

ELIMINATES THE OBLIGATION OF PRIOR CONSENT WITH NATIVE AND PEASANT FARMER COMMUNITIES: L. D. N° 1064



The violation of the right of communities to be consulted, eliminating prior consent, could worsen the socio-environmental conflicts in mining areas¹

- The implementation of the FTA is used to facilitate access to the land of peasant farmer and native communities, affecting the rights of the current owners.
- L.D. N° 1064 eliminates the obligation of a prior agreement with peasant farmer communities for access to community lands, presenting similar problems to the L.D. N° 1015 that has already been repealed.

Of the group of legislative decrees that affect the rights of native and peasant farmer communities in the country, L.D. N° 1015 and L.D. N° 1073 have attracted the most attention. These decrees have been behind the main demands during different protests carried out by native communities and Amazon organizations in July 2008. Both decrees have already been repealed. However, L.D. N° 1064 includes similar problems, representing a serious risk for peasant farmer and native communities across the nation and must be treated in a similar fashion by Congress.

Problems related to its form and content

Legislative Decree N° 1064, repeals Law N° 26505, the Law on private investment in the development of economic activities in national territory and land which belongs to peasant farmer and native communities. With this it:

Removes the obligation of the entity or individual holding a mining title to reach an agreement with the owner of the land, in repealing article 7 of Law N° 26505. This is extremely dangerous as it eliminates an express regulation that stipulated the OBLIGATION to have prior consent by the landowner before carrying out any activities, and contradicts what is agreed in Legislative Resolution N° 26253, under which ILO Convention 169 is approved.

There was no prior consultation with peasant farmer and indigenous communities regarding an issue of vital interest to them. In L.D. N° 1064 and in legislative decrees N° 1015 and N° 1073 the Executive did not carry out prior consultation for said modification, as indicated in articles 6 of Legislative Resolution N° 26253 that indicates that the governments must “consult the interested peoples, through appropriate procedures and in particular through their representative institutions, whenever legislative or administrative measures are foreseen that could affect them directly.”

It also failed to carry out the necessary procedure to repeal Law N° 26505 itself, which in its Third Final Dispositions indicates that for its appeal or modification: “The present law is approved by a qualified majority according to what is stipulated in Article 106 of the Peruvian Constitution, and its modification or repeal will be carried out through another legal norm issued by Congress, fulfilling the same formality.” Therefore, it has incurred in an illegality.

Illegality of L.D. N° 1064

- It goes against ILO Convention N° 169
- It annuls prior consent by peasant farmer and native communities.
- Indigenous peoples and peasant farmer communities were not consulted.
- It does not respect the procedure for the modification of Law N° 26505.

¹ Elaborated by Emma Gómez, Asesora Legal from CooperAcción. Acción Solidaria para el Desarrollo.

Weakening the rights of communities: Greater risk of socio- environmental conflicts

Together with the publication of L.D. N° 1064, the Executive has been promoting a series of regulatory changes that eliminate from the mining sector regulation the requirement of prior agreement between the title holder of the mining activity and the owner of the superficial terrain, considering only the mineral servitude², a broadly questioned mechanism and one that diverse experts have warned about due to its conflictive nature³.

The weakening of the rights of peasant farmer communities seems to be the focus of these reforms, ignoring the lessons that the socio-environmental conflicts have left us in recent years. According to the most recent report from the Ombudsman, 47% of social conflicts are of a socio-environmental nature and of this percentage 76% involve mining⁴. Laws such as L.D. N° 1064 can worsen these conflicts as its regulations do not allow for greater negotiation between native and peasant farmer communities and those holding the titles for extractive activity, and it facilities access to community lands.

It contradicts the spirit of the FTA

The Peruvian government has taken advantage of its extraordinary faculties to implement the US-Peru FTA in order to modify diverse norms, such as access to natural resources including water and land, as well as other regulations related to the rights of indigenous peoples and peasant farmer communities. It would seem that these regulations aim to take advantage of the period prior to the implementation of the FTA in order to reduce some social and environmental standards and to facilitate private investment, going against some of the criteria explicitly stipulated in the FTA⁶.

It is worth mentioning that this process is causing generalized national protest and, as we have indicated, in the mid term could lead to an increase in the conflict. For all of the above, it is urgent to repeal L.D. N° 1064.

EL DATO⁵:

Tendency toward an increase in socio-environmental conflicts

- December 2006
TOTAL: 97 conflicts
Socio-environmental: 20 cases (21%)
- December 2007
TOTAL: 78 conflicts
Socio-environmental: 37 cases (47%)
- October 2008
TOTAL: 189 conflicts
Socio-environmental: 88 cases (47%)

² In effect, the current regulation for mining exploration activities, approved under Supreme Decree N° 020-2008-EM is only limited to indicating that the title holder is obligated to have, among other instruments, and prior to beginning their mining exploration activities, the "right to use superficial land corresponding to the area where the mining exploration activities are going to be carried out, according to the current legislation." This regulation, unlike the previous, approved under Supreme Decree N° 038-98-EM, does not mention the need to have a "prior agreement with the owner of the superficial land."

³ Mining servitude has been heavily questioned by peasant farmer communities, as they consider it a violation of their right to land. Evidently, the implementation of this mechanism sparks serious conflicts with the local population, a situation, as summarized by Glave and Kuramoto in their book "Mining, minerals and sustainable development in Peru", the State tends to stay on the margin "and the communities and companies are in conflict without a mediator." in the opinion of the authors the highly conflictive nature of the application of this regulation means that those holding mining titles do not use the Law on Servitude.

⁴ According to the Ombudsman's 56 the Report on Social Conflicts as of October 31, 2008 there were 189 social conflicts at a national level, of which 88 were linked to mining. In : <http://www.defensoria.gob.pe/conflictos-sociales-reportes.php>

⁵ In: <http://www.defensoria.gob.pe/conflictos-sociales-reportes.php>

⁶ Environmental Chapter in the PERU – USA FTA "18.3.2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.

More information:

Acción Solidaria para el Desarrollo - CooperAcción

Calle Berlín N° 1353, Miraflores. Lima – Perú

Telephone: (511) 446-5385 / 444-0316 / Fax: (511) 445-0908

cooperación@cooperaccion.org.pe

www.cooperaccion.org.pe

Red Peruana por una Globalización con Equidad – RedGE

Centro Peruano de Estudios Sociales - CEPES, la Convención Nacional del Agro Peruano - CONVEAGRO, Acción Solidaria por el Desarrollo - CooperAcción , Grupo Propuesta Ciudadana, Centro de Estudios y Promoción del Desarrollo - DESCO, Acción Internacional para la Salud - AIS, Asociación Pro Derechos Humanos - APRODEH, Centro de Asesoría Laboral del Perú - CEDAL

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