

NO MORE Conga or Bagua

Signs that the social contract governing property in Peru is deteriorating: Strikes or delays in Tambogrande, Inambari, Cerro Quilish, Tia Maria, Majaz, Santa Ana, Toquepala expansion, Bayóvar expansion, La Granja, Pakitzapango, Corani, El Galeno, Hilarion, Invicta, Quellaveco, Marcobre, Quechua, Pampa del Pongo, Huaquira, Shahuindo, Rondoni, Cuajone expansion. The list goes on.

It is not just a mining **battle**

The industrial revolution has arrived in rural Peru. Armed with the kind of unassailable titles that make raising capital easy, big mining companies have installed themselves in remote areas of the Amazon and Andes where the local people are not likely to have the same access to the rights that these companies have. This is not a problem created by investors but by a State that has left the poor without the indispensable legal tools for capitalizing on the benefits of the global economy and living side by side with major corporations.

What follows are some preliminary thoughts on how to solve this problem, including an initial proposal to integrate those rural Peruvians who have been excluded from the formal economy and give them the opportunity to become prosperous. There is no need to repeat the merciless wars that we Peruvians faced in the 1980's and 90's just because the entire country was not modernized and too many of us had simply forgotten about rural Peru.

ALL OR NOTHING is not a solution



The President of Peru has a mandate from all Peruvians – over and above any local authority or passion – to defend the law, the country's word, and its reputation in order to keep us in the international financial system so that Peru can participate in the division of labor at a global level and add value to the production of all Peruvians. We must support him.

The President of the Cajamarca region must defend his constituency and demand equal opportunity for all and a clean environment. We share his indignation: The central government has never given the Cajamarquinos or many other Peruvians the same property and organizational rights that it gives to mining companies so that they can extract wealth and capital from the land; nor has the government of Peru made an effort to adequately control the pollution that these companies sometimes cause.

What the Cajamarca president Mr. Santos does not have a right to do is forcefully impose a single option on all Peruvians – “No to the Conga mining project” (“Conga no va”) – as if Peru were a communist country. Nor can he proclaim this knowing that there are many alternatives that would allow discriminated Peruvians to access wealth while allowing investors to stay. Worse still, Mr. Santos aims to spread his anti-mining model throughout the country.

So that the Head of State and the Regional President can fulfill their duties responsibly, we offer here a preliminary proposal for resolving the Conga controversy.

CONGA



Leveling upwards

"I'm William. I developed a 140,000 m² plot worth \$ 700,000 in Independence, North Lima, and turned it into a shopping center that employs 7,000 employees and sells \$ 400 million a year. Since the neighboring businesses and properties were formalized, it was easy for us to organize our businesses and access credit and capital."



Leveling downwards

"I'm Hilario, from the hamlet of El Porvenir, La Encañada, Cajamarca. I have a three-hectare plot. Like many people in my community I do not have a property title or credit to start a business and improve our standard of living."

BAGUA



Leveling upwards

"I'm Bobbi, an indigenous woman from Alaska. I run a \$2.3 billion company. Until our communities got property rights to control our resources and corporations to organize them, we were poor."



Leveling downwards

"I'm Irene, a Bora native from the Peruvian jungle. We do not have property rights over our territories nor can we do business easily. We're poor."

A gift
from
ILD

For: **Saints and Demons**
SOME IDEAS TO STOP
THE SILENT AND RAPID
DISINVESTMENT OF PERU

Economic model?



Patria Roja
leveling upwards



El Perú
leveling downwards

Thanks to a solid property title, the Conga project generated a \$ 4.8 billion investment from Newmont Mining. With equality in mind, Mr. Santos put the value of this title in question, which brought about the suspension of the project and the subsequent decapitalization of the mining company. Santos leveled the field from the top down.

Is it possible to level the field from the bottom up? Of course. On 1 July 1990, in New York, the then President-elect of Peru shifted the course of the programs he had proposed originally and adopted the current economic model – designed by the ILD, Hernando de Soto and Carlos Rodríguez Pastor Mendoza. In an interview published on the front page of the New York Times, the President-elect stated, "Peru is going to rejoin the world economy." The key was to level the field from the bottom up, strengthening the property rights of all Peruvians, especially the poorest among them, so that they could harness the international financial system and create capital.

A case in point is the Peruvian Telephone Company (CPT). In 1990, the CPT was valued at \$ 53 million. Due to deficient property titles over many of its assets, investors did not want to buy it. Over a period of three years, a team of skilled lawyers set about correcting those deficiencies by "formalizing" CPT's titles in such a way that not only were they accepted locally but internationally. The result: CPT entered the world of capital and was sold for a total of \$2 billion, – 37 times its initial value.

There are several more examples where an improved property title generated added value. The model was not "primary raw materials-extractor-exporter" in its origins (as Santos calls it); it was instead used by those who love the prosperous and look out for their future, and ignored by those who claim they love the poor and care only about their past.

If Santos, or whoever else who might be in charge, formalizes the property and enterprises of the Cajamarquinos, he will make it possible for them to create capital with their land in the same way that the mining companies do, and he will be leveling the playing field from the bottom up without decapitalizing Cajamarca, the mining companies, and the rest of Peru.

DRAFT LAW

LAW FOR AUTHORITIES TO BECOME ACCOUNTABLE FOR ECONOMIC INEQUALITY, ENVIRONMENTAL DEGRADATION, AND THE FRAGMENTATION OF NATIONAL SOVEREIGNTY AS A RESULT OF MINING

Article 1: Objectives of the law

This law aims to make the executive branch accountable, and to establish economic sanctions for not fulfilling its obligations of providing the poor with the same rights and opportunities that the mining companies have in using their property and organizing their businesses to create capital; and for protecting the environment from the effects of mining.

This law also aims to make regional governments accountable and establish economic sanctions for violating the law and national sovereignty by promoting the blockage, or impeding the execution, of executive branch decisions and authorizations relating to mining, adopted in accordance to law.

Article 2: Conditions and responsibilities for mining authorizations by the Executive Branch

To authorize mining, the executive branch undertakes to require that such activities be carried out only after mining companies have complied with at least the following conditions, in addition to other laws and regulations already in force:

- Mining activities do not produce pollution that exceed the maximum permissible levels established in national and international laws, especially those safeguarding health; and that the process of monitoring pollution levels be carried out with regional citizen participation;
- If water from the region is used, measures must be taken to ensure that the

same or greater amount of water used is returned to the region, and that this water be of the same environmental quality or better.

Additionally, the executive branch undertakes:

c) To establish a security fund to cover immediately, directly or through environmental liability insurance or other mechanisms, any damage caused by mining contamination, notwithstanding any action it may take against the companies themselves. To this end, the executive branch is authorized to set aside annually for this purpose an amount equivalent to no less than 3% of the annual Special Mining Tax receipts.

d) To create a specialized national entity with decentralized offices throughout the regions whose sole task is to provide the poor with the same rights and opportunities that mining companies have to use their property and organize their enterprises to create capital. To this end, the executive branch is authorized to designate annually an amount equivalent to no less than 3% of the annual receipts from the Special Mining Tax.

If the executive branch does not effectively carry out and monitor the conditions laid down in sections a) and b), it shall indemnify the region with a sum equal to two times the loss caused by such activity. If it does not comply with the provisions set out in sections c) or d), it shall transfer the authorized funds to regions.

Article 3: Conditions and responsibilities of regional governments to receive resources from mining

To receive economic resources derived from mining in a given region, as established by the laws in force, regional governments shall be obliged to act in the following ways:

- Not to interfere by administrative, political, or regulatory act or omission in mining projects approved by the executive branch, after fulfilling legal requirements;

b) To establish a regional office responsible for receiving grievances and complaints from inhabitants with regard to the implementation of central government mandates for both the protection of the environment by mining companies and the programs described in section d) of article 2. The grievances and suggestions received will help guide the search for concrete solutions and keep the political debate focused on solving specific problems without affecting public confidence in the country and its governance. To this end, regional governments are authorized to designate annually an amount equivalent to no less than 5% of their annual royalties from mining operations in their regions.

Should a regional government fail to comply with the provisions in section a), it shall not receive the economic benefits derived from mining that it would have received. Similarly, it will have to pay any compensation or other damages for which the executive branch may eventually be held accountable by companies whose legally authorized investments may have been blocked. The size of the compensation shall be in proportion to the economic benefit that it would have received.

In the event that a regional government does not comply with the provisions of section b), it shall transfer these resources to the executive branch so that they may be used to the same end.

Article 4: Specialized entity to protect and promote the poor's rights, property, and businesses

The specialized national entity referred to in article 2 shall ensure and promote the rights, properties, and businesses of the poor through, inter alia, the establishment or efficient operation of the following institutions:

- Institutions to facilitate business organization, which allow citizens within reasonable costs and times:
 - To create legal entities differentiated



from their owners, with asset partitioning between them, with publicly known bylaws.

- To accumulate capital and build a track record.
- To limit the liability of business partners, without putting their personal assets at risk unintentionally.
- To identify themselves commercially with legal mechanisms used in local and international markets.
- To establish hierarchies and contract with employees, suppliers, and clients beyond circles of family and friends.
- To put in force true and effective liquidation rules.

b) Institutions to facilitate business operations in expanded markets, which in turn allow citizens:

- To obtain financing and investment from strangers and legal financial entities, something that is still not possible given the current deficiencies in information and collateral systems.
- To form partnerships in order to grow, and expedite dispute resolution mechanisms to resolve internal disputes among partners.
- To represent their assets in shares, in order to obtain new shareholders or investors.
- To sell on credit and have access to collections and contract enforcement mechanisms.

c) Institutions to ensure clear, secure, and transferable property rights, which in turn allow:

- national or foreign suppliers, buyers, or investors:
- To identify and link Peruvians with their assets and businesses, making them individually accountable, while reducing the risks and costs of doing business with Peruvians by having comprehensive, standardized, and reliable information.
- To invest in Peruvian companies and look forward to reaping long term results thanks to the continuity of the companies after the death or retirement of their original owners.

That these institutions allow Peruvians who own formalized properties:

- To keep their properties formal so that they can use them economically, thanks to mechanisms that ensure that the costs of legality are continuously kept at reasonable rates.
- To use their properties or the reliable and up-to-date information on them to facilitate access to credit and basic public services, such as water and electricity.

Other faculties and powers of the above mentioned specialized entity, as well as coordinations with other officials from regional, municipal, or public or private entities, shall be established in the law creating that specialized entity.

Final Provisions

First Final Provision: Supplementary laws

The mechanisms for the implementation of the provisions of this Act shall be established in supplementary laws.

Second Final Disposition: On the national referendum for the approval of the law

In accordance with section 2 of article 32 of the Constitution and section b) of article 39 of Law 26300, authorizing referendums for the approval of laws, this law shall be submitted to a national referendum.

The law shall be passed as long as it obtains a majority of validly cast votes. The approval of the law by referendum shall mean it is applicable to current and future mining projects throughout the nation; should the referendum not approve the law, the current legal situation shall remain in force.

Third Final Disposition: On the national referendum to declare the development of new mining activities in Cajamarca a priority

Be it declared that the development of new mining activities in the Cajamarca region are a national priority.

The national referendum will also serve to consult voters on the national priority

declared in the previous paragraph. The approval of this consultation will signify that all authorities accept the development of those mining projects approved by the executive branch in accordance with the laws in force. The rejection of this consultation shall mean that the government and authorities accept the will of the people not to authorize the development of new mining activities in the region for the length of time and conditions laid down in article 43 of Law 26300.

Fourth Final Provision: Referendum questions

The questions for the referendum will be:

- 1) Do you accept Law No. ..., which holds authorities accountable for economic inequality, environmental degradation, and the fragmentation of national sovereignty as a result of mining?
- 2) Do you accept the declaration of new, responsible mining activity in the Cajamarca region as a national priority?

Answer yes or no to each of the previous questions.

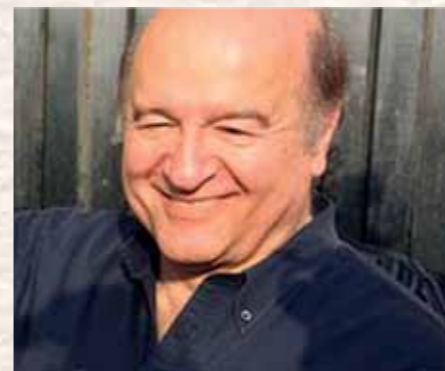
This is a preliminary proposal prepared as a draft law to be submitted to a national referendum. The purpose is to show that there are alternatives for empowering the poor while not making the mistake of removing Peru from the international financial system, which would especially harm the poor. The debate is open to all; the form, mechanisms, and content of the draft law shall be adjusted according to the feedback received from the public. Send your suggestions to:



www.ild.org.pe

Conga: not just a mining dispute *

By Hernando de Soto



The regional president of Cajamarca, Gregorio Santos, struck a chord with the country a few months ago when he pointed out that a significant number of Peruvians believe that this country suffers from genuine inequality. His message that the legal system regulating the economy “excludes the majority” is having a big impact on the public – including me.

I think his denunciation has great merit by revealing that the poor remain excluded from the right to property. He has won me over with that.

But he has lost me with his indiscriminate attack against the only system that, once reformed, can give the poor the capital and the legal tools they need to prosper.

SANTOS HAS WON ME OVER FOR THE FOLLOWING REASONS:

Grassroots support: The results of the national survey carried out by El Comercio are clear: 30% of Peruvians believe that the regional president's performance in Cajamarca is beneficial; and 40% support his campaign against the Newmont Mining Company's “Conga” gold mine project. According to another survey by Ipsos Apoyo, 78% of the inhabitants in Cajamarca support his campaign against Conga.

Professional support: Santos has managed to turn his fiery speeches into well-written technical proposals – written in the sober language of a United Nations report and supported by an eco-friendly vocabulary that is bound to appeal to progressives around the world.

Questioning the current economic model: Though he may never succeed in building a large constituency, the injustices Santos denounces are so sensitive and their

effects so divisive that they could break the trust that people have in the current economic model.

More than the radical left: Santos is not simply a spokesman for the radical left he is also a potential giant. He has begun to give a voice to the real Peru, that part of the country that still does not know how to interpret the industrial revolution or how to reap the benefits of having a multinational corporation in the neighborhood.

Class struggle: The vanguard of the most legal-minded civilization in human history arrived in Peru in the form of the big mining companies to extract valuable resources in informal rural Peru. Because the State has not provided the inhabitants of these areas with the tools to integrate themselves into the economy, they were instead alienated from the economy. Also, in globalization, which by definition is a worldwide phenomenon where economic activity must be an associative activity, which requires standardized documentation so that everyone involved can know the facts. Commitments, for example, must be declared in bills of exchange and promissory notes; authorizations must be validated in licenses and permits; bonds must be represented in shares and charges; companies must be embodied in statutes of incorporation, and so on.

With so many foreign companies arriving in remote areas of Peru with so little formalization of local property and businesses, it was only a matter of time before someone instigated a class confrontation. This is how a regional president emerges as a champion of nationalism, which Santos first announced to the citizens of Cajamarca in his Christmas letter in December 2011: “Do not fear,” he advised. “Peru can be for Peruvians.”

Handing over sovereignty: Rather than providing the citizens of Cajamarca with the legal tools to integrate themselves into modern Peru as autonomous individuals and companies, the State sits them down at negotiating tables – as if they were warriors belonging to a Brazilian tribe that must be pacified before it can be colonized. Instead of offering contracts, the State proposes to sign peace treaties with Cajamarquinos –

as if they were Chileans – and thus Santos ends up conquering the present.

CONQUERING THE FUTURE WILL BE MORE DIFFICULT— FOR THE FOLLOWING REASONS:

The alternative model: Once people are fully aware that the opposition to the Conga mining project is not an isolated phenomenon involving a Peruvian environmentalist facing a predatory multinational corporation; once they realize that Santos' proposal is not just to defeat one mining project but to revise all mining contracts and radically change the relationship with capital, they will urgently need to assess the new alternative model that he is proposing. And thus we will be able to deduce whether Santos is in a position to conquer the future.

Santos' Physical View of Capital: I have read his documents. Santos does not yet have an alternative ready for implementation, but he does have coherent thoughts and a well-defined ideological approach on how to build prosperity. Although it may seem like a trivial point, it is important to note that although Santos defines himself as a metaphysical Marxist, his approach is totally physical. He proposes to enhance the production of “physical things” such as rice, coffee, cassava, cocoa, alfalfa, fruit, and potatoes. That same “materialism” dominates his understanding of where the capital from mining companies comes from. He actually says that capital comes from minerals, gold, “which comes from the bowels of the earth and is sold to world markets at a high price.”

Capital is Metaphysical: Santos' materialist conception of capital is more problematic than it seems. Marx was very clear: he defined capital as “immaterial”. He and all the classical economists made a crucial contribution to the modern world: For them, capital was not gold itself but rather an independent concept, a potential value that facilitates starting up a venture: and because capital is metaphysical, it can be captured only by the head. (One theory about the origin of the word “capital” is that it was derived from the Latin word for head.)

The subsoil: Marx's definitions of value are in the language of the nineteenth century. Let me explain them in the language of today. Long before a mining company can extract gold from the ground, it needs capital: unlike gold, however, capital is not something that is discovered; it is constructed in a metaphysical space, like a computer program. To obtain capital in the form of money, a company presses its case among policy-makers until the Peruvian State grants it the right to mine gold from an area below the surface of a given piece of land. You could say that this government concession is the first title with which the company will build its capital and its associative capacity (a crucial element in Santos's proposal).

The soil: It is not enough to have a right over the subsoil. You also need a right to perforate the surface of the soil and build a mining complex on it. Since the surface belongs to the citizens of Cajamarca, the company has to buy the rights to their lands, which also means it will need to transform their holdings into property titles. With the titles and concessions in hand, the company begins to assemble the various documents that capture the potential value of its project.

Capital creates security: Although Peruvian titles are increasingly becoming more reliable, they still have flaws. For example, if the mining company is from the U.S., the bilateral treaty that Peru signed with the U.S. protects its title and compensates for the uncertainties that may exist abroad regarding the solidity of our law. The bilateral treaty's nine additional guarantees reduce insecurity. For greater security, the mining company can get additional insurance from several global organizations, including the Overseas Private Investment Corporation (OPIC). If it wanted even more insurance, the Peruvian title could be further guaranteed by the World Bank's Multilateral Investment Guarantee Agency (MIGA). The security on its portfolio is the entrepreneur's capital, which he can turn into money by using it as collateral for loans or by issuing shares for investment.

Capital is born in Cajamarca: This is how the capital that Santos considers so elusive – captured in the property documents required in the formalization process and consolidated in the Northern Hemisphere –, actually originates in the land of Cajamarca. If Santos reads this article carefully, he will see that capital is within reach of his decisions and the pock-



ets of Cajamarquinos.

And it comes with a bonus: As the necessary information is selected and sorted to accurately title the rights over the Peruvian subsoil and land surface, the documents recording that are like a chessboard where the pieces (in the case of a mine in Cajamarca: geologists, transport companies, smelters, refineries, salaries, managers, accountants, laborers, etc.) can be organized in a single legal space with different values and movements. The chessboard is property, a metaphysical construct that allowed the mining company to replace the chaos of information of physical Cajamarca with an order embodying such accurate and valuable information with such great security that it, in turn, permits an optimal combination of the parts that make up the company.

This chessboard is also essential for the model that Santos is developing in which the element of association for the agricultural sector is of central importance. (In this case the pieces are: irrigation, a trust, the production of agricultural goods, contracts for external markets, credit, etc). Santos is right: All of humankind's modern achievements, from the 120 components of my watch to the parts that make the Internet or navigation systems work, are a product of association: the ability to combine people and things to assemble a whole that is worth more than its parts.

Leveling the field from the top down: Therefore, if Santos seeks to make the poor equal by reducing the reliability of the titles with which formal businesses get their capital, not only will he deprive them of capital and scare them off but he will also reduce any possibility of capitalizing the poor. Fi-

nancial and commercial markets do not distinguish between good and bad people. They are guided primarily by country risk. Santos's path to equality has no future.

The average income of a rural family in Cajamarca – barely 215 Peruvian Soles (less than US\$100) per month – will stagnate or fall. If confidence in the safety of Peruvian paper is lost, whether for property or contracts, the power of association Santos has advocated to combine efforts and win markets will not get off the ground.

If he wants constructive equality, he should level the field from the bottom up, starting with the formalization of that part of Cajamarca that does not have the legal property rights with which to build that chessboard of associations, much the less the information needed to transform their land into capital.

To conquer the future: As soon as public opinion realizes that this is not a battle between a Peruvian David and a Yankee Goliath and that Peru's future is at stake, the public will make Santos pay. Marx saw socialism as a proposal that would supersede capitalism. He never thought that progress would come by returning to a pre-capitalist stage based on local agricultural production that had no possibility of overcoming poverty.

Respect: Just as Mr. Santos rightly asks that nature must be respected in Cajamarca, that rivers must not be poisoned and that the countryside must be preserved, it is important that he also respect the only instruments that have helped conquer poverty around the world – the rules and institutions created by law to combine physical things and reveal their hidden potential: capital.