

GOVERNMENT OF PERU

OFFICE OF THE PRESIDENT OF THE COUNCIL OF MINISTERS

Mining, Social License and Conflict Prevention

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ABBREVIATIONS

A.N.A.	Autoridad Nacional del Agua (<i>National Water Authority</i>)
A.P.R.A.	American Popular Revolutionary Alliance
B.I.T.	Bilateral Investment Treaty
C.D.A.	Community Development Agreement
D.C.M.	Dirección de Concesiones Minera (<i>Directorate of Mining Concessions</i>)
E.I.A.	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
F.P.I.C.	Free, Prior, and Informed Consent
F.T.A.	Free Trade Agreement
I.C.C.P.R.	International Covenant on Civil and Political Rights
I.C.E.S.C.R.	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
I.I.A.	International Investment Agreement
I.L.O.	International Labour Organization
INGEMMET	Instituto Geológico Minero y Metalúrgico (<i>Institute of Geology, Mines, and Metals</i>)
MINAM	Ministerio del Ambiente (<i>Ministry of the Environment</i>)
MINCUL	Ministerio de Cultura (<i>Ministry of Culture</i>)
MINEM	Ministerio de Energía y Minas (<i>Ministry of Energy and Mines</i>)
OECD	Organization for Economic Co-operation and Development
O.E.F.A.	Organismo de Evaluación y Fiscalización Ambiental (<i>Environmental Assessment and Inspection Agency</i>)
ONDS	Oficina Nacional de Diálogo y Sostenibilidad (<i>National Office of Dialogue and Sustainability</i>)
OSINERGMIN	Organismo Supervisor de la Inversión en Energía y Minería (<i>Supervising Body of Energy and Mines Investment</i>)
P.C.M.	Presidencia del Consejo de Ministros (<i>Presidency of the Council of Ministers</i>)
POT	Plan Nacional de Ordenamiento Territorial
SEIA	Sistema de Evaluación de Impacto Ambiental (<i>Environmental Impact Assessment System</i>)
SENACE	Servicio Nacional de Certificación Ambiental (<i>National Environmental Certification Service</i>)
S.M.B.	Special Mining Burden
S.M.T.	Special Mining Tax
U.N.	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous People

DEFINITIONS

2016 Report	SIPA, <i>The Peruvian Mining Sector: Exploring Issues Related to Social License, Corruption, and the Trans-Pacific Partnership Treaty</i> . SIPA Capstone Report 2016
Affected Community	A community that is directly affected by a mining project, usually referencing the social, economic, environmental effects of a project. This definition is not narrowly tailored or limited to a specific geographic location, but rather refers to the proximate cause of specific acts or actions associated with the entire mining chain.
Community	A collection of people, residences, agricultural areas, and commercial structures that comprise a historically recognized or newly established social structure, inclusive of both rural (<i>comunidades campesinas</i>) and indigenous communities.
Community Development Agreement	Agreement entered into between the mining company and local community for the purpose of improving the relationship between the stakeholders and specifying how the benefits of the mining project will be shared with local communities.
Company	A privately held partnership, corporation, or other entity configured to conduct business in the mining sector.
Free, Prior and Informed Consent (or also Consent)	<p>The right of accepting (agreeing to or rejecting) the implementation of a project that has more than an insignificant impact on the affected communities that is:</p> <p>Free, i.e. given without coercion, intimidation, manipulation or corruption;</p> <p>Prior, i.e. sought before every significant stage of the project; and</p> <p>Informed, i.e. all parties share information, have ready and easy access to information in a form that is understandable, and have enough information, including on all impacts of the project on the parties, and capacity to make informed decisions.</p>
Government	The executive branch of the The Republic of Peru, and all of its ministries, officers and agents.
Local Government	Municipal government officials, representatives, institutions and other entities.
Peru	The Republic of Peru, comprehensive of its territory in its current extent and political form.
Regional Government	Provincial, regional, subnational government representatives, institutions, and entities.
Report	This 2017 Capstone Report.
Social Conflict	The, often violent, manifestation of a protracted opposition between two or more parties in a defined society, usually stemming from rights, justice, agency, or political power.
Social License to Operate	The concept of social acceptance and approval between an affected community and a mining company, where the company has the requisite legitimacy, credibility, and trust to begin or continue operations.
Stakeholder	A party that has an interest in and/or is affected by mining operations. For the purposes of this report, there are three main stakeholders: the affected communities, the government, and the mining companies.
State	The Republic of Peru at the national, regional and local level, its representatives, institutions, and entities.

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 2016 to May 2017, the eight graduate student authors from the School of International and Public Affairs (SIPA) at Columbia University, New York, studied large scale mineral and metal mining in Peru using economic, social and environmental frameworks, while the three 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 Team benefited greatly from the help of students and professors affiliated with the Communications and Corporate Image program at the Peruvian University of Applied Sciences (*Universidad Peruana de Ciencias Aplicadas*).

The Capstone project client is Mr. Javier Fernandez-Concha Stucker, Vice-Minister of Territorial Governance, the Presidency of the Council of Ministers (Office of Prime Minister), Government of Peru (**Office of Prime Minister**, or **Client**), whose position was newly created to oversee management of social conflicts, decentralization and territorial organization, in all activities that impact local populations and mining activities. Professor Radon liaised with officials at the Ministry of Culture to refine the scope of the Report.

In March 2017, the Capstone team traveled to Peru for 10 days, where they conducted interviews with key stakeholders in Lima and in Cusco, including surrounding towns with a strong mining presence. These sites were chosen based on research conducted by the team, and agreed upon by the Client. In-country fieldwork consisted of interviews, 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 Client in creating a strategic plan for the development of the Peruvian mining sector. The report recommends several 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 possess diverse professional and academic backgrounds; in human rights, environmental science, investment and trade, conflict resolution, and many other fields.

The research would have been further strengthened if the team had been able to work in mining sites with more organized affected community presence, and if the team could have met with more diversified multinational and national mining companies. The Capstone team chose not to use surveys, polls or similar instruments, in the interest of fully committing to rigorous qualitative data collection. This kind of analysis provides telling insight into the perceptions surrounding the mining sector in Peru. The Capstone team 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, 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.

EXECUTIVE SUMMARY

Since the 1990s, the mining industry has been a boon to the Peruvian economy. However, mining activity comes at an economic, environmental, and human cost. The impact of mining projects on the surrounding environment and the local people has given rise to social conflicts, especially when these people feel excluded from project approval processes, from the economic benefits of the project or when they suffer environmental harm. When local communities feel they have no other recourse to protect their land and make their voices heard, they may opt to clash with the state and/or mining companies, resulting in work stoppages, violence, or even deaths. The Peruvian government still faces many challenges in mitigating and preventing these social conflicts.

Following up on the efforts of the two previous Peru Capstone teams at Columbia SIPA, this Report focuses on the impact of mining projects on local communities, and provides recommendations for the President of the Council of Ministers Office (*Presidencia del Consejo de Ministros del Perú*, or *PCM*), and for the newly created Vice Ministry of Territorial Governance (*Viceministerio de Gobernanza Territorial*) in particular. Based on secondary research and in-country fieldwork, including interviews and observations on the ground, this Report identifies the absence of the state in rural communities, legal gaps, ineffective public administration processes, and community management as key challenges to address in order to prevent future social conflicts. It also proposes a draft Consent Agreement to be entered into by mining companies and impacted communities, and recommends legal enforcement and oversight of the agreement by the state.

The first section of the Report, **Absence of State**, focuses on state absence in rural areas impacted by mining activities. Mining sites are often located in remote, rural regions of Peru that experience higher-than-average levels of poverty. Economic growth stemming from mining activities has done little to alleviate rural poverty. This fact, combined with negative perceptions of the state based on past experiences, has given rise to general feelings of distrust towards the state among rural communities. The overuse of declarations of state of emergency by the state, as well as the overuse of force by police in response to social conflicts, has served to further strain the relationship between the state and rural communities. Decentralization efforts beginning in the early 2000s were a positive step towards increasing state presence in rural regions, but much remains to be done. Regional and local governments are still lacking the capacity to properly address the root causes of social conflicts, and persistent corruption continues to be a major stumbling block. Increasing state presence in rural areas affected by mining activities is critical to repairing the state's relationship with rural communities and preventing future social conflicts.

The second section of the Report, **Analysis of the Current Legal Framework**, analyzes the existing legal framework pertaining to the mining industry in Peru. While national legislation has been enacted that aims to protect communities impacted by mining, several legal gaps must be filled in order to effectively prevent future social conflicts in the mining sector. The second section focuses on five key areas of the existing legal framework, providing recommendations for improving each.

First, there are several international treaties and soft laws that Peru is party to which are pertinent to the domestic mining industry. The central government must analyze these international treaties-- e.g. the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and ILO Convention 169-- as well as the soft laws-- e.g. the UN Declaration on the Rights of Indigenous People (UNDRIP) and the Extractive Industry Transparency Initiative (EITI)-- before pursuing any legal or policy reforms. International investment agreements, such as Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs), must also be analyzed before legal or policy action is taken, given their potential to impact foreign investment in the Peruvian mining sector.

Second, although legislation regulating the mining sector exists in the form of the Framework Mining Law (or *Ley General de Minería*), this law fails to adequately address the issue of social conflict. The second section of the Report provides recommendations for strengthening the Framework Mining Law by increasing landowner protections, making the *Compromiso Previo* legally binding, increasing the publication of mining concessions, enhancing the legal and technical reports performed by the *Dirección de Concesiones Minera*, eliminating automatism of concession granting under the law, and by increasing the involvement of regional and local governments in the issuance of mining concessions.

Third, existing environmental regulations in Peru represent an opportunity for the government to address a significant catalyst of social conflict-- environmental pollution caused by mining activity. The second section also focuses on the deficiencies of the Environmental Impact Assessment (EIA) stipulated by the Peruvian Law of the System of Evaluation of Impact Assessment (SEIA) which regulates the environmental aspects of a mining project. It also analyzes regulations such as the Regulation on the Quality of Water for Human Consumption (or *Reglamento de la Calidad del Agua para Consumo Humano*) that govern the use of water, a critical concern of mining activity. Environmental regulations would benefit greatly from a streamlining of applicable bureaucratic processes in order to provide more robust protections to the ecosystems threatened by mining pollution.

Fourth, the Consulta Previa law, which requires that indigenous populations be consulted before taking legislative or administrative action, can be modified to better meet the goal of achieving social license and preventing conflict. The second section identifies several deficiencies of the Consulta Previa law, namely: the lack of legal enforcement, the difficulty of determining which communities the law applies to, the overlapping of administrative responsibility during application of the law, and the ambiguity surrounding the timing and continuation of the consultation process.

Finally, the second section looks at issues surrounding fiscal revenues collected from mining activity in Peru. Mining royalties (*regalía minera*), the 'Canon Tax' (*Canon Minero*), the tax on dividends, the Special Mining Tax (SMT), the Special Mining Burden (SMB), and the *Derecho de vigencia* fee paid for land use are part of the Peruvian fiscal regime which applies to mining. This revenue earned by the central government from the mining industry is not always shared with regional and local governments however, or if they are, they are not always utilized efficiently. Stabilization agreements such as the *Convenio de Estabilidad Jurídica* (Legal Stability Agreement) and the *Contrato de Estabilidad Minera* (Mining Stability Contract) guarantee the dependability of these tax regimes for foreign investors. However, they create an obstacle for the Peruvian government to enact or amend legislation that would support the prevention of social conflict.

The third section of the Report, **Enforcement and Compliance**, addresses the challenges of formalizing community consent; i.e. the permission granted by local communities to the mining companies allowing a mining project to be undertaken in their area. In order to truly achieve social license and minimize the likelihood of social conflict, mining companies must enter into a fair and transparent agreement that informs the community of the impacts of the mining project, provides benefits to the community in exchange for these impacts, and is legally binding. As an example of such an agreement, section three highlights the Consent Agreement provided in the annex of the Report. Although in some cases mining companies enter into agreements with communities to gain their consent for a project, there is currently no universal agreement that also includes state oversight and sanctions, penalties or legal remedies for breaches. The Consent Agreement provided in the annex fills these gaps and the third section of the Report provides guidance for its implementation and use.

The fourth section of the Report, **Public Administration and Process Mapping**, explores six measures for improving governmental administration of issues surrounding the implementation of social license for mining projects. The first measure deals with the improvement of coordination among government agencies. Lack of intra-governmental coordination has impeded information sharing, resulted in unclear or overlapping responsibilities, and hampered the development of a national strategy for the prevention of social conflict. The second measure focuses on the

professionalization and training of public servants in order to prepare them for the challenges of working with rural communities to obtain social license. The third measure is centered on the creation of land management and development plans. Obtaining social license as a means of preventing conflicts is dependent on the effective management of land by the central government. This section recommends a national strategy for streamlining land management. The fourth measure discussed focuses on the creation of a national system of conflict prevention, one that envisions the central government improving its interactions with communities by increasing communication and information sharing. The fifth measure highlights the need to perceive the obtainment of social license as a process, and to map out the steps involved in the process accordingly. This section recommends launching a Social License Pilot Program as a means of developing a process and assessing its efficacy. Finally, the sixth measure discussed in the fourth section focuses on the need for increased transparency and accountability in the Peruvian mining sector to combat corruption.

The fifth and final section, **Community Management**, concludes the Report with an analysis of the communities impacted by mining projects. Based on interactions with community members and leaders in the field, the Capstone team identified three issue areas that drive communities to pursue conflict with mining companies and the state: community disempowerment, lack of effective communication with communities, and failure to properly manage community expectations. When communities lack technical resources and information about proposed mining projects in their area, they may form inaccurate expectations of the project, both in terms of impact and benefit. When their expectations are not met, they may feel powerless to change the situation because of a lack of knowledge, expertise, and/or political leverage, and thus opt to protest, clash with authorities, create work stoppages, etc. The fifth section concludes with recommendations for the state to better manage its relationship with the impacted communities in order to avoid such a conflict scenario.

Each section provides targeted recommendations for addressing the issues analyzed in the section. For a comprehensive list of all the recommendations made in the Report, please see Key Recommendations on the following page.

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LIST OF RECOMMENDATION

SECTION	KEY ISSUES AND RECOMMENDATIONS
ABSENCE OF STATE	<p>(1) Rural Socioeconomic Inequalities (see page 3)</p> <p>The statistical inequalities that exist between rural and urban centers can be reduced by: (i) providing greater incentives for individuals in the informal sector to transition into the formal economy. The registration of small businesses, income, and employees must be easy to complete; (ii) initiate a means tested conditional cash transfer program that targets rural families with high school aged children with the goal of increasing secondary education rates; and (iii) initiate a state funded micro credit scheme for the poorest regions, and which targets women the as recipients of funds.</p> <p>(2) Demilitarize Police Forces (see page 6)</p> <p>Support must be provided to congressional efforts to prohibit the ability of companies to hire law enforcement personnel for security purposes.</p> <p>(3) Declaration of State of Emergency (see page 6)</p> <p>The recourse to domestic remedies and stakeholders’ participation in the consultation process with all levels of government should be encouraged. The suspension of civil liberties should never be the first course of action.</p> <p>(4) Relations with Rural Communities (see page 6)</p> <p>Procedures for redress should be implemented in areas that were affected by past tragedies such as the Grupo Colina massacres. The state must utilize a human rights based approach that focuses attention on the needs of rural citizens in any program construction.</p> <p>(5) Budgetary Execution Rates (see page 9)</p> <p>Regional and local governments should be required to provide an investigative report in cases where budgets are not fully implemented. Report must indicate the remedial solutions that will be taken to ensure that all funds are utilized as authorized by law.</p> <p>(6) Capacity Building of Regional and Local Public Officials (see page 9)</p> <p>Regional and local public administrations officials should be provided with assistance and training to plan, implement, and fund development projects, in particular on how to make full use of allocated financial resources.</p>
ANALYSIS OF THE CURRENT LEGAL	<p>(1) Considering International Law Instruments When Drafting National Legislation and Policies (see page 12)</p>

FRAMEWORK

The government should take into account, and incorporate, international regimes when designing new policies and legislation on mining activities and social conflict prevention between the mining company and the community. More specifically, the government should, to state the obvious, abide by international treaties and conventions signed by Peru in order to comply with international law and remain consistent with the principles endorsed in cases where the relevant international instrument does not have binding character.

(2) Interpretation of ICCPR and ICESCR (see page 13)

With respect to compliance with the ICCPR and the ICESCR, it must be recalled that their provisions are regularly interpreted by the respective UN treaty bodies. In order to be consistent with international human rights obligations, Peru should closely monitor the work of the ICCPR and ICESCR treaty bodies, especially with regards to the progress concerning indigenous communities and other related topics.

(3) Compliance with International Law Instruments on Indigenous People's Rights (see page 13)

With respect to compliance with the ILO Convention 169 and UNDRIP, Peru has already enacted national laws in implementation of the provisions. Peru should further enact the requirement of obtaining free, prior and informed consent provided under the ILO Convention 169 and UNDRIP, so as to reduce the risk of social conflicts domestically and be a forerunner in advancing indigenous rights internationally.

(4) Implementation of Transparency Standards (see page 13)

In 2016, Peru's status on the implementation of the EITI standard was of "meaningful progress." However, Peru should work to attain the "satisfactory progress" level, which is the highest of three classifications. Peru should move forward towards the complete fulfillment of the EITI standard given that transparency and accountability builds trust with the communities and companies.

(5) Right to Regulate (see page 14)

The majority of the BITs and FTAs that Peru entered into do not include provisions granting the host state the right to regulate environmental/social matters nor investor's obligations with respect to the environment and social rights. On the contrary, applicable IIAs, as currently drafted, attribute significant protections to the foreign investor, while severely limiting the state's ability to legislate.

The government should reconfigure the current strategy for negotiating international investment agreements to include provisions that maximize the state's powers to restrict investors' activities with respect to environmental and social concerns. This can avoid the imposition of burdensome obligations, which might compromise Peruvian livelihoods in the future.

(6) Stabilization Clauses (see page 15)

The adoption of laws and regulations by the Peru aimed at ensuring the protection of environmental and social concerns may be severely impaired by the presence of stabilization or freezing clauses in the agreements entered into with foreign investors. Stabilization/freezing clauses may also be

found in BITs or FTAs themselves, thus effectively prohibiting the enactment of new laws and regulations applicable to the foreign investor following the entry into force of the relevant treaty. Peru should analyze IIAs that are currently in place in order to identify and assess the risks arising from the inclusion of stabilization/freezing clauses.

(7) Investor-State Arbitration (see page 15)

State-investor arbitration represents a material issue for Peru. Indeed, even in the event that Peru is successful in its arbitration against a foreign mining company, the state may still be required to pay significant amounts for arbitration costs and lawyer fees. In the event that Peru was to lose in the arbitration proceeding, the results would be even worse. Not only would Peru be required to pay damages to the mining company, but the mining operation would continue, thus aggravating the conflict between the mining company and the local community.

The government must take into account past experiences and prior investor-state dispute settlement procedures to foresee and mitigate potential conflicts that can arise with investors once the mining project is set up. In particular, the government should try to maximize the use of third party submissions as provided under the ICSID rules, in order to force arbitral tribunals to consider communities' rights in the adjudication of the case.

(8) Reform of National Mining Laws and Breach of IIAs (see page 15)

The enactment of new laws and regulations in the mining sector that substantially affect the rights of foreign investors may constitute a breach of applicable IIAs, and thereby grant a foreign investor the right to initiate arbitration against Peru.

The government must minimize the adverse impact on foreign investment by limiting the application of new measures to contracts with foreign investors that were concluded after the entry into force of the relevant amendment. This reduces the risk of investor-state dispute settlements being initiated against Peru.

(9) Scope of the Framework Mining Law (see page 17)

The Framework Mining Law only requires the obtainment of a mining concession for the activities of exploration and exploitation, while the preliminary activities such as search (cateo) and prospection (prospección) can occur without a license. While such activities can be freely performed, their performance might infringe upon the private property rights of local communities over the land.

In order to reduce the risk of social conflicts arising from the trespassing on the private property of local communities by the mining company, a legally binding obligation should be introduced whereby the mining company wishing to perform preliminary activities must obtain the permission of the landowners to access the land, as well as provide continuous and updated information on the impact that preliminary activities may have on the land, both to the landowners and to the municipal authorities. In this respect, the municipal authorities should be responsible for gathering complaints from the landowners in the event of non-compliance by the mining companies as well for imposing respective pecuniary sanctions.

(10) Effectiveness of the Compromiso Previo (see page 17)

The Compromiso Previo, as currently envisaged, lacks effectiveness in ensuring the sustainable operation of the mining project as well as the enforcement of the rights of the communities affected by the mining project. It is widely recognized that the Compromiso Previo is only a formality, without any enforcement mechanism that allows state entities to supervise the compliance with the obligations undertaken with the declaration. Non-compliance with the provisions of the Compromiso Previo may present another source of social conflict between a mining company and communities as communities trust in the commitments made in the Compromiso Previo and a belief that they will be upheld.

The petitioner must be required not only to assume the obligations set out in the Compromiso Previo but also to present a development plan explaining in detail how such obligations are going to be complied with, and to provide continuous and updated information to competent municipal authorities regarding the status of the implementation of the obligations of Compromiso Previo.

The state must also ensure effective enforcement of the obligations arising from the Compromiso Previo by specifying that the breach of such obligations shall represent a ground for expiration (*caducidad*) of the mining license.

(11) Adequacy of Publicity Requirements (see page 17)

The publicity provisions envisaged in the Framework Mining Law are not effective in ensuring actual knowledge of the affected communities about the issuance of the mining concession or the filing of the respective application. The publication of the relevant information on “El Peruano” - and/or other regional newspapers - is merely a formal requirement, which does not actually convey any information about the potential adverse effects that the mining activity may have on the lives and the environment of communities in the affected territory.

The publicity provisions should require the publication of the mining concession or application on not only INGEMMET’s website, but also on the walls of the townhouse of every municipality located in the area covered by the mining concession or application, and at the house of every community leader of communities located in the area covered by the mining concession or application.

(12) Role of Technical and Legal Reports (see page 19)

The technical and legal reports issued by the competent offices within the DCM only perform a formal control over the requirements for the grant of a mining concession. The governmental authorities do not factually investigate and evaluate the advantages of the mining project for the concerned area, as well as the compliance of the mining project with other relevant legal obligations.

The evaluation carried out by the DCM in its technical and legal reports should have a more substantive content. The legal report should ascertain the mining company’s compliance with: (i) the legal obligations with respect to preliminary activities, as suggested under Recommendation 10 above. Such ascertainment should be carried out on the basis of the information provided by the competent municipal authorities; and (ii) the obligations arising under the Compromiso Previo declaration. Such ascertainment should be carried out on the basis of the information provided by the competent municipal authorities.

The technical report should evaluate at least the adequacy and effectiveness of the measures that the mining company intends to adopt in the

performance of its obligations arising under the Compromiso Previo.

In the event that the technical and legal reports detect non-compliance by the mining company with legal obligations or technical and environmental standards, the issuance of the mining concession should be denied.

(13) Reducing the Automatism of the Mining Concession Process (see page 19)

The procedure set out in the Framework Mining Law is automatic. The law only requires that the petitioner and the area covered by the mining concession be duly identified and, once formal requirements have been complied with, there is little if no possibility to challenge or stop the administrative process and prevent the issuance of the mining concession. This automatism should be removed as it does not leave room for considering rights and interests of affected communities. The following mechanisms can provide for leeway in decision-making: (i) extending the review performed by the competent authorities to the compliance with substantive requirements, such as those set out by the Compromiso Previo and by other applicable sources of law; (ii) extending the grounds for expiration (*caducidad*) or nullity (*nulidad*) of the mining concession to include the breach of substantive requirements referred to under Recommendation 12 above; and (iii) strengthening the remedies available to third parties to challenge the administrative proceeding.

(14) Increasing Local Governments' Involvement in the Mining Process (see page 20)

The procedure for the issuance of mining concessions is carried out and managed exclusively at a centralized level and involves only the petitioner and the relevant administrative authority, i.e. INGEMMET. Nowhere in the course of this procedure, is the government under the obligation to liaise either with the regional or local government, which could have a better understanding of the concerns regarding the mining activity in the area under their competence.

The regional and local governments should be included in the procedure for the issuance of mining concessions. This objective could be attained, for example, by: (i) requesting local and regional authorities to participate in the administrative proceeding, for example by means of consultative reports and/or advisory opinions; or (ii) decentralizing the process for the issuance of the mining concessions, granting the respective authority to the regional or local governments.

(15) Reform of the SEIA Law Framework (see page 24)

In order to be fully suitable to address the environmental concerns arising from the performance of mining activities, the SEIA Law and relevant implementing regulations should be amended so as to provide for, among others: (i) the number of government workers employed to evaluate EIA, that must be proportional to the number of EIAs to be revised yearly, as currently the legislation does not contain such provision; (ii) the removal of the MINEM's authority over EIA approval for projects under categories I and II, so as to avoid the conflict of interests caused by MINEM's simultaneous authority over the promotion of foreign investment in the country; (iii) stronger enforcement policies and agency coordination on enforcement tasks, which are needed to ensure consistent outcomes; and (iv) through the amendment of Article 10 of the SEIA Law, the requirement that every EIA take into account potential impacts on the environment that could result from an accident in the mining

operations or unintended consequence derived from daily operations.

(16) Considering the Dynamic Nature of the EIA (see page 25)

EIAs should be dynamic, rather than static, documents that are continually evaluated and assessed throughout the lifetime of the project. A more dynamic approach is needed to consider that the mining project is an active and continuous process subject to contingencies and as such this contingencies should be included in the evaluation.

(17) Reform of the Framework under the Water Regulation (see page 26)26

In order to be fully suitable to address the water pollution concerns arising from the performance of mining activities, the Water Regulation should be amended so as to, among others, provide the Council for Water Basin Resources with the power to grant or withhold permission for water use to mining companies.

(18) Reform of the Framework under the Water Regulation (see page 26)

More generally, there is a clear need to address and improve water management and monitor water scarcity. Better coordination and accountability mechanisms amongst agencies are needed to monitor water pollution and scarcity in mining projects and enforce the standards. In addition, the funding of OEFA, ANA and Senace institutions must be increased, so as to allow them for the full development of their regulatory and monitoring functions.

(19) Legally Binding Nature of Consent under the Consulta Previa Law (see page 28)

Peru should introduce consent as a legally binding requirement, with the goal of complying with the international standard of free, informed, prior consent of ILO Convention 169 and UNDRIP. The content of an agreement, as well as mechanisms to monitor and ensure compliance, should be introduced into the legal framework.

(20) Widening the Scope of the Beneficiaries of the Consulta Previa Law (see page 29)

All communities affected by a mining project should be included in the consent whether or not they are indigenous as they are all impacted. There must be guidelines to assess when a community is directly impacted. Defining and assessing impact will require further research and development of respective recommendations and guidelines.

(21) Amending the Current Allocation of Responsibility between Governmental Actors (see page 30)

The distribution of responsibilities among the different government entities should be clarified and simplified for the sake of the communities as well, who have an interest in knowing their rights and how they are implemented.

(21) Timing of the Consultation Procedure (see page 30)

Consultation should ideally be concluded before the issuance of a mining concession, in any case continued and repeated throughout the lifecycle of a mining project, thereby respecting and responding to the changing perceptions and expectations in a social relationship. Future research should also look at the role of mining companies in the process of Consulta Previa.

(22) Distribution of Revenues (see page 33)

Revenues distributed to regional and local governments are severely underutilized. The grounds of such underutilization lie, among others, in the weak institutional governance of local authorities. The system of *canon minero* creates perverse incentives that discourage open and democratic governance. Indeed, in the absence of a robust civil society, excessive funding tends to encourage clientelism, corruption, and lack of transparency with respect to governmental initiatives.

In order to reduce the risk of misuse of financial resources, capacity building programs for local and regional officials should be established and promoted to ensure efficient use of government funds. Additionally, transparency and accountability of regional governments should be furthered through publicly accessible databases containing revenues, outlays, contracted agreements, and public projects. This increased access to information will allow communities to hold local government officials accountable, while setting reasonable expectations for projects.

(23) Shared Use of S.M.T. and S.M.B. (see page 34)

The S.M.T. and the S.M.B., as well as the revenues obtained from taxes on dividends, are not shared with regional and local governments. In addition, as they are considered as costs for tax purposes, they can be deducted from the taxable basis for the calculation of the income tax. As such, the amount of *canon minero* to be transferred at the subnational level will also be reduced. The lack of financial resources is frequently listed as one of the reasons preventing local and regional governments from effectively addressing social conflicts. The current regime governing revenue sharing with respect to the mining sector should be reviewed, in order to ensure sufficient revenues for local and regional authorities in order to remove or, at least, minimize the risks of social conflicts.

(24) Shared Use of S.M.T. and S.M.B. (see page 35)

Stabilization agreements usually impair the ability of Peru to implement newly enacted or amended legislation aimed at preventing social conflict in the mining sector. Stabilization agreements protect foreign investors from changes in the Peruvian administrative legal framework. Any new administrative laws and regulations designed to protect and enhance the rights of communities will not be applicable following the execution of a stabilization agreement with a foreign mining company. The stabilization agreements entered into by the government should specify that the stability does not include the enactment of laws and regulations designed to protect public interests, such as the environment, health, cultural heritage, or the promotion of communities' rights.

(25) Powers of Delegation to Individual Representatives (see page 22)

The key to the issue seems to be the delegation to individual representatives of the powers to sign off surface rights. Accordingly, the following is recommended in relation to the negotiation of surface rights on lands held by communities:

- A. Imposing publicity and standstill requirements prior to the concession of surface rights, where (a) the community needs to be informed in detail about the impending negotiations – e.g. through posting of bills in the village, in Spanish and in the local language if need be; and (b) a period of time needs to elapse between the notice and the commencement of negotiations; and
- B. Requiring some form of collective approval to sign land rights off – i.e., do not vest in individual representatives the power to negotiate land rights. This is not unlike what routinely happens in corporations, where individual directors usually require some form of board approval to acquire or sell property.

LACK OF ENFORCEMENT AND COMPLIANCE

(1) Multi-level Capacity Building (see page 38)

Increasing governmental capacity to monitor these processes. This capacity shall be reinforced by the training of civil servants as well as political official in the aspects of the project that should be monitored, what would result in a breach of the contract, and in the mechanisms available for communities and government officials to report a breach of the conditions. This capacity building should also include the training of citizens and organizations that volunteer to reinforce the monitoring process. Such capacity training for communities has already been performed by Peruvian organizations that work as intermediaries between communities and businesses. Trainings on environmental monitoring should be implemented in every community that wishes to participate. This will increase the levels of trust between communities and mining companies, since the communities themselves will be in a position to monitor compliance with the law or the Consent Agreement.

(2) Reinforce Political Intent (see page 39)

The Viceministerio de Gobernanza Territorial can be used as the tool to reinforce overall political intent by acting as a platform to inform other government branches of the importance of contributing towards the monitoring of these types of agreements. The governmental entities that could directly or indirectly be involved in the monitoring of these processes would be the ANA, the *Ministerio de Agricultura y Riesgo*, the Ministry of Interior, and the Regional Governments.

(3) Integrating the Consent Agreement within the Current Legal Framework (see page 39)

The integration between the current legal framework and the Consent Agreement may be attained through the provision of cross-default mechanisms. The law should obligate the mining company and the affected community to enter into the Consent Agreement. In this respect, the law introducing the Consent Agreement should expressly provide that the breach of the Consent Agreement automatically entails a breach of applicable Peruvian law on mining.

The setup of cross-default mechanisms is essential to the effectiveness of the system. If these are not established and instead the companies can

carry out parallel actions after a default, the companies will continue mining and the community will be unprotected. In other words, the company will not have incentives to accelerate the process to correct the breach of the contract if it can continue its operations. However, if via cross-default mechanisms their operations are suspended, they will make it a priority to comply with the agreement to continue their activity.

(4) Setting the Burden of Proof on the Mining Company (see page 39)

The Mining Company must provide proof that it has not breached the Consent Agreement if accused of a breach.

(5) Suspension of the Mining License (see page 39)

The mining license should be suspended for the whole duration of any default by the mining company. This measure can be useful in reducing social conflicts in that it forces the mining company to suspend the mining activity, thus preventing a potential worsening of the damage already caused. Furthermore, it grants the relevant stakeholders the opportunity to meet and agree upon the measures to be adopted by the mining company for the purpose of remedying the breach. The benefits granted by the mining license will only be reinstated when the damage has been remedied and adequate measures have been adopted in order to ensure that the performance of the mining activity can occur in compliance with all applicable laws.

(6) Obligation to Adopt Remediation Measures within an Established Timeframe (see page 39)

The mining company must adopt all necessary measures required in order to prevent conflict and eliminate the detrimental consequences arising from the breach. The duty to fix the consequences of the breach should be fulfilled within a set period of time, it being understood that the relevant timing must be determined and agreed upon by the parties. The timing should be limited enough so as to effectively force the mining company to adopt the measures required.

In this respect, Article 7.3 of the proposed Consent Agreement introduces the possibility for the parties to agree on a reasonable timeframe. If the company does not provide remedy within the agreed period this will entail the suspension of the license. In order for the company to comply, it will have to use the most up to date technical resources to correct any damage caused.

(7) Continuing Application of Workers' Rights (see page 39)

The mining company will be under the obligation of the company to pay the full salary to workers of the local site and compensate them for any injury or damage caused, even when the license has been suspended or revoked. In order to afford these unexpected costs the company must create an emergency fund that guarantees rapid remedial actions. In this way, it will be possible to grant the affected community with some form of monetary relief while, at the same time, ensuring that the mining company will be imposed an adequate penalty for its violations.

(8) Financial Aid to Communities for Legal Representation (see page 39)

The communities must be provided with the financial means to engage lawyers for legal services and representation, pay legal costs associated with

the conflict resolution process, as well as any other related costs that would prevent the communities from representing themselves in the process. An alternative would be the establishment of a legal advising section in the rural divisions of the Viceministerio de Gobernanza Territorial, which would provide free legal services to community members. Finally, the government should provide support to nonprofits that provide legal assistance to indigenous populations.

(9) Anti-Corruption Efforts (see page 40)

Regarding the need to diminish the number of corrupt officials, Peru already has adequate legislation addressing corruption in the mining sector. Beyond these measures, the Consent Agreement establishes that if at any point evidence of corruption or incidents of bribery on the part of mining companies becomes apparent, the mining company is in violation of the agreement, which can result in the suspension or revocation of the license. Furthermore, according to the Consent Agreement, the community may withdraw its consent if corruption occurs in connection with the securing of the community's consent or in the undertaking of the mining activities. Finally, the consent provided by the community will not be deemed as "free consent" if it was given by any member of the community deemed to be corrupt.

PUBLIC ADMINISTRATION AND PROCESS MAPPING

(1) Leadership Role of the Office of the President (see page 44)

Securing the social license associated with mining projects must be a top priority for the government. The Office of the President should lead an initiative aimed at achieving social license in order to demonstrate political will and interest in preventing social conflicts resulting from mining activities. Moreover, the Presidency should publicly show its support for the new Vice Ministry of Territorial Governance to empower it in the eyes of other governmental agencies. Furthermore, giving the new Vice Ministry legal powers through a presidential resolution can ensure that other governmental agencies cooperate and comply with the Vice Ministry's initiatives.

(2) Simplifying the Procedures for Obtaining Social License (see page 44)

It is necessary to establish a single procedure for obtaining social license to better allocate governmental responsibilities and duties; for example, by establishing a procedure similar to the Environmental Impact Assessment, but with a specific focus on social management issues.

(3) Ensure Communication among Governmental Agencies (see page 44)

Effective communication among governmental agencies could be ensured by creating a platform where all ministries can share and update relevant information associated with communities and mining projects. This could work as a social media platform and include an instant messaging platform (e.g. online chat) to facilitate communication, cooperation, coordination, and decision-making processes among governmental agencies. Instant messaging applications will also enhance coordination regarding conflict prevention and conflict resolution tasks.

(4) Importance of Interpersonal and Negotiation Skills (see page 46)

It is necessary to increase and enhance interpersonal skills and knowledge of civil servants through training programs and workshops on interculturality and negotiation skills. Ensure that these learning tools are properly applied. Moreover, public officials that will be working on issues

related to social management and/or extractive industries should have familiarity with the areas of impact in order to understand their political, socioeconomic, and environmental contexts. Thus it is crucial that civil servants frequently visit, and engage with, impacted communities and mining areas.

(5) Introduce Specific Job Descriptions (see page 46)

It is also necessary to define specific job descriptions for public officials working on conflict prevention and resolution issues to ensure relevant employee backgrounds in critical subject matters, while demonstrating necessary personal characteristics, such as empathy. In that sense, hiring procedures should include psychological or personality screening, as well as case interviews (based on real life conflict prevention and social management experiences) and ‘role-play’ questions to evaluate candidates’ responses to hypothetical scenarios based on real life examples.

(6) Increase Diversity in Personnel (see page 46)

Hire personnel from different socioeconomic, cultural, and professional backgrounds, in order to diversify perspectives, allowing the state to formulate comprehensive solutions for achieving social license. The state should especially seek to recruit lower-income individuals, women, young people, people of indigenous and African descent, and others traditionally underrepresented in government through targeted outreach activities.

(7) Increase Public Officials’ Motivation (see page 46)

Motivate people to work in the public sector by developing a government career path for young professionals. This requires promoting better work conditions through salary increases, access to health and travel insurance, economic and logistical resources for travelling to communities, scholarships, fellowships, and training programs.

(8) Implementation of a National Land Development Plan (see page 47)

The Vice Ministry should lead the first National Land Development Plan (*Plan Nacional de Ordenamiento Territorial*) at the country level to clarify what is already concessioned land and where it overlaps with protected natural land, community owned land and other denominations.

(9) Increase the Number of Personnel for Mapping Purposes (see page 47)

The Vice Ministry, through its office of the *Subsecretaría de Asuntos Técnicos y Demarcación y Organización Territorial* (Office of Technical Issues, Demarcation, and Territorial Organization), should increase the number of personnel dedicated to map the Peruvian territory for the new organization of the land.

(10) Establishment of a Diagnosis Taskforce (see page 47)

The office should form a taskforce (*Comisión Técnica*) with personnel of the MINAM, MINEM, ANA, MINCUL, OEFA, SENACE and nonprofit organizations to develop a diagnosis of current land use and titling. The taskforce should incorporate different stakeholder perspectives (with a

participatory approach) and be formed by an interdisciplinary team. The task force should spearhead the design of the POT (*Plan Nacional de Ordenamiento Territorial*). Additionally, the Vice Ministry should regularize the land titling of communal land and expedite the classification of territories where there is overlap between the mining concessions and communities. This will provide clarity for mining companies in regards to whom they should contact from the community to request permission to enter the land before exploration.

(11) Digitalization of Land Title Information (see page 47)

The Vice Ministry, through its *Subsecretaría de Información Territorial* (Office of Territorial Information), should compile and digitize the updated land titles and corresponding geographic information system (GIS) maps of Peruvian land, as well as make them publicly available through its Internet portal.

(12) Capacity Building for Local Governments (see page 47)

The Vice Ministry should provide regional governments with technical assistance in the form of experts in GIS planning, engineers, and others to develop land planning in confluence with the newly created POT. These experts could either be from the current government or outsourced as external consultants.

(13) Providing Prompt Information to the Affected Communities (see page 50)

The potentially impacted communities must be promptly consulted and informed – regardless of whether they are indigenous or rural (*campesinas*) – about the mining project, including decisions made regarding concessions, exploration, exploitation, etc. This includes communities where these projects are undertaken as well as communities in nearby areas, or any areas where the activities or transportation of the minerals is taking place. In order to avoid misunderstanding the communities' needs, conduct an analysis of each potentially impacted community, taking into account its particular characteristics.

(14) Organization of the Consultations with the Affected Communities (see page 50)

Increase attention to logistical details of dialogue management and negotiations conducted with community members and public servants. Oftentimes, lack of attention to detail and to the importance of these meetings creates misunderstandings and tension. Set the date, time, duration and schedule of the meeting in advance and ensure that state representatives adhere to the schedule. Pre-plan other logistical details such as the location, the presence of public servants, etc., and then comply with the logistical announcements or duly inform if there are changes.

(15) Communities' Capacity Building (see page 50)

In addition to information, the affected communities' need to be provided with the skills to better understand legal rights and implications, in order to negotiate with other stakeholders in mining project development.

(16) Role of Women in the Consultation Process (see page 50)

Women must be included in the process of asking about community needs. Provide information, legal assistance, and negotiation skills training to participate in any dialogue or setting where there are negotiations of agreements. Any agreements reached without the participation of women, will only include consent of less than about 50% of the population, leaving gaps in addressing the needs of the community.

(17) Compliance with Human Rights Obligations (see page 50)

The State must recognize the communities and respect their human rights and collect information about communities and any agreements they reach with the mining companies and government authorities.

(18) Enforcement of Communities' Agreements (see page 50)

The State must monitor any agreements reached with impacted communities and ensure compliance of agreements between communities, local governments and mining companies. It must also assist communities that are suffering from lack of compliance with reached agreements on the part of the local government and/or mining company. This assistance should include but is not limited to: interpreters in their local language, legal aid, administrative tools, linking them with nonprofits, and opening channels of communication with the mining companies.

(19) Social Conflicts and Use of Force (see page 50)

The State must limit the use of force and avoid declaring states of emergency, unless absolutely necessary. It must allow communities to protest peacefully and work with the police to create a use-of-force protocol to avoid the use of excessive force, thereby preventing social unrest. Use of force can trigger social conflict escalation and serve as a flashpoint for expanded unrest and violence.

(20) Establishment of a National System of Conflict Prevention (see page 50)

In order to prevent social conflict, the Government needs information, much of which it can gather by engagement with communities. To achieve this, Peru should develop a National System of Conflict Prevention, which is a database containing all agreements reached by the communities that are located in the territories of land concessions for mining exploration and exploitation. Although the Vice Ministry of Territorial Governance is focusing on creating an “inventory of previous agreements,” this database needs to be more than an inventory of previous agreements.

The National System of Conflict Prevention will serve as a tool for moving forward with current dialogue processes, negotiations, and future agreements, as new agreements are continuously updated. This database of agreements is key to determining the rights and obligations of the mining companies and affected communities. Additionally, it will serve as a tool to track progress and/or failure of compliance.

A database is the first step, but continued monitoring and compliance are critical to ensure efficacy and legitimacy in oversight. In doing so, the state must be actively involved in monitoring the agreements between communities and companies. Agreements must have a clear timeline for specific actions prior to the exploitation phase. Therefore, monitoring the compliance of such agreements is necessary. In the cases where

agreements have not been reached yet or negotiations have not begun, the Vice Ministry should act as an impartial mediator between the communities and companies to facilitate reaching agreements.

(21) Integrating IT Resources in Community Mapping Processes (see page 52)

Technology should be used to map communities, by collecting and analyzing information that supports setting the conditions for social license. While concurrently collecting data, community mapping should be conducted with support of the *Defensoría del Pueblo*, by identifying affected communities at low, medium, and high risk of conflict. Mapping is challenging because communities are not monolithic; they change with population growth, migration, and displacement.

Additionally, communities face internal challenges of leadership, representation, and community organizing. Technology gaps (lack of broadband internet, electricity and cellphone service in remote areas) complicate this process, as many communities are located hours away from major population centers and are therefore difficult to reach and engage with. However, the government should aim at providing access to Internet throughout the country to ensure access to information. The Vice Ministry should launch an online platform where communities are able to upload their reached agreements with mining companies or post non-reached agreements (i.e. information regarding pending or failed negotiations).

Decisions of dialogue and mediation interventions should be based on the information collected on the online platform, on the basis of the particular characteristics of the communities and the situation analysis to prioritize those in which conflict is rising.

(22) Implementing a Social License Pilot Program (see page 53)

Since social license has never been successfully implemented in this context, the government should launch a Social License Pilot Program for an upcoming mining project approval process to test the different components of it, adjust it, and scale it nationally. The Pilot Program should incorporate the use of a simple consent agreement in which commitments of both parties are clear in terms of deliverables, timing, and consequences for failure to comply with the terms.

This Pilot Program should begin with the government informing the potentially affected communities about the project, include the company seeking permission to enter the land for exploration, monitor the dialogue process being inclusive of women and incorporating their needs, and in drafting the associated agreement for witnessed signature, ensuring transparency in the community. Then the agreement should be uploaded and made publicly available through the Vice Ministry's portal, allowing for the continued monitoring and compliance of agreements before proceeding into the next stages of the mining project.

The Pilot Program should also include an evaluation phase to assess if the agreement attained its objective in the short run, that is, to have the consent of the impacted communities and prevent conflict. After the assessment, the Vice Ministry should make adjustments to any part of the design of the Social License Pilot Program and scale it up to promote social license for mining at the national-level.

(23) Development of IT Infrastructures (see page 53)

Incorporating technology in the social license process is key to empower all the involved stakeholders. The Vice Ministry should work with MINEM to incorporate the requirement for the mining company to provide free Internet access to the surrounding communities into the mining exploration and exploitation concession processes through a public-private partnership. The mining companies should provide free public Internet access within a radius outside the premises of the future mining site and exploration camp (the specific radius to be determined by the community in agreement with the company). For these affected communities, Internet access serves as a critical communication tool with the state, where the Vice Ministry's portal to upload posts on advancements of dialogue, negotiations, and archived consent agreements. Increased transparency and access to information will address knowledge deficits in communities, positively influence political will at the national and sub-national level, and promote social license in mining projects.

(24) Performance of Cost-Benefit Analysis and Risk Assessment Evaluations (see page 53)

A cost benefit analysis and risk assessment should be implemented to underpin the social license and mining approval process. This analysis will consider and weigh the social and environmental aspects of a mining project before the communities consent, in order to reduce social conflict. This increased awareness is important, because communities agree to projects where they are fully aware of the costs, risks, and chain of responsibility of responsibility if an accident occurs.

The cost benefit analysis should incorporate results of the Environmental Impact Assessment, the social costs (for example displacement of communities, increased transit in the area, etc.), and a risk assessment that clearly states the impacts associated with an environmental accident. These costs and risks must be assessed by the government *before* approving the exploitation phase. This analysis must be publicly available, including appropriate data sets, before official project approval, in order to discuss concerns with the community in the “*Mesas de Diálogo*” and “*Talleres Informativos*”.

(25) Establishment of a Single Database Containing All Information Relating to Mining (see page 56)

A publicly accessible Internet database should be developed that contains environmental impact statements, concessions, mining exploration and operations (locations, maps, descriptions, and parties), closed mines, agreements between companies and communities, and contracts. The database should be easily accessible and divided into sections designed for ease of use by affected communities (see previous subsections discussing information management and publicly accessed databases, including the *National System of Conflict Prevention*). Additionally, all historical mining documentation should be digitized and transferred to the publicly accessed portal.

(26) Enforcement of Anti-Corruption Measures (see page 56)

The Government should provide support for and effective enforcement of anticorruption measures that hold companies, as well as individuals, liable for corruption offenses associated with the mining industry.

(27) Establishment of a Corruption Reporting Platform (see page 56)

A secure mobile platform for corruption reporting should be created in partnership with Transparency International, which will act as a neutral arbiter, to instantly report and respond to corruption in timely manner.

COMMUNITY ENGAGEMENT

(1) Increase Access to Information and Expertise (see page 59)

To address the community's lack of information and understanding, provide them with learning tools on their rights, development and sustainability, environmental monitoring and social monitoring. The central government must institute a method for providing access to multidisciplinary expertise for communities in order to address the asymmetry among stakeholders.

One way to do this is by developing training workshops taught by lawyers with expertise in the mining sector, by environmental advisors who can explain EIAs to locals, among others types of experts. Another way to provide such expertise is to institute a system whereby communities can employ the services of experts free of charge for the purpose of advising them on aspects of the mining project that fall within their area of expertise. In order to minimize conflicts of interest and develop a coherent strategy, all training programs and workshops must be revised and approved by a multidisciplinary governmental commission led by the Viceministerio de Gobernanza Territorial. Participants coming from the private sector or civil society must also be vetted. Moreover, training sessions and workshops should be monitored by a designated team, the outcomes published and accessible to the parties.

(2) Addressing the Distrust (see page 59)

To address distrust, the central government must promote transparency through explanatory sessions which include information about the mining project, its implications on the community and the environment, as well as about the agreements made between the community and the state and/or the mining company (e.g. specifying the obligations and responsibilities of the company, the community and the state). Such sessions should be conducted by trained presenters with expertise in a relevant field. For example, a session focusing on explaining agreements made between stakeholders should be conducted by a lawyer with experience in the area.

(3) Enhance Women's Participation (see page 59)

In order to ensure inclusivity of all community members, the central government must enhance female participation in conflict prevention and conflict resolution processes. To do so, women's participation should be encouraged by ensuring they are present at and able to express their concerns during conflict prevention and conflict resolution processes. Additionally, the central government should encourage communities to assess their own success in increasing female participation by asking them to report on the number and nature of positions occupied by women.

(4) Timing for Exploration of Category I Projects (see page 64)

Citizens have only 10 days to provide comments from the date of publication of the EIA for revision. The authorities will take these comments into consideration when revising the EIA. The SEIA law should provide a minimum of 30 to 60 days for revision. It is not reasonable to expect

communities to understand a complex legal document. The term 10-day term currently provided is too short and results in the communities' inability to voice their concerns effectively.

(5) Timing for Exploration of Category II Projects (see page 64)

The population is notified through publication in the official diary "Diario Oficial El Peruano," where judicial notifications are published, and on the radio. Citizens are given 25 days to comment, after which the publication and observations are sent to the mining company. However, the law establishes that the authorities can send back their comments before this 25 days period expires. Include the publication systems required for category I projects (by which companies have to bring a copy to the community) for projects of category II. Reaching the communities with information is crucial to avoid tensions, no matter the category of the project. Furthermore, eliminate the third paragraph of article 10. This paragraph allows for the authorities to send their comments on the EIA before the end of consultation term. This could result in the government submitting its comments on the EIA without taking into account the communities' perspective, if their hearing takes place at the end of the consultation term.

(6) Role of the Affected Communities (see page Error! Bookmark not defined.)

Affected communities/citizens have no say in the design of this plan and the authorities have a mere 7 days to amend it. Creating a plan for citizen participation with the communities or with representatives of communities should be made mandatory. The timeline for the government to provide amendments to such plan should be extended to ensure qualitative revisions. The board revising the plan should include persons with knowledge about the community and the location. EIA approval should require publication similar to the one described for "exploration of category projects II", including radio advertisements.

(7) Communities' Technical Assistance (see page 65)

The legislation does not specify if the communities will have to pay for the technical assistance or if it will be provided by the Government. Presently, communities do not have access to such services as they lack the funding to hire such experts. Companies should be mandated to provide funding to communities to access technical assistance. Furthermore, the legislation does not contemplate any mechanism of collaboration between the government and affected committees to hear communities concerns when mining companies breach a contract. There is an immediate need to create an office to liaise this committee with the ANA and the Ministry of Environment.

(8) Improve Community Organization (see page 67)

In order to improve community organization and representation, the Government should create a taskforce under the Viceministerio de Gobernanza Territorial that is responsible for identifying and evaluating the types of existing local decision-making bodies of communities impacted by mining projects. The number of government officials on the taskforce should be proportional to the number of communities being assessed.

The taskforce can ensure adequate representation of affected communities and community members by registering, formalizing and strengthening

existing community organizations. This will avoid fractured or overlapping leadership within communities.

The taskforce must provide recommendations for the creation of community decision-making mechanisms should their evaluation determine that the communities affected by a mining project do not have an existing decision-making body that adequately represents them.

(9) Revise Dialogue Approach and Communication Mechanisms (see page 70)

Information about the impact of mining projects must be made readily available to communities in simple terms, appropriate for adults with minimal levels of education. Such information must be provided both in Spanish and the local language. Branches of government (e.g. the Viceministerio de Gobernanza Territorial) must provide informational materials (videos, brochures, copy of agreements, EIA's, etc.) and training sessions that explain the more complex aspects of mining projects and granting of consent. Again, such materials must be presented in simple-- but not patronizing-- terms both in Spanish and in the local language. Among other benefits, this helps to strengthen communication channels among the parties, builds trust and helps manage community expectations.

Mesas de Dialogo should be used as a conflict prevention tool rather than resolution. Additionally, the Mesas de Dialogo should be inclusive as a platform for those communities that might be indirectly affected by mining activities as well. Once the Mesa de Dialogo is established, agreement should be reached through consensus among the parties and not imposed by one party. During the dialogue process, technical support should be provided to the communities to ensure information symmetry. Additionally, a constant communication system should be set up and the government should promote initiatives such as the "Dialogue Group on Mining and Sustainable Development of Peru" (in Spanish *Grupo de Dialogo Minería y Desarrollo Sostenible de Perú*), a space that aims at building consensus among the stakeholders surrounding sustainable mining.

Lastly, the Government should identify and assess past and present experiences associated with community communication mechanisms, such as the *Mesas de diálogo*. Identify good practices and replicate them by adapting these to each community's situation.

(10) Effective Communication and Informative Plans (see page 70)

The Government should create a platform where community members can access relevant information regarding a mining project, mining companies, legal agreements, mining procedures and processes, grievance mechanisms etc.

Main Report

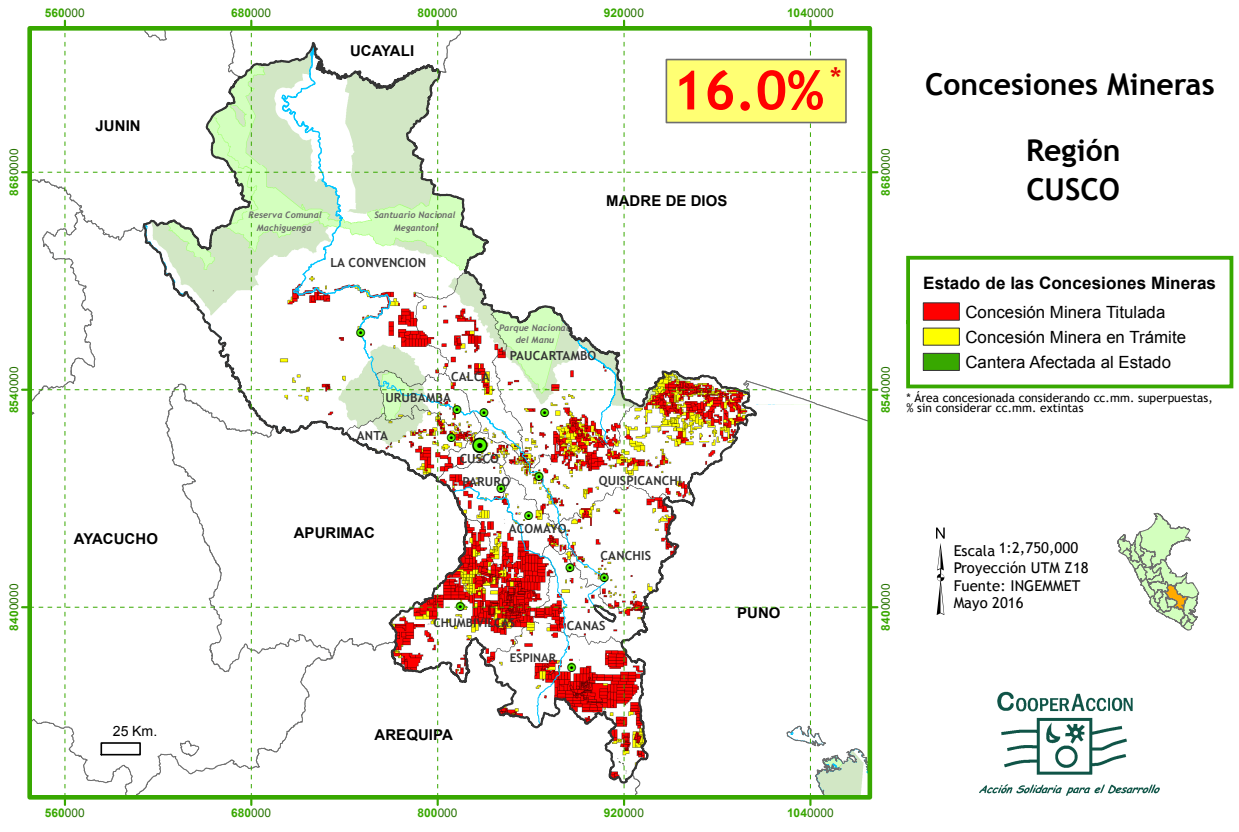


Figure 1 – Chart of Mining Concessions in the Cusco Region
Source: CooperAccion

INTRODUCTION

“Investment Climate” is defined as “the economic and financial conditions in a country that affect whether individuals and businesses are willing to lend money and acquire a stake in the businesses operating there”.¹ An unfavourable investment climate is one of the many hindrances faced by emerging economies. Given the complexity and specific characteristics of extractive industries², carefully crafting a proper investment climate for these industries is even more relevant³, and Peru has the potential and tools to undergo this process in the right way.

Ensuring a stable and strong investment climate is key for attracting new investment and forging a good reputation amongst foreign investors looking to set up long-term investments. A holistic approach is needed in order to promote a robust investment climate, addressing barriers that affect all phases of the investment lifecycle. The World Bank asserts that this approach should include strategies to address barriers in the “legal, regulatory, procedural and institutional⁴” realms. The US Department of State goes further by recommending their national investors to consider eight spheres that directly affect investment climate. These areas are: market barriers, business risk, legal and regulatory system, dispute resolution, corruption, political violence, labour issues, and intellectual property rights. Out of these 8 issues our report has identified 6 areas in the Peruvian mining sector that if addressed promptly could lead to a significant improvement in the investment climate of the sector. These areas are market barriers, business risk, legal and regulatory system, dispute resolution, corruption, and political violence.

Crafting a welcoming environment for businesses does not mean giving in and taking up on all their demands. Businesses do not want to invest in countries in which the success and security of their investments depend on the willingness of the government to accept their demands on a case-by-case basis. Instead they are looking for a stable environment in which if they comply with the law they will be treated fairly, equitably, and predictably. They are looking for locations in which good governance is the rule and not the exception. Places in which they can focus on developing their business rather than dealing with the barriers that arise from lack of development and the rule of law. As the Index of Economic Freedom by Heritage establishes, climate investment improves when the country counts on

¹ Investopedia. *Investment Climate*. Accessed at <http://www.investopedia.com/terms/i/investmentclimate.asp>

² Moran, T, *Toward Best Outcomes from Foreign Direct Investment in Poorly Performing States* in Birdsall, N., Vaishnav, M., Ayres, R., *Short of the Goal: U.S. Policy and Poorly Performing States* (2006).

³ Investment in the extraction of natural resources is a delicate topic in a country’s economy. If there is investment in these type of industries but the other industries are neglected, large exports can overvalue the exchange rate. Furthermore, extractive industries have been traditionally tied to corruption and are industries where diverting revenues to special interests is easier than in other more transparent industries.

⁴ The World Bank, *Investment Climate* (May 11, 2017), accessed at <http://www.worldbank.org/en/topic/competitiveness/brief/investment-climate>

an independent judiciary system that protects property and contractual rights of nationals and foreigners, and when corruption levels are rare⁵.

Finally, companies want to put their money in relatively predictable environments. This means that the government in place has to anticipate and eliminate those risks before they have even arisen. This is especially the case regarding social conflicts derived from the exploitation of natural resources and from the modification of natural habitats in a community. Social conflicts are considered one of the main sources of risk for businesses and as such need to be addressed. In cases, such as in the Peruvian mining sectors, where conflicts have arisen before, there is distrust ingrained in society. This absence of trust drives up the cost of business transactions⁶, it leads to an unwillingness to enter into transactions with unknown parties and reduces the size and frequency of transactions⁷. Such environment of distrust propagates itself to new generations if the grievances are not properly addressed.⁸

In order to leave behind past conflicts and ensure a solid investment climate moving forward, more resources need to be directed to strengthening what the World Bank defines as the broader “enabling environment” which includes “institutions, governance, capacity, and social capital”⁹. The implementation¹⁰ of an investment climate reform after conflict requires of a holistic strategy addressing all these points where a communications strategy, inter-institutional coordination, and the inclusion of unconventional stakeholders (stressing the role of women) in the process are crucial to prevent the appearance of spoilers in the process towards a better investment climate. This report addresses each of the aforementioned issues in five sections that address different dimensions of the Peruvian reality that can be better utilized to improve investment climate for the mining sector. These dimensions are: institutional, legal, governance, enforcement and compliance, and community management.

⁵ Heritage, *Index of Economic Freedom 2017*, accessed at <http://www.heritage.org>

⁶ Governance and Social Development Resource Center, *Helpdesk Research Report: Investment Climate in Fragile and Conflict Affected States* (2010).

⁷ Mills, R., and Fan, Q., *The Investment Climate in Post-Conflict Situations* (2006).

⁸ Governance and Social Development Resource Center, *supra* note 6.

⁹ Mills, *supra* note 7.

¹⁰ USAID, *A Rough Guide to Investment Climate reform in conflict affected countries*, accessed at <http://www.enterprise-development.org/wp-content/uploads/Rough-Guide-to-Investment-Climate-Reform-in-Conflict-Affected-Countries.pdf>

1. ABSENCE OF STATE

Mining sites and communities are often located in remote areas of Peru where historically the state has been largely absent,¹¹ resulting in extreme poverty and lack of access to basic social services. A feeling of abandonment within the rural communities has resulted in negative attitudes and a general distrust towards the state. To the extent that there has been state presence, the state's assertive response to social conflicts, particularly through declarations of states of emergency and the use of excessive force, has further reinforced this negative feeling and distrust. The failure to effectively and professionally decentralize state powers, authority and engagement has contributed to rural communities demanding more from mining companies in light of ineffective local governments that fail to meet basic needs.¹² To achieve the ultimate goal of reducing social conflict, a cooperative relationship must be developed between the state and rural communities, built on a foundation of consistent community engagement. This will also put the state in a better position to manage the tensions between affected communities and mining companies, thereby preventing future social conflict.

1. Absence of the State

a. Overview of the Issue

The absence of the State from the regions in which mining activities are performed has resulted, among others, in the following:

i. Extreme Poverty in Rural Regions

Extreme poverty remains high in areas where indigenous and rural communities reside. This is despite national poverty rates having substantially decreased in the past decade, largely due to the expansive growth of the commodities market.¹³ The regions of Huancavelica, Apurimac, Puno, Ayacucho, and Amazonas each exhibit a poverty rate above 50%.¹⁴

The absence of the state, as evidenced by a lack of provision of basic social services,¹⁵ exacerbates the extreme poverty in rural areas. In 2009, 30% of the lowest income population, the majority of which lives in the rural regions of Peru, were unable to access medical care.¹⁶ Only about two doctors are available per 10,000 people and malnutrition rates for children range from around 40 to 45%.¹⁷ In Andean regions, home to many of the country's indigenous and rural communities, more than 40% of the inhabitants lack access to water, electricity, and sanitation.¹⁸ Peru allocates less public expenditures for health and education than its neighboring countries of Chile and Colombia.¹⁹

Also, as a result of the absence of the state and the persistence of extreme poverty, economic advancement is slow to materialize in rural regions. This drives people to seek employment in

¹¹ For the purpose of this Report, "absence" should be interpreted as a lack of physical facilities such as offices, and representatives, etc.

¹² In more detail regarding the absence of the state in relation to mining companies, see SIPA, *The Peruvian Mining Sector: Exploring Issues Related to Social License, Corruption and the Trans-Pacific Partnership Treaty*. SIPA Capstone Report 2016, 46 (2016) (hereinafter, **2016 Report**).

¹³ See The World Bank, *Poverty Headcount Ratio at National Poverty Lines* (2015), available at <http://data.worldbank.org/indicator/SI.POV.NAHC?locations=PE> (last visited Apr. 29, 2017).

¹⁴ The World Bank, *Public Expenditure Review for Peru: Spending for Results*, 8 (2012), available at <http://documents.worldbank.org/curated/en/225811468297875669/pdf/NonAsciiFileName0.pdf> (last visited Apr. 1, 2017).

¹⁵ Basic social services include public services such as healthcare, infrastructure, education, social welfare programs, etc.

¹⁶ See The World Bank, *supra* note 14, at 9.

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 9.

¹⁹ Peru spends 4.4%, Chile 4.6%, Colombia 4.4% of the GDP for education as of 2013. See The World Bank, *Databank. Government Expenditure on Education, Total (% of GDP)*, available at <http://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS?page=2> (last visited Apr. 29, 2017); Peru spends 3.3%, Chile 3.9%, Colombia 5.4% of the GDP for health as of 2014. See The World Bank, *Databank. Government Expenditure on Health, Total (% of GDP)* <http://data.worldbank.org/indicator/SH.XPD.PUBL.ZS> (last visited Apr. 29, 2017).

the informal working sector,²⁰ for example, as street vendors or domestic laborers.²¹ In the informal sector, individuals and families do not benefit from unemployment insurance or social welfare programs. Additionally, they are not protected against market fluctuations or against unforeseeable hardships such as disease and abnormal weather patterns, which could result in an unexpected loss of income. Erosion of the rule of law and decreased confidence in public institutions are additional societal consequences of large informal working sectors.²² The inherent non-compliance with tax collection and market regulations in the informal working sector limits the ability of the state to introduce greater oversight in the labor market in the more rural regions of the country, which further deepens the precarious standard of living.²³ The result is a vicious circle of social tension.

The overall absence of the state leads indigenous and rural communities to demand basic services and other benefits from mining companies in exchange for the extraction of raw materials from their territories. Differing interests, between the community on one hand and the mining company on the other, can create tensions, inhibit agreement, and culminate in social conflict. The presence of the state, through the provision of a minimum standard of living and oversight of private actors, is crucial to managing these tensions.

ii. Inequality

Despite a significant expansion of extractive activities all across Peru in recent years,²⁴ economic inequality is still present throughout the country. Economic growth has not benefited the more rural parts of the country, in spite of the fact that extractive operations are most often located in these areas. The rural poverty rate of 50% is significantly higher than the national average of about 22%.²⁵ Health and educational services in rural areas lack the quantity and quality they achieve in more urban areas.²⁶ This inequality and uneven distribution of basic social services between rural and urban areas contributes to a negative perception of the state among indigenous and rural communities.

iii. Distrust

Poverty and inequality within communities have led to a feeling of distrust towards the state. The perception in rural regions tends to be that economic growth has not been equal and that economic gains have not been evenly distributed. Despite statistics indicating that income inequality actually fell,²⁷ in the World Values Survey measuring the amount of confidence citizens have in their government, Peru ranked last of the 55 countries measured.²⁸

Added to this perception is the distrust of rural and indigenous communities stemming from past exclusion from reform processes and national economic growth. For instance, in the 1990s, the government favored foreign investment at the expense of environmental

²⁰ For the purpose of this Report, “informal working sector” refers to the all jobs that are not recognized as normal income sources, i.e. not taxed, and not monitored by the government.

²¹ Estimates have determined that the size of the informal economy remained 30% in 2011. See R. Machado, *The Informal Economy in Peru: Magnitude and Determinants, 1980-2011*, 41 *Revista de Ciencias Sociales* 191, 221 (2014).

²² See G. Perry, *Informality, Exit and Exclusion*, 22 (2007).

²³ *Id.* at 22-23. Informal employment is less of a problem in urban areas. Urban centers, which utilize formal employment systems, are better able to offer services since urban workers create greater tax revenues for the economy. As the World Bank notes, “workers uninsured against health, old age, and other risks may have lower productivity [levels] and fewer incentives to invest in human capital accumulation” when compared to individuals in the formal sector that have such social protections. See *id.*

²⁴ P. de la Flor, *Mining and Economic Development in Peru*, *Revista Harvard Review of Latin America*, 24-27 (2014).

²⁵ See The World Bank, *supra* note 14, at 8.

²⁶ The number of doctors in rural regions is about 2 per 10,000 people, while in urban areas it is about 15 per 10,000. Malnutrition rates for children range between 40 to 45% in rural areas, while urban areas exhibit rates closer to 10%. See The World Bank, *supra* note 14, at 8.

²⁷ The Gini index for Peru went from a rate of 51.83 in 2001 to 44.14 in 2014. Source: The World Bank, *Databank. Gini Index (World Bank Estimate)*, available at <http://data.worldbank.org/indicator/SI.POV.GINI?end=2014&locations=PE&start=2001> (last visited Apr. 1, 2017).

²⁸ See The World Bank, *supra* note 14, at 8.

sustainability and indigenous rights in rural regions. Foreign investors received unrestricted access to lands and changes in the national legal system were enacted to foster a more robust mining sector. Such reforms were undertaken without any formal consultation process in rural areas and failed to take the needs of the affected communities into account.²⁹

Improving living standards through an increase in state presence in rural regions can build community trust towards the state. State presence, by means of providing basic services and redistributing economic gains, demonstrates political will to improve the economic situation of the population in rural areas. This includes the consultation of communities in reform processes that impact their economic situation.³⁰ Permanent state presence also creates the conditions for a sustainable relationship between the communities and the state. Addressing distrust in these ways will improve the state's position when it comes to preventing and mitigating social conflicts.

b. Recommendations

i. Rural Socioeconomic Inequalities

The statistical inequalities that exist between rural and urban centers can be reduced by:

- A. Providing greater incentives for individuals in the informal sector to transition into the formal economy. The registration of small businesses, income, and employees must be easy to complete.
- B. Initiate a means tested conditional cash transfer program that targets rural families with high school aged children with the goal of increasing secondary education rates.
- C. Initiate a state funded micro credit scheme for the poorest regions, and which targets women the as recipients of funds.

2. Excessive Use of Force and State of Emergency

a. Overview of the Issue

The state's actions towards within social conflicts in various instances have been extremely problematic. The most recent clashes between protesters and mining companies, in which the state played a negative role, occurred at the Las Bambas project located outside of Cusco.³¹ In September of 2015, local police who were hired by the mining company killed three protesters and wounded 17 others as local residents blocked the street that led to the Las Bambas mine.³² Local protestors also allege that local police shot at the ambulances which were taking the injured to local hospitals, the delay of which resulted in the death of the three individuals who were shot.³³ The issue of militarized police has now gained national focus, and a debate has

²⁹ In order to achieve the substantial increase in revenues from an expansion of the mining sector, the government instituted various reforms to land rights to facilitate the development of private and commercial activities. In 1996 for example, the administration implemented the National Mineral Cadastre Law that vastly revised Peru's mining concession processes. This Law essentially "centralized...concessions under a new geographic reference system" that led to the automatic guarantee that mining firms would have full control over land resources. While market liberalization contributed to a 85% increase in foreign direct investment in export and a 215% rise in imports between 1990 to 1998, this rise was the result of land reforms that contributed to a growing sense of marginalization and distrust of the government among the rural communities. See J.T. Bury, *Mining Mountains: Neoliberalism, Land Tenure, Livelihoods, and the New Peruvian Mining Industry in Cajamarca*, 37 *Environment and Planning* 221, (2005).

³⁰ For more information in this respect, please refer to Chapter 2, Section 5 below.

³¹ The Las Bambas copper mining site is owned by the Chinese consortium group Mineral and Metals Group (MMG), a subsidiary of the state owned Minmetals Corporation. The project's developers consistently state that the site could become one of the three largest copper mining sites in the world, in an effort to demonstrate the importance to Peru of the site's completion. The site already produces 25% of Peru's total copper exports, and if completed, could make Peru the second largest producer of copper in the world. See BBC News, *Peru Anti-Mining Protests Sees Deadly Clashes* (Sept. 29, 2015), available at <http://www.bbc.com/news/world-latin-america-34389803> (last visited Apr. 30, 2017).

³² Reuters. 2016. "Peru Scrutinizes Pacts Between Police and Miners After Clash." Reuters. October 24. Web. <https://www.yahoo.com/news/news/peru-scrutinizes-pacts-between-police-miners-clash-230927874.html>

³³ The Guardian, *Three Dead As Farmers and Police Clash at \$7.4 billion Chinese Mine* (Sept. 29, 2015), available at <https://www.theguardian.com/world/2015/sep/29/three-dead-as-peruvian-farmers-and-police-clash-at-74bn-chinese-mine> (last visited Apr. 1, 2017).

begun on whether private companies should be able to hire state law enforcement for commercial purposes.³⁴

A state of emergency was declared in February 2016 for the Las Bambas mine.³⁵ The consequence from such a decision is the temporary suspension of constitutional rights such as the right to privacy, freedom of movement, and peaceful assembly.³⁶ Police and the armed forces obtain authorization to intervene by using force and arresting without charge.³⁷ This sudden negative appearance of the state, which only acts to suspend legal rights, is taken negatively by rural communities and contributes to the distrust that currently exists. This adds to the already existing distrust of rural and indigenous communities based on past abuses of power and human rights violations committed by the state during the armed conflict against the terrorist organization Sendero Luminoso in the 1990s. These historical grievances remain unresolved until today.³⁸

The dichotomy between an absent state and governmental efforts to unilaterally introduce mining projects by force contributes to social conflict. Excessive use of force, human rights violations by the police, and arbitrary killings and arrest also aggravate the prospects for a positive and sustainable relationship with communities. The government should curtail the frequent use of declarations of state of emergencies and refrain from the excessive use of force. It not only causes loss of civilian lives but also foments distrust against the state government as well as stalemates or failures of mining projects themselves. It results in a vicious negative cycle of social tension.

b. Recommendations

i. Demilitarize Police Forces

Support must be provided to congressional efforts to prohibit the ability of companies to hire law enforcement personnel for security purposes.

ii. Declaration of State Emergency

The recourse to domestic remedies and stakeholders' participation in the consultation process with all levels of government should be encouraged. The suspension of civil liberties should never be the first course of action.

iii. Relations with Rural Communities

Procedures for redress should be implemented in areas that were affected by past tragedies such as the Grupo Colina massacres. The state must utilize a human rights based approach that focuses attention on the needs of rural citizens in any program construction.

³⁴ Peru Support Group. 2016. "Bill to End Private Police Contracts In Mines." Peru Support Group. October 29. Web. <http://www.perusupportgroup.org.uk/news-article-1219.html>

³⁵ See Defensoría del Pueblo, *Reporte de Conflictos Sociales N° 156*, 41 (2017), available at <http://www.defensoria.gob.pe/modules/Downloads/conflictos/2017/Reporte-Mensual-de-Conflictos-Sociales-N-156-Febrero--2017.pdf> (last visited Apr. 16, 2017).

³⁶ See Decreto Supremo N° 015-2017-PCM, *Declaran Estado de Emergencia en la provincia de Cotabambas del departamento de Apurímac*, available at <http://busquedas.elperuano.com.pe/normaslegales/declaracion-estado-de-emergencia-en-la-provincia-de-cotabambas-decreto-supremo-n-015-2017-pcm-1484472-1/> (last visited Apr. 16, 2017).

³⁷ Decreto Legislativo No. 1186 (for police) and Decreto Legislativo No. 1095 (for armed forces).

³⁸ The 2003 report of Peru's Truth and Reconciliation Commission estimated that up to 80,000 people were killed as a result of that conflict, with about 40% of the deaths occurring in the remote regions of Ayacucho, and that the victims were disproportionately poor indigenous peasants. Although Sendero Luminoso was ultimately held responsible, about 44% of the deaths were deemed attributable to the state. For instance, in the Santa massacre in the indigenous region of Ancash in May of 1992, nine rural community members were subjected to extrajudicial killing by Grupo Colina, a death squad composed of members of the Peruvian armed forces. The human rights violations committed by Grupo Colina were simultaneous to former President Fujimori's implementation of fear as a rhetorical instrument of choice to repress civil society actors throughout rural Peru. See Comisión de la Verdad y Reconciliación, *Informe Final* (2003), available at <http://cverdad.org.pe/ifinal/index.php> (last visited Apr. 9, 2017).

3. Challenges of Decentralization and Effects on Local Government

a. Overview of the Issue

i. Decentralization Efforts

In recent years, Peru attempted to decentralize the power of the central government and strengthen regional and local governments. Decentralization³⁹ aims to help a state to improve the standards of living of all citizens by creating necessary basic conditions for their well-being.⁴⁰ To this end, ideally, decentralization brings the state closer to the citizen regarding distance, communication, the assessment of needs, and the fast and efficient provision of services.⁴¹ It gives communities the opportunity to participate in regional and local plans.⁴² Especially in the case of Peru, decentralization can help to reduce the inequality between the urban and rural areas by evenly ensuring state presence through regional and local governments. This requires a level of equality among central, regional, and local governments, thereby moving political power, accountability, and responsibility away from the capital.⁴³

Current efforts to decentralize state authority in Peru began in 2002.⁴⁴ The approach taken was to reallocate authority, responsibilities, and resources to the regional and local entities outside of the structure of the central government, thereby effectively diminishing direct control from the central government.⁴⁵ The Decentralization Framework Law (*Ley de Bases de la Decentralización, Ley No. 27783*) signed by former President Toledo in 2002 sets out the incremental process through which responsibilities are to be transferred to the regional and local levels, hand in hand with the transfer of the necessary resources.⁴⁶

The implementation of the Decentralization Framework Law included the transfer of exclusive and shared competences to regional and local governments, the forming of regions, and the building of capacities of regional and local administrations.⁴⁷ However, the implementation shows deficits in light of the complexity of the decentralization process and the existing legal, policy, institutional, and capacity problems.⁴⁸ The decentralization of state powers was not accompanied by the respective quality and pace of capacity building, nor the respective fiscal decentralization.⁴⁹ In 2005, a referendum failed that would have merged 16 departments into 5 larger regions with the aim to secure more economically viable provinces. This vote was partly regarded as a popular rejection of the decentralization efforts.⁵⁰

ii. Effects on Local Government

Local governments are more familiar with the immediate terrain, culture, people, and businesses of communities located near mining sites. Local knowledge about how to best resolve conflicts remains a tool that the central government can utilize in order to prevent the

³⁹ For the purpose of this Report, “decentralization” refers to the process of redistributing and dispersing powers away from the central government to regional and local authorities.

⁴⁰ See S. Park, *Decentralization Process in Peru*, The Policy Wire (2015), available at <http://thepolicywire.com/decentralization-process-in-peru/> (last visited May 22, 2017).

⁴¹ *Id.*

⁴² See C. Salazar, *Building Democracy: Decentralization Growing Pains in Peru* (2009), available at http://www.developpementdemocratique.ca/documents/PSM_p30-331.pdf (last visited May 22, 2017).

⁴³ *Id.*

⁴⁴ On previous attempts since 1988, see La Controlatoria General de La República, *Estudio del proceso de descentralización en el Perú*, 27 (2014).

⁴⁵ Inter-American Foundation, *Decentralization Peruvian Style*, available at: <http://www.iaf.gov/resources/publications/grassroots-development-journal/2008-enterprise-at-the-grassroots/decentralization-peruvian-style> (last visited May 22, 2017).

⁴⁶ *Id.*

⁴⁷ See C. Salazar and G. Evans, *Strengthening Regional Government in Peru*, Canadian International Development Agency, available at ipac.ca/e-commerce/uploads/Strengthening-regional-government-in-peru.pdf (last visited May 22, 2017).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See International Monetary Fund, *Staff Country Reports: Peru, Selected Issues* (2006); in total, only about 24% of all voters supported the merger of the 16 departments into 5 larger regions, and null votes accounted for only 7% of the result. See R. De La Pedraja, *Free Trade and Social Conflict in Colombia, Peru, and Venezuela: Confronting U.S. Capitalism 2000-2016*, 69 (2016).

mismanagement of mining projects throughout rural Peru. However, the shortcomings in the process of decentralization have negative effects on local governments

A consequential effect in the more remote parts of Peru is the lack of project management and implementation. Many regional and local governments do not exhaust their annual capital budgets due to a lack of well-trained staff to plan and carry out development projects.⁵¹ Many local governments have issues with legal comprehension that contribute to a misunderstanding on how mining procedures work, their exact responsibilities, potential impacts, and how best to utilize allocated budget, in particular the Canon Tax and mining royalties.⁵² Therefore, local governments often do not have the capacity to successfully bargain with mining companies, a result that often leads to dissatisfaction about governmental services in rural areas.

This puts regional and local governments at a significant disadvantage to create and implement development plans and resolve social conflicts. Governmental workers at the local level have no institutional capabilities to negotiate with mining companies, create legal mechanisms to resolve conflict, and are left to compete with neighbor localities for resources.⁵³ Mining companies can exploit such disunity among local governments, and take advantage of the lack of standards that exist throughout rural Peru's mining sector.

If regional governments are unable to produce sustainable independent budgets, control local police forces in cases of large-scale protests, or be able to manage state emergencies, then reliance on the central government will only increase in the decades to come.

iii. Corruption

The ineffective implementation of decentralized enforcement and accountability has led to the exploitation of public funds by lower level officials and the private sector, which operate in the political vacuum left by the central government. This allows endemic corruption to exist among the three branches of regional and local governments. Corruption at the regional and local levels of government increases the cost for innovation, hampers the productivity of human capital, and undermines public confidence in the ability of investments to produce tangible benefits, among a host of other negative ramifications.⁵⁴

State institutions are perceived as ineffective in Peru. A Gallup poll conducted in 2012 found that 81% of the Peruvian population deemed the government as corrupt,⁵⁵ an obvious indication of the negative perception that citizens have against political authorities throughout the country. Corruption perception levels were worse at the local level, 95% of citizens from rural regions such as Apurimac responded in one survey that their government lacked integrity.⁵⁶ By 2005, corruption and ineffectiveness within the regional governorships contributed to the perception among rural communities that decentralization had failed. Within three years of the first regional elections, four governors had resigned due to corruption charges and a resurgence of local political machines often created controversial business alliances.⁵⁷

⁵¹ See C. Salazar, *supra* note 47.

⁵² For instance, the Anta and Espinar governments demonstrate that they do not fully understand the impact of mining, and the responsibility of their institution. See Meeting with Municipality of Anta on March 16 and Municipality of Espinar on March 17, 2017. For more information on the Canon Tax, please refer to Chapter 2, Section 6 below.

⁵³ See Meeting with Anonymous MINEM employee held on March 14, 2017 (during which it was mentioned that, in the absence of federal authorities, local governmental officials have no choice but to compete with one another in order to gain access to valuable sources of economic enrichment, or be left to construct a competitive advantage through costly means).

⁵⁴ OECD, *Multi-Dimensional Review of Peru: Volume I, Initial Assessment*, 28 (2015), available at http://www.keepeek.com/Digital-Asset-Management/oecd/development/multi-dimensional-review-of-peru_9789264243279-en#.WOrhZIM19E4 (last visited May 22, 2017).

⁵⁵ See J. Sonnenschein & J. Ray, *Government Corruption Viewed as Pervasive Worldwide*, Gallup (Oct. 18, 2013), available at <http://www.gallup.com/poll/165476/government-corruption-viewed-pervasive-worldwide.aspx> (last visited Apr. 1, 2017).

⁵⁶ For more information on corruption, please see Chapter 4, Section 4 below. See also 2016 Report.

⁵⁷ See OECD, *supra* note 54, at page 8.

The issue of corruption has the effect of allowing mining companies to exploit local governments, ignore legal regulations, and promotes a culture of indifference towards the human rights of rural citizens near project sites. The loss of institutional abilities to promote safe business practices in mining, namely because of bribes or collusion, contributes to social conflict in extractive industries.

b. Recommendations

i. Budgetary Execution Rates

Regional and local governments should be required to provide an investigative report in cases where budgets are not fully implemented. Report must indicate the remedial solutions that will be taken to ensure that all funds are utilized as authorized by law.

ii. Capacity Building of Regional and Local Public Officials

Regional and local public administrations officials should be provided with assistance and training to plan, implement, and fund development projects, in particular on how to make full use of allocated financial resources.

4. Building the Case for a Permanent State Presence

The government could significantly benefit from an increased presence in rural areas and an improved relationship with the more rural and resource rich areas of Peru:

- a. The first major argument in favor of a revised relationship with rural and indigenous communities is that revenues increase when mining companies operate free of work stoppages and protests. The most frequently cited costs that businesses incur within the mining sector are those “arising from lost productivity due to shutdowns or delays.”⁵⁸ Such a loss can occur even at the exploration stage of a mining project if, for example, an environmental impact assessment were to be revoked.⁵⁹
- b. The importance of an improved relationship with rural and indigenous communities not only helps to increase state revenue, but would also work towards the goal that Peruvian President Pedro Pablo Kuczynski has set of having the country join the OECD by the end of his term in 2021.⁶⁰ In order to accomplish this objective, Peru rapidly and extensively needs to reform various sectors of the economy. Ameliorating the current mining processes would be one way of securing a more stable commodities market for the international system. The OECD’s country program for Peru recommends reforms in the five areas of public governance, transparency, human capital, productivity, and the environment.⁶¹ A human rights based approach to reforms within the mining sector would bring Peru into alignment with international standards, and better position the country to apply for OECD membership before 2021.
- c. The ability to ensure compliance with environmental and other legal obligations within mining processes will build trust among rural communities. Long-term engagement with communities at all levels of government will allow leaders to focus on the needs of people in rural areas.

⁵⁸ R. Davis & D. Franks, *Costs of Company-Community Conflict in the Extractive Sector*, 8 (2014), available at https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf (last visited Apr. 1, 2017). This report states that “a mining project with capital expenditure costs of between \$3-5 billion will suffer costs of roughly \$20 billion per week delayed production...largely due to lost sales”. *Id.* at 8.

⁵⁹ *Id.* at 8.

⁶⁰ M. Taj, *Kuczynski vows to make Peru a member of OECD by end of his term*, Reuters (Jul. 28, 2016), available at <http://www.reuters.com/article/us-peru-kuczynski-oecd-idUSKCN10827J> (last visited Apr. 1, 2017).

⁶¹ OECD, *The OECD and Latin America & the Caribbeans. Peru*, available at <http://www.oecd.org/latin-america/countries/peru/> (last visited Apr. 1, 2017).

This also requires addressing the issue of overcoming past and present grievances. The cost of non-production due to social conflicts will decrease if all parties, including mining companies, promote dialogue with rural communities.

2. ANALYSIS OF THE CURRENT LEGAL FRAMEWORK

The Peruvian population is heavily affected by mining. On the one hand, the mining sector bears great potential for growth and development, as it is one of the main industries in Peru, representing 11% of the national gross domestic product (GDP).⁶² On the other hand, mining projects have a direct impact on the environment and water, and on the lives of communities affected by their operation. As such, mining projects are invariably a source of tensions and conflict between the mining companies and the affected communities. Peru has enacted national legislation with regards to mining that grant more consideration to the interests of the communities. However, such legislative interventions have proven inadequate, as tensions have increased in recent years and conflicts are still constantly present.

This section identifies gaps in the legal framework on mining and formulates recommendations aimed at improving the relationship among the state, mining companies, and affected communities, thus reducing the likelihood of social conflict. More specifically, this section provides an overview of international agreements and soft law instruments concerning community rights and social conflicts that have been ratified by Peru. This analysis is followed by a detailed examination of issues regarding the legal aspects of mining, Environmental Impact Assessments (EIA) and *participación ciudadana*, prior consultation (*Consulta Previa*), as well as mining taxes. Each of these issues is accompanied by a set of recommendations aimed at effectively addressing problems with pragmatic solutions.

1. International Agreements

The adoption of new laws, as well as the amendment of current laws, for the purpose of improving the relationship between the mining companies and the communities affected by mining operations requires the prior analysis of the applicable international treaties and soft law instruments.

With respect to international treaties, this analysis is particularly important not only because Peru is internationally bound by them,⁶³ but also because they are directly incorporated into Peruvian national law⁶⁴ by virtue of their ratification and thus constitute national legal obligations. With respect to soft law instruments, while not binding for the state, they are usually adopted after extensive research and deliberation, and therefore reflect current best practices. As such, they can serve as valuable samples in the drafting of national laws and policies.

a. International Instruments on Communities' Rights

i. International Treaties

- A. The International Covenant on Civil and Political Rights (hereinafter, **ICCPR**),⁶⁵ and the International Covenant on Economic, Social and Cultural Rights (hereinafter, **ICESCR**).⁶⁶ Both Covenants provide for the state's obligation "to respect and to ensure" or "take steps" respectively in order to fulfill the rights enshrined therein. In this respect, Art. 1(2) of both treaties grant peoples free disposal of their natural wealth and resources, while Art. 27 ICCPR gives minorities the right to enjoy their own culture.

⁶² El Comercio, *Que tan importante es la minería en el Perú*, June 15, 2015, available at <http://elcomercio.pe/economia/peru/que-tan-importante-mineria-peru-noticia-1818701> (last visited on Apr. 15, 2017).

⁶³ With the consequence that, in case of non-compliance with the provisions of an international treaty, Peru will be subject to the specific sanctions regime of the treaty if applicable, the general legal consequences of breaches under international treaty law, as well as the rules on State responsibility for internationally wrongful acts.

⁶⁴ See Art. 55, Peruvian Constitution.

⁶⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited on Apr. 15, 2017).

⁶⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> (last visited on Apr. 15, 2017). Both the ICCPR and the ICESCR have been ratified by Peru in 1971 and entered into force in 1976.

B. The 1989 Indigenous and Tribal Peoples Convention (hereinafter, **ILO Convention 169**).⁶⁷ The ILO Convention 169 entered into force in Peru in 1994 and was the first comprehensive and binding treaty that required governments to “consult the peoples [...] whenever consideration is being given to legislative and administrative measures which may affect them directly.”⁶⁸ The ILO Convention 169 provides for the state’s obligation to “establish means by which these peoples can freely participate, (...) at all levels of decision-making (...) for policies and programs which concern them.”⁶⁹ It further provides that indigenous peoples shall “participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.”⁷⁰

ii. Soft-law Instruments

A. The UN Declaration on the Rights of Indigenous People (**UNDRIP**).⁷¹ The UNDRIP built on the consent requirement of the ILO Convention 169 by developing the concept of free, prior and informed consent⁷² which can now be considered as the international standard for respecting indigenous rights.

B. Peru is a member to the Extractive Industry Transparency Initiative (**EITI**), a global standard designed to promote the open and accountable management of extractive resources, on the basis of the principles of sustainable use of natural resources, transparency and accountability of governments and companies.⁷³ Participation in this initiative is voluntary and aims at engaging governments, companies, and civil society. By adhering to EITI, Peru committed to the principles and to an annual progress review.

b. Recommendations

i. Considering International Law Instruments when Drafting National Legislation and Policies

The government should take into account, and incorporate, international regimes when designing new policies and legislation on mining activities and social conflict prevention between the mining company and the community. More specifically, the government should, to state the obvious, abide by international treaties and conventions signed by Peru in order to comply with international law and remain consistent with the principles endorsed in cases where the relevant international instrument does not have binding character.

67 International Labour Organization, Indigenous and Tribal Peoples Convention, C169, June 27, 1989, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO (last visited on Apr. 15, 2017).

68 Art. 6(1), ILO Convention 169.

69 Id.

70 Art. 7(1), ILO Convention 169.

71 United Nations Declaration on the Rights of Indigenous Peoples, U.N.G.A. A/Res/61/295 (Oct. 2, 2007) available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last visited Apr. 15, 2017).

72 See Artt. 10, 11 (2), 19, 28 (1), 29 (2), 32 (2) UNDRIP. For more information on the notion of free, prior and informed consent, see 2016 Report, at 26 and ff. See also FAO, Free Prior and Informed Consent. Manual for Project Practitioners (2016), available at <http://www.fao.org/3/a-i6190e.pdf> (last visited Apr. 15, 2017); UN-REDD Programme, Guidelines on Free, Prior and Informed Consent (2013), available at <http://www.unclearn.org/sites/default/files/inventory/un-redd05.pdf> (last visited Apr. 15, 2017); Oxfam, Guide to Free, Prior and Informed Consent (2014), available at https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf (last visited Apr. 15, 2017).

73 The EITI Standard 2016, available at https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf (last visited Apr. 13, 2017).

ii. Interpretation of ICCPR and ICESCR

With respect to compliance with the ICCPR and the ICESCR, it must be recalled that their provisions are regularly interpreted by the respective UN treaty bodies.⁷⁴ In order to be consistent with international human rights obligations, Peru should closely monitor the work of the ICCPR and ICESCR treaty bodies, especially with regards to the progress concerning indigenous communities and other related topics.⁷⁵

iii. Compliance with International Law Instruments on Indigenous People's Rights

With respect to compliance with the ILO Convention 169 and UNDRIP, Peru has already enacted national laws in implementation of the provisions. Peru should further enact the requirement of obtaining free, prior and informed consent provided under the ILO Convention 169 and UNDRIP, so as to reduce the risk of social conflicts domestically and be a forerunner in advancing indigenous rights internationally.

iv. Implementation of Transparency Standards

In 2016, Peru's status on the implementation of the EITI standard was of "meaningful progress." However, Peru should work to attain the "satisfactory progress" level, which is the highest of three classifications.⁷⁶ Peru should move forward towards the complete fulfillment of the EITI standard given that transparency and accountability builds trust with the communities and companies.⁷⁷

c. **International Investment Treaties and Arbitration**

In addition to international conventions and soft law instruments concerning the protection of indigenous communities' rights, Peru has also entered into numerous international investment agreements (hereinafter, **IAs**). Thereby, Peru undertakes *vis-à-vis* its state counterparty to grant to foreign investors belonging to the latter state a series of substantive rights aimed at protecting the investment that they have carried out in the Peruvian territory. In the event that foreign mining companies operating on Peruvian territory belong to a state that has entered into an IIA with Peru, they can invoke those substantive protections provided therein. The existence of such treaties must therefore always be taken into account when adopting legal or policy reforms, if for no other reason than the right of companies to invoke the dispute resolution mechanisms of those treaties in the event of any violation or disagreement. Such protections are, it should be noted, usually detrimental to environmental and communities' rights, as they may *de facto* prevent the state from legislating in favor of the latter.⁷⁸

⁷⁴ See, among others, OHCHR, *Country reports. Peru*, available at <http://www.ohchr.org/EN/Countries/LACRegion/Pages/PEIndex.aspx> (last visited Apr. 13, 2017). In particular, see J. Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples. The situation of indigenous peoples' rights in Peru with regard to extractive industries*, U.N. Doc. A/HRC/27/52/Add.3, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A-HRC-27-52-Add3_en.doc (last visited Apr. 15, 2017).

⁷⁵ For more information on Peru, see J. Anaya, *supra* note 74. Reports from other UN human rights bodies and Special Rapporteurs are also relevant regarding compliance with human rights obligations.

⁷⁶ EITI, *Implementation Status*, available at <https://eti.org/countries> (last visited April 4, 2017).

⁷⁷ For more information in this respect, see Chapter 4, Section 6 below.

⁷⁸ For example, the enactment of environmental regulations has sometimes been qualified as an "indirect expropriation" in violation of applicable BITs. See *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1. The fear of having environmental regulatory measures qualified as indirect expropriation, entitling the investor to payment of damages, may lead host states to refrain from adopting such measures, thus giving cause to what has been qualified in practice as "regulatory chill". See, among others, C. Brown and K. Miles, *Evolution in Investment Treaty Law and Arbitration* (2011).

Peru has signed around thirty bilateral investment treaties.⁷⁹ In reviewing these treaties, only one of them provides for the possibility to restrict the investor's activity when harming the environment or putting national health and security at stake.⁸⁰

The substantive provisions contained in IIAs are complemented by the procedural mechanism provided under the ICSID Convention⁸¹ that sets up an international institution tasked with resolving disputes between states and foreign investors. Accordingly, a foreign investor claiming a breach of its substantive rights under an IIA will be able to initiate an international arbitration against the host state that is party to the ICSID Convention.⁸² Peru ratified the ICSID Convention in 1993 and therefore faces the risk of becoming involved in state-investor arbitration.

Box No. 1: Case Study – *Bear Creek v Peru*

One example of state-investor arbitration brought against Peru under the ICSID Convention was ***Bear Creek v Peru***. This case is relevant because it took into account the interests and concerns of the local communities affected by the implementation of a mining project.

Bear Creek is a Canadian company operating the Santa Ana mine, located in the Puno region. In 2011, the mining site saw the outbreak of severe protests based on the threat of contamination of surrounding waterways to the detriment of local fishing and farming. The violence of the protests led the government to revoke Bear Creek's mining concession on the grounds that the original mining investment was illegal in the first place.

Bear Creek claimed that the revocation of the mining license amounted to a violation of the substantive rights granted to Bear Creek by the existing Free Trade Agreement between Canada and Peru. Arbitration was then initiated against Peru under the ICSID.

During the arbitration proceeding, the arbitral tribunal allowed for two amicus submissions, one from a lawyer specialized in human rights, and another from DHUMA, an NGO that protects human rights and the environment of indigenous peoples in the region of Puno. The tribunal concluded that both could contribute to the process with their information and experience on the region and on the case. Thus, it took into account the rights and concerns of the communities within state-investor arbitration.

The case is still pending as of the date of this Report. Post-hearing briefings and cost claims have been filed in mid February and end of March respectively.⁸³

d. Recommendations

i. Right to Regulate

The majority of the Bilateral Investment Treaties (**BITs**) and Free Trade Agreements (**FTAs**) that Peru entered into do not include provisions granting the host state the right to regulate environmental/social matters nor investor's obligations with respect to the environment and social rights. On the contrary, applicable IIAs, as currently drafted, attribute significant protections to the foreign investor, while severely limiting the state's ability to legislate.

⁷⁹ For more information, see Sistema de Información sobre Comercio Exterior, http://www.sice.oas.org/ctyindex/PER/PERBITs_s.asp.

⁸⁰ See Art. 9, Convenio entre el Gobierno de la Republica del Peru y El Gobierno de la República de Colombia sobre promoción y protección recíproca de inversiones, May 7, 2001, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4926> (last visited on Apr. 4, 2017).

⁸¹ See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, available at <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> (last visited Apr. 15, 2017).

⁸² Being party to the ICSID Convention does not mean that the ICSID will necessarily conduct the arbitration. Instead, the ICSID offers institutional support to tribunals and conciliation commissions. Using the ICSID, conciliation and arbitration procedures are voluntary. However, once the parties have agreed to it, they will not be able to withdraw unilaterally.

⁸³ *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/2, Procedural Order No. 10 (Sept. 15, 2016), available at <http://www.italaw.com/sites/default/files/case-documents/italaw7541.pdf> (last visited on Apr. 4, 2017).

The government should reconfigure the current strategy for negotiating international investment agreements to include provisions that maximize the state's powers to restrict investors' activities with respect to environmental and social concerns.⁸⁴ This can avoid the imposition of burdensome obligations, which might compromise Peruvian livelihoods in the future.⁸⁵

ii. Stabilization Clauses

The adoption of laws and regulations by the Peru aimed at ensuring the protection of environmental and social concerns may be severely impaired by the presence of stabilization or freezing clauses in the agreements entered into with foreign investors.⁸⁶ Stabilization/freezing clauses may also be found in BITs or FTAs themselves, thus effectively prohibiting the enactment of new laws and regulations applicable to the foreign investor following the entry into force of the relevant treaty. Peru should analyze IIAs that are currently in place in order to identify and assess the risks arising from the inclusion of stabilization/freezing clauses.

iii. Investor-State Arbitration

State-investor arbitration represents a material issue for Peru. Indeed, even in the event that Peru is successful in its arbitration against a foreign mining company, the state may still be required to pay significant amounts for arbitration costs and lawyer fees. In the event that Peru was to lose in the arbitration proceeding, the results would be even worse. Not only would Peru be required to pay damages to the mining company, but the mining operation would continue, thus aggravating the conflict between the mining company and the local community.

The government must take into account past experiences and prior investor-state dispute settlement procedures to foresee and mitigate potential conflicts that can arise with investors once the mining project is set up. In particular, the government should try to maximize the use of third party submissions as provided under the ICSID rules, in order to force arbitral tribunals to consider communities' rights in the adjudication of the case.

iv. Reform of National Mining Laws and Breach of IIAs

The enactment of new laws and regulations in the mining sector that substantially affect the rights of foreign investors may constitute a breach of applicable IIAs, and thereby grant a foreign investor the right to initiate arbitration against Peru.⁸⁷

The government must minimize the adverse impact on foreign investment by limiting the application of new measures to contracts with foreign investors that were concluded after the entry into force of the relevant amendment. This reduces the risk of investor-state dispute settlements being initiated against Peru.

2. Mining Law

Since the early 1990s, the mining sector in Peru has been subject to several legislative interventions aimed at regulating mining activities. The key legislation, *Ley General de Minería* (Decreto Supremo 014-

⁸⁴ For example, through the inclusion of general exceptions modeled after Art. XX GATT or having a wider scope.

⁸⁵ Particular attention when negotiating IIAs should for example be paid to the definition of "investor" provided under the relevant treaty. The definition should take into account the performance of an effective economic activity within the host state. The consideration of mere formal requirements - such as the incorporation of the investor pursuant to the laws of a state party - would significantly increase the risk of forum shopping. Any company incorporated under the laws of a state party to the treaty would benefit from the substantive rights provided therein, even if it is only a shell company exercising no actual economic activity in the host state.

⁸⁶ On this issue, see Chapter 2, Section 6.c below.

⁸⁷ For example, because they amount to indirect expropriation or because entailing a breach of the fair and equitable treatment obligation.

92-EM, hereinafter **Framework Mining Law**), sets out the activities that require obtaining prior concession, the rights and the obligations of the concessionaire, the procedure for obtaining relevant concessions, and the grounds for revoking, annulling or cancelling the concession.

The Framework Mining Law, however, does not contain any provision addressing social conflict. On the contrary, as detailed below, the procedure set out therein is structured in a way that in effect exacerbates such conflicts, significantly increasing the risk of clash between the mining company and affected communities.

a. Overview of the Framework Mining Law

The Framework Mining Law is designed as a concession system for activities of exploration⁸⁸ and exploitation.⁸⁹ A concession grants its owner the right to explore and exploit an area for an indefinite period of time.⁹⁰ Concessions are not subject to a final term and irrevocable for as long as their owner satisfies the requirements and the obligations under the Framework Mining Law.⁹¹

As set out under the regulations that specify the Framework Mining Law - the Legislative Decree No. 708 (*Ley de la Promoción a la Inversión Minera*, Law on the Promotion of Mining Investment) and the *Reglamento de Procedimientos Mineros* (Regulation of Mining Procedures, hereinafter, the **Regulation**) - the mining concession can be issued when following steps are completed:

i. Filing of the application

The application must be filed with the *Dirección de Concesiones Minera* (Directorate of Mining Concessions, hereinafter, the **D.C.M.**),⁹² accompanied by the payment of the *derecho de tramitación* (right to process), for an amount equal to 10% of a Tax Unit (*Unidad Impositiva Tributaria* - UIT).⁹³ The application needs to meet the requirements set out under Article 17 of the Regulation⁹⁴ and must also include the *Compromiso Previo* (prior commitment), in the form of sworn declaration.⁹⁵

Box No. 2: *Compromiso Previo*

By signing the *Compromiso Previo*, the petitioner ensures that, in the implementation of the mining project, it will:

- A. Carry out its activities in compliance with (i) policies and regulations provided to ensure the protection of the environment, and (ii) the local institutions, authorities, culture and customs,

⁸⁸ Meaning the activities aimed at ascertaining the size, position, mineral characteristics, reserves and value of the mineral deposit. *See* Art. 8, Framework Mining Law.

⁸⁹ Meaning the activities of extraction of minerals contained in a deposit. *Id.*

⁹⁰ The mining concession only grants to the concessionaire the right to explore and exploit the natural resources located in the area covered by the concession. This is without prejudice to other types of licenses and permits set out below.

⁹¹ *See* Art. 9, Framework Mining Law. In this respect, the concessionaire shall, among others: (i) ensure certain levels of productions, pursuant to Art. 38, Framework Mining Law; (ii) pay the *derecho de vigencia*, starting from the year in which the concession was issued, pursuant to Art. 39, Framework Mining Law. For more information on the *derecho de vigencia*, please refer to Section 6.6.c below; (iii) submit each year the *Declaración Annual Consolidada*, pursuant to Art. 50, Framework Mining Law; and (iv) submit online, within the first 10 days of each month, to the Ministry of Energy and Mines, information on the mining activities that were performed in the areas subject to concession.

⁹² The DCM is the office within the Instituto Geológico Minero y Metalúrgico (*Institute of Geology, Mines, and Metals* - INGEMMET) with the authority to issue mining concessions. In addition to the oversight of the whole mining concession process, INGEMMET also carries out technical and scientific research on geology, subsoil resources, geological hazards and geoenvironment.

⁹³ The UIT is a numerical baseline set out by the government for the calculation of fees and taxes. The UIT established for year 2017 is currently equal to 4,050.00 SOL. *See* Art. 1, Decreto Supremo No. 353-2016-EF, available at: <http://busquedas.elperuano.com.pe/normaslegales/aprueban-el-valor-de-la-unidad-impositiva-tributaria-durante-decreto-supremo-n-353-2016-ef-1466240-3/> (last visited Apr. 3, 2017).

⁹⁴ Relating to, more specifically: (i) the information relating to the petitioner; (ii) the type of concession requested; (iii) the information relating to the area in relation to which the concession is requested; and (iv) the receipts of payment of the *derecho de vigencia* and the *derecho de tramitación*.

⁹⁵ The requirement for the need of execution of the *Compromiso Previo* has been introduced with the Decreto Supremo No. 042-2003-EM as a series of undertakings to be implemented by the petitioner.

- maintaining a favorable relation with the population of the area affected by the mining activity.
- B. Maintain a continuous and timely dialogue with local and regional authorities, the population of the area affected by the mining activity and their representatives, providing them the relevant information on the implementation of the extractive processes.
- C. Develop with the population of the area affected by the mining activity an institutional framework to allow the local development of such area and cooperate with them in the creation of development opportunities beyond the life of the mining activity.
- D. Give preference to local employment, providing for the necessary measures of capacity building.
- E. Purchase local goods, services and personnel for the implementation of the mining activities, at reasonable conditions of price and quality.

ii. Review of the Application on a first-come first-serve basis

As part of the review, the Operational and Technical Unit within the DCM issues a first technical report to ensure that the mining concession does not infringe upon pre-existing rights and meets the requirements of the law. The Legal Department of the DCM then determines the legal consequences of the issues highlighted in the technical report.⁹⁶

iii. Publicity of the Application

The petitioner is required to publish the notice of the filing of the application on the newspaper “El Peruano” and on the periodicals distributed in the capital of the province in which the area subject to the concession is located.⁹⁷

iv. Second Technical and Legal Review of the Application

The application is reviewed for a second time by the Operational and Technical Unit and the Legal Department, which will examine also the compliance with the publicity requirements set out above.

v. Issuance of the Mining Concession

Within the first 15 days of each month, the competent authority shall publish on the newspaper “El Peruano” a report on the concessions granted in the previous month.⁹⁸

b. Recommendations

i. Scope of the Framework Mining Law

The Framework Mining Law only requires the obtainment of a mining concession for the activities of exploration and exploitation, while the preliminary activities such as search (*cateo*) and prospection (*prospección*) can occur without a license.⁹⁹ While such activities can be freely performed, their performance might infringe upon the private property rights of local communities over the land.¹⁰⁰

⁹⁶ If the issues highlighted in the legal report can be remedied, the applicant will be able to proceed with their remediation within the terms provided under Article 15 of the Regulation. Otherwise, if the defects of the petition cannot be remedied, the Legal Department will request a declaration of refusal, inadmissibility, nullity or cancellation.

⁹⁷ See Art. 19 and 20 of the Regulation, as well as Art. 122 of the Framework Mining Law.

⁹⁸ See Art. 24 of the Regulation and Article 124 of the Framework Mining Law.

⁹⁹ See Art. 2, Framework Mining Law.

¹⁰⁰ Under applicable Peruvian law, private property rights on land encompass the surface and the top fifty centimeters of soil thereunder. Everything below that layer belongs to the state and is subject to be given out in a mining concession. However, once a company obtains a mining concession, in order to start exploring, it needs to secure the right to the surface land. Obtaining surface

In order to reduce the risk of social conflicts arising from the trespassing on the private property of local communities by the mining company, a legally binding obligation should be introduced whereby the mining company wishing to perform preliminary activities must obtain the permission of the landowners to access the land, as well as provide continuous and updated information on the impact that preliminary activities may have on the land, both to the landowners and to the municipal authorities. In this respect, the municipal authorities should be responsible for gathering complaints from the landowners in the event of non-compliance by the mining companies as well for imposing respective pecuniary sanctions.

ii. Effectiveness of the *Compromiso Previo*

The *Compromiso Previo*, as currently envisaged, lacks effectiveness in ensuring the sustainable operation of the mining project as well as the enforcement of the rights of the communities affected by the mining project. It is widely recognized that the *Compromiso Previo* is only a formality,¹⁰¹ without any enforcement mechanism that allows state entities to supervise the compliance with the obligations undertaken with the declaration. Non-compliance with the provisions of the *Compromiso Previo* may present another source of social conflict between a mining company and communities as communities trust in the commitments made in the *Compromiso Previo* and a belief that they will be upheld.¹⁰²

The petitioner must be required not only to assume the obligations set out in the *Compromiso Previo* but also to present a development plan explaining in detail how such obligations are going to be complied with, and to provide continuous and updated information to competent municipal authorities regarding the status of the implementation of the obligations of *Compromiso Previo*.

The state must also ensure effective enforcement of the obligations arising from the *Compromiso Previo* by specifying that the breach of such obligations shall represent a ground for expiration (*caducidad*) of the mining license.

iii. Adequacy of Publicity Requirements

The publicity provisions envisaged in the Framework Mining Law are not effective in ensuring actual knowledge of the affected communities about the issuance of the mining concession or the filing of the respective application. The publication of the relevant information on “El Peruano” - and/or other regional newspapers - is merely a formal requirement, which does not actually convey any information about the potential adverse effects that the mining activity may have on the lives and the environment of communities in the affected territory.¹⁰³

The publicity provisions should require the publication of the mining concession or application on not only INGEMMET’s website,¹⁰⁴ but also on the walls of the townhouse of every municipality located in the area covered by the mining concession or application, and at the house of every community leader of communities located in the area covered by the mining concession or application.

rights often represents a major step for mining companies and communities, as it requires them to enter into negotiations on the use of the land and the compensation to be paid in exchange. Future research should assess possible improvements in law and policy on surface rights and land ownership.

¹⁰¹ Grupo Propuesta Ciudadana, *Concesiones Mineras en el Perú. Análisis y Propuestas de Política*, 64 (2014).

¹⁰² See Ernst and Young, *Business Risks Facing Mining and Metals 2014-2015*, 16 (2014), available at [http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/\\$FILE/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/$FILE/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015.pdf) (last visited May 21, 2017).

¹⁰³ The inadequacy of current publicity methods becomes only more evident when considering Peru’s geographical characteristics and the circumstance that most mining activities take place in remote and distant areas from the capital.

¹⁰⁴ As it is currently provided.

iv. Role of Technical and Legal Reports

The technical and legal reports issued by the competent offices within the DCM only perform a formal control over the requirements for the grant of a mining concession.¹⁰⁵ The governmental authorities do not factually investigate and evaluate the advantages of the mining project for the concerned area, as well as the compliance of the mining project with other relevant legal obligations.

The evaluation carried out by the DCM in its technical and legal reports should have a more substantive content. The legal report should ascertain the mining company's compliance with:

- A. the legal obligations with respect to preliminary activities, as suggested under Section 2.b.ii above. Such ascertainment should be carried out on the basis of the information provided by the competent municipal authorities;
- B. the obligations arising under the *Compromiso Previo* declaration. Such ascertainment should be carried out on the basis of the information provided by the competent municipal authorities.

The technical report should evaluate at least the adequacy and effectiveness of the measures that the mining company intends to adopt in the performance of its obligations arising under the *Compromiso Previo*.¹⁰⁶

In the event that the technical and legal reports detect non-compliance by the mining company with legal obligations or technical and environmental standards, the issuance of the mining concession should be denied.

v. Reducing the Automatism of the Mining Concession Process

The procedure set out in the Framework Mining Law is automatic. The law only requires that the petitioner and the area covered by the mining concession be duly identified and, once formal requirements have been complied with, there is little if no possibility to challenge or stop the administrative process and prevent the issuance of the mining concession. This automatism should be removed as it does not leave room for considering rights and interests of affected communities. The following mechanisms can provide for leeway in decision-making:

- A. Extending the review performed by the competent authorities to the compliance with substantive requirements, such as those set out by the *Compromiso Previo*¹⁰⁷ and by other applicable sources of law;¹⁰⁸
- B. Extending the grounds for expiration (*caducidad*) or nullity (*nulidad*) of the mining concession to include the breach of substantive requirements referred to under 2.b.iv above;
- C. Strengthening the remedies available to third parties to challenge the administrative proceeding.

¹⁰⁵ Set out under Art. 17 of the Regulation.

¹⁰⁶ Provided that the respective changes in the structure of the *Compromiso Previo* are implemented according to Section 2.b.ii above in this Chapter.

¹⁰⁷ See Section 2.b.ii above in this Chapter.

¹⁰⁸ See Section 2.b.iv above in this Chapter.

vi. Increasing Local Governments' Involvement in the Mining Process

The procedure for the issuance of mining concessions is carried out and managed exclusively at a centralized level and involves only the petitioner and the relevant administrative authority, i.e. INGEMMET. Nowhere in the course of this procedure, is the government under the obligation to liaise either with the regional or local government, which could have a better understanding of the concerns regarding the mining activity in the area under their competence.

The regional and local governments should be included in the procedure for the issuance of mining concessions. This objective could be attained, for example, by:

- A. Requesting local and regional authorities to participate in the administrative proceeding, for example by means of consultative reports and/or advisory opinions; or
- B. Decentralizing the process for the issuance of the mining concessions, granting the respective authority to the regional or local governments.¹⁰⁹

3. Surface Rights and Land Ownership

a. Overview

In Peru, rights to exploit the subsoil and rights to access the corresponding surface are altogether separate matters. From a community perspective, the negotiation of surface rights is at the same time an opportunity and a problem: it is an opportunity as it is often the only time at which communities have bargaining power vis-à-vis mining companies, and it can be a problem as more often than not talks are not conducted transparently, and in many instances they are resolved with corruptive means.

Under applicable Peruvian law, underground soil belongs to the state.¹¹⁰ Private property rights on land encompass the surface and the top fifty centimetres of soil thereunder.¹¹¹ Everything below that layer belongs to the state and is subject to be given out in a mining concession under the current system.¹¹²

Once a company obtains a mining concession, in order to start exploring, it needs to secure the right to the surface land (hereinafter, **surface rights**).¹¹³ Obtaining surface rights often represents a major step for mining companies as it requires them to enter into negotiations on the use of the land and the compensation to be paid in exchange. Depending on who owns the land, differences appear in the conduct of such negotiations.

i. Land Held by the State

Surface rights are negotiated in the framework of the authorization procedure with the state. However, in Peru little land is directly managed by the central administration in Lima, with local communities managing the majority of land.¹¹⁴ This is particularly true in the Andean region, which happens to be where most of the resource deposits are located.

¹⁰⁹ For more information on the relationship between central and local government, please refer to Chapter 4, Section 1.

¹¹⁰ This is consistent with the tradition of Civil Law countries, which sees property as essentially a superficies right, whereas Common Law tradition sees it as including the subsoil – *usque ad sidera, usque ad inferos*.

¹¹¹ Approximately 1 ft. 8 in.

¹¹² For more information on the concession regime, see above.

¹¹³ Surface Rights are herein held to encompass all legal forms and structure conferring to the holder(s) the exclusive right to use a surface, be it by form of property – dominical or allodial – or in the form of an easement.

¹¹⁴ As confirmed by interviews with all the parties involved: government employees (see meeting with Yury Becerra, *Gerente de Gestion Ambiental*, Municipality of Espinar, held on March 15, 2017), attorneys representing mining companies (see meeting with attorneys from

ii. Land held by Private Subjects

Individual landowners need to be assessed on a case-by-case basis. The main factor, in any event, is bargaining power: negotiations with weaker parties – such as disadvantaged private individuals – will understandably see companies enjoying a vantage position.

In such cases, interviews on the field have suggested recurrent situations wherein mining companies would exploit their bargaining power to force unfair conditions for small landholders to grant surface rights. This also applies when the plot of land the company intends to acquire is divided into multiple small parcels – these cases represent somewhat of a mixed case between individual negotiations and community negotiations discussed in the next subsection.

iii. Land held by Communities

Under Peruvian law, rural and indigenous communities hold a communal title on their land. Community lands are administered by community institutions, where every single community member (*comunero*) forms part and enjoys voting rights.¹¹⁵

Negotiations over surface rights are a very important moment in the relationship between companies and communities: this is often the only time at which the community has a bargaining chip vis-à-vis the company – denial of surface rights can effectively prevent the development of a mining project. In legal terms, within the community the power to sign off land rights rests within the elected representative - Chairman or President. As shown in the case studies below,¹¹⁶ this delegation is liable to create significant agency problems, paving the way for corruption and malpractice.

In light of the importance of surface rights, evidence from field research suggests instances of companies resorting to all means necessary to secure they be granted – a common pattern seems to be to curry the favor of community leaders with payments in cash or in kind (trips to Lima, cars, even houses). On the point, see the Box No. 3.

Box No. 3: Case Studies - Bajo Huancané and Huisa communities¹¹⁷

Field research provided two telling examples of how mining companies negotiate land rights with communities. Bajo Huancané and Huisa are two extremely poor communities adjoining a major copper mine in the Espinar province.

1. Bajo Huancané

In this case, the community was chaired by leader René Merma, who had been opposing mining developments. Prior to the elections to renew the community council, community members were reportedly approached by company representatives offering money as ‘encouragement’ for the election of another candidate, at the same time predicting negative consequences in case of a victory of Mr. Merma – in a sort of carrot-and-stick approach. As it happened, the other candidate prevailed in the election, then proceeding to show an attitude

Estudio Muñiz, held on March 10, 2017), and NGO representatives (*see* meeting with Javier Jahncke, Red Muqui, held on March 13, 2017).

¹¹⁵ Art. 136 and 139 of the Código Civil (Peru) (hereinafter, the **Peruvian Civil Code**); see also Art. 134, 135, 137, and 138 of the Peruvian Civil Code

¹¹⁶ See Box No. 3.

¹¹⁷ *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/2. On this matter, see also J. Dahlquist, *Arbitrators accept one amicus application and reject another in Bear Creek vs Peru arbitration*, Investment Arbitration Reporter (July 26, 2016), available at <http://tinyurl.com/zm3n4nm> (last visited on Apr. 4, 2017).

ostensibly friendly to the mine.

2. Huisa

In Huisa, a young and less experienced community leader was elected. In the course of a weekend, the mine – eager to obtain land rights – reportedly approached him in the middle of the night, took him to Lima, where corruption is implied to have taken place, secured his signature, and flew him back to the community. The community reported not to have been involved in any way and found out about what happened only when shown the papers by the mine at a later time.

b. Recommendations

i. Powers of Delegation to Individual Representatives

The key to the issue seems to be the delegation to individual representatives of the powers to sign off surface rights. Accordingly, the following is recommended in relation to the negotiation of surface rights on lands held by communities:

- C. Imposing publicity and standstill requirements prior to the concession of surface rights, where (a) the community needs to be informed in detail about the impending negotiations – *e.g.* through posting of bills in the village, in Spanish and in the local language if need be; and (b) a period of time needs to elapse between the notice and the commencement of negotiations; and
- D. Requiring some form of collective approval to sign land rights off – *i.e.*, do not vest in individual representatives the power to negotiate land rights. This is not unlike what routinely happens in corporations, where individual directors usually require some form of board approval to acquire or sell property.

4. Environmental Law and Mining

The negative environmental impacts of a mining project constitute a central source of tension and distrust of the communities, even before a mining project has been launched.¹¹⁸ Peru relies on a National System for Evaluation of Environmental Impact that has been developed through several regulations, resulting in a complex system that is comprehensive but ambiguous and difficult to navigate and understand.¹¹⁹ These regulations contain procedures which mining companies and the government must follow to assess and monitor the extent of environmental impacts caused by a mining project. Inadequacies in these regulations necessitate the improvement of environmental monitoring in order to reduce and prevent social conflict. The two main problems are related to the extent to which citizens are given the opportunity to participate in the assessments¹²⁰ and the faulty information flows among actors, especially towards the communities. Furthermore, in regard to environmental impact, water quality is one of the major concerns of communities. Hence, this analysis includes the respective legislation regulating water pollution.

¹¹⁸ For more information, please refer to Chapter 4, Section 4.

¹¹⁹ This system is based on the General Environmental Law (*Ley General del Ambiente*, Ley No. 28611) and developed in the National System for Environmental Management Law (*Ley del Sistema Nacional de Gestión Ambiental*, Ley No. 28245), Environmental Impact Assessment Law (*Ley del Sistema Nacional de Evaluación de Impacto Ambiental*, Ley No. 27446), and a several decrees (*see* Ministerial Resolution No. 239-2010-MINAM, Procedure for “Randomized revision of the EIAs approved by the authorities” and Ministerial Resolution No. 157 - 2011 - MINAM approving the first update of the list of inclusion of investment projects under the SEIA system) and resolutions (*see* Ministerial Resolution No. 239-2010-MINAM Procedure for “Randomized revision of the EIAs approved by the authorities” and Ministerial Resolution No. 157 - 2011 - MINAM approving the first update of the list of inclusion of investment projects under the SEIA system).

¹²⁰ For more information in this respect, please refer to Chapter 5.

a. Environmental Impact Assessment and Citizen Participation

Safeguarding the environment during and after a mining project is of great concern for communities both living right next to the site and those affected by it, especially as damage to the environment is often permanent and cannot be fully remedied or rectified. Communities are connected to their surrounding environment, which oftentimes serves as their main source of livelihood and health. This connection is even greater in some communities who have a special cultural attachment to nature, or, as they refer to it, the “Pachamama.”¹²¹ In order to accommodate environmental concerns, the Environmental Impact Assessment (hereinafter, **EIA**) includes the procedure of *participación ciudadana* (citizen participation) that applies to every citizen whose environment is directly affected by a project. In addition to *participación ciudadana*, Peruvian legislation also sets out the procedure for *Consulta Previa* (or prior consultation).¹²²

The Peruvian law that regulates the EIAs is the Law of the System of Evaluation of Impact Assessment, or *Ley del Sistema Nacional de Evaluación de Impacto Ambiental* (hereinafter, **SEIA**).¹²³ Under the SEIA Law, there are three types of EIA procedures:

i. Category I

Environmental Impact Declaration for activities, projects, or works that will cause **low** negative environmental impacts.

ii. Category II

Semi-detailed EIA for projects, activities, or works that can cause **moderate** environmental impacts.

iii. Category III

Detailed EIA for projects, activities or works which can cause **significant** negative environmental impacts.

The *Servicio Nacional de Certificación Ambiental para las Inversiones Sostenibles* (National Environmental Certification Service for Sustainable Investment, hereinafter, **SENACE**) is an institution under the Ministry of Environment and in charge of revising and approving the EIA of large scale projects that fall under Category III. In the case of mining activities that are deemed to be Category I or II, the MINEM itself is in charge of approving the EIA. This can result in a serious conflict of interest due to the fact that the same institution is in charge of both issuing the exploration and exploitation permits and of approving the environmental impact assessments of the activities that were approved by the same ministry.

Three main components of the current regulation should be highlighted:

- A. The content and components of an EIA are set out in Article 10 of the SEIA Law.¹²⁴ The environmental impact study shall be conducted by experts in environmental management authorized by and registered with competent environmental authorities (see Box No. 3 below).

¹²¹ Pachamama is the fundamental explanatory principle in the worldview of the Andean indigenous peoples in South America. Pachamama or pacha (pacha quechua and Aymara: Earth and also "world", "cosmos"; MOM: mother is saying "Mother earth") is the core of the system of beliefs and sort action among indigenous peoples of the Andes Central of South America (Merlino y Rabej 1993).

¹²² For more information in this respect, please refer to Section 5 below.

¹²³ Ley No. 27446, *Ley del Sistema de Evaluación de Impacto Ambiental*.

¹²⁴ For more information on the requirements under Article 10 of the SEIA Law, please refer to Box No. 3.

- B. Chapter III of the SEIA Law (Articles 13 and 14) provides for dissemination and public participation during the EIA and approval process.
- C. The *Organismo de Evaluación y Fiscalización Ambiental* (Environmental Assessment and Inspection Agency, hereinafter, **OEFA**), also under the Ministry of Environment, imposes fines in case of non-compliance by the company.

Box No. 3: Compromiso Previo

Article 10 of the SEIA law sets out the mandatory contents of every EIA. Out of these contents the most relevant for the purpose of this study are:

1. **Article 10.1** - Every EIA should contain:
 - A. A description of the proposal.¹²⁵
 - B. The identification and characterization of the environmental impacts during the entire project.
 - C. The strategy for environmental management and the definition of environmental tiers, including: (i) a management plan, (ii) a plan for contingency, (iii) a plan for compensation, and (iv) a plan for abandonment.
 - D. **A plan for citizens participation** (on behalf of the proponent¹²⁶).¹²⁷
 - E. Plans of follow up and control.
 - F. Executive summary that is **easily understandable**.
2. **Article 10.2** - The EIA must be carried out by authorized entities that count on professional teams with experience on environmental management, the entities will be **chosen and paid** by the proponent of the mining project.
3. **Article 10.3** - The authorities will establish a registry of authorized entities.

As shown above, there are different government agencies holding roles regarding the EIA approval and enforcement process (e.g. the SENACE, the OEFA, the MINAM). This makes the EIA processes more challenging and less straightforward. Moreover, the legislation does not contain a requirement on how many government workers should be involved in the revision and approval of the EIAs. If there is a fixed number of workers in charge of approving these EIAs regardless of the volume of mining project proposals presented in a year, the department is prone to be overloaded with work and ineffective at evaluating the EIAs. Finally, these aforementioned agencies are generally underfunded which makes it harder for them to correctly perform their functions.

Furthermore, the EIA is carried out under the premise that the project runs smoothly. There is no provision, in any of the laws, that takes into account potential impacts on the environment as a result of an accident or unintended consequence.

b. Recommendations

i. Reform of the SEIA Law Framework

In order to be fully suitable to address the environmental concerns arising from the performance of mining activities, the SEIA Law and relevant implementing regulations should be amended so as to provide for, among others:

¹²⁵ Description of the project proposed (whether it is a mining project, what is the scope, what will be the method used, etc)

¹²⁶ The Proponent is the mining company.

¹²⁷ For recommendations on this see Chapter 5.

- A. The number of government workers employed to evaluate EIA, that must be proportional to the number of EIAs to be revised yearly, as currently the legislation does not contain such provision.
- B. The removal of the MINEM's authority over EIA approval for projects under categories I and II, so as to avoid the conflict of interests caused by MINEM's simultaneous authority over the promotion of foreign investment in the country.
- C. Stronger enforcement policies and agency coordination on enforcement tasks, which are needed to ensure consistent outcomes.
- D. Through the amendment of Article 10 of the SEIA Law, the requirement that every EIA take into account potential impacts on the environment that could result from an accident in the mining operations or unintended consequence derived from daily operations.

ii. Considering the Dynamic Nature of the EIA

EIAs should be dynamic, rather than static, documents that are continually evaluated and assessed throughout the lifetime of the project. A more dynamic approach is needed to consider that the mining project is an active and continuous process subject to contingencies and as such this contingencies should be included in the evaluation.

c. **Water Regulation**

Water pollution and water scarcity caused by mining activities are central concerns for communities and lead to social discontent. The most salient examples of social discontent resulting from water pollution and scarcity are found in Cerro de Pasco (in Pasco),¹²⁸ Espinar (in Cusco),¹²⁹ and Conga (in Cajamarca).¹³⁰

Water resources in Peru are mainly regulated by the Law of Hydrological Resources¹³¹ and implementing regulations, most notably in the Regulation on the Quality of Water for Human Consumption (hereinafter, the **Water Regulation**).¹³² Article 19 of the Water Regulation establishes a series of authorities “linked to the management of hydrological resources.”¹³³ With respect to mining, such authorities include: (i) the *Organismo Supervisor de la Inversión en Energía y Minería* (Supervising Body of Energy and Mines Investment, hereinafter, **OSINERGMIN**); (ii) the OEFA; (iii) sectoral environmental authorities; and (iv) entities in charge of sanitation services.

The Water Regulation does not contain a ranking of which organ is in charge of intervening first if something goes wrong regarding water management. This legal gap creates doubts about who is the responsible entity to address the mismanagement. Given that all these institutions have a stake in water management processes, and in order to make the system more efficient, the regulation requires the creation of “specialized work groups” composed of

¹²⁸ Where nine out of ten kids had high levels of heavy metals in their blood. There were plans to move the village to another location given the high levels of pollution. See El Comercio, *Cerro de Pasco esta tan contaminado que urge reubicar a sus pobladores*, (Apr. 18, 2010), available at: <http://elcomercio.pe/ciencias/planeta/cerro-pasco-esta-tan-contaminada-que-no-se-puede-cultivar-papas-ni-lechuga-noticia-463596>.

¹²⁹ Where the community of Huisa and the Community of Alto Huancane suffered from high levels of heavy metals in their blood. See *La Republica*. “4% de Espinarense presenta metales pesados en sangre”. June 11th 2012. Accessed at <http://larepublica.pe/10-06-2012/4-de-espinarense-presenta-metales-pesados-en-sangre>.

¹³⁰ Where the Yanacocha mine experienced one of the largest leakages of inorganic mercury causing health problems to the population, and also causing the death of thousands of fishes in the river. See *Wiese, Patricia*. “Bodas de roble 20 de arsenico?”. *Red Latina Sin Fronteras*. Accessed at <https://redlatinasinfronteras.wordpress.com/2014/11/23/peru-cajamarca-yanacocha-bodas-de-roble-o-de-arsenico/>.

¹³¹ *Reglamento de Ley de Recursos Hídricos* (Ley No. 29338).

¹³² *Reglamento de la Calidad del Agua para Consumo Humano* (Decreto Supremo No. 031-2010-SA).

¹³³ See Article 19, Water Regulation.

representatives from each of these ministries and public organizations.¹³⁴ In reality, there is no evidence that these “specialized work groups” have been created to solve the conflicts derived from the pollution of water in mining projects. A deeper investigation would be needed to determine whether water issues are being addressed by multi-stakeholder expert groups at all. An example of the dysfunctions of the current system is the case of the pollution affecting Choropampa located near the Yanacocha mine. The Ministry of Health took eight years to release a report confirming that there was still mercury pollution in the area,¹³⁵ which means that the health of the communities, especially children, continued to be adversely affected during that period.

Annexes II and III of the Regulation on Water Quality for Human Consumption set out the standards that water for consumption must follow.¹³⁶ The MINAM approved a series of national environmental standards for water that must be respected in accordance with Supreme Decree number 002-2008-MINAM.

In order to evaluate the compliance with all the policies and norms related to water, the government created the *Autoridad Nacional del Agua* (National Water Authority, hereinafter, **A.N.A.**),¹³⁷ with the task of controlling the compliance with laws and detecting potential discrepancies between policies related to hydrology and general environmental regulations.¹³⁸ Within the A.N.A., communities are represented in the Executive Council of the A.N.A., as well as in the Council for Water Basin Resources.¹³⁹ However, this council does not have any powers when it comes to water usage by mining companies, because since the modification of the resolution N°007-2015-ANA¹⁴⁰ the mining companies do not need the permission of the Council and do not need for the EIA to be approved in order to get the permission to use water resources.¹⁴¹

d. Recommendations

i. Reform of the Framework under the Water Regulation

In order to be fully suitable to address the water pollution concerns arising from the performance of mining activities, the Water Regulation should be amended so as to, among others, provide the Council for Water Basin Resources with the power to grant or withhold permission for water use to mining companies.

ii. Role of Governmental Agencies

More generally, there is a clear need to address and improve water management and monitor water scarcity. Better coordination and accountability mechanisms amongst agencies are needed to monitor water pollution and scarcity in mining projects and enforce the standards.¹⁴²

¹³⁴ See Art. 51, Law on Hydrological Resources, *supra* note 131.

¹³⁵ See Ministry of Health, *Informe del grupo de trabajo encargado de levantar información sobre la situación ambiental y estado de salud de los afectados por el derrame de mercurio en las localidades de san juan, choropampa y magdalena, departamento de cajamarca en junio del año 2000* (Report No. 188-2008-DGSP/DSS/MINSA) 30 (2008), available at <http://www.guarango.org/choropampa/downloads/choro-dossier-spa/2-%20Congreso%20de%20la%20Republica%20-%20INF.%20FINAL%20SOBRE%20CHOROPAMPA.pdf> (last visited May 3, 2017).

¹³⁶ See Water Regulation.

¹³⁷ ANA was established by means of Legislative Decree No. 997 for the purpose of “establishing the rules and procedures for the sustainable management of water resources”. See Primera Disposición Complementaria Final, *Decreto Legislativo que Aprueba la Ley de Organización y Funciones del ministerio de Agricultura* (Decreto Ley No. 997).

¹³⁸ See Art. 50, *Reglamento de la Ley de Recursos Hídricos*, *supra* note 131.

¹³⁹ *Id.*, Art. 18.

¹⁴⁰ In Spanish resolución directoral N°007-2015-ANA

¹⁴¹ See Cooperacion, *Gobernanza del agua en zonas mineras del Perú: “Abriendo el diálogo”*, (2016), available at http://cooperacion.org.pe/main/images/derechos_colectivos/GOBERNANZAAGUA.pdf (last visited May. 01, 2017)

¹⁴² For more information on water and environmental issues please refer to Chapter 2.

In addition, the funding of OEFA, ANA and Senace institutions must be increased, so as to allow them for the full development of their regulatory and monitoring functions.

5. Consulta Previa Law

Consulta Previa (“Prior Consultation”) is the main Peruvian law concerning the requirement to consult indigenous communities prior to legislative or administrative measures. This law, credibly the first of its kind in Latin America,¹⁴³ is the result of considerable efforts by a variety of stakeholders, including the government and indigenous organizations.¹⁴⁴ Initial experience in the application of the law has demonstrated a need to amend it, or issue clarifying regulations, so that social license can be secured from communities and conflict avoided. *Consulta Previa* has a number of deficiencies: (a) the consultation does not require legally binding consent from the community; (b) there is a lack of clear determination of what constitutes an affected community; (c) the responsibilities of different state actors when carrying out the consultation overlap and conflict; and (d) the timing of the consultation as describe on the legislation could be ambiguously interpreted and it does it provide for a dynamic process.

a. Purpose of the Law: Consent v Consultation

Prior Consultation, governed by *Ley No. 29785* (hereinafter, the **Consulta Previa Law**),¹⁴⁵ is Peru’s implementation of its obligations under ILO Convention 169 and Peruvian constitutional requirements concerning indigenous rights.¹⁴⁶ Prior Consultation’s purpose is to regulate the content, principles, and procedures of the right to prior consultation of indigenous peoples with respect to legislative or administrative measures that the government is planning to enact or implement and that directly affect indigenous communities.¹⁴⁷ The objective of the consultation is to achieve an agreement between the state and the indigenous community, i.e. the consent of the indigenous community so that the state can carry out its legislative and administrative measures.¹⁴⁸

Reglamento de la Ley No. 29785 is a regulation implementing *Consulta Previa* that specifies the definitions, procedures, and the obligations of the responsible government entities. This instrument sets out the stages of the consultation process that include the identification of the affected communities, publicity, information, evaluation, and dialogue.¹⁴⁹

At the end of the procedure, the state must make a decision concerning the planned legislative or administrative measure, taking into account the views, suggestions, and recommendations of the indigenous communities obtained during the consultation process.¹⁵⁰ This can be formalized in an agreement between the state and the community which is legally binding for both parties.¹⁵¹ The conclusion of such an agreement between the state and the community is, however, not a legally required result, which it should be in order to be effective. It is stated as a mere purpose of the law and not as an obligation. The decision of the state can therefore

¹⁴³ See GIZ, *El derecho a la consulta previa: Normas jurídicas, prácticas y conflictos en América Latina*, 24 (2013), available at https://www.giga-hamburg.de/sites/default/files/md_pdf/1303_destradi_konferenzbericht_es.pdf (last visited Apr. 9, 2017).

¹⁴⁴ See Schilling-Vacaflor, R., *Conflict transformation through prior consultation? Lessons from Peru*, *Journal of Latin American Studies* 47 (2015), 811-839, at 821.

¹⁴⁵ *Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo* (Ley No. 29785).

¹⁴⁶ See, among others, Art. 89, Constitución Política del Perú (1993) (recognizing the cultural identity and land rights of native and peasant communities).

¹⁴⁷ See Art. 1, *Consulta Previa Law*.

¹⁴⁸ See Art. 3, *Consulta Previa Law*.

¹⁴⁹ See Art. 8 and ff., *Consulta Previa Law*. For more information, please refer to the 2016 Report, at 40 and ff. On this topic, see also Grupo Banco Mundial, *La Consulta Previa en el Perú, Aprendizajes y Desafíos*, 38 and ff. (2016), available at <http://documents.worldbank.org/curated/en/164661472713448678/pdf/108118-SPANISH-WP-PUBLIC-SPANISH-ABSTRACT-EMAILED.pdf> (last visited Apr. 9, 2017).

¹⁵⁰ See Art. 15(1), *Consulta Previa Law*.

¹⁵¹ See Art. 15(2), *Consulta Previa Law*; see also Art. 1(5) *Reglamento de la Ley No. 29785*.

also result in the rejection of the concerns of the indigenous community and no agreement. The state is then merely under a general obligation to take measures necessary to accommodate the interests of the community to the greatest extent possible.¹⁵²

The Consulta Previa Law and its regulations do not contain provisions setting forth the content of a consent agreement, in particular what commitments are to be made and what benefits should accrue to the communities. Neither do they provide mechanisms to monitor and ensure compliance with an agreement.¹⁵³ Also, there is not emphasis placed on getting mining companies compliance, even though they constitute a main actor in a mining operation.

b. Recommendations

i. Legally Binding Nature of Consent

Peru should introduce consent as a legally binding requirement, with the goal of complying with the international standard of free, informed, prior consent of ILO Convention 169 and UNDRIP.¹⁵⁴ The content of an agreement, as well as mechanisms to monitor and ensure compliance, should be introduced into the legal framework.

c. Beneficiaries of the Right to *Consulta Previa*: Affected Communities

As for the communities to which the prior consultation applies, the Consulta Previa Law names indigenous and native peoples (“*pueblos indígenas u originarios*”).¹⁵⁵ Certain objective and subjective criteria need to apply to the community in question in order to be regarded as indigenous or native. These criteria include ancestry, spiritual and historical connection to the land, distinctive patterns of culture and lifestyle, and a collective awareness of an indigenous or native identity.¹⁵⁶ Meeting such criteria is especially difficult for rural or Andean communities in Peru. While they are indeed significantly different from indigenous groups as so defined, they can suffer the same negative impacts of a mining project.¹⁵⁷ The overall goal of the agreements made with the community is to prevent conflict, and as a result we call for a broader interpretation of the regulations that includes any community affected by mining activities. The Government of Peru has already started working in this direction. Government officials have undertaken the identification of impacted communities via field studies, which allow them to determine the communities to be consulted through communication and exchange.¹⁵⁸ The government has also created a guide on the identification of indigenous peoples (“*guía de identificación de pueblos indígenas*”) that centers more on project impact in order to determine whether a community has to be consulted.¹⁵⁹

These developments demonstrate a shift from the identification of communities based on their nature and lifestyle towards a focus on the impact on a community by a planned measure. The latter approach enhances the inclusion of all communities. If a community is excluded from the opportunity to voice concerns and to be heard, although it suffers from adverse impacts, there is an increased risk of future conflict. Therefore, consent is a crucial factor to avoid social conflict.

¹⁵² See Art. 15(2) Consulta Previa Law. See also Artt. 5(d) and 5(e), Reglamento de la Ley No. 29785.

¹⁵³ See Grupo Banco Mundial, *supra* note 149, at 60. See also Chapter 3 on compliance and implementation.

¹⁵⁴ For more information, please refer to Section 1 above. See Artt. 6, 7 and 9, ILO Convention 169; Artt. 10, 11 (2), 19, 28 (1), 29 (2), 32 (2) UNDRIP; for more information on the notion of FPIC, please refer to the 2016 Report, at 26-30.

¹⁵⁵ See Art. 1, Consulta Previa Law.

¹⁵⁶ See Art. 7, Consulta Previa Law.

¹⁵⁷ In this respect, please refer to the relevant recommendations that were made by last year’s Capstone team. See 2016 Report, at 42 and ff.

¹⁵⁸ See Grupo Banco Mundial, *supra* note 149, at 43.

¹⁵⁹ Etapa de identificación de pueblos indígenas u originarios, Guía Metodológica, Ministerio de Cultura, 2014, <http://www.cultura.gob.pe/sites/default/files/noticia/tablaarchivos/guiaidentificacionppifinal.pdf>.

Notwithstanding the identification of the nature of a community, under the current law, a crucial requirement for the start of a consultation procedure is that a community is directly affected by the planned measures.¹⁶⁰ Whether this is the case, is within the discretion of the competent state authority that is implementing the applicable legislative or administrative proposal. However, the law does not specify how to interpret or determine “direct effect.”¹⁶¹ Clear guidance is necessary in order to assess the need for prior consultation of the communities.

d. Recommendations

i. Widening the Scope of the Beneficiaries

All communities affected by a mining project should be included in the consent whether or not they are indigenous as they are all impacted. Following the current regulations, communities could be treated differently depending on whether they are deemed as indigenous or not. However, the lines to differentiate them are blurry in many cases, and furthermore, distinguishing between indigenous and non-indigenous communities adds on the complexity of the process, making it harder to prevent foreseeable conflicts. Therefore, there must be guidelines to assess when a community is directly impacted. Defining and assessing impact will require further research and development of respective recommendations and guidelines.

e. Role of Governmental Actors

The state body that is planning to enact the legislative or administrative measure (or *entidad promotora*) is responsible and bears the costs for the initiation and execution of the Consulta Previa.¹⁶² This is usually the ministry or sub-organ of the ministry concerned with the subject matter of the legislative or administrative change. In the case of mining, the MINEM and its subdivisions are responsible for conducting the consultation.¹⁶³

This allocation of responsibility creates difficulties with respect to the scope of the consultation.¹⁶⁴ While the respective ministry has jurisdiction over the proposed legislative or administrative measure, it might not have the authority to make promises to a community with respect to a different issue. As an example, the MINEM has to consult with the community prior to the beginning of mining activity. The community might demand legal title to their territory in exchange for their consent. However, the issuance of titles is under the jurisdiction of the Ministry of Agriculture and the regional governments. The MINEM would therefore exceed the scope of authority in making this promise.¹⁶⁵ At the same time, the community will not accept the exclusion of a matter from the consultation that it needs in order to give its consent.

So far, *ad hoc* solutions have been developed to address this problem, for example by making compromises with other ministries.¹⁶⁶ Nevertheless, the lack of clear procedures increases the difficulty for government entities to foresee and plan the costs for the consultation process, which they have to bear.¹⁶⁷

¹⁶⁰ See Art. 1, Consulta Previa Law.

¹⁶¹ See generally Consulta Previa Law.

¹⁶² See Art. 17, 18 Consulta Previa Law.

¹⁶³ See Art. 6 Reglamento de Consulta en Minería.

¹⁶⁴ See Grupo Banco Mundial, *supra* note 149, at 35.

¹⁶⁵ *Id.* at 36.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 51.

f. Recommendations

i. Amending the Current Allocation of Responsibility between Governmental Actors

The distribution of responsibilities among the different government entities should be clarified and simplified for the sake of the communities as well, who have an interest in knowing their rights and how they are implemented.¹⁶⁸

g. Timing and Continuation of the Process

Considerable debate continues regarding the point in time when Consulta Previa should be initiated in the life cycle of a mining project. The legal provisions do not provide a clear indication. Ideally, the first Consulta Previa procedure should be concluded before the issuance of any type of mining concession.¹⁶⁹ However, considerable areas with potential minerals are already under mining concessions.¹⁷⁰ Frequently, no proper consultation has taken place.¹⁷¹

The government should also seek to consult with the communities whenever a significant change to the current situation is planned or imminent, such as at the beginning of exploration or other activity undertaken that add to the impact on the communities. This way, the concerns of the community are known and can be timely respected from the outset and during the course of mining operations when circumstances - and thus, demands - change.

Perceptions and expectations of communities are not static and are subject to changing circumstances, which requires a constant effort to maintain the social relationship.¹⁷² This requires the continuous presence and management of community expectations by the government in order to grasp changing social perceptions and the need to adjust existing arrangements.¹⁷³

Consulta Previa should therefore be understood as a long-term, dynamic process, as is the case for any kind of relationship, rather than “ticking it off the checklist.” Benefits of conducting a continuous and dynamic process are a gain in trust of the communities, the unimpeded and safe operation of mining projects for the companies involved, and relief from social clashes for the state. This, in turn, translates to significant savings, both in terms of financial and human costs as well as time.

h. Recommendations

i. Timing of the Consultation Procedure

Consultation should ideally be concluded before the issuance of a mining concession, in any case continued and repeated throughout the lifecycle of a mining project, thereby respecting and responding to the changing perceptions and expectations in a social relationship. Future research should also look at the role of mining companies in the process of Consulta Previa.

¹⁶⁸ For recommendations on coordination of government agencies, see Chapter 4, Section 1 below.

¹⁶⁹ Recommendations in this respect were already made by SIPA Capstone Team 2016. *See* 2016 Report, at 41.

¹⁷⁰ *See* Chart at page xxx of this Report.

¹⁷¹ Meeting with Marina Nuñez, Dirección de la Organización Distrital de Mujeres en Accha (*Director of the district organization of women in Accha*), held on March 17, 2017, Accha. Meeting with local officials of the Municipality of Anta, held on March 16, 2017, Anta. Meeting with community members of Urinsaya (Espinar), held on March 15, 2017, Urinsaya.

¹⁷² *See* 2016 Report, at 24; *see also* Chapter 5.

¹⁷³ *Id.*

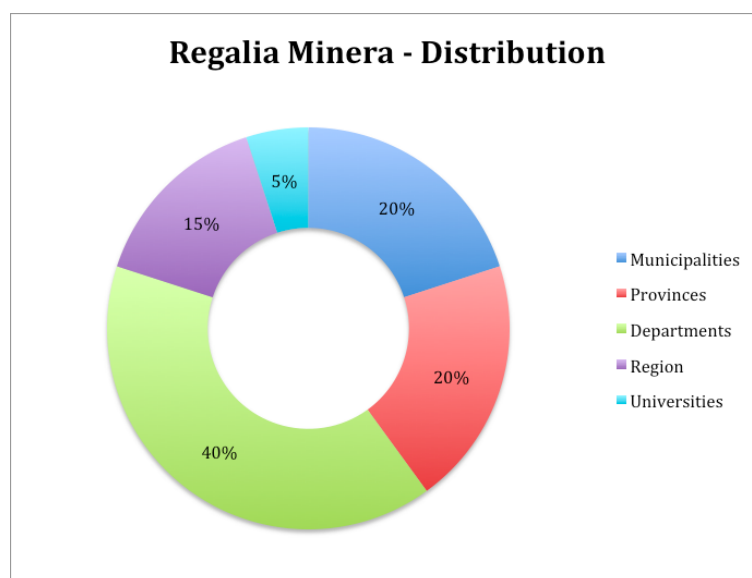
6. Mining Tax Regime

a. Applicable Taxes and Revenue Sharing Regime

Peruvian law provides for a specific fiscal regime applicable only to the mining sector and based essentially on the following revenues:

i. Mining Royalties (*Regalia Minera*)

It is not properly a tax¹⁷⁴ but rather the consideration that mining companies have to pay for the exploitation of non-renewable mineral resources located in the Peruvian territory. The *regalia minera* is applied on the mining company's operating income at a rate ranging between 1 and 12%¹⁷⁵ and is subsequently distributed to the regional and local authorities of the place where the mine is located. The *regalia minera* is not due by mining companies which have entered into stabilization agreements with the state.¹⁷⁶



ii. Canon Tax (*Canon Minero*)

All resident companies, i.e. companies incorporated in Peru, are subject to income tax, at a rate equal to 29.5%.¹⁷⁷ As a general rule, 50% of the income tax paid by the mining company is remitted as *canon minero* by the central government to the regional and local authorities of the place where the mine is located.¹⁷⁸

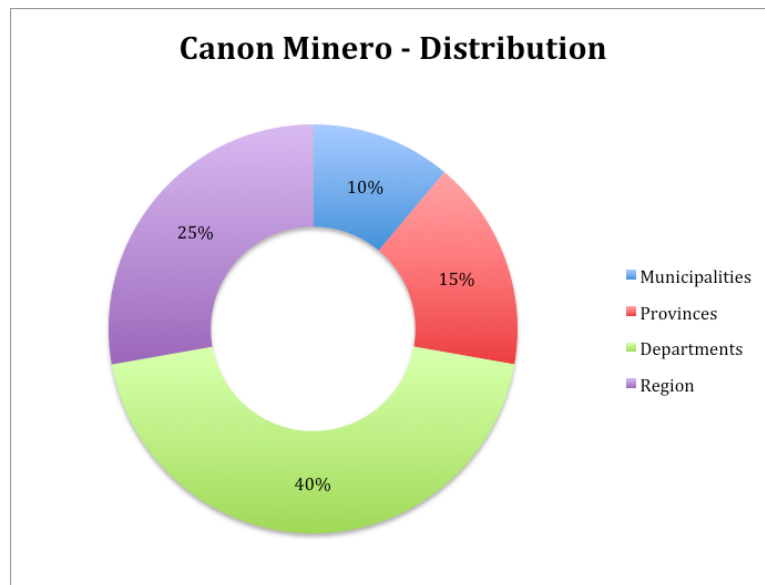
¹⁷⁴ Meaning a compulsory contribution to state revenue levied by the government on business profits or added to the cost of some goods, services, and transactions.

¹⁷⁵ Such new rates were introduced in 2011 by means of *Ley No. 29788*, which amended the *Ley de Regalia Minera* by making royalty payments progressive, meaning that companies with higher operating margins would pay higher amounts of royalties.

¹⁷⁶ On stabilization agreements, see Section 6.c in this Chapter.

¹⁷⁷ Ernst & Young, *Peru's Mining & Metals Investment Guide. 2017/2018*, 49 (2017).

¹⁷⁸ See Art. 9, *Ley de Canon* (Ley No. 27507).



iii. Tax on Dividends

A dividend tax at a rate of 5% is imposed on distributions of profits to nonresident companies and individuals by resident companies and branches.¹⁷⁹

iv. Special Mining Tax

The Special Mining Tax (hereinafter **S.M.T.**) is an additional tax on the mining company’s operating income at a rate ranging between 2 and 8.4%.¹⁸⁰ Companies with fiscal stability contracts are also exempted from the payment of the S.M.T.

v. Special Mining Burden

The Special Mining Burden (hereinafter **S.M.B.**) must be paid only by mining companies which have entered into stability contracts with the state. The S.M.B. is also based on the operating income, with an applicable rate ranging between 4 to 13.12%.¹⁸¹

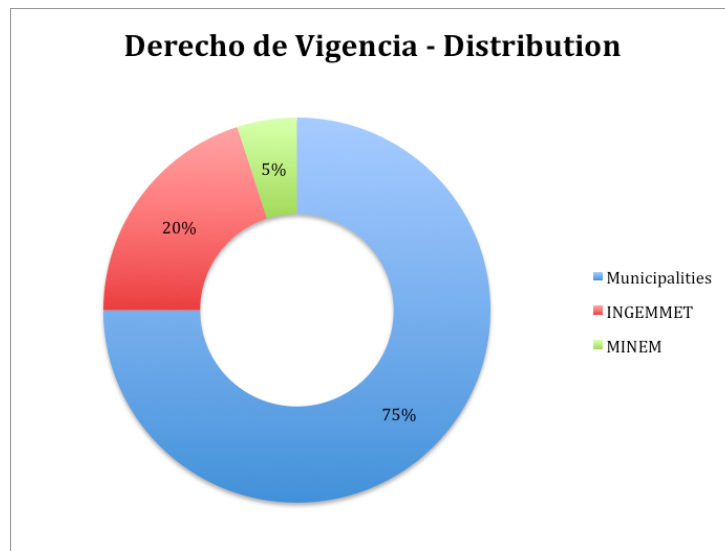
vi. Derecho de Vigencia.

A yearly amount to be paid by the mining company, currently equal to 3.00 USD per hectare requested or granted for mining operations.

¹⁷⁹ See Ernst & Young, *supra* note 177, at 49.

¹⁸⁰ *Id.* The S.M.T. was established in 2011 through the *Ley que Crea el Impuesto Especial a la Minería* (Ley No. 29789).

¹⁸¹ The S.M.B. is governed by the *Ley que Establece el Marco Legal del Gravamen Especial a la Minería* (Ley No. 29790).



All transfers made from the *Canon Minero*, the *regalía minera* and the *derecho de vigencia* to municipal, provincial and regional governments are to be used for public investment projects. According to the Peruvian Constitution, a percentage of the revenues collected from mineral resources must be allocated to mineral producing regions.¹⁸² The distribution of revenues depends on the production levels. This entails that subnational governments of producing regions will receive more resources than non-producing regions.¹⁸³

b. Recommendations

i. Distribution of Revenues

Revenues distributed to regional and local governments are severely underutilized.¹⁸⁴ The grounds of such underutilization lie, among others, in the weak institutional governance of local authorities.¹⁸⁵ The system of *canon minero* creates perverse incentives that discourage open and democratic governance. Indeed, in the absence of a robust civil society, excessive funding tends to encourage clientelism, corruption and lack of transparency with respect to governmental initiatives.¹⁸⁶

In order to reduce the risk of misuse of financial resources, capacity building programs for local and regional officials should be established and promoted to ensure efficient use of government funds. Additionally, transparency and accountability of regional governments should be furthered through publicly accessible databases containing revenues, outlays, contracted agreements, and public projects. This increased access to information will allow communities to hold local government officials accountable, while setting reasonable expectations for projects.¹⁸⁷

¹⁸² See Article 77, Peruvian Constitution 1993.

¹⁸³ With respect to the Cusco region, inhabited by 1,308,806 people, in 2014 it reached an overall production of \$442 million USD. As such, the municipal governments were allocated \$30 USD per capita, while the regional government was allocated \$9 USD per capita. The resources allocated, therefore, are minimal, when compared to, for example, the Moquega region: with a population of 178,612 and production levels in 2014 reaching \$550 million USD, the region was allocated \$471 USD per capita, as for the municipal governments, and \$146 USD per capita as for the regional government. See NRGI, *Mineral Revenue Sharing in Peru*, 6 (2016), available at http://www.resourcegovernance.org/sites/default/files/documents/mineral-revenue-sharing-in-peru_0.pdf (last visited Apr. 25, 2017).

¹⁸⁴ See NGRI, *supra* note 183, at 27.

¹⁸⁵ *Id.*

¹⁸⁶ See J. Crabtree, *Funding Local Government: Use (and Abuse) of Peru's Canon System*, Bulletin of Latin American Research (2014) (noting that the volumes of funding have created pressures for local authorities to spend beyond their ability to identify plausible projects, which in turn led to poor planning and inefficient execution of the selected projects and that the scale of the funding made available produces incentives for corruption among public officials, a situation favored by the limited extent of public oversight and the weakness or non-existence of participatory institutions).

¹⁸⁷ See further recommendations in Public Administration Process Mapping in Section 4 of this Report.

ii. Shared Use of S.M.T. and S.M.B.

The S.M.T. and the S.M.B., as well as the revenues obtained from taxes on dividends, are not shared with regional and local governments. In addition, as they are considered as costs for tax purposes, they can be deducted from the taxable basis for the calculation of the income tax. As such, the amount of *canon minero* to be transferred at the subnational level will also be reduced. The lack of financial resources is frequently listed as one of the reasons preventing local and regional governments from effectively addressing social conflicts.¹⁸⁸ The current regime governing revenue sharing with respect to the mining sector should be reviewed, in order to ensure sufficient revenues for local and regional authorities in order to remove or, at least, minimize the risks of social conflicts.

c. **Stabilization Agreements**

The stability of the tax regime is granted under Peruvian law by two different types of stabilization agreements:

i. Convenios de Estabilidad Jurídica (Legal Stability Agreement)

They are governed by Legislative Decrees No. 757 and 626, whereby the foreign investor committing to an investment in the mining sector for a minimum amount of USD 10 million¹⁸⁹ has the right to enter into a *convenio de estabilidad jurídica* with ProInversion, the private investment promotion agency of Peru. The agreement will grant to a foreign investor stability with respect to:

- A. the fiscal regime in force at the time when the agreement was entered into; and
- B. the right to non-discrimination between foreign and national investors.

ii. Contratos de Estabilidad Minera (Mining Stability Contract)

They are governed by Title 9 of the Framework Mining Law and the relevant implementing regulation.¹⁹⁰ Investors satisfying the quantitative requirements set out under the Framework Mining Law are entitled to enter into a *contrato de estabilidad minera*,¹⁹¹ granting them:

- A. Stability of the fiscal regime in force at the time when the agreement was entered into;
- B. Prohibition of unilateral amendment by the state of the guarantees included in the stabilization agreement;
- C. Administrative stability, which guarantees the stability of all administrative law provisions, relating to the rights and obligations of the concessionaire (e.g. *regalía minera*);¹⁹² and
- D. The right to deduct investments made by the concessionaire in infrastructures constituting a public service from the income tax. In this respect, infrastructure is deemed a public service when it concerns roads, ports, airports, works of environmental reparation, energy works and installations, ITC, health, education, recreation and urban infrastructure that can be used by the community.¹⁹³

¹⁸⁸ See Section 1.1.a above.

¹⁸⁹ See Art. 2, *Ley que Regula los Convenios de Estabilidad Jurídica al Amparo de los Decretos Legislativos No. 662 y 757* (Ley No. 27342)

¹⁹⁰ See in particular Decreto Supremo No. 024-93-EM.

¹⁹¹ In this case, in order to access the benefits granted by the *contratos de estabilidad minera*, the investor will bear an increase in the corporate income tax rate equal to 2%.

¹⁹² M. B. Santa María, *Apuntes sobre los Convenios de Estabilidad Jurídica y su Interrelación con los Acuerdos Internacionales Suscritos por el Perú*, Círculo de Derecho Administrativo, 306.

¹⁹³ Art. 72 Framework Mining Law; on stability clauses, see also J. Radon, *How to Negotiate an Oil Agreement*, 96, in M. Humphreys, J. Sachs and J. Stiglitz, *Escaping the Resource Curse* (2007).

d. Recommendations

i. Freezing Effect of Stabilization Agreements on New Legislation

Stabilization agreements usually impair the ability of Peru to implement newly enacted or amended legislation aimed at preventing social conflict in the mining sector. Stabilization agreements protect foreign investors from changes in the Peruvian administrative legal framework. Any new administrative laws and regulations designed to protect and enhance the rights of communities will not be applicable following the execution of a stabilization agreement with a foreign mining company. The stabilization agreements entered into by the government should specify that the stability does not include the enactment of laws and regulations designed to protect public interests, such as the environment, health, cultural heritage, or the promotion of communities' rights.

3. LACK OF ENFORCEMENT AND COMPLIANCE

The following section addresses the challenges of enforcement of and compliance with the conditions made by a community in exchange for their consent. The implementation of a consent agreement between communities and mining companies can significantly mitigate these challenges and increase the likelihood of conflict prevention. A proposed draft of such a Consent Agreement can be found in the annex (Annex 1). The importance of the Consent Agreement relies on the fact that it transforms the current process of mere consultation to the communities with no legal consequences, into a legally binding consent guided by conditions agreed between the communities and the companies.

Social consent is the third biggest risk for mining companies.¹⁹⁴ Companies have now realized the costs that the lack of social license entails for their projects and have started to push to get consent in order to carry out successful operations. However, there is still the need of shift in the way communities consent is handled right now in order to achieve a genuine social license. This process includes the execution of a legally binding consent agreement between the company and the indigenous community, and the appointment of independent counsel for the community to help it to negotiate such an agreement.¹⁹⁵ This treatment of the community as an equal partner in the process will decrease the risks associated to social license and will allow for a more stable exploitation of the resources and a steady development of the community.

1. Monitoring, Sanctioning and Legal Remedies

a. Problem Statement

The legislation governing mining exploitation and the relationship between the mining projects and the affected communities is extensive and complex. Under current regulations, companies are not required to have the communities' legally binding consent in order to operate. Furthermore, there is a very loose definition of what affected communities are, and the procedures for prior consultation are only required for communities considered "indigenous," excluding other rural communities that might be equally affected.¹⁹⁶ For those who don't fall under the category of indigenous populations, the legislation contemplates instances of consultation and participation in the process whenever the environment is affected, but these instances are not legally binding either.¹⁹⁷

In some cases, the companies sign private agreements with the communities to gain their approval. These agreements focus on the goods or capital that the communities would receive in exchange for the company's activity (i.e. in exchange for the community's consent for the company to operate).¹⁹⁸ However, there is not a template or any regulation stipulating the minimum set of clauses that should be included in this type of agreement. This lack of minimum requirements leaves complete freedom to the company's legal team to define what will be and what will not be part of the agreement, leaving the communities unprotected in front of the company's legal experts.

Furthermore, these agreements focus only on the benefits that the communities will receive in exchange for the activity. They do not define any standards to be met by the company, specify

¹⁹⁴ EY Report - Business Risks Facing Mining and Metals 2014-2015 (2014), 16-18 available at [http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/\\$FILE/EYBusiness-risks-facing-mining-and-metals-2014%E2%80%932015.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/$FILE/EYBusiness-risks-facing-mining-and-metals-2014%E2%80%932015.pdf).

¹⁹⁵ See 2016 Report (stating that "The Peruvian Mining Sector: Exploring issues related to social licence, corruption, and the trans-pacific partnership treaty")

¹⁹⁶ For more information in this respect, see Chapter 2, Section 5.

¹⁹⁷ For more information in this respect, see Chapter 5, Section Environmental Monitoring.

¹⁹⁸ El Comercio. *Minería: 15 grandes proyectos que cuentan con licencia social*. Accessed at <http://elcomercio.pe/economia/peru/mineria-15-grandes-proyectos-cuentan-licencia-social-192243>

the activities that will be performed by the company, or stipulate what would happen in the event that the scope of the activities surpasses the expectations the communities had when signing the agreement. Setting up a set of minimum standards will also render illegal the clauses agreed between company and communities that do not comply with these minimums¹⁹⁹.

For all these reasons, the implementation of a binding contract between mining companies and affected communities, where the state acts as an arbiter and guarantor, is necessary. This binding contract is hereinafter referred to as a Consent Agreement, a legally binding instrument that will empower the communities and provide companies with a more stable and predictable environment in which to operate.

The Consent Agreement will contain clauses regarding the rights and obligations of the mining company and the community, the conditions and procedures to obtain consent, as well as the consequences of breaches of the agreement. In order to reduce social conflict associated with extractive industries, it is necessary to ensure that mining companies comply with their legal obligations, both under applicable law and under the Consent Agreement itself.²⁰⁰ For this purpose, the Consent Agreement provides for the following:

i. Monitoring Mechanisms

Monitoring mechanisms must be established to continuously ensure compliance with what is stipulated in the applicable laws and in the Consent Agreement. These monitoring processes require both capacity and political intent.

Capacity refers to the government's capacity to properly execute its functions, and to provide the officials responsible for law enforcement with proper training and equipment to successfully fulfill their statutory mission.

Political intent refers to the government's willingness to actively bring solutions to the table and insert them in its policies, under an atmosphere of partial or total consensus in the country's political realm.

Once the Consent Agreement has been signed, its implementation shall be monitored to prevent any defaults or breaches of the parties. Monitoring these processes, however, can be tedious and very costly, and requires strong capacity building and political intent.

ii. Sanctions and Penalties

Sanctions and penalties must be imposed if a breach of the Consent Agreement or any other applicable legislation occurs in the course of the monitoring process. These sanctions and penalties provided under the law need to be sufficient to remedy a breach of obligations by the parties. This is to provide legal certainty to the parties, grant local communities adequate reparation for the damage suffered, and to disincentivize future violations.

Traditionally, monetary sanctions have been the most common type of penalty. However, in practice, these sanctions have no tangible effect, as mining companies internalize them as a

¹⁹⁹ This follows the logic of what in European and Australian law is called Unfair Contract Terms. This concept introduces a notion of "good faith" in order to prevent significant imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. In this case the communities are the unprotected group (the buyers) and the mining companies are the sellers. This general requirement is supplemented by a list of examples of terms that may be regarded as unfair. Terms that are found unfair under the consumer legislation are not binding for consumers. The legislation also requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers.

²⁰⁰ An adequate legal framework is also essential to ensure compliance with legal commitments. The analysis of the current legal framework pertaining to the Peruvian mining industry and proposed changes to increase efficiency and fill gaps are set out under Chapter 2 of this Report.

business cost to bear.²⁰¹ In addition, mining companies have the capacities and resources to challenge fines before the court, thus avoiding or delaying their application.²⁰² For this reason, changes to the form and scope of sanctions and penalties are proposed in the Consent Agreement.

iii. Legal remedies

The current legal system in Peru allows impacted communities to bring cases against mining companies in relation to any violation of their rights to the national courts.²⁰³

Cases can be brought either under Constitutional provisions²⁰⁴ and/or under the General Environment Law.²⁰⁵ Peruvian courts have also allowed third parties like NGOs to bring actions on behalf of affected communities. In addition, there are provisions for accessing legal remedies through alternative dispute resolution mechanisms to resolve conflicts between communities and mining companies.²⁰⁶

However, despite the availability of such legal remedies, mining conflicts in Peru have not been prevented. Communities do not have the financial means to pursue legal remedies to redress grievances.²⁰⁷ The legal proceedings take considerable time leading to delayed benefits to the communities.

In order to ensure that communities have access to legal remedies, the government must provide support to communities pursuing legal remedies and must continue its anti-corruption efforts. Communities are unable to access legal services to participate in the conflict resolution due to lack of financial means.

b. Recommendations

i. Multi-level Capacity Building

Increasing governmental capacity to monitor these processes. This capacity shall be reinforced by the training of civil servants as well as political official in the aspects of the project that should be monitored, what would result in a breach of the contract, and in the mechanisms available for communities and government officials to report a breach of the conditions. This capacity building should also include the training of citizens and organizations that volunteer to reinforce the monitoring process.²⁰⁸ Such capacity training for communities has already been performed by Peruvian organizations²⁰⁹ that work as intermediaries between

²⁰¹ For example, the OEFA may impose sanctions up to 1,000 UIT in the event that the mining company does not implement measures or activities aimed at avoiding that activities and events (such as emissions, ventilation, waste disposal and discharge into the environment) carried out during the processing of raw materials produce adverse effects on the environment. *See* Decreto Supremo 007-2012-MINAM. As mentioned above (*see* footnote 93), 1 UIT is currently equal to 4,050 SOL, meaning that the maximum amount of sanctions applicable by the OEFA will be equal to 40,500,000 SOL (approximately 12,500,000 USD). However, such amount is minimal when compared to the revenues made by the mining companies.

²⁰² *See* Meeting with anonymous members of mining companies, held on 13 March 2017.

²⁰³ In 2012 the Constitutional Tribunal of Peru (Exp N. 01126-2011-HC/TC) set precedent by explicitly recognizing the rights of the indigenous populations in Peru according to what was established in the ILO convention 169, the it referred to was known as Community known as Comunidad Nativa Tres Islas. Accessed at <https://es.mongabay.com/2017/05/peru-comunidad-indigena-exige-sentencia-defiende-territorio-mineros-ilegales-se-cumpla/>

²⁰⁴ Huanca Quispe, Herbert A. El derecho a la defensa de las comunidades campesinas nativas en los procesos judiciales desde la perspectiva constitucional. *Derecho y Cambio Social*.34. October 2013. Accessed at http://www.derechocambiosocial.com/revista034/DERECHO_COMUNIDADES_CAMPELINAS.pdf

²⁰⁵ Article 70, 72, 110, and 126 of the Law 28166 or Ley General del Ambiente. Accessed at <http://cdam.minam.gob.pe/novedades/leygeneralambiente2.pdf>

²⁰⁶ The Mesas de Dialogo and other attempts by the government to decrease tensions have been applied as an attempt to solve disputes in the mining sector.

²⁰⁷ United Nations. E/C.19/2009/CRP. 14. Permanent Forum for Indigenous Issues. New York September 2009.

²⁰⁸ This would never be understood as substituting the governmental monitoring protocol, only as a reinforcement of the process.

²⁰⁹ Some examples are the training by Futuro Sostenible, or the environmental monitoring tools provided by Grupo de Dialogo Minero y CARE Peru.

communities and businesses. Trainings on environmental monitoring should be implemented in every community that wishes to participate. This will increase the levels of trust between communities and mining companies, since the communities themselves will be in a position to monitor compliance with the law or the Consent Agreement.²¹⁰

ii. Reinforce Political Intent

The Viceministerio de Gobernanza Territorial can be used as the tool to reinforce overall political intent by acting as a platform to inform other government branches of the importance of contributing towards the monitoring of these types of agreements. The governmental entities that could directly or indirectly be involved in the monitoring of these processes would be the ANA, the *Ministerio de Agricultura y Riesgo*, the Ministry of Interior, and the Regional Governments.

iii. Integrating the Consent Agreement within the Current Legal Framework

The integration between the current legal framework and the Consent Agreement may be attained through the provision of cross-default mechanisms.²¹¹ The law should obligate the mining company and the affected community to enter into the Consent Agreement.²¹² In this respect, the law introducing the Consent Agreement should expressly provide that the breach of the Consent Agreement automatically entails a breach of applicable Peruvian law on mining.

The setup of cross-default mechanisms is essential to the effectiveness of the system. If these are not established and instead the companies can carry out parallel actions after a default, the companies will continue mining and the community will be unprotected. In other words, the company will not have incentives to accelerate the process to correct the breach of the contract if it can continue its operations. However, if via cross-default mechanisms their operations are suspended, they will make it a priority to comply with the agreement to continue their activity.

iv. Setting the Burden of Proof on the Mining Company

The Mining Company must provide proof that it has not breached the Consent Agreement if accused of a breach.²¹³

v. Suspension of the Mining License

The mining license should be suspended for the whole duration of any default by the mining company. This measure can be useful in reducing social conflicts in that it forces the mining company to suspend the mining activity, thus preventing a potential worsening of the damage already caused. Furthermore, it grants the relevant stakeholders²¹⁴ the opportunity to meet and agree upon the measures to be adopted by the mining company for the purpose of remedying the breach. The benefits granted by the mining license will only be reinstated when the damage has been remedied and adequate measures have been adopted in order to ensure that the performance of the mining activity can occur in compliance with all applicable laws.

²¹⁰ See Section 5 for more information on Environmental Monitoring

²¹¹ These cross-default clauses follow the same structure as a classical cross-default clause in a loan. This clause operates by automatically defaulting a borrower under Agreement A when it defaults under Agreement B. A cross-default provision effectively gives the lender under Agreement A the benefit of the default provisions in Agreement B. Cross-default provisions therefore have a domino effect.

²¹² For example, it could be possible to introduce this obligation under the Framework Mining Law, complementing it with the obligation to sign the *Compromiso Previo* declaration. See Chapter 2, Section 2.a.ia above.

²¹³ See Article 7.2 of the Consent Agreement.

²¹⁴ The state, the mining company, and the communities.

vi. Obligation to Adopt Remediation Measures within an Established Timeframe

The mining company must adopt all necessary measures required in order to prevent conflict and eliminate the detrimental consequences arising from the breach. The duty to fix the consequences of the breach should be fulfilled within a set period of time, it being understood that the relevant timing must be determined and agreed upon by the parties. The timing should be limited enough so as to effectively force the mining company to adopt the measures required.

In this respect, Article 7.3 of the proposed Consent Agreement introduces the possibility for the parties to agree on a reasonable timeframe. If the company does not provide remedy within the agreed period this will entail the suspension of the license. In order for the company to comply, it will have to use the most up to date technical resources²¹⁵ to correct any damage caused.

vii. Continuing Application of Workers' Rights

The mining company will be under the obligation of the company to pay the full salary to workers of the local site and compensate them for any injury or damage caused,²¹⁶ even when the license has been suspended or revoked. In order to afford these unexpected costs the company must create an emergency fund that guarantees rapid remedial actions.²¹⁷ In this way, it will be possible to grant the affected community with some form of monetary relief while, at the same time, ensuring that the mining company will be imposed an adequate penalty for its violations.

viii. Financial Aid to Communities for Legal Representation

The communities must be provided with the financial means to engage lawyers for legal services and representation, pay legal costs associated with the conflict resolution process, as well as any other related costs that would prevent the communities from representing themselves in the process.²¹⁸ An alternative would be the establishment of a legal advising section in the rural divisions of the Viceministerio de Gobernanza Territorial, which would provide free legal services to community members. Finally, the government should provide support to nonprofits that provide legal assistance to indigenous populations.

ix. Anti-Corruption Efforts

Regarding the need to diminish the number of corrupt officials, Peru already has adequate legislation addressing corruption in the mining sector.²¹⁹ Beyond these measures, the Consent Agreement establishes that if at any point evidence of corruption or incidents of bribery on the part of mining companies becomes apparent, the mining company is in violation of the agreement, which can result in the suspension or revocation of the license.²²⁰ Furthermore, according to the Consent Agreement, the community may withdraw its consent if corruption occurs in connection with the securing of the community's consent or in the undertaking of

²¹⁵ See Article 7.3 of the Consent Agreement.

²¹⁶ See Article 7.6 of the Consent Agreement.

²¹⁷ See Article 7.8 of the Consent Agreement.

²¹⁸ Refer to this issue in the Community Empowerment section (Section V), section 1.a

²¹⁹ In this respect, the Peruvian Criminal Code criminalizes bribery (Art. 578-585 of the Peruvian Criminal Code), illicit enrichment (Article 589 of the Peruvian Criminal Code) and embezzlement (Article 574 of the Peruvian Criminal Code) as corruption if performed by public officials.

²²⁰ See Article 7.5 of the Consent Agreement

the mining activities.²²¹ Finally, the consent provided by the community will not be deemed as “free consent” if it was given by any member of the community deemed to be corrupt.²²²

²²¹ See Article 3.3 of the Consent Agreement.

²²² See Article 1.1 of the Consent Agreement.

4. PUBLIC ADMINISTRATION PROCESS MAPPING

Securing social license in mining projects will require reorganization of government agencies and processes. This must be a flexible, active process involving engagement between parties through dialogue, consultation, and consent. This section addresses the need for stronger leadership, coordination between government agencies, as well as professionalization and training of public servants to prevent the too frequent social conflict associated with mining activities. It also addresses land management, conflict prevention systems, social license process mapping²²³ implementation, and accountability of state agencies.

1. Coordination between Government Agencies

a. Problem Statement

The current obstacles preventing the resolution of social conflicts are significantly rooted in a lack of coordination between state agencies.²²⁴ Absence of communication between different government agencies has resulted in an inadequate national strategy that fails to mandate mining companies to achieve and maintain social license when implementing projects. Frequently, political leadership roles and responsibilities are not clearly defined and in turn not properly executed. Institutional gaps negatively affect the state's management capacity in decision-making processes,²²⁵ as well as in the execution of effective consultation and dispute resolution among communities, companies and the state.²²⁶ The current bureaucratic issues are exacerbated by competition among state agencies for influence, resources, and the achievement of particular goals.²²⁷ The establishment of the *Viceministerio de Gobernanza Territorial* (Vice Ministry of Territorial Governance) is a welcome institutional change that aims to bridge these coordination and cooperation gaps. However, this Vice Ministry still understandably faces so-called growing pains and significant challenges as political capital must be utilized in order to achieve its institutional mandates, goals and aims.

b. Analysis

The Peruvian model for achieving social license in rural communities located near mining projects involves diverse tools and multiple tasks which are undertaken separately by different agencies. The problem is not the division of duties, but rather the absence of a national system that would allow the various responsibilities to be properly and effectively coordinated to accomplish mutual goals. For instance, the Consulta Previa law sets forth the legal framework for the consultation process with indigenous communities.²²⁸ The law recognizes that the Ministry of Culture is the ultimate authority responsible for ensuring that communities are duly consulted and for supervising the consultation process. However, each ministry is responsible for executing different aspects of the Consulta Previa law as various issues are addressed in the process. With respect to social license for mining projects, the authority in charge of the implementation of the Consulta Previa is the MINEM, which is also responsible

²²³ For the purpose of this Report, “social license process mapping” refers to the set of governmental actions, processes and stages that go into the achievement of the social license for mining operations.

²²⁴ For example, local and regional governments are not included in the process to obtain mining concessions for major mining projects. For more information on the mining concession process, please refer to Section Two, Analysis of Current Legal Framework. This issue was also mentioned by the Vice Minister of Territorial Governance, Javier Fernandez Concha, during the meeting in Lima on March 20 2017.

²²⁵ State decision making processes involve: identifying an issue, evaluating the possibilities, gather information about each of the alternatives, weigh the evidence, choose an alternative and finally take action.[<http://www.umassd.edu/fycm/decisionmaking/process/>]

²²⁶ G. Huamani Ober, S. Macassi Lavander, J. Alegría Galarreta and T. Rojas Alcalde, *Hacia una mejor gestión de los conflictos socioambientales en el Perú*, Consorcio de Investigación Económica y Social (CIES), 60 (2012).

²²⁷ *Id.* p 61.

²²⁸ For more information, please refer to Chapter 2, Section 5 above.

for issuing licenses and concessions and overseeing mining projects,²²⁹ which can impose a conflict of interest.

Another key component necessary for achieving social licenses in mining projects is the EIA, which includes a section on *Participación Ciudadana* (Citizen Participation).²³⁰ The governing board of SENACE (*Servicio Nacional de Certificación Ambiental para las Inversiones Sostenibles*), the national authority in charge of revising the EIAs, is composed of representatives of the Ministry of Culture, the Ministry of Energy and Mines, and the Ministry of the Environment. The exchange of information among these governmental agencies, however, is not efficient due to a lack of effective coordination, cooperation and communication mechanisms. At present, the state lacks a national system that includes specific implementation procedures and a set of minimum standards required to achieve social license in mining projects.

The current situation does not allow governmental agencies to share in all the available information on mining projects, companies, impacted communities, or social tensions regarding the mining industry, among other relevant data. Furthermore, lack of coordination results in wasted state effort and resources when different agencies collect similar information.²³¹ Additionally, competition between agencies for resources and influence can effectively disincentivise cooperation. In numerous cases,²³² duties overlap and responsibilities are not clearly defined, a problem that affects governmental accountability by making it unclear which governmental body has ultimate jurisdiction over any given issue. Ministries prefer to avoid direct responsibility for certain issues that have the potential to become a catalyst for social conflict,²³³ and often rely on extraneous governmental actors to address communities' concerns and expectations associated with the mining project.²³⁴ Multi-sector commissions (*comisiones multisectoriales*) have been created to enhance coordination among governmental agencies, but unfortunately, these are not implemented effectively.²³⁵

The Vice Ministry of Territorial Governance was established in February 2017 to monitor and manage social conflicts, replacing the National Office of Dialogue and Sustainability in this function.²³⁶ The new Vice Ministry is also tasked with addressing issues related to the decentralization process, land management and order. The Vice Ministry of Territorial Governance is now the entity responsible for developing a national system for the prevention of conflict. Although from a political perspective this governmental initiative has been perceived as positive,²³⁷ the Vice Ministry of Territorial Governance faces challenges. To start, it needs to design a more decentralized approach to conflict prevention that involves regional government institutions and agencies in conflict prevention efforts.²³⁸ Currently, the flow of communication and coordination is too “vertical”; hence, the central government oftentimes

²²⁹ For more information, please refer to Chapter 2, Section 5 above.

²³⁰ For more information, please refer to Chapter 2, Section 3 above.

²³¹ For instance, both the Defensoría del Pueblo and the Prime Minister Office's National Office of Dialogue and Sustainability “*Oficina Nacional de Diálogo y Sostenibilidad*” (now replaced by the Vice Ministry of Territorial Governance) monitor the evolution of social conflicts separately. See Defensoría del Pueblo, *Reporte de Conflictos Sociales N. 157*, (2017). See also, Oficina Nacional de Diálogo y Sostenibilidad, *Willaqkuni. Reporte N. 2*, (2017).

²³² For instance, when communities express an environmental concern regarding a Mining project, it is not clear which institution should take responsibility for the issue, if the Ministry of the Environment or if the Ministry of Energy and Mines. See Meeting with Cesar Ipenza, advisor to the Minister of the Environment, held in Lima in March 2017.

²³³ *Id.*

²³⁴ Such as local NGOs, civil society organizations or the Mining company itself. See Meeting with Rocio Silva Santisteban, former Executive Secretary of the Coordinadora Nacional de Derechos Humanos, held in Lima on March 21, 2017. See also Meeting with Gustavo Ruiz, representative from Defensoría del Pueblo, Adjuntía para la Prevención de Conflictos Sociales y la Gobernabilidad, held in Lima in March 2017.

²³⁵ In 2009 during Alan García's second administration, the “Comisión Multisectorial de Prevención de Conflictos” was created in order to help develop a strategic plan to ease social conflicts, however due to official representative's lack of expertise on social management was unable to achieve its goal. See G. Huamaní Ober, *supra* note 226, at 21.

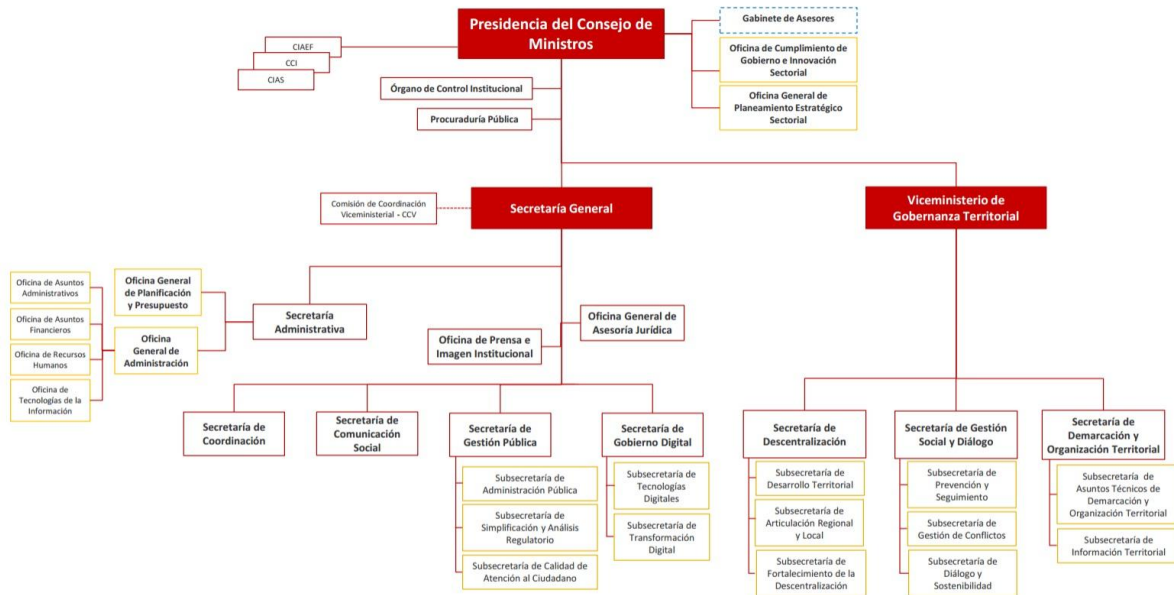
²³⁶ See *Presidencia Del Consejo De Ministros* website, available at: <http://www.pcm.gob.pe/organigrama-sectorial/> (last visited May 22, 2017)

²³⁷ La Voz de SE, *El Viceministerio de Gobernanza Territorial es una buena señal*, *Semana Económica* (Mar. 5, 2017) available at: <http://semanaeconomica.com/article/legal-y-politica/sector-publico/217517-nuevo-vice-ministerio/> (last visited May 4, 2017).

²³⁸ See G. Huamaní Ober, *supra* note 226, at 60.

becomes aware of social concerns only when tensions have peaked. Furthermore, substantive political will and an effective enforcement policy within state agencies is needed to change social and conflict management practices,²³⁹ particularly since the Peruvian state strongly encourages and prioritizes promotion of private investment such as mining projects.²⁴⁰

ORGANIGRAMA DE LA PRESIDENCIA DEL CONSEJO DE MINISTROS - PCM



Source: Vice Ministry of Territorial Governance, Prime Minister’s Office

c. Recommendations

i. Leadership Role of the Office of the President

Securing the social license associated with mining projects must be a top priority for the government. The Office of the President should lead an initiative aimed at achieving social license in order to demonstrate political will and interest in preventing social conflicts resulting from mining activities. Moreover, the Presidency should publicly show its support for the new Vice Ministry of Territorial Governance to empower it in the eyes of other governmental agencies. Furthermore, giving the new Vice Ministry legal powers through a presidential resolution can ensure that other governmental agencies cooperate and comply with the Vice Ministry’s initiatives.²⁴¹

ii. Simplifying the Procedures for Obtaining Social License

It is necessary to establish a single procedure for obtaining social license to better allocate governmental responsibilities and duties; for example, by establishing a procedure similar to the Environmental Impact Assessment, but with a specific focus on social management issues.

iii. Ensure Communication among Governmental Agencies

Effective communication among governmental agencies could be ensured by creating a platform where all ministries can share and update relevant information associated with communities and mining projects. This could work as a social media platform and include an instant messaging platform (e.g. online chat) to facilitate communication, cooperation,

²³⁹ See Meeting with Gustavo Ruiz, representative of the Defensoría del Pueblo’s Adjuntía para la Prevención de Conflictos y la Gobernabilidad, held in Lima in March 2017.

²⁴⁰ Red Muqui, *Los conflictos sociales desnudan problemas de fondo de la realidad peruana* (2017) available at <http://www.muqui.org/details/itemlist/tag/Conflictos%20sociales> (last visited May 4, 2017).

²⁴¹ See subsection “Accountability Within the State Agencies” in this Section of the report.

coordination, and decision-making processes among governmental agencies. Instant messaging applications will also enhance coordination regarding conflict prevention and conflict resolution tasks.²⁴²

2. Professionalization and Training of Public Servants

a. Problem Statement

The lack of public sector representatives with adequate professional skills is a major challenge for the central government, for example regarding multicultural²⁴³ competency, communication, prevention, and management of social conflicts, as well as negotiation techniques. Specific guidelines regarding the exact skills, professional background,²⁴⁴ sociocultural knowledge and personal qualities must be defined, so that the public understands the various responsibilities that are associated with specific positions. Governmental officials often face difficulties with cultural understanding.²⁴⁵ This contributes to an inability to establish meaningful relationships with rural communities, which have their own customs and do not necessarily have a command of the national language, Spanish. The state, thus, struggles to engage with indigenous communities and fails to prevent crises in high conflict areas.²⁴⁶

b. Analysis

There is an absence of well-trained professionals in the public sector available to undertake tasks related to achieving social license, particularly at the regional level.²⁴⁷ A social management strategy needs to be designed, which includes specific roles and tasks for conflict prevention and resolution processes. Such roles include: developers in charge of building capacity within local communities; socioeconomic and political analysts to evaluate community networks in mining areas; communications officers or government spokespeople; community mediators and negotiators with the skills to defuse social tensions; observers and guarantors of consultation procedures.²⁴⁸ Additionally, these positions require cultural knowledge of the rural areas of Peru, including proficiency in languages such as Quechua. Besides this, the *Defensoría del Pueblo* has noted that civil servants working on conflict prevention and conflict resolution are more state-focused rather than citizen-focused. There is a “them” and “us” perception among government employees regarding rural communities.²⁴⁹ From another perspective, working for the state is not necessarily an attractive option for young and/or skilled professionals. This is a consequence of a perception that the state has high levels of corruption,²⁵⁰ and also unattractive working conditions.²⁵¹

²⁴² During a meeting in Lima with the Vice Minister of Territorial Governance, Javier Fernandez Concha, pointed out that using WhatsApp groups had helped overcome interagency communication and coordination barriers. *See* Meeting with Javier Fernandez Concha, Vice Minister of Territorial Governance, held in Lima on Mar. 21, 2017.

²⁴³ Understood as ethnic and ideological diversity. *See* UNESCO, *Definition of Multiculturalism*, available at <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/multiculturalism/>.

²⁴⁴ Such as education, career path, previous training.

²⁴⁵ *See* Meeting with Gustavo Rodriguez, representative of the Defensoría del Pueblo’s Adjuntía para la Prevención de Conflictos y la Gobernabilidad, held in Lima on March 14, 2017. *See also* Meeting with Rocio Silva Santisteban, former Executive Secretary of the Coordinadora Nacional de Derechos Humanos, held in Lima on Mar. 21, 2017 (claiming that there is prejudice in the public sector with respect to the capabilities of indigenous and/or rural populations).

²⁴⁶ *See* G. Huamaní Ober, *supra* note 226, at 62.

²⁴⁷ For instance, in Cajamarca the Ministry of Energy and Mines has been incapable of delegating functions and economic resources for conflict resolution claiming that the regions don’t count with qualified personnel to undertake associated tasks. *Id.* at 21.

²⁴⁸ *Id.*

²⁴⁹ *See* Meeting with Gustavo Rodriguez, representative of the Defensoría del Pueblo’s Adjuntía para la Prevención de Conflictos y la Gobernabilidad, held in Lima on March 14, 2017.

²⁵⁰ For more information, please refer to Section 1 above.

²⁵¹ The Vice Minister of Territorial Governance mentioned during an interview in Lima that the State needed to offer better working conditions such as better salaries and life insurance, among others, in order to become more attractive for professionals. *See* Meeting with Javier Fernandez Concha, Vice Minister of Territorial Governance, held in Lima on Mar. 21, 2017

c. Recommendations

i. Importance Of Interpersonal And Negotiation Skills

It is necessary to increase and enhance interpersonal skills and knowledge of civil servants through training programs and workshops on interculturality and negotiation skills. Ensure that these learning tools are properly applied.²⁵² Moreover, public officials that will be working on issues related to social management and/or extractive industries should have familiarity with the areas of impact in order to understand their political, socioeconomic, and environmental contexts. Thus it is crucial that civil servants frequently visit, and engage with, impacted communities and mining areas.²⁵³

ii. Introduce Specific Job Description

It is also necessary to define specific job descriptions for public officials working on conflict prevention and resolution issues to ensure relevant employee backgrounds in critical subject matters, while demonstrating necessary personal characteristics, such as empathy. In that sense, hiring procedures should include psychological or personality screening, as well as case interviews (based on real life conflict prevention and social management experiences) and ‘role-play’ questions to evaluate candidates’ responses to hypothetical scenarios based on real life examples.²⁵⁴

iii. Increase Diversity in Personnel

Hire personnel from different socioeconomic, cultural, and professional backgrounds, in order to diversify perspectives, allowing the state to formulate comprehensive solutions for achieving social license. The state should especially seek to recruit lower-income individuals, women, young people, people of indigenous and African descent, and others traditionally underrepresented in government through targeted outreach activities.²⁵⁵

iv. Increase Public Officials’ Motivation

Motivate people to work in the public sector by developing a government career path for young professionals. This requires promoting better work conditions through salary increases, access to health and travel insurance, economic and logistical resources for travelling to communities, scholarships, fellowships, and training programs.²⁵⁶

3. Comprehensive Land Management and Development Plans

a. Problem Statement

Social license for preventing mining conflicts is directly related to land management. Peru needs a national strategy addressing land management through a Land Ordering Plan (*Plan de Ordenamiento Territorial*, POT).²⁵⁷ The POT is a key planning instrument for human

²⁵² In this case, by “properly applied” we are referring to an applied-based knowledge perspective, in which public servants are learning practical tools to prevent conflict when dealing with intercultural matters in the context of social license.

²⁵³ See D. Farrell, A. Goodman, *Government by Design: Four principles for a better public sector* (2013), available at <http://www.mckinsey.com/industries/public-sector/our-insights/government-by-design-four-principles-for-a-better-public-sector> (last visited May 26, 2017).

²⁵⁴ See L. H. Lippman, R. Ryberg, R. Carney, K. A. Moore, *Workforce Connections: Key “Soft Skills” That Foster Youth Work Success: Toward a Consensus Across Fields, Child Trends, USAID, 33-34* (2015), available at <https://www.usaid.gov/sites/default/files/documents/1865/KeySoftSkills.pdf> (last visited May 26, 2017).

²⁵⁵ See OECD, *Fostering Diversity in Public Sector* (2009), available at <https://www.oecd.org/gov/pem/paper-fostering-diversity-public-service.pdf> (last visited May 26, 2017).

²⁵⁶ See e.g. J. Kauzya, *Strategies for Attracting and Retaining the Best Talent in the Public Service in Africa: Challenges and Strategies*, United Nations (2010), available at <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan038584.pdf> (last visited May 26, 2017).

²⁵⁷ See Meeting with Javier Fernandez Concha, Vice Minister of Territorial Governance, held in Lima on Mar. 21, 2017.

development with a sustainable perspective that reduces risks of environmental disasters and social conflict.²⁵⁸ The overlapping of land uses and land management mandates, combined with a lack of comprehensive planning in terms of land management and order (*Ordenamiento Territorial*), contributes to increased social conflicts.²⁵⁹ The current land management decisions fall under the central government's purview. However, it remains unclear which level and entity is responsible, making land classification a politicized issue.²⁶⁰

b. Analysis

Peru is in urgent need of a Law of Land Management (*Ley de Ordenamiento Territorial*) because most of the socio-environmental conflicts are related to land disputes.²⁶¹ The Vice Ministry has a central role in mitigating and preventing these conflicts. To this end, Peru requires a long term land development plan.²⁶² After the decentralization process in Peru, land-use classification and titling became fragmented because land-use powers and responsibilities were distributed across government agencies and directorates that often have competing mandates and powers related to land use.²⁶³ An overlapping of communal land with territory concessioned to mining companies is one major issue.²⁶⁴ Another lies in conflicting interests of what the state declares property of the Peruvian people, and the surface of the land which can be privately owned, designated natural conservation areas, or populated.²⁶⁵ In 2011, Law 30230 expedited the resolution of mining investments on hold ("*destrabar inversiones*"), thus increasing tensions over land control.²⁶⁶ The current fragmentation of land management and titling, combined with the overlap of state agencies and lack of a POT, make the land management process a key component in preventing conflict. Finally, the launch and approval of the POT requires political will at the highest level because it is a politicized issue, and requires the strategic leadership of the President, the PCM and the Vice Ministry to be achieved.

c. Recommendations

i. Implementation of a National Land Development Plan

The Vice Ministry should lead the first National Land Development Plan (*Plan Nacional de Ordenamiento Territorial*) at the country level to clarify what is already concessioned land and where it overlaps with protected natural land, community owned land and other denominations.

ii. Increase the Number of Personnel for Mapping Purposes

The Vice Ministry, through its office of the *Subsecretaría de Asuntos Técnicos y Demarcación y Organización Territorial* (Office of Technical Issues, Demarcation, and Territorial Organization),

²⁵⁸ See *Propuesta Ciudadana, Ordenamiento Territorial: Hoja de Ruta*, 2 (2015), available at <http://www.propuestaciudadana.org.pe/sites/default/files/publicaciones/archivos/Hoja%20de%20Ruta%20para%20el%20OT.pdf> (Last visited Apr. 30, 2017).

²⁵⁹ Vladimir Pinto from Oxfam Peru mentioned that there is no land development plans. See Meeting with Vladimir Pinto, Oxfam Peru, held in Lima on March 13, 2017. In an interview with Ing. Baldoceba from the Regional Government of Cusco, he mentioned that there is no National Development Plan in Peru and it is urgently needed. See Meeting with Yordan Americo Baldoceba, Regional Government of Cusco, held in Cusco on March 14, 2017.

²⁶⁰ See Center for International Forestry Research, *Interactive: Who has power over land use in Peru?*, (2014), available at: <http://blog.cifor.org/40924/interactive-who-has-power-over-land-use-in-peru?fnl=en> (Last visited Apr. 30, 2017).

²⁶¹ *Propuesta Ciudadana*, supra note 258.

²⁶² See C. Flores Unzaga, *Conviviendo con la minería en el sur andino: Experiencias de las mesas de diálogo y desarrollo de Espinar, Cotabambas y Chamaca*, 179 (2016).

²⁶³ See M. Kovacevic, *Power and political interest pervade Peru's land sector* (2014), available at: <http://blog.cifor.org/25100/power-and-political-interest-pervade-perus-land-sector?fnl=en> (Last visited Apr. 30, 2017).

²⁶⁴ See Oxfam Research Report, *Geographies Of Conflict: Mapping Overlaps Between Extractive Industries and Agricultural Land Uses in Ghana and Peru*, (2014).

²⁶⁵ See Patrick Wieland, *Going Beyond Panaceas: Escaping Mining Conflicts in Resource-rich Countries through Middle-ground Policies*, (2013).

²⁶⁶ See F. Durand, *Cuando el poder extractivo captura el Estado: Lobbies, puertas giratorias y paquetazo ambiental en Perú*, 43 (2016).

should increase the number of personnel dedicated to map the Peruvian territory for the new organization of the land.²⁶⁷

iii. Establishment of a Diagnosis Taskforce

The office should form a taskforce (*Comisión Técnica*) with personnel of the MINAM, MINEM, ANA, MINCUL, OEFA, SENACE and nonprofit organizations to develop a diagnosis of current land use and titling. The taskforce should incorporate different stakeholder perspectives (with a participatory approach²⁶⁸) and be formed by an interdisciplinary team. The task force should spearhead the design of the POT (*Plan Nacional de Ordenamiento Territorial*). Additionally, the Vice Ministry should regularize the land titling of communal land and expedite the classification of territories where there is overlap between the mining concessions and communities. This will provide clarity for mining companies in regards to whom they should contact from the community to request permission to enter the land before exploration.

iv. Digitalization of Land Title Information

The Vice Ministry, through its *Subsecretaría de Información Territorial* (Office of Territorial Information), should compile and digitize the updated land titles and corresponding geographic information system (GIS) maps of Peruvian land, as well as make them publicly available through its Internet portal.²⁶⁹

v. Capacity Building for Local Governments

The Vice Ministry should provide regional governments with technical assistance in the form of experts in GIS planning, engineers, and others to develop land planning in confluence with the newly created POT. These experts could either be from the current government or outsourced as external consultants.

4. Conflict Prevention System

a. Problem Statement

Social conflict occurs with communities that have inherently different socioeconomic interests. Conflicts can be prevented when the state has accurate information, consults with potentially impacted community members about its proposals and decisions, ensures effective dialogue before tensions spike, and institutes mechanisms that solve disagreements prior to violent confrontations.²⁷⁰ In order to have an effective system of conflict prevention, an understanding of the root causes of social conflict and other influencing factors are necessary before effective institutional redress mechanisms can be created.

b. Analysis

Subsequent to the deregulation and privatization reforms in Peru in the 1990's, conflicts related to extractive industries increased dramatically.²⁷¹ The number of mining concessions

²⁶⁷ On efforts of MINAM in this regard, see MINAM, *Ordenamiento Territorial (OT) en el Perú (2011-2015), Avances concretos para la sostenibilidad y acciones de MINAM en ejercicio de su rol Rector* (2016).

²⁶⁸ Participatory approaches in public policy are those that incorporate citizens that may be impacted by a policy, in the decision of its design, implementation or evaluation. See Food and Agricultural Organization of the United Nations (FAO), "Participation and participatory policy making (PPM)" in "Sustainable Livelihoods and Participatory Policy Making: Issues and Answers", <http://www.fao.org/docrep/006/ad688e/ad688e03.htm> (Last visited 05/13/2017).

²⁶⁹ See MINAM, *supra* note 267, at 138 *et seq.*

²⁷⁰ See C. Flores Unzaga, *supra* note 262, at 21.

²⁷¹ See Oxfam America, *Mining Conflicts in Peru: Condition Critical* (2009), <https://www.oxfamamerica.org/static/media/files/mining-conflicts-in-peru-condition-critical.pdf> (Last visited April 16, 2017).

that include an environmental impact has similarly increased, doubling between 2005 and 2011, with noticeable increases in coastal areas, highlands and the Amazonian region.²⁷² Communities living in these areas have communal rights over much of the lands and therefore are directly affected by such government decisions on mining concessions. Approximately 50% of reported conflicts tracked by the *Defensoría del Pueblo* are categorized as either social or environmental, and 80% of these involve mining projects related to water.²⁷³ Citizens reported approximately 152 conflicts, of which 68% were related to issues with extractive industries.²⁷⁴ An economic model that prioritizes investment in extractive activity while disregarding the human rights of rural communities is neither environmentally or socially viable. Instead, an economic development model that incorporates sustainable social policies and ensures timely prevention of social conflicts needs to be developed.

In Peru, public officials have made several attempts to create a national conflict prevention system. The recent creation of the *Oficina del Diálogo y Sostenibilidad* (National Office of Dialogue and Sustainability)²⁷⁵ in 2016 is an example of this approach.²⁷⁶ Over the past five years, the PCM, the National Congress, and civil society have attempted to advance social conflict prevention. The new leadership of the Vice Ministry has the potential to create and coordinate a national system of conflict prevention that addresses land management and extractive industry issues.²⁷⁷

For a conflict prevention system to work, the government must generate trust by promptly informing potentially impacted communities.²⁷⁸ In order for the dialogue process to be effective it must be inclusive of women in the community.²⁷⁹ Including women in dialogue and negotiations is critical to incorporating the needs of more members of the community, which contributes to reaching agreements that accurately reflect communities' needs, thus gaining legitimacy.²⁸⁰

Another cause of social tension is the logistical management of dialogue spaces; for example, in many instances, the government opts to meet with mining companies in luxurious venues in Lima, while meeting with community leaders in improvised tents or open spaces.²⁸¹ In cases where there has been dialogue and the parties have reached an agreement, continued monitoring and follow-up with the compliance of the agreement is critical to avoid conflict

²⁷² VII Informe del Observatorio de Conflictos Mineros (OCM) in G. Huamaní Ober, *supra* note 226, at 9.

²⁷³ *Id.*

²⁷⁴ See J. C. Requena, *Conflictividad social: Diálogo sin sostenibilidad*, *Semana Económica* (Apr. 12, 2017), available at: <http://semanaeconomica.com/riesgo-politico/2017/04/12/conflictividad-social-dialogo-sin-sostenibilidad/> (Last visited Apr. 16 2017).

²⁷⁵ See Oficina Nacional del Diálogo y Sostenibilidad de la PCM, *Construyendo el Sistema Nacional de Prevención de Conflictos Sociales: Enfoques, avances y desafío* (2013), available at: <http://onds.pcm.gob.pe/construyendo-el-sistema-nacional-de-prevencion-de-conflictos-sociales-enfoques-avances-y-desafio/> (Last visited Apr. 16, 2017).

²⁷⁶ See Congreso de Relaciones Comunitarias, *Sistema Nacional de Prevención y Gestión de Conflictos Sociales Podría Crearse a Fines del 2016* (2016), available at <http://www.congresorelacionescomunitarias.com/2016/ndp073.php> (Last visited April 16 2017).

²⁷⁷ See C. Flores Unzaga, *supra* note 262, at 179.

²⁷⁸ For example, it is common that community leaders find out about mining concession decisions in the government's portal or through press announcements, instead of previously dialoguing with them directly.

See Meeting with Community Leaders in Paca (Peru) held on March 16, 2017. Additional to the potential environmental and social conflicts, the government's management of the whole mining process creates tension among communities. Sometimes there are communities that are against mining (“*conflictos de resistencia*”) and communities that agree on mining but want to reach fair agreements (“*conflictos de convivencia*”). See Meeting with Vladimir Pinto, Oxfam Peru, held in Lima on March 13, 2017. See also Meeting with Julia Cuadros, Cooperación, held in Lima on March 13, 2017.

²⁷⁹ See The World Bank and Oxfam, *Construyendo desde el Conflicto en Perú: Las mesas de diálogo de Tintaya y Moquegua en Perú*, 58 (2015), available at: <http://documentos.bancomundial.org/curated/es/55969146799994441/pdf/103113-WP-P147140-Construyendo-desde-el-Conflicto-en-Peru-SPANISH-Box394854B-PUBLIC.pdf> (Last visited Apr. 30 2017).

²⁸⁰ Oxfam Peru documented the reduced participation of women in “Mesas de Diálogo” and other negotiations related to mining. They stress the importance of including women, making the meetings and information available in quechua and other local languages, because when they participate, other issues are brought into the negotiations agenda like domestic and intra community violence, as well as healthcare needs. *Id.* at 58.

²⁸¹ This creates tensions because it shows that the government treats differently companies and community members. See Meeting with Rocio Silva Santisteban, former Executive Secretary of the Coordinadora Nacional de Derechos Humanos, held in Lima on Mar. 21, 2017.

escalation.²⁸² Finally, when tensions increase, the role of the state police as well as the government's state of emergency contributes to conflict escalation.²⁸³ In order to avoid conflict, state involvement and intervention should be active from the initial stages of the process through informative actions such as community consultations, management of the dialogue process, documentation of finalized agreements, making agreements transparent and publicly available through the use of technology, and monitoring compliance of both parties.

c. Recommendations

i. Providing Prompt Information to the Affected Communities

The potentially impacted communities must be promptly consulted and informed – regardless of whether they are indigenous or rural (*campesinas*) – about the mining project, including decisions made regarding concessions, exploration, exploitation, etc. This includes communities where these projects are undertaken as well as communities in nearby areas, or any areas where the activities or transportation of the minerals is taking place.²⁸⁴ In order to avoid misunderstanding the communities' needs, conduct an analysis of each potentially impacted community, taking into account its particular characteristics.

ii. Organization of the Consultations with the Affected Communities

Increase attention to logistical details of dialogue management²⁸⁵ and negotiations conducted with community members and public servants. Oftentimes, lack of attention to detail and to the importance of these meetings creates misunderstandings and tension. Set the date, time, duration and schedule of the meeting in advance and ensure that state representatives adhere to the schedule.²⁸⁶ Pre-plan other logistical details such as the location, the presence of public servants, etc., and then comply with the logistical announcements or duly inform if there are changes.

iii. Communities' Capacity Building

In addition to information, the affected communities' need to be provided with the skills to better understand legal rights and implications, in order to negotiate with other stakeholders in mining project development.

iv. Role of Women in the Consultation Process

Women must be included in the process of asking about community needs. Provide information, legal assistance, and negotiation skills training to participate in any dialogue or setting where there are negotiations of agreements. Any agreements reached without the participation of women, will only include consent of less than about 50% of the population, leaving gaps in addressing the needs of the community.²⁸⁷

²⁸² See Meeting with Julia Cuadros, Cooperacion, held in Lima on March 13, 2017.

²⁸³ See Section on Excessive Use of Force and State of Emergency - Absence of the State. See Meeting with community leader Elsa in Espinar, held on March 15, 2017. See also *Cómo se frustró diálogo por el Proyecto Conga en Cajamarca*, available at <https://www.youtube.com/watch?v=BmboGLRCdEc> (Last visited April 30 2017).

²⁸⁴ The dust from transporting the minerals, is a major source of tensions with communities near the roads. See Meeting with community leader Elsa in Espinar, held on March 15, 2017.

²⁸⁵ e.g. *Mesas de Diálogo, Talleres informativos* and other meetings

²⁸⁶ See Flores Unzaga, *supra* note 262, at 200.

²⁸⁷ See The World Bank, *World Development Report 2012. Gender Equality and Development*, 3-4 and 46-48 (2011), available at <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf> (Last visited Apr. 24 2017).

v. Compliance with Human Rights Obligations

The State must recognize the communities and respect their human rights²⁸⁸ and collect information about communities and any agreements they reach with the mining companies and government authorities.

vi. Enforcement of Communities' Agreements

The State must monitor any agreements reached with impacted communities and ensure compliance of agreements between communities, local governments and mining companies.²⁸⁹ It must also assist communities that are suffering from lack of compliance with reached agreements on the part of the local government and/or mining company. This assistance should include but is not limited to: interpreters in their local language, legal aid, administrative tools, linking them with nonprofits, and opening channels of communication with the mining companies.

vii. Social Conflicts and Use of Force

The State must limit the use of force and avoid declaring states of emergency, unless absolutely necessary. It must allow communities to protest peacefully and work with the police to create a use-of-force protocol to avoid the use of excessive force, thereby preventing social unrest. Use of force can trigger social conflict escalation and serve as a flashpoint for expanded unrest and violence.²⁹⁰

viii. Establishment of a National System of Conflict Prevention

In order to prevent social conflict, the Government needs information, much of which it can gather by engagement with communities. To achieve this, Peru should develop a National System of Conflict Prevention, which is a database containing all agreements reached by the communities that are located in the territories of land concessions for mining exploration and exploitation. Although the Vice Ministry of Territorial Governance is focusing on creating an “inventory of previous agreements,”²⁹¹ this database needs to be more than an inventory of previous agreements.

The National System of Conflict Prevention will serve as a tool for moving forward with current dialogue processes, negotiations, and future agreements, as new agreements are continuously updated. This database of agreements is key to determining the rights and obligations of the mining companies and affected communities. Additionally, it will serve as a tool to track progress and/or failure of compliance.

A database is the first step, but continued monitoring and compliance are critical to ensure efficacy and legitimacy in oversight. In doing so, the state must be actively involved in monitoring the agreements between communities and companies. Agreements must have a clear timeline for specific actions prior to the exploitation phase. Therefore, monitoring the compliance of such agreements is necessary.²⁹² In the cases where agreements have not been

²⁸⁸ See Meeting with Julia Cuadros, Cooperacion, held in Lima on March 13, 2017.

²⁸⁹ See M. Levano, *Balance y Propuestas para el funcionamiento de los procesos de diálogo en el Perú*, (2016) at 64.

²⁹⁰ See The World Bank, *World Development Report 2012. Gender Equality and Development*, 3-4 and 46-48 (2011), available at: <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf> (Last visited Apr. 24 2017).

²⁹¹ See J. Fernández-Concha, *El Estado debe tener presencia y después hacer la consulta previa*, La República (Apr. 14 2017) available at: <http://larepublica.pe/impres/politica/865146-el-estado-debe-tener-presencia-y-despues-hacer-la-consulta-previa> (Last visited Apr. 24 2017).

²⁹² Julia Cuadros from CooperAccion mentioned the need for a National System of Conflict Prevention and also the need for an office of Monitoring and Follow-up. See Meeting with Julia Cuadros, Cooperacion, held in Lima on March 13, 2017.

reached yet or negotiations have not begun, the Vice Ministry should act as an impartial mediator between the communities and companies to facilitate reaching agreements.

ix. Integrating IT Resources in Community Mapping Processes

Technology should be used to map communities, by collecting and analyzing information that supports setting the conditions for social license. While concurrently collecting data, community mapping should be conducted with support of the *Defensoría del Pueblo*, by identifying affected communities at low, medium, and high risk of conflict.²⁹³ Mapping is challenging because communities are not monolithic; they change with population growth, migration, and displacement.

Additionally, communities face internal challenges of leadership, representation, and community organizing.²⁹⁴ Technology gaps (lack of broadband internet, electricity and cellphone service in remote areas) complicate this process, as many communities are located hours away from major population centers and are therefore difficult to reach and engage with.²⁹⁵ However, the government should aim at providing access to Internet throughout the country to ensure access to information. The Vice Ministry should launch an online platform where communities are able to upload their reached agreements with mining companies or post non-reached agreements (i.e. information regarding pending or failed negotiations).²⁹⁶

Decisions of dialogue and mediation interventions should be based on the information collected on the online platform, on the basis of the particular characteristics of the communities and the situation analysis to prioritize those in which conflict is rising.

5. Process Mapping for the Achievement of Social License

a. Problem Statement

Social license in Peru is a key element for conflict prevention. Obtaining social license for mining projects must be seen as a process, rather than a particular moment in time.²⁹⁷ Social license historically difficult to achieve and maintain anywhere in the world. Thus, formalizing the process in Peru would make the country a pioneer in social licensing practices. In order for social license in mining to be effective, it must not only consult communities affected by mining activities, but it must also integrate a consent process that is present at the time of the mining concession. In cases where this is not possible anymore (due to previous decisions), then the obtaining of social license should be undertaken during the exploration and exploitation phase.²⁹⁸ A formalized process aimed at setting the conditions for and achieving social license must be flexible and adapt to different situations in communities in order to avoid conflict.

²⁹³ See Defensoría del Pueblo, *Conflictos Sociales*, available at <http://www.defensoria.gob.pe/temas.php?des=3#r> (Last visited Apr. 24 2017).

²⁹⁴ For more information, please refer to Section 5 of this Report.

²⁹⁵ In order to address these due to the geographical characteristics and distance challenges, the communities should be able self-register in the Community Mapping Database.

²⁹⁶ The platform for registering communities and reached agreements should also have an app for Smartphones and Tablets that allows community members and public servants travelling to the communities to register any information. Even if offline due to lack of internet, the files should be able to register and once the device is in an area with internet access, complete the upload automatically. The transparency aspect of this is key because mining companies that fail to comply will be publicly exposed; and it gives the communities information about other cases that might be useful for them to reach fairer agreements, which will in turn, decrease the possibility of future conflict. The Vice Ministry should use technology to collect and share information. The platform should have an open source design, so that any person can post and upload documents, however, the Vice Ministry should appoint personnel to ensure that all posted material is accurate in terms of the agreements between mining companies and communities. This database should be publicly available to anyone visiting the site.

²⁹⁷ The World Bank and Oxfam, *supra* at note 47, at 58.

²⁹⁸ Additionally, the Social License should be integrated within the Consulta Previa, the Environmental Impact Assessment and the dialogue processes. For more information, please refer to Section 2 of this Report.

b. Analysis

Currently, the different processes and stages of the mining approvals for concession, exploration and exploitation, Consulta Previa, Environmental Impact Assessments, “*Mesas de Diálogo*”, “*Talleres Informativos*” and others, are fragmented within different agencies of the central government and levels of government. In order to solve this problem, a common understanding of the problem and unity of efforts must replace the current episodic process. Accordingly, the Vice Ministry can serve as the interlocutor and coordinate the process of social license within the various agencies and levels of government.

Recently, the Office of Dialogue and Sustainability (*Oficina Nacional del Diálogo y Sostenibilidad*, ONDS), the entity previously in charge of managing dialogue with communities in conflict, was dissolved and its functions absorbed by the Vice Ministry.²⁹⁹ This new organizational arrangement allows the integration of dialogue with communities and land management process (known as *ordenamiento territorial*). However, as previously discussed, the administrative challenge remains in terms of land use overlap and process mapping. Therefore, the Vice Ministry should focus on interinstitutional coordination (*coordinación interinstitucional*) to pilot the different elements of the social license process.

In order for social license to be an effective method of avoiding conflicts, communities should be empowered with information and autonomy to make decisions. Access to information using technology and the Internet is critical because it reduces knowledge gaps and bridges communication. Additionally, having knowledge of the comprehensive costs – including environmental and social costs – and risks of mining projects allows communities to reach fairer agreements.

c. Recommendations

i. Implementing a Social License Pilot Program

Since social license has never been successfully implemented in this context, the government should launch a Social License Pilot Program for an upcoming mining project approval process to test the different components of it, adjust it, and scale it nationally. The Pilot Program should incorporate the use of a simple consent agreement³⁰⁰ in which commitments of both parties are clear in terms of deliverables, timing, and consequences for failure to comply with the terms.

This Pilot Program should begin with the government informing the potentially affected communities about the project, include the company seeking permission to enter the land for exploration, monitor the dialogue process being inclusive of women and incorporating their needs, and in drafting the associated agreement for witnessed signature, ensuring transparency in the community. Then the agreement should be uploaded and made publicly available through the Vice Ministry’s portal, allowing for the continued monitoring and compliance of agreements before proceeding into the next stages of the mining project.³⁰¹

The Pilot Program should also include an evaluation phase to assess if the agreement attained its objective in the short run, that is, to have the consent of the impacted communities and prevent conflict. After the assessment, the Vice Ministry should make adjustments to any part of the design of the Social License Pilot Program and scale it up to promote social license for mining at the national-level.

²⁹⁹ See La República, *Jefe de oficina de Diálogo y Sostenibilidad de la PCM renunció a su cargo* (April 1, 2017) available at: <http://larepublica.pe/politica/861283-jefe-de-oficina-de-dialogo-y-sostenibilidad-de-la-pcm-renuncio-su-cargo> (Last visited Apr. 17 2017). See also PCM, *Organigrama Sectorial*, <http://www.pcm.gob.pe/organigrama-sectorial/> (Last visited April 17 2017).

³⁰⁰ See Annex 1.

³⁰¹ Ensuring that the provision of free Internet access and the determined radius of the future project is included in the agreement.

ii. Development of IT Infrastructures

Incorporating technology in the social license process is key to empower all the involved stakeholders. The Vice Ministry should work with MINEM to incorporate the requirement for the mining company to provide free Internet access to the surrounding communities into the mining exploration and exploitation concession processes through a public-private partnership. The mining companies should provide free public Internet access within a radius outside the premises of the future mining site and exploration camp (the specific radius to be determined by the community in agreement with the company). For these affected communities, Internet access serves as a critical communication tool with the state, where the Vice Ministry's portal to upload posts on advancements of dialogue, negotiations, and archived consent agreements. Increased transparency and access to information will address knowledge deficits in communities, positively influence political will at the national and sub-national level, and promote social license in mining projects.

iii. Performance of Cost-Benefit Analysis and Risks Assessment Evaluations

A cost benefit analysis and risk assessment should be implemented to underpin the social license and mining approval process. This analysis will consider and weigh the social and environmental aspects of a mining project before the communities consent, in order to reduce social conflict. This increased awareness is important, because communities agree to projects where they are fully aware of the costs, risks, and chain of responsibility of responsibility if an accident occurs.³⁰²

The cost benefit analysis should incorporate results of the Environmental Impact Assessment, the social costs (for example displacement of communities, increased transit in the area, etc.), and a risk assessment that clearly states the impacts associated with an environmental accident. These costs and risks must be assessed by the government *before* approving the exploitation phase. This analysis must be publicly available, including appropriate data sets, before official project approval, in order to discuss concerns with the community in the “*Mesas de Diálogo*” and “*Talleres Informativos*”.

6. Transparency and Accountability

a. Problem Statement

The legal framework and implementation process for mining in Peru is complex, with numerous stakeholders, and, accordingly, not fully understood by all interested parties. Although many of the legal institutions, substantive law, and processes surrounding mining are developed and consistent with international norms, corruption resulting from a lack of transparency and accountability through enforcement – whether from capacity or political will – undermines state legitimacy. An absence of clear communication between stakeholders and information inequities magnifies corruption concerns, and in many instances perceived malfeasance becomes equally as damaging as proven illicit acts go unpunished.

b. Analysis

The importance of transparency and accountability in mining has led to an “increased awareness and urgency to tackle corruption [...] evident in the number of legislations and transparency efforts conducted by successive administrations in the last decade and a half.”³⁰³ Despite this increased awareness and international recognition for compliance with EITI

³⁰² For more information, see R. Davis, D. Franks, *Cost of Company-Community Conflict in the Extractive Sector, Corporate Social Responsibility Initiative* (2014).

³⁰³ See 2016 Report, at 57.

standards and other agreements on corruption issues, significant work remains to increase transparency and accountability in extractive industries.³⁰⁴ “Independent reviews of the legislative framework in Peru have found the country to be largely compliant with the standards provided in the The United Nations Convention against Corruption (UNCAC). However, reviews have also highlighted a glaring deficiency. Peru lacks effective legislation to deter and sanction the commission of crimes by corporate entities. Presently, criminal liability is only applicable to individuals.”³⁰⁵ Actual and perceived corruption is the key driver of social and political unrest in affected communities that can lead to or accelerate existing social conflict issues.³⁰⁶

“According to the Framework Mining Law, activities along the mining chain include preliminary prospection (*cateo*), prospection (e.g., geological survey), exploration, exploitation (operation) and other activities during or after operation, including mine closure and site rehabilitation.”³⁰⁷ Due to the complexities and risks associated with commercial mining projects, mining in Peru is one of the most heavily regulated industries and “each stage along the chain may require applicants for concessions or concession holders to obtain licenses, permits or approval from competent authorities.”³⁰⁸ This protracted and bureaucratic process poses “[c]orruption risks [...] under each stage of the mining chain.”³⁰⁹ Although corruption is usually thought of in terms of state actors, the prospect of illicit gains underpins corrupt acts by mining companies, community leaders, and private individuals.³¹⁰

Transparency is a critical component of accountability and anticorruption measures. Central to this concept is easy and unfettered access to public records, contracts, correspondence, and documents by all citizens. The recently created *Autoridad Nacional de Transparencia y Acceso a la Información Pública* (National Authority for Transparency and Access to Public Information) – which, as its name suggests, “is meant to increase government transparency and public access to information” – is an important first step in this process.³¹¹ However, full implementation with lasting enforcement is necessary to gain public trust.³¹²

Transparency still requires a means for reporting observed and suspected corruption in order to allow institutions to hold individuals and entities accountable. To this end, a secure means for reporting corruption in a decentralized fashion, with external oversight, is another affirmative step toward full transparency and accountability.

Box No. 4: Case Study – App *Dilo Aquí*

Transparency International developed the “*Say It Here*” app for iPhone and Android devices in order to allow citizens who witness or are victims of corruption to report it instantly on a secure platform.³¹³

Transparency International used this mobile app to create a bottom-up approach for exposing and shining a light on corruption, which saw early and measurable progress. Indeed, the app

³⁰⁴ See *Id.*

³⁰⁵ *Id.* at 63 (citing the UN Convention Against Corruption Civil Society Review).

³⁰⁶ See Oxfam International, *La participación ciudadana en la minería peruana: Concepciones, mecanismos y casos* (2009), available at https://peru.oxfam.org/policy_paper/la-participaci%C3%B3n-ciudadana-en-la-miner%C3%ADa-peruana, (Last visited 05/15/2017): Discussing the perception of the community associated with state was a shareholder in a project, through Minería Perú.

³⁰⁷ See 2016 Report, at 75.

³⁰⁸ *Id.* at 75.

³⁰⁹ *Id.* at 74.

³¹⁰ The SIPA Capstone 2016 described these instances and analyzed gaps in the legal framework that allows corruption to exist and, in some cases, flourish from the application process to revenue distribution, see Report 2016 at 85 - 91.

³¹¹ See J. Kubicz, *Strengthening Anti-Corruption Reform in Peru*, *The National Law Review* (2017) (citing F. Zavala, *Leyes para transformar el Perú*, *El Comercio* (Jan. 8, 2017)).

³¹² *Id.*

³¹³ See Transparency International, *Corruption and Human Rights Violations in Venezuela*, (2015), available at https://www.transparency.org/news/feature/corruption_and_human_rights_violations_in_venezuela

“allows victims and witnesses to report cases of corruption safely and anonymously, and then to track their complaints via their mobile phone or computer. Anonymity is of immense importance in a country where there is little trust in authorities and 83 per cent of people believe the police are corrupt or extremely corrupt. In the first month, Transparencia Venezuela received over 200 corruption reports. It registers them and follows up with the relevant authorities to try to solve them. Topping the list of the most complained about institutions were the national police and the institute of ground transport.³¹⁴

Redundancies in the system ensure accountability in all stakeholders, resulting in early success in Venezuela (with over 1,000 reported cases), Honduras (with 36 reported cases in the first few days), and further planned expansion into Guatemala.³¹⁵

Corruption in extractive industries negatively impacts the relationship between the state and the civilian populace. Corruption undermines government legitimacy and erodes trust, which exacerbate social conflict issues.³¹⁶ When “funds intended for public services are misappropriated[,] resulting in little or no provision of public facilities and development projects in the mining regions[,]” pools of discontent grow in communities affected by extractive industries -- pools from which social conflict movements draw strength.³¹⁷ This negative effect is exacerbated when the state is perceived as largely absent in the communities, except in cases of police action when responding to fomenting social conflict which further exacerbates conflict issues

c. Recommendations

i. Establishment of a Single Database Containing All Information Relating to Mining

A publicly accessible Internet database should be developed that contains environmental impact statements, concessions, mining exploration and operations (locations, maps, descriptions, and parties), closed mines, agreements between companies and communities, and contracts. The database should be easily accessible and divided into sections designed for ease of use by affected communities (see previous subsections discussing information management and publicly accessed databases, including the *National System of Conflict Prevention*). Additionally, all historical mining documentation should be digitized and transferred to the publicly accessed portal.

ii. Enforcement of Anti-Corruption Measures

The Government should provide support for and effective enforcement of anticorruption measures that hold companies, as well as individuals, liable for corruption offenses associated with the mining industry.

iii. Establishment of a Corruption Reporting Platform

A secure mobile platform for corruption reporting should be created in partnership with Transparency International, which will act as a neutral arbiter, to instantly report and respond to corruption in timely manner.

³¹⁴ *Id.*

³¹⁵ See Transparency International, *Reporting Corruption in Honduras: Use Our App!* (2016), available at <http://blog.transparency.org/2016/03/03/reporting-corruption-in-honduras-use-our-app/>

³¹⁶ See T. Johnson, *Peru's Mineral Wealth and Woes*, Council on Foreign Relations (2010), available at <https://www.cfr.org/backgrounder/perus-mineral-wealth-and-woes>

³¹⁷ *Id.* at 91.

5. COMMUNITY MANAGEMENT

Communities, despite being critical indispensable stakeholders in the mining industry in Peru, are oftentimes in conflict with mining companies and the state due to continued community disempowerment, lack of effective communication, and a failure to efficiently manage expectations. This creates a necessity and an opportunity for the state to manage the needs and demands of communities more effectively, thereby decreasing the likelihood of social conflicts. These issues and approaches to resolve them are discussed below.

1. Communities Empowerment

a. Problem Statement

Communities are at a disadvantage compared to mining companies and the government. They suffer from a lack of access to technology, political leverage,³¹⁸ and professional resources, including lawyers and environmental experts. Additionally, communities are not as organized as other stakeholders, resulting in inadequate representation of all parties affected by the mining project. These shortcomings impede communities from granting informed consent for mining projects to operate in a community. Such lack of access to resources causes communities to refuse consenting to mining projects. In many instances where communities grant consent, it is based on an incorrect understanding of the implications and ramifications of mining activities, resulting in incorrect expectations from communities. Furthermore, communities that aren't properly organized or represented are usually left unheard by mining companies and the state. In all of these scenarios, the likelihood of social conflict is invariably increased.

i. Asymmetry Between Stakeholders

Due to lack of economic resources, education, and access to information and communication technologies (ICTs), community members are left at a disadvantage in comparison with mining companies and the government.³¹⁹ Communities also lack political leverage to be heard in a timely manner or to effectively negotiate with the government and mining companies. In many cases, communities do not possess independent technical and legal advisors, nor the financial means to hire one, while the company and the state both bring technical help to the negotiating table.³²⁰ This asymmetry in their spaces for dialogue-- such as the *Mesas de Diálogo*³²¹-- translates into lack of confidence and trust in the negotiation process.

ii. Community Internal Organization

In order to effectively engage with mining companies and the government, communities must have defined representatives and decision-making procedures. The absence of official community representatives and internal decision-making mechanisms³²² in some communities demonstrates that not all communities are capable to negotiate and enter into agreements with other stakeholders in the mining industry.

³¹⁸ 'Political leverage' refers to the ability of communities to be heard and have influence in the political sphere. Communities who lack political leverage may be dismissed by government decision makers as insignificant because they represent a small fraction of a constituency. Compare this to mining companies who are more easily able to influence government decision making.

³¹⁹ See details of the lack of economic resources and education in rural community in the Absence of State section.

³²⁰ See also Oxfam, *Guide to Free, Prior, and Informed Consent*, 24 (2014).

³²¹ Mesas de Dialogo are dialogue sessions where the state acts as a mediator between stakeholders to discuss a mining project. See Red Muqui, *Balance y propuestas para el funcionamiento de los procesos de diálogo en el Perú*, 53 (2016).

³²² According to Merriam-Webster, decision-making is "the act or process of deciding something especially with a group of people," and a mechanism is, "a process, technique, or system for achieving a result." For the purpose of this Report, decision-making mechanisms include democratic processes that allow community members an opportunity to influence decisions made by community leaders that affect the community as a whole. For example, referendums.

Lack of fair and adequate³²³ representation of all affected parties causes the consent agreement to be an ineffective tool in preventing social conflict. It is also necessary to determine which communities will be affected by mining activities, and the extent of such impact in order to prevent conflict. However, companies and communities are not necessarily capable or able to reach consensus on the definition of communities that should be considered to be “affected communities”.³²⁴ Consent, however, cannot be granted unless all affected communities are present and adequately engaged. Absence of consent perpetrates distrust between affected communities as well as between affected communities, mining companies and the government.

Once affected communities are unambiguously defined, the government must ensure that they are adequately represented in any decisions made about the mining project. In some areas designated by the government as a *comunidad campesina* (“rural community”) the community is clearly delimited. In other areas however, there is no official government designation for the community, making it difficult to determine the most effective representation for such a community. Furthermore, even within a *comunidad campesina* or other officially recognized community, members are divided due to varied vested interests. This division within a community results in multiple individuals claiming leadership in a single community. The presence of a recognized community leader does not guarantee a majority support from the community members, and thus, his/her decision cannot necessarily be representative of the community’s will. Similarly, some communities fail to include women and indigenous groups in decision-making processes, thus overlooking large numbers of affected members of their communities.

Implementing a consent agreement or serving as a liaison between companies and communities, requires the government to work with existing structures of community organization (*comités, juntas directivas, asambleas*, etc.). Still the government must evaluate existing decision-making bodies to ensure fair and adequate representation, identify problems within these systems and apply appropriate solutions to resolve them.

Engaging effectively with communities also requires identifying local representatives to work with, ideally before the exploration phase is commenced. Building relationships founded on trust takes time, effort and constant presence and engagement on the ground. This is best achieved by being active in the affected communities from the initial phase of a mining project.

iii. Inclusion of Women

Conflict resolution mechanisms frequently lack a gendered approach.³²⁵ Despite the fact that women have proven to be key agents of change and defenders of community rights, dialogue spaces are constantly “defeminized.”³²⁶ Interactions with communities lack participation of women in consent negotiation processes even though women face the direct consequences of violence due to social conflict in their communities. Participation of women is essential to achieving effective and sustainable practices for preventing social conflict.³²⁷

³²³ For the purpose of this Report, “Fair and adequate representation” means the representation of communities in a formal agreement over a mining project that a) represents all impacted communities equally; b) is selected through democratic processes involving the participation of all impacted communities; c) takes into account demographic variation by ensuring female and indigenous community members are represented; and d) is proportional both in numbers and capacity to the representation of other stakeholders, i.e. government representatives and/or community representatives.

³²⁴ For more information please refer to Legal Framework, Definition of Affected Communities.

³²⁵ See Meeting with Rocío Silva Santisteban, former Executive Secretary of the Coordinadora Nacional de Derechos Humanos, held on March 21, 2017.

³²⁶ *Id.*

³²⁷ See S. Cowman, *The Fight Against Mining in Peru* (2016), available at <http://wafmag.org/2016/02/the-fight-against-mining-in-peru/> (Last visited on Apr. 28, 2017)

The SENACE (*Servicio Nacional de Certificación Ambiental para las Inversiones Sostenibles*), an office of the Ministry of the Environment, is currently working towards the implementation of a gendered approach for EIAs.³²⁸ However, Peru still lacks a comprehensive and transversal approach to effectively include women in conflict prevention and conflict resolution processes³²⁹. The advantages of increasing women's participation in official community matters are many. The inclusion of women brings different viewpoints to the discussion, while playing a significant role in engagements with mining companies and state agents during negotiations.

b. Recommendations

i. Increase Access to Information and Expertise

To address the community's lack of information and understanding, the government should the communities with learning tools³³⁰ on their rights,³³¹ development and sustainability, environmental monitoring and social monitoring (e.g. an early warning system to identify social tensions on time), community organization and management skills. The central government must institute a method for providing access to multidisciplinary³³² expertise for communities in order to address the asymmetry among stakeholders.

One way to do this is by developing training workshops taught by lawyers with expertise in the mining sector, by environmental advisors who can explain EIAs to locals, among others types of experts. Another way to provide such expertise is to institute a system whereby communities can employ the services of experts free of charge for the purpose of advising them on aspects of the mining project that fall within their area of expertise. In order to minimize conflicts of interest and develop a coherent strategy, all training programs and workshops must be revised and approved by a multidisciplinary governmental commission led by the Viceministerio de Gobernanza Territorial. Participants coming from the private sector or civil society must also be vetted. Moreover, training sessions and workshops should be monitored by a designated team, the outcomes published and accessible to the parties.

ii. Addressing the Distrust

To address distrust, the central government must promote transparency through explanatory sessions which include information about the mining project, its implications on the community and the environment, as well as about the agreements made between the community and the state and/or the mining company (e.g. specifying the obligations and responsibilities of the company, the community and the state). Such sessions should be conducted by trained presenters with expertise in a relevant field. For example, a session focusing on explaining agreements made between stakeholders should be conducted by a lawyer with experience in the area.

iii. Enhance Women's Participation

In order to ensure inclusivity of all community members, the central government must enhance female participation in conflict prevention and conflict resolution processes. To do so, women's participation should be encouraged by ensuring they are present at and able to express their concerns during conflict prevention and conflict resolution processes.

³²⁸ See SENACE, *Herramientas de Gestión Social para la Certificación Ambiental. Herramientas para los Actores Sociales* (2016).

³²⁹ See Meeting with Rocio Silva Santisteban, former Executive Secretary of the Coordinadora Nacional de Derechos Humanos, held on March 21, 2017.

³³⁰ Such as books, brochures, videos, online media platforms, training programs and workshops.

³³¹ Their rights as Peruvian citizens, as a member of a rural or/and indigenous community, international human rights, etc.

³³² Multidisciplinary expertise means professionals trained in legal, environmental, or social issues, especially as it relates to the mining industry and rural populations.

Additionally, the central government should encourage communities to assess their own success in increasing female participation by asking them to report on the number and nature of positions occupied by women.

2. Environmental Participation

a. Problem Statement

There is heightened concern about the environmental consequences of mining activities in communities. Despite the fact that EIAs are mandated and completed for projects, the environmental impact of projects is frequently greater than predicted or foreseen. There is a history³³³ of excessive water contamination from mining projects affecting local population and the surrounding biosphere. Instances of community members³³⁴ with high/abnormal levels of heavy metals in their blood have often been reported in areas near mining operations, such as the cases of Espinar³³⁵ and La Oroya.³³⁶ In the Ananea district, there have been cases of cattle dying due to water contamination.³³⁷ In Cerro Verde, there have been various reports of dust pollution, and instances of continued presence of trucks servicing the mining area, hindering normal life.³³⁸

There is an immediate need to ensure that communities and the environment are not negatively impacted by mining operations. By involving communities in the decision making process regarding the environment surrounding them conflicts can be prevented. Peruvian law provides channels for citizen participation in environmental issues through various laws and regulations.³³⁹ Although these provisions provide a good framework for participation, they have nevertheless been ineffective in preventing conflicts. The issues discussed below highlight the provisions that need to be addressed in order to make the law more effective.

Box No. 5: Participation on Environmental Issues

General Environmental Law³⁴⁰

- Article 47: every natural and legal person has a duty to participate responsibly in the environmental management process.
- Articles 48: the authorities will provide formal mechanisms for citizen participation in the decision making processes or execution of project regarding the environment.

SEIA Law

- Article 13: Guarantees formal instances of community participation in the processing of applications and of EIAs. The proponent (that is, the company filing the EIA) must insert informal mechanisms to insert in the EIA the opinion and perception of the population

³³³ Aforementioned cases like Espinar, like Iscahuaca or Masopampa (in Apurimac) are examples of cases in which the community was affected by water contamination without a fast answer from the state. See below Box No. [–] for more information.

³³⁴ These concerns were raised both by communities where a mining site is already in place, and in those communities where only exploration (and not exploitation) is taking place.

See Meeting with Mr. Alex Member of the Pacca Community Board, and Meeting with the Social Development Manager, Anthropologist, and Food Development Manager of the Anta Community, held on March 16, 2017. And meeting with Raquel Pilares, Manager of the Interprovincial Federation of Territorial Defense and Environment in Paruro, held on March 17, 2017.

³³⁵ See La República, *Pese a las pruebas médicas, el Gobierno obvio las evidencias en el caso Espinar* (Nov. 24, 2015), available at <http://larepublica.pe/imprensa/politica/720779-pese-las-pruebas-medicas-el-gobierno-obvio-las-evidencias-en-el-caso-espinar> (last visited May 10, 2017).

³³⁶ See El Correo, *La Oroya, la ciudad que respira plomo* (Aug. 16, 2015), available at: <http://diariocorreo.pe/ciudad/la-oroya-la-ciudad-que-respira-plomo-610402/> (last visited May 10, 2017).

³³⁷ See La Republica, *Pobladores denuncian que su ganado muere por contaminación del río Ramis* (Apr. 26, 2016), available at <http://larepublica.pe/imprensa/sociedad/762973-pobladores-denuncian-que-su-ganado-muere-por-contaminacion-de-rio-ramis>

³³⁸ See La República, *OEFA sanciona a Cerro Verde por Contaminar aire y suelo* (Apr. 24, 2012), available at <http://larepublica.pe/24-04-2012/oefa-sanciona-cerro-verde-por-contaminar-aire-y-suelo>

³³⁹ See Box No. 5 below.

³⁴⁰ Law No. 28611, *Ley General del Ambiente*

potentially affected or benefited by the action.

- Article 14: During the EIA the instances of participation contemplated are the following:
 - The competent authority, during the classification stage, has the authority to request from the community or representatives or qualified informants, the background or comments on the proposed action.³⁴¹
 - The proponent and his technical team must present a citizen's participation plan and a roadmap for execution.³⁴²
 - That the competent authority will carry out the formal consultation during the "review phase"³⁴³ for the detailed and semi-detailed EIAs (Category II and III). These studies shall be made available to the public for observations and comments in the regional headquarters of the respective sector. It will be announced in the most popular media in the region³⁴⁴ and electronically³⁴⁵.
 - The public hearing, as part of the review phase, must be made no later than 5 (five) days before the expiration date of the formal consultation period. The competent authority may order the presentation at a public hearing of Category II environmental impact studies.³⁴⁶

Regulation of the SEIA Law

The regulation develops the provisions of the SEIA law including an explanation of the meaning of environmental impact to the effects of the SEIA law. Within Environmental impact it includes the revision of social impacts. These assessments are most often delegated to expert consultants³⁴⁷ who inform SENACE. The consultants create what is called a "línea de base social," oftentimes done by Golder Associates, a privately held consulting firm. However, in many instances these assessments are conducted with low resources and the consultants infrequently visit the field to develop firsthand knowledge of community dynamics.³⁴⁸ As a result the real conditions of the community are not taken into account and oftentimes those who should be representing the community are not properly selected.

- Article 34: any reference to environmental impact must be understood as including social impacts that are **related** to the project. The necessary measures should be planned for an adequate social management, conflict prevention, as well as the mitigation and eventual compensation and compensation for the social impacts that could be generated.³⁴⁹

This is done by the creation of the so-called Línea de base social (Social baseline), carried out by independent consultancy firms³⁵⁰. According to consulted experts³⁵¹ this studies are usually lacking given the absence of specific guidelines and the fact that it is conducted by experts that barely spend a

³⁴¹ This provision, rather than a right of the citizens to participate in the beginning of the process, represents the right for the government to request information if necessary. However, it should be mandatory for the government to gather information from the communities. Furthermore, the definition of those allowed to provide such information on behalf of the community is very broad and can include individuals other than the legitimate leaders of the communities. This can lead to corruption since the officer in charge of requesting information can ask for information only from community members supporting the mining project.

³⁴² This gives the companies carte blanche to design participation plans at their convenience, and does not contemplate their duty to take into consideration the organization and decision making processes within the community. Instead there should be formal guidelines elaborating the participation plan, and the communities that should participate in the process.

³⁴³ According to Article 11 of the SEIA Law, the revision of the EIA is carried out once the proponent presents the EIA to the authorities. For the category III studies (EIA-detallados), the authorities can include regional or local authorities in the revision.

³⁴⁴ See Art. 42 Regulation of the SEIA Law.

³⁴⁵ No more details are provided in the legislation with regards to the means of distribution electronically.

³⁴⁶ Giving a 5 day period between the public hearing and the end of the consultation period is not sufficient if as a result of the consultation the EIA has to be revised. A reasonable period of time would be to leave at least 60 days until the end of the consultation period.

³⁴⁷ The list of experts is provided by SENACE and can be found at the following link: <https://www.senace.gob.pe/nosotros/evaluadores/>

³⁴⁸ See Meeting with Lizbeth Diaz Redolfo, Centro de Análisis y Resolución de Conflictos, held on March 10th, 2017.

³⁴⁹

³⁵⁰ Like GRADE (Grupo de Analisis para el Desarrollo), used by Xstrata and other companies in the region. See Línea de Base Social y Económica de las comunidades del área de influencia directa de Xstrata S.A. en el ámbito de la operación minera Las Bambas, accessed at <http://www.grade.org.pe/proyectos/395-linea-de-base-social-y-economica-de-las-comunidades-del-area-de-influencia-directa-de-xstrata-s-a-en-el-ambito-de-la-operacion-minera-las-bambas/>

³⁵¹ See Meeting with Lizbeth Diaz Redolfo, Centro de Analisis y Resolucion de Conflictos, held on March 10th, 2017.

few days in the field and are not familiar with the communities. Moreover, the government released a guide³⁵² in 2016 to help improve this evaluation process. However the guidelines are “flexible and for voluntary application.” Instead, there should be specific and mandatory guidelines for these studies and the consultants in charge should be mandated to hold regular visits to the communities during one year, so that they can evaluate the impact of the project during all the seasons.

The SEIA Regulation paved the way to for the improvement of citizens participation in mining projects. However, there are still weak points in the regulations that must be addressed. The SEIA Regulation provides thirteen³⁵³ ways of citizen participation in mining processes (some examples are public audiences, participative workshops, etc.). Regarding the environmental side of community participation the SEIA Regulation provides for six mechanisms:

- A. Article 2.1, providing access to the population to the Executive Summaries and to the content of the EIAs.
- B. Article 2.5, providing guided tours to the site to show the installation in which the project contained in the EIA will be developed.
- C. Article 2.6, regulating the interaction with the population via a team of facilitators (*equipo de facilitadores*) provided by the mining company in coordination with the government. This team visits the community “door to door” in order to compile the perceptions about the EIA to be compiled/ that is being compiled/or that is being revised, as well as about the potential impacts of the mining project, its control and its mitigation.
- D. Article 2.7, governing participative workshops (*Talleres Participativos*) created to provide information and establish a dialogue about the perceptions of the mining project by the community, before, during and after the draft of the EIA. More specifically, the mining companies should provide the documents showing how they reached the communities and about the community representatives. Finally, before presenting the EIA, the mining company should provide the local institutions and the *comunidades campesinas* with a hard copy of the EIA and by its digital publication.
- E. Article 2.8, providing for public audience by the authorities, which present the EIA and register the participants comments.
- F. Article 2.11, regulating the promotion of participative environmental monitoring by the communities after the EIA is approved to track the compliance of the mining company with its duties.

These mechanisms of participation vary throughout the different stages of the mining project. This Report will outline the mechanisms of the exploration and execution stages, and it will focus only on the legal flaws that should be addressed in order to empower the community in environment related issues.

i. Exploration Phase

The SEIA Regulation establishes³⁵⁴ that EIAs for exploration must include “participative workshops” (art 2.7)³⁵⁵ with the population directly affected by a mining project. Mining

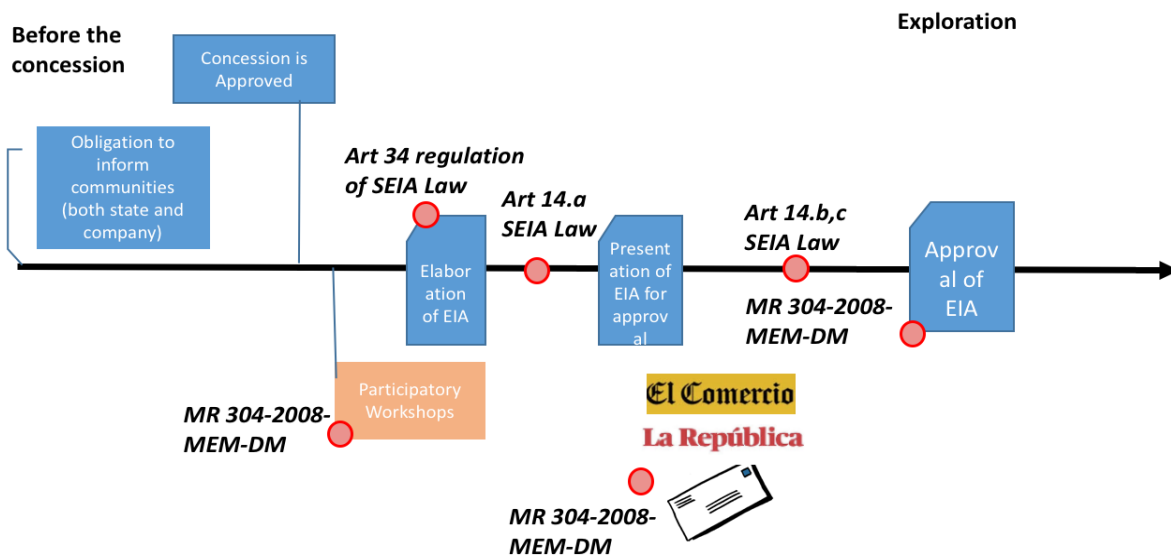
³⁵² See SENACE, *Herramientas de Gestión Social para la Certificación Ambiental* (2016), available at: <http://www.senace.gob.pe/wp-content/uploads/2017/01/herramientas-evaluadores.pdf>

³⁵³ See Article 2, SEIA Regulation.

³⁵⁴ See Articles 4, 5 and 6 of the SEIA Regulation.

³⁵⁵ See Ministerial Resolution 304-2008-MEM-DM

companies should provide the documents showing how they reached the communities and about the community representatives. Finally, before presenting the EIA, the mining company should provide the local institutions and the *comunidades campesinas* with a hard copy of the EIA and through modern means, digital publication.³⁵⁶



Outline of the Exploration Processes and Regulations

ii. Implementation Phase

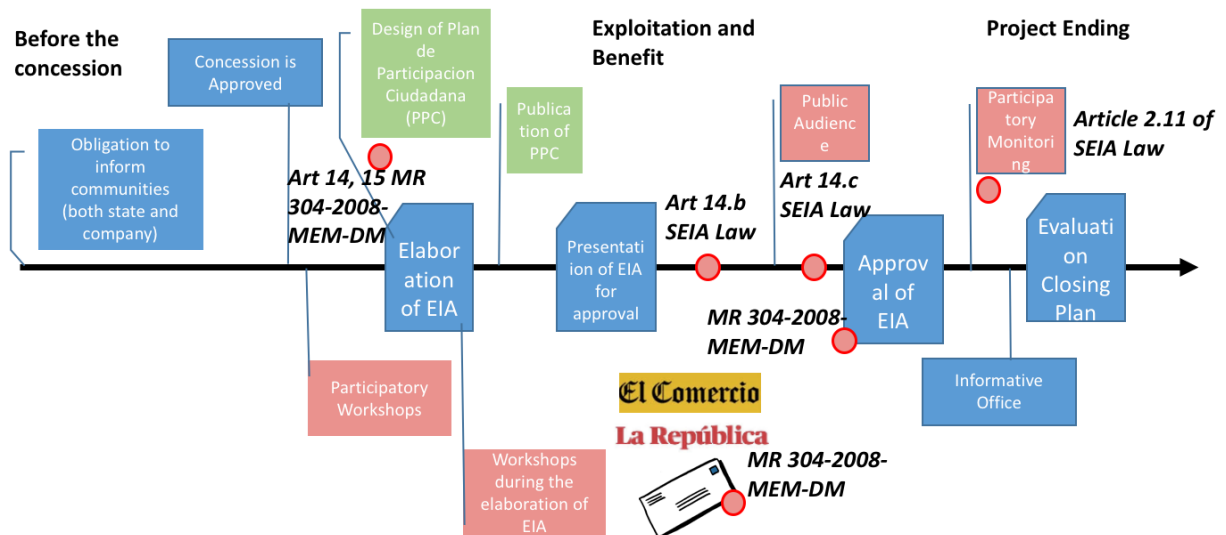
Mining companies have to present a plan for citizens' participation (*plan de participación ciudadana*) according to the regulation, detailing the procedures of citizens' participation during the EIA evaluation³⁵⁷. Authorities have 7 days to submit objections to this plan. The mining company then has 10 days to amend the plan.

As per SEIA regulation³⁵⁸, communities can create a committee with representatives interested in conducting environmental monitoring. The committee will create and approve a ruling to be applied in the development of their activities. In order to develop this set of norms, the community can hire technical assistance. These monitoring actions do not, and can not, substitute for the monitoring activities of the government itself.

³⁵⁶ Having to include an acknowledgment of receipt.

³⁵⁷ See Articles 14 and 15 of the Ministerial Resolution 304-2008-MEM-DM

³⁵⁸ See Article 2.11 of the SEIA Regulation, and its section regulating environmental monitoring.



Outline of the processes in projects of exploitation.

b. Recommendations

i. Timing for Exploration of Category I Projects

Citizens have only 10 days to provide comments from the date of publication of the EIA for revision. The authorities will take these comments into consideration when revising the EIA. The SEIA law should provide a minimum of 30 to 60 days for revision. It is not reasonable to expect communities to understand a complex legal text. The term 10-day term currently provided is too short and results in the communities' inability to voice their concerns effectively.

ii. Timing for Exploration of Category II Projects

The population is notified through publication in the official diary "Diario Oficial El Peruano," where judicial notifications are published, and on the radio. Citizens are given 25 days to comment,³⁵⁹ after which the publication and observations are sent to the mining company. However, the law establishes that the authorities can send back their comments before this 25 days period expires. Include the publication systems required for category I projects (by which companies have to bring a copy to the community) for projects of category II. Reaching the communities with information is crucial to avoid tensions, no matter the category of the project. Furthermore, it is necessary to eliminate the third paragraph of article 10, which allows the authorities to send their comments on the EIA before the end of consultation term. This could result in the government submitting its comments on the EIA without taking into account the communities' perspective, if their hearing takes place at the end of the consultation term.

iii. Role of the Affected Communities

Affected communities/citizens have no say in the design of this plan and the authorities have a mere 7 days to amend it. Creating a plan for citizen participation with the communities or with representatives of communities should be made mandatory. The timeline for the government to provide amendments to such plan should be extended to ensure qualitative revisions. The board revising the plan should include persons with knowledge about the community and the location. EIA approval should require publication similar to the one described for "exploration of category projects II", including radio advertisements.

³⁵⁹ See Articles 7 to 11 of the SEIA Regulation.

iv. Communities' Technical Assistance

The legislation does not specify if the communities will have to pay for the technical assistance or if it will be provided by the Government. Presently, communities do not have access to such services as they lack the funding to hire such experts. Companies should be mandated to provide funding to communities to access technical assistance. Furthermore, the legislation does not contemplate any mechanism of collaboration between the government and affected committees to hear communities concerns when mining companies breach a contract. There is an immediate need to create an office³⁶⁰ to liaise this committee with the ANA and the Ministry of Environment.

3. Effective Communication with Communities

a. Problem Statement

Communities lack the knowledge and understanding necessary to make informed decisions prior to granting consent to mining projects. These inadequacies considerably increase the chances of social tensions between the community, the state and the private sector because it creates or exacerbates distrust³⁶¹ and inhibits the formation of accurate expectations.³⁶² Mining companies can take advantage of communities' lack of understanding by providing only partial information about a project to the impacted communities, or by withholding information from communities altogether.

Efforts by the government and mining companies to fill gaps in information and understanding through training workshops have not sufficiently addressed the issue. Civil society groups and/or NGOs have endeavoured to fill these gaps. However, they lack specific and accurate knowledge³⁶³ about a mining project and its implications, as they are not privy to such information. In some instances, the involvement of NGOs and civil society groups has exacerbated social tensions.³⁶⁴ Although an effective tool for opening channels of communication amongst stakeholders, Mesas de Diálogo are not being convened at the most opportune time³⁶⁵ to prevent social conflict.

The presence of state actors in communities impacted by mining projects is lacking. There is an absence of state officers and offices, as well as any form of formal communication with the communities. In instances where the state communicates with communities, it is often one-sided and lacks an inclusive, dialogue-oriented approach.³⁶⁶ In other instances, the state fails to engage with communities in their local language, causing any dialogue to be ineffective.³⁶⁷

Weak communication channels between communities, the state and mining companies tend to foster a series of misunderstandings, which can potentially lead to disagreement and/or social discontent. Furthermore, it causes distrust among the parties and inhibits the spread of knowledge about mining projects amongst communities. The lack of effective communication with communities is closely related both to the state's historical absence³⁶⁸ in rural areas, and

³⁶⁰ This recommendation will be further developed at the end of the section.

³⁶¹ See Meeting with Anta government officials, held on March, 16th 2017.

³⁶² For more information, please refer to Managing Community Expectations below.

³⁶³ Specific in terms of knowledge applying to the mining project in question, rather than generalized knowledge about mining or knowledge about other projects. Accurate in terms of being based on the unbiased assessments of technical experts using scientific methodologies.

³⁶⁴ Mining Watch Canada, 2017 <http://miningwatch.ca/news/2017/4/24/what-does-hudbay-have-hide-peruvians-miningwatch-canada-staff-member-us-journalist>

Ministerio del Interior del Perú, 2017 <https://www.mininter.gob.pe/content/sobre-la-situación-migratoria-irregular-de-una-ciudadana-canadiense-y-un-norteamericano>

³⁶⁵ For more information, please refer to Chapter 4.

³⁶⁶ See Meeting with Anta government officials, held on March 16, 2017.

³⁶⁷ Although Spanish is the official language of Peru, our fieldwork confirmed that many rural communities lack fluency in Spanish.

³⁶⁸ For more information, please refer to Chapter 1.

lack of professionalization and training of public officials working on Social License issues at all levels. Geographical distances, as well as limited access to ICT's enhance this disconnection. Relevant information regarding mining projects and measures taken by the state are not delivered accordingly for consultation, monitoring and reaching consent subsequently. Community members complain that there are limited communication procedures, platforms and materials designed for communities.

The ability of impacted communities to communicate directly with companies is limited. In many cases, mining company offices are located far from the community.³⁶⁹ This geographical barrier to creation may create a sense of not being heard, and of being marginalized. This sense of marginalization can grow, giving rise to grievances, which results in antagonistic attitudes and excessive expectations.³⁷⁰

i. Accessibility to Information

Communities must have access to all relevant information and resources to comprehend the impacts of a proposed mining project. Communities should also be informed of the procedures available to them to communicate their needs, make demands,³⁷¹ and ultimately give consent to a mining project.

If communities agree to a mining project in the absence of essential information, or if such essential information has not been accurately understood, distrust within communities will inevitably increase. Communities often assume that mining companies are not entirely transparent about the projects they intend to undertake. Therefore, mining companies should be cautious and provide complete³⁷² and transparent information about the impacts of proposed mining projects.

Oftentimes communities are unable to understand information provided due to lack of technical education or understanding or because of the complexity of the information. Therefore, they must also be equipped to understand the information. For example, communities may be under the impression that mining leads to mercury contamination. However, mercury is not used in many mining projects.³⁷³ The knowledge required to understand information about a mining project should include information, in comprehensible language, about the implications of a mining project (e.g. its environmental impact). The state has the obligation to ensure that communities understand their rights.

ii. Mesas de Diálogo

According to Peruvian law, *Mesas de Diálogo*³⁷⁴ are defined as a permanent or temporary space of interaction between accredited representatives of the population, civil society actors, mining actors and local, regional or national authorities. Here, environmental, legal and other concerns are addressed to build consensus and establish agreements. The *Mesas de Diálogo*, if used properly, can be a good tool for conflict prevention because of their ability to facilitate mutual understanding amongst stakeholders and raise issues that concern communities in a fair manner.

³⁶⁹ Mr Rodrigo Velarde mentioned that the company's office was located in Cusco where is five hours drive from Antapacay, where he used to commute during the negotiation process. See Meeting with Rodrigo Velarde [insert title], held on March 17, 2017.

³⁷⁰ See Meeting with Abel Larico and Yuri Becerra, Gerencia de Recursos Naturales, Municipalidad de Espinar, held on March 15, 2017.

³⁷¹ Formal processes available to communities to demand changes include formal complaints filed with the Defensoría del pueblo whose aim is to denounce activities of mining companies that negatively impact the claimant.

³⁷² Complete information about a project includes details about environmental, economic, as well as social impacts, etc. To be considered thorough, the information provided by companies must specify the amount and nature of pollution the project will create, the effect that mining operations will have on the local economy by bringing in more workers with higher relative salaries, the social impact that the project will have by providing public services such as healthcare, employment, water and/or electric infrastructure development, highway construction and increased traffic, etc.

³⁷³ See Meeting with Rodrigo Velarde, held on March 17, 2017.

³⁷⁴ See Art. 2(13) of the SEIA Regulation.

An analysis of a *Mesas de Diálogo* in Rio Blanco, Espinar, and Morococha, as well as ongoing *Mesa de Diálogo* in Chumbivilcas³⁷⁵ allow us to conclude that the *Mesas de Diálogo* are an instrument used exclusively once conflict has arisen. Tensions among key actors play a key role in the development of negotiations because the mesas de dialogo are primarily used as the last resort, usually when tensions have heightened. Communities also perceive an internal conflict in the government, with MINEM trying to support and promote mining projects on one hand,³⁷⁶ and the *Defensoría del Pueblo* cautioning against it on the other. Furthermore, in most cases communities that are indirectly affected by mining projects maintain that they are not included in the *Mesas de Diálogo*.

b. Recommendations

i. Improve Community Organization

In order to improve community organization and representation, the Government should create a taskforce under the Viceministerio de Gobernanza Territorial that is responsible for identifying and evaluating the types of existing local decision-making bodies of communities impacted by mining projects. The number of government officials on the taskforce should be proportional to the number of communities being assessed.³⁷⁷

The taskforce can ensure adequate representation of affected communities and community members by registering, formalizing and strengthening existing community organizations. This will avoid fractured or overlapping leadership within communities.

The taskforce must provide recommendations for the creation of community decision-making mechanisms should their evaluation determine that the communities affected by a mining project do not have an existing decision-making body that adequately represents them.

4. Managing Community Expectations

a. Problem Statement

In the absence of public services, communities may expect mining companies to provide such services.³⁷⁸ Community members often do not fully know their rights, the obligations or responsibilities of mining companies and the state, or the actual needs of their community. Moreover, there are no standardized criteria, regulated by law, for services that mining companies have to provide to communities. Communities' expectations are usually influenced by what services are provided by other mining companies. In addition, community expectations may grow when unforeseen negative impacts of mining project become apparent only after the start of mining operations. Failing to properly manage community expectations leads communities to question agreements reached between the community, the mining company and/or the state.

Mining activities can be divided into four phases³⁷⁹ that consist of: search (*cateo*), prospecting (*prospección*), exploration (*exploración*) and exploitation (*explotación*). Different community expectations during the different stages could create tensions.

³⁷⁵ Some of these reflections were also found and documented by the Red de Propuesta y Acción Muqui in its report “*Balance y Propuestas para el funcionamiento de los procesos de diálogo en el Perú?*”.

³⁷⁶ This was especially the case in the Rio Blanco negotiation.

³⁷⁷ For more information on how to assess the composition of the communities, please refer to Chapter 4.

³⁷⁸ For more information, see Chapter 1.

³⁷⁹ See Article 2 of the Framework Mining Law.

i. Issues at the Pre-Operative Phase

The applicable legal framework obliges mining companies to enter into a dialogue with local populations. However, such dialogues take various forms. Many of these dialogues are carried out are for the sake of gaining permission from landowners to enter into their land in order to conduct search and prospection.

- A. Mining companies determine the form of the dialogue, and they often do not include needs assessment.³⁸⁰ Community members often do not fully know their rights, the obligations of mining companies and the state, or the actual needs of their community, e.g. water sanitation and health facilities.³⁸¹ When consulted, communities often prefer to receive economic or individual benefits rather than community development programs primarily because they believe the economic benefit from a mining project to be their only chance to escape extreme poverty.³⁸² Additionally, their demands and expectations vary. There can be conflicting demands within a single community, which can result in the division of the community, and eventually a stalemate of the negotiation. There is no official instrument to standardize dialogue with impacted communities, or to mandate that mining companies properly assess community needs.
- B. Additionally, there is a lack of clarity of responsibilities. It is unclear who (i.e. the government body or the company) will provide what services (e.g. education, health, utilities, etc.) to whom (the "affected community"). In the past, mining companies have provided infrastructure (e.g. electricity) and basic social services (i.e. schools, hospitals, sanitation). They have also provided facilities and economic benefits (e.g. water, employment) that are necessary to realize the mining projects. The provision of these services by the mining company has been on a voluntary basis. Although the Framework Mining Law obligates mining companies to engage in local development, the Law does not specify what constitutes "local development."³⁸³ The ambiguity surrounding the provision of services has contributed to the creation of excessive community expectations, false expectations, and mistrust.
- C. Distrust of the mining sector is persistent among rural populations due to past experiences in which communities received few benefits from mining operations.³⁸⁴ At the beginning of the Peruvian mining industry boom, some inexperienced mining companies mismanaged relationships with communities, which also contributed to the general distrust of the mining sector.³⁸⁵ As communities exchange information with each other, expectations are influenced by the experiences of other mining projects.³⁸⁶ In many instances, the knowledge communities possess regarding mining projects is limited to the

³⁸⁰ Representatives of anonymous mining companies refer to the practices by other mining companies of informative sessions without prior needs assessment. Meeting with anonymous mining company representatives held on March 10 and March 13, 2017 in Lima. Anonymous community members and government officials also attested to such in several meetings on March 10 and 20, 2017 in Lima and in Cusco.

³⁸¹ See Meeting with Rodrigo Velarde held on March 17, 2017. In addition, a lack of knowledge about the differences between the companies' monetary compensation/payments for land purchase and the companies' provision of community development programs also often result in the incongruence of expectations within the community and a stalemate of the negotiation according to discussion on land ownership. See Meeting with Lizbeth Diaz Redolof, Centro de Análisis y Resolución de Conflictos, held on March 10, 2017. See also Meeting with Julia Cuadros, CooperAccion, held on March 13, 2017. See also Meeting with Abel Larico, Gerente de Desarrollo Social, Municipality of Espinar, held on March 15, 2017; Meeting with Marita Chappuis, Independent Consultant and former MINEM official, held on March 12, 2017.

³⁸² For more information, please refer to Chapter 1.

³⁸³ For more information, please refer to Box No. 2 above.

³⁸⁴ Oxfam America argues that "(l)arge-scale resource extraction generates relatively few jobs." See Oxfam America, *Mining Conflicts in Peru: Condition Critical*, 5., March 2009, available at <https://www.oxfamamerica.org/static/media/files/mining-conflicts-in-peru-condition-critical.pdf> (last visited May 10, 2017).

³⁸⁵ A prominent example of inadequate assessment and misconduct of mining companies is the Tambogrande case that eventually failed to launch. See Oxfam America, *A Proposed Mine in Tambogrande, Peru: An Alternative Look*, March 25, 2003. Available at: <https://www.oxfamamerica.org/publications/a-proposed-mine-in-tambogrande-peru-an-alternative-look/> (last visited May 10, 2017).

³⁸⁶ See Meeting with Raquel Pilares, Asociación Provincial de Mujeres, Federación Interprovincial de Defensa de Territorio y Medio Ambiente, held on March 17, 2017.

information received from other communities. Such information is more akin to rumours in that it can lack accuracy, which contributes to the creation of false expectations by giving communities an inaccurate understanding of what mining companies provide. In addition, informal and illegal mining practices create excessive concerns and a negative perception of mining projects, which can render negotiations over agreements between mining companies and communities even more difficult.³⁸⁷

Some mining companies force community members to sign agreements while acknowledging that communities do not fully understand the future impacts of mining.³⁸⁸ In other cases, a community gives its consent orally or informally to a company and the company then legally validates the agreements.³⁸⁹ This can become a source of dispute³⁹⁰ when the final validated agreement differs from what the community had agreed on orally or informally in advance; usually to the company's advantage.

Timing of community consultation is not standardized, and is usually decided on by the companies. In many cases, the exact nature of the social programs that the company intends to implement is divulged only after the consultation takes place. In the case of the Tia Maria project, the company released their EIA plan before the EIA plan was approved by the government, resulting in a discrepancy between the declared EIA and the actual EIA.

ii. Issues at the Operative Stage

During later stages of the mining project, communities expectations may change after they realize the impacts of the mining project do not align with the understanding they formed based on the information previously provided by the mining company. Once communities become aware of the real impacts of a project, the company's breach of an agreement, or any change in the company's plans after the launch of the operation, they may change their expectations and/or make additional requests.

- A. Affected communities may not have been able to anticipate future negative impacts on the environment and their livelihoods due to a lack of adequate information. Once they see the changes in health, food production, livestock, water, etc., they may realize the impacts of construction or mining and require that companies provide compensation or development programs to reverse the effects.³⁹¹
- B. Mining companies sometimes do not comply with or breach agreements with communities.³⁹² Lack of enforcement and financial incentives for mining companies are the drivers of such noncompliance.³⁹³ In addition, changes to the agreed upon plan for the mining project usually result in an increase in community requests.³⁹⁴ Finally, changes in ownership of a project often lead to breaches of the agreed upon plan and procedure as seen in the Constanca case.³⁹⁵

³⁸⁷ See Meeting with Gabriela Jauregi, Silvana De Olazaval, Daniel Palomino, lawyers of Muniz Law Firm, held on March 10, 2017; In-country meeting with an anonymous mining country, held on March 14, 2017.

³⁸⁸ See Oxfam Australia, *Guide to Free, Prior and Informed Consent*, April, 2014. p27.

³⁸⁹ According to Rene Merma, ex-community leader of Bajo Huancane, the mining company operating in the area promised to bring back a legally validated documents after agreeing on the community development plan. According to him, however, the company never bring back the document. See Meeting with Rene Merma, ex-community leader of Bajo Huancane (Espinar, Cusco) held on March 15, 2017.

³⁹⁰ See Meeting with Pedro Camero, held on March 10, 2017.

³⁹¹ See Meeting with Juancito, community leader of Huanca (Espinar, Cusco) held on March 16, 2017.

³⁹² For example, some mining companies do not provide the number of jobs originally agreed to. See Meeting with Lizbeth Diaz Redolof, Centro de Analisis y Resolucion de Conflictos, held on March 10, 2017; Meeting with Abel Larico and Yuri Becerra, Gerencia de Recursos Naturales, Municipalidad de Espinar, held on March 15, 2017; Meeting with Jaime Borda, Derechos Humanos Sin Fronteras, on March 14, 2017.

³⁹³ For more information, please refer to Chapter 3.

³⁹⁴ As seen in Las Bambas. See Meeting with Vladimir Pinto, Oxfam Peru, held on March 13, Lima.

³⁹⁵ See Meeting with Javier Caravedo, ProDialogo, held on March 13, 2017.

b. Recommendations

i. Revise Dialogue Approach and Communication Mechanisms

Information about the impact³⁹⁶ of mining projects must be made readily available to communities in simple terms, appropriate for adults with minimal levels of education. Such information must be provided both in Spanish and the local language. Branches of government (e.g. the *Viceministerio de Gobernanza Territorial*) must provide informational materials (videos, brochures, copy of agreements, EIA's, etc.) and training sessions that explain the more complex aspects of mining projects and granting of consent. Again, such materials must be presented in simple – but not patronizing – terms both in Spanish and in the local language.³⁹⁷ Among other benefits, this helps to strengthen communication channels among the parties, builds trust and helps manage community expectations.

Mesas de Dialogo should be used as a conflict prevention tool rather than resolution. Additionally, the Mesas de Dialogo should be inclusive as a platform for those communities that might be indirectly affected by mining activities as well. Once the Mesa de Dialogo is established, agreement should be reached through consensus among the parties and not imposed by one party. During the dialogue process, technical support should be provided to the communities to ensure information symmetry. Additionally, a constant communication system should be set up and the government should promote initiatives such as the “Dialogue Group on Mining and Sustainable Development of Peru” (in Spanish *Grupo de Dialogo Minería y Desarrollo Sostenible de Perú*),³⁹⁸ a space that aims at building consensus among the stakeholders surrounding sustainable mining.

Lastly, the Government should identify and assess past and present experiences associated with community communication mechanisms, such as the *Mesas de diálogo*.

ii. Effective Communication and Informative Plans

Thee Government should create a platform where community members can access relevant information regarding a mining project, mining companies, legal agreements, mining procedures and processes, grievance mechanisms etc.

³⁹⁶ The impact of a mining project on a community can be framed in environmental, economic and social terms. The environmental impact of a project is exemplified by, but not limited to, pollution of the air, water, and other natural resources. The economic impact of a project is exemplified by, but not limited to, the increase in local prices resulting from an increase in wages of local workers and/or the influx of relatively higher-earning non-local workers on the project. The social impact of a mining project is exemplified by, but not limited to, the provision of social services such as health centers or construction/maintenance of transportation infrastructure.

³⁹⁷ Some mining companies, such as Sumitomo Corp., provide such explanatory materials to the communities impacted by their project. For an example of informational materials, see Annex ()

³⁹⁸ For more information visit www.grupodialogo.org.pe

ANNEX I – MODEL CONSENT AGREEMENT

This Consent Agreement attempts to draft a comprehensive and legally binding agreement between a mining company and a community affected by the activities of the former. It aims to promote meaningful consent by the community which enhances the prospects for a peaceful coexistence and sustainable relationship of indigenous and rural communities with the extractive industry. Consent is a crucial component to ensure the acceptance of a mining project by affected communities. This may reduce the risk of social conflicts by avoiding discontent arising out of environmental or socio-economic harm and unfulfilled promises. Consent therefore needs to be a binding requirement and entail the right to subject it to certain conditions in the interest of distributing the benefits of mining activities evenly among the parties involved, including the communities.

This Consent Agreement is an initial draft and requires further input by the communities themselves as well as a close alignment with international efforts and developments regarding social license and mining. First experiences may prove the need to adjust components of the Consent Agreement.

This Consent Agreement is a proposal founded on the findings and recommendations of the Columbia SIPA Peru Capstone Report 2017.

Prof. Jenik Radon

Clara Thiemann

Consent Agreement

This **Consent Agreement** is made on [insert date]

between

[insert name] (the “**Community**”);

and

[insert name] (the “**Mining Company**”)

and is supervised and approved by the Government of Peru [insert state division, name of the representative] (the “**Government**”).

(The Mining Company and the Community are referred to collectively as the “**Parties**” and individually as “**Party**”).

Whereas:

The Mining Company recognizes that the consent of the Community impacted by mining and mining related activities is morally necessary and is a requirement under applicable law to initiate, develop and continue such mining and mining related activities.

The Mining Company recognizes the importance and primacy of protecting, and not adversely affecting, the environment and the cultural distinctiveness of, and the social and economic well-being of the Community and safeguarding the health of the individual members of the Community.

The Mining Company recognizes the rights, titles and interests of the Community on its territory.

The Parties recognize that the Community gives up certain rights over its territory by consenting and agreeing to mining activities of the Mining Company to the extent disclosed to the Community.

It is recognized that the Mining Company has to fulfill the obligations and conditions set forth in this Consent Agreement in order to obtain and maintain the consent of the Community and to provide the benefits from the exploitation of natural resources as set forth in this Consent Agreement.

The Parties agree that this Consent Agreement is legally binding and judicially enforceable.

The Parties agree that this Consent Agreement is fundamental to the mining license and is an integral part of the mining license.

Article 1 – Definitions and Interpretation

1.1 “Consent” refers to the right of the Community to accept (agree to or reject) the implementation of mining activities and mining related activities, and shall include the following elements:

- a. Free: consent that is given by the Community openly and transparently without coercion, intimidation, manipulation or corruption of any member of the Community;
- b. Prior: consent is sought and secured from the Community before every non-minor stage of the project;
- c. Informed: the Mining Company and the Government share with the Community all relevant information, especially in respect of any potential or actual affect or impact on the water and the environment; that the Community has ready and easy access to such information in a form that is understandable; and that information is sufficient, accurate and complete information, including on all impacts of the project on a member of the Community and the environment; and that the Community has the capacity, or is given the capacity, to make informed decisions.

1.2 “Mining activities” refers to any and all actions that form part of the process of exploration of a territory (physical and aerial), exploration of the underground (“subsuelo”), use of equipment, technology or labor to move the soil in a territory, the extraction of minerals and metals, processing of extracted soil with minerals and metals, transport of the minerals and metals, disposal of wastes, the use of water and all other activities that are applied or used in the exploration, extraction or processing for minerals and metals.

1.3 “Mining related activities” refers to any activity that supports in any way the realization of mining activities, including, for example, the building of any structure that will support any part of the mining activity or the people involved in mining activities (camps, offices, houses, services, and others), and the transporting of tools, resources, and people that will be involved in any of the mining activities (e.g. food, supplies, material, and others).

1.4 “Community” includes all adult members, including women, of a Peruvian indigenous or rural community.

1.5 The terms and conditions of this Consent Agreement are to be interpreted in the best interest of the Community and according to what can reasonably be expected, applying the best technology and resources, to fulfill the respective obligation.

Article 2 – Rights and Obligations of the Mining Company

2.1 The Mining Company has the right to conduct mining and mining related activities subject to the Consent of the Community. Consent is only valid for those activities in respect of which Consent has been sought. Consent does not extend to any other mining activities in any other area in Peru.

2.2 The Mining Company agrees that it cannot operate without Consent from the Community, which is free, prior and informed.

2.3 The Mining Company is required to comply with and fulfill all of the conditions of this Consent Agreement in order to maintain the Consent of the Community.

2.4 The Mining Company shall renew the Consent at any time where there is a change of any condition or a change of the scope or impact of the mining activities upon which Consent was previously granted. Any deviation from the original proposal or agreement concerning the mining activities constitutes a change that requires renewal of Consent, unless it is minor in nature, in respect of which the Mining Company has the burden of proof.

2.5 The Mining Company is under an obligation to maintain the Consent throughout the lifecycle of the mining activities, broadly defined as follows: -

- a. Initial activities on the territory of the Community;
- b. Licensing;
- c. Exploration;
- d. Exploitation;
- e. Closure

Consent has to be obtained at each phase.

2.6 The Mining Company certifies that all information necessary for the Community to make a free, prior, and informed decision has been disclosed and that this information is complete and accurate.

2.7 The Mining Company shall create a fully funded Abandonment Fund to ensure the continued fulfillment of the conditions and obligations of this Consent Agreement upon closure of the mining activity.

2.8 This Consent Agreement does not alter any other obligations of the Mining Company under the mining concession or license, agreements with governmental entities or other communities, and applicable Peruvian laws. The breach of such obligations shall also constitute a breach of this Consent Agreement and breach under this Consent Agreement shall constitute a breach under such concession, license, agreement and law.

Article 3 – Rights and Obligations of the Community

3.1 The Community gives Consent for mining and mining related activities to be undertaken by the Mining Company as described in _____ .

3.2 Consent is subject to compliance by the Mining Company with the terms and conditions as set forth in this Consent Agreement.

3.3 The Community may withdraw its Consent in the case of: -

- a. breach or default by the Mining Company of its obligations under this Consent Agreement;
- b. Consent is shown not to have been free, prior, and informed;
- c. any statement or representation by the Mining Company proves to have been incorrect or incomplete;
- d. environmental harm or damage arising from the mining project or any mining activity; and

- e. Any act of corruption or bribery has occurred in connection with the securing of the Consent or in the conduct of the mining activities, in which event the mining license or concession is automatically null and void.

3.4 The Community has the right to seek out the respective governmental entities upon complaints of non-compliance of terms and conditions by the Mining Company.

3.5 This Consent Agreement is without prejudice to any other rights and remedies available to the Community under applicable law. The Consent Agreement does not restrict the ability of the Community to participate in any public forum, consultation process, or organization.

Article 4 – Conditions for Consent

4.1 In order to maintain the Consent, the Mining Company agrees to:

The following list is exemplary and non-exhaustive for the conditions that are tied to the consent by the community. It entails a variety of environmental, economic, monetary and other measures, one or more of which the mining company has to fulfill in order to obtain or maintain consent. The conditions should be specified through dialogue and negotiations between the mining company and the community. Proper assistance to the community should be provided. Ideally, the government should be responsible to manage the needs, priorities, and expectations of the community.

- a. To create and implement avoidance and/or mitigation measures to protect the environment from adverse impacts that arise out of, occasion by or result from mining activities
- b. To fully and adequately compensate each member of the Community for the acquisition of property rights / of rights of use of the land in form of a payment in the amount of [insert amount] per [insert amount of time, i.e. days/month/year, in case of right of use].
- c. To refrain from damaging, destroying, limiting access to or displacing any member of the Community from their territories, and ensure access to clean and pollution-free water and land.
- d. In case of physical displacement, to rehabilitate the Community by [insert measures] and/or compensate the Community in form of a payment in the amount of [insert amount].
- e. To offer employment to Community members with the Mining Company at the local site of the mining activities. Community employees will receive equal labor protections to that of any other employee of the Mining Company. The Mining Company agrees to hire a quota of [insert %] of its employees at the local site from the Community.
- f. If employment at the Mining Company requires qualified education: To provide necessary training to members of the Community for employment at the local site of the mining activities in order to secure such education.

- g. To construct / renew / maintain access and roads.
- h. To provide clean running water and electricity to all households of the Community as well as Community centers / local offices / local facilities.
- i. To construct / maintain / operate / staff a hospital that provides for ambulant and stationary medical services that can be expected to be rendered by hospitals of a comparable size.
- j. To provide health care and insurance to members of the Community Hospital of the same standard of the Mining Company's executive workers.
- k. To construct / maintain / operate / staff a school / boarding school / educational facility for children of the Community to obtain a level of education of [insert level].
- l. To provide free wi-fi internet access at all times to the Community.
- m. To share with the Community the profit from the mining and mining related activities in form of payment in the amount of [insert %] of the profits incurred by the Mining Company.
- n. Other payments / compensation [insert]

4.2 The Mining Company bears the cost of fulfilling the conditions agreed upon.

Article 5 – General Obligation

5.1 The Mining Company shall not engage in any illegal, detrimental or corrupt business practices,³⁹⁹ and shall not engage in any activity that gives rise to or can result in having a negative effect and/or disturbance on the environment and the Community, including but not limited to the social, economic and/or cultural conditions affecting the Community.

5.2 The Mining Company shall respect cultural characteristics, traditions, practices, as well as heritage and language, of the Community. The Mining Company shall not interfere with the traditions and customs of the Community. The Mining Company shall conduct all communication with the Community in the local language of the Community at all times. It is the Mining Company's responsibility to provide at its cost an interpreter of the local language at all times of communication with the Community.

Article 6 – Procedure for Obtaining Consent

6.1 Disclosure of Information

The Mining Company agrees to disclose to the Community all information relevant to the impact of the mining activities and shall give the Community sufficient time to analyse, study and understand such information. Such information shall include

³⁹⁹ For the purpose of this Agreement, corruption is understood as the abuse of entrusted power for private gain. This includes cases of bribery, i.e. the offering, promising, giving, accepting or soliciting of an advantage (e.g. gifts, loans, fees, rewards, favours etc.) as an inducement for an action which is illegal, unethical or a breach of trust.

- a. detailed description of the mining project proposal;
- b. all anticipated eco-systemic, socio-economic impacts;
- c. all anticipated impacts on the environment of the project;
- d. proposal of the Mining Company on how to monitor, avoid, and mitigate, to the maximum extent, adverse impacts, applying the most advanced technologies, procedures and processes, and on how the inclusion of Community members in the monitoring of impacts will be ensured;
- e. proposal of the Mining Company on how to optimize and share the benefits, including some profits, with the Communities affected by the mining project,
- f. proposal of the Mining Company on creation of employment for Community members at the local mining site;
- g. proposal on how and when to fulfill possible conditions of the consent;
- h. any report, study, or assessment related to the mining project;
- i. any other information that is required for the Community to make an informed decision

No applicable information can in any way be concealed or misrepresented. The Mining Company must give notice to the Community on any change of information and Consent be renewed respectively.

6.2 Procedure

Upon disclosure of the information according to provision 6.1, the Mining Company shall conduct the following to obtain Consent:

- a. Ask permission from the Community to enter the territory and meet with local Community leaders.
- b. Agree to meet on the date, times, location and conditions that the community sets for the dialogue.
- c. Communicate with the Community members and leaders at the location of the Community, on all issues set forth in Article 6.1 a to h. in the local or preferred language of the Community;
- d. Ensure the participation of women of the Community in all communication and negotiations with the Mining Company;
- e. Negotiate and agree in good faith with the Community on the conditions that the Mining Company has to fulfill to obtain and maintain the Consent;
- f. Translate the drafts Consent Agreement into the local language of the Community and Spanish;
- g. Sign the Consent Agreement with Community leaders in presence of male and female members of the Community at the location of the Community;
- h. Review and agree with the Community members and leaders at the location of the Community, any changes needed in the Consent Agreement;⁴⁰⁰
- i. Schedule regular meetings with the Community for the purpose of reviewing compliance with the Consent Agreement.

⁴⁰⁰ See Article 2.4 and 2.5.

6.3 The Mining Company shall not impair the right of the Community to seek assistance for this procedure from third parties, such as state officials, lawyers and non-governmental organizations.

6.4 The Mining Company shall pay all expenses of the Community's lawyers and other professional advisors needed by the Community for its review of the mining activities and the negotiation of the Consent Agreement, which amount shall be at least equal to that paid to the lawyers and professional advisors engaged by the Mining Company.

Article 7 – Breaches of the Consent Agreement

7.1 Burden of proof

The burden of proof on compliance with the terms of this Consent Agreement is on the Mining Company. Specifically, the Mining Company shall provide evidence that it is not in breach of this Consent Agreement.

7.2 Liability

The Mining Company is strictly liable for any breach of the obligations of this Consent Agreement. The Mining Company is strictly liable for any damage to the environment of the Community arising during its mining activities, whether or not arising out of an occurrence of force majeure, unless it can prove beyond a reasonable doubt that the damage did not arise from such mining activities and could not have been so caused by the mining activities, including activities which were undertaken by any predecessor mining company.

7.3 Period for Correction

Upon complaint of a breached obligation of this Consent Agreement by the Community, the Mining Company shall correct the breach within [insert number] days. The Mining Company must use the most up-to-date technical resources, processes and standards in correcting any breach, irrespective of the cost thereof, and give the highest priority to the correction of the breach.

7.4 Default

The Mining Company is in default if it

- a. Damages the environment or water;
- b. Makes to the Community a false statement, or provides incomplete or inaccurate information, about the mining activities or mining-related activities;
- c. Fails to correct a breach of the Consent Agreement after the expiry of any cure period;
- d. Commits any act of bribery or corruption.

7.5 Consequence of Default

The mining license of the Mining Company is suspended for the duration of the default of the Mining Company. The mining license is revoked if the Mining Company fails to fulfill its obligations under Article 7.4 c or d, or if Consent is withdrawn.

7.6 Obligations during suspension or revocation of the mining license

The suspension or revocation of the mining license does not exempt from the obligation to correct breaches. The termination or pause of mining activities due to suspension or revocation of the mining license does not exempt from the obligation to pay the full salary to workers of the local site of the mining activity and continue to provide for all other conditions of this Consent Agreement.

7.7 Damages

The Community, and each member thereof, shall be compensated for any injury or damage suffered from any breach of any obligation by the Mining Company of this Consent Agreement. Such compensation shall at least restore the Community and such member to such position it would have been in had there been no breach and for all costs and expenses incurred. In addition, the Community and such member shall be compensated for any pain and suffering.

7.8 Emergency fund

The Mining Company shall create an emergency fund to ensure rapid remedial action for any breach of its obligations.

7.9 Inspection

The Community shall have a right to inspect the local site of the mining activities at all times accompanied by third parties of their choosing, (e.g. non-governmental organizations, lawyers, government officials, members of other communities, and others).

7.9 The Mining Company is prohibited from hiring police forces for security purposes at any time. The Mining Company shall respect the right of assembly and freedom of speech of the Community at all times.

Article 8 Parent company guarantee

The parent company [insert name, location] of the Mining Company guarantees the prompt and immediate performance and payment for the fulfillment of all obligations arising from this Consent Agreement. The parent company submits to the Peruvian jurisdiction for claims against it arising from this guarantee.

Article 9 Succession

The Mining Company is under the obligation to transfer all obligations under this Consent Agreement to any legal successor to the Mining Company, for example in cases of the sale of the mining project to another company or restructuring of the Mining Company.

Article 10 Term of Agreement and Renewal

This Consent Agreement takes effect on the date of signing of this Consent Agreement and remains legal, valid, and binding for the term of the license and concession agreement, and after termination for all environmental impacts that may have arisen or arise from the mining activities, no matter when arising.

Article 11 Governing Law and Enforceability

11.1 The laws of Peru will govern the validity and interpretation of this Consent Agreement.

11.2 This Consent Agreement is a legally binding contract. Disputes arising hereunder are under the exclusive jurisdiction of the courts of Peru.

11.3 This Consent Agreement is not in conflict with any international and bilateral treaty entered into by the state of Peru.

Article 12 Language

The Mining Company shall make the Consent Agreement available in Spanish and in the local languages of the Community.

Article 13 Modification

No oral or written modification of this Consent Agreement will be effective unless such modification is in writing and signed by the Parties.

Article 14 Delegation

No right, privilege, or obligation under this Consent Agreement may be assigned or transferred in whole or in part to a third party without the Consent of the Community, except in cases of succession (see Article 9 of this Consent Agreement).

Article 15 Publication of the Consent Agreement

This Consent Agreement shall be published officially in [insert] and be accessible nationwide. The Consent Agreement shall be recorded in the database on agreements between communities and mining companies of the Vice Ministry of Territorial Governance.⁴⁰¹

Article 16 Documents that form part of the Agreement

Schedules

Plans

Exhibits

Specification of commitments of the parties

⁴⁰¹ See Recommendations in Community Management Section of the Report.

Annexes, such as Project Proposal Area and Scope, Traditional Territory

ACKNOWLEDGEMENTS

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The recommendations and content of this Report do not necessarily represent the views of Columbia University or its affiliates, nor of any entity of or affiliated with the Government of Peru, nor those of any other stakeholders or individuals, unless otherwise noted.

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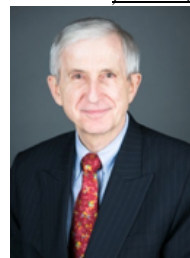
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Serving as an advisor during Estonia's independence struggle, Radon co-authored the country's foreign investment, mortgage/pledge, privatization and corporate laws and was an architect of Estonia's privatization. He was awarded the Medal of Distinction of the Estonian Chamber of Commerce and Estonia's Order of the Cross Terra Mariana, which was personally awarded by the President of Estonia. Radon presently advises public authorities and civil society in a number of developing and emerging nations around the world, including Estonia, Georgia, Namibia, Nepal, and Peru. This is his third consecutive year serving as the faculty advisor for the Columbia SIPA Peru Capstone Project.

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Peru Capstone 2017 Video:

<https://sipa.columbia.edu/news-center/video/capstone-workshops-2017>

