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civils, politiques, économiques, sociaux et culturels,
y compris le droit au développement**

Rapport du Rapporteur spécial sur les droits des peuples autochtones, M. James Anaya

Additif

La situation des droits des peuples autochtones au Pérou, eu égard aux activités des industries extractives* **

Résumé

Dans le présent rapport, le Rapporteur spécial examine la situation des droits des peuples autochtones au Pérou en se fondant sur les renseignements qu'il a obtenus au cours de sa visite dans le pays du 6 au 13 décembre 2013. L'objectif de cette visite était de s'informer de la situation des peuples autochtones dans le pays, en particulier des effets des activités des industries extractives et des processus de consultation et de participation menés dans ce contexte.

Au Pérou, les activités d'extraction engagées depuis de nombreuses années ont eu des conséquences sociales et environnementales dévastatrices sur plusieurs peuples autochtones du pays, qui n'ont que peu bénéficié de ces activités. Cette situation est à l'origine d'un niveau de mécontentement et de méfiance élevé vis-à-vis de l'État et du secteur minier, ce qui a donné lieu à de nombreux affrontements et manifestations. Malgré ces expériences négatives, il convient de relever que les peuples autochtones ne rejettent pas en bloc les activités d'extraction mais ont souligné que leurs droits dans ce contexte devraient être respectés.

* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le corps du rapport, qui figure en annexe, est distribué dans la langue originale et en anglais seulement.

** L'appendice du présent rapport est distribué tel qu'il a été reçu, dans la langue originale seulement.



Le Pérou fournit des efforts importants pour faire face aux problèmes liés à l'extraction de ressources naturelles qui touchent les peuples autochtones. Cependant, davantage d'efforts doivent être déployés pour s'assurer que les activités extractives sont menées dans le respect des droits des peuples autochtones, au moyen d'une action concertée et globale visant à répondre aux préoccupations des peuples autochtones et à assurer la paix sociale.

Annexe

[Espagnol et anglais seulement]

Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, on the situation of indigenous peoples' rights in Peru with regard to extractive industries

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I. Introduction

1. This report examines the situation of the rights of indigenous peoples in Peru on the basis of information obtained during the visit of the Special Rapporteur to the country from 6 to 13 December 2013. The purpose of this visit was to assess the situation of the country's indigenous peoples, especially in relation to the impact of the extractive industries and the consultation and involvement of indigenous peoples in that context.

2. During his visit, the Special Rapporteur held a series of meetings with various representatives of national and regional governments, indigenous peoples, civil society and private enterprises. These meetings took place in the city of Lima and in various towns, localities and indigenous communities in the departments of Puno, Cuzco and Loreto. The Special Rapporteur visited two sites in the Amazon that are symbolic of the situation faced by indigenous peoples with regard to hydrocarbon projects in Peru: the Camisea natural gas project in the department of Cuzco and the oil exploration area known as Block 1-AB (now Block 192) in the department of Loreto.

3. The Special Rapporteur wishes to thank the Government of Peru for its exemplary cooperation during the visit and for the information it provided, including after the visit, as well as the United Nations Development Programme for its invaluable help with the visit. He also wishes to express his appreciation to the Pluspetrol company for facilitating visits to its operations in Cuzco and Loreto and for the information it provided on its projects in these departments. Lastly, he wishes to express his gratitude to the indigenous peoples and organizations for their cooperation, for inviting him to visit their territory and for sharing their accounts, concerns and hopes with him.

II. The background of indigenous peoples and extractive industries in Peru

4. The present report concerns the indigenous peoples of Peru, that is, groups in various regions of the country who retain different ethnic and cultural traits that predate the colonial era. In Peruvian legal system, the term "peasant community" (*comunidad campesina*) includes the Aymara, Quechua and Uro indigenous communities of the Andean region, while the term "native communities" (*comunidades nativas*) covers the indigenous peoples of Peru's Amazon region. The 1993 Constitution recognizes the legal personality of peasant and native communities and guarantees their autonomy in respect of their organization, community work, the use and free disposal of their land and with regard to economic and administrative matters.¹

5. There are no precise data concerning the indigenous population in Peru. The only ethnic indicator used in the last national census in 2007 was the language learned during childhood. According to the figures of this census, 15.9 per cent of the population of Peru (or 3,919,314 people) learned an indigenous language during childhood, Quechua and Aymara in the Andean region being the most widely spoken indigenous languages.² Furthermore, according to a 2007 census specifically of Amazonian indigenous peoples, there were 332,975 individuals from 60 different indigenous peoples in that region.³

¹ Constitution of Peru, art. 89.

² National Statistics and Information Institute, 2007 National Censuses: Eleventh Population Census and Sixth Housing Census – Sociodemographic profile of Peru (2008), pp. 10 and 117.

³ National Statistics and Information Institute, Second Census of Indigenous Communities in the Peruvian Amazon, 2007, Vol. 1, December 2008, p. 12.

6. Many of the challenges that indigenous peoples face in Peru relate to the extraction of natural resources, which has a long history in the country and is of prime importance for the national economy. In recent years, over half the country's exports consisted of mineral or hydrocarbon products. According to 2011 figures of the Ministry of Energy and Mines, 11.54 per cent of the territory is under operating licence; 1.05 per cent is being explored or exploited, while an estimated 10 per cent of the territory has unexplored mining potential.⁴

7. There are no precise official figures regarding the percentage of licensed territory that concerns indigenous land, whether titled or held by custom. However, in terms of hydrocarbon operations, an estimated 88 per cent of licensed areas in the Amazon region that are currently being explored or exploited overlap with the titled land of indigenous communities, while approximately 32 per cent of licensed areas overlap with reservations set up for peoples living in a situation of isolation or initial contact.⁵

8. As will be noted in chap. IV, in recent years many protests have been staged against extractive projects by members of indigenous peoples. However, the Special Rapporteur observed during his visit that, in general, the representatives of indigenous peoples did not reject extractive operations outright; rather, they stressed the need for their rights to be respected, including their rights over their traditional lands and waters, and their related rights to self-determination and to define their own development priorities.

9. One of the prerequisites for the fulfilment of indigenous rights in the context of extractive projects is their participation in the strategic planning process in this sector, including the selection and delineation of blocks for hydrocarbon exploration, the definition of initiatives for attracting investment and the choice of the priority to be given to extractive operations to promote economic development. As the Special Rapporteur has emphasized before, in addition to contributing to the observance of the rights of indigenous peoples, "indigenous participation in strategic planning for resource extraction will undoubtedly lend itself to greater possibilities of agreement with indigenous peoples on specific projects" on their territories (A/HRC/24/41, para. 51). Although the implementation of prior consultation has led to the greater inclusion of indigenous peoples in the granting of licenses for extractive projects (see chap. VI below), so far the indigenous peoples in Peru have not taken part in the strategic planning concerning natural resources.

III. Legal and regulatory framework

10. Another prerequisite is the development and strengthening of a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in the behaviour of extractive companies; and that provides effective sanctions and remedies when those rights are infringed either by government or by corporate actors (A/HRC/24/41, para. 44). Although progress has been achieved in Peru on the regulatory framework protecting indigenous lands and the obligation to consult indigenous peoples, in many aspects, indigenous peoples' rights remain inadequately protected in the face of extractive industries.

⁴ Ministry of Energy and Mines, "Panorama y Proyecciones del Sector Minero: inversiones y operaciones para los próximos años" (Mining sector overview and forecast: investment and operations in the years ahead), 2011, p. 7.

⁵ Matt Finan and Martí Orta-Martínez, "A second hydrocarbon boom threatens the Peruvian Amazon: trends, projections, and policy implications", *Environmental Research Letters*, 16 February 2010, p. 4.

A. Land and natural resources

11. The ownership rights of peasant and native communities have been recognized under various laws, which also provide for the establishment of land titling procedures.⁶ Thus the land of 6,381 indigenous peasant and native communities has been titled pursuant to these laws, while approximately 1,200 peasant and native communities are awaiting a title for lands that they occupy or claim. Article 89 of the 1993 Constitution stipulates that ownership of communal lands is not time bound.

12. There have been delays in indigenous land titling in recent years. In 2009, the authority to grant indigenous land titles was devolved to the regional governments, which led to significantly fewer titles being granted, so that for example no new titles have been granted to indigenous communities in the Amazon since 2010. The cutback is partly due to the lack of proper uniform procedures to guide regional government efforts regarding land titling. Accordingly, the Ministry of Agriculture was reinstated in 2013 as the leading body for the titling of peasant and native lands. In addition, the Ministry of Culture has been charged with coordinating the efforts of the various actors involved.

13. The rights of indigenous peoples over the natural resources within their titled or traditional lands are limited by the corresponding rights and interests of the State. According to the Constitution, renewable and non-renewable resources belong to the nation, while according to national law mineral resources and hydrocarbons are the property of the State.⁷

B. Extractive industries

14. Since the 1990s, a growing number of laws and policies have encouraged private investment, especially in the mining and hydrocarbon industries.⁸ Since that time, there has been a significant increase in the number of licences awarded for the extraction of natural resources in all parts of the country, including indigenous territories.

15. In Peru, hydrocarbon activity is governed largely by the Organic Act on Hydrocarbons and other related environmental regulations. The State-owned company Perupetro, as the owner of extracted hydrocarbons, is authorized to enter into exploration and production contracts with private entities.⁹ Under these contracts, licensees are entitled to apply for surface-access rights to the public and private lands where hydrocarbon deposits are located, a process that includes the possibility of government expropriation of private land on grounds of national and public necessity.¹⁰ As will be discussed (see para. 39 below), Perupetro is required by national law to consult the indigenous peoples who will

⁶ See Act No. 24656, General Act on Peasant Communities (1987), arts. 1 and 2; Act No. 24657 on Peasant Communities – demarcation and titling of communal territories (1987), arts. 1-3; Act on native communities and the agricultural development of the forest and forest rim regions; Decree Law No. 22175 (1978), arts. 7, 8, 10 and 11; and its implementing regulations under Supreme Decree No. 003-79-AA (1979), arts. 4 and 5.

⁷ Constitution of Peru, art. 66; Organic Act governing hydrocarbon activities within the national territory (Act No. 26221), art. 8; and Single Consolidated Text of the General Act on Mining (Supreme Decree No. 014-92-EM), Preliminary Title 1.

⁸ See, for example, Act No. 26505, Act on private investment in the development of economic activities in lands within the national territory and agrarian and native communities (1995), arts. 2, 10 and 11.

⁹ Act No. 26221, art. 8.

¹⁰ *Ibid.*, arts. 82 and 84.

be affected by a license for hydrocarbon exploration and production before the executive decree approving the license is approved.¹¹

16. Mining activity, for its part, is regulated by a complex set of laws and regulations, with the Single Consolidated Text of the General Mining Act serving as the basis for awarding mining concessions.¹² Before an operating lease is signed, which gives the holder “the right to extract or concentrate the valuable part of a mineral aggregate”,¹³ it is necessary to obtain surface rights from the landowner, as well as to have an environmental certification, approval of water use studies and a series of other permits.¹⁴ As will be noted below (para. 40), the Ministry of Energy and Mines has drawn attention to the need to consult the indigenous populations affected at various stages during the process.

17. With respect to environmental safeguards, before any natural resources exploration or exploitation activity can take place, a contractor must submit an environmental impact study, which must be approved by the Ministry of Energy and Mines. One recent area of concern is the Ministry’s announcement that oil and gas exploration will no longer require an environmental impact study, as required under current legislation, a change that would be a serious step back in terms of environmental protection for these projects.

IV. Impact of extractive industries on the rights of indigenous peoples

18. For decades, extractive industries have had a devastating social and environmental impact on several of the country’s indigenous peoples, including on peoples in a situation of isolation or initial contact, without benefiting them greatly.

19. One concern has been that awarding concessions for the exploitation of natural resources in areas claimed by indigenous communities but for which they do not hold title may lead to disregarding any rights they might hold to the leased areas. It is worth noting that the Office of the Deputy Minister of Intercultural Relations of the Ministry of Culture has informed the Special Rapporteur that procedures for prior consultation with affected indigenous peoples will be put in place both in lands to which they hold title and in lands to which they do not (see section VI below).

20. One of the main problems to arise in the history of natural resource extraction in the country is the pollution caused by mining operations, which has still not been cleaned up. A good deal of this pollution was caused in the years before the development of the current environmental standards. It may be noted that informal and illegal mining, engaged in by roughly 60,000 persons nationwide (see para. 62 below), still takes place in entirely unregulated fashion, with devastating consequences for the environment. The Special Rapporteur also received information from community representatives from the district of Cojata (Huancané province, department of Puno) concerning the pollution caused by mining activities in the neighbouring Plurinational State of Bolivia, which has contaminated the Suches River, polluting grasslands and causing the death of alpacas, birds and other animals. Neither the Plurinational State of Bolivia nor Peru, it is alleged, is taking responsibility for the clean-up. Indigenous women have told the Special Rapporteur that the pollution is affecting them above all because of changes to the quality and availability of water, the effects on livestock production (the sole source of work for many women) and the negative effects on their health.

¹¹ Ministerial Decision No. 350-2012-MEM/DM, art. 1.

¹² Supreme Decree No. 014-92-EM.

¹³ *Ibid.*, art. 18.

¹⁴ Ministerial Decision No. 003-2013-MEM/DM, annex 1.

21. A typical case of oil pollution in indigenous lands has been that of the so-called Block 1-AB, located in the basins of the Pastaza, Tigre, Corrientes and Marañón rivers, which are inhabited by the Quechua, Kichwa, Cocama and Urarina indigenous peoples. Starting in 1971, Occidental Petroleum carried out oil operations in the block until the year 2000, when it transferred the block to Pluspetrol. Over that period, industrial waste and other waste associated with oil production was dumped directly onto the land and into the waters used by the indigenous peoples of the four river basins. Pluspetrol took on the obligations undertaken by Occidental under the current environmental regulatory framework, which involves decontaminating the soils and the water sources of Block 1-AB.

22. In recent years, the Government has taken significant steps to deal with the situation in Block 1-AB, which include monitoring activities by such agencies as the Environmental Assessment and Oversight Office. Moreover, the company has also changed its practices to comply with current environmental regulations, and is also reusing all the produced water resulting from its operations, which should make it possible to avoid additional pollution. Nonetheless, there are still serious environmental problems resulting from the pollution of the bodies of water and soils used by the indigenous populations of the area, which has affected their food sources and their health. In his travels around the area of Block 1-AB, in the district of Andoas, the Special Rapporteur was able to observe the presence of oil in the Shanshococho, Ushpayacu and Pampaliyacu pools, or in the neighbourhood, as well as junkyards filled with equipment which had been used in the course of Occidental Petroleum's operations.

23. In 2013, the Ministry of the Environment declared states of emergency, lasting around 90 days, in the basins of the Pastaza, Corrientes and Tigre rivers, and launched immediate and short-term environmental clean-up operations and other measures to mitigate the effects of pollution on the water and food sources of the affected population. However, the indigenous peoples of these basins have not seen much in the way of results from the immediate and short-term clean-up operations undertaken under these states of emergency. An important factor in this respect has been the lack of any progress towards the development of specific regulations to identify the sources of pollution in the block and the corresponding measures required to undertake environmental rehabilitation, or to determine the organizations, public or private, responsible for undertaking such rehabilitation.

V. State response to indigenous movements opposed to extractive projects

24. In view of the history of negative impacts on indigenous peoples' rights, the many protests that have arisen against government decisions to authorize extractive operations should come as no surprise.

25. The most widely known cases connected with protests against extractive industries in recent years include: the Bagua incidents of 2009, which resulted in the deaths of many indigenous and non-indigenous people and were the reason for an earlier visit by the Special Rapporteur to Peru (A/HRC/12/34/Add.8); the Aymara communities' opposition to the concession awarded to the Bear Creek Mining Corporation to go ahead with the Santa Ana mining project, which led to the investigation of dozens of Aymara persons; and the protests against the Conga mining project in the Cajamarca region, which prompted the declaration of two states of emergency, in 2011 and 2021, in addition to violent clashes between demonstrators and security forces in July 2012, that left five community members dead and scores injured.

26. The Government has told the Special Rapporteur that in Peru no one is denied the right of assembly for peaceful acts of social protest, pointing out that the suspension or limitation of that right has occurred only in cases where such protests have led to breaches of the peace or violations of the rights of third parties. The Government adds that any person who believes that his or her rights have been infringed by agents of the State may seek the criminal and civil remedies provided for by law.

27. Members of indigenous communities, however, consider that the Government's response to their protests against mining projects has in many cases been disproportionate. In this respect, there have been complaints of increasing reliance on the police and the armed forces to maintain order, as well as on government declarations of states of emergency in the areas where the protests are taking place. Concern has also been expressed about the role of police officials in the private security services of extractive companies, and about the appropriate degree of State supervision of such police officials' performance in situations of social conflict.

28. At the same time, members of indigenous communities have had difficulty gaining access to the justice system to obtain redress for harm caused by law enforcement officials in the context of social unrest. This is partly due to the fact that the courts allegedly refuse to try members of the police and other State officials responsible for these incidents, and partly to the costs and time limits related to civil court proceedings. An alarming development in that regard is a new act published in January 2014, which amends the Criminal Code to exempt from responsibility members of the armed forces and the police who, "in their official capacity, and when using their weapons or another means of defence, cause injury or death".¹⁵

29. At the same time, there have been allegations of undue "criminal prosecution" of indigenous persons who took part in protests against extractive operations and were accused of various offences such as extortion, disturbance of the public order, sedition and destruction of property. In addition, indigenous persons assert that they encounter problems in court cases against them on account of cultural and linguistic barriers, the lack of interpreters qualified to assist them and a shortage of funds, which compromise their ability to mount a legal defence.

30. The Government, for its part, notes that specific measures are provided to guarantee the defence rights of indigenous persons facing legal proceedings. In 2012, according to information received, the Directorate-General of the Public Defender Service assigned public defenders in indigenous matters in the departments of Amazonas, Loreto, San Martín and Ucayali, ensuring the defence of 25 indigenous persons charged in connection with the Bagua incidents. In addition, the Special Rapporteur has continued receiving information on detentions and criminal prosecutions, allegedly baseless, arising from the 2009 Bagua incidents. The Bagua district-attorney's office apparently sought life sentences for two of the three indigenous persons imprisoned following the Bagua incidents, whereas none of the police officers responsible for the deaths of indigenous people has been similarly charged.

VI. Participation, dialogue and prior consultation

31. There is no doubt that, thanks to the efforts made to overcome the unrest in recent years, considerable progress has been achieved towards creating venues for dialogue and consultation with indigenous peoples. One such step was the establishment in 2013 of the National Dialogue and Sustainability Bureau of the Office of the Council of Ministers. The

¹⁵ Act No. 30151 (13 January 2014).

Bureau works in areas of real or potential unrest in order, amongst others, to set up multisectoral discussions forums, to increase the presence of the State and to help improve relations between companies and communities.¹⁶ Many disputes have been dealt with by the Bureau, the great majority of them having to do with the extractive industry and the exploitation of natural resources. The Government reports that by March of the current year the Bureau had resolved 86 cases of social disputes.

32. Another recent advance has been the development of a legal framework for consulting indigenous peoples: Act No. 29785, On the Right of Indigenous or Aboriginal Peoples to Prior Consultation, recognized in the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), of September 2011 (the Prior Consultation Act); and the regulations implementing the Act.¹⁷ It may be noted that some representatives of indigenous communities and non-governmental organizations (NGOs) have expressed concern about some provisions of the Prior Consultation Act, and the implementing regulations in particular.

A. Development of consultation processes within the new legal framework

33. The Prior Consultation Act focuses on the procedural aspects of consultations with indigenous peoples. It contains positive components that reflect current international standards, including those according to which consultations must take place before the event,¹⁸ in good faith,¹⁹ in the language of the indigenous peoples affected,²⁰ offering timely information,²¹ over a reasonable time frame²² and through a process of intercultural dialogue.²³ The Act states that the aim of consultation is to reach an agreement with indigenous peoples,²⁴ but without specifically requiring consent as an absolute precondition in cases of significant impact, which has been a matter of concern pointed out by some NGOs. Failing an agreement or consent, it is, according to the Act, “the responsibility of State agencies to take all necessary measures to guarantee the collective rights of indigenous peoples”.²⁵ The Government has stressed that, in any case, whatever measure is taken must not leave the rights of indigenous peoples unprotected or place their survival at risk.

34. Significantly, the Act requires that the legislation should be interpreted “in accordance with the obligations provided for in ILO Convention No. 169”,²⁶ while the implementing regulations state that the coordination of consultations done by the Office of the Deputy Minister of Intercultural Relations must take account of the United Nations Declaration on the Rights of Indigenous Peoples.²⁷

¹⁶ Office of the President of the Council of Ministers. “Institucionalizando el diálogo a un año de gestión: Experiencias y aportes de la ONDS-PCM 2012–2013” (Institutionalizing dialogue following one year of management: experiences and contributions of the National Dialogue and Sustainability Bureau of the Office of the President of the Council of Ministers, 2012–2013), p. 26.

¹⁷ Supreme Decree No. 001-2012-MC (“Implementing regulations”).

¹⁸ Act No. 29785, art. 2.

¹⁹ Ibid., art. 4 (c).

²⁰ Ibid., art. 16.

²¹ Ibid., art. 4 (g).

²² Ibid., art. 4 (e).

²³ Ibid. art. 14.

²⁴ Ibid., art. 3.

²⁵ Ibid., art. 15.

²⁶ Ibid., art. 1; see also arts. 1, 5, 3, 5 and 6 of the implementing regulations.

²⁷ Implementing regulations, art. 1.4.

35. While there are positive aspects to the consultation procedure governed by the Prior Consultation Act and its implementing regulations, the challenge now is to implement prior consultation in such a way that the full spectrum of the human rights of indigenous peoples is recognized and safeguarded. As the Special Rapporteur has noted previously, consultation should function as “a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities carried out within their territories” (A/HRC/24/41, para. 85) and not only as a mechanism for obtaining approval for the legislative or administrative measure concerned. Moreover, in the context of consultations concerning extractive industries, the State should ensure “that other applicable safeguards are implemented as well, in particular steps to minimize or offset any limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing” (para. 88).

36. A case that could constitute a significant step forward in this respect is that of the indigenous peoples affected by petroleum-related activities in Block 1-AB. After the government announcement in 2012 that the block would be put out to tender and that the process would be subject to prior consultation, the indigenous peoples concerned jointly submitted a five-point agenda with five points that would need to be addressed in any resulting consultation process. Those items were: rehabilitation of the areas previously affected in Block 1-AB and the adjacent Block 8; the award of titles to their lands; completion of a social and environmental study; compensation for the use of the lands; and compensation for the pollution resulting from 40 years of oil exploration. In October 2013, the authorities undertook to set up a “development panel” with the participation of the Government, the company and the indigenous communities affected to seek a negotiated response to the demands of the indigenous communities.

37. The Government of Peru has made significant efforts to make progress with the implementation of the new legislative consultation mechanism. However, according to both State representatives and indigenous peoples, the Government is still in the process of building its capacity to implement prior consultation in methodological, logistical and budgetary terms.

38. In its task of overseeing the implementation of the consultation process, the Office of the Deputy Minister of Intercultural Relations of the Ministry of Culture has created various management tools.²⁸ A first step was the formulation of a methodology guide, published in April 2013. The guide contains positive aspects and establishes many of the initial instructions for conducting prior consultation. Nevertheless, there are several sectors that promote the consultation process responsible for determining key elements of the process, including the following: the actual consultation measure; when the process should be applied; the necessary information to be provided; the involvement of legal-technical advisers; and the measures needed to guarantee the rights of indigenous peoples in the event that no agreement is reached. It is feared that, as a result, the consultation process will be applied inconsistently among different sectors. In that regard, the guide has been criticized for not being sufficiently clear or specific about the minimum requirements relating to these issues, and until now there has been no alternative mechanism to provide guidance for decisions taken by those promoting the process.

39. In effect, owing to this lack of guidance, there are signs that the various sectors promoting the consultation process are developing practices that give rise to concern. For example, in the hydrocarbon sector, as mentioned in paragraph 15 above, according to the

²⁸ Examples include: the establishment of a register of consultation interpreters and facilitators; the establishment of an administrative procedure for the right of petition; the training of interpreters in indigenous languages; the training of indigenous representatives in prior consultation; and technical assistance for State bodies.

Ministry of Energy and Mines, the consultation would be conducted by the State-owned company Perupetro before the supreme decree is issued approving the conclusion of contracts for the exploration and exploitation of oil and gas deposits.²⁹ For other activities, such as the development of pipelines and the transportation of gas or modification of a concession, the consultation would be conducted by the General Directorate of Hydrocarbons before the concession is granted or modified. While it is important that indigenous peoples should be consulted in the early decision-making stages, it would seem that no provision has been made for the involvement of indigenous peoples in decisions beyond the very early stages.

40. To date, the Prior Consultation Act has not been implemented in relation to mining projects and it is still unclear which consultation procedure would be applied in this context within the new legislative regime. The new Single Consolidated Text on administrative procedures, which describes the process used by the Ministry of Energy and Mines for granting concessions (see para. 16 above), identifies three stages in which to conduct prior consultation: (a) prior to authorization of the construction works; (b) prior to the start of exploration activities; (c) prior to approval of the mining plans.³⁰ However, there is no provision for consultation before the mining concession is granted, which precedes all these stages, assuming that the mining concession does not, in itself, constitute “authorization for the holder to carry out exploration, exploitation or mineral extraction”.³¹ The Special Rapporteur considers that this position should be reviewed because in any case a concession for potential mining activities on indigenous land is definitely a decision that is likely to affect the rights of indigenous peoples. At the same time, the Government has informed the Special Rapporteur that, in addition to prior consultation, after the concession has been granted, a public participation process is initiated to communicate “the effects of the concession rights granted by the State, the mining activities, the environmental obligations, and the rights of the populations involved, amongst others”.³²

41. Another key stage for the implementation of the Prior Consultation Act, required under the Act itself,³³ is the establishment of a database of the country’s indigenous peoples.³⁴ The purpose of the database is to facilitate identification of the groups who need to be consulted. According to the Act, the database “does not directly grant any rights”.³⁵ The Office of the Deputy Minister of Intercultural Relations is also preparing a land registry of indigenous territories, both titled and untitled, to serve as a reference tool for the identification of indigenous groups affected by a project.

42. The Prior Consultation Act notes that “peasant or Andean communities and native communities or Amazonian peoples may also be identified as indigenous peoples, in accordance with the given criteria”,³⁶ and the database published by the Office of the Deputy Minister of Intercultural Relations includes both Amazonian and Andean groups. However, certain Andean groups will be considered on a case-by-case basis for inclusion in the database, according to the criteria established by the Act. These criteria include both objective factors (descent of the indigenous peoples, links with the occupied territory, specific customs and institutions, and cultures that are different from other sectors of the

²⁹ Ministerial Decision No. 350-2012-MEM/DM.

³⁰ Ministerial Decision No. 003-2013-MEM/DM, Annex 1.

³¹ Letter dated 13 January 2014 addressed to the Special Rapporteur by the Deputy Minister for Energy, Edwin Quintanilla Acosta.

³² See Supreme Decree No. 028-2008-EM.

³³ Act No. 29785, art. 20; see also Implementing Regulations, art. 29.

³⁴ Authorized under Deputy Ministerial Decision No. 202-2012-MC.

³⁵ Implementing Regulations, art. 29.

³⁶ Act No. 29785, art. 7.

national population) and subjective factors (collective indigenous identity).³⁷ Some indigenous representatives consider that these criteria are too restrictive and that they leave the Government at liberty to determine who is indigenous and entitled to consultation.

43. Indigenous peoples in a situation of isolation or initial contact are also included in the database for prior consultation, a fact which has been criticized by some people. Nevertheless, as will be discussed (see section VIII below), the Government does not carry out prior consultation relating to legislative or administrative measures which would affect these peoples, owing to their particular condition, a policy which the Special Rapporteur considers should be reviewed in the case of indigenous peoples in initial contact.

44. Lastly, there are concerns over the position of the Government on the non-applicability of prior consultation in relation to concessions granted before the entry into force of the Act on Prior Consultation in 2011. This position is based on the assertion that the provisions of the Act are not retroactive.³⁸ The Special Rapporteur received information following his visit to the effect that the Office of the Deputy Minister of Intercultural Relations refused to apply prior consultation in relation to oil-related activities in Block 156, located near Lake Titicaca in Puno province, on the grounds that the oil concession had been granted in 2009. However, the Government has officially recognized that the obligation to conduct consultation has existed since the entry into force for Peru in 1995 of the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169), independently of the entry into force of the Prior Consultation Act. The Special Rapporteur nevertheless considers that, insofar as the effects on the human rights of indigenous peoples of a project initiated in the past continue to be felt in the present, these effects should be the subject of consultation, in accordance with the jurisprudence of the International Labour Organization's Governing Body on the obligation to conduct consultations in accordance with Convention No. 169.³⁹

B. Implementation of prior consultation: the case of Block 169

45. To date, only one consultation process has been completed under the new legislative regime governing a natural resources extraction project, for the hydrocarbon exploitation project in Block 169 in the Department of Ucayali, which has resulted in agreements between the indigenous peoples concerned and Perupetro, the State body responsible for promoting such projects. The block extends over 400,000 hectares in the provinces of Coronel Portillo and Atalaya in the Ucayali region, where the Amahuaca, Asheninka and Yaminagua indigenous communities live.

46. In accordance with the above-mentioned decision of the Ministry of Energy and Mines (paras. 15 and 39 above), the measure identified as specifically related to the consultation process in cases of hydrocarbon projects is the Supreme Decree approving the conclusion of contracts for the exploration and exploitation of oil and gas deposits.⁴⁰ This measure includes the future "implementation of diverse hydrocarbon exploration activities, such as geological fieldwork, seismic research, and exploratory drilling; and hydrocarbon

³⁷ Ibid.

³⁸ This assertion is based on the second of the Final Complementary Provisions of the Implementing Regulations.

³⁹ See the report by the Committee set up to examine the complaint alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) made under article 24 of the ILO Constitution by the Ecuadorian Confederation of Free Trade Unions (GB 277/18/4; GB 282/14/2) (2001), paras. 37–40.

⁴⁰ Ministerial Decision No. 350-2012-MEM/DM.

exploration activities, development drilling, battery installation and production facilities”, but without specifying these future activities.⁴¹

47. Within this legal framework, prior consultation related to Block 169 was conducted before the fundamentals of the future project had been determined, including the nomination of the project operator, the methods of exploration and extraction of gas and petroleum, and the extent of their impact. Nonetheless, the process carried out provides a significant example of the progress and shortcomings of the practical implementation of prior consultation related to extractive projects.

48. In mid-2013, Perupetro, jointly with the Office of the Deputy Minister of Intercultural Relations, initiated a process of identifying indigenous representatives to be consulted, by visiting the communities in the areas affected. It seems, based on its own evaluation, that Perupetro identified the possible effects of the planned extraction activities on members of these communities, reporting potential impacts on the land, culture, health and intercultural education. In October 2013, a series of meetings were held with local and regional organizations representing indigenous communities to formulate a “consultation plan”, in which the stages and time frames of the consultation were determined and the representatives who would participate in the dialogue were selected. The possible effects mentioned were highlighted in the consultation plan.⁴²

49. The information stage lasted 30 days, during which Perupetro provided general information on the petroleum-related activities, the possible effects on collective rights and the risks that such activities entail; environmental protection and the standards and measures to mitigate or prevent related risks; any taxes, royalties and compensation that the companies might have to pay; employment opportunities and easement considerations. This information was conveyed by means of dialogues, workshops, written information and radio announcements, most of the content of which was translated into the relevant languages. From the information available, it would appear that Perupetro did not provide indigenous peoples with information concerning the potential economic benefits and profits generated by petroleum-related activities, beyond royalties and compensation, contrary to the Special Rapporteur’s previous recommendation (A/HRC/24/41, para. 64). The Office of the Deputy Minister of Intercultural Relations provided technical assistance regarding the current regulations on prior consultation and collective rights, and on training for translators and interpreters.

50. The dialogue stage was attended by representatives of most of the communities identified as affected by the consultation process, as well as representatives of Perupetro, the Office of the Deputy Minister of Intercultural Relations and the Ombudsman’s Office. Furthermore, Perupetro invited the regional indigenous organizations to attend all stages of the process, although they were not able to ensure consistent or active participation. It is worth noting that the indigenous community representatives who participated in the process did not have access to state-independent legal or expert advice, as recommended by the Special Rapporteur as part of the necessary measures to address power imbalances between the negotiating parties (*ibid.*).

51. There is no information available on the internal discussions of the communities during the internal evaluation process. However, the results of these discussions are known, as they were presented to Perupetro in the form of proposals for negotiation during the dialogue stage. During this stage, the indigenous representatives proposed the titling of their lands, as well as the provision of various social services, such as the construction of

⁴¹ Consultation Plan, p. 13.

⁴² *Ibid.*, Annex 6.

schools and health clinics, and electricity networks.⁴³ However, these proposals were deemed to be “unrelated to the administrative measures” pertaining to the consultation process, and, in accordance with the Perupetro proposal, it was agreed that these requests should be referred to the competent State institutions “for evaluation within the scope of their competence and a decision on admissibility”.⁴⁴ In the view of the Special Rapporteur, it is unwise to exclude these subjects from the dialogue process, given that security of land tenure is a subject of central importance in any discussion on extractive projects within the territories in question, and that an environment of trust needs to be created in order to reach lasting agreements (ibid, para. 72).

52. Regarding the proposals which were classified as “related to the administrative measure”, the communities identified their priorities as a labour preference contract, respect for collective rights, concerns over pollution, and revision of any future contract authorizing hydrocarbon exploration and exploitation. These priorities formed the basis for development of the eight agreed points. In the agreements, Perupetro undertook to monitor the project and periodically furnish information to the community on its impacts. For example, with regard to respect for the rights of indigenous peoples, Perupetro undertook to “visit communities in the area of the hydrocarbon exploration and exploitation projects in order to gain first-hand knowledge of the situation of the communities relating to their collective rights”; and, regarding the concerns of the indigenous communities over possible pollution, Perupetro undertook to coordinate with the future contractor “in order to implement community monitoring programmes with the participation of representatives from the community in the area directly affected by the project, in accordance with current regulations”.

53. These agreements concluded the consultation process and it was agreed “to approve the decision on the implementation of the administrative measure: the supreme decree which would approve the signing of the licensing contract for hydrocarbon exploration and exploitation in Block 169”, in preparation for the contract.⁴⁵

54. There are positive aspects to the consultation procedure related to Block 169, including the joint development of a consultation plan and methodology. However, in the view of the Special Rapporteur, the agreements reached are inadequate for various reasons. They do not contain the fundamentals in order to be considered equitable agreements centred on the rights of indigenous peoples, such as mitigation of the impacts and the effective participation of the indigenous peoples in the development of the project and its eventual benefits (see also chapter VII below). Nor is there any guarantee that the communities affected can revise or participate in the negotiation of the agreement to be signed between the Government and the contractor for oil and gas exploration and exploitation, despite the indigenous representatives having expressed this concern. In that regard, it was agreed only that “Perupetro will provide periodic information (every four months) on the activities carried out as part of the hydrocarbon exploration and exploitation projects”. Furthermore, the agreements reached do not appear to offer adequate protection for the substantive rights of the indigenous communities affected, especially during future hydrocarbon exploitation in the block.

55. According to the Government, there are plans for seven consultation processes relating to hydrocarbon projects in 2014, which offers many opportunities for improving the process and achieving better results. It should be pointed out that the Government has conducted consultation processes beyond the context of extractive projects, relating to the

⁴³ Record of proposals by the indigenous peoples concerning Block 169 unrelated to the administrative measure pertaining to the Prior Consultation process for Block 169 (19 December 2013) p. 1.

⁴⁴ Ibid., p. 2.

⁴⁵ Directive No. 003-2014 (13 January 2014).

national policy on intercultural health, the development of the Sierra del Divisor national park, the implementing regulations for the Act on languages, those for the Act on forestry and forest fauna, and several other administrative measures at regional level.

VII. Compensation and profit-sharing

56. Where extractive projects are carried out within their territories, indigenous peoples should accrue compensation and direct financial benefits for allowing access to their territories and for any agreed-upon adverse project effects, as well as because of the significant social capital they contribute under the totality of historical and contemporary circumstances (A/HRC/24/41, paragraph 76). However, while in Peru legislation does not provide for indigenous peoples' direct participation in royalties or taxes derived from extractive projects carried out within their territories, it does set out that, as any other land owner, indigenous peoples must be compensated for the surface use of their territories and for damages or curtailments to their rights as a result of the projects.⁴⁶

57. For example, the indigenous communities affected by the Camisea natural gas extraction project have received compensation and damages for the use of and impact on their territories from the company Pluspetrol. The Segakiato community has used this compensation partly to form, with the assistance of Pluspetrol, a river transport company producing significant financial gains. In addition, Pluspetrol is paying damages for the impacts of the Camisea project inside the reserve for the Kugapakori, Nahua and Nanti peoples and others living in a situation of voluntary isolation or initial contact (see chapter VIII below). However, until recently, this compensation could not be paid to the reserve dwellers, since entry to the reserve for that reason was not included among the "exceptions" to the rule of the inviolability of the reserve.⁴⁷

58. Beyond the payment of compensation and damages, in Peru there are certain measures for sharing the profits of extraction projects, although none of these apply specifically to indigenous peoples. Under current legislation, local and regional governments have the right to receive a proportion of the profits from the extractive operations, the so-called royalty ("*canon*"), which must be used to finance social investment projects.

59. The State also runs a "social fund" project for the investment of resources derived from private investment activities in sustainable development programmes in areas directly affected by extractive projects.⁴⁸ The social funds are administered by legal entities made up of representatives from the communities affected and the company. According to the Government, currently eight of these associations have managed projects to a total value of 325,106,786 nuevos soles (approximately 116.1 million US dollars), up to April 2013. These projects have focused on investment in programmes to alleviate malnutrition, education, health, sanitation and employment. In relation to the Camisea project, a socioeconomic development fund⁴⁹ was set up, which is distributed to the regional and local governments affected to support social development projects and environmental protection.

60. These fund investment mechanisms may be regarded as models that encourage the development of social investment projects specifically intended for indigenous communities. However, more needs to be done to ensure that extractive projects which affect indigenous peoples benefit them beyond compensation for surface use of their

⁴⁶ See the Organic Hydrocarbons Act, No. 26221, arts. 82 and 83; DS 032-2004-EM, arts. 297 and 302.

⁴⁷ No. 011-2013-VMI-MC, adopting Directive No. 003-2013-VMI/MC, art. 7.2.

⁴⁸ Legislative Decree No. 996.

⁴⁹ Established by Act No. 28451.

territories and for damages caused, or other benefits in the form of jobs or community development projects, that typically pale in economic value in comparison to profits gained by the corporation.

61. The Special Rapporteur has earlier emphasized that an alternative model for extractive activities in indigenous territories consists of indigenous peoples themselves controlling the extractive operations, through their own initiatives and enterprises, for example through partnerships with responsible non-indigenous companies, with the necessary experience and funding to launch projects (A/HRC/24/41, para. 80). When indigenous peoples choose to pursue their own initiatives for natural resource extraction within their territories, States should assist them to build the capacity to do so and should privilege these initiatives over others (*ibid.*, para. 81).

62. A possible consequence of the lack of opportunities for indigenous peoples to participate in mining and hydrocarbon activities, and in the benefits derived from those, is the presence across the Andean region of indigenous groups and individuals who engage in informal or illegal small-scale mining. The Government has taken steps to address this problem. For example, in January 2014, the Office of the President of the Council of Ministers established the National Strategy to Prohibit Illegal Mining.⁵⁰ This Strategy appears to focus primarily on sanctioning illegal and informal mining, while the Special Rapporteur would emphasize that, in addition, it is important to open channels to offer these miners the possibility of formalization through registration, and to create incentives to that end. It is also essential to engage a greater State presence in areas where informal and illegal mining is carried out, and to strengthen the regulatory framework on mining. The establishment, in February 2014, of the Multisectoral Technical Working Group, which will design the budgetary programme for the eradication of illegal mining, the reduction of mining and socio-environmental conflicts, and environmental compensation,⁵¹ could contribute towards resolving these outstanding issues.

VIII. Indigenous peoples in a situation of voluntary isolation or initial contact

63. Act No. 28736 of 2006 on the Protection of Indigenous or Aboriginal Peoples in a Situation of Isolation or Initial Contact establishes a “special cross-sectoral protection system” for the rights of these peoples who live in parts of the Peruvian Amazon region.⁵² The system provides for the establishment of indigenous reservations that are considered “intangible”, within which no settlements, no activities and no development of natural resources other than those of the resident indigenous peoples are permitted.⁵³ Despite this overall prohibition, however, an exception is allowed in the case of “a natural resource which is exploitable and the development of which is of public necessity for the State”.⁵⁴

64. In such exceptional cases, the sectoral authority responsible will request a technical opinion from the competent authority, which will then issue recommendations and will coordinate the necessary protection measures for the indigenous peoples in a situation of isolation or initial contact.⁵⁵ The Office of the Deputy Minister of Intercultural Relations is the competent authority in charge of coordinating measures at government level to protect the rights of indigenous peoples in a situation of isolation or initial contact in the areas of

⁵⁰ Supreme Decree No. 003-2014-PCM.

⁵¹ Ministerial Decision No. 026-2014-PCM.

⁵² Act No. 28736, arts. 1 and 4.

⁵³ *Ibid.*, art. 5 (a).

⁵⁴ *Ibid.*, art. 5 (c).

⁵⁵ Supreme Decree No. 008/07/MIMDES, Implementing Regulations of Act No. 28736, art. 35.

health, land and natural resources. The Office of the Deputy Minister is currently in the process of strengthening its capacity in this respect, with the creation of an attached Directorate of Indigenous Peoples in a Situation of Isolation or Initial Contact.

65. The case of the Camisea project illustrates the challenges that arise when extractive activities are undertaken on the traditional territories of indigenous peoples in a situation of isolation or initial contact. The Camisea project includes a programme for the exploitation of natural gas in Block 88, the greater part of which overlaps with the reservation established for the Kugapakori, Nahua, Nanti and other peoples. The Special Rapporteur has put forward specific comments and recommendations in connection with the plan to expand extractive activities in Block 88, which are shown in the appendix to this report.

66. At the same time, it should be remembered that the terms “isolation” and “initial contact” used by the Government and the defenders of indigenous peoples refer to a variety of indigenous groups that entertain different sorts of relations with the surrounding majority society, ranging from groups in situations of no contact at all to groups in evolving situations of growing contact. In the course of his visit, the Special Rapporteur called at Santa Rosa de Serjali, a Nahua community identified as a population in a situation of initial contact within the reservation of Kugapakori, Nahua, Nanti and other peoples. He was received by an assembly of the community, which was attended by many leaders and members of the community — men, women and young people — who expressed the wish to receive better services from the Government, especially in the areas of health and education, to be given greater opportunities for development and to participate in all decisions that affect them.

67. These views, which are evidently not to be confused with the feelings of the isolated groups that refuse all contact, indicate a need to adapt the protection system to the specific circumstances of the different groups that inhabit the reservation. In this respect, there is clearly a need to review the Government’s regulatory restrictions, which have limited both the supply of State services for indigenous peoples in situations of initial contact and the consultations with those peoples on the subject of extractive activities that might affect them.

68. Five territorial reservations have at present been created for the protection of indigenous peoples in a situation of isolation or initial contact. In June 2013, the Multisectoral Commission in charge of preparing studies for the establishment of reservations for indigenous peoples in a situation of isolation or initial contact had recommended setting up five additional indigenous reservations for indigenous peoples in a situation of isolation or initial contact.

IX. Conclusions and recommendations

69. **As a result of extractive activities conducted in Peru over a number of years, various indigenous peoples in the country have suffered a devastating social and environmental impact, without receiving many benefits from these activities in return. Consequently, there has been a high level of discontent and mistrust among indigenous peoples towards the State and the industrial extractive sector, leading to many protests and clashes.**

70. **It may be noted that, despite this negative experience, the indigenous peoples of Peru have not rejected extractive operations outright, but have stressed the need for their rights to be respected, including their rights over their traditional territories, their right to participate at all stages of decision-making related to the extractive industries which might affect them, as well as their right to obtain benefits and compensation for activities conducted within their territories.**

71. Peru is making significant efforts to deal with problems arising from the extraction of natural resources that affect indigenous peoples, such as the strengthening of environmental legislation, the development of a legal framework for consultation with indigenous peoples, measures for establishing dialogue forums to foment social peace in conflict areas, and the establishment of a specific system for the protection of indigenous communities in a situation of isolation or initial contact. Nevertheless, greater efforts are needed to ensure that extractive operations are conducted in a manner that is compatible with the rights of indigenous peoples through a coordinated and comprehensive effort to meet the concerns of indigenous peoples and the requirements of social peace.

72. In the light of the comments made in this report, the Special Rapporteur wishes to put forward the following recommendations, which are to be considered alongside the findings and recommendations of his 2013 report on extractive industries and indigenous peoples (A/HRC/24/41):

- The Government should, through the Office of the President of the Council of Ministers or other competent body, seek a review of the State's regulatory and programming framework related to the protection of the rights of indigenous peoples in the context of extractive industries. The aim of this review should be to achieve the necessary legislative, regulatory and programming reforms to guarantee: the effective recognition and enjoyment of the rights of indigenous peoples over the lands and natural resources that they occupy or use; the participation of indigenous peoples in the strategic State planning of the extraction and development of natural resources; the availability of adequate consultation procedures related to specific extractive projects, implemented at all stages of decision-making that might affect the rights of indigenous peoples; the effectiveness of the protection and safeguard measures to be implemented by the Government and companies to deal with environmental impacts; compensation and profit-sharing on fair terms; corporative conduct that maintains full respect for the rights of indigenous peoples; and effective mechanisms to redress any infringement of the rights of indigenous peoples in the context of the extractive industries;
- With respect to projects that have resulted in environmental conditions such as to endanger the health and well-being of indigenous peoples, including in Block 1-AB, determined measures must be taken to ensure environmental rehabilitation and to provide the compensation demanded by indigenous communities for the use or loss of their traditional lands, and for other damage they have suffered on account of the extractive industries, and to ensure recognition for their rights over their traditional lands and natural resources;
- State institutions must: apply the Prior Consultation Act, No. 29785, and its implementing regulations, in a manner that is compatible with the international standards established in ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples and other relevant sources of international law or authority; fully adhere to the principle of free, prior and informed consent; and ensure that the agreements arrived at through consultation are fair and such as to promote the enjoyment by indigenous peoples of their fundamental rights. The agreements should include, amongst others, provisions concerning safeguard and mitigation, compensation, profit-sharing and dispute settlement mechanisms;
- With regard to participation in the profits derived from the extractive industries operating in indigenous territories, new arrangements must be devised to ensure that indigenous peoples receive a direct participation in the

distribution of fees or royalties, or in the earnings derived from the extractive operations;

- In cooperation with the organizations that represent the country's indigenous peoples, the Government must make progress with the strengthening of the national institutional framework for the promotion and protection of the rights of indigenous peoples. In the short term, the Government should guarantee the necessary funding, staffing and organizational stability to enable the Office of the Deputy Minister of Intercultural Affairs to fulfil its mandate in relation to the indigenous peoples;
- Official policy must be in principle opposed to extractive activity in territories inhabited by indigenous peoples in a situation of isolation or initial contact, and must ensure that extractive activity is permitted in such territories only in exceptional cases, where there is clear evidence of a justification founded on strong public interest, and only in conditions in which the rights and well-being of these peoples are safeguarded. For such exceptional cases, the Government must strengthen the application of its protection system through the development of suitable plans, data bases and monitoring mechanisms. While the Government should adhere to the principle of no contact in relation to groups in isolation that reject contact, it should develop special protocols for the consultation of indigenous groups seeking initial contact who might be affected by the extractive industries, in order to ensure that these groups enjoy their rights of participation and self-determination in relation to the territories they inhabit; and such special consultation protocols should be adjusted to the particular circumstances of each group;
- Indigenous peoples should be able to oppose or withhold consent to extractive projects free from reprisals or acts of violence, or from undue pressures to accept or enter into consultations about extractive projects. Additionally, criminal prosecution of indigenous individuals for acts of protest should not be employed as a method of suppressing indigenous expression and should proceed only in cases of clear evidence of genuine criminal acts. Instead, the focus should be on providing indigenous peoples with the means of having their concerns heard and addressed by relevant State authorities related to criminal trials, detentions and acts of violence by the security forces against indigenous persons;
- For their part, extractive companies should adopt policies and practices to ensure that all aspects of their operations are respectful of the rights of indigenous peoples, in accordance with international standards and not just domestic law, including with regard to requirements of consultation and consent. Companies should conduct due diligence to ensure that their actions will not violate or be complicit in violating indigenous peoples' rights, identifying and assessing any actual or potential adverse human rights impacts of their resource extraction projects.

Appendix

[Spanish only]

Observaciones sobre la ampliación de exploración y extracción de gas natural en el Lote 88 del proyecto Camisea

Las siguientes observaciones y recomendaciones fueron publicadas originalmente el 24 de marzo de 2014

Introducción

1. El Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, presenta sus observaciones, con una serie de recomendaciones, sobre la iniciativa en curso para la ampliación del proyecto Camisea en el Lote 88 en el departamento de Cusco, Perú. Estas observaciones se basan en el intercambio de información que el Relator Especial ha sostenido sobre el asunto, inclusive durante su visita a Perú y al área del proyecto en diciembre de 2013, con representantes de pueblos indígenas y organizaciones no gubernamentales (ONGs), el Gobierno de Perú y la empresa operadora del proyecto^a. El presente documento precede al informe más comprensivo que el Relator Especial finalizará sobre la información recabada durante su visita a Perú y que será presentado al Consejo de Derechos Humanos de Naciones Unidas en septiembre de 2014.

2. El proyecto Camisea es un proyecto de aprovechamiento de gas natural desarrollado por un consorcio multinacional de empresas que incluye Pluspetrol Perú Corporation, la operadora del proyecto y su principal inversionista^b. En el año 2000, el consorcio obtuvo del Gobierno la concesión para el aprovechamiento de gas en el Lote 88, en donde se realiza la mayor parte del proyecto Camisea, la otra parte está siendo desarrollada en el adyacente Lote 56. Más del 70% del Lote 88 se superpone con la reserva creada por el Estado a favor de grupos en situación de aislamiento o contacto inicial que pertenecen a los pueblos kugapakori (o matsigenka), nahua, nanti y otros pueblos indígenas (“la reserva”)^c. El resto del Lote 88 se extiende sobre tierras tituladas a las comunidades indígenas Segakiato, Cashiari y Tincumpia.

3. El plan desarrollado por la empresa Pluspetrol para la ampliación del proyecto de exploración y explotación de gas en el Lote 88 consiste en la realización de un programa de adquisición de datos sísmicos a lo largo de trayectorias lineales y una cuadrícula que en su conjunto atraviesan la mayor parte del lote; la perforación exploratoria y operación de

^a El tema de la ampliación del proyecto Camisea fue objeto de un intercambio anterior entre el Relator Especial y el Gobierno en el año 2012. Véase A/HRC/24/41/Add.4, párrs. 129-134.

^b Los otros miembros del consorcio incluyen Hunt Oil Company of Peru, SK Energy Sucursal Peruana, Tecpetrol del Perú, Repsol Exploración Perú y Sonatech Peru Corporation.

^c Mediante el Decreto Supremo N° 028-2003-AG, se declaró “Reserva Territorial del Estado a favor de los grupos étnicos en aislamiento voluntario y contacto inicial Kugapakori, Nahua, Nanti y otros”, una superficie de 456,672.73 hectáreas, ubicada en los departamentos de Cusco y Ucayali. Con este decreto se pretende fortalecer el marco normativo establecido con la creación original de la reserva en 1990 mediante la Resolución Ministerial N° 00046-90-AG/DGRAAR, de acuerdo a unos compromisos asumidos por el Estado ante el Banco Interamericano de Desarrollo (BID) en relación al financiamiento adquirido del BID para componentes del proyecto Camisea.

18 pozos en 6 locaciones, las que se agregarían a los 20 pozos en 5 locaciones existentes; y la construcción de una línea adicional de conducción de gas. Todas estas actividades ocurrirán en su mayor parte en la reserva. Al concluir un proceso de revisión del estudio de impacto ambiental (EIA) de la empresa para su programa de ampliación, el Ministerio de Energía y Minas aprobó el EIA el 27 de enero de 2014.

4. El proyecto Camisea y los planes para su ampliación en la reserva han sido sujetos a un extensivo debate a nivel nacional e internacional. Por un lado, tanto el Gobierno como la empresa Pluspetrol señalan los beneficios al país en relación a sus necesidades energéticas y afirman la compatibilidad del proyecto Camisea con el sostenimiento de la biodiversidad y el bienestar de los pueblos indígenas en el área del proyecto. También se plantean los beneficios económicos y de empleo generados por el proyecto. Por otro lado, varias ONGs nacionales e internacionales han criticado severamente el proyecto, alegando impactos negativos ambientales y sociales, y que la expansión del proyecto de acuerdo a los planes de la empresa, pondrá en alto riesgo a los pueblos indígenas en aislamiento y contacto inicial dentro de la reserva.

5. El Relator Especial ha percibido que, en parte, este debate se debe a una divergencia de opiniones sobre los hechos relativos a los impactos ambientales y sociales del proyecto, y sobre los hechos relativos a la suficiencia de las medidas de mitigación. También en parte, se debe a las diferencias en las posturas filosóficas y políticas subyacentes en relación a los diversos valores que se presentan – valores económicos, ambientales, culturales, y de desarrollo. Al Relator Especial, le corresponde analizar el caso de acuerdo a los estándares internacionales aplicables sobre los derechos humanos y, en particular, los estándares que amparan los derechos de los pueblos indígenas que habitan el área del proyecto.

La evaluación de impacto y las medidas de mitigación y salvaguarda

6. El proyecto Camisea y su ampliación dentro de la parte del Lote 88 que se superpone con la reserva kugapakori, nahua, nanti y otros representa una serie de desafíos, no sólo por la alta biodiversidad de la zona, sino también, y especialmente, por la presencia humana que consiste en grupos que han sido identificados como indígenas en aislamiento o contacto inicial. Tal como se manifiesta en la legislación nacional^d y la creación de la reserva, los pueblos indígenas en aislamiento y contacto inicial requieren medidas de protección especiales, dada las condiciones de alta vulnerabilidad que caracterizan a estos pueblos. Debe de recordarse que la actividad extractiva relacionada al proyecto Camisea dentro de la reserva es de carácter excepcional, ya que ha sido permitida sólo porque se fundamenta en derechos de aprovechamiento de recursos naturales otorgados antes de haber sido declarada la reserva de acuerdo al Decreto Supremo N° 028-2003-AG. El mismo decreto establece que “aquellos derechos de aprovechamiento de recursos naturales actualmente existentes deberán ejercerse con las máximas consideraciones para garantizar la no afectación de los derechos de las poblaciones indígenas que habitan el interior de la Reserva”.

7. Para hacer efectiva esta disposición y salvaguardar los derechos de los pueblos indígenas dentro de la reserva en el contexto específico de la ampliación del proyecto Camisea, es necesario una evaluación exhaustiva de las diferentes características de la ampliación planificada y sobre los impactos que éstas tendrán o podrían tener sobre el medio ambiente del cual dependen las diferentes agrupaciones indígenas en el área y sobre

^d Ley N° 28736, Ley para la protección de los Pueblos Indígenas u Originarios en situación de aislamiento y en situación de contacto inicial (2006).

sus condiciones de salud. La elaboración del EIA por la empresa y su revisión por el Gobierno a través de sus instituciones competentes es un intento de cumplir con este objetivo.

8. El EIA de la empresa recopila y analiza un cuerpo de información extenso y detallado sobre las actividades planificadas para la exploración sísmica y la construcción y operación de las instalaciones, y sobre sus impactos o posibles impactos, atribuyendo a cada actividad un nivel de riesgo para el medioambiente o la actividad humana. Además, el EIA incluye un plan de manejo con una serie de medidas de mitigación de impactos y salvaguardas elaboradas en vista de la presencia de la población indígena identificada. El proceso de revisión del EIA por el Gobierno ha exigido una serie de clarificaciones y algunos cambios en las operaciones planificadas y el fortalecimiento de salvaguardas, incluyendo la reducción del área de exploración sísmica, la reubicación de una de las locaciones para pozos exploratorios y el aumento del valor económico del fondo de compensación a favor de los habitantes de la reserva. Además, el Gobierno ha hecho una serie de compromisos complementarios a los de la empresa para monitorear las actividades extractivas y efectuar planes de protección y de contingencia^e.

9. El Relator Especial reconoce el esfuerzo de la empresa de minimizar la presencia y los impactos adversos de sus actividades en un área geográfica de alta sensibilidad por su extensa biodiversidad y los habitantes indígenas. Considera como una buena práctica, desde el punto de vista medioambiental, el modelo de “*off shore in land*” desarrollado por la empresa para las operaciones en el Lote 88, un modelo por el cual se evade la construcción de carreteras y se limita la ubicación de los pozos en relativamente pocos lugares y en relativamente pequeñas áreas de superficie, después de haberse realizado las actividades temporales de exploración sísmica que cubren áreas más extensas. Según información suministrada por la empresa y el Gobierno, el proyecto Camisea desde su inicio no ha resultado en una disminución de la biodiversidad en el área, algo que el Relator Especial considera no ha sido controvertido con hechos específicos. Es notable además, el programa de compensaciones elaborado e implementado por la empresa, que ha significado una transferencia significativa de fondos a beneficio de las comunidades indígenas en el área de influencia del proyecto, y que la empresa se ha comprometido extender en relación con la ampliación de sus operaciones en el Lote 88.

10. También, el Relator Especial reconoce el nivel de atención que ha dado el Gobierno a la revisión del EIA y al fortalecimiento del régimen de salvaguardas. Múltiples instituciones del Estado han participado en el proceso de revisión de la EIA, dentro de un marco regulatorio bastante desarrollado que atiende a consideraciones ambientales y sociales, y que incluye un componente centrado en una preocupación por los pueblos indígenas y, en específico, los grupos indígenas en aislamiento o contacto inicial.

11. Sin embargo, el Relator no puede dejar de tomar nota de las varias críticas expuestas sobre el EIA de la empresa y el proceso de su revisión por el Gobierno. Algo que ha generado debate en este sentido es la opinión técnica emitida por el Viceministerio de Interculturalidad del Ministerio de Cultura mediante una resolución de 12 de julio de 2013^f, en la cual se hicieron 83 observaciones sobre el EIA, varias de ellas señalando que aspectos del plan de ampliación pondrían en peligro el bienestar de determinados grupos indígenas dentro de la reserva. Esta opinión técnica fue retirada y dejada “sin efecto” por medio de una resolución viceministerial posterior en que se señalaba que Pluspetrol y varias instituciones del Gobierno habían entregado información suplementaria después de haberse

^e Véase, Informe N° 008-2014-DGPI-VMI/MC, aprobado por la Resolución Viceministerial N° 003-2-14-VMI-MC del 22 de enero de 2014.

^f Informe N° 004-2013-DGPI-VMI aprobado por la Resolución Viceministerial N° 005-2013-VMI-MC del 12 de julio de 2013.

emitido la opinión técnica retirada^g. El 29 de noviembre de 2013, el Viceministerio de Interculturalidad emitió una nueva opinión técnica^h con sólo 37 observaciones que señalaban una evaluación mucho menos crítica que la anterior. El Gobierno ha comunicado al Relator Especial que la retirada de la opinión técnica original se justificaba por la información suplementaria que permitía una evaluación más precisa del EIA y por varios errores que se habían identificado en esa primera opinión técnica. Además, el Gobierno plantea que, aunque el número de observaciones en la segunda opinión técnica es menor que el de la primera, la segunda no es menos comprensiva.

12. Con independencia de lo señalado en las opiniones técnicas del Viceministerio de Interculturalidad, varias ONGs nacionales e internacionales han alegado una serie de problemas ambientales y de salud en relación al plan de ampliación del proyecto, en algunos casos afirmando que cualquier actividad de industria extractiva dentro de la reserva es simplemente incompatible con sus objetivos de protección. El Relator Especial ha encontrado que en muchos casos estas alegaciones han sido especulativas e imprecisas, y sin relacionarse a la información contenida en el EIA de la empresa o las apreciaciones del Gobierno.

13. En otros casos, sin embargo, organizaciones de la sociedad civil han planteado una serie de preocupaciones fundamentadas que merecen atención. Recientemente un grupo de ONGs peruanas y personas interesadasⁱ, que trabajan en el ámbito de derechos humanos y de medioambiente, entregaron al Relator Especial un escrito detallado señalando lo que opinan ser carencias metodológicas en la elaboración del EIA y su revisión por el Gobierno, vacíos en los datos utilizados, e imprecisiones en las conclusiones sobre los impactos y la suficiencia de las salvaguardas y medidas de mitigación. A la vez, en el escrito las ONGs reconocen aspectos positivos en las salvaguardas establecidas por la empresa o impuestas por el Gobierno, y señalan de manera constructiva mejoras que se podrían integrar en las salvaguardas y en el régimen estatal de protección para los pueblos indígenas en aislamiento y contacto inicial. El Relator Especial no pretende juzgar la validez de las críticas de las ONGs, ni de las propuestas que hacen; más bien es su intención resaltar que estas críticas y propuestas continúan siendo planteadas y que merecen atención por parte del Gobierno.

14. Asimismo, en un escrito entregado al Relator Especial en respuesta a una serie de preguntas, la Asociación Interétnica de Desarrollo de la Selva Peruana (AIDESEP), una organización nacional representativa de los pueblos indígenas de la región amazónica, señala como positivas, pero en algunos aspectos insuficientes, varias de las medidas de mitigación y salvaguarda ligadas al plan de ampliación de actividades extractivas en el Lote 88. A la vez, señala la necesidad de mayor información sobre las medidas de protección realizadas por el Estado a favor de los habitantes de la reserva. La organización se enfoca en los mecanismos de monitoreo de las actividades extractivas y de la salud de la población indígena que pudiera verse afectada, y plantea la necesidad de reforzar estos mecanismos con una metodología más participativa que incluiría a las organizaciones indígenas en su ejecución. AIDESEP propone su propia participación en estos mecanismos de monitoreo y en la elaboración o actualización del plan de protección para la reserva.

^g Resolución Viceministerial N° 007-2013-VMI-MC del 19 de julio de 2013.

^h Informe N° 030-20130DGPI-VMI/MC, aprobado por la Resolución Viceministerial N° 009-2013-VMI-MC del 29 de noviembre de 2013.

ⁱ Las organizaciones y personas incluyen: Derecho Ambiente y Recursos Naturales, Instituto de Defensa Legal del Ambiente y Desarrollo Sostenible, Servicios Educativos Rurales, Frederica Barclay, Martin Scurrah y Javier Torres Seoane.

15. Lo que queda evidente es la necesidad de asegurar la efectividad de mecanismos que puedan facilitar la divulgación de información completa y precisa sobre la planificada ampliación del proyecto Camisea en el Lote 88, sus impactos y las medidas de mitigación y salvaguarda pertinentes, además de mecanismos efectivos para impulsar la resolución de las preocupaciones fundamentadas que puedan persistir sobre la ampliación y para asegurar un monitoreo adecuado del proyecto y de sus impactos que sea transparente. El Gobierno ha señalado al Relator Especial que ha impulsado varios procesos de diálogo con las organizaciones indígenas y de la sociedad civil para divulgar información y atender sus preocupaciones sobre el proyecto Camisea. Sin embargo, es evidente que estos procesos no han sido del todo suficientes y que necesitan ser fortalecidos.

El conocimiento específico sobre los pueblos indígenas en aislamiento

16. Uno de los asuntos que fomenta desacuerdo, y hasta confusión, sobre la suficiencia de las medidas de salvaguarda planteadas por la empresa y avaladas por el Gobierno es la cuestión de la presencia o no en el Lote 88 de agrupaciones en aislamiento – a diferencia de los grupos identificados en el lote que sostienen o han iniciado contactos con el mundo externo. En general los pueblos indígenas en aislamiento que no han sido contactados, o que rehúsan el contacto, se encuentran especialmente en condiciones de vulnerabilidad frente a industrias extractivas que entran en sus territorios, dado sus elevados grados de dependencia de los ecosistemas en que viven, debilidades inmunológicas y falta de conocimiento del funcionamiento de la sociedad mayoritaria.

17. Para evaluar los impactos que cualquier actividad extractiva pudiera tener sobre los pueblos indígenas dentro de la reserva y establecer medidas efectivas de salvaguarda, es necesario de antemano tener un conocimiento adecuado, en la medida posible, sobre estos pueblos y sus dinámicas, en observancia del principio de no contacto con pueblos aislados. Sin embargo, si bien existe información relativamente amplia sobre asentamientos indígenas dentro de la reserva con contactos sostenidos o esporádicos, la información disponible sobre los pueblos indígenas en aislamiento está desactualizada e incompleta. Este vacío de información ha generado opiniones divergentes y una falta de confianza en relación a las medidas de protección que el Gobierno ha exigido y que la empresa Pluspetrol se ha comprometido a implementar en el contexto de las actividades extractivas en la reserva.

18. Varias fuentes de información^j identifican a grupos en contacto inicial a lo largo de la reserva, inclusive comunidades y asentamientos dentro del Lote 88, y señalan sus características de relacionamiento con la sociedad nacional en diferentes niveles. Los datos oficiales señalan que existen también en la reserva grupos en aislamiento que rehúsan el contacto con el mundo exterior. Pero la presencia de tales grupos aislados en la parte de la reserva que corresponde con el Lote 88 ha estado sujeta a un debate que no ha sido resuelto por el EIA o su revisión.

19. Al revisar el EIA, el Viceministerio de Interculturalidad, con base en sus propias investigaciones, señaló la posibilidad de la presencia de población aislada del pueblo machiguenga del Paquirí en la parte noroeste del Lote 88. Como precaución frente a esta observación, en su última opinión técnica el Viceministerio exigió a la empresa reducir por 8,198 hectáreas el área de intervención para la exploración sísmica 3D en esa parte del

^j Éstas incluyen, entre otras, el EIA de la empresa, las opiniones técnicas del Viceministerio de Interculturalidad del Ministerio de Cultura, y la publicación, *Aquí vivimos bien – Territorio y uso de recursos de los pueblos indígenas de la Reserva Kugapakori* (2004), elaborada por la organización Shinai con el apoyo de la organización nacional indígena AIDESEP.

Lote^k. Sin embargo, ha sido sujeto de preocupación que el Viceministerio no exigió medida similar en relación a la posible presencia de población aislada en otras partes del lote.

20. El Relator Especial reconoce los esfuerzos del Viceministerio para revisar la evidencia de la presencia de grupos indígenas aislados en el Lote 88, y también reconoce que la evidencia que se presenta al respecto es escasa y basada en gran parte en trabajos de campo y observaciones que se hicieron hace varios años. Por otro lado, es evidente que no existe actualmente un estudio riguroso que hiciera posible descartar de manera conclusiva la posibilidad de la presencia de población aislada en partes del Lote 88 afuera del área identificada en el noroeste del lote. El Relator Especial es consciente de la movilidad que caracteriza a los pueblos indígenas en aislamiento; los estudios – aun siendo estudios de varios años atrás – que llevaron a la creación de la reserva para los kugapakori, nahua, nanti y otros, en donde se ubica la mayor parte del Lote 88; y las dificultades logísticas en localizar a estos grupos. La reserva fue establecida precisamente para proteger a los pueblos indígenas aislados y en contacto inicial, y el Gobierno debería asegurar el cumplimiento de los objetivos de la reserva y actuar con la máxima cautela en este sentido.

21. El Relator Especial toma nota de la información proporcionada por el Viceministerio de Interculturalidad afirmando su intención de realizar, dentro del contexto de la actualización del plan de protección para la reserva, un estudio social exhaustivo con la finalidad de actualizar la información oficial de la situación de la población en aislamiento y contacto inicial que habita en la reserva. También toma nota, como un paso positivo, de la Resolución Viceministerial 008-2013-VMI-MIC, en la cual se establecen las pautas y procedimientos para un registro de pueblos indígenas en situación de aislamiento y contacto inicial.

El régimen de protección institucional y programático

22. Más allá de lo anterior, para cumplir con los objetivos de protección de la reserva establecida a favor de los pueblos kugapakori, nahua, nanti y otros, sobre todo frente a las actividades extractivas, es necesario asegurar la efectividad de un régimen institucional y programático estatal adecuado. El Relator Especial considera que en muchos sentidos el marco legislativo y programático para la protección de los pueblos indígenas en aislamiento y contacto inicial en Perú es ejemplar. Sin embargo, es evidente que éste requiere ser fortalecido especialmente en su implementación.

23. La institucionalidad del ente rector para la protección de los pueblos indígenas en aislamiento y contacto inicial recae actualmente en el Viceministerio de Interculturalidad del Ministerio de Cultura. Según varias fuentes, tanto gubernamentales como no gubernamentales, el Viceministerio todavía carece de suficiente presupuesto y personal para ejecutar sus funciones, aunque ha habido últimamente avances en este sentido; y sufre debilidades a causa de múltiples cambios administrativos y de sus autoridades a nivel interno en los últimos años. También se ha señalado al Relator Especial que el Gobierno todavía no ha cumplido con varias exigencias sentadas en el marco regulatorio relativo a la reserva, tal como el desarrollo, actualización, o implementación del plan de protección, planes de contingencia y de emergencia, y protocolos de actuación. Por otro lado, el Gobierno informa que ha tomado una serie de iniciativas al respecto, entre ellas el establecimiento de lineamientos para la elaboración de planes de contingencia; mecanismos para canalizar el pago de compensaciones en beneficio de los pueblos en aislamiento o contacto inicial ubicados en las reservas indígenas; y normas y procedimientos que regulan las autorizaciones excepcionales de ingresos a las reservas.

^k Informe N° 008-2014-DGPI-VMI/MC, supra, págs. 4-5.

La aplicación del derecho a la libre determinación y la norma de consulta

24. Es notable para el Relator Especial que, de lo que ha percibido, la voz de los pueblos indígenas directamente interesados ha estado poco presente en el debate sobre el proyecto Camisea y su ampliación. De gran relevancia al respecto es el derecho a la libre determinación de los pueblos indígenas, afirmado en el artículo 3 de la Declaración de Naciones Unidas sobre los derechos de los pueblos indígenas. La libre determinación incluye el derecho de los pueblos indígenas de participar en la toma de decisiones que les afectan, sentar sus propias prioridades para el desarrollo dentro de sus territorios y mantener sus medios de subsistencia, tal como se afirma en la misma Declaración. Una vía importante para el ejercicio de la libre determinación es el acceso a procesos de consulta en que pueden dar a conocer sus opiniones en aras de buscar el consenso sobre asuntos que pueden afectar su futuro desarrollo, de acuerdo a lo afirmado en la Declaración y varios otros instrumentos internacionales. La consulta con los pueblos indígenas, además, funciona para salvaguardar sus derechos territoriales y otros derechos cuando éstos puedan verse afectados por procesos de desarrollo impulsados desde el exterior.

25. Por lo tanto, dentro de la normativa internacional referente a los pueblos indígenas, existe un deber del Estado peruano de realizar consultas en relación al desarrollo del proyecto Camisea, dado que el proyecto indudablemente se desarrolla en las tierras tituladas y territorios tradicionales de varios pueblos y grupos indígenas. Este deber se refleja en varias disposiciones de la Declaración sobre los derechos de los pueblos indígenas (por ejemplo, en sus artículos 19 y 32), un instrumento que fue adoptado por la Asamblea General de Naciones Unidas en 2007 con el voto afirmativa de Perú; y tiene fundamentos jurídicos internacionales en el Convenio 169 de la Organización Internacional del Trabajo¹, el cual fue ratificado por Perú en 1994, y en otras fuentes de derecho internacional^m. El deber de realizar consultas se extiende, no sólo a aquellas comunidades indígenas formalmente reconocidas y con tierras tituladas que puedan ver sus intereses afectados por el proyecto (tal como Segakiato, Cashiari y Tincumpia, que son reconocidas como “comunidades nativas” según la legislación nacional); sino también se extiende a aquellos grupos indígenas afectados dentro de la reserva que han iniciado o mantienen, y que muestran deseos de mantener, contactos con el mundo externo.

26. A diferencia de los grupos indígenas que están en aislamiento y que eluden el contacto, cuando se trata de pueblos indígenas en contacto inicial que han manifestado su deseo de relacionarse en algún grado con la sociedad mayoritaria, a éstos se les debería garantizar la oportunidad de expresarse y ejercer influencia sobre, e incluso controlar, las decisiones acerca de actividades extractivas dentro de sus territorios. Tal como señalan las directrices relativas a pueblos indígenas en aislamiento y contacto inicial de la Oficina del Alto Comisionado de Naciones Unidas para los Derechos Humanos, en el contexto de decisiones estatales y procesos de desarrollo que puedan afectar a los grupos indígenas en contacto inicial, en contraste con los grupos indígenas en aislamiento, se deben aplicar los

¹ Convenio (Nº 169) de la Organización Internacional del Trabajo sobre pueblos indígenas y tribales en países independientes, 27 de junio de 1989, XXVI Conferencia Internacional del Trabajo, art. 6

^m Se deben tomarse especialmente en cuenta las obligaciones que derivan de la Convención Americana sobre Derechos Humanos, ratificada por Perú en 1978, de acuerdo a la jurisprudencia conexa desarrollada por la Comisión y la Corte Interamericana de Derechos Humanos. Al respecto, véase Comisión Interamericana de Derechos Humanos, Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales: Normas y jurisprudencia del Sistema Interamericano de Derechos Humanos, OEA/Ser.L/V/II, Doc. 56/09 (30 de diciembre de 2009); págs. 108-128.

lineamientos de consulta sentados en los instrumentos internacionales relevantesⁿ. Igual que a otros pueblos indígenas, los pueblos indígenas en contacto inicial que muestran el deseo de hacerlo deben poder acceder y utilizar los mecanismos de “participación y consulta ... como parte de su derecho de autodeterminación y como forma de legitimar procesos de interacción con relación a la garantía fundamental de los derechos humanos”^o. En este contexto, las consultas deberían llevarse a acabo con la necesaria cautela y con atención a los aspectos culturales y condiciones específicas de vulnerabilidad de cada grupo.

27. El Gobierno no realizó consultas en relación con el plan de ampliación del proyecto Camisea dentro de los lineamientos de la legislación nacional pertinente a la consulta con los pueblos indígenas^p, antes de aprobar el plan de ampliación, lo que el Gobierno justifica con base en que el reglamento de la ley de consulta previa establece que no necesitan ser consultadas las decisiones administrativas para actividades complementarias a proyectos ya aprobados y consultados^q. Sin embargo, según la información recibida por el Relator Especial, tampoco se realizó una consulta antes del otorgamiento al consorcio Camisea de la concesión para el aprovechamiento de gas natural en el Lote 88 en el año 2000. Al respecto, el Gobierno señala la no retroactividad de la ley de consulta, que fue promulgada en 2011^r. En lo que se refiere a los pueblos indígenas en aislamiento o contacto inicial, el reglamento de la ley de consulta delega al Viceministerio de Interculturalidad del Ministerio de Cultura la función de hacer las recomendaciones y observaciones pertinentes sobre los proyectos que puedan afectar a los habitantes de las reservas establecidas para pueblos indígenas en aislamiento y contacto inicial^s, lo que el Gobierno parece entender como una delegación de funciones que sustituye o hace innecesario la consulta con estos pueblos.

28. El Relator Especial no puede dejar de recordar que el cumplimiento con la legislación nacional no necesariamente equivale al cumplimiento con las obligaciones de los Estados dentro de la normativa internacional, la cual tiene un carácter independiente. En la opinión del Relator Especial, pese a que la ley nacional de consulta y su reglamento no lo habría requerido, el Gobierno debió haber realizado un proceso de consulta en relación a la ampliación del proyecto Camisea en el Lote 88, en cumplimiento de lo dispuesto en el Convenio 169 de la Organización Internacional del Trabajo y la Declaración de Naciones Unidas sobre los derechos de los pueblos indígenas, entre otras fuentes de derecho o autoridad a nivel internacional^t. Estos instrumentos internacionales requieren consultas, con

ⁿ Oficina del Alto Comisionado de Naciones Unidas para los Derechos Humanos, Directrices de protección para los pueblos indígenas en aislamiento y contacto inicial de la región amazónica, el Gran Chaco y la región oriental de Paraguay (2012) (en adelante “Directrices de OACNUDH”), párrs. 66-69.

^o *Ibíd.*, párr. 68.

^p Es decir, la Ley N° 29875, Ley del Derecho a la Consulta Previa de los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (2011); y su reglamento, Reglamento de la Ley N° 29785, Ley del Derecho a la Consulta Previa de los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo, Decreto Supremo N° 001-2112-MC.

^q *Ibíd.*, Disposiciones Complementarias, Transitorias y Finales, Décimo Segunda.

^r La no retroactividad de ley de consulta se afirma en la misma ley. Véase Ley N° 29875, *supra*, Disposiciones Complementarias Finales, Segunda.

^s Reglamento de la Ley N° 29785, *supra*, Disposiciones Complementarias, Transitorias y Finales, Novena.

^t El Relator Especial toma nota de que el Ministerio de Energía y Minas estableció las medidas sujetas a consulta previa así como el órgano del sector competente para llevarla a cabo y su oportunidad, ello conforme a lo dispuesto en el artículo 9° de la ley de consulta, Ley N° 29785, *supra*, respecto a que corresponde a las entidades estatales identificar las medidas administrativas sujetas a consulta. Sin embargo, el Relator Especial resalta que, al ejercer sus funciones relativas a la consulta con los

el objetivo de obtener el consentimiento o acuerdo, antes de la toma de cualquier decisión que pueda afectar a los pueblos indígenas en el ejercicio de sus derechos^u. A pesar de estar vinculada a un proyecto anterior, la aprobación del plan de ampliación de actividades extractivas en el Lote 88 representa una nueva decisión del Gobierno sobre un nuevo programa de exploración y explotación de recursos naturales, como claramente se manifiesta en el EIA y el proceso de evaluación del mismo. Dentro de la normativa internacional, los procesos de consulta deben proceder de manera progresiva en todas las etapas de decisión que impliquen actividades nuevas que puedan afectar a los pueblos indígenas y que no han sido abordadas en consultas anteriores^v.

29. En todo caso, de acuerdo a las obligaciones internacionales contraídas por Perú en el ámbito de los derechos humanos, así como en cumplimiento de la legislación nacional que rige la reserva a favor de los kugapakori, nahua, nanti y otros, es necesario asegurar la libre determinación y los otros derechos de estos pueblos indígenas frente a cualquier proyecto de desarrollo que les pudiera afectar. Los mecanismos de consulta, cuando se aplican, funcionan para ese fin.

Recomendaciones

En vista de lo anterior, el Relator Especial hace las siguientes recomendaciones:

30. **De acuerdo a lo sentado tanto en la legislación nacional como en los instrumentos internacionales que vinculan a Perú, se debe garantizar que ningún aspecto de la implementación del plan para la ampliación de actividades de exploración y extracción de gas natural en el Lote 88 pudiera poner en peligro al bienestar físico o vulnerar los derechos de los pueblos indígenas que habitan o usan el área. Al hacer esta recomendación y las que siguen, el Relator Especial hace recordar el deber de los Estados de proteger el goce de los derechos humanos, inclusive frente a las actuaciones de terceros, y la responsabilidad independiente de las empresas de respetar los derechos humanos^w; y además, hace hincapié en los estándares que amparan los derechos de los pueblos indígenas en la Declaración de Naciones Unidas**

pueblos indígenas, las instituciones del Estado deben acatarse a lo dispuesto en los instrumentos internacionales aplicables y no sólo a lo dispuesto en la legislación nacional, para así hacer cumplir con las obligaciones internacionales de Perú.

^u Para una discusión sobre los contornos del deber de los Estados de consultar a los pueblos indígenas según los instrumentos internacionales, véase Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, James Anaya, A/HRC/12/34 (informe anual del Relator Especial al Consejo de Derechos Humanos de 2009), párrs. 36-57.

^v Se ha señalado al Relator Especial que las comunidades indígenas dentro del área de influencia del programa de aprovechamiento de gas natural en el Lote 88, con exclusión a las que se ubican dentro de la reserva, fueron involucradas en el proceso de “participación ciudadana” requerido por la ley durante la elaboración del EIA. Sin embargo, es evidente para el Relator Especial que los diálogos dentro de este marco, siendo impulsados por la empresa con un enfoque en la elaboración del EIA todavía en curso, no fueron suficientes para exonerar al Gobierno de su propio deber de realizar consultas con estas comunidades con el fin de obtener su consentimiento o acuerdos relativos a la implementación de la propuesta ampliación del proyecto, en conformidad con la normativa internacional al respecto. Para una discusión de las responsabilidades empresariales relativas al deber de los estados de realizar consultas con los pueblos indígenas, véase Informe del Relator Especial sobre los derechos de los pueblos indígenas, James Anaya – Las industrias extractivas y los pueblos indígenas, A/HRC/24/41 (informe anual al Consejo de Derechos Humanos de 2013), párrs. 40, 52-62, 89.

^w Véase Principios rectores sobre las empresas y los derechos humanos, A/HRC/17/31 (endosados por el Consejo de Derechos Humanos de la ONU en junio de 2011).

sobre los derechos de los pueblos indígenas, el Convenio 169 de la Organización Internacional del Trabajo y otras fuentes de autoridad a nivel internacional.

31. El Gobierno debería divulgar información comprensiva, por medio de publicaciones accesibles que estén dirigidas al público en general, sobre las características del proyecto Camisea y su ampliación, sobre sus impactos ambientales y sociales, y sobre las condiciones acordadas por la empresa Pluspetrol o impuestas por el Gobierno para salvaguardar el medio ambiente y los derechos de los pueblos indígenas que habitan el área.

32. El Gobierno debería procurar atender y responder de manera satisfactoria a las preocupaciones e inquietudes expresadas por las organizaciones indígenas y de la sociedad civil en relación con el proyecto Camisea y su expansión. Para tal fin, se recomienda establecer, en coordinación con las organizaciones indígenas y de la sociedad civil interesadas, y con la participación de Pluspetrol y de todas las entidades estatales interesadas, una mesa de diálogo en donde se presente y se discuta información sobre el proyecto Camisea y su ampliación, y las preocupaciones al respecto por parte de las organizaciones indígenas y la sociedad civil. El Relator Especial toma nota de los mecanismos de diálogo ya impulsados por el Viceministerio de Interculturalidad en relación al proyecto Camisea, y recomienda que la mesa de diálogo propuesta se establezca sobre la base de estos mecanismos. El Gobierno debería estar dispuesto a considerar modificaciones pertinentes en las condiciones para la ejecución del proyecto y su ampliación, en vista de la información y las justificaciones que se presentaran. Por su parte, las organizaciones indígenas y de la sociedad civil deberían responder y actuar con un espíritu de cooperación con las iniciativas del Gobierno de diálogo y acomodo, y asegurar que sus posiciones se fundamenten en información objetiva y fiable.

33. El Gobierno debería dialogar directamente con AIDESEP y otras organizaciones representativas de los pueblos indígenas de la Amazonía sobre la base de sus propuestas para el fortalecimiento de las medidas de protección de los habitantes de la reserva a favor de los pueblos kugapakori (o matsigenka), nahua, nanti y otros pueblos, y asimismo considerar sus propuestas para el fortalecimiento de los mecanismos para la participación de los pueblos y organizaciones indígenas en el monitoreo de las actividades relacionadas al proyecto Camisea y su ampliación.

34. El Viceministerio de Interculturalidad debe proceder con urgencia para completar el estudio social exhaustivo que se ha comprometido a elaborar con el fin de actualizar la información oficial sobre la situación de la población en aislamiento y contacto inicial que habita la reserva, asegurando mediante la realización del estudio un enfoque especial sobre los grupos aislados que pudieran encontrarse en el Lote 88 y que pudieran verse afectados por la ampliación de las actividades extractivas en el lote. El Viceministerio debería realizar el estudio de manera participativa, involucrando a los pueblos y las organizaciones indígenas interesadas y expertos en la materia que no son funcionarios del Gobierno.

35. Se debería subsanar la falta de consulta adecuada en relación al proyecto Camisea y su ampliación sobre tierras y territorios indígenas en el Lote 88. Para tal fin, el Gobierno debería impulsar y responsabilizarse por la realización de un proceso de consulta con las comunidades indígenas que puedan verse afectadas por las actividades extractivas, inclusive con comunidades y grupos dentro de la reserva que mantienen o han iniciado contacto con la sociedad mayoritaria. El Relator Especial toma nota de que, según informa el Gobierno, el Ministerio de Cultura iniciará en el mes de abril un proceso de divulgación de información y de consultas sobre la ampliación de las actividades de exploración y explotación en el Lote 88 en las localidades y asentamientos de población en contacto inicial que habitan la reserva, un

proceso que se plantea a hacer fuera del marco de la ley de consulta. Este proceso podría funcionar para subsanar la anterior falta de consulta adecuada si se desarrolla en conformidad a los estándares internacionales aplicables.

36. En este sentido, las consultas se deberían centrar en la divulgación de información completa sobre la actividad extractiva actual y futura, y tener como objetivos el consentimiento a los impactos y acuerdos sobre las medidas de mitigación, compensación, beneficios, y mecanismos de participación en el monitoreo de las actividades, entre otros asuntos relacionados, tomando plenamente en cuenta las condiciones, capacidades y patrones culturales de estas comunidades. Además, se recomienda que el Gobierno realice el proceso de consulta, en cooperación con la empresa Pluspetrol y las organizaciones indígenas representativas.

37. Para asegurar la licencia social para el plan de ampliación del proyecto Camisea en el Lote 88, es recomendable no adelantarse con las actividades de ampliación mientras se realicen las consultas. En todo caso, no se debería avanzar con ninguna actividad dentro del plan de ampliación que pudiera afectar los derechos de una comunidad o grupo a ser consultado, sin haberse concluido el proceso de consulta con esa comunidad o grupo.

38. Se debe garantizar la existencia y efectividad de procesos de revisión administrativa o judicial para recibir y resolver cualquier impugnación a las decisiones de las instituciones del Estado, o a la actuación de la empresa Pluspetrol, relativas a la aprobación o ejecución del proyecto Camisea y su ampliación. Estos procesos deberían funcionar y estar disponibles para garantizar la conformidad con la legislación nacional y las normas internacionales aplicables.
