

What Additional Measures Can Be Implemented in Peru to Strengthen the Prevention and Management of Social Conflicts Related to Mining Activities?

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Peruvian journals and social media have echoed that, during the last few years, mining companies, some of which are based in Canada, whose projects have been put in practice in Peruvian territory, are the focus of criticism regarding subjects such as environmental pollution and social communities' rights. Furthermore, Peruvian aboriginals and social communities claim that their water resources are at risk, and that they have already suffered from polluting damages. They are also concerned about their displacement to other areas, despite the fact they have been living there since time immemorial. Likewise, they state that mining companies have breached the rules regarding the duty of consent, which is an essential right belonging to said aboriginals and social communities to be exercised after they have been given proper and sufficient information about the mining project to be developed.

On the other hand, the mining companies involved deny the accusations. They argue that they comply with the Peruvian legal framework, that they have followed the respective administrative procedures, and that they have been granted the permits and authorizations needed by the competent Peruvian authorities. These issues have led to social conflicts in Peru, bringing bad reputation to the mining companies involved and, among them, to those based in Canada.

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The main purpose of this paper is to provide some answers to the following questions: How are mining companies operating in Peru related to social conflicts with aboriginal and local communities? What are the current measures envisaged in the Peruvian legal framework to prevent and handle those social conflicts? Are there any additional measures in Canada that can be put in practice in the Peruvian legal framework to expand and boost the range of measures currently available? For that purpose, this paper will start by reviewing the principal facts of the mining activity in Peru as an important economic activity. Then, it will provide the reasons that cause the social conflicts to arise between the mining companies and the social communities in Peru. Thereafter, it will assess the existent measures used in Peru to face those social conflicts. Finally, this paper will try to come up with some measures used by Canada that can be put into place in Peru to extend and increase the availability of choices to prevent and manage the social conflicts arising from the mining companies.

I. THE IMPORTANCE OF MINING ACTIVITIES IN PERU

Mining is one of the main economic activities in Peru and it is considered as one of the main motors of its economy. In 2013, Peru ranked first place in Latin America in the production of gold, lead, zinc, and tin; and second place as a producer of silver, copper, molybdenum, mercury, selenium, cadmium, rock phosphate, and iron.¹ By 2013, mining represented 22% of the Peruvian gross domestic product.²

There are fourteen member companies of the International Council on Mining and Metals, which is the association of the world's largest mining companies, operating in Peru. Such number is the highest concentration of large mining companies in any country.³ Also,

1. Perú [Peru], Ministerio de Energía y Minas [Ministry of Energy and Mines], *La importancia de la minería en el Perú* [The importance of mining in Peru], Working Paper (2013), A9, online: <imp.org.pe/website2/jueves/ultimo341/jm20131010_importancia.pdf>.
2. *Ibid* at A10.
3. Oxfam America, "Mining conflicts in Peru: Condition critical", (March 2009), online: <oxfamamerica.org/static/media/files/mining-conflicts-in-peru-condition-critical.pdf> at 2. As pointed out by Oxfam America, these companies

Peru hosts around one hundred Canadian mining companies, 90% of which are junior mining companies doing exploration activities.⁴

The incomes derived from mining activities are destined to finance many of the Peruvian government activities with the purpose of attaining more development and social inclusion, such as funding the Education portfolio (it represents 36% of its annual budget), the construction of hospitals and national road network, and the support of social programs focused on the most vulnerable population (e.g. *Juntos*, *Beca 18*, and *Pensión 65*).⁵

Based on these reasons, the Peruvian Government is pretty interested in attracting more foreign mining investors. To this effect, the Peruvian legal framework provides with many figures to guarantee legal security for foreign investment: legal stability contracts guaranteed by the Peruvian Political Constitution, free disposal of foreign currency and free remittance of dividends outside Peru, use of national and international arbitration as an alternative dispute resolution mechanism, tax stability agreements, non-discrimination treatment between national and foreign investors, and early recovery of sales tax, among others.⁶ In exchange for the various benefits offered by the Peruvian Government, an excellent environmental management and an excellent corporate social responsibility are expected from the investors.

However, as it was anticipated in the introduction of this paper, in these last years, there have been many social conflicts in Peru due

are: Anglo American, Barrick, BHP Billiton, Freeport McMoran, Gold Fields, Mitsubishi Materials, Newmont, Nippon Mining and Metals, Rio Tinto, Sumitomo Metal Mining, Tec, Vale and Xstrata.

4. "El 90% de mineras canadienses que operan en Perú son mineras junior" [90% of the Canadian mining companies with operations in Peru are junior mining companies], *Andina*, (19 September 2014), online: <www.andina.com.pe/agencia/noticia-el-90-mineras-canadienses-operan-peru-son-mineras-junior-524055.aspx>.
5. *Supra* note 3 at 5.
6. Perú [Peru], Ministerio de Energía y Minas [Ministry of Energy and Mines], *Minería en el Perú* [Mining in Peru], Working Paper, by Felipe Isasi, (2008), online: <minem.gob.pe/minem/archivos/file/institucional/publicaciones/presentaciones/exposicion_minas_espa.pdf> at 27.

to the failure to comply to the aforementioned requirements by the mining companies. Unfortunately, some of those social conflicts, with fatal consequences, have had Canadian mining companies as protagonists.⁷

II. THE REASONS FOR THE RISE OF SOCIAL CONFLICTS RELATED TO MINING COMPANIES IN PERU

Peru is still a country where poverty and social inequality are considerable issues. Yet, most regions where many people live in poverty are also rich in mineral resources, as for instance Ancash,⁸ Apurímac,⁹ Puno,¹⁰ and Cusco.¹¹

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7. See e.g. “Protestors Trash Manhattan Minerals Offices and Camp in Tambogrande, Peru”, *Mining Watch Canada* (25 March 2001), online: <miningwatch.ca/news/2001/3/25/protestors-trash-manhattan-minerals-offices-and-camp-tambogrande-peru>; “Peru protest turns deadly, Bear Creek project halted”, *The Globe and Mail* (24 June 2009), online: <theglobeandmail.com/globe-investor/peru-protest-turns-deadly-bear-creek-project-halted/article600192/>; “Deadly clash at Peru protest over Barrick gold mine”, *BBC News* (20 September 2012), online: <bbc.com/news/world-latin-america-19669760>; “Minera Candente Copper suspendió sus actividades en proyecto Cañariaco” [Candente mining company suspended its activities in Project Cañariaco], *El Comercio* (17 May 2013), online: <elcomercio.pe/economia/peru/minera-candente-copper-suspendio-sus-actividades-proyecto-canariaco-noticia-1577706>; “Minera Hudbay suspende operaciones de Constancia por toma de la mina” [Hudbay mining company suspends its operations in Constancia miner after being occupied], *Gestión* (09 November 2016), online: <gestion.pe/empresas/canadiense-hudbay-suspende-operaciones-constancia-toma-mina-2174303>.
 8. Tiffany Grabski, “Peru’s Ancash region sees most social conflicts, eight related to Antamina” *BN Americas* (28 March 2013), online: <www.bnamericas.com/en/news/mining/perus-ancash-region-sees-most-social-conflicts-eight-relating-to-antamina1>.
 9. “Conflicto social en Apurímac: el nuevo escenario de Las Bambas” [Social conflicts in Apurímac: the new scenario of Las Bambas], *El Comercio* (04 November 2016), online: <elcomercio.pe/sociedad/apurimac/conflicto-social-apurimac-nuevo-escenario-bambas-noticia-1944126>.
 10. “Peru: Indigenous protests erupt in the city of Puno”, *BBC News* (28 May 2011), online: <bbc.com/news/world-latin-america-13582707>.
 11. Colin Post, “Anti-mining protesters occupy downtown Cusco”, *Peru Reports* (20 January 2016), online: <perureports.com/2016/01/20/anti-mining-protesters-occupy-downtown-cusco/>.

According to a research conducted in 2009 by the NGO Oxfam America,¹² the conflicts in Peru's mining sector have many different root causes:

- 1) Few benefits are experienced by local communities from mining revenues, which feel excluded from the profits of the country's natural resource wealth. As Oxfam America points out in its research, the large-scale mining does not generate an important number of direct jobs for local people. Therefore, communities benefit through redistributive government programs, which have been proven to be inefficient due to the bureaucratic procedures, or lack of knowledge of local authorities for using the mining revenues appropriately. This causes frustration in the local population who does not see any improvement in the quality of their lives, in aspects such as public utilities, health, education or basic infrastructure.
- 2) The Peruvian government lacks the capacity and political will to regulate the industry, manage local conflicts, and redress grievances.
- 3) Mining companies have made serious mistakes in their relationships with local communities like employing personnel with a racist attitude towards the local communities, or trying to operate in non-viable areas or lands off-limits to mining (like the Canadian mining company, Manhattan Minerals, who sought to build a mine under a town of 16,000 people). Also, many of the claims rose by the local communities are grounded on the companies' failure to comply with its commitments and agreements.¹³

Additionally, the impacts on the environment, especially those related to the quality and the quantity of the water used for the mining activities, are of major concern for Peruvian local communities. Although mining companies state that they use modern technologies to prevent negative effects on the water supply, many claims are grounded on this matter. For instance, the conflict between the local communities

12. *Supra* note 3 at 5.

13. See e.g. "Communities from the District of Chamaca Strike at HudBay Minerals' Constancia Mine in Cusco, Peru", *Mining Watch Canada* (10 November 2016), online: <miningwatch.ca/blog/2016/1/25/communities-announce-protest-against-hudbay-minerals-constancia-project-peru>.

in the region of Piura, located up north Peru, and Monterrico Metals PLC, a UK-registered company, motivated the visit of a delegation composed, among others, by a member of the UK Parliament, to solve the conflicts regarding the issue of water by the British mining company in such Peruvian region.¹⁴

III. THE CURRENT MEASURES TO PREVENT SOCIAL CONFLICTS IN PERU

A. The Acknowledgment of the Right of Consult of the Indigenous People (The Acknowledgment of the Duty to Consult Indigenous People?)

Pursuant to article 66 of the Political Constitution of Peru,¹⁵ the natural resources, both renewables, and non-renewables (such as the mineral resources) form part of the Nation's patrimony, and the Peruvian State governs their development.

Notwithstanding, regarding the utilization of the lands owned by local communities, the Peruvian State must comply with the provisions contained in the ILO Convention 169,¹⁶ which was approved by Legislative Resolution No. 26253.¹⁷ Its articles 6, 15 and 16 set a binding obligation for the Peruvian government to respect the right to consultation for Indigenous people when its territories could be directly affected by activities promoted by the government, or due to legal or administrative measures.

The Peruvian Constitutional Tribunal has had the chance to solve eight cases in which the right to consultation was in discussion: a) The *Lauricocha Province* case; b) the *Cordillera Escalera* case; c) *Tuanama 1*;

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14. Anthony Bebbington & Mark Williams, "Water and Mining Conflicts in Peru" (2008) 28:3/4 MRD 190 at 190-191.
 15. *Constitución Política del Perú* [Political Constitution of Peru], 29 December 1993 (entered into force on 31 December 1993).
 16. *Indigenous and Tribal People Convention*, International Labour Organization (ILO), 27 June 1989, ILO-C169 (entered into force on 05 September 1991).
 17. *Resolución Legislativa No. 26253, Aprueban el "Convenio 169 de la OIT sobre pueblos Indígenas y Tribales en países Independientes"* [Legislative Resolution No. 26253, An Act Approving Convention 169 of the International Labour Organization] (5 December 1993).

d) *Aidesepe 1* case; e) *Aidesepe 2* case; f) *Tuanama 2* case; g) *Tuanama 3* case; and h) *Tuanama 4-WRA* case.¹⁸ However, the following should be noted:

[I]n all the cases the Tribunal was unwilling to apply the right to consultation. Although it decided later to order the MEM [Peruvian Ministry of Energy and Mines] to elaborate a regulation of the right to consultation, in the *Aidesepe 2* decision, the order was very broad. *Aidesepe I* also has to be taken into account. The euphemism used by the Tribunal to avoid the future “gradual application” of the right to consultation, is another piece of evidence that supports the idea of a bias into the Tribunal regarding the jurisprudential implementation of the right to consultation.¹⁹

Later, as Professor Dwight G. Newman highlights, “Peru became the first Latin American State to develop legislation on consultation in August 2011, with the adoption of the *Ley de Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios Reconocido*. This law follows a longer period of developing case law on consultation in the Peruvian Courts”.²⁰ Indeed, the Peruvian executive power passed the *Act of Indigenous Peoples Right to Consultation* in 2011, implementing the Convention 169.²¹ Such Act establishes the right for Indigenous people to be consulted on the legislative or administrative measures that can prejudice them, and it also states that the purpose of the consult is to get a bargain, or a consent, between the State and the Indigenous people regarding those measures, within an intercultural dialogue that guarantees their inclusion in the procedures of the State’s decision-making.

18. See Alvaro R. Córdova, *The Right of Indigenous Self-Determination and the Right to Consultation in the Peruvian Constitutional Tribunal Jurisprudence (2005-2011)* (LLM Thesis, University of Victoria Faculty of Law, 2013), online: <dspace.library.uvic.ca/bitstream/handle/1828/4980/Cordova%20Alvaro%20LLM%202013.pdf> at 60.

19. *Ibid* at 77-78.

20. Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, Rev ed (Saskatoon: Purich Publishing Limited, 2014) at 159.

21. Ley No. 29785, *Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo* [Act of Indigenous Peoples Right to Consultation, Act No. 29785] (entered into force in Peru on 7 September 2011).

B. The Creation of the Peruvian National Office of Dialogue and Sustainability

The *Oficina Nacional de Diálogo y Sostenibilidad* [Peruvian National Office of Dialogue and Sustainability] (ONDS in its Spanish acronym) was established by Supreme Decree 106-2012-PCM.²² It is a specialized technical organ which forms part of the Peruvian Public Administration. It has the duty to conduct the dialogue processes between the different social actors, representatives of private institutions and public officials with the objective of managing the differences, controversies and social conflicts within Peru. In October 2016, the ONDS intervened in 161 social conflicts, of which 56.5% were related to extractive activities, including mining (37.8%), hydrocarbons (14.2%) and informal mining (4.3%).²³

C. Are There Other Additional Measures Used by Canada That Peru Can Put Into Practice to Reinforce the Management and Handling of the Social Conflicts Related to Mining Activities?

In addition to the current measures that aim to prevent the social conflicts in Peru, the following measures used in Canada could be considered:

A. The Establishment of More Mechanisms of Dialogue and Communication Between the Mining Companies and the Communities Should Be Propitiated

It is quite important that the dialogue and communication with the local communities, to establish a good relationship, be initiated from

22. *Decreto Supremo No. 106-2012-PCM* [Supreme Decree No. 106-2012-PCM] (entered into force in Peru on 25 October 2012).

23. Perú [Peru], *Oficina Nacional de Diálogo y Sostenibilidad* [Peruvian National Office of Dialogue and Sustainability], *La gestión del diálogo en el Perú. Tratamiento y prevención de conflictos a nivel nacional en octubre de 2016. Reporte mensual* [The management of dialogue in Peru. Treatment and prevention of conflicts at the national level. Monthly report], Working Paper No. 2016/48 (2016), online: <<http://onds.pcm.gob.pe/wp-content/uploads/2016/12/W48.pdf>>.

the beginning of the mining project and throughout it (including its operation and closure). This would insure that communities participate in the decision-making of all the activities that can prejudice their rights.

As Glenn Nolan, the first aboriginal Canadian presiding the Prospectors & Developers Association of Canada from 2012 to 2014, points out, the secret of Canada in exploring its mineral resources, appropriately with the interest of its Indigenous peoples, is to listen and talk continuously with those communities, and to work permanently in establishing the best permanent relationship practices between the mining companies and the local communities, instead of just seeking the approval of a single project.²⁴

Also, as Saleem H. Ali states, social conflicts in Canada have been contained “through an inclusive process of bringing together stakeholders and not taking sides with any particular party”.²⁵

[Canadians] have also managed to focus specifically on minerals development and indigenous activities as a phenomenon that involves multiple stakeholders. They have done so at two levels. First, at the federal government level a special program was created in 1999 to focus on indigenous communities and nonrenewable resources development [...] Second, the Canadian Government has established an Intergovernmental Working Group on Mining (among the federal and provincial governments), which has a special committee on indigenous participation in mining. This group publishes an annual report, which is sent to indigenous groups all across Canada.²⁶

24. “¿Qué deben hacer las mineras para evitar conflictos sociales?” [What should mining companies do to prevent social conflicts?], *El Comercio* (10 March 2014), online: <elcomercio.pe/economia/peru/que-deben-hacer-mineras-evitar-conflictos-sociales-noticia-1714841>.

25. Saleem H. Ali, *Mining, the Environment, and Indigenous Development Conflicts*, (Arizona: University of Arizona Press, 2009) at 191.

26. *Ibid* at 194.

B. Strengthening the Role and Professionalization of the Aboriginal Associations in the Mining Activities

According to Gérard Duhaime, Nick Bernard, and Andrée Caron, “among other factors, the active presence of aboriginal’s organizations seems to be a key agent for change in corporate encounters with Aboriginal peoples”.²⁷ In other words, the role of organizations representing the rights and interests of Aboriginal peoples is crucial in the dialogue between the mining companies and local communities.

It must be highlighted that one of the defining features of the Aboriginal associations in Canada is its professionalization, which brings them credibility:

Negotiations with a central government and multinational corporations forced the newly formed associations to engage in a process of professionalization [...] Aboriginals groups had to support their land claims, as well as their demands on the industry, with credible expertise. Consequently, they gradually hired a number of experts, especially lawyers, and natural scientists. Besides local associations, they created national organizations to lobby centers of influence more effectively.²⁸



Mining is one of the main economic activities in Peru. It hosts the highest concentration of large mining companies worldwide and around one hundred Canadian mining companies.

Mining incomes are destined to finance many of the Peruvian Government activities with the purpose of attaining more development and social inclusion. However, in these last years, there have been many social conflicts in Peru due to the failure to comply with the minimum standards required by the Peruvian Government: ensuring an excellent environmental management and an excellent corporate social responsibility.

27. Gérard Duhaime, Nick Bernard & Andrée Caron, “Mining on Aboriginal Lands” in Cora J. Voyageur, David R. Newhouse & Dan Beavon, eds, *Hidden in Plain Sight: Contributions of Aboriginal Peoples to Canadian Identity and Culture* (Toronto: University of Toronto Press, 2011) 108 at 109.

28. *Supra* note 27 at 124.

The root causes for the rise of social conflicts related to mining activities in Peru are: 1) the few benefits experienced from mining revenues by local communities, which feel excluded from the profits of the country's natural resource wealth, and do not see any improvement in the quality of their daily lives; 2) the lack of capacity and political will of the Peruvian government to regulate the industry, manage local conflicts, and redress grievances; 3) the mistakes made by the mining companies in their relationships with local communities; and 4) the impacts on the environment, which have not been adequately addressed by the mining companies.

The current measures put into place to prevent the social conflicts in Peru are the legal acknowledgement of the right to consultation of the Indigenous people prior to (adopting) a legislative or administrative measure that can prejudice their rights, enshrined in ILO Convention 169, and that forms part of the Peruvian legal framework; as well as the creation of the Peruvian National Office of Dialogue and Sustainability in 2012, which has the duty to conduct the dialogue processes with the objective of managing social conflicts in Peru.

Based on the Canadian sources consulted in this paper, in addition to Peru's current measures that aim to prevent and handle the social conflicts, it is suggested that more mechanisms of dialogue and communication between the mining companies and the communities should be established and propitiated, and that role and professionalization of the aboriginal's associations in the mining activities should be strengthened.