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**The Rule of Law and Environmental Justice in Perú: Lessons Learned
from the Choropampa Mercury Accident**

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Rule of Law Seminar

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Summary

This paper examines a complex legal and social conflict arising from a serious mercury spill accident in 2000 in Choropampa, Perú that resulted from the U.S.-based Newmont Mining Corporation's gold mining operation in the region. After finding the Peruvian justice system inadequate for their case, a group of people who suffered from mercury exposure filed a lawsuit in the United States for which the outcome is still pending. More than 1,000 people in the Choropampa area showed symptoms of mercury exposure after the spill and more than seven years later many still suffer from a range of ailments including blindness, memory loss, and muscular pain.¹ Newmont disputes whether these chronic injuries are related to the mercury spill, but has spent as \$14 million USD to clean up the spill site and has compensated some victims (who are not part of the U.S. lawsuit) with cash payments of \$570 to \$6,000 USD per person. The plaintiffs in the U.S. lawsuit and others consider this compensation to be lacking in light of the serious and permanent disabilities suffered by many of the victims.

We will analyze the Choropampa environmental conflict's implications for the rule of law in Perú, particularly focusing on the weakness of Peruvian legal institutions and the implications of a group of victims perceiving themselves as being so let down by their own justice system that they felt compelled to seek justice outside of the country. In this analysis we will consider the particular challenges presented by complex environmental conflicts like the Choropampa case where there is a substantial economic and social power disparity between the plaintiffs (mostly poor peasants) and the defendant (the world's largest gold mining firm). In addition,

¹ Peter Hecht, Chronicle Foreign Service, "Andean villagers seek American justice: Mercury contamination near Peru mine leads to legal showdown in Denver court," March 14, 2005.

this paper will explore how corporate responsibility and accountability factor into creating a culture that respects the rule of law.

Introduction

Foreign Investments in the Extractive Industries and Implications for Peru's Legal System and the Rule of Law.

Perú is commonly described as land of contradictions, rich in natural resources but also afflicted by poverty, inequality, and a legal system characterized by corruption, unpredictable rules, limited access to quality legal services, and unequal access to information. In recent years, however, Perú has evolved into a promising country for foreign investment and has developed its resources to the extent of becoming the world's second largest producer of silver, the fifth largest of gold, and the sixth largest of copper. Perú has also passed innovative legislation promoting foreign investment, showing by example that it is possible to create an open marketplace for foreign investments in the Americas.²

² See World Economic Outlook: Globalization and Inequality, International Monetary Fund, October 2007, <http://imf.org/external/pubs/ft/weo/2007/02/pdf/c2.pdf> at 88. In 1991 the Executive enacted a set of Laws - Decreto Legislativos 662 "Regimen de Estabilidad Jurídica a la Inversión Extranjera (September, 9, 1991), 674 "Ley de Promoción de la Inversión Privada de las Empresas del Estado (September, 27, 1991), 757 "Ley de Marco para el crecimiento de la Inversión Privada (November, 13, 1991) which fully reform the legal framework opening the Peruvian market to direct foreign investments particularly in Extractive Industries such as mining, oil and gas (Decreto Legislativo 708.). For instance the production of gold has been evolving in 1991-2006 from 22,6 metric tons per year to 202,8 metric tons. (source: <http://www.inei.gob.pe/perucifrasHTM/inf-eco/pro026.htm>).

Such development does not come without risks. The mercury spill accident in the remote town of Choropampa involved one of the largest mining companies in the world³ and left more than 1,000 people injured, sick, or even permanently disabled. A public health and environmental disaster like the Choropampa mercury spill presents a challenge to foreign investors, communities and governments. How can a developing legal system give victims access to justice and improve environmental protection, while maintaining incentives for needed foreign investment? Strong legal institutions are critical for economic development and sustaining interest among foreign investors because "[d]iscriminatory or arbitrarily enforced laws deprive people of their individual property rights, raise barriers to justice and keep the poor poor."⁴

Local and foreign private investments in the extractive industries become a powerful source of money for developing countries in South America like Perú.⁵ In fact, at least fifty percent of the Peruvian exports depend on the extractive industries.⁶ For years, silver, copper, gold, oil and recently natural gas have been the catalysts for development in Perú. However, toxic pollution, environmental degradation and ecosystem change have challenged the human communities and ecosystems that host these resources. Although, Peruvian law formally

³ Newmont, based in Denver, Colorado, is one of the world's leading gold mining companies and the large gold mining company operating in South America. See <http://www.newmont.com> and <http://www.newmont.com/en/operations/sthamerica/index.asp>.

⁴ Maria Dakolias, World Bank, "The Role of the Judiciary for Economic and Social Development," November 14, 2003, Speech to the EU Judiciaries Representatives in The Hague, The Netherlands.

⁵ See World Economic Outlook: Globalization and Inequality, International Monetary Fund, October 2007, <http://imf.org/external/pubs/ft/weo/2007/02/pdf/c2.pdf> at 86.

⁶ For 2006, the Mining sector exported more than \$14,464.8 million USD from total exports of \$ 23,430 million USD—more than 50% of the Peru's exports. Ministry of International Commerce and Tourism, <http://www.mincetur.gob.pe/default.asp?pag=COMERCIO/cuerpo3.htm&lat=COMERCIO/lateraL.asp?pag=comercio&num=3>.

addresses environmental conflicts, the regulations are poorly enforced, and local communities have little meaningful power to contest the actions of the large mining companies. In the Choropampa case, victims went so far as to seek justice outside the country altogether after finding no reason to expect a fair process or just result in Peruvian courts. The weakness of Peru's legal institutions for resolving environmental conflicts has substantial implications for the rule of law and the country's future development. Most definitions of the rule of law include elements of fairness, predictability, equality, accessibility, and enforceability.⁷ The lessons from the Choropampa case show failures of the rule of law in all of these aspects and demonstrate the need for Perú to strengthen its institutional framework, create a more reliable legal and judicial system, and engage the legal community in improving the rule of law and the people's trust in the legal system.

I

An Environmental Disaster: The Facts and Background of the Choropampa Case.

Choropampa is a small town of 3,500 residents in the highlands of the northern Peruvian Andes, near the biggest gold mine in the Americas, called Yanacocha. The mine is managed by an American-Peruvian consortium headed by Newmont Corporation.⁸ Choropampa is a town like many old towns in the Andes Mountains in Perú where most people work in small-scale agriculture and live amidst poverty and economic disparities. Choropampa is different than

⁷ See, e.g., American Bar Association World Justice Project, Working Definition, Rule of Law (August, 2007 draft).; Justice Anthony M. Kennedy, "The Rule of Law," Remarks to the American Bar Association, August 5, 2006, Honolulu, Hawaii.

⁸ Now & Beyond 2004: Minera Yanacocha, South America, <http://www.newmont.com/en/pdf/nowandbeyond/NB2004-Yanacocha.pdf> at 1.

other Andean communities, however, because the people are well organized and the people are willing to work together to protect their collective rights.⁹

For the last four hundred years, Peru's treasure trove of valuable metals like silver, copper, and gold have been mined by both foreigners and locals. Though it is a common belief among indigenous people is that Peruvian gold and silver have only ever been exploited by foreigners—starting with Spanish conquerors leading to American investors today. Moreover it is common among teachers in public primary schools around Perú to teach to their students that “Perú es un ciego sentado en un banco de oro (“Perú is a blind guy sitting on a gold bench”). This phrase was coined by the Italian naturalist Antonio Raymondi, in the middle of the nineteenth century and it implies that Perú could be a powerful country if it would exploit its own natural resources.

On June, 2, 2000, a Yanacocha mine contractor used to transport elemental mercury away from the Yanacocha mines by truck spilled more than three hundred thirty pounds of mercury along a twenty five mile stretch of road from the mine to the Pacific coast.¹⁰ Much of the mercury seeped into the region around Choropampa. Later, “...people thinking the mysterious metallic liquid could be valuable, gathered mercury using empty soda bottles, brooms, even

⁹ The community-organization protests and drama surrounding the mercury spill, the aftermath, and the on-going legal battles was chronicled in a documentary film by Ernesto Cabellos and Stephanie Boyd called “Choropampa: The Price of Gold” (2002). See <http://www.frif.com/new2003/cho.html>.

¹⁰ Peter Hecht, Chronicle Foreign Service, “Andean villagers seek American justice: Mercury contamination near Peru mine leads to legal showdown in Denver court,” March 14, 2005.

their hands. Children played with it and tasted it..."¹¹ People did not realize that they had been exposed to a tremendously hazardous substance.¹² Days later, Yanacocha operators returned to the town to recover some of the spilled mercury, informing people that Yanacocha mine already prevented any damage that could happen.¹³ Soon after that, people in Choropampa began complaining about various health problems like rashes, headaches, and vision loss that they believe are connected to the mercury spill.¹⁴ After not receiving satisfactory answers from Yanacocha mine, the community protested. Headed by the town's mayor¹⁵, the people blocked the road that connects Cajamarca to Yanacocha in effort to push the company into taking responsibility for the health damage. They demanded health treatment for all people in Choropampa who they believed to be sick from exposure to the spilled mercury. After negotiations between the mine and the community, some Choropampa residents signed individual agreements in which the company compensated to each person between \$570 and

¹¹ Missy Ryan, Reuters News Service, In Feature –Plight of Peru town dim after mine's mercury spill. July, 3, 2002. *See also* Peter Hecht, Chronicle Foreign Service, "Andean villagers seek American justice: Mercury contamination near Peru mine leads to legal showdown in Denver court," March 14, 2005.

¹² Symptoms of exposure to elemental mercury "include these: tremors; emotional changes (e.g., mood swings, irritability, nervousness, excessive shyness); insomnia; neuromuscular changes (such as weakness, muscle atrophy, twitching); headaches; disturbances in sensations; changes in nerve responses; performance deficits on tests of cognitive function. At higher exposures there may be kidney effects, respiratory failure and death." Mercury Health Effects, U.S. Environmental Protection Agency, <http://www.epa.gov/mercury/effects.htm>.

¹³ Peter Hecht, Chronicle Foreign Service, "Andean villagers seek American justice: Mercury contamination near Peru mine leads to legal showdown in Denver court," March 14, 2005.

¹⁴ Peter Hecht, Chronicle Foreign Service, "Andean villagers seek American justice: Mercury contamination near Peru mine leads to legal showdown in Denver court," March 14, 2005.

¹⁵ Former Choropampa Mayor Lot Saavedra is a young, dynamic leader who played a prominent role in organizing protests and garnering national and international media attention for the Choropampa case. "The people are rising up in a call to conscience," he told Peter Hecht of the Chronicle Foreign Service. "They are discovering the totality of abuses by companies only seeking to get the gold." "Andean villagers seek American justice: Mercury contamination near Peru mine leads to legal showdown in Denver court," March 14, 2005.

6,000 USD.¹⁶ Believing these compensation levels to be too low, some residents refused to sign agreements and instead sued Newmont in United States Federal District Court in Denver¹⁷ in 2001, where the Newmont Corporation headquarters is located.¹⁸ After six years, the court discarded a motion to dismiss the case filed by the Newmont lawyer, impliedly ruling that U.S jurisdiction is appropriate for discussing Choropampa complaint because Peruvian judiciary system does not give to plaintiffs a due process of law was inadequate to give a fair hearing to this case.¹⁹ The case has not proceeded beyond this point, thus it is yet to be determined by the U.S. court whether Newmont will be held liable for the damages caused by the mercury spill accident in June 2000.

II

Rule of Law: Institutions and Culture.

In developed countries such as the United States²⁰, environmental protection is addressed by a comprehensive environmental policy, including a set of regulatory tools, national technology-based standards, and a strict liability doctrine for harm caused by

¹⁶ Missy Ryan, Reuters News Service, who interviewed to Luis Campos Yanacocha's environmental supervisor in 2002.

¹⁷ *Castillo v. Newmont Mining*, CV-4453 (Denver Dist. Ct. filed Aug. 17,2001)

¹⁸ Newmont Corporation owns a majority share of Yanacocha mine. See 2004 & Beyond: Minera Yanacocha, <http://www.newmont.com/en/pdf/nowandbeyond/NB2004-Yanacocha.pdf> at 1.

¹⁹ Plaintiffs' attorneys—the California-based law firm of Engstrom, Libscomb & Lack—argued for the inadequacy of Peruvian courts in part based on allegations of corruption in the courts involving the Newmont Corporation in another case. See Engstrom, Libscomb & Lack, "Mine Games, <http://www.ellaw.com/mercury.htm>.

²⁰ The United States establishes standards based on a risk assessment approach, where standards may vary depending on target organisms or pollutants and the numerous assumptions made in calculating risks. On the other hand, a number of European countries utilize a precautionary approach, setting standards based on non-degradation of soils. Harrison and Oakes (2002)

hazardous substances.²¹ To comply with those regulations prudent companies manage their mining operations to limit emissions and discharges to permissible levels and comply with laws regulating the destination of hazardous waste produced by their activities. For enforcement purposes, generally industries must monitor their discharges and publicly disclose these data.²² In this way, industries are accountable to state and federal agencies as well as to the public at large. Most major U.S. environmental statutes include citizen lawsuit enforcement provisions,²³ which are used extensively by public interest NGOs to force industries to comply with regulations and to force the government to enforce its laws. Through the power of citizen lawsuits, public disclosure of pollution monitoring data has become an important source of empowerment for people challenging environmental damage caused by the extractive industries.

U.S. technological standards for environmental controls and the institutional framework developed to implement federal environmental protection statutes establish a system that is generally fair and accessible for most actors in environmental conflicts. In the United States, the cost of implementing environmental regulations and keeping records largely is assumed by industry in general. In developing countries, however, monitoring and keeping records of emissions is rarely done. A comprehensive regulatory system like the U.S. model might not be feasible in the short term, but a place to begin might be to focus monitoring on the most harmful pollutants from E.I. operations close to human communities and delicate ecosystems. It might

²¹ See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9607 (1980).

²² See e.g. the Clean Water Act, 33 U.S.C. § 1342 National Pollution Discharge Elimination System.

²³ See e.g. the Clean Water Act, 33 U.S.C. § 1365 Citizen Suits.

also be possible to extend this targeted approach to identifying and cleaning up E.I brownfields.²⁴

As all the countries in Latin America (with the exception of a few Caribbean countries) the Peruvian legal system is traditionally a civil law system, in which the role of the judges is limited by the Constitution to being the interpreters and applicants of the law. Judges principally focus on resolving individual conflicts in their courts. Judicial decisions employ a technical and logical labor that is appreciated by the society at large, but the judges themselves it do not enjoy the attributes and privileges of their counterparts in common law countries. In recent years in certain areas of law Peru's civil law system has acquired some of the characteristics of the common law. For example, Perú has moved toward using the adversarial model in the criminal law, which imposes new duties on the civil law prosecutor to conduct criminal investigations. Similarly, in constitutional law, constitutional judges are now entitled to declare a law to be inconsistent with the Constitution. The civil law system derives its power from the consistency and knowledge of legislators and legal scholars to identify the new trends of the law that provide a basis to modify the current statutes and doctrines and enact new ones.

Perú, as a developing and highly with create economic and social disparities, the law community reflects the society's hierarchical structure. In fact, the law profession is perceived by the population as corrupt and low quality.²⁵ At the top of that pyramid are law practitioners

²⁴ A brownfield is land contaminated by a hazardous substance or pollutant that to the extent that safe use and development of the land might be limited.

²⁵ Pasara Luis. Los Abogados han sido "olvidados", cuando se enjuicia a la justicia. Idee No. 165/ agosto 2004, <http://www.justiciaviva.org.pe/revista/165/olvidados.pdf>.

working at the most famous law firms and the law professors of the most prestigious law schools in Lima. In the middle there are lawyers who work as highly paid technocrats for the government and law practitioners at mid-level law firms. And at the bottom of the pyramid there are many lawyers who practice law in solo law offices, lawyers who serve as public officers in all the branches of the government, and the members of the judiciary (in which we include judges and prosecutors). This description is too generalized to capture all of the system's subtleties, but it reflects the common view that members of the Peruvian law community hold about their profession and their colleagues. Peruvian professionals who devote their careers to these occupations traditionally are not among the most talented students at the most prestigious law schools in Perú. A recent survey conducted at the Pontificia Universidad Católica del Perú—the most highly regarded and traditional law school in Perú—showed that those law students prefer to pursue careers as law practitioners at a large law firms and law professors over careers as judges or prosecutors.²⁶ The results of this survey underscore perceptions about the Peruvian law community's hierarchy by demonstrating that, despite the social importance of judges and prosecutors, most promising law students generally would not choose those jobs. The quality of legal education in Perú varies widely. Unlike at the best law schools, the majority of private and public law school curriculums feature lecture-style courses that provide information about statutes and doctrines with very little time devoted to developing logical and legal reasoning abilities.²⁷ Students from these schools are usually poorly

²⁶ Pasara Luis. *La Enseñanza del Derecho en el Peru*.

²⁷ Pasara Luis. *La Enseñanza del Derecho en el Peru*. Pasara suggested that law students commonly learn a solo method of legal analysis “literal legal analysis,” which limits student ability to understand correctly complexities of legal problems unless it will be performed with a systematic use of logical

prepared to compete for the best paid and well recognized positions at large law firms. In fact, according to data collected by the National Council of Education, most of the average students at these less rigorous schools around Perú go on to be interns in the judiciary and plan judicial careers.²⁸

A judicial career in Perú commonly begins with an internship, a voluntary position in which a law student assists a judge while still in school. After finishing a bachelor's degree and passing the professional exam at the law school, young lawyers can apply for temporary positions in the judiciary system as assistants. After seven years of practice, the lawyer can apply to the National Magistrature Council for a position as a judge. Applicants are tested competitively on legal and logical abilities to determine their fitness to be judges. The salary of a Judge of Pace (the first step in the judicial career) is not uncompetitive—approximately \$2,000 USD per month—compared to the average salary of law practitioners in a small law firms of about the same experience—\$700-1,000 USD per month. However, despite the reasonable pay, the most talented future lawyers are reluctant to pursue a judicial career because of low regard for the independence and talent of Peru's judges and prosecutors. The relatively low esteem in which judges in Perú are held suggests that the legal culture has not fully developed the customs, habits, and institutional expectations that characterize an independent judiciary.²⁹

reasoning methods of analysis. Peru also might benefit from a program like the American Bar Association's Rule of Law Initiative's Legal Education Reform efforts, which focus on shaping future lawyers to usher in lasting legal reform and establish a more robust "rule of law culture. *See* http://www.abanet.org/rol/programs/resource_legal_education.html.

²⁸ The National Council of Education has more than 31 law schools registered in Peru.

²⁹ Justice Stephen Breyer, Supreme Court of the United States, Remarks on Judicial Independence at the Georgetown University Law Center, September 28, 2006, 95 Georgetown L. J. 903 (2007).

This situation becomes quite complex in the rural provinces of Perú where the quality of the law schools decreases considerably. In these places, the lack of access to law libraries and legal research resources reduces the amount of litigation and produces repetitive and mechanical application of statutes by lawyers and judges. As a result, very little new law is created in the provinces. In Perú, more than eighty percent of industry and economic activity is concentrated in Lima—Peru’s capital and largest population center. Similarly, most creative law practice and legal developments are concentrated in Lima. Concentrating creative law practice with wealth and power means that the law develops to serve already economically influential groups rather than Peru’s rural and poor populations. Law practitioners in Lima have a highly disproportionate influence on the legal system, which creates substantial challenges for fairness in Peruvian courts for system “outsiders,” especially in complex litigation like the Choropampa environmental conflict. In such cases, plaintiffs and defendants must have competent legal advice to navigate the litigation process. It is unclear to what extent outright corruption³⁰ in the courts is a problem in Perú today, but inequality in access to sound legal information and representation on their own create a substantial challenge to justice. This is especially true too often in cases where the judge and prosecutors are not very knowledgeable about the law and perhaps not capable of conducting a fair process. Plaintiffs from rural provinces without access or resources to obtain high quality counsel have difficulty bringing complex claims successfully in Peruvian courts when facing wealthy, sophisticated adversaries.

³⁰ Transparency International dropped Peru’s Corruption Perceptions Index score from 4.1 (rank of 44) in 2001 to 3.5 (rank of 72) in 2007. *See* http://www.transparency.org/policy_research/surveys_indices/cpi/2007.

In Perú, environmental protection in the extractive industries is addressed in the National Agreement³¹ and technically by the General Environmental Law.³² These policies encourage companies to internalize environmental costs, promote sustainable development, and citizen participation in environmental management. Uniform international standards adopted by the Peruvian government³³ also theoretically limit pollution by making government agencies responsible for testing and monitoring pollutants in the environment. Peruvian environmental regulatory statutes, however, do not impose stringent effluent limitations, nor do they require monitoring of air or water pollution. They also do not require mining companies to disclose information about emissions, which limits availability of information that could be used to identify environmental statutory violations.³⁴ Moreover, Peruvian environmental and health agencies do not have the ability to collect basic emissions and environmental quality data about the air, soil and waters of Perú. The existing regulatory statutes do, however, open avenues to prescribe specific rules to provide causes of action for citizen lawsuits and standards for environmental statutory violations.³⁵ With such statutory modification, it might then be possible for communities or NGOs to bring lawsuits in situations

³¹ The National Agreement is an initiative in which the government, political parties and the civil society agreed to enact 31 national public policies to consolidate democracy in Peru. Peruvian State Policy #9 is about Sustainable Development and Environmental Management. Available at <http://www.acuerdonacional.gob.pe/Foros/ForosTematicos/competitividad/textoc19.htm>.

³² General Environmental Law enacted on March, 10, 2005 (Law 28611)

³³ Peruvian environmental and health authorities have adopted international standards issued by the World Health Organization as well as the United Nations to restrict pollutants releases on the environment.

³⁴ Compare to U.S. environmental statutes such as the Clean Water Act, which through the NPDES permit program requires regular monitoring and disclosure of data by industries. Reported data are used by the government and citizens to bring enforcement actions. See Clean Water Act, 33 U.S.C. §§ 1342 and 1365.

³⁵ In Peru, according to the General Environment Law (Law 28611) section 143 rules that a citizen suits can be filed under the grounds of public interests.

where mining companies' activities have caused harm to property or health or have damaged local ecosystems. The limited public pollution information available today, however, creates few opportunities to bring extractive industry companies to court or to negotiation tables.

This is not to say that the Peruvian legal system is not capable of finding a mining company to be liable for causing harm or damage to private property, public lands or human health. The legal questions to determine liability hinge on the grounds of the cause of action and the causation and the determination of harm/damage. Perú's General Environmental Law creates a cause of action against any operator engaging in environmental risky activities that produce harm or damage³⁶; in other words any operator in the extractive industries could be fully liable if causation and damages could be proved. The problem, however, arises in the process of determining causation. First, the source of the pollution must be identified; then harm to property, ecosystems, or human health must be evaluated. The legal analysis focuses on explaining the process of pollution as well as how it affected human health, properties, and the ecosystem. The harm or damage is the last event in a chain of causation originating with the source of the pollution. Therefore identifying the composition of the pollutants released by the mining company is essential in order to analyze the consequences for human communities and ecosystems. With no public pollution information available, the task of establishing causation becomes an enormous scientific and logistical challenge that few communities would have the resources to undertake. Substantial medical and scientific expertise is required to show, for example, that a person was sufficiently exposed to a pollutant to make him sick and that the

³⁶ According to the section 144 of the General Environmental Law any operator practicing environmental risk activities is liable for any activity that causes damages.

pollutant was in fact the cause of a real illness. As a result, the lack of publically available pollution data about the extractive industries is a critical barrier to both enforcement of environmental regulations and for communities affected by pollution that might otherwise be able to seek compensation through the legal system.

Scientific data about pollution made publicly available could be a key tool for communities to monitor and prosecute environmental violations incurred by mining companies. Without access to such information under Peruvian law, communities might seek to open new avenues of justice in environmental conflicts in international forums like the United Nations or the World Bank or via alien torts litigation in the home country of mining companies.³⁷ Rule of law encompasses more than legal institutions; it also requires the content of laws to be just and to “respect and preserve the dignity, equality, and human rights of all persons.”³⁸ Environmental justice, protection of human health, and ecological welfare implicate internationally recognized human rights issues such as access to justice and rights to life and health.³⁹ In this view, Perú cannot achieve a robust rule of law culture without strengthening environmental protection and reforming its system of environmental justice.

III

³⁷ To date, several environmental cases have been brought in the U.S. under the Alien Torts Claim Act, but none have been successful. *See* Natalie L. Bridgeman, “Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims,” 6 Yale Human Rights & Development L. J. 1 (2007) at 1. *See also* 28 U.S.C. § 1350 (1994). “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

³⁸ Justice Anthony M. Kennedy, “The Rule of Law,” Remarks to the American Bar Association, August 5, 2006, Honolulu, Hawaii.

³⁹ *See* Natalie L. Bridgeman, “Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims,” 6 Yale Human Rights & Development L. J. 1 (2007) at 40-41 (arguing for recognition of severe environmental degradation as itself a human rights violation).

The Conventional Remedies, Domestic and International Jurisdiction, and the Failure of the System.

In the United States, there are four possible methods for foreign plaintiffs to seek redress in U.S. courts for corporate environmental abuses abroad: 1) the Alien Tort Claims Act, 2) applying U.S. environmental laws extraterritorially, using environmental treaties to provide causes of action, and applying foreign environmental law.⁴⁰ None of these options, however, are “meaningful solutions to the problem of lack of corporate environmental accountability in U.S. courts” for environmental abuses abroad.⁴¹ Nor would any of these methods address the lack of corporate accountability for environmental harm in Perú. However, when domestic courts fail to provide adequate remedies, foreign and international forums provide alternative avenues for environmental plaintiffs to seek compensation for their damages.

For several years, many indigenous communities around the world failed in their attempts to seek justice in U.S. Courts under the doctrine of “forum non conveniens,”⁴² Courts in the United States dismiss cases under this doctrine when there is an adequate alternative forum —

⁴⁰ See Natalie L. Bridgeman, “Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims,” 6 Yale Human Rights & Development L. J. 1 (2007) at 2.

⁴¹ *Id.* at 2. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court described the Alien Tort Claims Act as a jurisdictional statute that does not create a cause of action and found that although customary international law is a proper basis for causes of action under the statute, the court found a need for “judicial caution.” After *Sosa*, human rights cases involving violations of international law norms that are universal, obligatory, specific or definable can be brought under Act — such as cases involving severe human rights violations like torture. See EarthRights International, Transnational Litigation Manual for Human Rights and Environmental Cases in United States Courts, Revised Second Edition, October 2006, http://www.earthrights.org/files/Reports/lit_manual_2nd_edition_2007.pdf at 17.

⁴² Forum non conveniens is the doctrine that an appropriate forum may divest itself of jurisdiction if, for the convenience of the litigants and the witness, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place. Black’s Law Dictionary (2004).

that is an independent, functioning judicial system—and if another location better serves the public and private interests involved.⁴³ Even if the plaintiffs succeeded in obtaining reparations from Newmont in U.S. court, the lawsuit would not solve the conflict among the government, the community and the company in Peru. There are several questions around Choropampa case that need to be answered in order to improve the rule of law and future relationships among the community, government, and mining company: 1) whether the Yanacocha mine is legally responsible for contractor activities that caused damages to people in Choropampa community; 2) whether the mercury spill in Choropampa caused long term health problems for Choropampa citizens; 3) whether, in the event that Newmont loses the U.S court case, the Yanacocha mine will be responsible for health damages and increase compensation for people who previously signed individual agreements with Yanacocha; 4) whether the people of Choropampa trust the Yanacocha mine to pay damages won in a decision against Newmont; and 5) whether it is possible to create a positive partnership between Choropampa people and Yanacocha Mine following resolution of the U.S. lawsuit. Only the first three of these questions can be answered by the U.S court system. Even though U.S courts could order Newmont to pay millions of dollars to plaintiffs in damages, that outcome might do very little to resolve the larger justice and rule of law problems raised by the Choropampa case.

Personal injury law in the United States works under the assumption that paying damages to victims dissuades defendants from causing damage again. The transfer of money from

⁴³ EarthRights International, *Transnational Litigation Manual for Human Rights and Environmental Cases in United States Courts*, Revised Second Edition, October 2006, http://www.earthrights.org/files/Reports/lit_manual_2nd_edition_2007.pdf, at 32.

defendants to plaintiffs also is intended to make the victims whole again. The United States' system creates a kind of balance between the cost of civil reparations and the cost of the investment in preventing damages. The theory is that companies will reduce risks in their operations if civil penalties or perceived risk of civil liability exceeds the actual cost of increasing safety measures or choosing methods that cause less external damage. For environmental harm, regulation can serve as a way to encourage companies to prevent causing damage rather than leaving victims to use litigation to make themselves whole.

In the United States, common law and regulation build a complex system of national environmental standards and liability for damage. Two factors stimulate equilibrium between companies and individuals in this system: information and advocacy. Parties act in the marketplace looking to optimize their benefits according to available information for making the best rational decision under the circumstances. Advocacy, on the other hand, allows minority economic actors to persuade decision makers to modify regulation for restricting activities that potentially could cause damage to local communities or for establishing duties for companies to disclose information about mining activities that potentially create risks to public health and the environment.⁴⁴ Theoretically, a legal system containing all of these elements could work fairly for local or foreign companies as well as local communities. An effective legal system creates equal opportunities for all parties to seek justice, provides equal protection to

⁴⁴ NGOs like the National Resources Defense Council and the Sierra Club, for example, are extensively involved in litigating environmental issues in the form of citizen lawsuits and challenging weak regulations or weak enforcement of regulations. See, <http://www.nrdc.org/> and <http://www.sierraclub.org/environmentallaw/>.

interests regardless of their socioeconomic status, and gives all parties reason to trust that resolutions to conflict will be fair.

The legal system in Perú is quite different and it is less clear that it has the ability to fairly balance the interests of parties of such unequal power as mining companies and local, indigenous communities. Local advocates generally do not trust the judiciary branch to be a fair arbitrator of conflicts between such disparate parties. Also, regulation is controlled exclusively by national government which usually represents the interests of banking, manufacturing and mining groups of power to the exclusion of poor communities. In this way, institutional factors restrict community access to information and the ability of communities to advocate for their own interests. For example, in the Choropampa case the community not only did not have access to health protection guidelines about how to deal with a mercury spill, but also lacked access to data about pollution produced by mining activities and the resources to collect such data on their own.⁴⁵ Advocacy, however, is growing as tool in Perú to support political and social claims of poor communities. International Non-Governmental Organizations, like Oxfam America, Radda Barnner, Human Watch, and Amnesty International are actively working with communities to protect human rights, citizen participation and the environment.

A win in the Choropampa lawsuit in U.S. court might increase expectations in Peruvian communities about the benefits of filing lawsuits in the United States, but it would not change the imbalance of power in Peru's legal system. Leaving the country to find justice does little or

⁴⁵ In the United States, companies must periodically disclose data about pollution they discharge into the waters of the United States under the Clean Water Act. 33 U.S.C. § 1342.

nothing to strengthen legal institutions and the rule of law in Perú. The Peruvian court system would remain inaccessible and inequitable for communities like Choropampa. A favorable judicial decision in the United States for the Choropampa community without a legal, economic, and social framework for future cases does not serve the system overall.

IV

Alternative Approaches to Support the Rule of Law: Corporate Social Responsibility and Community Empowerment.

There is global concern about protection of the environment and promoting human rights, which creates new challenges for the foreign investors, NGOs, and local communities seeking their place in a globalized economy. The extractive industries, with encouragement by international institutions like the World Bank⁴⁶, now sometimes disclose valuable information about the environmental impacts of mining on ecosystems and communities. International corporations facing these concerns in public and among their stockholders also have implemented new accountability initiatives. Newmont Mining, for example, now voluntarily participates in several international initiatives that promote sustainability, human rights, anti-corruption measures, and public health.⁴⁷ These kinds of initiatives focus on corporate social

⁴⁶ See IFC's Policy and Performance Standards on Social and Environmental Sustainability, International Finance Corporation, World Bank Group (2006) <http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards>; IFC's Disclosure of Information, International Finance Corporation, World Bank Group (2006) <http://www.ifc.org/disclosurereview..> See also, Extractive Industries Transparency Initiative, <http://www.eitransparency.org/>.

⁴⁷ Newmont participates in the United Nations Global Compact; the Sullivan Principles; the Voluntary Principles on Security and Human Rights; the World Economic Forum's Partnering Against Corruption Initiative; the Global Business Coalition on HIV/AIDS, Tuberculosis and Malaria; and the International Cyanide Management Code. Newmont Sustainability Report 2006, <http://www.beyondthemine.com/.%5C?l=2&pid=2&parent=9&id=29>. Newmont prepared this report

responsibility and sustainable development as a way to balance the exploitative image of the extractive industries. Companies like Newmont⁴⁸ use these programs as evidence of their commitment to sustainability and human rights and support claims that they do not take advantage or weak environmental and safety regulations in developing countries.⁴⁹ In fact, Newmont explicitly mentions lingering community distrust related to the Choropampa mercury spill as evidence of the need for on-going community relations improvements at the Yanacocha mine.⁵⁰

These international efforts to promote transparency and sustainability in the extractive industries and companies' public commitments to them change the position of local communities. Under these frameworks, communities have expanded options to advocate for their rights and to protect themselves from exploitation. International environmental and human rights NGOs have positioned themselves as watchdogs monitoring the impact of industry activities on the ecosystems and human health. These groups also have actively worked with local community leaders to develop stronger voices to challenge damaging practices by mining companies as in Choropampa or negotiate mutually beneficial solutions to conflicts over mining activities.⁵¹

according to Global Reporting Initiative Guidelines, *See* Global Reporting Initiative, <http://www.globalreporting.org>.

⁴⁸ *See* Newmont Sustainability Report 2006 at <http://www.beyondthemine.com/?pid=3>.

⁴⁹ *See* Newmont Sustainability Report 2006 at <http://www.beyondthemine.com/?pid=2>.

⁵⁰ Now & Beyond 2004: Minera Yanacocha, South America, <http://www.newmont.com/en/pdf/nowandbeyond/NB2004-Yanacocha.pdf> at 8.

⁵¹ In the Tambogrande case, in 1999 a gold deposit was discovered by Manhattan Minerals Corp, in the Tambogrande valley, well known by the quality of its lemons, producing a conflict between the national government and the company, both of which advocated for developing that deposit, and the

Conclusions

Lessons Learned from the the Choropampa Case.

1. To restore harmony in the legal system in way that is inclusive of all actors it is necessary to promote opportunities that provide incentives for communities to trust in the system. They have to believe that it is possible to win. No particular outcome should be inevitable.
2. Environmental conflicts raise issues and questions that should be addressed based on the best technical and scientific information available. Therefore, a conflict management approach should be built that promotes production and disclosure of quality environmental data and reduces information gaps among different actors. Access to the best scientific information to communities does not guarantee by itself a community's empowerment process in the dynamics of the social and environmental conflicts. There are several other influential factors (economic, legal, cultural, institutional, geographic and educational) that define relationships among the government, extractive industries, and communities.
3. To be engaged in a legal conflict or litigation, all actors need equal access to information and technical advice. Inequality in legal advice and resources creates an imbalance that impedes finding justice and pushes parties to seek justice elsewhere, as demonstrated by the

Tambogrande community which opposed development of the mining business in the valley. Some time later, the community, with assistance by NGOs like Oxfam America, successfully stopped the development of mining operation in the Tambogrande valley. In Tambogrande the environmental conflict was resolved with community organizing and advocacy before environmental harm occurred. In contrast, in the Choropampa case, the mercury release accident caused by Yanacocha truck contractor produced a social and environmental conflict between the community and the mine. The environmental and social outcomes, at this time, are unknown. On the social side, the community of Choropampa headed protests and strikes against the company and temporarily closed the access routes to the mine, receiving media national attention. On the legal side, one group of citizens settled the mining company and another group filed suit in U.S. federal court claiming tort damages.

Choropampa case. Even obtaining a U.S. court order to repair damage would not help to solve the ultimate problem of weak legal institutions in Perú. It might even have the perverse effect of causing local communities to give up on the Peruvian legal system, which would further weaken rule of law in Perú.

4. Foreign companies investing in developing countries with minimal environmental and health protections, low ability to enforce regulations, and weak legal institutions have a responsibility not only to avoid exploiting these frailties, but to take affirmative action to promote sustainability and protect human rights in their operations.

5. As powerful economic actors, international mining companies should consider how a legal system where the rights of all stakeholders are protected could be a guarantee for long term sustainability of their businesses. Business relies on predictable, equitable laws, and a functioning legal system. For a legal system to be sustainable long term, it must have support and trust from the people, including in this case the local communities that host mining operations. Communities are more likely to be amenable to work with mining companies if they believe that their rights will be protected without having to go to extraordinary measures like seeking justice outside the country.