



**Exit, Dismissal, Engagement:  
Understanding Extractivist Firm Behavior in Latin America<sup>1</sup>**

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**ABSTRACT**

Multinational companies are deeply involved in extractive activities in Latin America, where economies dependent on mining revenues have long welcomed their investment. This is especially true given the rise in commodity prices, increasing demand from emerging economies such as China, and the turn toward green technologies, with the concomitant need for minerals and metals such as lithium, copper, and cobalt. At the same time, communities impacted by these mines have become increasingly resistant to them, bolstered and supported by international actors and norms in Europe and North America, as well as stronger domestic environmental and justice institutions often modeled on trans-Atlantic partners. European countries and the EU have toughened due diligence requirements on their own companies to protect fragile environments and vulnerable populations in Latin America. In this paper, we research the behavior of one mining company across two Latin American countries in the face of social resistance, finding that the strength of domestic institutions and the capacity of civil society to litigate have an important effect on company decisions and actions.

In January 2021 an appeals court in the Netherlands ruled that the oil giant Shell was responsible for spills in the Niger Delta, Africa's largest oil producing region.<sup>1</sup> It was a victory for local communities, but accountability was a long time coming. Activists had spent years seeking rectification and compensation for what was an ongoing and severe environmental disaster. Legal challenges also took place in U.S. courts in an effort to hold Shell and other oil companies accountable for their mistakes and lapses (Enneking 2014; Hennchen 2015). Litigation in developed countries was deemed necessary because activists believed that oil giants were 'untouchable' in Nigeria, where domestic courts and other institutions are weak in the face of multinational corporate power. But what was required was more than competent institutions; it also took concerted legal action by Nigerian environmental activists to make sure that the damages caused by Shell's activities were rectified.

The Shell-Nigeria story is not an isolated one. In the first two decades of the 21<sup>st</sup> century, Latin America became the primary mineral ore destination for investors (Wagner and Walter 2021: 1-2). Shifts toward energy transition minerals and efforts to improve digital connectivity have boosted demand for lithium, copper, and cobalt among others.<sup>2</sup> Growing demand for hydrocarbons, minerals and metals created a perfect storm, exacerbating inequalities, poverty, environment damage, and governance weaknesses (Auz 2022; Rodríguez Garavito and Baquero Díaz 2020; ECLAC 2018; IADB 2017). The demand for resources and raw materials has severe social and environmental consequences for many poor countries, and one of the most damaging activities is open pit mining, which has caused many serious conflicts.<sup>3</sup>

Demand for minerals and metals is only one part of the perfect storm. More awareness of rights among affected communities, international scrutiny, and stronger domestic institutions capable of resolving conflict are helping some communities push back against investors. Companies are now under greater pressure than ever to respect rules and address problems and concerns in local communities. The pressures come from international actors, shareholders, reputational concerns,

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<sup>1</sup> <https://edition.cnn.com/2022/05/25/africa/shell-oil-spills-nigeria-intl-cmd/index.html>

<sup>2</sup> The consulting group Wood Mackenzie estimated there will be a global shortfall of almost 10 million tons of copper over the next decade, resulting from growing demand for low carbon projects. See <https://www.woodmac.com/horizons/red-metal-green-demand-coppers-critical-role-in-achieving-net-zero/>

<sup>3</sup> See for example the Environmental Justice Atlas's map of environmental conflicts worldwide. <https://ejatlas.org/>

among other sources. In 2011, the Office of the UN High Commissioner for Human Rights set out the responsibility of corporations to respect human rights (UN 2011: 13ff). Moreover, rulings of the Inter-American Court of Human Rights, and the new (in 2021) regional Escazú Accord, which strengthened environmental rights guarantees, have all bolstered the position of rights-defending communities.

However, while international actors are certainly present and have exerted pressure in many instances of environmental conflict (Malets 2017; Schilling-Vacaflor and Gustafsson 2022), we argue that domestic factors are the principal reason for variation in how companies respond when communities push back against their projects. In this paper we examine mining company behavior in several conflicts in Latin America, where an increase in commodity prices has led to rapid growth in mining activities and a surge in the number of conflicts (Walter and Wagner 2021). All our cases involve social resistance to open-pit mining; we find that actions by firms in the face of community resistance are affected by two main (domestic) factors: first, the ability and willingness of civil society to litigate, and second, the capacity of domestic institutions to hear and resolve cases. Unsurprisingly, institutional capacity matters, but perhaps less obvious is that when it comes to protecting communities and resolving conflict, litigation skills are more important than other civil society activities, such as advocacy, street protests, and publicity.

The level of analysis is the behavior of one Canadian mining company, Goldcorp. Canadian mining companies are no exception to the conflict-generating rule, and whatever Canada's reputation as a 'good guy' in international politics, when it comes to promoting its mining sector, Canadian governments across the political spectrum are aggressive and forthright, even in the face of widespread allegations of environmental damage and human rights abuses (PODER et al. 2017; Working Group on Mining and Human Rights in Latin America 2014). In Chile, where civil society had litigation skills (and a willingness to employ them) and also the relevant institutions were strong, Goldcorp's behavior was restrained and cooperative. In Argentina, where civil society sought to litigate but the provincial institutions were unwilling to address concerns, the company was dismissive of community complaints.

Company behavior in the mining sector is ostensibly guided by corporate social responsibility (CSR) norms. In the following section we review research on corporate behavior and introduce cases and methodologies. In later sections we evaluate cases and draw conclusions.

### **Corporate social responsibility (CSR)**

CSR has become a critical ingredient in mining operations, as firms seek to address community concerns and alleviate detrimental social and environmental effects due to mining operations. CSR, or environmental, social, and corporate governance (ESG) considerations now feature in reports of their activities and in internal corporate organization. CSR and ESG investments by mining companies have increased in recent years, including payments and investments in local infrastructure and services. Yet studies of ESG reporting among metal and mining companies show both the variable nature of reporting and also the need for stakeholder engagement to realize ESG goals (Sriyani De Silva Lokuwaduge and Heenetigala 2017).

Despite the growing attention to these community-oriented goals and plentiful information, mining companies still fall far short of fully incorporating responsibility goals into their actual business practices (Swart 2022). Mining-related CSR research in international business journals is scant in terms of its coverage of the developing world, and it also continues to be outside the mainstream of international business scholarship (Pisani et al. 2017). That which does address the developing world shows that results are mixed. Protests over prices paid for land by mining companies in various Latin American countries in the 1990s were addressed by making additional side payments. This implies that there were few if any protests based on lifestyle or socio-cultural or environmental impacts that the companies had to deal with at that point in time. Conflicts were predominantly related to land purchases and the influx of outsiders into the mine area (McMahon and Remy 2001: 34).

In sum, while companies act strategically to minimize conflict, they also act in their own interests in terms of pursuing investments. Firms use technical arguments and scientific studies to try to reassure stakeholders of the safety of their plans (Li 2015), or they use discourses of sustainability and environmental protection as a kind of guarantee of responsibility (Kirsch 2014). There are numerous studies that indicate best practice or normative guidelines for company treatment of communities (Ralph 2015). However, the incentives to address community needs vary according

to many factors, not least of which is the presence of some kind of resistance or protest; hence, the question remains how firms respond to resistance and why.

### **Corporate behavior beyond CSR**

CSR goes beyond splashing money around local communities and introducing corporate visions into annual reports. It is also a reflection of behavior when faced with real, ongoing challenges from local communities. Some studies implicitly portray mining company responses to social resistance as static and inflexible, perhaps informed by a common corporate culture. But can company reactions evolve in response to external stimuli? Do they negotiate, prevaricate, dissemble, compromise? Are they willing to modify their plans to accommodate local concerns? Shell was recognized as a leader in CSR due to its activities in Nigeria, where the state's inability to address corruption, poverty, and weak rule of law were legendary. Yet that 'leadership' evaporated when it came to accepting accountability for mistakes and responding effectively to local concerns.

Despite the rising importance of CSR/ESG, and ample research on aspects of it, little attention has been given to company behavior when confronted by local communities in developing countries. We find that company practices are not uniform even within a given firm, instead they adjust to country institutional and civil society context. That means that whatever the company promises in terms of community relations or CSR practices, its actual behavior varies according to national circumstances. Countries with institutional capacity and with litigation-savvy CSO groups force firms to take CSR action seriously.

What is the *a priori* logic for expecting that civil society litigation and institutions matter? Communities who are close to extractive activities are most likely to have direct experience of damages, and have legal standing to challenge mines, as well as a degree of ethical weight in front of courts. They have a variety of potential resistance tools at hand (Jaskoski 2022), but in many cases they do not have the knowledge or experience or connections or resources to take forward legal challenges. On the other hand, litigators do have knowledge of legal opportunity structures and processes, in other words, where to take a claim or complaint and how to frame the complaint and target the right institution to maximize chances of success. Litigators often draw in scientific and technical arguments and expertise, as well as legal ones, to help affected

communities put forth arguments about damages. Networks of NGOs involved in litigation are part of epistemic networks in which expertise and goals are shared. Litigators draw in human rights and environmental regulatory standards to show where companies have failed to uphold the law (cf. Zaelke et al. 2005). There can also be an interaction effect between civil society litigators and personnel working in judicial or administrative institutions, as there are numerous examples of the former helping to update and educate the latter as to current best practices (González 2014; Aspinwall 2021).

NGOs engaged in legal advising and legal action, in research, monitoring and related activities contribute to governance where the state is weak and close the compliance gap (Aspinwall 2021). Governments with severe resource constraints have learned to tap NGOs for help in achieving environmental aims. Similarly, where state authority is absent, NGOs themselves have mobilized their resources into enforcement and compliance. NGOs provide watchdog functions, act as intermediaries, and represent segments of the population. Statehood may be limited in certain parts of a state or in certain policy areas (Risse and Stollenwerk 2018; Hamann et al. 2018), but weak states also provide unintended opportunity structures for civil society (Lorch 2017; Esguerra et al. 2017; Lake 2018; Börzel et al. 2018).

Institutional capacity and willingness to hear complaints is the other aspect affecting corporate behavior. Institutions in Latin America tend to be fragmented by sector such that economics, finance, and development ministries and investors are far more powerful than environmental ministries and conservationist interests, despite strong laws to protect the latter. Without institutional capacity and willingness, complaints that are perfectly valid would get no hearing. There is a vast literature on the topic of institutional capacity. Improving institutional capacity is a key to good governance according to many authors, because strong institutions feature a certain degree of autonomy from political executives and also professionalized technocrats who are capable of understanding and resolving conflict (among many others see Fukuyama 2013; Grindle 2010; Dahlstrom et al. 2012; Wilson 1989).

Andrews, Pritchett, and Woolcock (2017) argue that there are different levels at which institutional capacities can be observed, one of which is related to the implementation of policies. When capacities are very low, 'the agents of organizations do not do what they are supposed to

do -- they are absent, they do not put in the effort, they take bribes, they are ineffective or even counterproductive in their actions' (Andrews et al 2017: 84). Rosas (2008) points out the importance of understanding the relationship of capacities to governance. In addition to the capacities of public organizations and their agents to implement state policies and mandates, they must also generate networks with non-governmental sectors.

### **Cases and Methods**

We compare the behavior of one Canadian mining company, Goldcorp, which was formed in Vancouver in 1994 and sold to Newmont Mining in 2019. Goldcorp operated a number of mines in Latin America (and Canada), often in joint ventures or with local companies which it controlled. It had mixed results in terms of corporate reputation. In 2016 it was named among Canada's 50 best corporations according to the magazine *Corporate Knights*. In a 2018 report, the Responsible Mining Index characterized Goldcorp's commitment to business ethics as strong, including on governance, transparency, and corruption issues. However, on other indicators, such as human rights and indigenous rights assessments, its performance was far weaker.<sup>4</sup> It was also harshly criticized by civil society and government agencies in numerous countries.<sup>5</sup>

In the following sections we review cases in two different countries, the Bajo la Alumbreira mine in Argentina and the El Morro mine in Chile. All are open-pit gold mines, producing other minerals and metals too. The rationale for choosing these was a most different cases strategy, in which company behavior and contextual factors were very different across the two. We treat the cases as a way 'to provide insight into an issue or to redraw a generalization' (Stake 2005: 445; Beach and Pederson 2013). The literature on corporate behavior does not give us a lot in terms of theoretical predictions, so our purpose is not to generalize but to build theory, seeking causal mechanisms in the cases we examine. The universe of cases in which Goldcorp owned and operated mines in Latin America is limited.

Our methodology involves process tracing, in which we present information on the mining investments, review how conflict unfolded and what the demands of local communities and civil

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<sup>4</sup> See <https://2018.responsibleminingindex.org/en/companies/19>.

<sup>5</sup> <https://www.corporateknights.com/rankings/best-50-rankings/2016-best-50-rankings/2016-best-50-results/> . See also <https://www.theguardian.com/environment/2009/dec/31/goldcorp-honduras-pollution-allegations>



society groups were, analyze the nature of their strategies and actions, as well as the responses of the company and of relevant government agencies and the interaction between social actors, mining companies, and public institutions. We consider decisions by national or regional/local institutions in response to social demands, and company reactions following social demands and institutional decisions. We look at what happened to the mine project, whether it was halted or changed, and whether company attitudes and actions evolved as a result of social resistance. Later we evaluate the reasons why Goldcorp responded as it did to conflict in each location. Our dependent variable is company behavior, not institutional reform or new policy enactment. To explain company behavior, we draw on a variety of potential factors, including social movement and civil society strategies, and institutional responses and actions. We consider alternative explanations and counterfactuals to ensure that our conclusions are robust.

Given that we are dealing with a small N of cases and a large number of potentially contributory causes, we exercise caution in our conclusions. We also triangulate using a variety of different primary and secondary sources, including information from academic publications, media and civil society sources, official bodies such as courts, tribunals, ministries and prosecutors, and in-depth interviews with participants. International bodies such as the Inter-American Commission and civil society organizations such as Amnesty International and Greenpeace were absent in these cases, which allows us to be more confident in ascertaining accurately the role of domestic institutions and civil society.

#### Bajo la Alumbreira, Argentina

The Alumbreira mine, one of Argentina's earliest 'mega-mines', began operations in 1997.<sup>6</sup> It was established in propitious circumstances, because a 1993 mining law offered financial incentives and judicial protection to encouragement mining companies to invest, and a 1994 constitutional reform devolved oversight of mining to the provincial level, where there is both weak institutional capacity and also conflicts of interest, since local governments are investment partners in many mines (Murguia 2013; also Lamalice and Klein 2016; Petrocelli 2019; Walter and Wagner 2021: 3). The state has long treated the environment as a source of economic revenue, prioritizing mining

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<sup>6</sup> For a brief description of the mine and the surrounding community, see Chayle et al 2021.

and other development and failing to take into account wider impacts or consequences. The combined effects of favorable government attitudes to mining development, weak institutional capacities, and conflicts of interest in governments, mean that environmental and social concerns take a back seat (Petrocelli 2019: 7-8). Environmental objectives are simply to limit damages after they occur.

Alumbrera is located in Catamarca province, with ownership divided between Glencore, Goldcorp, and Yamana Gold. Catamarca is among the poorest provinces in Argentina, and mining represents 70% of the Catamarca economy (Lamallice and Klein 2016). Alumbrera mined copper, gold, and molybdenum until 2018, when deposits were exhausted and operations stopped (Tejero 2022).

Complaints against the mine began early and extended widely. Critics argued that the mine was interested only in production and exploitation, with little attention to social or environmental consequences. The supposed local economic benefits such as development, jobs, and hospitals did not come to fruition, according to some observers (FARN 2019). Studies showed that various spills affected water supplies; the *Gendarmería Nacional* did tests confirming high levels of toxic residues such as copper sulphate cyanide from the spills. The mining secretariat also confirmed the spills and pollution levels, but despite numerous complaints, further action by the authorities did not take place (Murguía 2013: 75; Tierra Viva 2021a). Other disagreements occurred over the lack of local investment, land rights, and energy use, although the most serious conflicts concerned spills and water use.

In October, 2001, judicial findings forced the government of Tucumán to reach an agreement with the mine on compensation for environmental damages caused by a power line. In 2004, residents of the village of Vis-Vis complained of a spill, which led to protests and blockages (Petrocelli 2019: 5). In the same year, the first leak from a tailings dam was acknowledged by Alumbrera. Part of the compensation plan was to build three solid waste treatment plants to limit toxic discharges (the company built one) (Groba 2004). In 2007, a report from a local NGO, FOCO, complained of leaks in the slurry pipeline (which transported minerals over a distance of 317 kilometers from Catamarca province to Tucumán province) as well as from the tailings dam, plus air pollution from dust, and illnesses among inhabitants of the affected area (FOCO 2007).

FOCO reported an investigation by the Tucumán provincial prosecutor, Antonio Estofán, into Alumbreira pollution, and an investigation by a federal judge in the province of Santiago del Estero, Felipe Terán, into pollution in the Termas del Río Hondo area.<sup>7</sup> The FOCO report also described the complaint by inhabitants of Villa Vis, Catamarca related to leaks, and described the accusations of civil society organizations of air pollution, radiation, and desecration of indigenous cemeteries. A federal prosecutor in Tucumán, Gustavo Gómez, accused the company of illegal pollution and after a series of judicial decisions and appeals, the federal appeals court in Tucumán agreed, and it held the general manager responsible.<sup>8</sup>

Numerous activist groups emerged to contest the mine's activities, such as the Citizens Assemblies Union (*Unión de Asambleas Ciudadanas*) in 2006, which gives legal and communication advice and helps link anti-mining groups nationally, and the National Network of Mine-Affected Communities (*Red Nacional de Comunidades afectadas por la minería*) (Nieves Solsona (2019: 37-45; Walter and Wagner 2021: 7). Andalgalá residents filed an injunction in January 2010 demanding the suspension of the Agua Rica mine, because it violated their right to a healthy environment.

However, resolution of the injunction was delayed for several years.<sup>9</sup> Their civil complaints were ineffective, needed criminal complaints (Gómez interview).

Pro and anti-mine groups formed, each marching and advocating. Most of the anti-mining activism centered around marches, citizen committees, and similar activities, rather than legal action. The anti-mine attitudes of many local communities appeared to be well-founded. A study of the mine's own 2009 sustainability report showed the weaknesses in oversight and management (Murguía 2013). The legitimacy of the report was undermined by a lack of transparency and communication on the part of the company, and weak involvement by local authorities in disputes over spills.

Local authorities had insufficient technical capacity, finances, and people to oversee the mines adequately, and governance was correspondingly weak, which explains the lack of confidence in the mine on the part of local populations. In 2011, the Catamarca provincial office in charge of managing the environmental impacts of mining (*la Dirección Provincial de Gestión Ambiental*

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<sup>7</sup> In 2017, Terán was sentenced to five years in prison for corruption, and later died from Covid.

<sup>8</sup> <https://www.fiscales.gob.ar/fiscalias/confirman-el-procesamiento-del-gerente-general-de-minera-alumbreira-por-contaminacion-ambiental/>

<sup>9</sup> <https://concienciasolidaria.org.ar/es/index.php/campanas/117-homenaje-a-la-asamblea-el-algarrobo-a-6-anos-de-la-represion>

*Minera*) had only 2 people working in it, though this number increased to 40 people by 2015 (Petrocelli 2019: 9). Additionally, the company's sustainability report was biased, according to the study, lacking complete information, and there was no participation by interested groups or mechanisms of dialogue in decision-making, nor were there independent scientific evaluations to enable alternative judgements of the mine's actions (Murguia 2013: 91; Petrocelli 2019). At national level, environmental controls are 'extremely lax' (Petrocelli 2019: 9).

As Alumbreira was winding down, the mining companies embarked on a new project that would combine Alumbreira's facilities with another mine, known as Agua Rica. Agua Rica is 35 kilometers from Alumbreira. In fact, at least five previous attempts had been made to initiate extraction activities at Agua Rica, beginning in 1972, though never as a combined project with Alumbreira (Penelli 2022). The combined operation was called MARA, with investment from Yamana Gold, Glencore, and Newmont Goldcorp. MARA is designed to use some of Alumbreira's facilities while exploiting the Agua Rica deposits of gold, silver, copper, and molybdenum, and the two sites would be connected by pipeline infrastructure. The company anticipated having the EIA for the combined project approved by the end of 2022, although MARA was also met with resistance. Protesters from local and indigenous communities took to the streets and blocked routes to the combined operations, and the protests were repressed (Página12 2022; Tierra Viva 2021b; CDHAL 2021). A group called El Algarrobo Assembly (*Asamblea El Algarrobo*) was created, and it denounced the police brutality and reached out to Canadian human rights groups to intervene.

The Catamarca authority responsible for monitoring the mining operation was unable to resolve the concerns of the local population, and various legal actions ensued, some of which were aimed at calming violent protests and denouncing repressive reactions by the police (Chayle et al 2021), others aimed at challenging the EIA and protecting rights to a healthy environment, participation, access to information, and justice, and still others aimed at stopping exploratory drilling.<sup>10</sup> A local town, Andalgalá, passed a municipal ordinance in 2016 to prohibit large-scale metal mining, as well as the use of mercury and cyanide for mining. The Catamarca governor responded negatively, as did the mining secretary. Yamana Gold went to the Catamarca courts, which ruled in 2020 that the proclamation was invalid.

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<sup>10</sup> See also <https://ejatlas.org/conflict/agua-rica-andalgala-catamarca-argentina>

In 2019, a complaint argued that, in their evaluation of Agua Rica, the authorities failed to respect the so-called glacier law, which was passed in order to protect sources of water (Borse 2019). The case was brought by the Algarrobo assembly. It was rejected, but a federal prosecutor (Guillermo Marijuán) ordered the federal environmental ministry to conduct an inspection of the Agua Rica site.<sup>11</sup> In 2021 he requested that Agua Rica be closed for preventive purposes.<sup>12</sup> Provincial authorities rejected this as an incursion on their authority, and a federal judge agreed in a decision taken in 2021. The state prosecutor called the original complaint a bad faith effort to derail a decision taken according to the law.

While federal prosecutors were active litigators in the Alumbreira case, litigation by civil society groups took a back seat to street activism (Chayle et al 2021; Rodríguez and Maresca 2022). One exception was a 2019 provincial Supreme Court decision in Tucumán, which resolved a dispute brought by two brothers, Carlos and Miguel Aranda, in 2007 (Medina 2019). This followed an investigation by the Tucumán provincial prosecutor, Antonio Estofán, into Alumbreira pollution (he later became a Tucumán Supreme Court judge and ruled in favor of the two Aranda brothers). The court found that Alumbreira did pollute, and it upheld a lower court ruling from 2016 which ordered Alumbreira to rectify damages. The ruling required the company to provide environmental studies and requested the provincial government to rectify damages. Those legal actions which were pursued were often instigated by federal prosecutors, rather than civil society groups (for a review of selected cases, see Giménez 2017). Two NGOs were an exception to this rule – Conciencia Solidaria and ProEco took legal action, or participated in legal challenges by prosecutors (see Gagliardo and Giménez 2016).

### El Morro, Chile

El Morro is an open pit gold and copper mine located in Huasco Alto in the Atacama region of Chile. It was envisaged to last 14 years, with construction beginning in 2012 and operations beginning in 2017 (Portal Minero 2013). El Morro was created by Goldcorp and Newgold. In

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<sup>11</sup> <https://www.proyectomara.com.ar/la-justicia-federal-rechazo-presentacion-para-detener-agua-rica/>

<sup>12</sup> <https://www.elpucara.com/ciudades/el-fiscal-federal-marijuan-avalo-pedido-de-clausura-preventiva-del-proyecto-agua-rica.htm>

November, 2013 there were marches against El Morro (and another mine, Pascua Lama), but unlike the Alumbreira experience in Argentina, civil society reaction to the mine was oriented far more towards legal action than street protests. In 2012, the Antofagasta Appeals Court suspended the EIA approved by the Atacama Environmental Evaluation Commission for El Morro because consultations with the indigenous communities by Conadi (the *Corporación Nacional de Desarrollo Indígena*) had mitigated the impacts for only a very few affected farming families, and had not taken place in conformance with domestic and international law (Ley 19.300 and ILO 169; Portal Minero 2012).<sup>13</sup>

The Diaguita indigenous community participated in legal actions through groups such as the Diaguita Agricultural Community of the Huascoaltinos (*Comunidad Agrícola Diaguita de los Huascoaltinos*) and the Diaguita Community Council (*Consejo Comunal Diaguita*). Fifteen indigenous communities in total were represented by an independent lawyer, Lorenzo Soto (Correa 2014). The Latin American Mining Conflict Observatory (OCMAL) was also involved in legal complaints about the lack of consultation and the danger of water pollution and adverse impacts affecting the livelihoods of these farming and ranching communities.

However, the environmental approval process was restarted, and the EIA was again approved by the Atacama Environmental Evaluation Commission in October, 2013, only to be rejected by the Copiapó Appeals Court a month later (Ortiz 2013; OCMAL 2013). The basis of the November Appeals Court decision again was that the indigenous communities had not been consulted adequately and according to the requirements of ILO 169. However, the tide turned when the same Copiapó Appeals Court in April, 2014 rejected an injunction request against the EIA by the indigenous communities and permitted the project to go ahead. It ruled that the amended EIA now conformed to regulatory requirements and respected indigenous consultation mandates.

In yet another twist, in October, 2014, the Chilean Supreme Court agreed with the complainants and annulled the EIA. The Court mandated a new consultation with indigenous communities

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<sup>13</sup> The complaint was lodged in 2011. <https://ejatlas.org/conflict/el-morro-chile/?translate=es> The environmental impact assessment had been prepared by a private consulting firm in 2008. See Sociedad Contractual Minera El Morro (2008).

according to the requirements of ILO 169 (Correa 2014).<sup>14</sup> Other institutions were divided. The National Human Rights Institute (INDH) in 2014 supported the indigenous communities' actions in an *amicus* brief to the Supreme Court.<sup>15</sup> On the other hand, the local representative of the national Interior Ministry (the *Intendencia de Atacama*) supported the mining project. However, following the Supreme Court's ruling, and in sharp contrast with the behavior of the Alumbrera mine investors, Goldcorp revoked its own EIA to determine the best manner to proceed with its investment.<sup>16</sup>

Following these court cases, Teck mining (also Canadian) announced in 2015 that it would form a joint venture with Goldcorp, combining El Morro with Teck's Relincho development.<sup>17</sup> The operation would mine copper, gold, and molybdenum. The communication indicated that there would be economies of scale and greater efficiencies in the combined operation. This new group was named 'NuevaUnión'. By late 2018, the new company was in the process of doing its EIA and about to finish the fifth round of community consultations (Tapia 2018). The purpose of the consultations was – according to the report – to hear from the community and to inform them of advances.

Meanwhile, further complaints were made by the *Comunidad Diaguita Huasco Altinos* and various other affected inhabitants of the Río Huasco region between February 2017 and May 2019, this time to the agency responsible for overseeing and enforcing the EIAs (the *Superintendencia del Medio Ambiente*, or SMA) (Sustentable, S.A. 2021). The communities alleged that the explorations were affecting the Huasco River and that they lacked the necessary environmental authorizations. All three complaints were effectively shelved by the SMA. The communities then took the complaints to the Copiapó Appeals Court, which rejected the complaints in November, 2019, and

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<sup>14</sup> The Court also stated that such complaints should go via the administrative Environmental Tribunales, not the courts, but OCMAL countered that courts are there to protect rights, which had been violated. The Supreme Court's decision is available at <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/649/Sentencia%20CS.pdf?sequence=4&isAllowed=y>

<sup>15</sup> For the INDH *amicus* see <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/649/Amicus%20Curiae.pdf?sequence=1&isAllowed=y>

<sup>16</sup> <https://www.ocmal.org/?s=el+morro>

<sup>17</sup> See <https://www.teck.com/noticias-es/comunicados-de-prensa-es/2015/goldcorp-and-teck-combine-el-morro-and-relincho-projects-in-chile-es>

finally to the Supreme Court, which upheld the Appeals Court's decision in July, 2020 (Moraga Sarego 2020). The Appeals Court found that exploration activities had effectively ceased and that the company had enough information to proceed with the EIA (Minería Chilena 2020). The Supreme Court ruled that NuevaUnión's activities were not illegal or arbitrary, and did not threaten the rights of the inhabitants. It also mentioned that administrative procedures were ongoing (the EIA). Two dissenting judges argued that the precautionary principle was violated and that the SMA should have taken into account possible cumulative damages from exploration activities. Moreover, they argued that the company had the burden of proof to show that its actions would not harm the environment and that the authorities needed to justify why the exploratory drilling activities were excluded from the EIA.

Thus, in contrast to the Alumbra experience, as of 2020 there were no active conflicts related to the El Morro and NuevaUnión projects. Operations were due to start in 2023.<sup>18</sup> However, the communities were not finished taking legal and administrative action against the mine. They next filed a complaint in the First Environmental Tribunal, located in Antofagasta.<sup>19</sup> The complaints argued that the company initiated explorations without permission, diverted water sources, adversely affected water quality, damaged ecosystems, and caused other damages. They claimed that the SMA (which had shelved the earlier complaints) did not bother to verify the activities, the number of exploratory holes, the environmental impact, nor conduct a water analysis and other tasks that would have led to a more appropriate regulatory environment for the mine.

The lawyer representing the *Comunidad Diaguita Huasco Altinos* in the tribunal, Ignacio Montecinos Fernández, stated that the SMA's investigation was insufficient because it did not review the water diversion, nor did it do mineralogical or chemical analyses.<sup>20</sup> Other inhabitants were represented by Alejandra Donoso (*Defensoría Ambiental*). Both lawyers rejected the company's claim that there was a distinction between different kinds of drilling and criticized the SMA's acceptance of the company's argument. They argued that the SMA should have applied the

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<sup>18</sup> This is according to the Environmental Justice Atlas, which monitors conflict. See

<https://ejatlas.org/conflict/proyecto-nueva-union-huasco-chile>

<sup>19</sup> Chile's 2012 environmental reform created three independent (of the political executive) tribunals to deal with environmental administrative matters, in different regions of the country. The central one is in Santiago, the southern one in Valdivia, and the northern one in Antofagasta (Pring and Pring 2016: 28).

<sup>20</sup> <https://www.1ta.cl/primer-tribunal-ambiental-realizara-visita-inspectiva-en-el-marco-de-la-reclamacion-por-el-proyecto-nuevaunion/>



preventive principle, and they criticized the division of the project into fragments to reduce the regulatory burden. The SMA lawyer, Benjamín Muhr, rejected the allegations in evidence given to the tribunal, and argued that the SMA responded to the three complaints in 2017-2019. He stated that the key issue was whether the threshold to perform a certain type of EIA had been reached. Finally, the lawyer representing NuevaUnión, José Luis Fuenzalida, said they were in ‘permanent communication’ with the community and were not hiding information or playing tricks. He emphasized again the reduced impact from combining facilities.

The tribunal admitted the complaints in October, 2021. In January, 2022 it reported that it had scheduled a site inspection of NuevaUnión after hearing the reasons for the SMA’s shelving of the three complaints.<sup>21</sup> In October 2022 the tribunal ruled in favor of the complainants on two of the three counts. It stated that the SMA did not fully evaluate the impact of the mine, and that it should not have accepted the company’s argument that there was a distinction between ‘mineralogical’ drilling and ‘geotechnical’ drilling, because both have the same potential detrimental impact.<sup>22</sup>

### **Evaluating firm behavior**

The two cases have several features in common. First, the firm Goldcorp is or was an investor in all of them, along with other foreign mining investors and/or local subsidiaries. Second, the mines are located in rural areas that are relatively poor, where mining is important for the local economy and employment, and where there are strong pro-mining voices from government officials down to villagers. Local farming and indigenous communities reacted negatively in two of the cases, fearing polluted water sources and other damages. Third, local institutions were involved, namely provincial authorities in Argentina and local tribunals, courts, and environmental authorities in Chile. Thus, it was not the federalism/provincialism or centralization of institutions per se that made a difference to outcomes, but some quality of the institutions themselves. We treat this in more detail below.

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<sup>21</sup> See the Tribunal’s blog at: <https://www.1ta.cl/primer-tribunal-ambiental-realizara-visita-inspectiva-en-el-marco-de-la-reclamacion-por-el-proyecto-nuevaunion/>

<sup>22</sup> See <https://www.1ta.cl/tribunal-acoge-reclamacion-de-comunidades-de-la-provincia-del-huasco-por-denuncias-en-contra-del-proyecto-nueva-union/>

The differences between the cases are to be found in three areas: first, the behavior of Goldcorp, our dependent variable; second, the types of activities performed by civil society actors opposed to the mines; and third, the relevant features of the institutions responsible for administering and overseeing mining. As we stated earlier, the ability of civil society to litigate effectively, and the capacity and autonomy of relevant institutions, are the key factors determining mining company behavior. Below we evaluate company behavior and label it according to three types, and show why this variation occurred.

#### Obstinacy and dismissal: *Alumbreira y MARA*

The mine's website states that the 'MARA Integrated Project responds to a sustainable model of efficient mining, with a focus on the environmental care, participatory control of the community in the progress of the project through participation in transparent and regular monitoring, development of local suppliers, and hiring and training local labor force'.<sup>23</sup> According to the company, MARA would have a lower environmental footprint, various measures to protect the environment, and the aim of generating local employment. It claimed that it was pursuing an open-door policy, that transparency and communication with local communities was important, and that it would contribute to improved access to water infrastructure (Tejero 2022). The company said that social acceptance is important and that it was seeking to address doubts and concerns among locals (Penelli 2022; Althabe 2022).

Yet it is unclear how real is the company's commitment to local communities. Its website speaks of a 'community control model'<sup>24</sup> but there is no explanation of what this may entail, and a search online reveals nothing further. What attention is given to the community seems to be directed at providing people with passive opportunities to see what is planned and what is happening. In fact, one of the main purposes of MARA's open door transparency policies is to attract workers. There is no indication that the company will incorporate the community in the project design or consideration of alternatives (Althabe 2022). The company's own EIA stated openly that its pollution levels exceeded those permitted under law (Nemirovsky 2020b). Oversight plans also leave local populations vulnerable, because although the Catamarca mining ministry is planning to

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<sup>23</sup> <https://www.proyectomara.com.ar/en/mara-eng/>

<sup>24</sup> <https://www.proyectomara.com.ar/en/mara-eng/>

do monthly environmental evaluations along with the company, the Catamarca government is an investor in the mine. Obviously, this creates a serious conflict of interest, left unchecked by the lack of independent experts or alternative viewpoints during investigations.

Moreover, interviews of company managers and officials show there is little attention given to the local community in practice, above all in terms of addressing potential pollution risks and water shortages.<sup>25</sup> A MARA mining engineer (Daniel Moreno) told a journalist in 2022 that there was no need to change production techniques or processes in the shift from Alumbreira to Agua Rica.

Instead, the idea was simply to expand production (Tejero 2022). In another interview, the general manager of MARA, Nicolás Baretta, explained that the idea of combining infrastructure and costs in one project was to improve efficiency, not address the environmental footprint or social impact (Penelli 2022). He was asked about judicial proceedings and stated that once they changed their approach with the authorities, working together and providing information, there were fewer injunctions. He criticized groups with ‘totally extreme positions’ against mining or extractive activities who litigate actively but whose complaints ‘completely lack legal or factual basis.’ He never addressed rights or pollution problems for local communities. Baretta mentioned specific complaints from locals about water pollution and health impacts but in a dismissive way, and stated that complaints were not made by environmental groups but by neighbors, implying that the neighbors had less standing to complain. He also claimed that complaints are motivated by political interests, some of them international (this despite findings from authorities of leaks and pollution). But he also said that when there are valid complaints they do enter into dialogue.

Notwithstanding the dismissive attitude of the MARA manager, mine neighbors announced in 2022 that they want to create a community oversight committee with mechanisms for dialogue with the mine over issues such as inspections, impact assessments, and so forth (Minería y Desarrollo 2022). The committee would include all mine neighbors (around 800) and would provide scientific and technical support to relevant authorities and to the mine itself. Although it is too early to tell whether this initiative would work, considering the attitudes of mine managers, it seems unlikely.

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<sup>25</sup> <https://www.proyectomara.com.ar/en/mara-eng/>

These attitudes were possible because Argentine institutions were weak, politicized, and riddled with conflicts of interest. Enforcement and dispute resolution suffered because the interests of local communities were undermined by the involvement of provincial authorities as investment partners. Provinces have authority over mining and the environment, including compliance, EIAs, public consultations, and so forth, and at the same time are invested in the mine. Commitment to rule of law suffered accordingly. Environmental and judicial institutions lacked incentives to promote environmental and community wellbeing over mining interests. To the contrary, Argentinian law and economic policy long favored mining investment over social or environmental rights.

Dismissive attitudes by the mine were also possible because civil society was reluctant to make legal challenges. A 2021 article on the history of the mine spoke of fruitless years of ‘weekly marches, information campaigns and workshops, outreach activities, selective blockades, and encampments’, all without yielding results (Chayle et al 2021).<sup>26</sup> The federal prosecutor in Tucumán, Gustavo Gómez argued that citizens need to make legal complaints, not just analyses or public pronouncements. Legal action is necessary because it opens access to public resources such as appeal and cassation. Attention from higher courts can result in suspension of activities by mining companies, which was not achieved through protests. Moreover, he argued that citizens need institutional support, lawyers who are committed to helping, and capacity-building, to achieve the aims of stopping mining (Nemirovsky 2020a).

#### Constructive engagement: *El Morro*

The Teck communication mentioned earlier relating to the joint venture with Goldcorp and the new combined mining operation claimed that 4000 jobs would be created during the construction phase and 1400 during the operation phase. Teck also stressed that the combined project would reduce the environmental footprint by combining infrastructure requirements such as a single desalination plant (to reduce the use of scarce freshwater), a single tailings dam, and a single concentrator, all to be shared between the two facilities. The communication prioritized this rationale above economic considerations, at least rhetorically, and it stressed the benefits to local farming and indigenous communities, suggesting that the firm was conscious of the sensitivities of

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<sup>26</sup> Translation by author

this investment. It should be noted that Alumbreira investors made similar commitments rhetorically to locals. The difference is in how they followed up.

Regarding community relations, the communication said that the mine would initiate

a broad relationship with communities, indigenous peoples, and other stakeholders in order to guide the development of the project. The project team will meet with the community and indigenous groups to explain the project and work jointly to determine how the relationship will be structured. Two independent organizations with experience in community relations will be involved in this process in order to guarantee socially sustainable results.<sup>27</sup>

In the 2018 report mentioned above (Tapia 2018), NuevaUnión claimed that its rationale for changes to its plan, namely the joint venture and environmental changes, were because of demands from the community. It mentioned 'a list of design issues we have modified because of our conversations with the communities' (Tapia 2018). This is an important explanation but it discounts the impact of legal action and institutional response, and it is doubtful that community pressure alone was sufficient to get Goldcorp to change course. In Argentina, where the institutions were weak and legal actions from civil society were less frequent and less effective, Goldcorp failed to act in the same manner.

In contrast to Argentina, legal changes in Chile in 2010 and 2012 elevated environmental protection significantly. A 2010 reform created a new environmental agency with strong sanctioning powers, and the business community wanted access to specialist environmental tribunals to be able to seek redress when necessary. Thus, the environmental tribunals were created in 2012, with a strong emphasis on scientific and technical expertise. The Supreme Court has overview of some aspects of their work – administration, policy and finances – but in other respects they are independent of external influence. Two of the three judges on each tribunal must have law degrees and the third must have a science degree. In practice, some are economists or engineers, but they all need to have professional experience in environmental issues. Given

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<sup>27</sup> Translation by authors. See <https://www.teck.com/noticias-es/comunicados-de-prensa-es/2015/goldcorp-and-teck-combine-el-morro-and-relincho-projects-in-chile-es>

their expertise and the autonomy of the tribunals, their decisions are more ‘expert, fair, and balanced’ due to the highly technical nature of much environmental dispute (Pring and Pring 2016: 26; Haslam 2018).

In addition, Chilean social movements benefited from technical and legal advice from civil society actors such as OCMAL, Defensoría Ambiental, and independent lawyers (Haslam 2018: 164; ASPINWALL IPRI paper in 2023??). Legal action had an impact on firm behavior. In the El Morro case, as we saw above, the investors withdrew their own EIA in 2014 because of litigation and claims of insufficient consultation, an action that the Alumbrera investors never took.

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