

1-2-2018

The Creation of the Sierra Del Divisor National Park: The Conservation of Foreign Investment in Peru, or How a National Park Neglects to Fully Protect Natural Resources or Indigenous Communities

Charles Short

Follow this and additional works at: <https://repository.law.miami.edu/umialr>

 Part of the [Comparative and Foreign Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Charles Short, *The Creation of the Sierra Del Divisor National Park: The Conservation of Foreign Investment in Peru, or How a National Park Neglects to Fully Protect Natural Resources or Indigenous Communities*, 49 U. Miami Inter-Am. L. Rev. 167 (2018)
Available at: <https://repository.law.miami.edu/umialr/vol49/iss1/8>

This Notes and Comments is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The Creation of the Sierra Del Divisor National Park: The Conservation of Foreign Investment in Peru, or How a National Park Neglects to Fully Protect Natural Resources or Indigenous Communities

Charles Short

I.	INTRODUCTION.....	168
II.	PERUVIAN LAWS GOVERNING THE ENVIRONMENT AND INDIGENOUS PEOPLE	170
	1. <i>The Constitution of Peru</i>	170
	2. <i>Prior Consultation</i>	172
	3. <i>The Implementation of Prior Consultation in Peru</i>	173
	4. <i>Peru’s Mining Laws</i>	176
	5. <i>Required Environmental Impact Studies</i>	178
III.	THE CREATION OF THE SIERRA DEL DIVISOR NATIONAL PARK.....	180
	1. <i>The Zoning of the Sierra Del Divisor National Park</i>	182
	2. <i>Comparing the Zoning of the Sierra Del Divisor with Peru’s Environmental and Indigenous Rights Laws</i>	184
	3. <i>Comparing the Zoning Specifications to Provisions in the Peruvian Constitution Protecting the Environment and Indigenous Populations</i>	186
	4. <i>Peru Public Policy Regarding Foreign Investment and the Zoning of the Sierra Del Divisor</i>	188
IV.	THE EFFECT ON PACIFIC EXPLORATION AND MAPLE RESOURCES CONCESSIONS ACCORDING TO THE ZONING PROPOSAL	190
V.	RESOLUTION OF THE CONFLICT.....	192
	1. <i>Recognize Indigenous Rights to Ancestral Lands and</i>	

<i>Strictly Adhere to Legislation Aimed to Protect the Environment and Indigenous Communities</i>	193
2. <i>Retroactive Application of Prior Consultation</i>	195
VI. CONCLUSION	197

I. INTRODUCTION

Peru is a country made of rich history and rich resources. The promise of these rich resources is what first drew the early Spanish explorers to seek out the South American continent. Francisco Pizarro was one of many Spanish explorers to make their way to the New World in search of gold and land. When Pizarro finally landed close enough to the Incan empire, he carried with him a royal mandate giving him the title of Governor of Northern Peru.¹ The beginning of outside demand for the Peruvian resources started with the ransom and execution of the Incan emperor, Atahualpa.² Pizarro's bloody takeover was the first foreign investment in Peru's history and certainly not the last. Peru has gone through some changes since Pizarro in 1532.³ Natural resources are still abundant in Peru and still attract foreign investment—although not in the same manner as Pizarro. The resources that are the focus of the foreign investment detailed in this article are not the gold and silver Pizarro killed for in the Andes, but oil and gas in the Amazon.⁴

In an effort to protect parts of the Amazon Basin, the Peruvian government created a national park in November 2015 that it named *Parque Nacional Sierra del Divisor* (“Sierra del Divisor National Park”).⁵ The park is 1.4 million hectares in total area and sits on the border between Peru and Brazil.⁶ The park's stated objective in *Decreto Supremo 014-2015* is to safeguard the existing biological and

¹ DANIEL MASTERSON, *THE HISTORY OF PERU* 42 (Thackeray & Findling eds., 2009).

² *Id.*

³ *Id.*

⁴ David Hill, *National Parks Must Be For People, Plants, Pumas—not Big Oil*, *THE GUARDIAN*, August 21, 2016, (last visited Oct. 11, 2016) available at <https://www.theguardian.com/environment/andes-to-the-amazon/2016/aug/21/national-parks-people-plants-pumas-big-oil>.

⁵ *Decreto Supremo 014-2015-MINAM* (Peru) (2015).

⁶ *Id.*

ecological processes within the park for the benefit of the local population.⁷ Along with protecting the ecosystem of the Amazon Basin, the Sierra del Divisor also serves to protect indigenous people of the region, specifically the Matsés.⁸ The Peruvian government has granted concessions to Pacific Exploration and Production (“Pacific”) and Maple Resources Corporation (“Maple”) near Matsés ancestral land in circumvention of Peru’s own laws and policy.⁹

The Peruvian government has a history of allowing foreign corporations to extract minerals within its borders. For instance, Pacific, a Canadian company, and U.S.-based Maple own concessions within the Sierra del Divisor.¹⁰ To this date, neither company has begun to explore for oil and gas in the park, but according to the zoning directives, both companies are able to explore and extract their concessions within the Sierra del Divisor.¹¹

This article will provide insight into the standing of all parties involved in the creation of the Sierra del Divisor National Park—the Peruvian government, the foreign oil and gas companies, and the indigenous people living within the park. Part II will examine the laws and regulations surrounding environmental issues and mineral concessions, including the rights of the indigenous population. Part III will go into detail about the creation of the Sierra del Divisor and how the zoning of the park reconciles with Peruvian laws and policy regarding the environment and the indigenous population, as well as Peru’s attempts to promote foreign investment in its natural resources. Part IV will analyze how the Sierra del Divisor affects Pacific and Maple, as both companies hold concessions inside the newly created national park. Part V will predict the likely outcome to this potential conflict and propose an outcome that allows Peru to follow its policies protecting the indigenous population and the Amazon Basin.

⁷ *Id.* at art. 2.

⁸ Decreto Supremo 014-2015-MINAM (Peru) (2015).

⁹ *See* Hill, *supra* note 4.

¹⁰ *Id.*

¹¹ *Id.*

II. PERUVIAN LAWS GOVERNING THE ENVIRONMENT AND INDIGENOUS PEOPLE

Peru is home to a diverse landscape—53% of the country is covered by forests and part of the Andes mountain chain resides within its borders.¹² Peru is the homeland of the Incas, an advanced civilization that was colonized by Spain in the 1500s.¹³ Descendants of the Incas have been living on the fringes of society ever since, with some of the population living in the forested areas of the country.¹⁴ The forest, specifically the part of the Amazon rainforest within Peru's borders, is home to a diverse set of flora and fauna unique to the region.¹⁵ According to the CIA World Factbook, 45% of the Peruvian population is of Amerindian descent, specifically descendants of the Incas and other ancient tribes.¹⁶ With such a large population of indigenous people, the Peruvian government's incentive to protect the group is high, especially when that population is in the crosshairs of modernization and is facing encroachment by potentially hazardous mining operations.

1. *The Constitution of Peru*

Modernization is often at odds with conserving the environment we live in. As governments are faced with growing populations and the pressures of modernity, the need to maximize a country's resources is increased. When a government, such as Peru's, has an abundance of natural resources and indigenous populations that rely on those resources to survive, it is the government's responsibility to strike a balance between promoting the extraction of natural resources and protecting the indigenous population affected by the extraction process. Often, governments pass legislation to limit the negative effects of hazardous operations, such as natural resource

¹² Central Intelligence Agency, *Peru*, in *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/pe.html> (last visited October 12, 2016) [hereinafter Central Intelligence Agency].

¹³ See generally MASTERSON, *supra* note 1.

¹⁴ Central Intelligence Agency, *supra* note 12.

¹⁵ Convention on Biological Diversity, *Peru-Country Profile*, <https://www.cbd.int/countries/profile/default.shtml?country=pe> (last visited October 12, 2016).

¹⁶ Central Intelligence Agency, *supra* note 12.

extraction, but in Peru the government has a greater obligation because protecting both the indigenous population and the environment are major priorities outlined in its Constitution.¹⁷

Congress enacted the current version of Peru's Constitution on December 29, 1993.¹⁸ Article 68 of the Constitution dictates that the "State is obliged to promote the conservation of biological diversity, and protected natural areas."¹⁹ More specifically, the Constitution includes a necessary and proper provision that allows the government to enact laws to promote the preservation of the Amazon region in Peru.²⁰ Thus, the highest law of the land mandates that the government of Peru take action to conserve its protected natural areas and its unique and diverse environment. By comparison, the United States has elected to protect its environment by means of federal statutes and express and implied powers, rather than the full weight of the U.S. Constitution.²¹

The Peruvian Constitution also contains provisions protecting the indigenous population. The Constitution gives the indigenous communities full autonomy to control their lands.²² Additionally, the Constitution mandates that the "State respect the cultural identity of the rural and native communities."²³ The Constitution of Peru expressly protects the environment, as well as isolation and respect for the indigenous population.

¹⁷ CONSTITUCION POLITICA DEL PERU [POLITICAL CONSTITUTION OF PERU] (Peru) (1993) available in an official English translation at http://www.congreso.gob.pe/Docs/files/CONSTITUTION_27_11_2012_ENG.pdf, [hereinafter Constitution of Peru].

¹⁸ *Id.*

¹⁹ *Id.* at art. 68.

²⁰ *Id.* at art. 69 ("The State promotes the sustainable development of the Amazonia by means of appropriate legislation.").

²¹ *See generally* Jonathan Adler, Constitutional Considerations: State vs. Federal Environmental Policy Implementation (prepared statement as testimony in front of the House Subcommittee on Environment and the Economy) (July 11, 2014), available at <http://docs.house.gov/meetings/IF/IF18/20140711/102452/HHRG-113-IF18-Wstate-AdlerJ-20140711.pdf> (discussing ways Peru's federal government can dictate environmental policy using the Commerce and Spending Clauses of the Constitution).

²² CONSTITUTION OF PERU, *supra* note 17, at art. 89.

²³ *Id.*

2. *Prior Consultation*

Peru's indigenous population, especially those who live in the Amazon, have a special connection to the forest and the environment. The Matsés live within the borders of the Sierra del Divisor, and therefore, would be most affected if the holders of the oil and gas concessions in the area decided to explore and extract resources. To include groups like the Matsés in deciding what to do with Peru's natural resources, the government passed a law called *Ley del Derecho a la Consulta Previa a los Indígenas u Originarios* (prior consultation).²⁴

Prior consultation directs the government to consult the indigenous population regarding a proposed legislative or administrative measure that directly affects them.²⁵ Prior consultation's intent is for the State and the indigenous population to reach an agreement over the implementation of certain laws and procedures that have a direct impact on the indigenous people.²⁶ Most of the activities affected by consultation are government actions granting mineral extraction rights to corporations or some other natural resource harvesting concessions granted by the government of Peru.

This fostered relationship between the State and the indigenous population is to be forged with guiding principles, such as opportunity, good faith, and flexibility.²⁷ The State has outlined a plan on how to practically implement this consultation. The consultation process involves presenting the proposed action to the affected indigenous group for their own internal evaluation.²⁸ After the indigenous group has had time to evaluate the new government action, representatives from the affected indigenous group will meet with government representatives to discuss the matter before it is enacted as law.²⁹

Creating a step in the process to consult the indigenous groups before enacting measures that directly affect their lands and heritage is not enough. There must also be reprisal measures to give the indigenous groups a way of challenging the State's implementation of

²⁴ LEY NO. 29785 (Peru) (2011).

²⁵ *Id.* at art 1.

²⁶ *Id.* at art 3.

²⁷ *Id.* at art 4.

²⁸ LEY NO. 29785, art. 8 (Peru) (2011).

²⁹ *Id.*

a law or regulation. Prior consultation contains a provision that allows an indigenous group to challenge the proposed law by appealing to the Viceministry of Intercultural Affairs within the Ministry of Culture, which handles indigenous matters before challenging the government action in the court system.³⁰ The thrust of prior consultation is to foster agreement between the State and the indigenous population affected by the proposed government action, but the ultimate decision still remains with the State.³¹ However, the State must show that an agreement was sought, and in the event of no agreement, must take care to ensure the collective affected rights of the indigenous population are protected.³² Of course, any agreement reached between the State and the indigenous population is binding on both parties.³³

3. *The Implementation of Prior Consultation in Peru*

Before the enactment of prior consultation, the government awarded concessions to companies and then left it up to the companies to negotiate with the indigenous communities surrounding their operations.³⁴ The prior consultation legislation was passed in 2011, but it was not until April 2012 that regulations were passed providing guidance to the government agencies on how to implement the procedure of prior consultation.³⁵ The time lapse was due in large part to consulting with the indigenous organizations over how the law should be implemented.³⁶ Despite prior consultation giving a voice to the indigenous population, only twenty-three prior consultation processes took place from May 2013 to December 2015, initiated in only seven of Peru's twenty-five regions.³⁷

³⁰ LEY NO. 29785, art. 9 (Peru) (2011).

³¹ LEY NO. 29785, art. 15 (Peru) (2011).

³² *Id.*

³³ *Id.*

³⁴ CYNTHIA A. SANBORN AND ÁLVARO PAREDES, CONSULTA PREVIA, AT PAGE 3, available at <http://www.as-coa.org/sites/default/files/ConsultaPreviaPeru.pdf> (last visited on November 15, 2017).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

The Directorate of Prior Consultation within the Viceministry of Intercultural Affairs, created in 2013, implements prior consultation.³⁸ The Directorate is responsible for educating and informing the indigenous representatives of their rights under prior consultation as well as keeping a database of officially recognized indigenous communities who are afforded the prior consultation process.³⁹ Although the Directorate is responsible for providing training and information to the indigenous communities, it is up to the governmental agencies granting concessions or proposing regulations that affect indigenous communities to apply prior consultation.⁴⁰

In the case of mineral extraction rights and concessions, the Ministry of Energy and Mines is responsible for granting companies concessions.⁴¹ The Ministry of Energy and Mines has been wary of applying prior consultation for various reasons. First, most of the concessions were granted before prior consultation was passed in 2011.⁴² Second, the Ministry of Energy and Mines argues that concessions do not fall under the purview of prior consultation because concessions do not authorize companies to explore or extract resources from the land.⁴³ Finally, the Ministry of Energy and Mines argues that in some cases where the prior consultation process was sought, the operations do not affect officially recognized indigenous communities.⁴⁴

Some major projects have undergone the prior consultation process since the law was enacted. One example is the creation of the Majjuna-Kichwa Regional Conservation Area, which was finally created by law in 2015 after seven years of planning and lobbying by the indigenous communities of the region.⁴⁵ The government had reservations about creating the conservation area because it planned to build a major highway that would potentially split the park in two.⁴⁶ The government approved the reserve, stipulating that the re-

³⁸ *Id.* at 9.

³⁹ SANBORN, *supra* note 34.

⁴⁰ LEY NO. 29785, art. 19 (Peru) (2011).

⁴¹ SANBORN, *supra* note 34, at 10.

⁴² *Id.*

⁴³ *Id.* at 11.

⁴⁴ *Id.*

⁴⁵ *Id.* at 23.

⁴⁶ SANBORN, *supra* note 34, at 23.

serve would not limit public works projects or other economic interests in the area, including the exploration and extraction of natural resources, provided, of course, that the government-approved projects do not violate prior consultation or conservationist principles.⁴⁷

The next important project involved an oil and gas concession and four indigenous community organizations as well as a foreign investor and the state-owned energy company, PERUPETRO. The consultation process regarding this concession, owned by a foreign investor, was drawn-out and involved multiple false starts by the government.⁴⁸ The concession (in the Loreto region of Peru) was up for a re-licensing bidding, but before the bidding could take place, the indigenous communities staged a protest to force the government to consult with them before opening up the bidding.⁴⁹ After a month of protest, the government reluctantly gave in to the indigenous demands and sent a delegation to negotiate terms of the bidding process.⁵⁰ After this consultation, an Argentine company won the bid for the concessions, but again the process was rebuffed due to lack of an agreement with two of the four indigenous organizations affected.⁵¹ Finally, in September 2015, an agreement with all of the indigenous organizations was made and included a \$42 million public investment package for damage to the environment caused by the extraction on the land.⁵² The agreement left the responsibility of the Argentine company in operating the concession unresolved.⁵³

Perhaps the greatest shortcoming of prior consultation is the lack of retroactive application of the law. In 2015, a Canadian mining company planned to begin extraction on a lot in Lambayeque upon which it had held a concession since 2001.⁵⁴ The Cañaris people, a group indigenous to the region, sought consultation before the company began extraction operations but the Ministry of Energy and Mines refused consultation, stating that prior consultation did not apply retroactively.⁵⁵ The indigenous communities did not accept

⁴⁷ *Id.* at 24.

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 26.

⁵⁰ *Id.* at 27.

⁵¹ SANBORN, *supra* note 34, at 27.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 28.

this answer and have continued in their disapproval of the mine. To date, the mine is not operational due to funding issues and lack of local support despite the government's position that the Cañaris do not have a right to the prior consultation process over this concession.⁵⁶

Prior consultation is a fairly new measure that the Peruvian government has put in place and seems to be empowering the indigenous communities affected by natural resource extraction and government measures. However, where foreign investment is involved, the indigenous communities are rarely consulted and receive a fair deal regarding the mining and use of their historic lands. The Peruvian government created the Viceministry of Intercultural Affairs in 2013, which has tried to restore some balance to the conflict between the government and foreign companies and the indigenous communities whose land rights are often up for grabs. However, there is much room for improvement by the Peruvian government to protect its indigenous communities' land rights.

4. *Peru's Mining Laws*

The General Mining Law, enacted as *Decreto Supremo No. 014-92-EM*, regulates the mining industry in Peru. This law outlines the rights and regulations of companies seeking to conduct mining operations in Peru.⁵⁷ Notably missing from the law are any protections for the indigenous population, which the mining operations might affect.⁵⁸ The law goes into extensive detail regarding the various benefits bestowed on these companies and the government's role in facilitating the industry.⁵⁹ The General Mining Law also includes a section related to protecting the environment from the extraction of natural resources within Peru's borders.⁶⁰

Title 5, Article 37, lists the benefits that owners of mining concessions are entitled to and provides them wide latitude to facilitate mining operations.⁶¹ For example, Article 37 grants the concession

⁵⁶ SANBORN, *supra* note 34, at 30.

⁵⁷ DECRETO SUPREMO NO. 014-92-EM (Peru)(1992).

⁵⁸ *Id.*

⁵⁹ *Id.* at Tit. 5, art. 37 (Peru)(1992).

⁶⁰ *Id.* at Tit. 15, art. 219-26 (Peru)(1992).

⁶¹ *Id.* at Tit. 5, art. 37 (Peru)(1992).

holders the right to seek easements on third party lands that are necessary for the rational use of the concession from Peru's mining authority, so long as they compensate third party land owners.⁶² Additionally, this Article grants the concession holder the right to seek from the mining authority any adjacent real estate for the rational benefit of working the concession, provided compensation is paid for the real estate.⁶³ It should be noted that easements are granted under this Article without any mention of who may live on those adjacent lands or easements.⁶⁴ Specifically, it affords no explicit protection to the indigenous population that might be affected by the rights of concession holders.

The General Mining Law not only regulates and defines the rights of concession holders but also confers substantial tax benefits to mining companies. For example, the government will afford the company deductions to internal taxes that affect its mining activity, regardless of whether the product of the mining activity is exported or sold within the country.⁶⁵ Additionally, the government promises non-discrimination against foreign companies regarding regulation or other economic policy measures for concession holders.⁶⁶ To cap it all off, the final sentence of the Article is a guarantee from the government that these benefits will remain stable for the holders of concessions and companies conducting mineral activities in Peru.⁶⁷

The General Mining Law not only prescribes rights and benefits on concession holders and mining companies. Some of its provisions also ensure that these mining operations do not adversely impact the environment.⁶⁸ However, as noted previously, there is no mention of the indigenous population when implementing these restrictions. In Title 15, the law sets out restrictions based on environment protection.⁶⁹ However, the law does not restrict mining activity or the rights of concession holders to operate within a national park created after the activity or concession was granted, provided the

⁶² *Id.* at Tit. 5, art. 37 (Peru)(1992).

⁶³ DECRETO SUPREMO NO. 014-92-EM, §7 (Peru)(1992).

⁶⁴ *Id.* at Tit. 5, art. 37 (Peru)(1992).

⁶⁵ *Id.* at Tit. 9, Art. 72, § C.

⁶⁶ *Id.* at §H.

⁶⁷ *Id.* at §L.

⁶⁸ DECRETO SUPREMO NO. 014-92-EM, Tit. 15 (Peru)(1992).

⁶⁹ *Id.*

activity follows the guidelines set forth in the Environmental Code, which must be followed for mining activities anywhere in the country.⁷⁰ Where these provisions seeking to protect the environment really take hold is in the granting of new concessions or mining rights. Here, the guidelines in the Environmental Code require an environmental impact study before such rights are granted.⁷¹

5. *Required Environmental Impact Studies*

The General Mining Law of Peru provides for companies holding mining concessions to submit environmental impact studies for approval by the Ministry of Energy and Mines and the Ministry of the Environment.⁷² The Ministry of Energy and Mines has implemented a regulation requiring concession holders, before exploration, to submit for their approval two environmental studies: the Environmental Impact Statement and a Semi-Detailed Environmental Impact Study.⁷³ If the Ministry of Mines and Energy does not approve a concession holder's environmental study, the concession holder may have its mining operations suspended or stopped altogether.⁷⁴ Concession holders must comply with the requirements set forth in *Ley No. 27446* regarding the contents of the Environmental Impact Statement.⁷⁵ The concession holders must prepare a statement that includes a description of the proposed action and the physical location of the area that will be affected, the nature of the environmental impact of the project, and a strategy and contingency plan to control the environmental impact of the operation.⁷⁶

Under *Ley No. 27446*, the relevant authority—and in the case of mining operations, the relevant authority is the Ministry of Energy and Mines—must take into account certain criteria before approving these studies. The criteria to be considered includes, among other things, the protection of natural protected areas and the protection

⁷⁰ *Id.* at art. 219.

⁷¹ *Id.* at art. 221.

⁷² *Id.*

⁷³ DECRETO SUPREMO 020-2008-EM, art. 21 (Peru) (2008).

⁷⁴ *Id.* at art. 46.

⁷⁵ *Id.* at art. 29.

⁷⁶ LEY NO. 27446, art. 10 (Peru) (2001).

of nearby communities' lifestyle that might be affected by the mining operations.⁷⁷ However, the considerations in the Environmental Impact Studies do not contain any explicit requirements to include the indigenous population that may be affected in the concession holder's operation plan. There is a requirement though to include a plan for citizen involvement in the concession holder's plan to manage the environmental impact.⁷⁸

Despite the broad inclusion of the citizen's involvement provision in *Ley No. 27446*, the law does not go far enough to offer explicit inclusion of the indigenous population in the mining operation's Environmental Impact Studies. As described above, there is precedent in Peruvian law for specifically protecting indigenous rights apart from the mainstream population that was not included when contemplating an Environmental Impact restriction on mining operations. Citizen participation is promoted throughout the projects to foster a relationship between the concession holder and the surrounding community; however, this is just to promote goodwill towards the concession holder.⁷⁹ Because the law gives the relevant agency the final decision to approve an operation, citizen participation or protest has little effect on the decision.⁸⁰ This is of considerable concern because there is longstanding conflict between the government and the indigenous population over property rights.⁸¹ The indigenous population does have rights to land—with limitations.⁸² For example, the indigenous population does not have subsurface rights to their land; instead they must seek concessions from the government to mine below.⁸³ Additionally, forestland may not be titled, but again the indigenous population may seek rights to use from the government.⁸⁴ Because the indigenous population tends to be more impoverished and isolated, it is difficult for them to dispute

⁷⁷ *Id.* at art. 5.

⁷⁸ *Id.* at art. 10.

⁷⁹ *Id.* at art. 14.

⁸⁰ DECRETO SUPREMO NO. 019-2009-MINAM, art. 70 (Peru) (2009).

⁸¹ USAID, LAND TENURE COUNTRY PROFILE: PERU, Sept. 2016, at pg. 7, available at https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Peru_Country_Profile.pdf (last visited on Jan. 21, 2017) [hereinafter USAID].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 8.

any boundary conflicts, thus eroding the protection of their ancestral land rights.⁸⁵ Starting from such a disadvantaged position, it is alarming that there are no explicit calls for concession holders to consider the indigenous populations of Peru in their Environmental Impact Studies.

The indigenous population in Peru is intimately tied to the country's environment.⁸⁶ Recent efforts have emphasized protecting the indigenous population and the environment from exploitation.⁸⁷ Prior consultation and the Constitution both offer explicit calls to protect the environment and the indigenous peoples. However, implementing these protections has been more difficult than just passing the measures into law. There are gaps to be filled between the written letter of the laws and regulations and the practice of fulfilling the protections promised to the populace. For a country trying to balance its natural and ancestral beauty with the promise of prosperity, the emphasis should be on providing real protections for its historical people.

III. THE CREATION OF THE SIERRA DEL DIVISOR NATIONAL PARK

On the border between Brazil and Peru is a large area of the Amazon rainforest, which is home to a large concentration of "uncontacted" indigenous people.⁸⁸ Uncontacted indigenous people refers to tribes that remain isolated with little or no contact with the outside world.⁸⁹ On November 8, 2015, then-President Ollanta Humala approved the creation of the Sierra Del Divisor National Park, updating its status from a reserve to a national park.⁹⁰ The focus of the creation of the park was to preserve the valuable ecosystem in the

⁸⁵ *Id.* at 2.

⁸⁶ Survival International, *The Amazon Uncontacted Frontier*, available at <http://www.survivalinternational.org/tribes/amazonuncontactedfrontier> (last visited Jan. 21, 2017).

⁸⁷ SANBORN, *supra* note 34, at 3.

⁸⁸ Survival International, *The Amazon Uncontacted Frontier*, *supra* note 86.

⁸⁹ Survival International, *Uncontacted Tribes*, available at <http://www.survivalinternational.org/uncontactedtribes/who-they-are> (last visited Feb. 17, 2017).

⁹⁰ DECRETO SUPREMO NO. 014-2015-MINAM (Peru) (2015).

Amazon Basin and to protect the area from illegal logging and mining, as well as from drug trafficking.⁹¹ The Sierra Del Divisor is home to 3,000 species of flora and fauna, as well as uncontacted indigenous people.⁹² Because the park has been created where it directly affects the indigenous people of the area, the law creating the park seeks to protect the indigenous people's rights⁹³ and specifically singles out the tribes that live in the Isconahua Reserve Territory.⁹⁴ Furthermore, the government has charged Peru's National Park Service (SERNANP) with implementing a Master Plan to determine how the newly created Sierra Del Divisor National Park will operate.⁹⁵ Currently, SERNANP is working to create the Master Plan. In the meantime, the agency has released documents of the proposed zoning of the national park.⁹⁶ The zoning plans for the Sierra Del Divisor have come under considerable pressure from organizations in Peru that represent these indigenous people, notably the Interethnic Association for the Development of the Peruvian Rainforest (AIDSESEP) and the Organización de los Pueblos Indígenas Oriente (ORPIO).⁹⁷

⁹¹ Colin Post, PERU REPORTS, *Peru Designates Sierra Del Divisor as national park*, Nov. 8, 2015, available at <http://perureports.com/2015/11/08/peru-designates-sierra-del-divisor-as-national-park/> (last visited Jan. 21, 2017).

⁹² *Id.*

⁹³ DECRETO SUPREMO NO. 014-2015-MINAM, art. 3 (Peru) (2015).

⁹⁴ *Id.*

⁹⁵ *Id.* at art. 4.

⁹⁶ MINISTERIO DEL AMBIENTE: SERVICIO NACIONAL DE ÁREAS NATURALES PROTEGIDAS POR EL ESTADO [MINISTRY OF THE ENVIRONMENT: NATIONAL SERVICE OF NATURAL AREA PROTECTION FOR THE STATE], ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR [ZONIFICATION OF THE NATIONAL PARK SIERRA DEL DIVISOR] (2016), available at <http://assets.survivalinternational.org/documents/1593/zonificacion-pnsd.pdf> (last visited on Nov. 18, 2016) [hereinafter ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR].

⁹⁷ ORGANIZACIÓN REGIONAL AIDSESEP UCAYALI, *Pronunciamiento*, July 11, 2016 (2016), available at <http://www.aidesep.org.pe/wp-content/uploads/2016/07/PRONUNCIAMIENTO-ORAU-SERNANP.pdf> (last visited on Jan. 21, 2017)[hereinafter AIDSESEP, *Pronunciamiento*]; ORPIO, *Pronunciamiento: Pueblos Indígenas en Aislamiento Voluntario Amenazados por la Zonificación del Parque Nacional Sierra Del Divisor y negligencia consabida del SERNANP*, Sept. 13, 2016, available at <http://www.orpio.org/2016/09/13/pueblos-aislados-expuesto-al-peligro-en-el-pnsd%e2%80%8f/> (last visited Jan. 21, 2017)[hereinafter ORPIO, *Pronunciamiento*].

1. *The Zoning of the Sierra Del Divisor National Park*

The Sierra Del Divisor covers an area of 1.3 million hectares⁹⁸ in the Amazon Basin on the Peru side of the Peru-Brazil border.⁹⁹ SERNANP has divided this area into four separate zoning specifications.¹⁰⁰ Those zones are designated as: *Zona de Protección Estricta (Strict Protection Zone)*, *Zona Silvestre (Wilderness Zone)*, *Zona de Recuperación (Recovery Zone)*, and the *Zona de Uso Especial (Special Use Zone)*.¹⁰¹ In total there are eleven zones, each designated according to the above titles. Specifically, there are two Strict Protection Zones, three Wilderness Zones, four Special Use Zones, and two Recovery Zones within the Sierra Del Divisor.¹⁰²

The Strict Protection Zones are set-up strictly for use by the indigenous communities in the Iconahua Reserve and prohibits access by anyone.¹⁰³ The first Strict Protection Zone covers an area of 20% of the total land of the park.¹⁰⁴ The second Strict Protection Zone is restricted to everyone except those conducting scientific research or research relating to monitoring environmental changes.¹⁰⁵ This area comprises about 11% of the total land area of the park.¹⁰⁶ The next three Wilderness Zones allow human presence but strictly prohibit the use or exploitation of any natural resources in the zone.¹⁰⁷ In the two Recovery Zones, hunting and fishing are restricted to the extent those activities harm the recovery of the ecosystem and fragile species.¹⁰⁸ Additionally, in the Recovery Zones, no extraction of timber is allowed.¹⁰⁹ The first Special Use Zone permits the extraction of

⁹⁸ 1.3 million hectares is roughly the size of Connecticut.

⁹⁹ Hill, *supra* note 4.

¹⁰⁰ ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96 at 3.

¹⁰⁶ *Id.*

¹⁰⁷ ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96, at 5.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

non-timber natural resources for personal use and commercial extraction requires local permission.¹¹⁰ The second Special Use Zone, the most controversial zone in the park, allows those who hold concessions granted before the creation of the park the right to extract natural resources from this area provided they use techniques that cause the least environmental impact during extraction.¹¹¹ Additionally, the Special Use Zones create a right of access for a SERNANP employee to monitor the mining activity of the concession holder to ensure minimal harm to the environment.¹¹² The third and fourth Special Use Zones follow the same restrictions as Special Use Zone-2.¹¹³ Combined, Special Use Zones two, three, and four make up over 40% of the park.¹¹⁴

While it is clear that the Peruvian government has set out to create a large swathe of protected lands within its portion of the Amazon Basin, it is also clear that those protections come with tag-along provisions that muddy the government's intentions. Creating a protected area, while also providing an avenue to cash in on foreign investment, does not signal to the indigenous population that the government seeks to protect this population from potentially destructive outside influences. Organizations that represent the indigenous peoples have already been asserting their opposition to these zoning specifications, specifically ORPIO and AIDSESEP.¹¹⁵ AIDSESEP is an organization that represents the rights of indigenous people and has declined to sign off on these specifications because it says the government's plan for the park does not consider certain tribes that live in voluntary isolation within the park.¹¹⁶ ORPIO raises similar arguments, asserting that the Master Plan and the park zoning exposes indigenous populations living in isolation to foreign extraction companies by not recognizing, in the Master Plan, the existence of these isolated indigenous communities.¹¹⁷ Prior consulta-

¹¹⁰ *Id.* at 9.

¹¹¹ *Id.* at 10.

¹¹² ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96, at 11.

¹¹³ *Id.*

¹¹⁴ *Id.* at 10.

¹¹⁵ AIDSESEP, *Pronunciamiento*; ORPIO, *Pronunciamiento*, *supra* note 97.

¹¹⁶ AIDSESEP, *Pronunciamiento*, *supra* note 97.

¹¹⁷ ORPIO, *Pronunciamiento*, *supra* note 97.

tion would still operate in this cross-section; however, prior consultation does not apply retroactively. Thus, within the Sierra Del Divisor, concessions granted before prior consultation was passed could allow for extraction without meaningful input from the indigenous communities that would be affected.¹¹⁸

2. *Comparing the Zoning of the Sierra Del Divisor with Peru's Environmental and Indigenous Rights Laws*

As mentioned briefly above, the zoning specifications of the Sierra Del Divisor seem to be at odds with the stated objectives and plain meaning of some of Peru's most environmental and indigenous population friendly laws. One example of this conflict between the Special Use Zones in the Sierra Del Divisor and other Peruvian law is the application of prior consultation, which provides a voice to recognized indigenous communities over mineral extractions affecting their communities. Another consideration is the Peruvian Constitution's mandate regarding the government's express obligation to protect the environment and the rights of the indigenous population.¹¹⁹ The General Mining Law does not provide any explicit protections for the indigenous communities, but does provide certain protections for the environment by forcing companies to submit Environmental Impact studies for approval before extraction.¹²⁰

Prior consultation attempts to include the indigenous population in the process of government approval of natural resource extraction in areas that affect their communities. Notably, there are limitations on the extent of prior consultation, namely that the law is not retroactive and that there is a work-around in place to allow the government to grant concessions and approve projects despite indigenous dissent.¹²¹ Pacific owned two concessions in the Sierra Del Divisor, dubbed Lots 135 and 137, although recently, in 2016, the Canadian

¹¹⁸ SANBORN, *supra* note 34.

¹¹⁹ CONSTITUTION OF PERU, *supra* note 17, at art. 68.

¹²⁰ See LEY NO. 27644 (highlighting the required contents for the environmental impact studies).

¹²¹ See LEY NO. 29785 (Peru) (2011); SANBORN, *supra* note 34.

company cancelled its contract to explore Lot 137.¹²² Pacific executed the contract with the Peruvian government for Lot 135 in 2007, before the passage of prior consultation.¹²³ The effects of prior consultation do not apply to Pacific's operations, although the company's cancellation of Lot 137 was due to increased pressure from the indigenous tribes and international aid organizations.¹²⁴ Despite responding to indigenous pleas to cancel Lot 137, Pacific plans to continue to develop on Lot 135 regardless of similar pressure and the existence of uncontacted tribes in the area.¹²⁵

Lot 135 falls between the cracks of the Peruvian government's attempts to protect its vulnerable indigenous population. Prior consultation does not apply to Pacific's operations, but the law did apply to the creation of the Sierra Del Divisor. The Peruvian government heard pleas from the indigenous communities and their representatives to create a protected area in the Amazon Basin to shield these communities from illicit activities that harm the indigenous communities' lifestyles.¹²⁶ However, the prior consultation process only went as far as the creation of the Sierra Del Divisor and is currently being implemented in creating a Master Plan for the park itself.¹²⁷ It remains to be seen if the zoning preferences that have been proposed will be implemented in the Master Plan despite stark opposition

¹²² Lewis Evans and Sarina Kidd, *Peru: National Park 'Master Plan' Opens Uncontacted Tribe's Land to Oil Drilling*, THE ECOLOGIST, Oct. 7, 2016, available at http://www.theecologist.org/News/news_round_up/2988208/peru-national-park-master-plan-opens-uncontacted-tribes-land-to-oil-drilling.html (last visited Jan. 23, 2017)[hereinafter EVANS AND KIDD].

¹²³ Hill, *supra* note 4.

¹²⁴ SURVIVAL INTERNATIONAL, *Victory! Canadian oil company pulls out of Matsés territory*, Sept. 16, 2016, available at <http://www.survivalinternational.org/news/11415> (last visited Jan. 23, 2017).

¹²⁵ Hill, *supra* note 4 ("Pacific does not accept that part of the park could eventually not be considered a protected zone simply because part of it is assigned to [our company] under block 135," says Pacific's Melissa Mackie. "We have sculpted our operations based on the existence of these environmental restrictions.").

¹²⁶ See DEFENSORÍA DEL PUEBLO, *DEFENSORÍA DEL PUEBLO PRESENTÓ DEMANDA DE AMPARO PARA LA CREACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR*, Oct. 22, 2015, available at <http://www.defensoria.gob.pe/modules/Downloads/prensa/notas/2015/NP-229-15.pdf> (last visited on Jan. 23, 2017).

¹²⁷ *Id.*

from the indigenous communities and their representatives. The requirement for prior consultation demands a dialogue with the indigenous population but it leaves the final decision in the hands of the government. The ultimate decision to continue with the zoning as planned belongs to the Peruvian government, which has not made a statement accepting the proposed zoning specifications for the Sierra Del Divisor.

3. *Comparing the Zoning Specifications to Provisions in the Peruvian Constitution Protecting the Environment and Indigenous Populations*

The Peruvian Constitution contains provisions that explicitly call for the government to make decisions with an eye towards protecting the environment and indigenous populations. Article 68 of the Constitution restricts the government in an effort to protect the environmental concerns of Peru: the “State is obliged to promote the conservation of biological diversity, and protected natural areas.”¹²⁸ However, the Special Use Zones in the proposed zoning specifications permit concession holders, who had concessions prior to the creation of the park, to conduct mining operations.¹²⁹ It is difficult to reconcile this capitulation from the government, considering the Constitutional provision in Article 68. Allowing Pacific to drill for oil, within a national park that was created to protect a large area of the Amazon Basin and the resident indigenous communities, does not “promote the conservation of biological diversity, and the protected natural areas.”¹³⁰

The environmental impact of drilling for oil is well-documented and even well-maintained sites pose a major threat to the environment. The most overlooked environmental impact from oil drilling operations occurs with the installation of the infrastructure to begin extraction.¹³¹ For example, trees and brush must be cleared to allow

¹²⁸ CONSTITUTION OF PERU, *supra* note 17, at art. 68.

¹²⁹ See ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96.

¹³⁰ CONSTITUTION OF PERU, *supra* note 17, at art. 68.

¹³¹ RAINFOREST FOUNDATION US, *Oil*, available at <http://www.rainforestfoundation.org/effects-oil-drilling-0/> (last visited Jan. 23, 2017); see generally CHRISTOPHER BARBER, MARK COCHRANE, CARLOS SOUZA JR., AND WILLIAM LAURENCE, *Roads, deforestation, and the mitigating effect of protected areas in*

the machinery to be put in place, which changes the landscape and forces out wildlife from the area.¹³² Access roads are not the only negative externality associated with oil drilling, there are also risks of oil spills, and heavy metal run-off from the oil extraction process that enter the ecosystem.¹³³ The strain on the environment as a result of oil drilling is considerable in less bio-diverse areas, but allowing these operations in an area designated a national park for the purpose of protecting the unique environment of the Amazon is counter-intuitive.

Notwithstanding the government's obligation to protect the environment, the Constitution also contemplates the government taking a role in protecting the indigenous communities in Peru. Article 89 of Peru's Constitution mandates that the government "respect the cultural identities of the rural and native communities."¹³⁴ The Special Use Zones, as proposed, permit concession holders to conduct mining operations within ancestral lands of uncontacted tribes, namely the uncontacted sect of the Matsés tribe.¹³⁵ Parts of the Matsés tribe not living in isolation and their representatives have confronted Pacific directly on this issue.¹³⁶ Not only did the government create zones that allow mining operations to occur within the area of the national park, it did so without consulting the indigenous community beforehand.¹³⁷ One could hardly call unilateral creation of zoning specifications for mining operations that would directly affect the nearby indigenous communities respect for the cultural identities of the native communities.

The environmental concerns attributable to oil drilling not only affect the ecosystem of the Amazon Basin, but also negatively impact the indigenous communities that rely on that fragile ecosystem. The heavy metals that seep into the environment affect the indigenous population that relies on the now-contaminated water and fish

the Amazon, 177 *BIOLOGICAL CONSERVATION* 203-09, Sept. 2014, available at <http://www.sciencedirect.com/science/article/pii/S000632071400264X> (last visited Jan. 23, 2017)[hereinafter RAINFOREST FOUNDATION, *Oil*].

¹³² RAINFOREST FOUNDATION, *Oil*, *supra* note 131.

¹³³ *See id.*

¹³⁴ CONSTITUTION OF PERU, *supra* note 17, at art. 89.

¹³⁵ *See* AIDSESEP, *Pronunciamiento*, *supra* note 97.

¹³⁶ EVANS AND KIDD, *supra* note 122.

¹³⁷ *See* ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96.

for sustenance.¹³⁸ The roads and machinery designed to extract oil intrude on these communities' recognized autonomy and desire to remain isolated. The Peruvian government is responsible for granting concessions for mineral extraction as well as for zoning the newly created national park, even though the government also has the responsibility to adhere to its Constitution and respect the rights of the indigenous communities.

4. *Peru Public Policy Regarding Foreign Investment and the Zoning of the Sierra Del Divisor*

The Peruvian economy has been a large beneficiary of foreign investment, particularly in natural resource extraction. This is evidenced by the various tax incentives for foreign natural resource extraction companies and various laws aimed at promoting investment in Peru's natural resources.¹³⁹ The government has offered guarantees of stability in the country's favorable tax code towards foreign investors to ensure that changes in government do not affect the benefits afforded to foreign investors.¹⁴⁰ The government has passed pro-foreign-investment legislation to ensure that foreign companies receive domestic status from the government as well as other benefits, such as no restrictions on repatriation of earnings, international transfers, or currency exchanges.¹⁴¹ Peru has made foreign investment a priority, as it is a way to provide economic stability for the country.¹⁴² The largest percentage of the foreign investment in Peru is concentrated in mining at 23%, and petroleum extraction is around 3%.¹⁴³ Peru has opened its borders to foreign companies seeking to extract its natural resources. The only question that remains is to what extent Peru will promote this type of investment.

¹³⁸ RAINFOREST FOUNDATION, *Oil*, *supra* note 131.

¹³⁹ See DECRETO SUPREMO NO. 014-92-EM, Tit. 5, art. 37, § 3 (Peru) (1992); see generally MINISTRY OF FOREIGN AFFAIRS PERU, EY, AND PERÚ PETRO, *Peru's Oil & Gas Investment Guide 2016/2017*, Feb. 2016, pp. 75-92, available at <http://lima.be.mfa.gov.tr/images/localCache/12/5de88bf5-4056-4ca7-b2fa-6dc53a75bc8d.pdf> (last visited on Jan. 23, 2017).

¹⁴⁰ MINISTRY OF FOREIGN AFFAIRS PERU, *Peru's Oil & Gas Investment Guide 2016/2017* at 28.

¹⁴¹ See *Id.*

¹⁴² *Id.* at 19.

¹⁴³ *Id.* at 27.

Until recently, the indigenous communities had to rely on only the promise of the government to protect their rights as citizens of Peru, despite being among the most vulnerable of the population. Prior consultation did not become law until 2011,¹⁴⁴ giving the indigenous communities a formal voice in matters affecting them. There has been longstanding tension between modernization and exploitation of natural resources and the indigenous communities. There is some progress in recognizing the land rights of indigenous communities living in the Amazon Basin, but those rights are small and difficult for these rural—impoverished by modern standards—indigenous communities to defend. Despite the government recognizing the land rights of the indigenous communities, the government retains title to all natural resources and subsoil rights in the land.¹⁴⁵ Additionally, when comparing the number of indigenous communities whose land titles the government formally recognizes to the number of corporations granted mining concessions in the Amazon Basin, the difference is staggering. According to a 2015 study by AIDSESEP and the Rainforest Foundation US, since 2007 only 50 land titles were granted to indigenous and rural communities while, during that same period, 35,658 mining concessions were granted.¹⁴⁶

While the Peruvian government openly supports the recognition of indigenous communities and writes laws to protect their rights, it simultaneously promotes natural resource extraction—often adverse to the very same indigenous communities it is charged with protecting. These decisions have given indigenous populations a miniscule voice compared to the natural resource extraction companies, conducting mining operations that greatly affect the indigenous people's land. Retaining the subsoil and natural resource rights to all land owned by the indigenous communities serves the government's policy of supporting foreign investment, unfortunately at the expense of indigenous communities. The zoning specifications should

¹⁴⁴ See LEY NO. 29785 (Peru) (2011).

¹⁴⁵ See USAID, *supra* note 81.

¹⁴⁶ AIDSESEP, ALTO TAMAYA SAWETO, AND RAINFOREST FOUNDATION US, *Peru at the Climate Crossroads: How Saweto and Indigenous Communities Can Guide Peru Down the Right Path*, 2015, available at http://dev.rainforestfoundation.org/wp-content/uploads/2015/12/climate_crossroads_20pp_CMYK.pdf (last visited Jan. 24, 2017).

not seem shocking because of the government's current use of prior consultation and the General Mining Laws, but nonetheless they are because of their effects on the livelihood of the indigenous communities.

IV. THE EFFECT ON PACIFIC EXPLORATION AND MAPLE RESOURCES CONCESSIONS ACCORDING TO THE ZONING PROPOSAL

Currently, two oil and gas companies hold concessions within the Sierra Del Divisor National Park: Pacific and Maple.¹⁴⁷ Pacific held two concessions in the park, Lot 135 and Lot 137, but it cancelled Lot 137 due to pressure from indigenous communities.¹⁴⁸ Maple owns what is called Lot 31-B,¹⁴⁹ which is substantially smaller and located in Special Use Zone-3.¹⁵⁰ Currently, Pacific has stated that it is in force majeure and does not plan to extract oil from the lot.¹⁵¹ Maple first acquired Lot 31-B in 1994 and has already been extracting oil from it.¹⁵² In 2010, Maple was extracting 352 barrels of oil per day from Lot 31-B.¹⁵³

The zoning proposal of the Sierra Del Divisor accounts for the companies' concessions by creating the Special Use Zones around their concessions. Maple's Lot 31-B is in Special Use Zone-3 and Pacific's Lot 135 is in Special Use Zone-2.¹⁵⁴ The government has afforded Maple and Pacific considerable protection for their concessions by placing them in these zones because these zones allow the

¹⁴⁷ Hill, *supra* note 4.

¹⁴⁸ See LEY NO. 29785 (Peru) (2011).

¹⁴⁹ Hill, *supra* note 4.

¹⁵⁰ See ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra*, note 96.

¹⁵¹ PACIFIC EXPLORATION & PRODUCTION, *Management Discussion and Analysis*, November 14, 2016, available at <http://www.pacific.energy/content/uploads/2016/11/Pacific-EP-Interim-MDA-Nov-14-2016.pdf> (last visited Jan. 24, 2017).

¹⁵² SOURCE, *Oil Exploitation and Indigenous Rights in the Peruvian Amazon Forest*, at 21, available at <http://www.source-international.org/wp-content/uploads/2015/10/Oil-extraction-and-indigenous-rights-in-Peru.pdf> (last visited Jan. 24, 2017).

¹⁵³ *Id.*

¹⁵⁴ See ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra*, note 96.

concession holders to continue their operations following best practices to reduce environmental impact.¹⁵⁵ The only force stopping the companies from operating as usual is the indigenous communities protesting and pressuring the companies, which already led to Pacific cancelling Lot 137. Additionally, legislation has ensured that mining companies will not face any substantial changes in their tax benefits or other rights associated with holding a concession.¹⁵⁶

Furthermore, Maple and Pacific are protected from the rigors of prior consultation. In 2015, a Peruvian court refused to apply prior consultation retroactively for a concession granted in 2001.¹⁵⁷ This ruling provides protection for both companies, because their concessions date back to before the passage of prior consultation. Maple has already begun production on Lot 31-B and Pacific's Lot 135 has not yet begun operations, but both are still protected from the formal consultation of indigenous communities to conduct their operations. The oil companies are not completely free of the indigenous opposition as these communities still informally protest and disrupt operations. However, the ruling does allow the oil companies to operate freely without fear of government reprisals.

The election of President Pedro Pablo Kuczynski will put Pacific and Maple at ease because he has a very pro-foreign investment stance to spur economic growth in Peru.¹⁵⁸ Furthermore, the zoning of the Sierra Del Divisor, including the Special Use Zones, seems to be the kind of compromise between the environment and indigenous communities on one side and foreign investment that the new president seeks on the other. He has already commented that environmental standards are too strict to attract substantial foreign investment.¹⁵⁹ The installation of President Kuczynski will assure Maple and Pacific that their operations will be protected from government intervention.

¹⁵⁵ *Id.*

¹⁵⁶ See DECRETO SUPREMO NO. 014-92-EM, Tit. 5, art. 37, § 3 (Peru) (1992).

¹⁵⁷ See SANBORN, *supra* note 34.

¹⁵⁸ See Andres Schipani, *Pedro Pablo Kuczynski sworn in as Peru president*, FINANCIAL TIMES, July 28, 2016, available at <https://www.ft.com/content/a4d860f7-d080-3446-8620-a3a57ae42b37> (last visited on Jan. 24, 2017).

¹⁵⁹ Marco Aquino, *Peru's Kuczynski wants to relax air standards to spur refining*, REUTERS, July 13, 2016, available at <http://af.reuters.com/article/energyOilNews/idAFL1N19Z24H?pageNumber=1&virtualBrandChannel=0> (last visited on Jan. 24, 2017).

V. RESOLUTION OF THE CONFLICT

For Peru and many other countries with rich natural resources, the conflict between modernization and economic prosperity and conservation and protecting an ancestral way of life is nothing new. It has persisted since the beginning of human history, and Peru has faced this conflict repeatedly. This conflict takes shape over different projects, but the major players are usually the same. The cast of characters in this age-old conflict includes: the government (which has and continues to allow industry and modernization to push the indigenous communities to the side) and the indigenous people. It may be naïve to launch an argument advocating for indigenous rights in a national park created to protect the Amazon and the indigenous communities by saying, “They were there first!” But it is not naïve to point to the Constitution of Peru and prior consultation as starting points to ask the government to stand by its indigenous communities.

The conflict over the Sierra Del Divisor’s zoning will not be easily resolved. The laws of Peru protect both the foreign oil companies and the indigenous groups. Foreign investment and natural resource extraction are both positive aspects for a country’s economy. Cultural identity and protection of the most vulnerable population within that society are also important for the nation’s well-being. How does a government resolve a conflict where both outcomes are desirable?

President Kuczynski has made it his objective to spur foreign investment in the country’s natural resources and has decided to support legislation to relax some environmental standards to provide an easier path for foreign investors to bring their operations to Peru.¹⁶⁰ The former president of Peru, Ollanta Humala, decided it was in the country’s best interest to protect part of the Amazon Basin when he signed legislation creating the Sierra Del Divisor. But ever-cognizant of the economic incentives of foreign investment, the government zoned some parts of the new national park that overlap with oil and gas concessions to allow the concession holders to conduct operations inside the park. This is the government’s way of resolving both issues—force a coexistence between natural resource companies and the indigenous communities in the same space.

¹⁶⁰ See Schipani, *supra* note 158.

As discussed previously, prior consultation puts some of the power in the hands of the indigenous communities, but that power is often futile.¹⁶¹ The government holds the final say to grant concessions and approve operations, and governmental barriers are often in place that are difficult for indigenous communities to overcome. Land rights are also a concern for most indigenous communities because while the government recognizes their right to land, it ultimately holds the rights to natural resources and the area beneath the soil of these lands. The indigenous communities living in the Amazon rely on the ecosystem to sustain their way of life, yet they do not have full control over the land they inhabit.

1. Recognize Indigenous Rights to Ancestral Lands and Strictly Adhere to Legislation Aimed to Protect the Environment and Indigenous Communities

The following proposed solutions to these issues are all long-term fixes and will take some time to implement and take effect. The most effective way to ensure that indigenous communities have adequate protection is to recognize their rights to the land they have title to. Currently, a process is in place to register these indigenous communities' titles to the land they occupy.¹⁶² However, the issue is really with communities that live in isolation and are not recognized. Within the Special Use Zone-2 of the Sierra Del Divisor, a community of the Matsés is living in voluntary isolation and has not been recognized by the zoning of the Sierra Del Divisor.¹⁶³ The government recognizes the Matsés community, but there are sects within the Matsés that live in voluntary isolation.¹⁶⁴ The Peruvian government must take steps to officially recognize these communities, to protect their rights to the land, and to respect their cultural identity. The government does not currently recognize the existence of the Matsés community living in isolation within Special Use Zone-2 and instead, has established zoning regulations which allow private corporations to extract oil in the area surrounding the indigenous community. Again, the issue in this instance is not the legislation but the implementation. *Decreto Supremo No. 038-2001-AG*

¹⁶¹ See generally LEY NO. 29785, art. 15 (Peru) (2011).

¹⁶² See USAID, *supra* note 81, at 13.

¹⁶³ See ORPIO, *Pronunciamento*, *supra* note 97.

¹⁶⁴ *Id.*

recognizes and protects indigenous communities living in voluntary isolation within natural protected areas.¹⁶⁵ The failure to properly protect these indigenous communities' rights to their ancestral lands is not a failure of law but rather a failure of action.

Maple and Pacific both have rights afforded to them by contract and by law. The solution to this conflict must be born of compromise that benefits all parties. The government's wholesale cancellation of Lots 31-B and 135 would cause undue hardship on the companies and dampen Peru's ability to attract the foreign investment it seeks. However, potentially causing irreversible damage to the indigenous community and the Amazon rainforest would bring unwelcomed negative attention to both the government of Peru and the oil companies. Pacific has already cancelled its other lot within the Sierra Del Divisor amidst immense social pressure, but it still holds on to its other concession on Lot 135. Maple has been extracting oil from Lot 31-B since 1994. The General Mining Law¹⁶⁶ and the Special Use Zones¹⁶⁷ require that companies follow best practices and submit an Environment Impact Study before beginning operations. In the case of Pacific's Lot 135, the government should raise the safety standards of the operations and require the company to use indigenous communities nearby as consultants to ensure that Pacific does not encroach on or disturb the fragile ecosystem that provides for the communities living nearby. In the case of the uncontacted community in Special Use Zone-2, these indigenous consultants would come from the Matsés communities that are not living in isolation but are in the best position to ensure their rights are respected. This solution would be a fair compromise because the concessions were granted to Pacific and Maple before prior consultation, and the indigenous communities affected had no formal voice in granting the concession.

¹⁶⁵ See DECRETO SUPREMO NO. 035-2001-AG art. 90-91.

¹⁶⁶ See LEY NO. 27446, art. 10 (Peru) (2001).

¹⁶⁷ See ZONIFICACIÓN DEL PARQUE NACIONAL SIERRA DEL DIVISOR, *supra* note 96.

2. *Retroactive Application of Prior Consultation*

Prior consultation does not apply retroactively, which seriously hampers the indigenous communities' ability to negotiate formally.¹⁶⁸ Pacific has stated that it does not currently have plans for activity in Lot 135, but it holds the concession for 30 years for oil and 40 years for gas beginning when it signed the contract in 2007.¹⁶⁹ It can decide to begin production at any time without formally consulting the indigenous communities. The government should place a restriction within the zoning of the Special Use Zones to require formal consultation in accordance with the right to prior consultation before any new phase of activity on any concession within the Sierra Del Divisor. This will at least establish some form of control over the extraction operations that will affect indigenous communities within the park. Because the Sierra Del Divisor was created to cordon off this large area of the Amazon for conservation efforts, it would make sense to require the indigenous population's approval of any mining activities that take place in a sanctuary created, in part, to protect their well-being.

More to the point, the government in this scenario would be required to ensure that an agreement was in place before operations began. As it stands, prior consultation does not require an agreement to be in place before the government approves operations, only that a good faith effort to reach an agreement was made.¹⁷⁰ This proposed procedure would provide an incentive for oil companies to meet certain terms with the indigenous communities regarding their operations. Of course, for this consultation to occur, prior consultation will have to be applied retroactively, which may open current operations outside of the Sierra Del Divisor to the law's effects. Retroactive application of prior consultation was denied in Peru's courts, per the government's recommendation.¹⁷¹ To apply prior consultation retroactively, the indigenous communities' representatives would need to pressure Congress to pass regulations or legislation. Alternatively, the indigenous groups could find a project where retroactive application of prior consultation would fall in line

¹⁶⁸ See SANBORN, *supra* note 34, at 28.

¹⁶⁹ Hill, *supra* note 4.

¹⁷⁰ See LEY NO. 29785, art. 15 (Peru) (2011).

¹⁷¹ See SANBORN, *supra* note 34.

with the existing laws and regulation aimed at protecting the indigenous groups.

Retroactive application would not be detrimental to the promotion of foreign investment. It may slow down production initially, which might cause some foreign investment to leave, but it would ensure an ongoing formal dialogue between oil and gas companies and the indigenous communities who are affected by their operations. Requiring retroactive application of prior consultation would open concession holders to seek consultation from the indigenous communities on concessions the companies already have rights to. This would add more time to any project and hold up any activity on these concessions until an agreement is in place. Already, even without strict application of prior consultation, there are delays and cancellations of concession due to indigenous protests. Allowing the indigenous communities a more active role will improve public perception of both the Peruvian government and the extraction companies, while also assuring that once started, operations will continue without interruption because the companies would have an agreement with the indigenous communities.

After all, the indigenous communities are citizens of Peru and an important part of Peru's society and history. Furthermore, retroactive application of prior consultation could be limited to only operations and concession within national parks to ensure that disruption of mining operations outside of protected areas are not affected. Still, Lot 31-B in Special Use Zone-3 is in current operation and this makes it more difficult to resolve. However, retroactively applying the law of prior consultation within the Sierra Del Divisor will ensure that the indigenous communities have a formal voice in the continued extraction operations within the national park and will disrupt Maple's overall production the least.

The Matsés call for an outright annulment of Lot 135, but this is not a realistic solution that would be in line with Peru's policy and legislation geared towards promoting foreign investment in its natural resources.¹⁷² Not to mention, the negative effects of an annulment on Peru's credibility that could deter foreign investment. Yet, the government has constitutional authority to take steps to ensure

¹⁷² See Hill, *supra* note 4.

that the environment and the indigenous population are protected.¹⁷³ That being said, this is likely too drastic of a remedy that would negatively impact both foreign investment and the government's reputation for foreign investment.

VI. CONCLUSION

Peru's government is armed with adequate legislation and the means to protect its indigenous communities. It decided to create a national park to serve the dual goals of protecting its part of the Amazon rainforest and protecting its indigenous communities. The government then set up zoning specifications for the newly created Sierra Del Divisor, which opened over 40% of the park to oil and gas companies. Despite requiring prior consultation with the indigenous communities for government approval of concessions and mining activity and possessing the constitutional authority to protect the environment and indigenous communities, the government still seeks to promote natural resource harvesting while leaving indigenous communities to deal with the impact. Compromise can be struck between the two policy goals of the Peruvian government, but the path is through a true open dialogue with the indigenous communities. For too long, the indigenous communities lacked control over their ancestral land and, instead of offering a true forum to be formally heard, the government has continued to make decisions without them. It is time for the Peruvian government to stop sidelining the indigenous communities on this important issue of natural resource harvesting in lands that directly affect their way of life, and it is time involve indigenous leaders and representatives in the conversation.

¹⁷³ See CONSTITUTION OF PERU, *supra* note 17, at art. 68-89.