

Jorge Balarezo and Henrik Wiig

The mighty few vs. the silent majority – Barriers to resource extraction for poverty reduction in Peru

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Abstract: Peru is rich in natural resources and the former president García believed extraction would lead to development. However, he had only limited success in spite a strong presidential system. This paper analysis social and judicial forces that limited the level of resources extraction.

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Preface

The position of the president is extraordinary strong in the Peruvian democratic system. The former president Alan García favoured resource extraction as the main pathway to development. However, most of his large scale initiatives stalled due to resistance at various levels. This study tries to explain the seemingly paradox of a president with formally close to absolute power in fact has a limited capacity to impose his preferred policy.

NIBR chose to fund this explorative study as we perceive a pressing need to understand the role of decentralisation, local resistance and the judiciary system for the policy implementation in resource rich Latin American countries.

Oslo, May 2012

Marit Haug
Research Director

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Summary

Jorge Balarezo and Henrik Wiig

The mighty few vs. the silent majority – Barriers to resource extraction for poverty reduction in Peru

NIBR Working Paper 2012:105

Peru is rich in natural resources like minerals, gas, oil, forests and potential farmland. However, most of them are still unexploited, and a large part of the population (34.8%) is deeply poor. The president has a strong position within the Peruvian democratic system and can even decide to exploit sub-terrain and some surface natural resources without the explicit acceptance of the congress as long as he follows the technical laws of procedure. The former President García believed exploitation of natural resources to be the best way to development, but most of his large scale initiatives stall. This paper has two preliminary explanations for the inability of the president to act: First, the central state lacks territorial control. Secondly, the given procedures, regulations and laws are quite complex and time consuming.

1 Introduction

Peru is rich in natural resources like minerals, gas, oil, forests and potential farmland. However, most of them are still unexploited, and a large part of the population (34.8%) is deeply poor.¹ Even though the benefits from resource extraction are visible through some indicators, there is a deep mistrust in the local population to resource extraction.² However, there is no reason to believe the losses from irregularities in management of state income from resource extraction are higher in Peru than in any other western countries.³ New concessions are given in open auctions, and there is little leeway for shadow deals.⁴

The president has a strong position within the Peruvian democratic system. He has a right and a duty under the constitution to develop the country.⁵ Generally, he can even decide to exploit large reserves without the explicit acceptance of the congress as long as he follows the technical laws of procedure in that sector. Furthermore, the constitution states that sub-terrain and some surface natural resources, e.g. trees, are public assets and can be exploited by the state, even though the land surface itself is a private property. However, there is a marked inability of the president to carry out development projects and maintaining internal order to allow the exploitation of natural resources through concessions. This paper has two preliminary explanations for the inability of the president to act: First, the central state lacks territorial control.⁶ Secondly, the given procedures, regulations and laws are quite complex and time consuming.⁷

¹ The last President Alan García, was a “power socialist” when it came to making the riches of the nation work for the whole population, but a market liberalist as he let private interests do the exploration and extraction. Anyhow, the state coffer is filled with tax revenue from the companies which is spent on social programs, e.g. el Programa Nacional de Apoyo Directo a los más Pobres – JUNTOS, See: <http://www.juntos.gob.pe/>) and much needed large-scale infrastructure investment.

² Politicians are seen as thieves, receiving bribes from the multinational companies, with no positive effects for the population, neither at a local nor at a national level. So one dollar from the state is not necessarily seen as a dollar that can improve the life of an ordinary citizen.

³ Peru has good control systems both of state activity itself and of the resource extraction industries in specific. The audit work for a transparent and efficient use of public resources is made through the Comptroller General of the Republic. On the other hand, the audit of the taxes generated by private economic activity is conducted through the National Superintendency of Tax Administration.

⁴ That being said, the foreign companies might perceive that corruption is necessary to win auctions, even though the receiving end might have no influence at all over the process. One example is the small Norwegian oil company Discovering Petroleum, which was involved in a case of corruption to obtain an oil concession in the Peruvian Amazonia. The political scandal caused the change of the cabinet. See for the chronology of events: : <http://elcomercio.pe/ediciononline/html/2008-11-13/cronologia-caso-discover-negociado-petrolero-que-termino-gabinete.html>

⁵ Constitution, Article 118

⁶ When locals resist and organize protests and regional strikes (some of them violent), the government tends to back out, as they cannot physically go through with a safety construction and exploitation process. This limits the implementation of state developmental policies, and this is aggravated by the lack of a system of coordination to

This paper hence describes the economic and legal background that restricts the president from exploiting more resources under national ownership under the law. This paper focuses on the following question: Is the right to be consulted under the ILO Convention 169 an obstacle to or a condition for development in Peru?

In this paper, it is assumed that the last president, Alan García, had good intentions of using income from natural resources to reduce poverty and build a modern economy, probably according to the will of the majority of the population. Each type of natural resource will be analyzed by, (i) describing the default system of allowing resource extraction in this field, (ii) type of resistance that confront such exploitation, (iii) how the government tries to bypass such resistance and (iv) the success or failure by the government to exploit these natural resources in the end.

The ILO §169 plays a vital role, but it is hard to define when the prescribed necessary consultations have been satisfied. The effective implementation of this right continues as an open discussion without proper domestic regulation, and it could differ from those standards defined internationally. On the other hand, if a complaint about lacking consultations is taken to court, they should judge whether the applied consultation is sufficient or not. Currently, this is being defined through ad hoc political commissions which leave the situation open to populism.

Providing answers, this paper suggests: First, it is required to understand what *consultation* implies to understand the right to be consulted in a comprehensive manner. It comprises not only matters regarding use of the territory, but also the development of democracy and cultural diversity issues.⁸ Secondly, the right to consultation is an important tool for development but at the same time only one element. Making decisions for development from a broad and deep democratic base in order to ensure the sustainability of the projects requires a comprehensive assessment of all relevant factors.⁹

build development between the state and local and regional governments. Here regional governments are focused on the potential negative effects in the region than on the overall benefits, as well as feeding regional populist sentiments against the exploitation of the upper class in Lima.

⁷ Protests group, regional authorities and international society are often able to stop or delay the projects in courts by indicating procedural errors or in Congress if new laws are needed to go through with the project. This is aggravated because the central government has failed in providing a long-term and effective policy to prevent social conflicts, and the president has insisted on acting with authoritarianism by issuing regulations inconsistent with the constitution.

⁸ From a perspective of respect for human rights, all cultures have the right to be respected, and that demands to be allowed to continue to exist. Sometimes states have imposed things (for example, a vision of development), or have acted affecting cultures, trying to assimilate (voluntarily or not). What seeks the ILO 169 is that the state does not impose, but achieve accords taking into account that there are a diversity of cultures within its borders, and those cultures have world views worthy of being taken into account as much as the others. From there, the right to be consulted is not only the right to be involved in these decision-making processes, but also the tool to reach consensus between cultures.

⁹ This requires parallel agendas like a better planning of national territory use (such as having a land policy), institutional development, and a comprehensive management in the prevention of social conflicts. Here the right to consultation is not only a tool for resolving conflict but also a tool to enhance and build more inclusive and participatory democracy.

2 Democratic system in Peru

The Constitution of Peru has defined the Peruvian state as a democratic state based on the rule of law. The State is one and indivisible, and its government is unitary, representative and decentralized. It is organized according to the principle of separation of powers. According to this principle, the Peruvian government has been divided into three powers. (See table 2.1)

Table 2.1 *State's power division*

State power:	Directed by:
Executive	President of the Republic and ministers
Legislative	Congress and representatives
Judicial	Courts and Judges

The President is elected in mandatory, direct and general elections every five years. However, the Congress election takes place at the same time as the first round of presidential elections. The election of judges is through the internal organs of the judiciary to ensure their autonomy and independence.

While the Congress issues laws and approves the state budget, the President directs the general policy of the nation, and therefore, its development. The President also manages the public finances and has limited legislative faculties. In order to legislate, and eventually implement developmental policies, the President could pursue:

- a) The ordinary procedure to produce *Lams* by exercising its right to legislative initiative before the Congress.¹⁰
- b) An authorization by the Congress to legislate through *Legislative Decrees* in a specific matter.¹¹

¹⁰ The Congress has the first responsibility for the creation of the law, and the Constitution gives the President of the Republic the right of legislative initiative to propose bills. The executive's initiative is discussed in the working committees of the Congress, and after 30 working days, the committees issue their opinions: Favorable, unfavorable, or rejected outright. If it is favorable, the Board of the Congress gives the bills priority and places them in the agenda for discussion by the full House. After a debate, the full House can approve or reject the law. If it is approved, the Congress sends the autograph of the law to the President of the Republic for promulgation in the period of 15 working days. If the President has comments, the President will send the bill to the Congress within 15 working days, and if the term has passed without President's promulgation, the Congress can perform it. The ordinary process should take approximately three (3) months, but in practice, it takes more time, because the analysis of the bill by the committees is not carried out immediately, and the placement of the project within the agenda can delay the debate over the project and its subsequent approval.

¹¹ The Congress may delegate legislative functions to the Executive, through this, the executive can issue Legislative Decrees with the obligation to report to the Congress. The delegation takes place through the enactment of an ordinary law (Authorization Act) by the Congress following the ordinary process. This Law

- c) *Emergency Decrees* as the executive's direct faculty to legislate on economic and financial matter facing extraordinary situations.¹²

However, given the presidential tradition characterized by greater dynamism and technical resources of the executive, the discretionary exercise of the presidential faculties to legislate has led to a rethink of the theory of separation of powers, the form of government and the legislative functions of the Congress in Peru. This latter is not because the executive exercises legislative powers according to the constitutional framework or not, but rather, because Congress cannot find a way to prevent the executive to abuse its power, or even more, the Congress does not have the willingness to prevent it.

The legislation generated by the executive and the Congress from 1980 to 2010 shows clearly that the executive in comparison with ordinary laws has intensively used the emergency decrees. On the other hand, the enactment of legislative decrees has been gradually reduced in relation to ordinary laws; however, under García's government, it has risen significantly. (See table 2.2 and figure 2.1)

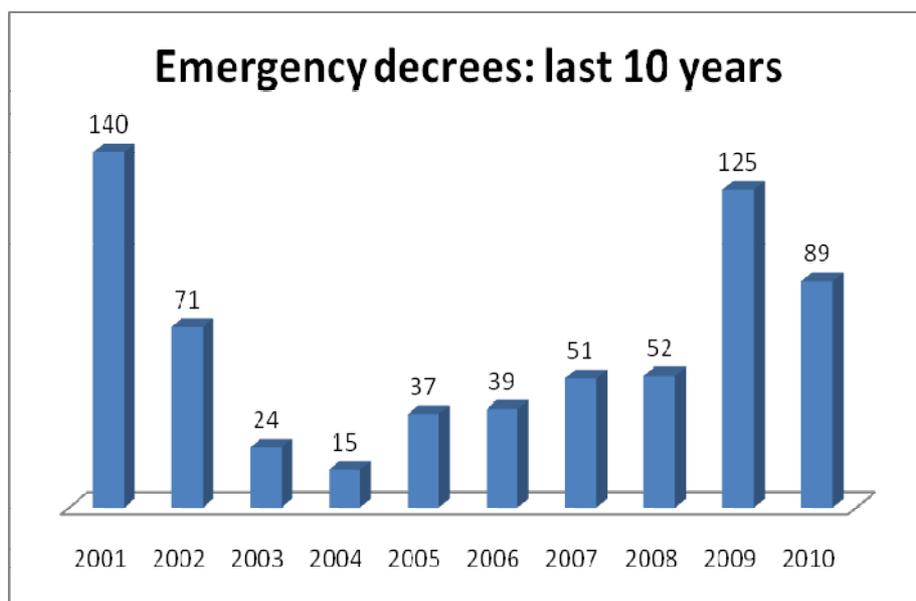
Table 2.2 *Production of Ordinary laws, Emergency and Legislative decrees by Governments*

Type of law	Belaúnde 1980- 1985	García 1985- 1990	Fujimori 1990- 2000	Paniagua 2000- 2001	Toledo 2001- 2006	García 2006- 2010	Total	100%
Ordinary Laws	990	848	1373	139	602	595	4547	46,83%
Emergency Decrees	667	1033	1655	120	287	348	4110	42,33%
Legislative Decrees	348	263	303	12	19	106	1051	10,82%

Source: www.congreso.gob.pe

authorizes the executive to legislate, pointing out the specific matter and the period within the executive can exercise this power. The control of the Congress consists in determining whether the executive has complied with the parameters established in the authoritative law or not. If the executive has gone beyond these limits, the rules produced are unconstitutional. The control by the Congress is posterior, and it demands an active role of the Congress.

¹² The emergency decree is an original attribution of the executive government established by the constitution to legislate in economic and financial matters. This is an extraordinary measure which use is only justified when the national interest and extraordinary situations require it. This determines its temporality as an interim measure in order to face an emergency or an unexpected situation caused by exogenous reasons. It means that the unexpected situations do not depend on the normal exercise of the government. The article 91 of the Regulations of Congress establish the mechanism of parliamentary control. Indeed, within 24 hours from the publication of the Emergency Decree, the President must submit to the Congress the Emergency Decree issued, in order to enable the Constitutional Commission to determine whether it concerns economic or financial matters or not, and if the enabling assumption of "extraordinary and unforeseen situations where imminent risk of spread is damaging the national economy or public finances" is given. Only in the case of a breach of the requirements, this Commission will decide and recommend its repeal by Congress, which must be approved by law.

Figure 2.1 *Emergency Decrees 2001 - 2010*

Source: Informe Legislativo 2001-2010, Gaceta Jurídica.

It is important to note that, even use of emergency decrees is justified in extraordinary situations.¹³ The production of this type of norms in the last ten years (between 2001 and 2010) constitutes more than 20% of the total.¹⁴ (See figure 2.2)

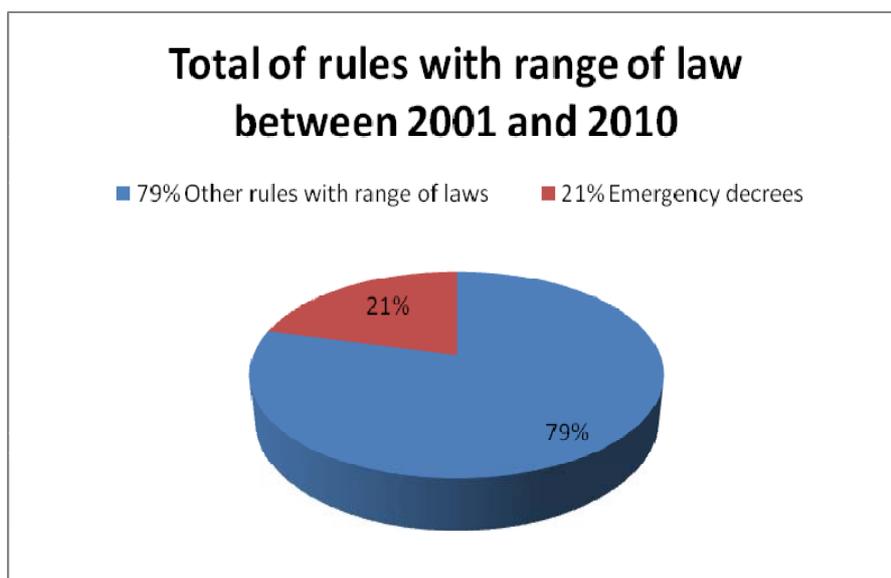
¹³ The Constitutional Tribunal has established the criteria to determine what "extraordinary situations" means within the emergency decree context: Exp. No.008-2003-AI/TC p. 56 and 60, No.007-2009-PI/TC p. 9 -10, No. 025-2008-PI/TC p.6. According to these precedents, the emergency decree must meet the following criteria:

- Exceptionality: The standard should be aimed at reversing extraordinary and unforeseeable situations, conditions that must be evaluated in response to the specific case, which existence does not depend on the "will" of the norm itself, but previous facts to its enactment and objectively identifiable.
- Necessity: The circumstances must be such that the time it takes the application of parliamentary procedure to issue laws (initiative, debate, approval, and sanction) might impede the prevention of damage or, if, that they become irreparable.
- Transitoriness: Extraordinary measures used must not maintain effective for longer than strictly necessary to reverse the adverse situation.
- Overview: The benefits that derive from the implementation of the measure cannot confine their effects on specific interests, but rather, must reach the whole community.
- Connectedness: There must be a recognizable link between the measure applied immediate and extraordinary circumstances exist.

The extraordinary measures and the benefits that its application produced must arise from the content of the Emergency Decree and not deferred stock over time or regulatory delegations, as this would be inconsistent with an alleged exceptionally delicate situation.

¹⁴ This percentage considers not only ordinary laws, legislative decrees and emergency decrees, but it considers all the rules with range of laws within the Peruvian system, which includes, for example, "resoluciones legislativas" and "decreto ley".

Figure 2.2 *Total of rules with range of law 2001-2010*



Source: Informe Legislativo 2001-2010, Gaceta Jurídica.

This practice has been imposed over the legality established in the constitution. What constitutes “an emergency” is the main problem regarding the use of Emergency Decrees.¹⁵ The lack of clear criteria leads to a subjective assessment by the executive branch of what emergency means, which in turn, is subjectively assessed by the Legislature. In both cases, the problems that occur are obvious: not having clear guidelines about the “emergency” of a particular topic, in theory, the legislature could see all the emergency decrees issued by the Executive as an issue considered as not urgent.

On the other hand, “decentralization”, as a form of democratic organization adopted by the Constitution of 1993, involves the process of transfer of political and developmental decision-making from the central government to the regional and local government. Decentralization is a priority in the constitution,¹⁶ and it is a mandatory and permanent policy of the state, which has as its main objective the development of the country. However, the decentralization process is done gradually and is organized according to criteria that enable appropriate allocation of responsibilities and transfer of resources from the national government to regional and local governments.¹⁷

¹⁵ This uncertainty together with the possibility of the executive to resort directly to Emergency Decrees without an effective posterior control by Congress opens a big door to corruption. As it has happened with Alberto Fujimori, ex-President of Peru, who was sentenced to seven years for having committed acts of corruption by using emergency decrees. In 1996, the revenues and expenditures of the privatization were deposited in the BCR: US\$ 2.214 and US\$ 1.366 million. From the expenditures, US \$484 million were for purchases of weapons authorized by Emergency Decrees: US \$402 million for the Air Force, and US \$38 million and US \$44 million for the Army and Navy, respectively. The conviction was confirmed by the Supreme Court on January 2, 2010. See: Campodónico, Humberto. Recordando los Decretos de Urgencia. Diario La República, 06.04.2007 Available at: <http://www.larepublica.pe/node/52781/comentario> [Visited: 07.03.2011]

¹⁶ Peruvian Constitution, Eighth transitional provision.

¹⁷ Peruvian Constitution, Article 188

The territory of the Republic is composed of regions, departments, provinces and districts. They are organized at the national, regional, and local level by the Constitution, which preserves the unity and integrity of State and Nation. The scope of the regional level of government is the regions and departments. The local government level covers the provinces, districts and towns.¹⁸

The Constitution has established that local and regional governments have political, economic, and administrative autonomy in matters within their competences, which includes the promotion of economic development. However, these competences have to be performed in “harmony” with the other levels of governance, including national plans.¹⁹ It implies, for example, that developmental regional plans cannot be considered in isolation from national and local plans of development. According to these norms, development should be harmonized at the three levels of governance, but the state has not developed a system that enables effective coordination.

The economic and financial management of the State is governed by the budget approved annually by Congress. The structure of the public sector budget contains two sections: the central government and decentralized agencies. According to the constitution, the budget has to allocate public resources equitably. Their programming and implementation have to meet the criteria of efficiency and decentralization. For that reason, the constitution has provided that the government and the budget should be decentralized through Ordinary laws.²⁰

Accordingly, each jurisdiction has to receive an adequate share of total income obtained by the State in the exploitation of natural resources in this area. This share was defined as a *Canon*.²¹ Existing fee rates considered as Canon are: Mining Canon, Hydropower Canon, Gas Canon, Fishing Canon, Forestry Canon and Oil Canon and Sobre-canon.²² The Canon is the 50% of the following incomes:

- a) Income tax paid by companies exploiting mineral resources, gas, fisheries, and electric power generation.
- b) Royalties paid by companies producing gas.
- c) Fishing rights charged by the Ministry of Production.
- d) The rights of forest resource use charged by Municipalities and the Forestry Departments of the Ministry of Agriculture and Regional Governments.

The Oil Canon is calculated at 10% of oil production value. The Oil over-canon is based on 2.5% according to the same value; royalties paid by companies exploiting the resource finance them. It is important to note that in relation to these two last cases, there is a political debate over the basis on which the Canon is calculated,

¹⁸ Constitution, Article 189

¹⁹ Constitution, Article 191, 192 and 194; the Organic Law of Municipalities No. 27972, Article 86, and; the Organic Law of Regional Governments No. 27867, Article 45.

²⁰ Constitution, Article 188

²¹ Constitution, Article 77, 193 and 196

²² The first five are regulated by the following laws: Law N ° 27506 (Canon Act and its amendments), the Thirteenth Final Provision of Law N ° 29289, Law on Public Sector Budget for Fiscal Year 2009, which was extended by Sixty Fifth final provision of Law No. 29465, the Budget Act for Fiscal Year 2010; while the Oil Canon and Sobre-canon are regulated by special legislation for each department. It has to be considered that the current government of Ollanta Humala has introduced changes in mining royalties that have not been considered in this paper.

because to calculate the Canon based on the commercial value of oil at the international market can be more beneficial than based on the value of production.²³ The Canon is distributed between districts, provinces, departments and regions where natural resources are exploited. (See table 2.3)

Table 2.3 *Canon distribution*

100 %	Beneficiaries are locals where resources are exploited	Criteria
10 %	District Municipality	If there are more than one municipality in equal parts
25 %	Provincial Municipality	According to the population unmet basic needs
40 %	Departmental Municipality	According to the population unmet basic needs
25 %	Regional Government	80% Regional Government 20% Universities

Source: MEF

The mining royalty is the monetary compensation that is paid by holders of mining concessions for the exploitation of metallic and non-metallic minerals.²⁴ The mining royalty is determined monthly and using the following ranges of the concentrate value of sales, calculated according to the international market prices:

- First range: up to US\$ 60 million dollars a year, 1%
- Second range: between US\$ 60 million to US\$ 120 million dollars a year, 2.0%
- Third range: above US\$ 120 million dollars a year paying 3%

In the case of minerals whose prices have not traded internationally 1% of the mining component is charged. In the case of small farmers and artisans mining royalties is 0%. The Royalties are distributed between districts, provinces, departments and regions where naturals are exploited. (See table 2.4)

²³ For example, Venezuela uses the market value to calculate royalties for oil extraction. Article 47, Organic Law for Hydrocarbons

²⁴ The mining royalty is non-tax according to the Constitutional Court.

Table 2.4 *Mining royalties' distribution*

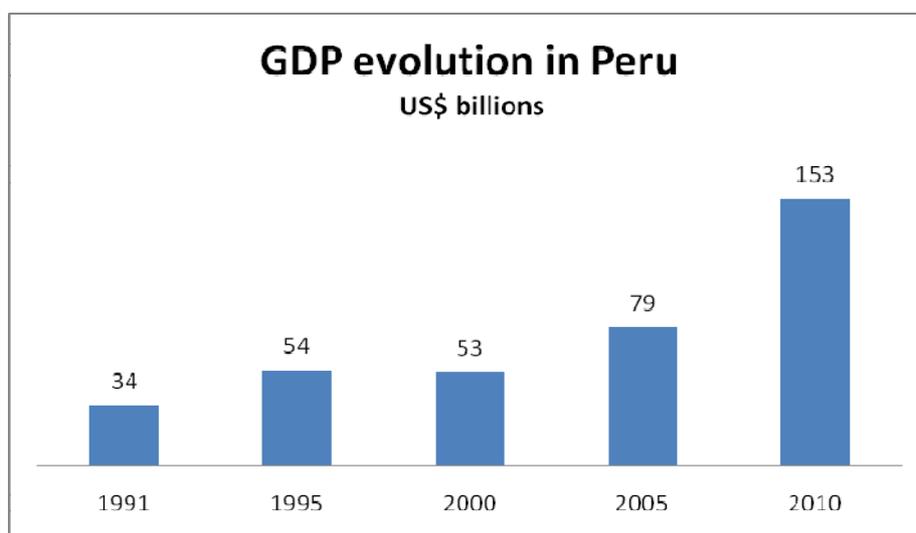
100 %	Beneficiaries are locals where resources are exploited	Criteria
20 %	District Municipality	If there are more than one municipality in equal parts
20 %	Provincial Municipality	According the population and unmet basic needs
40 %	Departmental Municipality	According the population and unmet basic needs
15 %	Regional Government	
5 %	Universities	

Source: MEF

3 Natural resource extraction and poverty reduction

The GDP in Peru has doubled over the last five-year period and tripled over the past decade from 34 to 153 billion dollars (See figure 3.1), and this economic growth has been the driving force in reducing poverty rates from 48.7 percent in 2005 to nearly 30 percent in 2010.²⁵

Figure 3.1 *GDP evolution in Peru*



Source: Pre-election report, Administration 2006-2011

According to the Global Competitiveness Report - GCR 2010-2011²⁶, Peru has improved its competitiveness by thirteen places since 2007. Mirroring its impressive growth performance in recent years (an average of 6.7 percent GDP growth between 2002 and 2009), the Peruvian economy did not stop following 2009 international economic crisis, but continued to grow moderately at 0.9 percent. The economy

²⁵ The Administration Report 2006-2011, Council of Ministers (PCM), in collaboration with the Ministry of Economy and Finances (MEF)
Available at: <http://empresarioshaciendopais.pe/documentos-de-interes/informe-pre-electoral-administracion-2006-2011/> [Visited: 07.03.2011]

²⁶ World Economic Forum, Global Competitiveness Report - GCR 2010-2011. Available at: <http://www.weforum.org/issues/global-competitiveness> [Visited: 02.03.2011]

grew strongly again in 2010 and beyond, with an estimated 6.3 percent rate for this year.²⁷

According to the UNEP, between 1980 and 2010 the Human Development Indicator - HDI in Peru rose by 0.9% annually from 0.560 to 0.723 today, which gives the country a rank of 63 out of 169 countries with comparable data. The HDI of Latin America and the Caribbean as a region increased between 1980 and 2010 from 0.578 to 0.706 today, placing Peru above the regional average.²⁸

However, the benefits of the economic growth in Peru have not been sufficient to meet the developmental demands of the population. Significant percentage of the population is still living below the poverty line and in extreme poverty. Even more, the poverty index hides a deepened reality of poverty that cannot be showed easily by figures. For example, a person living in extreme poverty last year with less than US \$2.00 per day, this year, receives some economic assistance from the government, and he is living now with US \$2.10 per day. In consequence, he is not considered to live in extreme poverty any more.

Based on 2007 figures, the World Bank has estimated that the population living on less than \$2.00 a day in Peru constitutes 17.8% of the total population and the population living on less than \$1.25 makes up 7.7%.²⁹ According to the National Institute of Statistics and Information (INEI) using a national poverty line, poverty rates fell 1.4 percentage points in 2009, going from 36.2 percent in 2008 to 34.8 percent over that period, in spite of the financial crisis.³⁰ According to INEI, poverty from 2004 to 2009 has been reduced by more than 13% (See figure 3.2 and 3.3)

In a recent report about Peruvian economy,³¹ the World Bank notes, in reference to the above figures, that despite progress in reducing poverty, there is considerable heterogeneity across the territory. The largest decline in poverty rates in recent years has occurred among residents of urban slums. The improvement in urban areas is associated with the possibility of access to a more dynamic labor market and better income and employment opportunities in labor-intensive sectors as trade, construction and manufacturing. By contrast, increases in welfare in rural areas have been more limited.³² (See table 3.1 and 3.2)

²⁷ GCR 2010-2011, p. 36

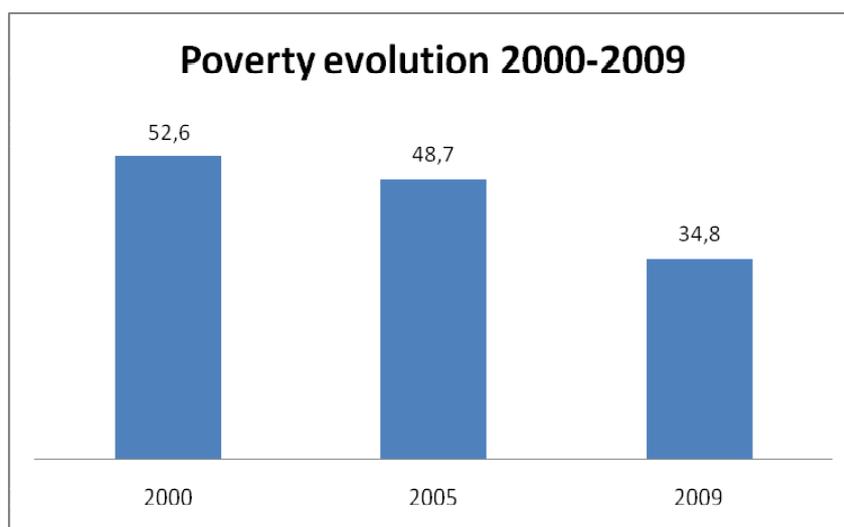
²⁸ International Human Development Indicators Available at: <http://hdrstats.undp.org/en/countries/profiles/PER.html> [Visited: 07.03.2011]

²⁹ World Bank Indicators Available at: <http://data.worldbank.org/indicator> [Visited: 07.03.2011]

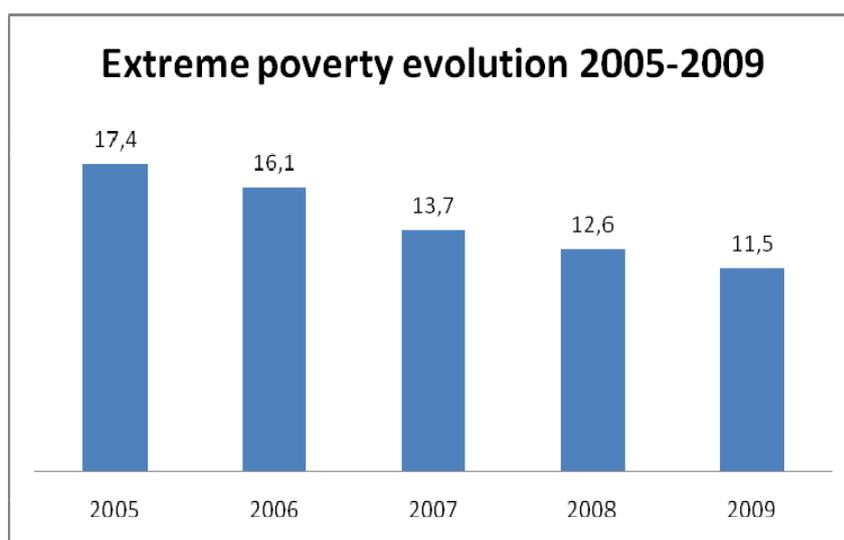
³⁰ National Institute of Statistics and Informatics (INEI), Poverty Indicators 2009 Available at: <http://www.inei.gob.pe/> [Visited: 07.03.2011]

³¹ Jaramillo, Felipe. Peru, en el umbral de una nueva era. Banco Interamericano de Reconstrucción y Fomento/Banco Mundial. 2011. Available in Spanish at: http://siteresources.worldbank.org/INTPERU/SPANISH/Resources/Peru_en_el_Umbral_de_una_nueva_era_version_final.pdf

³² Ibid. p.32

Figure 3.2 *Poverty evolution 2000-2009*

Source: Pre-election report, Administration 2006-2011

Figure 3.3 *Extreme poverty evolution 2005-2009*

Source: INEI

Table 3.1 *Total poverty evolution and by regions 2004 - 2009*

Total poverty							
	2004	2005	2006	2007	2008	2009	Differ.
National	48,6	48,7	44,5	39,3	36,2	34,8	-13,8
Urban coast	37,1	32,3	29,9	25,1	23,4	21,4	-15,7
Rural coast	51,2	50	49	38,1	34,8	40,6	-10,6
Urban Highland	44,8	44,4	40,2	36,3	33,5	31,3	-13,5
Rural Highland	75,8	77,3	76,5	73,2	68,8	65,6	-10,2
Urban Amazon	50,4	53,9	49,9	40,3	31,3	32,5	-17,9
Rural Amazon	63,8	65,6	62,3	55,3	49,1	57,4	-6,4
Lima	30,9	32,6	24,2	18,5	17,7	14,1	-16,8

Source: World Bank with data from INEI

Table 3.2 *Total of extreme poverty evolution and by regions 2004 - 2009*

Extreme poverty							
	2004	2005	2006	2007	2008	2009	Differ.
National	17,1	17,4	16,1	13,7	12,6	11,5	-5,6
Urban coast	5,6	4	3	2,1	2,4	2,3	-3,3
Rural coast	13,8	13,4	14,4	10,5	7,9	9,2	-4,6
Urban Highland	13,6	11,6	10,3	8,5	9,2	6,8	-6,8
Rural Highland	44	46,6	46,5	40,8	37,4	33,2	-10,8
Urban Amazon	18,7	22,5	18,1	11	7,2	8,8	-9,9
Rural Amazon	30,4	28,8	24,6	23,4	20,7	23,8	-6,6
Lima	1,3	2	0,9	0,5	0,7	0,2	-1,1

Source: World Bank with data from INEI

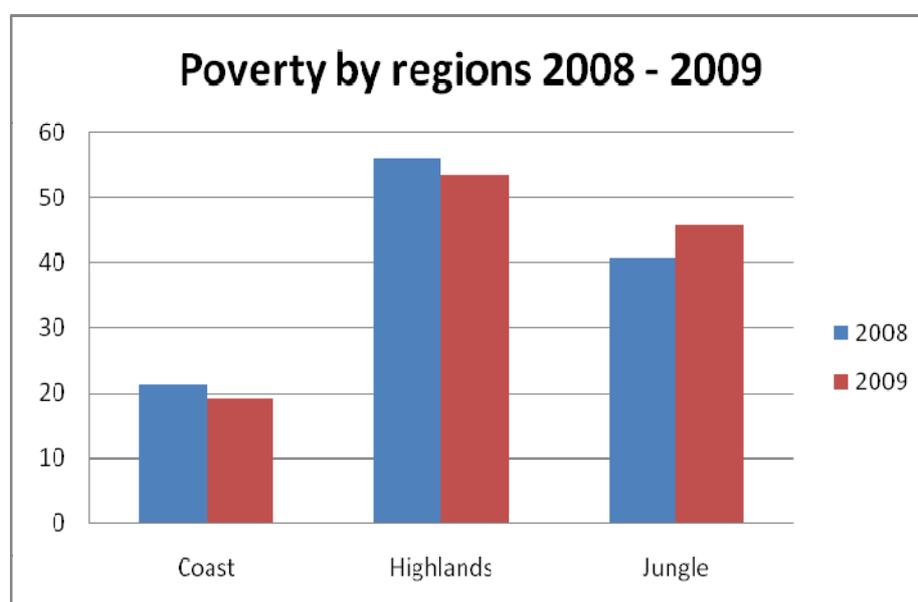
In relation to inequality, the report notes that inequality has been reduced only slightly at the national level. The income inequality in Peru³³ has fallen in the last five years, particularly during the high-growth biennium 2007-08. However, this reduction in inequality has been moderate. The report makes a comparison between Latin American countries on the Index of doing business, Human development

³³ Measured by Gini coefficient or Theil

index and the Index of human opportunities. In the first two, Peru is located in the second and sixth places respectively. However, Peru is in the bottom third of countries within the region with regard to ensuring equal opportunities for all, which contrasts with its leadership in the other indices.³⁴

During the international economic crisis in 2009, Peru could sustain the economic growth, but the benefit of the economic growth was spread unevenly. According to the INEI, in 2009, the Sierra had the highest poverty reduction, varying from 56.2% in 2008 to 53.4% in 2009, which represented a decrease of 2.8 %. Poverty also dropped in the Costa from 21.3% to 19.1%. However, poverty has increased in the Amazonia from 40.9% to 46.0% with compared to 2008.³⁵ (See figure 3.4)

Figure 3.4 *Poverty evolution by regions 2008-2009*

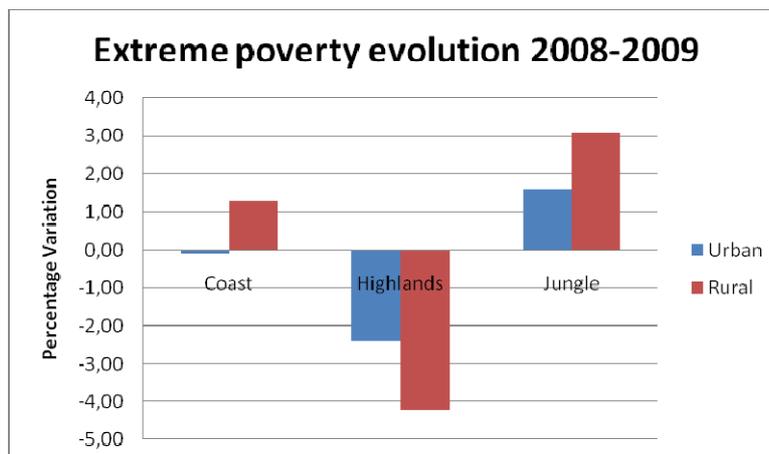


Source: INEI

In relation to extreme poverty, the steepest decline was reported in the Sierra to decrease by 3.5 %; this behavior is also observed in both the Urban Area (-2.4 %) and Rural (-4.2 %). On the coast, the extreme poverty in urban areas, contracted slightly (-0.1 %), whereas in the Rural Areas increased by 1.3 %. In the Amazonia, extreme poverty rose by 2.4 % increase that occurred in both the Urban Area (1.6 %) and Rural (3.1 %).

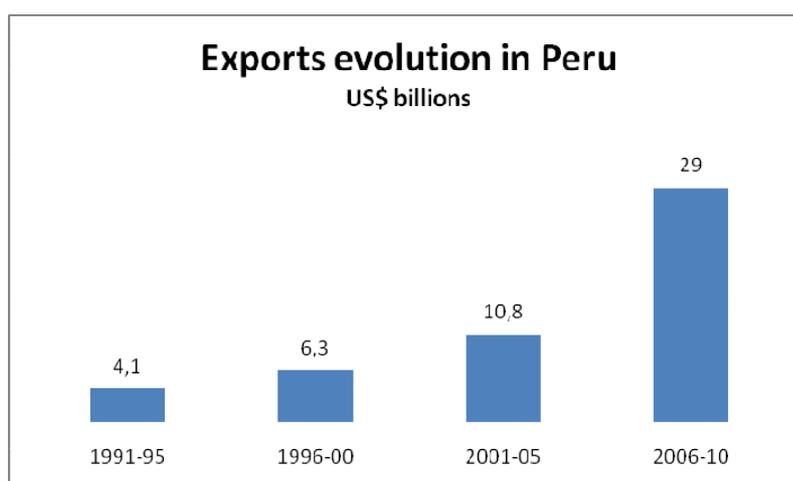
³⁴ Ibid. p.34

³⁵ INEI, Evolution of the Poverty in 2009. Available at: <http://www.inei.gob.pe/> [Visited: 07.03.2011]

Figure 3.5 *Extreme poverty evolution 2008-2009*

Source: INEI

In consequence, the poverty and extreme poverty in the urban coast and highlands were reduced, but why have both increased in the rural coast and the Amazonia? In other words, why does economic growth not equally benefit the different regions in Peru? In addition, why do the economic crises affects one area more than another does? The successful economic growth in Peru is explained by the remarkable evolution of exports in recent years. Exports have reached a record level in 2010 of U.S. \$ 35 billion (See figure 3.6). While the trend in recent years shows a steady growth of the Peruvian economy, the effects of the crisis have affected those most vulnerable regions. However, the growth of exports is mainly explained by the increase of the mining sector, which operates in the highlands. Mining has benefited the population in the highlands because more resources were allocated by way of fees or royalties for exploitation of natural resources to regional governments and to attend social programs. (See table 3.3)

Figure 3.6 *Export evolution in Peru 1991-2010*

Source: Pre-election report, Administration 2006-2011

Table 3.3 *Evolution of exports by sector in US \$ Millions.*

	2000	2005	2010
Traditional			
Mining	3220	9790	21148
Hydrocarbons	381	1526	3130
Fishing	955	1303	2167
Agriculture	249	331	921
No Traditional			
Agro-exports	394	1008	2009
Textiles	701	1275	1510
Chemicals	212	538	1177
Metallurgical	265	493	866
Fishing	177	323	580
Wood	123	261	343

Source: Pre-election report, Administration 2006-2011

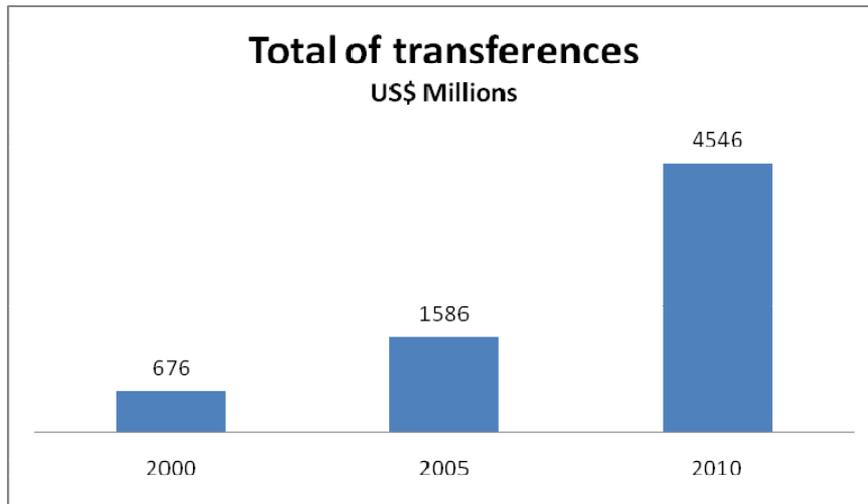
The other three economic sectors whose growth has been significant in Peru in the last years are hydrocarbons, fishing and agro-exports. While the fishery and agro-exports activities have been developed on the coast and have benefited the population of that region, the growth within the hydrocarbons' sector is explained by the increment of investments in the "Gas de Camisea" project in Cuzco, the offshore activities along the coast and oil extraction in other regions like the Amazonia.

The growth in these sectors from 2005 to 2010 has resulted in a trebling of the total of transfers to regional and local governments. (See figure 3.7) In 2010, the Canon, Over-canon, Royalties, Revenue Customs,³⁶ and Shares³⁷ reached S / . 9 416 million, four times compared to 2005, and showed greater increases in the departments of Cusco (four times), Ancash (13 times), Lima (11 times), La Libertad (19 times) and A

³⁶ Revenue Customs refers to those profits that the state receives for the applicable taxes for the movement of persons, goods and means of transport crossing the customs border.

³⁷ A share refers to those profits that the state receives from its participation in the capital of private companies. For example, Telefonica, which has Spanish capital in control of the company but the state has participation in it.

Figure 3.7 *Evolution of transfers to regional and local governments 2000-2010*



Source: Pre-election report, Administration 2006-2011

Table 3.4 *Transfers to sub-national governments for canon, royalties, customs revenues and Shares in S/. Millions 2005-2010.*

Departments	2005	2010	Differences
AMAZONAS	0	72	72
ANCASH	70	885	815
APURIMAC	7	115	108
AREQUIPA	75	481	406
AYACUCHO	22	280	258
CAJAMARCA	290	591	301
CALLAO	187	357	170
CUSCO	323	1444	1121
HUANCAVELICA	63	342	279
HUANUCO	2	126	124
ICA	33	304	271
JUNIN	24	235	211
LA LIBERTAD	33	623	590
LAMBAYEQUE	0	73	73
LIMA	77	805	728
LORETO	240	211	-29
MADRE DE DIOS	0	73	73
MOQUEGUA	219	389	170
PASCO	36	242	206
PIURA	207	526	319
PUNO	124	418	294
SAN MARTIN	1	127	126
TACNA	221	312	91
TUMBES	49	165	116
UCAYALI	92	219	127
Total	2393	9416	7023

Source: Pre-election report, Administration 2006-2011

The economic growth has contributed to poverty reduction, mainly in two ways: First, by an increase in employment, which has happened mainly in the coast, and; Second, through higher tax revenues because of the greater economic activity, allowing an increase in the budget for social programs, infrastructure investment and in general, support to the most vulnerable, which has mainly happened in the Highlands. In 2010, social spending increased by 63% over 2005, with growth in education by 62%, health and sanitation by 132%, while social protection and welfare grew by 21%. Resources for social programs rose by just over 80% in relation to 2007.

In our opinion, it is clear to note that the rural zones in Peru and particularly the Amazonia received less attention from the state. The reason could be linked to the socio-economic structure of the country and the possibility to increase private

investments in that area. It is also related to the distribution of the benefits of growth and the willingness (or capacity) of the state to involve local population in this process. This reality demands long-term policies and systematic changes to bring development to the whole Peruvian population, but with particular emphasis on the incorporation of those living in the Amazonia among the beneficiaries of the growth. However, it also demands immediate steps to address the basic needs of the poorest population within the country. In that sense, emergency measures or long planned measures could serve to different purposes, and both measures play an important role facing poverty.

In any case, the economic growth should continue to attend to the population in poverty and extreme poverty. However, what are the factors that prevent the Peru from continuing this growth? According to a study of the Economic Peruvian Institute – IPE with reference to 2008, the infrastructure gap³⁸ in Peru amounts to US\$37,760 billion dollars that represent the 30% of the GDP.³⁹ It is one of the most difficult limits to overcome in order to continue with economic growth. This study concludes that it is necessary to design policies and mechanisms to encourage public and private investment in this area. It also concludes that given the limited public resources in relation to the identified investment needs, it is necessary to create the conditions for greater private-sector involvement in providing basic infrastructure through mechanisms such as public-private partnerships (PPP).⁴⁰

The GCR 2010-2011 ranks Peru at the 73rd position in the world ranking of 139 economies.⁴¹ Infrastructure gaps is analyzed and ranked by the report among one of the fourth basic requirements for competitiveness: Infrastructure in Peru is ranked at the position 88 in the world ranking, in comparison with Institutional development (96), health and primary education (92) and macroeconomic environment (75).⁴² (See figure 3.8)

³⁸ The difference between existent infrastructure and the current and identified need for basic infrastructure

³⁹Pastor, Cinthya and Patricia Perez, *El Reto de la infraestructura al 2018*, Instituto Peruano Economico – IPE, Lima, Agosto (2009). This is the updating of previous studies which have pointed that in 2003, the gap amounted to over U.S. \$ 18.000 million, while two years later, in 2005, the amount of the gap in infrastructure investment was U.S. \$22.879 million. Available at:

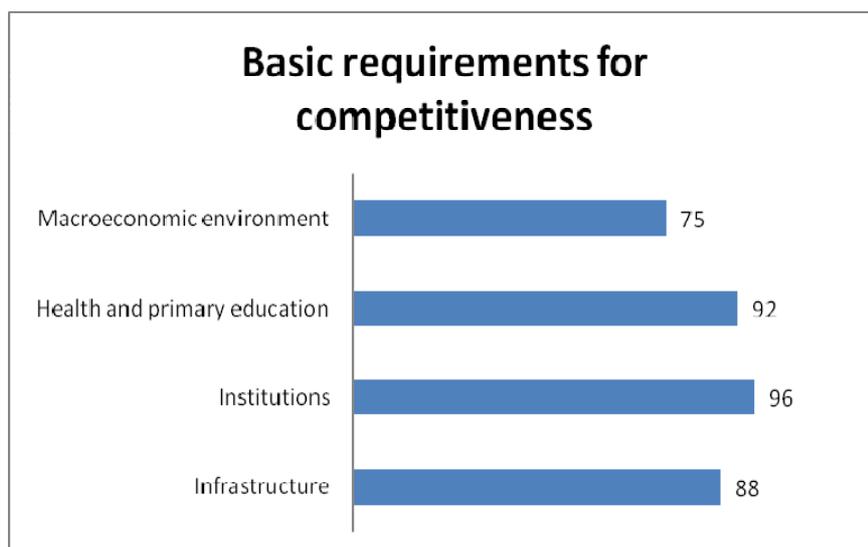
http://www.afin.org.pe/index.php?option=com_docman&task=cat_view&gid=32&dir=DESC&order=date&Itemid=110&limit=5&limitstart=0 [Visited: 02.03.2011]

⁴⁰ Ibid., p 163.

⁴¹GCR 2010-2011. As a reference, the World Bank has calculated the World Ranking of GDP in 2009 by Country, and Peru was located at the 51position. See: *Global Domestic Product Ranking 2009*. Available at: <http://search.worldbank.org/data?qterm=GDP%20&language=EN&format=html>. In 2010, Peru was located at the position 43 by the Central Intelligence Agency CIA USA. See: *The CIA World Factbook*. Available at: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html>

⁴² GCR 2010-2011. p.272

Figure 3.8 *World ranking of Peru: Basic requirements for competitiveness*



Source: GCR 2010-2011

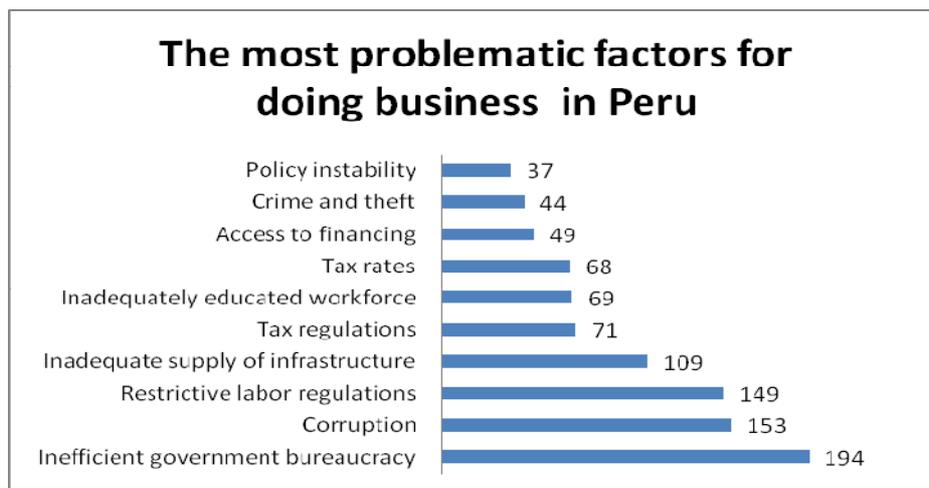
In consequence, the infrastructure gap is one of the key factors that limited the economic development in Peru. However, the lack of institutional development and the lack of basic provision of health and primary education are the two most negative factors that limit the Peruvian economic development.⁴³ By disaggregating the results of those three worst indices of competitiveness in Peru, it is possible to observe that both the quality of primary education and the quality of port infrastructure are the most critical aspects in the Peruvian economy.⁴⁴

The infrastructural gap and the institutional challenges in Peru could be analyzed separately. The limited public resources and the necessity to create the conditions for greater involvement of the private sector in the task of providing basic infrastructure closely link them. In fact, the lack of institutional development is a strong barrier for investment. Both, the complexity of bureaucratic procedures and the lack of coordination between institutions discourage private investments. The GCR 2010-2011 has pointed out the inefficient government bureaucracy and corruption as the most problematic factors for doing business in Peru. (See figure 3.9)⁴⁵

⁴³ GCR 2010-2011. p.36 On the other hand, Peru faces a number of competitiveness challenges that must be addressed going forward, including improving the poor institutional environment (96th), upgrading the quality of and access to the educational system at all levels (111th for primary education and 76th for higher education and training), and reinforcing the capacity to absorb technology and generate innovation (ranked 74th and 110th for technological readiness and innovation, respectively).

⁴⁴ GCR 2010-2011. p.273

⁴⁵ From a list of 15 factors, respondents were asked to select the five most problematic for doing business in their country and to rank them between 1 (most problematic) and 5. The bars in the figure show the responses weighted according to their rankings. See: GCR 2010-2011, p.272

Figure 3.9 *World ranking of Peru: The most problematic factors for doing business in Peru*

Source: GCR 2010-2011

In this context, it seems logical that Peruvian state's policies should concentrate efforts to improve bureaucratic procedures and governmental institution's efficiency. For example, private investments in infrastructure could be favored by reducing the duration and number of procedures. However, the implementation of developmental measures and policies in the Amazonia has found a strong resistance by the population, mainly indigenous communities, who have claimed their right to prior consultation. The ILO Convention 169 has granted this right and is part of the rights granted by the constitution.⁴⁶ Although, it is not clear that this right entitles indigenous communities with a veto right with enough force to stop investments and concessions granted for the benefit of the majority of the population. In practice, the indigenous communities have managed to organize themselves, and their protests have stopped investment processes. Some of those investment processes are already affecting their rights and the environment, or are likely to affect them.

The Amazon is still a fringe area of Peru, far away, inaccessible and lacking of infrastructure. The state seems to be absent, although it is not when it is promoting extractive projects and is providing security forces to ensure them. While there are few oil blocks in operation, the companies have gained an extraordinary influence on the population to fill the void left by the state in areas like health and transport. However, this has not prevented the organization of those suffering from pollution.

In recent years, the indigenous tribes Achuar and Kichwa waged heavy fighting to remedy environmental and social impacts resulting from oil spills and water bearing formation. These experiences were the prelude to the massive mobilization in June 2009, which brought together more than a thousand communities of different peoples (some of them members of the Association of Development of the Peruvian Rainforest - AIDSESEP) to stop President García's attempts to privatize the territories that corresponded to the indigenous communities. Although the uprising

⁴⁶ Constitution of Peru, Fourth Transitory Provision: The rules relating to rights and freedoms which are recognized by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and with international treaties and agreements thereon ratified by Peru.

was suppressed in what is known as *El Baguazo*, García's government could not move forward with their developmental policies, and the problem persists because 75% of this region is under the concession to oil and gas activity, and it is not clear how the current President Ollanta Humala could solve this actual and potential conflict.

4 Natural resource extraction and decision-making power in Peru

4.1 General rules

According to the Peruvian Constitution, all natural resources belong to the nation, and the government enjoys the sovereign right to their development. Therefore, the government is entitled to define the terms for their use and concession to private actors by organic laws.⁴⁷ The Constitution has also established that concessions grant real rights to the holders subject to such laws.⁴⁸ However, it does not mean that the public property, which is inalienable and imprescriptibly, is transferred by the granting of concessions.⁴⁹ Property for public use may be conceded to private actors in accordance with the law for the purpose of economic development.⁵⁰

The constitution sets that private enterprise is free and is practiced within a social market economy. Under this system, the government should guide the country's development and is mainly active in the areas of the promotion of employment, health, education, security, public services, and infrastructure.⁵¹

On the other hand, the constitution recognizes the economic pluralism, and the government should base the national economy on the coexistence of several forms of ownership and enterprise.⁵² The Peruvian Constitution sets that the government determines the nation's environmental policy. It promotes the sustainable use of its natural resources. The government also has the obligation to promote the conservation of biological diversity and protected natural areas, and promote the sustainable development of the Amazon Region through proper legislation.⁵³

⁴⁷ The Constitution states that structure and functioning of state institutions are regulated by Organic Laws. Organic laws in draft form are handled like any other law. The vote of over half of the legal number of members of Congress is required for their approval or modification. (Article 106, Peruvian Constitution)

⁴⁸ Peruvian Constitution, Article 66. The Article 885 of the Civil Code also defines the rights entitled by concessions as a real rights

⁴⁹ The State has dominion over the natural resources on behalf of the nation, but not the owner thereof. The state may grant individuals the right to exploit them through the mechanism of the concession, but this does not imply a transfer of assets. It has been developed in Law as the Public Trust Doctrine concept, which has its roots in the Social Contract between the society and the state, and acts as a boundary that limits the state action in relation to public assets.

⁵⁰ Peruvian Constitution, Article 73

⁵¹ Peruvian Constitution, Article 58

⁵² Peruvian Constitution, Article 60

⁵³ Peruvian Constitution, Articles 67, 68 and 69.

The implementation of this constitutional framework through laws is complex. Economic, social, and environmental rules are interconnected. However, the process of promoting private investment in public infrastructure and public services are channeled through public tenders and project's competitions, convened by the central government for granting concessions for a maximum period of 60 years. The legal framework for concession of public infrastructure and services⁵⁴ states that the granting of concessions can be given through the following ways:

- a) Onerous title, by requiring the contracting party a determined amount of money or a share in relation to their benefits.
- b) Gratuitously.
- c) Partial financing by the State, through the State's contribution during the construction phase or operational phase.
- d) Mixed concession, combining more than one of the foregoing forms.

The contracting party is authorized by the respective concession contract to perform the collection of fees, rates, tolls or other recovery systems investments.⁵⁵ The State may enter into legal stability agreements with the holders of a concession and its investors. In these cases, investment requirements and deadlines established in the contract are applicable to a specified period.

Pro-Inversion is the agency, part of the central government, responsible for directing an integrated system to promote private investment. This agency has the functions of strategic promotion and provision of services to investors in order to achieve private investment in public projects and assets, and additionally has powers of direction and coordination across sectors. However, it is important to note that regional and local government can also grant concessions.⁵⁶

This legal framework is directed to promote private investment in public infrastructure and public services. However, there are particular issues in each productive sector that has to be analyzed separately.

⁵⁴ Supreme Decree N ° 059-96-PCM and regulated by Supreme Decree N ° 060-96-PCM However, there are many other laws directed to promote private investments. Legislative Decree 674 (law promoting private investment in state enterprises), Legislative Decree 757 (Framework for private investment growth), and other laws related to decentralization of investments.

⁵⁵ The concession contract is an agreement between the State and the concessionaire, whereby the first granted to the second the execution of certain public works and infrastructure or public services by a deadline, receiving in return the dealer exploitation. The concession contract on public property does not confer a property right in them, it constitutes sufficient basis for the concessionaire to assert their rights granted in the contract before third parties, especially to collect the fees, charges, tolls or other systems recovery of investments. In these cases, the concessionaire operates the property subject to the grant, being the only responsible before the State.

⁵⁶ The article 34 of the Organic Law of Regional Governments No.27867 sets: "Regional governments give concessions and any other type of contract (...)". In its turn, the article 33 of the Organic Law of Municipalities No. 27972 sets: "Local governments can grant concessions to domestic corporations or foreign for the implementation and operation of infrastructure or public services, according to law (...)"

4.2 Agricultural lands

Peru has an area of 128 522 000 ha. The FAO has calculated 21 560 000 ha. of agricultural land⁵⁷ in Peru. In comparison, Norway has 1 033 000 ha. of agricultural land. This calculation does not consider land abandoned because of shifting cultivation, which is very common in the jungle, and there is not a comprehensive statistic on this. However, the Agriculture Ministry has calculated that Peru is only used a small part of this capacity for the national total planting of major crops⁵⁸, and the Amazonia contributes only with little more than 10% on average.⁵⁹ (See table 4.1)

Table 4.1 *National total planting of major crops (ha) 2005-2011*

Annual period	2005-6	2006-7	2007-8	2008-9	2009-10	2010-11
Total National	1 574 581	1 613 428	1 647 597	1 675 501	1 658 428	1574352,00
Amazonia	214 218	176 504	195 525	191 342	194 493	182321,00
Amazonia in %	13,60	10,94	11,87	11,42	11,73	11,58

Source: Agriculture Ministry of Peru. Monthly agricultural statistic Feb 2011

At the international arena, the issue of bio fuels has generated considerable interest among national and foreign investors. However, it has also generated several concerns in relation with food security, displacement, and harmful impacts on fragile ecosystems like the Amazonia.

During the period of the President Toledo in 2003, Peru prioritized the production of agro-energy in the Peruvian jungle, through a "Sustainable Alternative Development Program"⁶⁰ in order to combat the problem of illicit cultivation of coca leaves and drug trafficking. Later, during the period of the President García, the Congress passed the Law No. 29157 (December 18th 2007) in which the Congress empowered the executive to legislate in order to implement the Free Trade Agreement between Peru and USA. The law established a specific period of 180 days beginning on January 1st 2008 and established that the content of the legislative decrees will be issued under this Act must adhere strictly to the commitments in the FTA Peru – USA.

Under this delegated authority, the executive attempted to facilitate access to land for private investments, mainly in the Jungle. At the end of the period, the executive

⁵⁷ The definition of Agricultural land refers to the share of land area that is arable, under permanent crops, and under permanent pastures. Arable land includes land defined by the FAO as land under temporary crops (double-cropped areas are counted once), temporary meadows for mowing or for pasture, land under market or kitchen gardens, and land temporarily fallow. Land abandoned because of shifting cultivation is excluded. Land under permanent crops is land cultivated with crops that occupy the land for long periods and need not be replanted after each harvest, such as cocoa, coffee, and rubber. This category includes land under flowering shrubs, fruit trees, nut trees, and vines, but excludes land under trees grown for wood or timber. Permanent pasture is land used for five or more years for forage, including natural and cultivated crops. See: FAO Country profiles (2007) Available at: <http://www.fao.org/countryprofiles/index.asp?lang=en&ISO3=PER>

⁵⁸ Major crops in Peru are not inputs for biofuels.

⁵⁹ Monthly agricultural statistic Feb 2011 Available at: <http://www.minag.gob.pe/boletines/estadistica-agraria-mensual.html>

⁶⁰ Law 28054, The Promotion of Biofuels Market Act

issued 102 decrees.⁶¹ Two of them were the Legislative Decree 1090 – LD 1090 (the Forestry and Wildlife Act) and the Legislative Decree 1064 – LD 1064, which approved the legal regime for the agricultural land use, both issued in 2008.

Through the LD 1090, forestry plantations and *lands for forest production* were excluded from the definition of *Forest Resources* that were defined and regulated by the article two of the Law 27803, the forestry and wildlife Act. This Act regulates two types of lands: *lands for forest production* and *lands for forest protection*, and both constitute the National Forest Heritage, which, according to the article seven, “**cannot be used for agricultural purposes or other activities** affecting the vegetation, sustainable use, and conservation of forest resources, regardless of their location in the country.” In essence, the LD 1090 attempted to leave out *lands for forest production* from the concept of *Forest Resource* that constitutes approximately 45 million ha. of forest and land suitable for forestry (which is equivalent to 60% of all forests of Peru⁶²). In addition, the LD 1090 attempted to create a new form of forest concession to encourage private investments on these lands.

Furthermore, the LD 1090 weakened the guarantee for sustainable use of the low and highland in the Amazonia in order to promote agro-forestry and forestry systems. In fact, the decree attempted to regulate authorizations and procedures by *Reglamento* (Regulations), which is a rule with lower ranking of law and can be directly issued by the executive. The EIA was among of them.⁶³

In consequence, these lands were losing a legal status as *Forest Resources* and *Forest Heritage*, but this also weakened the environmental standards of protection of the Amazon forest.

On the other hand, the LD 1064 incorporated the *lands of forestry or forestry potential* within the concept of *land for agricultural use*. In fact, this decree was trying to include *Forest Resources* within the constitutional concept of *Agricultural Land* regulated by the Law 26505, Article 2, which declares that the juridical regime of *Agricultural Lands* is ruled by the Civil Code, and therefore, subject to private transference.

The LD 1064 was modifying the Third Complementary Disposition of the Law 22175, which defines the terms *Agricultural Land* and *Agriculture* used in this Act.⁶⁴ Those terms include agriculture, animal husbandry, and forestry, but exclude the direct use of natural forests within them. In essence, the terms *Agricultural Land* and *Agriculture* do not include *Forest Resources* as the decree was intended to cover in order to facilitate the transference of land ownership to private investors. It is important to note that, according to Law 27308, *Forest Resources* are part of *Natural Resources*,

⁶¹ Within the same period, the government had issued more laws than the Congress. Recognized lawyers and NGOs qualified many of the decrees as illegal because those were exceeding the matter specifically delegated. Martín, Carolina, Los 102 decretos de Alan García, La República, 29 de junio del 2008 Available at: http://blog.pucp.edu.pe/item/25443/los-102-decretos-de-alan-garcia?utm_source=google%20gmail&utm_medium=social-media&utm_campaign=addtoany [Visited: 07.03.2011]

⁶² Luna Amancio, Nelly. PER-096 Dos Normas amenazan el 60% de los bosques del Perú. Diario el Comercio Lima December 2008 Available at: <http://www.biodiversityreporting.org/article.sub?docId=30688&c=Peru&cRef=Peru&year=2009&date=December%202008>

⁶³ Regulated by Law 27446 - The National System for EIA

⁶⁴ Native Communities Act and Agrarian Development of the Amazon Region Act

which in its turn, according to Article 66 of the constitution, are public assets, and therefore, its ownership cannot be transferred to be private.

These decrees caused many protests, and this was expected considering that, until now, there is no register of deforested areas in the country, specifically in the Jungle, nor a study on the current legal status of these lands (rights to ownership, possession or usufruct rights to use or uses of natural resources on it, and others). On the other hand, local and regional authorities were not consulted on forest resource use or land-use planning processes under their jurisdiction, nor have studies been conducted to assess different environmentally friendly options to exploit these ecosystems.⁶⁵

The signing of an FTA with USA somehow defines the direction of economic development of a relative small economy like the Peruvian, but the obligation to implement it within the domestic legal system also demands its articulation with other obligations assumed by the state. At least, this implementation mainly demands respect for the constitutional framework that legitimates the adoption of obligations by the state.

The state wanted to take action, regulate, and boost economic activity in the forestlands. However, it was problematic because no rights were assigned before over some of those lands affected by the new regulation. Primarily, it entitles the state, but indigenous communities have also had traditional and customary rights over the same land. The informality and lack of adequate regulation make difficult to define these lines, and it is likely that this legal uncertainty and continuous overlapping of rules is one aspect that generate conflicts.

Indigenous communities cannot feel assured that their rights will be respected after the approval of these decrees. This could be understandable after so many years of neglect of indigenous communities by the central government and the absence of the state, mainly in the Amazonia. Even more if the promulgation of these laws did not involve a process of prior and informed consultation with indigenous communities.

Later, in January 2009, the Congress introduced an amendment to LD 1090 through the Law No. 29317, which exacerbates the protest even more. This modification was introduced in order to ban the granting of titles of ownership or possession certificates to the occupants of the land with the ability to be used for *forest production or forest protection* with or without forest cover.

This change in our view was promulgated with the intention of clearing in part the uncertainty about the ownership or possession of land, but clearly, this bill, which was intended to create legal certainty, was not conducive to indigenous communities, and even less conducive to those informal landholders. While the regulation establishes an efficiency criterion for the use of land, it does not take into account cases in which indigenous peoples or population that occupies or is working the land. In consequence, most of them must leave the land because the state requires that these lands have greater capacity for production, and therefore, should be granted in

⁶⁵ Dourojeanni, Marc and others; Amazonia Peruana en 2021: Explotacion de recursos naturales e infraestructura. (2009) p.105. Available at: <http://www.actualidadambiental.pe/?p=3832>

concession or at least are likely to be granted. Here, ownership and possession rights have not been recognized by the state.

We believe that the balance was tilted to one side, this is, the economic interests of the state aimed at making the exploitation of the forest resources by concessions viable. However, there are many individuals and companies currently exploiting the forest without permission or payment of fees. Many trucks emerge from the forest every day loaded with timber that is extracted from land on which there are no clear rights that can be regulated and inspected. A clear example of this is what happens in Madre de Dios. The combination of unclear property rights, the increase of mining concessions granted by the state, and the proliferation of illegal logging and informal mining, are driving this region to rapid deforestation.

The delay of Congress to repeal the rules stressed the protest in the jungle, and it degenerated into violence. After a week of deplorable acts of violence in the jungle, which left dozens of civilians and police officers killed, the Congress decided the indefinite suspension of DL 1090 in order to facilitate the dialogue with indigenous communities and facilitate the internal peace recovery. However, the suspension of the rule did not solve the underlying problem in relation to how to integrate the right to prior consultancy with the legal authority of the government to implement developmental measures. This issue will be developed in section 5.

4.3 Forest resources

Peru has 128 522 000 ha. of land. 53% is covered by natural forests, about 68 million ha, and 91% of these are in the Amazon. Furthermore, there are 9.6 million ha of land suitable for reforestation. Peru is the second Latin American country with the second largest area of forest, surpassed only by Brazil.⁶⁶ The forests of the Peruvian Amazon contain the greatest diversity of species of wood in the world; this includes around 2500 species, 600 of them have been classified and only 80 are used for export, focusing on products with low value-added and commodities such as mahogany and cedar.⁶⁷ This has led Peru to import wood and as a result, the use of forests contributes only 1% of GDP of Peru.⁶⁸ However, the exploitation of forest resources is not a priority of the Peruvian Government. Even more, Peru is far from achieving forest policy suitable for the country, and therefore, to the proper management of forests and biodiversity housed there.

In 2000, through the adoption of the Law 27308, the Forestry and Wildlife Act, the Peruvian government sought to develop this sector based on the management of large areas of land for the forestry production and forest protection. This rule, which is currently in force, defines new modalities for the granting of concessions and management tools for proper management of forest resources like the EIA. However, in our opinion, this later has been considered by the government and economic actors more as a formality than a useful mechanism to achieve sustainable managing of concessions and its resources.

⁶⁶ Anuario Forestal 2009. DGFSS. Available in: www.minag.gob.pe

⁶⁷ Galarza, Elsa and Karlos La Serna. Are sustainable forestry concessions in Peru? In: *Economía y Sociedad* 56, CIES, June 2005, p.34-35

⁶⁸ Dourojeanni (2009) p.106

The first reactions against this new model of forest use came from people engaged in illegal logging of forests. However, some aspects have prevented the progress toward the objectives of this law: The informality prevailing in these areas, the limited capabilities of small businesses involved in the sector, the limited enforcement capacity of the Peruvian authorities and the continuing changes to the legal framework are between the main reasons. Even more, the sum of these factors has produced the deforestation of 150 000 ha. yearly (The equivalent to deforest a similar area to Oslo, 45.000 ha approximately, in less of four months) and 42% of Greenhouse gases in the country.⁶⁹ The rate of deforestation in Madre de Dios caused mainly by mining activities is also of particular concern. (See Table 4.2)

Table 4.2 *Deforestation scenarios in the Peruvian Amazonia by regions (ha) 2001-2020*

Deforestation	2001	2010	2020
Loreto	775.400	825.400	917.300
Ucayali	543.200	666.700	821.800
Madre de Dios	123.100	480.000	980.500
San Martin	956.500	1.235.500	1.600.900

Source: Emission Reductions from all land uses in Peru. World Agro-forestry Centre.

In 2008, the Peruvian government attempted to approve a new Law on Forestry and Wildlife through the LD 1090 before mentioned. However, as it is commented by Dourojeanni,⁷⁰ rather than to develop structural changes in forest management in the country. This law obeyed the interest of facilitating the ownership of forestland for private investors.⁷¹

4.4 Hydrocarbons in the Amazonia

Peru has 1 163 million barrels of proved reserves of crude oil. In comparison to Norway, which has 6 680 million barrels of proved reserves, the Peruvian oil constitutes a significant reserve. From 209 countries, Peru is located at the 43 position on the world ranking of oil reserves, and Norway at the 21 position.⁷² However, Peruvian reserves could increase rapidly in the next years, and the level of investments in the Peruvian Amazon has already increased the last years.

Between 2003 and 2009, lots for exploration and exploitation of oil has increased from 15% of the total area of the Peruvian Amazon to over 70% (55 million ha)⁷³ According to the Ministry of Energy and Mines of Peru – MEM, the Peruvian government has signed contracts for exploration in 65 lots, of these, 45 lots are in

⁶⁹ Defensoria del Pueblo, Informe 151: La Política Forestal y la Amazonia Peruana: Avances y obstáculos en el camino hacia la sostenibilidad

⁷⁰ Marc Dourojeanni is an agricultural engineer, doctor of sciences and professor emeritus at the Universidad Nacional Agraria La Molina, Lima. He has devoted most part of his life to issues relating to the Amazon in Peru and Brazil and other tropical forests on three continents. Vice President of the World Commission on Protected Areas (WCPA), World Bank senior adviser and first chief of the Environmental Division of the BID.

⁷¹ Dourojeanni (2009) p.106

⁷² Central Intelligence Agency CIA USA. See: The CIA World Factbook. Information updated at: 1. January. 2010 Available at: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2178rank.html>

⁷³ Dourojeanni (2009) p.43

the Amazonia, and in all cases the companies are doing some preparatory work and drilling work has been done. On the other hand, Peru has signed contracts for exploitation in 20 lots, of these, 7 are in the Amazonia, and all are operative and producing.⁷⁴

The environmental and social impacts of this economic activity can be very serious, especially with regard to pollution of watercourses. The pollution is mainly caused by improper disposal of formation waters that carry a number of highly toxic substances like lead, cadmium, arsenic, and mercury, among others. Formation waters also carry known carcinogens such as toluene and benzene. Pollution is also caused by spill oil wells and within each batch and, especially during transport pipelines to the towns of processing or consumption.

There are also serious social impacts because the superposition of lots for oil concessions on *National Protected Areas* established by the Law 26834, especially on those that meet the basic needs of indigenous people.

The only areas fully protected from oil and gas activities are *National Parks* and *National and Historic Sanctuaries*, which cover 12% of the total Peruvian Amazon. However, 20 blocks overlap 11 areas with lower grade of protection, such as *Communal Reserves* and *Reserved Zones*. At least 58 of the 65 blocks overlay lands titled to indigenous peoples. Further, 17 blocks overlap areas that have proposed or created reserves for indigenous groups in voluntary isolation.⁷⁵ In fact, 4 of them (Lots 88, 110, 113 and 138) directly threaten indigenous groups in voluntary isolation, including Kugapakori, Nahua, Murunahua and Isconahua.⁷⁶ (See figure 4.1) Dourojeanni warns that reserve areas constitute a provisional category and most of them will not necessarily be returned for conservation purposes. Other categories of protected areas that overlap on the lots do not prohibit the exploitation of oil, even if there are not developed studies demonstrating its compatibility with the area's management.⁷⁷

⁷⁴ Ministry of Energy and Mines of Peru, Statistics, updated to 31.03.2010, Available at:

<http://www.minem.gob.pe/estadistica.php?idSector=5&idEstadistica=6632>

See also: Relation of contracts in the web page of Peru Petro, Available at:

http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site/InformacionRelevante/MapaLotes/Cont_MapaLotes

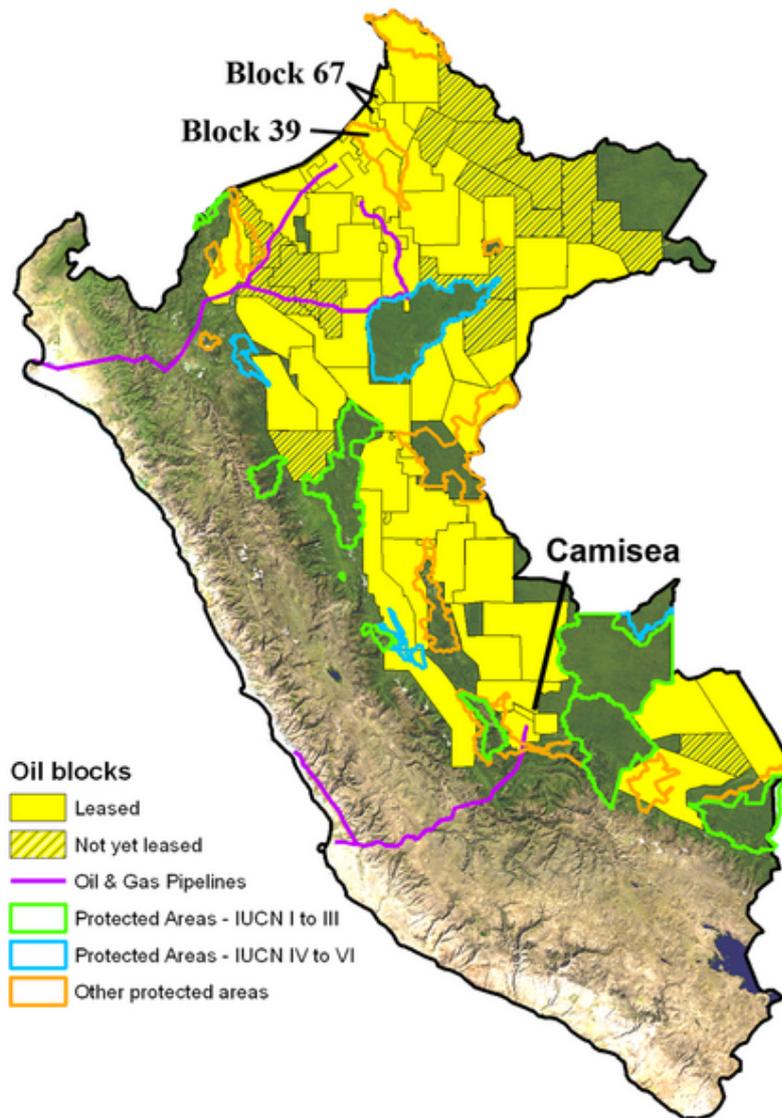
⁷⁵ Finer M, Jenkins CN, Pimm SL, Keane B, Ross C (2008) Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples. PLoS ONE 3(8): e2932. doi:10.1371/journal.pone.0002932.

Available at: <http://www.plosone.org/article/info:doi%2F10.1371%2Fjournal.pone.0002932>

⁷⁶ Gamboa, Cesar. Insostenibilidad de los Hidrocarburos en la cuenca amazónica peruana. In: La guerra del fuego: políticas petroleras y crisis energética en América Latina (2008) p. 219-238

⁷⁷ Dourojeanni (2009) p.62

Figure 4.1 *Oil and gas blocks in the Peruvian Amazon and protected areas*



Source: Finer M. Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples

On the other hand, it is important to consider the great influence that the *Camisea* gas project has had in the country. The hydrocarbon resources from lots 88 and 56 of *Camisea* were considered a priority for energy security in Peru and it generated great expectancy in the population. However, the management of the project at all stages was given exclusively to private investment and exploitation has been directed mainly to exports, which has generated a broad debate on the need to recover these resources and improve legislation and oil contracts, prioritizing the national interests and needs. This has put into debate the Peruvian State's role not only in regulating the sector but also in terms of its direct involvement in the development of these economic activities and its participation in the benefits.

4.5 Hydroelectric energy

The 85% of the hydroelectric potential of Peru is located in the Amazon basin. It is around 178,000 MW.⁷⁸ Part of this potential (6 000 MW) is projected to be exploited by Peru and Brazil under the Energy Agreement – EAPB signed by both countries in June 2010. This agreement allows Brazil to study, finance, build and operate six of the largest hydropower plant central projects in Peru: Inambari (2 000 MW)⁷⁹, Sumabeni (1 074 MW), Paquizapango (1 374 MW), Urubamba (940 MW), Vizcatan (750 MW) y Cuquipampa (800 MW). However, there are 52 active projects that could generate a total of 24 500 MW. 26 of them are located in the highland of the Amazon basin, and 15 of them have been pointed as interest of Brazil.⁸⁰

According to the legal framework in Peru, it is necessary to obtain a concession contract for the development of hydroelectric generation and transmission. The state grants the concession for a period of 30 years, and, at the expiry of that period, the electrical rights and ownership of infrastructure will be transferred to the Peruvian State at no cost.⁸¹

These projects will generate significant incomes for the Peruvian Government, and it appears to be the main reason for signing the EAPB. It could be justified on the mandate to promote development, but the central government is not the only owner of this mandate, this is shared with regional and local governments and a certain level of coordination is necessary. In fact, the lack of systematic coordination in this matter justifies the protest of regional and local governments. Then, they can convene regional strikes and stop the progress of projects.

It is also important to note that the adoption of some international agreement implies: a) the enactment of laws (for example: implementation of laws), b) compromise of the domain of the state, c) demand financing from the state or d) involve human rights obligations, among others. According to the legal framework in Peru, when one of those elements is necessary for the implementation of the agreement, then, this agreement should be considered as a legislative treaty that implies the approval of the Congress.⁸² However, the EAPB has been signed without approval of the congress.

One of the biggest projects included in the agreement was the hydroelectric central power of Inambari, which had received a temporary concession⁸³ for a period of 24

⁷⁸ Compared to Norway, which produces 134.3 GW (134,300,000,000 wats), it represents 132% of the whole production of Norway. See: US Energy Information Administration, Available at: <http://www.eia.doe.gov/countries/country-data.cfm?fips=NO>

⁷⁹ Recently, after weeks of protests in the region Puno, the temporary license for the construction of the project Inambari was definitely suspended by the central government before the evidence of not having the approval of the local population in accordance with the right to prior consultation under the ILO Convention 169 <http://elcomercio.pe/peru/780558/noticia-construccion-hidroelectrica-inambari-queda-suspendida>

⁸⁰ Dourojeanni (2009) p.41.

⁸¹ Agreement between the government of the federal republic of Brazil and the government of the republic of Peru for the supply of electricity to Peru and export of surplus to Brazil, Article 3 (d)

⁸² According with the article 56 of the Peruvian Constitution, Congress must approve treaties before their ratification by the President of the Republic, if they deal with the following subjects: 1. Human Rights; 2. Sovereignty, domain or territorial integrity; 3. National Defense; and, 4. Financial obligations of the State. Treaties that create, modify or repeal taxes, which require amendment or repeal of any law, and requiring legislative action for implementation must be approved by Congress.

⁸³ This temporary concession had been granted by Ministerial Resolution No. 287-2008-MEM/DM

months for the development of feasibility studies concerned, including the study of environmental impact. However, this process was advancing without the participation of local populations and it generated regional strikes in Puno. Faced with such protests, the government finally decided to suspend definitely the temporary concession granted to this project.⁸⁴

On the other hand, in order to apply for a permit for the development of electric power activities the prior approval of EIA by the MEM is required.⁸⁵ This defines the EIA as a prerequisite to be evaluated before the granting of the concession. However, the executive branch of the Peruvian government attempted to use its legislative faculties enacting Emergency Decrees in order to favor the building of hydroelectric central plants in the Amazon.⁸⁶ In this case, the President has attempted to reduce the relevance of the EIA within the process of granting licenses. Specifically, by using these Emergency Decrees, the government had set that “the environmental certifications will not be required before the implementation or performance of the economic activities and those certifications will not be prerequisites to obtain the licenses to perform the economic activities mentioned in the decrees.”⁸⁷ This measure was taken probably with the aim to avoid the public participation (tied to the EIA), which, in turn, could probably prevent the realization of executive’s developmental projects.

The regional governments, the ombudsman, and the civil society demanded the derogation of the Emergency Decrees because they were enacted without following constitutional requirements. After a month of firm pronouncements, the executive government decided to partially derogate the content of the decrees, specifically in the article 5.3 (a) which refers to the EIA as requirement to obtain the licenses. That returned the status of the EIAs as a prerequisite to obtaining definitive permits. However, this partial derogation does not solve the legality of the decrees. The decrees as such have not met the requirements established by the constitution to produce this kind of rules,⁸⁸ the rules of the congress to controls their constitutional consistency,⁸⁹ and binding decisions of the constitutional tribunal, which have developed their scope.⁹⁰ In consequence, this derogation was performed in order to meet legitimacy requirements but not legal requirements.

It is important to note, that this derogation was made after the executive branch met the regional government assembly. This later institution has not a veto right, even more it has not the power to control the legality of emergency decrees. However, the regional government assembly has probably gained political power to stop developmental measures from the central government because it can better represent local interests, which are involved in projects of national relevance.

⁸⁴ Diario El Comercio, June 14th 2011. Available at: <http://elcomercio.pe/peru/780558/noticia-construccion-hidroelectrica-inambari-quedo-suspendida>

⁸⁵ Supreme Decree No. 29-94-EM

⁸⁶ It is important to notice that the Emergency decree 002-2011 mentions, in general way, as a Project: Energy of new hydroelectric centrals, being impossible define to which projects it refers. However it is easily infers because the context that the projects in the Amazon are included.

⁸⁷ That refers not only to the building of hydroelectric centrals but also to many other infrastructure projects.

⁸⁸ Constitución del Perú, Article 118.19

⁸⁹ Rules of the Congress, Article 91

⁹⁰ Constitutional Tribunal Jurisprudence (No.0008-2003-AI/TC, No. 0007-2009-PI/TC, No. 0025-2008-PI/TC)

For the EIAs to produce their beneficial effects,⁹¹ it is necessary to conceive this mechanism as an early warning process. It requires previous incorporation of this mechanism in the planning of the investment project. The timing is also important in terms of providing those peoples concerned with the relevant information, and to enable their participation in the planning and negotiation of the projects. The framework and scope of this obligation have been so defined by binding precedents.⁹²

In case of the building of hydroelectric central plants, it is important to know the area to be flooded for each dam and the area to be indirectly affected in their environment. It contains information about the number of people who will be displaced or affected, and also the range of deforestation or alteration of ecosystems that will be produced. Another key aspect is to estimate the distance between the energy produced at each plant and the interface to existing mains because the electric transmission lines in terms of direct and indirect deforestation may be as significant as the roads.⁹³

Building dams in the Amazon may seem as a friendly climate initiative as the energy produced replaces brown energy consumption in other places in the world, e.g. transferring the coal based steel mills from China to the hydro-energy based plants in Amazon. However, just in the case of the Inambari project, the area of flooding has been estimated at 25 588 ha and the area of influence on 178 984 ha. Transmission lines that would be needed for this project compromise approximately 300 km in the Peruvian territory and imply a net deforestation of 6 000 ha considering only an impact of only 20 m. In terms of greenhouse gases, contributions from the lake of a little more than 40,000 could increase national emissions of greenhouse gases in 5.86%, excluding any that would occur in the turbines and spillways, which are considerable. This may illustrate what could be the total impact of the 15 large dams planned in the jungle.⁹⁴

4.6 Mining

Gold Mining in Madre de Dios could generate US\$ 730 million, but 97% of the activity is informal. Despite of that, the state has granted in the last years 400 new concessions. Now, there are 3 204 mining concessions granted, but without effective control from the state. The price of each concession is in average less than US\$ 1.00 for each ha. However, an area of 93 000 ha, where mining rights are granted, is already in conflict with protected areas. This activity generates 18 000 jobs, but most of them are in the informal sector. Even more, this activity has caused that an area of 32 000 ha has been deforested, and an area of 307 000 ha is in process of destruction.⁹⁵

⁹¹ The main effect that the EIA seeks as an objective is to serve as an instrument to protect the environment effectively.

⁹² Constitutional Tribunal Jurisprudence (No.00022-2009-AI/TC)

⁹³ Dourojeanni (2009) p.42

⁹⁴ Dourojeanni (2009) p.58-59

⁹⁵ Diario El Comercio, March 5th 2011. Available at: <http://elcomercio.pe/peru/722807/noticia-alarmanete-97-mineria-oro-informal-madre-dios> See also: El Comercio, April 19th 2011. Available at: <http://elcomercio.pe/planeta/745213/noticia-deforestacion-amazonia-peruana-crecio-seis-veces-fiebre-oro>

The state has tried to establish order and the rule of law in the area. However, informal miners have organized strikes for several days with road closures.⁹⁶ The MEM recently issued the Supreme Decree 045-2010 PCM that approves the national plan for the formalization of artisan mining. This plan is the work of a multi-sectorial commission formed by the state and local actors in seeking to formalize artisan-mining activities through the implementation of management tools that include the organizational, technical, legal, and environmental aspects of this activity, as well as involving all actors in the value chain.⁹⁷ However, it is necessary to establish baselines on which to support this process because legitimizing those who encroach on the territory may result in more informality. On the other hand, this plan should articulate interests of farmers and miners, guarding the national interest about natural resources, and social and environmental sustainability.

⁹⁶ Diario El Comercio, March 1th 2011. Available at: <http://elcomercio.pe/peru/720698/noticia-disturbios-reveltas-madre-dios-huelgas-mineros>

⁹⁷ Diario El Comercio, March 31th 2011. Available at: http://elcomercio.pe/planeta/735678/noticia-mas-cien-mil-personas-se-dedican-mineria-artesanal_1

5 The right to be consulted and the environmental impact assessment.

Peru initiated the development of a legal and institutional framework for environmental protection with the adoption of the Environmental and Natural Resources Code in 1990. However, the mistaken perception that environmental issues were a serious obstacle for the investment and business was the main reason for the process suffering difficulties. An example is the “Sectoralization” of environmental management, which was regulated by Legislative Decree 757 in 1991.⁹⁸ This law established that the various ministries would be responsible for regulating, licensing and control in environmental matter those activities developed within their sectors.⁹⁹

In 2001, the National System of Environmental Impact Assessment (SEIA) was created by the Law 27446 as the unique and coordinated system of identification, prevention, monitoring, control, and preventive correction of the negative environmental impacts of human actions through investment projects. This implied the establishment of a uniform process that included requirements, milestones, and scope of EIA in investment projects. This act has also established mechanisms to ensure citizen participation in the process of EIA. Therefore, investment projects involving public and private activities, facilities or works that may cause negative environmental impacts fall within the scope of the Act.

This Act sets that the EIA should include: A description of the proposed action and area of influence; the identification of the implications and negative environmental impacts; the environmental management strategy and the definition of targets; monitoring plans and control; the economic evaluation of environmental impact, but it also includes the citizen participation plan.¹⁰⁰

In fact, this system ensures the disclosure of information and community participation in the process of handling applications and environmental impact studies. This is made with a formal request by which the competent authority has the power to ask the community representatives or informants, antecedents or comments on the proposed action. In addition, the investment project proponent has also to submit a citizen participation plan and its implementation. This also involves conducting public hearings in cases of major socio-environmental impact and other informal instances that the proponent of the project has to promote.¹⁰¹

⁹⁸ Legislative Decree 757, Article 50

⁹⁹ Dourojeanni (2009) p.98

¹⁰⁰ Law 27446, Article 10

¹⁰¹ Law 27446, Article 13

The law 27446 established that the executive ought regulate this system in 45 days, but the executive spent more than 8 years to regulate it in 2009 by the Supreme Decree No. 019-2009. In this decree, the executive set that the EIA sectorial rules still in force pending the approval or updating of the regulations concerning the SEIA by the relevant authorities.¹⁰² The relevant authorities include state institutions at national, regional or local level that have responsibility in environmental matters, use and exploitation of natural resources, protection and preservation of biological diversity, human health, climate change, historical and cultural heritage, protected areas and other associated matters. Consequently, the full implementation of this system requires all these authorities to update their regulations.

Recently, and after 10 years of law 27446 was approved, the Ministry of Environment - MINAM approved the Ministerial Resolution 239-2010-MINAM, which establishes the procedure for review of EIA approved by relevant authorities in order to reduce efforts and inconsistencies in the management of the EIA . According to this, MINAM is the lead agency responsible for ensuring the integration mechanism and cross-sectorial coordination of environmental management among different levels of government. However, the “Sectorization” of environmental management was not replaced by government. In consequence, the establishment and implementation of the SEIA is breakthrough.

On the other hand, since 2005 is applied the Law 28611, General Law on the Environment, which provides that “every natural or legal person, individually or collectively, may have opinions, positions, views, comments or contributions, in decision-making processes of environmental management and policies and actions that impinge on it, and its subsequent implementation, monitoring and control.”¹⁰³ This norm also establishes specific requirements for public entities to promote mechanisms for participation in the environmental management.¹⁰⁴ This standard is grounded in the constitution, which guarantees the rights of everyone to participate in political, economic, social, and cultural life of the state, and to the recognition of their ethical and cultural identity. In fact, the constitution establishes that the state recognizes and protects the ethnic and cultural plurality of the nation. These rights are closely connected, and should be interpreted and regulated harmoniously.¹⁰⁵

Furthermore, the Peruvian government has signed the ILO Convention 169 Indigenous and Tribal Peoples in 1994, and during the last months of the García’s period in 2011, the Congress passed a law that domestically implemented the Convention and obliges the state to consult indigenous peoples before approving new projects. However, the standard was rejected by the executive because it was not granted specifically that indigenous peoples has not a veto right, and the standard was returned to the Parliament. It was until now, and after 17 years, that the right to prior and informed consultation granted in the convention has been implemented during the period of Ollanta Humala. However, since the ILO Convention 169 is a human rights treaty, the constitutional provisions related to participatory rights must

¹⁰² The unique supplementary and transitional provision

¹⁰³ Law 28611, Article 46

¹⁰⁴ Law 28611, Article 49

¹⁰⁵ Constitution, Article 2.17 and 2.19

be interpreted and implemented in accordance with this agreement,¹⁰⁶ despite of effective implementation or not.

In consequence, these norms represent a limit to the state, which has the need and interest to exploit natural resources that are located in indigenous territories. These activities could affect the traditional use of resources by indigenous peoples and, eventually, affect their very survival or existence.

According to a report by the Ombudsman on the status of social conflicts, there are over 230 active or latent social conflicts in Peru, mostly in poor rural areas. More than half of these conflicts involve the indigenous community.¹⁰⁷

- 233 social conflicts, of which 159 are active (68%) and 74 dormant (31%)
- From the 159 active social conflicts, 92 are in the process of dialogue (58% of the total active cases).
- 49 of the 92 cases in the process of dialogue (53%) emerged after a violent incident.
- From the 233 social conflicts, 117 of them (50%) reported at least one episode of violence since its inception.
- Socio-environmental conflicts occupy 50.2% (117 cases) of all conflicts in April, followed by conflicts with local government affairs 11.2% (26 cases), and conflicts of government affairs 10, 3% (24 cases).

In consequence, the social conflict generated by developmental measures or investment projects is a reality difficult to deny, and, as more than a half of these conflicts involve the indigenous community, the ILO Convention 169 becomes relevant.

As Zambrano notes, the ILO Convention 169 is an instrument of dialogue between indigenous peoples, governments, civil society and development institutions, on issues and decisions that may affect the lifestyle of the former. Its content is intended to be a framework of rights and duties to ensure the social development of indigenous peoples on an equal footing with the rest of the population of a country. The Convention is seen as an instrument to match a historical reality of vulnerability and discrimination established by the possibility of exercising human rights adequately on an equal footing with the rest of the population.¹⁰⁸

What states parties seek by ratifying the ILO Convention 169 is to achieve conditions for recognition of cultural diversity in society. In the case of Peru, the signature of the Convention responded to a populist measure of the Fujimori government. Its signature was an instrument to gain legitimacy within a dictatorial regime. However,

¹⁰⁶ Constitution, Article 3 and the Fourth final and transitory provision

¹⁰⁷ Defensoria del Pueblo, Peru, Reporte Mensual N° 86 Conflictos Sociales - Abril 2011 Available at: http://www.defensoria.gob.pe/modules/Downloads/conflictos/2011/reporte_86.pdf

¹⁰⁸ Zambrano Chávez, Gustavo (2011) Aproximación a la noción de derecho a la propiedad comunal de los pueblos indígenas elaborado a partir de las sentencias de la Corte interamericana de derechos humanos, En: PRIORI, Giovanni (Editor)/Autores Varios. Estudios sobre la propiedad. Lima, Fondo Editorial PUCP, (en edición).p.19 Gustavo Zambrano Chavéz was the advisor of the Peruvian Ombudsman on the agenda of indigenous peoples for the implementation of the right to consultation.

the legitimacy obtained by Fujimori with this measure is not only a confirmation of the cultural diversity within the Peruvian population, but the desire of people to build a society that respects such diversity.

According to the ILO Convention 169, Article 6:

1. In applying the provisions of this Convention, governments shall:
 - a) Consult the peoples concerned, through appropriate procedures and in particular, through their representative institutions, whenever consideration is being given to legislative or administrative measures, which may affect them directly.
(...)
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures

Thus, the right to consultation is essential in order to ensure inclusion and participation of indigenous peoples in decision-making processes of the state, and in order to improve the relationship between the state and individuals under their jurisdiction within the logic of democratic development.

In the same way, the ILO Convention 169, Article 15 sets:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management, and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall, when possible, participate in the benefits of such activities, and shall receive fair compensation for any damages, which they may sustain because of such activities.

In consequence, there is an obligation on States to ensure that indigenous peoples can use and enjoy their lands and resources within it. This obligation is important in the case of mega-project's development and investments that could generate impacts on the lives and lifestyles of indigenous peoples. These human rights could be affected, so the consultation process would be understood as mandatory for this not to happen. Therefore, the consultation process should be done prior to the implementation of legislative or administrative measures, or projects affecting the rights of indigenous people. On the contrary, if this is done after the decision was made or implemented it distorts the purpose of the consultation.

In relation to this, the Constitutional Tribunal established in 2009:

24. From the reading of the Article 6 and 15 of ILO Convention 169 is not clear that indigenous peoples enjoy a kind of veto. That is, the state's obligation to consult indigenous peoples regarding legislative or administrative measures that could directly affect them, not give them the ability to prevent such measures are carried out. While the last paragraph of Article 6 of the Convention states that consultation should be carried out "with the objective of achieving agreement or consent to the proposed measures", this does not imply a condition in which if the agreement or consent would not be achieved, the measure becomes illegal. What the Article 6.2 explains is that the purpose (to reach an agreement or obtaining consent) should guide the process, and should be the objective of the consultation. From this follows that a consultation process which is not intended to achieve that purpose, may be questioned. **It must be said that does not flow from the articles of agreement that indigenous peoples have a right of veto. The intention of standard is to institutionalize the intercultural dialogue.**

In sum, **it is mandatory and binding to conduct the consultation process, and the consensus reached by the parties shall be binding**, however, this does not imply that indigenous people can avoid the application of the provisions submitted for consultation by the fact of disagree with the administrative or legislative measure. In addition, while it is legitimately compulsory the protection of indigenous peoples is true that this realization needs to be made within the margins of the Common Good, a concept clearly established in the Constitution as a leading guide for action by the State, only subject to the principle of protection of the individual's dignity.¹⁰⁹

In consequence, according to Peruvian law, the prior consultation is an obligation of the state and the end of the consultation is that the State and indigenous peoples come to an agreement or consent on measures consulted. Therefore, it is more than talk or just providing information. It is a recognition of different lifestyles, respect for different views on how to understand the development and pursuit of common agreements that settle the intercultural rule of law.¹¹⁰ Therefore, in its implementation, the state should develop consultation procedures to do everything that is possible in order to achieve consensus of all stakeholders.¹¹¹

In relation to the use of natural resources by the state and property rights guaranteed under the American Convention on Human Rights, the Inter-American Court of Human Rights has said:

126. (...) while it is true that all exploration and extraction activity in the Saramaka territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that **Article 21 of the**

¹⁰⁹ EXP. N.º 0022-2009-PI/TC, LIMA, Gonzalo Tuanama Tuanama y más de 5000 ciudadanos.

¹¹⁰ Zambrano (2011) p.20

¹¹¹ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Human Rights Council UN A/HRC/12/34 of July 15, 2009.

Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory. (...)

127. Nevertheless, **the protection of the right to property** under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. (...) In this sense, Article 21 of the Convention states that the **“law may subordinate [the] use and enjoyment [of property] to the interest of society”**. Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.(...) ¹¹²

Thus, states have the authority to exploit natural resources, but by doing so, the state should take into account the need to establish mechanisms to ensure that indigenous rights will suffer the minimum possible affectation. Therefore, the limitation must be established by law, shall be necessary in the sense that there is a public interest justifying it, must be proportional in the sense that the infringement of rights correspond to the objective pursued, and this objective should be consistent with the objective to develop democratic structures in society. These achievements are important, but it remains to establish: When it is necessary to reach an agreement? In addition, is obtaining consent compulsory or not in any case?

The Court’s jurisprudence, as stated in the *Yakye Axa* and *Sawhoyamaxa* cases, sets that members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory. This is for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake.¹¹³ Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people.

Regarding this last aspect, the Court has established that in order to guarantee that restrictions to the property rights of indigenous peoples by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards:

1. The State must ensure the effective participation of the members of the community, in conformity with their customs and traditions, regarding any development, investment, and exploration or extraction plan within their territory.

¹¹² Case of the Saramaka People *v.* Suriname, Inter-Am. Ct. H.R. (Judgment of November 28, 2007) §.126-127. See also: Cf. Case of the Indigenous Community Yakye Axa, supra note 75, §. 144-145 citing (*mutatis mutandi*) Case of Ricardo Canese *v.* Paraguay, Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, §. 96; Case of Herrera Ulloa *v.* Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, §. 127, and Case of Ivcher Bronstein *v.* Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74. §. 155. Cf., also, Case of the Indigenous Community Sawhoyamaxa, supra note 75, §. 137.

¹¹³ Cf. Case of the Indigenous Community Yakye Axa, supra note 75, §. 137, and Case of the Indigenous Community Sawhoyamaxa, supra note 75, §. 118.

2. The State must guarantee that the community will receive a reasonable benefit from any such plan within their territory.
3. The State must ensure that no concession will be issued within their territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.¹¹⁴

These safeguards are intended to preserve, protect, and guarantee the special relationship that the members of indigenous communities have with their territory, which in turn ensures their survival as a tribal people. These safeguards are also the preconditions for consultation processes are carried out properly. However, the Court goes further, and following the Declaration on the Rights of Indigenous Peoples establishes:

137. (...) in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.¹¹⁵

Consequently, those states that are under the jurisdiction of the Inter-American human rights, who want to exploit natural resources within the territories of indigenous communities shall be obliged to make an inquiry to indigenous peoples with the objective of achieving agreement or consent of the proposed measures. However, when these legislative or administrative measures to encourage investment or development projects could generate a profound impact on the lives of indigenous peoples the consent should be reached.

In other words, if these measures generate dramatic changes in the way of life of indigenous peoples such as the loss of land, eviction, displacement, health impacts, depletion of resources needed for subsistence, destruction or contamination of the environment, social disorganization, or other similar effect, the state is required to obtain consent. The main reason is that these projects can limit the possibilities that the culture of indigenous people continue to exist. Given this situation, it is necessary not only that indigenous people are aware of what can happen, but also this information is part of the final decision or consent.¹¹⁶

¹¹⁴ Case of the Saramaka People *v.* Suriname, Inter-Am. Ct. H.R. (Judgment of November 28, 2007) §.129.

¹¹⁵ The Declaration on the Rights of Indigenous Peoples, Article 10 sets: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." This Declaration was adopted by the General Assembly on Thursday September 13, by a majority of 144 states in favor, and Peru was one of them.

¹¹⁶ Report of the International Workshop on Methodologies regarding Free, Prior and Indigenous Peoples, held in New York City, from 17 to 19 January 2005, as part of the meetings of the Permanent Forum on Indigenous Issues . In: (Zambrano 2011)

Available at: http://www.tebtebba.org/index.php?option=com_docman&task=cat_view&gid=25&Itemid=27

6 Conclusions

It is clear that the Peruvian government does not have a developmental plan for the sustainable use of natural resources in the Amazon as a result of consensus with the population. During presidential elections, the majority of the population delivers a mandate to the president. At the same time, the last presidential management is approved or punished.¹¹⁷ This last presidential election in Peru has been a clear example. The majority of the population has punished the economic model of this last 20 years and is expecting a turn in the governmental policies. The majority of the population has shown its dissatisfaction with the economic model. They have opted for a change in state policies that allows the reformulation of policies for poverty reduction and called for a policy for the social inclusion. In fact, the level of inequality between the poorest and richest sectors in Peru prevents the long-term economic growth, and the population has sent a clear message: "unequal economic growth is unsustainable in the long term."¹¹⁸

During the 5 years of presidential period, the government can compromise public assets and the population does not have power to stop developmental projects without the intervention of the regional/local governments, the ombudsman, or the Congress. Despite of that, protests, some of them violent, have been the most effective means to stop developmental projects that compromise the environment or affect social rights. A good example was the regional strike in Puno against mining activities in 2011, which gave the government a truce for a week to allow them to conduct the electoral commissions in the region.¹¹⁹

Although concession contracts have an administrative nature, which suppose the primacy of the will of the state and the public interest, this system offers high levels of security and protection for the investor. There is a small place for social and environmental issues. Under this situation, the government is called to play a proactive role to promote corporate social responsibility, proper regulate social and environmental issues, and use its position in negotiating investment and projects in

¹¹⁷ Peruvian Constitution, Article 112. The presidential term is five years, there is no immediate reelection. After another period of office as a minimum, the former president may run again, subject to the same conditions. (*) (*) This article was amended by Law No. 27,365, published on November 5, 2000. Before the reform, this article was the following: "Article 112. The presidential term is five years. The President may be re-elected for one term. After another period of office as a minimum, the former president may run again, subject to the same conditions."

¹¹⁸ Ligorria, Julio. La Desigualdad en el Perú determino el triunfo de Humala. El Comercio. Jun 7th 2011. Available at: <http://elcomercio.pe/politica/772558/noticia-desigualdad-peru-determino-triunfo-ollanta-humala> [Visited: 07.06.11]

¹¹⁹ The government has accused the leaders of the protest and has said that political interests motivate them. However, the 70% of the territory of Puno is compromised with mining concessions, and the majority of the population depends on agriculture. Available at: <http://elcomercio.pe/peru/766424/noticia-dirigente-aimara-aseguro-que-no-boicoteara-elecciones> [Visited: 07.06.11]

favor of the majority without denying the possibility of minorities to be part of the development. However, the government is also called to defend the interest of minorities when they see their rights threatened.

On the other hand, although regulations and more initiatives to increase the quality of public investment are still pending, investment should be encouraged in order to reduce poverty in the country. In this, the promotion of private investments by the executive branch of the government is consistent with the constitutional legal framework and is canalized in the right direction. However, the right of prior consultation is an important tool to clarify unclear borders between the mandate of the government to promote development in the country and local or indigenous peoples' rights. It is confusing to define clear borders between legality and politics, and what really implies the domestic implementation of right of prior consultation granted in the ILO Convention No. 169, which was ratified by Peru, and is part of domestic legislation with constitutional range.¹²⁰

The need to regulate the use of emergency decrees better is an important issue. Its proper regulation could create predictability and certainty to the work of parliamentary control, but also to prevent acts of corruption from the executive branch. However, it is not sufficient to solve the fundamental problem about how to make development viable in Peru. A call for institutional development is imperative. Participation within an inclusive process of decision-making at different levels of governance is crucial for economic, social and environmental reasons.

During the last years and by means of protest and strikes, minority groups and indigenous communities have gained power to stop policies and measures of development promoted by the government that could potentially benefit the majority. This power has been interpreted by minority groups and indigenous communities as a veto right that allow them to stop such projects, but also allow them to protect their rights, specifically, when the development of the project implies the threat or violation of their fundamental rights. In relation to this, the Inter-American system of human rights has clearly stated: "...when these legislative or administrative measures to encourage investment or development projects could generate a profound impact on the lives of indigenous peoples the consent should be reached."¹²¹

Poverty index hides a deepen reality of poverty that can be used to show changes on the percentages of population living in poverty. For example, a person who was living the last year in extreme poverty with less than US\$ 2,00 per day, this year, he is receiving some economic assistance from the government, and he is living now with US\$ 2,10 per day. In consequence, he is not considered to living in extreme poverty any more. The understanding of poverty in Peru and how to deal with it are the main challenges of the current government in Peru. It is clear that calculations based on minimum index falls short on describing the complexities of dealing with poverty in Peru. More assistance programs could alleviate but not solve the deep problems

¹²⁰ Fourth Final and Transitory Provision of the Constitution of Peru. This right should also be implemented and applied in accordance with the Universal Declaration of Human Rights and Article 1 paragraph 19 of the Constitution, which recognizes the multi-ethnicity in Peru. Constitution of Peru, Article 2: Everyone has the right to: 19. A cultural and ethnic identity; The State recognizes and protects the ethnic and cultural diversity of the nation.

¹²¹ Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (Judgment of November 28, 2007) § 137

of inequality and inclusion in Peru. Policies to reduce poverty should be based on policies with universal perspective. In other words, those policies should ensure the provision of basic public services for the whole population, as primary education or health services, and ensuring equal opportunities for all Peruvians.

The duration, number, and unnecessary complexities of legal procedures are symptoms of the institutional crisis in the Peruvian state. This constitutes a strong disincentive to develop business within the legal system. Conversely, it encourages the informality and corruption.

Institutions in Peru are not a consequence of consensus achieved with the population within a democratic participation. Institutions are subject to the political convenience of the government in turn and are created ad hoc without being consequence of a process of democratic evolution in which population is involved.

In fact, citizen participation is not part of institutional development in Peru. Citizen participation within a democratic state of law has not been developed in such a way that it enables continuous participation of the population within a participatory decision making process that goes beyond the presidential election or election authorities every time. That means that the gap between legitimacy and legality still large within the Peruvian democracy, and in that context is very difficult to build sustainable development. In consequence, it is required a high level of integration of economic, social, and environmental issues within a system which promotes participation and coordination between different levels of governance. To make this possible is the main challenge of present and future governments.

The Mancur Olson's distinction between the (often self-interested) few and the (perhaps publicly spirited, but usually apathetic) many results paradoxical applied to Peru. Olson writes:

The small oligopolistic industry seeking a tariff or a tax loophole will sometimes attain its objective even if the vast majority of the population loses as a result. The smaller groups ... can often defeat the large groups – the latent groups – which are normally supposed to prevail in a democracy. The privileged and intermediate groups often triumph over the numerically superior forces in the latent or large groups because the former are generally organized and active while the latter are normally unorganized and inactive.¹²²

In other words, the interest of the organized few usually over-rides the interest of the unorganized many. However, as Ann Brower and John Page explain, it would be a mistake to assume that all organized interest groups are narrowly self-interest to the point of eschewing altruism unilaterally, or that all latent and large groups are too apathetic to mobilize in support for landscape protection or poverty reduction, say.¹²³ In the context in Peru, it would be a similar mistake to assume that the few are only the small oligopolistic industry; indigenous peoples can be also considered the few

¹²² Mancur Olson, *The logic of collective action: Public goods and the theory of groups* Cambridge (1965) p.127-128

¹²³ Brower, Ann and John Page, *Property Rights across sustainable landscapes*; In: *Property Rights and Sustainability. The evolution of property rights to meet ecological challenges*, Edited by David Grinlinton and Prue Taylor Leiden – Boston (2011).

because they have self-interest in their survival as a community, motivating them to strengthen their organization.

In consequence, there is, at least, the coexistence of two small groups in Peru, which are constantly colliding between apparently irreconcilable interests: The oligopolistic industry and indigenous peoples. These groups are projecting their influences under the rest of the population, which is the majority living under poverty.

Recent governments have been influenced by the small oligopolistic industry. This relationship has achieved some goals in reducing poverty, but failed in granting equal opportunities for all and policies of universal scope. However, Indigenous peoples' organizations have created a very active net with other social actors and increased awareness on social and environmental issues. They have been able to stop unsustainable developmental projects and set a clear counterweight against developmental attempts that not consider social rights.

The last presidential election in Peru has showed this new relationship, and the majority has sent a clear call for social inclusion. After the last presidential election, the new Congress approved the law, which regulates the right to prior consultation to indigenous peoples recognized in the ILO Convention 169 (The approval by unanimous vote in Congress is a significant political fact for Latin America and the history of implementation of the ILO Convention 169). Recently, the government has also approved the regulation of this Law. However, the effective implementation of this regulation is the biggest challenge of the current government. The implementation of this instrument should ensure a productive and beneficial dialogue between the state, the oligopolistic groups and indigenous communities in order to protect the environment, respect social rights and achieve development.