



## **Atahualpa's Legacy: Analysing the Impact of Gold Mining on Peru's *Campesino* Community**

Winning essay of the 2014 graduate-level Baptista Essay Prize by

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## Introduction

In 1532, the Inca Emperor Atahualpa was captured by Spanish conquistador Francisco Pizarro. Atahualpa offered to fill a large room (about 7 metres long and 5 metres wide, up to a height of 2 metres) once with gold and twice with silver. Pizarro promptly accepted this offer, although whether the ransom was offered in exchange for Atahualpa's freedom or his life remains a mystery. Nevertheless, the Spanish sentenced the Emperor to death months later.<sup>1</sup> Sadly, this event would not mark the last time foreigners would exploit Peru for its mineral wealth, leaving violence in their trail.

Nearly 500 years later, the development of Peru's mining sector is still accompanied by social conflicts and sometimes even violence. During the last 20 years in particular this phenomenon has undergone a dramatic increase. For example, between 1993 and 2011, US\$29.5 billion was invested in the mining sector, with 57% of it invested since 2007.<sup>2</sup> Because of this level of financing, Peru has become a world leader in the production of gold and silver, alongside other metals such as copper, zinc and tin.<sup>3</sup> This economic transformation has been accompanied by a disproportionate rise in social conflicts, with an increase of 300%

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<sup>1</sup> Fiorella Triscritti, "Mining, development and corporate-community conflicts in Peru" (2013) Vol 48 No 3 Community Development Journal 437 at 439 [Triscritti].

<sup>2</sup> Alana Wilson, "Peru's social conflict is about more than mining" *Fraser Institute*, online: Fraser Institute <<http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/articles/perus-social-conflict-is-about-more-than-mining.pdf>> at 15 [Wilson].

<sup>3</sup> Javier Arellano-Yanguas, "A Thoroughly Modern Resource Curse? The New Natural Resource Policy Agenda and the Mining Revival in Peru" *Institute of Development Studies*, online: Institute of Development Studies <[r4d.dfid.gov.uk/pdf/outputs/futurestate/wp300.pdf](http://r4d.dfid.gov.uk/pdf/outputs/futurestate/wp300.pdf)> at 10 [Arellano-Yanguas].

over the past five years.<sup>4</sup> As of February 2013, there were 84 active mining-related conflicts across Peru.<sup>5</sup>

This essay concerns one of these 84 conflicts: a dispute between Barrick Gold and the *campesinos* of Quiruvilca over the company's project in Lagunas Norte, Peru. While opposition to Barrick's presence in this district dates back several years, the current dispute revolves around Quiruvilca *campesinos'* demands for jobs and development projects, and their concerns over contaminated water supplies resulting from Barrick's daily operations.<sup>6</sup> The community is especially concerned about the possibility of Barrick expanding their project, which would have even further repercussions on the community's supply of clean water.

## **Community Profile**

### **Campesino Communities in Peru**

Before describing the Quiruvilca communities' particular characteristics, it is important to understand the historical context in which *campesino* communities emerged in Peru. Indigenous communities were recognised in Peru's 1920 and 1933 constitutions as having "special communal land rights that in turn gave rise to State responsibilities to protect these rights."<sup>7</sup> However, in 1969, the *Agrarian Reform Law* was passed in Peru, which declared that "Indigenous communities" would henceforth be referred to as "Campesino communities."<sup>8</sup> Thus, the term "campesino"

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<sup>4</sup> Wilson, *supra* note 2 at 15.

<sup>5</sup> Barrick, "Preventing and managing social conflict in Peru" *Beyond Borders* (2 July 2013), online: Barrick Beyond Borders <barrickbeyondborders.com/2013/07/preventing-and-managing-social-conflict-in-peru/> [*Beyond Borders*].

<sup>6</sup> "Barrick's Peru Mine Blocked by Residents" *Reuters* (22 February 2013), online: Reuters <www.reuters.com/article/2013/02/22/barrick-peru-idUSL1N0BM2QZ20130222>.

<sup>7</sup> Charis Kamphuis, "Foreign mining, law and the privatization of property: a case study from Peru" (2012) Vol 3 No 2 *Journal of Human Rights and the Environment* 217 at 219 [*Kamphuis*].

<sup>8</sup> *Ibid.*

carries deeper implications within Peru than it does within most of Latin America, wherein it typically denotes a villager or person living in a rural area.

Along with this change in terminology came an agrarian reform system that purported to replace *hacienda* land systems by granting communal title to parcels of expropriated *hacienda* territory to *campesino* communities. Although the reformed agrarian system was meant to create a “just system of property and tenancy,” the system enjoyed limited success: “over two decades after its inception, the vast majority of Campesino Communities had yet to receive registered title.”<sup>9</sup>

Communal title faced further erosion with the election of Alberto Fujimori and his adoption of neoliberal reforms. Fujimori’s strict economic reforms were accompanied by the replacement of the *Agrarian Reform Law* with the *Law for the Promotion of Investment in the Agrarian Sector*, which contemplated only individual land titling, thus “excluding Campesino Communities from its purview.”<sup>10</sup> *Campesinos* received another blow with the passing of the 1993 *Constitution*, which significantly reduced the protection that *campesino* communal land had previously enjoyed.<sup>11</sup> A 1995 law further reduced the content of *campesino* rights by establishing a framework that facilitated the transferral of *campesino* land to private investors. The framework involved direct “negotiation” between mining companies and *campesino* communities. However, the word “negotiation” is a misnomer

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<sup>9</sup> *Ibid* at 221.

<sup>10</sup> *Ibid* at 222.

<sup>11</sup> *Ibid*.

considering the *campesino* communities had no right to refuse the investor's offer to purchase its land.<sup>12</sup>

Before moving on to the Quiruvilca community, there are two general aspects of Peruvian law that may have an effect on the appropriate legal remedy for the resolution of this conflict. First, in Peruvian constitutional law, mineral resources are the property of the State. The State has interpreted this law to mean that when granting concession rights to minerals, it may do so without the consent of the surface property owner.<sup>13</sup>

Second, despite the *campesinos'* indigenous heritage, the state of Peru has often taken the stance that Peru has very few Indigenous peoples, as its populations is essentially *mestizo* (or "mixed").<sup>14</sup> Alternatively, the Peruvian Commission for the Environment, Ecology and Andean, Amazonian, and Afro-Peruvian Peoples, a Commission within the Peruvian Congress, has considered Peru's *campesino* communities to be indigenous people for the purposes of the application of the Peruvian Constitution.<sup>15</sup> The applicability of standards that require indigenous communities' consultation and consent depends on whether the community is (or can be) classified as indigenous.

### **The Quiruvilca *campesino* community**

The Quiruvilca district is located in the province of Santiago de Chuco, which is in the La Libertad region of northwestern Peru, 474 kilometres away from Lima.

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<sup>12</sup> *Ibid* at 223.

<sup>13</sup> *Ibid* at 224.

<sup>14</sup> *Ibid* at 218.

<sup>15</sup> *Ibid*.

La Libertad is one of the poorest regions in the country, with 95% of its populations living in utter poverty.<sup>16</sup>

Barrick's mine in the region provides approximately 500 direct jobs, and the entire mine's unskilled workforce is locally recruited.<sup>17</sup> Although it is positive that Barrick employs such a high level of Peruvians, Barrick currently does not retain the capacity to meet Quiruvilca's employment needs. According to the World Bank, the mining industry has become a technologically complex sector, and as such the number of unskilled workers employed by the industry has been on the decline.<sup>18</sup>

The community's perspective on Barrick's presence in their region and its potential expansion is mixed. Due to the district's unemployment rates, some see the benefits of Barrick's Corporate Social Responsibility ("CSR") projects and the jobs they bring to the community. However, the community's water supply is just as serious a concern as employment. Approximately 79% of the community's water supply comes directly from the surrounding rivers, springs and lakes. Understandably, much of the dispute stems from the *campesinos'* anxiety over the protection of lakes found within Barrick Gold's mining concession, as any expansion of Barrick's current Lagunas Norte mining project could have an adverse environmental impact on the five lakes comprising the community's fresh water resources.

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<sup>16</sup> Leonardo Ccori Vargas, "Peru: Alerta! Contaminacion en las cuencas del ande liberteno" *Servindi* (23 January 2011), online: Servindi <<http://www.servindi.org/actualidad/39101>>.

<sup>17</sup> *Triscritti*, *supra* note 1 at 443.

<sup>18</sup> Gary McMahon, *The World Bank's Evolutionary Approach to Mining Sector Reform*, online: The World Bank Extractive Industries for Development Series #19 (October 2010), online: The World Bank <[siteresources.worldbank.org/INTOGMC/Resources/336099-1288881181404/7530465-1288881207444/eifd19\\_mining\\_sector\\_reform.pdf](http://siteresources.worldbank.org/INTOGMC/Resources/336099-1288881181404/7530465-1288881207444/eifd19_mining_sector_reform.pdf)> at 8.

The *campesinos'* fears are not baseless. Indeed, Barrick has a history of adverse environmental impact in Lagunas Norte. In 2010, a study was conducted by a local non-governmental organization ("NGO") which found low pH levels and high levels of heavy metals in the water supply in the communities surrounding Lagunas Norte. The preservation of the lakes is of utmost importance to the *campesinos*, as they utilise lake water not only for their daily consumption of drinking water but also for local agriculture and cattle farming, their main sources of livelihood.<sup>19</sup>

The community has been very vocal in its opposition of Barrick's presence in their region since at least 2007, when approximately 3000 people protested against Barrick operations in their district.<sup>20</sup> Furthermore, they have attempted to catch the government's attention by repeatedly requesting their support in this matter. For example, in February 2012, a contingent of farmers from the district walked and caught rides covering a distance of more than 500 kilometers in six days to reach Lima and join thousands of others from across Peru in the National March for Water. At the march, the Quiruvilca farmers chanted, "Water is life, and we are going to defend our lakes."<sup>21</sup> The central government has not become involved in the dispute,

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<sup>19</sup> "Comunidades de Quiruvilca acatan tercer dia de paro indefinido contra minera Barrick" *Celendin Libre* (23 February 2013), online: Celendin Libre <[celendinlibre.wordpress.com/2013/02/23/comunidades-de-quiruvilca-acatan-tercer-dia-de-paro-indefinido-contra-minera-barrick](http://celendinlibre.wordpress.com/2013/02/23/comunidades-de-quiruvilca-acatan-tercer-dia-de-paro-indefinido-contra-minera-barrick)> [*Celendin Libre*].

<sup>20</sup> Rick Arnold, "Mining, CIDA partnership in Peru is pacification program, not development: Local indigenous rep writes to World Vision, Barrick Gold, CIDA asking them to stop." *Protestbarrick.net* (5 March 2012), online: Protestbarrick.net <[www.protestbarrick.net/article.php?id=799](http://www.protestbarrick.net/article.php?id=799)> [*Arnold*].

<sup>21</sup> *Ibid.*

apart from the presence of 300 policemen who arrived to break the 2013 blockade and protect Barrick's property.<sup>22</sup>

## **Company Profile**

Barrick Gold is the largest gold mining company in the world, with a market capitalisation ranging from \$13.78 billion (July 5, 2013) to \$55.58 billion (April 21, 2011).<sup>23</sup> At the time of writing, Barrick's market capitalisation was \$21.69 billion.<sup>24</sup> Barrick is incorporated in Ontario, Canada, and has its headquarters in Toronto. It is listed on the Toronto Stock Exchange and the New York Stock Exchange (ABX).<sup>25</sup>

As the wide range in their market capitalisation would suggest, Barrick's stock prices are subject to great instability. Some of this instability is attributable to the nature of the precious metal mining industry, and as such is suffered by all similar miners: "Since gold is not a productive asset, it has little fundamental value of its own. This leads to volatile price swings at times due to speculation that triggers herd behaviour in buying or selling."<sup>26</sup> However, because Barrick is the world's largest gold producer, the company receives intense scrutiny from investors "as a barometer for the industry's health."<sup>27</sup>

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<sup>22</sup> Franklin Briceno, "Peru: Campesinos bloquean acceso a mina de Barrick" *Yahoo! News* (25 February 2013), online: Yahoo! News <[news.yahoo.com/per-campesinos-bloquean-acceso-mina-barrick-013818046.html](http://news.yahoo.com/per-campesinos-bloquean-acceso-mina-barrick-013818046.html)>.

<sup>23</sup> "Barrick Gold Market Cap" *YCHARTS*, online: YCHARTS <[ycharts.com/companies/ABX/market\\_cap](http://ycharts.com/companies/ABX/market_cap)>.

<sup>24</sup> Time of writing: April 13, 2014.

<sup>25</sup> "Barrick Gold Corporation's Company Profile" *Sedar*, online: Sedar <[www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00000923](http://www.sedar.com/DisplayProfile.do?lang=EN&issuerType=03&issuerNo=00000923)>.

<sup>26</sup> Trefis Team, "Taking Another Look at Barrick Gold After Its Slump" *Great Speculations* (9 July 2013), online: Forbes <[www.forbes.com/sites/greatspeculations/2013/07/09/taking-another-look-at-barrick-gold-after-its-slump/](http://www.forbes.com/sites/greatspeculations/2013/07/09/taking-another-look-at-barrick-gold-after-its-slump/)> [*Trefis Team*].

<sup>27</sup> *Ibid.*

Although “almost all miners operating in the precious metals space are sinking in the same boat,”<sup>28</sup> 2013 was a particularly alarming year for Barrick. The company saw its stock price plummet by nearly 25% in July. Although their stock price has made a recovery since July 2013, the current year has not been that much kinder to Barrick. Zacks, a leading investment research firm which focuses on stock analysis and recommendations, recently recommended investors drop Barrick from their portfolios, citing a significant price decline in March and negative earnings estimate revisions for the current quarter and the current year as reasons for the recommendation.<sup>29</sup> Of course, there is a wide range of analysts’ ratings: while some recommend buying Barrick stocks, others recommend selling. However, Barrick’s average rating as of the time of writing is a “Hold” rating.

Barrick’s problems cannot be entirely blamed on macroeconomic issues, as there are company-specific factors that are also contributing to the company’s woes. For example, the fact that Barrick has been forced to delay the first production from its Pascua Lama mine in Chile and Argentina from late 2014 to mid-2016 is often cited as a negative factor.<sup>30</sup> Shareholders may have further cause for alarm amid \$14 billion writedowns tied to two major projects, and a \$3-billion share issue to help decrease its \$15 billion debt load.<sup>31</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> Zacks Equity Research, “Why Barrick Gold (ABX) Could Be Positioned for a Slump” *Zacks* (26 March 2014), online: Zacks <[www.zacks.com/stock/news/127621/why-barrick-gold-abx-could-be-positioned-for-a-slump](http://www.zacks.com/stock/news/127621/why-barrick-gold-abx-could-be-positioned-for-a-slump)>.

<sup>30</sup> *Trefis Team*, *supra* note 26.

<sup>31</sup> Rachelle Younglai, “The man with the key to China: Barrick Gold’s quest to open new doors” *The Globe and Mail* (6 December 2013), online: The Globe and Mail <[www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-man-with-the-key-to-china-barrick-golds-quest-to-open-new-doors/article15814739/](http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-man-with-the-key-to-china-barrick-golds-quest-to-open-new-doors/article15814739/)>.

There are two important social conflicts, apart from the one in Quiruvilca, which may be relevant for our purposes. In September 2012, protesters and police clashed at Pierina, a Barrick Gold mining project near Lagunas Norte. The clashes led to one death and at least four injuries. Citing an increased focus on disciplined capital allocation, the company has decided to close activities at Pierina as of August 2013.<sup>32</sup> Interestingly, the protesters' demands were similar to those of the Quiruvilca *campesinos*, as they were centred around the supply of water.

The second conflict involves Barrick's open pit mining project in Pascua Lama, Chile. Because of its proximity to glaciers, the project has caused a great deal of public protest in Chile. Again, protesters are mostly concerned with the environmental impact of the mining project, placing a focus on the adverse effects it could have on water supplies. The company, expecting the project to provide a large share of its future gold production, has invested more than \$5 billion into the project. However, amid the controversy and protests the company has decided to temporarily suspend development of the project by one and a half years, pending more favourable regulatory conditions.

Why these two conflicts may be relevant to this essay will become apparent within the "Proposed Legal Remedy" section below. It is important for our purposes to note that Barrick consistently describes the Lagunas Norte mine as one of its key five mines.<sup>33</sup> Barrick representatives have even stated that Lagunas Norte "represents the efforts of the company to promote a sustainable mining model

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<sup>32</sup> "Deadly clash at Peru protest over Barrick gold mine" *BBC News Latin America & Caribbean* (20 September 2012), online: BBC News <[www.bbc.com/news/world-latin-america-19669760](http://www.bbc.com/news/world-latin-america-19669760)>.

<sup>33</sup> "Driven by Returns: Annual Report 2012" (13 February 2013), online: Barrick <[www.barrick.com/files/annual-report-2012/Barrick-Annual-Report-2012.pdf](http://www.barrick.com/files/annual-report-2012/Barrick-Annual-Report-2012.pdf)>.

through a modern operation that *incorporates lessons learned from previous experiences in Peru and abroad.*<sup>34</sup> [emphasis added] According to Barrick, this approach has contributed to the project's ability to "maintain low production costs while ensuring clean and sustainable production and promoting local development."<sup>35</sup> The takeaway point is that it seems important to the company that Lagunas Norte appear not only to be a financially successful project, but also an ecologically sustainable and community-consensual enterprise.

### **Barrick's Corporate Social Responsibility Practices:**

Barrick has a CSR Charter which outlines the four pillars that guide its conduct of business around the world: Ethics; Employees; Environment, Safety and Health; and Community.<sup>36</sup> In its CSR Charter, Barrick expresses its commitment to make a "positive difference in the communities in which [they] live and work."<sup>37</sup> The company also states its ambition to "earn the trust of all with whom [they] interact," including its employees, the communities where they work, and the governments that host them.<sup>38</sup> The Charter makes no reference to any external CSR standards. Rather, the guiding pillars were created by the company itself. However, Barrick Gold is currently a member of the International Council on Mining and Metals,<sup>39</sup> Prospectors and Developers Association of Canada<sup>40</sup> and the Mining Association of

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<sup>34</sup> *Triscritti, supra* note 1 at 443.

<sup>35</sup> *Ibid.*

<sup>36</sup> "Our Commitment", online: Barrick <[www.barrick.com/responsibility/our-commitment/default.aspx](http://www.barrick.com/responsibility/our-commitment/default.aspx)>.

<sup>37</sup> "Corporate Social Responsibility Charter", online: Barrick <[www.barrick.com/files/responsibility/Barrick-CSR-Charter.pdf](http://www.barrick.com/files/responsibility/Barrick-CSR-Charter.pdf)>.

<sup>38</sup> *Ibid.*

<sup>39</sup> "2012 Annual Responsibility Report", online: Barrick <[barrickresponsibility.com/2012/2012-barrick-annual-responsibility-report/](http://barrickresponsibility.com/2012/2012-barrick-annual-responsibility-report/)> [*Responsibility Report*].

<sup>40</sup> "Corporate Members" *Prospectors & Developers Association of Canada* (2013), online: PDAC <[www.pdac.ca/members/membership/corporate-members](http://www.pdac.ca/members/membership/corporate-members)>.

Canada,<sup>41</sup> and as such should abide by their guiding principles in addition to their own.

Consistent with Barrick's intention to promote a sustainable mining model that incorporates lessons learned from previous experiences in Peru, Barrick has undertaken a number of steps to prevent and mitigate conflicts in Lagunas Norte. For example, the company implemented a communication team and a community-relation team at the mine's site. These teams work closely with local communities to "identify their needs, attend to issues they might raise, and jointly manage development programmes."<sup>42</sup> Barrick also uses their "Community Grievance Management Resolution Procedures," a mechanism that allows individuals or groups to submit grievances to be resolved either by the community-relation team or with the intervention of the General Manager of the site, depending on the seriousness of the issue.<sup>43</sup> In more serious cases, the company may arrange for a mediation conducted by a third-party or the matter can be referred to the Peruvian judicial system.<sup>44</sup>

Barrick has been fostering its social licence by contributing funds to NGOs working in the area or implementing programs themselves, such as a water management system which appears to recycle water.<sup>45</sup> Finally, the company publishes an annual Responsibility Report in which it describes such CSR activities

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<sup>41</sup> "Our Members" *The Mining Association of Canada*, online: The Mining Association of Canada <[www.mining.ca/members-partners/our-members](http://www.mining.ca/members-partners/our-members)>.

<sup>42</sup> *Triscritti*, *supra* note 1 at 444.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid*; *Beyond Borders*, *supra* note 5.

and achievements. Interestingly, the 2012 report makes no mention of any local opposition in Quiruvilca.<sup>46</sup> The 2013 report has not yet been released.

### **Dispute Description:**

As referenced above, the development of the Peruvian mining sector has been accompanied by a propensity towards social conflicts, and Barrick's project in Lagunas Norte is no exception. Despite its aforementioned efforts to prevent and mitigate conflicts, Barrick has not been immune to local resistance to its presence. The specific dispute that is the subject of this essay began in January 2011, when Juan Gabriel Alipio, Mayor of the Santiago de Chuco province, objected to Barrick's interest in exploiting satellite deposits located in the proximity of the Lagunas Norte mine on the basis that doing so would pollute several mountain lakes. Additionally, Mayor Alipio and representatives of twenty-eight local communities accused the company of polluting their natural water supplies. These allegations were supported by environmental studies conducted by a local NGO. Barrick's representatives met with Mayor Alipio and local community representatives and reached an agreement "whereby Barrick promised that any future expansion project would be subject to the communities' approval."<sup>47</sup>

On February 21, 2013, approximately 200 people set up blockades to Barrick Gold's Lagunas Norte mine to persuade the company to take part in talks with local government representatives.<sup>48</sup> According to Barrick representatives, a simple misunderstanding triggered the blockades: "Barrick applied for permits to increase

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<sup>46</sup> *Responsibility Report*, *supra* note 39.

<sup>47</sup> *Triscritti*, *supra* note 1 at 445.

<sup>48</sup> "Barrick Says Access to Peru Mine Blocked by Residents" *MAC: Mines and Communities* (21 February 2013), online: MAC Mines and Communities <[www.minesandcommunities.org/article.php?a=12171](http://www.minesandcommunities.org/article.php?a=12171)>.

the mine life at Lagunas Norte by two years, which community members have interpreted as an intention to expand the mine outside of its area of operation.”<sup>49</sup> The day after the blockades were set up, Barrick agreed to participate in a mediation effort with the community.<sup>50</sup>

The mediation process was not without its challenges; at one point, communications broke down due to a disagreement over appropriate wage raises.<sup>51</sup> However, eventually both parties returned to the negotiation table, and an agreement was reached: the *campesinos* would end the protest in exchange for Barrick’s participation in “workshops” to find a solution to the demands over jobs, wages and water supplies.<sup>52</sup>

The protests were generally successful for two reasons. Firstly, the *campesinos* achieved their goals of bringing Barrick and the executive government to the negotiation table: the workshops were attended by a variety of stakeholders, including Barrick’s representatives, mayors of surrounding districts, representatives of the Peruvian Ombudsman, and a delegate of the Ministry of Energy and Mines.<sup>53</sup> Second, the negotiation eventually led to an agreement between the parties: the settlement resolved the social aspects of the dispute, as

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<sup>49</sup> Tiffany Grabski, “Lagunas Norte social conflict due to a ‘misunderstanding’ – Barrick Gold” (25 February 2013), online: BNAmericas <[www.bnamericas.com/news/mining/laguna-norte-social-conflict-based-on-a-misunderstanding-barrick-gold](http://www.bnamericas.com/news/mining/laguna-norte-social-conflict-based-on-a-misunderstanding-barrick-gold)> [Grabski].

<sup>50</sup> “Barrick to start mediation effort at Peru mine” *Reuters* (22 February 2013), online: Reuters <[www.reuters.com/article/2013/02/22/barrick-peru-idUSL1N0BM2QZ20130222](http://www.reuters.com/article/2013/02/22/barrick-peru-idUSL1N0BM2QZ20130222)>.

<sup>51</sup> “Minera Barrick rompe dialogo con comuneros de La Libertad”, *La Republica* (26 February 2013) online: La Republica <[www.larepublica.pe/26-02-2013/minera-barrick-rompe-dialogo-con-comuneros-de-la-libertad](http://www.larepublica.pe/26-02-2013/minera-barrick-rompe-dialogo-con-comuneros-de-la-libertad)>.

<sup>52</sup> “Peru villagers end protest at Barrick gold mine” *Reuters* (27 February 2013), online: Reuters <[www.reuters.com/article/2013/02/27/barrick-peru-idUSL1N0BR5TE20130227](http://www.reuters.com/article/2013/02/27/barrick-peru-idUSL1N0BR5TE20130227)>; *Beyond Borders*, *supra* note 5.

<sup>53</sup> “Comunidades y minera Barrick lograron acuerdos” *La Republica* (26 April 2013), online: La Republica <[www.larepublica.pe/26-04-2013/comunidades-y-minera-barrick-lograron-acuerdos](http://www.larepublica.pe/26-04-2013/comunidades-y-minera-barrick-lograron-acuerdos)>.

Barrick agreed to implement wage raises and community-approved development projects.<sup>54</sup>

Despite this progress, the dispute is still ongoing. For example, allegations have surfaced that Barrick has not complied with the wage raises it agreed to during the workshops.<sup>55</sup> If true, this breach is particularly outrageous given that the *campesinos* were asking for a 114% increase and ended up settling for a 37% hike.<sup>56</sup> Moreover, the environmental aspect of the dispute remains unresolved. The *campesinos* are demanding that Barrick renounce a mining concession that would allow the company to expand their mining project into Lagunas Sur.<sup>57</sup> As the land on which this concession stands is marked with high-altitude lakes, the *campesinos* are concerned that a mining project in this area may affect five of these lakes which provide clean water for 8,000 people from 28 different communities downstream.<sup>58</sup> The company has conducted an environmental impact study for the area alongside 366 perforations.<sup>59</sup> Despite undertaking these preliminary activities, the company

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<sup>54</sup> Victor Castillo Bacon, "Pese a acuerdo, renuncia de Barrick a concesion minera sigue pendiente", *La Republica* (25 April 2013) online: La Republica <[www.larepublica.pe/25-04-2013/pese-acuerdo-renuncia-de-barrick-concesion-minera-sigue-pendiente](http://www.larepublica.pe/25-04-2013/pese-acuerdo-renuncia-de-barrick-concesion-minera-sigue-pendiente)>.

<sup>55</sup> "Frente de Defensa denuncia que Barrick no cumple con aumento de salarios", *La Republica* (12 June 2013) online: La Republica <[www.larepublica.pe/12-06-2013/frente-de-defensa-denuncia-que-barrick-no-cumple-con-aumento-de-salarios](http://www.larepublica.pe/12-06-2013/frente-de-defensa-denuncia-que-barrick-no-cumple-con-aumento-de-salarios)>.

<sup>56</sup> *Ibid*; "Minera Barrick rompe dialogo con comuneros de La Libertad" *La Republica* (26 February 2013), online: La Republica <[www.larepublica.pe/26-02-2013/minera-barrick-rompe-dialogo-con-comuneros-de-la-libertad](http://www.larepublica.pe/26-02-2013/minera-barrick-rompe-dialogo-con-comuneros-de-la-libertad)>.

<sup>57</sup> Igor Ybanez Gamboa, "Dia decisivo en el dialogo entre comuneros de Quiruvilca y Barrick", *La Republica* (25 February 2013) online: La Republica <[www.larepublica.pe/25-02-2013/dia-decisivo-en-el-dialogo-entre-comuneros-de-quiruvilca-y-barrick](http://www.larepublica.pe/25-02-2013/dia-decisivo-en-el-dialogo-entre-comuneros-de-quiruvilca-y-barrick)> [*Ybanez Gamboa*].

<sup>58</sup> "Rondas campesinas libertenas amenazan con tomar carreteras contra proyecto minero", *La Republica* (16 February 2013) online: La Republica <[www.larepublica.pe/16-02-2013/rondas-campesinas-libertenas-amenazan-con-tomar-carreteras-contra-proyecto-minero](http://www.larepublica.pe/16-02-2013/rondas-campesinas-libertenas-amenazan-con-tomar-carreteras-contra-proyecto-minero)> [*Rondas campesinas libertenas amenazan*]; Arnold, *supra* note 20.

<sup>59</sup> *Celendin Libre*, *supra* note 19; Arnold, *supra* note 20.

insists that it does not intend to expand the mine outside the current area of its operation, and therefore the surrounding lakes will not be affected.<sup>60</sup>

The *campesinos* are not satisfied with this assurance, finding it suspicious that Barrick insists on keeping the concession if they will not be making use of it.<sup>61</sup> The community's skepticism is understandable given Barrick's history in Peru. The Interprovincial Association for the Defence of Environmental Rights ("IADER"), a coordinating committee that brings together communities living in the area around Lagunas Norte, cites a number of unfulfilled agreements with affected communities, a lack of social inclusion, and the development of public works that did not represent the real necessities of the community, as reasons for the committee's disapproval of Barrick's presence.<sup>62</sup> Additionally, the IADER is critical of Barrick's lack of compliance with Peruvian environmental regulations, specifically in relation to water management, which are already highly permissive.<sup>63</sup> The IADER claims to have provided Barrick with technical studies that demonstrate the company's activities are contaminating their water supplies, "but they do not want to recognise these studies, for which reason [IADER believes] that they will most likely continue their contaminating practices."<sup>64</sup>

In June 2011, a municipal ordinance was passed declaring the area on which the five lakes stand as a protected region in order to prevent Barrick from

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<sup>60</sup> *Grabski, supra* note 49.

<sup>61</sup> *Ybanez Gamboa, supra* note 57.

<sup>62</sup> Jen Moore "Canadian Development Aid No Longer Tied – Just Shackled to Corporate Mining Interests" *MiningWatch Canada* (27 March 2014), online: MiningWatch Canada <[www.miningwatch.ca/article/canadian-development-aid-no-longer-tied-just-shackled-corporate-mining-interests](http://www.miningwatch.ca/article/canadian-development-aid-no-longer-tied-just-shackled-corporate-mining-interests)> [*Moore*].

<sup>63</sup> *Ibid*; *Arellano-Yanguas, supra* note 3 at 26.

<sup>64</sup> *Moore, supra* note 62.

expanding into it. Barrick successfully appealed the ordinance at court. The municipality is currently awaiting the Constitutional Tribunal's verdict of their appeal to the reversal. Mayor Alipio warned that protests may resume if the municipality loses its appeal.<sup>65</sup>

Incidentally, in July 2013 Lenin Bazan Villanueva, the *campesinos'* lawyer, claimed to have been the victim of three break-ins in which burglars stole documents and photographs. He also alleges he constantly receives intimidating phone calls in which the anonymous callers warn him to stop interfering in the *campesinos'* problems.<sup>66</sup> The source of these crimes, and whether they are connected to Barrick, has not been established.

Finally, the conflict in question indirectly involves the Canadian government, as the Department of Foreign Affairs, Trade and Development (formerly "CIDA") is matching Barrick Gold's funds as part of a World Vision-led project to reduce poverty in Peru through development of this region. According to CIDA's website, this project has:

"so far helped increase the capacity of the local government to manage mining revenue transferred from the central government and to better engage all community stakeholders in prioritising needs and diversifying the local economy, including providing business loans that are benefiting more than 500 families."<sup>67</sup>

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<sup>65</sup> "Advierten que un fallo adverso sobre proteccion de lagunas generara protestas", *La Republica* (29 November 2013), online: La Republica <[www.larepublica.pe/29-11-2013/advierten-que-un-fallo-adverso-sobre-proteccion-de-lagunas-generara-protestas](http://www.larepublica.pe/29-11-2013/advierten-que-un-fallo-adverso-sobre-proteccion-de-lagunas-generara-protestas)>.

<sup>66</sup> "La Libertad: Asesor de rondas campesinas denuncia amenazas de muerte" *RPP Noticias* (15 July 2013), online: RPP Noticias <[www.rpp.com.pe/2013-07-15-la-libertad-asesor-de-rondas-campesinas-denuncia-amenazas-de-muerte-noticia\\_613479.html](http://www.rpp.com.pe/2013-07-15-la-libertad-asesor-de-rondas-campesinas-denuncia-amenazas-de-muerte-noticia_613479.html)>.

<sup>67</sup> Foreign Affairs, Trade and Development Canada, "Natural Resources Management: Advancing Global Prosperity Through Responsible Resource Development", online: Foreign Affairs, Trade and Development Canada <[www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/FRA-102311492-LK7](http://www.acdi-cida.gc.ca/acdi-cida/acdi-cida.nsf/eng/FRA-102311492-LK7)>.

Local communities are less enthusiastic about the tri-partite project: some NGOs have even asked all three parties to cease funding the project in the midst of local opposition to Barrick's presence in the region.<sup>68</sup> The IADER, for example, wrote a letter to the Canadian Minister of International Development, detailing its discontent: "We feel cheated by these and other so-called social responsibility activities because this has not helped to reduce poverty nor to address exclusionary processes."<sup>69</sup> Instead of funding the program, the IADER asks that the Minister monitor Barrick's activities in Peru. One of these parties replied to IADER's letter in confidence, thus their reply cannot be discussed for the purposes of this paper. However, the fact that the project went forward suggests IADER's letter did not cause them to alter their position.

### **Proposed Legal Remedy:**

Compared to the Pierina and Pascua Lama conflicts, the Lagunas Norte dispute is not as highly publicised. The company itself cites the "regulatory challenges to Pascua Lama" and "a significant change to the [Pierina] mine plan" as contributing to the company's significant decrease in their long-term gold, silver and copper price assumptions for 2013.<sup>70</sup> As alluded to above, all three conflicts feature similar complaints and demands from the communities involved: environmental protection and the safeguarding of water supplies. The reason the Pierina and Pascua Lama conflicts may be relevant to the Lagunas Norte dispute concerns the

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<sup>68</sup> "Canada's Development Aid Dollars at Odds with Communities" *MiningWatch Canada* (26 November 2012), online: MiningWatch Canada <[www.miningwatch.ca/article/canada-s-development-aid-dollars-odds-communities](http://www.miningwatch.ca/article/canada-s-development-aid-dollars-odds-communities)>.

<sup>69</sup> *Moore, supra* note 62.

<sup>70</sup> "Barrick Reports Third Quarter 2013 Results" (31 October 2013), online: Barrick <[www.barrick.com/files/quarterly-reports/2013/Barrick-2013-Third-Quarter-Report.pdf](http://www.barrick.com/files/quarterly-reports/2013/Barrick-2013-Third-Quarter-Report.pdf)> at 43 and 72.

fact that shareholder confidence may be shaky as a result of weak gold prices and a dropping stock price. Another dispute similar to the Pierina and Pascua Lama conflicts may exacerbate shareholder weariness.

Much depends on the outcome of the Constitutional Tribunal's decision. A decision from the Constitutional Tribunal is dispositive as the Tribunal is the final appellate level court for constitutional matters in the Peruvian justice system. Mayor Alipio's warnings that protests will resume if the Tribunal dismisses the municipality's appeal makes sense in this context, as the community will have exhausted all its domestic legal avenues.

According to some commentators it appears highly unlikely that the community will win the appeal, particularly given the history of indigenous land rights within the region alongside "the political tradition of disregarding them."<sup>71</sup> Arguably, the community is not claiming a land right as the issue before the Tribunal is the validity of a municipal ordinance. Nonetheless, Peruvian courts are "plagued by allegations of weakness and susceptibility to influence from the other branches of Peru's government."<sup>72</sup> Thus, given the fact that Peru's executive government has been prioritising the promotion of foreign investment (and current centre-left President Humala has been no exception), the Tribunal is likely to favour Barrick's property rights over the *campesinos'* environmental concerns. In the alternative, even if the ruling were to side with the community, Barrick could pursue an

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<sup>71</sup> Alex Meyers, "Clearing the Path for Land Rights, One Road Block at a Time: How Peru's Indigenous Population Can Assert Their Land Rights against Peru's Government" (2011) 1 Global Bus L Rev 229 at 246.

<sup>72</sup> *Ibid* at 250.

alternative course of legal action, such as requesting a conciliation or arbitration facilitated by the International Centre for Settlement of Investment Disputes.<sup>73</sup>

Therefore, regardless of the Tribunal's decision, the resolution to this conflict lies in convincing the company that it is in their best interest to reach an adequate settlement with the Quiruvilca community, so as to avoid the negative publicity that would come from an escalation in blockades at Lagunas Norte. The following are some legal remedies that may accomplish this goal.

### **Equator Principles**

The Equator Principles (EPs) is a "risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making."<sup>74</sup> The financial institutions that have adopted the EPs (EPFIs) commit to implement these principles in their standards for financing projects, and will supposedly not provide Project Finance or Project-Related Corporate Loans to projects where the client will not comply with the EPs.

Some Canadian institutions that have become EPFIs have lent money to Barrick in the past. For example, Bank of Montreal lent the company \$4 billion as recently as November 2013.<sup>75</sup> The Royal Bank of Canada ("RBC") is even more

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<sup>73</sup> See also "Canadian Organizations Condemn Gold Company's Lawsuit Against Costa Rica" *MiningWatch Canada* (13 February 2014), online: MiningWatch Canada <[www.miningwatch.ca/news/canadian-organizations-condemn-gold-company-s-lawsuit-against-costa-rica](http://www.miningwatch.ca/news/canadian-organizations-condemn-gold-company-s-lawsuit-against-costa-rica)>.

<sup>74</sup> "Equator Principles, June 2013" *Equator Principles*, online: Equator Principles <[www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)> at 7 [*Equator Principles*].

<sup>75</sup> "Global Metals & Mining Deals" *BMO Capital Markets*, online: BMO Capital Markets <[www.bmocm.com/knowledge/sector-coverage/mining/deals/](http://www.bmocm.com/knowledge/sector-coverage/mining/deals/)>.

involved in Barrick's financial affairs, having bought 22% of the aforementioned \$3 billion share issue (worth \$650 million), also in November 2013. RBC is responsible for selling its portion of the stock.<sup>76</sup>

The EPs are not intended to be applied retroactively; rather, EPFIs are meant to apply EPs to the expansion or upgrade of an existing project “where changes in scale or scope *may create significant environmental and social risks and impacts*, or significantly change the nature or degree of an existing impact.”<sup>77</sup> [emphasis added] As the expansion into Lagunas Sur represents a change in scale or scope of an existing project, and may very well significantly impact the environment, the EPs may prove helpful in tempering the potential socio-ecological damages arising from this situation.

Furthermore, clients of EPFIs are required to demonstrate effective stakeholder engagement: specifically, they must take indigenous peoples' concerns into account. Accordingly, projects that affect indigenous peoples will be subject to a process of “Informed Consultation and Participation.”<sup>78</sup> Under this framework, the *campesinos* would be able to voice their concerns on the expansion of the Lagunas Sur project. In certain special circumstances, projects with an adverse impact on indigenous people will require their Free, Prior and Informed Consent (“FPIC”).<sup>79</sup>

As positive and applicable as the EPs seem, they are constrained by at least five limitations. First, the EPs will only be helpful if the community's suspicions are

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<sup>76</sup>Boyd Erman & Rachelle Younglai, “Barrick investors cool to stock sale, push for board revamp” *The Globe and Mail* (1 November 2013), online: The Globe and Mail <[www.theglobeandmail.com/report-on-business/barrick-stock-drops-on-stock-sale-project-halt/article15207040/](http://www.theglobeandmail.com/report-on-business/barrick-stock-drops-on-stock-sale-project-halt/article15207040/)>.

<sup>77</sup> *Equator Principles*, *supra* note 74 at 3.

<sup>78</sup> *Ibid* at 8.

<sup>79</sup> *Ibid*.

vindicated and Barrick does in fact expand into Lagunas Sur. The EPs will not be helpful if Barrick simply holds the concession. Second, the EPs will only apply if Barrick expands *and* borrows money from an EPFI for said expansion. In this scenario, the Quiruvilca community would have to know which financial institution will be financing the project, and voice their concerns before the transaction takes place, as the EPs are not to be applied retroactively.

Third, the requirement that clients must ensure that indigenous communities are consulted (under Principle 5, “Stakeholder Engagement”) may not apply to the Quiruvilca *campesinos*. EPFIs are supposed to require that projects comply with the rights and protections for indigenous peoples “contained in relevant national law.”<sup>80</sup> As mentioned earlier, the indigenous status of *campesinos* in Peru is a contentious point. Fourth, even if the *campesinos* were to be treated as an indigenous community by the company, FPIC is defined by the EPs as “good faith negotiation between the client and affected indigenous communities” and does not “confer veto rights to individuals or sub-groups.”<sup>81</sup>

Even if the community surpasses these hurdles, the most critical shortcoming of the EP framework is that it does not provide an enforcement mechanism. EPFIs’ commitment is to abide by the principles, and to report at least annually about their implementation processes and experiences; there is no overseeing body to ensure members’ commitment and accountability. Although the EPs represent a positive step towards improving the *processes* of assessing human rights impacts of corporate activities, they do not contribute to a *substantive* realization of corporate

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<sup>80</sup> *Ibid* at 7.

<sup>81</sup> *Ibid* at 8.

responsibility.<sup>82</sup> However, one study found that many banks have created quasi-appellate levels of review which go to upper management for verdicts on difficult funding decisions. The study's author observed that "the creation of these heightened review mechanisms suggests that banks take very seriously potential reputational risks arising out of complicated, often politically sensitive transactions."<sup>83</sup>

One possible course of action could be for the *campesinos* to draft letters, similar to those sent to CIDA, Barrick Gold and World Vision, detailing the extent of the discontent in Quiruvilca, the environmental damage suffered thus far, and the concern for future ecological harm should Barrick expand into Lagunas Sur. The letter could be drafted to each Canadian EPFI, as the community has no way of knowing which bank (if any) will fund the expansion. The letters would put the EPFIs on notice of environmental concerns, thus triggering a duty of due diligence should Barrick approach the bank for financing. Of course, it is entirely possible that the letters share the same fate as the aforementioned letters regarding the tripartite project. However, it is a fairly cheap and safe course of action, and as such the community has nothing to lose from pursuing this route.

### **OECD Guidelines for Multinational Enterprises**

The Organization for Economic Cooperation and Development ("OECD") Guidelines provide multinational corporations operating in or from member countries to the OECD Declaration on International Investment and Multinational

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<sup>82</sup> Ariel Meyerstein, "Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles" (2013) 45 NYUJ Int'L & Pol 487 at 575.

<sup>83</sup> *Ibid* at 556.

Enterprises with *voluntary* principles and standards for responsible business conduct in areas such as employment, human rights, environment and information disclosure. Adhering countries must set up National Contact Points (“NCP”), which undertake to handle enquiries and contribute to the resolution of issues that arise.

Both Canada and Peru are member countries and have set up NCPs. Therefore, the Quiruvilca community could submit a request for review on the basis that the company is not observing certain provisions of the OECD Guidelines, such as Paragraph 2 under Part VI (Environment), or Paragraph 1(b) under Part V (Employment):

*Part VI (Environment), Paragraph 2*

Enterprises should...

(a) provide the public and workers with adequate, measureable and verifiable... and timely information on the potential environment, health and safety impacts of the activities of the enterprise...

(b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.<sup>84</sup>

*Part V (Employment), Paragraph 1(b)*

Enterprises should... engage in *constructive* negotiations, either individually or through employers’ associations... with a view to reaching agreements on terms and conditions of employment.<sup>85</sup>  
[emphasis added]

Paragraph 2 of Part VI may be premature at this point. Barrick is still in compliance with this principle, as it has conducted an environmental impact study at Lagunas Sur and disclosed it to the community leaders.<sup>86</sup> This principle will only be triggered if, following the Constitutional Tribunal’s verdict, Barrick decides to expand into Lagunas Sur without any additional consultation, and despite the

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<sup>84</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011) at 42 [*OECD Guidelines*].

<sup>85</sup> *Ibid* at 35.

<sup>86</sup> *Rondas campesinas libertenas amenazan*, *supra* note 58.

community's opposition. The principle espoused in paragraph 1(b) of Part V may prove more helpful: It cannot be said that the company engaged in a *constructive* negotiation with the community on wages if it did not implement the terms of the constructive negotiation.

Upon receipt of the community's request for review, the NCP will make an initial assessment of whether the issues raised merit further examination, and if they do, the NCP will "facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist both parties in dealing with the issues."<sup>87</sup>

This proposed legal remedy has both advantages and disadvantages. This remedy might prove fruitful given the nature of the dispute and the history between the parties. For example, the expansion has not yet begun, as the company is still denying there is an expansion to speak of. Therefore, the timing for a mediation is ideal. Furthermore, the protests thus far have been peaceful in nature and the parties have conclusively negotiated before; the positive discourse between the parties may be conducive to a successful mediation.

However, the OECD Guidelines present some drawbacks as well. First, the NCP can only facilitate access to mediation with the agreement of the parties involved.<sup>88</sup> Thus, if the company is not amenable to the idea of going through another negotiation, there is nothing the NCP can do to force Barrick to the negotiation table. Second, the parties have negotiated before, and were not able to reach an agreement on the concession. Furthermore, there have been claims that the company has not implemented the wage raises it previously agreed to. In light of

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<sup>87</sup> *OECD Guidelines*, *supra* note 84 at 73.

<sup>88</sup> *Ibid.*

these circumstances, the probability of the mediation reaching a substantive agreement is unknown. Third, the NCP's role in the dispute ends with the facilitation of the mediation. In the event that the mediation fails or Barrick does not abide by the terms of the settlement, the community cannot turn to the NCP for any enforcement or compulsion mechanism.

The greatest drawback to this mechanism is that the *campesinos* have a very strong stance regarding the expansion. While some in the community are supportive of the Lagunas Norte mine because of its contribution in the areas of employment and CSR projects, others want Barrick's complete withdrawal from the region. This range of opinion indicates a range of possible outcomes from the negotiation. However, the areas of employment and CSR projects have already been successfully negotiated: with the exception of the implementation of wage raises, there is nothing more to negotiate concerning the Lagunas Norte mine. Public opinion on the Lagunas Sur extension is less broad: the consensus seems to be that the community does not want any more damage done to lakes. Even pro-mining municipal leaders are not willing to support the extension.<sup>89</sup> In light of such a strong stance, it will be difficult to find middle ground between the community and the company. This difficulty will be even more palpable if Barrick wins before the Constitutional Tribunal, as it will have even less incentive to give up the concession in light of the court's affirmation of their property interest. Therefore, the most that can be accomplished from a negotiation is a shared management model over the concession, with some sort of regulatory guarantees for the protection of the lakes.

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<sup>89</sup> Interview of Georgina Alonso, Graduate Student in International Development Studies at Saint Mary's University, by the author (10 April 2014).

## Securities Law

Because Barrick is incorporated in Ontario, the company must comply with Ontario statutes, such as the *Ontario Securities Act* (“*OSA*”).<sup>90</sup> According to section

1.1 of the Act, the purposes of this legislation are:

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.

One way to accomplish these purposes is to require companies (or “reporting issuers”)<sup>91</sup> to provide regular up-to-date information to current and potential investors.<sup>92</sup> This requirement is generally referred to as a “continuous disclosure obligation.”<sup>93</sup> Failure to adequately comply with this requirement may lead to civil liability, including common law remedies and statutory civil liability.<sup>94</sup>

There are two basic types of continuous disclosure obligations, only one of which is relevant to this essay: “The *OSA* requires reporting issuers to comply with... timely disclosure of material business developments when they occur.”<sup>95</sup> The *OSA* states that the obligation to make timely disclosure is triggered when “a material change occurs in the affairs of a reporting issuer.”<sup>96</sup> A material change is defined in subsection 1(1) of the *OSA* as: “a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market

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<sup>90</sup> RSO 1990, c S.5 [*OSA*].

<sup>91</sup> Note: Barrick is listed in Sedar as a reporting issuer.

<sup>92</sup> Jeffrey G. MacIntosh & Christopher C. Nicholls, *Securities Law* (Toronto: Irwin Law, 2002) at 253 [*MacIntosh & Nicholls*].

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid* at 254.

<sup>95</sup> *Ibid* at 274.

<sup>96</sup> *OSA*, *supra* note 90, s 75(1).

price or value of any of the securities of the issuer.”<sup>97</sup> In light of concerns that this definition was too restrictive in that it defines material change as an “internal corporate development” when it is entirely possible for external developments to have an impact on the market price of an issuer’s securities, Canadian securities regulators have promulgated policies to supplement legislation.<sup>98</sup> National Policy 51-201 is relevant to our purposes, as it is specifically concerned with Disclosure Standards.

The weight these supplementary policies carry is uncertain in light of *Pezim v British Columbia (Superintendent of Brokers)*, in which the British Columbia Court of Appeal stated that regulators have no authority to impose “more exacting standards than those specifically adopted and imposed by the legislature.”<sup>99</sup> Nonetheless, National Policy 51-201 is still relevant to this discussion as it provides guidance on “best disclosure” practices.<sup>100</sup> According to this policy, although companies are not generally required to interpret the impact of external political, economic and social developments on their affairs, if:

an external development will have a direct effect on the business and affairs of a company that is both material and uncharacteristic of the effect generally experienced by other companies engaged in the same business or industry, the company is urged to explain, where practical, the particular impact on them.<sup>101</sup>

Finally, the policy lists a number of non-exhaustive examples of the types of events or information which may be material, which included: “major labour

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<sup>97</sup> *Ibid*, s 1(1).

<sup>98</sup> *MacIntosh & Nicholls*, *supra* note 92 at 270, 274.

<sup>99</sup> (1992), 66 BCLR (2d) 257 (CA), rev’d in part [1994] 2 SCR 557 on different grounds.

<sup>100</sup> *Disclosure Standards*, OSC NP 51-201, (12 July 2012) [*NP 51-201*].

<sup>101</sup> *Ibid*, s 4.4.

disputes,” and “the commencement of, or developments in, material legal proceedings or regulatory matters.”<sup>102</sup> Apart from one article found in Barrick’s self-published magazine “Beyond Borders,” there is no mention of the dispute on their website, their Management Discussion and Analysis reports, their financial statements or their news releases. The magazine article simply says that the February 2013 protest was short-lived because “Barrick and local leaders agreed to find solutions to demands over jobs, wages and water supplies.”<sup>103</sup> There is no follow-up on whether the parties reached an agreement, or whether any outstanding issues remain. There has also been no disclosure on the fact that their concession in Lagunas Sur is the subject of a municipal ordinance and an appeal before the Peruvian court system. The author even contacted Mr. Andy Lloyd, Vice President of Barrick’s Communications Department, to inquire on the lack of information surrounding the Lagunas Norte dispute. Mr. Lloyd did not reply, despite having responded to an earlier email.

The company’s obligation to disclose the opposition in Quiruvilca and the uncertain status of the concession turns upon the materiality of that information.<sup>104</sup> In making materiality judgments, companies must take into account a number of factors that cannot be captured in a simple bright-line standard or test. These factors include the nature of the information itself, the volatility of the company’s securities and prevailing market conditions. As a guiding principle, if there is any

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<sup>102</sup> *Ibid*, s 4.3.

<sup>103</sup> *Beyond Borders*, *supra* note 5.

<sup>104</sup> *MacIntosh & Nicholls*, *supra* note 92 at 270.

doubt about whether particular information is material, companies should err on the side of materiality and release the information publicly.<sup>105</sup>

Announcements such as the delay in gold production at Pascua Lama and the assessment of an impairment charge have been followed by slumps in Barrick's stock price. These slumps cannot be solely attributed to these announcements, as the falling price of gold also contributed to the stock's decline. In light of the guiding principle that companies should err on the side of materiality, and considering factors such as the volatility of gold prices and, consequently, Barrick's securities, Barrick should have disclosed the protests and the legal proceedings before the Constitutional Tribunal. This conclusion is supported by the seminal Supreme Court case *Pezim v British Columbia (Superintendent of Brokers)*, in which Justice Iacobucci stated that, "from the point of view of investors, new information relating to a mining property (which is an asset) bears significantly on the question of that property's value."<sup>106</sup>

The *campesinos* could file a complaint to the Ontario Securities Commission ("OSC") in relation to the company's lack of disclosure. The advantage of this approach is that it would place Barrick under the scrutiny of the OSC. A person or company that is found to breach the *OSA* "is guilty of an offence and on conviction is liable to a fine of not more than \$5 million or to imprisonment for a term not more than five years less a day, or to both."<sup>107</sup> Furthermore, as mentioned previously, breaches of securities legislation may expose companies to civil liability.

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<sup>105</sup> NP 51-201 Disclosure Standards, *supra* note 100, s 4.2(2).

<sup>106</sup> [1994] 2 SCR 557 at para 87.

<sup>107</sup> *OSA*, *supra* note 90, s 122(1).

However, this course of action poses its disadvantages as well. First, it is not clear that the OSC will find that a breach of its statute has occurred: after all, according to a Barrick representative, the protests did not disrupt mine production, and as such, the OSC could find that the protests could not reasonably be expected to have a significant effect on the market price or value of any of Barrick's securities.

Even if the OSC were to find a breach, the purpose of the *OSA* is to protect investors.<sup>108</sup> Thus, any remedy fashioned by the OSC will take into consideration the interests of investors and the promotion of a fair market, not the interests of the *campesinos*. Requiring Barrick to disclose the protests and the constitutional case may help the *campesinos* in that disclosure may expose their environmental concerns to a wider public. However, there is no guarantee that this added scrutiny will bring Barrick back to the negotiation table, or strengthen the community's position vis-à-vis the Lagunas Sur concession.

## **Conclusion**

As mentioned previously, in order to resolve this dispute the *campesinos* must capitalise on the recent decline in shareholders' confidence. Mayor Alipio's preferred course of action, resorting to further blockades and protests, has its advantages, the main advantage being that blockades have worked for the community in the past. Although the protests did bring Barrick to the negotiation table, they lacked foreign media attention. Thus, while some foreign NGOs and media did report on the local discontent surrounding Lagunas Norte, the level of reporting has diminished substantially following the agreement reached between

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<sup>108</sup> *Ibid*, s 1.1.

the parties. This lack of reporting lends support to Barrick's interpretation of events: that the protests were short-lived and successfully resolved. Ultimately, the *campesinos* need to tap into resources to get their voices heard outside of Peru. Thus, Mayor Alipio's call for protests has to be supplemented with other action, including (but not limited to) the recommendations made within this paper.

Mayor Alipio's willingness to wait until the Constitutional Tribunal releases its verdict on the municipal ordinance is prudent: what the Tribunal decides will have a direct impact on both the *campesinos* and the company's next move(s). Nevertheless, the community can begin preparing for the likelihood that their appeal will be dismissed. Therefore, the letters to the EPFIs should be sent as soon as possible so that the banks are on notice of the community's position on the Lagunas Sur expansion before Barrick is able to approach any financial institution for backing.

Following a negative verdict and an announcement that Barrick will pursue an expansion, the *campesinos* should submit a request for review to the NCP. Perhaps the involvement of the NCP will garner more foreign media attention, which would have the effect of informing shareholders of the presence of yet another socio-environmental dispute in Latin America. This information may be particularly relevant given Barrick's portrayal of the Lagunas Norte project as a culmination of lessons learned. The potential media attention and shareholder weariness may motivate Barrick into resolving the dispute this time around. If the NCP's involvement does not increase the level of media attention to the dispute, the

community should file a complaint with the OSC, as this option may compel the company to disclose the dispute to its shareholders.

As mentioned previously, the community is resolutely opposed to any expansion of the Lagunas Norte project. If Barrick acquires the support of the Peruvian courts, in addition to the support already provided by the executive government, the *campesinos* will be unlikely to succeed in its ultimate goal of preventing expansion. Consistent with the current state of affairs in Peru and Peruvian history, it may be that all the *campesinos* can hope for is for less of Atahualpa's gold to find its way into Barrick's room.

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