



# Forest Peoples Programme

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Dear Dr Krishnan,

Thankyou for forwarding us the initial responses and supplementary information from RSPO member, Plantaciones de Pucallpa SAC in response to public denunciations made by the community of Santa Clara de Uchunya whose lands in the Peruvian amazon are affected by the plantation developments.

After consultation with co-complainants and community representatives we attach the following responses and observations to the specific points raised by Plantaciones de Pucallpa in their letters to the RSPO on the 19<sup>th</sup> November and 26<sup>th</sup> November 2015.

After reviewing the response, we conclude that indeed Plantaciones de Pucallpa remains in serious violation of key criteria (and numerous indicators) of the RSPO standards with respect to transparency and provision of information to the communities (1.1 and 1.2), legality (2.1), respect for indigenous peoples' customary rights (2.2 and 2.3), FPIC (2.3, 6.4 and 7.5), EIAs (5.1 and 7.1) participatory SIAs (6.1 and 7.1), HCV assessments (5.2, 7.3), in clearance of primary forests (7.3) and is wholly non-compliant with the New Planting Procedure. We urge RSPO to sanction the company for these multiple violations.

Before we address the details of this specific case we believe it is important to provide some more historical and background information on this particular region of the Peruvian amazon and the issues of forest governance and indigenous land tenure. For more in depth information we refer you to the following publication which provides an examination of indigenous peoples' struggle for land rights in the Ucayali region<sup>1</sup> as well as a recent report released by FPP and the national indigenous peoples organisation of the Amazon (AIDSESP) that addresses forest governance and indigenous peoples' rights issues in a national context<sup>2</sup>

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<sup>1</sup> García Hierro, Pedro, Søren Hvalkof & Andrew Gray, 1998, Liberation through Land Rights in the Peruvian Amazon. IWGIA Document no. 90.

<sup>2</sup> <http://www.forestpeoples.org/topics/rights-land-natural-resources/news/2014/12/press-release-selling-our-forests-business-peruvia>

## **Background information and historical context**

The region of the Peruvian Amazon which today lies within the administrative district of Ucayali has historically been occupied by many indigenous peoples the most numerous of which are the Shipibo-Konibo and the Asháninka. However, they also include the Yine, Amahuaca, Cacataibo, Yaminahua and Cashinahua peoples amongst others. Archaeological, anthropological and early historical records have shown that large and dense indigenous populations have historically occupied lands within the river Ucayali basin and its principal tributaries, including in remoter headwater regions. Traditionally, these peoples have enjoyed a highly mobile way of life revolving around hunting, fishing, gathering and traditional rotational farming. The area specifically in question on the Aguaytia river lies on the boundary historically understood to delimit the territories of the Shipibo-Konibo and Cacataibo peoples.

Despite the arrival of the Spanish in the 16<sup>th</sup> century in contemporary Peru and their military and political conquest of the region, the Amazon region and Ucayali in particular remained largely uncolonised by Europeans and those of mixed European and indigenous descent (*mestizos*) until the late 19<sup>th</sup> and early 20<sup>th</sup> century. This relative isolation ended with the growth of the commercial rubber industry and the subsequent large scale migration to and exploitation of the Amazon lowlands by settlers and colonists from outside the region.

Although the rubber boom ended abruptly in the first quarter of the 20<sup>th</sup> century, the Ucayali region and its indigenous peoples have since been exposed to waves of migration from the highlands as farmers from the Andes fled to the Amazon from political conflict in 1980s and in search of land and tropical hardwoods particularly from the 1950s. Most recently this economic interest has focussed on agricultural opportunities including papaya, coca and most recently oil palm. Until the 1970s, indigenous peoples, while recognised in Peru's constitution, enjoyed no mechanism within Peru's legal framework to secure legal guarantees over their territories and extensive swathes of Peru remained in the form of large estates (*haciendas*) owned by elite families on which many indigenous peoples' lived effectively as indentured labourers.

An agrarian reform in the 1970s alongside constitutional reform resulted in the break up of these large estates and the titling of indigenous Amazonian communities (known as 'Native Communities' under existing national law) in which some individual villages including Santa Clara de Uchunya received collective title to a fraction of their customary or traditional lands. Over the next 40 years this process continued in fits and spurts depending on the political will of the government in power. Today, approximately 10 million hectares of lands have been titled in the name of approximately 1200 native communities. Despite this undoubted progress, the traditional lands of many communities remain without any legal protection. The titling and demarcation procedure has remained a top down process in which community lands have consistently been titled not on the basis of customary use and occupation, customary law and traditional concepts of territory or indigenous forms of social organisation and livelihoods, but on the basis of an agrarian model in which communities were simply allocated lands on the basis of perceived agricultural needs. A detailed survey by the national indigenous organisation, AIDSESEP published in 2014 documents at least 1174 communities whose applications for legal title remain pending and an area of over 20 million hectares of indigenous traditional lands that remains without legal recognition<sup>3</sup>.

This lack of protection and recognition of indigenous lands lies at the heart of a long history of often violent conflicts over land and resources between the Amazon's indigenous inhabitants, migrants from the Andes in search of land, timber companies and large scale agricultural, infrastructure and energy programmes. Overlaps and invasions of indigenous lands (both titled and untitled) by logging concessions, individual land holdings, agribusiness concessions, protected areas, mining, oil and gas lots are commonplace and well documented<sup>4</sup>.

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<sup>3</sup> AIDSESEP, 2014. La demanda territorial de los pueblos indígenas de la Amazonía peruana.

<sup>4</sup> RAISG. 2012. Amazonía bajo presión. 68 pág:

## Indigenous land rights in Peru: The legal framework

The RSPO Principles and Criteria require that members not only respect indigenous peoples' and local communities' legal and customary rights but also applicable international laws. In Peru, indigenous peoples' customary but untitled lands enjoy the same level of legal protection as indigenous peoples' titled lands, due to constitutional provisions and international legal obligations applicable to Peru (the latter forming part of the State's norms<sup>5</sup> and enjoy the same status as the constitution<sup>6</sup>). Amongst others these include the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), the Convention on the Elimination of All Forms of Racial Discrimination, the American Convention on Human Rights, and the jurisprudence of the international courts and committees given the authority by States to interpret respective treaties and conventions. Specifically, the Constitutional Court of Peru has clarified that the rulings of the Inter American Court of Human Rights (IACHR) are legally binding on the Peruvian state<sup>7</sup>. In various cases the IACHR has established that "traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title" and such possession "entitles indigenous people to demand official recognition and registration of property title."<sup>8</sup>

This means that mere possession of land in accordance with their own customary laws establishes indigenous peoples' right to property in said lands, regardless of whether they have a title. In fact, what remains is not that the State "grant" them rights, but merely affirm the rights they already have by issuing the title.<sup>9</sup> Consequently, all the legal duties and obligations Peru has with respect to Santa Clara's *titled* lands, also apply to their *untitled* customary lands. This includes the requirement to consult the community and obtain their free, prior and informed consent prior to any development plans that may affect their territory such as a palm oil plantation. These requirements must be carried out by the Government itself, and as regulator it must guarantee their adherence by private sector parties to whom they grant licenses and concessions.

Indeed, under the American Convention on Human rights (as affirmed by the jurisprudence of the IACHR), among others, there are two inescapable obligations of the State with respect to indigenous territories. The obligation to 1. delimit, demarcate and title the property of indigenous communities, in accordance with their customary law, values, customs and mores and, 2. abstain from issuing rights to third parties while these lands remains untitled. In order

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<sup>5</sup> Political Constitution of Peru (1993), Art. 55.

<sup>6</sup> Peru's Constitutional court has established that: "International human rights treaties to which the Peruvian state is a party make up the legal framework. They are not just part of the legal framework however but hold constitutional status". STC N° 00025-2005-PI/TC y N° 00026-2005-PI/TC acumulados, f.j. 25. (Authors translation).

<sup>7</sup> The rulings of the IA Court of Human Rights are not only a source of academic or expert opinion but are of binding character for the Peruvian state. As the Constitutional court has ruled and in accordance with Article V of the Preliminary Title of the Constitutional Procedural Code approved by Law 28237: "The rulings of the Inter American Court of Human Rights are binding on all public powers and this binding nature is not restricted to its resolutive aspects but extends as per *ratio decidendi* (including all the principle arguments that underpin the ruling) and including those cases where the Peruvian state has not been part of the process". STC N° 00007-2007-PI/TC, f.j. 36). (Author's translation and explanation in brackets).

<sup>8</sup> I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, par. 128 ("*Sawhoyamaya*");

<sup>9</sup> IA Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, par. 151 ("*Awas Tingni*")("As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration")

to ensure the protection of indigenous territories while titling procedures are underway the IACHR has established that “States may not design or implement development or investment plans or programs, nor grant concessions for the exploitation of natural resources, which can affect indigenous communities until their communal property rights have been fully identified and secured through the granting of title, delimitation and demarcation”<sup>10</sup>. Furthermore, in the case of the Awas Tingni community the State had “violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property”.... “for having granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled”.<sup>11</sup>

Despite this, in practice these untitled lands are frequently overlapped by private concessions and landholdings often facilitated by legal loopholes, and incomplete and inaccurate national and regional cadastres. These loopholes are exploited by widespread land trafficking practices in which indigenous lands are first occupied and deforested.<sup>12</sup> This forest clearance is then used to claim occupational rights or certificates of possession before being issued with title by local authorities often in an irregular manner. Finally, and once titled, the lands are sold on to commercial interests. In other cases, economic interests promote the titling and registration of individual landholdings which they subsequently purchase in order to establish their own area of exploitation.

We trust that this brief summary will enable a better understanding of the situation affecting the community of Santa Clara de Uchunya and our observations of the principal claims made by Plantaciones de Pucallpa that follow:

## Specific responses

### 1. With regard to affirmations about the extent and timing of deforestation in the affected area

In the first instance we note that Plantaciones de Pucallpa challenges the suspension of their operations ordered by the Ministry of Agriculture (2nd September 2015)<sup>13</sup>, an order which they have appealed. This order was issued on the basis of unauthorised deforestation by Plantaciones de Pucallpa of over 5000 hectares, including extensive areas of primary forest without any of the required environmental licenses and soil studies. Many of their arguments focus on alleged procedural irregularities of government officials rather than on the substantive issues at hand. As a result this is clearly a matter for the Ministry of Agriculture

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<sup>10</sup> *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II. Doc. 56/09., p. 106 (30 December 2009) (citing to *Awes Tingni*, pars. 153, 164, 174.4, providing that: The State must “abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.

<sup>11</sup> *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, OEA/Ser.L/V/II. Doc. 56/09., p. 110 (30 December 2009) (citing to *Awes Tingni*, pars. 153)

<sup>12</sup> For example, in recent years in the region of San Martín, small-scale farmers have deforested land in order to obtain a certificate of possession which they sold or rented to farmers with access to capital to cultivate oil palm or papaya, given that in theory it is prohibited to convert forest into agricultural land. In the specific case of the Romero Group (a major commercial group dedicated to oil palm) operating in Shanusi and as a result of a denunciation of illegal logging the public prosecutor's office collected testimonies of small-scale farmers who in 2008 sold their land after finding themselves surrounded by the Romero Group. The testimonies revealed that the sales were made after the lands had already been deforested at the request of the company which offered payments three times higher for land that had already been deforested. For further information see Observatorio de Tierras y Derechos y IDL reporteros cited in: *Making Visible the Invisible: Indigenous perspectives on deforestation in the Peruvian Amazon*, FPP and AIDSESP: 78, 2015.

<sup>13</sup> Resolución de Dirección General No 270-2015-MINAGRI-DVDIAR-DGAAA

to comment on. Nevertheless, RSPO requires companies to carry out EIAs, participatory SIAs and participatory HCV Assessments prior to opening up lands and the company has demonstrably failed to comply with these requirements.

We also wish to address two key claims made by Plantaciones de Pucallpa. The first is the claim that there is no evidence that the deforestation encountered can be attributed to them (they argue for example that the investigators were not able to access their land holding) and that the deforestation that was observed had taken place in adjacent plots belonging to other interests. They also claim that Plantaciones de Pucallpa acquired these lands in 2012 at which time the area was already deforested and there was no primary forest.

With respect to these two claims it is worth pointing out that the investigations and conclusions of the Ministry of Agriculture resolution were based primarily on satellite data, rather than on field investigations. Contrary to the claims of Plantaciones de Pucallpa, the satellite analysis concluded that, of a total area of 6845.23ha contained within the landholding of Plantaciones de Pucallpa, only 1561.06ha or 22.80% had been deforested by May 2012 by which point Plantaciones de Pucallpa state that it was under their formal ownership. However, by June 2013 over 72% of the entire area, or 4976.59ha had been deforested, and by 25/8/2015 a total of 6824.39ha or 99.69% of the landholding had been cleared. These conclusions are reinforced by an independent satellite investigation published in April 2015 which examined the holdings of Plantaciones de Pucallpa and the sister company of Plantaciones de Ucayali in Nueva Requena. This study<sup>14</sup> provides visible evidence that highlights the rapid progress of deforestation in both landholdings since 2012 and highlights that only a very minor percentage of these lands had been cleared prior to ownership by Plantaciones de Pucallpa and Plantaciones de Ucayali. This study further concluded that in the two plantations, **“of the 12,188 ha of the two oil palm projects, 9,404 ha (77%) was primary forest immediately prior to project installation.** That is the equivalent to nearly 7,000 soccer fields. **An additional 2,350 ha (19 %) was secondary forest.** Only 434 ha (4 %) was already deforested at the start of the project.”<sup>15</sup> Any clearance of primary forests is contrary to RSPO standards and moreover any clearance at all can only be carried out after the company has submitted its EIAs, HCV Assessments, SIAs, proof of legality and proof that it has commenced a mutually agreed FPIC process to independent assessors and then submitted endorsed summaries of these to the RSPO in accordance with the New Plantings Procedure which came into effect on 1<sup>st</sup> January 2010. The company is manifestly in violation of these requirements and has provided no evidence to the contrary.

### **1. With regard to the property rights of the community of Santa Clara de Uchunya**

One of the main arguments made by Plantaciones de Pucallpa is that they cannot be in violation of the rights of indigenous communities because their activities have not been carried out in the lands of the community of Santa Clara de Uchunya. The company says their landholding was made up of a result of multiple purchases of *private* lands, which were already titled. With disregard for any circumstances in which some of these landholdings may have been titled to private owners, Plantaciones de Pucallpa limits their understanding of community lands merely to the 218 hectares titled to the Santa Clara indigenous community on the right bank of the river Aguaytia. The company fails to recognise or comprehend that the customary untitled lands enjoy the same legal protections as those that are titled. Indeed, the existence of titles subsequently issued to third parties (and later transferred to Plantaciones de Pucallpa), does not extinguish the underlying property rights of the indigenous peoples in question. In fact, as per the American Convention on Human rights binding on Peru, "members of indigenous peoples who have unwillingly left their traditional

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<sup>14</sup> Finer M, Novoa S (2015) Large-Scale Oil Palm Causes Deforestation of Primary Forest in the Peruvian Amazon (Part 1: Nueva Requena). MAAP: Image #4. <http://maaproject.org/2015/image-4-oil-palm-projects-cause-deforestation-of-primary-forest-in-the-peruvian-amazon-part-1-nueva-requena/>

<sup>15</sup> Ibid: 4

lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith" -- which has not occurred in this specific case.<sup>16</sup>

As outlined in the background provided at the start of this letter it is entirely commonplace in Peru for the traditional lands of indigenous communities such as Santa Clara de Uchunva to remain untitled despite decades of pending applications and requests by the communities concerned. This delay in justice is itself a violation of the rights of indigenous peoples to fair trial and judicial protection under the American Convention on Human Rights.<sup>17</sup> Furthermore, the overlap of indigenous territories by private land holdings and concessions is all too frequent in Peru despite the obligation deriving from international human rights obligations including the jurisprudence of the Inter American Court of Human Rights) to ensure that indigenous territories are duly delimited, demarcated, and titled before their interests are interfered with and diminished through grants, transfer or transport to third parties.

## **2. With respect to the relations between Plantaciones de Pucallpa and other settlements in the vicinity.**

The favourable opinions towards Plantaciones de Pucallpa expressed in a letter ostensibly signed by members of some neighbouring settlements are also used as part of an attempt to legitimise the actions of Plantaciones de Pucallpa with respect to the lands of Santa Clara de Uchunya. It is regrettable that Plantaciones de Pucallpa seeks to foster division and resentment between communities in an area where conflict is already rife. We do not wish to comment on the nature of the relationship between Plantaciones de Pucallpa and these settlements except to point out that whatever the reality, this has no bearing on the central points in question as set out in the complaint filed by the indigenous community of Santa Clara de Uchunya.

We also note that with the exception of Shambo Porvenir, which is also an indigenous community, the remainder of these settlements are not indigenous and have been formed by migrants who have moved to the area for economic and agricultural opportunities. As the background information above outlines, such settlements have frequently come into conflict with indigenous communities throughout the Amazon. In fact, some of these settlements are currently in conflict with the community of Santa Clara de Uchunya who accuse them of attempting to expand further into Santa Clara's lands. Nevertheless, we note that the community of Santa Clara de Uchunya makes no objection to either the presence of these settlements in the region or attempts to intervene in their internal matters. All that the community of Santa Clara requests is that, just as they respect the rights of these settlements to make their own choices, so too that their rights to their traditional lands be respected.

## **3. With respect to the allegations made about indigenous leaders**

In a similar vein, the defamatory comments and accusations levelled at the representatives of Santa Clara de Uchunya including indigenous leader Washington Bolivar and the President of FECONAU Robert Guimaraes Vasquez highlighted in various of the communications provided to the RSPO, are equally regrettable and irresponsible. We are sure we do not need to remind the RSPO that the substance of this complaint is based on the violation of the rights of the community of Santa Clara de Uchunya to their traditional lands and not on unfounded speculation about the credibility of their representatives. We note that in the case of Santa Clara de Uchunya, the community has been affiliated to FECONAU since 1992. Similarly the community itself requested the support of Washington Bolivar to assist with this conflict in 2014 and has reiterated their support for his representation on multiple occasions including in

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<sup>16</sup> *Sawhoyamaya*, para. 128 (noting that even in the case of good faith titles being issued without their consent, the indigenous peoples are "entitled to restitution thereof or to obtain other lands of equal extension and quality.")

<sup>17</sup> *Sawhoyamaya*, paras. 112 & 248(1).

a recent letter to the Ministry of Interior.<sup>18</sup> The company should also be reminded that the RSPO Principles and Criteria require protection of whistleblowers from intimidation

Given the evidence and explications above, the information supplied by Plantaciones de Pucallpa does not change our original assertion that the companies operations have violated numerous RSPO Principles and Criteria as outlined at the start of this letter. We hope these observations have been of assistance to the RSPO's deliberations and remain available for any further consultations that may be necessary.

Yours sincerely,



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<sup>18</sup> Act, reiterating endorsement of Washington Bolivar in his role as Indigenous leader of the village of Santa Clara de Uchunya, 5th July 2015. Act signed by village authorities.