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## Clearing the Path for Land Rights, One Road Block at a Time: How Peru's Indigenous Population can Assert Their Land Rights Against Peru's Government

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# CLEARING THE PATH FOR LAND RIGHTS, ONE ROAD BLOCK AT A TIME: HOW PERU'S INDIGENOUS POPULATION CAN ASSERT THEIR LAND RIGHTS AGAINST PERU'S GOVERNMENT

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## I. INTRODUCTION

To the indigenous people of Peru, a strong relationship exists between land and livelihood. They depend on their land for the food they eat, the water they drink, and

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the resources they use to build their shelter. It follows that a threat to their property rights also threatens their survival; this past year, they have proven that they are prepared to defend their property rights with their lives.

This Note shows that between the legal systems of Peru, the Organization of American States (OAS), and the United Nations (UN), Peru's indigenous people should pursue their claim against Peru's government in the OAS. However, because the OAS lacks a mechanism to enforce its policy and must rely on political pressure, Peru's indigenous people are still far from a complete remedy. Currently, Peruvian law (particularly the Peruvian Constitution), as well as law promulgated by the OAS and the UN, all contain express provisions that are designed to protect the property rights of indigenous communities.<sup>1</sup> However, recent events in Peru have shown that the weight of these provisions has failed to exceed that of the paper they are written on, as their substance and overall policy has failed to achieve implementation.<sup>2</sup>

In the interest of economic gain, Peru's President has passed multiple presidential decrees, stripping the above-mentioned laws of their effect.<sup>3</sup> Peru's indigenous communities have responded to these decrees by going to the streets in protest, resulting in fatalities on both sides of the conflict.<sup>4</sup> The presidential decrees are the most recent development of a history of government corruption and complicity in legal violations regarding land grants to foreign investors who wish to exploit Peru's valuable resources.<sup>5</sup> These land grants have frequently come at the displeasure of the indigenous people who inhabit the land being exploited. How are Peruvians to enforce their rights in a domestic system infested with those who disregarded their rights by giving their land away in the first place?

Section II of this Note describes the background of the Peru's current conflict. By providing a timeline of the events leading up to the protests, as well as illustrating the source of indigenous peoples' distrust in their government, this section presents a reasonable justification for the need of indigenous peoples to take action to protect their rights. Recently enacted presidential decrees weaken indigenous peoples'

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<sup>1</sup> See CONSTITUCION POLITICIA DEL PERU, art. 89 (1993), available at [http://www.congreso.gob.pe/\\_ingles/CONSTITUTION\\_29\\_08\\_08.pdf](http://www.congreso.gob.pe/_ingles/CONSTITUTION_29_08_08.pdf) [hereinafter PERUVIAN CONSTITUTION]; Organization of American States, *Proposed American Declaration on the Rights of Indigenous Peoples*, Art. 18, approved by the Inter-American Commission on Human Rights at its 1333rd session on February 26, 1997, in OEA/Ser L/V/II.95.doc.7, rev. 1997 [hereinafter *Proposed American Declaration*]; United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295/Annex (Oct. 7, 2007) [hereinafter UN Declaration].

<sup>2</sup> See MAUREEN TAFT-MORALES, PERU: CURRENT CONDITIONS AND U.S. RELATIONS 3 (Congressional Research Service) (2009) (citing ECONOMIST, *Oil and Land Rights in Peru: Blood in the Jungle*, June 11, 2009, available at [http://www.economist.com/node/13824454?story\\_id=13824454](http://www.economist.com/node/13824454?story_id=13824454)) [hereinafter TAFT-MORALES]; Milagros Salazar, *Peru: Indigenous Groups Challenge Private Investment Decree* (May 29, 2009), <http://ipsnews.net/news.asp?idnews=42578>.

<sup>3</sup> See TAFT-MORALES, *supra* note 2, at 3-4.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> See *id.* at 2.

ability to protect their lands from encroachment by foreign investors.<sup>6</sup> Further, the methods by which the decrees were passed violate Peru's obligations under both domestic and international laws.<sup>7</sup> However, government corruption has led indigenous communities to doubt their chances of obtaining a legal remedy, causing them to take to the streets in protest.<sup>8</sup>

Section III of this Note illustrates the relevant provisions in Peru's domestic and international legal schemes. This section reveals that, among others, two important rights are common to Peruvian law, the OAS, and the UN. First is the right to prior consultation, meaning that indigenous peoples must be consulted before the government initiates any activity or program that will affect indigenous peoples' land.<sup>9</sup> Second is the right to sovereign discretion as to how the land should be used.<sup>10</sup> The enactment of the presidential decrees was an explicit violation of prior consultation, and the effect its application will have on indigenous property rights will no doubt lead to a violation of the right to sovereignty over land usage.

Section IV illustrates how Peru has generally not enforced the substance of the aforementioned rights, again showing that the presidential decrees are the final act in a history of disregarding indigenous interests. In contravention of the Peruvian constitution, as well as law from the OAS and UN, Peru has enacted laws that promote foreign investment and encroachment on indigenous lands.<sup>11</sup>

Section V highlights institutional and policy differences between Peru, the OAS, and the UN that effectively make the OAS the best forum for Peru's indigenous people to assert their claims. For example, Peru's government has frequently been accused of corruption and complicity regarding violations of its environmental law by foreign investors.<sup>12</sup> Further, the International Court of Justice, the principal judicial body of the UN, only hears disputes between two states.<sup>13</sup> Although both the OAS and UN have organizations designated to further the interests of indigenous

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<sup>6</sup> Lila Barrera-Hernandez, *Peruvian Indigenous Land Conflict Explained* (June 16, 2009), <http://www.as-coa.org/article.php?id=1710>; TAFT-MORALES, *supra* note 2, at 3.

<sup>7</sup> Salazar, *supra* note 2.

<sup>8</sup> See TAFT-MORALES, *supra* note 2, at 3.

<sup>9</sup> See PERUVIAN CONSTITUTION, *supra* note 1; *Proposed American Declaration*, *supra* note 1, arts. 21, 25; UN Declaration, *supra* note 1, art. 30.

<sup>10</sup> See PERUVIAN CONSTITUTION, *supra* note 1; *Proposed American Declaration*, *supra* note 1, arts. 21, 24; UN Declaration, *supra* note 1, art. 30.

<sup>11</sup> See Sergio A. Leiseca & Lawrence L. Johnson, *Investment Incentives Law Goes into Effect in Peru*, LATIN AMERICAN LAW AND BUSINESS REPORT, Jan. 31, 1999, at 21; TAFT-MORALES, *supra* note 2, at 3-4; Salazar, *supra* note 2; Barrera-Hernandez, *supra* note 6.

<sup>12</sup> TAFT-MORALES, *supra* note 2, at 2-3.

<sup>13</sup> International Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1&.&PHPSESSID=0d004b984801f15bf847e577331a6177> (last visited Mar. 1, 2011). See also International Court of Justice Case Page, <http://www.icj-cij.org/docket/index.php?p1=3> (last visited Mar. 1, 2011) (explaining that the court gives Advisory Opinions on legal issues by specialized agencies and settles legal disputes filed by one State against another State).

peoples, the OAS is the only organization that can also afford them an impartial judicial decision in their favor.<sup>14</sup>

Finally, Section VI explains that the best legal avenue for the indigenous population to effectively protect their land rights against their government is to submit their case to the Inter-American Court of Human Rights (Inter-American Court) of the OAS. Among other reasons, in recent history the OAS has demonstrated a strong interest in protecting indigenous peoples.<sup>15</sup>

## II. PERU'S INDIGENOUS PEOPLE HAVE A REASONABLE BASIS FOR SEEKING PROTECTION OF THEIR LAND RIGHTS FROM THE GOVERNMENT

Recent legislation promoting resource exploitation, along with a tradition of promoting foreign investment and multiple instances of government corruption, has led the Peruvian indigenous communities to reasonably distrust their domestic legal system. Peru has a long tradition of selling or leasing land to foreign investors.<sup>16</sup> Most recently, Peru's President has issued presidential decrees, the most controversial of which ultimately apply to make acquiring indigenous land easier for foreign investors.<sup>17</sup> For instance, the president has used his legislative power to reduce the number of votes required from members of an indigenous community to consent to a sale of the community's land.<sup>18</sup> He also has enacted decrees that broaden the government's power to grant indigenous land to foreign investors.<sup>19</sup> These decrees are only the most recent instances of Peru's tradition of promoting foreign investment, this time leading to a series of violent protests, motivating Peru's

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<sup>14</sup> Inter-American Commission on Human Rights, What is the IACHR?, <http://www.cidh.oas.org/what.htm> (last visited Mar. 1, 2011) (explaining that any person, group, or nongovernmental organization can submit a petition to the Commission, and the Commission in turn determines whether the case should be submitted to the Inter-American Court).

<sup>15</sup> See generally *Case of the Mayagna (Sumo) Awajitjuna Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf) [hereinafter *Awajitjuna Case*]; *Mary and Carrie Dann v. U.S.*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1, rev. 1 (2002), available at <http://www.iachr.org/annualrep/2002eng/USA.11140.htm> [hereinafter *Mary Case*]; see *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5, rev. 1 (2004), available at <http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm> [hereinafter *Maya Case*]; *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146ing.pdf) [hereinafter *Paraguay Case*].

<sup>16</sup> See EarthRights Int'l et al., *A Legacy of Harm: Occidental Petroleum in Indigenous Territory in the Peruvian Amazon* 11 (2007), available at <http://www.earthrights.org/sites/default/files/publications/A-Legacy-of-Harm.pdf> (citing Philippe Descola., *La Selva Culta: Simbolismo y Praxis en La Ecología de Los Achuar* (Abya Yala, Colección Pueblos del Ecuador 3, Tercera Edición, Ecuador, 1996)).

<sup>17</sup> See Barrera-Hernandez, *supra* note 6; Salazar, *supra* note 2.

<sup>18</sup> See Salazar, *supra* note 2.

<sup>19</sup> See Barrera-Hernandez, *supra* note 6.

President to deploy government police to quiet those involved.<sup>20</sup> When the soldiers engaged the protestors, a conflict ensued resulting in multiple fatalities.<sup>21</sup> Indigenous people's skepticism of their domestic government is further perpetuated by frequent occurrences of corruption among government officials.<sup>22</sup>

*A. Presidential Decrees and Indigenous Protests*

In 2008, the Peruvian Congress gave President Garcia the power to create implementing legislation by presidential decree, so long as the legislation was intended to implement the Peru Trade Promotion Agreement (PTPA) with the United States.<sup>23</sup> He then issued over ninety-nine presidential decrees, attempting to hastily implement the agreement before George W. Bush's Presidential term expired.<sup>24</sup> Under the PTPA, which concluded on December 7, 2005, tariffs between the two nations were eliminated, and Peru was to create a stable, predictable legal scheme for U.S. investors conducting business within its territory.<sup>25</sup> One desired effect of the agreement was for Peru to strengthen the country's development prospects.<sup>26</sup>

One of the decrees passed by President Garcia was Decree 1015, which provided that indigenous communities may permit the sale or lease of communal land to private investors with a vote of just over fifty percent of members present in community assemblies.<sup>27</sup> This altered the previous standard that required two-thirds of the qualified community members consent in order to sell or lease the land.<sup>28</sup> Also, those who vote are no longer required to be qualified community members; anyone who is present at a community assembly is permitted to vote.<sup>29</sup> This has led to a fear that foreign investors interested in encroaching on indigenous land may influence these assemblies by paying disinterested individuals to attend and vote in favor of selling.<sup>30</sup>

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<sup>20</sup> David Dudenhoefer, *Amazonian Indigenous Protest Provokes Peruvian Government Reprisals*, ENV'T NEWS SERVICE, May 27, 2009, <http://www.ens-newswire.com/ens/may2009/2009-05-26-02.asp>.

<sup>21</sup> Chris Kraul & Adriana Leon, *13 Killed as Indians Battle Police*, L.A. TIMES, June 6, 2009, <http://articles.latimes.com/2009/jun/06/world/fg-peru6>.

<sup>22</sup> See TAFT-MORALES, *supra* note 2, at 2-3.

<sup>23</sup> See TAFT-MORALES, *supra* note 2, at 3.

<sup>24</sup> *Id.* (explaining that the reason for rushing the implementation of the trade agreement was to make sure it was in place before United States President George W. Bush's term expired).

<sup>25</sup> Press Release, Office of the U.S. Trade Representative, United States and Peru Conclude Free Trade Agreement (Dec. 7, 2005), *available at* [http://www.ustr.gov/sites/default/files/uploads/agreements/mefta/asset\\_upload\\_file744\\_8518.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/mefta/asset_upload_file744_8518.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> See Salazar, *supra* note 2.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

Decreces 994 and 020-2008-AG created a legal scheme aiming to facilitate speedy concessions of “idle and unproductive land” with agricultural potential to private investors.<sup>31</sup> The obvious problem, however, is that most of the land within the scope of the decree is traditionally occupied by indigenous people.<sup>32</sup> Decree 1064 is related to Decree 994 in that it expands Decree 994’s already broad definition of “idle and unproductive land.”<sup>33</sup> Further, it also eradicates the requirement that foreign investors have prior informed consent from indigenous communities before encroaching on their land.<sup>34</sup> President Garcia also passed Decree 1090, a new forestry law that removes deforested land from the protection of the state.<sup>35</sup> This makes any deforested land available to sell to foreign investors. Soon after this law was passed, illegal deforestation commenced on indigenous land in order to make it open for sale.<sup>36</sup> Finally, Decree 1089 provides that it is in the nation’s interest to title lands having agricultural potential.<sup>37</sup> This gives the state title to all land capable of agricultural use, taking priority over any pending indigenous titling proceedings regarding the same area.<sup>38</sup>

Opponents of these decrees argue that some were passed without notification or consultation of the affected indigenous communities.<sup>39</sup> They also claim that numerous decrees are not essential to the implementation of the free trade agreement, which is why the president has the power to issue them in the first place.<sup>40</sup>

In August 2008, the indigenous communities carried out their first protests relating to President Garcia’s decrees.<sup>41</sup> Indigenous people from over sixty communities halted the operations of an oil pipeline run by the state-owned organization Petroperu in the Loveta province, and occupied a hydroelectric power plant in Bagua.<sup>42</sup> Four days after the protests began, another group of indigenous people took control over drilling platforms operated by Petroplus, a transnational

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<sup>31</sup> Barrera-Hernandez, *supra* note 6.

<sup>32</sup> *Id.* (explaining further that indigenous communities have the ability to protect their land from the effect of these decrees by obtaining a legal title. However, obtaining a title is difficult because of the complex seventeen step process and the expensive legal procedures that are required).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Barrera-Hernandez, *supra* note 6.

<sup>38</sup> *See id.*

<sup>39</sup> Abigail Poe, *Protests in Peru*, JUST THE FACTS, June 11, 2009, <http://justf.org/blog/2009/06/11/protests-peru>.

<sup>40</sup> Dudenhoefer, *supra* note 20.

<sup>41</sup> Kiraz Janicke, *Peru: Conflict Grows, Government Slumps*, GREEN LEFT WEEKLY, Aug. 16, 2008, <http://www.greenleft.org.au/2008/763/39409>.

<sup>42</sup> *Id.*

mining company.<sup>43</sup> Following these events, Peru's Congress repealed Decrees 1015 and 1073 that were both intended to make sales of indigenous land easier.<sup>44</sup> Although Congress promised to vote on repealing eight other decrees having the same effect, the vote never occurred.<sup>45</sup> Peru's indigenous population retaliated by organizing a 30,000 person protest in which sixty-five tribes were represented.<sup>46</sup>

Although the new protests were mild at first, tensions began to build, and by late April, protestors had blocked another oil pipeline in northern Peru, causing it to halt operations.<sup>47</sup> Congress again responded by attempting to repeal another of the decrees, but was prevented by President Garcia's administration.<sup>48</sup> Effects of the protests only became worse as indigenous people blocked travel on roads, waterways, and even disrupted flights at remote airports.<sup>49</sup> After President Garcia declared a sixty-day state of emergency in affected areas on May 9, the protests, which initially began in northern Peru in April, began to spread south.<sup>50</sup>

After two months of enduring the protests, tensions came to a head when President Garcia sent 650 government police to restore order and bring down the blockades. This decision resulted in multiple clashes and consequential fatalities on both sides.<sup>51</sup> When police arrived at a roadblock in Bagua, a conflict erupted that took the lives of over thirty-five people.<sup>52</sup> Indigenous leaders claim that the violence started when the police began firing at protestors from a helicopter,<sup>53</sup> but government officials argue that the protestors were the initial aggressors.<sup>54</sup> Some reports claim that the indigenous peoples were either unarmed or carrying only wooden spears and fighting only in self-defense;<sup>55</sup> others contend that some of the protestors had guns and fired first, while other protestors took guns from the officers to use against

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<sup>43</sup> *Id.*

<sup>44</sup> Survival, Amazon Indians' Protest Forces Repeal of Laws, <http://survivalinternational.org/news/3654> (last visited Mar. 1, 2011).

<sup>45</sup> See Lucien Chauvin, *Peru's Deadly Battle Over Oil in the Amazon*, TIME, June 10, 2009, available at <http://www.time.com/time/world/article/0,8599,1903707,00.html>.

<sup>46</sup> See Rory Carroll, *Peruvian Police Fire on Unarmed Indigenous Tribes' Oil and Gas Protest*, GUARDIAN, June 5, 2009, available at <http://www.guardian.co.uk/world/2009/jun/05/amazon-tribes-police-protest-deaths>.

<sup>47</sup> See Chauvin, *supra* note 45.

<sup>48</sup> See TAFT-MORALES, *supra* note 2, at 4.

<sup>49</sup> Simon Romero, *Fatal Clashes Erupt in Peru at Roadblock*, N.Y. TIMES, June 6, 2009, at A4, available at [http://www.nytimes.com/2009/06/06/world/americas/06peru.html?\\_r=2](http://www.nytimes.com/2009/06/06/world/americas/06peru.html?_r=2).

<sup>50</sup> *Id.*

<sup>51</sup> Poe, *supra* note 39.

<sup>52</sup> *Id.*

<sup>53</sup> Romero, *supra* note 49.

<sup>54</sup> Poe, *supra* note 39.

<sup>55</sup> John Gibler, *Indigenous Protest and State Violence in the Peruvian Amazon: How the Media Misrepresents*, HUFFINGTON POST (June 12, 2009, 3:22 PM), [http://www.huffingtonpost.com/john-gibler/indigenous-protest-and-st\\_b\\_214901.html](http://www.huffingtonpost.com/john-gibler/indigenous-protest-and-st_b_214901.html).



them.<sup>56</sup> In a separate conflict, also in Bagua, nine police officers were killed while government forces seized control of Petroperu's petroleum facility from indigenous protestors.<sup>57</sup> In the wake of these fatal events, Congress repealed two more presidential decrees, Decrees 1064 and 1090.<sup>58</sup> There are still decrees in place, however, that negatively effect indigenous peoples' land.

### B. History of Promoting Foreign Investment

The presidential decrees and consequential protests are only the most recent developments in Peru's long tradition of promoting foreign investment. The Peruvian government began promoting exploitation of its land in 1947, when it welcomed settlements established by people of both indigenous and European ancestry.<sup>59</sup> These groups used the land for agriculture, logging, and extraction of minerals.<sup>60</sup> They also built up the land's infrastructure, which began the deforestation of Peru's Amazon region.<sup>61</sup> In 1990, President Alberto Fujimori began a large-scale program of "denationalization and privatization."<sup>62</sup> In order to facilitate trade, Fujimori took an active role in forming Peru's legal policy by maneuvering legislation through parliament.<sup>63</sup> Further, Fujimori bypassed the Peruvian Legislature for a two-year period when he governed by enacting presidential decrees.<sup>64</sup> Today, seventy percent of Peru's 173 million acres of rainforest have been, "granted or offered as concessions for oil and gas exploration."<sup>65</sup> The current President, Alan Garcia, has made many of these concessions.<sup>66</sup> Indigenous groups who inhabit the Amazon region argue that the concessions violate their property rights because much of the land is believed to be ancestral communal land owned by the indigenous tribes.<sup>67</sup>

Peru has also enacted legislation that creates incentives for investing in Peru's Amazon region. In 1999, Peru enacted Ley No. 27037 (Law 27037), which gives tax exemptions to transnational corporations who operated in Peru's Amazon region,<sup>68</sup>

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<sup>56</sup> Kraul & Leon, *supra* note 21.

<sup>57</sup> Romero, *supra* note 49.

<sup>58</sup> Barrera-Hernandez, *supra* note 6.

<sup>59</sup> EarthRights, *supra* note 16, at 11.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Foreign Law Guide: Peru, <http://www.foreignlawguide.com/sample/Peru%20Introduction.htm> (last visited Apr. 2, 2011).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> TAFT-MORALES, *supra* note 2, at 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Ley de Promocion de la Inversion en la Amazonia [Law on Investment Promotion in the Amazon, hereinafter Amazon Investment Law], Law No. 27037, art. 11, 12 (Dec. 30,

an area that is also occupied by numerous indigenous communities.<sup>69</sup> In order to qualify for income tax benefits awarded by the legislation, the private investor must have seventy percent of its operations in the Amazon Region.<sup>70</sup> Article nine of the act provides that the Transportation and Communications departments of government are to run infrastructure studies in order to facilitate the construction of port and airport infrastructure as well as roads into the jungle.<sup>71</sup>

One year after the above-mentioned tax benefits took effect, Peru passed a comprehensive legal system regarding the concession of forestland.<sup>72</sup> Under the new law, much of Peru's forests were re-zoned to make granting concessions to timber-seeking investors easier.<sup>73</sup> In a superficial effort to remedy any land conflicts that were caused by the new legislation, the Peruvian officials also provided a titling program that afforded the indigenous communities an avenue to prevent their land from being taken.<sup>74</sup> However, the project did not take effect in the Amazon region until 2001, whereas re-zoning of that forestland began in 2002, giving the affected indigenous communities a mere year to utilize the program.<sup>75</sup> The provisions of these two laws and the actions of Peru's administration illustrate that Peru's indigenous people have been subject to the government's policy of foreign investment promotion much longer than the last two years.

### C. Multiple Instances of Corruption in Government

Combined with the above-mentioned conflict and long-standing policy of encouraging foreign investment, a tradition of corruption in the presidential office further perpetuates tensions between the indigenous people of Peru and their domestic government. During Alan Garcia's first term as president, from 1985 to 1990, he was repeatedly charged with corruption and human rights violations.<sup>76</sup> However, Alberto Fujimori, the candidate who defeated Garcia in the 1990 election,

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1998), available at <http://intranet2.minem.gob.pe/web/archivos/dgh/legislacion/127037.pdf> (act took effect on Jan. 1, 1999).

<sup>69</sup> Leiseca & Johnson, *supra* note 11.

<sup>70</sup> Amazon Investment Law, *supra* note 68, art. 11.

<sup>71</sup> *Id.* at art. 9.

<sup>72</sup> Ilmi Elijah Granoff, *Peruvian Forest Law: Seeing the People for the Trees*, 16 N.Y.U. ENVTL L.J. 533 (2008).

<sup>73</sup> *Id.* at 451; see Ley Forestal Y De Fauna Silvestre [Forestry and Wildlife Law], Law No. 27308, arts 39, 45-47, July, 16, 2000, available at <http://adaalegreconsultores.com.pe/normas/Agricultura/8.pdf>.

<sup>74</sup> Granoff, *supra* note 72, at 541 (citing Interview with Senior Forestry Officer, IRENA-Pucallpa, in Peru (June 12, 2005)).

<sup>75</sup> Granoff, *supra* note 72, at 542 (citing Int'l Research Group et al., Manual de Legislacion Forestal (Version Preliminar) 4 (2005)) (explaining further that much of the land occupied by indigenous peoples was re-zoned as a "production forest" which meant that it was possible for the government to grant the land to an investor in a concession, or give him a permit to harvest the land's timber).

<sup>76</sup> TAFT-MORALES, *supra* note 2, at 1.

proved not to be any better.<sup>77</sup> On April 7, 2009, Fujimori was convicted and sentenced to twenty-five years in prison by the Peruvian courts for crimes against humanity as well as corruption while in office.<sup>78</sup> Although this conviction has been considered an accomplishment for the Peruvian judicial system that adds to its legitimacy, the system has traditionally been viewed as weak and easily influenced by political pressure.<sup>79</sup> Further, convicting a former president who is no longer involved with the government still does not prove that the Peruvian courts are prepared to stand up to a currently governing president. Finally, after Garcia was reelected in 2006, he again faced charges of corruption in October 2008.<sup>80</sup> Garcia had to fire seven of his seventeen-member cabinet after their involvement in a scandal regarding alleged kickbacks for awarding specific contracts for oil exploration.<sup>81</sup> Peru's indigenous population would be reasonable in taking issue with the idea of relying on government personnel who accept bribes from foreign oil companies for protection of their land rights.

Having illustrated a reasonable justification for the need of Peru's indigenous people to protect their land rights against its domestic government, next is a discussion of Peru's domestic and international obligations regarding its treatment of indigenous land rights.

### III. LEGAL BACKGROUND

Peruvian law, as well as law promulgated by the Organization of American States (OAS) and the United Nations (UN), all protects indigenous land rights. Each legal scheme protects indigenous communities' right to own the land they occupy. Beyond this common ground, OAS and UN law provide for more direct protection of indigenous land rights than Peruvian law. Each of these three legal frameworks formally guarantees the same legal rights to indigenous peoples, thus making the substance of any one body of law no more attractive than the other. This is because the rights provided by treaties from the OAS and the UN are substantially similar, and Article 55 of Peru's Constitution incorporates any active treaty into Peru's domestic legal system. However, differences among these governing bodies do exist in terms of their institutions and indigenous rights policy.

#### A. Peruvian Law

Article 89 of the Peruvian Constitution explains that indigenous communities enjoy imprescriptible ownership of their land, and they alone may determine how that land can be used.<sup>82</sup> Also, Peruvian Congress passed a law that created an

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<sup>77</sup> *See id.* at 1-2.

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2.

<sup>81</sup> TAFT-MORALES, *supra* note 2, at 2.

<sup>82</sup> *See* PERUVIAN CONSTITUTION, *supra* note 1, art. 89.

Rural and Native Communities are legally recognized and enjoy legal status. They are autonomous in terms of their organization, communal working, use and free disposal of their land, as well as economically and administratively within the framework established by law. Ownership of their land is imprescriptible except in the case of

organization in the executive branch called the National Institute for the Development of Andean, Amazonian, and Afro-Peruvian People (INDEPA), which is responsible for promoting, coordinating, evaluating, and approving projects and policies intended to support Peru's indigenous citizens.<sup>83</sup>

Further, Peru's administration has adopted multiple international treaties that protect indigenous land rights and sovereignty, which will be discussed below.<sup>84</sup> Article 55 of Peru's Constitution provides that, "Treaties concluded by the government and now in affect are part of national law."<sup>85</sup> This provision applies to make Peru's international obligations under treaties it has ratified also binding as a matter of national law. This means that under Peru's Constitution, it is a violation of Peruvian national law for the government to disregard international obligations imposed on the government through treaties it has ratified. Therefore, provisions of UN and OAS treaties must be respected because, through Article 55, they have been incorporated into Peruvian domestic law. However, the methods by which the presidential decrees mentioned above were passed violated some of Peru's international obligations, suggesting that the Peruvian government has not yet given much effect to treaty provisions. This point will be further developed in Section IV.

#### B. Law of the Organization of American States

Similar to the UN, the OAS is an international body that is composed of the nations making up North, South, and Central America.<sup>86</sup> OAS's human rights system (also referred to as the Inter-American Human Rights System) starts with a body called the Inter-American Rights Commission (Commission).<sup>87</sup> The Commission is responsible for investigating human rights practices of the state-members of the OAS, and can also hear complaints from those individuals who

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abandonment described in the preceding article. The government respects the cultural identity of the Rural and Native Communities.

<sup>83</sup> See Ley del Instituto Nacional de Desarrollo de Pueblos Andinos, Amazonicos y Afroperuano [Law of the National Institute of Development of Andean, Amazonian, and Afro-Peruvian Towns, hereinafter Andean Law], Law No. 28495, April 2005, available at <http://www.servindi.org/pdf/Ley28495.pdf>.

Art. 1, sec. 2 states: The INDEPA is the governing body of national policies responsible for proposing and monitoring compliance with national policies, and coordinating with the Regional Governments when implementing projects and programs aimed at promoting, advocacy, research and affirmation of the rights, development, and identity of Andean, Amazonian, and Afro Peoples.

<sup>84</sup> EarthRights, *supra* note 16, at 38.

<sup>85</sup> PERUVIAN CONSTITUTION, *supra* note 1, art. 55

<sup>86</sup> See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, O.A.S.T.S. No. 67 [hereinafter OAS Charter].

<sup>87</sup> Andrew Huff, *Indigenous Rights, Local Resources and International Law: Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295, 328 (citing S. James Anaya & Robert A. Williams Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 35 (2001)).

claim that their national government has engaged in human rights violations.<sup>88</sup> OAS's human rights system also contains the Inter-American Court of Human Rights (Court), which is the judicial organ of the OAS and hears human rights cases in the American States.<sup>89</sup> Article 62 of the American Convention on Human Rights (Convention) provides that at the time of ratification, a state-party may declare that it recognizes the decisions of the Court as binding.<sup>90</sup> Peru made such a declaration when it ratified the Convention in 1981.<sup>91</sup> Although Peru later withdrew its declaration in 1999, it re-declared in 2001.<sup>92</sup> Therefore, Peru currently recognizes the Court's decisions as binding.

Human rights legislation has been passed by the General Assembly of the OAS in the form of the American Convention on Human Rights (American Convention) and the Declaration on the Rights and Duties of Man (Declaration).<sup>93</sup> Both the American Convention and Declaration provide that everyone has a right to use and enjoy property;<sup>94</sup> however, indigenous peoples' rights were specifically denoted in OAS's later document, the Proposed American Declaration on the Rights of Indigenous Peoples (Proposed Declaration).<sup>95</sup>

The Commission has interpreted combined provisions of the Convention and Declaration to indicate that property rights attach to land, if it is maintained by indigenous people in accordance with their traditional system of land tenure.<sup>96</sup> Therefore, as long as an indigenous person is using land in compliance of his

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<sup>88</sup> See Anaya & Williams, *supra* note 87, at 35 (citing *The Human Rights Situation of Indigenous Peoples in the Americas*, Inter-Am. C.H.R., OEA/Ser.L./VII.108.doc.63 (2000)).

<sup>89</sup> See Inter-American Commission of Human Rights Homepage, *supra* note 14.

<sup>90</sup> Organization of American States, American Convention on Human Rights art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

<sup>91</sup> See American Convention Ratification Page, available at <http://www.oas.org/juridico/English/sigs/b-32.html>.

<sup>92</sup> *Id.*

<sup>93</sup> Anaya & Williams, *supra* note 87, at 41.

<sup>94</sup> See American Convention, *supra* note 90, art. 21 ("Everyone has the right to use and enjoyment of his property, the law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases according to the forms established by law."); Organization of American States, American Declaration of the Rights and Duties of Man art. 23, Apr. 1948, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) (Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home.).

<sup>95</sup> See Proposed American Declaration on the Rights of Indigenous Peoples [hereinafter Proposed Declaration], approved by the Inter-American Commission on Human Rights at its 133rd session on Feb. 26, 1997, in OEA/SerL/V/II95.doc.7, rev. 1997.

<sup>96</sup> *Awac Case*, *supra* note 15, at para. 151.

"As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain full recognition of that property, and for consequent registration."

community's traditional "property law," he will gain a right to use that land regardless of what the official law of the state holds.<sup>97</sup> This principle is illustrated by the Commission's statement in the Proposed American Declaration on the Rights of Indigenous Peoples (Proposed Declaration), which provides:

Indigenous peoples have the right to legal recognition of their varied and specific forms and modes of possession, control, and enjoyment of territories and property, on the basis of each state's legal system.<sup>98</sup>

In the event that a state's government acts in such a way that will affect an indigenous community's land rights, the Proposed Declaration requires that the state notify and consult the indigenous community that will be affected before the action is carried out.<sup>99</sup> The Proposed Declaration emphasizes the importance of this right by clarifying it again in articles XV and XXI that give indigenous peoples the right to participate in all levels of decision-making in matters, as well as legislative measures which may affect their rights, lives, and destinies, and that states must obtain informed consent from indigenous peoples before enacting a plan or program affecting their rights or living conditions.<sup>100</sup>

### *C. Law of the United Nations*

Like the OAS, the UN also has a body to which indigenous people can look to for help called the International Labour Organization (ILO).<sup>101</sup> The ILO was originally

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<sup>97</sup> *See id.*

<sup>98</sup> Proposed Declaration, *supra* note 95, art. XVIII.

<sup>99</sup> *Id.* at art. XIII.

Indigenous peoples have the right to be informed and consulted regarding measures which could affect their environment, including information ensuring their effective participation in acts and policies which might affect it . . . Indigenous people have the right to full participation in formulating, planning, managing, and applying governmental programs and policies for the conservation and exploitation of their lands, territories, and resources.

<sup>100</sup> *Id.* at art XV, XXI.

Article XV: Indigenous peoples have the right to participate without discrimination, if they so decide, in decision-making, at all levels, concerning matters which might affect their rights, lives, and destiny. They may do so directly or through representatives chosen by them pursuant to their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to gain access to, and participate in, all national institutions and fora.

Article XXI: Unless exceptional circumstances so warrant in the public interest, the states shall take the necessary measures to ensure that decisions regarding any plan, program, or proposal affecting the rights or living conditions of indigenous peoples are not made without free and informed consent and participation of those peoples; that their preferences are recognized; and that no provision which might have negative effects on those peoples is adopted.

<sup>101</sup> INTERNATIONAL LAW AND INDIGENOUS PEOPLES 54 (Joshua Castellino & Niamh Walsh eds., Martinus Nijhoff Publishers 2005).

focused on addressing labor and social policy; however, this focal point has grown to encompass the protection of indigenous rights.<sup>102</sup> The ILO addressed indigenous issues when it began adopting conventions that concerned problems of indigenous workers regarding labor contracts and working conditions.<sup>103</sup> Thereafter, the ILO headed the UN's Andean Indian Programme, which was "an integrated programme for regional development ultimately involving several countries and the indigenous peoples living there . . . ."<sup>104</sup> It was during this time that the ILO passed Convention 107, also known as the Indigenous and Tribal Populations Convention, which was the precedent to Convention 169.<sup>105</sup>

Convention 169 (ILO Convention), alternatively called the Indigenous and Tribal Peoples Convention,<sup>106</sup> was proposed by the ILO and adopted by the UN General Assembly in 1989.<sup>107</sup> It was ratified by Peru on February 2, 1994.<sup>108</sup> Another relevant UN instrument is the UN Declaration on the Rights of Indigenous Peoples (UN Declaration). Both documents provide that state governments must consult indigenous communities, and allow for their input in the decision-making process before approving any project, program, or legislative change that would affect their land or the resources connected therewith.<sup>109</sup> In the event it is necessary to relocate an indigenous community, the ILO Convention and UN Declaration explain that relocation can only occur with free and informed consent of the community concerned, the persons being relocated must be paid fair compensation, and when possible, they are to be given the option to return to the land at a later time.<sup>110</sup>

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<sup>102</sup> *See id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See* Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/law/>.

<sup>107</sup> *See* Indigenous and Tribal Peoples Convention, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

<sup>108</sup> *See* Table of Ratification, *available at* <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

<sup>109</sup> *See* Convention concerning Indigenous and Tribal Peoples in Independent Countries, arts. 6, 7, 15, June 27, 1989, 72 ILO Official Bull. 59 [hereinafter ILO Convention], *and* UN Declaration, *supra* note 1.

<sup>110</sup> *See* ILO Convention, *supra* note 109, art. 16, *and* UN Declaration, *supra* note 1, art. 10.

Art. 16: Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

Both instruments also indicate that indigenous people shall be granted property rights and sovereignty to decide how land is used regarding not only territory they have traditionally occupied, but also land and resources that they have traditionally used or had access to.<sup>111</sup> They further explain that legal recognition by the state shall be given to customary land tenure systems, as well as procedures by which the indigenous communities transfer land rights.<sup>112</sup>

With a few variances, the three bodies of law guarantee the same property rights to indigenous peoples. Article 89 of the Peruvian Constitution grants indigenous peoples land ownership, and gives them the right to autonomously determine how to use that land.<sup>113</sup> Virtually the same right is articulated in article XVIII of OAS's Proposed Declaration,<sup>114</sup> as well as provisions of UN's Draft Declaration<sup>115</sup> and the ILO Convention.<sup>116</sup> Further, all three bodies have created organizations whose responsibilities include protecting the rights of indigenous peoples (INDEPA, Inter-American Rights Commission, Human Rights Council, and ILO).

The OAS and UN exceed legislative protection for indigenous land rights of Peru's Constitution by providing that land tenure systems practiced by indigenous

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Art. 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

<sup>111</sup> See ILO Convention, *supra* note 109, art. 14 (explaining that particular attention shall be paid to nomadic peoples, who should be given rights to land which they traditionally use, rather than occupy); UN Declaration, *supra* note 1, art.26.

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

<sup>112</sup> See ILO Convention, *supra* note 109, art. 17, and UN Declaration, *supra* note 1, arts 26, 27.

Article 17: Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

<sup>113</sup> PERUVIAN CONSTITUTION, *supra* note 1, art. 89.

<sup>114</sup> See Proposed Declaration, *supra* note 95, art. XVIII.

. . . Indigenous peoples are entitled to recognition of their property and ownership rights with respect to lands, territories, and resources they have traditionally historically occupied, and to the use of those to which they also have had access for their traditional activities and livelihood.

<sup>115</sup> UN Declaration, *supra* note 1, arts. 26, 27.

<sup>116</sup> See ILO Convention, *supra* note 109, art. 14.



communities should be recognized by a state's domestic law, and potentially affected indigenous populations must give the government consent before it approves of any program or legislation that may alter the population's rights. However, as mentioned before, all of the treaties mentioned in this section have been ratified by Peru, and article 55 of the Peruvian Constitution incorporates all ratified treaties into its domestic law. Consequently, any excess rights granted by these treaties should have legal force in Peru's national legal system. Article 55 of Peru's Constitution therefore applies to make internationally guaranteed rights enforceable in Peruvian law, putting these three legal frameworks on an even setting. The next section illustrates how the above-mentioned rights have been recently violated and in the past by the Peruvian Government.

#### IV. APPLICATION OF LAW TO THE PRACTICES OF PERU'S GOVERNMENT

Although the above-mentioned bodies of law provide numerous protections for indigenous rights, a visible gap exists between the rights as they are written and the recognition of those rights in practice. Peru's government has passed laws that infringe on indigenous peoples' land rights, and occasionally the methods by which the laws were enacted constituted a violation of the right of prior consultation guaranteed by OAS's Proposed Declaration, and ILO Convention 169.

For example, Law 27307, mentioned in section II,<sup>117</sup> gives tax benefits to transnational corporations who operate in the Amazon region.<sup>118</sup> Enticing foreign investors to exploit a region inhabited by indigenous peoples is a violation of their imprescriptible land rights under Peru's Constitution as well as their right to decide how their land should be used.<sup>119</sup> The policy illustrated by these tax benefits undercuts the autonomy given to indigenous people in OAS's Draft Declaration<sup>120</sup> and Convention 169.<sup>121</sup> While it is uncertain whether the affected indigenous communities were consulted before this legislation was passed, it is unlikely that they would have agreed to a program that purports to facilitate the degradation of their environment.

The new forest legislation, also mentioned in Section II,<sup>122</sup> similarly infringes on indigenous land rights. Like the presidential decrees that inspired the protests in 2008 and 2009, indigenous people inhabiting the effected area were unaware of the new re-zoning law.<sup>123</sup> This failure to inform them of the new legislation constitutes a violation of Article XIII of OAS's Proposed Declaration and Article 6 of ILO

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<sup>117</sup> See *supra* pp. 232-33.

<sup>118</sup> See Amazon Investment Law, *supra* note 68, arts. 11, 12.

<sup>119</sup> See PERUVIAN CONSTITUTION, *supra* note 1, art. 89.

<sup>120</sup> See Proposed Declaration, *supra* note 95, art. XXI.

<sup>121</sup> See ILO Convention, *supra* note 109, art. 14.

<sup>122</sup> See *supra* p.233.

<sup>123</sup> Granoff, *supra* note 72, at 541, 543 (citing Interview with Campesino 1, in Peru (June 16, 2005); Interview with Campesino 2, in Peru (June 16, 2005) (Both were personal interviews between the author and indigenous natives)).

Convention 169.<sup>124</sup> Although Peru's government provided for a titling program in an attempt to resolve land conflicts, once again, few indigenous people were notified of the titling project, and most of the communities lacked title to the land they occupied, meaning application of the new law would lead to their land being rezoned as a production-forest, and would be sold to foreign investors.<sup>125</sup>

Most recently, indigenous people argue that they were not consulted when President Garcia passed Decree 1015. The law significantly impacts indigenous peoples' ability to protect their land from exploitation by foreign investors.<sup>126</sup> The U.S. Bureau of Democracy, Human Rights, and Labor reported on human rights practices in Peru in 2004, stating that the ability of indigenous people to participate in decision-making that affects their land was continually impeded.<sup>127</sup> The report notes that although Article 2 of the Peruvian Constitution gives all Peruvian citizens the right to speak their native language when speaking before any government authority (the conversation is to be translated by an interpreter), the government officials said language barriers were the reason that the indigenous people were not involved in the decision-making process.<sup>128</sup> The failure to include the indigenous communities in making decisions regarding their land is a simultaneous violation of Article 2 of Peru's Constitution as well as the right of consultation in OAS's Proposed Declaration and ILO's Convention 169.<sup>129</sup>

The above examples show that the Peruvian government refuses to respect or enforce the substance of indigenous peoples' land rights, and that those rights tend to be secondary to the government's interest in promoting foreign investment. Peru's Constitution, as well as treaties under the OAS and UN, all protect indigenous land rights. However, Peru's government has continued to engage in conduct that violates textual provisions of each document. Initially, the forest legislation and the decrees were passed without proper consultation. Further, the application of each of the above laws works to infringe on indigenous peoples' imprescriptible land ownership as well as their sovereign right to decide how their land should be used.

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<sup>124</sup> Proposed Declaration, *supra* note 95, art. XIII; ILO Convention, *supra* note 109, arts. 6, 7.

<sup>125</sup> Granoff, *supra* note 72, at 541, 543 (citing Interview with Campesino 1 (explaining that there was no incentive for indigenous people to seek title to their land before enactment of the new legislation because before it was passed, forest exploitation could be conducted by an investor without obtaining title to the land)).

<sup>126</sup> TAFT-MORALES, *supra* note 2, at 3.

<sup>127</sup> Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, Country Reports on Human Rights Practices-2004, Peru (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41771.htm> [hereinafter 2004 Peru Report].

<sup>128</sup> See 2004 Peru Report, *supra* note 127; PERUVIAN CONSTITUTION, *supra* note 1, art. 2.

Every individual has the right . . . to his ethnic and cultural identity. The government recognizes and protects the ethnic and cultural plurality of the nation. Any Peruvian unable to express himself in Spanish has the right to use his own language before any authority through an interpreter. Foreigners enjoy the same right when summoned before any authority.

<sup>129</sup> Proposed Declaration, *supra* note 95, art. XIII; ILO Convention, *supra* note 109, arts. 6, 7.

The Peruvian government has been violating indigenous land rights since early 1999, thus declining to give the rights any substantive value. Therefore, when Peru's government engages in activity that infringes on indigenous peoples' rights, the communities must seek a solution outside of Peru's domestic legal system. Along with showing how the OAS practices a policy of protecting indigenous rights, the next section also highlights institutional characteristics that separate the OAS from both the Peruvian and UN legal system.

V. DIFFERENCES IN THE INSTITUTIONS AND ORGANS OF PERU, THE OAS, AND THE UN MAKE THE OAS THE BEST CHOICE FOR PERU'S INDIGENOUS PEOPLE TO ASSERT THEIR LAND RIGHTS

As mentioned in Section III, Peru's domestic system, the OAS, and the UN grant indigenous people substantially similar land rights. However, institutional differences among these three organizations exist, and when they are highlighted, it becomes apparent that Peru's indigenous population is most likely to obtain judicial protection of their land rights in the OAS's Inter-American Court. Regretfully however, this may not adequately remedy the indigenous people's situation. The OAS still lacks an enforcement mechanism to compel compliance with the Inter-American Court's decisions, and this has led to nations disregarding the Court's orders in the past.<sup>130</sup> The OAS is still preferable to the other two organizations because, among other reasons, Peru's domestic court is unlikely to uphold indigenous land rights due to the political tradition of disregarding them as mentioned in Sections II and IV, and the ICJ of the UN only hears cases brought by state-members,<sup>131</sup> which an indigenous community cannot qualify as.

A. *Differences Between the OAS and Peru Show that the OAS is a Preferable Venue to Peru's Domestic Judicial System*

Where Peru's government has passed laws that promote foreign investment at the expense of indigenous land rights,<sup>132</sup> the Inter-American Court has rendered judicial decisions that produce the exact opposite outcome. The following are a few case examples illustrating how the Inter-American Court has applied the legal provisions mentioned in Section III to human rights violations committed by their state-members. These decisions suggest a trend toward affording broad protection for indigenous peoples' land rights.<sup>133</sup>

In 2001, the Inter-American Court heard the case of *Mayagna (Sumo Community of Awas Tigni) v. Nicaragua*.<sup>134</sup> This conflict arose from Nicaragua's concession of

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<sup>130</sup> See Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tigni v. Nicaragua*, 24 ARIZ. J. INT'L & COMP LAW 609, 619-620 (2007).

<sup>131</sup> International Court of Justice Case Page, *supra* note 13.

<sup>132</sup> See Amazon Investment Law, *supra* note 68; Forestry and Wildlife Law, *supra* note 73.

<sup>133</sup> See generally Awas case, *supra* note 15; Mary case, *supra* note 15; Maya case, *supra* note 15; Paraguay case, *supra* note 15.

<sup>134</sup> See Alvarado, *supra* note 130, at 609.

Awass land to a foreign investor.<sup>135</sup> However, the state made this concession without gaining the community's consent, which constituted a violation of Nicaragua's Constitution,<sup>136</sup> as well as the Awass' rights under the American Convention.<sup>137</sup>

The Court found that Nicaragua was in violation of Article 25 of the American Convention because it had not afforded the indigenous population the protection of a competent court.<sup>138</sup> In rendering this holding, the Court explained that although Nicaragua's Constitution recognized indigenous land tenure rights, it failed to give indigenous peoples a judicial remedy that would allow them to challenge state violations.<sup>139</sup> It stated that the mere availability of judicial remedies is not adequate to comply with the Convention if they are not effective.<sup>140</sup>

Ultimately, the Court held that Nicaragua must enact legislative and administrative provisions that would create an effective procedure for the demarcation and titling of indigenous territory.<sup>141</sup> Further, the newly adopted procedures must be in accordance with the customary law of the indigenous people whose land was being affected.<sup>142</sup>

Later, in the case of *Mary and Carrie Dann v. the U.S.*, the Danns brought a suit against the United States (U.S.) when it confiscated Western Shoshone land.<sup>143</sup> Although the U.S. had set up a commission to hear such claims domestically (called the Indian Claims Commission, or ICC), the ICC failed to grant the Danns relief.<sup>144</sup> In deciding the case, the Inter-American Court found that international mechanisms such as the Proposed Declaration may be consulted when it is interpreting and applying the terms of the OAS human rights legislation such as the American

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<sup>135</sup> See Awass case, *supra* note 15, at para. ¶ 2.

<sup>136</sup> Alvarado, *supra* note 130, at 610-11 (citing Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. I, ch. I, art. 5, tit. IV, ch. VI, art. 89, La Gaceta [L.G.] 9 January 1987 [hereinafter Nicaraguan Constitution]; Ley No. 28, 2 Sept. 1987, Estatuto de Autonomía de las Regiones Autónomas de las Costa Atlántica de Nicaragua [hereinafter Autonomy Statute]) (explaining that Nicaragua's Constitution recognized communal forms of indigenous land ownership. Nicaragua also had a statute which provided that "indigenous communal property consists of the land, waters, and forests that have traditionally belonged to the communities of the Atlantic Coast.").

<sup>137</sup> See Awass case, *supra* note 15, at ¶ 2.

<sup>138</sup> Awass case, *supra* note 15, ¶¶ 1, 2; American Convention, *supra* note 90.

Art. 25: Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this convention, even though such violation may have been committed by persons acting in the course of their official duties.

<sup>139</sup> See Awass case, *supra* note 15, at ¶ 164.

<sup>140</sup> *Id.* at ¶ 114.

<sup>141</sup> *Id.* at ¶ 164.

<sup>142</sup> *Id.*

<sup>143</sup> Mary Case, *supra* note 15, at ¶ 2.

<sup>144</sup> *Id.*

Convention in the context of indigenous rights.<sup>145</sup> This holding further illustrates the Court's trend of promoting indigenous land rights because the Proposed Declaration exclusively protects the rights of indigenous people.<sup>146</sup> By applying the Proposed Draft's provisions when deciding human rights cases, the Court effectively makes it binding on OAS members even though it has not yet been passed by the OAS's General Assembly. The Court ultimately ordered the U.S. to adopt legislative measures necessary to protect the Danns' property rights.<sup>147</sup>

The Court then heard *Maya Indigenous Communities of the Toledo District*.<sup>148</sup> This case arose because the state had given foreign investors logging and oil concessions regarding land that was occupied by indigenous peoples without previously consulting them.<sup>149</sup> The Court held that this was a violation of the right to consultation,<sup>150</sup> stating that one of the "central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories."<sup>151</sup>

The most recent relevant case heard by the Inter-American Court was *Sawhoyamaza v. Paraguay*.<sup>152</sup> In deciding this case, the Court held that an indigenous community's traditional possession of its territory has equivalent legal affect to that of an official state-granted property title.<sup>153</sup> The Court also stated that, in the event where an indigenous community loses possession of its ancestral land, the community is entitled to restitution.<sup>154</sup>

The trend of protecting indigenous rights shown by the cases above is a significant difference between the Peruvian legal system and the OAS. As shown before, Peru has been passing laws promoting foreign investment since 1999, and thus has failed to give OAS treaty provisions substantive effect when making the law.<sup>155</sup> Conversely, since 2001, the Inter-American Court has strictly applied the provisions of OAS treaties to hold that encouraging foreign investment will not be tolerated if it infringes on indigenous land rights. This difference makes the OAS a

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<sup>145</sup> *Id.* at ¶ 129 (explaining that the Court maintained this position even though the Proposed Draft American Declaration on the Rights of Indigenous Peoples had not yet been approved by the OAS General Assembly nor ratified by the United States).

<sup>146</sup> See generally Proposed Declaration, *supra* note 95.

<sup>147</sup> See Mary case, *supra* note 15, at ¶ 173.

<sup>148</sup> See Alvarado, *supra* note 130.

<sup>149</sup> See Maya Case, *supra* note 15, at ¶¶ 2, 5.

<sup>150</sup> *Id.* at ¶ 194.

<sup>151</sup> *Id.* at ¶ 142 (explaining further that the object of the consultation was to ensure that any decisions which may affect indigenous property are based on fully informed consent from the indigenous community).

<sup>152</sup> See Alvaro, *supra* note 130, at 616.

<sup>153</sup> Paraguay Case, *supra* note 15, at ¶ 128.

<sup>154</sup> *Id.*

<sup>155</sup> See Amazon Investment Law, *supra* note 68 (passed in 1999).

more attractive venue for the indigenous peoples. If the Inter-American Court continues to apply this policy, it should work well for Peru's indigenous population.

Regardless of the Court's trend of upholding indigenous land rights, its lack of ability to enforce its orders cannot be overlooked. For example, after the decision in the Awas Case, the Nicaraguan government neglected to implement adequate judicial remedies for the indigenous people, and did not demarcate their land, failing to meet the Court's order in both respects.<sup>156</sup> Further, third party encroachment on Awas territory became more frequent even after the Court's decision.<sup>157</sup> Still today, even after the Court issued a provisional measure in 2002 ordering Nicaragua to prevent the third-party encroachment, Nicaragua has still not satisfactorily addressed the issues presented in that case.<sup>158</sup>

Similarly, in the OAS's Annual Report on the Status of Compliance with the Court's orders, the Inter-American Commission states that as of 2009, the U.S. has failed to comply with the Court's recommendations given in *Mary and Carrie Dann*.<sup>159</sup> Although Belize has made "important efforts and actions," the Commission stated that it also has not substantially complied with the Court's recommendations in *Maya Indigenous Communities of the Toledo District* because logging continues on indigenous land, impacting the community's ability to hunt.<sup>160</sup> Finally, after the decision in *Sawhoyamaza v. Paraguay*, the Court had to issue a provisional order in February 2007 because Paraguay had failed to comply with thirteen of the Court's seventeen orders.<sup>161</sup> Although Paraguay's noncompliance was based on a failure to provide adequate health care to the indigenous community,<sup>162</sup> it nevertheless illustrates that there is not a forceful incentive in place to compel compliance.

Although the OAS has had difficulty enforcing some of its decisions in the past, the 2009 report shows that, out of twelve Inter-American cases that involved Peru, its government has "fully complied" with three of the decisions, "partially complied" with eight, and completely failed to comply only once.<sup>163</sup> This shows that just obtaining a judgment from the Inter-American Court is likely to result in some gain for Peru's indigenous people. Further, because Peru has a history of disregarding indigenous land rights, it is likely that its domestic courts will fail to even decide a claim in favor of the indigenous population, whereas the Inter-American Court, through the above cases, has shown that it will.

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<sup>156</sup> See Alvarado, *supra* note 130, at 619-20 (explaining that a Joint Commission set up by Nicaragua could not reach an agreement with the Awas Tigni regarding demarcation of their land).

<sup>157</sup> *Id.* (explaining non-indigenous persons continued to harvest timber from Awas Tigni's claimed land even after the Court ordered Nicaragua to keep third-party activity on the indigenous land that would affect the community's use and enjoyment of it).

<sup>158</sup> *Id.* at 621.

<sup>159</sup> Inter-Am. Comm'n on H. R. 2009 ¶¶ 806, 818 (2009) [hereinafter 2009 Report].

<sup>160</sup> *Id.* at ¶¶ 99-100.

<sup>161</sup> *Sawhoyamaza Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. No.9.

<sup>162</sup> *Id.*

<sup>163</sup> 2009 Report, *supra* note 159.

Institutional characteristics also help to make the OAS an attractive venue. For instance, whereas the Peruvian courts have been plagued by allegations of weakness and susceptibility to influence from the other branches of Peru's government,<sup>164</sup> the Inter-American Court is an independent judicial body made up of members from different American States.<sup>165</sup> This disconnection with any domestic government increases the Court's impartiality.<sup>166</sup> The vulnerability of Peru's courts to political influence, as compared with the impartiality of the Inter-American Court is another reason why Peru's domestic courts would be an inferior option for pursuit by Peru's indigenous population. As President Garcia has shown through his decrees that he does not believe in substantive protection of indigenous land rights,<sup>167</sup> it is likely that he will use political pressure to influence Peru's courts to decide on such a matter in his favor.

As mentioned in Section II, Peru's government also has allegations of corruption in its past. President Garcia discharged seven members of his cabinet for taking kickbacks and bribes in return from offering exploration contracts.<sup>168</sup> Although it is not certain, it would not be a surprise if those who offered the bribes for the contracts similarly offered bribes to influence the Court's judgment. Because the Inter-American Court is not overly burdened by any kind of economic agenda, it is less vulnerable to such temptations. The members of the Inter-American Court should also be given some credibility because of their pattern of deciding against foreign investors as shown in the cases mentioned above.

*B. Differences Between the OAS and the UN Make the OAS a More Attractive Venue to Peru's Indigenous Population than the UN*

Treaties in both the OAS and the UN confer substantially similar land rights to indigenous peoples; however, differences between the investigative and judicial branches of these organizations make the OAS the best option for Peru's indigenous peoples. For instance, the OAS, having only 35 members, is a smaller organization and its members are tied to one region,<sup>169</sup> whereas the UN is comprised of 192 nations that are spread throughout the world.<sup>170</sup> Because it has far less members to oversee, the OAS may focus more in depth with regional relations while the UN must monitor the interactions between its 192 state-members.

Having membership limited to nations who are geographically close should make political pressure coming from the organization and its closely situated state-members stronger and more effective than that of the UN. Any political pressure

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<sup>164</sup> TAFT-MORALES, *supra* note 2, at 1.

<sup>165</sup> See Inter-Am. Ct. H.R. Homepage, last visited on Feb. 28, 2010, available at <http://www.corteidh.or.cr/index.cfm?CFID=356406&CFTOKEN=53815211>.

<sup>166</sup> *Id.*

<sup>167</sup> See Barrera-Hernandez, *supra* note 6.

<sup>168</sup> See TAFT-MORALES, *supra* note 2, at 2.

<sup>169</sup> Org. Am. States Members Page, available at [http://www.oas.org/en/about/member\\_states.asp](http://www.oas.org/en/about/member_states.asp) (last visited Feb. 27, 2010).

<sup>170</sup> U.N. Quick Facts Page, available at <http://www.un.org/en/aboutun/index.shtml> (Last visited Feb. 27, 2010).

exerted from an outside source is likely to have more effect if coming from a neighboring state than a distant one. For example, President Garcia began implementing his decrees in order to facilitate the Peru Trade Promotion Agreement with the United States.<sup>171</sup> The United States therefore has had some influence on Peru's observance of indigenous land rights. If the U.S. were to amend the agreement, making it contingent on Peru's substantive protection on such rights, President Garcia will be more compelled to rethink the decrees.

Although the UN and OAS both have judicial organs committed to rendering objective decisions based on international principles,<sup>172</sup> the ICJ only hears cases brought by state-members of the UN.<sup>173</sup> This principle forbids the ICJ from hearing a case brought by a group representing the interests of Peru's indigenous peoples. Although indirectly, the Inter-American Court does hear cases regarding the claims of individuals or groups.<sup>174</sup> Also, in 2001, Peru declared that it recognizes decisions rendered by the Inter-American Court as binding.<sup>175</sup> Therefore, even though both organizations have bodies that are committed to investigating and notifying them of human rights violations, the OAS stands out from the UN because it also has a judicial body that can hear the indigenous peoples' case and render a decision that Peru recognizes as binding.

The fact that the OAS affords a judicial body that can hear a case brought to it by an indigenous group clearly makes it more beneficial to the indigenous population.<sup>176</sup> Having a case heard by a judicial actor is important because, in addition to having an interest in upholding human rights, courts also have an interest in objectively applying relevant legal principles. The Inter-American Court will not advocate for the rights of indigenous communities; it will impartially apply the law to the facts of the case, leading it to come to a well-reasoned conclusion based on the merits. This type of rational decision-making by an impartial court is preferable because it affords more legitimacy to the final holding.

Another advantage of the OAS is that the Vice President of the Inter-American Court is from Peru,<sup>177</sup> whereas only one of the ICJ's fifteen members is from South America (Brazil).<sup>178</sup> Although they both have at least one member who should be familiar with Peru's situation, twelve of the ICJ's remaining fifteen members hail from countries located on distant continents.<sup>179</sup> Having a member on the Court from

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<sup>171</sup> TAFT-MORALES, *supra* note 2, at 3.

<sup>172</sup> Inter-Am. Comm'n H.R., *supra* note 14; International Court of Justice, *supra* note 13.

<sup>173</sup> International Court of Justice Case Page, *supra* note 13.

<sup>174</sup> See Inter-Am. Comm'n H.R., *supra* note 14 (explaining that a petition first must be filed with the Commission which will review the case, and has the option to submit it to the Court afterwards).

<sup>175</sup> See American Convention Ratification page, *supra* note 91.

<sup>176</sup> See *id.*

<sup>177</sup> Inter-Am. Ct. H.R. Composition Page, available at <http://www.corteidh.or.cr/composicion.cfm> (last visited Feb. 27, 2010).

<sup>178</sup> I.C.J. Current Members Page, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Feb. 27, 2011).

<sup>179</sup> *Id.*



Peru should add to the legitimacy of the Court's decision in the view of Peru's citizens.<sup>180</sup> Furthermore, since he is from Peru, the Vice President should have a good sense of the situation confronting the indigenous communities. This, together with the fact that the OAS is a close-knit organization, should increase the Court's legitimacy because the decisions will not be handed down by judges from another continent that are less able to relate to the situations of the parties. This kind of firsthand observance is something that anybody working under the UN is unlikely to match.

The final difference between the two organizations, giving the OAS an important advantage over the UN, is that the ICJ has heard only 146 cases since 1947,<sup>181</sup> whereas the Inter-American Court heard 211 cases between 1987 and 2009.<sup>182</sup> Whether this is a function of the ICJ being selective in accepting cases, or of states simply not submitting cases, the fact that wronged parties have continually come to the Inter-American Court more times in fewer years lends support to the idea that it is viewed as a legitimate international adjudicator. Also, if the ICJ is being selective, this difference between the two makes the Inter-American Court a better option because the indigenous people stand a better chance of having their case accepted by the court that hears the most cases.

## VI. CONCLUSION

In conclusion, Peru's indigenous people should assert their claims against Peru's government in OAS's Inter-American Court. The Court has decided multiple cases in favor of indigenous peoples' land rights, including some that specifically uphold the right of prior consultation, which is said to have been violated when Presidential Decrees were passed.<sup>183</sup> Also, members of the Inter-American Court are distant enough from Peru's government that they will not be coerced by it; however, they are not so distant that a judgment from them would lack legitimacy to Peru's citizens. Finally, along with hearing more cases than the ICJ, the OAS affords Peru's indigenous people an opportunity to petition the Inter-American Commission, which then can pass their case on to the Inter-American Court, giving it an advantage over the ICJ that can only hear cases between two state-members.

Although the OAS is preferable to the systems of Peru and the UN, there are still some problems indigenous people will have to overcome both before and after they submit their case to the Inter-American Commission. Initially, Article 46 of the American Convention provides that the American Commission may not be petitioned until all domestic remedies have been exhausted,<sup>184</sup> meaning that the indigenous people are compelled to first file their claim in Peru's domestic system. This threshold that must be met will surely cost the indigenous people and their attorneys time and money to litigate a case in a court that has been viewed as weak

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<sup>180</sup> Inter-American Court of Human Rights Composition Page, *supra* note 177.

<sup>181</sup> International Court of Justice Case Page, *supra* note 13.

<sup>182</sup> Inter-Am. Ct. H.R. Decisions and Judgments Page, *available at* <http://www.corteidh.or.cr/casos.cfm> (last visited Feb. 27, 2010).

<sup>183</sup> *See* *Awas Case*, *supra* note 15; *Maya Case*, *supra* note 15; *Paraguay Case*, *supra* note 15.

<sup>184</sup> *See* American Convention, *supra* note 90, art. 46.

and easily influenced.<sup>185</sup> However, by raising the constitutional and international legal arguments available to them, the indigenous people can simply file a case in Peru's court and overcome this barrier.

The second, and more pressing, issue is that the OAS does not have a mechanism in place to enforce any judgment rendered by the Inter-American Court. This is illustrated by the difficulty the Court has had in enforcing its decision in the cases mentioned above. In order for indigenous people like those in Peru to be afforded full protection of their rights, the OAS needs to find some enforcement mechanism to implement its decisions. Although political pressure can sometimes be an effective tool, the Inter-American Court needs a more stable threat to enable it to compel compliance.

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<sup>185</sup> TAFT-MORALES, *supra* note 2, at 1.