

Foreign investment in the mining sector in Southern Peru: The Case of the *Tintaya Antapaccay* mine project

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Introduction

The case of *Antapaccay*, a mining operation in southern Peru, is a good example to illustrate how a duty to cooperate, derived from the right to development, can generate/enhance development in local communities and States involved in mining projects.

This case also shows that cooperation has been generated between different private and public, national, and international actors, at a factual level, without claiming the application of the Right to Development. This dynamic of cooperation occurs mainly at the initiative of non-governmental organizations that seek to support local populations regarding their social demands towards the mining company and the Peruvian State.

This document will first present the mining project and the various conflicts relating to it, conflicts which have affected both the communities and the mining company. In the description of the conflicts, it will be highlighted, the impact of these on the human rights of the population and some of the company's rights; and also, the impact in development understood as capability expansion or enhancement of freedoms (Sen, 2003).

Subsequently, we will analyze the actions carried out by the different actors at the national and international level to stop the conflict and try to generate an interaction between the company and the population that generates mutual benefits and development. Finally, we will develop the thesis of how to strengthen the existing cooperation between the various actors with respect to the duty to cooperate present in article 3 of the UN Declaration on the Right to Development (UNDRTD).

1. Mining and Development in Peru: Infringements of the RTD in the Antapaccay case

The concession of mining projects is considered as a source of income for the State. Likewise, it is a source of income for local communities. This is achieved through the payment made by the company for the concession, taxes, and taxes destined directly to the communities surrounding the mining project (in Peru called “canon”).

This income can be considered as generating economic development as it allows the accumulation of wealth and economic growth in Peru and in the communities. However, mining activity in Peru has also generated multiple social conflicts, more than a hundred annually. This situation also shows that economic development does not necessarily mean Development from a more holistic version as recognized in the UNDRTD Article1:

“[...] every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized. [...] also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

Precisely, the *Antapaccay* case shows how some of the rights recognized in UNDRTD have not been complied, and the remediation of the rights was achieved through cooperation, specifically through private actors. This cooperation has lessened the impact of these breaches.

Cooperation for the matter of this document is understood in a wider meaning, the duty to cooperate has been Recognized in article 3 of the UNDRTD:

“States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.”

Despite the focus on States, we consider that cooperation, in the sense of UNDRTD, can also be achieved by non-state actors, in other words, the State must allow in some cases non-state actors to cooperate to achieve the duty to cooperate in the sense of the UNDRTD. In other words, the State must not impede the cooperation between non-State actors; and must also cooperate with them to foster development. Because the cooperation between non-State actors exist and will continue to increase due to globalization.

The content of the duty of cooperate has certainly born in Public International Law and involved various of the legal international systems from the UN Charter to the Marrakech Agreement, UN Human Rights treaties and Environmental Agreements. Nowadays is also possible to argue that is part of International Customary Law (Wolfrum, 2020). But, as before pointed, it has also being recognized that the duty to cooperate also involve private actors:

“The implementation of the 2030 Agenda and all other actions in the development sphere should be guided by the right to development and its mandate for international cooperation, mutual accountability and shared responsibilities by all organs of society, including the private sector. International solidarity, cooperation, and capacity building are essential to building a just, secure and peaceful world for all.” (UNOHCHR, 2016).

The case of Antapaccay shows how the different actors related to the conflicts have cooperate in order to reach solutions that could allow the mine project to generate development.

Antapaccay mining project

The Mining Project is located in Espinar, Cusco, in the southern Andean region of Peru, in the so called “Southern Corridor” where various mining companies also operate. The mine has been exploited for more than 35 years, since the 1980’s, currently is managed by the Glencore company, that acquired the Xstrata company (previous owner of the concession), at its time, Xstrata acquired the concession from BHP Billinton. [quote] The mine has mineral to be exploited for 20 more years (Antapaccay, 2021).

Currently, the mining project has started its mine closure plan, it has advanced 81% of the rehabilitation of the soil where the mine had operated (ca 567 Ha. Have been covered with herbage) (Antapaccay, 2021). There is an interest from the company to exploit other deposits in the region, but protest impeded it, the protests of the residents of 13 communities who accuse the company of polluting their waters and soils, exposing them to toxic metals such as cadmium and arsenic.

However, the problems of the communities with the company do not refer only to contamination, the history of conflicts between residents and the companies that hold the concession is as old as the exploitation of the mine, and this has led to several accusations of violations of human rights that are also present in other conflicts in the “Southern corridor” with other extractive companies. The affection to Human Rights are presented in the following paragraphs

Allegations of excessive use of force, harassment of human rights defenders, and death of civilians

Several protests against the mining project occurred during the time of the exploitation of it, however, the most tragic one occurred in May 2012, when Xstrata had the concession. The protest begun at the end of 2011, the protesters forcibly took land from the mining company, the conflict escalated with large demonstrations, and in May 2011, the repression by the police against the demonstrators caused the death of 2 people, due to police shooting (Daniel Alfredo Condori Vilca vs. Xstrata Plc & Compania Minera Atapaccay SA, in the London Courts) (GESTION, 2017).

Given the size of the demonstrations, police agents from the capital and other provinces mobilized to the conflict zone, installing their operations center within the mining company. This was a controversial fact, because the Police used a private facility to carry out its activities, also as a center for detention, situation that can configurate kidnaping. The last was alleged by the several community leaders that were detained and taken inside the company's facilities, where the police had installed their base of operations. The community leaders also claimed to have been tortured inside the facilities of the company.

In general, the involvement of the Police in mining conflicts generates controversy because many police officers during their off-hours are hired as private security by enterprises, as mining companies. Also, there are institutional agreements between the National Police and mining companies for their protection. According to the National Police, these agreements are institutional, and the company does not give direct orders to the police officers; however, in the 2012 demonstrations, the protesters denounced that the company gave direct orders to shoot people.

Aside from the Police other organs of the State questioned of exercising intimidation against the population are the Prosecutor Office and judges, who are accused of applying excessive detention measures against the leaders of the protests. For example, obliging the defendants to be detained during the process, in some cases even for 3 months, without having a conviction; this preventive detention, which is normally used for very serious cases, was applied to the leaders of the protests.

To seek for relief for its rights related to the alleged excessive use of force (kidnapping, prolonged detention, and death of two persons), with the support of international NGOs, the protesters sue the company in foreign courts. The case was prosecuted in London courts for private law, where Xstrata had its headquarters. In the process, the alleged excesses committed by the state and the connection with the company have been made visible, however, there was no compensation, as it was considered that the right to request for compensation of those affected by the mistreatment and kidnapping in the 2012 rallies had prescribed.

Right to a clean environment

The populations surrounding the Antapaccay mining project have been concerned about the quality of the water and soils since the company's mineral extraction began. Since 2013 they have been demanding studies to be carried out by the Ministry of Health to analyze the amount of heavy metals in water and soils; and to determine if the origin of this contamination is the mining activity. Likewise, they request that the company take charge of the medical treatment of people who have become ill from these metals. From the side of the company the minerals on the rivers and soils are a natural phenomenon due of the concentration of metals in the region (from an informal conversation with some workers of the enterprise).

Despite the claims of the communities, that lead to a continued mistrust and demonstrations against the company, the Ministry of Health did not carry out studies until 2021 because they were forced by a judicial order. In the meantime, in 2010, an NGO carried out a study finding that 9 of 506 people evaluated showed contamination by heavy metals. Then in 2020, another independent study by *Amnesty International* and *Human Rights Sans Frontiers* showed that 78% of the population had heavy metals in their blood; It was also shown that out of 197 samples from water sources, 131 had high levels of metals. [quote]

Other complaints of the population related to the environment, are about the lack of water. The communities claim that they suffer from water shortages that are due to the more than 600 holes in the soil to get water that the company has drilled. They claim for compensation for this lack of water.

Transparency and mistrust in the communications

Another problem that affects the rights of the population is the lack of transparency in the relationship between the actors. The lack of transparency has a detrimental effect on communication between the parties involved and is a catalyst for conflicts.

Communication between the communities and the companies is regulated by law, it is also a duty to consult the communities surrounding the mining concession about their objections regarding the project. These obligations are also agreed upon in the concession contracts. But in the day-to-day relations the communications are limited by distrust among the parties, related to the lack of transparency, but also because of structural racist relations. These limitations occur in the relations communities-enterprise, enterprise-State, State-communities, and between these 3 actors and the public opinion.

Additionally, in conflict situations, the legal obligation is *de facto* suspended, driving communication between the residents and the company indirect, using an intermediary that is normally the State. However, local populations also distrust the State for not being able to solve their problems or respond to their requests.

As an example of the later, regarding the contamination of water and soils, the communities asked the State to analyze the quality of the water, without response. In the face of the government's inaction, the communities had to sue the state in 2014, after 7 years, in March 2021, it was possible to force the Ministry of Health to carry out water studies. The level of distrust of the communities increased after a first Resolution of the Judiciary, that forced it to carry out the studies in the water, the Ministry of Health instead of fulfilling with the Resolution decide to appeal the judgement of first instance; this delayed the process. To avoid this situation in the future, in May 2021 the Congress of the Republic enacted a law on prevention, mitigation, and treatment of the health of persons affected by heavy metals. [quote]

The relation between the company and the communities is also distrustful, from the side of the communities, the company contributes with the less than is due. From the side of the company there is always more and more demands, and the communities are never satisfied with the agreements achieved.

This tense relationship, due to mutual mistrust and the limited action of the State may have led to the fact that the communities refused new mining operations in the area, despite the possibility to have new income. Specifically, of all the communities, two opposed and initiated a legal claim to have their position respected.

Institutions not prepared to use new wealth for development projects

One area where the duty to cooperate could be very useful is in helping communities and local governments deal with new revenues. Typically, in poor regions or localities that receive new income, it has been shown that limitations of local political organizations to deal with the situation to have a great and sudden increase of income generates limited economic growth (Parson, 1983).

This is evidenced, for example, at the time of granting permits for public works. A case of this occurred in Antapaccay when the company offered to build a water plant for the towns surrounding the project, this would allow more access to water (currently, the communities only have 3 hours of water a day). [quote] The water plant project of almost 30 million USD is paralyzed because the local government has not initiated the procedure to expropriate the land where the water plant would be built. In other cases,

construction takes longer than it should, also due to bureaucratic procedures. This generates a vicious circle: the government does not initiate public works because it does not have resources, but neither does allow private parties to build them due to their limited management procedures. [quote]

In cases like these, state-to-state cooperation would be beneficial. Developed countries that already had dealt with new wealth can advise developing countries to manage this situation, to share good experiences can enhance the abilities to these regions to take advantages of the new revenues. Similarly, the cooperation of international civil society (communities-to-communities) can help remedy some other social problems, as the differences generated by those persons that get money from the mine and those that does not.

COVID-19 related problems

COVID-19 and the measures to combat this pandemic have also generated tensions between the different actors in the Antapaccay case. In general, the fact that the Peruvian government, despite the general quarantine allowed to operate the mines generated criticism among other economic sectors that could not operate at the same time and even had less concentration of persons as mining camps. This also demonstrated the importance of mining for the government of Peru, or the power of mining lobbies.

In the relation communities-company, the community members ask that the mine give each of the residents directly an amount of money to face COVID-19 pandemic. The money they want to be used is that of the "Framework Agreement", but the resources of this agreement were agreed to be used for social projects in health and education (after a process of consultation and feasibility). The amount of the "Framework Agreement" is one of the highest amounts if we compare it with other mining projects and amounts to a 3% of the annual earnings of the mining company, before taxes. The request of the money by the communities and the company's denial is one of the most important current conflicts to the date regarding COVID-19. [quote]

Another problem that has arisen due to COVID-19 is the claim of workers regarding the measures adopted by the company to protect them from the pandemic. One of the claims is that the workers feel insecure to get infected in the houses in the mining camps, small cities for workers located close to the mine pit, some of them should prefer to work remotely. Other claims are relating to the benefits to live in the mining camps, before the pandemic some of the houses of the mining camps could be used for families of the workers, now due to the pandemic and the limitation of persons in the mining camps, families must be moved to other cities, the workers complaint for the separation and the new costs of housing that they are assuming.

Those are some of the problems that affect the rights of the actors involved in the conflicts, these conflicts are common to other mining projects in Peru, for instance the similar problems of pollution, alleged violence and labor rights are shared with the mining project *Las Bambas*, also in the “Southern Corridor”. Also pollution and labor rights are key demands in the case of Shougang mining project, both of these cases where also analyzed in the previous phase of this study case.

2. Different actors and their contribution to the conflict

Communities and the company

The distrust between the mining company and local communities can be traced historically in the relation between both the parties, there are actions that show the tense relations that arose from the start of the exploitation of the mine and that date before the acquisition of the Antapaccay project by Glencore.

Before the start of the operations, the mining company negotiates with the different communities individually, not in group. [quote] This is a common practice in Peru, as the companies have the concession for the subsoil, but must acquire the land over it to avoid an expropriation of the communities’ lands by the State. The same situation happened in the in the case of *Las Bambas*, which was also operated by Xstrata, the

previous owner of Antapaccay)¹. Depending on each community's bargaining power, some receive more benefits than others. When the communities who have received less learn about these differences, they protest and try – sometimes even by force – to gain the better benefit.

To these problems between the communities directly related to the mining project (10 communities), it is important to add the problems with the former communities with those communities that are not directly affected by the project (other 69 communities in Espinar)– for example, because no extraction is performed on their lands, or they are not located within the area of impact. The mining project do not have contractual obligations or directly legal obligations towards these populations; but these other communities wish also to obtain certain benefits anyhow and so they protest against the company.

There are also problems inside the communities that receive benefits from the mining company. For instance, there are cases when their own leaders act corruptly and steal the communities' funds. These corrupt leaders fail to distribute the money to the community members or to implement planned projects. They may even tell the community that the mining company never paid the money in the first place (Wiener, 2021). There is no record that this has happened to the communities in the Antapaccay area of influence.

In some cases, the benefits are negotiated by one set of community leaders, but when new community leaders take office, they want to renegotiate with the company. The company, however, sees the agreements as a done deal and has no interest in changing them.

¹ In the case of Las Bambas, see: Leonidas Wiener. **Problemas de gobernanza en una actividad extractiva: El caso Las Bambas**". Tesis para optar el grado de Magíster en Ciencia Política y Gobierno. Pontificia Universidad Católica del Perú, 2017.

The Peruvian State

The zone in which the *Antapaccay* mining project is located is an extremely poor area where the State has failed to provide public services. Indeed, the government has little presence at all. Upon encountering an actor with the ability to foster development in the region, some communities expect the mining company to solve all their problems. They believe that “because it has money, it should pay for everything” (Wiener, 2021). Peru’s central government seems to have the same attitude as the communities. Rather than taking advantage of the company’s presence to improve or provide public services, it reinforces the idea that the mining company should take care of all these services. This attitude is also reflected in the discourse of many politicians.

The Peruvian State also plays a role in conflict generation and management at the local and regional levels. Conflicts can be caused by a lack of knowledge regarding how to manage the money or handle the new revenue that comes from mining. These local or regional governments have no development plan, often investing in projects such as city beautification works or athletic facilities, which are not as pressing as access to water or health care services. The communities thus continue to feel closer to the company, viewing it as the actor to whom they must address their complaints and development requests. The foregoing is also caused by a lack of coordinated development plans among the different levels of government.

The government also plays a role in conflict management, as the party responsible for handling eruptions of violence using the forces of law and order. This use of force often comes with the alleged excesses mentioned above. The various governments have invested in dispute prevention, also successive Ministers have intervened in the conflicts. Also, the Peruvian Ombudsman has an area in social conflicts and has mediated in various conflicts. However, little or nothing has been done to prevent these violent flare-ups. At regional and local levels, there is no efficient conflict prevention plan, and – as previously mentioned – there is not an efficient development plan through which mining funds can be used to meet basic needs.

Other improvements made by the Peruvian State are National Human Rights Plan and has a Business and Human Rights Plan, regarding the later, Peru is one of the five first States in the region to have one. Also, according to Antapaccay, in Peru the mine sector is the most regulated and the most supervised and the most heavily audited (Antapaccay

2021). It is expected that in the futures these improvements can reduce the conflictivity and allow development.

Likewise, the Judiciary Power has also being subject of criticism, because the demonstrators of the 2012 manifestation claim that the judges where not objective in validate the detentions of the demonstrators. Also, the judiciary is accused to be slow to respond when community leaders engage in acts of corruption, and communities are left with few options for recovering their money (Wiener, 2021)

As before mentioned, these problems are rooted in the behavior of multiple actors. There is no single responsible party. However, from the International Law point of view, the responsibility differs depending on the obligations of each actor. Specifically, the state has more international and domestic obligations to all the actors involved: obligations to the community within a framework of human rights and the right to development; and obligations to the mining company within the framework of international investment law (Mandelbaum & Loutit :350) These rights will be examined in the following section.

As will be discussed in further detail in Section 3, the State must play a more active role in monitoring these spaces of conflict generation, which are in turn a good opportunity for economic growth and development if the revenue is used transparently. If the State is unable to do this, it can and should resort to international cooperation as part of its duty to cooperate for the RTD. Current governance requires a different but committed approach by the State. Nevertheless, other actors have domestic law obligations based in International Law and International standards.

NGOs, home State of the company, public opinion, and other companies.

The roles of the NGOs and of the State from where the enterprise comes from (home State), will analyzed in section 3; as those were actors with the greatest participation in cooperation activities. It is important to remember thar it is possible to find cases where home states have extraterritorial responsibility for the violations of human rights of tits enterprises (Berkes, 2020).

Regarding public opinion, the opinions of Peruvians regarding the social conflicts between mines and communities, and especially in the case of Antapaccay is divided. Most of the rural population considers that the mining companies must fulfill its obligations regarding the environment, and human rights, including labor rights; but are against “extreme” positions as those that are against the mining projects or the protest that can lead to the situation where the mining investment abandons Peru.

The law of third States have also influence in the conflicts in the region or can be the solution to the conflicts. Regarding the first situation, the influence in the conflicts, the tense relations in Las Bambas mine, close to Antapaccay, in the Southern Corridor, started because of the decision to divide the Las Bambas and Antapaccay projects. The two projects belong to Xstrata, now Glencore; but Glencore decided to sell Las Bambas because, in China an investigation on monopoly start against Glencore. In other words for the Chinese law Glencore was a monopoly. To avoid Chinese regulations, Glencore sold Las Bambas to the Chinese company MMG. As result, the joint projects of the two projects as built a mineral pipeline were sidelined, MMG start to use the road of the community and this use and the pollution generated by the trucks are the main reasons for the conflicts in Las Bambas.

But also other companies can have a positive impact reducing conflicts thru cooperation, especially the companies connected in the value chain of the cooper generated by Glencore. The exports of Glencore are raw materials, the cooper produced in Peru is exported as a concentrate, the cooper is to processed in Peru but in smelters principally in Canada and China². The countries that process copper concentrate can have a positive impact if they ask a certificate of sustainable cooper, for instance as the certificate of the Better Gold initiative of Switzerland (see below). Antapaccay also exports some amounts of gold.

At this point is important to mark that, at the time of the writing of this document, the prices of copper and those of the Smelters rose worldwide (Reuters, 2020) (Earthi, 2021). As Peru export just the raw copper it lost a great part of the earnings of the smelting, Peru has only five small smelters, but even Chile that is a neighbor country is not use as a smelting destiny, perhaps due to the aging of its smelters (Toro et al, 2021), which leaves the smelting processes to China and Canada, the biggest producers of

² Informal discussion with a Peruvian mine Engineer and mining specialist.

refined copper (Statista, 2021), reinforcing the idea that the developing countries are dependent of the developed countries.

In the case of Canada, Peru and Canada have agreed in their Free Trade Agreement to have a Committee on Cooperation related to trade, in the framework of this Committee, initiatives as the certificate of sustainability or other initiatives to involve other enterprises in the value chain of copper as smelters can be discussed. Under the Peru-Canada Free Trade Agreement there is also a Committee on Environment, but none of the two committees envisages the participation of civil society, as for instance does the Committee of Labor, but the provisions are not as developed as the article 282 of the European Union- Peru FTA. The agreement with China has also a Committee for cooperation at a diplomatic level.

3. Reaching solutions involving the cooperation among the different actors

To face the problems mentioned above in Section 1, NGOs sought solutions and remedies in Peru, but also at the domestic level of the State of origin of the company, and in international organizations. For instance, regarding the problem of the alleged undue detention of protesters in 2012, when community leaders were detained at the mining company's premises, local NGOs assumed the legal defense of the detainees, managing to free the detainees from all criminal charges. Likewise, with the support of an international NGO, they managed to bring the case before the courts in London, where the mining company was based at that time (The Law Society Gazette, 2016).

In this case, 22 people sued Xstrata for 5 million GBP before London courts. The company was charged with the death of two people, for handing over vehicles and equipment to the Police and inciting them to attack the protesters. The case concluded in 2018, the final judgement concluded that: “In the result, the Claimants' claims under Peruvian law are barred by extinctive prescription” (Vilca & Ors v Xstrata Ltd & Anor [2018] EWHC 27 (QB) (19 January 2018) Conclusion x)).

In addition to taking the case before the courts at the headquarters of the company, international NGOs as *FIDH – International Human Rights Federation* and *Amnesty International* helped to bring the case before International Organizations. As a result, the *Special Rapporteur on the situation of human rights defenders* visited Peru (January 21st and February 3rd of 2020), after his visit he included in his report a direct reference to the events of 2012:

“I am also concerned about the misuse of the justice system to harass and silence defenders in the country, particularly those working to defend the environment, such as Oscar Mollohuanca Cruz and others in Cusco”. [He also made mention to the use of force by] “security guards or police officers employed by mining companies” (OHCHR, 2020).

The case was also brought before the InterAmerican Commission on Human Rights, which in 2018 analyzed the case of the irregular use of force by the Peruvian police when protecting private mining companies that explore and exploit natural resources. It is not the first time that the Inter-American Commission has seen a Peruvian case related to extractive industries, previously it did so regarding a case of environmental contamination affecting human rights³.

The resource to the Ombudsman of the home State of the investor was other option explored by international NGOs, seeking to protect the rights of the communities; along with using the domestic courts. In 2000, when Antapaccay belonged to the Australian company BHPB, a conflict arose between the company and the communities, which was fueled “due to an arrogant and discriminatory treatment against the rural population by mining workers” (Zambrano, 2009: 28).

In this scenario of lack of trust, to generate dialogue, the Peruvian NGO *Cooperación* jointly with *Oxfam America*, the *Canadian Environmental Law and Association* and *Oxfam Community Aid Abroad* of Australia, managed to organize a meeting with the Australian Ombudsman in Lima. This meeting allowed the parties in conflict to negotiate again, end the conflict, re-establish a dialogue and achieve fruitful results (Zambrano, 2009: 29).

³ For instance, 2 cases are PETICIÓN 504/03 (CIDH, 2004), and the case of La Oroya (2007) where were enacted preliminary measures to protect 79 persons affected by heavy metals contamination.

It is also important to highlight the participation of the home State of the investor, currently Switzerland. Among the Swiss Cooperation cooperation projects in Peru, one to highlight in mining is the Swiss-Better-Gold Initiative⁴ directed to artisanal small-scale mining communities. Although it is not related to the extraction of copper or a large company like Glencore, it is an interesting initiative, carried out by public-private association, that since 2013 achieved great results in environmental and social development of artisanal miners. This achievement is based on (1) generate transparency in the value chain and incentives for socially responsible mineral consumption, and (2) involve local producers in the value chain. This recipe could be replicated at the large company level as in the Antapaccay case, but it needs the partnership of the State and privates (NGO, SMEs and the Company).

In its Cooperation Program 2021-2024, the Swiss Cooperation does not specifically include support to solve social or environmental conflicts, but it does consider as priorities (“thematic priority 2”) to promote SMEs -the actual cases include agro-industrial business (SECO, 2021: 15). These programs could be articulated with the communities in the areas of influence of Antapaccay, so that the community members can strengthen their business abilities to have sustainable resources after the mine finish its operations. These programs can also be articulate with the “Framework Agreement” projects, for instance, providing not only basic education, but also technical education and even the creation of a Technical University for the region.

In addition to the home State of the investment, which would be the formal nationality of the company, it is also important to consider the State of the company's shareholders as a partner to cooperate, at governmental o private level. As an example, it is noteworthy that representatives of the communities meet with the shareholders of the company, specifically with a Dutch pension fund that have shares in the company (Wiener, 2021). The meeting helped to connect the persons involved in the company scheme, so they can see the impact that their actions have in others’ lives. This also helps to generate democracy in this new global governance, where the actions of citizens have impact in other countries, and new schemes of accountability are necessary. This accountability will be only possible under the cooperation of the States that have authority over their citizens [quote].

⁴ That seeks to improve “working and living conditions in artisanal small-scale mining communities, and [facilitate] the creation of responsible supply chains from ASM operations to the Swiss market.” <https://www.swissbettergoldassociation.ch/>

Finally, the company has initiatives to generate development⁵. Antapaccay is one of the few companies in Peru that delivers 3% of the profits (before taxes) to the communities. The distribution of the revenue is done through development projects, the money is not directly allocated to the members of the communities but they participate to decide the projects to implement, according to the “Framework Agreement” (that was negotiated with all the communities in the area of influence). Thanks to this agreement, important works in health, education and agricultural development have been developed. However, the Framework Agreement has also been the subject of several conflicts, as the community members have asked to change it to obtain greater benefits.

The company has an important economic impact in Espinar, between 2013 and 2020 it has paid 688’619,547 USD in taxes. The company has also contributed in development projects, according to the company it has enterprise has five mechanisms to generate benefits to the region. The first one is the before mentioned “Framework Agreement”, that since 2004 allowed to implement 1058 development projects for the amount of around 150 millions USD (for 2021 the amount in projects is 9.5 million USD). A second mechanism to generate benefits are direct agreements with the communities in the area of influence of the mine, to support them, in 2020 were spend 7.2 million USD in development projects. A third mechanism is the “taxes for projects” (instead of paying taxes, public projects are executed for the amount of the taxes), these projects are coordinated with the national, regional and local governments, 8 million USD have been invested in 4 projects. The other two mechanisms are local employment (the company generates 5000 jobs, 2000 locals have jobs in the mine company) and contract with local companies as providers (the company work with 50 local enterprises that in 2020 were contracted for around 40 million USD) (Antapaccay, 2021).

The development projects of the company are centered in education (capacity building for students and teachers), health (building the Hospital of Espinar and provide equipment for it); support local producers (building of a plant for diary products and for textiles); water and irrigation facilities; and capacity building for workers and the

⁵ There was not a formal response from the Antapaccay Mining Company for the preparation of this document. A group of questions were sent to the Company, the last communication with the company was on November 17th offering to send the answer. This document was presented on November 30, 2021. Most of the information regarding the Company was obtained from a Conference that was given by a representative of the company in November 23.

provider enterprises from the region. The company has also contribute to reduce the impact of COVID-19 in the Region, expending ca. 2 million USD (Antapaccay, 2021).

The company has also an ISO 14001 certificate in environmental management and follows the principles of the International Council on Mining and Metals that are aligned to de UN SDGs⁶. Finally, according to the company, the growth in the Human Development Index (HDI) of Espinar between 2003 and 2019, growing from 0.2100 to ca. 0.4800 is due to the mining activities (Antapaccay, 2021), an interesting fact is that in the capital of Espinar the growth is bigger than in the rural areas (more affected by the mining direct activities).

Nevertheless the efforts of the Antapaccay company, the tensions with the communities still exist, with possibilities to violent conducts. It is also interesting to hear that for the company, the actors involved are only: the State, the communities and the enterprise (Antapaccay, 2021), leaving aside other actors as third companies or NGOs.

Shaping multi-level cooperation to enhance development

The case of Antapaccay shows how several actors, mainly private, have been cooperating in an uncoordinated manner to Human Rights realization and to generate their own views of development. This cooperation has been achieved using globalization tools, including new forms of communication that allow different actors to interconnect internationally (Jimenez, 2011). To generate development the role of the State to coordinate and regulate this non-governmental cooperation is important. The State has an advantage over private actors to generate development, since it has the power to enforce the decisions made by citizens in a democratic process.

Despite the fact that Globalization affect the State reducing its power and influence (Jimenez, 2011). If the Peruvian State fulfill the duty to cooperate, the problems presented in the case Antapaccay could be solved, generating development for the State itself and the communities.

⁶ This was commented informally by one employee of the company. The ICMM principles include the following: Ethical Business, Human Rights, Health and Safety, Environmental Performance, Responsible Production; Social Performance; Stakeholder engagement, among others. <https://www.icmm.com/en-gb/about-us/member-requirements/mining-principles>

The case of Antapaccay also shows that despite all the efforts by the company, the State and the NGOs, the conflict is still present and can turn into a violent one. The main cause of the conflicts is the mistrust between the company and the community relating the “Framework Agreement” of 2003, even if it is the most beneficial agreement that any company has given to a community, the communities seek continuously to renegotiate it.

Why is the agreement not respected? The answer, from the side of the communities, is that they consider that they have been deceived by the company (Llatas, 2021); and that the company has not given them the deal they deserve, that the company is making a huge benefit and is obliged to share it with them

This distrust is based on a prejudice of the communities: that the companies believe that they look at them as "inferiors", so they can deceive the community members (Banda, 2018:60). The background of this prejudice is racism, both parties of the conflict do not consider their selves as equal (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2019).

The racism that exists in Peru is difficult to change, it generates that both parties are always on the defensive; and also generates paternalistic positions towards the members of the community (Zambrano, 2021). In this unbalanced relationship the State has a major role to play, as an impartial actor that must level the field. This role is also compulsory, as it must fulfill its international obligations to respect the rule of law and human rights in its territory, such as: The right to a healthy environment, right to health, right to integrity, right to water, the right to food, the right to work, among others violated because of the social conflicts.

These obligations are juridically enforceable, so the State must consider the impacts the resolutions of international courts and International Human Rights Organizations in its sovereign decision-making capacity. Peruvian internal regulations is based on the “Constitutional block” a legal interpretation of Human Rights that must take into account International Human Rights Law at moment of apply the Constitution. In this sense it also recognizes that the resolutions of Human Rights bodies, such as the judgments of the Inter-American Court of Human Rights, are compulsory to Peru.

These resolutions also have an interpretative function of the Constitution, in cases that did not involve Peru (Landa, 2018).

The Peruvian State has been sued on multiple occasions before the Commission and the Inter-American Court of Human Rights, also before the different Human Rights Committees of the UN human rights agreements. It has also been sued before the ICSID, in all cases he has complied with international sentences and obligations. The question that arises is why there are still cases of conflict and not yet achieved in all cases to generate development in the mining areas.

In the same way, the Peruvian State is aware of the new governance and the role that multinational companies play in it. Although it is not a State that must supervise the actions of its companies abroad, it must supervise the actions of foreign companies in its territory. This is based on Human Rights obligations incorporated in international agreements that Peru has ratified, and the public policies adopted. On this last point, Peru has adopted its National Human Rights Plan and has a Business and Human Rights Plan, which clearly includes Ruggie's principles⁷.

The Peruvian State has also been working to reduce the conflict related to investments by extractive companies, with different approaches to take advantage of the high prices of raw materials, with a legitimate interest in generating development. This work has been carried out by the Executive branch and by regional and local governments, but also by independent bodies such as the Ombudsman. Again, despite the almost 20 years of uninterrupted work by the State to try to prevent conflicts, the question remains: why conflict continues to exist and this scale at violent levels?

In the first place, conflict is something natural, it will persist as it does when two groups with opposing interests coexist. It is even necessary that there is a difference of positions that is manifested in attempts to show who has more force, to generate a balance of power. But is important that the tension must be supervised by the State, to not surpass limits, the limits of the human rights.

⁷ Decreto Supremo que aprueba el Plan Nacional de Acción sobre Empresas y Derechos Humanos 2021-2025 **Decreto Supremo N° 009-2021-JuS**. Encated in June 11th, 2021.

Second, conflicts do not have to be violent, and violence can be prevented, it is also an obligation of the State to prevent it and reduce its negative effects. [quote] At this point we must try to answer the question posed previously: why with a regulatory framework, public policies, institutions, and even international cooperation at the level of non-state actors, there continues to be violent social conflict in the Antapaccay case.

For Zambrano, the answer seems to be racism, which can manifest itself as exclusion but also as paternalism. Regarding exclusion, racism in Peru has very particular characteristics. Although it is related to physical characteristics, racism is enhanced by access to economic resources: people with certain physical characteristics will be more discriminated if they are poor (and usually poor people belong to special protection groups: women, disabled, LGTBI, communities native and indigenous peoples). The peculiarity about the Peruvian case is that the discussion on racism is seen as taboo and people sought to avoid it, this attempt to make the debate invisible means that the problem cannot be overcome (Zambrano, 2021).

The effects of having racism as invisible in public debates is that it is not considered within the governmental strategies to seek solutions to social conflicts (Zambrano, 2021). This can be seen both in the actions of the ministries involved (Ministries of Health, Energy and Mines, Labor) and the Peruvian Ombudsman Office; but also, at the Judiciary Power and the Congress.

Also, at the level of the relationship between the parties in conflict, paternalism can be present in the NGOs that support the communities or also in the company when negotiating or managing the fund of the “Framework Agreement”. For example, to consider that only the projects with a solid technical support will be implemented, this could be understood as an expression of the mistrusting in the communities’ persons capacity to decide what is good for themselves, not considering the wills, needs and customs of the population.

An example of the last happened in Fuerabamba, a community under the influence of the Las Bambas project, other mine located close to Antapaccay. In this project a new town was created following “occidental standards” this town and the houses was well received by the young population, but not by the eldest that were used to have a relation to the land, to cultivate it, and in only a house they did not found that plenitude, as a

result, the average of alcoholism in elder population increased in Fuerabamba (Wiener, 2021).

While it is true that people, regardless of their background may have problems when becoming “new rich”, a paternalistic response will not necessarily generate a solution that will be sustainable at the long term. Also, a paternalistic approach could only reinforce the idea that both parties in the relation are not equal, it does not generate an egalitarian relationship between the parties that can increase trust and equality.

In the problems of the Antapaccay case, paternalism can also have some other effects. For instance, this approach does not effectively attack corruption problems within communities, if prejudices are added to paternalistic approaches, it is possible to consider that “corruption does not exist” in Andean communities, because they are good people, or that their communitarian cultural view is not affected by corruption, which is proved to be false and must be prevented. Also, paternalistic views have served to criticize the communities when they hire advisers for demonstrations, as is considered that the communities are manipulated by “occidentals” (NGOs or other communities with experience in protests).

Paternalism can also be a tool to analyze the fear to investment arbitration. The Peruvian press has sold the idea that if Peru is sued before an international tribunal it will lose the trial, because it has weak and corrupt institutions, as a biased conclusion it is not good to affect the foreign investors. These ideas are still present, even though Peru has won almost 90% of the processes in which it has been involved in ICSID. One cases that has been lost by Peru, involved Bear Creek mining company, Peru was condemned to pay a compensation of 24 million dollars to the company. This idea to do not affect the foreign investors is very common in Peruvian press, and also in public opinion.

4. Final remarks

Globalization allows different non-state actors, communities directly, or with the help of NGOs, to connect with other non-state actors in the company headquarters country to seek solutions to their demands. This has been achieved by addressing the shareholders, the Judiciary or the Ombudsman of the home State of the investor. It is undeniable that globalization allows actors to interconnect with others from other countries with which they share the same interests.

The Peruvian State must adapt to this new form of governance. Current governance requires a different but committed intervention from the State. Governance should no longer be analyzed at the local level, but also consider its global aspect to have a development strategy.

Responsibility in conflicts must be in accordance with the obligations of each actor. The actor with the greatest obligations is the State; as it has the obligation to be an arbitrator in the relationship between private parties, avoiding conflicts between the parties, and preventing them. Otherwise, it could be the violation of international obligations of the State as Human Rights.

The Peruvian government must implement measures that attack discrimination in the relations between actors in social conflicts. As well, it needs to implement policies to openly discuss the issue of racism and empower all actors to achieve them. If it cannot do so, it should request for international cooperation, to achieve this goal. Mainly the State-to-State cooperation can start with the home State of foreign investment and the home State of the investment shareholders.

To do the previous, it is possible to replicate what NGOs have already been doing, that is, building bridges across borders. The State can take advantage of international cooperation for the following:

1. Achieve dialogues between communities, affected by mining projects, from developing and developed countries, to exchange successful experiences.
2. Build capacities its officials with successful experiences from other States in which discrimination problems have been overcome, and it has been possible to take advantage of mining projects to generate development. Especially at the local government level.
3. Generate constant and effective communication channels between local authorities and central governments so that a long-term development plan can be created, in which mining resources can be used.
4. Have an anti-discrimination policy. The figure of an Anti-racism Officers in companies and governments can be implemented, replicating the figure of the Compliance Officer that exists in the Peruvian companies nowadays.
5. Continue with its policies to prevent conflicts and implement its Plan for the respect of Human Rights by enterprises.

As the State is the center of these obligations and the actor with most capabilities to act to solve problems as the ones studied in the Antapaccay case, an international obligation to cooperate will help it to enhance its options to generate development. Also because the diversity of actors involved in the conflicts, the solution requires a more general approach than those of Human Rights or international obligations, but a solution that can articulate this other obligations. In this sense the Duty to Cooperate must consider these variety of cooperations.

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