

# Mining Megaliths in the Argentine Andes: Where Will Victims of Environmental Degradation Find Justice?

Catherine M. Wilmarth

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## MINING MEGALITHS IN THE ARGENTINE ANDES: WHERE WILL VICTIMS OF ENVIRONMENTAL DEGRADATION FIND JUSTICE?

CATHERINE M. WILMARTH\*

The debate over mining in Argentina has become more pressing in the past decade as increasingly larger mining projects develop and pose a threat to the environment. With the progress of information technology, more voices are using the Internet to bring awareness to the negative effects that mining sites have on local communities.<sup>1</sup> The recent 2010 Copiapó mining accident in Chile, during which thirty-three miners were trapped underground for sixty-nine days after a mine collapsed,<sup>2</sup> brought awareness to the issues of safety and regulation of mining in the Andes Mountains.<sup>3</sup> The San José Mine involved in the incident had been closed in 2007 in relation to the death of a worker, but reopened in 2008 despite not having complied with all the regulations imposed on it to begin operating again.<sup>4</sup>

Even before this incident, however, a debate had already been developing in Latin America, among the international community, and

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\* J.D. Candidate, 2012, B.A., 2009, Major in International Relations and Minor in Hispanic Studies, The College of William & Mary. The author would like to thank her family—especially Dad, Mom, Ted, Tom, and Ron—and her friends for supporting her throughout law school. She'd also like to thank Daniel Taillant and the Centro de Derechos Humanos y Ambiente for all they taught and showed her on this subject. Lastly, she'd like to thank the Board and all those who made Volume 36 happen.

<sup>1</sup> See *infra* note 13 and accompanying text.

<sup>2</sup> See *Times Topics: Chile Mining Accident (2010)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/c/chile\\_mining\\_accident\\_2010/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/chile_mining_accident_2010/index.html) (last updated Oct. 12, 2011).

<sup>3</sup> See Pascale Bonnefoy, *Poor Safety Standards Led to Chilean Mine Disaster*, GLOBALPOST (Aug. 29, 2010, 2:19 PM), <http://www.globalpost.com/dispatch/chile/100828/mine-safety>; Eric Marx, *Chile's Mines: Rescue that Should Never Have Been Needed*, ETHICAL CORP. (Dec. 3, 2010), <http://www.ethicalcorp.com/communications-reporting/chile%E2%80%99s-mines-rescue-should-never-have-been-needed> (describing international ratification of an International Labour Organisation convention on health and safety in mines).

<sup>4</sup> See Gideon Long, *How Safe Are Chile's Copper Mines?*, BBC NEWS (Oct. 5, 2010, 5:39 AM), <http://www.bbc.co.uk/news/world-latin-america-11467279>; see also Bonnefoy, *supra* note 3.

most visibly, online, concerning mining projects in South America.<sup>5</sup> Two large projects in particular in Latin America—Pascua-Lama and Veladero, which are only ten kilometers apart<sup>6</sup>—have faced the brunt of public condemnation<sup>7</sup> and will be the examples of the crises upon which this Note will focus. With respect to these two sites, discussion focuses on a number of issues: the company's economic impact assessment that originally proposed to "relocate" glaciers,<sup>8</sup> claims in court over ownership of the land,<sup>9</sup> an agreement developed by Chile and Argentina to allow a mining site that sat both on Argentine and Chilean territory,<sup>10</sup> and the lobbying power of Barrick Gold Corporation ("Barrick"), the owner of Pascua-Lama and Veladero, in Argentina to shoot down the previous Ley de Glaciares ("Glacier Law") in 2008 and to fight the current 2010 version.<sup>11</sup> Pascua-Lama, Veladero, and the nearby communities affected by the mining activity at these two sites are landmark examples that epitomize the character and attitudes of powerful foreign extraction firms, the environmental damage of mining, and the polarizing nature of economic development in the Andes Mountains.

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<sup>5</sup> See *infra* note 13 and accompanying text (giving examples of watchdog web sites that track mining projects and their consequences).

<sup>6</sup> *Pascua-Lama*, BARRICK GOLD CORP., <http://barrick.com/GlobalOperations/SouthAmerica/PascuaLamaProject/default.aspx> (last visited Apr. 6, 2012)

<sup>7</sup> See *Barrick Gold Faces Determined Opposition at Pascua Lama and Veladero*, MININGWATCH CANADA (Dec. 21, 2005), <http://www.miningwatch.ca/barrick-gold-faces-determined-opposition-pascua-lama-and-veladero>.

<sup>8</sup> See *infra* notes 78–84 and accompanying text; see also BARRICK GOLD CORP., INFORMATIVO PROYECTO PASCUA-LAMA [PASCUA-LAMA PROJECT BULLETIN] (June 2005) (on file with author).

<sup>9</sup> 14° Juzgado Civil de Santiago [14° J.Civ. Santiago] [14th Civil Court of Santiago], 19 junio 2006, "Villar, Rodolfo c. Compañía Minera Nevada," Rol de la causa: C-1912-2001 [hereinafter Villar, Rodolfo c. Compañía Minera Nevada] (on file with author).

<sup>10</sup> Mining Integration and Complementarity Treaty Between Chile and Argentina, Chile-Arg., Dec. 29, 1997, available at <http://www.cochilco.cl/english/normativa/descarga/tratado-chile-argentina.pdf>; see BARRICK GOLD CORP., BEYOND BORDERS: A SPECIAL REPORT ON PASCUA-LAMA 10 (2009), available at [http://www.barrick.com/Theme/Barrick/files/docs\\_csr/BeyondBorders-BarrickGold-ResponsibleMining-PascuaLama-Sept09-v2.pdf](http://www.barrick.com/Theme/Barrick/files/docs_csr/BeyondBorders-BarrickGold-ResponsibleMining-PascuaLama-Sept09-v2.pdf) (indicating that this treaty made the Pascua-Lama site possible).

<sup>11</sup> See Kyle Younker, *Ley de Glaciares: Caught in the Balance*, THE ARGENTINA INDEPENDENT (Sept. 27, 2010), <http://www.argentinaindependent.com/socialissues/environment/ley-de-glaciares-caught-in-the-balance-/>; see also Gov't, *San Juan Province Governor Accused of 'Economic Ties' with Mining Company*, BUENOS AIRES HERALD (July 7, 2010), available at <http://www.buenosairesherald.com/article/38619/govt-san-juan-province-governor-accused-of-economic-ties-with-mining-company> (discussing the "traffic of influence" and suspicious ties between politicians and mining companies).

The mining companies' propensity to damage the environment and societies has drawn increasing attention from multiple communities and organizations.<sup>12</sup> Currently a number of watchdog web sites maintained both by Latin Americans and by North Americans track every move of the mining giants.<sup>13</sup> Many of these large American, Canadian, and Australian companies have operations not only in Latin America, but also in North America and around the world as well, which make the environmental sustainability of mining a global issue.<sup>14</sup> This newfound awareness brought about by the public's increased access to information and to publicizing resources has caused governments to take a closer look at the statutes and regulations currently in place, and to respond by proposing a number of new pieces of legislation that make mining companies more accountable.<sup>15</sup> Bills limit the allowable methods of mining and increase accessibility to court systems for victims of environmental degradation.<sup>16</sup> This new surge of legislation has arisen both in Argentina and also in Canada, home to a number of international mining companies.<sup>17</sup>

Advancements of this kind in environmental protection are not fully embraced by all parts of national government. In Argentina, current president Cristina Kirchner and several representatives from prominent mining provinces staunchly support the gross incentivization of extraction development.<sup>18</sup> They defend the interests of companies like Barrick,

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<sup>12</sup> With regard to Barrick, see generally CORPWATCH, BARRICK'S DIRTY SECRETS: COMMUNITIES RESPOND TO GOLD MINING'S IMPACTS WORLDWIDE (May 2007), available at <http://www.corpwatch.org/article.php?id=14466>.

<sup>13</sup> See, e.g., PROTEST BARRICK, <http://protestbarrick.net/> (last visited Apr. 6, 2012); MININGWATCH, <http://www.miningwatch.ca/> (last visited Apr. 6, 2012); MINES AND COMMUNITIES, <http://www.minesandcommunities.org/> (last visited Apr. 6, 2012).

<sup>14</sup> Large companies with a presence in Latin America include Barrick Gold Corporation, Rio Tinto, and Xstrata, among many others. E.g., *History*, BARRICK GOLD CORP., <http://www.barrick.com/Company/History/default.aspx> (last visited Apr. 6, 2012); *At a Glance*, RIO TINTO, [http://www.riotinto.com/aboutus/19602\\_overivew.asp](http://www.riotinto.com/aboutus/19602_overivew.asp) (last visited Apr. 6, 2012); *At a Glance*, XSTRATA, <http://www.xstrata.com/about/at-a-glance/> (last visited Apr. 6, 2012).

<sup>15</sup> See *infra* Parts II–III.

<sup>16</sup> See *infra* Parts II–III.

<sup>17</sup> See *Factbox: Argentine Legislation that Targets Mining*, REUTERS (Aug. 17, 2010, 1:41 PM), <http://www.reuters.com/article/2010/08/17/us-argentina-glaciers-factbox-idUKTRE67G46320100817> (discussing the national Glacier Law and provincial mining laws); Matthew Hill, *Son of Dead Antimining Activist in Canada Lobbying for Tougher Laws*, MINING WEEKLY, Oct. 1, 2010, <http://www.miningweekly.com/article/son-of-murdered-anti-mining-activist-in-canada-lobbying-for-tougher-laws-2010-10-01> (discussing Bills C-300 and C-354 in Canada).

<sup>18</sup> See *Gov't, San Juan Province Governor Accused of 'Economic Ties' with Mining Company*, *supra* note 11. See generally UNDERSECRETARIAT OF MINING, 10 REASONS TO

a Canadian firm that is the global leader in gold production,<sup>19</sup> and fight tooth and nail against any environmental regulation that will constrict the freedom of those companies.<sup>20</sup> Other national actors, whose constituencies depend less on mining investment and activity, are more willing to defend environmental interests and support bills that propound limitations for mining companies.<sup>21</sup> This political divide makes for a lot of heated debate: in 2008 the Argentine National Congress passed a bill protecting glaciers, the original Glacier Law,<sup>22</sup> but President Cristina Kirchner vetoed it under pressure from mining interests.<sup>23</sup> This turn of presidential support contributed to a rift between President Cristina Kirchner and Romina Picolotti, the former Secretary of Environment and Sustainable Development, who later resigned.<sup>24</sup> The 2010 version passed in October by the National Congress has already been declared in part unconstitutional and suspended in the province of San Juan,<sup>25</sup> which is the leading pro-mining region.<sup>26</sup> The sharp divisions that these regulations cause may make enforcement in Argentina difficult to bring about.

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INVEST IN ARGENTINE MINING 8–13, *available at* <http://www.argentina.org.au/10%20reasons%20to%20invest%20in%20Argentine%20Mining.pdf> (listing government regulatory and fiscal incentives to invest in mining operations).

<sup>19</sup> *Company: Profile*, BARRICK GOLD CORP., <http://www.barrick.com/Company/Profile/default.aspx> (last visited Apr. 6, 2012).

<sup>20</sup> *See Gov't, San Juan Province Governor Accused of 'Economic Ties' with Mining Company*, *supra* note 11 (discussing politicians' ties with mining companies and the veto of the Glacier Law).

<sup>21</sup> Miguel Bonasso, a national deputy from the coastal capital of Buenos Aires, has been the main supporter of the new Glacier Law. *El Proyecto de Ley de Glaciares Sólo Se Aprobó en General [The Glacier Law Project Was Only Approved in General]*, PARLAMENTARIO.COM (July 15, 2010), <http://parlamentario.com/noticia-30332.html>. The opposition tends to come from national leaders and provincial leaders of mining regions, such as the Governor of San Juan, José Luis Gioja. *See Gov't, San Juan Province Governor Accused of 'Economic Ties' with Mining Company*, *supra* note 11 (discussing Gioja's and the President's resistance to impediments to mining).

<sup>22</sup> Gustavo Ybarra, *La Ley de los Glaciares Influyó en la Destitución de Picolotti [The Glacier Law Influenced the Dismissal of Picolotti]*, LA NACIÓN (Dec. 4, 2008), <http://www.lanacion.com.ar/1077233-la-ley-de-los-glaciares-influyo-en-la-destitucion-de-picolotti>.

<sup>23</sup> Younker, *supra* note 11.

<sup>24</sup> Ybarra, *supra* note 22.

<sup>25</sup> *See Suspenden la Aplicación de la Ley de Glaciares en San Juan [Court Suspends the Application of the Glacier Law in San Juan]*, DIARIO DE CUYO (Nov. 2, 2010, 11:50 AM), [http://www.diariodecuyo.com.ar/home/new\\_noticia.php?noticia\\_id=430671](http://www.diariodecuyo.com.ar/home/new_noticia.php?noticia_id=430671).

<sup>26</sup> *See Younker, supra* note 11.

In Canada, the Parliament has already defeated one of two bills proposed to make Canadian mining companies responsible for their actions in developing countries.<sup>27</sup> Despite widespread support from academics, watchdog organizations, and international non-governmental organizations,<sup>28</sup> mining and extractive interests have put up a fight against Canadian legislation that would make them more vulnerable to examination and lawsuits.<sup>29</sup> Though regulating and filing suit against corporations through the nation in which they are incorporated may make decisions easier to enforce,<sup>30</sup> many of the citizens of these first-world countries are less aware and feel less connected to the environmental and societal effects that mining has in less developed countries.<sup>31</sup> For this reason they are less inclined to impose restrictions based upon violations they have not witnessed. But supporters of this type of legislation argue that enforcing sanctions against violations, and improvements in the ethos of corporate social responsibility, will give Canadian companies a more professional business edge on the global scene.<sup>32</sup>

By supporting, passing, and beginning to enforce these laws, especially in Argentina, the international community has finally recognized the destructivity of mining and arranged a number of easily accessible mechanisms to keep the activities of corporations in check. Previous applicable law, the Argentine Mining Code,<sup>33</sup> does not take a hard enough stance on the matter of enforcement and aims mainly to facilitate investment into the country by attracting foreign corporations. By creating opportunities for justice in a number of different fora, private persons, communities, non-governmental organizations, and provincial and

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<sup>27</sup> See Liezel Hill, *Canadian Lawmakers Vote Down Controversial Bill C-300*, MINING WEEKLY, Oct. 28, 2010, <http://www.miningweekly.com/article/canadian-mps-vote-against-bill-c-300-2010-10-28>; see also *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, R.S.C. 2009, c. C-300 (Can.) (proposed legislation), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4> [hereinafter Bill C-300].

<sup>28</sup> *Supporters of C-300*, HONOURABLE JOHN MCKAY PC, MP SCARBOROUGH (Oct. 26, 2009), [http://www.johnmckaymp.on.ca/newsshow.asp?int\\_id=80590](http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80590).

<sup>29</sup> See Hill, *supra* note 27.

<sup>30</sup> Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401, 402–03 (2001).

<sup>31</sup> See Jim Lobe, *Gold Jewelry—World's Dirtiest Valentine's Gift?*, INTER PRESS SERV. (Feb. 14, 2005), [http://www.ipsnews.net/new\\_notas.asp?idnews=27432](http://www.ipsnews.net/new_notas.asp?idnews=27432).

<sup>32</sup> RICHARD JANDA, BILL C-300: SOUND AND MEASURED REINFORCEMENT FOR CSR 2 (2009), available at <http://www.johnmckaymp.on.ca/images/newsmanager/newsfiles/bill%20c-300%20report%20-%20final.pdf>.

<sup>33</sup> 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 18.

national governments may use the new laws to finally place a check on the previously minimally regulated mining company activity. With the choice between trying these cases in Argentine courts because they represent the state in which the projects are located and trying these issues in foreign court systems such as that of Canada because they have jurisdiction over the companies that manage the projects, one must wonder: which course of jurisdiction, statute, and enforcement shows better promise in truly putting an end to environmental abuses by mining companies?

The Argentine government heavily encourages mining projects operated by Canadian and American companies in the Argentine Andes Mountains because it believes these operations will bring investment and jobs into the country.<sup>34</sup> The reality of the situation is that the promised benefits are not fully realized,<sup>35</sup> and that the Argentine government minimally regulates the activities of these companies<sup>36</sup> as they damage the environment and harm nearby communities.<sup>37</sup> Argentine and Canadian legislatures are currently debating a number of different pieces of legislation that would help to remedy this situation.<sup>38</sup> In Argentina, the Glacier Law, which was once previously passed but vetoed by President Cristina Kirchner, has now been passed by the legislature<sup>39</sup> in a new and more extensive form.<sup>40</sup> There are also a number of other national and provincial bills to outlaw open-pit mining,<sup>41</sup> a highly destructive and dangerous technique most frequently used in Argentina to mine various

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<sup>34</sup> See *Minería—Objetivos* [Mining—Objectives], SECRETARÍA DE MINERÍA DE LA NACIÓN [SECRETARIAT OF MINING OF THE ARGENTINE NATION], <http://www.mineria.gov.ar/objetivos.htm> (last visited Apr. 6, 2012).

<sup>35</sup> See *generally Issue Areas*, PROTEST BARRICK, <http://protestbarrick.net/section.php?id=4> (last visited Apr. 6, 2012).

<sup>36</sup> See Cole Robertson, *In the Shadow of a Mine: Pollution, Corruption and Crime*, ARGENTINA INDEPENDENT (Sept. 10, 2009), <http://www.argentinaindependent.com/feature/in-the-shadow-of-a-mine-pollution-corruption-and-crime/>.

<sup>37</sup> See *generally Issues Areas*, *supra* note 35, at subsecs. “Indigenous/Community Rights,” “Environment.”

<sup>38</sup> See *infra* Parts II–III.

<sup>39</sup> See *Diputados Aprobó el Proyecto de Protección de Glaciares Que Había Vetado Cristina* [Deputies Approved the Glacier Protection Project That Cristina Had Vetoed], CLARÍN (July 15, 2010, 8:11 AM), [http://beta.clarin.com/politica/congreso/Diputados-proyecto-proteccion-glaciares-Cristina\\_0\\_298770304.html](http://beta.clarin.com/politica/congreso/Diputados-proyecto-proteccion-glaciares-Cristina_0_298770304.html).

<sup>40</sup> See *El Proyecto de Ley de Glaciares Sólo Se Aprobó en General*, *supra* note 21; see also *Diputados Aprobó el Proyecto de Protección de Glaciares que Había Vetado Cristina*, *supra* note 39.

<sup>41</sup> Younker, *supra* note 11.

minerals, including silver and gold.<sup>42</sup> In Canada there are two bills, C-300 and C-354,<sup>43</sup> which would allow foreign parties to sue Canadian corporations in Canadian courts for environmental and human rights violations and other torts they commit in developing countries.<sup>44</sup> All of these pieces of legislation have created and may help create a number of new frameworks under which the victims of environmental degradation can seek justice for the abuses of mining companies.

This Note argues that the Argentine framework for bringing mining companies to justice is the mechanism with the most promise for success and enforcement. Part I of this Note will examine the current state of mining projects and the environment in Argentina, including two of the most controversial projects: the Pascua-Lama and Veladero sites, owned by the Canadian corporation Barrick. It will detail Barrick's previous social and environmental atrocities, including the corporation's proposal to "move glaciers." Part II will examine the Argentine Mining Code, the Glacier Law, and new provincial bills proposing to ban open-pit mining and the use of toxic substances, and will look at the text of the bills and their reception in Argentina to assess whether they provide a viable outlet for justice. Part III will examine the current Canadian

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<sup>42</sup> See Robertson, *supra* note 36; see also *Latin America Gold Rush Comes with Concerns*, MSNBC (April 15, 2005, 8:25 AM), [http://www.msnbc.msn.com/id/7404461/ns/us\\_news-environment](http://www.msnbc.msn.com/id/7404461/ns/us_news-environment).

<sup>43</sup> An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, R.S.C. 2009, c. C-300 (Can.) (proposed legislation); An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.C. 2009, c. C-354 (Can.) (proposed legislation), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3796994> (last visited Apr. 6, 2012) [hereinafter Bill C-354]. While C-300 was defeated in the Fortieth Parliament, see Hill, *supra* note 27, C-354 was reintroduced as C-323 in the Forty-first Parliament in October, 2011. *Bill C-354 (Historical)*, OPENPARLIAMENT.CA, <http://openparliament.ca/bills/40-3/C-354/> (last visited Apr. 6, 2012). The bill as reintroduced is substantially the same, adding only the phrase "that are" to subpart 1. An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.C. 2011, c. C-323 (Can.) (proposed legislation), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5160018&file=4> (last visited Apr. 6, 2012) [hereinafter Bill C-323]. Because much of the discussion of this bill with respect to mining references the bill by its Fortieth Parliament session number, this Note shall do the same.

<sup>44</sup> An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, R.S.C. 2009, c. C-300 (Can.) (proposed legislation); An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.C. 2009, c. C-354 (Can.) (proposed legislation).



Environmental Protection Act,<sup>45</sup> the proposed bills C-300 and C-354, and the text of these bills and their reception in Canada, to analyze whether they will be useful for victims of environmental degradation. Finally, this Note will conclude that the Argentine system is the better forum for suits against mining companies due to its laws with more specific content, preferable enforcement mechanisms, interested public, and proximity to the victims of mining's destructive activity.

#### I. MINING IN THE ANDES MOUNTAINS: AN OVERVIEW OF THE ISSUES

Mining in the Andes Mountains has been an important part of the Argentine economy for decades, and particularly in recent years due to increased government focus on the industry.<sup>46</sup> The Argentine government created a "first generation" of mining projects by opening up these mineral-rich regions to large numbers of private investors in the early 1990s.<sup>47</sup> With this first round of investment came large growth in the field, and the Argentine government continues to pursue this growth in its promotion of a "second generation" of projects.<sup>48</sup> However, as the industry has grown over the past two decades, the problematic side effects of mining have shown themselves. These include negative impacts on small communities proximate to mining operations,<sup>49</sup> the environmental dangers of the mining process,<sup>50</sup> the failure of the Argentine government in regulating these private investors,<sup>51</sup> and the contribution of mining to the retreat of glaciers located in South America's Andes Mountains.<sup>52</sup>

##### A. *The Case of Pascua-Lama and Veladero*

Pascua-Lama is a major gold mining site owned by Barrick, which is the world's largest mining company and is based out of Canada.<sup>53</sup>

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<sup>45</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33 (Can.).

<sup>46</sup> See 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 6, 8.

<sup>47</sup> *Id.* at 6.

<sup>48</sup> *Id.*

<sup>49</sup> See generally Press Release, Ctr. for Human Rights and Env't, Community Affected by Barrick Gold Marches Against Veladero and Pascua Lama Mines (Mar. 4, 2010), available at [http://web.archive.org/web/20101202195826/http://www.cedha.org.ar/en/more\\_information/comunity-barrick.php](http://web.archive.org/web/20101202195826/http://www.cedha.org.ar/en/more_information/comunity-barrick.php) (describing the effects of Veladero and Pascua-Lama on the nearby community of Tudcum).

<sup>50</sup> See *infra* Part I.B.

<sup>51</sup> See *infra* Part I.B.

<sup>52</sup> See *infra* Part I.C.

<sup>53</sup> *Company: Profile*, *supra* note 19.

The site sits in the Andes Mountains on the border between Chile and Argentina.<sup>54</sup> It has become infamous for a number of reasons: there is a controversial multinational treaty called the Mining Integration and Complementation Treaty to enable the site,<sup>55</sup> there has been litigation in courts over whether Barrick has proper title to the land,<sup>56</sup> and the site is located on top of or nearby a number of ice formations, which some consider glaciers while others consider them “glaciarettes,” an entity possibly not protected by law.<sup>57</sup>

Barrick has been studying and preparing the site for nearly two decades.<sup>58</sup> It has almost US \$3,000,000,000 as a pre-production capital estimate, expects a twenty-five-plus-year life for the site, hopes to create about 5500 jobs, and has “17.8 million ounces of proven and probable gold reserves; 718 million ounces of silver contained within gold reserves; [and] 4.7 million ounces of measured and indicated gold resources.”<sup>59</sup> Barrick expects to end its preparatory phase and begin its actual operational mining phase in 2013.<sup>60</sup> Barrick is the world’s leading mining company in gold extraction and is based out of Toronto, Canada.<sup>61</sup> It has twenty-six currently operating mines and a number of projects in development across five continents, with “140 million ounces of proven and probable gold reserves. In addition [the company has] 12.7 billion pounds of copper reserves and 1.07 billion ounces of silver contained within gold reserves as of December 31, 2011.”<sup>62</sup> Barrick has been expanding as a power in mining in recent years, subsuming many smaller mining firms that owned operations in Latin America.<sup>63</sup>

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<sup>54</sup> BARRICK GOLD CORP., BUILDING PASCUA-LAMA FACTSHEET (2009), available at [http://www.barrick.com/Theme/Barrick/files/docs\\_project/PascuaLamaFactsheet-May2009.pdf](http://www.barrick.com/Theme/Barrick/files/docs_project/PascuaLamaFactsheet-May2009.pdf).

<sup>55</sup> Gustavo González, *Pascua Lama Gold Mine, A Threat to Sustainability*, INTER PRESS SERV. (June 5, 2006), <http://ipsnews.net/news.asp?idnews=33501>.

<sup>56</sup> *9/12 Suprema Falla en Juicio Que Complica a Pascua Lama [9/12 The Supreme Court Decides in Case that is Complicating Pascua Lama]*, CAPITAL (Dec. 9, 2008), [http://www.capital.cl/index.php?option=com\\_content&task=view&id=3090&Itemid=56](http://www.capital.cl/index.php?option=com_content&task=view&id=3090&Itemid=56).

<sup>57</sup> See BUILDING PASCUA-LAMA FACTSHEET, *supra* note 54; BARRICK GOLD CORP., PASCUA-LAMA 2010 RESPONSIBILITY REPORT 1 (2010), available at <http://www.barrick.com/Theme/Barrick/files/responsibility-reports/2010/pascua-lama.pdf>.

<sup>58</sup> See BUILDING PASCUA-LAMA FACTSHEET, *supra* note 54.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Company: Profile*, *supra* note 19.

<sup>62</sup> *Id.*

<sup>63</sup> See *History*, BARRICK GOLD CORP., <http://www.barrick.com/Company/History/default.aspx> (last visited Apr. 6, 2012) (detailing Barrick’s mergers and mine acquisitions over the years).

The tract of land on which Pascua-Lama is located originally was closed to mining under Chilean and Argentine law because it was within border zones between the two countries.<sup>64</sup> The matter of the boundary between Chile and Argentina has created tension between the two nations and disputes over various parts of the Southern Patagonian Ice Fields continue to this day and has led to various agreements.<sup>65</sup> The presidents of Chile and Argentina signed the Mining Integration and Complementation Treaty<sup>66</sup> in 1997, which their legislatures approved in 2000, that allowed Barrick to advance with its prospecting.<sup>67</sup> The Treaty has faced criticism from non-governmental organizations in Latin America and has survived challenges to its constitutionality.<sup>68</sup> The Regional Environment Commission ("COREMA") resolved the issue for Chile when it decided to allow the project but forbid Barrick from "relocating" three glaciers that are a part of the site.<sup>69</sup>

Disputes over ownership of the land for Pascua-Lama have dragged on in court for years. A man named Rodolfo Villar acquired a 3100-hectare parcel of land in Chile in 1996 that was proximate to Barrick's Pascua-Lama site.<sup>70</sup> Villar thought that he could get a sizeable sum for the land when Barrick came looking to purchase it in 1997 since the only road to the mine ran through it.<sup>71</sup> On the same day Barrick approached Villar, it purchased a much smaller plot for \$650,000; however, Villar received only \$20 for his parcel, in part because of an untrustworthy lawyer.<sup>72</sup> Villar sued Barrick in 2001, and in 2006 the 14th Civil Court of Santiago nullified the contract of sale and ordered the land returned to Villar.<sup>73</sup> Barrick appealed this decision arguing that the deciding judge was not qualified to decide, but the Supreme Court upheld her competency.<sup>74</sup>

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<sup>64</sup> *The Real Blunder of Pascua Lama*, MININGWATCH (July 6, 2006), <http://www.miningwatch.ca/real-blunder-pascua-lama>.

<sup>65</sup> See, e.g., Mining Integration and Complementation Treaty Between Chile and Argentina, *supra* note 10 (providing an example of an agreement formed around the boundary controversy).

<sup>66</sup> *Id.*

<sup>67</sup> González, *Pascua Lama Gold Mine*, *supra* note 55.

<sup>68</sup> See Daniela Estrada, 'Yes' to Gold Mine, But Don't Touch the Glaciers, INTER PRESS SERV. (Feb, 15, 2006), <http://www.ipsnews.net/news.asp?idnews=32174>.

<sup>69</sup> *Id.*

<sup>70</sup> Rick Westhead, *Fighting a Gold Goliath*, TORONTO STAR, Mar. 10, 2007, <http://www.thestar.com/article/190390>.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

<sup>73</sup> Villar, Rodolfo c. Compañía Minera Nevada, *supra* note 9.

<sup>74</sup> *9/12 Suprema Falla en Juicio que Complica a Pascua Lama [9/12 The Supreme Court Decides in Case that Is Complicating Pascua Lama]*, *supra* note 56.

The website of the Chilean judiciary shows activity in the case as recent as July 6, 2011.<sup>75</sup>

The three glaciers mentioned in COREMA's decision have caused a large amount of trouble for Barrick. They are named Toro 1, Toro 2, and Esperanza, and the total amount of ice that Pascua-Lama endangers is approximately twenty hectares, or 300,000 to 800,000 cubic meters.<sup>76</sup> These glaciers compose one of the main environmental conflicts facing Barrick in moving forward with mining at Pascua-Lama. Most authorities have allowed Pascua-Lama to proceed with the stipulation that Barrick tread lightly with respect to the glaciers.<sup>77</sup> The company's initial Evaluación de Impacto Ambiental ("EIA," Environmental Impact Evaluation) prepared for Chile neglected to mention the glaciers,<sup>78</sup> and later versions proposed to "relocate" the three glaciers that were situated within the site.<sup>79</sup> They even went so far as to hand out Spanish language pamphlets to the local community, explaining in a series of cartoons how they were going to do so: they would use hydraulic excavators to break up the glaciers and load the ice blocks into trucks, which they would then transport to a deposit site at a nearby glacier outside of Pascua-Lama, where they would pile the ice and then fence it in to help the ice blocks re-form with the large mass of the original glacier.<sup>80</sup> The scientific community rejects this technique of "relocating" glaciers, as it removes an essential part of ecosystems,<sup>81</sup> and the Chilean government eventually denied this part of their proposal.<sup>82</sup>

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<sup>75</sup> *Consulta Causas: C-1912-2001* [Case Inquiry: C-1912-2001], PODER JUDICIAL [THE JUDICIARY], [http://civil.poderjudicial.cl/CIVILPORWEB/?opc\\_menu=7](http://civil.poderjudicial.cl/CIVILPORWEB/?opc_menu=7) (search by Rol and enter a Rol Interno of "C-1912-2001" and select from the drop-down menu a Tribunal de Origen of "14° Juzgado Civil de Santiago," then hit "Consulta"—the one result is the case) (last visited Apr. 6, 2012).

<sup>76</sup> Gustavo González, *Gold Mining Project Threatens Andean Glaciers*, INTER PRESS SERV. (June 25, 2005), <http://www.ipsnews.net/news.asp?idnews=29223>.

<sup>77</sup> See Estrada, *'Yes' to Gold Mine*, *supra* note 68.

<sup>78</sup> See González, *Pascua Lama Gold Mine*, *supra* note 55; Ricardo Acuña, *Barrick's Gold: Canadian Mine Threatens a Chilean Watershed*, CANADIAN DIMENSION, Oct. 29, 2006, <http://canadiandimension.com/articles/1816>.

<sup>79</sup> Daniela Estrada, *Conflict Over Andean Glaciers Heats Up*, INTER PRESS SERV. (Nov. 11, 2005), <http://www.ipsnews.net/africa/nota.asp?idnews=30994>; see Glenn Walker, *Barrick Gold Strikes Opposition in South America*, CORPWATCH (June 20, 2005), <http://www.corpwatch.org/article.php?id=12447>.

<sup>80</sup> See INFORMATIVO PROYECTO PASCUA-LAMA, *supra* note 8.

<sup>81</sup> See Walker, *supra* note 79 (noting "[a] glacier isn't just a chunk of ice you can pick up and move").

<sup>82</sup> Estrada, *'Yes' to Gold Mine*, *supra* note 68.

Once Argentina and Chile imposed more conditions on Barrick that disallowed them from relocating the glaciers, Barrick changed their platform: reclassifying the glaciers as “glaciarettes” or “ice reservoirs” and making it easier for them to sidestep regulations on glaciers.<sup>83</sup> The term “glaciarette” seems to refer to smaller ice bodies that are less active.<sup>84</sup> In addition, the use of this term literally belittles the importance of the three ice bodies. It also provokes a number of questions concerning why these glaciers are so small and what is being done to protect them and support their maintenance and growth.

Barrick now promises not to disturb the glaciers intentionally, but there is evidence suggesting that there has already been a fifty-six to seventy percent depletion of the three “glaciarettes” so far during the production stage.<sup>85</sup> This may result from the unsettling of dust and rock at the site, which can land on top of the glaciers and darken them, speeding up the melting process.<sup>86</sup> In addition, there continue to be concerns about the chemicals used in the gold leaching process and possible contamination of the nearby environment.<sup>87</sup> The Organisation for Economic Co-operation and Development (“OECD”) has also expressed

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<sup>83</sup> Compare INFORMATIVO PROYECTO PASCUA-LAMA, *supra* note 8 (using the term “glaciarettes [glaciarettes]”), with BEYOND BORDERS: A SPECIAL REPORT ON PASCUA LAMA, *supra* note 10, at 20 (using the terms “glaciarettes [glaciarettes]” or “ice fields/reservoirs [masas/reservorios de hielo]”).

<sup>84</sup> See BEYOND BORDERS: A SPECIAL REPORT ON PASCUA LAMA, *supra* note 10, at 20 (explaining that “[g]laciologists classify smaller bodies of ice as ‘glaciarettes’ or ice reservoirs rather than traditional glaciers, which are much larger and demonstrate movement. These smaller ice bodies are formed as the result of wind-blown snow accumulated behind shallow hills”). It is worth noting that as of March 19, 2012, there are two displayed hits for the search term “glaciarette” on the search engine Google. The term “glaciarette” garners more hits (although many not on point), but “glaciarette” and “Barrick” together yield only one result. GOOGLE, <http://www.google.com/> (search the terms “glaciarette,” then “glaciarette,” and finally, “glaciarette and Barrick,” and compare the displayed results) (last visited Apr. 6, 2012).

<sup>85</sup> DIRECCIÓN GENERAL DE AGUAS DEL MINISTERIO DE OBRAS PÚBLICAS [GENERAL WATER DIRECTORATE OF THE MINISTRY OF PUBLIC WORKS], INFORME DE COMISIÓN DE SERVICIO A LA III REGIÓN: VISITA A PASCUA LAMA 12 DE ENERO DE 2005 [REPORT OF THE SERVICE COMMISSION OF THE THIRD REGION: VISIT TO PASCUA LAMA JANUARY 12, 2005] (Chile) (on file with author).

<sup>86</sup> See BARRICK GOLD CORP., BARRICK PASCUA-LAMA SHAREHOLDER REPORT, 21 (2006), available at [http://www.barrick.com/Theme/Barrick/files/docs\\_ahss/ERM%20Report%20on%20Barrick%20Pascua-Lama.pdf](http://www.barrick.com/Theme/Barrick/files/docs_ahss/ERM%20Report%20on%20Barrick%20Pascua-Lama.pdf) (noting that mining indirectly impacts ice features because the dust unsettled by mining activities increases melting rates).

<sup>87</sup> See *Issue Areas*, *supra* note 35, at subsec. “Environment.”

concern with the minimal ability of Chile to set economic and environmental standards.<sup>88</sup>

Tudcum is a village in San Juan, Argentina, proximate to the Pascua-Lama and Veladero mining sites.<sup>89</sup> The community members are seeing a number of negative effects from the preparatory stages now taking place.<sup>90</sup> The decrease in water supply is what they find most damaging, and they are also finding sludge on the riverbanks, a sign of contamination.<sup>91</sup> They have less water both for home consumption and for use in agriculture.<sup>92</sup> The community residents have seen falling crop yields, as much as an eighty-five percent decrease, in produce including apples, peaches, apricots, and plums.<sup>93</sup> Deaths caused by leukemia are beginning to appear in Tudcum, the first occurring two years after Barrick began operating at its Veladero site.<sup>94</sup> The community is also seeing its first struggles with prostitution and drugs, markets newly created in Tudcum by the arrival of workers brought into employ at the Barrick sites.<sup>95</sup>

#### B. *The Operation of Mining Projects Generally*

The open-pit technique is utilized in South America as it allows for reaching the deposits of gold, copper, and other minerals<sup>96</sup> generally found closer to the surface or in lower concentrations.<sup>97</sup> In this technique, miners blast terraces deeper and deeper into the ground until they hit the largest tracts of the deposits.<sup>98</sup> A number of toxic chemicals are then used to separate the ores from dirt and waste material,<sup>99</sup> most notably

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<sup>88</sup> Cecilia Vargas, *Chile: El Gobierno Se Asoma al club de los Ricos* [*Chile: The Government Joins the Club of the Rich*], Inter Press Serv., <http://ipsnoticias.net/nota.asp?idnews=87407> (last visited Apr. 6, 2012).

<sup>89</sup> Press Release, Community Affected by Barrick Gold, *supra* note 49.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Press Release, Community Affected by Barrick Gold, *supra* note 49.

<sup>96</sup> See Robertson, *supra* note 36; EARTHWORKS & OXFAM AM., *DIRTY METALS: MINING, COMMUNITIES AND THE ENVIRONMENT* 4 (2004), available at <http://www.nodirtygold.org/pubs/DirtyMetals.pdf>.

<sup>97</sup> See 19 ENCYCLOPEDIA AMERICANA 169 (1999); EARTHWORKS & OXFAM AM., *supra* note 96.

<sup>98</sup> 19 ENCYCLOPEDIA AMERICANA 169.

<sup>99</sup> See *id.*

cyanide as an agent to extract gold.<sup>100</sup> The waste byproducts of the separation process then compose tailings or slurry,<sup>101</sup> which contain the excess chemicals along with dirt and rock.<sup>102</sup> This slurry is most often left to sit in the mine or in a tailings dam, where these toxic substances then seep into the ground and poison the terrain and water in the ecosystem.<sup>103</sup>

Mining projects operate in a number of stages,<sup>104</sup> all of which are damaging to the environment.<sup>105</sup> In the development stages, mining companies scout out the area to figure out where the deposits are, breaking deeper and deeper into the earth to find the richest veins of minerals.<sup>106</sup> As the scouting stage progresses, more heavy-duty machinery is brought in to reach deeper levels of the soil, and this necessitates the creation of even more unnatural infrastructure, such as roads.<sup>107</sup> Moving around dirt, dust, and earth unsettles particles that land on glaciers.<sup>108</sup> Gradually the glaciers darken, retaining more heat, and melt faster.<sup>109</sup> Open-pit mining is used to mine minerals in South America,<sup>110</sup> and this method involves blasting shelves and pits into the ground to reach deposits.<sup>111</sup> In the process, large amounts of water and cyanide are used to extract the minerals, and this affects the local area's water supply and endangers contamination of their soil.<sup>112</sup>

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<sup>100</sup> See Robertson, *supra* note 36.

<sup>101</sup> Tailings are remnants of "ground rock and process effluents that are generated in a mine processing plant." See *What Are Tailings?*, TAILINGS.INFO, <http://www.tailings.info/tailings.htm> (last visited Apr. 6, 2012). Slurry is the milled ore. See *Use of Cyanide in the Gold Industry*, INT'L CYANIDE MGMT. CODE FOR THE GOLD MINING INDUS., [http://www.cyanidecode.org/cyanide\\_use.php](http://www.cyanidecode.org/cyanide_use.php) (last visited Apr. 6, 2012).

<sup>102</sup> See Robertson, *supra* note 36.

<sup>103</sup> See *id.*

<sup>104</sup> See *How Gold Is Produced*, BARRICK GOLD CORP., <http://www.barrick.com/Investors/AboutGold/HowGoldIsProduced/default.aspx> (last visited Apr. 6, 2012).

<sup>105</sup> ENVIRONMENTAL GUIDELINES FOR MINING OPERATIONS, UNITED NATIONS DEP'T OF ECON. AND SOC. AFFAIRS & UNITED NATIONS ENV'T PROGRAMME INDUS. AND ENV'T 1 (1998), available at [http://commdev.org/files/814\\_file\\_UNEP\\_UNDESA\\_EnvGuidelines.pdf](http://commdev.org/files/814_file_UNEP_UNDESA_EnvGuidelines.pdf).

<sup>106</sup> See *How Gold Is Produced*, *supra* note 104.

<sup>107</sup> See *id.*

<sup>108</sup> See BARRICK PASCUA-LAMA SHAREHOLDER REPORT, *supra* note 86, at 21 (noting that mining indirectly impacts ice features because the dust unsettled by mining activities increases melting rates).

<sup>109</sup> See *id.*

<sup>110</sup> See Robertson, *supra* note 36.

<sup>111</sup> See *How Gold Is Produced*, *supra* note 104.

<sup>112</sup> *Issue Areas*, *supra* note 35, at subsec. "Environment."

The Undersecretariat of Mining for Argentina keeps available on its website information for all the mining sites in Argentina.<sup>113</sup> This information can be found in varying stages of detail and accuracy, as the mining companies themselves provide it. Often times the information is outdated, as sites are not listed, the listed ownership of the mine is not current, or other details from the Undersecretariat of Mining's reports are inaccurate.<sup>114</sup> A number of different substances are extracted from Argentine soil, including gold, silver, copper, iron, lithium, lime, manganese, molybdenum, borates, tin, lead, zinc, and uranium.<sup>115</sup> The website currently names more than forty different mining sites within Argentina, spread through ten of the nation's twenty-three provinces.<sup>116</sup> In Argentina's Mining in Numbers Report, its projection for 2029 shows a substantial growth in the mining industry.<sup>117</sup>

Foreign companies, largely based out of Canada, the United States, Australia, and Europe, operate the majority of mining projects in Argentina.<sup>118</sup> These companies and their operations are larger than those of their Latin American counterparts and tend to have more resources to maximize the value of their mining projects.<sup>119</sup> For this reason Latin

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<sup>113</sup> SECRETARÍA DE MINERÍA DE LA NACIÓN [NAT'L UNDERSECRETARIAT OF MINING], <http://www.mineria.gov.ar/> (last visited Apr. 6, 2012).

<sup>114</sup> A simple comparison between a mining company's website and data on the Undersecretariat of Mining's site will reveal inconsistencies. *Compare, e.g., Martha (Argentina) Exploration*, COEUR, <http://www.coeur.com/exploration/martha-argentina.html> (last visited Apr. 6, 2012), *with Veta Martha*, SECRETARÍA DE MINERÍA DE LA NACIÓN [NAT'L UNDERSECRETARIAT OF MINING], <http://www.mineria.gov.ar/proyecto/Santa-Cruz/vetamartha.htm> (last visited Apr. 6, 2012).

<sup>115</sup> *See generally Minería—Proyectos y Prospectos en la República Argentina [Mining—Projects and Prospects in the Argentine Republic]*, SECRETARÍA DE MINERÍA DE LA NACIÓN [NAT'L UNDERSECRETARIAT OF MINING], <http://www.mineria.gov.ar/proyectos.htm> (last visited Apr. 6, 2012) (featuring an interactive map of provinces and their projects).

<sup>116</sup> *Id.*

<sup>117</sup> SECRETARÍA DE MINERÍA DE LA NACIÓN [NAT'L UNDERSECRETARIAT OF MINING], *MINERÍA EN NUMEROS 2009 [MINING IN NUMBERS 2009]*, available at <http://www.mineria.gov.ar/pdf/mineriaennumeros.pdf> (last visited Apr. 6, 2012).

<sup>118</sup> *See* 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 33 (describing the growth of foreign investment in Argentine mining); *Mining Companies in Argentina*, ARGENTINA MINING (May 5, 2010), <http://www.argentinamining.com/en/empresas-mineras-en-argentina/> (displaying a comprehensive list of companies with mining interests in Argentina).

<sup>119</sup> *See* 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 33 (noting the significant increase in production value and exportation); FACT PACK: SWEDISH TRADE COUNCIL IN ARGENTINA, *THE MINING AND MINING EQUIPMENT INDUSTRY: ARGENTINA 19* (2006), available at <http://www.swedishtrade.se/Pagefiles/134534/Argentina%20Mining>



American national governments court foreign companies over domestic companies: there is more promise for a larger amount of investment and the development of a larger project, which will mean a larger operation, the creation of more jobs, and the use of more national resources in production.

Lastly, these mining sites and the natural deposits they center around are mostly in the Andes Mountains on the western side of Argentina.<sup>120</sup> Incidentally, the communities in the mountain towns where mining projects are located tend to be less urban and have smaller populations.<sup>121</sup> This has a number of effects. The affected communities are very distant from the ocean-side capital of Buenos Aires,<sup>122</sup> and have lesser access to national political recourse. The lower amount of commerce and interaction with other parts of Argentina make local communities more dependent on the land and environment for their sustenance.<sup>123</sup> Additionally, these communities tend to be more simplistic and lack big-city problems such as drugs and prostitution, which enter the communities as a result of the influx of miners and workers.<sup>124</sup> Mining severely disrupts the small and close ethos of communities in the Andes Mountains near mining projects.

### C. *Glaciers in South America*

Glaciers are an important part of the world's ecosystem. They store about seventy percent of the earth's freshwater supply,<sup>125</sup> and can be found on every continent.<sup>126</sup> They tend to be located in the mountainous colder regions,<sup>127</sup> and grow and shrink in line with precipitation

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%20Swedish %20Trade %20Council.pdf (describing the amount of money foreign mining companies in Argentina are investing).

<sup>120</sup> See *Minería—Proyectos y Prospectos en la República Argentina*, *supra* note 115.

<sup>121</sup> See González, *Pascua Lama Gold Mine*, *supra* note 55.

<sup>122</sup> See *Argentina*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> (last updated Apr. 6, 2012) (click on "Click Map to Enlarge" to see where the Chile-Argentina mining region is in reference to Buenos Aires).

<sup>123</sup> See Mahmood Hasan Khan, *Rural Poverty in Developing Countries*, FIN. & DEV., Dec. 2000, available at <http://www.imf.org/external/pubs/ft/fandd/2000/12/khan.htm> (describing how "[t]he rural poor depend largely on agriculture, fishing and forestry, and related small-scale industries and services").

<sup>124</sup> See Press Release, Community Affected by Barrick Gold, *supra* note 49.

<sup>125</sup> *The Water Cycle: Water Storage in Ice and Snow*, U.S. GEOLOGICAL SURVEY, <http://ga.water.usgs.gov/edu/watercycleice.html> (last modified Mar. 9, 2012).

<sup>126</sup> *All About Glaciers: The Life of a Glacier*, NAT'L SNOW & ICE DATA CTR., <http://nsidc.org/cryosphere/glaciers/life-glacier.html> (last visited Apr. 6, 2012).

<sup>127</sup> See *id.*; Hugo Ahlenius, *Glaciers Monitored Through the World Glacier Monitoring Service*, UNITED NATIONS ENV'T PROGRAMME GRID-ARENDA, <http://maps.grida.no/go>

and temperature levels.<sup>128</sup> They have gone through several cycles of more and less prolific times over thousands of years.<sup>129</sup> Today they are again receding,<sup>130</sup> in part due to increased harmful human activities in recent decades.<sup>131</sup>

Most of the glaciers in South America are located in the Andes and other mountain ranges toward the center of the continent,<sup>132</sup> the same area of prevalence as that of mining projects.<sup>133</sup> The particular situation in the section of the Andes that Chile and Argentina share is especially alarming because glaciers contribute importantly to the area's water supply.<sup>134</sup> Large swaths of Argentina are very arid, and supplied with water only through intricate irrigation systems of channels and canals that bring runoff water from mountains and rivers into the areas where it is most needed.<sup>135</sup>

Not much is known about glaciers in Argentina. The national glacier inventory project is in its beginning stages, and as of right now the exact "number, area, and volume" of Argentina's glaciers is not known.<sup>136</sup> Therefore there is also little information about the changes in Argentine glaciers over time and little hard and fast data about the way that mining projects have definitively affected glaciers.

/graphic/glaciers-monitored-through-the-world-glacier-monitoring-service (last visited Apr. 6, 2012).

<sup>128</sup> See *All About Glaciers: The Life of a Glacier*, *supra* note 126.

<sup>129</sup> See *All About Glaciers: Facts About Glaciers*, NAT'L SNOW & ICE DATA CTR., <http://nsidc.org/cryosphere/glaciers/quickfacts.html> (last visited Apr. 6, 2012) (noting trends in the Ice Age, the Little Ice Age, and other eras).

<sup>130</sup> *All About Glaciers: The Life of a Glacier*, *supra* note 126.

<sup>131</sup> *All About Glaciers: Glaciers and Climate Change*, NAT'L SNOW & ICE DATA CTR., [nsidc.org/cryosphere/glaciers/questions/climate.html](http://nsidc.org/cryosphere/glaciers/questions/climate.html) (last visited Apr. 6, 2012).

<sup>132</sup> Compare Ahlenius, *supra* note 127, with *Patagonia*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/media/3442/The-Southern-and-Central-Andes-and-Patagonia> (last visited Apr. 6, 2012) (showing that the glaciers in the first map align with the mountain range seen in the second).

<sup>133</sup> See *Minería—Proyectos y Prospectos en la República Argentina*, *supra* note 115.

<sup>134</sup> Miguel Bonasso, *Agua para las Mineras o para los Argentinos* [*Water for the Mining Companies or for the Argentines*], CLARÍN (July 14, 2010), [http://www.clarin.com/politica/congreso/Agua-mineras-argentinos\\_0\\_298170210.html](http://www.clarin.com/politica/congreso/Agua-mineras-argentinos_0_298170210.html).

<sup>135</sup> See generally *Argentina*, AQUASTAT, <http://www.fao.org/nr/water/aquastat/countries/argentina/indexesp.stm> (last visited Apr. 6, 2012) (describing the climates of Argentina, including its arid areas, and irrigation and water control efforts).

<sup>136</sup> See *Inventario*, GLACIARES DE ARGENTINA, <http://www.glaciares.org.ar/paginas/index/inventario> (last visited Apr. 6, 2012).

For these reasons it is clear to see why the destruction of glaciers by mining in Argentina is so alarming. It is difficult to tell if a proposed mining project threatens glaciers if there is no database of glaciers in Argentina against which to review a proposal in the first place. Additionally, if mining companies are destroying glaciers to get to metal deposits, they are reducing stores of water in the region, and they endanger the existing water system with the toxic chemicals they use in the extraction process and the large quantities of water that are needed simply to keep the processes functioning.

## II. ARGENTINE LEGISLATION AND RESTRICTIONS ON OPEN-PIT MINING

Argentina is an increasingly important global player in the mining industry. Over the past decade or two, the Argentine national government has instigated a number of programs and regulations to invite foreign investment and development in mining operations in Argentina.<sup>137</sup> While the companies that establish and operate large-scale open-pit mining operations in Argentina come from first-world countries including Australia, the United States, the United Kingdom, and Canada, the victims of the environmental degradation caused by their conduct live in and are citizens of Argentina. Thus, in constructing enforcement mechanisms, it is most important that we consider which fora will be most accessible for these victims.

Argentina regulates mining both at the national and at the provincial level. The Código de Minería ("Mining Code") is a longstanding statute that has been revised over the years and contains many of the national incentives for mining investment.<sup>138</sup> In addition, the National Congress recently passed the Glacier Law, protecting glaciers and banning mining activity proximate to their locations.<sup>139</sup> Lastly, provincial laws, for example those in the southern province of Chubut and in the western province of Mendoza, ban the use of open-pit mining and ban the use of toxic chemical substances, respectively.<sup>140</sup> They have not, however, been met without resistance.

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<sup>137</sup> See *infra* Part II.A.

<sup>138</sup> See *infra* Part II.A.

<sup>139</sup> See *infra* Part II.B.

<sup>140</sup> See *infra* Part II.C.

A. *The Mining Code*

The Mining Code is the preeminent document that governs mining operations within Argentina.<sup>141</sup> It was first enacted in 1887 and has seen minor changes over the past decades, but in large part is very unrestrictive and favors the investment of foreign countries in Argentina, limiting the ability of the government to directly act against corporations.<sup>142</sup>

A few sections of the Mining Code contain laws that incentivize investment in Argentine Mining. For example, Article 214 exempts mining companies from all taxes or contributions imposed on mining property rights, products, and all tools used in extraction.<sup>143</sup> The Mining Investment Law also contains a number of fiscal benefits, including double deductions of exploration expenses and value-added tax reimbursements.<sup>144</sup> Even today the Undersecretariat of Mining has proposed changes to the Mining Code that, instead of protecting Argentina's interests, favor foreign mining companies and seek increased investment into the industry.<sup>145</sup>

The Mining Code also facilitates mining exploration in other ways. It establishes two broad categories of minerals. The first type is not property of the owner of the land; rather, the minerals are owned in origination by the provincial governments in which they are located, and these governments have the ability to grant concession licenses to private investors.<sup>146</sup> This category includes the major substances mined in Argentina: gold, silver, copper, lithium, lead, borate, and more.<sup>147</sup> The second type can be extracted only by the landowner, and includes construction or industrial minerals and materials.<sup>148</sup> There is also a marked lack of regulation in areas that other nations would restrict. For example, the Mining Code does not regulate the type of minerals extracted, so

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<sup>141</sup> CÓDIGO DE MINERÍA [MINING CODE] (LEXIS) (Arg.); 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 18–19.

<sup>142</sup> 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 18.

<sup>143</sup> *Id.* at 13.

<sup>144</sup> *Id.* at 8.

<sup>145</sup> *See id.*

<sup>146</sup> CÓDIGO DE MINERÍA [MINING CODE] at art. 2; *see* 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 19.

<sup>147</sup> CÓDIGO DE MINERÍA [MINING CODE] at art. 3; *see* 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 19.

<sup>148</sup> CÓDIGO DE MINERÍA [MINING CODE] at art. 2, 5; *see* 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 19.

foreign private companies may mine strategic and nuclear materials such as uranium.<sup>149</sup> Also, there is minimal protection of lands that may have mineral deposits where other nations would create barriers to protect aboriginal lands or national parks.<sup>150</sup>

The Mining Code is a largely uncontroversial document as it has such lengthy legal precedence and does not violate the interests of foreign mining companies. Those newer statutes that ban particular types of mining or are an impediment to investment are fraught with much more media and legal debate.

### B. *The Glacier Law*

After the National Congress's previous failed attempt to pass a national law protecting glaciers, it recently succeeded in voting the legislation into effect on September 30, 2010.<sup>151</sup> The Glacier Law contains a number of rules angled at protecting Argentina's glaciers,<sup>152</sup> including provisions creating a National Glacier Inventory,<sup>153</sup> banning the use of toxic substances and mining proximate to glaciers,<sup>154</sup> and reiterating the need for environmental impact assessments and environmental strategic evaluations.<sup>155</sup> Most important to this analysis are the articles that grant implementing authority, define those functions, and enumerate sanctions and jurisdiction.<sup>156</sup>

The implementing authority of the Glacier Law is granted to "the institution with the highest national environmental jurisdiction."<sup>157</sup> It is

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<sup>149</sup> 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 19.

<sup>150</sup> *Id.*

<sup>151</sup> *Argentine Lawmakers Pass Glacier Law to Curb Mining*, REUTERS (Sept. 30, 2010, 7:37 AM), <http://www.reuters.com/article/2010/09/30/us-argentina-mining-glaciers-idUSTRE68T2IG20100930>.

<sup>152</sup> Law No. 26639 (Régimen de Presupuestos Mínimos para la Preservación de los Glaciares y del Ambiente Periglacial [Regimen of Minimum Standards for the Preservation of Glaciers and the Periglacial Environment]), Oct. 28, 2010, [B.O.] (Arg.), available in Spanish at <http://infoleg.gov.ar/infolegInternet/anexos/170000-174999/174117/norma.htm> [hereinafter Glacier Law]. For an unofficial English translation of the Glacier Law, see *Argentine National Glacier Act*, CTR. FOR HUMAN RIGHTS & ENV'T (Sept. 30, 2010), <http://wp.cedha.net/wp-content/uploads/2011/09/Argentine-National-Glacier-Act-Traducción-de-CEDHA-no-oficial.pdf>.

<sup>153</sup> *See id.* arts. 3–5.

<sup>154</sup> *See id.* art. 6.

<sup>155</sup> *Id.* art. 7.

<sup>156</sup> *Id.* arts. 9–11.

<sup>157</sup> *Id.* art. 9 (quoting English translation, Argentine National Glacier Act, *supra* note 152).

unclear from the Glacier Law who exactly this authority will be, but Article 10 details their tasks in creating policies and programs that implement the goals and tasks of the legislation in collusion with the Federal Environmental Council and the National Argentine Glaciological and Science Institute.<sup>158</sup> Though these implementing provisions do not relate directly to the legal enforcement of the law, they prove an important interest and a constructed mechanism for the true enforcement of the Glacier Law.

The Glacier Law gives jurisdiction to the location where the infraction took place, presumably meaning the province in which the mining site is located.<sup>159</sup> This is consistent with the deference that current Argentine mining laws give to provincial authorities in owning the rights over their mineral deposits.<sup>160</sup> It allows them to enforce their own sanctions if they are stronger than the national ones that this Glacier Law sets.<sup>161</sup> Those include a warning, a fine in the amount of anywhere from 100 to 10,000 times the minimum income of the entry-level salary of a national public administrator, a suspension or revocation of mining authorizations, or a definitive cessation of mining activities.<sup>162</sup> That these powers are in the hands of provincial authorities and that the outlined national sanctions are achievable since corporate assets are located in those areas and the governments control mining permits make the Glacier Law more likely to be enforced. However, the Glacier Law continues to face great opposition from mining companies and their supporters: some provinces have found ways to legislate around Glacier Law mandates,<sup>163</sup> and others have declared the Glacier Law unconstitutional in part and do not enforce those Articles—in particular San Juan, a province whose economy is highly dependent on mining activity.<sup>164</sup>

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<sup>158</sup> Glacier Law, art. 10.

<sup>159</sup> *Id.* art. 11.

<sup>160</sup> See 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 19.

<sup>161</sup> Glacier Law, art. 11.

<sup>162</sup> *Id.*

<sup>163</sup> *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

<sup>164</sup> *Suspenden la Aplicación de la Ley de Glaciares en San Juan* [Court Suspends the Application of the Glacier Law in San Juan], *supra* note 25; see *Minería—Proyectos y Prospectos en la República Argentina*, *supra* note 115 (showing many projects in San Juan in the interactive map); *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

C. *Provincial Bans on Mining Methods*

Some provinces also have their own laws that limit the permissible mining activities within their boundaries.<sup>165</sup> Several have enacted such legislation in the past decade: some are still in place and others have been overturned on constitutional grounds.<sup>166</sup> In particular, laws from the provinces of Chubut and Mendoza exemplify two ways that regional governments are writing laws that attack mining operations.

The province of Chubut in Argentina's southern region of Patagonia passed Law XVII-68 in 2003.<sup>167</sup> This law prohibits open-pit mining and the use of cyanide within the province.<sup>168</sup> It also allowed the Provincial Council of the Environment to divide parts of the province into zones for mining development and zones exempted from the restrictions.<sup>169</sup> This law actually successfully halted some mining projects in the exploration phases and remains in place today.<sup>170</sup>

The province of Mendoza, in the central western region, passed a law in 2007 that banned the use of toxic chemical substances such as cyanide in any mining operation.<sup>171</sup> The law particularly mentions the importance of water and hydrological resources in restraining mining activities.<sup>172</sup> It bans the use of cyanide, mercury, sulfuric acid, and other similar substances in all stages of mining, including prospecting, exploration, exploitation, and industrialization of minerals.<sup>173</sup> The law also specifically involves as important authorities the Ministry of Environment and Public Works, charged with application, the Environmental Mining Police, charged with enforcement, and the General Direction of Irrigation, charged with managing the effects on water supply.<sup>174</sup> This law too has put several projects into suspension, and so far has withstood challenges to its constitutionality.<sup>175</sup>

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<sup>165</sup> Law No. XVII-68, Cht., Apr. 9, 2003 (Arg.), [hereinafter Chubut Law No. XVII-68].

<sup>166</sup> *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

<sup>167</sup> *Id.*; see Chubut Law No. XVII-68.

<sup>168</sup> Chubut Law No. XVII-68.

<sup>169</sup> *Id.* art. 2.

<sup>170</sup> *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

<sup>171</sup> Law No. 7.722, Mza., June 20, 2007 (Arg.), available in Spanish at <http://www.tribunet.com.ar/tribunet/ley/7722.htm> [hereinafter Mendoza Law No. 7.722]; *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

<sup>172</sup> Mendoza Law No. 7.722, art. 1.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* arts. 4–5.

<sup>175</sup> *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

D. *An Analysis of Argentine Law*

The multiple existing national and provincial laws provide a number of ways in which mining activity is regulated and statutes under which victims of environmental degradation may seek justice. This evinces the growing importance of responsible mining operations and of making the courts accessible for Argentine citizens. Though controversy about these new laws runs high in Argentina, a fair number have withstood the incredible pressure of mining interests, and this at least makes the issue of social responsibility highly palpable in political discourse.

One of the largest problems with regulations on mining is that the sanctions aim to punish the violator and not to recompense the victims of the violations.<sup>176</sup> At the same time, should mining projects be successfully kept out of communities from the start, like some of these pieces of legislation aim to do, the negative effects on proximate neighborhoods will not be seen in the first place. If mining companies are simply more aware that they are subject to restrictions and oversight by the government, they may not be so reckless with their operations.

Each of the pieces of legislation has its own strength in creating an ethos that Argentina will not tolerate irresponsible mining. The reality of the global economy is that mining is a “necessary evil,” and Argentina most likely will not halt its operations any time soon; but if corporations can operate in a sustainable and socially responsible way, then they can work in harmony with Argentina. Additionally, the Mining Code, which largely encourages mining,<sup>177</sup> is important in that it gives power to the provinces over their own mineral deposits.<sup>178</sup> This is good for regulation because provincial authorities are more likely to be concerned and involved in particular sites than is the national government. The combination in the Glacier Law of particular rules and initiatives, specific implementation plans, and realistic enforcement schemes combine to make the Glacier Law a relatively powerful piece of legislation as recourse for environmental damage. However, it is highly controversial as it is a new piece of legislation, and a tumult of cases challenging its

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<sup>176</sup> See *supra* note 162 and accompanying text.

<sup>177</sup> See *supra* notes 138, 142, 143 and accompanying text.

<sup>178</sup> See, e.g., 10 REASONS TO INVEST IN ARGENTINE MINING, *supra* note 18, at 19 (discussing the power of provincial governments to grant exploitation concessions to private investors under the Mining Code).



constitutionality is already growing.<sup>179</sup> So far, it has largely survived such hits, but has been applied unevenly.<sup>180</sup> Provincial legislation is also a controversial matter, but it is on the rise in recent years.<sup>181</sup> It also often takes a different tact from the Glacier Law in that it bases its bans not around periglacial environments but rather the inarguable ill effects of toxic chemicals and open-pit mining on the environment.<sup>182</sup> Though some of these statutes have been overturned,<sup>183</sup> many are still in place and prove the importance of protecting people and the environment to the local communities and governments.

Though Argentine legislation restricting mining operations has faced much opposition, it has often survived attempts to defeat it by mining interests. On the whole, the rise of legislation and the re-emergence of the Glacier Law show that more and more Argentines are aware of the social and environmental issues implicated by mining activity. Argentina has proven itself to be a very interested party in this struggle.

### III. CANADIAN ENVIRONMENTAL LEGISLATION AND ENFORCEMENT

Canada is a leading country in the mining sector, with many international mining companies originating in Canada. These include Barrick, Goldcorp Inc., Kinross, Agnico-Eagle Mines Ltd., and Yamana Gold Inc., which all have a market capitalization size of over \$8 billion Canadian, with Barrick worth \$37.1 billion.<sup>184</sup> Canada is itself also a large exporter of minerals and metals.<sup>185</sup>

The Canadian Environmental Protection Act, passed in 1999, covers a wide range of environmental protection issues with the stated aim of helping create sustainable development.<sup>186</sup> Canadian companies

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<sup>179</sup> See *supra* notes 151, 163–64 and accompanying text.

<sup>180</sup> See Danielle Sugarman, *Argentina's Law of the Glaciers: A Tortured Path to Environmental Protection*, CLIMATE LAW BLOG (May 9, 2011), <http://blogs.law.columbia.edu/climatechange/2011/05/19/argentina%E2%80%99s-law-of-the-glaciers-a-tortured-path-to-environmental-protection/>.

<sup>181</sup> See *supra* Part II.C.

<sup>182</sup> See *supra* Part II.C.

<sup>183</sup> *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

<sup>184</sup> *Top 20 List of the Biggest Canadian Gold Stocks*, MONEYENERGY (Sept. 10, 2009), <http://www.getmoneyenergy.com/2009/09/list-largest-canadian-gold-stocks/>.

<sup>185</sup> *Canada—Mining*, ENCYCLOPEDIA OF THE NATIONS, <http://www.nationsencyclopedia.com/Americas/Canada-MINING.html> (last visited Apr. 6, 2012).

<sup>186</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.31/>.

operating in other nations are subject to these Canadian laws. In addition to regulatory laws, two proposed bills, C-300 and C-354, would lay the groundwork for trying companies like Barrick in Canada for their environmental and social abuses during operations in other countries.

A. *The Canadian Environmental Protection Act*

The Canadian Parliament enacted the Canadian Environmental Protection Act (“CEPA”) in 1999.<sup>187</sup> It is the major statutory guideline concerning environmental issues in Canada, and its stated aim is to protect the environment through sustainable development.<sup>188</sup> The bill defines “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>189</sup>

The CEPA provides for public voluntary reporting, which means any person with the knowledge or reasonable suspicion of the commission of an offense against the act may report their knowledge to an enforcement officer.<sup>190</sup> In addition, an of-age resident of Canada may apply to the Minister and request an investigation of an offense he or she believes has occurred.<sup>191</sup> This petition must be more detailed than the public voluntary report, with a formal description of the offense, the evidence, and the identities of individuals involved.<sup>192</sup> With this form of reporting, the Minister must acknowledge his receipt of the request and must update the applicant every ninety days on the progress of his investigation into the applicant’s claims;<sup>193</sup> should he choose to end it, he must explain to the applicant why he did so.<sup>194</sup>

If the applicant finds the Minister’s investigation unsatisfactory, he or she may bring an environmental protection action in any court with proper jurisdiction.<sup>195</sup> The applicant may file for relief by declaratory or interlocutory order, and also may file for court costs, but not for damages.<sup>196</sup>

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<sup>187</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33.

<sup>188</sup> *Id.* at Declaration.

<sup>189</sup> *Id.* § 3(1).

<sup>190</sup> *Id.* § 16(1).

<sup>191</sup> *Id.* § 17(1).

<sup>192</sup> *Id.* § 17(2)(c)–(d).

<sup>193</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33, §§ 18–19.

<sup>194</sup> *Id.* § 21.

<sup>195</sup> *Id.* § 22(1)–(2).

<sup>196</sup> *Id.* § 22(3).

The statute of limitations to bring such a case runs for two years from the time that the applicant becomes aware of or should have reasonably become aware of the conduct involved in the suit.<sup>197</sup> The burden of proof in such case is “on a balance of probabilities.”<sup>198</sup> The statute notes that one of the available defenses in such a case is “the defence that the alleged conduct is authorized by or under a law of a government that is the subject of an order made under subsection 10(3)[,]”<sup>199</sup> which may allow Canadian mining companies operating in Argentina to claim that their conduct is governed by Argentine environmental law.

The CEPA sets strict guidelines as to the use and transportation of toxic substances.<sup>200</sup> It also allows for cooperation on environmental matters with other governments that have jurisdiction, which is defined as membership with the OECD.<sup>201</sup> Chile is a member country; Argentina is not but does participate in a number of OECD Bodies.<sup>202</sup>

The CEPA is a longstanding piece of legislation that protects the environment generally. It contains a few provisions that imaginably provide a structure for a complainant about environmental damage by a Canadian corporation in a foreign country to bring their cause in Canada. At the same time, it does not really focus on mining as a particular environmental issue, or on cross-border violations.

### B. *An Introduction to C-300 and C-354*

Two private members' bills, C-300 and C-354, have become important in recent months with regard to forcing Canadian mining corporations to respond for their actions. One, C-300, was defeated in October 2010, but not without bringing much attention to the issues it proposed to solve.<sup>203</sup> Another, C-354, continues in debate in the Canadian Parliament.<sup>204</sup>

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<sup>197</sup> *Id.* § 23.

<sup>198</sup> *Id.* § 29.

<sup>199</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33, § 30(1)(c).

<sup>200</sup> *See generally id.* §§ 64–72.

<sup>201</sup> *Id.* § 75(1).

<sup>202</sup> ORGANISATION FOR ECON. CO-OPERATION AND DEV., LATIN AMERICA AND THE CARIBBEAN: FOR A STRONGER, CLEANER, FAIRER WORLD ECONOMY 41–42, available at <http://www.oecd.org/dataoecd/19/4/46864927.pdf> (last visited Apr. 6, 2012).

<sup>203</sup> *See Hill, supra* note 27.

<sup>204</sup> Jack Caldwell, *Bill C-354: New Threat to Canadian Mining Companies*, I THINK MINING (Dec. 9, 2010), <http://ithinkmining.com/2010/12/09/bill-c-354-an-new-threat-to-canadiaon-mining-companies/>.

Though both bills are private members' bills, which often do not get successfully signed into law,<sup>205</sup> they have shone a light onto the importance of making Canadian companies liable for their actions across the world and have furthered discussion on the inadequacy of corporate social responsibility programs.

John McKay, a member of the Canadian Parliament, introduced Private Members' Bill C-300 on February 9, 2009.<sup>206</sup> Its title is An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries.<sup>207</sup> Bill C-300 charged the Minister of Foreign Affairs and the Minister of International Trade with the duty to issue guidelines for corporate accountability standards by reference to documents such as the International Financial Corporation's *Policy on Social & Environmental Sustainability* and the *Voluntary Principles of Security and Human Rights*.<sup>208</sup> It then created a mechanism for Canadians or residents of the host country to allege a specific complaint, which would then be examined by the Ministers and acted upon.<sup>209</sup> The bill was widely supported by an international assortment of environmentally focused non-governmental organizations, scholars, human rights organizations, and development organizations.<sup>210</sup> It was opposed by the mining industry and by the ruling Conservative party in Canada, who argued that its frameworks would be abused by companies and their competitors and that implementation of the legislation would drive companies out of Canada.<sup>211</sup> The bill was defeated in Parliament on October 27, 2010, by a narrow margin of 140 to 134.<sup>212</sup> Much commentary and analysis of the bill and its defeat followed, as the movement in support of the bill had grown notably in the preceding year.<sup>213</sup> Though defeated, the Bill

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<sup>205</sup> See An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.C. 2009, c. C-354 (Can.) (proposed legislation).

<sup>206</sup> *Corporate Accountability the Focus of John McKay's New Private Members' Bill C-300*, Hon. John McKay, PC MP (Feb. 12, 2009), [http://www.johnmckaymp.on.ca/newsshow.asp?int\\_id=80484](http://www.johnmckaymp.on.ca/newsshow.asp?int_id=80484).

<sup>207</sup> An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, R.S.C. 2009, c. C-300 (Can.) (proposed legislation).

<sup>208</sup> *Id.* § 5.

<sup>209</sup> *Id.* § 4.

<sup>210</sup> See *Supporters of C-300*, *supra* note 28.

<sup>211</sup> Hill, *supra* note 27.

<sup>212</sup> *Id.*

<sup>213</sup> See Jennifer Wiebe, *What's Next After Bill C-300?*, Mennonite Central Comm.—Ottawa Office (Nov. 2, 2010), <http://ottawa.mcc.org/stories/news/whats-next-after-bill-c-300>.

brought the issue of corporate responsibility to the forefront and came close to forcing mining companies to take a hard look at whether their actions are truly responsible and whether mechanisms in place are really functioning properly.

Peter Julian, also a Member of the Canadian Parliament, introduced the Private Members' Bill C-354, which is titled An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights).<sup>214</sup> This bill would allow persons who are not Canadian citizens to sue perpetrators of torts outside Canada within the Canadian court system if the tort violates international law or treaties to which Canada is a party.<sup>215</sup> It specifically extended jurisdiction by appending the following text to the Federal Courts Act:

The Federal Court has original jurisdiction in all cases that are civil in nature in which the claim for relief or remedy arises from a violation of international law or a treaty to which Canada is a party and commenced by a person who is not a Canadian citizen, if the act alleged occurred in a foreign state or territory[.]<sup>216</sup>

It also listed a number of torts for which a claimant could file.<sup>217</sup> These included "wanton destruction of the environment that directly or indirectly initiates widespread, long-term or severe damage to an ecosystem, a natural habitat or a population of species in its natural surroundings[.]"<sup>218</sup> Therefore, potentially, a victim of environmental degradation in Argentina whose human rights are affected could sue a mining company in Canada under the theory of a commission of a tort or a violation of international law. One blogger recognized the threat that C-354 posed to Canadian international mining companies, and extolled the reasons why the Bill and its supporters should be disregarded.<sup>219</sup> He laments that after the defeat of Bill C-300, another has cropped up to challenge the mining industry, and "[t]his new proposal embedded in Bill C-354 is

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<sup>214</sup> An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights), R.S.C. 2009, c. C-354 (Can.) (proposed legislation).

<sup>215</sup> *Id.* § 25.1(1).

<sup>216</sup> *Id.* § 25.1(1)(1).

<sup>217</sup> *Id.* § 25.1(1)(2).

<sup>218</sup> *Id.* § 25.1(1)(2)(m).

<sup>219</sup> See Caldwell, *supra* note 204.

couched in much more elegant philosophy than Bill C-300.”<sup>220</sup> There is no statute of limitations, so violations can be brought into court at any time in the future.<sup>221</sup> This legislation has yet to be passed by Parliament.<sup>222</sup>

C. *An Analysis of Canadian Law*

None of the Canadian legislation bans particular types of mining, the use of toxic substances, or delineates particular illegal actions; instead the bills and CEPA couch in vague terms a disdain for environmental damage and the advocacy of corporate social responsibility. Additionally, they do not set up regulations that can be violated and brought into court; rather, they create a mechanism whereby a complainant brings his matter to a government minister who then investigates it and decides whether it is worthy of pursuit. This injects an interested party, a government representative aware of the national prerogative to reprimand or ignore the actions of mining companies, into the adjudicative process. In short, it undercuts the complainant’s ability to find justice.

One of the reasons that corporations oppose these pieces of legislation is that there are already corporate social responsibility mechanisms in place.<sup>223</sup> These corporate social responsibility programs are instituted and enforced by the companies themselves,<sup>224</sup> and so corporations have acted with impunity concerning their operations in other nations. Social outcry has developed in recent years over these freedoms, and so the Canadian Parliament in 2005 called for legal and industry reform.<sup>225</sup> However, these reforms continue to be lacking. There are also inherent faults with the corporate social responsibility concept: it provides few mechanisms for victims to seek justice and reparation and it excludes potential victims, interest groups, and government from the discourse on what is socially and environmentally responsible.<sup>226</sup> Therefore, the lax treatment of corporate

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *C-323: Status of the Bill*, LEGISINFO, <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5138027> (last visited Apr. 6, 2012).

<sup>223</sup> See JP Laplante and Catherine Nolin, *Snake Oil and the Myth of Corporate Social Responsibility*, CANADIAN DIMENSION (Jan. 25, 2011), <http://canadiandimension.com/articles/3613/>.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See *id.*

social responsibility in Canada makes it less likely that the government will want to examine and try them for their violations.

Additionally, both the hands-off and bureaucratically mangled procedures constructed in the CEPA and in C-300 evince a larger disinterest in Canada. The involved parties that reside in Canada are corporate entities who bring large amounts of money and jobs into Canada through their operations in other nations, and this is a much less sympathetic figurehead for the issue than the human victims of environmental degradation in Argentina. Though the text of the proposed legislation has a respectable connection to human rights,<sup>227</sup> enforcement of international treaties and human rights issues is much more difficult to pursue in the country of incorporation than the country of operation.

#### IV. CHOOSING A PREFERABLE ROUTE TO JUSTICE

Both the Argentine legal system and the Canadian legal system are working to develop mechanisms that regulate mining projects and hold companies responsible for any environmental damage they may cause. In addition, various elements of both countries' social and political climates contribute to the interest in prioritization of protecting people and the environment from the negative effects of mining. An analysis of all these factors will help show which of these two fora is better suited to trying mining companies for their violations.

There are a number of elements in all the new legislation in Argentina and in Canada that help determine its usefulness. These include the specificity in the content of the laws, the enforcement mechanisms established by the laws, and the quantity of such legislation and enforcement bodies in each nation. The Argentine legislation largely targets the specific modes of operation for projects: where they may be located and what substances and techniques they may use.<sup>228</sup> The Canadian legislation, on the other hand, focuses more on the human rights violations that occur when mining companies ruin environments, and predicate these concerns on the destruction of the environment generally.<sup>229</sup> Because the Argentine laws have such clear directives, it will be much easier to see when a company violates those and to build a case than it will be for a

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<sup>227</sup> An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, R.S.C. 2009, c. C-300 § 5(2)(b)–(d) (Can.) (proposed legislation).

<sup>228</sup> See *supra* notes 147–48, 152–55, 171–73 and accompanying text.

<sup>229</sup> See *supra* notes 205–07, 213–17 and accompanying text.

victim to develop broad claims about environmental destruction and the violation of human rights to a standard that will raise the concern of the reviewing Minister. Secondly, the Argentine enforcement mechanisms are much more clear, tangible, and impartial than the Canadian system involving allegations and investigation by ministers. Because the national and provincial legislation delegates authority to the provincial courts, enforcement takes place much closer to the victims and to the site of the violation, instead of with a foreign national government.<sup>230</sup> The nature of court systems is that they aim to provide justice and impartiality in decision-making. These elements are much foggier when a claim goes under review by a Minister of the national government, who then decides whether to pursue the claim and investigate it further. There is a high risk that political concerns and priorities will make their way into the evaluative process. Lastly, there are many more layers of mining laws and legislation in Argentina than there are in Canada.<sup>231</sup> This ensures more rules and jurisdictions in which to seek justice, as opposed to the situation in Canada, where legislation directed at this mining issue has yet to actually pass a vote in the Parliament.<sup>232</sup> The elements of legal content, enforcement mechanisms, and number of statutes favor Argentina as the better venue in which to bring a claim.

There are additional factors as well within each country that favor and disfavor their interest in these types of litigation. These include the interested parties that have representation within each nation and the presence of mining issues in the political discourse. The victims of environmental degradation are located in Argentina. Given proper support from the growing number of environmental interest groups,<sup>233</sup> they increasingly make their plight known and garner support from the public and politicians. The megalith mining corporations are based out of Canada, and with operations across the globe their financial importance and lobbying pressure are great. Additionally, because most mining projects in Canada are in sparsely populated areas,<sup>234</sup> there isn't the same clash of communities and corporations that there is in Argentina.

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<sup>230</sup> See *supra* notes 146, 159, 167–70 and accompanying text.

<sup>231</sup> See *supra* notes 138–40 and accompanying text.

<sup>232</sup> See *supra* notes 202–03 and accompanying text.

<sup>233</sup> See *Supporters of C-300*, *supra* note 28 (listing a range of environmental and human rights groups that supported Bill C-300).

<sup>234</sup> See, e.g., *The Atlas of Canada: Table 1. Some Major Mines by Ecozone*, NATURAL RES. CANADA, [http://atlas.nrcan.gc.ca/site/english/maps/environment/ecology/humanactivities/mines\\_table.html](http://atlas.nrcan.gc.ca/site/english/maps/environment/ecology/humanactivities/mines_table.html) (last visited Apr. 6, 2012) (showing mining projects in Canada by region).



In political debate, the voices of mining corporations are often much louder than those of the interests who protect the environment. This truth is clearly shown in the prevalence of mining issues in the social and political discourse: while numerous pieces of legislation are being proposed and passed in Argentina,<sup>235</sup> press about the issue is flying left and right,<sup>236</sup> and the nation is seriously re-evaluating the inviolability it had previously granted to mining companies, the same level of prevalence is not seen in Canada. The few efforts at legislative change are at an impasse or have even been voted down, and there is minimal press surrounding the issue of mining. This lack of interest within Canada as opposed to rapidly rising interest in Argentina also supports the argument that Argentina is a better forum for adjudicating claims over environmental degradation.

The conclusion drawn from this analysis is that Argentina is inherently a more interested nation. The issue of mining has particularly become more pressing in recent years as larger and more threatening mining projects have come to life, spurring legislative, social, and political reaction. For this reason at this time Argentina shows better promise as a forum nation. Canada continues to be far distanced from these issues, and the corporate social responsibility of mining companies is a low-level interest. It is quite possible that the lynchpin of the issue in Canada is that the government allows corporations to set their own social responsibility and sustainability guidelines, and in turn enforce them; however, this dynamic is drawing increased criticism within Canada.<sup>237</sup> If the momentum of the movement toward government-implemented corporate social responsibility can reach far enough into the currently untouchable mining sector, Canada may one day become a second defender of environmental and human rights in the struggle against irresponsible and destructive mining.

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<sup>235</sup> See *supra* Part II.

<sup>236</sup> See, e.g., *Factbox: Argentine Legislation that Targets Mining*, *supra* note 17.

<sup>237</sup> See, e.g., Laplante & Nolan, *supra* note 223.