participation plan to be implemented during the project. May include establishment of Permanent Information Office and/or a Participatory Environmental Surveillance and Monitoring Committee. The mining company is required to provide information on the mining project, including its compliance with its obligations, and respond to feedback and complaints from the community with respect to the company’s environmental social performance through the Permanent Information Office.</td>
</tr>
<tr>
<td><strong>Application in later stages of the mining project cycle (such as closure etc.)</strong></td>
<td>No specific consultation processes provided for.</td>
<td>Provides for participation when there is an extension or modification of mining activity and during the operation of the mine. The law also provides for participation at the mining closure stage and for citizen approval and modification of the closure plan, however, the adoption of participatory mechanisms at this point is at the discretion of MINEM</td>
</tr>
</tbody>
</table>

### B. Community Engagement in Peru: Issues and Recommendations

This Report applauds the Government of Peru for the significant and progressive strides taken by it to give effect to community engagement in mining projects in Peru. The enactment of Consulta Previa and Participacion Ciudadana reaffirms Peru’s commitment to sustainable development of its natural resources and its aim to ensure inclusive development in the country.

While the distinct legal instruments are definitely a step in the right direction, this Report argues that there are some shortcomings in these instruments. For the community engagement laws to truly achieve its purpose of incorporating a participatory decision-making process and to become an effective measure of preventing social conflicts in Peru, this Report implores the Government of Peru to do more. Our recommendations recognize the Social License as a fundamental component of the community engagement process. Further, as discussed earlier, obtaining and maintaining a Social License has positive effects on

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543 O’Callaghan, *supra* note 527, at 18.45.
business; the absence of a Social License can result in significant financial and reputational impacts to business.\textsuperscript{544} This Report emphasizes improved and transparent communication between the various stakeholders and measures to reduce the trust deficit in the mining sector. The recommendations aim to move the state of affairs “from reactive, to proactive, and from conflict management and crisis resolution, to conflict prevention.”\textsuperscript{545}

While the different aspects of our recommendations will be specifically discussed at length in this Part, the recommendations proceed on the basis of the following normative framework:

- Peru should increase emphasis on social issues, in addition to environmental issues, in the community consultation process;
- FPIC envisaged under ILO Convention 169 is the basic principle underlying community participation in Peru, however, it is time for Peru to push the envelope and apply a higher standard than the traditional conceptions of FPIC;
- in relation to particular issues, Peru should adopt consent of the community as the operating standard by requiring consent of the communities under Consulta Previa and Participacion Ciudadana;
- steps should be taken to strengthen the participation and consultation mechanisms in Consulta Previa and Participacion Ciudadana to better promote meaningful community engagement in mining projects; and
- steps should be taken to ensure the effective implementation of commitments and compliance with obligations imposed in mining projects.

\textbf{C. De-linking Social Impact Assessment from Environmental Impact Assessment}

Currently, under the laws in Peru, mining companies are not required to prepare a separate Social Impact Assessment (SIA). Under the General Environmental Law,\textsuperscript{546} an EIA does incorporate certain social aspects:

- a description of the proposed activity and the anticipated direct and indirect effects of such activity on the physical and social environment;\textsuperscript{547} and
- steps to ensure adequate social management, including to ensure transparency, conflict prevention and the prevention, mitigation and eventual compensation for social impacts.\textsuperscript{548}

Notwithstanding the aforesaid, by definition, an EIA will be particularly focused on the environmental impacts of mining. Consequently, an EIA will pay insufficient attention to the social impacts of mining. Given the potentially far-reaching social impacts\textsuperscript{549} of mining, this Report argues for an independent assessment framework with respect to the social aspects of mining. Such independent framework should cover the entire scope of social impacts of mining and should be in the form of a SIA.

\textsuperscript{544} EY, *Business risks*, supra note 20, at 16.
\textsuperscript{546} General Environmental Law (Law No 28611).
\textsuperscript{547} General Environmental Law (Law No 28611), Art 25.
\textsuperscript{548} Regulation of the Law of the National EIA System, Art 34.
\textsuperscript{549} Social impacts are commonly understood as “the consequences to human populations from any public or private actions that alter the ways in which people live, work, play, relate to one another, organize to meet their needs and generally cope as members of society” Rabel J. Burdge and Franck Vancly, “Social Impact Assessment: the contribution to the State of Art Series”, Impact Assessment, Vol 14, March 1996, 59, available at http://www.hardystevenson.com/Articles/SOCIAL\%20IMPACT\%20ASSESSMENT\%20A\%20CONTRIBUTION\%20TO\%20THE\%20STATE\%20OF\%20THE\%20ART\%20SERIES.pdf (accessed on April 1, 2015).
The SIA is “a process for understanding and responding to social issues associated with development.”550 SIAIs are comprehensive studies, which are undertaken to measure the extent of impact of mining activities on the social aspects of the communities. Generally speaking, the adverse social impacts of mining are:551

- demographic changes, e.g. size and composition of resident population, influx of temporary work force or new recreational users (disrupts the cohesion of a small, stable community);
- economic changes, e.g. new patterns of employment/income, real estate speculation (marginalizes long term, older residents);
- environmental changes, e.g. alterations to land use, natural habitat and hydrological regime (loss of subsistence or livelihood in resource dependent community); and
- institutional changes, e.g. in the structure of local government or traditional leadership, zoning by-laws or land tenure (reduced access or loss of control leads to disempowerment or impoverishment of the established population).

Developing a SIA is a crucial phase in the process of establishing a mining project. A SIA is an important tool to identify key issues for communities that may be impacted by the mining project, anticipating these impacts and devising mitigation policies as well as enumerating proactive strategies.552 Figure 3.3 depicts the various phases of SIA for natural resource projects.

**Figure 3.3: Phases of the SIA for natural resource projects**

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SIA is a continuing process, with phases that interrelate with each other throughout the life of a mining project and even after the closure of the mining project. The dimensions and dynamics of a mining project require continuous follow up and review of the SIA findings, which should be adapted and conformed to new and emerging realities.

There may be instances where more than one concession holder could cause a social/environmental impact on the communities. This could potentially happen where different companies have mining concessions in the vicinity of a specified area of land. It is important in this regard to undertake a cumulative impact assessment and management regime. This will ensure that all the social risks from the cumulative mining activities have been identified and accounted for. From a company’s perspective, it will also ensure that it is not burdened with the entire financial strain of a cumulative impact and the responsibility/liability can be apportioned between the different companies involved.

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**Australia: Importance of assessing cumulative impacts**

Nine major new coal mines are being proposed in the Galilee Basin in central Queensland. The mines will include 34 open cut pits and 11 underground mines to produce over 300 million tons of coal per annum. In order to do so, however, it is estimated that 1,354 billion liters could be lost as a consequence of water being pumped or drained, an equivalent of two and a half “Sydney Harbors.” The nine mines’ activities combined also have the potential to structurally change the local geology by generating fracturing. The impact on surface water and shallow groundwater can be irreversible.

The Independent Expert Scientific Committee, appointed by the Australian Government in 2012, found that there has been an inadequate assessment of cumulative impacts and recommended building a “regional water balance model” of the cumulative impacts of these mining proposals with improved data on the connectivity between the aquifers and their key hydraulic properties. Despite these recommendations, projects have not been assessed in an integrated way and some of them have already received approval.

Similarly, in 2010, the Australian Government approved amendments to the Water Act 2000 that included a cumulative impact management regime to be overseen by the Queensland Water Commission. The amendments establish that where more than one petroleum tenure holder may cause an impact on underground water resources as a consequence of water rights, the area could be declared a ‘cumulative management area.’ In those regions, the Queensland Water Commission would then produce a single underground water impact report for the whole area and develop a regional groundwater flow model that is to be funded by the companies. The regulation also determines that petroleum tenure holders have additional obligations such as collecting data and making “good arrangements” among themselves so that activities are coordinated and impacts are minimized.

**Source:** Perrine Toledano and Clara Roorda, Leveraging Mining Investments in Water Infrastructure for Broad Economic Development: Models, Opportunities and Challenges, Columbia Center on Sustainable Investment Policy Paper, March 2014.

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553 Id.
This Report recommends that the SIA should undertake a cumulative impact assessment, when required.

**RECOMMENDATIONS:**

**Establishing a process for SIAs**

The law in Peru should be amended to provide for a social impact assessment, separate from the EIA, prior to any significant exploration activity. A template of the SIA is annexed with this Report as Annex F.  

The Government should develop this template as the basis for the SIAs to be provided by mining companies in Peru.

A new provision should be included in the law requiring mining companies to undertake a SIA. Such SIA shall be subject to a similar approval mechanism as the EIA.

The following provision should be included in new legislation establishing a process for the SIA:

> “Within a period of 90 days from the grant of the Mining Concession, a Concessionaire shall submit a social impact assessment (SIA) for the project to the Ministry of Energy and Mines for its approval. The Ministry of Energy and Mines may acting reasonably extend the time period prescribed in this provision. Provided however that, the extension shall in no event exceed a period of 90 days to be calculated from the last day of expiry of the initial period prescribed under this provision. The submission of a SIA shall be a fundamental term of the Mining Concession granted to the Concessionaire.”

**Content of the SIA**

Such assessment shall provide the following detailed description and analysis: (a) clear description of existing social conditions in the area(s) potentially affected by the project, before the project is realized, (b) identify the expected positive and negative impacts of the mining project, (c) identify and clarify the risk mitigation measures to be adopted by the company to minimize the negative impact of mining, (d) where the risks cannot be mitigated, identify the alternatives available to deal with the consequences of such risks, (e) identify and demonstrate organizational, technical and financial ability to undertake each of the actions mentioned herein above, (f) develop a monitoring plan for the project, and (g) undertake to take complete financial responsibility for any mitigation or alternative arrangements suggested by the SIA.

**Cumulative SIAs**

In cases where more than one Concessionaire may cause an impact on the community or the resources in an area, the said area shall be treated as a ‘cumulative management area’ and the Concessionaire involved in the area shall have the obligation to prepare and submit for approval a cumulative SIA. Such cumulative SIA shall clearly identify the cumulative and incremental effects of the activities of each of the companies and propose a mechanism to mitigate / remedy the negative impacts of their cumulative actions. The financial liability of implementing such mitigation / remediation measures shall be apportioned between the relevant Concessionaire in the manner mutually agreed between them. To the extent the Concessionaires are unable to agree on the apportionment of the financial burden, the decision of the Government shall be final and binding.

**Consequences of non-compliance**

If: (i) the Concessionaire fails to submit the SIA within the period (or the extended period, as applicable) prescribed under this provision, or (ii) the Concessionaire has been unable to obtain an approval for the SIA for a period of three years from the date of grant of Mining Concession, the Mining

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554 The form of the SIA was developed by Radon Law Offices.
Concession shall terminate automatically and upon such termination, the Government shall have the right to grant a Mining Concession to any other company.”

Updating SIAs

The SIA must be updated on a year on year basis through the life of the mine. The following provision should be included in new legislation establishing a process for the SIA:

“Within a period of 60 days from the beginning of a calendar year, the Concessionaire, shall provide to the Ministry of Energy and Mines, an update on whether there has been any change in conditions requiring a modification to the SIA previously approved by the Ministry of Energy and Mines. To the extent there has been specific change in conditions, the Concessionaire shall provide complete details of these conditions and the changes to be made to the SIA previously approved by the Ministry of Energy and Mines. The Concessionaire shall also specifically identify any mitigation / remediation measures that may be required to be undertaken pursuant to such change in conditions and shall continue to be financially liable for such measures. If the Concessionaire fails to submit such update within the time period prescribed above or such other period the Ministry of Energy and Mines may deem appropriate, the same will be treated as a fundamental default by the Concessionaire and the Concession held by the Concessionaire shall be terminated with immediate effect.

Provided that any extension of the time period prescribed in this provision shall be reasonable and shall in no event exceed an additional period of 60 days to be calculated from the last day of the expiry of the initial period prescribed under this provision.”

D. Ensure consistency between Consulta Previa and Participacion Ciudadana

As discussed before, community engagement in mining projects is codified under two separate legal instruments in Peru. The authors recognize the specific rationale for implementing a specific legislation for consultation with indigenous populations. However, there are some specific concerns arising from the controversies surrounding the recognition of ‘indigenous population’ under the Consulta Previa.555 The

555 Sanborn, supra note 404. Andean peoples do not always identify with the term ‘indigenous’ and were largely redefined in the 1970s to be ‘peasant communities’, and the national census has not included ethnic variables since 1961.
How should business deal with self-identified indigenous populations?

In some countries, the government does not recognize groups that identify as indigenous due to concerns over the obligations that would follow such recognition, for example in relation to self-determination or land rights. There are also some countries that do not recognize the existence of indigenous peoples at all. As discussed above, this is a relevant issue for companies operating in Peru as well, in the context of FPIC for mining projects.

According the Ruggie Framework on Business and Human Rights, businesses have a responsibility to respect human rights and should avoid causing or contributing to adverse human rights impacts through their activities. Given this context, one could make the argument that businesses have the obligation to respect human rights, irrespective of a State’s willingness to protect human rights. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has discussed this challenge:

“One of the fundamental difficulties facing companies that operate in indigenous territories, or whose operations affect those territories, is the absence of formal recognition of indigenous peoples by the State in which they live, or recognition limited solely to certain groups. Nevertheless, a generally accepted principle of international human rights law holds that the existence of distinct ethnic, linguistic or religious groups, including indigenous peoples, can be established by objective criteria and cannot depend on a unilateral decision by a State. Businesses cannot use limited recognition, or absence of explicit recognition, of indigenous peoples in the countries in which they operate as an excuse not to apply the minimum international standards applicable to indigenous peoples, including in cases where States are opposed to the application of such standards.”

As the authors understand, currently, mining companies operating in Peru adhere to the recognition of indigenous populations by the Government of Peru. On the basis of the observations of the Special Rapporteur, one could make the argument that the mining companies in Peru should go beyond the state-recognized indigenous populations. Consequently, where certain groups legitimately identify themselves as indigenous population, the mining companies operating in Peru should engage with such groups in the spirit of upholding the international instruments recognizing human rights of indigenous populations.

Sources:


authors understand that there is a general reluctance by the Government of Peru to apply the Consulta Previa to populations outside the Amazonian region.556

Traditionally, community engagement rights emerged in the context of the rights granted to indigenous people under the different international conventions. While this remains the applicable standard, more recently, there is a greater recognition of the non-indigenous population in relation to community

556 Id.
participation in the decision process. For example, court cases have extended the right to tribes that are technically non-indigenous. Further, certain international institutions such as the IFC also extend the standard to ensure that the Social License of nonindigenous communities for high-risk projects has also been obtained.

Therefore, this Report recommends that the right to be consulted (and consent, in some specified circumstances) be extended beyond indigenous people to all communities affected by the mining project. The authors recognize that the Participacion Ciudadana, in principle, aims to achieve this objective. It is commendable that the law goes as far as saying that the Government must reach a consensus with civil society on environmental management decisions and actions (a limited right to consent). However, this Report argues that the consultation (and consent, in some specified circumstances) under Participacion Ciudadana should be broader and not limited to the EIA aspects of a mining project.

**RECOMMENDATIONS**

The provisions of the Consulta Previa and the Participacion Ciudadana should be made consistent.

The right to consultation (and consent, in specified circumstances) should be equally available to both indigenous and non-indigenous populations in Peru.

The Participacion Ciudadana should be amended to expand the scope of consultation (and consent in specified circumstances) to all matters relating to a mining project and should not be restricted to the EIA submitted by the Concessionaire.

If the relevant community for the purposes of Participacion Ciudadana is a mix of indigenous and non-indigenous groups, the consultation (and consent, where applicable) processes for the two groups should be undertaken in a concerted fashion by the different ministries of the Government of Peru involved in the processes.

Participacion Ciudadana and Consulta Previa restricts the participation of the Government and the mining company, respectively, in the community engagement process. This Report argues for a more active involvement of the mining company in the consultation process under Consulta Previa. This is crucial to establish a constructive relationship between the mining companies and the indigenous communities in the early stages of the mining project. On the other hand, more involvement by the Government in the engagement under Participacion Ciudadana would also be beneficial. The Government can be a neutral mediator in the process and reconcile the (sometimes polarizing) positions assumed by the mining company and the communities.

Unlike Participacion Ciudadana, Consulta Previa does not mandate continuing consultation through the life of the mining projects and on matters related to closure of the project. Often the scope of the social and environmental risks will not be completely known early on in the project or these may change as the project progresses. It is important that the mining company continues to engage with the communities through the different phases of the project, up to closure. Consulta Previa should provide for provisions similar to Participacion Ciudadana.

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560 Id.
RECOMMENDATION

Consulta Previa should be amended to mandate continuing consultation through the life of a mining project, including in relation to any modification or extension of the mining activity. Further, the law should provide for specific consultation process in relation to closure of a mining project and to manage the impacts arising from the closure of the mine.\(^{561}\)

Following the consultation process, the following information should be published: (a) the proposed measures subject to consultation, (b) the minutes of consultation, and (c) the responses to feedback from the indigenous people who participated in the consultation process.

E. Identifying the ‘Community’ and Addressing Issues of Representativity

One of the primary issues for consideration in a discussion on community engagement is the community that should be involved in the discussions on the project. The word ‘community’ usually refers to the people who are likely to be immediately affected by the development of a project, but nearby towns may also be affected.\(^{562}\) According to World Bank, the following three processes may help guide the identification of qualified communities:\(^{563}\)

- self-identification;
- an assessment of risks and impacts; and
- ongoing monitoring / adjustment.

The identification of the ‘community’ is an important aspect of the community engagement process and arbitrary inclusion / exclusion of sections of community could by itself trigger social conflicts. From a reading of the Participacion Ciudadana, there does not seem to be a specific definition of ‘areas of influence’ or ‘communities.’

Another important issue in relation to the community engagement process is the question of who will represent the community in the community engagement process and in establishing any agreement (community agreements are discussed later in this Part). Under the process under Consulta Previa, indigenous people participate in the consultation processes through their representatives who are chosen according to their traditions and customs.\(^{564}\) Further, the selection process takes into consideration gender representation and the facilitation of intercultural dialogue towards agreement.\(^{565}\) Consulta Previa provides for a selection of representatives that is culturally and contextually appropriate for the indigenous population in question, while ensuring that groups such as women are not underrepresented. Participacion Ciudadana should similarly provide for the selection of appropriate community representatives.

RECOMMENDATIONS

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561 For more details on mine closure, see Part 5(V)(B).
563 The World Bank makes a distinction between ‘affected communities’ and ‘qualified communities’. The term “impacted” or “affected” community is a broad term encompassing any group that is affected in some significant way by a project’s activities. This may include both adverse and beneficial impacts, such as loss of land; disruption of livelihood; economic, cultural, health, and infrastructure impacts; and changes in social dynamics and power relations. In contrast, a “qualified” community defines the groups which are (or will be) the principal beneficiaries of a community development agreement. These groups are formally represented in the CDA development process. Mining Community Development Agreement, Source Book, World Bank Group March 2012, http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf, 18 (accessed April 15, 2015).
564 Supreme Decree No. 001-2012-MC Art 10.
565 Supreme Decree No. 001-2012-MC Art 10.
Participacion Ciudadana should be amended to provide clear guidelines on identifying ‘areas of influence’ and impacted or relevant community for the purposes of community engagement under the law.

The mining company, in consultation with the Government and the communities, shall undertake the analysis on impacted or relevant community on a case-by-case basis.

Participacion Ciudadana should be amended to provide for a process of selecting community representatives for the purpose of community engagement. Such process should be (a) based on the community’s traditions, customs or preferences, and (b) ensure the representation of a broad cross-section of the community, including women and youth.

In the context of Consulta Previa, the authors are of the view that there is a conflict of interest, i.e., currently, MINEM has the decision-making authority vis-à-vis engagement with the indigenous groups. This creates a conflict of interest, given MINEM’s primary responsibility to increase investment in the mining sector in Peru. The Ministry of Culture has the technical expertise to determine as to whether a group is ‘indigenous’ and will be impartial in the determination.

**Recommendation**

The Ministry of Culture shall be the final authority for making the determination of whether a group of people is ‘indigenous’ under Article 7 of Consulta Previa.

**F. Pushing the Envelope: Incorporating Consent in Certain Instances**

As mentioned previously, there is currently no requirement for obtaining community consent, either under Participacion Ciudadana or Consulta Previa. As one commentator observed, “under Peruvian law and practice, once a project is proposed there is a general understanding that it will proceed and that the environmental and social impacts can be avoided or mitigated to satisfaction”.

Under Participacion Ciudadana, MINEM has an obligation to take community feedback into account, but the law does not provide guidance on the weight to be given to community feedback. While Consulta Previa contains a clear aspiration for agreement, there is no mandatory requirement in the law except in cases of relocation. The decision is ultimately the prerogative of the government agency planning to implement the measure in question. However, the decision should:

- be properly motivated;
- involve an assessment of the views, suggestions and recommendations raised by the indigenous or native peoples during the process of dialogue; and
- include an analysis of the consequences that the adoption of a particular measure would have on their collective rights.

It is critical to draw a distinction between consultation and consent of the community. If a community’s actual consent is required before the mining operations begin, mining companies have to engage in a more proactive manner with the community and provide them with information important to their decision to consent to the mining project.

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567 Participacion Ciudadana, Art 29.

568 Participacion Ciudadana, Art 15.

569 Participacion Ciudadana, Art 15.
Traditionally attached to the principles of protection of indigenous community rights, there is no universally agreed definition of FPIC. FPIC has been implemented in various ways, which can broadly be summarized as falling into two categories:

- a requirement of evidence that consent has been obtained;
- a requirement of evidence of consultation in good faith with the goal of achieving FPIC.\(^{570}\)

Under the 1\(^{st}\) category, the group essentially has a veto over whether the activity (in this case, the mining project) can proceed.\(^{571}\) Under the second category, the activity (in this case, the mining project) can proceed without consent, as long as the relevant communities have been consulted, and continue to be consulted, in good faith with the goal of achieving consent.\(^{572}\) The second category recognizes the tension between indigenous rights and state sovereignty.\(^{573}\) Table 3.2 summarizes the standards under different international instruments and adopted by international institutions.

Table 3.2: FPIC at a Glance: Legal Obligations and Voluntary Standards

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Application of FPIC</th>
<th>Binding / Non-binding</th>
</tr>
</thead>
<tbody>
<tr>
<td>ILO Convention 169</td>
<td>ILO Convention 169 requires FPIC in cases of resettlement. Further consultation is mandated with indigenous and tribal peoples, prior to allowing exploration or exploitation of mineral or subsurface resources, with the objective of achieving agreement or consent.</td>
<td>ILO Convention 169 is binding on the 22 countries that have ratified the convention.</td>
</tr>
<tr>
<td>(applicable to States)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>UNDRIP</td>
<td>Article 10 states: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” Article 29 (2) provides that: “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.” Article 32 (2) provides that: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the</td>
<td>Non-binding unless enacted in national law, but compliance is expected in the 144 countries that have endorsed the Declaration. The UNPFII and the UN Human Rights Council monitor compliance.</td>
</tr>
</tbody>
</table>
development, utilization or exploitation of mineral, water or other resources.”

**IFC (third party obligations applicable to companies)**

**Performance Standard 7** now requires companies to elicit free, prior and informed consent from indigenous peoples in cases of resettlement; where indigenous knowledge is to be used for commercial purposes, and in other cases of ‘significant adverse’ impact.

(Prior to 2012, the IFC required only ‘free, prior and informed consultation’ and ‘broad community support’, but stopped short of ‘consent.’)

**Binding on companies that are IFC investment clients.**

(Broadly regarded as international good practice, e.g. adopted by the Equator Banks)

**Inter-American Development Bank (IDB) (applicable to companies)**


IDB will “only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities” if it can confirm that “the people affected have given their informed consent to the resettlement and compensation measures.” For projects with significant potential adverse impacts on indigenous peoples, the proponent should demonstrate that it has “through a good faith negotiation process, obtained agreements regarding the operation and measures to address the adverse impacts as necessary to support, in the Bank’s judgment, the sociocultural viability of the operation.”

**Binding on companies that are IDB investment clients.**

**European Bank for Reconstruction and Development (EBRD) (applicable to companies)**


**Performance Requirement 7** recognizes that ‘the prior informed consent of affected Indigenous Peoples is required, for specified activities, given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects’

“The client will enter into good faith negotiation with the affected communities of Indigenous Peoples, and document their informed participation and consent as a result of the negotiation.” Specified activities relate to activities that are on traditionally used land, or would affect livelihoods, cultural, ceremonial or spiritual uses, or would lead to resettlement; or affect cultural resources.

**Binding on companies that are EBRD investment clients.**

Source: Abbi Buxton and Emma Wilson, FPIC and the Extractive Industries (2013), IIED

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574 The information included in Table 3.2 has been adapted from the report. The report is available at http://pubs.iied.org/pdfs/16530IIED.pdf (accessed on April 15, 2015).
While international legal and voluntary standards have mandated consultation in certain cases, some commentators argue that these standards do not go as far as mandating a right to consent, even in cases of relocation. For instance, while paragraph 1 and the first sentence of paragraph 2 of Article 16 of the ILO Convention 169 use strong language to indicate that FPIC is required for relocation, the second part of paragraph 2, and paragraphs 3 through 5 provide for contingencies such as public inquiries and compensation when FPIC cannot be obtained prior to relocation. The UNDRIP while recognizing more situations where consent is required, similarly makes a compromise between consultation and consent.

It is also interesting to note that a number of multinational companies operating in Peru have made public commitments in relation to FPIC in certain circumstances. Table 3.3 summarizes these positions.

Table 3.3: Positions of multinational companies on FPIC

<table>
<thead>
<tr>
<th>Company</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>BHP Billiton</td>
<td>Projects must have broad-based community support before proceeding. FPIC is only required where mandated by law.</td>
</tr>
<tr>
<td>Newmont</td>
<td>Commits to FPIC in relation to land acquisition and resettlement.</td>
</tr>
<tr>
<td>Rio Tinto</td>
<td>Commits formally to FPIC based on IFC standard.</td>
</tr>
<tr>
<td>XStrata</td>
<td>Commits to abiding by FPIC “where appropriate” or “relevant”.</td>
</tr>
</tbody>
</table>

Source: Marianne Voss and Emily Greenspan, Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC), Oxfam America Research Backgrounder Series (2012)

Absent the ability to walk away from the bargaining table, community engagement is effectively a meaningless exchange of views designed to merely fulfill a legal requirement. For the consultation process to be meaningful and to prevent and mitigate social impact, this Report argues that a broader and more comprehensive view of community engagement should be adopted. The recommendations go beyond the traditional notions of FPIC under ILO Convention 169 and build on some of the standards discussed above. The fact that some multinational companies already recognize ‘consent’ as an operating standard, in certain circumstances, strongly supports our recommendation. While recommending a higher standard for community engagement, the authors are cognizant of maintaining the balance between protecting community interests, attracting investment in the mining sector and state sovereignty over mineral resources. Consequently, the higher standard should not be construed as an absolute ‘right to veto’ for the communities. Instead, the higher standard mandates consent in instances, where the interests of the communities will be significantly compromised on account of the mining project.

As a starting point, this Report recommends ‘consent’ of the communities in the following instances:

- relocation / resettlement of communities (indigenous and non-indigenous committees);
- mitigation / remediation of the various environmental and social risks identified pursuant to the SIA / EIA – the mitigation / remediation measures shall be clearly documented in an Environmental and Social Risk Agreement (as discussed in detail below); and

575 O’Callaghan, supra note 527, at 18.8.
576 Id.
577 Id. at 18.12.
580 Please note that this Report is not dealing specifically with the issue of relocation / resettlement in the context of mining in Peru (other than as mentioned in Part 2(II) of this Report). The said impact is a recognized issue in Peru. Further, while reviewing issues on relocation / resettlement, special reference must be made to the traditional relationship indigenous populations share with their land. On account of the vast nature of the issue, this Report is not dealing with this issue in detail and readers should review other literature available in this regard.
specifically in the context of indigenous populations, any actions that have a dangerous adverse effect on the culture or way of life of the indigenous populations.

The instances mentioned above can significant impact the life and livelihoods of the communities and consequently, should require the consent of the relevant communities. Subjects that do not fall into the umbrella of relocation or the Environmental and Social Risk Agreement can be dealt with on a consultation basis. Community referenda are a potential way to assess consent and can provide an effective means of ensuring that community decision-making is free and fair.  

**RECOMMENDATIONS**

The provisions of Consulta Previa and Participacion Ciudadana should be amended to specifically provide for consent in case of: (a) relocation / resettlement of communities, on account of the mining project, (b) mitigation / remediation of the various environmental and social risks identified pursuant to the SIA / EIA, which should be codified in an Environmental and Social Risk Agreement, or (c) in the context of indigenous groups, any actions that can result in a potentially adverse effect on the culture or way of life of such indigenous groups.

In seeking such consent, the communities should be provided all relevant information, including a complete relocation plan, in case of a proposed relocation / resettlement.

In the context of the community consultation (or consent, where applicable), to ensure consistency in decision-making and procedural fairness, it is important to curb the administrative discretion permitted under the provisions of Participacion Ciudadana and Consulta Previa. For example, per the provisions of Consulta Previa, even if a group is recognized by the Government to be ‘indigenous’, there is no explicit requirement on the Government to consult with such groups. In interviews with communities and CSOs in Peru, the authors were informed that Consulta Previa have not been applied to mining projects, given the economic significance of the sector. While there have been 16 successful consultations and agreements under Consulta Previa, they have all been in the context of oil and gas projects.

Similarly, neither Participacion Ciudadana nor Consulta Previa provides guidelines on the manner in which the mining company or MINEM should factor community views in the decision-making process.

**RECOMMENDATIONS**

Consulta Previa should be amended to provide for the following:

“Where the Ministry of Culture has determined that a group of people is ‘indigenous’, such group shall be consulted under the process set out by Consulta Previa.”

Article 29 of Participacion Ciudadana and Consulta Previa should be amended to provide that in considering project proposals submitted by mining companies pursuant to Participacion Ciudadana, MINEM shall specifically consider the following:

(a) the Concessionaire or MINEM (in the case of Consulta Previa) has complied with the community engagement process required under Participacion Ciudadana or Consulta Previa,

(b) the Concessionaire has adequately addressed the concerns raised by the relevant community in relation to issues discussed in the community engagement process,

(c) the Concessionaire has obtained the consent of the community in relation to the items specifically identified as instances requiring mandatory consent of the community,

(d) the Concessionaire has submitted an effective process to respond to feedback and complaints with respect to its environmental and social performance during the mine’s operation.

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581 McGee, supra note 579, at 590.
582 Sanborn, supra note 404.
(e) there are no outstanding issues that should reasonably be addressed to ensure the general acceptance of the community of the mining operation.

G. Documenting the Community Consent: The Environmental and Social Risk Agreement

Commonly known as ‘Community Development Agreement’ (CDAs), community agreements are increasingly being viewed as a key instrument for clearly defining the obligations of the mining companies towards the impacted communities. If undertaken appropriately, CDAs can be used to promote a sustainable and mutually beneficial relationship between the various stakeholders, i.e., the impacted communities, the government (both national and regional governments), and the mining company.

In addition to documenting a clear roadmap for community engagement in the mining project, through the

One or multiple agreements?

A CDA may function as one agreement with several component topics or may be developed as several discrete agreements individually covering distinct subjects. In some cases it may be more successful to implement multiple CDAs, rather than relying on a single, overarching agreement, for example, in case of the project having impacts on regions that are culturally or politically distinct, or where communities experience different impacts and have different needs.

The Ok Tedi mine in Papua New Guinea dealt with this issue by implementing an umbrella process, involving all impacted communities, where broad principles and allocations were established, and community-specific agreements were then developed within this framework. Rio Iron Ore in Western Australia used similar approach to negotiate new agreements with ten different traditional landowner groups.

Forming multiple agreements has the advantage of flexibility, but it can be very resource-intensive, in both the negotiation and implementation phases. Without an integrating structure there is a danger of inconsistency in approach across agreements, which can have detrimental consequences. For example, if one community or region perceives an agreement to be less generous than that of another group, this can damage relations with the project and fuel intercommunity rivalry and conflict.


different stages of the project, such agreements can go a long way in establishing a transparent framework for community engagement. Most importantly, the agreement between the stakeholders is locked-in, thereby ensuring long term commitment, notwithstanding changes in ownership and personnel of the mining company or a churn of government level or a change in political structure in the country. Further, by managing the environmental and social risks from an early stage, the Government will be less likely to be faced with the costs and damage control caused by project-related social conflict and environmental


584 Id.

585 Id. at 8.
harm.\textsuperscript{586} However, there could be potential or actual risks associated with the execution of community development agreements, specifically arising from the power asymmetries between the community and the other stakeholders, such as mining companies. Amongst others, concerns relating to coercion of communities, misrepresentation and incapacity of communities could become relevant.\textsuperscript{587} Most importantly, there are concerns about such agreements potentially restricting legal remedies available to communities.

This Report recommends that the community consent pursuant to the community engagement should be documented in an agreement entitled the Environmental and Social Risk Agreement. Amongst other things, the Environmental and Social Risk Agreement should document the agreement with the community on plans for relocation, including details of replacement housing and compensation to be provided, mitigation plans for environmental, social or cultural impact of mining etc. Further, the agreement should include a dispute resolution mechanism and provisions for compensation to offset impacts arising from a breach of the agreement.

The Environmental and Social Risk Agreement should be signed by the representatives of the community, the mining company and MINEM and the local and regional governments of the area in which the mine is situated. The involvement of the government in the agreement will give the agreement greater credibility and promote a stronger government presence in the process.

\textbf{RECOMMENDATION}

Participacion Ciudadana and Consulta Previa should be amended to require an Environmental and Social Risk Agreement between the mining company, the governments (both national and local/regional governments) and the affected community in relation to:

(i) relocation plans and details of replacement housing, compensation, and the like,
(ii) the mitigation / remediation plans for the environmental and social risks identified pursuant to the EIA / SIA, and
(iii) mitigation plans for addressing any dangerous effects of the mining project on the culture or way of life of indigenous communities.

In addition to clearly documenting the agreement between the stakeholders and the obligations of the mining companies and/or the governments, the Environmental and Social Risk Agreement should include a dispute resolution mechanisms and measures to address amendments to the agreement and breaches of the agreement, including a compensation framework to offset impacts arising from a breach of the agreement.

The relevant communities shall have the right to withdraw from the negotiation at any time without any adverse consequences, either prior to the execution of the Environmental and Social Risk Agreement or any time after, if the mining company and/or the governments do not meet the obligations under the Environmental and Social Risk Agreement.

The Environmental and Social Risk Agreement should be signed by the Concessionaire, representatives of the community as selected through the processes prescribed in Participacion Ciudadana or Consulta Previa and MINEM.

The execution of the Environmental and Social Risk Agreement shall be a fundamental condition of the Mining Concession. The following provision should be included in legislation:

“\textit{If the Concessionaire has been unable to agree and execute an Environmental and Social Risk Agreement within a period of two years from the date of grant of Mining Concession, the Mining}


\textsuperscript{587} Mining, \textit{World Bank Group, supra} note 583, 9.
Concession shall terminate automatically and upon such termination, the Government shall have the right to grant a Mining Concession to any other company.”

VII. Overhaul the Provisions on Information Sharing

Currently, there are some concerns in relation to the information to be provided to communities under Participacion Ciudadana and Consulta Previa. Among other things, Consulta Previa does not specify the subjects that should be discussed during the consultation with the indigenous community. Further, unlike Participacion Ciudadana, the consultation under Consulta Previa does not extend to issues relating to mine closure and related impacts.

Building Trust through Cooperative Approach to Information Sharing

Some companies have adopted a co-operative approach in the process of sharing information with communities.

In the case of the Sakhalin-2 project in the Russian Far East, the local indigenous population expressed mistrust of the company’s environmental, social and health impact assessment, demanding an anthropological expert review and compliance with the guidelines on cultural impact assessment. Pursuant to such request, the company, Sakhalin Energy, commissioned an independent review of its impact assessment documentation to identify any gaps relating to the needs or concerns of the indigenous population. The company was able to enter into a development plan with the indigenous community, based on the independent review arranged by the company.

Similarly, in the case of Siberian-Urals Aluminium Company in Russia, the company organized visits to the project sites, which helped the company to reach a broader range of stakeholders and improve relations between communities, local government and the company. Local participants felt that the site visits were useful in improving their understanding of the project and shaping their expectations about possible impacts and benefits. Further, Company managers gained first-hand experience of community concerns, a clear picture of potential risks, and a better idea of the impact mitigation measures they would need to consider. Stakeholders also helped the company understand how best to present the assessment findings to the public.


Similarly, the focus of the community engagement under Participacion Ciudadana is the information included in the EIA. The need to specifically incorporate social impacts into the consultation process has been discussed previously. True progress in management of social conflicts can only be attained if social impacts are assessed and taken into account in the early stages of the project, preferably at the project design and approval stage.588

588 Supra note 566, at 163-4.
Moreover, the sharing of information under the two laws is primarily one-sided and there is no mechanism for communities to seek further information from the company or the Government. Access to information is a crucial aspect of community engagement process. Equal access to impartial scientific and technical information is key to effective community engagement. 589

It is important to ensure that the relevant communities are able to seek additional information from the mining companies and the Government during the community engagement process. However, such requests should be reasonable in nature and to the extent, the company or the Government is unable to provide the information sought by the relevant communities, they shall inform the community accordingly.

**RECOMMENDATION**

*Participacion Ciudadana and Consulta Previa should be amended to provide for a process, which enables community members (in the case of Participacion Ciudadana) and indigenous people (in the case of Consulta Previa) to request additional information regarding the proposed mining activity. In particular:*

(i) a person who wishes to obtain more information shall make a request in writing to the mining company or government agency for access to that information,

(ii) the company and government agency shall provide such information, where it is reasonable

(iii) where a decision is made to not to provide the requested information or where such information does not exist, the company or government agency will notify the requesting community person in writing along with reasons for not providing such information.

*Participacion Ciudadana and Consulta Previa should be amended to specifically include site visits during the community engagement process.*

*Information should be provided in a language that is generally understood by the community members. All technical information should be presented in a format that can be easily understood by the communities.*

**VIII. Strengthening the enforcement processes**

The application of early deterrence models to corporate misconduct relied on four simplifying assumptions in order to define the critical enforcement problem: (a) corporations are fully-informed utility maximizers, (b) legal statutes unambiguously define misbehavior, (c) legal punishment provides the primary incentive for corporate compliance, and (d) enforcement agencies optimally detect and punish misbehavior, given available resources. 590

Participacion Ciudadana contemplates comprehensive enforcement mechanisms. There are provisions on the establishment of a Permanent Information Office and/or a Participatory Environmental Surveillance and Monitoring Committee. In contrast, Consulta Previa does not include any enforcement or monitoring provisions. It is important to provide for this in legislation to ensure that the agreement has effect, promote accountability by all parties and ensure awareness of enforcement mechanisms through the law. A similar process to the one in Participacion Ciudadana should be incorporated in Consulta Previa. In addition legislation should specify that if effective measures are not taken within a reasonable period of time, the Mining Concession should be revoked.

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RECOMMENDATIONS

Participacion Ciudadana should be amended to provide for the establishment of a Permanent Information Office and/or a Participatory Surveillance and Monitoring Committee.

The amendment should require the Concessionaire to provide information on its compliance with its obligations under the Environmental and Social Risks Agreement and respond to feedback and complaints from the community with respect to the Concessionaire’s environmental and social performance. (See “Administrative Remedies” under Part 4(XI) for a description of recommended participatory mechanisms).

Violations of the Environmental and Social Risks Agreement should result in an automatic revocation of the mining concession, without a release from the liabilities arising from actions prior to such revocation (See Part 2(I)(C) for suggestions on termination of mining concessions).

IX. Parent Company Liability for Subsidiary Non-Compliance

The diversity of a corporate organization coupled with the established principle of limited liability creates issues for establishing liability on the parent company for the physical footprint of its subsidiary in its operations abroad. The complicated network of subsidiaries could sometimes even make the identity of the ultimate Controlling Shareholder unknown. Neither the government nor the communities in the developing countries have the capacity to unravel these complicated conglomerates and do not have the financial wherewithal to prosecute these conglomerates. The absence of a regulatory framework holding the parent company liable only adds to the concerns.

Notwithstanding the principle of limited liability, under the corporate law jurisprudence in different countries and even under international law, the process of “lifting the corporate veil” and disregarding the corporate entity has been found justified in certain circumstances. While there is no exhaustive list of such circumstances, the corporate veil has been pierced, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor, or purchaser, or to prevent the evasion of legal requirements or of obligations.

With an expansion in the jurisprudence on “piercing the corporate veil”, extraterritoriality of certain laws has also become an important feature. In addition to this, there has also been a focus to increase the direct


592 Id.

593 For example, the Foreign Corrupt Practices Act of the United States has been granted extraterritorial application.
liability of the parent company to diligently monitor the activities of its subsidiary companies. For example, Principle 13 of the UN Guiding Principles on Business and Human Rights clearly establish a responsibility on business enterprises to not only avoid causing human rights harms directly but also “prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” Similarly, the OECD Guidelines for Multinational Enterprises extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. The OECD guidelines specifically clarify that compliance and control systems should extend where possible to these subsidiaries.

The authors understand from discussions with stakeholders in Peru that most foreign investors in the mining industry operate through subsidiaries as a standard practice. Currently, under the laws in Peru, there are no specific obligations on parent company liability for social, environmental and other human rights impacts caused by a subsidiary during the course of its mining operations. This Report recommends that Peru should implement specific laws for parent company liability for the actions of its subsidiary in Peru. Specifically, in light of the fact that these subsidiary companies would normally rely on their parent company for technical and financial resources, the imposition of liability on the parent company is not without reason.

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594 See also Meredith Dearborn, “Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups”, 97 CAL. L. REV. 195 (2009). The premise of this theory is that the business of the parent company has profited and consequently, the entire enterprise should be held liable for the human rights violation.

595 UN Guiding Principles, supra note 102.


597 Id.

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People of Bhopal Wait for Justice:
Denial of Parent Company Liability for the Gas Disaster

In December 1984, Union Carbide India Ltd. (UCIL) turned into a death chamber for the millions of residents of Bhopal, India. 30 years on, this disaster remains India’s biggest industrial disaster. While the aspects of the disaster and continuing effects of the poisonous gases released from the industrial plant are chilling, the complete denial of liability by the parent company of UCIL, UCC (and subsequently, Dow Chemicals) has angered the people of Bhopal even further. As recently as August 2014, the US courts decided that UCC (and so Dow chemical) cannot be held responsible for the management of the Indian subsidiary. But one case still continues. In 2004, a resident of Bhopal, Alok Pratap Singh, filed a case in the Madhya Pradesh high court, demanding Dow be held responsible for the pollution. The Union government supported this position by filing an application in this case and asking Dow to deposit money for environmental remediation. Dow has continued frantic lobbying to get the Indian government to withdraw its application. As of now, the Madhya Pradesh high court has not deleted Dow from the list of respondents and a hope remains that UCC (and Dow Chemicals) will finally pay and the victims will finally get justice.

Doing so would ensure that the recourse of the affected communities will not be affected by the limited financial capacity of the subsidiary companies.

**RECOMMENDATION**

A presumption of parent company liability should be created in cases involving social or environmental impact (or any other human rights violations) of mining operations of the subsidiary. The following provision should be included in the laws in Peru:

“In relation to any social or environmental harm caused by a Concessionaire or any human rights abuse caused by or aided or abetted by a Concessionaire, there is a patent presumption of liability of the ultimate Controlling Shareholder of such Concessionaire. To overcome such a presumption, the Controlling Shareholder of the Concessionaire will have the burden to establish each of the following:

(a) it undertook a detailed due diligence on the operations of its subsidiary, in relation to the potential negative impacts of the subsidiary,

(b) it created and implemented mechanism and procedures to ensure that the negative impacts can be mitigated or remedied in a manner that is most beneficial to the potential victims,

(c) it undertook adequate training programs for the personnel at the subsidiary company level to ensure that all levels of employees are aware of their responsibilities to mitigate the negative impacts,

(d) it created adequate monitoring structures, by way of timely progress reports of the subsidiary company and review such reports to ensure that there are no potential issues with the operations of the subsidiary company,

(e) it created adequate escalation mechanism within the internal structures of the corporation as well as safe avenues for third parties, including community members to complain about the impacts of the subsidiary’s operations,

(f) it was not aware of the violation by the subsidiary,

(g) where it was aware of the violation or any potential issues with the operations of its subsidiary, it immediately took necessary actions to remedy the situation (including punishing the perpetrators at the subsidiary) and compensate the victims.”

Refer to Part 2(I)(C) for definition of ‘Controlling Shareholder’.

Additionally, it is also recommended that the laws in Peru create personal criminal liability for the board of directors of both the subsidiary and the ultimate parent company. Under the principles of international humanitarian laws, the principle of “command responsibility” is a generally recognized principle. Under this responsibility, the ‘commander’ has the responsibility to train the subordinates and more importantly, take necessary measures to prevent or punish subordinates committing violations. Similar provisions exist in the laws of other Latin American countries. Reference may be made to a recent criminal case in Guatemala, which arose from a complaint that the Center for Social Legal Action in Guatemala filed in relation to the contamination of the Escobal Creek and the El Dorado River, located near the community of Los Planes. The complaint alleged that the contamination was a result of the exploration activities carried on by a subsidiary of Tahoe Resources, Minera San Rafael S.A. A Guatemalan court has till now ordered

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600 Id.
pre-trial detention of two of the managers of the mine (the criminal case carries a sentence of eight years, if convicted). 601

**RECOMMENDATION**

A strict criminal liability should be introduced for the board of directors of the subsidiary company and the board of directors of the ultimate Controlling Shareholder of the subsidiary company. The following provisions should be included in the environmental and social laws related to mining:

“In case of any violation of the legal obligations under the Mining Law, the terms of SIA as approved by the Government from time to time, the terms of EIA as approved by the Government, from time to time, the terms of the community agreements executed by the Concessionaire in relation to the operations of the mine in question and other human rights violations caused by the Concessionaire in the course of its operation of its mine in question, each of the board of directors of: (a) the Concessionaire, and (b) the ultimate controlling parent of the Concessionaire, shall have joint and several personal liability and shall be liable to imprisonment for a period not less than [X] years and / or pay a fine of amount not less than [X].

The personal liability of the boards of directors as above shall be strict liability and the absence of intent shall be irrelevant for the purposes of this provision. If any of the members of the boards of directors provides sufficient proof that he/she conducted his/her responsibilities diligently and the violation occurred without his / her knowledge or consent, it can be used as a defense against the liability, subject to the Government and judicial courts, acting in its sole discretion, being satisfied of the proof submitted by the relevant member.

**X. Changing the Way Corporations Engage with Communities**

**Indigenous support to facilitate informed decision-making**

In negotiating with indigenous Australians in relation to a project, a Canadian mining company involved indigenous Canadians in the negotiations to provide assistance, information and support to the indigenous Australians. The company also flew a number of the indigenous Australians to Canada so that they could see first-hand an operating mine of that type, also on indigenous land.


The time and resources invested by mining companies in fostering community relations has a direct correlation to limiting social conflicts.

The process of building trust should be initiated early on in the process. Mining companies should take the opportunity during the community engagement process to promote meaningful community relations. Additionally, companies should also address concerns relating to bureaucracy and inaccessible corporate structures.

**RECOMMENDATIONS**

601 Id.
The senior management of the mining company should be engaged in the consultation process. This will facilitate good community relations and will also go a long way in establishing trust in the process.

The mining company should engage personnel (and third party experts) who can speak the language of the communities and understand the cultural specificities of the communities. This aspect is specifically relevant from the perspective of engagement with indigenous communities.

XI. Conflict Resolution Mechanism in Peru

Social conflicts resulting from mining projects open a window of opportunity to transform power relations and bring about institutional change by providing communities with the leverage to engage in negotiations. Moreover, effective, independent government mediation can restore faith in government institutions, and a constructive engagement with companies can enhance communities’ trust in them. This Part will concentrate on the conflict resolution mechanism available in Peru for tackling social conflicts.

Broadly speaking, there are two avenues available for conflict resolution in Peru: (a) legal remedies, and (b) administrative remedies.

A. Legal Remedies

Communities have the ability to bring cases against mining companies in relation to any violation of their rights by the mining companies. Such cases can be brought under the provisions of the Constitution and/or under the General Environment Law. Courts in Peru have recognized the standing of third parties, including NGOs to bring actions on behalf of affected communities. For example, the local organization Grufides is currently suing Newmont over its proposed Conga mine’s environmental impact. Further, the General Environmental Law also provides for a number of alternative dispute resolution mechanisms to resolve social conflict. These include arbitration, conciliation and mediation. The arbitration and conciliation process may include a determination of amounts of compensation for environmental damage or for committing crimes against the environment.

In spite of the availability of legal remedies, communities, often, do not have the means to pursue them. Further, the legal proceedings could take considerable time to yield results. The authors are not aware of any interim support measures in cases where communities may have lost their land and livelihoods pursuant to a mining project and are seeking remedy in this regard.

RECOMMENDATIONS

The Government of Peru should constitute a community fund for the purpose of providing funds to communities seeking to bring non-frivolous legal claims against mining companies. Further, the fund can also be used to provide reasonable financial support to the communities during the pendency of the trial.

This fund should be administered by an independent accounting or legal body (for example, through a trust fund).

The representative should submit an annual report to the Government outlining its expenses and these expenses should be reviewed by an independent auditor.

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604 General Environmental Law Art 151.
B. Administrative Remedies

ONDS, which was established in October 2012, “leads the dialogue processes that involve different social actors, representatives of private and public entities, and civil servants at the different levels of government in order to channel various social demands and solve the controversies, differences, and conflicts amongst the population, as well as fulfill their expectations.” 605 In other words, ONDS is the leading administrative institution for conflict prevention and resolution in Peru.606

Underlying ONDS’ approach to conflict is the assumption that conflicts are inevitable in democracies. ONDS holds the view that dialogue allows for agreements that are beneficial to everyone, especially the historically excluded.607 Its classification of social conflicts has been discussed previously in this Part.

ONDS’ conflict management strategy focuses on prevention (which only applies to differences and controversies), treatment (when social conflict is manifest and can reach the level of a crisis), and the monitoring of agreements and commitments.608 ONDS uses the following dialogue mechanisms:

- **Roundtables:** This mechanism responds to differences, controversies, and social conflicts in order to bring together the community and state actors involved.609

- **Dialogue tables:** This mechanism involves state actors, communities, civil society organizations and companies. It seeks to foster a comprehensive view of development in areas where there are mining projects of regional and national importance. The expectation is that communities provide input on the development of an area. The Government allocates social investments within the framework of these tables, while companies make commitments toward the development of the region in which they operate.610 Dialogue tables were created to address some of the limitations of roundtables, particularly concerns relating to monitoring of agreements.

The institutionalization of conflict management through ONDS is a positive measure that signals the Government’s commitment to conflict management. Civil society organizations, communities, and scholars, however, remain skeptical about ONDS’ approach to conflict resolution, specifically the use of roundtables and development tables.611 The skepticism is a result of the emphasis on addressing the conflict without tackling its root causes. Government actors tend to perceive protests as the principal conflict as


606 Government conflict resolution mechanisms have been in place in Peru since 2004, when the Government created a Conflict Unit tasked with designing a proposal to tackle social conflicts. Greater institutionality was achieved with the establishment of the Office for the Management of Social Conflicts (Oficina de Gestión de Conflictos Sociales), part of the organizational structure of the PCM. In 2012, the Government revised its conflict management strategy as the number and severity of conflicts spiked in 2011. President Humala announced the new approach in June 2012 during a visit to Europe to sign the FTA with the European Union. Taking into account the conditions set forth by the European Parliament for signing the agreement, president Humala emphasized that measures against poverty, inequality and climate changes, as well as policies for environmental protection and conflict resolution were a priority for his government. Soon after the FTA was signed the government initiate a process of reform of the Office for the Management of Social Conflicts that lead to the establishment of ONDS.


608 Id.

609 Id.

610 Id.

611 Richard Sexton, “Reducing Local Conflict Through Information: A Field Experiment in the Mining Areas of Peru” (Department of Politics, New York University, 2015), 3 [hereinafter Sexton].
opposed to a manifestation of grievances with the process of natural resource management and social, political, and economic marginalization.\textsuperscript{612}

Despite the commitment of ONDS to conflict prevention, both roundtables and development tables are established, to a large extent, as a reaction to the threat of escalation, or to de-escalate social conflicts. Used merely as ad hoc structures, the aforementioned mechanisms fail to achieve their primary purpose: building trust in the communities. Moreover, there is a tendency to grant fiscal transfers to mine-affected areas as a conflict reduction mechanism.\textsuperscript{613} Experts in conflict resolution have argued that this “quick fix” approach further induces social conflicts, as communities perceive violence as a means to garner financial resources from the Government and mining companies.\textsuperscript{614}

There is a need to foster constant engagement between the various stakeholders. This would result in stronger relationships and enhance trust by eliminating the perception that dialogue mechanisms do not address the underlying causes of social conflicts. Furthermore, the permanency of dialogue forum will be an effective monitoring mechanism.

**RECOMMENDATIONS**

The existing strategy of using development tables and roundtables to foster dialogue (after a conflict has arisen) should be modified. This Report suggests that development tables and roundtables be established prior to the approval process of the EIA and SIA.

The chosen dialogue forum should be permanent throughout the lifecycle of the mine and for an agreed period after the closure of a mine and should meet on an ongoing basis.

The authors recommend that mining companies establish mechanisms enabling communities to report on any particular social or environmental concerns arising from the operations of companies. Technologies such as text messaging could be used to facilitate the process of submitting complaints, which should remain anonymous.\textsuperscript{615}

Ideally, mining companies should submit periodical reports on the complaints received by them and the manner in which they resolved such complaints. These reports should be submitted to the permanent dialogue forum recommended above, as well as to ONDS on a monthly basis.

Where a complaint requires immediate action, the mining companies should have an obligation to take measures to address the complaint within a reasonable time. Such measures may include consultation with community members or active steps to prevent further environmental damage. Should the community deem that the measures taken by the company are unsatisfactory, complaints shall be taken to ONDS, either in the framework of the chosen dialogue forum (should the community decide to use it for this purpose), or immediately via a mechanism to be determined by ONDS that allows communities to report complaints on a real-time basis.

**XII. Conclusion**

Peru has made considerable progress in its social policies in mining, particularly in the sphere of community engagement. This Part has set out some of challenges that still remain in this area. It has highlighted the importance of mining companies obtaining a Social License to operate in mitigating social and business costs and in preventing social conflict. It has advocated for recommendations that provide for obligations


\textsuperscript{613} Sexton, *supra* note 611, at 2.

\textsuperscript{614} Id.

\textsuperscript{615} See Sexton, *supra* note 611. Sexton outlines a design for a randomized field experiment in Peru that will test the effectiveness of information in reducing violence and increasing cooperation and perceptions of peace. The experiment will pilot a third-party information sharing system whose model is applicable to the recommendation herein presented.
to obtain a Social License and ways of implementing and enforcing these obligations. The proposals in this Part hope to promote a trust-based model of community engagement and provide a greater role for communities in the decision-making process, which ultimately the authors hope, will benefit both mining companies and the people affected by their activities.
PART 5. ENVIRONMENT

Peru is one of the world’s 10 “megadiverse” countries, named for its rich diversity in ecosystems, species, and natural resources.\(^{616}\) Peru is home to about 5,528 plant species and 760 animal species endemic to the country.\(^{617}\) The country is also rich in ecosystem biodiversity with marine, mountain, forest, freshwater and agricultural ecosystems. Peru’s Ministry of Environment (MINAM) estimates the value of environmental services provided by protected areas to be in the range of USD 1 billion per year.\(^{618}\) Examples of these services include food and water production, energy, natural control of climate and disease, replenishment of nutrient cycles and crop pollination, and important tourism and recreational benefits.\(^{619}\) The Peruvian Amazon Basin—the world’s fourth-largest tropical forest—is a global public good, acting as an important carbon sink.\(^{620}\)

In spite of this rich environmental heritage, Peru received a low ranking of 110\(^{th}\) out of 178 countries by the 2014 Environmental Performance Index, a joint project between the Yale Center for Environmental Law & Policy, the Center for International Earth Science Information Network at Columbia University, and the World Economic Forum.\(^{621}\) The index, first published in 2002, was designed to supplement the environmental targets set forth in the United Nations Millennium Development Goals, and to evaluate environmental sustainability relative to the paths of other countries. Peru scored particularly low on access to drinking water and water sanitation and climate and energy use, which both are heavily impacted by the mining sector.

The environmental impacts of mining in Peru are multitudinous. Given the limitations in the scope of this Report, four of the most pressing environment-related areas for reform have been focused upon. These four areas are:

- Water management.
- The recent legislative and regulatory amendments to EIAs.
- Clean-up of mining spills and mine closure.
- The monitoring and oversight capacity of the Agency for Assessment and Environmental Control (Organismo de Evaluación y Fiscalización Ambiental) (OEFA).

This Part approaches the environmental issues by first considering the environmental damage caused by the mining industry, focusing primarily on water-related issues, but also providing a brief overview of the impact of mining on air and soil, deforestation and biodiversity loss, and carbon emissions and climate change. It then turns to consider the EIA processes and associated issues, followed by mine closures and spills. Finally, it considers some of the most pertinent institutional issues.

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617 Id.
619 Id.
620 Id.
I. Peruvian Environmental Law Overview

Chapter II of the Constitution concerns the environment and natural resources. All natural resources are the property of the nation, and the state is sovereign in their application.622 The conditions of the use of natural resources and granting of natural resources to private individuals is governed by organic law,623 that is, the General Law of the Environment (Law No 28611) (General Environmental Law).624 The state is “obliged to promote the conservation of biological diversity, and protected natural areas.”625 On an individual level, every person has the right to “a balanced and appropriate environment for the development of his life.”626

Mining and the environment are governed by the General Law of the Environment, the Mining Law and a host of other laws and regulations.627 For the purposes of this Report, it suffices to discuss relevant legal issues as they arise.

Of particular note is the passing of a recent law that has had significant impacts on the environmental regulatory landscape in relation to mining in Peru. In mid-2014, the Government passed Law 30230. Law 30230 comprised a number of decrees, which are aimed to promote investments. It has been widely criticized by NGOs for a number of its environmental reforms.628 For example, it revokes the power of the MINAM to declare areas for landscape and biodiversity conservation.629 Further, it reduces the time frame within which governmental departments can review EIAs to 45 days, from up to 120 days under previous version of the law.630 It also enables the sanctioning of public officers who fail to meet the 45-day deadline and presuming that approval is granted after this time. Finally, the new law severely restricts OEFA’s ability to fine for environmental transgressions for three years after the enactment of the law.631 For example, OEFA may only issue fines that are reduced by 50% of the normal amount for very serious offenses that generate real and serious damage to human life or health, or for activities executed without the requisite environmental approval, or for a sanctioned offender re-committing the same offense within six months after having been sanctioned.632 Various issues associated with Law 30230 are considered throughout this Part in further detail as they arise.

II. Environmental Risks Associated with Mining

622 Constitution, art. 66.
623 Constitution, art. 66.
625 Constitution, art. 66.
626 Constitution, art. 2(22).
627 For a full list of laws and links see “Normatividad Ambiental,” MINEM http://www.minem.gob.pe/_area.php?idSector=4&idArea=56&idTitulo=614&idMenu=sub611&idCategori=334 (accessed on April 6, 2015).
631 Peru and the COP 20, supra note 629; see also Gonzales Tovar, supra note 629.
632 Gonzales Tovar, supra note 629, at 3.
Open-pit and artisanal mining have a proven adverse impact on air, soil, and water quality, though improvements in industry practices and technologies have made it possible to mitigate the worst of such damages.\(^6\)\(^3\)\(^3\) Mining can also encourage deforestation and result in habitat loss and fragmentation, negatively affecting Peru’s wildlife and rich biodiversity.\(^6\)\(^3\)\(^4\) Peru is also particularly vulnerable to impacts of climate change. The United Nations Framework Convention on Climate Change (UN Convention on Climate Change) has identified Peru as the third riskiest country in the world to climate hazards.\(^6\)\(^3\)\(^5\) The country already suffers from water quality and scarcity issues, which are expected to increase.\(^6\)\(^3\)\(^6\) It is also at risk of an increase in natural disasters, such as flash floods and accelerated glacier retreat, as a result of the world’s changing climate.\(^6\)\(^3\)\(^7\) This makes it even more important for the country to begin implementing policies and practices that best manage its water and environment.

Extractive industry activities can have profound environmental impacts near a project site as well as at the regional and global level. A project’s environmental sustainability at the local level depends on whether its impacts remain within the carrying capacity of the surrounding ecosystem.\(^6\)\(^3\)\(^8\) Impacts at the local and regional level include pollution, waste and toxic substance management, and acid rock drainage. At the national level, wind can carry dust and other airborne pollutants to areas outside of a project zone and projects located around rivers upstream can impact communities downstream. At the global level, the major concern regarding extractive industries is their associated greenhouse gas emissions and contribution to climate change.\(^6\)\(^3\)\(^9\)

**A. Water**

Water issues are a central source of social conflict in both Peru and broader Latin America. In 2011, the IFC’s Office of the Compliance Advisor/Ombudsman noted that 40% of complaints received from all regions and sectors of Latin America were water-related.\(^6\)\(^4\)\(^0\) Peru faces short- and long-term water problems related to mining that the government can and should address immediately. In Peru, water issues surrounding mining fall into two categories: (a) water scarcity and availability, and (b) water contamination.\(^6\)\(^4\)\(^1\) “This Part of the Report addresses each category in turn.

**Water availability**

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\(^6\)\(^3\)\(^4\) Id.


\(^6\)\(^3\)\(^7\) Id.


\(^6\)\(^3\)\(^9\) Id.

\(^6\)\(^4\)\(^0\) David Rivera and Moises Navarro, “Building trust through dialogue -- key lessons learnt on conflict resolution in Peru,” ICMM, Good Practice Newsletter, December 2014, 12.

\(^6\)\(^4\)\(^1\) Javier Torres and Raquel Reynoso, Water Program at NGO Asociación Servicios Educativos Rurales, Interview by Maya Srikrishnan, March 20, 2015.
Although Peru has the eighth largest quantity of freshwater per capita in the world, its water resources have historically been poorly managed. As a result, Peru is one of the countries that suffers the most from water stress and scarcity globally.\textsuperscript{642} Inefficient use and allocation of water, pollution, depletion of water resources, and widespread water conflicts have marked water management in Peru. According to a USAID report, issues of water scarcity in Peru are less related to absolute shortages and more to the poor management of water supply.\textsuperscript{643} The report found that existing water rights are inefficient and inequitable. For example, high basin areas that serve as the source of water are not the main consumers of water. The lower basin agricultural areas that serve as the source of water have more administrative capacity and political influence and end up managing these water sources for their benefit, causing water shortages in poor, rural areas where the water is coming from.\textsuperscript{644} 70% of the country’s population lives on the arid Pacific coast, where less than 2% of the water resources are located, while 98% of the country’s water is found on the eastern side of the Andes—home to only 25% of the population.\textsuperscript{645} According to WWF, in Peru only around 87% of urban populations and less than 62% of rural Peruvians have access to safe drinking water, which can result in public health problems, like diarrhea and other water-related diseases, from inadequate sanitation and poor hygiene.\textsuperscript{646} As water is already a sensitive issue in Peru, any further perceived compromise of water resources by mining activities can exacerbate tensions with communities.\textsuperscript{647}

It is also important to note that there is no comprehensive inventory of water resources in Peru, like river basins and aquifers, which provides a challenge in measuring what parties are using quantities of water.\textsuperscript{648} The creation of the National Water Authority (ANA) in Peru in 2008 to promote integrated water resource management was an important step to improve the management of water use and quality in the country, but the agency lacks capacity and power. ANA collects S/. 0.0126 per cubic meter of water used each year from mining companies (this can be compared to a S/.0.015 fee for the volumetric water usage by the agriculture sector), but in spite of differentiated fees that should allow ANA to determine how much water is being used by each sector based on how much they charge, it is also important to note that there is no comprehensive inventory of water resources in Peru, like river basins and aquifers, which provides a challenge in measuring what parties are using quantities of water.\textsuperscript{648}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{643} “Follow the Water: Emerging Issues of Climate Change and Conflict in Peru,” USAID, June 2012, 5, available at http://www.fess-global.org/Publications/Other/FollowWater-EmergingIssue_of_Climate_Change%20Conflic_Peru.pdf (accessed on February 23, 2015) \textsuperscript{[hereinafter Follow the Water].}
\item \textsuperscript{644} Id.
\item \textsuperscript{645} Id.
\item \textsuperscript{647} Id.
\item \textsuperscript{648} Froilen Exaltacion Romaca, ANA engineer in Cusco, Interview with Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 17, 2015.
\end{itemize}
\end{footnotesize}
ANA engineers say it is still difficult to gauge the precise water consumption of each sector because industries self-report.\(^{649}\)

**RECOMMENDATION**

*The Government of Peru should establish a comprehensive and compulsory monitoring system of water use.*

A good example is the system used by the United States. Since the 1990s, states in the United States use five to 10 year cycle water monitoring programs. These programs map out the natural and political boundaries of water areas (including watersheds, municipalities, etc.), surface-water characteristics (including water bodies, hydrologic characteristics, biological communities, and waste-water treatment plants), human infrastructure and activities (such as land use or water intake), ground-water characteristics (such as hydraulic properties of aquifers, waste-injection sites, and landfills), and other natural characteristics (including soil, altitude, dominant vegetation, and precipitation values).\(^{650}\)

These water monitoring programs are independently run and verified by teams, which include representatives from federal, regional, and local agencies, and other institutions, such as universities, industrial organizations, and volunteer monitoring groups that collect and analyze surface and groundwater information within each state.\(^{651}\) Companies can contribute to paying the costs of measuring their water usage to make this effort affordable for the Peruvian government.

**Water contamination**

While there are estimates that mining comprises of only about 5% of Peru’s total water consumption, this understates the significance of this use.\(^{652}\) Many Mining Concessions are located in source or headwater areas in the high Andes. This means that the siphoning of water upstream can change stream flows, resulting in droughts of flooding in areas downstream. Also, any contamination that occurs in the headwaters can carry down to communities using water further downstream.\(^{653}\)

A study from Johns Hopkins Bloomberg School of Public Health found widespread arsenic contamination in groundwater used for drinking in 12 districts of Peru, including Juliaca and Caracoto. The study also found arsenic concentrations in the section of the Rímac River that flows through Lima, calling the presence of arsenic in water “an alarming public health threat that needs to be addressed immediately.” A total of 151 water samples were included in the present study. A total of 116 samples, roughly 77% of all the samples taken, contained arsenic in excess of WHO’s 10 µg/l recommended limit and 62, about 41%, had arsenic in excess of 50 µg/l. Although it is difficult to determine whether mining is the prominent cause of arsenic contamination or if it is from existing minerals in mountain springs, it is important to note that when there is water contamination, communities blame mining activity for most water contamination. For this reason, regardless of blame, it is important for the Government to take a lead role in mitigating contamination, in order to alleviate tensions between communities and mining projects. This Report recommends that water be tested monthly to assess the variability of arsenic concentrations over time and

\(^{649}\) Id.


\(^{651}\) Id.


\(^{653}\) Id.
mitigation options, such as “well switching, arsenic removal devices for household or community use, large-scale surface water treatment and rainwater harvesting.”

**RECOMMENDATION**

The Government should provide capacity to communities to test water and implement water contamination mitigation technologies and strategies, such as rainwater harvesting or water purifying technologies. In communities where there is current mining activity, the Government can use a surcharge on the mining industry to pay for water testing and mitigation technologies. The Government may even consider these as part of compulsory requirements outline in EIAs for companies to operate in the country, resulting in significant penalties and even in a loss in operating licenses if companies don’t comply.

### The role of water in social conflicts

Water issues are a central driver of social conflicts around mining projects and, as such, should be a priority of the national government. An example of where water is the source of social conflict can be found in Espinar, in the province of Cusco. There, several conflicts over mining activities have erupted in protest of the mining company Xstrata, which was operating the Tintaya mine and will now be opening a new mine, Antapaccay. In April 2013, MINAM released the summary of results of its Participatory Health and Environmental Monitoring, which was undertaken to begin to assess Xstrata’s mining impacts in the Espinar region. The study was commissioned by the Government in 2012, following the most recent violent protests by Espinar residents and politicians that accused Xstrata PLC’s Tintaya copper mine of contaminating water. The study concluded that there is pollution in the Espinar Province, including, but not limited to metals contamination in surface waters and sediments of the Camacmayo, Tintaya, and Collpamayo waterways. A related finding was that people living in the communities directly affected by Tintaya are exposed to arsenic, thallium and lead.

During the Dialogue Table (Mesa de Dialogo) after the 2012 conflict, which brought government, community leaders, and the mining company to discussions to resolve these and other issues, there were many commitments made to start addressing the environmental concerns, such as a Community Environmental Oversight Program and Joint Environmental Monitoring. However, community leaders remain dissatisfied with the lack of follow-up, despite these agreements having been made.

Several community leaders stated in interviews conducted in Espinar in March that in order to avoid another uprising, the first thing the national government should do is address their water concerns. For example, Ruben Haneco Ccama, the President, of the Federation of Campesinos in Espinar explained that, “Water is the biggest issue.”

Oscar Mollehuaca, the former mayor of Espinar agreed that to prevent the population from uprising again in Espinar, they need a concrete solution to clean the water. Many community members claim that their livestock fall ill and die from drinking water out of unfiltered tailings, where mine waste has been discarded. The Government and the mining company, Xstrata, disagree that current mining...

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656 Id.

657 Id.

658 See Part 4 for more information on the *Mesa de Dialogo* in Espinar.

659 Julio Roger Huillca and Ruben Haneco Ccama, General Secretary and President of Federation of Campesinos in Espinar, Interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 15, 2015.

660 Oscar Mollehuaca, former mayor of Espinar, Interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 15, 2015.
activity is contaminating the water, claiming that the contamination was from prior mining activity in the 1990s before environmental standards were put into place.\(^{661}\) It is important to note that mining companies in this situation should have the burden of proof that they did not cause contamination, rather than being innocent until proven guilty. Since the Mesa de Diálogo, Xstrata has begun to put in pipelines and tubing to clean and prevent further contamination of the water, but community members say this is not sufficient.\(^{662}\) Although attempting to prove who is causing the contamination may be a difficult way of addressing the conflict, better communication and coordination on water issues between companies, governments and community members can help avoid conflicts.

Another example of a social conflict resulting from water issues is the Conga mining project in the northern region of Cajamarca. The conflict in Conga is more concerned with water availability than contamination, when compared to the conflict in Espinar. The project has been the target of especially fierce opposition because it will entail the destruction of four high mountain lakes. Tensions surrounding the proposed project erupted in civil unrest after the Conga EIA conducted by the Newmont Mining Corporation was approved in 2010. The Government submitted the project’s EIA to an international expert review because of disagreements over the perceived impacts of the project on the area’s water supply. The review concluded that two of the four lakes were to be emptied out to extract the gold, while the other two would be used to deposit the earth and rock removed. The expert review found that no detailed hydrological or hydrogeological studies were carried out for the project, even though they are essential for preventing leakage of toxic waste. A study of the micro-basins that could be impacted by the mining activity carried out was also not conducted, and the local communities that would be potentially affected were not all informed about the Conga gold mining project.\(^{663}\)

The mining company has said it will create two water reservoirs with more than the quantity of water that exists within the lakes. However, this fails to take into account the ecosystem services that the lakes provide. It also creates a problem by privatizing what was once a public good to the community.\(^{664}\)

The conflicts in Espinar and in Conga reveal the importance of pre-emptively dealing with water issues for new and ongoing mining projects in order to avoid conflicts. Community perceptions that their water will be depleted and/or contaminated must be taken into account and addressed.

**Mining companies have interests in sustainable water use**

Along with the Peruvian population, mining companies also have a significant interest in water quality and quantity. A water disclosure survey of the mining industry by the Carbon Disclosure Project in 2013 (CDP Survey) found that 92% of respondents saw water risks as generating a substantive change in their revenue

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661 Carlos Alacar Herrera, Engineer, MINAM, Cusco Region, Interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 17, 2015.

662 Id.


664 Jose de Echave, Cooperaccion, Interview by Kathrin Bausch and Maya Srikrishnan, March 20, 2015.
or expenditure in the next five years. Increased stress on the availability of water resources was the most commonly reported risk for mining companies according to the report.

In Peru, the pre-existing water management and availability issues highlighted in the Water Availability section above exacerbate this problem. Many mines have been forced to close in the past due to community protests centering on water pollution, revealing the basis for these industry concerns. For example, in 2005, Newmont Mines was forced to reconsider plans to exploit part of its concession in Yanacocha after thousands of farmers blocked the entrance to the mine in protest over water availability and contamination issues for their livestock and irrigation needs. The protest cost the company USD 1.8 million per day over the course of six days. Peru lost USD 615,000 per day in tax revenues.

The CDP report also notes that those companies that disclosed water information through CDP have had better financial results than companies from whom CDP requested information, but did not respond. Respondents, on average, had an operating margin about 50% higher than non-respondents. Similarly, respondents have had a return on invested capital 25% higher than non-respondents. This suggests that investment in sustainable water management in mining projects could lead to higher profitability. Higher profitability also impacts the return on equity and among targeted companies, respondents manage to get a return on equity 25% higher than non-responders. These findings by the CDP reveal that better water management and transparency can reflect better management and community relations overall in a company, which can, therefore, translate to increased profitability. This reinforces the idea that addressing environmental and social concerns of communities where mining complexes are located can bolster profits, rather than hinder them.

Given that both mining companies and Peruvian peoples stand to lose profits and other benefits from inadequately conducted mining activities that cause water issues, it is imperative that government agencies ensure that water risks are taken into account from the very initial exploration phase. It is also important to note that since mining companies stand to lose profits over water conflicts, the Government should not fear the loss of investment by heightening water controls and protections.

Some ways governments, companies and local communities can work collectively to address water risks are described in Figure 4.1.

Figure 4.1: Water Risk Management Strategies

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666 Id.

667 Follow the Water, supra note 643, at 9.

668 Metals and Mining, supra note 665, at 13.

669 Id.

670 Id.
<table>
<thead>
<tr>
<th>RESPONSE EXAMPLES</th>
<th>SUITABILITY EXAMPLES</th>
<th>COST AND RESOURCES</th>
<th>CAPABILITIES TO DELIVER</th>
<th>DURATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communication and planning</td>
<td>• Share collected water risk data • Include stakeholders in monitoring • Fund a catchment strategy • Jointly monitor water resources</td>
<td>Community concerns about the quality of local water as a result of mining or smelting activities</td>
<td>Ranking Low/moderate/high</td>
<td>Technical expertise • Stakeholder capacity-building skills</td>
</tr>
<tr>
<td>Community engagement</td>
<td>• Conduct hygiene awareness • Consult community on mine water • Rehabilitate local water supply • Operate community water supply</td>
<td>Strong community concerns about mining/metal operation’s impact on water or high expectations for the company’s role in the community</td>
<td>Ranking Low/moderate/high</td>
<td>Community and stakeholder engagement specialists</td>
</tr>
<tr>
<td>Catchment governance</td>
<td>• Promote farm water use efficiency • Participate in catchment forums • Build regulator capacity • Implement joint early warning</td>
<td>Limited regulatory capacity but complex hydrology requires a catchment management plan reflecting the interests of multiple stakeholders</td>
<td>Ranking Low/moderate/high</td>
<td>Strong operational performance • Capacity to drive sustained and constructive engagement with policymakers and regulators</td>
</tr>
<tr>
<td>Collective infrastructure</td>
<td>• Advocate passive treatment • Plan coherent flood management • Contribute to infrastructure finance • Jointly treat regional mine water</td>
<td>Instances where water supply and quality may be limited due to insufficient infrastructure capacity or functioning</td>
<td>Ranking Low/moderate/high</td>
<td>Construction capability • Ability to engage and negotiate with municipalities • A mandate to commission infrastructure</td>
</tr>
</tbody>
</table>

Source: ICMM

Example: Cerro Verde

The Cerro Verde mining project near Arequipa provides a good example of managing water issues that has received positive responses from community members. The facts were provided by the ICMM and a research visit to the Arequipa and the Cerro Verde project.

Freeport-McMoRan Inc., a United States natural resource company, operates the Cerro Verde copper and molybdenum mining complex near Arequipa. The city is reliant on the Chili River as the main source of water for the population and for all economic activities in the region including agriculture, mining, commerce and tourism. Access to clean water is a major challenge due to population growth and the arid desert environment. The water supply is nearly fully allocated and the Chili River has become contaminated with untreated residential and industrial sewage discharges.

Water for Cerro Verde’s processing operations comes from the Chili River system. As this water source is shared with all industrial and domestic water users, reliable access to clean water is a concern for all stakeholders. When Cerro Verde’s planned to expand operations, increased water supply was required. In order to address the supply deficit, an innovative public–private partnership was initiated between Cerro Verde, civil society representatives, the local water utility company, local authorities and the central government to ensure the sustainable delivery of potable water and the treatment of the city’s wastewater.

The Freeport-McMoRan Cerro Verde Mine in Peru constructed a potable water treatment plant to ensure that the city of Arequipa will have access to clean drinking water. The plant currently provides water to over 300,000 people in the region and is projected to expand to 750,000 people. In addition, the construction of a water storage and distribution network was undertaken to ensure water resources reach a greater proportion of households in the city.

Sources:


III. Other Environmental Issues that Require Attention

A. Air Quality

Air and soil pollution are larger issues in legacy, as opposed to current, mining sites. Lax environmental standards from the last century has deeply engrained in rural communities a distrust of mining projects.672 An important and necessary step in preventing social conflicts over current and new mining projects is

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672 Carlos Alacar Herrera, Engineer, MINAM, Cusco Region, Interview by Isabela Cunha, Maya Sirkrishnan and Ruthia Yi, March 17, 2015.
rebuilding this trust. To do this, the government should provide affected communities with support and solutions to mitigate this existing damage.

Airborne emissions occur during the exploration, development, construction, and operational stages of a mine. Large-scale mining has the potential to contribute significantly to air pollution, especially in the operation phase.\(^{673}\) All activities during ore extraction, processing, handling, and transport depend on equipment, generators, processes, and materials that generate hazardous air pollutants such as particulate matter, heavy metals, mercury, carbon monoxide, sulfur dioxide, and nitrogen oxides.\(^ {674}\)

Mobile sources of air pollutants, like heavy-duty vehicles, are a major source of particulate matter, carbon monoxide, and volatile organic compounds that significantly contribute to the formation of ground-level ozone.\(^ {675}\) There are concerns from communities along highways near mining projects in Peru, such as communities near Espinar, that express serious concern over the air pollution from trucks.\(^ {676}\) These communities are often left out of the EIA process because they are considered “indirectly” impacted by mining activities by operating mining companies.\(^ {677}\)

Human exposure to airborne pollutants from metal processing and smelting can lead to various acute and chronic diseases. Initial sudden exposure can lead to an eye, nose, and throat irritation.\(^ {678}\) More serious, chronic effects include heart and lung problems. Heavy metals also pose chronic health risks including bioaccumulation of toxic elements in organisms, which can result into birth defects, kidney and liver problems, gastrointestinal tract issues, joint pain, as well as nervous, respiratory and reproductive system damage.\(^ {679}\)

Air pollution from mining is an externality that must be further looked into and addressed by the Government. Detailed recommendations on how to address air pollution is beyond the scope of this Report, but techniques such as strictly enforced air quality mandates and cap and trade programs for various air pollutants are two common strategies used to address air pollution in other countries. It is also recommended that part of the conditions for transferring a license to an older, legacy mining site to a new company should involve cleaning up air pollution from the past.

### B. Soil Quality

Mining operations significantly alter the landscape surrounding them. Erosion from exposed soils, extracted mineral ores, tailings, and fine material in waste rock piles can cause substantial sediment loading to surface waters and drainage ways.\(^ {680}\) In addition to the damage caused by regular operations, spills and leaks of hazardous materials and the deposition of contaminated windblown dust can lead to soil contamination.\(^ {681}\) Human health and environmental risks from soils fall into these two categories of contaminated soil

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\(^ {674}\) Id.

\(^ {675}\) Id.

\(^ {676}\) Leaders of Comunidades Campesinas de Ocoruro, Huisapata, and Hancollahua, Interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 15, 2015.

\(^ {677}\) Yajaida Mendoza, Environmental Legal Specialist at OEFA in Cusco, Interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 16, 2015. According to Mendoza, mining has direct and indirect impacts, but it’s hard to determine what those impacts are and if they can be correlated with mining. Companies can contest the accusations of impacts that are levied against them, and there is no legal framework for what’s considered a direct or an indirect impact.

\(^ {678}\) Gunnar F. Nordberg, Bruce A. Fowler, Monica Nordberg, *Handbook on the Toxicology of Metals*, Academic Press, Aug. 7, 2014, 530. The rest of this paragraph can be attributed to this source.

\(^ {679}\) Id.


\(^ {681}\) Id.
resulting from windblown dust, and soils contaminated from chemical spills and residues. A study conducted by researchers at Columbia University’s Mailman School of Public Health found that 1.6 million people in Peru could be exposed to lead in soil. The study advocated a solution to both mitigate public health concerns and help show affected communities that they can depend on the central government to address their concerns. In particular, it noted:

Our two case studies highlight the potential of local surveys of lead in soil to reduce exposure at a cost that is negligible relative to the revenues generated by mining, even in highly contaminated areas such as Cerro de Pasco. The key is to provide households and local government with appropriate information. In addition, systematic soil surveys could help identify areas where public health education and interventions are most needed.

Soil contamination is a problem that can be easily fixed and addressing the problem will not only mitigate public health issues, but help build trust between communities and the Government. Below are some suggestions of how the Government can address these issues:

- From the information produced in the study, the government can generate a map of soil contamination in the country that can be publicly available.
- Government agencies and regional governments can work with affected areas through the formation of and collaboration with community environmental monitoring groups.
- The government can provide community leaders or members of the community environmental monitoring groups of the worst affected communities with portable soil and blood analyzers that test for heavy metal contamination. Once trained on how to test for levels of contamination and on which levels are appropriate and exceed Peruvian national standards, community members can, at the very least, advise children to stay inside on certain days or prohibit children from playing in the dirt in the worst contaminated areas to avoid the worst repercussions of soil and air pollution. The cost of such portable analyzers is roughly USD 30,000 per unit.

C. Deforestation and Biodiversity

Biodiversity is essential for ecosystem services, such as the provision of clean water, the regulation and purification of atmospheric gases, the moderation of climate, the provision of food and fuels, the recycling of nutrients and pollination, and the detoxification and decomposition of waste. Mining activities have the potential to negatively affect biodiversity. This risk is particularly acute in remote, environmentally sensitive areas. Some of the activities that can negatively impact biodiversity include access road construction, exploration drilling, overburden stripping or tailings impoundment construction. Open-pit mining often requires the logging of trees, clear-cutting or burning of vegetation above the ore deposit, and

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682 Id. at 12.
683 Id.
685 Dr. Alexander Lex Van Geen, Doherty Senior Research Scientist at the Lamont-Doherty Earth Observatory and the Associate Director of the Earth Clinic, Interview by Maya Srikrishnan, February 13, 2015.
687 Id.
688 Id.
the removal of natively vegetated areas. It is therefore among the most environmentally destructive types of mining, especially within tropical forests.689

Many mining companies have adopted increasingly sophisticated approaches to manage and protect biodiversity as part of their commitments in establishing and maintaining a “Social License”.690 Some of the benefits of encouraging mining companies to prioritize biodiversity management include:

- access to capital, particularly where project finance is to be obtained from one of the investment banks that are signatories to the Equator Principles;691
- reputation with international community, NGOs and local communities, which will reduce of risk of social conflicts; and
- reduced risks and liabilities that come from damaging ecosystems.692

A loss in biodiversity can result in further climate changes, water shortages, disease, and food shortages. Protecting Peru’s biodiversity through sustainable mining is essential for protecting human health and livelihoods.

D. Carbon Emissions and Climate Change

Climate change adaptation and mitigation present Peru with another significant challenge. According to the UN Convention on Climate Change, Peru is the third most at risk country of climate hazards after Honduras and Bangladesh.693 Andean glaciers provide water to millions of Peruvian people in the productive and population centers in the coastal deserts, and generate 60% of the country’s electricity.694 Global climate changes directly affect Peru through the melting of these Andean glaciers. As water becomes scarce, competition over its use will fuel more social conflicts. The potential political and economic consequences of environmental collapse due to climate change are high risks.695

The mining sector is a large emitter of greenhouse gases. One assessment found that life-cycle greenhouse gas emissions from copper production are roughly 3.3 kilograms of CO2 per kilogram of metal for copper produced by smelting.696 In general, metal mining generates more than one kilogram of greenhouse gas for every one kilogram of metal that is produced, without taking into account the lost carbon uptake of cleared forests.697

It is beyond the scope of this Report to consider in detail the full implications of climate change. Instead, a simple recommendation relating to climate change is flagged below for future consideration:

- EIAs conducted in Peru should require carbon budgets, including potential emissions from lost CO2 uptake by cleared forests and vegetation, CO2 emitted by machinery and CO2 emitted through the processing of ore into metal.

689 Artisanal mining is also causing deforestation. More than 20% of gold mined in Peru is from non-sanctioned sources which has cleared over 120,000 acres of forested land. See “Illegal Mining Severely Impacting Peruvian Environment,” available at http://www.forbes.com/sites/kitconews/2014/07/04/illegal-mining-severely-impacting-peruvian-environment/

690 Part 4(IV) discusses the aspect of ‘Social License’ in greater detail.

691 The Equator Principles II apply the Biodiversity Performance Standard 3 of IFC to all investments in excess of USD 10 million.

692 ICMM Good Practice Guidance, supra note 686, at 13-14.

693 Cigarán, supra note 635.


695 Id.


697 Id.
A good example to manage emissions from the mining example comes from Fiji, where companies and the Fijian government agree on set emissions levels and companies are free to choose whichever abatement technologies are most cost-effective for them.698

IV. Regulation on Environment

If managed sustainably, mining can bring great economic opportunity to a country and its people through employment and increased government revenue (See Part 3 for discussion in this regard). In spite of this growth potential, if mining activities are not adequately regulated, the environmental harm that can result can be devastating for a country or region as discussed further in this Part. In this respect, the authors are of the opinion that the Government of Peru plays a vital role in regulating mining activities and their environmental impacts, and holding mining companies to account for any environmental harm caused by mining activities.

An argument against strong environmental regulation is that it deters mining investment.699 According to 494 executives and managers from top mining and mining consulting companies, surveyed by the Fraser Institute, more than 20% of companies feel at least some deterrent to investment in Peru in 2011 due to constraints caused by or uncertainties resulting from environmental regulations.700 However, the same survey revealed that factors other than environmental regulations, such as “uncertainty concerning disputed land claims (52%)” and “legal processes (42%)”, are considered greater impediments to investment.701 For example, even though Canada and Australia have strong environmental regulation for mining activities, Behre Dolbear, a mining analyst, ranked them as the two most attractive destinations for mining investment.702 In Peru, given the strong correlation between environmental issues and social conflicts discussed in Part 4 of this Report, adequate regulation and monitoring that address these issues can benefit mining companies.

Peru has several main mechanisms for regulating the environmental effects of mining exploitation. This Part focuses on two of those, namely, the EIA and monitoring regimes. Recent pro-investor legislative activity threatens to undermine the strength of Peru’s EIA system in relation to mining. The EIA process and recent amendments are discussed further in this Part. The Report will focus on OEFA, the administrative body tasked with carrying out important environmental services such as planning and carrying out oversight and monitoring environmental quality. In spite of the central role of this governmental agency in environmental protection, it currently faces a serious budget problem that threatens to undermine its efficacy.

Given these particular challenges and the importance of EIAs and monitoring to the Peruvian mining sector, the remainder of this Part of the Report focuses on these two aspects. It also briefly sets out some of the issues related to mine spills and mine closure, and flags potential areas for further investigation.

It is important to note that the prevalence of informal mining in Peru also has extremely negative environmental impacts. Informal mining is, however, beyond the scope of this Report, but worthy of its own careful consideration.

701 Id., at 30-34.
V. **Institutional Overview**

The mining sector in Peru is regulated by a number of governmental ministries and agencies. The two major Ministries in the field of mining and the environment are MINAM and MINEM. Both of these ministries are engaged in environmental regulation. Main relevant agencies include:

- **OEFA** – which handles an environmental enforcement under MINAM
- The **Service of Environmental Certification (SENACE)** – which handles the review and approval of the Detailed-EIAs (EIA-d) under MINAM
- **ANA** – which handles water utilization, including licensing under MINAG.

Additionally, as a result of decentralization, regional governments are becoming increasingly involved in environmental regulation.\(^{703}\) For example, some regulations in EIA and monitoring are being transited to regional governments.\(^{704}\)

### A. EIA

EIA is “the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made.”\(^{705}\) In addition to acquiring the appropriate concession,\(^{706}\) in order to conduct mining exploration and exploitation activities, mining companies must also obtain environmental certification, which includes compliance with the EIA process.\(^{707}\)

The National Environmental Impact Assessment Law creates the National System for Environmental Impact Assessment (SEIA), which is coordinated by MINAM. EIAs are split into three categories, depending on the expected level of environmental damage that will be caused. Those three categories are as follows:\(^{708}\)

**Category I:** Activities, projects or works which will cause low negative environmental impacts require the submission of an environmental impact statement (DIA).\(^{709}\)

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\(^{704}\) Legal Specialist at ARMA in Arequipa, Interview by Kazumasa Ueda, March 17, 2015.

\(^{705}\) “Principle of Environmental Impact Assessment Best Practice,” (International Association for Impact Assessment, 1999), 2.

\(^{706}\) Please refer to Part 2(I)(B) of this Report on Mining Concessions.


\(^{709}\) National EIA Law, art. 4(1)(a).
**Category II:** Projects, activities, or works which can cause moderate environmental impacts require the submission of a semi-detailed environmental impact assessment to the environmental division of MINEM (EIA-sd).\(^{710}\)

**Category III:** Projects, activities or works which can cause significant negative environmental impacts require the submission of an in-depth analysis to review their impacts and propose environmental management plan, a detailed environmental impact assessment, to the SENACE (EIA-d).\(^{711}\)

Given that this Report is focused on large-scale mining, this sub-part only focuses on the Category III and the EIA-d.

Applicants must submit the relevant application for review to the competent authority. If approved, an environmental certification is issued and the approved project may commence.\(^{712}\) Article 10 of the SEIA, as modified, lists the elements required in an EIA report, they are roughly translated as follows:\(^{713}\)

- A summary.
- A description of the proposed action and a background on the area to be impacted by the project, also known as a baseline study.
- Identification and characterization of environmental impacts throughout the project life cycle.
- An environmental management plan or the definition of environmental goals including, as appropriate, a management plan, contingency plan, compensation plan, and closure plan.
- A citizen participation plan.
- Monitoring and control plans.
- An economic valuation of environmental impacts.
- Any other requirements of the competent authority.

In mining, MINAM and MINEM both have responsibilities in environmental issues. Pursuant to article 7 of the EIA Regulations (019 of 2009), MINAM is the governing body of SEIA, in accordance with the SEIA Law (No. 27446) as amended. MINAM's main duties in relation to EIAs involve regulating, managing and administering the SEIA, and guiding the process of implementation at the national, regional and local levels.\(^{714}\) Under article 8 of the EIA Regulations (019 of 2009), OEFA is the mining sector’s EIA

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\(^{710}\) National EIA Law, art. 4(1)(b).


\(^{712}\) National EIA Law, art. 2. On environmental certification, *Ministerio del Ambiente, supra note 707.*


\(^{714}\) EIA Regulations, art. 7.
governing body and is responsible for the oversight, supervision, evaluation, control and punishment in environmental matters of mining activities. 715 MINEM approves Environmental Impact Statements (EIS)—the formal documents required by the regulatory authority—through MINEM’s General Directorate of Environmental Mining Affairs (Dirección General de Asuntos Ambientales Mineros) (DGAAM). 716

A new body, the SENACE, an agency of MINAM, has been set up as the competent authority responsible for reviewing and approving Category III EIA-d. 717 SENACE falls within the MINAM, and is part of the SEIA. 718 SENACE is in the early days of establishment. It is, at this stage, too early to provide recommendations in relation to its functioning. Instead, it is relevant to flag a few points of concern that were raised during interviews with relevant stakeholders on the field trip, including, NGOs and community leaders in the mining community of Espinar. One of the main concerns raised was the potential for a conflict of interest given the make-up of SENACE, which Board of Directors comprises the Ministers for Environment, Finance, Agriculture, Energy and Mines, Production, and Health. 719 While these claims cannot yet be tested, they are points worth flagging for future monitoring and review.

An area of immediate concern is the shortening of the timeframes for EIA approval by governmental authorities. The EIA process is cumbersome and time-consuming, with public officials needing to assess a heavy volume of documents. 720 Under earlier versions of the law, agencies had up to 120 days to decide on Categories III EIA-d applications. 721 Article 21 of Law 30230 reduces the time for approval of EIAs by the competent authority to 45 days. This reduction in timeframe has been widely criticized as inadequate to ensure environmental protection, 722 and is inadequate for properly reviewing and approving an EIA. Instead, this Report recommends a 90-day timeframe for EIA approval. Article 21 of Law 30230 also notes that officials who fail to meet this timeframe can be disciplined and sanctioned. 723 This provides an inappropriate incentive for careful and considered EIA review and could have negative impacts if EIAs are pushed through without adequate consideration. Finally, under the new law, EIAs are approved by default if the deadline is missed. 724

The total timeline for EIA process is not clear in Peru. In our interviews, interviewees from several mining companies complained about unclear and time-consuming EIA process in Peru. 725 McKinsey & Company

715 National EIA Law, art. 8.
716 EIA Regulations, art. 12.2. See also Arbelaez-Ruiz, supra note 707, at 44-45.

718 Solano, Birth of SENACE, supra note 717, at 198.


720 Legal Specialist at private law farm in Lima, Interview by Kazumasa Ueda, March 20, 2015.

721 Glasson, supra note 630, at 278.


723 Ley 30230, Article 21.


estimates mining companies spend 360-540 days for EIA in Peru with a large distribution.\textsuperscript{726} If these concerns are considered, setting the total timeline for EIA process is one idea. In Canada, for example, Environmental Assessment Agency is required to complete an environmental assessment within 365 days, even though the minister of the environment can refer a project to a review pane and that review panel has different time limit (24 months) in special cases.\textsuperscript{727}

Additionally, some countries, including Australia, are adopting a new approach of a cumulative impact assessment, where different companies have mining concessions in the vicinity of a specified area of land (See \textit{Part 4(VI)(C)} for further discussion in this regard).

As discussed in \textit{Part 2(I)(D)}, Mining Concessions are terminated after certain periods of time when the Concessionaire fails to pay annual fees, reach minimum production, pay penalties or make certain financial investments. EIA also has similar automatic expiration mechanism: EIA approval expires if the project proponent does not start activities within three years.\textsuperscript{728}

\begin{table}[h]
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\textbf{Recommendation} & \\
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\textit{Article 21 of Law 30230 should be revoked. The introduction of the total timeline for EIA process should be considered.} & \\
\hline
The timeframe for allowing EIA-d approval should be extended to 90 days, with non-approval after this time period being presumed, provided reasons for the delay and an expected approval time are issued. & \\
\hline
The previous sanctioning regime should be re-instated and OEFA’s full powers reinstated. & \\
\hline
A new approach of cumulative impact assessment should be implemented (See \textit{Part 4(VI)(C)} for a discussion and recommendation in this regard). & \\
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\textbf{B. Mine Closure and Clean-up}

\textbf{Mine closure}

Ensuring that mine closure is planned and funded ahead of time is essential to prevent legacy pollution and maintain community trust in mining sites. If the closure is inappropriately managed, the mining project can continue to cause environmental damages long after the mine has stopped operating. General best practices for funding for closure involve setting aside funds progressively over the life of the mine so that sufficient funds are available to cover closure costs. Initial cost estimates should be prepared early in the mine life – preferably before the mine opens – and should be updated systematically on a regular basis (every five years for a 30 years mine life, every two years for a 10 years mine life).\textsuperscript{729} Various funding instruments exist, such as “closure bonds”, warranties, securities and insurance to assure that the resources exist when needed. Such instruments can also be useful to provide funds for dealing with unexpected problems should they arise during or after closure. While they may be considered separately, “social” costs related to redundancy payments, trust funds, transfer of social assets, contributions towards future maintenance and operations of social assets also need to be estimated and funded.\textsuperscript{730} For example, in South Africa, the Mineral and Petroleum Resources Development Act 28 of 2002 provides that a company must establish a


\textsuperscript{730}Id.
financial provision, usually in the form of a rehabilitation fund or bank guarantees, before the mandatory environmental management plan can be approved. When individual insurance is not feasible, mitigation fees financing an insurance pool could be an alternative to limit public risk exposure.731

Peru established a mine closure law in 2003, the Mine Closure Law, much earlier than its neighboring Latin American countries.732 The General Environmental Law requires that “[t]he holders of all economic activities must ensure that the closure of activities or facilities not subsist negative environmental impacts of a significant nature.” Companies are also required to submit a closure plan as part of the EIA process. Every year a mine is in operation, the company must provide a renewed financial guarantee considering the ultimate closure cost, allowance for closure expenditures already made, and values of pre-existing and valid guarantees.733 In the worst case, failure to provide sufficient guarantees will result in the operating license being revoked. The plan has been criticized for being too abstract and for there being no guarantee that it will be followed.734

**Clean-up of accidents and spills**

The Government of Peru should not bear any cost of cleanup in the case of an accident, spill or closure and should ensure that companies have adequate funds available in the case of such emergencies. For example, the U.S. Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act in 1980 under which the U.S. Environmental Protection Agency was directed to require that industrial polluters have adequate funds in place for clean up, so that the industry, not U.S. taxpayers, bear the cost of cleanup.735 The fund, known as the “Superfund,” was initially financed by a corporate tax on polluting industries. However, the fund has been dwindling since the tax expired in 1995 and the amount of money in the fund not allocated from the U.S. reached zero dollars by 2003. Such a Superfund could be emulated in Peru. It is important to note that such a tax would not deter mining companies from investing in Peru – pooling the cost of the risk through a general fund to which all mining companies operating in Peru contribute, will alleviate the burden on any individual company and on the Government when a spill or accident occurs and must be cleaned up.

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732 Elizabeth Bastida and Tony Sanford, *A Review of Recent Developments in Argentina, Bolivia, Chile and Peru*, (ECUS and MDS 2010), 27


**Example: La Oroya**

The La Oroya mine is an example where cleanup and closure were not handled well and the Peruvian Government ended up bearing the brunt of the costs for addressing legacy pollution. This is the type of situation the Government should strive to avoid in the future.

For decades, the people of La Oroya have been exposed to high levels of air pollution stemming from the complex’s emissions of toxic substances, including lead, cadmium, arsenic and sulfur dioxide. In the middle of the 2000s La Oroya was identified as one of the 10 most polluted cities in the world.

According to independent studies, 97% of children between the ages of six months and six years, and 98% of those between seven and 12 years old still have high levels of lead in their blood. The percentage reaches 100% in La Oroya Antigua, the area closest to the smelter. The effects of lead poisoning are irreversible.

Doe Run Peru, a subsidiary of the U.S.-based Doe Run Company, began operating the complex after its privatization in 1997. Both the company and the Peruvian State have failed to comply with their obligations to prevent environmental impact and respect the human rights of the population of La Oroya. In response, the Interamerican Association for Environmental Defense (AIDA) and other organizations requested the Inter-American Commission on Human Rights (IACHR) in 2005 to issue precautionary measures for people whose health was at serious risk from the pollution in the city. On August 31, 2007 the IACHR ordered the State to adopt measures to protect the health, integrity and life of a group of residents of La Oroya.

Meanwhile, parents of children with high levels of lead in their blood have tried to obtain compensation for the damages through a collective action in the United States (Missouri), headquarters of the complex’s parent company The Renco Group.

In late 2010, Renco initiated international arbitration alleging that its rights as a foreign investor as guaranteed by the FTA between Peru and the United States were violated. Renco asked for compensation of $800 million. Renco claimed the government of Peru refused to clean the soil in and around La Oroya as it “legally committed and promised to do, and the government’s improper refusal to assume full responsibility for legal claims brought by certain citizens of La Oroya.” La Oroya, therefore, exemplifies why mining companies need to be held clearly liable for past, current, and future environmental damage in mining agreements before being granted operating licenses. Even if Peru does not lose such international arbitration, it is a waste of state resources to engage in such litigation that can be pre-empted and the damages to community public health and livelihood can be avoided.

**Sources:**


RECOMMENDATIONS

The Government should consider setting up a fund similar to the U.S. Superfund, but without the expectation that the tax would expire.\(^{736}\) The taxes would be put into a pool that could be used as risk protection in the case of accidents, spills or when closing plans go wrong. While companies should be held liable for any damage from accidents and for closure, this will provide a safety net to ensure that communities are always protected and that the Government never has to bear the financial burden of mining accidents.

VI. Oversight and Monitoring: OEFA

A. Mine and Environmental Monitoring in Peru

Oversight and monitoring are important functions of the Government in regulating the environmental impacts of mining. This Report focuses on functions and capacity of OEFA, a special environmental supervision and auditing agency established under MINAM. In particular, it looks at four distinct issues relating to OEFA, namely, a current overlap in environmental institutions, the current penalties regime for environmental harms caused by mining, limitations of OEFA’s authority, and current funding threats to OEFA.

It is first relevant to set out MINAM’s ability to set environmental quality standards for air, soil, and water.\(^{737}\) Peru’s environmental quality standards have previously been thought to be relatively lax compared with other countries.\(^{738}\) However, during the last decade, legal reform in the environmental sector has strengthened the environmental management framework and led to updated and improved environmental quality standards.\(^{739}\) A comparative analysis of U.S. Environmental Protection Agency standard and Peru’s environmental quality standard about water quality conducted by Dr. Robert Moran showed that Peru’s current water standards are as strict as those in the United States.\(^{740}\) In some parameters for drinking water such as Cadmium and Uranium, the Peruvian standards were even shown to be stricter than USA.\(^{741}\) In spite of these regulatory strengths, there are a number of issues that threaten environmental oversight and monitoring in relation to mining in Peru.

B. Issues

Overlapping institutions

OEFA was established to strengthen oversight and monitoring of mines, but it is not the only institution that engages in this task. As a result of decentralization, some regional governments have also established special environmental agencies to perform their own oversight and monitoring for small mines, one such example being the Regional Environmental Authority (ARMA) in Arequipa.\(^{742}\) These regional agencies adopt MINAM’s environmental quality standards for air, soil, and water, although they sometimes consider unique regional conditions like altitude and soil condition.\(^{743}\)


\(^{739}\) Castroa, supra note 737.


\(^{741}\) Id.

\(^{742}\) Legal Specialist at ARMA in Arequipa, Interview by Kazumasa Ueda, March 17, 2015.

\(^{743}\) Id.
Penalties for environmental harms caused by mining

When mining companies violate environmental standards, OEFA has the power to penalize them through both warnings and fines. OEFA can levy maximum fines of up to 30,000 Peruvian Tax Units and the establishment of coercive execution proceedings for the collection of fines including suspension or cancellation of the concession. The maximum amount of penalties that can be applied to mining companies is capped at 10% of the last year’s annual gross revenue of the mining company that committed the infraction. This maximum fine limits give a company a reduced incentive to comply with environmental standards.

More recently, Law 30230 further weakened OEFA’s powers to issues penalties. Law 30230 establishes a three year period starting from 2014 during which the applicable fines for infractions is reduced by 35%. These rules were established to protect companies from unpredictable and excessive penalties. According to OEFA employees, the reforms put forth in Law 30230 are intended to help mining companies fix their infractions before fining them. While it is unclear whether the change in fines will impact OEFA’s effectiveness, it is important to reiterate that giving OEFA the power to implement fines for environmental infractions is not a deterrent for mining investment. According to Hugo Gómez Apac, Chairman of the Board of OEFA, of every 100 inspections conducted by OEFA, only two result in fines.

Limited authority of OEFA

OEFA’s authority is also weak and limited in other areas. Even in cases of serious environmental pollution, OEFA’s mine suspension powers are limited to only the part of mining activities that are directly related to the infraction; it cannot suspend the overall project for repeated infractions.

Law 30230 further undermines OEFA’s oversight and monitoring for mines. Prior to the law’s enactment, the MINAM could set environmental quality standards for the mining sector independently, without requiring consultations with other authorities. Now MINAM is required to get approval by Supreme Decree, signed by all involved sectors, in order to set the standards. A number of environmental NGOs have opposed this reform out of concern that it may hurt the independence and autonomy of the MINAM. For example, if the MINAG or the MINEM have conflicts of interest, which may impact their judgment in

745 Id. at 230.
748 Yajaida Mendoza, Environmental Legal Specialist at OEFA in Cusco, Interview by Isabela Cunha, Maya Srikrishnan and Ruthia Yi, March 16, 2015.
750 A former official for OEFA, Interview by Maya Srikrishnan and Kazumasa Ueda, March 20, 2015.
evaluating and approving environmental standards. This report shares concern that the environmental regulation authority should be independent and considers that the setting of environmental quality standards should be solely within the purview of MINAM.

**RECOMMENDATIONS**

Law 30230 should be modified.

*Environmental quality standards should be set by the MINAM, without approval of other sectors required.*

*The applicable fines for infractions should not be reduced temporarily or capped. OEFA’s resources should be strengthened.*

**OEFA funding threats**

A further issue related to the monitoring and oversight of environmental issues relates to OEFA’s funding. OEFA collects revenue in two ways, namely, through penalties collected from environmental infractions and through a special tax imposed on mining companies. This special tax is called the Contribution for Regulation (APR). OEFA collects 90% of its revenue from this APR. The legality of this tax is currently the subject of litigation being run by a business interest group, the National Society of Mining, Petroleum and Energy (SNMPE), and 32 mining companies, such as Gold Fields La Cima, Aurífera Retamas and Antapaccay. In addition to litigation, four companies requested the administrative procedure to the Commission Elimination of Bureaucratic Barriers (INDECOPI), a government institution that overviews market practices and consumer rights, by arguing that the APR is a bureaucratic barrier. One of the arguments led by the mining companies is that the 0.21% of annual sales of mining that OSINERGMIN already receives should include the 0.15% that is given to OEFA, given that the transfer of oversight and monitoring functions was originally moved from OSINERGMIN to OEFA. Based on these arguments, some mining companies have refused to pay APR. On October 2014, INDECOPI declared the APR “illegal bureaucratic barrier.” To date, INDECOPI is now in process to decide whether the former decision to the APR in 2014 is still valid or not in the 2015 budget. In addition, the Peruvian judiciary has – separately from the INDECOPI decision – issued two judgments confirming the constitutionality and legality of the APR. The future of the APR is still uncertain, but the APR represents about 80 percent of OEFA’s budget in 2015. If mining companies refuse to pay APR, OEFA could face the possibility of not being able to continue their work in 2015 due to lack of funding.

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753 “¿El fin del OEFA?: quitarían casi el 90% de ingresos a organismo de fiscalización ambiental”, *SPDA Actualidad Ambiental*, October 22, 2014.

754 “El OEFA apeló la resolución de Indecopi que considera al aporte por regulación una ‘barrera burocrática’”, semanaeconomica.com, October 27, 2014.


757 Id.


761 Id.
It is not the purpose of this Report to engage in a discussion about whether the APR is legal or not. Instead, this current situation makes clear that OEFA should not rely on a tax that is being challenged for its legality in court to get its funding.

**Recommendation**

The Government should secure a sufficient budget to OEFA. To that end, the government should enshrine APR in law in an articulate manner or distribute enough budget to OEFA.

VII. Conclusion

This Part details some of the most important environmental challenges faced in Peru from the mining industry, focusing on the availability and contamination of water. It presents some suggestion on how to address and mitigate water issues that often are primary drivers for social conflicts around mining projects. This Part also describes the regulatory framework that governs environmental protection around mining projects in Peru and highlights some of the gaps, challenges and conflicts of interest present. Law 30230 that was recently passed could result in the reduction of environmental protections. The Government should go forth on the implementation with careful attention to the issues with Law 30230 presented here and it is recommended that some parts even be reconsidered. Finally, it is of great importance that OEFA continues to be strengthened so that Peru’s environmental laws can be adequately and fairly enforced. Strengthening and coordinating environmental protection will allow the Government to avoid costly repercussions of environmental damage, such as water or soil cleanup and social conflicts.
PART 6. CONCLUSION

Peru has been able to reinvigorate the economy over the past two decades using careful macroeconomic policy and management of mining investments and revenues, but mining has also been accompanied by environmental and social costs.

This Report has provided analysis of the current economic, social, and environmental landscape of large-scale mineral and metal mining in the country and the legal framework in which actors operate. Civil unrest and water contamination due to mining have been given especially thorough analysis because of their extensive implications. While progressive legal instruments that protect the interests of local communities and the host country government exist, the implementation of these instruments has been inconsistent. The Government has shown commitment to improving the welfare of all people in the country, but it has also enacted measures to invite greater investment that threaten to worsen welfare. Socioeconomic inequality and poverty, social conflict, and environmental damage due to mining activities persist in Peru, and are unintentionally worsened by recent deregulation of licensing requirements. The Government has shown strategic vision for maximizing gains from a robust mining sector while attempting to uphold environmental standards and protect social welfare, but has also made myopic decisions that consider short-term benefits without weighing the attached long-term damages. This report has put forward several recommendations to the Government’s policies and laws surrounding mining. Sound policy and governance have led Peru out of crises in the past, and now need to be modified so that they keep the country on a stable and inclusive path to prosperity for all of the citizens of Peru.

Some key recommendations include the following:

Mining Law

Mining Concession applicants should be subject to greater scrutiny, and should be required to submit evidence of financial and technical capacities, of ownership structures, of prior mining activities in other countries, and detailed activity proposals. The Government should be able to, and should, revoke a Mining Concession if the Concessionaire does not observe Mining Law, or breaches the EIA or SIA, or fails to meet other requirements. Transfer of concessions should similarly be closely monitored, and Government approval of a transfer should be compulsory.

The Government should increase the transparency of the concession granting process, and public awareness of Mining Concessions should be prioritized. There should be a clear redressal mechanism so that community members can make appeals throughout the concession granting process. If mining activities require relocation of residents or other impacted communities, companies should acquire consent and negotiate compensation agreements with the owners and inhabitants. To that end, the Government should make land titling more formal, more extensive, and provide a grievance mechanism for land title-holders, especially in rural areas.

Corruption Prevention

The Government should create a central portal containing all mining information, and Peruvian community members should be instructed on its use. The Government should also implement an Information Act, where even private parties (such as corporations) are required to disclose information, especially if it effects human rights, contains incriminating evidence, poses environmental and health risks, and if it is against the public interest.

Companies should have to submit annual reports that contain information on anti-corruption programs, organizational structure and beneficial ownership, and these reports should be independently audited.
**Investment Law**

Foreign corporations operating in Peru should have minimum stakes in their home country, so as to avoid companies exploiting the legal framework of Peru to maximize their gains. These corporations, while respecting home country laws, should also be respecting Peruvian laws. If arbitration between actors becomes necessary, domestic remedies should be exhausted first, and only majority stakeholders in corporations should be allowed to seek arbitration.

Government acts and policies that protect public welfare objectives, including those in health, safety, culture, social welfare, and environment, do not constitute expropriation. Furthermore, the Government is obligated to upholding health, safety, human rights, environmental protection and labor standards, and has the right to be as progressive as preferred, independent of the beliefs of investors.

**Economics**

Government should require Concessionaires to invest in infrastructure, and where mining is absent, the Government should provide that support. The Government should also train civil servants so that they can interface with foreign investors, and plan monthly stakeholder meetings between all actors.

Subnational governments should be required to submit development plans with clear goals and implementable projects, with input from local mining actors and community leaders. Canon revenues should be used to finance those projects. Canon revenues should also be used for capacity building purposes, such as civic leadership, revenue resource management, and policy making.

Companies and Mining Concession applicants should be required to conduct risk analyses and present risk mitigation proposals, and to report on externals and costs in audited annual reports. Companies should also face strict consequences for transfer pricing, for non-compliance with rules and regulations, and for breach of EIA and SIA agreements.

**Social**

SIA should be conducted for any exploration activity, independent of an EIA, and should contain analyses of social conditions, expected social impacts of a mining project, identify risks, identify capacity of the actors to mitigate risks, develop monitoring plans, and several other components. Where more than one concessionaire is causing an impact, all actors should be held accountable. Punishments for non-compliance should be strict and prompt, and SIAs should be conducted annually.

Consulta Previa and Participacion Ciudad should be made consistent, so that all people have the right to consultation. The laws should mandate consent in the event of relocation, the provision of remediation of social risks and actions that can harm cultural practices, and they should require risk agreements, compensation frameworks, measures to address amendments and other clauses. These laws should provide channels for people to access information, and should also establish monitoring committees and other mechanisms to ensure continued community involvement over the life of the project, including mine closure.

In the event of negative social or environmental impacts due to mining, parent company liability should be assumed, and the company should face sanctions for those impacts. The Government should also create a community fund from Mining Canon so community members can litigate when necessary in a reasonable manner.

**Environment**

The Government should establish a comprehensive and compulsory water use monitoring system, and should train communities in testing water purity and contamination mitigation technologies. Water pollution has been one of the key drivers of social unrest surrounding mining activities and warrants close analyses.
Aspects of Law 30230 should be modified or revoked to restore high environmental quality standards and to bolster the weight of EIAs. The Government should also strengthen the influence of OEFA, and create a more durable funding mechanism for the agency. It is also recommended that similar to a social community fund, an environmental fund be created so that communities and the Government have the resources to deal with emergencies if they arise because of mismanagement in mining activities.

Mining in Peru is highly dynamic, influenced by global commodity prices, domestic and international political pressures, and a changing natural resource environment. Mining, and all of its related aspects, should be closely monitored in the face of these changes. There are many components of mining that were not within the scope of this Report, but should be considered for future research. There are also several reforms and enactments that were passed only recently, and should be revisited to see what their effects have been. Within the context of economics, it will be highly telling to see if the passage of Law 30230 in 2014 has had any impact on foreign investments in mining, and if the Government will consider repealing it. It would also be informative to see whether or not policies designed to increase economic diversification, such as the MEF’s investments in increasing science and technology innovation or the MINAG’s initiatives to increase exports have achieved results. Within the social context, since implementation in 2011, Consulta Previa has been carried out successfully in sixteen cases, all within oil and gas projects. As applications of the law increase it will be important to engage with stakeholders to see what the impacts of consultation have been and what kind of modifications might be necessary to increase benefits. Civil rights has an uneven history in Peru, and even in 2015, there are concerns over the criminalization of peaceful protestors and dissenters. Further investigation into this would also be valuable. Within the context of environmental concerns, this report examined the effects of mining on water most closely, but the impacts on air and soil pollution and deforestation rates also merit close, long-term examination. Institutions such as OEFA and SENACE should be closely followed to see how their capacities change, and whether or not they become more powerful instruments in the mining landscape. The consequences of Law 30230 on mining operations should be monitored closely, as there is risk companies may take advantage of less stringent regulation and revert to harmful mining practices. Changes in company practices should be scrutinized and there should be closer study of environmental impacts surrounding mining.

Peru has overcome considerable obstacles to achieve the relative success and stability the country enjoys today. It is important that as the country continues to prosper, the drivers of growth are sustainable and the beneficiaries of growth are inclusive and that costs be minimized to the maximum extent possible. This can only be achieved if a holistic approach is adopted for sustainable resource development for all, including future generations.
Annex A. Peru’s Corruption Rank

<table>
<thead>
<tr>
<th>Rank</th>
<th>Country</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Denmark</td>
<td>92</td>
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<tr>
<td>2</td>
<td>New Zealand</td>
<td>91</td>
</tr>
<tr>
<td>21</td>
<td>Chile</td>
<td>73</td>
</tr>
<tr>
<td>31</td>
<td>Portugal</td>
<td>63</td>
</tr>
<tr>
<td>80</td>
<td>El Salvador</td>
<td>39</td>
</tr>
<tr>
<td>85</td>
<td>Peru</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>Burkina Faso</td>
<td></td>
</tr>
<tr>
<td></td>
<td>India</td>
<td></td>
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<tr>
<td></td>
<td>Jamaica</td>
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<td></td>
<td>Philippines</td>
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<td></td>
<td>Sri Lanka</td>
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<td></td>
<td>Thailand</td>
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<tr>
<td></td>
<td>Trinidad and Tobago</td>
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<tr>
<td></td>
<td>Zambia</td>
<td></td>
</tr>
<tr>
<td>94</td>
<td>Colombia</td>
<td>37</td>
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<tr>
<td>110</td>
<td>Ecuador</td>
<td>33</td>
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<tr>
<td>119</td>
<td>Tanzania</td>
<td>31</td>
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<td>161</td>
<td>Venezuela</td>
<td>19</td>
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<td>174</td>
<td>Somalia</td>
<td>8</td>
</tr>
</tbody>
</table>

Source: Transparency International’s Corruption Perceptions Index 2014
Annex B. Members of CAN

- Congreso de la Republica
- Poder Judicial
- Presidencia del Consejo de Ministros
- Ministerio de Justicia y Derechos Humanos
- Tribunal Constitucional
- Consejo Nacional de la Magistratura
- Fiscalía de la Nacion
- Asamblea Nacional de Gobiernos Regionales (ANGR)
- Asociacion de Municipalidades del Peru
- Acuerdo Nacional

CAN’s observer members are:

- Contraloria General de la Republica
- Defensoria del Pueblo
- Organismo Supervisor de Contrataciones del Estado
- Asamblea Nacional de Rectores
- Consejo Nacional Para La Etica Publica
- Conferencia Nacional de Instituciones Empresariales Privadas
- Centrales Sindicales de Trabajadores del Peru
- Representante de la Iglesia Catolica – Conferencia Episcopal Peruana
- Representante de la Iglesia Evangelica
- Consejo de Prensa Peruana
- Sociedad Nacional de Industrias
- Camara de Comercio de Lima
# Annex C. Legislative proposals by CAN

<table>
<thead>
<tr>
<th>Proposition</th>
<th>Agreement</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislation draft which regulates the penal responsibility of legal personnel in corruption offenses</td>
<td>Acuerdo No 031-2013-CAN / Sesión XVIII</td>
<td>In evaluation process by the Council of Ministers</td>
</tr>
<tr>
<td>Legislation draft which modifies the article 400 of the Penal Code, referring to the Influence Peddling Crime, and incorporates the article 400-A</td>
<td>Acuerdo No 030-2013-CAN / Sesión XVIII</td>
<td>In evaluation process by the Council of Ministers</td>
</tr>
<tr>
<td>Draft of Supreme Decree which regulates the Legislative Decree N 1106 of effectively fighting the laundering and other offenses related to illegal mining and organized crime</td>
<td>Acuerdo No 029-2013-CAN / Sesión XVIII</td>
<td>Submitted to the Presidency of the Council of Ministers</td>
</tr>
<tr>
<td>Legislation draft which incorporates fines in the penalty for corruption offenses</td>
<td>Acuerdo No 026-2013-CAN / Sesión XV</td>
<td>Law Nº 30111 published in November 26 2013</td>
</tr>
<tr>
<td>Amendment of Law 29976, which creates the High-Level Commission of Anticorruption</td>
<td>Acuerdo No 025-2013-CAN / Sesión XV</td>
<td>Supreme Decree N 089-2013-PCM</td>
</tr>
<tr>
<td>News campaign which permits citizens to know the reporting mechanism in the public entities</td>
<td>Acuerdo No 023-2013-CAN / Sesión XIV</td>
<td>Video Brochures Informative Platform Reporting Manual</td>
</tr>
<tr>
<td>Legislation Draft which doubles the statute of limitation for the corruption offenses</td>
<td>Acuerdo N° 018-2012-CAN / Sesión XIV</td>
<td>In evaluation process by the Council of Ministers</td>
</tr>
<tr>
<td>Legislation Draft which modifies the penal concepts of government officials</td>
<td>Acuerdo N° 017-2012-CAN / Sesión XIV</td>
<td>Ley Na 30124 publicada el 13 de diciembre del 2013</td>
</tr>
<tr>
<td>(1)Model Ordinance and (2)Agreement Model linked to the infringement breach in the Registration of Exchange, Loans and Pawns of the UIF(Financial Intelligence Unit) of the SBS (Superintendence of Banks and Securities)</td>
<td>Acuerdo N° 016-2012-CAN / Sesión XIV</td>
<td>Instructive model UIF-SBS</td>
</tr>
<tr>
<td>National Plan of Fighting the Corruption 2012-2016</td>
<td>Acuerdo N° 015-2012-CAN / Sesión XIV</td>
<td>Supreme Decree N° 119 2012-PCM</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>--------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Supporting the legislation draft on Conflict of Interests</td>
<td>Acuerdo N° 010-2012-CAN / Sesión XII</td>
<td>Project of Law N° 1218/2011-CR</td>
</tr>
<tr>
<td>Publicity of equal contracting to the Tax Unit in the Standard Transparency Portal</td>
<td>Acuerdo N° 009-2012-CAN / Sesión XII</td>
<td>Law N° 29873 (articles 3.3° incise i); and, 68°)</td>
</tr>
<tr>
<td>Integrated Proposition of the legislation projects of the High-Level Anti-Corruption Commission</td>
<td>Acuerdo N° 002-2012-CAN/Sesión X and Acuerdo N°007-2012-CAN/Sesión XI</td>
<td>Law N° 29976 Amendment N° 29976</td>
</tr>
<tr>
<td>Supporting the claim of unconstitutionality against Law No. 29703 which is filed by the Attorney General</td>
<td>Acuerdo N° 012-2011-CAN/Sesión IX</td>
<td>Law N° 29703 Law N° 29758 Claim of Unconstitutionality Exp. 00017-2011-PI/TC</td>
</tr>
<tr>
<td>Supporting the Ethics Code in the business sector</td>
<td>Acuerdo N° 028-2010-CAN/Sesión VI</td>
<td>Business Sector Ethics Code</td>
</tr>
</tbody>
</table>

**Source:** Comisión de Alto Nivel Anticorrupción, http://can pcm.gob.pe/category/propuestas-can/
Annex D. The MIM Initiative

The MIM Initiative centers on providing information and opening lines of communication between the government, its citizens, and CSOs. Specifically, through the MIM Initiative, the IFC:

- provides useful information to CSOs in selected municipalities so that they can undertake a systematic monitoring of royalty transfers and municipal investment,
- disseminates such information to a network of informed citizens,
- promotes an open dialogue between authorities and the population to achieve greater understanding of royalties and municipal investments, and
- provides Mayors with feedback of the perception that the population has of their investment management decisions.\(^1\)

To accomplish these, the IFC produces various materials and information campaigns that are disseminated to the public through different channels, such as print, television, radio, visits to rural communities, and theatre. These materials aim to increase awareness on the importance of municipal investments and royalties, and to give the communities an avenue to express their opinions. In addition to educational materials, the IFC also organizes discussions with the Mayor to generate an “informed dialogue between the population and their authorities,”\(^2\) with a view to encouraging behavioral change on both sides to promote accountability regarding the use of royalties.\(^3\)

The MIM is currently being implemented in 31 municipalities in the following regions: Cajamarca, Ancash, Cusco, La Libertad, Piura, Moquegua, Puno, and Tacna.\(^4\) Since its implementation, IFC has measured the following developments in the areas with MIM Initiatives:

- Informed and engaged civil society.\(^5\) More people have begun searching for information and expressing their concerns and ideas for the investment of resource revenue funds, either through MIM websites and emails, or through participating in discussions with the Mayor.
- Media involvement with MIM Peru.\(^6\) The media have begun to pay attention to the progress of investments, and keeps the public informed. Through the MIM, local journalists were trained to have a better understanding of the importance of the media in making sure that resources are put to good use.
- Mayors becoming socially accountable.\(^7\) Because of the constant engagement with an informed community and a more active media, mayors have begun to provide more information. Moreover, authorities have also realized the benefits of keeping the public informed, and have also begun to validate information for MIM publications.

As part of the MIM, the IFC has ranked each of the municipalities where the MIM operates, with the view to informing the authorities of the perception of the community regarding the management of the municipality and to point out the opportunities for improvement. The MIM Initiative focuses on two

\(^2\) Id.
\(^3\) Id.
\(^6\) Id.
\(^7\) Id.
components: capacity to respond and social accountability. Based on the MIM’s Initiative’s latest literature, the municipality of de Torata ranks the highest, and the municipality of de Ciudad Nueva the lowest.\footnote{IFC, “Como esta tu municipalidad en el ranking del MIM?” \textit{Ranking de Buen Gobierno Municipal 2014 (Enero – Diciembre 2013)}, MIM Informa (Lima: 2014), 4 - 5.}
## Annex E. Comparison of laws on indigenous peoples’ rights in Latin America

<table>
<thead>
<tr>
<th>Who are indigenous peoples?</th>
<th>Peru</th>
<th>Chile</th>
<th>Colombia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consulta Previa in Peru establishes more stringent conditions to determine whether a collective is indigenous than ILO Convention 169. It requires a connection with the ancestral territory, which would exclude groups that may have been forced to abandon their lands. It also requires that groups be direct descendants of the original inhabitants and does not admit that part of their institutions and customs be maintained.</td>
<td>Chilean law includes provisions that could restrict prior consultation. Supreme Decree 66 of 2013, which establishes the procedure for prior consultation, states that indigenous peoples are those defined under article 1 of ILO Convention 169 and recognized by Law No. 19,253 of 1993 on the “promotion, protection and development of indigenous peoples.” The language of the aforementioned law is problematic because the notion of peoples is absent. Additionally, article 5 of the Supreme Decree states that prior consultation will be conducted through the relevant national, regional or local representative institutions depending on the scope of the effect of the measure that could affect them. This provision could be used to avoid consulting with organizations that have a broad territorial scope, e.g. regional and national organizations.</td>
<td>The scope of who is subject to prior consultation under Colombian law is broad and in accordance with international law. Nevertheless, the identification of indigenous communities for the purpose of prior consultation is challenging from an institutional perspective. According to the existing norms, the implementers of a project must request to the Ministry of Interior’s Direction of Prior Consultation a certification of presence of indigenous communities. To issue the certification, the Direction must contrast various databases. However, there are major gaps in the information system available, in particular regarding the geographic location of indigenous groups. This has led to the issuance of certifications that fail to acknowledge the actual presence of indigenous communities subject to prior consultation.</td>
<td></td>
</tr>
</tbody>
</table>

| When should | An issue of concern in Peru is that a consultation Supreme Decree 40 limits the situations in which prior consultation is required. | Supreme Decree 40 limits the situations in which prior consultation is required. | The Colombian Constitutional Court has |

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11. *Id.* at 62.

12. *Id.* at 152.
consultation be sought?

Process in not necessary when companies and the community have reached agreements. This is worrisome given the asymmetries between indigenous groups and companies.

consultation should be conducted. Article 85 of the Decree states that prior consultation is only necessary when activities have one of the characteristics established in articles 7 (resettlement of human groups and significant alternation of the systems of life and customs), 8 (location in or in the vicinity of indigenous territories or environmental value of the territories) and 10 (alteration of cultural patrimony). Furthermore, Supreme Decree 66 does not adhere to the ILO standard that requires consultation for all measure susceptible of directly affecting indigenous peoples by determining that impacts have to be significant and specific. This wording imposes a higher threshold than the Convention, which does not take magnitude into account. 13

Who conducts prior consultation processes?

The state institution responsible for the measure subject to prior consultation must conduct the process. The Ministry of Culture, specifically the Vice Ministry of Multiculturality, must coordinate all public policies related to prior consultation. According to Supreme Decree 66, the state institution that must adopt the measure subject to consultation is responsible for coordinating and executing prior consultation. This institution can request a report to the Ministry of Social Development to establish the scope of prior consultation. According to the Court, all issues that directly affect ethnic communities necessitate prior consultation. 14 Thus, the exploitation of natural resources, and legislative and administrative measures are subject to prior consultation. The Court has determined that there are direct impacts to indigenous groups when the status of a person or community is altered because it is restricted or granted benefits. 15 Consent must be obtained in the event of relocation due to a project, storage or spilling of toxic wastes in ethnic lands, and high social, cultural and environmental impacts that can put the survival of a community at risk. 16

Colombia is the only country in which a single institution, in this case the Prior Consultation Direction at the Ministry of Interior, conducts all prior consultation processes. Experts have argued that the Direction has a limited capacity and a high turnover ratio. 20

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14 Rodriguez, supra note 10, at 65.

15 Id.

16 Id. At 207.

20 Gonzalo Vargas, “Industria minera y comunidades en Colombia: problemas y recomendaciones” in Insumos para el Desarrollo del Plan Nacional de Ordenamiento Minero, comp. Juan Benavides, (Bogotá, Colombia: Ediciones Uniandes, 2014), 653,
consultation, as well as provide technical assistance and capacity building to state agencies and indigenous peoples and organizations. Moreover, it manages the official database of indigenous peoples and records the outcomes of prior consultation processes.

Additionally, its independence is compromised by the fact that companies finance consultations.

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18 Id.

19 Decreto Supremo 66°, art. 12-14.

### Annex F. Social Impact Assessment: 3-Component Summary Template

#### Population and Demographics

<table>
<thead>
<tr>
<th>Baseline Assessment</th>
<th>Research categories</th>
<th>Suggested research methods</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Composition of population</td>
<td>Household surveys</td>
</tr>
<tr>
<td></td>
<td>Previously relocated populations</td>
<td>Statistical analysis of census data</td>
</tr>
<tr>
<td></td>
<td>Current in-migration and out-migration</td>
<td>Focus groups</td>
</tr>
<tr>
<td></td>
<td>Current seasonality of workers and residents</td>
<td>Rapid Rural Appraisal</td>
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<tr>
<td></td>
<td><strong>Baseline Assessment</strong></td>
<td>Stakeholder mapping</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Impact Report</th>
<th>Research categories</th>
<th>Suggested research methods</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Change in composition of population</td>
<td>Household surveys</td>
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<td>Relocated populations</td>
<td>Community consultations</td>
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<tr>
<td></td>
<td>In-migration and out-migration</td>
<td>Statistical analysis of census data</td>
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<td>Seasonality in movement of workers and residents</td>
<td>Focus groups</td>
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<tr>
<td></td>
<td><strong>Impact Report</strong></td>
<td>Rapid Rural Appraisal</td>
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<table>
<thead>
<tr>
<th>Impact questions</th>
<th>Adverse Impacts</th>
<th>Beneficial Impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>How can Project Activities impact size or composition of the population of Project-affected communities?</td>
<td>Fill in the Adverse Impacts associated with all population and demographic changes</td>
<td>Fill in the Beneficial Impacts associated with all population and demographic changes</td>
</tr>
<tr>
<td>Will the Project bring changes to the existing social infrastructure?</td>
<td>What is the level of risk that a particular Adverse Impact will occur?</td>
<td>What is the level of severity under the Risk Score Template?</td>
</tr>
<tr>
<td>Could there be displacement in populations?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Could the Project Activities result in in-migration or out-migration?</td>
<td></td>
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<tr>
<td>Will the creation of economic opportunities and services by the Project result in welfare imbalances or attract</td>
<td></td>
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</table>

- **Baseline Assessment**
- **Impact Report**
### Impact Mitigation Plan

<table>
<thead>
<tr>
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<th>Impact Mitigation Plan</th>
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<tr>
<td></td>
<td>Indicate how Adverse Impacts will be avoided for each identified Adverse Impact</td>
</tr>
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<td>Indicate how Adverse Impacts will be mitigated, if unavoidable, for each Adverse Impact identified as unavoidable.</td>
</tr>
</tbody>
</table>

### Land Use and Natural Resources

#### Baseline Assessment

<table>
<thead>
<tr>
<th>Research categories</th>
<th>Baseline Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current status of existing residential, agricultural and forestry land</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Current status of common property resources, such as water, grazing, hunting and fishing areas, forest, timber and fuel wood, medicinal and herbal plants, craft materials, nomadic routes and seasonal uses</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Suggested research methods</th>
<th>Baseline Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community natural resource and land use mapping</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Community consultations</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>GIS mapping using remote sensing data &amp; community data</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Geospatial statistical analysis</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Land surveying</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
</tbody>
</table>

#### Impact Report

<table>
<thead>
<tr>
<th>Research categories</th>
<th>Impact Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Projected changes to existing residential, agricultural and forestry land</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Projected changes to common property resources, such as water, grazing, hunting and fishing areas, forest, timber and fuel wood, medicinal and herbal plants, craft materials, nomadic routes and seasonal uses</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Suggested research methods</th>
<th>Impact Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community consultations</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Use GIS overlays to produce alternative maps and plans that utilize the Mitigation Hierarchy</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Current project plans overlay with baseline GIS data</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Impact questions</th>
<th>Impact Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sensitivity mapping to produce list of risks</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>What kind of impact can Project Activities have on land use?</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Could Project Activities reduce existing land use, potential land use or impact the quality of land use?</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>What kind of impact can Project Activities have on physical or economic displacement of people in projected affected communities?</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
<tr>
<td>Could Project Activities create economic opportunities vis-à-vis use of agricultural and forestry land?</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Adverse Impacts</th>
<th>Impact Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>What kind of Adverse Impact can Project Activities have on water sources?</td>
<td><strong>Impact Mitigation Plan</strong></td>
</tr>
</tbody>
</table>
### Beneficial Impacts

Are there any Beneficial Impacts to land use?

<table>
<thead>
<tr>
<th>Impact Mitigation Plan</th>
<th>Using Risk Score Template, project risks using sensitivity mapping to show severity risk associated with geographic areas</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Indicate how Adverse Impacts will be avoided for each identified Adverse Impact</td>
</tr>
<tr>
<td></td>
<td>Indicate how Adverse Impacts will be mitigated, if unavoidable, for each Adverse Impact identified as unavoidable.</td>
</tr>
<tr>
<td></td>
<td>Risk level index and mitigation plan referenced with Mitigation Hierarchy and reason for position</td>
</tr>
<tr>
<td></td>
<td>Documentation confirming available resources for mitigation proposal, if necessary</td>
</tr>
</tbody>
</table>

### Economic Impacts

<table>
<thead>
<tr>
<th>Baseline Assessment</th>
<th>Research categories</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Current status of economic vulnerability</td>
</tr>
<tr>
<td></td>
<td>Current status of employment: direct, indirect and temporary</td>
</tr>
<tr>
<td></td>
<td>Current status of unemployment</td>
</tr>
<tr>
<td></td>
<td>Current status of wages and income level</td>
</tr>
<tr>
<td></td>
<td>Current status of impact on local economy and businesses</td>
</tr>
<tr>
<td></td>
<td>Current status of competition for economic resources</td>
</tr>
<tr>
<td>Suggested research methods</td>
<td>Community consultations</td>
</tr>
<tr>
<td></td>
<td>Statistical analysis of census data</td>
</tr>
<tr>
<td></td>
<td>Household and market surveys</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Impact Report</th>
<th>Research categories</th>
<th>Projected change in employment: direct, indirect and temporary</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Projected changes in unemployment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Projected changes in wages and income level</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Projected changes in impact on local economy and businesses</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Projected change in competition for economic resources</td>
</tr>
</tbody>
</table>
### Projected change in economic vulnerability

#### Suggested research methods
- Community consultations

#### Impact questions
- What is the average or median income in a particular community?
- What kind of negative impact will the Project have on all local businesses and industry?
- What economic benefits can the Project bring to the community?

#### Impact Mitigation Plan
- Indicate how Adverse Impacts will be avoided for each identified Adverse Impact.
- Indicate how Adverse Impacts will be mitigated, if unavoidable, for each Adverse Impact identified as unavoidable.

### Community health, education and food security

#### Baseline Assessment

<table>
<thead>
<tr>
<th>Research categories</th>
<th>Suggested research methods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current status of communicable diseases</td>
<td>Secondary health data review</td>
</tr>
<tr>
<td>Current status of water resources</td>
<td>Literature review</td>
</tr>
<tr>
<td>Current status of food security</td>
<td>Community health appraisal</td>
</tr>
<tr>
<td>Current status of maternal and childhood health</td>
<td>Food security and market assessment</td>
</tr>
</tbody>
</table>

#### Impact Report

<table>
<thead>
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<th>Research categories</th>
<th>Suggested research methods</th>
</tr>
</thead>
<tbody>
<tr>
<td>Projected changes in communicable diseases</td>
<td>Community consultations</td>
</tr>
<tr>
<td>Projected changes in water resources</td>
<td>Epidemiological models</td>
</tr>
<tr>
<td>Projected changes in food security</td>
<td></td>
</tr>
<tr>
<td>Projected changes in maternal and childhood health</td>
<td></td>
</tr>
</tbody>
</table>

#### Impact questions
- Have similar Projects resulted in health issues or reduced food security for communities?
<table>
<thead>
<tr>
<th>Category / Impact</th>
<th>Likelihood</th>
<th>Severity</th>
<th>Size of Area</th>
<th>Term</th>
<th>Total Risk Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adverse Impacts</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beneficial Impacts</td>
<td></td>
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</tbody>
</table>

- **Population and Demographics**
  - Identified Risk
  - Identified Risk
  - Identified Risk

- **Land use and Natural Resources**
  - Identified Risk
  - Identified Risk
  - Identified Risk

- **Economic**
  - Identified Risk
  - Identified Risk
  - Identified Risk

- **Health and Nutrition**
  - Identified Risk
  - Identified Risk
  - Identified Risk
TEAM BIOGRAPHY

Professor Jenik Radon, Esq.

Jenik Radon is founder and director of the Eesti and Eurasian Public Service Fellowship, which has provided students from Columbia, Stanford, Tuck School of Business at Dartmouth and other institutions the opportunity to intern in emerging nations such as Cambodia, Ecuador, Estonia, Georgia, India, Kenya, Mozambique, Nepal, Philippines, and Uganda. Radon is a recipient of SIPA’s “Top Five” teaching award for his work during the spring 2010 semester; and his 2012 Capstone class won the Dr. Susan Aurelia Gitelson Award for Human Values in International Affairs for the report “Oil: Uganda’s Opportunity for Prosperity.” He was selected as a Fulbright Specialist (2012) at the Law School of Makerere University, Uganda in the field of extractive industry.

Radon served as a lecturer at Stanford University, where he taught access to medicine, human rights, privatization and international investment management, and as a visiting professor at the Indira Gandhi Institute for Development Research in Mumbai, India, where he taught “Dynamics of Corruption.” Radon was the Ashton J. and Virginia Graham O’Donnell Visiting Professor/Educator at Whitman College. He regularly teaches at Monterrey Tech, Queretaro, Mexico, which named him Distinguished University Professor.

Radon participated in the constitutional peace process in Nepal and served as a drafter of the interim peace constitution, which granted citizenship to millions of stateless people in the Terai region, among other things. He served on the UN Global Compact Academic Initiative taskforce which seeks to have business schools incorporate the Compact’s 10 human rights principles into their curriculum and teaching. He supports the Zawadi Africa Education Fund, Kenya, in bringing education to the next generation of Africa’s women leaders.

In the early 1980s, Radon founded Radon and Ishizumi, an international law firm representing international corporations and foreign public entities. From 1999 to 2007, Radon was one of the executors/trustees of Vetter Pharma, a privately-held German pharmaceutical company, the world leader in the production of aseptic pre-filled injectable systems.

In 1980, Radon co-founded the Afghanistan Relief Committee that sought freedom for Afghanistan and supported refugees displaced during the Afghan-Soviet war. Serving as an advisor during Estonia’s independence struggle, Radon co-authored the country’s foreign investment, mortgage/pledge, privatization and corporate laws and was an architect of Estonia’s privatization. In 1990, he was the first to officially raise the U.S. flag in Soviet-occupied Estonia since the 1940 Soviet invasion and was awarded the Medal of Distinction of the Estonian Chamber of Commerce.

Radon served as Georgia’s key foreign advisor and negotiator of the multi-billion dollar and multi-nation oil and gas pipelines from Azerbaijan to Turkey (the BTC), featured in the James Bond movie, The World is Not Enough. In 2000, he was awarded Georgia's highest civilian award, the Order of Honor. Radon presently advises public authorities and civil society in number of developing and emerging nations around the world, including Cambodia, Ecuador, Kenya, Mozambique, Nepal, Philippines, and Uganda, particularly in respect of the negotiation of extractive industry agreements, especially oil and gas, and sustainable natural resource development, as well as Afghanistan, among other things, in respect of the prospective multi-nation TAPI gas pipeline from Turkmenistan to Afghanistan to Pakistan to India.
Radon has lectured in almost 40 (and visited 100) nations, including Azerbaijan, Bhutan, Cambodia, China, Germany, India, Kazakhstan, Laos, Mexico, Mongolia, Mozambique, Nepal, Nigeria, South Sudan, Turkmenistan, Uganda, and UK. He has written numerous articles, including Resolving conflicts of interest in state-owned enterprises, International Social Science Journal (UNESCO); Staatsfonds vor den Toren(Sovereign Wealth Funds Before the [Trojan] Gates), Wirtschaft (Economy) section, Frankfurter Allgemeine Zeitung (FAZ); Getting Human Rights Right, Stanford Social Innovation Journal (December, 2007); How To Negotiate Your Oil Agreement, in Escaping the Resource Curse, ed. Macartan Humphreys, Jeffrey Sachs and Joseph Stiglitz (Columbia University Press, June 2007); Ethics in Business (MBA) Education - A New Must, International Management Development Research Yearbook, Technology, Structure, Environment, And Strategy Interfaces In A Changing Global Business Arena (June 2006); Sleepless, Clueless, Dangerous, in Ergo-Med (Haefer Verlag, Germany, March 2006); The New Mantra: Bribers Beware! The Journal for Transnational Management (Vol. 11, No. 4, 2006); Hear No Evil, Speak No Evil, See No Evil Spells Complicity, (UN) Compact Quarterly (Volume 2005, Issue 2), published by the (United Nations) Global Compact. Radon obtained his B.A. from Columbia University, a M.C.P. from the University of California, Berkeley and a J.D. from Stanford Law School.

Peru Capstone Team Biographies

Stephanie Ashton, a native of Colombia, received her B.A. from Georgetown University and a Master of International Affairs from the School of International and Public Affairs at Columbia University. Prior to moving to New York, she worked at the Colombian National Planning Department, where she was the liaison for multilateral development banks and international development agencies. She was also an advisor to the director of the Colombian Department for Social Prosperity, the government agency responsible for designing and coordinating all national poverty-reduction policies and providing reparations for victims of conflict in Colombia.

Kathrin Bausch is a German-qualified attorney and a Master of Law from Columbia Law School at Columbia University. Prior to her studies at Columbia Law School, she worked in the arbitration team of one of Germany’s leading international law firms, the Integrity Vice Presidency of the World Bank Group, and the Directorate-General for Energy of the European Commission. Her most recent research at Columbia Law School has focused on local content policies in Latin America for the Columbia Center on Sustainable Investment.

Anna Bulman received her B.A. and LL.B. from the University of Adelaide, Australia and a Master of Law from Columbia Law School at Columbia University, where her studies were focused on multi-disciplinary approaches to food security and international development. Prior to coming to Columbia Law School, she had clerked for a Supreme Court Justice in South Australia, worked for a top-tier corporate law firm in the Energy & Resources and Pro Bono practices, and interned at the Legal Resources Centre in South Africa, and North Australian Aboriginal Justice Agency and the Young Workers’ Legal Service in Australia. After graduation, she will return to the Legal Resources Centre as a David W. Leebron Human Rights Law Fellow to work on a right-to-food project.

Isabela Cunha is a Master of International Affairs from the School of International and Public Affairs at Columbia University, with focus on Human Rights. Her main interest is democratic governance and strategies against state brutality in Latin America. Prior to SIPA, she attended the International Affairs School at the University of Brasilia, where she organized and published a book on the subject of human security. Isabela is currently a member of the Beyond 2015 campaign advocacy team in New York, pushing for a legitimate successor to the Millennium Development Goals.
Danfu Liu is a Master of International Affairs from the School of International and Public Affairs at Columbia University concentrating on International Finance. Previously, he served as financial expert for SINOPEC’s overseas operations across multiple countries in Latin America and the Middle East.

Jacinth Pathmanathan is a Master of Law from Columbia Law School, Columbia University. Previously, she worked as a policy lawyer, specializing in policy development and legislative reform, at the Department of Justice and Victorian Law Reform Commission in Melbourne, Australia. After graduation, she will be spending her summer working at the Australian Permanent Mission to the United Nations.

Lara Pham is a Master’s in International Affairs from the School of International and Public Affairs, Columbia University with a focus on human rights and humanitarian policy. Previously, she served as Director of Operations at United Against Nuclear Iran and as a mining/metals analyst at the Electrum Group. Prior, she worked at the U.S. State Department’s U.S. Mission to the United Nations as an advisor on management and reform issues. After graduation, she will be joining the Counter Extremism Project as Deputy Director and Director of Policy Coordination. Her work has been published with World Policy Journal and Mic.

Nandini Ravichandran received her B.A. LL.B (Hons.) from NALSAR University of Law, India and is a Master of Law from Columbia Law School, Columbia University. Previously, she worked with the General Corporate team at the biggest national law firm in India with a focus on foreign investments (both inbound and outbound investments), private equity, and investment funds. Nandini’s research interests centers on issues at the intersection of law, public policy and the shifting paradigm of corporate responsibility.

Maya Srikrishnan is a Master of International Affairs from the School of International and Public Affairs, Columbia University, with a focus on energy and environment policy. She graduated from the University of Texas in Austin in 2010 with a B.A. in History and Latin American studies and received a Master’s degree in 2014 from the Stabile Center for Investigative Journalism at Columbia University. Her work has been published with the Los Angeles Times and ABC News.

Christina Tecson received her J.D. (second honors) from the Ateneo Law School, Philippines and is a Master of Laws from Columbia Law School, Columbia University. Previously, she worked as a corporate associate at Quisumbing Torres (member firm of Baker & McKenzie), where her practice focused on foreign investments, cross-border transactions, and public-private partnership projects. She was also a professorial lecturer in the Ateneo Law School and in the Ateneo de Manila University, teaching both law students and undergraduates the fundamentals of legal research and resource management. Her work has been published in the Ateneo Law Journal and the Centro Escolar University Law Journal.

Kazumasa Ueda is a Master of Public Administration from the School of International and Public Affairs, Columbia University. Previously, he worked as a public official at the Ministry of Economy, Trade and Industry in Japan. He has also served in Japan’s Office of the Prime Minister. After graduation, he will return to public service in Japan.

Ruthia Yi completed her postgraduate degree from Columbia University's School of International and Public Affairs, where she focused on International Economic and Finance Policy. Her background is in sustainable agriculture and food security in developing countries, and she is pursuing a career in agribusiness and trade. She is from New York, and has also lived and worked in West Africa and Southeast Asia.