

SCHOLARLY ARTICLE

Human Rights, Social Resistance and Mining Firm Behaviour in Latin America

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Abstract

Mining companies are rhetorically committed to corporate social responsibility standards such as human rights, but what really affects their behaviour in the developing world? Communities impacted by mines have become increasingly resistant to them, bolstered and supported by international actors and norms as well as stronger domestic environmental and justice institutions. In this paper, I examine the behaviour of multinational mining companies (primarily Canadian) in two Latin American countries in the face of social resistance, finding that domestic institutional capacity and legal mobilization have an important effect on company decisions and actions. Both are necessary—the legal opportunity structure creates an institutional context in which legal mobilization is encouraged or discouraged. Litigators interacting with competent institutions have a far greater ability to hold firms to account. Thus, company practices adjust to the country's institutional and legal context, and behaviour varies according to host country conditions.

Keywords: environmental institutions; human rights; Latin America litigation; mining

1. Introduction

In August 2014, a tailings dam in the Mexican state of Sonora burst, releasing 40 million litres of copper sulfate into the Sonora and Bacánuchi Rivers and jeopardizing the health and livelihoods of 22,000 people across seven local communities. The environment minister called it Mexico's worst-ever environmental mining disaster.¹ Nearby communities requested help from a small Mexico City non-governmental organization (NGO) known as PODER (Proyecto sobre Organización, Desarrollo, Educación e Investigación), which convinced them to pursue litigation. While the courts were considering various injunctions, the company in charge of the mine—Grupo México—started building a new tailings dam without first obtaining environmental authorizations.

PODER sought to empower the local community to defend its rights and determine remediation measures. It helped the communities launch a series of legal actions, one of which successfully held the company to account for human rights violations (an earlier federal court decision ruled that a firm could not violate human rights, as it was not an

¹ Mark Aspinwall 'Legal Mobilization without Resources? How Civil Society Organizations Generate and Share Alternative Resources in Vulnerable Communities' (2021) 48:2 *Journal of Law and Society*, 202.

'authority'). They showed that the company acted in bad faith by not completing the promised remediation measures. PODER also brought a case in the representation of the communities against the new dam. In 2018 the Supreme Court ruled that a non-indigenous community has the right to participate in project discussions if it affects their right to a healthy environment and that the communities had not been consulted adequately.² An earlier decision had excluded them because they were not part of an indigenous community.

The Río Sonora case is not unusual—damaging impacts from extractivist projects are growing. Demand for hydrocarbons, minerals and metals has exacerbated inequalities, environmental damage and governance weaknesses, with severe social and environmental consequences for many developing countries.³ Latin America is no exception. In the first two decades of the twenty-first century, Latin America became the primary mineral ore destination for investors⁴ as shifts towards energy transition minerals and efforts to improve digital connectivity boosted the search for lithium, copper, cobalt and other important inputs.

At the same time, more awareness of rights among affected communities is encouraging them to push back against investors. Pressures to behave responsibly have come from many quarters—international organizations, national governments, shareholder activists, public opinion and reputational concerns, and, of course, workers and communities who are affected by company practices. For example, in 2011, the Office of the United Nations (UN) High Commissioner for Human Rights set out the responsibility of corporations to respect human rights.⁵ Moreover, rulings of the Inter-American Court of Human Rights, and the regional Escazú Accord, which strengthened environmental rights guarantees, have bolstered the position of rights-defending communities.⁶

However, international scrutiny, voluntary firm-level responsibility commitments and shaming pressures are often ineffective.⁷ Indeed, Choudhury and Petrin argue that business has not done enough to serve the public interest, and activities need to be more oriented to social ends.⁸ To address these shortcomings, I ask how certain host country conditions induce mining companies to behave responsibly and to respond fairly and effectively to community resistance in Latin America. I hypothesize that *actions by firms are affected by the interaction between two host country conditions: first, the ability and willingness of domestic actors to*

² PODER et al, 'Minería Canadiense en Puebla y su Impacto en los Derechos Humanos,' (February 2017).

³ Juan Auz, 'Human Rights-based Climate Litigation: A Latin American Cartography' (2022) 1 *Journal of Human Rights and the Environment*, 114. César A Rodríguez Garavito and Carlos Andrés Baquero Díaz, *Conflictos Socioambientales en América Latina: El Derecho, los Pueblos Indígenas y la Lucha Contra el Extractivismo y la Crisis Climática* (Ciudad de México: Siglo Veintiuno Editores 2020). Economic Commission for Latin America and the Caribbean, *Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean: Towards Achievement of the 2030 Agenda for Sustainable Development* (LC/TS.2017/83) (Santiago 2018). Inter-American Development Bank, *Lessons from 4 Decades of Infrastructure Project Related Conflicts in Latin America and the Caribbean* (Washington DC: IDB 2017). Virginie Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (London: University of London Press 2022).

⁴ Mariana Walter and Lucrecia Wagner, 'Mining Struggles in Argentina: The Keys of a Successful Story of Mobilisation' (2021) 8 *The Extractive Industries and Society*, 1.

⁵ Office of the United Nations Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (New York and Geneva: United Nations 2011), 13.

⁶ Olga Malets, 'The State in Private Sustainability Governance: Contestation, Limited Statehood, and Forest Certification in Russia' in Alejandro Esguerra, Nicole Helmerich, and Thomas Risse (eds.) *Sustainability Politics and Limited Statehood: Contesting New Modes of Governance* (London: Palgrave Macmillan 2017) 105.

⁷ On the failures of Corporate Social Responsibility (CSR) initiatives, see Peter Newell, 'CSR and the Limits of Capital' (2008) 39:6 *Development and Change*, 1063. Peter Newell and J G Frynas, 'Beyond CSR: Business, Poverty and Social Justice: An Introduction' (2007) 28:4 *Third World Quarterly*, 669.

⁸ Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (Cambridge: Cambridge University Press, 2019).

litigate, and second, the capacity of domestic institutions to hear and resolve cases. Institutional or administrative capacity and legal mobilization are my key causal variables, but they are not discrete, separate characteristics or factors. Neither is sufficient on its own. Institutions provide a legal opportunity structure for litigators in which they interact with personnel working in judicial or administrative institutions.⁹ Such interactions often result in decisions that favour affected communities, but beyond that, they can also result in evolutions in mindsets among those tasked with judicial or administrative decisions.¹⁰

I analyze multinational mining company operations at two mines, one in Argentina and the other in Chile. In Chile, where civil society had litigation skills (and a willingness to use them) and the relevant institutions were strong, company behaviour was restrained and cooperative. In Argentina, where civil society had a clear preference for street protests, and the provincial institutions were unwilling to address alleged human rights violations, the investors were dismissive of community complaints. It was only the tenacious legal actions of a federal prosecutor that enabled some control to be exerted over the mining companies.

II. Respecting Human Rights in Mining Activity

Company behaviour in the mining sector is ostensibly guided by corporate social responsibility (CSR) and due diligence norms whereby firms address community concerns and alleviate detrimental social and environmental effects. CSR, or environmental, social, and corporate governance (ESG) considerations, are now an important feature of activity reports and internal corporate organization. Yet there is an obvious and gaping power imbalance between these multinational mining companies and the local communities that are affected by their operations. What restrains the companies? How do they react when faced with challenges from local communities? There is no question that in a world where only power mattered, the firms would prevail because their investments would not be constrained by community opposition. Indeed, scholars have shown that there are various types of power frameworks available to transnational firms which communities are often powerless to confront.¹¹

For the purposes of this study, I treat corporate power and interests as a constant, assuming that mine investors are both 1) more powerful than communities, and 2) disinterested in social protections unless forced to be. But there is more to the relationship than power—there is also the law, imperfect though it may be, and institutions which act as custodians of the law. The power of multinational corporate investors in the mining industries in Chile and Argentina is counterbalanced by more or less effective civil society resistance, and by institutions whose remit is to protect rights and uphold the rule of law. How do civil society and domestic institutions do these things and how effective are they? That is the heart of the research question here.

Ensuring that the interests of affected communities are protected in mining operations in remote developing country locations is a major challenge, but despite the rising importance of CSR/ESG, and ample research on aspects of it, little attention has been given to specific

⁹ Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9:2 *Journal of European Public Policy*, 238.

¹⁰ Aspinwall (2021), note 1. Ezequiel González, 'Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina,' (2014) 46:4 *Comparative Politics*, 1.

¹¹ Doris Fuchs and Sophie Doling, 'Corporate Power and the Shaping of Sustainability Governance' in Basil Bornemann, Henrike Knappe and Patrizia Nanz (eds), *The Routledge Handbook of Democracy and Sustainability* (New York: Routledge 2022).

mechanisms that can control company behaviour.¹² It is clear that social movements have an impact on mining investment and therefore on how that investment affects local livelihoods¹³ but it is not clear exactly *how*. Opposition movements combine strategies such as litigation, media outreach and street activism at different levels of government to improve the chances of success when opposing mining operations¹⁴, yet the relative effectiveness of these strategies is not always clear.

From the perspective of companies, the picture is less certain.¹⁵ Existing studies of firm CSR behaviour do not adequately answer the question of how or why firms respond to community interests and concerns. CSR goals are peripheral to operations, according to some¹⁶, even philanthropic.¹⁷ When it comes to firm responses to community resistance, at least two patterns can be detected. The first is side payments; the second is rhetorical. New investments in developing countries tend to increase social conflict, especially where transparency is low. Thus, CSR spending is positively correlated with conflict in mining operations in Africa according to some studies: companies tend to spend when they experience conflict in order to reduce the risk of further conflict.¹⁸ CSR investments by mining companies have increased, including payments and investments in local infrastructure or services. However, despite the growing attention to community-oriented goals and abundant information about best practices, mining companies still fall far short of fully incorporating responsibility goals and human rights protections into their actual business practices.¹⁹ Their reporting tends to be variable, and realizing responsibility goals often requires stakeholder engagement for it to be effective.²⁰ A top-down auditing approach to evaluating CSR implementation and compliance, and ensuring accountability, has often not worked well.²¹

Firms also react rhetorically by building rationality narratives around sustainability and responsibility, drawing on (or twisting) the science to undermine community positions

¹² On the interaction between NGOs and firms more generally see Michael Yaziji and Jonathan Doh, *NGOs and Corporations: Conflict and Collaboration* (Cambridge: Cambridge University Press 2009).

¹³ Anthony Bebbington et al, 'Mining and Social Movements: Struggles over Livelihood and Rural Territorial Development in the Andes' (2008) Brooks World Poverty Institute Working Paper No. 33.

¹⁴ Maiah Jaskoski, *The Politics of Extraction: Territorial Rights, Participatory Institutions, and Conflict in Latin America* (New York: Oxford University Press 2022). Walter and Wagner, note 4. Arnim Scheidel et al, 'Environmental Conflicts and Defenders: A Global Overview' (2020) 63 *Global Environmental Change*. Lucas Gabriel Christel, 'Resistencia Sociales y Legislaciones Mineras en las Provincias Argentinas. Los Casos de Mendoza, Córdoba, Catamarca y San Juan (2003-2009)' (2020) 27:1 *Política y gobierno*.

¹⁵ Christopher Wickert and David Risi, *Corporate Social Responsibility* (Cambridge: Cambridge University Press 2019).

¹⁶ Deanna Kemp and John R Owen, 'Community Relations and Mining: Core to Business but not "Core Business"' (2013) 38:4 *Resources Policy*, 523.

¹⁷ Dima Jamali and Ramez Mirshak, 'Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context' (2007) 72 *Journal of Business Ethics*, 243.

¹⁸ Selina Bezzola et al, 'CSR and Local Conflicts in African Mining Communities' (2022) 158 *World Development*. Matthew Amengual, 'Buying Stability: The Distributive Outcomes of Private Politics in the Bolivian Mining Industry' (2018) 104 *World Development*, 31.

¹⁹ Andrew Swart, 'Where The Rubber Meets The Road: Getting Serious About ESG In Mining' *Forbes* (18 April 2022). Radu Mares, 'Disruption and Institutional Development: Corporate Standards and Practices on Responsible Mining' in Isabel Feichtner, Markus Krajewski and Ricarda Roesch (eds.), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Cham, Switzerland: Springer Nature Switzerland 2019). Kemp and Owen, note 16.

²⁰ Chitra Sriyani De Silva Lokuwaduge and Kumudini Heenetigala, 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study' (2017) 26:4, *Business Strategy and the Environment*, 438.

²¹ Deanna Kemp, John R Owen and Shashi van de Graaff, 'Corporate Social Responsibility, Mining and "Audit Culture"' (2012) 24, *Journal of Cleaner Production*, 1.

where they are contrary to the mines' objectives.²² Companies frame solutions in technical and measurable ways, creating distance between their opponents and themselves.²³ They use Western standards of interaction and do not make adjustments to account for local context.²⁴ Moreover, certain benefits from external investors, such as capital or knowledge, often backfire, as local populations find them unsuitable or counterproductive or downright damaging.

III. Mobilizing for Rights

Domestic law in Latin America and international agreements to which most countries are party guarantee substantive environmental rights, such as a healthy environment, and also procedural rights, such as rights to information about business investments, participation in planning decisions and access to justice. Both substantive and procedural rights were important to the cases below. In numerous instances, mining companies were alleged to have violated these rights in communities affected by their investments.

However, there was significant variation in company responses when challenged. As stated above, the variation was due to the interaction between 1) the capacity of relevant institutions (especially environmental agencies and courts) to hear and knowledgeably decide the case; and 2) the ability and willingness of litigators (prosecutors, communities, and NGOs) to bring legal action against the mine. Institutional capacity and effective legal mobilization made it more likely that the mine would adhere to the law, listen to communities, and respond positively to their complaints. The power of the mining companies and their interest in moving forward with investments is a constant, as I mentioned. State institutions are responsible for ensuring that specific human rights are protected (in these cases they are a healthy environment, accessible water and consultation rights). Also, civil society action to call attention to rights violations, and the strategies they choose, are essential to accounting for firm behaviour. Institutional capacity and willingness to act, and civil society strategies are the variables here.

What is the a priori logic for expecting that legal mobilization and institutions matter? I draw from the literature on legal opportunity structure (LOS) to connect these two causal factors. LOS is a concept borrowed from political opportunity structure theory, in which the ability to make legal claims hinges on characteristics of the court system, regulatory agencies and horizontal oversight institutions (such as ombudsmen, public prosecutors and freedom of information agencies).²⁵ The more accessible the LOS, the more incentives there are to mobilize legal challenges (either by civil society or by prosecutors). The accessibility of the legal opportunity structure is affected by rules over who has standing and under what circumstances, the ease of making a legal claim and the cost and timeliness of judgements.

Legal frameworks also matter—due process and procedural rights, rights to a healthy environment, rights to health, freedom of expression, cultural rights and freedom from

²² Stuart Kirsch, *Mining Capitalism: The Relationship between Corporations and Their Critics* (Oakland, CA: University of California Press 2014).

²³ Fabiana Li, *Unearthing Conflict: Corporate Mining, Activism, and Expertise in Peru* (Durham, NC: Duke University Press 2015).

²⁴ Eric Cezne and Jana Hönke, 'The Multiple Meanings and Uses of South–South Relations in Extraction: The Brazilian Mining Company Vale in Mozambique' (2022) 151 *World Development*.

²⁵ Hilson, note 9. Bruce M Wilson and Juan Carlos Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39:3, *Comparative Political Studies* 325. Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press 2009). Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46:3, *Law and Society Review*, 523.

persecution for defending the environment. There are numerous differences among legal systems with respect to sources of law and types of claims, among others,²⁶ which have impacts on how legal mobilization occurs and with what results. As freedoms and rights become more widespread and inclusive, the LOS becomes more accessible and legal mobilization is encouraged. Rose Spalding made a similar argument in her study of mining resistance in Central America.²⁷ Spalding shows that mining resistance is more successful when there are what she calls ‘docking points’ where social movements have access to state authorities.

Thus, to be clear, the legal opportunity structure is what gives civil society greater or lesser ability to press legal challenges. Moreover, the impact of the LOS on legal mobilization is not static. Legal mobilization evolves endogenously within the claims-making process, encouraging various kinds of strategies associated with legal claims, such as alliance-building, public awareness and educational outreach, forum-shopping and framing strategies which link environmental compliance claims to rights discourses. Legal mobilization differs according to the legal opportunity structure.²⁸ Moreover, the iterative effect of rights claims enables challengers to experiment and learn, and the ability to form partnerships between civil society groups and sympathetic public agencies which can exert pro-compliance pressure is also likely to augment the effectiveness of legal mobilization.

Communities that are close to extractive activities have a variety of potential resistance tools at hand²⁹, but in many cases, they do not have the knowledge, experience, connections or resources to take forward legal challenges. This may explain why street protests and blockades are such a common means of resisting mines in Latin America. On the other hand, specialized law firms or NGOs with knowledge and experience of legal opportunity structures and processes can be helpful for communities. They know where to take a claim or complaint and how to frame it to maximize their chances of success. Litigators connect to human rights and environmental regulatory standards to show where companies have failed to uphold the law.³⁰ They also draw on scientific and technical as well as legal arguments and expertise to put forth arguments about damages. Therefore, the presence of these civil society actors is important for communities.

Institutional capacity and a willingness to hear complaints are the other half of the equation because legal mobilization requires open venues willing to hear and decide on complaints. Institutional capacity is defined as the ability ‘to analyze, to create new programs, to solve problems, to plan, to administer programs with efficiency, and to ward off corruption.’³¹ In practice, capacity operates through institutional autonomy, legal authority (or mandate) and resources (money and trained personnel). Autonomous institutions set agendas of inspections, reporting and so forth, independently of elected officials or sectoral bureaucrats. Pro-mining authorities and companies are unable to interfere with environmental and human rights enforcement if the latter agencies are

²⁶ Robert McCorquodale, ‘The Litigation Landscape of Business and Human Rights,’ in Richard Meeran and Jahan Meeran (eds), *Human Rights Litigation Against Multinationals in Practice* (Oxford: Oxford University Press, 2021).

²⁷ Rose J Spalding, *Breaking Ground: From Extraction Booms to Mining Bans in Latin America* (New York: Oxford University Press 2023). Michael L Dougherty, ‘Rose J Spalding, *Breaking Ground: From Extraction Booms to Mining Bans in Latin America* Oxford University Press, 2023, 308 (2024) 56:2 *Journal of Latin American Studies*, 365.

²⁸ Mark Aspinwall, ‘Como las Oportunidades Legales Condicionan la Movilización entre los Movimientos Ambientales’ (2020) 28 *Perfiles Latinoamericanos*, 27.

²⁹ Jaskoski, note 14.

³⁰ See, for example, Durwood Zaelke, Matthew Stilwell and Oran Young, ‘NGO Compliance Strategies’ in Durwood Zaelke, Donald Kaniaru and Eva Kružíková (eds.), *Making Law Work: Environmental Compliance and Sustainable Development* (London: Cameron May Ltd. 2005), Volume I.

³¹ Daniel P Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton University Press, Princeton, NJ 2001), 14.

autonomous. The legal mandate refers to the authority granted to the institution to undertake its work. Institutions may have the authority to conduct inspections without independence from political executives, or vice versa, either of which would neutralize their effectiveness.

Finally, resources means that personnel have technical proficiency in the policy area (understanding the rules and how legal or scientific procedures operate), and broader abilities such as information-processing skills, knowledge of problem-solving techniques and communication abilities.³² Training in policy analysis, law, and natural sciences enables personnel to make sense of technical arguments, precedents, legal standards and facts of cases. Adequate resources also imply that these personnel have sufficient budgets to carry out their work. Independence from government principals on the part of judicial or administrative oversight bodies, legal authority to investigate cases and punish transgressions, the will to do so and resources (financial and human capacity) encourage litigators to act. Without institutional capacity and willingness, valid complaints from skilled litigators get no hearing and the rule of law is vulnerable. Of course, institutions with capacity may still be faced with problems of corruption, conflict of interest, capture, conflicting executive priorities and power imbalances favouring other institutions. In other words, their willingness to address complaints is not a given.

In separate research, Haslam showed that variation in institutional capacity had a significant impact on the outcome of conflicts over the Pascua Lama mine, which crosses the border between Chile and Argentina.³³ The mine provided a kind of natural experiment because it is located in both countries but is controlled by one company, Barrick Gold, and because there were similar environmental risks to water sources and linked transnational movements with similar demands. Chilean authorities halted the project in early 2018, while in Argentina, despite legislative changes at provincial and federal levels to protect glaciers (the source of much water for agricultural communities), social movement activists were unable to bring the project to a halt, because of 'weak and politicized oversight.' A context of the rule of law in Chile together with bureaucratic capacity and ability to implement policies led to a sharply different outcome there. Table 1 below sets out theoretical expectations based on institutional and civil society capacities.

IV. Cases and Methods

My cases are the Bajo la Alumbrera mine in Argentina and the El Morro mine in Chile. Most of the mine investors in these mines are Canadian. The mining companies are Newmont Goldcorp, Teck, New Gold, Yamana Gold and Glencore. All the firms profess to respect certain standards of conduct³⁴, even though their human rights performance has been harshly criticized by civil society and government agencies in numerous countries.³⁵ All

³² Kimberly Nolan García and Mark Aspinwall, 'Restraining Gulliver: Institutional Reform and the Strengthening of State Capacity and Compliance' (2019) 13:3 *Regulation and Governance*, 324–5. C Dahlstrom, V Lapuente and J Teorell, 'The Merit of Meritocratization: Politics, Bureaucracy, and the Institutional Deterrents of Corruption' (2012) 65 *Political Research Quarterly*, 656.

³³ Paul A Haslam, 'The Two Sides of Pascua Lama: Social Protest, Institutional Responses, and Feedback Loops' (2018) 106 *European Review of Latin American and Caribbean Studies*, 157.

³⁴ Loana Tejero, 'Proyecto MARA-Agua Rica: Las Claves de un Emprendimiento Millonario para Producir Cobre, Molibdeno, Oro y Plata en Catamarca' *Econojournal*, 5 April 2022. Sebastián D Penelli, 'Proyecto MARA, el Plan Minero que Generará USD1.200 Millones Anuales Durante 27 Años' *ámbito*, 6 April 2022. Lihueel Althabe, 'Proyecto Integrado MARA: El Yacimiento de Cobre que Usará Infraestructura Reciclada y Busca ser un Ejemplo de Sostenibilidad' *Infobae*, 6 April 2022.

³⁵ Working Group on Mining and Human Rights in Latin America, 'The Impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American

Table 1. Expected firm behaviour under varying domestic conditions

| Institutional capacity | | | |
|---|------|---|---|
| | | High | Low |
| Civil society litigation capacity | High | Firms conform to legal requirements, positive interaction with communities. | Risk of co-optation or capture of institutions. Optional firm interaction with communities. |
| | Low | Behaviour dependent on whether institutions take action independently of civil society. | Maximum freedom of operation for firms. |

except two (New Gold and Yamana Gold) are members of the International Council on Mining and Metals, which espouses principles of ethical business, respect for human rights and environmental protection.³⁶ All except Yamana Gold are members of the Mining Association of Canada, whose aim is to ‘turn high-level environmental and social commitments into action on the ground ... (by providing) communities with valuable information on how operations are faring in important areas, such as community outreach, tailings management and biodiversity.’³⁷ Yamana Gold’s website includes similar commitments to community relations and ESG issues.³⁸

All the firms are Canadian except Glencore, which is Swiss. Methodologically, selecting firms with similar national profiles and ethics commitments helps to control for variation. One mining company (Newmont Goldcorp) was a major investor in both mines. Thus, I do not look at internal firm-level decision processes but rely on their similar profiles to control as much internal variation as possible. In an essay of this length, it is impossible to work through all the potential internal decisions made by the companies. My focus instead is on their revealed behaviour.

The case analysis examines the specific human rights violations alleged by local communities, presenting information on the mining investments, reviewing how conflict unfolded and what the demands of local communities and civil society groups were. I analyze community strategies and actions, as well as the responses of the company and relevant government agencies, and the interaction between social actors, mining

Commission on Human Rights,’ 2014, http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf (accessed 1 June 2021).

³⁶ The International Council on Mining and Metals, ‘Our Principles’ <https://www.icmm.com/en-gb/our-principles> (accessed 6 December 2024).

³⁷ The Mining Association of Canada, ‘Corporate Responsibility’ <https://mining.ca/our-focus/corporate-responsibility/> (accessed 6 December 2024).

³⁸ Yamana Gold was acquired by Pan American Silver in 2023. For a statement on its approach to communities see Pan American Silver, ‘Sustainability’ <https://panamericansilver.com/sustainability/> (accessed 5 February 2025). These guidelines are informed by The United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises for Responsible Business Conduct have sought to provide international standards for national policies. John G Ruggie, Caroline Rees, and Rachel Davis, ‘Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations’ (2021) 6 *Business and Human Rights Journal*, 179. Peter Muchlinski, ‘The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights’ (2021) 6 *Business and Human Rights Journal*, 212. Florian Wettstein, ‘Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights’ (2021) 6 *Business and Human Rights Journal*, 312. Surya Deva, ‘Mandatory Human Rights due Diligence Laws in Europe: A Mirage for Rightsholders?’ (2023) 36 *Leiden Journal of International Law*, 389.

companies and public institutions. I consider decisions by national or regional/local institutions in response to social demands, and company reactions following social demands and institutional decisions. I look at what happened to the mine project, whether it was halted or changed, and whether company attitudes and actions evolved as a result of social resistance. In later sections, I evaluate the reasons why the mines responded as they did in each location, particularly the role of institutional capacity and legal mobilization.

In terms of case study design, I follow Yin.³⁹ The first element of the design is the puzzle, namely variation in the behaviour of similar-profile companies in different national contexts. Second, the units of analysis are firms, institutions and litigators acting within legal opportunity structures. Third, data come from the events and actions of these actors, which I interpret and compare across the cases, considering alternative explanations. Concretely, in my empirical cases, I compare how institutional capacity and legal mobilization impacted the behaviour of multinational mining companies at two mines, one in Argentina and one in Chile. Thus, the key elements for comparative purposes are 1) the actions of civil society in response to perceived human rights violations, 2) the actions of institutions in light of civil society action and 3) firm behaviour in light of the first two elements. *Note here that the characteristics of the firms, their intentions and their power are not elements of comparison.* These are treated as constants for reasons discussed earlier. Table 2 below indicates the predicted sequences following an accusation of human rights violations.

Thus, the cases show how civil society responded to human rights violations, how institutions acted on these complaints and how companies responded. The analysis accounts for company behaviour in the face of accusations of human rights violations. In Argentina the ‘wrong’ was pollution. In Chile, it was a failure to consult indigenous communities according to established human rights standards. In both cases, the firms were found to have violated standards and laws, but they reacted differently following those findings. The methodological strategy is inductive; there is no widely accepted framework to explain how firm behaviour is constrained in the presence of social resistance. I start with an empirically observable outcome (firm behaviour) and look for evidence that certain mechanisms were a factor in the outcome. The mechanisms should be necessary for the outcome to occur. I nevertheless explore potential alternative explanations in a later section. While it is true that national contexts and characteristics between Chile and Argentina vary, I have selected specific characteristics to test, as mentioned earlier and explained (institutional capacity and legal mobilization). These are the national characteristics that I expect will matter when it comes to company behaviour, and for the purposes of this study, they represent the variation between Chile and Argentina.

There are some important differences between the two operations, as we shall see, including the fact that Alumbraera operated for more than 20 years, while El Morro has yet to begin operations. However, I argue that the comparison is justified for several reasons. First, both are in regions with relatively low income levels and with substantial local support for mining (and opposition). Alumbraera is in Catamarca, one of the poorest provinces in Argentina, where mining represents 70 per cent of the economy.⁴⁰ This mine alone generated as much as 3.4 per cent of Argentine exports in the 2000s, and 96 per cent of provincial exports.⁴¹ El Morro is located in the commune of Alto del Carmen in the Atacama region of Chile. Alto del Carmen has a poverty level about twice the national average,

³⁹ Robert K Yin, *Case Study Research: Design and Methods*, 4th ed (Sage: Thousand Oaks, CA 2009).

⁴⁰ Annie Lamalice and Juan-Luis Klein, ‘Efectos Socioterritoriales de la Mega Minería y Reacción Social: el Caso de Minera Alumbraera en la Provincia de Catamarca, Argentina’ (2016) 65 *Revista de Geografía Norte Grande* 155.

⁴¹ Diego Murguía, ‘20 Años de Minería en Alumbraera: Controversias, Aprendizajes y Asuntos Dendientes de Cara a Agua Rica’ (2022) 62:1 *Estudios Sociales*.

Table 2. Sequence of actions following an accusation of human rights violations

| Step 1 | Step 2 | Step 3 | Step 4 |
|---|--|--|--|
| Firms allegedly violate human rights (substantive or procedural). | Local communities take action against firms. | Local or national institutions are asked to adjudicate or administer a remedy. | Firms react (or not) to institutional decisions. |

according to the national congressional library, where more than 41 per cent of homes lack basic services, compared to a national average of less than 14 per cent.⁴²

Second, the two mines are located in remote mountainous areas in the Andes, where livelihoods are centred around small-scale farming, which depends on glacial runoff for water supplies. Water pollution and sharply reduced water supply were a threat in both areas, and local farming and indigenous communities reacted negatively for that reason. Both faced large-scale public resistance to their operations and their investment plans. Third, the strong presence of Canadian ownership in the two operations—with their professed adherence to human rights and socially responsible practices—and the absence of other external influences, such as the Inter-American Commission and civil society organizations such as Amnesty International and Greenpeace, enables a comparison of the effects of domestic conditions on company practices and decisions. Fourth, institutions at all levels were involved, including provincial authorities in Argentina and regional tribunals, courts and environmental authorities in Chile.

I employ a process tracing methodology and use a variety of primary and secondary sources, including information from academic publications, media and civil society sources; official bodies such as courts, tribunals, ministries and prosecutors and in-depth interviews with participants. Process tracing requires ‘looking for the observable implications of hypothesized causal processes within a single case.’⁴³ In my case, this means of course the effects of legal mobilization and institutional capacity on company behaviour in the light of community resistance. In process tracing, case detail is necessary—this is what enables us to identify instances in which civil society and institutions took action of some kind, and also permits us to make inferences or draw direct conclusions based on the later actions of firms.⁴⁴ Given that I am dealing with a small number of cases and a large number of potentially contributory causes, I use multiple sources of evidence to triangulate and ensure validity, and then infer causality. I exercise caution in my conclusions. My purpose is not to generalize but to contribute to theory-building, seeking causal mechanisms in the cases I examine. I treat them as a way ‘to provide insight into an issue or to redraw a generalization.’⁴⁵

⁴² Constanza Vergara Cáceres, ‘Conflictos Socioambientales Relacionados al Agua y la Minería en Chile el Extractivismo Minero Entre 1990 y 2015. Memoria para Optar al Título Profesional de Antropóloga Social.’ (2019) 77, <https://repositorio.uchile.cl/bitstream/handle/2250/173944/Conflictos%20socioambientales%20relacionados%20al%20agua%20y%20la%20miner%C3%ADa%20en%20Chile.pdf?sequence=1> (accessed 6 December 2024). For more information on the data, see https://www.bcn.cl/siit/reportescomunales/comunas_v.html?anno=2021&idcom=3302 (accessed 6 December 2024).

⁴³ Andrew Bennett, ‘Process Tracing: A Bayesian Perspective’ in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds.), *The Oxford Handbook of Political Methodology* (New York: Oxford University Press 2008) 705. Andrew Bennett and Jeffrey Checkel, ‘Process Tracing: From Philosophical Tool to Best Practices’ in *ibid* (eds.) *Process Tracing: from metaphor to analytical tool* (Cambridge: Cambridge University Press 2015).

⁴⁴ Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods* (Ann Arbor: University of Michigan Press 2013).

⁴⁵ Robert E Stake, ‘Qualitative Case Studies’ in N K Denzin and Y S Lincoln, *The Sage Handbook of Qualitative Research*, 3rd ed (Sage Publications Ltd. 2005) 445. Beach and Pederson, *note 44*.

A. Bajo la Alumbra, Argentina

The Alumbra mine, one of Argentina's earliest 'mega-mines,' began operations in 1997, with ownership divided between Glencore (50 per cent), Newmont Goldcorp (37.5 per cent) and Yamana Gold (12.5 per cent).⁴⁶ Alumbra mined copper, gold and molybdenum until 2018 when deposits were exhausted and operations stopped.⁴⁷ It was established in propitious circumstances: a 1993 mining law offered financial incentives and judicial protection to encourage mining investment and a 1994 constitutional reform devolved oversight of mining to the provincial level.⁴⁸

Numerous activist groups emerged to contest the mine's activities, such as the Citizens Assemblies Union (*Unión de Asambleas Ciudadanas*) in 2006, which gives legal and communication advice and helps link anti-mining groups nationally, and the National Network of Mine-Affected Communities (*Red Nacional de Comunidades afectadas por la minería*).⁴⁹ Most social resistance centred around water use and pollution, either from the tailings dam in Catamarca or along the slurry pipeline, which stretched 317 kilometres from Catamarca province to Tucumán province.

In 2004, residents of the village of Vis-Vis complained of a spill, which led to protests and blockages.⁵⁰ In the same year, the first leak from a tailings dam was acknowledged by Alumbra. Part of the compensation plan was to build three solid waste treatment plants to limit toxic discharges, though the company only built one.⁵¹ In 2007, a local NGO complained of leaks in the slurry pipeline as well as from the tailings dam, plus air pollution from dust and illnesses among inhabitants of the affected area.⁵² It reported an investigation by a Tucumán federal prosecutor, Antonio Estofán, into Alumbra pollution. It also described the complaint by inhabitants of Villa Vis, Catamarca related to leaks and detailed the accusations of civil society organizations.

The *Gendarmería Nacional* did tests confirming high levels of toxic residues from spills such as copper sulfate cyanide. The mining secretariat also confirmed the spills and pollution levels, but despite numerous complaints further action by the authorities did not take place.⁵³ By 2009, studies by the *Gendarmería Nacional*, the Tucumán environmental ministry, the federal mining ministry and even the company itself had all shown that pollution levels were high. Sulfates,

⁴⁶ Ana Chayle, et al, 'Cuando la Autodeterminación del Pueblo deja de ser una Utopía. La Experiencia de Andalgalá. *Tricontinental*,' (9 July 2021). Murguía (2022), note 41. Goldcorp was the original investor. It was purchased by Newmont in 2019, and the new firm became known as Newmont Goldcorp. For the purposes of this paper, I use the name Newmont Goldcorp.

⁴⁷ Tejero, note 34.

⁴⁸ Diego Murguía, 'Minería Sostenible? Análisis del Conflicto Socio en Bajo de la Alumbra Desde sus Informes de Sostenibilidad y Actores Locales Críticos' (2013) 13 *Estudios Socioterritoriales. Revista de Geografía*, 69. Lamallice and Klein, note 40. Santiago P Petrocelli, 'Institucionalización de la Cuestión Ambiental en el Contexto del (neo) Extractivismo Minero. El Rol del Estado Argentino en el Caso Minera Alumbra Ltd.' (2019) 15:2 *Geograficando*. Walter and Wagner, note 4, 3.

⁴⁹ María Nieves Solsona, 'Bajo de la Alubra: Vivencias y Huellas a Partir de las Experiencias de los Trabajadores,' (Buenos Aires: Secretaría de Política Minera, Ministerio de Producción y Trabajo 2019), 37. Walter and Wagner, note 4, 7.

⁵⁰ Petrocelli, note 48, 5.

⁵¹ Alejandra Groba, 'Alumbra y Tucumán, al Borde de un Conflicto' *Cronista*. (1 September 2004).

⁵² FOCO, 'Informe de Investigación Sobre las Operaciones de Minera Alumbra Ltd. en Argentina y de las Transnacionales que la Integran' Observatorio de las Empresas Transnacionales, Foro Ciudadano de Participación por la Justicia y los Derechos Humanos. (12 March 2007), <https://www.business-humanrights.org/en/latest-news/doc-informe-de-investigaci%C3%B3n-sobre-las-operaciones-de-minera-alumbra-ltd-en-argentina-y-de-las-transnacionales-que-la-integran/> (accessed 6 December 2024).

⁵³ Murguía (2013), note 48, 75. Tierra Viva (2021a), 'Andalgalá de pie frente a la megaminería' (13 April 2021), <https://agenciaterraviva.com.ar/andalgala-de-pie-frente-a-la-megamineria/> (accessed 6 December 2024).

molybdenum, iron, manganese, arsenic, boron and other waste exceeded permitted limits.⁵⁴ Moreover, a study of the mine's own 2009 sustainability report showed that it was biased, lacked transparency and communication and revealed weak oversight by local authorities in disputes over spills.⁵⁵ There was no participation by interested groups or mechanisms of dialogue, nor were there independent scientific evaluations to enable alternative judgements of the mine's actions.⁵⁶ In 2013, a federal court in Tucumán received the third study in a year showing high levels of copper in the water. Analyses indicated not simply that Alumbrera was responsible for the pollution, but that the levels were such that the company was negligent.⁵⁷

Meanwhile, most of the anti-mining activism involved street protests, blockades, marches, citizen committees, media communication, networking and similar activities, rather than legal action.⁵⁸ The aim was to undermine the positive image that Alumbrera had among many in the community and government, according to one NGO leader.⁵⁹ Nevertheless, some legal cases were launched too, as citizens sought compensation for damages. These were civil cases, and they were almost entirely fruitless, for several reasons. It was difficult in civil cases to prove a connection to concrete harms resulting from the spills, which made it hard for courts to assess damages. Furthermore, the mining company countered with other studies indicating that pollution was at safe levels, and it made periodic investments in public services and infrastructure, without compensating individuals for specific damages.⁶⁰ Perhaps most importantly, the authorities simply were reluctant to act against a large local employer, especially since provincial governments were also local investors in the mines. In short, the legal opportunity structure was not advantageous.

While civil cases were ineffective, criminal cases were not. In 1999 the director of the provincial environmental ministry in Tucumán, Juan González, brought a criminal complaint against the mine. The case was taken on by the federal prosecutor in Tucumán (Gustavo Gómez), who ordered baseline studies to be done on environmental conditions. Provincial regulations permitted a higher level of contamination than was permitted under federal law, but the prosecution was still able to secure a criminal indictment (although not until 2008) of one of the mine's executives, Julián Rooney. However, in September 2009, the *Cámara Nacional de Casación Penal* (Argentina's highest federal court in criminal cases) reversed the decision against Rooney and requested more studies to determine pollution levels.⁶¹ The institutional reluctance up to this point to take serious action against the mine is striking, even with a federal prosecutor behind the litigation, and it shows the inauspicious nature of the legal opportunity structure even for criminal complaints. It was not until 2016 that prosecutors were finally able to convince a federal court in Tucumán that there was enough evidence to indict a second company official, Raul Mentz. An appeals court confirmed the indictment the following year. Moreover, Julián Rooney was indicted a second time in April 2019.⁶² These

⁵⁴ https://www.biodiversidadla.org/Principal/Prensa/Argentina_el_oro_no_brilla_en_la_academia (accessed 6 December 2024).

⁵⁵ Murguía (2013), note 48.

⁵⁶ Ibid, 91. Petrocelli, note 48.

⁵⁷ <https://noalamina.org/argentina/tucuman/item/11892-peritaje-cientifico-ratifica-a-la-justicia-el-dano-que-causa-minera-alumbrera> (accessed 9 December 2024).

⁵⁸ Chayle, note 46. María del Mar Rodríguez and Susi Maresca, 'En Defensa del Agua y el Cerro, se Multiplican los Rechazos al Proyecto Minero MARA en Catamarca' *Agencia Tierra Viva*, (27 April 2022).

⁵⁹ Myrian Genisans. ProEco, Argentina. 24 March 2023. Personal interview.

⁶⁰ Ibid. Also, Murguía 2022, note 41. Eduardo Medina. Federal prosecutor, Argentina. 21 March 2023. Personal interview.

⁶¹ <https://www.fiscales.gob.ar/fiscalias/confirman-el-procesamiento-del-gerente-general-de-minera-alumbrera-por-contaminacion-ambiental/> (accessed 9 December 2024). Also, <https://www.petrolnews.net/noticia.php?&r=12045> (accessed 9 December 2024).

⁶² Poder Judicial de la Nación, 'Tribunal: Cámara Federal de Tucumán. Legajo No. 11 - Querellante: Ana Loto y Otros Imputado: Julián Rooney s/Legajo de Apelación.' Cédula de Notificación 20000039254905. (November 2020).

cases showed the determination of the federal prosecution to pursue criminal action against mining executives in cases of pollution that endangered human wellbeing (despite the institutional reluctance to act). They also showed that criminal complaints were more effective than civil complaints.⁶³

As Alumbraera was winding down, the mining companies embarked on a new project with another mine, known as Agua Rica, 35 kilometres from Alumbraera. The combined operation was called MARA, with investment from the same firms—Yamana Gold, Glencore and Newmont Goldcorp. MARA is designed to use some of Alumbraera's facilities while exploiting the Agua Rica deposits of gold, silver, copper and molybdenum, and the two sites would be connected by pipeline infrastructure. However, MARA also met with resistance.⁶⁴ Protesters from local and indigenous communities once again took to the streets and blocked routes to the combined operations, and the protests were repressed by provincial police using rubber bullets to disperse crowds and make arrests.⁶⁵ A group called El Algarrobo Assembly (*Asamblea El Algarrobo*) was created, and it denounced police brutality. Hence, the long history of Alumbraera is filled with protests and complaints, but little effective legal action, at least on the part of civil society. A 2021 article on the history of the mine spoke of fruitless years of 'weekly marches, information campaigns and workshops, outreach activities, selective blockades, and encampments,' all without yielding results.⁶⁶

B. El Morro, Chile

El Morro is a proposed open pit gold and copper mine located in Huasco Alto in the Atacama region of Chile, backed by Newmont Goldcorp (70 per cent) and Newgold (30 per cent). It was envisaged to last 14 years, with construction beginning in 2012 and operations beginning in 2017.⁶⁷ However, in 2012, following a complaint lodged the year before by an agricultural community, the Antofagasta Appeals Court suspended the environmental impact assessment (EIA) approved by the Atacama Environmental Evaluation Commission for El Morro. The reason was that the consultations with the indigenous communities by Conadi (the *Corporación Nacional de Desarrollo Indígena*) had mitigated the impacts for only a very few affected farming families and had not taken place in conformance with domestic and international law guaranteeing indigenous communities the right to free, prior and informed consent over projects affecting their land and livelihoods.⁶⁸ This decision was confirmed two months later by the Chilean Supreme Court.⁶⁹

⁶³ For a review of selected cases, see Nora Giménez, 'Otro Revés para Minera La Alumbraera,' *Conciencia Solidaria* (23 December 2017). <https://concienciasolidaria.org.ar/es/index.php/campanas/218-otro-reves-para-minera-la-alumbraera> (accessed 9 December 2024).

⁶⁴ Genisans interview, note 59.

⁶⁵ Página 12, 'Represión y Cruce Entre Policías y Ambientalistas dejó Varios Heridos' (4 May 2022), <https://www.pagina12.com.ar/419374-represion-y-cruce-entre-policias-y-ambientalistas-dejo-vario> (accessed 9 December 2024). Tierra Viva, 'Cacería de asambleístas socioambientales en Catamarca' (15 April 2021), <https://agenciatierraviva.com.ar/caceria-de-asambleistas-socioambientales-en-catamarca/> (accessed 9 December 2024). CDHAL, 'Declaración Asamblea El Algarrobo,' Comunicado (14 April 2021), <https://www.cdhal.org/es/declaracion-asamblea-el-algarrobo/> (accessed 9 December 2024).

⁶⁶ Chayle, note 46.

⁶⁷ Portal Minero, 'Proyecto Minero El Morro Obtiene Permiso Ambiental' (23 October 2013), <http://www.portalminero.com/display/NOT/2013/10/23/Proyecto+minero+El+Morro+obtiene+permiso+ambiental>.

⁶⁸ Portal Minero, '¿En qué consiste el Proyecto minero El Morro?' (23 March 2012), <http://www.portalminero.com/pages/viewpage.action?pageId=10911809> (accessed 9 December 2024). Vergara Cáceres, note 42, 113.

⁶⁹ See <https://www.diarioconstitucional.cl/2012/05/03/cs-confirmando-sentencia-de-la-corte-de-antofagasta-que-habia-acogido-accion-de-proteccion-de-comunidad-agricola-contra-proyecto-minero-el-morro/> (accessed 9 December 2024).

The environmental approval process was restarted, and the EIA was again approved by the Atacama Environmental Evaluation Commission in October 2013, only to be rejected by the Copiapó Appeals Court a month later.⁷⁰ The basis of the November Appeals Court decision again was that the indigenous communities had not been consulted adequately. Nevertheless, the tide turned when the same Copiapó Appeals Court in April 2014 ruled that the amended EIA now conformed to regulatory requirements and respected indigenous consultation mandates. It rejected an injunction request against the EIA by the indigenous communities and permitted the project to go ahead. In yet another twist, in October 2014, the Chilean Supreme Court agreed with the complainants and annulled the EIA. The Court mandated a new consultation with indigenous communities. Fifteen indigenous communities were represented in this case by an independent lawyer, Lorenzo Soto.⁷¹

Other institutions were divided. In 2014 the National Human Rights Institute (INDH) supported the indigenous communities' actions in an amicus brief to the Supreme Court.⁷² On the other hand, the local representative of the national Interior Ministry (the *Intendencia de Atacama*) supported the project. However, after the Supreme Court's ruling, and in sharp contrast with the behaviour of the Alumbreira mine investors, the El Morro investors revoked their own EIA to determine the best manner to proceed with the investment.⁷³ In 2015, Teck Resources Limited (a mining company, also Canadian) announced that it would form a joint venture with Newmont Goldcorp, combining El Morro with Teck's Relincho development.⁷⁴ The operation would mine copper, gold and molybdenum. This new group was named 'Nueva Unión.' By late 2018, the new company was in the process of doing its EIA and about to finish the fifth round of community consultations.⁷⁵ The purpose of the consultations was—according to the report—to hear from the community and to inform them of advances.

Meanwhile, three further complaints were made by the *Comunidad Diaguita Huasco Altinos* and various other affected inhabitants of the Río Huasco region between February 2017 and May 2019, this time to the agency responsible for overseeing and enforcing the EIAs (the *Superintendencia del Medio Ambiente*, or SMA).⁷⁶ The communities alleged that explorations by the mine were affecting the Huasco River and that the company lacked the necessary environmental authorizations. All three complaints were shelved by the SMA. The communities then turned to the Copiapó Appeals Court, which rejected the complaints in November 2019, and finally to the Supreme Court, which upheld the Appeals Court's decision in July 2020.⁷⁷ The Appeals Court found that exploration

⁷⁰ David Ortiz, (2013) 'Aprueban Proyecto Minero El Morro en Valle del Huasco' *biobiochile.cl*, (22 October 2013). OCMAL, 'Fallo Judicial Paraliza Proyecto Minero El Morro' (25 November 2013), <https://www.ocmal.org/fallo-judicial-paraliza-proyecto-minero-el-morro/> (accessed 9 December 2024).

⁷¹ Paula Correa, 'Proyecto Minero El Morro Detenido por Presuntas Irregularidades en Consulta Indígena' *DiarioUChile*, (8 October 2014). The Court also stated that such complaints should go via the administrative Environmental Tribunales, not the courts, but OCMAL countered that courts are there to protect rights that had been violated. The Supreme Court's decision is available at <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/649/Sentencia%20CS.pdf?sequence=4&isAllowed=y> (accessed 9 December 2024).

⁷² See <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/649/Amicus%20Curiae.pdf?sequence=1&isAllowed=y> (accessed 9 December 2024).

⁷³ <https://www.ocmal.org/?s=el+morro> (accessed 9 December 2024).

⁷⁴ See <https://www.teck.com/noticias-es/comunicados-de-prensa-es/2015/goldcorp-and-teck-combine-el-morro-and-relincho-projects-in-chile-es> (accessed 9 December 2024).

⁷⁵ Daniela Tapia, '¿En qué está el Proyecto Nueva Unión?' *Nueva Minería y Energía*, 26 November 2018.

⁷⁶ Sustentable, S A, 'Comunidades del río Huasco Denuncian que Proyecto Minero Nueva Unión Comenzó a Operar sin Permisos' *Sustentable*, (7 October 2021).

⁷⁷ Pilar Moraga Sariego, 'Sentencia de la Corte Suprema Rol N°36.413-2019 "Compañía Minera Nueva Unión SpA, Servicio de Evaluación Ambiental, la Junta de Vigilancia del Río Huasco y del Director General de Aguas de Atacama"' *Actualidad Jurídica Ambiental*, (26 November 2020).

activities had ceased and that the company had enough information to proceed with the EIA.⁷⁸ The Supreme Court ruled that Nueva Unión's activities were not illegal or arbitrary and did not threaten the rights of the inhabitants. It also stated that the EIA administrative procedures were ongoing.⁷⁹

Thus, by 2020 there were no active conflicts related to the El Morro project. Operations were due to start in 2023.⁸⁰ However, the communities were not finished taking legal action. They next filed a complaint in the First Environmental Tribunal, located in Antofagasta.⁸¹ The complaint argued that the company initiated explorations without permission, diverted water sources, adversely affected water quality, damaged ecosystems and caused other damages. They claimed that the SMA (which had shelved the earlier complaints) did not bother to verify the activities, the number of exploratory holes or the environmental impact, nor did they conduct water analysis and other tasks that would have established baseline conditions and led to a more appropriate regulatory environment for the mine.

The tribunal admitted the complaints in October 2021. In October 2022 it ruled in favor of the complainants on two of the three counts.⁸² It described the administrative proceedings in the SMA prior to their decision and stated that the SMA did not fully evaluate the impact of the mine and that it should not have accepted the company's argument that there was a distinction between mineralogical drilling and geotechnical drilling, because both have the same potential detrimental impact.⁸³ Neither the SMA nor the mining company appealed this decision, which required the SMA to reinstate enforcement and inspection activities.

In summary, numerous legal challenges occurred through different institutions, some administrative, some judicial, some at the regional level and others at the national level. Not all were successful, but together they effectively paralyzed the planned operation of the mine. There were some protests too. In November 2013 there were marches against El Morro, but unlike the Alumbrera experience in Argentina, civil society reaction to the mine was oriented far more towards litigation than street protests.

V. Human Rights Obstinacy or Constructive Engagement?

Despite similar commitments and national profiles, the firms behaved differently in these cases—the question is how legal mobilization and institutional responses affected that behaviour. In this section, I describe company behaviour and in the following section, I analyze the impact of institutional capacity and litigation on this behaviour.

⁷⁸ Minería Chilena, 'Corte Suprema Confirmó Fallo que Rechazó Recursos de Protección Contra Nueva Unión,' *Minería Chilena* (9 July 2020).

⁷⁹ Two dissenting judges argued that the precautionary principle was violated and that the SMA should have taken into account possible cumulative damages from exploration activities. Moreover, they argued that the company had the burden of proof to show that its actions would not harm the environment and that the authorities needed to justify why the exploratory drilling activities were excluded from the EIA.

⁸⁰ This is according to the Environmental Justice Atlas, which monitors conflict. See <https://ejatlas.org/conflict/proyecto-nueva-union-huasco-chile> (accessed 9 December 2024).

⁸¹ Chile's 2012 environmental reform created three independent tribunals to deal with environmental administrative matters in different regions of the country. George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policymakers* (Nairobi: UN Environment Programme 2016), 28.

⁸² Primer Tribunal Ambiental de Chile, Rol R-51-2021 acum. R-52-2021, 'Comunidad Agrícola Los Huasco Altinos con Superintendencia del Medio Ambiente' (2022). See the Tribunal's blog at: <https://www.1ta.cl/primer-tribunal-ambiental-realizara-visita-inspectiva-en-el-marco-de-la-reclamacion-por-el-proyecto-nuevaunion/> (accessed 9 December 2024).

⁸³ See <https://www.1ta.cl/tribunal-acoge-reclamacion-de-comunidades-de-la-provincia-del-huasco-por-denuncias-en-contra-del-proyecto-nueva-union/> (accessed 9 December 2024).

In the Argentine case, several pieces of evidence strongly suggest that when confronted by local resistance, the mine did little to accommodate concerns or demands. First, it rejected accusations of pollution, and when pollution was found, prevaricated and challenged scientific and legal findings. Its executives were indicted, and they continued to fight claims against them. It resisted compensation for damages. Interviews with company managers and officials show there is little attention given to the local community in practice, above all in terms of addressing potential pollution risks and water shortages.

A MARA mining engineer (Daniel Moreno) told a journalist in 2022 that there was no need to change production techniques or processes in the shift from Alumbrera to the combined MARA operation. Instead, the idea was simply to expand production, even though Alumbrera conceded that its pollution levels had exceeded those permitted under law and that two of its executives were indicted for environmental crimes. Indeed, despite Alumbrera/MARA's avowed commitment to a 'community control model,' its community activities were directed at attracting workers and providing passive opportunities to see what is planned rather than getting community input. There is no indication that the company will incorporate the community in the project design or consideration of alternatives.⁸⁴

In another interview, the general manager of MARA, Nicolás Bareta, explained that the idea of combining infrastructure and costs in one project was to improve efficiency, not improve the environmental footprint or social impact.⁸⁵ He was asked about judicial proceedings and stated that once they changed their approach with the authorities, working together and providing information, there were fewer injunctions. His focus was on the institutions, not the affected populations. He criticized groups with 'totally extreme positions' against mining or extractive activities who litigate actively but whose complaints 'completely lack legal or factual basis.' He never addressed the widespread pollution problems for local communities. Bareta mentioned specific complaints from locals about water pollution and health impacts, but dismissively, and stated that complaints were not made by environmental groups but by neighbours, implying that the neighbours had less standing to complain. He also claimed that complaints are motivated by political interests, some of them international (despite findings from authorities of leaks and pollution). But he also said that when there are valid complaints they do enter into dialogue.

In the Chilean case, after discarding the El Morro plan, the Nueva Unión investors said that the mine would initiate

a broad relationship with communities, indigenous peoples, and other stakeholders in order to guide the development of the project. The project team will meet with the community and indigenous groups to explain the project and work jointly to determine how the relationship will be structured. Two independent organizations with experience in community relations will be involved in this process in order to guarantee socially sustainable results.⁸⁶

In the 2018 report mentioned above, Nueva Unión claimed that the rationale for changes to its plan, namely the joint venture and environmental changes, was because of demands from the community. It mentioned 'a list of design issues we have modified because of our conversations with the communities.'⁸⁷ This is an important explanation, but it discounts

⁸⁴ Althabe, note 34.

⁸⁵ Penelli, note 34.

⁸⁶ Translation by author. See <https://www.teck.com/noticias-es/comunicados-de-prensa-es/2015/goldcorp-and-teck-combine-el-morro-and-relincho-projects-in-chile-es> (accessed 9 December 2024).

⁸⁷ Tapia, note 75.

the impact of legal action and institutional response, and it is doubtful that community pressure alone was sufficient to get the firms to change course. More significant was the fact that, after the Supreme Court's 2014 ruling annulling the EIA, and in sharp contrast with the behaviour of the Alumbrera mine investors, the El Morro investors withdrew their own EIA to determine the best manner to proceed with the investment.⁸⁸ The El Morro investors took objections more seriously than did the Alumbrera/MARA investors.

One might argue that there are local mine-operating firms between the communities and these large multinational mining companies which complicates the latter's responsibility for social and community outcomes. However, none of the multinational firms themselves or their representative sectoral associations state that respect for human rights depends on the cooperation of intermediary local firms. In fact, the CSR commitments of the firms explicitly obligate subsidiaries and contractors as well as the principal mine investors. This issue is more germane with regard to the Argentina case because the mining companies had many years of operational experience there (unlike in Chile). To imagine that the principals in Argentina failed to notice what their subsidiaries were up to when two senior executives were indicted on criminal charges and other spokesmen were brazenly dismissive of local communities in press interviews, seems highly implausible.

VI. Institutional Capacity and Legal Mobilization

Differences in institutional capacity and legal mobilization explain company behaviour in these cases. Argentine institutions were weak, politicized and riddled with conflicts of interest. Recall that authority over mining and environmental oversight was devolved to the provincial level in the 1990s, including compliance, EIAs and public consultations, even though local authorities had insufficient technical capacity, finances and personnel to oversee the mines adequately, and their ability to hold firms to account was correspondingly weak. In 2011, the Catamarca provincial office in charge of managing the environmental impacts of mining (*la Dirección Provincial de Gestión Ambiental Minera*) had only two people working in it, though this number increased to 40 people by 2015. At the national level, environmental controls were 'extremely lax.'⁸⁹

Moreover, when it came time to make complaints about human rights violations, local communities were undermined because the Catamarca provincial government and Tucumán National University were investment partners in Alumbrera. Furthermore, little appears to have been learned in the transition from Alumbrera to MARA. The oversight plans leave local populations vulnerable because although the Catamarca mining ministry is planning to do monthly environmental evaluations of MARA (along with the company), the Catamarca government is again an investor in the mine. Obviously, provincial ownership in the mine and partnering with the company on inspections perpetuates the serious co-optation and conflict of interest problems, left unchecked by the lack of independent experts or alternative viewpoints during investigations.

The strong pro-rule-of-law legal entrepreneurship of the federal prosecutor's office supports the conclusion regarding the role of institutions. The federal prosecutor, Gustavo Gómez, took a leading role in driving forward the criminal prosecution of Alumbrera executives, in contrast to the lethargy of provincial environmental oversight institutions. The history of these prosecutions is telling, not simply because of the slow nature of justice and stubborn provincial resistance, but because of the eventual impact they had on federal courts. Gómez took up the cudgel after the criminal complaint was filed by the

⁸⁸ <https://www.ocmal.org/?s=el+morro> (accessed 9 December 2024).

⁸⁹ Petrocelli, note 48, 9.

then Tucumán Environment Secretary Juan González in 1999. Twenty-five years later, the case has still not been fully resolved, although thanks to the indictments, federal prosecutors have been responsible for two important achievements. One was the lessons learned by NGOs and citizens about making legal challenges. As one NGO director explained, they ‘got an education’ from the prosecutors on how and why to bring criminal charges against mine executives.⁹⁰ Gómez himself tours the country giving talks on why criminal complaints are critical tools and how to initiate them.

The other achievement was to bring about a shift in federal court attitudes to be more receptive to community rights.⁹¹ Interaction between litigators and institutions brought change, albeit slowly. The thinking among judges evolved, especially in terms of interpreting the concept of environmental danger. Judges in prior years insisted on having causal evidence of the effects of pollution. That has changed, and plaintiffs do not need to show the effects of environmental crimes, instead just show the crime. Courts now presume that activities such as exceeding pollution limits are *per se* a crime, and a connection to damages is not necessary.⁹²

In stark contrast to Argentina, innovative institutional reforms in Chile in 2010 and 2012 elevated environmental protection significantly and diversified the institutions of impact evaluation, prosecution and justice. That is not to say that Chilean institutions never suffer from low budgets or insufficient personnel.⁹³ But the panorama is better than in Argentina. A 2010 reform created a new environmental agency, the SEA (the *Servicio de Evaluación Ambiental*, or environmental evaluation service), with sanctioning powers and stronger environmental impact oversight. The *Superintendencia del Medio Ambiente* was also created in the 2010 reform. It has enforcement powers and legal authority, although according to NGO lawyers, too little budget.⁹⁴ Public participation in impact assessments improved though there are still weaknesses, as the public is excluded from the SEA’s process of completing an environmental declaration, which follows the impact assessment.⁹⁵

These reforms were widely interpreted as a significant strengthening of environmental governance, so much so that the business community wanted to be able to seek redress when necessary through new environmental tribunals. These were created in 2012 to interpret administrative law, with an emphasis on scientific and technical expertise. The Supreme Court has an overview of its administration and finances, but in other respects, they are independent of external influence. The judges on the tribunals are required to have professional experience in environmental issues and relevant training. Given their expertise and the autonomy of the tribunals, their decisions are more ‘expert, fair, and balanced’ due to the highly technical nature of much environmental dispute.⁹⁶ Chilean NGO officials, for their part, applaud the tribunals’ high standards and contribution to better administrative justice.⁹⁷

Strengthening institutions had benefits beyond specific cases. In rulings in the mid-2010s, the Environmental Tribunal and Supreme Court obliged the *Servicio de Evaluación Ambiental*

⁹⁰ Genisans, note 59.

⁹¹ Gustavo Gómez. Federal prosecutor, Argentina. 30 January 2023, personal interview. Medina, note 60.

⁹² Medina, note 60.

⁹³ Alejandra Donoso. Defensoría Ambiental, Chile. 4 November, 2020, personal interview. Vergara Cáceres, note 42, 71–2.

⁹⁴ Donoso, note 95. Florencia Ortúzar. AIDA, Chile. 30 October 2020, personal interview. <https://portal.sma.gob.cl/index.php/que-es-la-sma/>.

⁹⁵ Donoso, note 95. Javiera Calisto. Oceana, Chile. 30 October 2020, personal interview. Economic Commission for Latin America and the Caribbean, note 3, 36.

⁹⁶ Pring and Pring, note 81, 26. Sergio Muñoz Gajardo, ‘El Acceso a la Justicia Ambiental’ (2014) VI:6, *Justicia Ambiental*, 17–38. Haslam, note 33.

⁹⁷ Calisto, note 97. Diego Lillo. FIMA, Chile. 8 October 2020, personal interview.

to widen its concept of who was considered an interested party (standing).⁹⁸ It urged the agency to be more open and active, and draw from wider rights.⁹⁹ Additionally, constitutional and judicial scholars reported that by the 2010s, the Chilean Supreme Court had become more progressive, expanding its view of rights and obligations.¹⁰⁰ This institutional diversification and strengthening opened the legal opportunity structure, and the result has been to push conflict towards the legal system and away from the streets. A report published by the Economic Commission for Latin America noted that:

The Chilean institutionalist culture has encouraged the resolution of social conflict in judicial institutions, including courts and environmental tribunals. Social actors have used a series of legal resources to suspend or cancel mining projects.¹⁰¹

At the same time, local institutions tend to be biased towards development, and economic pressures to approve development are high, especially among economics ministries.¹⁰² NGOs lament the insufficient public participation, low budgets for enforcement agencies, and tendency to simply approve project proposals. EIA decisions can be appealed to the *Comité de Ministros*—a body comprised of various ministries, which politicizes the process of approval.¹⁰³ Regional environmental institutions and courts in the Antofagasta area showed a disposition to approve mine proposals, but the Supreme Court and the First Environmental Tribunal were powerful, independent checks on lower institutions and company behaviour.

At the same time, institutional capacity only makes a difference in firm behaviour when litigators are active. In the El Morro case, litigators took action both through administrative agencies (SMA, tribunals) and also through courts. The First Tribunal Ambiental, in its report in October 2022 on SMA decisions, summarized several relevant legal antecedents and described in detail the administrative and geological steps involved in the project. Unlike in Argentina, a network of Chilean NGOs rather than federal prosecutors initiated litigation on behalf of communities. Communities benefited from technical and legal advice from civil society actors such as the Observatory of Mining Conflicts in Latin America (OCMAL), Defensoría Ambiental and independent lawyers.¹⁰⁴ Legal actions drew on concrete examples and normative language to help set precedents and engage in cumulative learning to inform later actions. Other lawyers have negotiated agreements between communities and mining companies, to protect the former. This level of legal expertise was not available to Argentine communities.

As an example, Ignacio Montecinos Fernández, the lawyer representing the *Comunidad Diaguita Huasco Altinos* in the tribunal, stated that the SMA's investigation was insufficient

⁹⁸ Paula Gajardo Matthews, 'Hacia una Nueva Definición del Concepto de "Interesado"' (2014) VII:7, *Justicia Ambiental*, 17–32.

⁹⁹ Ortúzar, note 96.

¹⁰⁰ Lisa Hilbink, 'The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment' (2009) 62:4 *Political Research Quarterly*, 781–97. Siri Gloppen, et al, *Courts and Power in Latin America and Africa* (New York: Palgrave Macmillan, 2010). Javier Couso and Lisa Hilbink, 'From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (New York: Cambridge University Press 2011). Donoso, note 95. Ortúzar, note 96.

¹⁰¹ Rafael Poveda Bonilla, 'Estudio Comparativo de la Gobernanza de los Conflictos Asociados a la Minería del Cobre en Chile, el Ecuador y el Perú' (2021), Documentos de Proyectos (LC/TS.2021/180), Santiago, Comisión Económica para América Latina y el Caribe (CEPAL) 48.

¹⁰² Haslam, note 33.

¹⁰³ Donoso, note 95.

¹⁰⁴ Haslam, note 33, 164.

because it did not review the water diversion, nor did it do mineralogical or chemical analyses.¹⁰⁵ Other inhabitants were represented by Alejandra Donoso of the NGO *Defensoría Ambiental*. Both lawyers rejected the company's claim that there was a distinction between different kinds of drilling, and they criticized the SMA's acceptance of the company's argument. They argued that the SMA should have applied the preventive principle, and they criticized the division of the project into fragments to reduce the regulatory burden.

Iterated legal action at both regional and national levels, and in both administrative and judicial institutions, slowed down the Chilean El Morro/Nueva Unión permitting process significantly, and most likely had an impact on firm behaviour. Support for this claim comes from the investor withdrawal of their own EIA in 2014 because of litigation and claims of insufficient consultation, an action that the MARA investors in Argentina never took. The presence of capable civil society litigators who took repeated cases to different institutions forced the mine to take its responsibilities to consult seriously.

Civil society in Argentina litigated less than in Chile. Dismissive attitudes by Alumbra and MARA were possible not simply because institutions were weak, but also because the legal opportunity structure was unfavourable. Citizens opted for civil complaints, but damages were hard to prove, the company had outsized influence on this disadvantaged region, and the provincial government was in bed with it as an investor. Civil complaints refer to environmental damage, not to criminal liability for specific environmental crimes that threaten health and life. It was too easy for the company to provide contradictory evidence, and environmental damages were usually overlooked if they did not harm individuals.¹⁰⁶

The Tucumán federal prosecutor, Gustavo Gómez, argued that legal mobilization must involve criminal complaints, not civil ones because criminal complaints open access to public resources such as appeal and cassation. This means that there are effectively two legal opportunity structures in Argentina, one for civil cases and one for criminal cases. Additionally, prosecutors take the case on behalf of plaintiffs in criminal cases, and redress goes beyond economic compensation to victims, extending to criminal charges against company executives. Cases can work their way through the federal court system to appeals courts and then to the federal cassation court, whose judgements have wide effect and which has become a strong environmental advocate. Attention from higher courts can result in the suspension of mining activities, which was not achieved through protests or civil cases. They empower victims, according to Gómez. 'If 100 people suffer health damages from a spill they shouldn't make a single collective criminal complaint but rather each make their own criminal complaint. That gets the prosecutor's attention.'¹⁰⁷ He also argued that citizens need committed lawyers and better litigation skills to defend their rights, because, to file a criminal complaint, a lawyer needs to represent the community, and it is virtually impossible to find one willing to take on major firms, especially in poor provinces like Catamarca.¹⁰⁸ Hence, the inauspicious legal opportunity structure in Argentina.

¹⁰⁵ <https://www.1ta.cl/primer-tribunal-ambiental-realizara-visita-inspectiva-en-el-marco-de-la-reclamacion-por-el-proyecto-nuevaunion/> (accessed 9 December 2024).

¹⁰⁶ Genisans, note 59.

¹⁰⁷ Gómez, note 93.

¹⁰⁸ Ibid.

VII. Conclusions

Host nations need to be capable of safeguarding vulnerable communities in the face of corporate mining power, but host country conditions vary. Institutional weaknesses in Argentina and a 1990s-era policy of pro-mining liberalization left a long legacy. The state treated the environment as a source of economic revenue, prioritizing mining and failing to take into account wider impacts or consequences. It never created institutional capacities adequate to receive and judge legal challenges. The combined effects of favourable government attitudes to mining development, weak institutional capacities and conflicts of interest and (mostly) inconsequential legal challenges meant that environmental and social concerns took a back seat and mining firms were given a green light to proceed according to their own interests.¹⁰⁹

In contrast, Chilean institutional reforms left a legacy in which expertise and capacity were established facts of life (even if imperfect). Civil society litigators had multiple opportunities to take legal action against mines and did so repeatedly. Meanwhile, their counterparts in Argentina relied on street protests and legal action by the federal prosecutor. When done effectively (i.e., with solid arguments in the right institutions), litigation in both countries worked to advance community interests and strengthen resistance because it leveraged the power of institutions to hold mining companies to account. It did not matter greatly whether the institution was an environmental agency, a court of appeals or an administrative tribunal. What mattered was its capacity to hear and decide complaints effectively.

The public policy implications are not simply to strengthen the legal opportunity structure through environmental institutions, but also to strengthen the ability of civil society groups and prosecutors to mobilize legal action on behalf of communities. It is unrealistic to assume that communities themselves, or their representatives, will become experts in using the legal system, given that they may need to challenge a mine only once. Instead, creating conditions in which national-level expert NGOs and other civil society litigators have opportunities to represent communities in court could pave the way for more just outcomes and a fairer balance between mines and local populations. Thus, the interplay between litigators and institutions is an important takeaway of this study. The legal mechanisms necessary to ensure appropriate firm behaviour depend on the legal opportunity structure. In Chile, litigators faced a stable and diverse legal opportunity structure. In Argentina, the federal prosecutor worked through the court system alone given the criminal nature of the prosecution, with indictments coming after several years of consistent findings of misconduct. This long experience afforded courts a chance to reflect on the legitimacy of mine activities beyond their economic contribution.

The conclusions here are tentative and merit more research. The question of determining what exactly caused company behaviour is complex and yet to be fully resolved. A major difference between the two cases is that Alumbraera began operations in the late 1990s, whereas El Morro was prevented from initiating operations. Street protests may have been less common in Chile because the mine never opened, although that does not explain the lack of legal action in Argentina. The context could well have shifted over time—if El Morro had entered operations in the late 1990s, prior to institutional reforms, it is possible that behaviour similar to Alumbraera's would have emerged. If so, that would confirm the findings of this study. Conversely, in Argentina, many complaints were from 20 years ago or more, and there may have been a shift over

¹⁰⁹ Petrocelli, note 48, 7–8.

time in recognition of mining wrongs plus a new knowledge of the benefits of litigation over street action. On the other hand, even after many years of protests and two important indictments of company officials, provincial institutions in Argentina still seem incapable of standing up to the mine, and the behaviour of Alumbrera never became more cooperative.

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