

2013

Conflict in Latin America over Natural Resource Exploitation

Michelle Richard

Recommended Citation

Michelle Richard, *Conflict in Latin America over Natural Resource Exploitation*, 19 LAW & BUS. REV. AM. 561 (2013)

<https://scholar.smu.edu/lbra/vol19/iss4/8>

This Update is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CONFLICT IN LATIN AMERICA OVER NATURAL RESOURCE EXPLOITATION

*Michelle Richard**

ON July 15, 2013, a Chilean appeals court ruled in favor of the indigenous Diaguita community, holding that Barrick Gold Corp (Barrick) must maintain its environmental promises before continuing construction on the Pascua-Lama gold mine.¹ But this case is not the first case of its kind; in fact, throughout Latin America courts are dealing with battles between international corporations and social and environmental groups regarding natural resource exploration and its environmental and social effects. Many organizations demand greater protections for the environment and indigenous communities. Further, states seek greater compensation for their national resources, while simultaneously struggling to protect competing social and economic interests.

I. LITIGATION IN ARGENTINA AND CHILE REGARDING THE PASCUA-LAMA MINE

Barrick is the largest gold mining company in the world.² They began construction of the Pascua-Lama mine in 2009,³ and expected it to cost \$8.5 billion and to produce 800,000 to 850,000 ounces of gold each year for the first five years, thus becoming the largest gold mine in Chile.⁴ The mine sits high in the Andes Mountains on the Argentina-Chile border.⁵ The litigation over Barrick Gold Corp's Pascua-Lama project has centered on concerns of water contamination and glacier pollution resulting

* Michelle Richard is a third-year law student at SMU Dedman School of Law. She is interested in International Criminal Law and would like to thank her family for their support through law school.

1. *Chile Court Rules for Indians Against Barrick Gold*, WEEKLY TIMES OF INDIA (July 16, 2013) <http://www.weeklytimesofindia.com/world-news/chile-court-rules-for-indians-against-barrick-gold/>.

2. Cecilia Jamasmie, *More Headaches for Barrick: Chile's Indigenous Group Appeals Pascua-Lama Ruling*, MINING.COM (July 23, 2013), <http://www.mining.com/fresh-headaches-for-barrick-chiles-indigenous-group-appeals-pascua-lama-ruling-71620/> [hereinafter *More Headaches for Barrick*].

3. James Fowler, *Government Study: Pascua Lama Threatens Glaciers*, SANTIAGO TIMES (Jan. 7, 2010), available at <http://www.minesandcommunities.org/article.php?a=9800>.

4. *More Headaches for Barrick*, *supra* note 2.

5. Fowler, *supra* note 3.

from Barrick's failure to comply with environmental regulations.⁶ The Diaguita community claims that the Pascua-Lama project has contaminated their downstream water supply and damaged nearby glaciers.⁷ Specifically, three glaciers that sit on the Argentina-Chile border risk melting as a result of emissions from Pascua-Lama construction.⁸ These glaciers serve as the main source of water to over 70,000 farms in the Huasco Valley,⁹ a very arid area where the Diaguita community resides;¹⁰ therefore, any damage to these glaciers could result in a severe depletion of their main source of water.¹¹

Prior to the appeals court's decision, Chile's environmental regulator suspended Pascua-Lama's license, citing severe environmental violations.¹² The Chilean appeals courts thereafter affirmed the regulator's suspension by unanimously deciding that Barrick had to cease all operations until they implement means to prevent water pollution and until their environmental permit is reviewed.¹³ Days after the appeals court's decision, the Diaguita appealed the case, asking the Supreme Court to completely revoke Barrick's environmental license for the mine and force Barrick to prepare another environmental study.¹⁴ Subsequently, Barrick publicly admitted in front of a Chilean judge that they did commit environmental violations at Pascua-Lama and further supported the appeals decision, vowing to implement the proper infrastructure to avoid future contamination.¹⁵

Despite Chile's business-friendly reputation, recently Chile's courts seem very open to suits from environmental and social groups against "mega projects" and corporations.¹⁶ Last year alone, Chile's Supreme Court suspended Goldcorp Inc.'s permit for a copper and gold mine and additionally rejected a \$5 billion thermo-electric project.¹⁷ The long-term implications for the Chilean economy arising from mega project litigation have yet to be seen. In the case of Pascua-Lama, in addition to the time delays surrounding construction, the project has cost \$5 billion more than initially projected; yet, Barrick has still expressed their desire to comply

6. Erik Lopez, *UPDATE 4- Chilean court suspends Barrick's Pascua-Lama mine project*, REUTERS (July 15, 2013), <http://www.reuters.com/article/2013/07/15/chile-barrick-court-idUSL1N0FL10H20130715>.

7. *Id.*

8. Fowler, *supra* note 3.

9. *Id.*

10. Catherine Solyom, *In the Shadow of Pascua-Lama*, MONTREAL GAZETTE, <http://www.montrealgazette.com/news/pascua-lama/index.html> (last visited Nov. 20, 2013).

11. *Id.*

12. Lopez, *supra* note 6.

13. *Id.*

14. *More Headaches for Barrick*, *supra* note 2.

15. Cecilia Jamasmie, *Barrick Admits Violations in Pascau Lama, Vows to Make 'Things Right'*, MINING.COM (Aug. 27, 2013), <http://www.mining.com/barrick-admits-violations-in-pascua-lama-vows-to-make-things-right-63547/> [hereinafter *Barrick Admits Violations*].

16. Lopez, *supra* note 6.

17. *Id.*

with all regulations and hopes to begin production in 2016.¹⁸ Hence, Pascua-Lama litigation indicates that Chile's courts will enforce higher environmental standards for future natural resource exploitation projects.¹⁹

In addition to litigation in Chile regarding Pascua-Lama, Barrick also encountered glacier protection legislation in Argentina that resulted in litigation.²⁰ Recently passed, the National Glacier Act (Act) bans mining in or around permafrost²¹ and glaciers.²² Initially, upon hearing a claim brought by several mining groups that Pascua-Lama operations violated the Act, a federal circuit court judge ruled that the Act did not apply to San Juan province and further granted an injunction, effectively suspending six articles of the Act in San Juan.²³ But on appeal, the National Supreme Court revoked the injunction, stating that the Act certainly applies to Pascua-Lama.²⁴ Now companies mining in Argentina, specifically in the Andes Mountains, will have to file glacier impact reports and if they do in fact operate around glaciers or impact glaciers, they must either redesign their project or cease operations.²⁵

The Supreme Court's ruling affected many other corporations and mining operations besides Barrick, such as Xstrata Copper, NGEx Resources, McEwen Mining, and Peregrine Metals to name a few.²⁶ Several hundred mining projects across the Argentine Andes must now comply with the Act and could potentially be forced to cease operations altogether.²⁷ Only time will show the overall impact of the Act; however, anywhere from hundreds to thousands of glaciers surround most mining operations in the Andes. Thus the Supreme Court ruling could significantly affect current and future mining.²⁸ On the other hand, many companies believe that more flexible local regulations will eventually prevail over the strict national Act.²⁹ Since the ruling, Barrick has publicly de-

18. Dorothy Kosich, *Barrick's Huge Pascua-Lama Gold Mine Start-up Now Delayed to Mid-2016*, MINEWEB (July 1, 2013), <http://www.mineweb.com/mineweb/content/en/mineweb-gold-news?oid=196171&sn=Detail>.

19. Lopez, *supra* note 6.

20. Cecilia Jamasmie, *Glaciers Stop Progress of Barrick Gold's Mining Plans in Argentina*, MINING.COM (July 4, 2012), <http://www.mining.com/glaciers-stop-progress-of-barrick-golds-mining-plans-in-argentina/> [hereinafter *Glaciers Stop Progress*].

21. *Id.* (Permafrost, or periglacial areas occur "where the ice has recently retreated but water remains below the surface.")

22. Luis Andres Henao, *Argentine Judge Grants Glacier Law Exemptions for Pascua-Lama*, MINEWEB.COM (Nov. 2, 2010), <http://www.mineweb.com/mineweb/content/en/mineweb-gold-news?oid=114097&sn=Detail>.

23. *Id.*

24. Jorge Daniel Taillant, *Barrick Gold Suffers Legal Defeat in Argentine Supreme Court*, CENTER FOR HUMAN RIGHTS AND ENV'T, (July 3, 2012), available at <http://www.minesandcommunities.org/article.php?a=11791>.

25. *Id.*

26. *Id.*

27. *Glaciers Stop Progress*, *supra* note 20.

28. *Id.*

29. *Pascua-Lama and Veladero Not Affected by Argentina Supreme Court Ruling*, BARRICK (July 6, 2012), <http://www.barrick.com/investors/news/news-details/2012/Pascua-Lama-and-Veladero-Not-Affected-by-Argentina-Supreme-Court-Ruling/default.aspx>.

clared that, “[w]e believe we are legally entitled to continue our current activities on the basis of existing approvals.”³⁰ In fact, Barrick has taken the Act to the National Supreme Court, seeking a declaration that the Act is unconstitutional.³¹

The obstacles that Barrick has encountered with Chile and Argentina surrounding Pascua-Lama have continued for over a decade; however, the mine has also caused disputes between Argentina and Chile.³² During the planning stages of Pascua-Lama, Argentina and Chile disputed how the taxes levied upon Barrick would be allocated.³³ Chile claimed the right to a larger portion of the taxes because more of the mine is located in Chile, while Argentina sought an equal allocation.³⁴ Ultimately on April 29, 2009, after delaying the commencement of construction for two years, Argentina and Chile executed a taxation agreement.³⁵

The conflicts concerning Pascua-Lama in Argentina illustrate the internal conflict occurring between state governments and social groups struggling over environmental concerns versus economic growth. A Glacier Protection Act was passed in 2008, but President Cristina Fernandez promptly vetoed it, claiming that it would hinder local economies.³⁶ In September 2010, the Senate narrowly passed a new version, the Act currently at issue.³⁷ Furthermore, many local governments have far less stringent glacier protection laws than the national Act, which do not protect permafrost or all glaciers.³⁸ Hence, in addition to the external conflicts existing between international corporations and social and environmental groups, internal disagreement over natural resource exploitation exists within the judiciary, between local and national legislation, and between legislative and executive branches of government.

II. CONSULTATION LAWS IN PERU

The conflict over Pascaua-Lama in Argentina and Chile is only the most recent development in an increasing number of conflicts occurring throughout Latin America regarding environmental and social concerns over natural resource exploitation projects. For example, in Peru protests over Colorado-based Newmont Mining Corp.’s Conga mine have continued for over three years, resulting in several ministers resigning from the president’s cabinet and questions regarding the government’s legiti-

30. *Id.*

31. *Glaciers Stop Progress*, *supra* note 20.

32. *Pascaua Lama Project Mired in Conflict*, MAC: MINES AND COMMUNITIES (Sept. 22, 2008), <http://www.minesandcommunities.org/article.php?a=8816>.

33. *Id.*

34. *Id.* (During the ongoing disagreement over taxes, Barrick actually contemplated redesigning the plan so as to bypass Argentina altogether).

35. *Chile-Argentina Tax Agreement Clears Way for Barrick’s Pascua-Lama Project*, WOMP (June 25, 2009) <http://www.womp-int.com/story/2009vol05/story002.htm>.

36. *Glaciers stop progress*, *supra* note 20.

37. *Id.*

38. Taillant, *supra* note 24.

macy.³⁹ Newmont intends to drain three lakes in the Cajamarca region into reservoirs, threatening the main water supply for thousands of farmers and downstream residents in the highlands community.⁴⁰ Reportedly, Newmont has ignored both protestors and local authorities, which thus escalated tensions, incited further protests, and led to further internal conflict.⁴¹ In response to increasingly violent protests, President Humala sent in law enforcement to maintain the peace at a protest in July 2012, but clashes between protesters and law enforcement led to the death of at least five protesters and required the President to declare a temporary state of emergency.⁴²

The Congo project is Peru's largest private sector investment project ever.⁴³ Protesters want the project completely abandoned; however, President Humala wants the project to proceed.⁴⁴ In 2011, a precedential Indigenous People's Consultation Law (Consultation Law) passed, requiring that companies negotiate with local indigenous communities before constructing oil wells or mineral mines near their land.⁴⁵ If effective, the Consultation Law would decrease violent protests and promote amicable agreement; however, an executive declaration released in May excludes the highland communities from the category of indigenous peoples.⁴⁶ Accordingly, the government will now allow fourteen projects, including the Conga mine—currently under construction in the highland area—to proceed without consulting the highland communities.⁴⁷ This executive decision has been highly criticized as an illegal infringement upon the protection of indigenous rights.⁴⁸ Further, Peru's Vice Minister of Culture even resigned in protest of the decision.⁴⁹ Ultimately, this decision epitomizes the constant struggle the government faces between indigenous rights and natural resource exploitation.⁵⁰

39. *Peru Gold Mine Protesters Want Project Scrapped*, UPIBETA (July 2, 2013), http://www.upi.com/Business_News/Energy-Resources/2013/07/02/Peru-gold-mine-protesters-want-project-scrapped/UPI-54141372773148/.

40. *Id.*

41. *Id.*

42. *Fifth Person Killed in Minas Conga Protests*, PERUVIAN TIMES (July 6, 2012), <http://www.peruviantimes.com/06/fifth-person-killed-in-minas-conga-protests/16179/> [hereinafter *Fifth Person Killed*].

43. Robert Kozak, *Protesters Target Conga Mine Project in Peru Again*, WALL ST. J. (June 18, 2013), <http://online.wsj.com/article/BT-CO-20130618-707242.html>.

44. *Id.*

45. Mitra Taj & Teresa Cespedes, *Exclusive: Peru Rolling Back Indigenous Law in Win for Mining Sector*, REUTERS (May 1, 2013), <http://www.reuters.com/article/2013/05/01/us-peru-mining-indigenous-idUSBRE9400CG20130501>; Emily Greenspan, *Peru Backslides on Indigenous Rights*, OXFAM (May 8, 2013), <http://policy.sofpoverty.oxfamamerica.org/2013/05/08/peru-backslides-on-indigenous-rights/>.

46. Greenspan, *supra* note 45.

47. *Id.*

48. *Id.*

49. *Id.* (The executive declaration could possibly subject Peru to litigation in front of the Inter-American Court of Human Rights).

50. Barbara Fraser, *Indigenous Rights Still Being Trumped by Mining Money in Peru*, INDIAN COUNTRY (Aug. 14, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/14/indigenous-rights-still-being-trumped-mining-money-peru-150840>.

Peru is one of the world's largest producers of minerals⁵¹ and also one of Latin America's fastest growing economies.⁵² Despite these conditions, many natural resource exploitation projects in Peru are currently being protested.⁵³ In fact, Newport faced protests ten years ago regarding the Yanacocha gold mine.⁵⁴ Barrick also temporarily ceased operations of their gold mine in Peru in 2012 after a protester died.⁵⁵ Economists project that such frequent protests will "slow foreign direct investment and economic development."⁵⁶ In fact, some companies have already decreased investments into Peru.⁵⁷ Essentially, Peru is dealing with competing interests and struggling with how to compromise the interests. Protesters seek to maintain environmental integrity and desire social responsibility programs to benefit the local communities, while the government wants to continue natural resource exploitation to increase investment into the economy.⁵⁸

III. THE CONSTITUTIONAL RIGHTS OF NATURE AND HUMAN RIGHTS IN ECUADOR

Similar to many other Latin American states, Ecuador has also increasingly encountered national opposition to natural resource exploitation agreements. In Ecuador, new laws promoting mining investment have given rise to litigation regarding the constitutionality of a new mining agreement.⁵⁹ Upon re-election, Ecuador's President Correa promised to improve investment opportunities for mining companies, including a proposed law that companies will not have to pay taxes until they regain their initial investment.⁶⁰ To date, Ecuador has only executed one production agreement with a Chinese company, Ecuacorriente SA, for Mirador, the first open-cast mine in Ecuador.⁶¹ Protests over Mirador began the same day that Ecuador signed the agreement with Ecuacorriente.⁶² Like many similar mining projects, the construction and opera-

51. Kozak, *supra* note 43.

52. Nathaniel Parish Flannery, *Protests in Peru Scaring Off Mining Investment, Government Responds with Social Programs*, FORBES (Oct. 29, 2012), <http://www.forbes.com/sites/nathanielparishflannery/2012/10/29/protests-in-peru-scaring-off-mining-investment-government-responds-with-social-programs/>.

53. *Fifth Person Killed*, *supra* note 42.

54. Kozak, *supra* note 43.

55. Flannery, *supra* note 52 (human rights groups have criticized the use of police force against protestors and have called on President Humala to stop using lethal force).

56. Kozak, *supra* note 43.

57. Flannery, *supra* note 52.

58. *Id.*

59. Mercedes Alvaro, *Ecuador Indigenous Groups Plan Suits Against Mining Activity*, WALL ST. J. (July 11, 2013), <http://online.wsj.com/article/BT-CO-20130711-710197.html>.

60. Ragnhild Kjetland, *Ecuador Looks to Sweeten Deal for Miners as Locals Promise Opposition*, MAC: MINES AND COMMUNITIES (Mar. 1, 2013), <http://www.minesandcommunities.org/article.php?a=12172>.

61. Alvaro, *supra* note 59.

62. Huang Hongxiang, *In Ecuador, Home Truths for China*, CHINADIALOGUE (Aug. 6, 2012), <https://www.chinadialogue.net/article/show/single/en/4966-In-Ecuador->

tion of Mirador would interfere with nearby indigenous communities and poses a risk to the area's rich biodiversity.⁶³ Again, contamination of the local water supply also seriously concerns local communities.⁶⁴ Protesters fear that a project of this magnitude will result in local devastation similar to when Chevron's oil project left the local community with the highest cancer rates in the state.⁶⁵ Furthermore, opponents of Mirador urge that the benefits that the government claims will flow down to communities as a result of such projects never actually reach the local communities.⁶⁶

Various human rights organizations, non-governmental organizations, and Ecuadorian tribal nations brought suit against Ecuador's government, asserting the Mirador violates the Rights of Nature and Human Rights.⁶⁷ Specifically, they claim "that the mine would violate the protected rights of ecosystems guaranteed in the Articles 71-73 on Rights of Nature in the Ecuadorian Constitution,"⁶⁸ and that the government did not consult with local indigenous communities.⁶⁹ Initially the court heard and dismissed the case; however, the case is currently on appeal.⁷⁰ Opponents—specifically the Ecuarnari Confederation—plan to bring their case to the Human Rights Commission or even file suit in the Inter-American Court of Human Rights if national courts fail to recognize their constitutional rights.⁷¹ Taking a case before an international tribunal poses additional questions as to the legality and future of mining in Latin America.

IV. CONCERNS OVER NATURAL RESOURCE EXPLOITATION

Increasing suits against mega projects stem from political, social and environmental concerns. Chile, Argentina, Peru, and Ecuador's most recent battles over natural resource exploitation exemplify the struggles occurring throughout Latin American. Many states feel that they have not economically benefited from mega projects, but rather large foreign corporations are depleting states of their natural resources without adequate compensation. Also, environmental and social groups concerns center on

home-truths-for-China. While protests to environmental exploitation are far from uncommon in Ecuador, Amnesty International reported that Ecuador's criminal justice system is being used to stop protests against the government's environmental policies.

63. *Id.*

64. Alvaro, *supra* note 59.

65. Hongxiang, *supra* note 62.

66. *Id.*

67. "Rights for Nature"? *News Update for June 2013 + Map*, PROTECT ECUADOR (June 26, 2013), <http://protectecuador.org/ecuador-june-2013/>.

68. John Ahni Schertow, *Stand with the Shuar: Oppose the Mirador Mine Project in Southeastern Ecuador*, IC MAGAZINE (March 15, 2013), <http://intercontinental-cry.org/stand-with-the-shuar-oppose-the-mirador-mine-in-the-headwaters-of-the-river-amazon/>.

69. Alvaro, *supra* note 59.

70. Silvio, *supra* note 67.

71. Alvaro, *supra* note 59.

the negative environmental impact of these projects and the resulting health impact on many indigenous communities.⁷² For instance, contamination of the water supply remains a constant concern for communities living near construction sites as well as preservation of rich local biodiversity.

Additionally, as exemplified in Peru, the communities located by project sites desire corporate investment into social responsibility programs, created to benefit those communities.⁷³ The large majority of conflicts occur within communities of extreme rural poverty, thus investment into these programs could significantly decrease conflict.⁷⁴ Opponents of mega projects claim that the benefits never actually reach the local communities, despite the government's contrary promises.⁷⁵ It appears that protests may be rooted in extreme poverty and exclusion of indigenous communities that has existed in many Latin American countries long before foreign corporations began large-scale natural resource exploration.⁷⁶

The lines are clearly drawn, corporations desire natural resources, state governments seek to build their national economies, and environmental and social groups fight to preserve environmental integrity and protect indigenous rights. Continued litigation and legislation in each Latin American state will further establish and clarify the rights of the respective parties. The ultimate effect of constant litigation and changing legislation concerning natural resource exploitation in Latin America has yet to be seen, however, undoubtedly, conflict will continue to occur given the conflicting interests at stake.

72. Lopez, *supra* note 6.

73. Flannery, *supra* note 52.

74. *See id.*

75. Hongxiang, *supra* note 62.

76. Flannery, *supra* note 52.