

Harmonizing Growth & Environmentalism in the Peruvian Mining Sector: Lessons from  
Yanacocha

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**Executive Summary:**

This paper examines Peru's potential to foster economic growth by supporting private investment and maximum sustainable exploitation in the mining sector while simultaneously protecting human rights and the environment. Using the widely-scrutinized mercury spill at Yanacocha as a lens through which to analyze the common mistakes and shortcomings of major players in the mining industry, we suggest various policies that would enable those with political and economic power to better address, if not altogether prevent, the various human and environmental costs associated with mining in present-day Peru. Major identified policy problems include conflicting competencies within the Peruvian government's executive branch, lack of enforcement of environmental laws, minimal state presence near mine sites, and multinational mining corporations' lack of communication with and investment in the local communities surrounding the mines they own and operate. Our recommendations include:

- (1) The establishment of a single government body for the oversight and enforcement of environmental regulations.
- (2) The implementation of corporate social responsibility policies that address local needs as expressed by the community themselves.
- (3) The use of NGOs and local leaders as mediators for the resolution of conflicts and consultants for the operations of mining companies.

## INTRODUCTION

How is it that an industry that relies on carving up mountains – mountains that hold religious and mythical value to *campesinos* who have thrived for centuries in their majesty – can contribute to human development and environmental protection? The question reads almost paradoxically, as the business of mining relies necessarily on the exploitation of nature for the generation of profits. In Peru, this is a question that is particularly pertinent and in need of resolution. Mining today accounts for more than 50% of Peru's export revenue and 10% of Peru's now stable and annually increasing GDP; however, frequent uprisings in mining towns reflect local disapproval of social and environmental harm caused by typical mining practices, and furthermore threaten to stifle the productivity of the mining industry. If Peru is to sustain its economic growth in the mining sector, it must simultaneously protect its citizens' human rights and demand respect for the natural environment.

While challenges clearly exist, mining can exist in harmony with local communities and the environment. This paper draws on information gathered from various stakeholders in the Peruvian mining sector to suggest particular policies to address, if not altogether prevent, the various human and environmental harms associated with mining in present-day Peru.

This paper begins by placing mining in historical context, explaining the centuries-old tension between the exploitation of mineral wealth by foreign powers and the resistance to such exploitation by local communities. These communities not only rely on the natural environment for subsistence, but also place great cultural value on its mountains and rivers, which are often negatively

affected by mining practices. This section addresses the constant tension in the present era between a capitalist tendency toward economic growth on the one hand, and a communitarian impulse to protect social fabrics and cultural values on the other. Given this context, in Section II the paper explores one of the most widely publicized mining disasters in recent years: the mercury spill at Yanacocha in June of 2000. The paper examines the human and environmental costs of the spill and outlines the responses of various actors in the spill's aftermath, aiming to highlight shortcomings and missteps that could potentially be rectified in order to better address, or even prevent, similar problems in the future. Section III of the paper outlines the current policy regime in place in Peru, exposing a complicated bureaucracy in need of streamlining in order to adequately manage mining-related problems. This section explains the context in which mining companies, civil society and other non-governmental actors operate, and discusses how private actors can contribute to the cause of human rights and the environment vis-à-vis mining. Section IV offers a series of substantive recommendations to stakeholders on all sides of the issue, including the Peruvian Government, mining corporations, civil society and private persons. These recommendations seek to enable these actors to bring growth and development into harmony with human rights and the environment in Peru.

## I. BACKGROUND ON MINING IN PERU

Peru is the world's second-largest producer of silver, third largest producer of zinc, fourth largest producer of lead, fifth largest producer of copper, and sixth largest producer of gold. Since 1992, Peru has attracted over US\$10 billion in domestic and international investment. Gold alone accounted for 57 percent of Peru's exports and 6.6 percent of Gross Domestic Product in 2003. Between 2001 and 2003, mining accounted for 37 percent of total foreign investment in Peru. Mining contributed 4.5 percent of government tax revenues in 2003, and, despite being a capital-intensive industry, employed over 70,000 people directly and 350,000 people indirectly, many of them in Peru's poorest rural areas.<sup>1</sup> Yet the question remains: How can a country so rich in mineral wealth continue to suffer from extreme poverty and social and environmental injustice?<sup>2</sup> An examination of Peru's mining industry in historical context reveals that from its earliest days, mining has been characterized by a conflict between generating maximum amounts of wealth and protecting local values.<sup>3</sup>

The story begins with the capture of Incan Prince Atahualpa by the Spanish Conquistador Francisco Pizarro during the Battle of Cajamarca in 1532. As myth has it, Pizarro told Atahualpa that

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<sup>1</sup> World Bank, 2004, "Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru," Peru Country Management Unit, Environmentally and Socially Sustainable Development, Latin America and the Caribbean Region 33545 v.2 (unpublished).

<sup>2</sup> www.perusupportgroup.org, (In 2005, more than 50 percent of Peruvians lived in poverty and nearly 25 percent of Peruvians lived in extreme poverty, or on less than \$1.00 per day. Those living in poverty and extreme poverty are disproportionately indigenous, and the province in which Newmont operates is the second poorest in all of Peru.)

<sup>3</sup> Personal interview, Gonzalo Quijandría, Manager Corporate Affairs, Compañía Minera Antamina S.A., March 1, 2007 (hereinafter "Quijandría interview") ("Peru has a really bad history with over 100 years of bad mining standards, and a list of more than 600 environmental liabilities stemming from mines that have never closed properly, mine tailings put in rivers that are polluting water and lakes.")

if he filled the room in which he was being held hostage with gold and silver, he would be granted his freedom in exchange. In Atahualpa's view, this was a nonsensical agreement because the Inca valued many things above gold and silver. Nevertheless, Atahualpa obliged Pizarro's request, furnishing him with more gold and silver than he had ever seen. Unfortunately, Pizarro did not live up to his end of the bargain, and Atahualpa was executed by strangulation on August 29, 1533. After the death of their leader, the Inca were easily conquered, and Spanish rule was declared. So began centuries of deception and distrust in the Andean highlands, where what some remembered as the holy sites of the Inca were recast as objects of great economic potential.

In the 500-year interim, little has changed. Today, the conflict between ancient community values and wealthy foreign power in mining areas parallels the iconic conflict between Atahualpa and Pizarro: communities believe they deserve development in exchange for allowing companies to exploit minerals within their land, while mining companies seem to share Pizarro's preference for ignoring the perceived entitlements of the communities, sometimes despite promises to the contrary. The longstanding Peruvian problem of marginalizing communities such as those in the Andean highlands where people do not speak the majority language, live in extreme poverty, and are geographically isolated continues to cause discord, particularly because in these areas there is limited government presence to negotiate the needs of the communities against the bottom line of the mining companies. "Civil unrest [in Peru] happens in remote areas and there is no policy to address it."<sup>4</sup>

In fact, the isolated nature of mining communities made them prime targets in the 1980s for the Marxist guerilla organization, the Shining Path. Members of Shining Path traveled to these

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<sup>4</sup> Personal interview, Rolando Luque, Head of Social Conflict Unit, Defensoría del Pueblo, Office of the Ombudsman, March 2, 2007 (hereinafter "Luque interview").

remote communities, and because of the absence of State authority, were able to take over the communities and run them for the benefit of their terrorist agenda. The Shining Path exploited the communities' distrust of mining companies to legitimize the terrorist measures they took against mining operations. Thus, during the period of the Shining Path's reign, the mining sector effectively shut down.<sup>5</sup>

However, President Fujimori's authoritarian administration brought the terrorism of the Shining Path to an end in the early 1990s, and positioned Peru for a surge in private investment. With newfound social and political stability, combined with the creation of economic incentives for private investors, the Peruvian mining sector attracted \$10 billion in mining investments between 1992 and 2004 from both domestic and international companies.<sup>6</sup>

Presently, most of Peru's mines are operated by private corporations. These corporations contribute significantly to the Peruvian economy in taxes, investment costs, and voluntary contributions. Currently, the mining industry is experiencing a significant boom, largely stemming from all-time high mineral prices and strong exports to China.<sup>7</sup> While private investment in the mining sector has generated a great deal of wealth in Peru, it has also caused many problems in the local communities where mining takes place. For example, land rights conflicts arose between local campesinos and mining companies when, in granting mining concessions to private companies, the

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<sup>5</sup> de Eiden, Talia Larisa Vela Vargas. Dissertation. "*Environmental Policy Under Political Transition: The Peruvian Mining Sector and the Yanacocha Goldmine*," (2006) (available at [hss.ulb.uni-bonn.de/ulb\\_bonn/diss\\_online/phil\\_fak/2006/vela\\_vargas\\_de\\_eiden\\_talia/0743.pdf](http://hss.ulb.uni-bonn.de/ulb_bonn/diss_online/phil_fak/2006/vela_vargas_de_eiden_talia/0743.pdf)) (hereinafter "de Eiden") The legacy of the Shining Path remains in these towns: "Opening mines and working with communities where Shining Path operated in the 1980's is incredibly difficult [even today], because these communities remember the Shining Path and are skeptical that mining companies can have their interests in mind." Quijandria interview.

<sup>6</sup> World Bank, 2004, "*Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru*," Peru Country Management Unit, Environmentally and Socially Sustainable Development, Latin America and the Caribbean Region 33545 v.2 (unpublished).

<sup>7</sup> Personal interview, Lucien Chauvin, Reporter, *The Economist*, Feb. 2, 2007 (hereinafter "Chauvin interview").

Peruvian government essentially sold the right to what lies beneath the land. They could not, however, sell the surface of the land itself, which was owned by campesinos, many of whom have used their land for centuries for agriculture and other purposes. Campesinos protested this sale, as, according to their worldview, land is not divisible for purposes of dual ownership. The sales, however, were final and enforced, and local peoples were forcibly displaced from their land or compelled to redesign their land use in ways that disrupted ancient community practices.

In addition, local communities resent the fact that while private companies are generating billions of dollars in profits through their operation of local mines, very little of that wealth has had a tangible effect on local livelihoods and development.<sup>8</sup> In some mining towns, the majority of the population remains without electricity, without access to markets for locally produced goods, and without adequate facilities to address education, healthcare and other basic needs. Such starkly inequitable distribution of profit naturally spawns anger in communities where foreign corporations are turning exceptional profits by exploiting minerals from land the communities consider their own – if not by legal right, than by virtue of tradition and their dependence on that land.

Other problems commonly caused by mining operations in current mining towns include the drying up of rivers and streams relied upon by the historically fish-dependent communities. Also, farmers generally report that water contaminated by arsenic and cyanide has adversely affected their crop outputs. Increases in mining claims have driven up land prices, which places a significant burden on the poorer members of the community who may no longer be able to purchase land due to its new status as a marketable commodity and its increasing value. As a result of all of these factors, out-

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<sup>8</sup> Chauvin interview; de Eiden.

migration has become increasingly common, significantly altering the social fabric of once unified and harmonious communities.<sup>9</sup>

All of the abovementioned tension-causing factors are present in Cajamarca, Peru, where Newmont Mining Corporation, the majority shareholder and sole operator of the Yanacocha mine, is currently learning the hard way that its success as a company is inextricably tied to the livelihoods of those in the communities where they operate.

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<sup>9</sup> Bury, Jeffrey. "Livelihoods in transition: transnational gold mining operations and local change in Cajamarca, Peru." *The Geographical Journal* 170 (March 2004): 78-91.

## II. A CLOSER LOOK: THE MERCURY SPILL AT YANACOCHA MINE

A product of the private foreign investment era, Minera Yanacocha, located in the Peruvian region of Cajamarca, is the largest gold producer in South America and has become one of the most famous and profitable large-scale mining operations on Earth. Constructed by Newmont Mining Corporation and its Peruvian partner, Compañía de Minas Buenaventura, with support from the World Bank's International Finance Corporation, Yanacocha – the “crown jewel” of Newmont's mining operations – was opened in 1993.<sup>10</sup> By 2004, the mine moved 300,000 tons of rock each day. By 2005, Newmont had removed more than 19 million ounces of gold from Yanacocha, worth more than \$7 billion.<sup>11</sup> In the same year, Newmont sold a record 3.3 million ounces of gold from Yanacocha.<sup>12</sup>

From the beginning, the mine created a tension typical in mining communities seeking to balance jobs and development against health, the environment, and traditional lifestyles. While certain members of the community were employed by the mine and benefited from the increased value of their land, others remained in the extreme poverty characteristic of the region. The communities surrounding the mines were quickly divided into “haves” and “have-nots” as the social fabrics of the once agrarian community unwound. Prostitution boomed while agriculture plummeted, as new demands and land use patterns reconfigured the small towns of Cajamarca around the activities driving the mine.

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<sup>10</sup> Newmont Mining Company Website. [www.newmont.com/en/operations/sthamerica/yanacocha/index.asp](http://www.newmont.com/en/operations/sthamerica/yanacocha/index.asp).

<sup>11</sup> “The Cost of Gold: Treasure of Yanacocha Tangled Strands in Fight Over Peru Gold Mine.” *Times* [New York] 25 October 2005, p. A1.

<sup>12</sup> Newmont Mining Corporation (2005). *Newmont Annual Report 2005*. Nevada: Newmont Mining Co.

The tension reached a breaking point on Friday, June 2, 2000. That morning, a leaky flatbed truck loaded with over 200 kilograms of mercury in poorly secured canisters not intended for the transfer of mercury left the Yanacocha mine.<sup>13</sup> Over the next few hours, the truck spilled three-fourths of its mercury load as it maneuvered a rocky and twisted mountain roadway running through the villages of San Juan, Choropampa, and Magdalena.<sup>14</sup> Local residents came in contact with the mercury along the road, collecting it, handling it, and some, thinking it possessed gold, bringing it home to cook.<sup>15</sup>

#### Human Consequences of mining and the mercury spill at Yanacocha

In the immediate aftermath of the mercury spill, 260 people were treated for mercury intoxication, though the popular press reports that more than 1000 people believe they were affected by the spill. Elevated mercury vapor was present in 78 houses. In 2001, citizens of Cajamarca underwent blood analysis to test for the presence of mercury, and every person tested manifested levels of toxicity double or triple the values considered normal by the Ministry of Health, which relied on standards set by the World Health Organization.<sup>16</sup> Manifestations of mercury poisoning in the town included purplish, burning skin-rashes, hair loss, nausea and vomiting, respiratory ailments, searing headaches, joint and muscle aches and even blindness.<sup>17</sup> One local man laments, “Had they just shot me in the head, I would have felt better. Nothing could be worse than seeing my daughters

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<sup>13</sup> Office of Compliance Advisor/Ombudsman of the International Finance Corporation. “Investigation into the Mercury Spill of June 2, 2000 in the Vicinity of San Juna, Choropampa, and Magdalena, Peru.” July 2000. [http://www.yanacocha.com.pe/pdf/set11/3indrepcao\\_eng.pdf](http://www.yanacocha.com.pe/pdf/set11/3indrepcao_eng.pdf).

<sup>14</sup> Ibid.

<sup>15</sup> “The Cost of Gold: Treasure of Yanacocha Tangled Strands in Fight Over Peru Gold Mine.” *Times* [New York] 25 October 2005, p. A1.

<sup>16</sup> de Eiden.

<sup>17</sup> Missy Ryan, “Plight of Peru Town Dim after Mine’s Mercury Spill,” Reuters. July 3, 2002. <http://www.planetark.org/dailynewsstory.cfm/newsid/16688/story.htm>.

suffer and hear them tell me about the tremendous pain in their eyes, their backs, their heads, day-in and day-out. What can a father say to his sick children?"<sup>18</sup>

Concern exists that because over one-third of the spilled mercury was never unaccounted for, additional mercury-related health problems may arise in the future. Newmont provided health insurance to citizens exposed to the chemical for follow-up treatments, but that insurance expired in 2005, and health problems persist to the present day. For example, several children from the region have been born missing fingers and toes. Miscarriages are also occurring at an alarming rate, while children suffer from chronic nosebleeds, respiratory infections, loss of sight and hearing, chronic migraine headaches and an inability to concentrate.<sup>19</sup>

### Environmental Consequences

The consequences of the mercury spill for the natural environment are less severe, though more difficult to quantify. Because the spill occurred in the dry season and because mercury does not generally bioaccumulate in terrestrial plants or herbivorous animals, local ecological consequences did not extend significantly beyond aquatic animals,<sup>20</sup> many of which were already under significant stresses due to the general Yanacocha operation.<sup>21</sup>

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<sup>18</sup> Friends of the Earth International (FOEI), "Dividing and Polluting: Yanacocha Gold Mine in Peru." <http://www.foei.org/publications/link/mining/22.html>.

<sup>19</sup> Ibid. Ryan 3 July 2002.

<sup>20</sup> Ibid. "Investigation into the Mercury Spill of June 2, 2000."

<sup>21</sup> Newmont uses the cyanide leaching method for extracting gold from Yanacocha; that is, gold is chemically sifted from huge piles of low-grade ore using a water-based sodium cyanide solution. At Yanacocha, Newmont must extract and leach approximately 30 tons of dirt and rock to recover just one ounce of gold. Once the massive amounts of cyanide have trickled over the ore, they are stored in lined pits on site. Leaching, however, is inevitable, as rain often causes these pits to overflow, and toxic waste water then filters into the soil, the water table, and thus, the local water supply. Cyanide poisoning in the environment has caused fish to die out, land to be less fertile, and contributes to disease in livestock who graze and drink in untreated areas. See, [www.miningnews.org](http://www.miningnews.org).

### The Aftermath: What went wrong?

Many actors designed and implemented strategies to address the damage sustained in the mercury spill. Their responses reflect an effort to strike a sustainable balance between economic growth and human and environmental security. Though the goal of these differently situated parties is the same, at least rhetorically, the parties' differing valuations of the elements to be balanced yield varying project designs. For example, "[W]here Newmont sees a new reserve of wealth... local farmers and cattle grazers see sacred mountains, cradles of the water that sustains their highland lives."<sup>22</sup> These different visions of what constitutes sustainable development result in distinct, and sometimes dissonant, policies designed to address the inherent hazards of the modern mining industry. Indeed, the need to agree on a definition of sustainability is a central requirement and first step in the effort to create policies that harmonize growth and development with the environment and public health.

### *Government Response*

Immediately following the infamous Yanacocha mercury spill, the Fujimori administration manifested its disapproval by fining Newmont Mining Corporation. However, the fine was for only US\$500,000, an insignificant sum for a mine that generated US\$1 billion in exports in 2003.<sup>23</sup>

Subsequent administrations have taken similarly timid actions despite the protests of Cajarmarquinos, who have often taken to the streets to voice their disapproval of Newmont's

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<sup>22</sup> Perlez, Jane, Lowell Berman, Marlana Telvick and Natasha del Toro. "Tangled Strands in Fight Over Peru Gold Mine," *New York Times*, October 25, 2005.

<sup>23</sup>"Wealth and Sustainability: The Environmental and Social Dimensions of the Mining Sector in Peru." The World Bank. 33545 v.2.

operation of the Yanacocha mine. The Peruvian government seems to intervene only when the people of Cajamarca protest so vehemently as to cause Yanacocha to shut down entirely, forcing the mine to incur millions of dollars in losses per day and the government, by extension, to lose hundreds of thousands of tax dollars.<sup>24</sup> Concerned with both the overall economic growth of the country and the well-being of its citizens, the Peruvian government is typically caught in a tug of war between these historically opposing interests. This tension is in part responsible for a government mining policy with respect to the environment that is vague, undefined, and characterized by conflicting bureaucracies (discussed at length below). Such a policy leaves little room for the effective management of mining-related problems and on-the-ground conflicts. It seems that in trying not to favor either growth and development or human rights and the environment, the Peruvian government tends to punt the creation of conflict-resolution strategies to the affected parties, remaining as neutral as possible so as not to damage its relationship with either the wealth-generating mining companies or the populations of mining towns.

Most recently, the new Garcia administration negotiated an agreement with Yanacocha whereby the shareholders in the mine will contribute a combined \$757.5 million over the next five years to “voluntarily” create a “Fund for Equality,” intended to address the extreme poverty, hunger, lack of education and overall inequality in mining towns. This agreement follows the companies’ resistance to a royalty tax on windfall profits as promised by Garcia in his campaign.<sup>25</sup> Garcia eventually agreed to the voluntary payment system whereby mining companies voluntarily contribute to local development efforts for a short period of time in exchange for continued

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<sup>24</sup>Salazar, Milagros. “Peru: Residents Fight Back as Gold Mining Pollutes Their Water,” Global Information Network. New York: 21 September 2006, p. 1.

<sup>25</sup> “Mining Policy Reaps Dividends,” OxResearch. Oxford: 30 October 2006. p.1

exemption from paying royalties on extracted minerals.<sup>26</sup> While this is a very significant amount of money that Yanacocha will contribute to local development efforts, critics of the agreement note that “the government has not acted in a very transparent manner, as it has failed to explain what formula was used to set the total amount.”<sup>27</sup> What is more, the accord represents another compromise, palatable to the mining companies who would likely have to invest that much money in mining infrastructure in the communities regardless of the agreement.<sup>28</sup> In addition, the euphemistic language that the government has used to describe the agreement, calling it, for example, “an extraordinary voluntary payment,” allows the government to cater at once to the public image the mining companies are trying to foster, and simultaneously to appear responsible, above all, to its citizens.<sup>29</sup>

Regardless of the wisdom of this latest compromise, the \$151.5 million annual payments are to be administered by the company, the beneficiary communities, and the local and regional governments. Some doubt the efficacy of this new plan, however, given the government’s historic failure to transfer funds for spending by municipal and regional governments, and, indeed, only one company, Antamina, has formalized its voluntary payment programs and has begun funding those projects.<sup>30</sup> For example, last year, nearly \$300 million from mining taxes – money reserved by law for development programs in mining communities – was held up in Lima because of typical bureaucratic delays in approving spending projects. Garcia has vowed to decentralize the fund disbursement system, and the coming months may reveal that his administration will produce more

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<sup>26</sup> Quijandría interview.

<sup>27</sup> Milagros Salazar. “Mines Making Billions Agree to Pay Millions for the Poor,” Global Information Network. New York: Aug 28, 2006. p. 1.

<sup>28</sup> Chauvin interview.

<sup>29</sup> Ibid. Salazar.

<sup>30</sup> Chauvin interview.

tangible results than his predecessors in the Toledo Administration. Garcia's plan is to create a separate fund for each mining region. At the same time, the Ministry of Economy and Finance is to set up small subsidiary offices in each region to assist with financial procedures. These measures aim to ensure effective projects are implemented in the shortest possible time.<sup>31</sup>

Even if this funding does materialize, some skeptics continue to doubt the capacity of local governments to administer such an increase in revenue. Municipal officials who have never managed more than US\$100,000 may be working with individual programs that are funded with millions of dollars.<sup>32</sup> This capacity is a key concern of the mining companies as they set up their voluntary programs, many of which will include capacity building components so that local governments can more efficiently administer programs when the companies are no longer involved.

### *Corporate Response*

According to Newmont, its delayed reaction to the mercury spill was a result of the "confusion, disbelief and lack of preparation" common to many emergencies.<sup>33</sup> Critics of the company suggest Newmont was simply trying to downplay the incident and that the company only took affirmative steps to address the situation once the press reports exposed the serious health and environmental damage caused by the spill. Whatever the case, it was not until one week after the spill that Newmont mobilized a comprehensive response team to manage the situation.<sup>34</sup>

However, once the response team was in place, Newmont did take a series of laudable steps to address the problems caused by the spill. For example, the company undertook a search to locate

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<sup>31</sup> Ibid. Salazar. (quoting Economist Humberto Campodonico, a columnist for La Republica)

<sup>32</sup> Quijandria interview.

<sup>33</sup> Ibid. "Investigation into the Mercury Spill of June 2, 2000."

<sup>34</sup> Newmont did not have a comprehensive procedure in place to identify, record, or respond to potential environmental hazards in place at the time of the spill. Ibid. "Investigation into the Mercury Spill of June 2000."

and retain both local medical doctors and world-renowned experts in the field of mercury toxicity who were willing to aid in the crisis response. In addition, Newmont provided assistance to the Cajamarca Regional Hospital, and to local medical clinics, in the form of medicines, nurses, ambulances, laboratory assistance, database compilation, support personnel and supplies.<sup>35</sup> Newmont and its partners worked closely with the Peruvian Directorate General of Environmental Health and the Peruvian Civil Defense Authority to identify which homes had unsafe levels of mercury present in the indoor air. When unsafe concentrations of mercury were identified, residents were removed from their homes and provided temporary housing until their homes could be cleaned to levels that were safe for occupancy.<sup>36</sup>

Despite these efforts, evidence shows that local “hatred for the mine runs deep.”<sup>37</sup> Newmont itself acknowledges that the mine has brought about changes affecting the lives and customs of Cajamarquinos. What is more, the corporation acknowledges “that we have not always understood the magnitude of those changes and at times, did not hear the legitimate concerns expressed by the people of Cajamarca.”<sup>38</sup> Guy Landsdown, Yanacocha's operations manager, says the corporation “has got a lot of work to do on the social front.”<sup>39</sup>

Thus, in the years since the mercury spill, Newmont Mining, at least rhetorically, has wholeheartedly embraced Corporate Social Responsibility (CSR), joining the United Nations’ “Global

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<sup>35</sup> “Mercury from Gold Mine Dumped in Transit,” Environment News Service. 16 June 2000. <http://www.corpwatch.org/article.php?id=1281>.

<sup>36</sup> “Mercury Spill Incident Report: Summary and Data Compilation,” 16 April 2001. <http://www.yanacocha.com.pe/pdf/set11/1msir.pdf>.

<sup>37</sup> Weitzman. “Newmont Now & Beyond 2003: Minera Yanacocha, South America,” <http://www.newmont.com/en/pdf/nowandbeyond/NB2003-Yanacocha.pdf>.

<sup>38</sup> Now & Beyond 2004.

<sup>39</sup> Ibid.

Compact” to respect human rights, the environment, and to “work against all forms of corruption.”<sup>40</sup> It has also developed an internal auditing mechanism whereby it evaluates its performance in these areas annually, recounting its successes and identifying challenges and goals for the future. In 2003, the company constructed an alternate access road to keep large trucks off Cajamarca’s main thoroughfare, built an addition to the regional hospital, upgraded six local schools, and implemented a city security program. Furthermore, in order to better control sediment resulting from mining operations, Newmont constructed a sediment control dam.<sup>41</sup> In 2004, the consortium spent \$50 million on a reverse osmosis plant to clean discharged water, \$20 million on dams to prevent sediment seeping into rivers, and \$6.5 million on other environmental programs.<sup>42</sup>

However, despite millions of dollars spent toward achieving corporate social and environmental corporate responsibility, Newmont remains at odds with the communities of Cajamarca. In fact, the relationship between Newmont and local communities has become so strained that the company has had to abandon two major mining projects in the past three years.

### *Community Response*

One example of this continuing local distrust and frustration is the protest surrounding Yanacocha in 2004. In October 2002, in response to citizen’s concerns about water contamination and other potential mining impacts, the regional government of Cajamarca declared the Cerro Quilish watershed, an area in which Newmont was looking to expand, a protected area off limits to mining. Newmont saw the situation differently, however, and managed to convince a high court that

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<sup>40</sup> “What is the Global Compact,” <http://www.unglobalcompact.org/AboutTheGC/index.html>.

<sup>41</sup> “Newmont Now & Beyond 2003: Minera Yanacocha, South America,” <http://www.newmont.com/en/pdf/nowandbeyond/NB2003-Yanacocha.pdf>.

<sup>42</sup> Weitzman, Hal. “Mining Groups Struggle to Operate,” *Financial Times*. 4 June 2005. <http://www.corpwatch.org/article.php?id=12370>.

it, and not the regional government, had a property right in the watershed. With the court's ruling, Newmont was free to begin exploiting the natural resources at Cerro Quilish.

However, in the summer of 2004, local NGOs expressed concerns about the potential environmental impact of the new mine, and the Ministry of Energy and Mines instructed Newmont to respond. Instead, the corporation began excavations. Outraged, local communities began a two-week blockade of the roads to the new mine, but Newmont did not suspend its operations. To the contrary, Newmont inflamed local passions by ignoring protestors, spending \$2 million to ferry personnel and supplies to the site by helicopter. The protests turned violent; 27 farmers and seven policemen were injured. Some 10,000 people participated in a 24-hour strike. In addition to long-term costs such as damage to stockholder confidence and Newmont's reputation, Newmont's stock price plunged eight percent during the blockade.<sup>43</sup> In November 2004, Newmont agreed to stop prospecting, asked the government to revoke its license to do so, and issued an unprecedented public apology.<sup>44</sup> Efforts to mine at Cerro Quilish have not been revived and the watershed remains entirely intact. International press reported that "protesters won hands down."<sup>45</sup>

In light of further unrest during 2006, what Newmont believed to be an isolated incident in 2004 now appears to be part of a concerted strategy developed by the people of Cajamarca. With one successful protest under their belts, Cajamarquinos took the streets again in August and September of last year to protest Newmont's proposed expansion into the Combayo valley. The mayor of Combayo, Luciano Llanos, said that protestors were seeking to protect local water supplies. "This project has not brought us benefits," he said. "We have demonstrated how our lagoons, our springs

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<sup>43</sup> Ibid. "Managing Social Risks."

<sup>44</sup> "Halting the Rush against Gold: Mining in Peru," *The Economist*. 374:8412, p. 48. (5 February 2005).

<sup>45</sup> Ibid.

are being destroyed by this project.”<sup>46</sup> On August 2, 2006, the conflict came to a head when local farmer Isidro Llanos was shot and killed, along with some of his supporters.<sup>47</sup>

Shortly after this incident, local residents blocked the roads leading to Yanacocha, preventing the company's trucks from getting in or out, and demanded the clarification of Llanos' death, measures to protect local water supplies, and social development programs. Reports indicate the six-day blockade, which briefly shut down the mine, caused \$1.8 million a day in losses, while the state lost \$615,000 a day in taxes.

President Alan García, who took office approximately one month earlier, sent a high-level commission to mediate talks between the community and the company. In the end, the protestors secured three important outcomes: Newmont and its partners agreed to compensate the family of Isidrio Llanos; the government committed to build a highway nearby and test local water; and Newmont agreed to construct a water treatment plant for the water to be affected by the mine's extension.<sup>48</sup>

While the peace may be secured for the time being, problems in this mining region are hardly over. The U.N. recently sent a working group to Cajamarca to investigate threats made against a local leader, Father Marco Arana, who has been a key community organizer against what he believes are irresponsible mining practices since the mercury spill in 2000. Their investigation, with the help of local NGOs and national human rights watchdogs, has uncovered a broad scheme of spying and threats paid for and contracted through Yanacocha's private security company. Computer logs have been uncovered containing video footage and written details of Father Arana's every move

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<sup>46</sup> “Latin American Update,” (August 2006) <http://www.minesandcommunities.org/Action/press1196.htm>.

<sup>47</sup> Personal interview, Rocio Peñafiel, Lawyer, Asociacion Pro Derechos Humanos (APRODEH), March 1, 2007 (hereinafter “Peñafiel interview”).

<sup>48</sup> No Dirty Gold Website, “No Dirty Gold (NDG) Partner Brokers Settlement at Peruvian Mine,” <http://www.nodirtygold.org/NDGnews.cfm>

– from when he wakes up to where he eats lunch to who he meets with in the afternoon. Even local ice cream vendors have been co-opted to spy on the priest, and he receives daily death threats on his cell phone.<sup>49</sup> According to a member of the U.N. working group, “[The security company] works for Yanacocha, and Yanacocha is in conflict with the campesinos of Cajamarca who receive advice and support from Father Arana. So here we see a link. What worries us is that the state's monopoly over the use of force has begun to be yielded to private security companies. Regulations are needed here.”<sup>50</sup> Amnesty International has called for urgent action on Father Arana’s behalf, and despite the threats and spying clearly intended to discourage Father Arana from continuing his work, the priest continues to provide advice and support to local community members concerned about pollution and indigenous rights.

When the protests of 2004 and 2006 are examined together it seems likely that Cajamarquinos believe that massive protest is an effective tool to compel Newmont to meet their ongoing demand that the environment be protected and the region – the second poorest in all of Peru – benefit from the billions dollars generated by the mine. In terms of balancing economic growth against social and environmental security, locals have made clear that they often place greater value on the latter, and have shown a willingness to sacrifice production and possibilities of increased wealth in favor of protecting the environment and local customs. This willingness to protest is likely a consequence of some of the very practices that local communities complain about when discussing Newmont, such as the fact that many Peruvian employees and services for the employees are brought in from outside Cajamarca. In contrast to other major industrial facilities in Peru, such as La Oroya, a

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<sup>49</sup> Peñafiel interview.

<sup>50</sup> Ángel Paez, “UN Mission Probes Private Security Groups,” Inter Press News Service. February 1, 2007. <http://www.corpwatch.org/article.php?id=14350>.

large smelter in central Peru, the local population in Cajamarca feels less dependent on the Yanacocha because of Newmont's employment and subcontracting practices.<sup>51</sup>

While Newmont insists that local expectations for environmental and human security are too high, and that a corporation cannot be expected to perform services typically provided by governments, the people of Cajamarca are overwhelmingly averse to way the mine is operated and are suspicious of Newmont, if not altogether untrusting given the companies ability to meet higher environmental and public health standards in the U.S. According to Rocio Peñafiel, a human rights attorney, “[The community] is not against mining, but against irresponsible mining. The community just wants the mining companies to follow the law, and if they don't, that they pay for it.”<sup>52</sup>

A series of events and conflicts that has resulted in a citizens' strategy based on civil unrest cannot be the safest, most efficient, or most desirable system for reaching a policy point that balances the economic production of mines with the health and environmental welfare of communities. The government, citizens, mining companies, and NGO's must work together to create institutional frameworks and policies that facilitate the harmonization of economic growth and development with the protection of human rights and the environment.

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<sup>51</sup> Personal interview, Silvia Ibanez Salazar, Environmental Legal Advisor, Asociacion Civil *LABOR*, March 1, 2007 (hereinafter “Ibanez interview”).

<sup>52</sup> Peñafiel interview.

### III. Peruvian Environmental Policy Setting

The Yanacocha mercury poisoning disaster, Newmont’s continued expansion efforts, and all current Peruvian mining projects operate within, and are affected by, Peru’s fragmented environmental policy setting. This section explains the formal legal framework and legislative instruments that make up the Peruvian environmental policy realm and then shows how, in practice, lack of enforcement by the executive branch allows mining companies to operate with minimal oversight.

#### Constitutional and Legislative Framework

During the 1980s, uncontrolled industrial and mining discharges polluted Peruvian water and air resources. Environmental regulatory efforts were uncoordinated, hampered by scattered and conflicting legislation, widespread noncompliance, and poor enforcement.<sup>53</sup> Although the Peru did have a weak set of pre-1990s environmental laws, which were mostly developed for health purposes a more comprehensive and (theoretically) powerful framework emerged during the early 1990s.

The Constitution of 1993, which serves as the basis for Peru’s environmental regulatory framework, could serve as a powerful tool for environmental protection – with proper enforcement.<sup>54</sup> The 1993 Constitutional drafters added environmental protection clauses for sustainable use of natural resources, sustainable development and biodiversity to the existing constitutional right for all Peruvians to have the right to “enjoy a balanced environment adequate to the person’s life

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<sup>53</sup> Public Broadcasting System website, Peru Environmental Page, [www.pbs.org/wgbh/commandingheights/lo/countries/pe/pe\\_environmental.html](http://www.pbs.org/wgbh/commandingheights/lo/countries/pe/pe_environmental.html),

<sup>54</sup> Chauvin interview.

development.”<sup>55</sup> The Constitution reflects the political setting of its time, in that it includes two opposing themes: 1) neo-liberal, free-market ideology, and 2) the environmental protection enthusiasm of the international Rio Summit on the Environment of 1992.<sup>56</sup> This constitutional conflict has yet to be settled.

As an example of the neo-liberal strain of Peruvian lawmaking contradicting good environmental intentions, one of the most important laws with respect to environmental policy frameworks is the 1991 Law of Private Investment. Although the law is mostly aimed at attracting foreign direct investment, it also loosened environmental standards and, more importantly, divided environmental competencies equally between all the executive Ministries. Divided competencies means that, instead of using an executive body with overarching environmental powers to make and enforce national environmental policy, each Ministry is the sole environmental authority in its sector. Further, no attention is paid to serious problems of overlapping sector authority, and the most powerful Ministries tend to dominate in cases of sector conflict.

With respect to specific legislation, Peru has developed a respectable environmental framework.<sup>57</sup> However, it is important to note that some laws have codicils stating “*si se puede*,” meaning “if it is possible,” which effectively gives companies who do not wish to comply an easy out.<sup>58</sup>

The first Environmental and Natural Resource Code (CMARN) (*Codigo del Medio Ambiente y los Recursos Naturales*), implemented in 1994, created the outlines for effective national environmental policy, but did not allocate enforcement or financial powers. In 1995, the Law of the

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<sup>55</sup> Peru Constitution of 1993, [www.congreso.gob.pe](http://www.congreso.gob.pe), Peru Constitution of 1979.

<sup>56</sup> de Eiden.

<sup>57</sup> Chauvin interview.

<sup>58</sup> Personal interview, Eduardo Niz, Director, Corplab, March 2, 2007 (hereinafter “Niz interview”).

National Council for the Environment created the executive branch environmental administration system of Peru. The law designates the National Council for the Environment (CONAM) as the highest level of the environmental administrative system, with the objective of creating national policy on the environment that other sectors will implement. Although CONAM is the highest body in the environmental sector, it was given formal status below the other sector Ministries, and, consequently, the Ministries do not necessarily view CONAM regulations as binding.

In 2005, the Peruvian Congress passed the General Environment Law, updating the outdated environmental code from the mid-1990s and tightening some environmental standards. The law, however, is a mixture of environmental default rules taken mostly from developed countries, and does not adequately take into account the limitations inherent in a developing country setting like Peru.<sup>59</sup>

#### Executive Branch Institutional Framework: Macropolitical Setting

The Peruvian executive branch is the most powerful branch of government. With respect to the mining sector's environmental footprint, the most important executive bodies include the Ministry of Mining and Energy (MEM), the National Council on Environment (CONAM), and the Ministries of Health and Agriculture. Although CONAM is formally charged with environmental policymaking, the Law of Private Investment gave environmental powers to each individual sector, meaning that each Ministry is more powerful than CONAM in their respective sectors. This power allocation has set the stage for environmental policy conflicts between Ministries, especially between the MEM and the Ministry of Health.

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<sup>59</sup> Niz interview.

## CONAM

Peru's environmental authority, CONAM, is conceived of as a sub-Ministry body, with mainly advisory powers. These powers include policy elaboration (although this has been largely hijacked by the Ministries), political coordination, and survey of sector environmental policies. Notably, CONAM's powers do not include implementation or enforcement, although the 2005 General Environment Law did endow CONAM with a token enforcement power.

In theory, CONAM should be developing environmental policies that the various Ministries will implement. Nonetheless, in practice, the respective Ministry environmental units are more proactive in developing sector environmental agendas; the most powerful Ministries (especially MEM) control the environmental policymaking process. The decision to allocate environmental powers among the Ministries instead of giving the sole power to CONAM was meant to reduce hurdles to foreign investment, but has also had the effect of furthering environmental degradation.

CONAM has been most successful in working collaboratively with regional and local governments to create environmental action plans, reports, and assessment. However, an implementation assessment of these initiatives has not been conducted.<sup>60</sup>

## Ministry of Energy and Mines (MEM)

Based on the economic strength of the mining sector versus other sectors, and mining's paramount importance to the Peruvian economy, MEM is the executive body with the most power over the mining industry's environmental consequences. In Peru, economics take precedence over

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<sup>60</sup> De Eiden.

the environment (and human health), and thus MEM runs mostly unrestrained over the environmental powers of other formally equal executive bodies, as well as the legislative and judicial branches of government.<sup>61</sup> Additionally, MEM is closely aligned with the interests of the mining companies. One commentator described MEM as being “in the pocket of the mining companies.”<sup>62</sup>

MEM’s major enforcement unit for mining policy is the General Direction for Mining (DGM), which is formally equal to MEM’s General Direction for Environmental Affairs (DGAA), the unit responsible for mining environmental protection policy. However, reminiscent of CONAM’s lack of enforcement powers, the DGAA is also without enforcement powers. DGAA depends on DGM for enforcement, and as DGM is much more powerful and heavily biased toward mining operators, enforcement of Peru’s network of environmental laws rarely takes place.<sup>63</sup>

Although DGAA is less powerful than DGM, DGAA does have the power to evaluate and rule on Environmental Impact Assessments (EIAs) and environmental denunciations of entities that fail to comply with environmental regulations. Still, an EIA disapproval or a denunciation must be enforced through DGM, and DGAA’s general policy is to help mining companies toward EIA approval rather than act as a barrier.

For all the power of DGM, however, it lacks the capacity to monitor the environmental consequences of mining in Peru, including water quality and air pollution, which affect human health, agriculture, fisheries and other ecosystems. Private contractors, hired by the mining companies, not the government, perform these monitoring functions.

In recent weeks, the Peruvian government has created a supervisory body for the mining industry called the Supervisory Organism over Mining Investment (OSINMIN). It is a supervisory

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<sup>61</sup> Chauvin interview. (With respect to mining and the environment, “The Ministry is the judge and jury here.”)

<sup>62</sup> Id.

<sup>63</sup> de Eiden

body endowed with full enforcement power over environmental regulations pertaining to mining. According to spokespersons at MEM, the purpose of OSINMIN is to prevent MEM “from being judge and jury” of environmental laws, given that they until now that have been responsible for setting and enforcing environmental norms and also promoting private investment in the mining sector. He says, “MEM should be an organism that promotes investment. When it performs the two functions, law enforcement and investment promotion, it generates conflict.”<sup>64</sup>

Skeptics note that OSINMIN is funded in part by energy companies, immediately calling its impartiality into question. Additionally, the government created a similar body to protect indigenous rights, and that body has since been swallowed up by the office concerned with women and children.<sup>65</sup>

### Enforcement Gaps

The value system within Peru’s executive branch, which places economic gain from mining so far above environmental health, is the major cause of the yawning gap between the environmental laws on the books and the enforcement in the field.<sup>66</sup> “The government itself is the biggest culprit in not complying with environmental and remediation legislation.”<sup>67</sup>

One outgrowth of this value system is the implementation failure of the Environmental Impact Assessment process. The government’s stated goal for the EIA process is to “reach a harmonic development between mining industry operations and the environment.” Like most formal policy in Peru, the reality is far from what is on paper. EIAs have been required for new investment projects

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<sup>64</sup> “MEM presentará proyecto de ley para crear organismo regulador en minería,” 24 Horas Libre Peru. September 4, 2006. <http://www.24horaslibre.com/economia/1157385860.php>.

<sup>65</sup> Chauvin interview; Peñafiel interview.

<sup>66</sup> Peñafiel interview.

<sup>67</sup> Chauvin interview.

since 1993, but public hearings on the documents are at the discretion of the DGAA. The highly technical EIAs are not available to the public except during public hearings. Additionally, participation in these hearings takes place in Lima and can only be obtained for a fee. These requirements are prohibitive to citizens of most Peruvian communities affected by mining.

Making the EIA process even less effective, companies often manipulate monitoring data to hide the true environmental effects of mining. Sometimes, labs hired to test data will design tests to reach a conclusion desired by the companies. Or, company workers will take samples from clean areas instead of contaminated areas. One lab that tested samples from the Yanacocha area brought in by citizens, not Newmont, said that “the numbers they had didn’t correspond with reality.”<sup>68</sup>

However, on a positive note, the Peruvian Congress has passed some mining closure laws in the last few years requiring that mining companies operating in the country put funds in an escrow account during operation to pay for environmental remediation that will become necessary when mines eventually close.<sup>69</sup> Still, since there has never been a Peruvian mine that has been properly closed,<sup>70</sup> it remains to be seen how the escrow funds will be used and whether the funds will be sufficient to cover the environmental damage.

### Conflicting Environmental Competences at the Ministry Level

Due to the allocation of environmental regulatory power among Ministries with overlapping mandates, conflicts among complex sector environmental policies are common and problematic –

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<sup>68</sup> Niz interview. (Niz noted that his lab had a hard time entering the market because there are not many honest labs in Peru.)

<sup>69</sup> Chauvin interview.

<sup>70</sup> Quijandría interview.

especially because the power balance is in favor of the Ministry of Energy and Mining's lax environmental standards.<sup>71</sup>

The Ministry of Health (MoH) has an extremely well-developed environmental unit because it was the first governmental body endowed with environmental powers to control pollution to protect human health. The conflict between MEM and MoH arises because MoH has created a sophisticated array of environmental regulations – including policies on environmental protection, water quality, biological agents, gases, noise, and other health-related environmental effects – that often clash with MEM environmental policies. Most significantly, MEM and MoH have a fundamental disagreement as to how pollutants should be regulated. MEM favors point-of-source pollution control regulations, whereas MoH has ecological limits standard for the environmental media (water, air, etc.) that absorbs the pollutants. Multiple sources in concentrated areas could combine to create an unacceptable level of pollutants within an ecological body while still meeting point-of-source limits. Companies operating in Peru pay the price of submitting wholly different reports on pollutant output to MEM and MoH, but due to the value placed on the mining industry, the separation of environmental competences, and the overall power of MEM, MEM pays no heed to mining company violations of MoH standards.<sup>72</sup>

The Peruvian city most damaged by mining-related activities is La Oroya, a city that has been blanketed in lead by a smelter owned by the notorious U.S.-based Doe Run Co. smelter. In 2002, the people of La Oroya filed a claim against the Ministry of Health for not enforcing environmental and health standards against Doe Run. The outcome of the suit was an environmental monitoring agreement between MoH and Doe Run, financed by the United States Agency for International

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<sup>71</sup> Niz interview.

<sup>72</sup> de Eiden.

Development (USAID).<sup>73</sup> Despite the agreement, Doe Run has done very little substantive work to clean up the lead damage.<sup>74</sup>

The unit within the Ministry of Agriculture that clashes with MEM is INRENA (National Institute for Natural Resources). However, the structural upheaval within the Ministry of Agriculture and the departure of many qualified staff, coupled with lack of financial resources, has left both MEM (and even CONAM) with more power than the Ministry of Agriculture. The most important power of INRENA with respect to the environmental impact of mining is INRENA's power to evaluate Environmental Impact Assessments (EIAs) affecting agriculture. This power is qualified, however, by the fact that INRENA's opinion is not considered binding and by the practice of considering administrative silence on an EIA to be approval. Thus, as INRENA suffers from a lack of resources, it often cannot take a position on an EIA within the four-month EIA evaluation time frame, and thus loses its formal power over the environmental effects of mining.<sup>75</sup>

As far as interaction with CONAM, it is MEM's policy that CONAM regulations do not inhibit MEM environmental regulations, but only complement MEM rules.<sup>76</sup>

Overall, the Peruvian environmental policy framework fails to foster socially responsible mining. Instead, the overwhelming power of a Ministry of Energy and Mines held captive by the mining industry, the separation of environmental monitoring and enforcement powers within relevant institutions, and the conflicting environmental competencies divided among Ministries serves to create an operational atmosphere in which mining companies feel little to no real pressure to conform to Peruvian environmental standards, much less stronger international environmental

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<sup>73</sup> Ibanez interview.

<sup>74</sup> Chauvin interview; Ibanez interview; Hiles, Sara Shipley and Guevara, Marina Walker. "Lead Astray," *Mother Jones*, Nov./Dec. 2006.

<sup>75</sup> de Eiden.

<sup>76</sup> Id.

standards.<sup>77</sup> Thus, responsible mining is left to the discretion of private industry, and often practiced only by mining companies that possess an internal culture of social responsibility.<sup>78</sup>

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<sup>77</sup> Peñafiel interview (“The standards here are a lot lower, but people still are not meeting the standards.”).

<sup>78</sup> *E.g.*, Antamina vs. Doe Run; Ibanez interview (“Doe Run is the most terrible.”); Chauvin interview (Doe Run is one of the most evil companies in the world.)

## V. RECOMMENDATIONS

In light of the tensions between local communities and mining companies, the fragmented environmental policy framework, and the lessons learned from the Yanacocha mercury disaster and Cajamarca’s continuing unrest, we offer the following recommendations to stakeholders on all sides of the mining and environment issue:

### For the Government

#### **(1) Streamlining Environmental Policy-Making and Enforcement Mechanisms**

To eliminate issues of conflicting environmental competencies and corresponding regulatory conflicts among structurally-equal Ministerial bodies, as well as to create an institution with innate environmental values (as opposed to the Ministry of Energy and Mines, which is primarily oriented toward national investment and revenue creation<sup>79</sup>), we recommend elevating CONAM to a full Ministry of the Environment.<sup>80</sup> To ensure that the Ministry is not a toothless tiger, it should have full environmental enforcement powers, including the ability to fine mining companies for environmental violations and prosecute environmental crime lawsuits.<sup>81</sup> Further, the new Ministry should be required to operate in an environment of transparency and accountability with respect to environmental assessment and monitoring procedures, reports, and decision-making.

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<sup>79</sup> Peñafiel interview (“The Ministry of Energy and Mines is conflicted because it is responsible for investment. It can’t be an autonomous body and also enforce. There needs to be an autonomous body.”).

<sup>80</sup> Personal interview, Eduardo Niz, Director, Corplab, March 2, 2007 (hereinafter “Niz interview”); Personal interview, Quinn Meyer, Managing Director, Centro de Recursos y Educación en la Selva (CREES), Feb. 27, 2007 (hereinafter “Meyer interview”) (Having no environmental Ministry “is just ridiculous.”).

<sup>81</sup> Peñafiel interview.

Additionally, a new Ministry of the Environment should not be solely composed of scientists. Considering that most environmental problems, and certainly the effects of Peruvian mining, include social, health, and economic aspects in addition to ecological aspects, the new institution would be best served by an interdisciplinary power structure and civil servant cadre.<sup>82</sup> Even if a new Ministry lacked power at the outset, power to create and enforce policy can be accumulated over time, especially if the Ministry has the power to fine and thus amass financial resources.

## **(2) Monitoring and Sanctions**

The government, either via a new Ministry of the Environment or via existing institutions, should begin seriously enforcing the environmental laws already on the books.<sup>83</sup> Currently, even if the state does lay down sanctions, either those sanctions do not sufficiently punish the offending parties or the government fails to follow up with the threatened discipline. While we heard time and time again that if mining companies are held to high environmental standards they will not make vital private investments in Peru, we find that proposition hard to believe.<sup>84</sup> Due to extensive Peruvian mineral deposits with the capacity to generate untold billions of dollars for mining companies, the state does not have to worry about mining companies choosing not to invest in Peru or leaving the country in response to environmental enforcement. Further, since multinational companies operating in Peru are able to follow the laws in other countries, there is no reason that following the less-stringent environmental laws in Peru would create excessive costs inhibiting investment and growth in the mining sector. Rather, what seems to be happening is that companies

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<sup>82</sup> Meyer interview.

<sup>83</sup> Ibanex interview (“If we have law, we need to respect the law.”).

<sup>84</sup> Personal interview, Sebastián Ugarte and Conrado Falco, Proinversión March 2, 2007 (hereinafter “Proinversión interview”).

are taking advantage of the lax enforcement and lack of state presence in remote mining communities.<sup>85</sup>

In order to better monitor and enforce these laws, certified laboratories with honest reputations such as Corplab Perú, could be hired to perform regular audits of the companies' practices and procedures.<sup>86</sup>

At the very least, the government should capacitate build capacity within citizens groups, educating them in basic environmental monitoring techniques and encouraging them to report misconduct to local authorities with the power to follow up on their complaints and sanction violators appropriately.<sup>87</sup>

### **(3) Increasing Use of Judicial Mechanisms to Enhance Accountability**

Although Peru's judiciary is heavily influenced by the executive, in some instances the judicial system has acted as a check on the combined power of the mining industry and the executive. Also, using institutionalized means to address conflicts often reduces violence.<sup>88</sup> Thus, we are recommending that community and NGO stakeholders continue to file environmental and human rights lawsuits in Peruvian courts, and perhaps create a legal NGO focused on the mining industry and its environmental ramifications. Currently, no pro-bono law firms or legal NGOs operate in the country, so this is an area where international funding and focused work could make a difference.<sup>89</sup> Additionally, anecdotal evidence exists showing that mining companies are worried about the potential effectiveness of Peruvian courts as a tool for fighting company policy. For example,

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<sup>85</sup> Ibanez interview.

<sup>86</sup> Niz interview (Mining companies are not spending nearly enough on environmental monitoring.).

<sup>87</sup> Peñafiel interview.

<sup>88</sup> Roque interview.

<sup>89</sup> de Eiden.

Newmont states on its website that it fears that activists and NGOs will attempt to use the courts in order to slow down or stop projects in frontier areas.<sup>90</sup> This fear is based in reality, considering the citizens of La Oroya successfully used a lawsuit to negotiate health concessions from Doe Run.

Further, a specialized NGO such as that described above would come into a legal realm with already-established environmental rights. The courts have explicitly recognized Peruvian's constitutional rights to environment as well as standing for third parties to sue on behalf of those who have difficulty participating (e.g., indigenous peoples). The Peruvian Constitutional Court has also recognized the concept of diffuse interests and has ruled that NGOs have standing to sue on behalf of affected third parties.<sup>91</sup>

Although legal precedent is not binding in Peru because the country operates under a civil law system, a growing amount of environmental jurisprudence exists that is likely to influence judicial decisions, and judges are now more familiar with environmental legal norms. Also, citizens have developed more faith in the system as a check on the executive,<sup>92</sup> and realize that filing a lawsuit – even one that may not succeed – can create useful leverage for their cause.

Further, local communities and NGOs can use international or foreign courts as a venue to pressure mining companies into more responsible mining practices. For example, with respect to companies based in the United States, shareholders may sue management teams and boards for violations of their risk management responsibilities under the Sarbanes-Oxley accountability framework and other laws if large investments are lost due to "predictable" environmental or social

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<sup>90</sup> Newmont Website. <http://www.newmont.com/en/about/profile/frontline.asp>.

<sup>91</sup> *Protterra v. Ferroaleaciones San Ramon S.A.*, 1987.

<sup>92</sup> de Eiden.

challenges. Also, NGOs like APRODEH have brought claims to the Inter-American Commission on Human Rights, as well as to Peruvian courts.<sup>93</sup>

With respect to the private sector, regulations requiring corporations to internalize more legal costs (e.g., fees and damage awards to parties harmed by mining operations) could help incentivize better mining operation technology, thoroughly contemplated CSR policies designed to prevent (as opposed to address) environmental and social crises, and general corporate concern for the communities in which mining operations take place.

In order for the judiciary to function as desired, as a tool for enhancing accountability, executive interference in judicial processes must be stopped. For example, some judges are afraid of engaging in cases against big companies due to executive pressure in support of the mining companies. Some potential strategies for decreasing executive interference include:

Media: Peruvian government officials have historically responded to media pressure, and some NGOs have successfully used media exposure of individual judges to minimize corruption in individual cases.<sup>94</sup> We recommend that interested stakeholders, especially local communities and NGOs, put more effort into public relations strategies during lawsuits, and as a general practice.

Financial and Technical Resources: Since a lack of resources often causes reliance on the executive branch for key evidentiary environmental studies, we recommend that international organizations provide resources for independent environmental studies. For example, the Ministry of Health is often called upon to pronounce upon damages to health and the environment, but the Ministry can be put under political pressure from other parts of

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<sup>93</sup> Peñafiel interview.

<sup>94</sup> de Eiden.

the Executive branch. Further, as with most judicial proceedings, environmental suits are expensive, and individual complainants often have to rely on NGO funding.<sup>95</sup>

Eliminating Legal Interference in Criminal Realm: Congress should revoke Ministry approval requirement in the environmental crimes regime, and in any other environmental regimes. During a criminal suit against Southern Peru Copper Corporation, Congress passed a law adding an additional administrative requirement for the opening of criminal prosecution – the sector Ministry’s opinion confirming the existence of the environmental crime. This means that the opinion of MEM is required *before* any judicial suit for an environmental crime can occur, effectively closing off the criminal realm to any environmental plaintiffs. In the Southern Peru Copper case, MEM issued an opinion against the existence of the environmental crime, after which the prosecutor permanently closed the case.<sup>96</sup> Clearly, requiring a party such as the Ministry of Energy and Mines, which caters almost solely to the mining industry, to hold sole power over lawsuits against the mining industry represents a troubling conflict of interest. Any such restrictions should be immediately removed.

#### **(4) Effective Use Local Government Power**

Local governments may represent the strongest check on executive power and the mining industry. They often figure in environmental cases before the judiciary, as well as in clashes with executive branch authorities, due in part to Peru’s strong tradition of local participation. Strong local governments have successfully mediated clashes between the citizenry and the mining industry, whereas municipalities with weaker governments have seen abuses and violence.

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<sup>95</sup> de Eiden.

<sup>96</sup> de Eiden.

In some respects, Peru's municipalities enjoy power equal to the country's legislative branch. Municipalities in Peru have a special lawmaking power called the *Ordenanza Municipal*, which is equal in strength to a Parliamentary law. This power can only be challenged before Peru's Constitutional Tribunal. Additionally, the Constitution of 1993 and the Law of Municipalities, local governments have broad environmental and economic powers, including the ability to create ecological reserves via *Ordenanza Municipal*. The powers of municipalities stem from a special respect for a government close to the citizenry that has been elected by universal vote. Notably, environmental issues are a big part of political platforms at the local level, but not at regional or national levels.

One strong municipal weapon against mining incursions has been the power to create local protected reserves via *Ordenanza Municipal* in the face of concessions MEM grants to mining companies in the same area. In the Tambogrande region, the creation of a reserve by the local government forced a constitutional clash between the local government and the Ministry of Energy and Mines. In the end, the mining company left the region.<sup>97</sup>

Also, because 50 percent of taxes from mining operations are to be funneled to local governments along with major contributions to the voluntary "Fund for Equality" from mining companies, local governments have a unique opportunity to design and implement programs to address social and environmental problems. Where once there was not enough money for local governments to effectively realize projects that benefit the community, now "they have a lot of money but don't know how to spend it."<sup>98</sup> We suggest these governments follow the model used by the World Bank in Cusco, receiving submissions for project ideas from local citizens and

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<sup>97</sup> de Eiden.

<sup>98</sup> Quijandría Interview.

entrepreneurs that promote harmonizing growth and development in the mining sector, and allocating funds to cover the costs and implementation of the best project designs.<sup>99</sup> Of course, this all depends on more efficiency in Lima, and the central government's ability to transfer funds for local use in a timely fashion.<sup>100</sup>

However, as noted earlier, in more remote areas, there is often no government presence whatsoever. President Garcia's plan to set up small government offices in each region to assist with the management of funds is a good one, and should be followed through. Mining companies such as Antamina have expressed concern that if local governments are not given significant assistance with managing funds – as they will now be responsible for allocating several millions of dollars as opposed to a couple of thousand dollars – the mining tax money and contributions to the Fund for Equity will be all but useless. Explains Antamina's development coordinator, the typical local government office staff member “may be literate, but definitely doesn't know how to manage an Excel spreadsheet.”<sup>101</sup> Thus as Garcia seeks to make good on his promise to open local government offices for the management of funds, he should place a great deal of emphasis on building general municipal financial management capacities.

Also, for these local offices to be effective, they must be transparent in their use and allocation of funds and must allow members of the community to voice their concerns and participate in the development process. Government-NGO relationships that facilitate local participation are therefore desirable and should be fostered. A policy of transparency that includes

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<sup>99</sup> World Bank Tour with Wilfredo Vega, Local Project Facilitator, Cusco, Peru. February 26, 2007, (Hereinafter “World Bank Tour.”)

<sup>100</sup> Chauvin interview. “The main problem is that the taxes don't go back to the local communities. We need the taxes to go back.”

<sup>101</sup> Personal Interview, Allison Coppel, Productive Development Coordinator, Compañía Minera Antamina S.A. March 1, 2007 (Hereinafter “Coppel Interview.”)

open dialogues with the local communities, the publication of financial reports, and regular updates on local government activities can all be facilitated through NGO involvement with government processes and will ensure that the local government is honest with and accountable to its constituents.

#### **(5) Making Corporate Social Responsibility Contractually Binding**

As noted, the private investment experts at Proinversión, the government working-group responsible designing materials to attract private investment and drafting contracts between the government and private contractors for projects such as opening and operating a mine, believe that if the government imposes too many restrictions or requirements on private companies, the companies will choose to invest elsewhere. Hernando De Soto's Institute for Liberty and Democracy, the sentiment expressed is similar: "In Peru, where industry is only in its beginning stages, you cannot expect companies to live up to the same standards they would in the United States. If that was required, [the companies] would just go to China!"<sup>102</sup>

These sentiments notwithstanding, a review of the contracts recently drafted at Proinversión, all of which are available to the public on the Internet,<sup>103</sup> contain provisions requiring that the companies follow environmental laws, provide a certain number of jobs in the communities where they operate, and now include a provision imposing the royalty tax Garcia promised in his campaign but could not compel companies with outstanding government contracts to accept. This is significant, and suggests that within the contract limitations articulated by the World Bank and contained in free-trade agreements to which Peru is party, the Peruvian government may be able to

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<sup>102</sup> Personal Interview, Institute for Liberty and Democracy, February 28, 2007 (Hereinafter "ILD Interview.").

<sup>103</sup> Proinversión website. <http://www.proinversion.gob.pe>.

insert creative provisions in government contracts binding private companies to certain minimum standards of behavior.

Proinversión is ideally situated to be responsible for such a project. For example, in deciding who to award a government contract, Proinversión reviews and compares proposals from competing companies. These proposals are required by law to articulate the companies' plans for (1) how their operations will conform to Peruvian laws; (2) how the project will contribute to the state as well as the local community. Thus, based on the strength of the plans included in these reports, Proinversión could insert contract provisions not in violation of international contract law that bind companies to the promises and suggestions put forth in their proposals.

#### For Corporations

##### **(6) Corporate Social Responsibility**

Innovative Resources Management, Inc., a Washington, D.C.-based CSR consulting firm, has suggested that Newmont's problem is one of timing: the company seems only to implement CSR programs *after* crises arises, as opposed to using CSR to prevent the problems from arising in the first place.<sup>104</sup> While it is possible that Cajamarca is simply resistant to large-scale mining, it seems more likely that many of the problems that Newmont has faced in the region are self-inflicted. For an example of a mine that has more aptly managed its relations with the local communities, one can look to Antamina in central Peru.

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<sup>104</sup> Ibid. "Managing Social Risks: Yanacocha Mine Case Study."

Many parties to Peruvian mining conflicts suggest Antamina as a model that other large-scale mining operators should follow when working with local communities.<sup>105</sup> Unlike Yanacocha, Antamina focused on public relations from its inception and made clear in the communities where it undertook mining operations that it sought out available technologies and methods to improve mine safety and minimize health and environmental impacts.<sup>106</sup> It has always offered local jobs where possible and bought maximum amounts of local goods in support of the local economy. It communicates with locals about their needs in regular roundtable meetings, and has built dining halls, parks, schools and churches when communities have expressed a desire for such amenities. To Antamina, “how to find peace in the community is a more important question than how to find copper.” Put simply, Antamina seemed to understand from the beginning what Yanacocha’s managers learned only recently: investing in community relations and local development projects pays for itself many times over in reduced friction with local communities.<sup>107</sup>

And while Antamina’s community relations model is exemplary, the company’s track-record is not without missteps. For example, early in the company’s history it sought to displace a very small campesino community consisting of about 40 people. In doing so, it offered members of the community cash – a sum several times the property value of the land – in compensation for land rights and the community’s relocation. The people of the community used that money to move to cities where they lived until the money was gone. And then, having spent the cash they were given, they came back to what had become a major mining operation in search of their homes and their

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<sup>105</sup> Ibanez interview (“Antamina is one of the few really good companies in Peru. They care.”); Chauvin Interview.

<sup>106</sup> For example, the Ancash pipeline will enable the company to move minerals from the mountains to the coast free of the spill risks implicated by the Yanacocha incident. Furthermore, the company is treating the water used to pump the minerals through the pipeline, and is using that water to create a forest in the desert. Coppel Interview.

<sup>107</sup> Niz interview.

livelihoods. What Antamina's executives had not understood is that it was not within the "Andean cosmovision" to understand that land rights could be transferred and rights to livelihood, sold.<sup>108</sup>

Antamina went to the World Bank for help, and the World Bank recommended a relocation program that would move the community to another plot of land where they could continue to live in the tradition to which they were accustomed. From this situation, Antamina undertook the project, and it was a great success for the displaced community. And Antamina learned an important lesson:<sup>109</sup> when trying to reach the community, it is both more helpful, and more cost effective, to do so on the community's own terms, allowing the people affected to identify and define the issues important to them, and working to create programs that revolve around those issues.

This is just what Antamina has done, making community relations "biggest part of corporate affairs." The Antamina community relations model is best understood in light of the company's plans to implement the hundreds of millions of dollars they have agreed to donate in place of a windfall tax. The voluntary fund compromise was particularly attractive to Antamina because under the voluntary fund framework it, and not the state, decides where the money it contributes will go, thus giving the company control over the usefulness of their donation.<sup>110</sup> Antamina has identified four major goals they intend to meet:

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<sup>108</sup> Quijandría interview.

<sup>109</sup> Quijandría interview (Antamina has learned a great deal from their mistakes and is preparing a course to be taught at the local business school on what they have learned by working with families in mining towns.).

<sup>110</sup> Quijandría interview (Antamina is weary of the state's current capacity to oversee development in rural communities for reasons noted earlier – primarily that there is currently little or no government presence in remote communities and the governments that do exist lack the skills capacity to manage and apply the millions of dollars Antamina is now voluntarily donating. And while Antamina is certainly trekking through state territory in developing its voluntary fund agenda, it maintains as a central goal the development of local government capacities); compare Chauvin interview (Critics suggest that mining companies are replacing the state.); see also Niz interview (It is important to keep in mind that mining companies are always acting with their bottom line in mind, and therefore giving private companies government power is not appropriate.).

1. Address health and nutrition by diversifying food grown near the mine using greenhouses, avoiding fertilizers and by introducing eggs, poultry and other sources of protein such as guinea pigs into local diets.
2. Improve local education by providing everything from basic infrastructure (schools) to teaching teachers and parents to nurture students, to providing students with culturally relevant learning materials so that they better relate to the lessons being taught.
3. Increase local producers' access to markets by sponsoring fairs in which producers can exhibit their products and seek out new clients, using microlending to get small businesses – particularly niche agricultural businesses – off the ground, and giving local entrepreneurs access to credit in support of their business endeavors.
4. Build institutional capacity by providing technical assistance to local governments to teach them how to manage unprecedented sums of money, spend it.

Inherent in each of these goals is the concept that the community should learn how to sustain itself. The life of a mine is relatively short – 30 to 40 years, and Antamina's underlying goal is “to have the community better off when [Antamina] leave[s] it.” Thus, the project designs always have sustainability in mind, as they will enable locals to learn the skills they need to perpetuate local development.

Antamina executives explain that the company is “ready to show the world that we can create a new model [of corporate social responsibility]”.<sup>111</sup> The company does not want to “re-invent the wheel,” making the same mistakes it and other mining companies have made for years. To avoid that scenario, the Antamina voluntary fund model has based itself on models proven to work and

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<sup>111</sup> Ibid.

suggestions from local NGOs with on-the-ground experience of what works and what does not work. That strategy is sound, and if other mining companies followed Antamina's example, mining operations would run smoothly because the social and environmental needs of local communities surrounding mines would be met.

#### For the NGOs and Civil Society

##### **(7) Using NGOs as Mediators and Intermediaries**

Affected parties can also turn to the national ombudsman group, Defensoría del Pueblo, an autonomous governmental body dedicated to protecting fundamental rights. The Defensoría keeps tabs on conflicts throughout Peru, and often steps in to mediate conflicts including the Yanacocha spill and the recent Achuar standoff around major pipelines in the northern jungle.<sup>112</sup> The Defensoría suggests that litigation be used as a last resort. Instead, they prefer mediation as means for parties to create mutually acceptable agreements.<sup>113</sup> The Defensoría relies primarily on its contacts with NGOs and local leaders to mediate conflicts, explaining that people who communities trust have the greatest ability to affect peace and compromise.<sup>114</sup>

Furthermore, as noted above, NGOs with connections to local communities have a vast capacity to advise and consult with corporations seeking to improve their corporate social responsibility policies and programs. NGOs should actively seek out these types of positive relationships to show that the industry-NGO relationship need not always be adversarial. Furthermore, NGOs could perform tasks such as environmental audits and rountabing with local

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<sup>112</sup> For information on the Achuar standoff, see, "Achuar in Peru: History, Recent Victory and New Threats" December 1, 2006,. [http://www.amazonwatch.org/amazon/PE/view\\_news.php?id=1282](http://www.amazonwatch.org/amazon/PE/view_news.php?id=1282).

<sup>113</sup> Roque interview.

<sup>114</sup> Ibid.

communities for the benefit of corporations looking to have a constant handle on local circumstances surrounding their mines.

**(8) Raising National Consciousness around Health and Environmental Issues as a Tool for Pressuring Government and Corporate Action**

When dealing with those mining companies that violate environmental standards, public health standards, and, particularly, human rights standards, NGOs should show their willingness to generate negative international press, government investigation, and local unrest. NGOs play a vital role in stimulating healthy democracies by encouraging dissent. Without such agitation, it is unlikely that either companies or the government will take measures necessary to protect the needs of local populations. Experience has shown that organized communities massively protesting for change is effective, and NGOs should resort to those means when less diplomatic ones have failed, as the health and security of local populations should be a goal, whatever the cost.

For Private Persons

**(9) Creating False Economies to Jumpstart Local Industry**

Another opportunity to harmonize growth and environmentalism lies in private persons with the funds and the will to make investments in mining towns in order to create a false economy and jumpstart local industry. Quinn Meyer at Centro de Recursos y Educación en la Selva (CREES) has done just that, opening a research center and servicing that center with local products and labor. The research center consists of a hotel for visiting researchers who pay to be housed at the center and also for their meals and security during their stay. Thus, the local community around the research center

now has a market for local produce and livestock and for service jobs such as hotel maintenance, guest services and security provision. The creation of this “false economy” has given locals the incentive to harness skills that enable them to support themselves. Their increased capacity has attracted eco-tourism companies to the area, as the infrastructure to support that industry is already in place. What is more, Mr. Meyer has become connected with established eco-tourism companies in areas surrounding the community in which the research center is located, broadening the scope of the markets to which residents of the town have access and also stimulating the creation of new industries to support the unique needs of each eco-tourism company.

Similar projects could be undertaken in mining towns. For example, a national park is located near Antamina’s major mine. A private investor could create a hotel in that national park and use local labor to build it, local produce to service it, local artisans to decorate it and in doing so, could jumpstart industries that would enable communities to develop. With development comes education and capacity building that enables long term growth and empowers local communities to take their futures into their own hands.

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