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**Litigating Indigenous
Dispossession in the Global
Economy: Law's Promises and
Pitfalls**

**La desposesión de los indígenas
en la economía global:**
posibilidades y obstáculos para su
enjuiciamiento

Charis Kamphuis

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Litigating Indigenous Dispossession in the Global Economy: Law's Promises and Pitfalls*

La desposesión de los indígenas en la economía global: posibilidades y obstáculos para su enjuiciamiento

Charis Kamphuis**

ABSTRACT

Based on documents collected with local community members and advocates over the course of more than a decade, this paper begins by describing the legal processes whereby the Campesino Community San Andres de Negritos allegedly “consented” to its own dispossession in favor of the large foreign-owned Yanacocha Mine located in Northern Peru. It frames this story within the larger unfolding story of Agrarian Reform, neoliberal globalization, transnational resource extraction, the rise of community-based activism, and the emergence of Indigenous rights in international law and domestic constitutions in Latin America. In this highly-textured context, this paper describes how advocates developed an innovative rights framework for problematizing the Negritos Community’s dispossession and challenging the legality of Yanacocha’s operations. This unprecedented turn to the law ultimately reveals a disjuncture between the expansion of Indigenous rights recognition at one level, and the absence of appropriate causes of action and procedures for operationalizing these rights on the ground. As the Negritos Community litigates its case against one of the most powerful mining companies in the world, it has faced numerous challenges inside and outside of the courtroom. This paper critically analyzes the response of the state, the company and the domestic legal system. It focuses in particular on the limitation period procedural rule and the formalist and discriminatory view of consent that has permeated the courts’ decisions to date. In formulating this critique, the paper theorizes “the dynamics of dispossession” and reflects on human rights law’s promise and pitfalls as an instrument of global economic justice. The conclusion articulates this study’s findings and consequences for future research and law reform.

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RESUMEN

Basado en documentación aportada por miembros y abogados de las comunidades locales en el transcurso de más de una década, este estudio comienza con la descripción de los procesos legales mediante los que la comunidad campesina San Andrés de Negritos supuestamente “consintió” su propia desposesión por la gran mina aurífera de propiedad extranjera, Yanacocha, ubicada en el norte de Perú. El texto enmarca este caso dentro

de las historias interconectadas de la reforma agraria, la globalización neoliberal, la extracción transnacional de recursos, el crecimiento del activismo de base local y la plasmación de los derechos indígenas en el derecho internacional y en las constituciones latinoamericanas. En este contexto altamente complejo, el estudio describe cómo los abogados desarrollaron un creativo marco legal para problematizar la desposesión de la comunidad de Negritos e impugnar la legalidad de las operaciones de Yanacocha. En esencia, este novedoso uso de las leyes muestra la contradicción que se presenta entre la expansión del reconocimiento de los derechos indígenas, por una parte, y por la otra la ausencia de precedentes y procedimientos judiciales apropiados para aplicar estos derechos en la práctica. Al presentar ante la justicia su caso contra una de las más poderosas compañías mineras del mundo, la comunidad de Negritos ha enfrentado numerosos desafíos dentro y fuera de la sala del tribunal. El presente estudio analiza críticamente la respuesta del estado, la compañía y del sistema legal peruano, centrándose particularmente en la norma procesal del período de prescripción y en el criterio formalista y discriminatorio del consentimiento que ha permeado hasta hoy día las decisiones de los tribunales. Al formular esta crítica, el estudio teoriza sobre la “dinámica de la desposesión” y reflexiona sobre las posibilidades que brinda el derecho internacional de los derechos humanos como instrumento de la justicia económica global, así como los obstáculos que enfrenta su aplicación. La conclusión articula los hallazgos y las consecuencias del estudio, con vistas a futuras investigaciones y a la reforma de la ley.

1. INTRODUCTION & CONTEXT: GLOBAL RESOURCE CONFLICTS AND THE GOVERNANCE GAP

In the last two decades, foreign investment in the extraction of natural resources has expanded dramatically around the world.¹ Latin America in particular has become a region plagued by social conflicts between communities, resource extraction companies and the states that support them.² These conflicts often origi-

nate in community concerns related to control over the use of land, environmental protection and the equitable distribution of benefits.³ Social conflicts are intense, involving everything from peaceful protests, civil disobedience and sit-ins or occupations. These actions are often met with the exercise of force by public and private security forces. Activists and community members are too often defamed, threatened, surveiled, incarcerated, injured and in some instances even murdered due to their criticism of resource extraction projects.⁴ In Latin America as a whole, the proponents of resource extraction activities are typically foreign companies headquartered in wealthy developed countries. As of 2016, mining companies headquartered in Canada, the United States and the United Kingdom had the greatest presence in the region.⁵

II.Doc.49/15 (2015) at paras 48-50. Also see Observatorio de Conflictos Mineros de América Latina, “Mapa de Conflictos Mineros en América Latina”, online: <http://www.conflictosmineros.net/>; McGill Research Group Investigating Canadian Mining in Latin America, “Canadian Mining in Ecologically Vulnerable Areas: South America”, online:http://micla.ca/wpcontent/uploads/2012/05/CanadianMining_ecologically_vulnerable_areas.png; Environmental Justice Organization, Liabilities and Trade, “Environmental Justice Atlas”, online: <http://ejatlas.org/>.

3 Most resource extraction is an industrial for-profit activity that fundamentally involves permanently transforming the surface and/or subsurface of significant tracts of land with which communities have a mix of historical, cultural, economic and social relationships, along with asserted or recognized legal rights: Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, *Extractive industries and indigenous peoples*, GA, 24th Sess, UN Doc A/HRC/24/41 (2013) [Anaya]; OAS, Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OROEA/Ser.L/VII.Doc.47/15 (2015) [OAS, *Human Rights Protection*].

4 See generally *supra* notes 1 and 2. Also see: Justice & Corporate Accountability Project, *The “Canada Brand”: Violence and Canadian Mining Companies in Latin America* (JCAP, 2016); Jen Moore, *In the National Interest?: Criminalization of Land and Environment Defenders in the Americas* (MiningWatch Canada, 2015); Charis Kamphuis, “Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru” (2012) 37(2) *Brooklyn Journal of International Law* 529 [Kamphuis, “Privatization of Coercion”]; Global Witness, *On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide* (London: Global Witness, 2016).

5 Half of announced investment in metal mining between 2003 and 2015 in Latin America originated in Canadian firms (50.6%), which also accounted for 83.0% of total investment in gold and silver mining. United Kingdom-based companies made up the next largest source, representing 52.2% of investment in iron ore mining and 21.3% of investment in copper, nickel, lead and zinc mining. The United States was the main source of investment in aluminum and the second-largest investor in iron ore extraction: Economic Commission for Latin America and the Caribbean (ECLAC), *Foreign*

1 Todd Gordon & Jeffery R Webber, *Blood of Extraction: Canadian Imperialism in Latin America* (Fernwood Publishing, 2016).

2 OAS, Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, OROEA/Ser.L/

The proliferation of these kind of social conflicts, not only in Latin America but also elsewhere in the world, has led to an extensive global debate regarding the governance of transnational resource extracting companies and their impacts on local communities in developing countries.⁶ As a whole, this debate tends to center on the efficacy (or not) of corporate social responsibility mechanisms⁷, the existence (or not) of a home state responsibility to regulate⁸ and the viability (or not) of a binding international treaty instrument to address these matters.⁹ While these conversations are prolific, they overwhelmingly focus on jurisdictions and instruments outside of the developing countries where ground-level social conflicts around resource extraction

are taking place. There is relatively little debate in the global governance literature over the emerging efforts of mine-affected communities in developing countries to engage with their own domestic public law regimes in order to address their justice concerns.¹⁰ There are relatively even fewer in-depth, extended studies of this form of legal activism and its implications.¹¹

This absence likely has more than one reasonable explanation. Developing country legal systems are routinely viewed as either incapable or unwilling to rein in transnational resource companies and subject them to the rule of law generally, much less to human rights standards more specifically. Some point to the presence of endemic inefficiencies, corruption and inadequacies in developing country legal systems, the product of some combination of a chronic lack of resources, colonial

Direct Investment in Latin America and the Caribbean, 2016, LC/G.2680-P (Santiago, 2016) at 107.

6 John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, OHCHR, UN Doc A/HRC/17/31 (2011); Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014).

7 Hevina S. Dashwood, *The Rise of Global Corporate Social Responsibility: Mining and the Spread of Global Norms* (Cambridge University Press, 2012); Cynthia A. Williams, "Civil Society Initiatives and 'Soft Law' in the Oil and Gas Industry" (2003-2004) 36 *NYU Journal of International Law and Politics* 457; Luis Eslava, "Corporate Social Responsibility & Development: A Knot of Disempowerment" (2008) 2 (2) *Oñati Journal of Emergent Socio-Legal Studies* 43; Ronen Shamir, "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony" in Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005); Penelope Simons, "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes" (2004) 59 *Relations industrielles/ Industrial Relations* 101.

8 Sara L. Seek, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) *Yale Human Rights & Development Law Journal* 177-206; ETOS for Human Rights beyond Borders, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (February 2012); Robert McCorquodale & Penelope Simons "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70 *Modern Law Review* 598.

9 Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (Germany: Global Policy Forum, June 2014); Penelope Simons, "International law's invisible hand and the future of corporate accountability for violations of human rights" (2012) 3:1 *Journal of Human Rights and the Environment*; Claire A Cutler, "Private transnational governance and the crisis of global leadership" in Stephan Gill, ed, *Global Crises and the Crisis of Global Leadership* (Cambridge University Press, 2011); *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, HRC Res, UNGAOR, 26th Sess, UN Doc A/HRC/26/L.22/Rev.1 (2014).

10 References to these efforts are beginning to appear in some places, although most are cursory. For a reference to a court case in Chile, see: James S Phillips, "The rights of indigenous peoples under international law" (2015) 26(2) *Global Bioethics* 120; Michelle Richard, "Conflict in Latin America over Natural Resource Exploitation" (2013) 19 *L & Bus Rev Am* 561. For discussions of a court case in Argentina, see Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development" (2009) 27 *Berkeley J Intl L* 570. For references to court cases in Columbia see: Viviane Weitzner, *Holding Extractive Companies to Account in Columbia: An evaluation of CSR instruments through the lens of Indigenous and Afro-Descendant Rights* (The North-South Institute, Proceso de Comunidades Negras, Resguardo Indígena Cañamomo Lomaprieta, 2016); Europe-Third World Centre & International Association of Democratic Lawyers, *Mining and Human Rights Violations in Colombia: The Case of Anglo Gold Ashanti vs the Afro-descendant community of La Toma*, UNGA, 26th Sess, Annex, Agenda Item 3, UN Doc A/HRC/26/NGO/38 (2014). For references to court cases in Guatemala, see: Rachel Sieder, "'Emanicipation' or 'regulation'? Law, globalization and indigenous peoples' rights in post-war Guatemala" (2011) 40(2) *Economy and Society* 239; Shin Imai et al, "Breaching Indigenous Law: Canadian Mining in Guatemala" (2007) 6(1) *Indigenous L J* 101. For references to court cases in Ecuador, Bolivia and Costa Rica, see Begüm Özkaynak et al, *Mining conflicts around the world: Common grounds from an Environmental Justice perspective*, EJOLT Report No 7 (Environmental Justice Organisations, Liabilities and Trade, 2012).

11 For some recent examples of case studies of the genius, litigation and consequences of particular Indigenous rights cases see: Cesar Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deposition on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015); Pooja Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (Cambridge University Press, 2015); Judith Kimerling, "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil and Ome Yasuni" (2016) 40 *Vermont Law Review* 445. For a series of studies of domestic human rights litigation in the African context in an effort to challenge global poverty, see: Lucie E. White & Jeremy Perelman, *Stones of Hope: How African activists reclaim human rights to challenge global poverty* (Stanford University Press, 2011).

histories, foreign influences, and imperial impositions.¹² Other scholars point to the ways in which international trade agreements and foreign investment protection agreements circumscribe the range of public policy options available to decision makers in developing countries in relation to foreign resource companies.¹³ The applicable instruments of public international law are often similarly viewed as inadequate, for the reason that, even when binding, they represent a system of law that is non-enforceable vis-à-vis a developing country state that, once again, is beholden to the powerful companies that it hosts.¹⁴ Finally, logistically and conceptually, it may be difficult for the transnational solidarity networks that support mine-affected communities to engage with developing country legal systems, causing them to favor other more familiar legal options and strategies.

These explanations and characterizations are well known. They form part of the context for an important global conversation about how to address the “governance gap”, a term used to refer to the systemic impunity that transnational corporations, operating in developing countries, appear to enjoy.¹⁵ This article in

no way aims to detract from this extremely important conversation. Law reform and new enforceable mechanisms that aim to address problematic corporate conduct are pressing.¹⁶ However, while the larger political struggle over the terms of effective transnational regulation and extra-territorial jurisdiction continues, mine-affected communities, local activists and lawyers in the Global South are deeply involved in the daily, ground-level work of attempting to engage with existing, ostensibly enforceable, domestic public law to address their ongoing social injustice concerns.¹⁷

In spite of many pitfalls, the public law regimes currently in force in developing countries maintain a certain appeal for activists and their lawyers. They offer an enforceable rights framework, which, in the Latin American context and perhaps elsewhere, increasingly incorporates international human rights law. Moreover, domestic public law represents the system of law with the closest proximity to the historical context, democratic life and political struggles of mine-affected communities. This paper departs from the assertion that the task of recognizing, tracking and analyzing mine-affected communities’ engagement with applicable public law regimes in the Global South is incredibly important. To the extent that these efforts are successful (by some measure), they represent an important advance toward the aspiration that law might be an instrument of social justice in the hands of poor and marginalized communities in developing countries.¹⁸ To the extent that they are unsuccessful (by some measure), their pitfalls offer important insight into public law’s shortcomings in the context of the foreign resource extraction, with the potential to feed local law reform efforts as well as the

12 See Simons & Macklin, *supra* note X at 16-17, citing the OECD definition of weak governance zones. In a transnational tort action against a Canadian mining company, the British Columbia Court of Appeal recently decided that the risk of an unfair trial in the Guatemalan courts was a factor that weighed in favor of its determination that the province of British Columbia is the most appropriate jurisdiction to hear the Guatemalan plaintiffs’ claim: *Garcia v Tahoe Resources Inc*, 2017 BCCA 39. For critique of Canadian foreign policy in relation to resource extraction in developing countries, see generally: Stephen Brown, ed, *Struggling for Effectiveness: CIDA and Canadian Foreign Aid* (McGill-Queen’s University Press, 2012); Yves Engler, *The Black Book of Canadian Foreign Policy* (Fernwood Publishing & RED Publishing, 2009).

13 Hadrian Mertins-Kirkwood, *A Losing Proposition: the Failure of Canadian ISDS Policy at Home and Abroad* (Ottawa: Canadian Centre for Policy Alternatives, 2015); Gus Van Harten, “Investment Treaty Arbitration and the Policy Implications for Capital-Importing States” in Diego Sánchez-Ancochea & Kenneth C Shadlen, eds, *The Political Economy of Hemispheric Integration* (New York: Palgrave Macmillan, 2008) 83; Gus Van Harten, “Investment treaties as a constraining framework” in Shahrukh R Khan & Jens Christiansen, eds, *Towards New Developmentalism: Market as means rather than master* (New York: Routledge, 2011) 154; Lorenzo Cotula, *Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries*, 2nd ed, IIED Natural Resources Issues Series 31 (International Institute for Environment and Development, 2016).

14 Claes Cronstedt & Robert C Thompson, “A Proposal for an International Arbitration Tribunal on Business and Human Rights” (2016) 57 Online Symposium, Harv Intl LJ 66, online: http://www.harvardilj.org/wp-content/uploads/Cronstedt-and-Thompson_0615.pdf.

15 Simons & Macklin, *supra* note 6, Catherine Coumans, “Alternative Accountability Mechanisms and Mining: The Problems of Ef-

fective Impunity, Human Rights, and Agency” (2010) 30 CJDS 27; Ruggie, *supra* note 6.

16 Sara L. Seck, “Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights” (2011) 49 Can YB Int’l Law 51; Charis Kamphuis, “Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account” (2012) German Law Journal 1456; Penelope Simons, “Canada’s Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) 56 Canadian Business Law Journal 167.

17 See references in *supra* note 10. Also see Rachel Sieder, “The judiciary and indigenous rights in Guatemala” (2007) 5(2) Int J Const L 211.

18 See María Galvis & Ángela Ramirez, *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria* (Washington: Fundación del Debido Proceso, 2013); Boaventura de Sousa Santos & César Rodríguez-Garavito, eds, *Law and Globalization from Below. Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

broader global conversation on the transnational regulation of the multinational corporation.

Using the case study method, this article will focus on one Campesino Community's engagement with the matrix of public laws enforceable in its jurisdiction of Peru. It traces this community's attempts to translate its justice concerns with respect to the actions of a large multinational mining company into terms that have traction with applicable domestic and international law regimes. This case study is particularly interesting because its substantive issues are at the heart of the contemporary resource extraction model, namely it examines the nature of communities' ownership and control over land and access to equitable compensation and benefits when resources are developed. In this connection, this study profiles another important legal issue that challenges many resource extraction projects around the world, namely the matter of how courts should respond to past injustice claims, advanced now in the language and in accordance with the procedures of constitutional rights and international human rights law. This case study reveals some of the promises and pitfalls that may emerge when Indigenous communities in Latin America attempt to bring their claims of dispossession in the global economy to their own domestic legal systems. This test of one domestic legal system's capacity as a potential instrument of justice in this context has implications for substantive and procedural law at international human rights bodies like the Inter-American Commission and Court of Human Rights, some of which I explore in this paper's conclusion. At both the domestic and the international level, what is at stake is the ability of Indigenous communities to bring claims that might benefit from, and further advance, these bodies' promising statements of collective rights.

Part A of this paper reviews, by way of background, the first leg of the unfolding story of the Peruvian Campesino Community San Andres de Negritos. Elsewhere, I have provided an account of the legal processes whereby Yanacocha Mine, majority owned by American gold mining giant Newmont, came to occupy the Negritos Community's communally titled land in the northern Andes of Peru.¹⁹ In this previous work, I

19 Charis Kamphuis, "Foreign Mining, Law and the Privatization of Property: A case study from Peru" (2012) 3:2 *Journal of Human Rights and the Environment* 217 [Kamphuis, "Foreign mining"]; Charis Kamphuis, "Derecho y la Convergencia del Poder Público y el Poder Empresarial: La Desposesión Campesina y La Coerción

argue that these processes were a product of the convergence of Yanacocha's corporate power with the Peruvian state's public power. I described a central feature of this convergence in terms of the production of the Community's "consent" to its own dispossession and ultimately its own legal annihilation or "annulment". The present paper adds to the story by fully assessing the complex dynamics of dispossession and describing some of the Negritos Community's responses and forms of resistance to the circumstances of its dispossession, setting the context for its ultimate turn toward the Peruvian courts. Further, it situates these local forms of resistance in a national and international context of Indigenous activism that has simultaneously spurred the emergence of Indigenous rights regimes while reacting to ongoing neoliberal reforms of investment and resource laws.

Whereas Part A of this paper recounts the Negritos Community's story of dispossession and resistance, Part B tells the story of the case itself; focusing on how the Community has endeavored to pursue justice through law. In 2011, the Negritos Community initiated a constitutional *amparo* action in local courts in an effort to seek a remedy for its dispossession. Its action challenges the legality of Yanacocha's operations on its land, attempts to compel the state and the company to respect and protect its constitutionally recognized communal property rights, and seeks to remedy the alleged violations. Part B describes the Community's legal strategies in the domestic scene, in particular that of putting the full matrix of applicable public law before the court. Importantly, in Peru, like in other Latin American countries, the constitutional rights regime applicable to Indigenous and Campesino Communities incorporates certain international Indigenous rights principles, ratcheting up the domestic legal standard and creating a matrix of rights enforceable against both public and private actors. This makes the Negritos Community's efforts to actualize these rights provisions and principles all the more interesting, especially from the perspective of the "governance gap" referenced above.

The section also analyzes the challenges that the Negritos Community has faced, both inside and outside of the courtroom. Significantly, the actualization of rights

Privatizada en el Perú" (2012) 15 *Revista Latinoamericana de Derecho Social: Universidad Nacional Autónoma de México Instituto de Investigaciones Jurídicas* 57 [*Translation*].

principles through local courts involves finding a suitable domestic cause of action. The Negritos case study reveals that procedural matters can become front and center in communities' struggles to frame their stories of injustice in ways that are intelligible to public law rights protecting regimes. Legal claims are successful not only with good facts and robust substantive rights frameworks. Crucially, they must also package themselves into a recognizable cause of action and navigate the associated procedural requirements. The Negritos case study reveals how the complexity of these matters is augmented in the context of resource extraction, where the lived reality of dispossession's legal and social processes may be difficult to reconcile with procedural rules. It depicts how procedural rules become a site of struggle over the meaning of consent, the subjectivity of the rights holder, and how to come to terms with past and ongoing injustice.

This overview requires a comment on the research methods that inform this paper. The story that the Negritos case tells about dispossession and resistance (Part A), as well as the story of the Negritos Community's engagement with public law (Part B), are based on hundreds of pages of primary documents collected and organized over more than a decade by Negritos community members and *pro bono* local lawyers and law students based in Peru, with the support of volunteer lawyers and law students in Canada. I was an active participant in this transnational team since its inception. The documents referred to in Part A were collected beginning in 2006 and up until 2011 when the Negritos community filed its *amparo* claim before local courts. The documents described in Part B were collected between 2011 and 2016 as the court case wound its way toward Peru's Constitutional Court, where, at the time of publication, it awaits a final decision. All of these documents were produced either by Peruvian courts, government institutions, the company in question, or the Community's own governance bodies. These materials are complemented by information published in secondary sources as well as through many conversations between myself, members of the Negritos legal team and Community leaders over the course of multiple visits to the Community and countless virtual conversations.

The strength of this method is derived from the opportunity it provides to critique the formal legal justification for Yanacocha's presence on the Negritos Community's land. The documentary record consti-

tutes the formal legal underpinnings for Yanacocha's operations, primarily rooted in property and contract law. The review of this record offers an important and potentially powerful opportunity to challenge the very legality of the company's presence, using normative frameworks embedded in constitutional and international law. In other words, the Negritos case scrutinizes Yanacocha Mine's claim to legality and advances a critique that brings the dynamics of dispossession into a legal forum. However, there is no doubt that this reliance on documents, including the Community's own written records, has limitations. While myself and other members of the Negritos legal team have spent time in the Negritos Community, our work did not include ethnographic methods. As a result, the story told here can only very partially and tangentially capture the lived experiences of Community members with respect to the events surrounding the official documents and the litigation itself. It does not endeavor to account for the meanings that Community members assign to the many legal and political moments in their journey, from the *hacienda* system, to Agrarian Reform, through to the arrival of Yanacocha, the Community's dispossession, and its ultimate decision to pursue justice in local courts.²⁰

In telling this story, and notwithstanding the limitations of the documentary method, my approach to law in this article resonates with the tenants of critical legal pluralism.²¹ I attempt to capture the multiple scales of law at play (local, national, regional and international), the interrelationship between multiple areas of law (private and public), the slippage between substantive claims and procedural requirements, and the interaction between law, politics/ideology and corruption. In this vein, this paper consciously employs the term "story" in order to make explicit the techniques used to packa-

20 For one relatively rare example of a rich ethnographic study of one community's historic and contemporary dispossession story, see Parmar, *supra* note 11. Writing about a "Scheduled Tribe" in India, Parmar's captures the differing interpretations among activists, lawyers and community members with respect to the nature of the injustice at issue and the significance of the domestic litigation that emerged in response.

21 See Martha-Marie Kleinmans & Roderick A. Macdonald, "What is Critical Legal Pluralism?" (1997) 12(2) *Canadian Journal of Law & Society* 25. Kleinmans and Macdonald define critical legal pluralism as an approach that sees legal subjects as "law inventing". Also see: Roderick A Macdonald, "Custom Made: For a Non-chirographic Critical Legal Pluralism" (2011) 26 *Canadian Journal of Law & Society* 301.

ge complex social relationships into legal frameworks that serve to justify or problematize those relationships. This reflects the socio-legal insight that, in their efforts to pursue justice through law, social justice lawyers do not just find cases. Rather, they act to convert complex social realities into terms that have currency with applicable systems of law. In this article, I examine the techniques employed in a multidimensional, shifting and sometimes contradictory legal landscape in order first, to articulate the Negritos story as one of dispossession and second, to fashion a pathway for resistance using law.

This introduction reveals the fact that this article is fundamentally a product of advocacy and activism, including my own. It is also written as part of an explicit effort to support the Negritos Community's case going forward. In other words, it takes the opportunity, in an academic venue, to explore and develop the approaches to law that might enable the Negritos Community, and communities like it, to pursue justice in domestic and international courts. Beyond its practical value to communities, this advocacy oriented approach, supported by an extensive documentary record, has the potential to ground and inform a range of analytical and theoretical work going forward. The thick description of context, practices, law and legal argument in the pages that follow offers important data that is not easily or readily available to those who have not had the opportunity to work intensively and continuously with mine-affected communities in the Global South. This material has value to efforts to theorize the concepts of consent and knowledge, as well as the procedural and remedial legal forms the might govern encounters between Indigenous communities and multinational companies operating in developing countries. As such, this paper recounts an unfinished story in more than one sense. Not only does the Negritos Community's advocacy journey continue as it awaits a decision from Peru's highest court, likewise, the concepts and legal forms profiled here similarly await further in-depth analytical reflection and research.

This article's conclusion in Part C takes some early steps toward this larger goal. It begins by articulating the international and comparative research and potential law reform agendas that flow from this work. Reflecting on the Negritos Community's pursuit of justice, it offers insight into law, lawyering and access to justice in the context of Campesino and Indigenous legal challenges to resource extraction practices in Latin America.

This includes an incipient reflection on the transformative potential and pitfalls of collective property rights claims as a mode for articulating the justice concerns of Indigenous communities adversely affected by the global system of resource extraction.

2 THE NEGRITOS STORY: AN ACCOUNT OF DISPOSSESSION (THE CASE TELLS A STORY ABOUT LIFE)

In many Latin American countries, struggles over land, resources and rights often occur in the context of rural property regimes characterized by a mix of communal and individual tenures. Today's legal framework is a product of a complex history of ideologically-driven land reform initiatives that stretch from protectionist/nationalist policies enacted between the 1960s and the 1980s,²² through to on-going neo-liberal reforms begun in the 1990s that aim to foster private investment including on Campesino land,²³ and now, in some countries, with relatively new layers of community consultation laws and an emerging Indigenous and Campesino constitutional rights jurisprudence.²⁴

Each of these waves are of course the product of a complex interplay between transnational and domestic trends and influences. As a practical matter though, mine-affected communities who seek to challenge the legality of a company's concession and surface property

22 Tom Griffiths, "Indigenous Peoples, Land Tenure, and Land Policy in Latin America" in P. Groppo, ed, *Land Reform: Land Settlement and Cooperatives* (FAO, 2004) 49; Miguel Alteri & Andrés Yurjevic, *La agroecología y el desarrollo rural, sostenible en América Latina* (Santiago de Chile: Economic Commission for Latin America and the Caribbean, 1992) online: http://repositorio.cepal.org/bitstream/handle/11362/33761/S9200648_es.pdf?sequence=1

23 See *infra* Section B.5 for discussion of the more recent laws that critics argue infringe Campesino and Indigenous rights.

24 See Roger Merino Acuña, "Prior Consultation: Law and the Challenges of the New Legal Indigenism in Peru" (2014) 4(1) *Hendu* 19; Fundación del Debido Proceso, "El derecho a la consulta de los pueblos indígenas en Perú" (Washington, DC: 2010); Raquel Yrigoyen, "El horizonte del constitucionalismo pluralista: del multiculturalismo a la decolonización" in César Rodríguez, ed, *El Derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo XXI Editores, 2011) 139; César Rodríguez-Garavito, "Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields" (2010) 18 *Indiana Journal of Global Legal Studies* 1; Emiliano López & Francisco Vértiz, "Extractivism, Transnational Capital, and Subaltern Struggles in Latin America" (2015) 42(5) *Latin American Perspectives* 152.

rights must navigate this complex and even contradictory domestic legal matrix. The Negritos case study provides a highly-textured example of how these trends have unfolded in Peru with consequences for present day legal struggles between mine-affected communities and foreign mining companies.

2.1. Dispossession Story: Agrarian Reform, neoliberalism, transnational mining & corruption

Agrarian Reform is an important historical point of departure for the Negritos Community in that for the first time it became an entity with significance in Peruvian law. Agrarian Reform came to Peru in 1969 with an agenda to transform the agrarian system by replacing the *haciendas*, inherited from colonial times, with a fair system of property and a legal regime that would guarantee social justice in rural areas.²⁵ The *Agrarian Reform Law* also declared that “Indigenous Communities” would thereafter be called “Campesino Communities”.²⁶ The key provisions of Agrarian Reform were later constitutionalized in the 1979 *Political Constitution of Peru*. The program was also implemented in part through a series of statutes that purported to define Campesino Communities, their political and economic institutions, and their legal relationship with their communal lands. Most prominent among these were the 1970 *Campesino Communities Special Statute*,²⁷ the 1987 *Campesino Communities General Law*²⁸ and the 1987 *Law for the Demarcation and Titling of the Communal Territories of Campesino Communities*.²⁹ The significance of this domestic legal regime for the Negritos case will be described more fully in the next section.

In 1971 the Peruvian state designated the inhabitants

25 Law No 17716, *Agrarian Reform Law* (1969), art 1. When comparing Agrarian Reform in Peru to other processes of the same name across Latin America, some authors have characterized Peru's Agrarian Reforms as “revolutionary”, “massive” and “structural”: see Raúl Alegrett, “Past and present land reform in Latin America” in P. Groppo, ed, *Land Reform: Land Settlement and Cooperatives* (FAO, 2003/2) 112 online: <http://www.fao.org/docrep/006/J0415T/j0415t0b.htm>.

26 *Agrarian Reform Law*, *ibid*, art 115.

27 Supreme Decree No 37-70-AG, *Campesino Communities Special Statute* (1970).

28 Law No 24656, *Campesino Communities General Law* (1987). Also see: Supreme Decree No 008-91-TR, *Regulation of the Campesino Communities General Law* (1991).

29 Law No 24657, *Law for the Demarcation and Titling of the Communal Territories of the Campesino Communities* (1987).

of an area of land called “Negritos” as beneficiaries of Agrarian Reform and in 1974 the country's President decreed that 14,375 hectares of land would be communally titled in the Community's name. The Negritos Community is located in the northern Andes of Peru in the Department of Cajamarca, relatively close to the regional capital city, also called Cajamarca. It is one of approximately 118 Campesino Communities in the entire Department. Cajamarca is a predominately rural region and has consistently ranked among the poorest in the country. In 2015 about half of the population continued to live in poverty and another one quarter struggling in extreme poverty.³⁰ In La Encañada, the district where the Negritos Community is located, poverty levels in recent years have fluctuated between 70 and 80%.³¹ The Negritos Community is located in the highlands, accessible only by a simple road. Most households do not have electricity or running water.

The practical implementation of Agrarian Reform was a complex affair, under-resourced and suffering from serious deficiencies, delays and in some cases, acts of corruption.³² The Negritos Community was not immune to these issues. For example, in 1975, in a patently illegal move, state officials purported to sell the Negritos Community's land to representatives of the neighboring Campesino Community of Tual. In 1980, the payment requirement was removed but title remained with the neighboring Community. When Negritos community members became aware of these events in 1986, they called a General Assembly and agreed to pressure Peruvian government bodies to recognize their Community and its property rights. This agreement was recorded in a handwritten resolution entitled “Act of the General Assembly of the Negritos Community”:

By majority we request the separation of Negritos land from the Campesino Community of Tual and the [legal] formation of an independent community that will be called Negritos, given that among other things we are an independent socio-economic territorial unit,

30 Cajamarca is one of three regions of Peru with the highest incidence of poverty, generally fluctuating between 44.7 and 51.7 %. As of 2015 Cajamarca had the highest incidence of extreme poverty in Peru, with peak levels reaching 26.97% of the total population in 2013: see Instituto Nacional de Estadística e Informativa, *Evolución de la Pobreza Monetaria: 2009-2015* (Lima: INEI, 2015) at 46, 50.

31 *Ibid*, at 61, 107.

32 Alfonso Quiroz, *Historia de la corrupción en el Perú*, translated by Javier Flores, Popular Collection Series No 5 (Lima: Institute for Peruvian Studies, 2014) at 320-9. Also see: Alfonso Quiroz, *Corrupt Circles: A History of Unbound graft in Peru* (Washington: Woodrow Wilson Center Press, 2008).

which is why it is absurd to consider that we might be part of the Campesino Community of Tual, given that the two communities have always lived independently without any links between us. [translation]

There is a paper trail, beginning in the 1980s, of handwritten records (Acts) of decisions made at Negritos Community General Assembly meetings. To date, Community members maintain original copies of the documents produced at these meetings. In these Acts, Community members describe their communal decision-making processes regarding many practical matters of interest to their Community as a whole. They make reference to their collective political and legal institutions, elections of leaders, decisions related to communal justice, agreements regarding communal planting and harvesting of crops, and the collective management of communal property and finances.

Between 1987 and 1989, officials from the Ministry of Agriculture responded to the Negritos Community's requests for recognition in a series of field studies and meetings with community members. Based on these visits, Ministry officials wrote in their technical reports that the Negritos Community members are "natural-born" Campesinos, with their own unique characteristics and institutions, "who have been working on the communal lands in question since the time of their ancestors". Finally, in 1990, the Ministry officially recognized the Campesino Community San Andres de Negritos as a legal entity consisting of 140 families. Community members then took steps to debate their Community Statute and Internal Regulations, "article by article", which they ultimately adopted with a signature from the head of each family. Among other things, these rules allowed Negritos families to obtain "certificates of possession" of parcels of Negritos communal land. Between 1990 and 1991, Community members worked with Ministry staff to demarcate the boundaries of its territory. The agreed upon demarcations establishing a total surface area of 13,609 hectares of Community land and this was incorporated into the Community's Internal Statute. Negritos' communal title was registered in the local Public Registrar in October of 1991.

Following these events, this story of recognition and communal titling abruptly reversed itself over just a few short years. By 1995 Yanacocha Mine had established itself squarely within the boundaries of the Negritos Community's land. Moreover, according to the State and company, the Negritos Community no longer exist-

ed in law and was not longer a property titleholder. The remainder of this section will describe the documentary record of how this came to be.

As the first large-scale foreign investment project of its kind in the country and perhaps even the entire region, Yanacocha was truly emblematic of the new face of neoliberal globalization in Peru, in the region and the entire world. It consisted of a joint venture between its majority shareholder, the American company Newmont Mining, and its minority shareholders, the International Finance Corporation (IFC), an arm of the World Bank, and Buenaventura, a Peruvian company owned by one of the most powerful families in Peru.³³ With significant start-up financing from the IFC, Yanacocha quickly grew to be the largest gold mine in Latin America and one of the largest in the world.³⁴ Its extraordinary profitability, due in part to extremely low production costs, has also been the subject of significant study, with some authors concluding that it quickly became the most profitable mine in the world.³⁵ Yanacocha's size and profitability have arguably made a significant contribution to the success of its majority shareholder. In 2015 Newmont Mining was the second largest gold producer globally.³⁶ These figures starkly contrast those that depict persistent extreme poverty in the region of Cajamarca, which marked 2015 with the highest levels of extreme poverty in Peru.³⁷

Yanacocha established itself in Peru at a time of radical neo-liberal restructuring of the Peruvian legal and economic system, and just as neo-liberal globalization began to take a stronger hold in many countries around the world.³⁸ Elected president of Peru in 1990, Alber-

33 Newmont Mining Company, online: <http://www.newmont.com/operations-and-projects/south-america/yanacocha-peru/overview/default.aspx>.

34 Some researchers report that Yanacocha is the second largest gold mine in the world: Fabiana Li, "Contested Equivalences: Controversies over water and mining in Peru and Chile" in John Wagner, ed, *The Social Life of Water* (Berghahn Books, 2013) at 18 [Li, "Contested Equivalences"].

35 Raul Wiener & Juan Torres, *Large scale mining: Do they pay the taxes they should? The Yanacocha case* (Latin American Network on Debt, Development and Rights, 2014) at 23, 29. These researchers allege that Yanacocha has consistently inflated its expenses to reduce its taxes owing: *ibid* at 73.

36 "10 Top Gold-producing Companies", *Investing News Network* (20 April 2016) online: <http://investingnews.com/daily/resource-investing/precious-metals-investing/gold-investing/barrick-newmont-anglogold-goldcorp-kinross-newcrest/>.

37 *Supra* note 30.

38 David Harvey, "The 'New' Imperialism: Accumulation by Dis-

to Fujimori became a champion of neo-liberal policies, immediately implementing a wide-ranging program to reduce restrictions on international trade and investment while also cutting government funding of social services, health and education.³⁹ Fujimori immediately began to pursue policies specifically aimed at weakening Agrarian Reform and opening Campesino communal land up to foreign investment.⁴⁰ In addition to this very favorable legal framework, Yanacocha's investors further benefited from a foreign investment agreement with the Peruvian government, guaranteeing it a low rate of income tax, tax-stability, and a complete exemption from royalty payments.⁴¹

The comfortable relationship between Yanacocha Mine, its majority shareholder Newmont, and the Peruvian government has, at a minimum, crossed ethical boundaries. In the mid-1990s, Newmont became embroiled in a legal dispute in Peruvian courts with a French company over the right to shares in Yanacocha.⁴² In the early 2000s, video evidence leaked as part of a *New York Times* investigation revealed that, in the midst of the court case, in two separate meetings, a representative of the American Central Intelligence Agency (CIA) and a Newmont executive personally requested help from Vladimiro Montesinos, the head of Peru's secret intelligence agency and the most powerful official in the country at the time.⁴³ In response, Montesinos met with one of the seven justices of Peru's Supreme Court who were presiding over the case.

possession" (2004) 40 Socialist Register 63.

39 See: Legislative Decree No 662, *Granting a Legally Stable Regime to Foreign Investors through the Recognition of Certain Guarantees* (1991); Legislative Decree No 757, *Legal Framework for the Growth of Private Investment* (1991); Legislative Decree No 674, *Law for the Promotion of Private Investment in State Enterprises* (1991); Legislative Decree No 708, *Law for the Promotion of Investments in the Mining Sector* (1991).

40 In 1991, Fujimori repealed the *Agrarian Reform Law*, replacing it with Legislative Decree No 653, *Law for the Promotion of Investment in the Agrarian Sector* (1991). He followed this with an agrarian land titling program that only contemplated individual title and a controversial law dubbed the "Land Law": Law No 26505, *Law for the Promotion of Private Investment in the Development of Economic Activities on the National Territory and on Campesino and Native Community Land* (1995). Fujimori's attack on Campesino land and institutions has continued with subsequent governments: see *infra* Part B.5.

41 Christian Aid, *Undermining the Poor: Mineral Taxation Reforms in Latin America* (September 2009) at 9, 16; Wiener & Torres, *supra* note 35 at 42. For a general description of the tax agreements available to the mining sector in Peru, see Wiener & Torres, *ibid* at 65-6.

42 Wiener & Torres, *ibid* at 11.

43 *Ibid* at 12. J Perlez & L Bergman, "Tangled Strands in Fight Over Peru Gold Mine" (Series: The Cost of Gold: Treasure of Yanacocha), *New York Times* (25 October 2005).

Leaked videos depict Montesinos explaining to the judge that he must decide in Newmont's favor in order to improve Peru's diplomatic position in negotiations with the United States on other matters.⁴⁴ Days later, the Supreme Court handed down its decision, with the judge in question making the difference in a 4-3 vote in Newmont's favor. The Yanacocha scandal was only the beginning of Fujimori and Montesinos' downfall. Beginning in 2007, and unrelated to Yanacocha, Peruvian courts found Fujimori guilty of a long list of crimes, including crimes against humanity and corruption.⁴⁵ Montesinos was similarly found guilty, beginning in 2002, of numerous crimes related to corruption and abuse of public office.⁴⁶ Thus, while the careers of these political leaders ended, Yanacocha's career, as a profitable mine surrounded by impoverished communities, remained in full swing.

This broad strokes description of these macro processes paints a backdrop for the micro-level legal and social processes that opened doors for Yanacocha on the ground, or more specifically, on the Negritos Community's communally titled land.⁴⁷ Generally speaking, the mineral tenure system in Peru is similar to that of many other countries in that a company can begin extraction only after the state has granted it a mi-

44 Some of the leaked videos are available online. For a video of the meeting between Montesinos and a representative of the Central Intelligence Agency (CIA), see: "Vladimiro Montesinos ofreciendo mina Yanacocha a través de la CIA a cambio de millones", YouTube, online: <https://www.youtube.com/watch?v=15k3GHWHHVw>. For a transcript of the meeting between Montesinos and Justice of the Supreme Court of Peru, see: Segunda Legislatura Ordinaria de 2000, Transcripción del Video No 892 (19 May 1998), online: <http://www2.congreso.gob.pe/sicr/diariodebates/audiovideos.nsf/indice/CD180DDE013DE79805256A8E006F659A>. There are a number of documentary videos about these events, including one by a *New York Times* journalist: Lowell Bergman, *La maldición del oro inca* (FRONTLINE/World, 2005), YouTube, online: https://www.youtube.com/watch?v=5OdJ9eRv_LY.

45 Supreme Court of Justice of the Republic, Criminal Investigations Section, Exp No 13-03 (11 December 2007); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No 10-2001 / Acumulado No 45-2003 AV (7 April 2009); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No AV-33-2003 (30 September 2009); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp. No AV 19-2001 (7 April 2009); Supreme Court of Justice of the Republic, Special Criminal Appeals Section, No AV-23-2001 (20 July 2009).

46 Roberto Barandiaran Dempwolf & José Antonio Nolasco Valenzuela, *Jurisprudencia penal generada en el subsistema anticorrupción. Corrupción gubernamental*, Vol 2 (Lima, Palestra: 2006) at 691-704, 991-1011, 712-779.

47 Some parts of this story are recounted in Kamphuis, "Foreign mining", *supra* note 19 at 224-31.

neral concession, referring to a kind of property right to the subsurface minerals beneath a tract of land.⁴⁸ As stated above, Newmont's acquisition of the concession rights to Yanacocha Mine are a point of controversy. However, with these rights in hand, the company faced the task of securing access to the surface land above the subsurface minerals, which of course happened to be the recently communally titled property of the Negritos Community.

In Latin America more generally, the legal processes whereby companies acquire surface property rights and access can be highly controversial for the reason that, in many cases, projects proceed without the free, prior and informed consultation or consent of Indigenous communities who either hold title, or claim title, to the surface area and perhaps even the subsurface minerals.⁴⁹ Thus, for legal and practical reasons, the issue of access to surface land is often at the heart of conflicts between communities and resource companies. The Negritos case study offers a particularly stark depiction of the extraordinary difficulty of informed consultation and consent where a community is left to negotiate directly with a company in the context of immense power inequalities, which create serious risks of, among other things, the abuse of power, the breakdown of community cohesion, and the corruption of community leaders.⁵⁰

According to documents, in 1992 Yanacocha submitted a request to the Ministry of Mining for the expropriation of 609 hectares of Negritos communal land (in an area known as Pampa Larga). In 1993, the Ministry granted this request and title to this portion of land passed from the Community to the company. Official documents indicate that Yanacocha and the Community "directly agreed" to compensation in the amount of approximately \$US 30,000, or just under \$50 per hectare.⁵¹ These funds were transferred directly to

only three community members, including the then President, over 800 kilometers away in the national capital city of Lima. By 1995, Yanacocha had obtained two mortgages over the expropriated property in exchange for loans from the IFC and a German bank totaling US\$ 85,000,000.⁵²

The expropriation and the transfer of all of the compensation directly to the then Negritos President in Lima was purportedly authorized by several Acts of the Community's General Assembly. In one Act, dated just months before Yanacocha solicited the expropriation, the Community purportedly agreed to grant the President a certificate of possession to Pampa Larga, coincidentally the area that would shortly become the object of expropriation. The timing and contents of this Act suggest that the President took steps to position himself to benefit from the expropriation before it was even officially requested.

Then, a few months after Yanacocha requested the expropriation, in another Act, the Community purportedly made a number of important decisions: agreeing to the expropriation; agreeing that 95% of the total compensation would be designated for the holder of the certificate of possession to the expropriated area (the then President); and granting the then President and two other community leaders the authority to act on behalf of the entire Community in all matters related to the expropriation and the transfer of funds. On the basis of these "authorizations", the President then proceeded to unilaterally agree to, and personally accept, a compensation amount. Notably, the Community's alleged agreement in this Act to the expropriation and compensation occurred before the compensation amount had been proposed.

This expropriation is only one of a number of allegedly unconstitutional and illegal transfers of Negritos' communal property to Yanacocha.⁵³ In 1995, in exchange for approximately US\$18,000, Yanacocha obtained a mining easement in relation to 810 hectares of Negritos communal land. The easement was tantamount to an

48 In Peru, like in many other countries, renewable and non-renewable natural resources, including subsurface minerals, are the property of the State and concession rights are real property rights, see: the *Political Constitution of Peru, 1993*, art 66; the *General Law on Mining (1992)* and the *Organic Law for the Sustainable Use of Natural Resources (1997)*, art 23.

49 See generally, Anaya, *supra* note 3.

50 For critiques of power relationships under contemporary consultation laws in Peru and Bolivia see: Flemmer & Schilling-Vacaflor, *infra* note 122.

51 Also see Wiener & Torres, *supra* note 35 at 36. In their study Wiener & Torres record that on average Yanacocha paid US\$ 52 per hectare to Campesinos in exchange for land.

52 In its 2011 submissions to the First Civil Court of Cajamarca, Yanacocha claimed that the mortgage was not of the expropriated property alone, but also of other properties and all of the machinery and structures located on its property.

53 See Part B.5.b of this paper for the argument that the law of mining expropriations and easements in Peru is unconstitutional and contravenes international law with respect to Campesino and Indigenous Communities.

expropriation given that its terms permitted the full range of mineral extraction activities. The easement was also established under the same provisions of Peruvian mining law and followed a very similar procedure to that of the expropriation.

Not surprisingly, the Negritos Community asserts that its alleged consent to the expropriation and easement was totally fraudulent. Between 1995 and 1996, the Community passed at least two General Assembly Acts condemning the Community leaders who had signed onto the expropriation and easement documents. Community members sent these Acts, along with numerous letters, to local authorities. They alleged that the Community's then President and his small group of supporters had pressured fellow Community members off of their land in anticipation of transfers of land to Yanacocha, had sold land to Yanacocha that did not belong to them, had participated in fraud and extortion in relation to the procurement of signatures on Community Acts and in the creation of certificates of possession, and had not shared any of the expropriation compensation with the rest of the Community. There is no record that state officials did anything to respond to these concerns, sent in writing. Rather, Yanacocha's operations continued to benefit from state support.

Finally, between 1992 and 1995, the Ministry of Agriculture designated the Community's communally titled land as eligible for individual title, leaving only a small portion known as the "reserve area", considered in Peruvian law to be property of the state (although this is not the Community's view). This process of individual titling culminated in an administrative act executed by the Ministry in 1995 that purported to strip the community of its legal status (legal personality) as a Campesino Community. The actions of the Ministry to convert communally titled land to individual titles and to annul the Community's legal personality were highly problematic and appear to have violated, not only the Community's constitutional rights, but also basic administrative law principles.⁵⁴ The documents suggest that Ministry officials actively misinformed Negritos Community members by advising them, among other things, that their Campesino Community did not have communal property rights and that they had no other

54 See Part B.5.b of this paper for the argument that the individual titling and annulment of the Negritos Community violated the constitution and international law.

choice but to accept individual title. This approach to the Community starkly contrasts the Ministry's actions, just a short few years prior, to recognize and communally title the Negritos Community.

The introduction of individual title and the purported annulment of the Negritos Community was perfectly timed with Yanacocha's arrival and occurred at a time of crisis in the Community due to the betrayal of its leaders to Yanacocha. Individual title made it even easier for the company to acquire land through direct dealings with individual Campesinos. Community members recount that transfers of property to Yanacocha were often induced by a combination of misinformation, threats, extortion and unfulfilled promises.⁵⁵ Researchers have reported that Yanacocha workers drove poor and illiterate community members to the land titles office in company vehicles in order to sign the necessary paper work.⁵⁶ By 2009, Yanacocha Mine occupied approximately one third of the Negritos Community's original communally title property area. Part B.2 of this paper analyzes these events by conceptualizing the knowledge and power dynamics of dispossession in the Negritos case. Part B.5 describes the substantive rights violations that the Negritos Community attributes to these events.

As Yanacocha consolidated the surface rights necessary to initiate and quickly expand its operations, social conflict began to brew. As early as 1993, Campesinos from numerous Communities in the area had begun to complain about land usurpation, extortion, environmental impacts on animals and water and excessive use of force on the part of Yanacocha's security forces.⁵⁷

55 A number of empirical studies have documented the tactics adopted by Yanacocha in purchasing land from local Campesinos: S Langdon, 'Peru's Yanacocha Gold Mine: The IFC's Midas Touch?' in *Profiling Problem Projects (Project Underground, Berkeley CA 2003)*; Anthony Bebbington et al, "Mining and Social Movements: Struggles over Livelihood and Rural Territorial Development in the Andes" (2008) 36 *World Development* 2888. Wiener & Torres accuse the company of tactics to pressure Campesinos to "sell" their land for unbelievably low prices. This includes threatening Campesinos with expropriation if they refuse to sell and hiding information about the gold deposits in order to induce them to accept lower prices for their land. These authors characterize the processes whereby Yanacocha acquired land as a "brutal fraud and pillage" of land: *supra* note 35 at 14-15.

56 J Bury, "Neoliberalismo, minería y cambios rurales en Cajamarca" in A Bebbington, ed, *Minería, Movimientos Sociales y Respuestas Campesinos* (CEPES & IEP, Lima 2007) 49 at 76-7.

57 Marco Arana, "El Cerro Quilish y la Minería del Oro en Cajamarca", online: <http://cajamarca.de/mine/quilish.htm>; Fabiana Li, "Relating Divergent Worlds: Mines, Aquifers and Sacred Mountains in Peru" (2013) 55 *Anthropologica* 399 at 401 [Li, "Divergent

These early years of protest against Yanacocha were also witness to the birth of a growing class of local NGOs in the Cajamarca region.⁵⁸ In 2000, Yanacocha's subcontracted trucking company was responsible for a serious mercury spill along a local road.⁵⁹ The subsequent handling of the spill and the alleged cover up did not help the deteriorating relationship between the mine and surrounding communities.⁶⁰ The community living alongside the road suffered extensive mercury poisoning and there are widespread allegations that compensation agreements between the company and victims were inadequate with many victims receiving no compensation at all.⁶¹

2.2. The Turn to Law: An unresponsive state and the emergence of local activism

Beginning in 2004 with a long general strike, social unrest linked to Yanacocha culminated over the years in more than one period of social crisis, widespread blockades and general strikes.⁶² Of course the Negritos

Community, living with Yanacocha literally in its backyard, was involved in many of these protest events, which have at times implicated multiple Campesino Communities and sometimes spread to the nearby regional capital city of Cajamarca. Especially in the first decade following Yanacocha's arrival in the area, communities, including the Negritos Community, typically expressed their opposition with social protest, civil disobedience and road blockades.⁶³ In recent years, these tactics have been increasingly accompanied by resort to local courts.⁶⁴

This section describes the Negritos Community's trajectory from participation in broad-based grassroots community activism and protest to political advocacy with local officials to the articulation of collective rights claims with the support of a transnational legal team. Attention to the multiple scales of law that surround the Negritos case reveals that, at the turn of the century, growing social discontent with Yanacocha specifically, and large scale mining in Peru and the Americas more generally, occurred in conjunction with significant shifts in the international and domestic legal landscape of Indigenous rights.

Nearly two and a half decades after Agrarian Reform had declared that Peru's Indigenous peoples would thereafter be called "Campesinos", the term "Indigenous" began to reappear in Peruvian law along with a series of legal and institutional innovations with respect to *peoples* more generally in Peru, including Indigenous, Campesino and Afrodescendant communities. In 1993, Peru passed 1989 ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries*⁶⁵ ("Convention No 169") into domestic law, ratifying it the following year.⁶⁶ Then in 1995, the National Institute for the Development

Worlds"]; Wiener & Torres state that the first legal complaints about water contamination occurred in 1999: *supra* note 35 at 18.

58 For the influence of local NGOs, formed in the early 2000s, on social protest and concern about mining, see: Li, "Divergent Worlds", *ibid* at 402.

59 Allan Ingelson, Arturo Urzúa & William Holden, "Mine Operator Liability for the Spill of an Independent Contractor in Peru" (2006) 24(1) *J Energy Nat Resources L* 53.

60 The Peruvian Ombudsman reported that Yanacocha workers told community members to collect the mercury themselves and offered money rewards in proportion to the amount collected. Children and adults alike proceeded to collect the liquid mercury with their bare hands. They were not told that it was a toxic substance: Defensoría del Pueblo, *El Caso del Derrame de Mercurio que afectó a las localidades de San Sebastián de Choropampa, Magdalena y San Juan, en la Provincia de Cajamarca*, Informe Defensorial No 62 (2001) at 18-79.

61 Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología, *Informe del Grupo de trabajo encargado de levantar información sobre la situación ambiental y estado de salud de los afectados por el derrame de mercurio en las localidades de San Juan, Choropampa y Magdalena, Departamento de Cajamarca en junio del año 2000* (Lima: Congreso de la República del Perú, 2008). Also see documentary film: Ernesto Cabellos & Stephanie Boyd, *Choropampa: The Price of Gold* (Guarango Association, 2002).

62 In 2004 protests erupted against a proposed expansion of Yanacocha Mine to a neighboring mountain called Quilish. Over a period of 15 days protestors called for a general strike, demanding that Yanacocha halt exploration activities on the mountain. At times, the protestors ranked more than 10,000 strong, uniting sections of urban and rural civil society. At the time, these protests were unprecedented in the country's history: Li, "Divergent Worlds", *supra* note 57. Also see: Fabiana Li, "In Defense of Water: Modern Mining, Grassroots Movements, and Corporate Strategies in Peru" (2016) 21(1) *The Journal of Latin American and Caribbean Anthropology*

109 (referring to protests in Combayo).

63 Arana, *supra* note 57.

64 In 2012 local activists decided to bring a legal case against a proposed expansion of Yanacocha Mine known as the Conga Project, see: STC No 03673-2013-PA/TC (11 December 2014). Also see: Natalia Guzmán Salano, "Struggle from the margins: Juridical processes and entanglements with the Peruvian state in the era of mega-mining" (2016) 3 *The Extractive Industries and Society* 416; Maiah Jaskoski, "Environmental Licensing and Conflict in Peru's Mining Sector: A Path-Dependent Analysis" (2014) 64 *World Development* 873 (referring to protests over the proposed Conga Mine).

65 *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, International Labour Organization, Convention No. 169, (1989) [*Convention No 169*].

66 Legislative Resolution No 26253, *For the approval of "Convention 169 of the ILO on Indigenous and Tribal Peoples in Independent Countries"* (1993).

of Andean, Amazonian and Afro-Peruvian Peoples was created.⁶⁷ These developments continued between 2003 and 2011 as the Peruvian government passed a series of laws protecting and recognizing Campesino and Indigenous peoples' rights, including in relation to Campesino traditional institutions of communal justice (2003), Indigenous groups in voluntary isolation in the Amazon (2006), Campesino and Native Communities' right to water (2009), and Indigenous Peoples' right to prior consultation (2011).⁶⁸ With respect to the 2003 law on Campesino communal justice, it explicitly extended the protections of *Convention No 169* to traditional justice institutions, called *Rondas Campesinas*.⁶⁹ Between 2002 and 2005 Peru's environmental laws also added special recognition for Indigenous peoples, Campesino and Native communities, including references to rights protection, knowledge recognition, equitable compensation and consultation.⁷⁰

At the same time, at the international level, and especially in the Americas, the Indigenous rights movement was making gains, catalyzed by the 2001 landmark *Awas Tingni* ruling where the Inter-American Court of Human Rights found that the property rights protected by the 1969 *American Convention on Human Rights* encompass an Indigenous right to collective property.⁷¹ Since then, the Inter-American Court has produced a notable body of jurisprudence on Indigenous property and

cultural rights, often in response to cases brought by communities affected by resource extraction.⁷² These claims often echo many of the issues raised by the Negritos Community, namely that extraction activities are occurring without the consent and to the detriment of affected communities.⁷³ This inter-American jurisprudence is important because it has the potential to influence and even direct the development of constitutional law in many Latin American countries with monist legal systems.⁷⁴

It is fascinating that these national and international shifts in law and political consciousness occurred roughly in parallel to a renewal of activism and hope for justice within the Negritos Community. In 2005, following the massive 2004 regional general strike against Yanacocha (mentioned above), the Negritos Community elected a new leadership with a mandate and the capabilities to begin to investigate the past wrongs that had led to Yanacocha's entry into its territory. The Community had not forgotten about the expropriation of Pampa Larga. However, while Community members carried a strong sense of betrayal and injustice, they knew very little about how their dispossession had actually been effected in law, just over 10 years prior.

67 Law No 28495, *Law for the National Institute for the Development of Andean, Amazonian and Afro-Peruvian Peoples* (1995).

68 See respectively: Law No 27908, *Rondas Campesinas Law* (2003); Law No 28736, *Law for the protection of Indigenous and original peoples in a situation of isolation or initial contact* (2006); Law No 29338, *Hydro Resources Law* (2009), arts 3, 64; Law No 29785, *Law for the right of Indigenous and original peoples to prior consultation, recognized in Convention 169 of the International Labour Organization* (2011) [Right to Consultation Law].

69 *Rondas Campesinas Law*, *ibid*: article 1 states that the recognized rights of Indigenous and Campesino Communities apply to the *Rondas*.

70 Law No 28611, *General Law on the Environment* (13 October 2005), arts 70-2; Law No 27446, *National System of Environmental Impact Assessment Law* (2009), art 71.

71 See *Mayagna (Sumo) Awas Tingni Cmty v Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug 31, 2001) at para 148 [*Awas Tingni*]. *Awas Tingni* was the first indigenous rights claim brought to the Inter-American Commission. The petition was filed in 1995 and the Court issued a final judgment in 2001. See Galvis & Ramírez, *supra* note 18, for specific references to subsequent Indigenous rights jurisprudence in Latin American courts more generally. For a description of the emergence of the Indigenous rights movement as an international human rights movement, see Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010).

72 See generally: *Maya Indigenous Communities of the Toledo District v Belize*, Merits Report, Case 12.053, Inter-Am Comm'n HR, Report No 40/04 (2004) [*Maya Communities*]; *Moiwana Cmty v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 124 (June 15, 2005); *Yakye Axa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 125 (17 June 2005); *Sawboyamaxa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 146 (29 March 2006) [*Sawboyamaxa*]; *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 172 (28 November 2007) [*Saramaka*]; *Saramaka People v Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 185 (12 August 2008); *Xákemok Kásek Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 214 (24 August 2010); *Pueblo Indígena Kichwa de Sarayaku v Ecuador*, Merits and Reparations, Judgment, Inter-Am Ct HR (ser C) No 245 (27 June 2012); *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtabuanan v Guatemala*, Report on Admissibility, Inter-Am Comm'n HR, Report No. 20/14 Petition 1566-07 (3 April 2014); *Comunidad Garifuna de Punta Piedra v Honduras*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 304 (8 October 2015); *Comunidad Garifuna de Triunfo de la Cruz v Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 305 (8 October 2015); *Kaliña and Lokono Peoples v Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 309 (25 November 2015).

73 OAS, *Human Rights Protection*, *supra* note 3.

74 Galvis & Ramírez, *supra* note 18 at 256-7.

In this context, Negritos Community leaders began to collect volumes of official documents pertaining to the legal status of their Community and its property rights. These documents, spanning from the 1970s to the mid-1990s, were primarily collected from government entities such as the Public Registrar and government ministries, but they also included the handwritten record of communal decisions (Acts) made at countless community General Assemblies. These documents ultimately formed the basis of the Community's legal case and the allegations described throughout this paper. The Community's internal decision to investigate its own case in order to understand it and pursue some form of justice underscores the assertion that the elimination of the Community's property rights and its very existence, as described in the previous section, occurred without the informed consent or even knowledge of the Community. While in the eyes of the company and the Peruvian state the Community no longer existed in law, it certainly existed as a sociological fact.

Bolstered by what they saw in these documents, Community leaders initiated a series of formal and informal appeals with a wide range of administrative and political decision makers, as well as Yanacocha itself. In 2006, the Community found a local lawyer who helped them file civil law proceedings against a group of third parties (non-community member), who were apparently attempting to occupy and illegally obtain title to a portion of the Community's land, known to the Peruvian state as the "Reserve Area" and to the Community as "Llagaden". Community members believed that these "invaders" were receiving informal support from Yanacocha. In order to better investigate and document the situation, the Community resolved to undertake a traditional communal inspection of the area. However, it feared that these third parties were armed and violent and made numerous requests for protection from local authorities, including to the regional Governor, the prosecutions office and the police. After these requests went unanswered, the Community resolved to undertake the inspection anyway with over 250 community members in attendance. Unfortunately, during the inspection unknown assailants shot at the Community members and one person was injured.

This new threat to communal property appears to have catalyzed yet another series of appeals to state and company officials. It also starkly revealed that without state recognition, the Negritos Community's capacity to

protect its communal property interests would be limited. Between 2006 and 2009 the Community sent at least eight letters to the regional office of the Ministry of Agriculture requesting official recognition as a Campesino Community and title to Llagaden (the Reserve Area). In response, the Ministry consistently took a number of problematic positions in its communications to the Community, from claiming that the Reserve Area is state-owned property, to stating that the Community does not exist, to denying that the matter is in its jurisdiction, to proposing that the area could only be demarcated and titled in exchange for thousands of dollars. The Ministry's responses to the Community's letters were less than timely, often delayed by months, and sometimes up to a year at a time. Community leaders' frequent requests to meet with officials in person yielded similarly sparse results.

In the same time period, the Negritos Community sent complaints to the Ministry of Energy and Mining and at least thirty letters to Yanacocha. In these letters, the Community advised that a recent expansion of the Mine had occurred without consulting the Community and it detailed the impact of mining activities on ongoing traditional communal uses of land and livelihood. The Community requested that Yanacocha negotiate matters related to the acquisition of communal property with the recognized and elected leaders of the Community and that the company cease to use and occupy communal property without permission. In written responses Yanacocha consistently denied the Community's existence and stated that it had fulfilled all of its commitments. Yanacocha refused to meet with Community leaders, stating that its operations take place exclusively on property owned by the company and threatened to initiate legal action against anyone who failed to respect its property rights.

2.3. Developing a Legal Strategy: Putting dispossession into a rights framework

In 2007 the Community solicited the support and legal representation of a local NGO who in turn sought support from international partners. Beginning in 2008, a transnational team of *pro bono* Canadian and Peruvian lawyers and academics began to organize and analyze the documents collected by Community members. Working with hundreds of pages of documents, these lawyers reconstructed the historical record of the

Negritos Community's land title and status as a Campesino Community. The documents detailed the story recounted in the previous section, of how, after granting Yanacocha the concession rights to the minerals beneath the Negritos Community's land, the Peruvian state had proceeded to expropriate a portion of the Community's communal land, designate its communally titled land as eligible for individual titling, and strip the Community of its legal status.

The Negritos legal team undertook to analyze these documents in light of applicable domestic, constitutional and public international laws. Their starting point was the status of Campesino Communities in Peruvian law. As referenced above, the first mention of Campesino Communities in Peruvian law occurred in 1969 with the promulgation of the *Agrarian Reform Law*, which declared that Indigenous Communities were to be denominated Campesino Communities from that point forward. Previously, Indigenous Communities were recognized in the 1920 Constitution, which specified that the State had a duty to protect the "indigenous race" and to pass special laws to support its development in harmony with its needs.⁷⁵ This now historic Constitution also afforded Indigenous communal property special protections, stating that Indigenous property interests may not be diminished by prescription, that Indigenous property can only be transferred to the state and that such transfers may occur only as prescribed by law.

Following Agrarian Reform, Campesino Communities were recognized in the 1979 Constitution. This legal text is relevant to the Negritos Community's case because it applies to those events that took place prior to the introduction of the subsequent 1993 Constitution. This includes for example the expropriation of the Community's land and the conversion of a portion of its communal property interest into individual interests. The 1976 Constitution states that Campesino Communities have legal existence and legal personhood, that they are autonomous in their communal organizations, work, land uses, economy and administration, and that the State must respect and protect their traditions.⁷⁶ It also creates a state duty to promote Campesino Communities' development and communal enterprises.⁷⁷ Finally, it provides special protections for communal pro-

perty, stating that Campesino land is unalienable except in one of two circumstances: either by a law based in the Community's interest and approved by two-thirds of community members; or in the case of an expropriation, by a law based on public need and utility.⁷⁸ These 1970s Campesino rights and protections are relatively progressive for their time, especially due to their recognition of political and economic autonomy and rights.

Fujimori's 1993 Constitution, which remains in place today, significantly weakened these constitutional recognitions and protections for Campesino Communities. It recognizes the right to communal property but controversially allows the state to claim rights over "abandoned" lands.⁷⁹ In a context where so many communities remain unable to acquire communal title due to deficiencies in domestic land laws, this provision puts untitled communities at risk. Like its predecessor, the 1993 Constitution recognizes the legal existence of Campesino Communities, their autonomy, and some property protections. However, it very significantly removed the requirement that communal property might only be alienated on the basis of a two-thirds majority vote of Community members.⁸⁰

The 1993 constitutional changes were consistent with Fujimori's wide-sweeping program of law reform that aimed to weaken communal property rights and facilitate private foreign investment in natural resource extraction. Of interest though, is the fact that Fujimori's reforms left the most important Agrarian Reform statutes in place, including the 1987 *Campesino Communities General Law* and the 1987 *Law for the Demarcation and Titling of Communal Territories of Campesino Communities*. Importantly, these statutes, which remain in place to date, maintain the property protections that Fujimori eliminated from the Constitution, including the requirement for a two-thirds majority vote.⁸¹

Taken together, these Constitutional and statutory laws referring to Campesino Communities formed the

75 *Agrarian Reform Law*, *supra* note 25, art 58.

76 *Political Constitution of Peru, 1979*, art 161.

77 *Ibid*, art 162.

78 *Ibid*, art 163.

79 *Political Constitution of Peru, 1993*, art 88.

80 *Ibid*, art 89.

81 See *Campesino Communities General Law*, *supra* note 28 at art 7. These Agrarian Reform statutes remain in place today, even in the midst of the ongoing roll out of neo-liberal reforms that aim to further facilitate foreign investors' access to land and resources. Many of these laws arguably violate different aspects of Indigenous peoples' rights as recognized in international law and the Peruvian Constitution. See Part B.5.b for more detail on some of these contemporary reforms and their relevance to the Negritos case.

basic starting point for the Negritos legal team's in-depth analysis of the documents that the Community had been collecting. However, key features of the Peruvian constitutional system allowed the Negritos legal team to complement these domestic rights provisions by drawing upon international legal principles on the rights of Indigenous peoples.⁸² Doctrinally, this was possible due to the combined operation of two rules, one domestic and the other international.

Beginning with the domestic rule, Peru, like many Latin American countries, is a monist legal system in that article 55 of its 1993 Constitution explicitly incorporates international treaties into national law upon ratification by the Peruvian state. In 2005 Peru's Constitutional Court interpreted this provision to include international human rights treaties such as the 1969 *American Convention*.⁸³ In 2009 the Court acknowledged that ILO *Convention No 169* and the jurisprudence of the Inter-American Court also have the status of enforceable law in Peru.⁸⁴

This recognition of the constitutional status of international human rights treaties and jurisprudence in Peru requires some clarification regarding the applicability of these sources of law to past events. In international law, the rights recognized in any given treaty become binding on a state after it ratifies the treaty. In Peru, these rights become binding domestically once the treaty is specifically incorporated into Peruvian law by legislation. For example, ILO *Convention No 169*, first available for ratification in 1989, was not incorporated into Peruvian law until November 1993, just months after the expropriation of Negritos land but nearly two years before the mining easement was established. As such, its provisions would apply to the latter but not the former.

The temporal applicability of the jurisprudence of the Inter-American Court in Peru also merits comment. When the Inter-American Court considers provisions of the 1969 *American Convention* in any given case, its interpretation of the content and meaning of specific

rights are available to analyze facts that pre-date the case at hand. This is due to the nature of rights jurisprudence in international as well as domestic public law. Part of a court's judicial function is to interpret the rights statements contained in the constitution or treaty within its jurisdiction. In other words, public law rights jurisprudence interprets and applies existing rights, it does not create new rights. This is precisely what makes it such an important and powerful tool for analyzing the present-day legal significance of past injustice. On this basis, the Negritos legal team invoked the Indigenous rights jurisprudence of the Inter-American Court to analyze the earlier facts of the Community's case.

With this framework, the Negritos team advanced the proposition that the above-named sources of international law (*Convention No 169*, the *American Convention* and decisions of the Inter-American Court) should be relied on, together with the constitutional and legislative provisions pertaining to Campesino Communities in Peru, to analyze the facts of the Negritos case. Indeed, there are remarkable parallels between Peru's 1970s and 80s Campesino Community laws, and the Indigenous rights principles developed in international law beginning with ILO *Convention 169* in 1989 and continuing with the Inter-American Indigenous rights jurisprudence beginning in 2001. These parallels allowed the Negritos legal team to create a robust and coherent substantive rights framework by effectively weaving these international sources of Indigenous rights law together with the Campesino rights provisions already present in the Peruvian Constitution and domestic law.

The impact of this approach was further complemented by the operation of another rule, this time emanating from an international source. Article 29(b) of the *American Convention* establishes that its provisions cannot be interpreted to limit the enjoyment and exercise of any right or freedom recognized under the domestic law of the state in question or recognized by an international treaty ratified by that state. In the context of the Negritos case, this principle infuses the Indigenous property rights jurisprudence of the Inter-American Court with the rule from the *Campesino Communities General Law* that Campesino land cannot be alienated without a two-thirds majority vote. Given that this jurisprudence has constitutional status in Peru, the operation of article 29(b) in the context of Peru's Constitutional framework creates a kind of feedback loop, elevating the property rights-related provisions of the *Campesino Communities*

82 The Negritos legal claim asserted that Campesino Communities in Peru are analogous to Indigenous Communities for the purposes of the application of international human rights law protections. The details of this argument are described in Part B.5.a of this paper.

83 STC No 4587-2004-AA/TC (29 November 2005) at para 44. STC No 0025-2005-PI/TC (25 April 2006) at para 30.

84 STC No 00007-2007-PI/TC (19 June 2007) at para 36.

General Law to constitutional status on their own terms. This also accords with the principle that rights recognized in domestic statutes should be taken into account when interpreting related constitutional rights.

As a result, the two-thirds majority vote rule should retain significant legal weight in Peru, even after Fujimori's 1993 Constitution removed it. This is relevant to the conversion of the Negritos Community's communally titled land into individually titled land (one form of alienation), which occurred both before and after this constitutional amendment. It is also helpful due to the fact that the sources of international law applicable to the Negritos facts have only recognized a limited Indigenous right to free, prior and informed *consent* to the alienation of communally-held land.⁸⁵ As a result, the two-third majority rule arguably has the potentially to create a higher standard than international sources, at least in the context of the potential alienation of communally titled land.

In sum, article 55 of the Peruvian Constitution and article 29(c) of the *American Convention* allow for the integration of the rights protection offered by applicable international human rights treaties and Peruvian domestic law in order to assemble a rights framework that contains the most robust and comprehensive level of protection available. Consequently, the sources of law relevant to the Negritos case are: the *American Convention*, *Convention No 169*, the Peruvian Constitution, Peruvian domestic law, the jurisprudence of the Inter-American Court on Human Rights, and the jurisprudence of the Peruvian Constitutional Court. The Negritos legal team considered these sources holistically to identify the substantive rights available to the Negritos community. In other words, the focus of the rights analysis was not on each relevant article and statements of law, which taken together are numerous. Rather, the Negritos legal team synthesized the relevant articles and their interpretations to identify the substantive rights

that these provisions, taken together as a whole, recognize in relation to the facts of the Negritos case.

Applying this holistic method, Community's legal team ultimately concluded that there was strong documentary evidence that the actions of the Peruvian state and Yanacocha Mine had violated the Negritos Community's rights, as protected by Peruvian constitutional and international laws applicable at the time of the acts in question. It identified violations of the following substantive rights: (1) the right to collective property; (2) the right to free, prior and informed consent prior to a change in the status of the Community's property title from communal to individual; (3) the right to the recognition of the Community and its legal personhood; (4) the right to free, prior and informed consent prior to a change in the Community's legal status or personhood; (5) the right to free, prior and informed consultation prior to the expropriation of the Community's land; (6) the right to equitable indemnification in exchange for the expropriation of the Community's land; (7) the right to benefit equitably from the benefits generated by mining activity on the Community's land; and (8) the State's obligation to take special measures to protect the aforementioned rights. The alleged violation of these rights stems primarily from the State's actions, detailed in the previous section, to expropriate communal land and strip the community of communal title and legal status, concurrently with the establishment of Yanacocha Mine squarely within the boundaries of the Negritos Community's communally titled property.⁸⁶

The articulation of these rights arguments was a watershed moment for Negritos community members because it represented a significant reframing of their concerns into a legal framework that they had been largely unaware of. Community members previously had very limited knowledge of their legal rights as a Campesino Community and even less information about how the state and the company had purported to diminish or eliminate those rights in law. As such, they had expressed their sense of injustice primarily in the language of a general demand for recognition as a Campesino Community and in reference to a raft of specific practical grievances with the Yanacocha and the impact of

85 The Inter-American Court has recognized that the state must obtain the free, prior, and informed consent of affected communities before proceeding with certain types of projects such as where the project may endanger the physical or cultural survival of a community: Saramaka, *supra* note 72. See: Forest Peoples Programme, *Indigenous Peoples' Rights and Reduced Emissions from Reduced Deforestation and Forest Degradation: The Case of the Saramaka People v. Suriname* (UK: Forest Peoples Programme, 2009). The *UN Declaration* is not directly applicable to the Negritos facts since it came into being much later: *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 62 Sess., Annex, Agenda Item 68 UN Doc. A/61/L.67 (2007).

86 A full and methodical analysis of each state and company impugned action in the Negritos case and the complete argumentation with respect to these alleged violations is beyond the scope of this paper. However, for more discussion on the alleged violations mentioned here, see Part B.5 of this paper.

its operations on daily subsistence life. Community members welcomed and celebrated the proposition that international law and Peruvian constitutional law recognize that their Community has special status, including special property rights, that should command the attention and respect of company and state alike. However, given that the state and company were certainly not listening, the Community's last resort was to approach a court of law that could recognize and enforce its rights claims. Crucially, this was contingent on the identification of an appropriate legal forum and a cause of action. The next part of this paper turns to this issue.

3. THE NEGRITOS CASE: LITIGATING A DISPOSSESSION CLAIM (THE STORY OF THE CASE ITSELF)

This part begins with the practical question of what would be required to operationalize the statements of international and constitutional Campesino rights described above. The Inter-American Commission for Human Rights can admit a petition only when claimants have complied with a number of procedural requirements, including the "exhaustion of domestic remedies" rule.⁸⁷ The Negritos volunteer legal team ultimately determined that a domestic constitutional cause of action called *amparo* was in principle available in Peru to protect the Community's constitutionally enshrined rights, as set out in the previous section. If the *amparo* action were to fail, the Negritos Community would be in a position to present a petition to the Inter-American Commission alleging violations of the *American Convention* on the part of the Peruvian State.

In general, once the Commission deems a petition admissible, it evaluates the claim on the merits. If it finds one or more human rights violations, the Commission can refer the case to the Inter-American Court where claimants can seek a binding judgment against their home state.⁸⁸ As such, if the Negritos Community were to have any chance of pursuing justice with either international or domestic public law, it would have to navigate its own domestic regimes by fitting the particularities of its Campesino rights claim into the pa-

rameters and logic of Peru's *amparo* domestic cause of action. The following section describes the Negritos *amparo* action and touches on its significance in terms of the global debate on the regulation of the transnational corporation, referred to in this paper's introduction.

3.1. The *Amparo*: A cause of action for dispossession in Peru?

Peru's *Constitutional Procedural Code* establishes three potential causes of action for rights protection. The *habeas corpus* action is linked to the protection of individual freedoms, typically in the realm of criminal law, and the *habeas data* action typically relates to the right to receive information from any public office.⁸⁹ The *amparo* action is available to protect all other constitutional rights not covered by these first two, including presumably Campesino rights. In this sense, it is considered a "residual" cause of action.⁹⁰

The Peruvian *amparo* shares common features with the cause of action by the same name in a number of other countries in the region.⁹¹ It is a civil law procedure that enables a plaintiff to request a court order requiring the defendant to cease any actions or omissions that the court finds responsible for violating the plaintiff's constitutional rights.⁹² An *amparo* action can be brought against a private party and/or a state defendant. In the sense that it offers judicial protection of constitutional rights, the *amparo* resembles the procedure known as judicial review in common law countries, with one significant difference being that the Peruvian *amparo* is not available to challenge the constitutionality of statutes or legislation.⁹³

An *amparo* claim in Peru must allege violations of the constitutionally protected aspects of the rights claimed.⁹⁴ In this regard, the *Code* specifies twenty-four di-

87 *Rules of Procedure of the Inter-American Commission on Human Rights*, art 31(1).

88 *Ibid*, art 45.

89 Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2008) at 159.

90 See Omar Cairo Roldán, "El panorama general del proceso de amparo en el Perú" 3(8) (2008) *Palestra Tribunal Constitucional: Revista de doctrina y jurisprudencia* 153 at 157.

91 Peru's *amparo* is similar to that in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala and Nicaragua: see Brewer-Carías, *supra* note 89 at 139.

92 Law No 28237, *Constitutional Procedural Code*, art 2.

93 In Peru, judicial oversight of legislation for constitutional compliance is triggered by a distinct cause of action known as the action of unconstitutionality: at Brewer-Carías, *supra* note 89 at 161, 175.

94 *Constitutional Procedural Code*, art 5(1).

fferent constitutional rights that the *amparo* protects.⁹⁵ Campesino rights are not mentioned anywhere in this long list. As such, they necessarily fall under the twenty-fifth and final item listed, namely “other rights that the constitution recognizes.”⁹⁶ Notably then, while Peru’s 1979 and 1993 Constitutions both set out Campesino rights in some detail, the accompanying *Constitutional Procedural Code* does not provide for a cause of action specifically tailored to these rights, nor does it even mention them explicitly.⁹⁷ This general absence of Campesino Communities from Peru’s procedural code led the Negritos legal team to undertake intensive consultations with Peruvian constitutional experts before determining that the *amparo* cause of action was in principle available to the Negritos Community.

The Negritos Community began the process of assembling its legal claim in 2008 and in 2011 it filed its *amparo* action before a local court of first instance in the city of Cajamarca, Peru. Interestingly, this period of time coincided with an unprecedented series of decisions from Peru’s Constitutional Court. Between 2008 and 2012, the Constitutional Court issued eight decisions that addressed the issue of Indigenous peoples’ constitutional rights in Peru for the first time.⁹⁸ Seven of the eight cases were initiated between 2008 and 2009 and as of the date of publication, there have been no further decisions on Indigenous constitutional issues at the Constitutional Court level since 2012.⁹⁹ In only three of these eight decided cases did the Court find in favor of the claimant.¹⁰⁰ Nonetheless, as a group, these

cases are important because they pushed the Constitutional Court to recognize, as mentioned earlier, that both ILO *Convention No 169* and the Inter-American Court’s jurisprudence on Indigenous peoples rights have constitutional force in Peru.¹⁰¹

Notwithstanding their achievements, the substantive rights claims advanced in these cases have limited precedential value for the purposes of the Negritos claim. For the most part, these cases have focused on asserting an Indigenous right to consultation prior to enacting national legislation that impacts Indigenous communities.¹⁰² In this sense these cases can be understood as an attempt to address some of the neo-liberal investment oriented reforms referred to earlier. A smaller subsection of these eight cases focused on rights related to a healthy environment.¹⁰³ Only one case advanced a claim to an Indigenous right to communal property. However, the allegations in that case related to trespass and hold little resemblance to those of the Negritos case in that they do not involve allegations of elimination of title and illegal property transfers to a foreign mining company.¹⁰⁴ As a result, to date, there is not a single case on record in Peru’s highest court whereby a Campesino Community has initiated a constitutional rights claim that resembles that of the Negritos Community, claiming violations of communal property title, recognition, consent and compensation for violations.

The total absence of a Campesino or Indigenous rights jurisprudence in Peru until 2009 is striking in light of the fact that the contemporary recognition and protection of Campesino and Native communal property, social, economic and cultural institutions first occurred in the 1979 Constitution. Indeed, even among the Indigenous rights cases decided since 2009, five of the eight to date were brought by civil society groups impugning national legislation on behalf of Indigenous communities generally.¹⁰⁵ In only two cases were the claims on

95 *Ibid*, art 37.

96 *Ibid*, art 37(25).

97 The Constitutional Court has stated that the *amparo* is not the appropriate proceeding for determining whether or not claimant is a rights-holder. Rather, it is available solely for the purpose of alleging a rights violation: STC No 4762-2007-PA/TC (22 September 2008) at para 10-11. As such, it appears that the Peruvian legal system lacks a constitutional process whereby an Indigenous community can bring a claim seeking constitutional rights recognition.

98 STC No 03343-2007-PA/TA (19 February 2009); STC No 06316-2008-PA/TC (11 November 2009 and clarification decision 24 August 2010); STC No 00027-2009-PI/TC (5 January 2010); STC No 0022-2009-PI/TC (9 June 2010); STC No 05427-2009-PC/TC (30 June 2010); STC No 00025-2009-PI/TC (17 March 2011); STC No 00024-2009-PI/TC (26 July 2011); STC No 01126-2011-HC/TC (11 September 2012).

99 The only Constitutional Court decision after 2012 is STC No 01931-2013-HC (30 July 2015). However, this decision relates to a Native Community’s request for clarification of a judgement previously obtained. As such, it is linked with one of the eight cases already mentioned.

100 STC No 03343, *supra* note 98; STC No 05427, *supra* note 98;

STC No 01126, *supra* note 98.

101 See *supra* note 98 and accompanying text. See specifically STC No 00024, *supra* note 98 at para 12.

102 STC No 00027, *supra* note 98; STC No 0022, *supra* note 98; STC No 05427, *supra* note 98; STC No 00025, *supra* note 98; STC No 00024, *supra* note 98.

103 STC No 03343, *supra* note 98; STC No 06316, *supra* note 98. In this second case, the right to property was raised among a long list of environmental rights but it was not considered because the court concluded that there was insufficient evidence that the communities in voluntary isolation in fact existed.

104 STC No 01126, *supra* note 98.

105 STC No 00027, *supra* note 98; STC No 0022, *supra* note 98;

behalf of a named community or group of communities and in only one case (the trespass case) was the community itself the claimant.¹⁰⁶

Notwithstanding the constitutionalization of Campesino rights since 1979 in Peru, this overview points to three absences. First, Campesino rights are absent from Peru's *Constitutional Procedural Code*. Second, Campesino and Indigenous rights are absent from the Constitutional Court's jurisprudence before 2009. And finally, at least to date, Campesino and Indigenous communities *as claimants* are almost totally absent from the Court's jurisprudence on their rights. Arguably, these absences suggest that there are barriers that prevent these communities from accessing Peruvian courts to advance their interests through constitutional rights protection claims. This highlights the importance of tracking the barriers that arose in the Negritos case as well as the strategies employed over the course of the case's journey in the Peruvian court system.

While the shortage of comparable precedents on point certainly presents a challenge for the Negritos claim, it is not fatal to its pursuit of justice. As lawyers well know, an absence of comparable case law does not necessarily mean that innovative claims are not legitimate, viable and even a necessary part of broader efforts to push the law to respond to social realities. Moreover, in spite of the absences described above, the Peruvian *amparo* has two features that are particularly promising for a community like Negritos, seeking to advance a legal claim against a foreign resource company for violations of its Campesino rights, including communal property rights.

First, the Peruvian *amparo* permits a plaintiff to bring a constitutional rights action against a public authority, functionary and/or a private person, which includes a corporation.¹⁰⁷ As such, in the Negritos *amparo* action, the Community named Yanacocha as a co-defendant

alongside the Peruvian Ministry of Energy and Mining. The Community was able to allege that the actions and omissions of state authorities and the mining company, often in combination, had violated the Community's collective rights.

Second, a successful *amparo* claimant obtains an enforceable remedy from the Peruvian courts. The available remedy aligns with the purpose of the *amparo* as a cause of action, namely to protect constitutional rights.¹⁰⁸ As such, the court will attempt to return the plaintiff to the state in which they were before the violation occurred. To this end, the judge may order a defendant to fulfil its legal obligations or, in the case of a public authority, to perform an administrative act.¹⁰⁹ The court may issue a declaration requiring the defendant(s) to cease rights violating actions, or in the case of omissions, requiring the defendant(s) to undertake some form of positive action in order to respect the claimant's rights.¹¹⁰ The court has the power to impose fines or other penalties on a defendant who refuses to comply with court orders.¹¹¹

These two features are significant especially when considered together with the incorporation of international human rights law into the Peruvian constitutional framework, as described in the previous section. In summary, the *amparo* creates a domestic cause of action, with an enforceable remedy, against a public or private actor who violates constitutionally protected Campesino rights, which includes certain Indigenous rights recognized in international human rights law. Within this framework, the Negritos Community's *amparo* claim is fundamentally about the pursuit of an enforceable remedy via a domestic cause of action in Peru directly against a foreign resource company for the violation of its constitutional and international human rights as a Campesino Community.

As such, the Negritos claim brings together a constellation of rights, remedies and actors that is of particular interest in the context of the global conversation, referred to in this paper's introduction, regarding the problem of the "governance gap" in the effective re-

STC No 00025, *supra* note 98; STC No 00024, *supra* note 98; STC No 03343, *supra* note 98.

106 STC No 05427, *supra* note 98; STC No 06316, *supra* note 98; STC No 01126, *supra* note 98. There are a handful of examples where an single Campesino Community has brought an claim to the Constitutional Court for protection of constitutional right *other than* Campesino constitutional rights. See for example: STC No 04611-2007-PA/TC (9 April 2010); STC No 09874-2006-PA/TC (20 December 2007); STC No 03215-2008-PA/TC (19 August 2009).

107 *Constitutional Procedural Code*, art 2. The *amparo* action against individuals is expressly referred to in the constitutions of Argentina, Bolivia, Paraguay and Peru: see Brewer-Carías, *supra* note 89 at 174.

108 *Constitutional Procedural Code*, art 1.

109 *Ibid.*

110 Part B.5.c provides a detailed description of the specific remedies requested in the Negritos action.

111 *Constitutional Procedural Code*, art 22. The defendant may be obligated to pay fixed or accumulative fines. The judge may also order the dismissal of a responsible public authority.

gulation of the human rights impacts of transnational corporations operating in developing countries. The techniques described here are fascinating in light of the widely-observed fact that communities in developing countries often lack a forum and an enforceable cause of action when seeking to mount rights claims, and in particular international human rights claims, against foreign resource companies. While this paper undoubtedly explores the problems that the Negritos Community has faced in the course of its efforts to access this regime in practice, the mere fact of its existence is significant. In light of the governance gap, the Negritos *amparo* action appears to represent a relatively unusual opportunity, at least to date. Human rights lawyers in Peru report that there is now a handful of Indigenous property claims of various kinds against foreign resource companies in progress in the lower courts in Peru. However, the Negritos claim remains the only one of its kind now before Peru's Constitutional Court.¹¹²

3.2. Dispossession as Knowledge and Power: An equitable approach to the limitation period

The previous section described how the *amparo* offers the Negritos Community an avenue for constitutional rights protection and remedy in that it applies to the substance of its case, framed in terms of violations of its Campesino constitutional rights. However, like most civil causes of action, the *amparo* imposes various procedural rules on claimants. While several of these requirements presented challenges to the Negritos Community, the limitation period rule ultimately became its biggest obstacle. The Peruvian *Constitutional Procedural Code* requires that an *amparo* claim be filed before a court of first instance within sixty days of the time that the claimant's rights were first violated.¹¹³ The rationale for this rule appears to be rooted in the *amparo*'s conception as a simple and prompt remedy for the urgent protection of rights.¹¹⁴

The limitation period rule as set out in the *Code* includes two important qualifiers, first the claimant must have knowledge of the violating act, and second, the

claimant must have the ability to present the claim to the courts. The rule states that if either of these obstacles exist, the limitation period will be calculated from the moment that the impediment is removed.¹¹⁵ Thus the limitation period rule as it appears in the *Code* exists in the form of a strict rule (60 days) accompanied by a kind of equitable exception, internal to the rule itself, that gives the court the discretion to account for the claimant's knowledge and ability in relation to the alleged violation and, arguably, the legal system itself. This general statement of the limitation rule in the *Code* precedes a list of numbered exceptions to the rule, to be considered in the next section of this paper.

The Inter-American Court has indirectly addressed procedural questions in relation to Indigenous peoples' rights claims with an important statement regarding the right to remedy. The Court has stated that Indigenous peoples who have *unwillingly* lost their lands are entitled to a legal remedy and that *the right to a remedy persists* so long as their relationship with the land exists, or where there are impediments to the maintenance of this relationship, so long as those impediments exist.¹¹⁶ Notably, this statement regarding the right to a remedy is qualified with the requirement that the loss of land must have occurred "unwillingly", in other words, without their consent.

These statements from the Inter-American Court can be read together with the statement of the limitation period rule in Peru's *Constitutional Code* to identify at least some of the general principles that might apply to the question of the admissibility of the Negritos Community's claim. First, the Negritos Community's right to a legal remedy persists so long as the loss of its legal interests occurred unwillingly, meaning without its consent; and second, the limitation period for seeking a legal remedy will be triggered at the point in time when the Community has knowledge of the violating acts *and* the ability to bring its claim forward. In this light, consent, knowledge and ability all emerge as central concepts in the admissibility and right to remedy analysis. At the same time, Parts A.3 and B.5.b of this paper both describe how the concept of consent, which is of course inextricably linked with knowledge, is also at the core of the alleged rights violations in the Negritos case.

112 Instituto de Defensa Legal, "Listado de casos patrocinados por el Área de Litigio Constitucional" (July 1, 2016), document on file with the author.

113 *Constitutional Procedural Code*, art 44.

114 Brewer-Carías, *supra* note 89 at 165; Cairo Roldán, *supra* note 92 at 179, 230.

115 *Supra* note 113.

116 *Savboymaxca*, *supra* note 72, at paras 128, 131-132 [emphasis added].

Taking all this together, an interesting situation comes into sharper focus, with potential implications for the litigation of other Indigenous dispossession claims. In the Negritos *amparo* claim, the concepts of knowledge and ability/power are engaged in the analysis of procedural questions related to admissibility, as well as in the analysis of the Community's substantive right to consultation and consent.

Arguably, at both the procedural and substantive phases, these concepts must be considered in context.¹¹⁷ Given that the *amparo* is in place to protect constitutional rights, including Campesino rights, it is critical that its procedural requirements, including the limitation period requirement, be interpreted in context. This refers to the lived reality of those rights and by extension, rights violations. In the Negritos case, searching for the lived reality of rights violations requires a brief review of the factual story, told in Part A of this paper, of the social and legal processes that led to the elimination of the Community's Campesino property title and legal status, as well as the processes whereby the Community came to assert rights and claim rights violations.

The Negritos legal claim arises from contemporary processes of dispossession and lack of recognition that are rooted in a history of colonial relations and the subsequent inadequacies of Agrarian Reform. Part A of this paper described how in the early 1990s, newer legal and economic forms of globalization mapped onto a preexisting context of disadvantage and social exclusion that was only partially addressed by Agrarian Reform. As a result, the processes of dispossession in the Negritos case unfolded in the context of fundamentally unequal power relationships, between the Campesino Community on one side and the state and the foreign company on the other. Indeed, the interests and actions of the state and the corporation (Yanacocha) were at times so highly coordinated that the exercise of public and private power seemed to converge. The Peruvian state and the company often appeared to operate in a complementary fashion toward achieving a common objective. This occurred in part through the exchange of roles, responsibility, resources and information and through the mutual facilitation of the social and legal processes necessary to ostensibly eliminate the Negritos

Community's legal interests.¹¹⁸

When the state and company's interests prevailed, this occurred formally through processes that engaged the legal constructs of property, contract and consent. For example, the name of the titleholder in the state registry changed from that of the Community to the mining corporation, purportedly on the basis of an expropriation "agreement" between Yanacocha and the Community. Other pivotal moments involved the elimination of the Community's legal personhood and its communal property title in favor of the opportunity to obtain individual titles. Legal title to many individually titled properties was also transferred to the Mine. Critically, these changes to the Community's status and property interests in law all occurred with the signatures of some (but not all) Community members, procured at different intervals between 1991 and 1995, and just as Yanacocha began to produce its first bars of gold. Part A of this paper described how in 1995 and 1996 the Community publically denounced, including in letters to state officials, the legitimacy of these legal processes along with the allegedly corrupt leaders that facilitated them. However, and of particular importance for the limitation period discussion, the Community did not respond to these events with an immediate and coordinated turn to the law, much less with a formulated constitutional claim. Indeed, the Negrito *amparo* action was only filed much later, in 2011 with the support of a transnational team of lawyers and law students.

On a socio-historical level, the Negritos Community's delayed turn to the law might be understood in light of the long history of indifference (or even animosity) on the part of Peru's Campesino Communities toward laws emanating from the Peruvian state.¹¹⁹ This may

118 For a detailed description of the convergence of private and public power in the Negritos case and the links with the exercise of coercive force, see: Kamphuis, "Foreign mining", *supra* note 19 at 239-242.

119 For example, Campesino Communities in Peru have long standing communal institutions of justice called "*Rondas*" that applied communal laws. The *Rondas* historically operated with disregard for state-based law in part because it was either unknown, inappropriate or unenforced: see Antonio Peña Jumpa, *Justicia comunal en los Andes del Perú: El caso de Calabuyo* (Lima: Pontificia Universidad Católica del Perú, Fondo Editorial, 1998). In 2003, legislation was enacted to protect the *Rondas* as Campesino institutions and give them special status as indigenous rights holders: Alejandro Laos Fernández et al, *Rondando por Nuestra Ley* (Lima: Asociación Servicios Educativos Rurales, Red Interamericana para la Democracia, 2003).

117 See for example: Jeremy Webber, "The Meanings of Consent" in Jeremy Webber and Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 3-41.

explain in part the many absences, described previously, of Campesino and Indigenous communities from Peruvian constitutional jurisprudence. However, turning to the specific facts at issue in the Negritos case, the *amparo* action alleges that unequal power relations enabled illegal practices such as fraud, corruption, extortion and misrepresentation, which in turn reinforced or deepened these power relations. Although the state and the company purported to procure signatures from Community members, there are many unresolved questions surrounding the validity of these signatures. Community members allege that signatures were falsified, extorted or otherwise uninformed. Moreover, even the number of (contested) signatures was insufficient to comply with the constitutional requirement in Peruvian law that the agreement of two-thirds of the Community is required before communal land can be alienated.

Nonetheless, the signatures of some Community members on the documents that purported to transfer title and eliminate rights in the Negritos case raises the possibility that, at a preliminary procedural phase, an uninformed observer (or even a court judge) might presume that if at least some Community members signed documents that purported to extinguish their communal rights, the fact of these signatures should constitute knowledge of the alleged violations and capacity to act, thereby triggering the sixty-day limitation period. This reveals that the concept of knowledge and capacity employed in the limitation period analysis is a crucial matter and requires critical interrogation. Beyond the allegations of dubious dealings described above, the Negritos *amparo* action alleges that, even if these signatures are taken at face value, the facts reveal that Community members did not know what they were signing due to lack of adequate information and inappropriate procedures. At this juncture, an important argument emerges with respect to how the court should approach the limitation period. The assertion here is that where the substantive rights issues in *amparo* proceedings raise questions of consent, the court cannot avoid a careful consideration of the plaintiff's knowledge and capacity for the purposes of the limitation period analysis. Moreover, in order to properly interpret the legal standards of knowledge applicable to an Indigenous community, the courts must consult with the case law on point.

As stated previously, the Negritos *amparo* action argues that the Community has a right to free, prior and informed consent prior to the alienation of its com-

munal property, and in the case of expropriation, a right to free, prior and informed consultation.¹²⁰ The Inter-American Commission has stated that consent requires, at a minimum, that all members of the Community be fully and precisely *informed* of the nature and consequences of the proposed project and of the decision-making process; and that they be afforded the opportunity to effectively participate individually and collectively.¹²¹ For its part, Peru's Constitutional Court has stated that access to "true information" is not only a fundamental human right, but also an essential condition for free choice.¹²² Drawing on Inter-American jurisprudence, the Constitutional Court has recognized that the appropriate methodology for consultation is case specific, considering the needs and circumstances of each community. However, at a basic level, the information required in relation to a proposed resource project would include information about the company proposing the project, the kind of resource, the exploitation area and the potential environmental and health impact.¹²³ Moreover, communities should have adequate time to digest this information during the consultation process and the process itself should aim to achieve an agreement that protects the legitimate interests of the community, including the preservation of its economic and cultural activities and the environmental integrity of its territory.¹²⁴

The work of legal anthropologists in the Peruvian context offers critical insights that help illuminate the complexity of the concepts of adequate information and appropriate procedures as described in the case law above. They have accumulated a rich body of research that reveals that consultation and consent processes with Indigenous peoples will only be effective if they are designed to account for information and knowledge differences and power disparities.¹²⁵ Anthropological

120 This assertion is grounded in the following legal instruments and jurisprudence: *Political Constitution of Peru, 1979*, art 163; *Campesino Communities General Law*, art 7, *supra* note 28; *American Convention*, art 2(2), 2(14), 21; *Convention No 169*, arts 6(1), 6(2), 17(2); *Awaj Tingni*, *supra* note 71; *Yake Axca*, *supra* note 72; *Saramaka*, *supra* note 72. It is supported by the following legal instruments: *Political Constitution of Peru, 1979*, art 161; *Political Constitution of Peru, 1993*, art 89.

121 *Maya Communities*, *supra* note 72 at para 142.

122 STC No 1776-200-AA/TC (26 January 2007) at paras 39-40.

123 STC No 0022, *supra* note 98 at paras 26-8, 32, 34, 35, 51; STC No 03343, *supra* note 98 at para 35. Also see *Saramaka*, *supra* note 72 at para 134.

124 STC No 0022, *supra* note 98 at paras 30, 33, 39.

125 See for example: David Szablowski, "Operationalizing Free, Prior and Informed Consent in the Extractive Industry Sector? Ex-

work with Campesino Communities in Peru suggests that these inequities are exacerbated by deeper epistemological differences between the parties regarding the meaning of community, property, livelihood, development, and the environment.¹²⁶ A number of studies have observed that Communities have complex, mixed and multilayered conceptions of property that blend communal and familiar rights into different and variable arrangements that do not coincide with state-based legislation or legal concepts.¹²⁷ One researcher who did ethnographic work with Negritos Community members reports that when Yanacocha arrived in the early 1990s most of the adults in the Community were illiterate and did not understand exactly what a “mine” was.¹²⁸

As stated, the Negritos *amparo* action alleges that for most Negritos Community members the legal processes that lead to their dispossession in law (on the books) were initially either entirely unknown or, if known, their significance was not understood. Much less did they conceive of what had occurred as a violation of their constitutional rights, bolstered by international law, with a potential domestic remedy called *amparo*. Moreover, there is continuity between the formal legal processes of dispossession and the material outcomes of the mining project that these processes purport to legalize. The adverse material impact of the project on the Negritos Community embodies the fundamentally different understandings and worldviews (at best), and

fraud, extortion and misrepresentation (at worst), that characterized the initial legal processes that presumed to eliminate the Community’s property title and status with its “consent”.

The Negritos Community’s dispossession was consolidated by the subsequent deepening of its relative marginalization as Yanacocha’s operations picked up speed and it became grossly unable to equitably benefit from the mining project. This occurred as a result of a two-fold process. First, the Community was substantively excluded from the model of mining “development” initiated by the changes to its property title. Community members did not obtain meaningful employment and otherwise meaningfully share in Yanacocha’s wealth production. Second, Yanacocha’s operations diminished Community members’ capacity to engage in their land-based livelihoods. They allege that their natural sources of water have been contaminated, that their traditional pathways for moving animals have been destroyed and that their homes have suffered the consequences of blasting. In the Negritos case the subsequent wealth disparities are stark: Part A referred to the fact that after more than twenty years of Yanacocha’s operations, members of the Negritos Community remain among the poorest inhabitants of one of the poorest regions of Peru while Yanacocha’s wealth has consistently topped the charts globally. Its success is arguably due in part to the way that it originally leveraged its title to Negritos’ land to obtain start-up financing loans in the amount of US\$ 85,000,000.

This account of the Negritos Community’s knowledge and ability for the purposes of the limitation period analysis must also account for its processes of resistance and its ultimate turn to law. Gradually Community members became aware of the stark material consequences of their dispossession, the grossly unequal and disadvantageous conditions in their midst, and the adverse impact of the mine’s operations on their livelihood. As mentioned earlier, explicit or open conflict between Yanacocha, the Negritos Community and other neighboring communities emerged toward the end of the 1990s, once the mine was well into the operations phase and the reality of its potential and actual environmental, social and economic consequences were felt. Part A of this paper described how these initial conflicts occurred primarily in the form of social protests as opposed to claims brought to the courts.

aming the Challenges of a Negotiated Model of Justice” (2010) 30:1-2 *Canadian Journal of Development Studies* 111; Riccarda Flemmer & Almut Schilling-Vacaflor, “Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia’s and Peru’s extractive industries” (2015) *Third World Quarterly*.

126 One researcher working with Campesino Communities in Cajamarca has observed the impact of divergent epistemologies on conflicts related to the management of water resources impacted by Yanacocha Mine: Li, “Contested Equivalences”, *supra* note 34.

127 See Alejandro Diez, “Interculturalidad y Comunidades: Propiedad Colectiva y Propiedad Individual” (2003) 36 *Debate Agrario* 71; Laureano del Castillo, “Titulación de las Comunidades Campesinas: CEPES, ALLPA y la Problemática Comunal” (2003) 36 *Debate Agrario* 89; Cletus Gregor Barié, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*, 2d ed (La Paz, Bolivia: Génesis, 2003) at 492-3; R Plant & S Havlkof, *Land Titling and Indigenous Peoples in Latin America* (Inter-American Development Bank, Washington DC, 2001) at 15.

128 Richard André O’Diana Rocca, *Las limitaciones del sistema de dominio minero vigente en el Perú y las consecuencias negativas que genera a las comunidades campesinas: un estudio a partir del caso de la Comunidad Campesina San Adres de Negritos de Cajamarca*, Thesis for the degree of Bachelor of Law, Faculty of Law, Pontifical Catholic University of Peru (Lima, 2014) at 120, 144.

As the Negritos Community came together in the years that followed to seek solutions for a variety of problems, it encountered the consistent message from state and company officials that it lacked the status to make demands as a Community, in other words, that it did not exist. All of this served as a catalyst for renewed Community mobilization and search for justice. However, it took a period of years for the Community to explore its options. The previous section described how following several episodes of protest in the region, in 2005 the Negritos Community began to intensify its pursuit of potential avenues of recourse, directly appealing to political actors, administrative decision makers and the corporation itself.

When these avenues consistently failed, the Community ultimately turned to the law, searching for legal mechanisms that might govern the public and private actions and inactions in question. In the process, it faced serious hurdles as it sought to collect hundreds of pages of documentation from state authorities in order to understand what had happened to its legal interests. Finally, it turned to the only legal counsel willing to assist, a team of volunteer lawyers, law students and local NGO workers, who in turn received support from national and international allies. This team was ultimately able to file the Community's claim in local courts in early 2011. This brief recap of the Community's pursuit of justice signals that a final condition of inequity has reinforced its dispossession, namely its lack of access to legal counsel and the resources necessary to efficiently bring its claims to local courts.

In sum, the Negritos Community's dispossession fundamentally involved the non-consensual loss of land and status, resulting in the enrichment of Yanacocha, growing economic disparity and the deprivation of the Community. The processes that purported to imbue dispossession with a veneer of legality and consent were underpinned by vast inequalities in economic and political power. The impossibility of meaningful consent in this context is a consequence of at least four conditions of inequity or what I refer to as the "dynamics of dispossession": (1) lack of meaningful access to information about material fact and law, (2) inaccessible, inappropriate, inefficient or unfair administrative procedures, (3) epistemological differences with respect to the meaning of legal categories and events, and (4) lack of access to appropriate legal support.

This account emphasizes the temporal aspect of these legal and social process in order to explain why the Negritos Community's turn to the courts took place gradually, over a period of years, and far beyond the 60-day limitation period required by statute. The dynamics of dispossession help explain why the Negritos Community did not have the knowledge or ability to mount a legal challenge to the alleged rights violations, which began between 1991 and 1995, until it finally presented its case to local courts in 2011, a decade and a half later. As I have noted, this examination of the specific features of knowledge, ability and consent in the Negritos case raises important questions regarding how the courts should interpret and apply limitations period rules in the context of Indigenous rights claims like that of the Negritos Community.

Importantly, the above account signals that the inequities that enable the legal processes of dispossession can be the same factors that prevent the community from promptly understanding the full significance of these processes and bringing legal action. For example, not only does a lack of access to information and fair process make meaningful consent impossible, it can also prevent a timely response from the Community. The Negritos story reveals that, due to the dynamics of the unequal power relationships that inform the processes of dispossession, the legal underpinning of the impugned act or omission is often consolidated without the full knowledge or participation of the Community and according to the terms of a system of law that the Community is not familiar with. As a result, it may take a period of years or even decades for a Community to become aware of the loss of its rights in the eyes of state-based law, as well as the possibility, and potentially the necessity, of seeking redress through the state's legal system.

The Negritos Community's experience in this regard supports a more general argument, namely, that where an Indigenous community's constitutional claim alleges the nonconsensual loss of property and rights, for the purposes of the limitation period rule the claimant's knowledge and ability must be considered in the full context of each case and on the basis of relevant principles in the applicable Indigenous rights jurisprudence. Strict adherence to the sixty-day limitation period requirement on the basis of formal signatures would put the law dramatically out of touch with the ways in which Indigenous property rights are often lived and lost on

the ground. To demand by way of a generic procedural requirement that the Negritos Community, and communities like it, should mobilize within sixty days of the impugned act or omission would be to perpetuate the very dynamics of dispossession that form the basis of the claim. Especially where questions of dispossession and consent are at issue, to assume at the admissibility stage that the Community's knowledge and ability was sufficient to launch a legal challenge within sixty days of the alleged violations would amount to a premature and formalistic determination of the substantive issues. Indeed, issues such as what the Community *knew* are central to the allegations of rights violations. Thus, a strict application of the limitation period criterion in the context of Negritos case, and cases of a similar nature, would risk creating a *de facto* bar in Peru to Indigenous communities seeking constitutional redress for constitutional wrongs that fall outside of a 60-day period.

3.3. Dispossession as Actions and Omissions: A doctrinal approach to the limitation period

The previous section set out the *amparo's* limitation period rule as stated in the *Constitutional Procedural Code*. It observed that the 60-day limitation rule contains a qualification, internal to the rule itself, that references a claimants' knowledge and capacity. This grounded the argument that the rights violations alleged in the Negritos case, rooted in the dynamics of dispossession, are a direct result of inequities related to knowledge and capacity, thereby explaining the fact that the Community did not turn to the law for several years. While this equitable argument makes an important contribution to a critical analysis of the limitation period, it also faces important evidentiary obstacles. The substantive arguments in the Negritos action rely on the available documentary record to argue that the Community's loss of title and status was non-consensual. However, further evidence would be required to prove that the Community lacked sufficient knowledge and capacity to bring its claim in the years between the initial loss of its rights (1992-1995) and the moment when it filed its claim (2011). This would likely be difficult to prove in light of the strict evidentiary requirements of the *amparo* action. The *amparo* procedures do not typically allow forms of evidence that would need to be tested and weighed by the court, such as witness testimony in the form of affi-

davit evidence.¹²⁹

In this context, the Negritos legal team sought an alternative approach to overcoming the limitation period hurdle, one that would not raise complex evidentiary questions and equitable arguments. It turned to a list of specified exceptions that appear in the *Constitutional Procedural Code* immediately following the statement of the rule. In this regard, articles 44(3) and 44(5) were particularly promising. These two provisions permit exceptions to the *amparo's* sixty-day limitation period rule in circumstances where the alleged violations are generated by omissions and/or ongoing actions. Relying on these provisions, the Negritos *amparo* asserted that the courts should admit the claim and exempt the Community from the application of the 60-day limitation period requirement on the basis that the alleged rights violations are the result of continuous actions or omissions. Continuous actions are actions that have been occurring, that continue to occur, and that will certainly continue to occur.¹³⁰ Another way to identify continuous actions is by their effects. Decisions of Peru's Constitutional Court state that the effects of a continuous action are periodically produced and reproduced, leaving the rights holder constantly unable to exercise the right.¹³¹

On the basis of these provisions and their interpretation, the Community argued that the rights violations it attributes to the mining company and the state did not end with the initial changes in law to the Community's status and its property title, such as for example through the expropriation of Pampa Larga. Rather, the Community asserted that the violations of the rights in question, the right to property, the right to recognition, the right to consultation and consent, and the right to equitable compensation and an equitable share of the benefits of resource development, should all be characterized as the product of continuous actions and omissions. However, given the absence already noted of decided constitutional cases in Peru with facts comparable to those of the Negritos case, it is not surprising that

129 *Constitutional Procedural Code*, art 9. This evidentiary rule is a result of the *amparo's* intended status as a rapid constitutional procedure designated for urgent rights issues. However, judges have the discretion to accept other forms of evidence if it will not compromise the expediency of the process: Cairo Roldán, *supra* note 92 at 161.

130 Samuel Abad Yupanqui, *El Proceso Constitucional de Amparo* (Gaceta Jurídica: Lima, 2008) at 127.

131 STC No 3283-2003-AA/TC (15 June 2004) at para 4.

there is a similar absence of guidance in the case law with regard to how limitation period exceptions should be interpreted in the context of Campesino constitutional rights claims. As a result, in order to support the argument that the rights violations in the Negritos claim are continuous, the Community's legal team sought analogies with continuous actions and omission in other contexts already recognized by Peru's Constitutional Court.

The Negritos submissions developed two main analogies with established case law interpreting the meaning of continuous actions and omissions. The first related to the allegations in the Negritos claim that the state and company had violated the Community's right to equitable compensation for the loss of its property interest and the right to benefit equitably from mining activity on its land. The *amparo* claim argued that these violations were generated by the company's continual failure to transfer compensation and benefits and by the state's failure to ensure that these rights are respected. In developing this argument, the Negritos action put forward the view that the deprivation of one's right to a constitutionally protected economic entitlement is an ongoing violation of that right. To support this assertion, it drew upon the fact that Peru's Constitutional Court had upheld this principle in a series of pension benefits cases, where the court found that the failure to provide these benefits constituted an ongoing violation of the claimants' rights.¹³²

The second analogy drew on the allegations in the Negritos case that any purported consent or consultation was invalid because the Community lacked the information necessary to make a free and informed decision with regard to changes made to its status and property title. The Community's *amparo* action argued that this deficiency constituted a failure (omission) on the part of the state and the company to provide appropriate information. In making this argument, it drew on Peruvian jurisprudence that accepts that a lack of access to adequate information is an ongoing omission that exempts a claimant from the limitation period requirement.¹³³

Moving beyond these doctrinal analogies, the Ne-

gritos *amparo* claim extended the concept of ongoing violations and omissions to the case's core rights issues of Campesino communal property title and status. Referring to Yanacocha's alleged illegal acquisitions of the Community's property for its mining operations, the Negritos claim asserted that the physical act of Yanacocha's occupation is an ongoing action, thereby constituting a continuing violation of the Community's communal property rights. With regard to the state's purported elimination of the Negritos Community's legal status, the *amparo* claim asserted that the failure of the state to fulfill its duty to recognize the Negritos Campesino Community as such is an ongoing omission. On the facts of the Negritos case, this omission has become an active violation of the Community's right to recognition due to the state's consistent rejection of the Community's requests for recognition.¹³⁴ Moreover, this sustained refusal to recognize the Community has made it vulnerable to new and ongoing impacts on its rights. Part A of this paper described how Yanacocha and other third parties have taken advantage of the Community's uncertain legal status. It recounted how in one instance, when non-community members invaded tracts of land which were formally communally titled, the Community's efforts to confront these invaders and obtain protection from the police were frustrated in part by the state's continued denial of the Community's very existence.

The Negritos legal team ultimately made a strategic decision to invoke the "ongoing actions" and "omissions" exceptions to the limitation period, rather than focusing its limitations argument on the conditions of knowledge and capacity referred to within the rule itself. In doing so, it appealed to doctrine, as described in this section, rather than the equitable arguments put forward in the previous section. There were two reasons for this. First, the team calculated that the courts would be more likely to accept arguments based on analogies with established doctrine than arguments rooted in a social analysis of the inequities that inform the dynamics of dispossession. Second, even if successful in the Negritos case, going forward, arguments regarding any given community's knowledge and ability at the time of dispossession would need to be proven on a case by case basis, thereby maintaining procedural and evidentiary obstacles for other communities in a similar situation. In contrast, if the Negritos Community were successful

132 STC No 2574-2005-AA/TC (27 May 2005) at para 1. This case relates to article 11 of the 1993 Constitution which guarantees access to pension and health services.

133 STC No 00014-2007-PI/TC (4 May 2009) at para 16. This case relates to the fundamental right to information, established in article 5 of the 1993 Constitution.

134 See Part A.2. of this paper.

with a doctrinal argument that constructs relations of dispossession in terms of ongoing actions and omissions, this could potentially be useful to communities facing similar hurdles at the limitation period stage.

The viability of any doctrinal argument depends considerably on the willingness of the Court to accept the proposed construction of law. At the admissibility stage of the Negritos case, this refers to the proposed construction of the alleged rights violations as ongoing actions and omissions. Arguably, the distinction between rights violating actions that have ceased, are continuous or qualify as omissions, is not self-evident, but rather can only be resolved by making analytical choices. As with any application of law to fact, and particularly when adjudicating rights claims, there is often more than one reasonable construction and the ultimate path chosen will be informed by the courts' underlying political and social values.¹³⁵

Ultimately then, the outcome in the Negritos case would depend on the importance, in the eyes of Peruvian courts, of making the *amparo* cause of action accessible to Communities whose dispossession has occurred over time and under conditions of gross inequality. Absent such a willingness, the limitation period requirement stands to perpetuate the factors of inequity and risks creating an absolute bar to any Campesino justice claim that is not brought within sixty days of the first occurrence of rights violating acts. As argued above, the very circumstances that inform rights violations in contexts like the Negritos case often serve to prevent Communities from presenting their claims to the courts within such a narrow timeframe. With all of this in the background, the next section will critically examine the Peruvian courts' responses to the Negritos *amparo* to date, with particular attention to their treatment of the limitation period issue.

3.4. San Andres de Negritos Campesino Community v Yanacocha Mine

This section is divided into three parts. The first recounts the Negritos Community's experience in the courtroom to date litigating its constitutional claim against Yanacocha Mine and the Peruvian State. The

second offers a critical analysis of this experience. The third describes some of the challenges that the Community has faced outside of the courtroom.

3.4.1. The Litigation

The Negritos legal team filed the Community's *amparo* claim in civil court in the regional capital city of Cajamarca, Peru in March 2011. In its response submissions, Yanacocha made four objections to the admissibility of the claim. It argued that the Community did not have the legal capacity to present an *amparo* claim because it did not have legal personhood, meaning it did not exist in law. Adding to this, the company argued that the Community could not claim property rights violations because it was not a property titleholder. It further asserted that the Community had failed to exhaust administrative remedies and that the claim was outside the limitation period.¹³⁶

Yanacocha and the Community's lawyers made a series of written and oral submissions with regard to these objections over the course of nearly six months before the proceedings ran into procedural delays. Three distinct procedural disputes emerged and each was only resolved on appeal, leading to considerable delays as the case was transferred back and forth between two levels of court each time. Confusion over the proper service of documents and the timeliness of the Ministry of Energy and Mining's written submissions caused the first procedural delay. This issue arose in part because the Ministry's response to the Negritos claim was filed outside of the timeframe required in the Procedural Code. The Ministry had also failed to specify an address in the regional capital city of Cajamarca for the service of documents, instead insisting on service at its headquarters in the national capital city of Lima. The service issue was significant for the Community given that its *pro bono* lawyer at the time was located in the city of Cajamarca and without a budget for executing service in the nation's capital, hundreds of kilometers away.

In the final weeks of 2012, an appeal court resolved

135 See for example Allan Hutchinson, "Looking for the Good Judge: Merit and Ideology" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (McGill-Queen's University Press, 2013) 99.

136 On matters of substance, Yanacocha took the position that the Community had freely consented its own elimination and to the transfers of its property to the company. It also argued that, in any case, the Negritos Community could not avail itself of rights regimes applicable to Campesino and Indigenous Communities because it does not fulfill the definition in Peruvian law of a Campesino Community.

the matter, ordering the Ministry to accept service at its regional office.¹³⁷ Although the Ministry remains a named defendant and continues to be served with documents in the proceedings, it has declined to make a single submission to the courts on any of the substantive or admissibility issues raised by the other two parties. In light of all this, it seems fair to describe the Ministry's role in the proceedings as one of indifference, at the very least, and less charitably, perhaps even incompetence. Without a doubt, the Ministry's errors added to the delays in the process and created further challenges for the Community.

The second procedural issue arose when Yanacocha challenged a resolution of the court of first instance allowing the Community to make audio recordings of oral submissions at hearings. Yanacocha argued that such recordings would violate its lawyers' rights to free expression and to preserve their "image and good reputations". The finagling over this issue continued (in parallel to other issues) for nearly two years until an appeal court sided with the Community in 2013 and awarded it the right to make the recordings requested.¹³⁸ In spite of this win, on the day of the hearing, the presiding judge nonetheless failed to ensure that the courtroom was furnished with the necessary audio video equipment. Community members were forced to record what they could with their cellular phones.

The third issue arose in 2013 when a Canadian NGO, the Justice and Corporate Accountability Project (JCAP), sought permission to participate in the Negritos *amparo* proceedings as an intervenor in order to make written submissions to the court on points of law (known in Peru as an *amicus curiae*). Yanacocha argued that the court should refuse to grant JCAP *amicus* status. The company asserted that JCAP was not objective or impartial and that, in any case, in the company's view the subject matter of the litigation did not raise any public interest issues that would merit intervenor participation. This issue was temporarily addressed on appeal, when the court decided that JCAP's *amicus* request would be determined together with the issue of the admissibility of the *amparo* action itself.

These three procedural disputes created additional obstacles and distractions from the threshold issue of the Negritos *amparo*'s admissibility in light of Yanacocha's objections. In June 2014, more than three years after the *amparo* claim was first filed, the local court of first instance finally issued a decision, declaring the Community's claim inadmissible. It reached this conclusion by finding in favor of two of Yanacocha's four objections.¹³⁹ It agreed with Yanacocha that the Community did not have the legal status to present its claim (it did not exist in law) and that its claim was beyond the limitation period. In coming to this latter conclusion, the court relied on the principle that, absent evidence to the contrary, there is a presumption that both natural and legal persons have *knowledge* of the records contained in the Public Registry.¹⁴⁰ This refers to the official repository of documentation where the changes to the Negritos Community's property title and legal status were registered. In its judgement, the lower court failed to address the Community's doctrinal arguments that the codified exception to the limitation period should apply on the basis that the alleged violations are ongoing actions and omissions.

The Negritos Community appealed this lower court decision to Cajamarca's regional appeal court for civil matters and the appeal court issued its decision in May 2015.¹⁴¹ It rejected three of Yanacocha's four objections, overturning the lower court's conclusion that the Community did not have the legal status to present its claim. However, it agreed with the lower court's conclusion that the claim was outside of the limitation period. On this basis, the appeal court upheld the lower court decision to rule the Negritos *amparo* claim inadmissible. At the same time, it denied JCAP's request to act as an *amicus curiae* in the proceedings. The Community sought and received leave to challenge the appeal court's decision before Peru's Constitutional Court. The Community continues to wait for a hearing date, knowing that delays are notorious due to a heavy backlog of cases at the highest Court. The legal questions that frame the Negritos Community's appeal to the Constitutional Court will be addressed in the final section of this paper.

137 Specialized Civil Appeal Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 2 (14 December 2012).

138 Specialized Civil Appeal Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 1 (19 March 2013).

139 First Specialized Civil Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 25 (16 June 2014).

140 Legislative Decree No 295, *Civil Code* (2015), art 2012 [emphasis added].

141 Superior Court of Justice of Cajamarca, Permanent Civil Appeal Court, Exp 00315-2011-0-0601-JR-CI-01, Resolution No 33 (5 May 2014).

3.4.2. Critical Analysis of the Appeal Court Decision

There are at least two important observations to make of the Negritos Community's experience in the courtroom to date litigating against Yanacocha and the Peruvian state. The first, and most obvious, relates to process, and the second, and more complex, addresses the appeal court's admissibility analysis of the Negritos claim. A final point of analysis focuses on the appeal court's treatment of JCAP's *amicus curiae* request.

Turning to issues of process, the proceedings notably suffered from significant procedural delays. This is evident from the fact that it took more than four years for the Community to receive an admissibility decision from Cajamarca's appeal court and the Community continues to wait for a hearing before the Constitutional Court. Much of this delay was caused by procedural issues triggered by either the company or the Ministry of Energy and Mining. This ranged from the Ministry's failure to properly participate in the proceedings to Yanacocha's objections to increased transparency and public participation in connection to the Community's attempt to film the proceedings and JCAP's request to submit an *amicus*. Undoubtedly, a four-year court battle on the threshold issue of admissibility took a toll on the Negritos Community, especially where it spent much of that time fighting to make the proceedings more transparent and open to public participation.

A second observation arises from a concerning set of developments at the core of the court's treatment of the limitation period issue. Yanacocha has challenged the claim's admissibility by adopting a strategy of conflating the substantive legal issues in the case with admissibility questions. Critical analysis of this strategy reveals that it is predicated on a formalistic concept of consent and an abstract universalizing construction of the legal subject. These two approaches to consent and subjectivity have infiltrated the court's admissibility analysis in the form of formalist assumptions that have the effect of decontextualizing the Community's dispossession claim, rendering its experience invisible or irrelevant, and ultimately excluding its justice claims from the courts. This section will examine how this has occurred.

As stated, in its objections to the Negritos claim's admissibility, Yanacocha took the position that the

Community does not exist and does not have a property right to defend. Both assertions rely on a common sense formal notion of consent to the legal events that lead to the elimination of the community's legal status and property title. They ask the court to presume that the signature of some community members on the relevant documents is a full and sufficient answer to the Negritos claim. This ignores the fact that the question of free and informed consent to these legal events is precisely at the heart of the case. It is problematic to implicitly presume informed consent at a preliminary stage when the alleged absence of informed consent is central to the substantive issues in the case.

Although the appeal court's admissibility decision rejected these two objections, it accepted another of Yanacocha's objections, namely that the Community's claim is barred because it is outside of the limitation period. Crucially, the limitation period objection depends on the same problematic formalist notion of consent and knowledge. The reasoning of the appeal court on this point is revealing. The court began its discussion of the limitation period objection by emphasizing that constitutional rights are not absolute and must be balanced with other objectives, presumably referring to the objective of legal certainty generally associated with limitation period rules.¹⁴² It rejected the theory of continuous rights violations and omissions, instead taking the position that any alleged rights violations would have concluded with the finalization of the legal transactions in question, referring to the transfer of property interests from the Community to the company. The court seems to have relied on "common sense" reasoning to support this conclusion, as it did not point to any supporting case law, nor did it directly address the Community's submissions on point.

In reaching these conclusions, the appeal court explicitly assumed that these legal processes occurred with the consent of the Community. The court stated that as soon as these property transfers occurred, the Community is presumed to have had the *ability* to act in defense of its own rights.¹⁴³ It reasoned that the Community cannot argue that it did not have the technical or economic *capacity* to do so given that it had previously registered itself as a Campesino Community, therefore interacting with the Public Registry. The court conclu-

142 *Ibid* at para 8.

143 *Ibid* at paras 10-11 [emphasis added].

ded that any argument that the Community leaders who signed the property transfer documents were corrupt is unsupported and merely serves as a convenient reason for bringing a claim after the expiry of the limitation period. The court further observed that it would be impossible for the Community not to know that there was a mine operating in its midst on the basis of these property transfers.

The appeal court's reasoning on the limitation period issue made dramatic presumptions about the Negritos Community's knowledge and consent, without acknowledging that these issues are directly related to the Community's substantive arguments on the merits of the case. In doing so, the court avoided the need to consider documentation suggesting misrepresentation, corruption, fraud and extortion. It failed to consider alternative approaches to the limitation period and Peruvian and international jurisprudence elaborating on the right to remedy and the meaning of informed consent and consultation. Further, it ignored the social context of the Negritos Community, its poverty, isolation, limited literacy, lack of legal knowledge, and lack of access to competent lawyers capable of taking on a case against the most powerful foreign company in Peru.

Rather, the appeal court implicitly held the Negritos Community to a standard that would require it to engage with Yanacocha as though it were also a legally sophisticated, knowledgeable and resourced actor. The court conflated the obvious fact of the Community's knowledge of the physical existence of the Mine, with knowledge of its legal rights, alleged violations and available causes of action. It presumed that since the Mine's presence is based on official documents and publically registered title, then the Community should have had knowledge of these documents and of its legal rights and remedies in this respect. In this way, the court measured the Community's conduct against the standard of an ideal subject, with qualities that do not reflect the Community's actual social experience. To the extent that the Community cannot meet this standard due to its social disadvantage, the appeal court's approach is exclusionary and discriminatory. This reasoning effectively transforms the limitation period rule into an absolute bar to the pursuit of justice through law for the Negritos Community and communities like it.

The appeal court's reasoning leaves unanswered the question of what kind of information and consultative

community processes would be required for the Negritos Community to make a free and informed collective choice, in the early 1990s, to transfer large portions of its communal land to one of the largest and most powerful mining companies in the world, in order to build one of the largest and most profitable gold mines in the world, such that its members would live with this mammoth open pit mine as their neighbor for decades and generations to come. In this context, and putting aside questions of allegedly illegal acts in procuring signatures, it does not seem reasonable to presume that the Community made a free and informed choice to extinguish all of its rights and its very existence in law in exchange for a few thousand dollars. This is highlighted by the apparent contradiction between the Community purported agreement to annul its legal existence and the fact that it continued with its communal economic, cultural and governance practices as before. Given the high indicators of poverty among Campesino Communities in the region, combined with limited to no access to basic education, much less legal advice, it seems unlikely that the Community had meaningful knowledge in the early 1990s that it had collective rights protected in Peruvian constitutional and international law. This all casts in serious doubt the appeal court's conclusion that the Community had the capacity to marshal the knowledge and the resources necessary to bring its case to court within sixty days (the limitation period) following the events in question.

When the appeal court rejected the community's doctrinal arguments with respect to the application of the codified exceptions of continuous actions and omissions, it appeared to do so offhandedly, and not on the basis of doctrinal reasoning. Rather, it chose to rest its decision on presumptions about the Community's consent and knowledge. In choosing to go down this path, it was incumbent on the court to consider a contextualized equitable approach to the limitation period as well as the case law on Indigenous knowledge and consent in an effort. These sources would have certainly complicated the formalist notion of consent and knowledge that the appeal court ultimately adopted. It is discriminatory for the court to adopt an interpretation of the limitation period rule and presumptions about the Community's consent and knowledge that do not take the Negritos Community social context of historical disadvantage into account.

In the final portion of its decision, the appeal court

rejected JCAP's *amicus curiae*, presented earlier in the proceedings. The controversy regarding the admission of the JCAP *amicus* arose due to some uncertainty in the law on this area. As a starting point, the regulations of the Constitutional Court give it the discretion to directly invite a third-party to act as an *amicus curiae*.¹⁴⁴ However, according to some legal experts, the right to proactively request *amicus curiae* status (without an invitation from the court) is rooted in Peru's constitutional provisions establishing the right to make legal submission to public authorities, the right to publicize legal proceedings and the right to participate in the political life of the nation.¹⁴⁵ In practice, it has become increasingly common practice for Peru's Constitutional Court, as well as lower courts, to accept *amici curiae* from third parties without previous invitation from the court, although there are some notable (and arguably politicized) exceptions.¹⁴⁶ Nonetheless, the increasing participation of *amici curiae* in public interest cases in Latin America is widely seen as part of a trend toward greater democratization, transparency in legal debate and judicial decision making that takes into account the broader public and social impacts of individual cases.¹⁴⁷ The Inter-American Court has emphasized the importance of *amici curiae* because of their capacity to represent relevant public interests and contribute to debate in cases with broad social consequences that require greater public and democratic deliberation.¹⁴⁸ Peru's Constitutional Court has reiterated this perspective in a number of cases.¹⁴⁹

The court of appeal in the Negritos case ultimately concluded that the JCAP *amicus* was inadmissible be-

cause the court had not directly requested it from the NGO. As such, it adopted a conservative interpretation of the law on point, converting the court's discretion to solicit an *amicus* into a strict rule that an *amicus* is only admissible if it is solicited. In doing so, the appeal court ignored the public interest purposes of the *amicus*. However, the court went further, reasoning that the fact that the *amicus*' authors had presented it on their own initiative made it evident that they were not impartial and objective. The court then went on to say that JCAP's interest in the case reveals that the case itself is a product of third party NGO interests, aimed at generating instability in the country by taking advantage of a difficult social context on mining issues.¹⁵⁰

As such, the appeal court's reasoning and conclusion in relation to the *amicus* appears to be based on ideological rather than legal considerations. It does not offer any support for its statement that JCAP aims to cause social instability in the country. This conclusion appears to be based on unfounded assumptions and a suspicious view of the Negritos Community's decision to resort to the courts with the help of civil society actors. The court's comments with respect to JCAP's *amicus* are consistent with a conservative strand of thinking in some circles in Peru that delegitimizes, and in some cases, even dehumanizes and criminalizes, Campesino Communities and NGOs for their concerns and critiques of resource extraction in the country.¹⁵¹ In doing so, the appeal court ignored accepted practice and relevant jurisprudence with regard to the public policy and democratic function of an *amicus curiae* in human rights cases.

The forgoing analysis of the appeal court's comments on the JCAP *amicus*, taken together with the rea-

144 Administrative Resolution No 095-2004-P-TC, *Normative Regulation of the Constitutional Court* (14 September 2004) art 13-A.

145 *Political Constitution of Peru, 1993*, arts 2.17, 2.20, 31, 139.4. See: Juan Carlos Ruiz Molleda, "Para que sirven los *amicus curiae*? TC rechaza el amicus del IDL sobre el derecho a la consulta de pueblos indígenas" (Instituto de Defensa Legal, 2010) online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=221>.

146 Ruiz Molleda, *ibid*.

147 Martín Abregu & Christian Courtis, "Perspectivas y posibilidades del *amicus curiae* en el derecho argentino" in *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (CELS, Editores del Puerto, 1997) at 388, cited in Ruiz Molleda, *supra* note 145; Peter Haberle, *El Estado Constitucional* (Autonomous University of Mexico, 2003) at 149, cited in Ruiz Molleda, *ibid*.

148 *Castañeda Gutman v Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 184 (August 6, 2008).

149 Some examples are: STC No 3081-2007-PA/TC (9 November 2007); STC No 0017-2003-AI/TC (16 March 2004); STC No 7435-2006-PC/TC (13 November 2006); STC No 00027-2006-PI/TC (21 November 2007).

150 *Ibid* at para 14.

151 This ideology is best described by the concept of "*perro de hortelano*" or "the dog in the manger". In 2007, then President of Peru Alan Garcia published an editorial in a major Peruvian newspaper where he described the "syndrome" of "the dog in the manger", to refer to Indigenous and Campesino communities who oppose resource extraction on their land, thereby creating obstacles to national prosperity for all. He accused them of being irrationally attached to a way of life that only traps them in poverty and prevents progress. This discourse is used to justify militarized responses to opposition and protest. For commentary see: Moore, *supra* note 4 at 12-3; Roger Merino Acuna, "The politics of extractive governance: Indigenous peoples and socio-environmental conflicts" (2015) 2 *The Extractive Industries and Society* 85; Kamphuis, "Foreign mining", *supra* note 19 at 135; Anthony Bebbington & Denise Humphreys Bebbington, "Actores y ambientalistas: Continuidades y cambios en los conflictos socio-ambientales en el Perú" (2009) 35 *Iconos* 117.

soning in its admissibility decision and the procedural delays in the Negritos legal proceedings to date, paint a bleak access to justice scenario for Campesino Communities in Peru. First, the appeal court was willing to ignore evidence, jurisprudence and social context in order to rule the Negritos claim inadmissible on the basis of a formalist and exclusionary notion of consent and knowledge. It implicitly evaluated the Community's conduct against the standard of a legally sophisticated and resourced subject, thereby turning the limitation period rule into an absolute bar to justice for Campesino Communities in a position similar to that of the Negritos Community. This obstacle was augmented in the proceedings themselves when both the company and the Ministry generated delays on procedural matters. Ultimately, this has forced the Community to somehow marshal the resilience and the resources to advocate in a process that has continued for nearly six years and counting.

Finally, the appeal court's reasoning on the admissibility of the *amicus* seals the Community's fate. To the extent that the Community receives support from civil society actors, include foreign lawyers, the court presumes that the claim is illegitimate and animated by nefarious goals, as opposed to a *bona fide* concern to defend the rights in question. Following the logic of the appeal court, not only must the Community have the ability to mount its legal case extremely quickly, with full knowledge of the law, it must do so without the support of civil society organizations, lest its intentions be called into question. This paper's conclusion will explore the wider implications of the Peruvian courts' treatment to date of the Negritos claim.

3.4.3. Challenges outside the Courtroom

The previous sections recounted the challenges that the Negritos Community faced inside of the courtroom over the course of its litigation journey. This captures only one dimension of the complex set of economic, political, cultural and social challenges that Campesino and Indigenous communities face when they choose to engage with state law against a powerful foreign company. This section will profile some of the additional challenges that the Community faced in relation to its litigation efforts. Just as Part A of this paper contextualized the Negritos Community's dispossession story, this section sketches some of the social context details

that have characterized the Community's litigation experience to date.

The Negritos Community litigated its case in a broader social context where the corruption of public officials in Peru is an ongoing concern. Unfortunately, it seems that corruption concerns and allegations continue to maintain close proximity to both Yanacocha and the Negritos case. The lower court decision in the Negritos *amparo* action in favor of Yanacocha's admissibility objections was issued by a judge of the Superior Court of Cajamarca by the name of Guhtember Pacherras Pérez. This is the same judge who neglected to duly organize audio recordings of certain hearings. Throughout the proceedings, the Negritos Community members and their local lawyer strongly suspected that Justice Pacherras Pérez was not an ethical judge and they believed that he was intentionally delaying the proceedings. It appears that they may have had good reason to suspect as much. Coincidentally, the day after Justice Pacherras Perez issued his decision dismissing the Negritos' *amparo* claim, he was filmed accepting a bribe in another case and was subsequently arrested, tried, and sentenced to a nine-month prison term.¹⁵² He admitted his guilt, and the evidence revealed that he had solicited the bribe on July 11, 2014, just days before he issued his admissibility decision in the Negritos case.

The Negritos Community has no direct evidence that Justice Pacherras Perez accepted bribes from Yanacocha in relation to the Negritos *amparo* proceedings. There is no doubt though that this lower court judge was engaged in acts of corruption while he presided over the Negritos proceedings. The uncertainty about whether or not corruption has influenced outcomes to date in the Negritos case is heightened by the grim reminder of the high-profile corruption allegations that plagued the decision of the Supreme Court of Peru in favor of Newmont in Yanacocha's early days.¹⁵³ Moreover, just a few months before the Pacherras Pérez

152 "La intervención a Juez Titular Gutenberg Pacherras Pérez por coima" (21 July 2014) online: <https://www.youtube.com/watch?v=PCOtbyBTHZU>; "Juez Titular Guhtember Pacherras Pérez al penal de Huacará en Cajamarca" (19 July 2014), online: https://www.youtube.com/watch?v=-W9hKrF__C8; "Si, soy corrupto: El reo Pacherras aceptó recibir coima, ahora sufridos litigantes piden revisión de casos", *El Mercurio* (21 July 2014) 2, online: <https://issuu.com/elmercurio/docs/21-07-2014>; "Cajamarca: encarcelan a juez acusado de recibir coima de 4 mil dólares", *Canal N* (18 July 2014), online: <http://canaln.pe/peru/cajamarca-encarcelan-juez-acusado-recibir-coima-4-mil-dolares-n145767>.

153 See *supra* Part A.1.

corruption scandal broke, Yanacocha was implicated in yet another high-profile corruption story. In May 2014, Peruvian journalists reported on a leaked audio recording of conversations that took place in 2012 between Yanacocha's governmental affairs manager and three elected public officials in Cajamarca. In the recordings, the public officials requested a financial contribution from the company in return for their support of its controversial mine expansion project, known as Minas Conga. In response, Yanacocha's manager promised to raise the issue of "economic support" with senior management. Following the publication of these recordings, Yanacocha promised to investigate and reiterated its commitment to transparency.¹⁵⁴

There can be little doubt that the challenges associated with litigating a case like that of the Negritos Community's has taken a personal toll on the Community and its allies. In 2014, the local NGO that had been providing legal representation for the Negritos Community since 2007 withdrew from the case without an official explanation. As a result, for much of the litigation process, the Community was represented by a young local lawyer, working *pro bono*, with the distant help of a volunteer group of students and lawyers in Lima, Peru and in Canada. Just like the mine that sits on its land, the Negritos Community's case is mammoth, involving hundreds of pages of documents and complex arguments of fact and law. Dispossession cases are often complicated by nature, making them difficult to for NGO workers and *pro bono* lawyers to sustain.

The logistical, social and human conditions of the Negritos Community itself has added to these challenges. This paper has already referred to the Community's relatively low levels of education and continued high levels of poverty and exclusion from basic services. Community members live high up in the mountains, making communication very difficult with limited telephone access or electricity. In order to meet with Community members, lawyers must wait for regularly scheduled monthly General Assembly meetings. Community members walk long distances to attend meetings

and it is often difficult for lawyers to find and pay for transportation for the trip up into the mountains. Meetings take place in the open air, sitting under the hot Andean sun. Community leaders and members come to nearby Cajamarca only periodically and can sometimes be hard to locate with inconsistent access to a telephone. The Community's isolation, lack of resources and logistical challenges are just some of the obstacles that have made it difficult for Community members and *pro bono* lawyers alike to engage in a court process against a powerful company over a period of years.

These observations offer only a very partial picture of the social context that framed the Negritos Community members' experiences of the legal arguments, procedures and decisions taking place in the courtroom. Importantly, the documentary record does not capture the social and cultural impact of the case on the Negritos Community itself. Whenever a community decides to bring its justice concerns to the dominant legal system, it will undoubtedly face stresses and strains on community relationships and political leadership.¹⁵⁵ Litigation inevitably triggers a complex array of internal and external pressures that may create or exacerbate divisions within the Community. Community members and leaders may come under enormous pressure to drop or settle the case, sometimes they are offered bribes, sometimes they are threatened and sometimes they are actually harmed.¹⁵⁶ It is well documented that Yanacocha's operations are increasingly militarized with many reported incidences of its security services threatening, harming or surveilling the company's critics.¹⁵⁷

155 For one example of a detailed account of the negative impact of litigation on community relationships, see Parmar, *supra* note 11.

156 See generally commentary on criminalization of environmental and human rights defenders in Latin America: *supra* notes 2 and 4.

157 Kamphuis, "Privatization of Coercion", *supra* note 4; Guzmán Salano, *supra* note 64; Tim Martin et al, "Tragadero Grande: Land, Human Rights, and International Standards in the Conflict Between the Chaupe Family and Minera Yanacocha", *Report of the Independent Fact Finding Mission* (Washington, DC: Resolve, 2016); Inter-American Commission on Human Rights, Resolution, Resolución 9/2014, *Lideres y Lideresas de Comunidades Campesinas y Rondas Campesinas de Cajamarca Respecto de la República de Perú*, Precautionary Measure No 452-11 (2014), online: <http://www.oas.org/es/cidh/decisiones/pdf/2014/MC452-11-ES.pdf>; Roxana Olivera, "I Will Never Give Up My Land", *New Internationalist* (July 2016), online: <https://newint.org/features/2016/07/01/interview-maxima-acuna/>; EarthRights International, Media Release, "Factsheet: Campos-Alvarez v Newmont Mining Corp", online: <https://www.earthrights.org/sites/default/files/documents/Factsheet-Campos-Alvarez-v-Newmont.pdf>; "Máxima Acuña: 2016 Goldman Prize Recipient" (2016) *The*

154 "Peru: Miners in bribery risks, Yanacocha probes case", *Latin IQ* (21 May 2014), online: <http://latin-iq.com/blog/peru-miners-in-bribery-risks-yanacocha-probes-case/>; "Consejeros de Cajamarca pidieron plata a Yanacocha para apoyar proyecto Conga", *La República* (21 May 2014), online: <http://www.larepublica.pe/21-05-2014/consejeros-de-cajamarca-pidieron-plata-a-yanacocha-para-apoyar-proyecto-conga>.

Further in-depth fieldwork is required to fully document the Negritos Community's social experience with respect to the litigation to date and as it continues to unfold.

In sum, the Negritos Community has faced multiple challenges in its efforts to use the domestic Peruvian legal system to advance communal property claims grounded in international human rights law and the Constitution. Outside of the courtroom, these challenges have included the risk of corruption and bias in the local judiciary and a lack of access to trained and funded legal counsel. Inside the courtroom, the Community faces the formalist application of procedural rules to justify the dismissal of its case on the basis of a concept of consent and subjectivity that is arguably discriminatory. This live legal issue is the focus of the Negritos Community's current appeal to Peru's highest court.

3.5. Negritos Case Next Steps: Precedents & Remedies

As stated, the Negritos Community has appealed the dismissal of its *amparo* action to Peru's Constitutional Court. In Peruvian constitutional law, this type of appeal is called a *recurso de agravio*. The *Constitutional Procedural Code* grants an *amparo* claimant a general procedural right to appeal a negative decision of a court of second instance to Peru's highest court.¹⁵⁸ Thus, according to the *Code*, the Peruvian Constitutional Court is required to consider all *recurso de agravio* petitions if they are presented according to the specified rules.

However, recent developments in Peruvian constitutional jurisprudence have expanded the grounds upon which the Constitutional Court may refuse to grant a full hearing to such an applicant. In 2014, the Court issued the *Vásquez Romero* precedent, which established a special expedited procedure for dismissing *recurso de agravio* claims in certain situations.¹⁵⁹ The decision identifies a list of deficiencies that could, alone or in combination, form the basis for the Court's decision to summarily

dismiss the case: the alleged violations are manifestly unsubstantiated; the question of law at issue does not have "special constitutional importance"; the claim relies on law that clearly contradicts an established precedent of the Court; and finally, cases with substantially similar legal issues have been unsuccessful.¹⁶⁰ Referring to the criterion of "special constitutional importance", the *Vásquez Romero* decision states that this threshold is met when a case requires the court to consider the content or scope of a fundamental right, when the alleged violations affect the constitutionally protected aspects of the rights in question, or when the issues at stake require especially urgent rights protection.¹⁶¹ Commentators have observed that the *Vásquez Romero* criteria are highly subjective and they speculate that the Constitutional Court will likely be forced to provide further precision on their meaning in subsequent decisions.¹⁶²

Importantly, the Court's inquiry into the "constitutional importance" of the case is expeditious, in that the Court makes this assessment without an in-depth review of the proceedings. Rather, the claimant must make a written submission to the court addressing the issue of constitutional importance. This is a function of the fact that the *Vásquez Romero* criteria were introduced, at least in part, to help reduce the unmanageable case load that the Constitutional Court faces. In 2013, the Court had an accumulated load of over six thousand and six hundred cases pending.¹⁶³ This situation obviously impedes the Court's ability to attend to urgent and important cases in a timely manner.

Given the centrality of the "constitutional importance" criteria, the remainder of this section will describe the legal significance of the Negritos case in the context of the ongoing tension in Peru between neoliberal reforms and Indigenous rights. If the Constitutional Court agrees to consider the case on the merits, it would have the opportunity to develop jurisprudence in three distinct aspects of Indigenous and Campesino rights law with respect to resource extraction. First, admitting the case would give the Court the opportunity to clarify the status of Peru's Campesino Communities

Goldman Environmental Prize, online: <http://www.goldmanprize.org/recipient/maxima-acuna/>.

158 *Constitutional Procedural Code*, art 18.

159 STC No 00987-2014-PA/TC (6 August 2014) at para 49. This decision attempted to refine earlier decisions with a similar orientation: César Landa Arroyo, "Límites y alcances de la 'especial trascendencia constitucional'" (2015) 8 *Revista Peruana de Derecho Constitucional* 89 at 91-96.

160 STC No 00987, *ibid*.

161 *Ibid* at para 50. Also see: Eloy Espinosa-Saldaña Barrera, "La 'especial trascendencia constitucional' como causal para el rechazo liminar de recursos de agravio en el Perú" (2015) 8 *Revista Peruana de Derecho Constitucional* 41 at 48-49, 52.

162 Landa Arroyo, *supra* note 159 at 101.

163 *Ibid*.

vis-à-vis the incorporation of international Indigenous rights norms into Peru's constitutional order. Second, the substantive arguments in the case address matters relating to the nature of Campesino constitutional rights, including norms governing: the conversion of communal property into individual property; the legal recognition of Campesino communities; the expropriation of Campesino communal property, and meaning of fair and equitable compensation. Finally, if successful on the merits, the case would give the Constitutional Court the opportunity to explore law's capacity to remedy dispossession claims.

Due to its focus on the ongoing Negritos *amparo* litigation, this section of the paper frames the important questions and arguments advanced in the case in terms of their potential contribution to Peruvian law. However, many of the issues in the Negritos case are arguably a microcosm of the tensions between Indigenous communities around the world and the globalized model of foreign resource extraction. As such, the discussion in this section, while situated in the Peruvian context, arguably transcend the Negritos case. Controversy over the foreign resource extraction model are very often about the legal status of rights holders, the meaning of consent, the terms of property ownership, transfer and compensation, the tension between private and public law, as well as the nature of available legal remedies. At the same time, exploring these themes in a discrete case study is helpful because it illuminates law's potential and limitations as a tool for responding to the underlying justice concerns that the Negritos case represents. I will take this topic up again in this paper's conclusion.

3.5.1. The Indigenous Status of Campesino Communities in International Law

Part A of this paper described briefly how in the 1920 and 1933 Peruvian Constitutions, "Indigenous Communities" were given special status and rights. The 1969 *Agrarian Reform Law* changed this terminology when it declared that from that moment forward, the Indigenous Communities of Peru would be denominated "Campesino Communities".¹⁶⁴ The Peruvian state subsequently developed an elaborate statutory regime pertaining to Campesino Communities and in the 1979 and 1993 Constitutions they were granted special status

and rights. In each of these Constitutions, the term "Campesino Community" was used together with "Native Community" in reference to the same set of cultural, political, and property rights. Specific legislation clarifies that Campesino Communities are those located in the Andes while Native Communities are found in the Amazon region of Peru.

Part A also referred to the fact that at the international level, Indigenous peoples began to make significant gains beginning in the early 1990s. In 1989 the ILO revised its earlier 1957 Convention¹⁶⁵ to approve *Convention No 169*, which remains the only binding international treaty on the subject of Indigenous peoples' rights. In 2001 the Inter-American Court pronounced in its first Indigenous land rights case, interpreting existing provisions of the 1969 *American Convention* to include an Indigenous right to communal property.¹⁶⁶ Finally, in 2007, the *United Nations Declaration on the Rights of Indigenous Peoples* was broadly endorsed by the international community. Part B of this paper described the legal significance of these international law developments in Peru. Peru's Constitutional Court has held that it is bound by the jurisprudence of the Inter-American Court, including its interpretations of Indigenous rights, while *Convention No 169* is similarly part of Peruvian Constitutional law, acquiring constitutional status after it was approved by Peru's Congress in 1993.

This brief recap reveals that a curious situation has arisen in Peruvian law. While relatively recent international statements of Indigenous rights have been incorporated into Peruvian Constitutional law, the category of "Indigenous Communities" disappeared from the 1979 Constitution in favour of the terms Campesino and Native Communities. Thus, while international and domestic law have converged in Peruvian constitutional law, the legal categories employed in these two spheres have diverged. In this context, the status of Peru's Campesino Communities vis-à-vis international law has become an important question. In other words, do the rights of Indigenous peoples, as incorporated into the Peruvian Constitution through various international instruments, apply to Campesino Communities? This question is pressing. There are over 5000 Campesino Communities in Peru and a significant portion of mi-

¹⁶⁵ *Indigenous and Tribal Populations Convention*, International Labour Organization, Convention No 169, (1957).

¹⁶⁶ *Anas Tingni*, *supra* note 71.

¹⁶⁴ *Agrarian Reform Law*, *supra* note 25 at art 115.

ning activity affects land belonging to these Communities.¹⁶⁷

Human rights institutions, both inside of Peru and internationally, have consistently treated Campesino Communities, either implicitly or explicitly, as Indigenous for the purposes of the application of the Peruvian Constitution and international law.¹⁶⁸ Certain domestic statutes have also treated Campesino Communities and Indigenous peoples as a single grouping for the purposes of describing their rights.¹⁶⁹ However, the Peruvian State's official position on this issue is inconsistent at best and it has tended to deny that Campesino Communities have Indigenous rights. In 2009 the Peruvian State informed the ILO Expert Committee that it intended to treat Campesino Communities as collectivities similar to Indigenous Peoples in the recognition of their ethnic and cultural rights.¹⁷⁰ Yet in a 2011 decision, the Constitutional Court took note of the Peruvian government's submissions that *Convention No 169* does not apply because Peru has very few Indigenous peoples and Campesino and Native Communities are fundamentally *mestizo* or 'mixed'.¹⁷¹

Also in 2011, the Peruvian state legislated a controversial set of objective and subjective criteria for the recognition of Indigenous peoples, including that they must be "direct descendants" of the country's "original inhabitants" and that they must self-identify as Indigenous.¹⁷² This definition directly contradicts statements

of the ILO Expert Committee on the application of *Convention No 169* in Peru.¹⁷³ The Committee has clearly stated that if Campesino Communities fulfill the requirements of the *Convention*, they should receive the full protection of its provisions. Notably the language of the *Convention* is significantly broader than the concepts of "direct descendant" of "original inhabitants".¹⁷⁴ Moreover, the ILO has stated that the use of the term "Indigenous" by a community in the Peruvian context is not a requirement and its absence should not be used to preclude the application of the *Convention*.¹⁷⁵ In spite of this, in 2012, Peru's Ministry of Culture adopted an even more restrictive definition to the effect that, in order to be registered in the Official Indigenous Peoples' Database, communities must speak an Indigenous language and remain in their ancestral territory.¹⁷⁶ Local lawyers have documented instances where the Ministry of Energy and Mining has used this restrictive definition to avoid consulting with Campesino Communities impacted by proposed mining projects.¹⁷⁷

In spite of the controversy and importance of this issue, Peru's Constitutional Court has declined to offer any meaningful guidance in its decisions to date. It has referenced the issue only once by way of comments

167 See Laureano del Castillo, "Propiedad Rural, Titulación de Tierras y Propiedad Comunal" (1997) 26 *Debate Agrario* 59.

168 For domestic examples, see: the Peruvian Commission for the Environment, Ecology and Andean, Amazonian and Afro-Peruvian Peoples: Comisión de Pueblos Andinos, Amazónicos y Afroperuanos, Ambiente y Ecología, *Proyecto de Ley de Reforma de la Constitución*, Título II, Capítulo VII "Derechos de los Pueblos Indígenas", art 96. Also see the National Institute for the Development of Andean, Amazonian and Afro-Peruvian Peoples: Supreme Decree No 065-2005-PCM, *Regulation of the National Institute for the Development of Andean, Amazonian and Afro-Peruvian Peoples* (2005), art 2. For international examples, see: OAS, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OR OEA/Ser.L/V/II.106/Doc 59, rev (2000) at Chapter X, "Indigenous Communities' Rights". Also see: ILO, Committee of Experts on the Application of Conventions and Recommendations, *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No 169)*, ILC.98/III/1A (ILO: 2009), 686-687 at paras 3, 4 [CEACR 2009].

169 See *Rondas Campesinas Law*, *supra* note 69; See environmental laws (Law No 28611 and Law No 27446), *supra* note 70.

170 CEACR 2009, *supra* note 168.

171 STC No 00024, *supra* note 98.

172 *Right to Consultation Law*, *supra* note 69 at art 7.

173 The ILO Expert Committee expressed disapproval of Peru's definition of Indigenous peoples in its *Law for the Right to Consultation*: see ILO, Committee of Experts on the Application of Conventions and Recommendations, *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, ILC.100/III/1A (ILO: 2011), at 794-795 [CEACR 2011].

174 The Expert Committee stated that if Campesino Communities comply with either (a) or (b) of article 1, *Convention No 169* will apply: CEACR 2009, *supra* note 168. The text of article 1 is as follows: 1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions: *Convention No 169*, art 1.

175 CEACR 2009, *supra* note 168; CEACR 2011, *supra* note 173 at 872.

176 Directive No 03-2012/MC at arts 7.1, adopted by Ministry of Culture, Ministerial Resolution No 202-2012-MC (2012).

177 Juan Carlos Ruiz Molleda, "Ministerio de Cultura bloquea la consulta previa de las concesiones mineras e invisibiliza a los PPII en Espinar", *Instituto de Defensa Legal: Justicia Viva*, (16 April 2015), online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1597>.

that were tangential to its ultimate decision. On this occasion, the Court stated that the Indigenous status of Campesino Communities for the purposes of the application of *Convention No 169* in Peru must be considered on a case-by-case basis.¹⁷⁸ Unfortunately, the Court refrained from offering any additional guidance regarding this form of individualized consideration.

Taken together, the legislation described above and the Court's decision ostensibly create a situation where, prior to invoking the rights and protection of *Convention No 169*, each individual Campesino Community must somehow prove its status as an Indigenous community. As a result, Campesino Communities in Peru exist in a legal context where there is a presumption that they are *not* Indigenous and where the onus is on them to prove their indigeneity. When making a legal claim in a court, this amounts to an additional threshold evidentiary burden on Campesino Communities who claim Indigenous rights as recognized in international law. Given that the 1969 Agrarian Reform in Peru declared that Indigenous Communities would thereafter be dominated Campesino Communities, the Peruvian State's contemporary approach to the legal category of Indigenous converts this change in terminology into a presumption in favor of Campesino Communities' loss of Indigenous status and the concomitant reduction of their rights in international law. Not only does this contradict the professed social justice purpose and spirit of the *Agrarian Reform Law* and its implementing legislation, it converts Agrarian Reform into a fundamentally assimilationist rights-reducing project.

In the context of the ongoing controversy in Peru over the legal definition of Indigenous communities, the Negritos *amparo* claim takes the position that Campesino Communities *as such* have the legal status of Indigenous communities under international law. This argument is legalistic as opposed to anthropological. It begins with the historical progression in Peru's *Agrarian Reform Law* from the term Indigenous to Campesino. It further points to the significant conceptual similarities between international Indigenous rights regimes and the Peruvian domestic legal regime with respect to Campesino Communities. Peruvian laws recognize Campesino Communities' legal personhood, their culturally specific characteristics as a group, their communal political and economic institutions and their special

relationship to a specific area of land or territory. On this basis, the Negritos *amparo* claim argues that to identify oneself as part of a Campesino Community in Peru is the equivalent, for the purposes of the application of international law, to identifying oneself as a member of an Indigenous group.

This argument attempts to counteract the State's assimilationist approaches by intentionally relying on legal histories and facts available to all Campesino Communities in order to construct a broad claim for their international status as Indigenous people. The value of this approach is that Campesino Communities are not required to marshal complex historical anthropological evidence before invoking international Indigenous rights statements to support their claims. This avoids the imposition of a heavy evidentiary burden on Campesino Communities, which in practical terms may be insurmountable. In the context of litigation, such a burden would only exacerbate the existing procedural and practical obstacles described in the previous sections of this paper. In this way, the Negritos *amparo* action has the potential to set an important precedent by advancing an approach that would clarify some of the legal uncertainties and alleviate some of the evidentiary burdens that presently plague Peru's Campesino Communities who assert Indigenous rights in local courts.

3.5.2 Substantive Rights Precedents

Previous sections of this paper described how the Negritos *amparo* action draws on domestic and international law and jurisprudence to advance four substantive rights claims of precedent setting value. Each claim speaks to an unresolved point of law in the Peruvian context and, if accepted, would make an important contribution to the advancement of Campesino and Indigenous rights in Peru. Beyond their legal significance, these claims have political significance in that they confront a suite of neoliberal state policies and company practices that continue to pose a threat to Campesino Communities' land and legal status. While certain events in the Negritos case occurred decades ago, they remain emblematic of the vulnerabilities and pressures that Campesino Communities in Peru continue to face vis-à-vis legal regimes designed to promote foreign investment at the expense of rights protection. This highlights the need for strategic Campesino rights litigation like the Negritos case to push the political de-

178 STC No 0022, *supra* note 98 at para 10.

bate and legislative agenda.

The *first* significant substantive rights claim in the Negritos action is that the communal property of a Campesino Community cannot be alienated or converted into individual property without the free, prior and informed consent of the majority of the Community.¹⁷⁹ This assertion is grounded in the 1979 Constitution and 1987 *Campesino Communities General Law* which require a vote of two-thirds of the community in these circumstances.¹⁸⁰ Part B of this paper described how international and domestic law principles imbue this provision of the *Campesino Communities General Law* with constitutional significance even after it was dropped from the 1993 Constitution. International sources of law support the proposition that this vote should be free, prior and informed, emphasizing (among other things) that information should be meaningful, appropriate and allow for effective decision-making.¹⁸¹

This argument is important because of consistent efforts of the Peruvian State since the early 1990s to introduce policies that attempt to facilitate and expedite the conversion of communally titled property into individual property.¹⁸² The expressed goal of these policies has often been to facilitate the disposition of (formerly) communal property to private, often foreign, investment. While the state has repealed some of these policies due to their controversial and allegedly unconstitutional status, this has only occurred after significant social conflict.¹⁸³ As recently as 2015, the Peruvian go-

vernment passed laws purporting to allow a small number of Campesino Community leaders to approve mining projects without bringing the proposal to a General Assembly,¹⁸⁴ thereby expediting the sale of communally owned Campesino and Indigenous property to private investors.¹⁸⁵ Notably, these laws presume to legalize the very type of process that was actually followed in the Negritos case in the early 1990s. Commentators have denounced these 2015 laws for contravening provisions of the *Campesino Communities General Law* and international law regarding consultation and consent and for interfering with Communities' political autonomy and rights under national and international law to establish their own governance structures and decision-making procedures.¹⁸⁶

In sum, the Peruvian state and the private sector have consistently pursued legal frameworks that help expedite the commodification of communal land. This has led to policies and practices on the ground that generate significant pressure on Campesino Communities to individually parcel and/or sell their land to companies. In this context, the facts of the Negritos case remain extremely relevant. Their judicial treatment would give the courts an opportunity to make a clear statement that informed consent with the meaningful participation of the majority of Community members is the standard in relation to the alienation of communal land.

The *second* substantive claim of constitutional significance in the Negritos action arises from the state's administrative action purporting to eliminate the Community's legal existence.¹⁸⁷ As a result, the Negri-

179 This right is part of a suite of interrelated Indigenous property rights, including the right to collective property, the right to state recognition of collective property and the state's duty to take special measures to protect communal property related rights. The conversion of Negritos communal land into individually titled land occurred between 1991 and 1995. As such, both the 1979 and 1993 Political Constitutions of Peru apply, as well as *Convention No 169* and the *American Convention*.

180 In domestic law, this right is based on articles 163 and 161 of the *Political Constitution of Peru, 1979*, article 7 of the *Campesino Communities General Law*, and article 89 of the *Political Constitution of Peru, 1993*.

181 See *American Convention*, art 21 and relevant jurisprudence of the Inter-American Court: *Avas Tingni*, *supra* note 71 at para 149; *Yakye Axa*, *supra* note 72; *Saramaka*, *supra* note 72. Also see: *Convention No 169*, arts 6(1), 6(2), 17(2).

182 Part A above referred to the Fujimori era laws associated with this tendency.

183 In 2007, the Executive Branch, endowed with special new powers, introduced new laws to facilitate Peru's Free Trade Agreement with the United States. Five decrees in particular endeavored to reduce the property rights of Campesino and Native Communities. After one year of widespread protest against the new laws, four

of the five decrees were repealed: see Pedro Castillo Castañeda, *El Derecho a la Tierra y los Acuerdos Internacionales: el Caso de Perú* (Lima, CEPES & International Land Coalition: 2009) at 74-75.

184 Supreme Decree No 001-2015-EM, *Provisions for mining procedures that encourage investment projects* (2015).

185 Legislative Decree No 1192, *Law for the acquisition and expropriation of real property, transfer of state real property, removal of interferences and other measures for the execution of infrastructure projects* (2015).

186 Álvaro Másquez Salvador & Juan Carlos Ruiz Molleda, "Gobierno aprueba norma que consagra intromisión en autonomía de Comunidades Campesinas", *Instituto de Defensa Legal: Justicia Viva* (15 January 2015), online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1526>; Juan Carlos Ruiz Molleda, "¿El sexto paquetazo normativo? La aprobación de los DL N° 1192 y N° 1210" *Instituto de Defensa Legal: Justicia Viva* (1 October 2015), online: <http://www.justiciaviva.org.pe/blog/el-sexto-paquetazo-normativo-la-aprobacion-de-los-dl-n-1191-y-n-1210/> [Ruiz Molleda, "Sexto paquetazo"].

187 A regional branch of the Ministry of Agriculture issued a resolution purporting to annul the legal personhood of the Negritos Community in 1995. As a result, the *Political Constitution of Peru*,

tos *amparo* action offers the courts the opportunity to pronounce on Indigenous and Campesino rights to political and legal recognition. This directly relates to the first legal claim in the Negritos case in that the state's efforts to eliminate communal land rights were directly linked with its efforts to eliminate the legal personhood of the Community itself. Domestic and international tribunals are clear that state recognition of Campesino and Indigenous communities is declaratory and not constitutive.¹⁸⁸ The Negritos case builds on this to argue that, following recognition, any change in the legal status of a Campesino Community may only take place with the free, prior and informed consent of the majority of the Community. Given that the recognition of the Community as such strengthens its capacity to assert rights claims in legal and political arenas, establishing a standard of informed consent prior to any changes to the Community's legal personhood is a fundamental first step toward securing robust rights protection for Campesino Communities.¹⁸⁹

The *third* claim of constitutional importance in the Negritos *amparo* action relates to the domestic regulatory regime that governs the expropriation of Campesino communally owned land in favour of private mining interests. The Peruvian Constitution allows the state to expropriate both communal and individually titled land in situations of public necessity and utility or for a social interest, in accordance with law and with fair monetary compensation.¹⁹⁰ Peru's 1992 *Mining Law* gives

1993, *Convention No 169* and the *American Convention* all apply to this event.

188 In domestic law, the Constitutional Court has interpreted article 89 of the *Political Constitution of Peru, 1993* to conclude that Campesino Communities have exceptional and privileged legal existence and legal personhood, that state recognition is declaratory and not constitutive of their existence, and that their existence should not depend on formalities: see STC No 02939-2008-PA/TC (13 May 2009) at para 9; STC No 04611, *supra* note 106 at para 22; STC No 00042-2004-AI/TC (13 April 2005) at para 1. In international law, the Inter-American Court has held that the legal personhood of Indigenous Peoples makes existing rights operational and that Indigenous rights do not originate in the act of State recognition: *Yakye Axa*, *supra* note 72 at para 82.

189 The Inter-American Court has stated that Indigenous peoples' right to the recognition and legal personhood is connected to communal property rights, the right to legal protection and the state's duty to take measures to effectively protect Indigenous rights: *Saramaka*, *supra* note 72 at paras 174-5.

190 *Political Constitution of Peru, 1979*, art 125; *Political Constitution of Peru, 1993*, art 70. While, international law principles tend to support the existence of this power, it is controversial. *Convention No. 169* recognizes the state's right to expropriate Indigenous land upon realizing a consultation process with the Indigenous community (art

mineral concession owners the right to submit a request to the Ministry of Mining to expropriate property for the purposes of mining activities.¹⁹¹ This law does not distinguish between individually titled and Campesino communally titled property.

The *Mining Law* also specifies the resulting procedures, which apply equally to all property titleholders.¹⁹² It requires that, within fifteen days of receiving notice from the Ministry of Mining, the titleholder must attend a "negotiation meeting" with the mineral concession holder in order to reach an agreement regarding the expropriation. If the property owner fails to attend, the process will continue in its absence. If the owner does attend but an agreement cannot be reached at the meeting, the Ministry will designate an expert official to impose a final decision regarding the process and the compensation.¹⁹³ In all cases, whether the property owner agrees or not to the expropriation, a visual inspection of the property must occur within sixty days of the meeting and a report must be issued in the thirty days following. Upon receiving the report, the Ministry must, within thirty days, issue a final resolution approving or not the expropriation request.¹⁹⁴ Thus the entire expropriation process is designed to wrap up in approximately four and half months and property owners, including Campesino Communities, are legally entitled to only fifteen days at the outset to participate in the process and negotiate an agreement. If they are unable to agree in this period, the Ministry has the power to impose an agreement upon them.

The *Mining Law* contemplates an identical process in order to establish an easement in favor of a concession holder over privately owned property, including Campesino property.¹⁹⁵ The substantive effect of the mining easement on Campesino communal land interests is tantamount to that of an expropriation. In other words, just like the expropriation, the easement allows for the involuntary and potentially permanent transfer of the right to use the surface of a particular piece of land. Although an easement does not transfer title, mining

6) while the *UN Declaration* states that Indigenous peoples cannot be forcefully displaced from their land and that any relocation must occur after the consent of the community (art 10).

191 Supreme Decree No 014-92-EM, *General Mining Law* (1992), art 37.

192 *Ibid*, arts 130-1.

193 *Ibid*.

194 *Ibid*.

195 *Ibid*.

easements in Peru allow for activities that permanently and radically alter the land. For example, in the Negritos case the easement afforded Yanacocha the open-ended right to undertake work related to mining exploration and exploitation, broadly defined.

The expropriation of a portion of Negritos communal land known as Pampa Larga was executed in 1993 and the establishment of a mining easement in favor of Yanacocha over another portion of Negritos land occurred in 1995. Both processes occurred in accordance with the procedures dictated by the *Mining Law*, as outlined above. The now discredited Community leaders agreed to the expropriation and the easement at a negotiation meeting with Yanacocha, with no further consultation with the rest of the Negritos Community and even before many key details of the transaction were specified, including the compensation amount. As stated earlier, there is no evidence that the Community received any information about its legal rights and the anticipated consequences of the mining activities contemplated. Part A outlined the dubious dealings that occurred in relation to both transactions and the grossly inequitable final arrangement.

The Negritos *amparo* action claims that, while the expropriation and easement procedures with respect to the Negritos Community's land may have followed the provisions of the *Mining Law*, they did not conform to the constitutional standard of free, prior and informed consultation with at least two thirds of Community members.¹⁹⁶ It is inconceivable that a Campesino Community could participate in meaningful consultation with respect to the expropriation of its land for the purposes of a large mining project within fifteen days and in the absence of basic information regarding the expropriation and the project. The imposition of such a severe timeframe effectively subverts Communities' right to engage in decision making in accordance with their customs and traditions and in light of their social and economic constraints.¹⁹⁷ The Negritos action ar-

196 The Negritos Community's communal property was expropriated and title was transferred to Yanacocha in April of 1993. As a result, the *Political Constitution of Peru, 1979* and the *American Convention* both apply to this event. An easement was established in favor of Yanacocha over Negritos communal land in 1995. As a result, the *Political Constitution of Peru, 1993*, the *American Convention* and *Convention No 169* all apply to this event.

197 See STC No 0022, *supra* note 98 at paras 26, 28, 34, 39, 51; STC No 003343, *supra* note 98 at para 97; *Saramaka*, *supra* note 72 at paras 129, 134. Also see: *Campesino Communities General Law*, *supra*

gues that respect for the Campesino right to meaningful consultation is part of the constitutional framework of due process and legality that constrains the state's power to expropriate communally-held land.¹⁹⁸ In this respect, Peru's Constitutional Court has stated that the right to consultation is engaged by the expropriation of Indigenous land and that the content of that right is elevated where the impact of the expropriation will be significant.¹⁹⁹ For its part, the Inter-American Court has stated that in the case of large scale projects with a significant impact on an Indigenous group's territory, the state must obtain their consent.²⁰⁰

Within the scope of the Negritos *amparo* action, the assertion that the expropriation and easement in the Negritos case was unconstitutional has only indirect implications for the relevant provisions of the *Mining Law*. It is not open to a court in *amparo* proceedings to find that the *Mining Law's* expropriation provisions are themselves unconstitutional as they apply to Campesino land. This is due to the fact that the *amparo* is a cause of action against public and/or private actions/omissions, and not legislation.²⁰¹ However, in spite of these constraints, the Negritos action marshals a claim with considerable impact. It argues that while the conduct of the state and the company may have formally occurred in conformity with the *Mining Law*, this conduct is nevertheless unconstitutional (and therefore illegal) because did not comply with the constitutional requirement of free, prior and informed consultation.²⁰²

Judicial treatment of the Negritos claim in this regard is pressing since the status quo in Peru on this is-

note 28, art 15.

198 In Peru's constitutional framework, the state's power to expropriate occurs by definition against a property owner's will and as such is an exception to the constitutionally recognized right to property. As such, an expropriation must comply with certain conditions, including it may only be done: in accordance with law, when necessary, proportional, and in order to pursue a legitimate objective in a democratic society: STC No 05614-2007-PA/TC (20 March 2009) at paras 8-9.

199 STC No 0022, *supra* note 98 at paras 32, 51.

200 *Saramaka*, *supra* note 72 at paras 134, 137. The Inter-American Court has also added that any restriction on Indigenous peoples' property cannot put their subsistence into jeopardy: *Yake Axa*, *supra* note 72 at paras 145-8.

201 See discussion in Part B.1.

202 The Constitutional Court has stated that where there are gaps in the law with respect to the regulation of consultation with Indigenous peoples, the state must proceed in accordance with constitutional standards lest its actions be deemed unconstitutional even if it has complied with applicable statutes: STC No 0022, *supra* note 98 at para 26. Also see *infra* note 213.

sue remains deeply problematic. The 1992 expropriation provisions of the *Mining Law* were not modified following the 2011 *Right to Consultation Law*, thereby contributing to a situation of regulatory incoherence that puts Campesino Communities' rights at risk.²⁰³ Moreover, recent expropriation laws that aim to support large development projects have failed to include provisions that would protect Indigenous and Campesino land.²⁰⁴ In 2015 a law regulating expropriation more generally was modified so that it could be read to apply to Campesino and Native Communities' lands.²⁰⁵ Like the 1992 *Mining Law*, the 2015 general expropriation law fails to stipulate appropriate conditions and procedures for meaningful consultation with Campesino Communities. It also implements nearly identical expedited procedures, including the extraordinarily limited fifteen-day window for negotiating compensation followed, failing this, by the imposition of an agreement.²⁰⁶ In this context, Indigenous and Campesino communities in Peru continue to demand that the state must, at a minimum, undertake free, prior and informed consultation with them prior to transferring their land interests over to resource companies.²⁰⁷

In sum, the legal status quo in Peru continues to be

one where Campesino and Native land are subject to expropriation laws that do not account in any way for their right to meaningful free prior and informed consultation. In light of this reality, the questions raised in the Negritos action are certainly constitutionally significant and require urgent judicial consideration.

The *fourth* contribution of the Negritos *amparo* action to substantive law in Peru moves beyond the process required before expropriating Campesino Community land (consultation and in some cases consent) to address the matter of Campesino Communities' rights to equitable compensation. Part A.1 told the story of how, using the legal instruments of expropriation and easement, Yanacocha received title and/or full access rights to a combined total of just over 1200 hectares of Negritos communally titled land in exchange for a total payment of approximately US\$ 48,000. The company subsequently mortgaged the expropriated property for financing loans totaling US\$ 85 million.

At a minimum, Peruvian and international law requires fair compensation where Campesino communal land is expropriated.²⁰⁸ As such, the meaning of fair compensation in this context must be explored. Clearly a meaningful process of free and informed consultation prior to a proposed expropriation is essential to determining the terms of fair compensation. According to the Inter-American Court, fair compensation for any limitation on Indigenous property rights in favor of private investment includes the right to participate in the creation of a "development plan".²⁰⁹ Moreover, the state must *guarantee* that Indigenous communities' reasonably benefit from the plan.²¹⁰ Peru's Constitutional Court has similarly stated that where expropriation occurs to facilitate resource extraction, Indigenous peoples' right to compensation includes the right to an equitable share in the profits and benefits²¹¹ and that

203 This situation is described in greater detail in Part A.1.

204 See: Law No 30025, *Law that facilitates the acquisition, expropriation and possession of real property for infrastructure works and declares the public need for the acquisition or expropriation of real property affected by the execution of diverse infrastructure works* (2013). This law allows private investors to acquire land for infrastructure projects and permits special procedures for expropriation. Also see: Law No 30327, *Law for the promotion of investment for economic growth and sustainable development* (2015). This law simplifies the procedures for obtaining easements and expropriations of "unoccupied" land, which could include the untitled land of Campesino Communities.

205 Legislative Decree No 1192, *supra* note 185 as modified by Legislative Decree No 1210, *Modification of the Tenth Final Complementary Disposition of Legislative Decree No 1192* (2015).. The modification retains an exemption for Indigenous peoples from the law's expropriation provisions but changes the earlier version by removing Campesino Communities from this exemption, presumably in accordance with the state's position that Campesino Communities are not Indigenous: see Ruiz Molleda, "Sexto paquetazo", *supra* note X.

206 Decreto Legislativo No 1192, *supra* note 185, art 20.

207 See for example: "Reconocen que servidumbres petroleras están sobre territorios indígenas", *Servicios de Comunicación Intercultural*, (28 November 2016), online: <https://www.servindi.org/actualidad-opinion/28/11/2016/reconocen-que-servidumbres-petroleras-se-encuentran-sobre-territorios>. Communities are also demanding that consultation occur prior to granting mineral concessions: "Todas las concesiones mineras deberán ser consultadas a las comunidades" *Servicios de Comunicación Intercultural* (24 November 2016), online: <https://www.servindi.org/actualidad-noticias/24/11/2016/todas-las-concesiones-mineras-deberan-ser-consultadas-las-comunidades>.

208 See *Constitution Political del Peru, 1979*, arts 2(2), 2(15), 125, 163; Supreme Decree No 004-92-TR, *Regulation of Chapter VII – Economic Regime for the Campesino Communities General Law* (1992), art 167; *American Convention*, art 21(2).

209 *Saramaka*, *supra* note 72 at para 129, interpreting article 21(2) of the *American Convention*.

210 *Ibid* [emphasis added]. This fits with a line of jurisprudence at Peru's Constitutional Court to the effect that the state has an obligation to correct inequalities generated by the free market, while private parties have an obligation to exercise their freedoms with social responsibility: STN No 03343, *supra* note 98 at para 22; STC No 00020-2005-PI/TC and 00021-2005-PI/TC (27 September 2005) at para 17; STC No 0008-2003-AI/TC (11 November 2003) at para 4.

211 STC No 03343, *supra* note 98 at para 34. Equitable benefit in-

a failure to ensure equitable compensation is actionable.²¹² These standards are rooted in the recognition that land has a special spiritual and cultural significance for Campesino Communities and its loss can put their very existence as such into jeopardy.²¹³

Drawing on this international and domestic jurisprudence, the Negritos *amparo* action argues that the expropriation and easement in favor of Yanacocha violated, not only the Community's right to consultation, but also its right to fair and equitable compensation. Part A.1 of this paper recounted the Negritos Community's continued social and economic deprivation in the face of Yanacocha's extraordinary profitability over more than two decades. Moreover, the meaning of fair and equitable compensation remains pertinent in Peru. While the mining laws, consultation law, and expropriation laws referenced throughout this section all regulate in some regard the potential transfer of communal land interests to private companies, none of these laws have addressed Indigenous and Campesino rights to equitable compensation.

Unfortunately, the legislative trend in Peru is to specifically curtail the concept of equitable compensation. The most explicit example of this is the recent 2015 expropriation law. It expressly states that property, including Campesino and Indigenous property, can only be valued in terms of its commercial value, fixed by the value, present and future, of any existing improvements and crops being cultivated *at the time* that the acquisition or the expropriation is solicited.²¹⁴ This provision has the effect of precluding any consideration of the post-expropriation profitability of the property. Moreover, this same law specifically prohibits calculating compensation by taking into account "non-economic" valuations, such a property's cultural, social and spiritual significance to its owner.²¹⁵

Undoubtedly, this economic approach is a disadvantage for Peru's Indigenous and Campesino Communities who generally do not have large amounts of capital

and who mostly use their land for subsistence purposes. It also directly disadvantages Communities if they chose not to cultivate certain tracts of land for conservation or other reasons. Most importantly, the preclusion of equitable compensation and non-economic valuations flies in the face of the jurisprudence of Peru's Constitutional Court and the Inter-American Court, which have both directly prohibited a purely economic approach to compensating Indigenous peoples for limitations or losses of property interests.²¹⁶ In this context, the Negritos case stands to make an important contribution by presenting the court with the opportunity to analyze the right to equitable benefit in a well-documented factual matrix.

3.5.3 Legal Remedies for Dispossession

The claims made in the Negritos action ultimately require inquiry into the nature of the remedies available in an *amparo* proceeding in response to a dispossession claim such as that of the Negritos Community. The question of remedy is of major constitutional significance given the lack of jurisprudence in this area in Peru. It critically goes to the heart of law's potential as an instrument of justice in these circumstances. Especially given the significance of the procedural, substantive and practical obstacles to the Negritos claim, it is important to be clear about what is at stake and what might be accomplished by the Community's decision to resort to domestic courts against the odds. In this light, questions of remedies in the context of the Negritos claim allow for an important reflection on the possibilities and limitations that shape law's ability to redress Indigenous dispossession in the global economy.

In its written submissions, the Negritos Community must request action from the court (*petitorio*) on the basis of the facts and allegations presented in its case. Section B.1 of this paper explained that the remedial focus of Peru's *amparo* cause of action is on the protection and restoration of constitutional rights. As such, the *Procedural Code* neither mandates nor prohibits a monetary damages award to the claimant as compensation for violations. Rather, it empowers the Court to issue a declaration ordering the cessation of the offending action and the restoration of the claimant to its original position prior to the violation. The *amparo* process is

cludes participation in the extractive activities and sharing of profits: *ibid* at para 39; STC No 0022, *supra* note 98 at para 33.

212 STC No 0022, *ibid* at para 52. A 2005 environmental law also provides that Indigenous peoples, Campesino and Native Communities have the right to equitable compensation when the state grants third parties the right to exploit resources on their land: Law No 28611, *supra* note 70, art 72.3.

213 *Ibid*.

214 Decreto Legislativo No 1192, *supra* note 185, art 13.1.

215 *Ibid*.

216 See *supra* notes 208 through 213.

restorative in that the objective is “to restore the enjoyment of the plaintiff’s injured right, reestablishing the situation existing when the right was harmed, by eliminating or suspending, if necessary, the detrimental act or fact.”²¹⁷ To this end, the Court may also order the defendant to perform a positive action in the case of proven omissions.

These are the statutory parameters that shape the nature of the remedies that the Negritos Community may request if the Constitutional Court finds in its favor on the merits of its case. Within this framework, the Negritos legal team fashioned four specific remedies that attempt to redress the injustice of the Community’s dispossession in terms that fit the scope of the court’s remedial power in an *amparo* action. These proposed remedies reflect a preliminary effort to explore the question of what might be required, practically speaking, in order to take the Negritos Community’s justice claims and its right to remedy seriously. Given the Peruvian courts’ limited consideration of Indigenous property rights to date, there does not appear to be any domestic case law directly on point. As such, this discussion of remedies refers to relevant Peruvian commentary as well as statements of international human rights bodies.

The *first* available remedy would be a declaration that the Ministry of Energy and Mining and Yanacocha Mine violated the Negritos Community’s rights (as described above) and failed to fulfil their obligations to the Community under the Peruvian Constitution and international law. This first step would form the basis for the *second* remedy, namely a declaration that the administrative decisions that purported to eliminate or diminish the Community’s communal property rights and legal existence are null and void. This includes the Ministry’s approval of the expropriation and mining easement.

Building on these first two remedies, as a *third* step, the court could restore the Negritos Community to its original position before the violations by declaring that it remains a legal person and rightful property owner of the Reserve Area (Llagaden), the expropriated area (Pampa Larga) and the area subjected to a mining easement in favor of Yanacocha. This third order could include recognition of the Community’s right to participate in the benefits of the mining activity taking place on its land and to be equitably indemnified for the damage it has suffered due to past violations of its proper-

ty rights and the illegal occupation of its property since the early 1990s for the purposes of mining activity.²¹⁸

Finally, to secure the ongoing protection of the Negritos Community’s rights in light of Yanacocha’s occupation of its land, the court could add a *fourth* order requiring the company to negotiate an agreement with the Community. Such an agreement would govern the terms of the co-existence of the mining company and the Community in light of the Community’s rightful ownership of the land upon which the company conducts some of its key operations.²¹⁹ The court should specify that the negotiation of this agreement must be conducted in accordance with the principles of constitutional and international law that define the Community’s right to equitable compensation and equitable benefit in return for the loss of its land to mining activity.

To ensure that the company commits to such negotiations, the court could impose a fine or penalty if the company refuses to comply.²²⁰ However, it could also take a more proactive approach, by ordering the suspension of all mining activities that impact the Community’s property interests until such an agreement is reached.²²¹ A proactive approach may be important in light of the severe nature of the rights violations and the extraordinary power imbalance between the parties. It would incentivize Yanacocha to take its negotiations with the

218 Citing a report of the Peruvian national Ombudsmen, Sulca Huamani also concludes that mining operations, even when authorized by the Ministry of Mining, are illegal if they have not met the constitutional standard of free, prior and informed consent or consultation, as the case may be: Daniyar Sulca Huamani, “Acceso a las tierras comunales y el conflicto sociambiental: el Caso Majaz” (2008) *Palestra del Tribunal Constitucional: Revista de Doctrina y Jurisprudencia* 3(9) 135 at 145. Also see *supra* note 202.

219 The Community may decide to negotiate an agreement to govern present day operations given that the mine is already established and its impacts can only be mitigated. The Peruvian State could of course elect to re-expropriate the Community’s property but this would require conformity with the general rules that govern expropriation in addition to due regard for the Community’s status as a Campesino property holder under Peruvian Constitutional and international law.

220 *Constitutional Procedural Code*, art 22.

221 There is at least one example of an international human rights body ordering the temporary suspension of a foreign-owned mine in response to a petition brought by Indigenous communities in Guatemala alleging rights violations, including property rights violations: Inter-American Commission on Human Rights, PM 260-07 “Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacan Municipalities in the Department of San Marcos, Guatemala” (May 20, 2010 revised December 7, 2011), online: <http://www.oas.org/en/iachr/decisions/precautionary.asp> under 2010, PM 260-07.

217 Brewer-Carías, *supra* note 89 at 279.

Community seriously and reach an agreement, thereby protecting the Community's right to property and equitable compensation. Of course, if it is difficult to reach an agreement expeditiously, at the Community's discretion the suspension of mining operations could be lifted by way of an interim agreement predicated on the consolidation of a longer-term agreement.

These proposed remedies are structured to acknowledge that, while the *amparo* is a public law rights-protecting cause of action, some of the Negritos Community's specific rights claims have distributive consequences. In particular, this refers to the right to equitable compensation for damage to its property and to an equitably share of the profits generated by resource extraction. The legal remedies described above address this through a combination of orders that recognize rights, restore rights and require the company to do the same, including by applying economic pressure on the company through a suspension order.

This discussion of remedies makes apparent the fact that, in problematizing the Negritos story of dispossession by raising rights claims rooted in constitutional and international human rights law, the Negritos case taps into deeper questions regarding judicial remedies for past wrongs. More specifically, in fashioning a remedy for dispossession, courts are often forced to address a material conflict between rights rooted in public law, due in this case to the claimant's special status as a Campesino Community, and rights rooted in private law, acquired here by the mining company through the law of contract and property.²²² In this context, Peruvian constitutional experts have advocated for the principle that private law rights must give way to constitutional rights where there is a conflict.²²³ Statements from international human rights bodies have similarly concluded that the state should suspend a company's private rights to exploit a natural resource where its operations have been approved and undertaken without fully respecting

the rights of affected Indigenous communities.²²⁴ Even those who argue that private rights should be insulated from public law remedies for historic injustice nonetheless qualify their argument to those cases where the private rights-holders are "morally innocent", having acquired their rights many years after the original violations.²²⁵ Undoubtedly where the private rights-holder is also the original rights violator, as alleged in the Negritos Community's action against Yanacocha, this reasoning should not apply.

4. CONCLUSION: DISPOSSESSION RESEARCH AND LAW REFORM AGENDA

This case study told the story of how one domestic legal system in Latin America responded to an Indigenous dispossession claim that fundamentally challenges the legal arrangements underpinning the operations of a large and profitable foreign-owned gold mine. In conclusion, I will summarize the practical consequences of this study for those who seek to continue the work of studying and problematizing Indigenous dispossession in the global economy. This includes by advancing rights claims in domestic and international legal fora in order to support Indigenous communities confronted with unwanted models of resource extraction. In this section, I outline this study's two most significant findings, along with their potential consequences for national and international law reform and future comparative research. The first set of findings relate to the study and problematization of dispossession using human rights law. The second set speak to the litigation of dispossession in domestic and international courts. I

222 While contract and property rights enjoy constitutional protection in Peru, they nonetheless originate in private law: see *Political Constitution of Peru*, 1993, arts 62, 70. The constitutional right to property in Peru is limited by the state's power to expropriate property for reasons of national security or public necessity.

223 Roger Arturo Merino Acuña, "La Tutela Constitucional de la Autonomía Contractual. El Contrato Entre Poder Público y Poder Privado" in *El Derecho Civil Patrimonial y Derecho Constitucional* (Gaceta Jurídica, 2009) 43; Roger Arturo Merino Acuña, "Legitimando el Abuso en el Contrato: El Pleno Casatorio Sobre Transacción Extrajudicial y los Contratos Contaminados" (2010) *Actualidad Civil y Procesal Civil*, Normas Legales 221.

224 In 2010, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization (ILO) recommended that the Peruvian State "suspend the exploration and exploitation of natural resources which are affecting peoples covered by the Convention until such time as the participation and consultation of the peoples concerned is ensured through their representative institutions in a climate of full respect and trust, in accordance with Articles 6, 7 and 15 of the Convention", see: ILO, Committee of Experts on the Application of Conventions and Recommendations, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III, Part 1A), International Labour Conference, 99th Session, 2010 (ILO: 2010) at 784.

225 One example is Jeremy Waldron concept of supersession: Burke A. Hendrix, "Historical Injustice, Rawlsian Egalitarianism, and Political Contestation" (2014) 27 *Canadian Journal of Law & Jurisprudence* 73 at 74.

will describe each area in turn.

First, this paper demonstrates the strategic value of accumulating a critical mass of empirically informed systematic studies of the legal processes of Indigenous dispossession in the global economy. In the preceding pages, I relayed the story of the Negritos Community's dispossession and resistance, making an effort to tell this story in its larger social, legal, economic and political context. I also analyzed this story systematically in order to describe the "dynamics of dispossession". While this description is rooted in the Negritos Community's experience, it has the potential to contribute to further comparative study and theorizing of dispossession in the global economy. Although every Indigenous community's dispossession story has its own specificities, systematic and comparative studies may reveal patterns. More studies are needed of the mechanics of how legal processes facilitate, maintain and enforce the dispossession of local communities in the global economy and a comparative review of existing studies may be in order.²²⁶

Not only can this mode of inquiry be useful for specific communities, studies of this kind can present a powerful challenge to the contemporary model of global resource extraction, revealing the extent to which it is predicated on relations of dispossession. The strength of communities' efforts to challenge the ethics and legality of the relations that underlie global resource extraction will depend in part on the quality of the evidence behind each dispossession story. Uncovering (and interrogating) a company's official claim to legality is a critical starting point.

This paper also described how the Negritos legal team drew on constitutional and international human rights law to develop a legal framework for problematizing the Negritos Community's dispossession. It depicts how the expansion of Indigenous rights principles in international law complements existing constitutional frameworks and jurisprudence in Peru to create a relatively robust set of standards and rights for problematizing dispossession and making a claim for remedy. These principles, enforceable in the jurisdiction, include the right to communal property, the right to free, prior and informed consultation and in some cases consent, the right to legal personhood, and the right to bene-

fit equitably from resource extraction activities. Most importantly from the perspective of Negritos Community members, these principles speak to their lived experience of dispossession and they offer a language for challenging their material loss of property and legal personhood, as well as their alleged consent to these processes. Thus, at least at the level of principle, the Negritos experience suggests that human rights law can be a useful frame for translating dispossession concerns into legal and political claims.

Despite this, the state has failed to respond to the Negritos Community's claims and the domestic courts have become the Community's last resort. This paper tells the story of how the Negritos Community has attempted to give practical effect to its Campesino Community rights. This provides an important opportunity to examine the available causes of action that might channel dispossession claims to local (and international) courts. While much is known about the expansion of Indigenous peoples' substantive rights internationally, much less is known about how these rights are operationalized in domestic legal systems. As the Negritos Community discovered, Peru's domestic legal system offers a single cause of action, the *amparo* action, for presenting a claim to local courts alleging violations of constitutional Campesino rights and international human rights law.

Rights are only meaningful if processes and mechanisms exist whereby communities can advance their substantive claims before legal decision makers. In the process of litigating its case, the Negritos Community encountered multiple hurdles in the courtroom. Among these, the limitation period has emerged as the most significant procedural obstacle. To date, domestic courts in the Negritos case have ignored other possible approaches to the limitation period requirement, opting for an interpretation that would have required the Community to bring its legal claim within sixty days of purportedly signing the documents that transferred its land to the company. I have argued that the courts' interpretation of the limitation period requirement in the Negritos case is doctrinally unnecessary in that it was open to the court to conceptualize the impugned rights violations as ongoing actions or omissions. Perhaps more importantly, I have argued that if the court decides to draw conclusions with respect to an Indigenous claimant's knowledge and capacity at the admissibility phase of a dispossession claim, it must consider the-

226 See Anaya, *supra* note 3; Engle, *supra* note 71; Rodríguez-Garavito & Rodríguez-Franco, *supra* note 11; Parmar, *supra* note 11.

se concepts in context and in light of Indigenous rights case law. To do otherwise is problematic from an equitable perspective because it ignores the power dynamics that characterized the processes that lead to the Community's dispossession. To date, the courts in the Negritos case have been unwilling to substantively consider the factors that impacted the Community's knowledge and capacity to bring its claim in a timely fashion.

Rather, the courts in the Negritos case have ultimately relied (at least to date) on the same formalist, superficial view of consent that Yanacocha put forward in its submissions. Thus, a certain irony emerges. The Community is attempting to access the court in order to assert a rights framework that includes the right to *free and informed* consultation, and in some cases, consent. The facts of the case provide strong evidence suggesting that the signatures procured on the documents in question fall far short of meeting the free and informed standard being developed in international law and in Peruvian domestic law. The irony is that the Community is precluded from a substantive consideration of its consent-related allegations due to the operation of a formalist notion of consent in the limitation period analysis at the admissibility stage.

This observation lays the groundwork for this paper's second major finding. The expansion of Indigenous rights frameworks in both domestic and international law is undoubtedly important and, as described above, these statements of principle seem capable of effectively problematizing relations of dispossession. However, this expansion of substantive rights recognition has not been accompanied by a parallel concern for the development of appropriate and accessible judicial procedures and legal remedies. Communities' legal claims are successful not only because they have good facts and are decided with robust substantive rights frameworks. Crucially, they must also be able to package themselves into a recognizable domestic cause of action and navigate the associated procedural requirements. Access to justice is of course as contingent on appropriate procedures as it is on rights statements and enforcement. Arguably international and domestic lawmakers have been insufficiently attentive to the procedural aspects of the assertion of Indigenous and Campesino rights, and particularly property rights, in domestic courts. This observation applies in particular to contexts where the claims relate to past violations associated with established projects.

In Peru, despite the existence of promising statements of law, there is no specific constitutional procedure for the litigation of Campesino and Indigenous rights claims. When the Negritos Community attempted to bring its rights claim using the only cause of action that ostensibly applied, the associated procedural rules proved susceptible to the re-introduction of formalist concepts of consent. Thus, the rules of procedure themselves have become a new site of political and legal struggle. This suggests that appropriate public law mechanisms, procedures and principles must be developed to prevent courts from dismissing Indigenous rights claims at the procedural phase of legal proceedings on the basis of formalistic notions of consent. More research is needed to identify whether or not substantive Indigenous rights frameworks and remedies are similarly inaccessible in other domestic legal systems in the Americas. There may be good reason to believe that this issue is systemic given that the Peruvian *amparo* as a cause of action is similar to *amparo* proceedings in other countries across Latin America.²²⁷ Law reform may be needed to design new mechanisms, or to make available mechanisms more accessible and responsive to the reality of Indigenous claims, especially claims of past rights violations. If this does not happen, the Negritos experience teaches that existing domestic rights protection mechanisms will work to simply reinforce the dynamics of power and exclusion that give rise to rights violations.

Importantly, this Indigenous rights-based critique of domestic procedure and access to justice in Peru has its international counterpart with international consequences. This paper has described how the Negritos case unfolded in parallel with the emergence, at the turn of the millennium, of a body of inter-American jurisprudence that acknowledges Indigenous rights. However, these rights might only be claimed before the Inter-American Commission or Court in accordance with certain procedural requirements. Perhaps most significant is the long-standing exhaustion of remedies requirement: all claimants must exhaust available remedies in their domestic legal system, albeit with some exceptions.²²⁸ Thus, the expansion of Indigenous rights

227 See generally Brewer-Carías' comparative study of the *amparo* proceedings across numerous Latin American countries: *supra* note 89.

228 *Rules of Procedure of the Inter-American Commission on Human Rights*, art 31(1). The exceptions to the exhaustion of remedy requirement are: (i) the domestic legislation does not afford due pro-

recognition in the inter-American system has not been accompanied by, at least on its face, any changes to the procedural requirements that Indigenous groups must meet in order to operationalize these rights.

Yet the Negritos case study reveals that an ostensible domestic cause of action may in practice include procedural requirements that are interpreted to create an insurmountable obstacle for Indigenous dispossession claims. The Negritos example is important because it documents how a community can become caught in a web of procedural requirements that threaten to effectively frustrate its capacity to assert its substantive rights claims before any court of law, either domestically or internationally. There is potentially a kind of misalignment between inter-American procedures and statements of Indigenous rights on one hand, and on the other, the complex domestic legal and political terrain that Campesino and Indigenous communities must navigate in an effort to simply identify a cause of action and convince a court to admit their claim and consider it on the merits. Due to the exhaustion of remedies requirement, where an ostensible cause of action exits these domestic efforts are a necessary prerequisite, even if they are ultimately fruitless, before a community may appeal to an international human rights body, like the Inter-American Commission.

This points to a potential area of future public international law research focused on the admissibility decisions of the Inter-American Commission in response to Indigenous rights related petitions. If the domestic mechanisms available for actualizing Indigenous rights in the region are systematically and seriously deficient, more research is needed to identify how this reality is informing, or should inform, admissibility rules at the inter-American level. For example, how has the Inter-American Commission applied the exhaustion of remedies requirement (and its exceptions) to petitions presented by Indigenous communities in the Americas? Can a systematic pattern of deficient local remedies be observed across the petitions presented to date? If so, how should the Commission respond in its admissibility determinations? Are specialized admissibility considerations or rules warranted for Indigenous rights pe-

cess of law [art 31(2)(a)]; (ii) the party alleging violation has been denied access to the remedies under domestic law or has been prevented from exhausting them [art 31(2)(b)]; (iii) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies [art 31(2)(c)].

titions? Should the Commission develop substantive principles to inform debate over the domestic causes of action and procedural rules that would ensure Indigenous communities meaningful access to their local courts?

As a stand-alone case study, the Negritos case cannot answer these questions; rather it can only help to pose them. While a single case study will always have inherent limitations, one of the strengths of the Negritos study is the depth and detail of information compiled over more than a decade. As such, it offers a unique window into the interaction between the domestic legal system, a Campesino Community, and a transnational mining company, where enforceable Constitutional rights and international human rights are at stake. It tells us that the incorporation of international public law, and specifically rights related to Indigenous communal property, into the domestic sphere, can trigger important access to justice problems due to the absence of appropriate procedural rules. More detailed empirical and longitudinal studies of other cases and contexts are needed to identify the extent to which these problems extend beyond Peru.²²⁹ In this work, it would be important to distinguish between the proactive use of the courts to resist the imposition of a project, and recourse to the courts in order to remedy past violations and dispossession.

The Negritos case study depicts a particular form of legal practice in contemporary conditions of economic globalization. At the broadest level, it represents an attempt by activists to use international human rights concepts to address issues of global economic justice. This activism must be informed by a conception of the nature of the problem it seeks to address and of course such an exercise is always contentious and complex.²³⁰

229 Although there are a number of studies of Indigenous and other communities in Latin American using domestic courts to address concerns related to resource extraction, none of these offer the detail and depth described here. Moreover, many of these depict examples of communities resorting to the courts in order to proactively prevent a proposed mining project, rather than examples of efforts to remedy past violations: see generally *supra* note 10.

230 Karen Engle published an extensive study of the struggle within the Indigenous rights movement over international law strategies for addressing “the problem”. She sees the history of the movement primarily in terms of a struggle between framing the problem as the right to self-determination and the right to culture. While she understands the right to property as a derivative of the right to culture, she also observes how the property frame has the potential to advance certain elements of the self-determination

In the *amparo* action, the Negritos Community's concerns were primarily framed as violations of communal property rights. This was in part due to the nature of the available documentary evidence. Perhaps with other forms of evidence, other legal frames could have been adopted, such as cultural rights or environmental rights. However, as stated above, the Negritos experience suggests that there is significant value in framing cases of this kind as struggles over property in particular. The property lens reveals the material, corporeal, aspect of foreign mining activities, where land is taken, transferred, occupied and exploited in the midst of people, communities and livelihoods. In the Negritos case, the property lens was powerful because it allowed the Community to challenge the very legality and the legitimacy of Yanacocha's mining operations, and arguably by extension, the global status quo of transnational resource extraction as described in this paper's introduction.

In the first paragraphs of this conclusion I referred to the importance of studying dispossession in the global economy and the promise that human rights law seems to hold as one problematizing frame for this endeavor. However, at the same time, the procedural obstacles in the Negritos case point to a potential weakness or irony of property claims as a human rights claims. In a market economy, property is traded through contracts, usually in exchange for money. This exchange of course is predicated on some notion of consent. Legitimate property transfers must be consensual. Where they are not consensual, they must be justified in the national public interest, as in the case of expropriation.²³¹ The Negritos study reveals how slippery the notion of consent can be, not only in relation to substantive rights matters, but also at the procedural stage of legal proceedings. The case law and literature cited in Part B.3 of this paper emphasize that for Indigenous communities the question of consent is never merely a matter of formal information transfer, but can only be understood in a cultural, social, historical context and with attention to different ways of knowing. In the Negritos case, to date the courts, the state and the company have all accepted the idea that, in exchange for practically nothing, the Community consented to the elimination of all of its communal land interests, any other community right or

agenda, namely control over land and resources: see Engle, *supra* note 71.

231 *Political Constitution of Peru, 1993*, art 70; *American Convention*, art 21(2).

interest, and its very existence in law.

In one view, the Negritos case study is perhaps an extreme example due to the time period of the property acquisitions in question. In today's Latin America, arguably few communities occupy a position comparable to that of the Negritos Community in the early 90s: most have at least heard about the pitfalls of large scale foreign mining and many have relatively greater access to information and supportive civil society actors. However, these changes are a matter of degree. Communities in Latin America and foreign resource companies continue to encounter each other in the context of vastly unequal power relations. The widespread resource related social conflicts described in this paper's introduction reveal that, politically speaking, the terms and meaning of consent remain very much unsettled, notwithstanding the growing international Indigenous rights case law.

In this light, many of the deeper questions in the Negritos case maintain their relevance. Of particular importance is the question of just how free consent can be under current conditions, not only of unequal power relations, but where the rules of property and contract that ultimately govern these relations remain squarely in the political economy of neoliberal capitalism. Even where Communities are relatively better resourced and equipped to negotiate with companies, it can be difficult to escape a model that pushes toward the commodification of rights, exchanging monetary compensation in return for permission to exploit resources.²³² One important commonality between the Negritos case and the circumstances of present day resource conflicts is that few communities have real choices and control over outcomes when it comes to proposed resource projects and the legal frameworks that determine who has ultimate decision making power.²³³

232 See for example: Ibiroinke Odumosu-Ayanu, "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Law and Industry-Community Agreements" (2012) 35 *North Carolina Central Law Review* 65; Colin Samson, "Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims" (2016) 31(1) *Canadian Journal of Law and Society* 87.

233 For an Indigenous rights critique of the dominant global resource extraction model, see Anaya, *supra* note 3. Popular referenda in Latin America represent one attempt to establish and advocate for another source of law and decision making power. For just two of many examples see: McGee, *supra* note 10; Shin Imai et al, *supra* note 10. This is not just a developing country issue. Indigenous controlled project assessments and decision-making processes that

Property has come to occupy this ambivalent space, as a foundational right in Indigenous rights frameworks as well as in the neoliberal economic system. This paper previously described how, in Peru and in many other countries in the region and around the world, Indigenous rights and neoliberal legal (foreign investment) projects have unfolded almost in parallel. The Negritos case study reveals that the slippage between these two worlds often occurs in the context of the struggle over the meaning of consent, crystalized in this study in arguments over how to apply the limitation period. While this paper has advocated for progressive interpretations of limitation period laws, or other Indigenous appropriate procedural reforms, in the background we are always confronted with the possibility that in order to approximate global social justice, we must address and transform the system of property that generates the very injustices we seek to redress.²³⁴ This raises questions about whether or not, or under what conditions, human rights, and Indigenous property rights more specifically, can be liberating, or conversely, whether or not even the most robust procedural reforms will nonetheless somehow fail to convert law into an instrument of justice for the dispossessed.

In the meantime, while we contemplate how we might change the legal structures of the global economic system, or while we strategize legal responses to the global governance gap described in this paper's introduction, we must bear in mind one final lesson from this study. As we reach to global debates and work toward structural changes, we must nonetheless remain grounded in the struggles of the dispossessed. This involves thinking critically, conscientiously and consulting as we

situate themselves outside of the state's jurisdiction are also growing in Canada. For two examples see: Stk'emlupsemc te Secwepemc Nation, Media Release, "Stk'emlupsemc te Secwepemc Nation (SSN) says No to KGHM Ajax Mine and Yes to Healthy People and Environment" (4 March 2017), online: http://miningwatch.ca/sites/default/files/2017-03-ssnajaxdecisionrelease_0.pdf; Tsleil-Waututh Nation, Media Legal Backgrounder, "Tsleil-Waututh Nation (IWN) Legal Challenge to the National Energy Board's (NEB) review of Kinder Morgan Trans Mountain Pipeline and Tanker Project" (2 May 2014), online: http://www.twnation.ca/en/~media/Files/Press%20Releases/TWN%20-%20NEB%20-%20Legal%20Backgrounder%20-%20CLEAN_VAN_LAW-1461360-v4.ashx.

234 Engle, *supra* note 71 at 274-8; David Kennedy, "The international human rights movement: part of the problem?" *European Human Rights Law Review* 3 (2001) 245; David Kennedy, "The International Human Rights Regime: Still Part of the Problem?" in Ole Windahl Pedersen, ed, *Examining Critical Perspectives on Human Rights* (Cambridge University Press, 2013) 19.

craft legal frames for problematizing relations of dispossession. It requires using law to fight practices and ideologies that would treat the dispossessed as irrelevant, nonexistent, invisible, or deserving of their fate. At the same time, we must be realistic that even the most committed communities may become weak and divided after decades (or centuries) confronting relations of power and exploitation. And even when our efforts feel futile in the face of what we confront (delays, corruption, formalism), we must continue to support communities' demands that their local legal systems be efficient, fair, equitable and accessible. May we be creative and courageous in our pursuit of remedies, reparations and a new order of legal relations.

REFERENCES

International conventions & declarations

American Convention on Human Rights, 1144 UNTS 123 (1969).

Convention concerning Indigenous and Tribal Peoples in Independent Countries, International

Labour Organization, Convention No 169, (1989).

Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, HRC Res, UNGAOR, 26th Sess, UN Doc A/HRC/26/L.22/Rev.1 (2014).

Indigenous and Tribal Populations Convention, International Labour Organization, Convention N° 169, (1957).

Rules of Procedure of the Inter-American Commission on Human Rights (2013).

United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR, 62 Sess., Annex, Agenda Item 68 UN Doc. A/61/L.67 (2007).

Peruvian legislation

Administrative Resolution No 095-2004-P-TC, *Normative Regulation of the Constitutional Tribunal* (14 September 2004).

Comisión de Pueblos Andinos, Amazónicos y Afroperuanos, Ambiente y Ecología, *Proyecto de Ley de Reforma de la Constitución*, Título II, Capítulo VII "Derechos de los Pueblos Indígenas".

Directive No 03-2012/MC, Ministry of Culture, Ministerial Resolution No 202-2012-MC (2012).

Law No 30327, *Law for the promotion of investment for economic growth and sustainable development* (2015).

Law No 30025, *Law that facilitates the acquisition, expropriation and possession of real property for infrastructure works and declares the public need for the acquisition or expropriation of real property affected by the execution of diverse infrastructure works* (2013).

Law No 29785, *Law for the right of Indigenous and original peoples to prior consultation, recognized in Convention 169 of the International Labour Organization* (2011).

Law No 29338, *Hydro Resources Law* (2009).

Law No 27446, *National System of Environmental Impact Assessment Law* (2009).

Law No 28736, *Law for the protection of Indigenous and original peoples in a situation of isolation or initial contact* (2006).

Law No 28611, *General Law on the Environment* (13 October 2005).

Law No 28237, *Constitutional Procedural Code* (2004).

Law No 27908, *Rondas Campesinas Law* (2003).

Law No 26821, *Organic Law for the Sustainable Use of Natural Resources* (1997).

Law No 28495, *Law for the National Institute for the Development of Andean, Amazonian and AfroPeruvian Peoples* (1995).

Law No 26505, *Law for the Promotion of Private Investment in the Development of Economic Activities on the National Territory and on Campesino and Native Community Land* (1995).

Law No 24656, *Campesino Communities General Law* (1987).

Law No 24657, *Law for the Demarcation and Titling of the Communal Territories of the Campesino Communities* (1987).

Law No 17716, *Agrarian Reform Law* (1969).

Legislative Decree No 295, *Civil Code* (2015).

Legislative Decree No 1192, *Law for the acquisition and expropriation of real property, transfer of state real property, removal of interferences and other measures for the execution of infrastructure projects* (2015).

Legislative Decree No 1210, *Modification of the Tenth Final Complementary Disposition of Legislative Decree No 1192*

(2015).

Legislative Decree No 662, *Granting a Legally Stable Regime to Foreign Investors through the Recognition of Certain Guarantees* (1991).

Legislative Decree No 674, *Law for the Promotion of Private Investment in State Enterprises* (1991).

Legislative Decree No 708, *Law for the Promotion of Investments in the Mining Sector* (1991).

Legislative Decree No 653, *Law for the Promotion of Investment in the Agrarian Sector* (1991).

Legislative Decree No 757, *Legal Framework for the Growth of Private Investment* (1991).

Legislative Resolution No 26253, *For the approval of "Convention 169 of the ILO on Indigenous and Tribal Peoples in Independent Countries"* (1993).

Political Constitution of Peru, 1993.

Political Constitution of Peru, 1979.

Supreme Decree No 001-2015-EM, *Provisions for mining procedures that encourage investment projects* (2015).

Supreme Decree No 065-2005-PCM, *Regulation of the National Institute for the Development of Andean, Amazonian and AfroPeruvian Peoples* (2005).

Supreme Decree No 014-92-EM, *General Mining Law* (1992).

Supreme Decree No 004-92-TR, *Regulation of Chapter VII – Economic Regime for the Campesino Communities General Law* (1992).

Supreme Decree No 008-91-TR, *Regulation of the Campesino Communities General Law* (1991).

Supreme Decree No 37-70-AG, *Campesino Communities Special Statute* (1970).

Jurisprudence

International jurisprudence

Castañeda Gutman v. Mexico, (2008) Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 184.

Comunidad Garifuna de Punta Piedra v Honduras, Preliminary Objections, Merits, Reparations, and Costs, Judgment,

ment, Inter-Am Ct HR (ser C) No 304 (8 October 2015).

Comunidad Garífuna de Triunfo de la Cruz v Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 305 (8 October 2015).

Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacan v Guatemala, Report on Admissibility, Inter-Am Comm'n HR, Report No. 20/14 Petition 1566-07 (3 April 2014).

Inter-American Commission on Human Rights, PM 260-07 "Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacan Municipalities in the Department of San Marcos, Guatemala" (May 20, 2010 revised December 7, 2011), online: <http://www.oas.org/en/iachr/decisions/precautionary.asp> under 2010, PM 260-07.

Inter-American Commission on Human Rights, Resolution 9/2014, *Líderes y Líderesas de Comunidades Campesinas y Rondas Campesinas de Cajamarca Respecto de la República de Perú*, Precautionary Measure No 452-11 (2014), online: <http://www.oas.org/es/cidh/decisiones/pdf/2014/MC452-11-ES.pdf>.

Kaliña and Lokono Peoples v Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 309 (25 November 2015).

Maya Indigenous Communities of the Toledo District v Belize, Merits Report, Case 12.053, Inter-Am Comm'n HR, Report No 40/04 (2004).

Mayagna (Sumo) Awas Tingni Cmty v Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser C) No. 79 (31 August 2001).

Moiwana Cmty v Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 124 (June 15, 2005).

Pueblo Indígena Kichwa de Sarayaku v Ecuador, Merits and Reparations, Judgment, Inter-Am Ct HR (ser C) No 245 (27 June 2012).

Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 172 (28 November 2007).

Saramaka People v Suriname, Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 185 (12 August 2008).

Sawhoyamaxa Indigenous Cmty v Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 146 (29 March 2006).

Xákmok Káseké Indigenous Cmty v Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 214 (24 August 2010).

Yakye Axa Indigenous Cmty v Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (ser C) No 125 (17 June 2005).

Domestic jurisprudence

British Columbia Court of Appeal, *Garcia v Tahoe Resources Inc*, 2017 BCCA 39.

Constitutional Court of Peru, STC No 01931-2013-HC (30 July 2015).

Constitutional Court of Peru, STC No 03673-2013-PA/TC (11 December 2014).

Constitutional Court of Peru, STC No 00987-2014-PA/TC (6 August 2014).

Constitutional Court of Peru, STC No 01126-2011-HC/TC (11 September 2012).

Constitutional Court of Peru, STC No 00024-2009-PI/TC (26 July 2011).

Constitutional Court of Peru, STC No 00025-2009-PI/TC (17 March 2011).

Constitutional Court of Peru, STC No 05427-2009-PC/TC (30 June 2010).

Constitutional Court of Peru, STC No 0022-2009-PI/TC (9 June 2010).

Constitutional Court of Peru, STC No 04611-2007-PA/TC (9 April 2010).

Constitutional Court of Peru, STC No 00027-2009-PI/TC (5 January 2010).

Constitutional Court of Peru, STC No 06316-2008-PA/TC (11 November 2009 and clarification decision 24 August 2010).

Constitutional Court of Peru, STC No 03215-2008-PA/TC (19 August 2009).

Constitutional Court of Peru, STC No 02939-2008-PA/TC (13 May 2009).

Constitutional Court of Peru, STC No 00014-2007-PI/

- TC (4 May 2009).
- Constitutional Court of Peru, STC No 05614-2007-PA/TC (20 March 2009).
- Constitutional Court of Peru, STC No 03343-2007-PA/TA (19 February 2009).
- Constitutional Court of Peru, STC No 4762-2007-PA/TC (22 September 2008).
- Constitutional Court of Peru, STC No 09874-2006-PA/TC (20 December 2007).
- Constitutional Court of Peru, STC No 00027-2006-PI/TC (21 November 2007).
- Constitutional Court of Peru, STC No 3081-2007-PA/TC (9 November 2007).
- Constitutional Court of Peru, STC No 00007-2007-PI/TC (19 June 2007).
- Constitutional Court of Peru, STC No 1776-200-AA/TC (26 January 2007).
- Constitutional Court of Peru, STC No 7435-2006-PC/TC (13 November 2006).
- Constitutional Court of Peru, STC No 0025-2005-PI/TC (25 April 2006).
- Constitutional Court of Peru, STC No 4587-2004-AA/TC (29 November 2005).
- Constitutional Court of Peru, STC No 00020-2005-PI/TC and 00021-2005-PI/TC (27 September 2005).
- Constitutional Court of Peru, STC No 2574-2005-AA/TC (27 May 2005).
- Constitutional Court of Peru, STC No 00042-2004-AI/TC (13 April 2005).
- Constitutional Court of Peru, STC No 0017-2003-AI/TC (16 March 2004).
- Constitutional Court of Peru, STC No 3283-2003-AA/TC (15 June 2004).
- Constitutional Court of Peru, STC No 0008-2003-AI/TC (11 November 2003).
- First Specialized Civil Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 25 (16 June 2014).
- Specialized Civil Appeal Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 1 (19 March 2013).
- Specialized Civil Appeal Court of Cajamarca, Exp No 00315-2011-1-0601-JR-CI-01, Resolution No 2 (14 December 2012).
- Superior Court of Justice of Cajamarca, Permanent Civil Appeal Court, File 00315-2011-0-0601-JR-CI-01, Resolution No 33 (5 May 2014).
- Supreme Court of Justice of the Republic, Criminal Investigations Section, Exp No 13-03 (11 December 2007).
- Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No 10-2001 / Acumulado No 45-2003 AV (7 April 2009).
- Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No AV-33-2003 (30 September 2009).
- Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No AV 19-2001 (7 April 2009).
- Supreme Court of Justice of the Republic, Special Criminal Appeals Section, Exp No AV-23-2001 (20 July 2009).
- Secondary materials: book chapters & monographs**
- Abad Yupanqui, Samuel. *El Proceso Constitucional de Amparo* (Gaceta Jurídica: Lima, 2008).
- Alegrett, Raúl. “Past and present land reform in Latin America” in P. Groppo, ed, *Land Reform: Land Settlement and Cooperatives* (FAO, 2003/2) 112.
- Alteri, Miguel & Andrés Yurjevic, *La agroecología y el desarrollo rural, sostenible en América Latina* (Santiago de Chile: Economic Commission for Latin America and the Caribbean, 1992).
- Barandiaran Dempwolf, Roberto & José Antonio Nolasco Valenzuela. *Jurisprudencia penal generada en el subsistema anticorrupción. Corrupción gubernamental*, Vol 2 (Lima, Palestra: 2006).
- Bury, J. “Neoliberalismo, minería y cambios rurales en Cajamarca” in A Bebbington, ed, *Minería, Movimientos Sociales y Respuestas Campesinos* (CEPES & IEP, Lima 2007) 49.
- Brewer-Carías, Allan R. *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2008).

- Brown, Stephen, ed. *Struggling for Effectiveness: CIDA and Canadian Foreign Aid* (McGill-Queen's University Press, 2012).
- Castillo Castañeda, Pedro. *El Derecho a la Tierra y los Acuerdos Internacionales: el Caso de Perú* (Lima, CEPES & International Land Coalition: 2009).
- Cutler, A. Claire. "Private transnational governance and the crisis of global leadership" in Stephan Gill, ed, *Global Crises and the Crisis of Global Leadership* (Cambridge University Press, 2011).
- Dashwood, Hevina S. *The Rise of Global Corporate Social Responsibility: Mining and the Spread of Global Norms* (Cambridge University Press, 2012).
- Engle, Karen. *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010).
- Engler, Yves. *The Black Book of Canadian Foreign Policy* (Fernwood Publishing & RED Publishing, 2009).
- Gregor Barié, Cletus. *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama*, 2d ed (La Paz, Bolivia: Génesis, 2003).
- Griffiths, Tom. "Indigenous Peoples, Land Tenure, and Land Policy in Latin America" in P. Groppo, ed, *Land Reform: Land Settlement and Cooperatives* (FAO, 2004) 49.
- Gordon, Todd & Jeffery R Webber. *Blood of Extraction: Canadian Imperialism in Latin America* (Fernwood Publishing, 2016).
- Haberle, Peter. *El Estado Constitucional* (Autonomous University of Mexico, 2003).
- Hutchinson, Allan. "Looking for the Good Judge: Merit and Ideology" in Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (McGill-Queen's University Press, 2013) 99.
- Kennedy, David. "The International Human Rights Regime: Still Part of the Problem?" in Ole Windahl Pedersen, ed, *Examining Critical Perspectives on Human Rights* (Cambridge University Press, 2013) 19.
- Laos Fernández, Alejandro et al. *Rondando por Nuestra Ley* (Lima: Asociación Servicios Educativos Rurales, Red Interamericana para la Democracia, 2003).
- Merino Acuña, Roger Arturo. "La Tutela Constitucional de la Autonomía Contractual. El Contrato Entre Poder Público y Poder Privado" in *El Derecho Civil Patri-monial y Derecho Constitucional* (Gaceta Jurídica, 2009) 43.
- O'Diana Rocca, Richard André. *Las limitaciones del sistema de dominio minero vigente en el Perú y las consecuencias negativas que genera a las comunidades campesinas: un estudio a partir del caso de la Comunidad Campesina San Adres de Negritos de Cajamarca*, Thesis for the degree of Bachelor of Law, Faculty of Law, Pontifical Catholic University of Peru (Lima, 2014).
- Odumosu-Ayanu, Ibrónke. "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Law and Industry-Community Agreements" (2012) 35 North Carolina Central Law Review 65.
- Parmar, Pooja. *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (Cambridge University Press, 2015).
- Peña Jumba, Antonio. *Justicia comunal en los Andes del Perú: El caso de Calabuyo* (Lima: Pontificia Universidad Católica del Perú, Fondo Editorial, 1998).
- Plant, R & S Havlkof. *Land Titling and Indigenous Peoples in Latin America* (Inter-American Development Bank, Washington DC, 2001).
- Quiroz, Alfonso. *Historia de la corrupción en el Perú*, translated by Javier Flores, Popular Collection Series No 5 (Lima: Institute for Peruvian Studies, 2014).
- Quiroz, Alfonso. *Corrupt Circles: A History of Unbound graft in Peru* (Washington: Woodrow Wilson Center Press, 2008).
- Rodríguez-Garavito Cesar & Diana Rodríguez-Franco. *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015).
- Shamir, Ronen. "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony" in Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005).
- Simons, Penelope & Audrey Macklin. *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014).
- de Sousa Santos Boaventura & César Rodríguez-Garavito, eds. *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).
- Van Harten, Gus. "Investment treaties as a constraining

framework” in Shahrukh R Khan & Jens Christiansen, eds, *Towards New Developmentalism: Market as means rather than master* (New York: Routledge, 2011) 154.

Van Harten, Gus. “Investment Treaty Arbitration and the Policy Implications for Capital-Importing States” in Diego Sánchez-Ancochea & Kenneth C Shadlen, eds, *The Political Economy of Hemispheric Integration* (New York: Palgrave Macmillan, 2008) 83.

Webber, Jeremy. “The Meanings of Consent” in Jeremy Webber and Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 3.

White, Lucie E. & Jeremy Perelman. *Stones of Hope: How African activists reclaim human rights to challenge global poverty* (Stanford University Press, 2011).

Yrigoyen, Raquel. “El horizonte del constitucionalismo pluralista: del multiculturalismo a la decolonización” in César Rodríguez, ed, *El Derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI* (Buenos Aires: Siglo XXI Editores, 2011) 139.

Secondary materials: academic articles

Bebbington, Anthony et al. “Mining and Social Movements: Struggles over Livelihood and Rural Territorial Development in the Andes” (2008) 36 *World Development* 2888.

Bebbington, Anthony & Denise Humphreys Bebbington. “Actores y ambientalistas: Continuidades y cambios en los conflictos socio-ambientales en el Perú” (2009) 35 *Iconos* 117.

Cairo Roldán, Omar. “El panorama general del proceso de amparo en el Perú” 3(8) (2008) *Palestra Tribunal Constitucional: Revista de doctrina y jurisprudencia* 153.

del Castillo, Laureano. “Titulación de las Comunidades Campesinas: CEPES, ALLPA y la Problemática Comunal” (2003) 36 *Debate Agrario* 89.

-----, “Propiedad Rural, Titulación de Tierras y Propiedad Comunal” (1997) 26 *Debate Agrario* 59.

Coumans, Catherine. “Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency” (2010) 30 *Canadian Journal of Development Studies* 27.

Cronstedt, Claes & Robert C Thompson. “A Proposal for an International Arbitration Tribunal on Business and Human Rights” (2016) 57 *Online Symposium, Harvard International Law Journal* 66, online: http://www.harvardilj.org/wp-content/uploads/Cronstedt-and-Thompson_0615.pdf.

Diez, Alejandro. “Interculturalidad y Comunidades: Propiedad Colectiva y Propiedad Individual” (2003) 36 *Debate Agrario* 71.

Eslava, Luis. “Corporate Social Responsibility & Development: A Knot of Disempowerment” (2008) 2 (2) *Oñati Journal of Emergent Socio-Legal Studies* 43.

Espinosa-Saldaña Barrera, Eloy. “La “especial trascendencia constitucional” como causal para el rechazo liminar de recursos de agravio en el Perú” (2015) 8 *Revista Peruana de Derecho Constitucional* 41.

Flemmer, Riccarda & Almut Schilling-Vacafloer. “Unfulfilled promises of the consultation approach: the limits to effective indigenous participation in Bolivia’s and Peru’s extractive industries” (2016) 37(1) *Third World Quarterly*.

Guzmán Salano, Natalia. “Struggle from the margins: Juridical processes and entanglements with the Peruvian state in the era of mega-mining” (2016) 3 *The Extractive Industries and Society* 416.

Harvey, David. “The ‘New’ Imperialism: Accumulation by Dispossession” (2004) 40 *Socialist Register* 63.

Hendrix, Burke A. “Historical Injustice, Rawlsian Egalitarianism, and Political Contestation” (2014) 27 *Canadian Journal of Law & Jurisprudence* 73.

Ingelson, Allan, Arturo Urzúa & William Holden. “Mine Operator Liability for the Spill of an Independent Contractor in Peru” (2006) 24(1) *J Energy Nat Resources* L 53.

Imai, Shin et al. “Breaching Indigenous Law: Canadian Mining in Guatemala” (2007) 6(1) *Indigenous LJ* 101.

Jaskoski, Maiah. “Environmental Licensing and Conflict in Peru’s Mining Sector: A Path-Dependent Analysis” (2014) 64 *World Development* 873.

Kamphuis, Charis. “Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account” (2012) *German Law Journal* 1456.

-----, “Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security

- Company in Peru” (2012) 37(2) *Brooklyn Journal of International Law* 529.
- , “Foreign Mining, Law and the Privatization of Property: A case study from Peru” (2012) 3:2 *Journal of Human Rights and the Environment* 217.
- , “Derecho y la Convergencia del Poder Público y el Poder Empresarial: La Desposesión Campesina y La Coerción Privatizada en el Perú” (2012) 15 *Revista Latinoamericana de Derecho Social: Universidad Nacional Autónoma de México Instituto de Investigaciones Jurídicas* 57.
- Kennedy, David. “The international human rights movement: part of the problem?” *European Human Rights Law Review* 3 (2001) 245.
- Kimerling, Judith. “Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil and Ome Yasuni” (2016) 40 *Vermont Law Review* 445.
- Landa Arroyo, César. “Límites y alcances de la ‘especial transcendencia constitucional’” (2015) 8 *Revista Peruana de Derecho Constitucional* 89.
- Li, Fabiana. “In Defense of Water: Modern Mining, Grassroots Movements, and Corporate Strategies in Peru” (2016) 21(1) *The Journal of Latin American and Caribbean Anthropology* 109.
- , “Contested Equivalences: Controversies over water and mining in Peru and Chile” in John Wagner, ed, *The Social Life of Water* (Berghahn Books, 2013).
- , “Relating Divergent Worlds: Mines, Aquifers and Sacred Mountains in Peru” (2013) 55 *Anthropologica* 399.
- López, Emiliano & Francisco Vértiz. “Extractivism, Transnational Capital, and Subaltern Struggles in Latin America” (2015) 42(5) *Latin American Perspectives* 152.
- McCorquodale, Robert & Penelope Simons. “Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law” (2007) 70 *Modern Law Review* 598.
- McGee, Brant. “The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development” (2009) 27 *Berkeley J Intl L* 570.
- Merino Acuna, Roger. “The politics of extractive governance: Indigenous peoples and socio-environmental conflicts” (2015) 2 *The Extractive Industries and Society* 85.
- , “Prior Consultation: Law and the Challenges of the New Legal Indigenism in Peru” (2014) 4(1) *Hendu* 19.
- , “Legitimando el Abuso en el Contrato: El Pleno Casatorio Sobre Transacción Extrajudicial y los Contratos Contaminados” (2010) *Actualidad Civil y Procesal Civil, Normas Legales* 221.
- Phillips, James S. “The rights of indigenous peoples under international law” (2015) 26(2) *Global Bioethics* 120.
- Richard, Michelle. “Conflict in Latin America over Natural Resource Exploitation” (2013) 19 *L & Bus Rev Am* 561.
- Rodríguez-Garavito, César. “Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields” (2010) 18 *Indiana Journal of Global Legal Studies* 1.
- Samson, Colin. “Canada’s Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims” (2016) 31(1) *Canadian Journal of Law and Society* 87.
- Seck, Sara L. “Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights” (2011) 49 *Can YB Int’l Law* 51.
- , “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) *Yale Human Rights & Development Law Journal* 177.
- Sieder, Rachel. “‘Emancipation’ or ‘regulation’? Law, globalization and indigenous peoples’ rights in post-war Guatemala” (2011) 40(2) *Economy and Society* 239.
- , “The judiciary and indigenous rights in Guatemala” (2007) 5(2) *Int J Const L* 211.
- Simons, Penelope. “Canada’s Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses” (2015) 56 *Canadian Business Law Journal* 167.
- , “International law’s invisible hand and the future of corporate accountability for violations of human rights” (2012) 3:1 *Journal of Human Rights and the Environment*.

-----, “Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary

Self-Regulation Regimes” (2004) 59 *Relations industrielles/ Industrial Relations* 101. Sulca Huamaní, Daniyar. “Acceso a las tierras comunales y le conflicto sociambiental: el Caso Majaz” (2008) *Palestra del Tribunal Constitucional: Revista de Doctrina y Jurisprudencia* 3(9) 135.

Szablowski, David. “Operationalizing Free, Prior and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice” (2010) 30:1-2 *Canadian Journal of Development Studies* 111.

Williams, Cynthia A. “Civil Society Initiatives and ‘Soft Law’ in the Oil and Gas Industry” (2003-2004) 36 *NYU Journal of International Law and Politics* 457.

Reports

Christian Aid. *Undermining the Poor: Mineral Taxation Reforms in Latin America* (September 2009).

Comisión de Pueblos Andinos, Amazónicos, Afroperuanos, Ambiente y Ecología. *Informe del Grupo de trabajo encargado de levantar información sobre la situación ambiental y estado de salud de los afectados por el derrame de mercurio en las localidades de San Juan, Choropampa y Magdalena, Departamento de Cajamarca en junio del año 2000* (Lima: Congreso de la República del Perú, 2008).

Cotula, Lorenzo. *Foreign investment, law and sustainable development: A handbook on agriculture and extractive industries*, 2nd ed, IIED Natural Resources Issues Series 31 (International Institute for Environment and Development, 2016).

Defensoría del Pueblo. *El Caso del Derrame de Mercurio que afectó a las localidades de San Sebastián de Choropampa, Magdalena y San Juan, en la Provincia de Cajamarca*, Informe Defensorial No 62 (2001).

Economic Commission for Latin America and the Caribbean (ECLAC). *Foreign Direct Investment in Latin America and the Caribbean, 2016*, LC/G.2680-P (Santiago: ECLAC, 2016).

ETOS for Human Rights beyond Borders, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (February 2012).

Europe-Third World Centre & International Associa-

tion of Democratic Lawyers. *Mining and Human Rights Violations in Colombia: The Case of Anglo Gold Ashanti vs the Afro-descendant community of La Toma*, UNGA, 26th Sess, Annex, Agenda Item 3, UN Doc A/HRC/26/NGO/38 (2014).

Forest Peoples Programme. *Indigenous Peoples’ Rights and Reduced Emissions from Reduced Deforestation and Forest Degradation: The Case of the Saramaka People v. Suriname* (UK: Forest Peoples Programme, 2009).

Fundación del Debido Proceso. “El derecho a la consulta de los pueblos indígenas en Perú” (Washington, DC: 2010).

Galvis, María & Ángela Ramírez. *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria* (Washington, DC: Fundación del Debido Proceso, 2013).

Global Witness. *On Dangerous Ground: The Killing and Criminalization of Land and Environmental Defenders Worldwide* (London: Global Witness, 2016).

ILO, Committee of Experts on the Application of Conventions and Recommendations. *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, ILC.100/III/1A (ILO: 2011).

ILO, Committee of Experts on the Application of Conventions and Recommendations. *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Report III, Part 1A), International Labour Conference, 99th Session, 2010 (ILO: 2010).

ILO, Committee of Experts on the Application of Conventions and Recommendations. *Indigenous and tribal peoples: Observations of Peru, Indigenous and Tribal Peoples Convention, 1989 (No 169)*, ILC.98/III/1A (ILO: 2009).

Instituto de Defensa Legal. “Listado de casos patrocinados por el Área de Litigio Constitucional” (2016).

Instituto Nacional de Estadística e Informativa. *Evolución de la Pobreza Monetaria: 2009-2015* (Lima: INEI, 2015).

Justice & Corporate Accountability Project. *The “Canada Brand”: Violence and Canadian Mining Companies in Latin America* (Toronto: JCAP, 2016).

Langdon, S. “Peru’s Yanacocha Gold Mine: The IFC’s Midas Touch?” in *Profiling Problem Projects* (Berkeley, CA: Project Underground, 2003).

Martens, Jens. *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (Germany: Global Policy Forum, 2014).

Martin, Tim et al. "Tragadero Grande: Land, Human Rights, and International Standards in the Conflict Between the Chaupe Family and Minera Yanacocha", *Report of the Independent Fact Finding Mission* (Washington, DC: Resolve, 2016).

Mertins-Kirkwood, Hadrian. *A Losing Proposition: the Failure of Canadian ISDS Policy at Home and Abroad* (Ottawa: Canadian Centre for Policy Alternatives, 2015).

Moore, Jen. *In the National Interest?: Criminalization of Land and Environment Defenders in the Americas* (MiningWatch Canada, 2015).

OAS, Inter-American Commission on Human Rights. *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OROEA/Ser.L/VII.Doc.47/15 (2015).

----- . *Criminalization of the Work of Human Rights Defenders*, OROEA/Ser.L/II.Doc.49/15 (2015).

----- . *Second Report on the Situation of Human Rights in Peru*, OR OEA/Ser.L/V/II.106/Doc. 59, rev (2000).

Özkaynak, Begüm et al. *Mining conflicts around the world: Common grounds from an Environmental Justice perspective*, EJOLT Report No 7 (Environmental Justice Organisations, Liabilities and Trade, 2012).

Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. *Extractive industries and indigenous peoples*, GA, 24th Sess, UN Doc A/HRC/24/41 (2013).

Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, OHCHR UN Doc A/HRC/17/31 (2011).

Weitzner, Viviane. *Holding Extractive Companies to Account in Columbia: An evaluation of CSR instruments through the lens of Indigenous and Afro-Descendent Rights* (The North-South Institute, Proceso de Comunidades Negras, Resguardo Indígena Cañamomo Lomapieta, 2016).

Wiener, Raul & Juan Torres. *Large scale mining: Do they pay the taxes they should? The Yanacocha case* (Latin American Network on Debt, Development and Rights, 2014).

Print & visual media

Arana, Marco. "El Cerro Quilish y la Minería del Oro en Cajamarca", online: <http://cajamarca.de/mine/quilish.htm>.

Bergman, Lowell. *La maldición del oro inca* (FRONTLINE/World, 2005), YouTube, online: https://www.youtube.com/watch?v=5OdJ9eRv_LY.

Cabellos, Ernesto & Stephanie Boyd. *Choropampa: The Price of Gold* (Guarango Association, 2002).

"Cajamarca: encarcelan a juez acusado de recibir coima de 4 mil dólares", *Canal N* (18 July 2014), online: <http://canaln.pe/peru/cajamarca-encarcelan-juez-acusado-recibir-coima-4-mil-dolares-n145767>.

"Consejeros de Cajamarca pidieron plata a Yanacocha para apoyar proyecto Conga", *La Republica* (21 May 2014), online: <http://www.larepublica.pe/21-05-2014/consejeros-de-cajamarca-pidieron-plata-a-yanacocha-para-apoyar-proyecto-conga>.

EarthRights International, "Factsheet: Campos-Alvarez v Newmont Mining Corp", online: <https://www.earthrights.org/sites/default/files/documents/Factsheet-Campos-Alvarez-v-Newmont.pdf>.

The Goldman Environmental Prize, "Máxima Acuña: 2016 Goldman Prize Recipient South and Central America" (2016), online: <http://www.goldmanprize.org/recipient/maxima-acuna/>.

"Juez Titular Guhtember Pacheres Pérez al penal de Huacariz en Cajamarca" (19 July 2014), YouTube online: https://www.youtube.com/watch?v=-W9hKrF__C8.

"La intervención a Juez Titular Gutenberg Pacheres Pérez por coima" (21 July 2014), online: YouTube <https://www.youtube.com/watch?v=PCOtbyBTHZU>.

Olivera, Roxana. "I Will Never Give Up My Land", *New Internationalist* (July 2016), online: <https://newint.org/features/2016/07/01/interview-maxima-acuna/>.

Perlez, J & L Bergman. "Tangled Strands in Fight Over Peru Gold Mine" (Series: The Cost of Gold: Treasure of Yanacocha) *New York Times* (25 October 2005).

"Peru: Miners in bribery risks, Yanacocha probes case", *Latin IQ* (21 May 2014), online: <http://latin-iq.com/blog/peru-miners-in-bribery-risks-yanacocha-probes->

case/.

“Reconocen que servidumbres petroleras están sobre territorios indígenas”, *Servicios de Comunicación Intercultural*, (28 November 2016), online: <https://www.servindi.org/actualidad-opinion/28/11/2016/reconocen-que-servidumbres-petroleras-se-encuentran-sobre-territorios>.

Ruiz Molleda, Juan Carlos. “¿El sexto paquetazo normativo? La aprobación de los DL N° 1192 y N° 1210” *Instituto de Defensa Legal: Justicia Viva* (1 October 2015), online: <http://www.justiciaviva.org.pe/blog/el-sexto-paquetazo-normativo-la-aprobacion-de-los-dl-n-1191-y-n-1210/>.

------. “Ministerio de Cultura bloquea la consulta previa de las concesiones mineras e invisibiliza a los PPII en Espinar”, *Instituto de Defensa Legal: Justicia Viva*, (16 April 2015), online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1597>.

------. “Para que sirven los *amicus curiae*? TC rechaza el amicus del IDL sobre el derecho a la consulta de pueblos indígenas” (Instituto de Defensa Legal, 2010), online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=221>.

“Si, soy corrupto: El reo Pacherras aceptó recibir coima, ahora sufridos litigantes piden revisión de casos”, *El Mercurio* (21 July 2014) 2, online: <https://issuu.com/elmercurio/docs/21-07-2014>.

Stk'emlupsemc te Secwepemc Nation, Media Release, “Stk'emlupsemc te Secwepemc Nation (SSN) says No to KGHM Ajax Mine and Yes to Healthy People and Environment” (4 March 2017), online: http://miningwatch.ca/sites/default/files/2017-03-ssnajaxdecisionrelease_0.pdf;

“Todas las concesiones mineras deberán ser consultadas a las comunidades” *Servicios de Comunicación Intercultural* (24 November 2016), online: <https://www.servindi.org/actualidad-noticias/24/11/2016/todas-las-concesiones-mineras-deberan-ser-consultadas-las-comunidades>.

“10 Top Gold-producing Companies”, *Investing News Network* (20 April 2016) online: <http://investingnews.com/daily/resource-investing/precious-metals-investing/gold-investing/barrick-newmont-anglogold-goldcorp-kinross-newcrest/>.

Tsleil-Waututh Nation, Media Legal Backgrounder, “Tsleil-Waututh Nation (TWN) Legal Challenge to the National Energy Board’s (NEB) review of Kinder Morgan Trans Mountain Pipeline and Tanker Project” (2 May 2014), online: http://www.twnation.ca/en/~media/Files/Press%20Releases/TWN%20-%20NEB%20-%20Legal%20Backgrounder%20-%20CLEAN_VAN_LAW-1461360-v4.ashx

“Vladimiro Montesinos ofreciendo mina Yanacocha a través de la CIA a cambio de millones”, YouTube, online: <https://www.youtube.com/watch?v=15k3GHHVw>.

Internet sites

Environmental Justice Organization, Liabilities and Trade, “Environmental Justice Atlas”, online: <http://ejatlas.org/>.

Másquez Salvador, Álvaro & Juan Carlos Ruiz Molleda. “Gobierno aprueba norma que consagra intromisión en autonomía de Comunidades Campesinas”, *Instituto de Defensa Legal: Justicia Viva* (15 January 2015), online: <http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1526>.

McGill Research Group Investigating Canadian Mining in Latin America, “Canadian Mining in Ecologically Vulnerable Areas: South America”, online: http://micla.ca/wpcontent/uploads/2012/05/CanadianMining_ecologically_vulnerable_areas.png

Newmont Mining Company, online: <http://www.newmont.com/operations-and-projects/south-america/yanacocha-peru/overview/default.aspx>.

Observatorio de Conflictos Mineros de América Latina, “Mapa de Conflictos Mineros en América Latina”, online: <http://www.conflictosmineros.net/>.

Segunda Legislatura Ordinaria de 2000, Transcripción del Vídeo No 892 (19 May 1998), online: <http://www2.congreso.gob.pe/sicr/diariodebates/audiovideos.nsf/indice/CD180DDE013DE79805256A8E006F659A>.

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