2007

Breaching Indigenous Law: Canadian Mining in Guatemala

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Source Publication:
Indigenous Law Journal. Volume 6, Issue 1 (2007), p. 101-139.

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* Shin Imai, Associate Professor, Osgoode Hall Law School. This article cites to several documents that are in Spanish. The translation of these documents has been done by this author We would like to thank Benjamin Richardson, Aaron Dhir, Kathy Laird and Ascanio Pomelli for comments on aspects of this paper.

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This is a case study of a small Indigenous community in Guatemala that defied a powerful Canadian mining company by holding a community vote on whether to allow mining on its territory. The result of the vote—to stop mining activity on its territory—has not been honoured by the Canadian mining company. The dispute is being played out against a backdrop of intimidation and violence. The study reviews the major players in the dispute—the mining company, the Guatemalan government, the World Bank and the Canadian government—and concludes that they all have a stake in the profitability of the mine. There is a clear deficiency in the checks and balances needed to ensure that the Indigenous people are dealt with fairly. Drawing on ideas from the National Roundtables on Corporate Social Responsibility ("CSR") and the Canadian Extractive Industry in Developing Countries (released in March 2007), the study suggests that at the present time, Canadian courts may be the only forum capable of holding the major actors accountable for their actions.

I INTRODUCTION

In the pages that follow we will describe a dispute between the Canadian mining company, Glamis Gold (now Goldcorp)[1] and the Indigenous people in the San Marcos district of Guatemala. This is a case study conceived after visits to Guatemala by Shin Imai in 2004 and a summer spent in the San Marcos area by Ladan Mehranvar in 2005. It would be fair to say that we were both taken aback by what we saw and what we have learned since.[2]

Glamis Gold ("Glamis") began preliminary work on the open pit gold mine in 1999. Indigenous people raised concerns soon after about the environmental impacts, including the controversial use of cyanide to extract

1. In November 2006, Goldcorp Inc. merged with Glamis in a $21.3 billion transaction. The CEO of Glamis, Kevin McArthur, became the CEO of Goldcorp. In the rest of this article, we will refer to Glamis when there is a reference to historical events involving Glamis. When we are dealing with more contemporary issues, we will refer to Goldcorp. See Jane Werniuk, "The New-Look Goldcorp" (June 2007), online: <http://www.canadianminingjournal.com/issues/ISarticle.asp?id=188471&story_id=31989103454&issue=06012007&PC=>.
2. One of Ladan's first emails from San Marcos began, "For the first time in my life I truly felt ashamed of being Canadian."

the gold. We will touch on the environmental issues, but the focus of this paper is on a different aspect of the dispute: the right of the Indigenous people in the area to control development on their territory. We will discuss the exercise of Indigenous law by the community of Sipacapa; the application of the domestic laws of Guatemala; and the relevance of international norms, such as the International Labor Organization's *Indigenous and Tribal Peoples Convention (No. 169)*. We will see the role that the World Bank and the Canadian embassy have played in financing and supporting Glamis Gold. We will end with some observations on the importance of establishing an independent, effective accountability mechanism to monitor the relationship between Canadian extractive industries and Indigenous peoples.

In order to understand the perilous situation of Indigenous people in Guatemala today, it is necessary to briefly review the past. This history begins with the CIA-sponsored coup in 1954 and takes us through the dark period of a civil war when Canadian mining giant INCO was opening a mine in Guatemala. During and after this period, the Guatemalan government committed genocide of groups of Mayan people. There was a restoration of a fragile democracy in 1985 and a Peace Accord signed with guerillas in 1996. The story of Glamis Gold begins at around the same time as the release of a report by Bishop Juan José Gerardi on the brutalities committed by the Guatemalan government.

II FOREIGN INTERESTS AND GUATEMALAN HISTORY

Guatemala is a country that is predominantly Indigenous. It has 24 language groups with 52 distinct languages.[3] About 60 per cent of the population identifies itself as Indigenous and continues to wear their traditional dress and speak their own languages. Anyone going to the highlands of Guatemala is immediately struck by the vibrancy of the culture. It is likely that a much higher percentage of the population is actually Indigenous, but does not identify as such. Being Indigenous is a bar to "getting ahead."[4]

Although Indigenous people have survived in Guatemala, it has been a precarious existence. Guatemalan society has historically been dominated by a small group of descendants of Spanish settlers who have been allied with

3. Raymond G. Gordon Jr., ed., *Ethnologue: Languages of the World*, 15th ed. (Dallas: SIL International, 2005).
4. Rachel Sieder, "The Judiciary and Indigenous Rights in Guatemala" (2007) 5:2 Int'l J. Const. L. 211 at 240 [Sieder, "Guatemala Judiciary"]. Sieder refers to the "innate racism" that pervades most of Guatemalan society as a reason that the judiciary has not taken a "proactive role in defense of [I]ndigenous rights."

the military and foreign interests. In 1951, when populist president Jacobo Arbenz took office, he began land reforms which would have appropriated uncultivated land from private companies and returned it to peasant farmers.[5] The powerful United Fruit Company was one of the private interests affected. Despite receiving adequate compensation for the land, the United Fruit Company sought the assistance of the United States government to stop these reforms, accusing Arbenz and his government of being communists.[6] With the financial and military backing of the CIA, Castillo Armas invaded Guatemala from Honduras in 1954.[7] Armas' leadership favoured foreign investment and reversed the many beneficial social reforms that had been developed under Arbenz.[8]

Repression and economic disparity grew even more severe over the following years and guerilla armies were established, made up largely of Indigenous people. A civil war began in 1960. It was a brutal, one-sided war. The guerillas were no match for the American armed and trained Guatemalan military.[9] Over 200,000 people were killed or went missing and a million people were displaced.[10] Of the 42,275 registered acts of violence, 85 per cent of the killings were committed by the Guatemalan army, either acting alone or with other forces.[11] One of the gruesome tactics employed by the army was a campaign to massacre Indian villages. The atrocities that were committed during these massacres included the amputation of limbs, killing of children, victims being burned alive, and the removal of organs from live victims.[12]

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5. Laura Moye, "The United States Intervention in Guatemala" (1998) 73:1 & 2 Int'l Social Science Rev. 44 at 45.
6. *Ibid.*
7. *Ibid.* at 44.
8. *Ibid.*
9. Andrew J. Schlewitz, "Imperial Incompetence and Guatemalan Militarism, 1931–1966" (2004) 17:4 Int'l J. Politics, Culture and Society 585 at 600. Ironically, both Arbenz and Armas were graduates of a U.S.-directed military training program.
10. Guatemalan Commission for Historical Clarification (CEH), *Guatemala: Memory of Silence*, online:, American Association for the Advancement of Science ("AAAS"), Science and Human Rights Program <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> [*CEH Report (1999)*]; Patrick Ball, Paul Kobrak & Herbert Spirer, "State Violence in Guatemala, 1960–1996: A Quantitative Reflection" (Washington, D.C.: American Association for the Advancement of Science, 1999), online: AAAS <http://shr.aaas.org/guatemala/ciidh/qr/english/en_qr.pdf>.
11. *CEH Report (1999)*, *ibid.* at <http://shr.aaas.org/guatemala/ceh/report/english/graphics/charts/page86.gif>.
12. *Ibid.* at <http://shr.aaas.org/guatemala/ceh/report/english/conc2.html>; Rigoberta Menchú, *I, Rigoberta Menchú: An Indian Woman in Guatemala* (London: Verso, 1994). In her book, Rigoberta Menchú recounts in detail the torture and murder of her brother and mother at the hands of the military. Menchú received the Nobel Peace Prize in 1992 for her advocacy of Indian rights in Guatemala and the Western hemisphere.

The Canadian mining company, INCO first became involved in Guatemala in 1960, when it created the subsidiary Exmibal with the U.S.-based Hanna Mining Company.[13] After negotiations with the government, Exmibal was granted a 40-year concession to exploit the El Estor region in August 1966.[14] INCO's involvement in Guatemala was part of a corporate strategy to maintain its position in the world nickel market by investing heavily in foreign ventures.[15]

There was strong opposition to the Exmibal project from Indigenous people and other concerned Guatemalans. A group of professors from the School of Economic Sciences at the University of San Carlos, Guatemala City, took up the cause and established a commission in 1969.[16] The commission concluded that the Guatemalan government had not negotiated enough benefits from the project and that Exmibal would simply strip Guatemala of its riches.[17]

Public protests against the mine followed. President Arana responded by suspending the constitutional right to assembly and arresting large numbers of people. The army even occupied the university, in its attempt to silence the opposition from the nation's intellectual community. Two law professors and members of the commission, Julio Camey Herrera and Adolfo Mijangos López, were assassinated by state death squads.[18]

In February, 1971, an exploitation agreement was signed between INCO and the Guatemalan government.[19] Because of Guatemala's desire for income from its deposits of metals and minerals,[20] INCO played an influential role in the country. Bradbury alleges that INCO assisted in drafting a new Guatemalan mining code in 1973 favourable to INCO's interests.[21] In 1980, the Guatemalan government scrapped their plan to increase taxation due to strong opposition from foreign businesses in Guatemala, including INCO.[22]

The Canadian public did not appear to take much notice of the assassinations associated with Exmibal in 1969. However, there was an

13. J.H. Bradbury, "International Movements and Crises in Resource Oriented Companies: The Case of Inco in the Nickel Sector" (1985) 61:2 Economic Geography 129 at 138.
14. *Ibid.*; Steven L. Driever, "The Role in Lateritic Nickel Mining in Latin American Countries with Special Reference to Exmibal in Guatemala" (1985) 11:1 GeoJournal 29 at 34.
15. Bradbury, *ibid.*
16. *Ibid.*
17. Driever, *supra* note 14 at 36.
18. Ball, *supra* note 10 at 18; Bradbury, *supra* note 13 at 138.
19. Driever, *supra* note 14 at 34.
20. "Guatemala Keen to Get INCO Deal" *Toronto Star* (15 January 1971) 17.
21. Bradbury, *supra* note 13 at 138.
22. Arthur Moses, "Proposed Tax Law Endangers Future of INCO Operation" *The Globe and Mail* (15 December 1980) 10; Arthur Moses, "INCO Spared Tax Reform on Ore in Guatemala" *The Globe and Mail* (27 December 1980) 14.

outcry about a decade later when the Canadian Export Development Corporation provided INCO with a $20 million loan for the Guatemala project.[23] At the same time INCO was cutting jobs in Canada.[24]

Only three years after production started the mine was mothballed due to the declining market value of nickel and rising oil costs.[25] During this same period, the most serious human rights violations were occurring at the hands of the dictator Rios Montt. There were 192 massacres in 1982 alone.[26] Despite condemning these human rights violations in Guatemala in 1983, the Canadian government was in negotiations to sell military planes to the Guatemalan air force.[27] The Guatemalan military had been known to use their planes to shoot at Indian villages.[28]

In 1983, General Oscar Humberto Mejía Víctores overthrew Rios Montt and promoted the return of a democratic system in Guatemala.[29] The first civilian president in 15 years was elected in 1985.[30] However, the military still retained much of its power and massacres of Indigenous villagers continued well into the 1990s.[31] The military also silenced individual critics, among them, anthropologist Myrna Mack Chang, who had dedicated herself to identifying the remains of those killed during the civil war and exposing the military's role in those deaths. She was stabbed to death in 1990.[32]

In 1996, the Guatemalan government signed a Peace Accord with the guerrillas. For a moment, there was a promise of a significant transformation of Guatemalan society. Under the accords, the government would be compelled to take action on a wide range of subjects including agrarian reform and rural development; decentralization; social services, such as health, education, employment, and social security; reform of the administration system of justice; reform of the military and of the systems of intelligence of the state; electoral reform; recognition of the rights of

23. Stephen Lewis, "INCO Strike Leaves Bitter Legacy" *Toronto Star* (15 April 1979) A20.
24. Roger Croft, "Safer to Fire Canadians INCO Admits" *Toronto Star* (29 October 1977) A3
25. Driever, *supra* note 14 at 34.
26. *CEH Report (1999)*, *supra* note 10; Ball, *supra* note 10 at 21-22. For example, Oliverio Castañeda de León, a member of the University Student Association, was machine gunned to death in broad daylight in front of hundreds of witnesses including police. The police did not attempt to chase or arrest the shooters; Oficina de Derechos Humanos del Arzobispado de Guatemala ("ODHAG"), "Informe para la Recuperación de la Memoria Histórica: Nunca Más" (24 April 1998) at vol. 4, ch. 2, online: ODHAG <http://www.odhag.org.gt/INFREMHI/Default.htm> ["Nunca Mas"].
27. Jonathan Lemco, "Canadian Foreign Policy Interests in Central America: Some Current Issues" (1986) 28:2 J. Interamerican Studies and World Affairs 119 at 123.
28. *Ibid.*
29. Susanne Jonas, *The Battle for Guatemala: Rebels, Death Squads, and US Power* (Boulder: Westview Press, 1991) at 153.
30. *Ibid.* at 156.
31. "Nunca Mas", *supra* note 26.
32. "International court condemns Guatemala over murder" *Reuters News* (19 December 2003).

women; and the integration of populations uprooted and demobilized during the civil war.[33]

Particularly significant was the *Agreement on the Identity and Rights of Indigenous Peoples*[34] which established political rights for Mayan people by redefining Guatemala as a multiethnic, multicultural, and multilingual nation.[35] It also called for the constitutional and legal recognition of Mayan organizational forms, political practices and customary law. On cultural rights, the Accord focused on language and cultural "self-determination," calling for the creation of representative institutions to defend and strengthen Mayan culture, and the officialization of all Mayan languages. The section referring to economic rights focused on land, calling for the restitution of expropriated communal lands, the immediate titling of lands historically occupied by Mayan people, and a comprehensive program of land reform.[36] It created a formal basis for a new entitlement of Guatemala's Indigenous majority, a right to make claims upon the state.

Two studies were started to address the abuses committed during the war. In 1998, Bishop Juan José Gerardi released the results of evidence and testimony of 600 people collected from across Guatemala over three years. His report, *Guatemala: Nunca Mas* ["Never Again"] stated that over the course of the civil war, 150,000 people were murdered, 50,000 disappeared and one million had been displaced.[37] Two days after the release of the report, Bishop Gerardi was beaten to death outside of his home.[38] At first, the police and government authorities attempted to cast the blame on an attempted robbery, then on a domestic dispute and then an attack by a dog. After a concerted effort by the Catholic church and international agencies, individuals connected with the military were charged.[39] There were death

33. Luis Pásara, "The Guatemalan Peace Process: The Accords and Their Accomplishments" *Kroc Institute Occasional Paper* (December 2001) at 12.
34. *Agreement on Identity and Rights of Indigenous Peoples* (31 March 1995), Guat.-URNG, UN Doc.A/49/882--S/1995/256, (1997), 36 I.L.M. 285, online: United States Institute for Peace <http://www.usip.org/library/pa/guatemala/guat_950331.html>.
35. Hilde Salvesen, "Guatemala: Five Years after the Peace Accords" (Oslo: International Peace Research Institute, ("PRIO"), March 2002), online: PRIO <http://www.prio.no/files/file44990_guatemala_report_salvesen.pdf>.
36. Rachel Sieder, "Reframing Citizenship: Indigenous Rights, Local Power and the Peace Process in Guatemala" (1997), online: Conciliation Resources <http://www.c-r.org/our-work/accord/guatemala/reframing-citizenship.php>.
37. Teo Ballve, "Remembering in the Land that Memory Forgot" *NACLA News* (14 May 2007), online: North America Congress on Latin America ("NACLA") <http://news.nacla.org/2007/05/14/remembering-in-the-land-that-memory-forgot/>.
38. Rachel Sieder, "Coming to Terms with the Past: Remembering and Forgetting in Guatemala" *History Today* 55: 9 (September 2005) 28 at 29.
39. Amnesty International, *El Legado Mortal de Guatemala*, [*The Lethal Legacy of Guatemala*] (2002) at 32-37, online: Amnesty International <http://www.amnistiainternacional.org/publica/ISBN_8486874785.html> [*Lethal Legacy*].

threats against witnesses and others involved in the process, and in 2001 both the prosecutor, Leopoldo Zeissig, and the trial judge, Yasmin Barrios, were forced to flee the country.[40]

The promise of reforms to the *Constitution* that would provide greater recognition for Indigenous communities never became a reality. The United Nations had played a strong role in ensuring that rights for Indigenous people were recognized, but the ruling elite continued to be hostile and had no incentive to include any changes to the *Constitution*. A referendum on constitutional reform was defeated in 1999 after a virulent campaign against reform organized by elements of the private sector.[41]

In that same year, the United Nations sponsored Commission on Historical Clarification ("CEH") released its report, *Guatemala: Memories of Silence*.[42] The CEH found that the state, in some capacity, was responsible for 93 per cent of the human rights violations that occurred during the war[43] and that the state had "committed acts of genocide against groups of the Maya people."[44]

III THE MARLIN PROJECT

It was a few months after the murder of Bishop Gerardi that Glamis Gold, a Canadian-owned mining company, appeared in Guatemala.[45] Glamis' subsidiary Montana Exploradora was provided with an initial exploration licence from the Ministry of Energy and Mines in August 1999 for the Marlin Mine.[46]

The regions affected by the Marlin project are San Miguel Ixtahuacán and Sipacapa, both within the San Marcos department of Guatemala. These communities are largely composed of Indigenous Mayans who speak their traditional languages, in addition to Spanish.

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40. "Guatemala lawyer flees death threats" *BBC News* (30 July 2001), online: BBC News <http://news.bbc.co.uk/2/hi/americas/1465512.stm>.
41. See Sieder, "Guatemala Judiciary", *supra* note 4 at 219.
42. United Nations, "Report of the United Nations Verification Mission in Guatemala ("MINUGUA") for the Consultative Group meeting for Guatemala" (18 January 2002) at 2, online: Inter-American Development Bank <http://www.iadb.org/regions/re2/consultative_group/gu/minugua_eng.pdf>.
43. *Ibid.*
44. *Ibid.*
45. Compliance Advisor Ombudsmen ("CAO"), *Assessment of a Complaint Submitted to CAO in Relation to the Marlin Mining Project in Guatemala* (7 September 2005) at 3, online: CAO <http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf> [*CAO Report (2005)*].
46. *Ibid.*

Glamis first began to meet with municipal officials in San Miguel Ixtahuacán and Sipacapa areas in 2002.[47] During their exploration activities, Glamis conducted 30 meetings in San Miguel Ixtahuacán and 17 in Sipacapa between June and September 2003. According to Glamis, these meetings attempted to address environmental and other community concerns. Later that year, Glamis was granted a 25-year exploitation licence for the Marlin project and received an exploration licence for the Marlin I area from the Ministry of Energy and Mines. A few months later Glamis also received an exploration licence for the Marlin II area. Construction of the mine began in May 2004.[48] A month later, the Marlin Project received a $45 million dollar International Finance Corporation ("IFC") loan from the World Bank.[49] The IFC, which is part of the World Bank, provides loans to companies owned by the private sector for projects in developing countries. The purpose of this funding is to encourage competitive markets in developing countries while also improving the social well-being of people within these countries.[50]

To acquire the land for the Marlin project, Glamis made land purchases from individual landowners. Apparently, land was bought from 254 landowners and all transactions were witnessed by municipal staff members. At the time, Glamis said that no complaints had been raised regarding the sale of these lands and that all individual land transactions were conducted successfully.[51] They report that they paid Q 4,000 per *cuerda* (US $4,567 per acre) to landowners for land that usually sells for Q 350 to Q 1,500 per *cuerda*.[52] They also emphasize that the average income in Guatemala is US $1,670 per year, making their land purchase offers a "fortune" to landowners.[53]

IV THE INDIGENOUS PEOPLE OF SIPACAPA DECIDE

The two municipalities, Sipacapa and San Miguel Ixtahuacán, are both affected by the mine, but 85 per cent of the mine is located in San Miguel

47. Compliance Advisor Ombudsmen ("CAO"), "Annexes A-D: CAO Assessment" (7 September 2005) at 17, online: CAO <http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment anexes-English-7Sept-05.pdf> ["Annex to CAO Report (2005)"].
48. *Ibid.* at 21.
49. "Montana Exploradora: Marlin Gold Project", online: The World Bank <http://site resources.worldbank.org/INTOGMC/Resources/marlinfactsheetenglish.pdf> at 1 ["Marlin Fact Sheet"].
50. "About IFC", online: International Finance Corporation <http://www.ifc.org/about>.
51. *CAO Report (2005)*, *supra* note 45 at 26.
52. Montana Exploradora de Guatemala S.A., "Marlin Mining Project Land Acquisition Procedures" (20 February 2004), online: Goldcorp Inc. <http://www.goldcorp.com/_resources/project_pdfs/marlin/landacq.pdf> at 3.
53. *Ibid.*

Ixtahuacán. Although there was opposition to the mine in both municipalities, only the municipal council of Sipacapa decided to poll its own members with respect to the mine.

There are 13 villages within the municipality of Sipacapa. The village level governance structure includes a community assembly which is part of a village development council and an elected auxiliary mayor. There is a larger municipal body which includes representatives of the villages and a municipal mayor.[54] The people who live here speak Sipakapanese, a language distinct from their Mam-speaking neighbours in San Miguel Ixtahuacán. Most people in the municipalities are subsistence farmers.

The mine had been controversial for some time, with protests in Sipacapa beginning in February 2004.[55] Residents were concerned about the environmental impact of the mine but they were also concerned about mining as a tool of development. They favoured alternative development proposals controlled by the community.[56] A poll released on November 4, 2004, in San Marcos showed that 95.5 per cent of those surveyed were against the implementation of the mining project due to fears that the mining would damage the environment.[57] On November 6, a meeting held in Sipacapa resulted in a declaration against the mine, stating, among other things,

> We publicly declare at the national and international level, that the granting of the licence for open pit metal mining violates the collective rights of the [I]ndigenous peoples who inhabit our territories.[58]

In December, an Indigenous group 150 kilometres away from the mine site in Sololá began a 42-day blockade of Glamis trucks passing through their community on the way to San Marcos. The blockade ended on January 11, 2005, when more than 1,200 soldiers and 400 police agents began firing at

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54. *CAO Report (2005)*, *supra* note 45 at 6.
55. "Annex to CAO Report (2005)", *supra* note 47 at 21. The first recorded protest event against the Marlin mine in Sipacapa was in February 2004.
56. "Statement on the IFC-financed Marlin Mine, Guatemala, by Civil Society Organizations" (12 June 2006), online: Bank Information Center <http://www.bicusa.org/Legacy/Statement%20on%20Marlin%20-%20June%202006.pdf>.
57. Prensa Libre, "Rechazan actividad minera en San Marcos: Habitantes de dos municipios señalan que explotación causará daños al medio ambiente" [Mineral activity rejected in San Marcos: Residents of the municipalities indicate that exploitation will cause damage to the environment] (4 November 2004), online: Prensa Libre <http://www.prensalibre.com/pl/2004/noviembre/04/100844.html>.
58. *Declaración Comunitaria Sobre La Licencia de Minería de Metales a Cielo Abierto En el Departamento de San Marcos* [*Community Declaration on the Licence for Open Pit Mining for Metals in the Department of San Marcos*] (6 November 2004).The *Declaration* contained the seals of 35 organizations, about eighty signatures and a dozen people signing with their thumbprints.

the unarmed protesters. Raúl Castro Bocel, an Indigenous farmer, was killed by the security forces. Twenty others were injured.[59] Glamis blamed the protests on misinformation spread by anti-mining activists.[60] A few weeks later, Catholic Bishop Álvaro Ramazzini led a 3,000-person protest in San Marcos, where the mine was located.[61]

On January 24, 2005, the communities in Sipacapa decided to act. The municipal council passed the first of three resolutions establishing a *Consulta de Buena Fe* ("*consulta*").[62] The process would provide an opportunity for "the [I]ndigenous authorities, the [I]ndigenous Maya Sipakapanese population and the residents over 18 years old in the Municipality of Sipacapa to pronounce in favour or against the mining activity, exploration and exploitation of minerals in open pit mines."[63] A commission was established involving the village governance structures and the municipal council to organize and publicize the *consulta*. The decision was to be binding and in force in the territory of Sipacapa.[64]

During the evening of Sunday, March 13, 2005, there was a choral concert in the parish church of the municipality of San Miguel Ixtahuacán, department of San Marcos. Alvaro Benigno, a man from the village of Pie de

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59. Mining Watch, "Mayan Organisations and Supporters Demand the Closure of the Marlin Mine in San Marcos, Guatemala", online: Mining Watch <http://www.miningwatch.ca/index.php?/Guatemala/Close_Marlin>; Julio Lara & Edgar René Sáenz, "Queman autopatrulla—Vecinos de Sololá atacan Policía durante cortejo de muerto en disturbios" (13 January 2005), online: Prensa Libre <http://www.prensalibre.com/pl/2005/enero/13/105397.html>; "Open Pit Gold Mining: Human Rights Violations and Environmental Destruction—The Case of the Marlin Gold Mine" *FoodFirst Information and Action Network* ("FIAN") (September 2005) at 3.
60. Glamis Gold, Press Release, "Glamis Gold Comments on Transport Incident" (13 January 2005), online: Goldcorp Inc. <http://www.goldcorp.com/_resources/glamis/pressreleases/2005/jan13-05.pdf>.
61. Kelly Patterson, "Canadian Mine Strikes Lode of Unrest: The Debate over the Presence of a Gold Mine in Guatemala has Resulted in a Call for 'Urgent Action' by Amnesty International" *Ottawa Citizen* (26 April 2005).
62. Actas 04-2005 24 de enero, 06-2005 07 de febrero, 09-2005 28 de febrero, Corte de Constitucionalidad, Guatemala, "Caso Sipacapa (Minerías)", Expediente 1179 - 2005, (8 May 2007) at 2, online: Constitutional Court of Guatemala <http://www.cc.gob.gt/index-2.html> [*Corte*].
63. *Ibid.* at 1. "[U]na "Consulta de Buena Fe" con el objeto de que las autoridades indígenas, la población indígena de ascendencia maya sipakapense y vecinos mayores de 18 años del municipio Sipacapa se pronunciaran a favor o en contra de la actividad minera de reconocimiento, exploración y explotación de minerales metálicos a cielo abierto en dicho municipalidad."
64. *Ibid.* at 21. "Los resultados de la Consulta de Buena Fe es una decisión soberana de la voluntad de la población indígena y no indígena, mayores de 18 años vecindados en el Municipio de Sipacapa, San Marcos; la cual será de observancia general y obligatoria en el territorio del municipio de Sipacapa." ["The outcome of the Consulta de Buena Fe is a sovereign decision of the will of the Indigenous and non-Indigenous population over 18 years old residing in the Municipality of Sipacapa, San Marcos; which decision will be in force in the territory of the municipality of San Marcos."].

la Cuesta, a municipality of Sipacapa, was in attendance. According to eye-witnesses, when Benigno left the church and headed towards his home, two employees of the private security company hired by Glamis, the Golan Group, shot five or six bullets, killing Álvaro Benigno. He was taken to the National Hospital in Huehuetenango, where he was pronounced dead.[65] According to Glamis, it was a private dispute, and a Glamis press release reported that the company met with the family of Alvaro Sanchez, and assisted them in filing charges with the police against the company security guard.[66]

On June 8, 10 days before the *consulta*, Glamis issued a press release which made the *consulta* sound sinister, secretive and intimidating.

> Glamis has learned that a small group of private individuals in Sipacapa are proposing to hold a referendum regarding whether or not the municipality wants future mineral development within its borders .... The information provided herein has been gathered from various sources believed to be reliable.
>
> Glamis has received reports of intimidation by the referendum organizers, including threats to shut off water or burn crops of residents if they vote against the referendum. The Company understands that there will be no secret ballot, but that in the face of such threats and intimidation, organizers of the referendum intend to conduct a public vote by a show of hands.[67]

Glamis "communicated its concerns" to the non-government organizations supporting the people of Sipacapa about the "apparently undemocratic and abusive process," suggesting that they should reconsider their involvement. Glamis labelled the referendum as "patently corrupt." This was strong language and, in the context of Guatemala, threatening language.[68]

The community had arranged for the group of 70 national and international observers to be present before, during and after the *consulta*. In Latin America international observers have been used to provide some

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65. Mining Watch, "Killing of Álvaro Benigno Sanchez by Security Guards Working for Glamis Gold Subsidiary in Guatemala" (5 April 2005), online: Mining Watch <http://www.miningwatch.ca/index.php?/Guatemala/Killing_of_Alvaro_Be>. To date, no one has been charged for either of these killings. In fact, according to Alvaro Sánchez, the father of the deceased, and several NGOs that work in Guatemala, the manager of the Grupo Golan company telephoned Benigno's family a number of times to offer them "settlement" money in an attempt to ensure that the family would not begin a legal process against the company.
66. See Glamis Gold, Press Release, "Glamis Gold Comments on Recent Events in Guatemala" (20 April 2005), online: Goldcorp Inc. <http://www.goldcorp.com/_resources/glamis/press releases/2005/apr20-05.pdf>.
67. Glamis Gold, Press Release, "Glamis Gold Comments on Proposed Referendum in Guatemala" (8 June 2005), online: Goldcorp Inc. <http://www.goldcorp.com/_resources/glamis/press releases/2005/jun8-05.pdf>.
68. *Ibid.* Glamis claimed that the majority of people in the area supported the mine.

protection to Indigenous people during conflicts over resources. The presence of observers acts as a constraint on the exercise of power. It is understandable then, that Glamis viewed their presence in a negative light, referring darkly to "special interest groups."[69]

Ladan Mehranvar was one of the international observers.[70] She conducted interviews in the community to determine the source of the information about intimidation of individuals by anti-mine activists, but was unable to find any evidence other than the rumours reported by Glamis. The local police stated that they had not received any denunciations of threats, nor had they heard of any such incidents.

On June 13, five days before the vote, Glamis went to court to get an injunction to stop the *consulta* from taking place. The provisional injunction was granted.[71] The municipality appealed the decision to the Constitutional Court on June 17, but the mayor decided to withdraw his support for the *consulta*. At around the same time, the Ministry of Energy and Mines proceeded directly to the Constitutional Court, which did not issue an injunction. The communities, nonetheless, continued with plans for the vote, and announcements were made on the radio.

The day before the *consulta*, some children from the community distributed unsigned pamphlets that claimed that the referendum was cancelled. Similar announcements were sent out over local radio stations. The pamphlets were later discovered to be from the offices of Montana Exploradora, the subsidiary of Glamis.

The *consulta* took place notwithstanding these attempts to derail it. It was realized simultaneously at three sites within the town of Sipacapa and in 10 rural communities in the region. Each community met at its local community hall, where benches or individual chairs were placed in rows facing the front stage. In the three communities visited by Ladan, the auxiliary mayor and other local leaders spoke. Each community hall was also connected to the local radio station which was airing the process live, and ensuring a simultaneous vote. The question put out to the communities was: "Are you in favour of mining on the territory of the Sipakapense people?"

Each community carried out its voting according to the traditions and customs of that particular community. Thus, in some communities there was an open vote demonstrated by the show of hands. This was the case in San

69. *Ibid.* The groups included Guatemalan supporters such as the environmental group Madre Selva and the Catholic church. There were also some international NGOs such as CARE and Rights Action.

70. The description of the *Consulta* is taken from her own observations.

71. Lic. Guillermo Galindo Gonzalez, Juez Septimo de Primera Instancia Civil, Proceso Constitucional de Amparo 87-2005 (13 June 2005).

Isidro. The group that walked in included women with their babies and lots of children. The participants were given an opportunity to talk, then five or six community leaders, including the auxiliary mayor, counted the raised hands (twice). In Sipacapa, the community, the vote was carried out by secret ballots. In other communities, such as Quecá and Chual, people lined up and individually marked their position (yes or no) on a poster-sized paper (the "Act") that was managed by the auxiliary mayor of the community. In some of the communities, individual members also signed the Act by either a thumb-print or a signature.

The national and international observers were organized in smaller groups to ensure a fair vote. Each group of observers was also given the task of recording all events during the *consulta* within the community they were based, including the completion of a questionnaire created by the organizers of the referendum. The observers reported that there was a high level of participation by both men and women and that there were no incidents of violence or coercion.

In total, 2,426 persons voted against mining, 35 persons voting for mining, 8 ballots were illegible, one was blank and 32 abstained. Of the 13 community assemblies, 11 rejected mining (the great majority unanimously), one supported it and another community abstained from voting. In total, 98.5 per cent of the participating population rejected mining. The number of people who participated in the referendum was 2,502. Of the total voting population of Sipacapa, this represents 44.3 per cent. As a benchmark, in the 2004 federal elections, 3,087 people in Sipacapa (or 54.6 per cent of the population) participated in the voting process.

On June 21, 2005, the Sipakapense population and each community auxiliary mayor gathered in the central plaza of Sipacapa, San Marcos, to present the results of the community consultations to the municipal authorities. The Municipal Council issued a Municipal Agreement, which, in its operative section, states: "Agrees: To abide by the outcome of the Community Consultation carried out on June 18, 2005 by the community authorities of the villages in the Municipality of Sipacapa, San Marcos." Thus, the decision of the citizens to reject the exploration, exploitation, and extraction of minerals in the territory of the Sipakapense people was confirmed.[72]

All of these events occurred before a backdrop of impending and actual violence.

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72. Mines and Communities, "The People of Sipacapa Reject Mining Activities in their Territory: We Demand That Their Sovereign Decision be Respected", online: Mines and Communities: <http://www.minesandcommunities.org/Action/press667.htm>.

Bishop Álvaro Ramazzini, who led the march against the mine, had received death threats and had to be put under government protection.[73] There were death threats against other anti-mine activists and a car belonging to one of the leaders was set on fire.[74] After members of the environmental group Madre Selva received threats and attacks, the Inter-American Human Rights Commission ordered the government to provide police protection.[75] Glamis says that its workers were also threatened. What is interesting is the approach to death threats by Kevin McArthur, then CEO of Glamis. A June 23, 2005, press release from Glamis described an incident in Sololá:

> [T]hree residents of the municipality of Sololá (approximately 120 km from the Marlin project) allegedly received death threats because of their opposition to mining in general and the Marlin project in particular. These coincide with the numerous death threats and threats of violence that have been directed toward Marlin project employees and contract personnel in recent months.[76]

The press release suggests that, in the eyes of Glamis, the death threats to anti-mining activists are only allegations whereas death threats to Glamis employees are fact. McArthur condemned violence and stated that Glamis had no knowledge of individuals issuing death threats. However, there is no indication in any of the press releases from this time that Glamis investigated the death threats against the anti-mining activists or had any policy to deal with such threats.[77]

V EXERCISE OF INDIGENOUS LAW OR EXERCISE OF GUATEMALAN LAW BY INDIGENOUS PEOPLE?

Prior to the 1990s the prevailing view in legal and political circles was that only laws sanctioned by the state were valid. Laws of Indigenous peoples themselves were not laws at all, but merely customs, traditions, habits, or instincts. It was this approach which allowed a court in Australia in 1971 to declare that, as a matter of law, Australia was *terra nullius* (empty land)

73. Patterson, *supra* note 61.
74. *Ibid.*
75. Amnesty International, "Guatemala: Further Information on Fear for Safety: Flaviano Bianchini (m)" (23 February 2007), online: Amnesty International, Urgent Actions <http://web.amnesty.org/library/Index/ENGAMR340092007?open&of=ENG-GTM> ["Fear for Safety"].
76. Glamis Gold, Press Release, "Glamis Gold Comments on Sipacapa Referendum" (23 June 2005), online: Goldcorp Inc. <http://www.goldcorp.com/_resources/glamis/pressreleases/2005/jun23-05.pdf>.
77. *CAO Report (2005)*, *supra* note 45 at 36. "There is no system in place for addressing the allegations and threats to security".

when the first settlers arrived. In other words, the Aborigines did not exist because they had no "law."[78] In 1990, Chief Justice McEachern made a similar decision in Canada. He assumed that, because First Nations societies did not have the same institutions, governmental structure, or technology, they did not have law, social fabric or humanity.

> It would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiff's ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that [A]boriginal life in the territory was, at best, "nasty, brutish and short."[79]

The judge concluded that "[the First Nation people] more likely acted as they did because of survival instincts."[80]

There is no doubt that these approaches are no longer acceptable. Indigenous laws have been accepted on their own terms in both domestic and international spheres.[81] What is at stake is not whether Indigenous law exists, but how that law interacts with state law.

It is thus important to look at what happened in the *consulta* in Sipacapa from this perspective. There are three features that should be noted.

First, the decision to hold the *consulta* was not a decision of "private individuals," as alleged by Glamis, but rather a decision that was channeled through existing governance structures in the community. The municipality duly passed three resolutions relating to the process, which were implemented through the village governance structures.

Second, there was a clear process. The process called for organized community gatherings which were publicized in advance. On the day of the *consulta*, the deliberations were well organized, orderly and provided a means for community members to express their wishes. The fact that one community abstained and another decided to vote in favour of the mine indicates that the process contemplated a range of different results.

Third, the *consulta,* and the binding effect that it was meant to have, were assertions of the will of the community. The community had the right to hold the *consulta* and the community had the right to bind the government

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78. *Milirrpum v. Nabalco Pty Ltd.* (1971), 17 F.L.R. 141.
79. The trial judgment by McEachern C.J.B.C. was delivered in *Delgamuukw v. British Columbia*, [1991] 5 C.N.L.R. 1, 79 D.L.R. (4th) 185 (B.C.S.C.) at para. 111. The Supreme Court of Canada firmly rejected McEachern's comments, overturned the trial decision and sent the case back for trial in 1997: [1997] 3 S.C.R. 1010, 1 C.N.L.R. 14.
80. *Ibid.*at para. 1343, McEachern C.J.B.C.
81. See generally, S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford: Oxford University Press, 2004).

of Guatemala and the mining company to the outcome of the *consulta* on its territory. According to Indigenous law, the community could decide *whether* there should be mining in their territory.[82]

From the Indigenous perspective, the authority and jurisdiction to act does not arise from Guatemalan legislation. The authority arises from the inherent rights that come with being an Indigenous people. The resolution of the municipality referred to above speaks of the "sovereign decision of the will of the [I]ndigenous and non-[I]ndigenous population"[83] The fact that a judge attempted to issue an injunction was not valid *within* the Indigenous law and that is why the *consulta* continued in spite of the court decision. The community emphasized this point to a representative of the World Bank's Compliance Advisor Office who went to Sipacapa in May 2006 to try to start a dialogue between Sipacapa and Glamis:

> In their view, the popular referendum that occurred June 18, 2005, has closed the discussion about mining and their position is clear: "No to mining on our territory." They also expressed the importance of retaining their land and not selling it to the company. While some community members may want to continue to debate the mining issue, most have no appetite for continuing to discuss the dispute or engaging in dialogue over mining. "We can ignore the mine as long as it doesn't affect us" captures the prevailing attitude. Nevertheless, there is still little acceptance of the mine and no resolution of the root causes of the dispute.[84]

The mine defied the results of the *consulta*. The company freely admitted that it continued exploring land in Sipacapa, even though the municipal leaders were opposed.[85] According to Glamis, it was conducting exploration activities only in communities where it received expressed support and

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82. *CAO Report (2005)*, *supra* note 45 at 32:

> [T]he self-guided nature of Montana's activities raises the issue of what questions people are being asked during consultation: is it whether the project should go ahead or rather how the project should go ahead. Without endorsing either perspective, it appears that given the timing and extent of the project's consultation activities it (*i.e.* the project) is asking to some extent how the project should go ahead. The people of Sipacapa want to be asked whether or not the project should be approved based on what the impacts will be on their territory from this mine and from the future expansions.

83. *Corte*, *supra* note 62 at 20: "una decisión soberana de la voluntad de la población indígena y no indígena."

84. Compliance Advisor Ombudsmen ("CAO"), "CAO Follow-up Assessment, Guatemala" (May 2006), online: CAO <http://www.cao-ombudsman.org/html-english/documents/CAOGuatemalaMarlinReport-english-May12006.pdf> at 6 ["CAO Follow up Report (2006)"].

85. *Ibid.* at 7. "[T]he mine is continuing to negotiate with individual landholders to explore for mineral prospects Sipacapa .... While we understand that no additional land has been purchased, the mine is undertaking exploration activities with the permission of landowners and villages but without the recognized approval of the municipality."

consent.[86] From the point of view of Indigenous law, this was a clear violation. The community leaders had said that land in Sipacapa should not be sold for the mine. Whether an individual person in Sipacapa has the right to sell land should be determined by the community, not by the mine. If there were a law in Canada prohibiting the sale of water, and an American company tried to buy water directly from individual "willing sellers," the act would be illegal irrespective of the wishes of the individuals.

This is not to say that there is a consensus that state law automatically accedes when in conflict with Indigenous law. What is clear is that the relationship between Indigenous law and state law is currently being worked out in both the domestic and the international arena. During this stage, both domestic and international law have put constraints on non-Indigenous actors who violate Indigenous law. These constraints are what prevent the unilateral overriding of Indigenous law. From the Indigenous law perspective, however, it is important to realize that these are constraints put on non-Indigenous actors by non-Indigenous actors. These constraints should not be mistaken for Indigenous law itself.

In order to understand how these constraints operated in our case study, it is important to have an appreciation of the power imbalances which are a reality for the Indigenous people in Sipacapa and San Miguel Ixtahuacán.

VI POWER IMBALANCE

Goldcorp has assets of US $17.9 billion.[87] This is over half of Guatemala's GDP of US $35.25 billion.[88] Goldcorp "is the single largest taxpayer ever in Guatemala"[89] and claims that it will be contributing US $69.9 million in taxes and royalties over 11 years to the Guatemalan government.[90]

The enormous financial resources of the mine were publicly acknowledged by the government of Guatemala. A Glamis press release

86. Glamis Gold, "Response to CAO Follow-up Assessment Report" (22 May 2006), online: CAO <http://www.cao-ombudsman.org/html-english/documents/GlamisResponsetotheCAOFollow-UpAssessmentReport.pdf> at 2.

87. Goldcorp Inc., "Goldcorp 2006 Annual Report", online: <http://www.goldcorp.com/_resources/financials/annuals/2006_Goldcorp_AR_web.pdf> at 1 ["Goldcorp Annual Report (2006)"].

88. "World Factbook: Guatemala" in *International Market Research Reports*, online: Industry Canada <http://strategis.ic.gc.ca/epic/site/imr-ri.nsf/en/gr-05098e.html>.

89. Email from Jeff Wilhoit of Goldcorp to Dawn Paley (1 February 2007), online: Business & Human Rights Resource Centre <http://www.business-humanrights.org/Search/SearchResults?SearchableText=paley> ["Wilhoit Email"]. "President Berger has observed that Goldcorp is the single largest taxpayer ever in Guatemala."

90. "Annex to CAO Report (2005)", *supra* note 47 at 16. US $3.9 million of a total $69.9 amount is in royalties to government; San Miguel gets an additional $3.9 million in royalties, Sipacapa was to get $778,000.

from September 8, 2005, gives a glowing account of the announcement of a highway in San Marcos with President of Guatemala Oscar Berger saying, "San Miguel is going to win with new employment, economic activity as well as infrastructure .... This is an exemplary project."[91]

In addition, the mine was involved in projects at the local level. Glamis/Montana created its own "NGO" (non-governmental organization) called Fundación Sierra Madre which works with an American NGO called Citizens Development Corps. According to their reports, the foundation has trained midwives, provided vocational training in carpentry, sewing and cooking, renovated health care centers and established 18 communal banks for women.[92] As of September 2005, Glamis had spent US $1.3 million and committed another US $5 million over the next 10 years for community improvements. Glamis funded school repairs and the hiring of teachers in local community schools. Glamis also built a 24-hour medical clinic; purchased and equipped an ambulance and helicopter rescue service; and installed chlorinators in both municipalities' water systems.[93]

Involvement in these activities gave Glamis an attractive profile and in February 2005, before the *consulta*, the World Bank referred to the company as a "good corporate citizen."[94] Since then, much has become unraveled.

The first clear analysis of the problems with Glamis' approach was contained in a report commissioned by the World Bank itself. After a complaint made to the Bank in March 2005, before the *consulta* was held, the Bank sent the Office of the Compliance Advisor ("CAO" or "Compliance Advisor") to investigate the complaints. The Compliance Advisor reports directly to the president of the World Bank.[95] In this case, the Compliance Advisor prepared two reports, both written after the *consulta*—the first in September 2005 and the second in May 2006. While

91. Glamis Gold, Press Release, "Glamis Gold Comments on IFC Compliance Office Report on Marlin Project" (8 September 2005).
92. "Annex to CAO Report (2005)", *supra* note 47 at 15.
93. *Ibid.*; "Marlin Fact Sheet", *supra* note 49 at 2. According to Ladan Mehranvar, some community members questioned whether these projects had all taken place.
94. Letter from Rashad Kaldany, Director, Oil, Gas, Mining and Chemicals Department, IFC to Shin Imai (22 February 2005).
95. The Compliance Advisor is one of the most important mechanisms for the World Bank to ensure that the loan recipient is adhering to environmental and human rights standards. The CAO can act as an ombudsman and can mediate disputes related to compliance (see Susan Park, "Assessing the Accountability of the World Bank Group," online: <http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/workshops/forthcoming/wbbled/papers/park.pdf> at 26. Another mechanism of accountability is the Inspection Council which reports to the executive directors of the Bank and has an investigative and advisory role (see Clark, *ibid.* at 17). For an account of the operation of a third mechanism, a compliance evaluation conducted by the Multilateral Investment Guarantee Agency, see David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oxford and Portland: Hart, 2007). The latter two mechanisms did not play a role in the Glamis situation.

couched in neutral language, the reports provide a methodical record of the failures of the state of Guatemala and Glamis. We will highlight two of the issues here: the environment and consultation.

One of the environmental issues arises out of the use of the cyanide leaching process.[96] Due to the mountainous region, the dams that hold waste water cannot be lined, and instead Glamis breaks down the cyanide content in the water to appropriate levels before sending it to unlined dams.[97] The possible contamination of groundwater from the use of cyanide is a pressing environmental concern.[98]

The people of Sipacapa were particularly worried about competition for water resources as well as possible contamination of the local water supply from mining operations. The CAO report noted that Glamis' original environmental assessment was incorrect in stating that there were no individuals living downstream from the Tailing Storage Facility. It then went on to find it unclear how the IFC determined that the Environmental and Social Impact Assessment, which is required for IFC funding, was adequate.[99]

The Compliance Advisor, however, found that there was no significant risk of water contamination to local communities near the mine, including Sipacapa.[100] As well, it determined that due to an updated project design, Sipacapa would not experience any water shortage from mine activities.[101] Since the release of the Compliance Advisor report, various opinions regarding the environmental impacts of the Marlin mine have been submitted. A technical analysis from hydrogeologist Robert Moran retained by environmental group Madre Selva claims that the hydrogeologist consulted by the Compliance Advisor for its assessment had never visited

96. *CAO Report (2005)*, *supra* note 45 at 15.

97. "Environmental Impact Assessment Summary", Online: IFC <http://ifcln001.worldbank.org/ifcext/spiwebsite1.nsf/2bc34f011b50ff6e85256a550073ff1c/60b8beb20d6bdc7285256e610054690a?OpenDocument>.

98. "I-137: Ban on Cyanide Mining", online: Montana Environmental Information Center ("MEIC") <http://www.meic.org/mining/cyanide_mining/ban-on-cyanide-mining/i-137>. An indication of the controversial nature of cyanide is the fact that its use in mining has been banned in the state of Montana since 1998; Cambior Inc., Press Release, "Update Camp Caiman Project" (11 October 2006), online: Cambior Inc. <http://www.cambior.com/2/communiques/2006/06-10-11_EN_CampCaiman_Final.pdf>. A Cambior mine in Guyana is stalled until the company's environmental plans can meet the requirements of the French government. In particular, the government is concerned over the management and containment of cyanide; see *infra* note 173 and accompanying text that discusses a big cyanide spill by Cambior in Guyana that spurred a law suit in Canada; *Fisheries Act: Metal Mining Effluent Regulations*, 6 June 2002, SOR/2002-222 (QL). Cyanide use in gold mining is not banned in Canada, but its use is regulated if cyanide is used in the milling process (as a process reagent).

99. *CAO Report (2005)*, *supra* note 45 at 20.

100. *Ibid.* at i.

101. *Ibid.* at ii.

the mine site and had based his opinion on documents provided by Glamis. As well, Moran finds that the impact assessments in the Compliance Advisor report were too simplistic and failed to take into account many factors and long term scenarios. For example, in testing Acid Rock Drainage ("ARD"), the Compliance Advisor hydrogeologist tested the ARD over 20 weeks. However, Moran indicates that many in the industry use a longer period, from 40 weeks to a year to properly predict the possible development of ARD.[102]

The second issue relates to the consultations that took place with the people in the area. The *ILO Convention 169* clearly requires states to consult with Indigenous peoples "before undertaking or permitting any programmes for the exploration or exploitation" of subsurface resources.[103] Yet in this case there was no such consultation before the granting of a mining concession.[104] Local individuals, who were hired to provide information after the mining concession was granted, did not provide information on the environmental impacts of the mining activities.[105] The Environment and Social Impact Assessment conducted by Glamis was wanting in that "issues of acid rock drainage, dam safety and cyanide management were poorly defined."[106] This Assessment itself was highly technical, and was presented, not as a consultation, but as a *fait accompli.* The Compliance Advisor suggests that this lack of information may have led to the signing of a declaration of support for the mine by leaders in San Miguel and Sipacapa early on in the project. The Compliance Advisor reports that this initial support has dissipated and that "the complainants believe that Sipacapa was

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102. Madre Selva & Robert Moran, "Response to CAO Assessment Report" (22 September 2005), online: CAO <http://www.cao-ombudsman.org/html-english/documents/MadreSelvaResponseCAOAssessmentReportEnglishwithtechnicalReviewAnnexEnglish_000.pdf)>.
103. *ILO Indigenous and Tribal Peoples Convention (No. 169)*, (entered into force 5 September 1991), online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/62.htm> at Article 15.2 [*ILO Convention 169*].
104. "Annex to CAO Report (2005)", *supra* note 47 at 17: "No records relating to disclosure and consultation are available for this period [1996-1998]. No evidence that municipalities of San Miguel or Sipacapa or landholders were consulted or notified before/during granting of exploration license was provided to the CAO."
105. *CAO Report (2005)*, *supra* note 45 at 31: "The CRG personnel expressed that in general they heard continuing concerns within both Sipacapa and San Miguel municipalities about the environmental impacts of the project and noted that they were unable to explain project impacts and mitigation plans, such as why water demands of the project would not impact local users and how potential contamination of water supplies would be mitigated."
106. *Ibid.* "Public disclosures about project impacts and potential risks prepared by the company—including the ESIA—were highly technical and did not at the time have sufficient information to allow for an informed view on the likely adverse impacts of the project. In particular, issues of acid rock drainage, dam safety and cyanide management were poorly defined."; *Ibid.* at ii. "Much of the disclosure and consultation activity occurred after completion of the ESIA, and it is reasonable to question the extent to which they had an opportunity to meaningfully participate in the ESIA process."

neglected in the consultation process and that the project has failed in its obligations to involve them in the license approval process."[107] Finally, in its report in May 2006, the Compliance Advisor sounds an alarm concerning Glamis' explorations in Sipacapa, suggesting that "[t]he mine could declare a temporary, voluntary suspension of exploration activities in Sipacapa" because of the "the risks of continuing with exploration activities in Sipacapa, particularly in the current climate of a tense calm."[108]

Although there were many meetings, the Compliance Advisor stated that the people of Sipacapa expressed dissatisfaction with the process and observed that the "[l]ack of clarity about whether and how potential impacts of the project were conveyed to local people, as opposed to a more general discussions on project benefits."[109]

In the context of the types of concerns expressed by the Compliance Advisor, one gets a hint that all of the activity on the part of Glamis did not arise solely of benign good will. Glamis had faced significant opposition to the mine and these "consultations" may have been more about self-promotion than about fulfilling their legal duty outlined by the Constitutional Court of Guatemala to "reach agreements or arrive at a consensus."[110] Viewed in this light, informational campaigns conducted by Glamis which have reached "tens of thousands" of people could be seen as a somewhat menacing use of economic and political power.[111]

Perhaps this impression can be placed in better relief by taking the perspective of the Indigenous population. Between 1962 and 1996, 15 massacres occurred within the San Marcos department.[112] The mining company showed up only three years after the Peace Accords had been signed. It is apparent that the people of Sipacapa and San Miguel Ixtahuacán had little understanding of the potential impact of the mine in the early

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107. *Ibid.* at 28.
108. "CAO Follow up Report (2006)", *supra* note 84 at 12.
109. *CAO Report (2005)*, *supra* note 45 at 31.
110. *Corte*, *supra* note 62 at 27.
111. "Wilhoit Email", *supra* note 89. "Proper, documented consultation has been carried out with regard to the local communities, and informational campaigns continue to be a significant part of our community relations effort. In the course of our frequently-held site visits and community discussion forums, easily tens of thousands of people have been consulted and asked for feedback, suggestions and recommendations."
112. Guatemalan Commission for Historical Clarification ("CEH"), "Number of Massacres by Department", online: American Association for Advancement of Science, Science and Human Rights Program, Map of Massacres <http://shr.aaas.org/guatemala/ceh/report/english/graphics/charts/page83.gif>; Guatemalan Commission for Historical Clarification ("CEH"), "Total Percentage of Human Rights Violations and Acts of Violence by Department, 1962-1996", "Principle Violations by Year and by Department", online: American Association for Advancement of Science, Science and Human Rights Program <http://shr.aaas.org/guatemala/ceh/report/english/graphics/charts/page84.gif>.

stages. When the mine started to become a reality, it became a reality in the context of the tragic backdrop of the recent history of the area. The overflights of reconnaissance planes and helicopters would have brought back memories of the war, as would the use of the military to guard the mine and the deployment of private security forces, apparently including ex-military personnel.[113] These fears would be exacerbated by the killing of Raúl Castro Bocel, the protester in Sololá, by the military, and the killing of Álvaro Benigno by the security firm hired by Glamis. Surrounding these events were death threats to Bishop Alvaro Ramazzini and others.

The Compliance Advisor was critical about the lack of attention paid by Glamis to security issues:

> The lack of a clear policy on human rights and the management of security forces is a significant oversight on the part of both the company and IFC to adequately safeguard against the potential for violence .... Local people remain gravely concerned about security force issues, and the company to date does not have policies in place for management of security forces.[114]

Glamis took some steps to address the issue, including adopting the U.S.-U.K. Voluntary Principles on Security & Human Rights in its operations.[115] However, the intimidation and targeting of leaders was alleged to have continued. A report from a member of a human rights NGO describes the situation in July 2006:

> On July 5th, Sipakapense community leader and former municipal mayor Mario Tema was on his way to Huehuetenango with his wife when they were followed by a green pickup truck with no license plates. Several community members have informed Tema of conversations they have overheard in which unknown individuals proclaim their intention to get rid of him in the same way as his father, who was killed in 1987.
>
> There are also concerted efforts to criminalize and delegitimize the community leaders who have been at the forefront of the struggle in Sipacapa for consultations and who have maintained a clear position against mining activities in the municipality. There are at least three false accusations, mainly of threats and possession of weapons, against community leaders Mario

113. *CAO Report (2005)*, *supra* note 45 at 34. According to the report, the presence of the military is required by Guatemalan law for safety with respect to explosives.
114. *Ibid.* at 35.
115. World Bank/IFC, "Response to CAO Report (2005)" (14 October 2005), online: CAO <http://www.cao-ombudsman.org/html-english/documents/Marlin-Responsetofinalreport.pdf> at 4.

> Perfecto Tema Bautista, Horacio Bamaca Mejía, Santos Arnulfo López, Sergio Carrillo Tojil, and Eliseo Bamaca.[116]

Nonetheless, opposition continues to grow. This is illustrated by events in the municipality of San Miguel Ixtahuacán where 85 per cent of the mine is located. Most of the land was purchased in this municipality and in September 2005, the Compliance Advisor reported that there were no complaints from people selling the land. In January 2007, dozens of protesters blocked entrances into the mines for a week complaining about the land transactions.[117] Then in March 2007, a group called the Communal Front of Resistance to Mining Exploitation located in San Miguel Ixtahuacán released a declaration stating that they had been pressured and intimidated into selling their lands. They complained of water wells drying up and deaths to animals from tailings deposits.[118] In May 2, 2007, another organization from San Miguel Ixtahuacán, the Asociación para el Desarrollo Integral San Miguelense, sent a letter to shareholders of Goldcorp, revealing that two of their members had been taken away by the Guatemalan army in the middle of the night and that there were arrest warrants out for 14 others. They say, "all of this because these community members claim they were cheated when people from your company came to take away their lands with force and coercion."[119]

The arrests may have been a response to pressure from Goldcorp for direct action against those opposed to the mine. In February 2007, a spokesperson for the mining company wrote that Goldcorp has asked "that authorities investigate when fabricated social and environmental issues are employed to further localized political contests in the country."[120]

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116. Sandra Cuffe, "San Miguel Ixtahuacán Announces Community Consultations & Sipacapa Community Leaders Face Ongoing Repression" (20 July 2005), online: Global Exchange, <http://www.globalexchange.org/countries/americas/guatemala/3354.html>.
117. "Guatemalan gold mine operations slowed by protests" *Reuters News* (17 January 2007).
118. "Press Release and Declaration by the Communities in Resistance in San Migual Ixtahuacan, San Marcos, Guatemala to National and International Public Opinion" (7 March 2007), online: <http://portal.rds.org.hn/ listas/medio-ambiente/msg01394.html>.
119. ADISMI, "Letter from Communities in Resistance to Goldcorp" (2 May 2007), online: Fredericton Peace Coalition <http://fredericton peace.org/?p=562>; "Wilhoit Email", *supra* note 89. Goldcorp explains:

> These road blocks were orchestrated by a small group expressing dissatisfaction with land agreements they had entered into with Goldcorp. In short, they have demanded more money after being paid well in excess of market value. Concerning the blockades themselves, we are disappointed that instead of constructive dialogue, those orchestrating this roadblock preferred to engage in harassment, threats and intimidation to advance their claims.

120. "Wilhoit Email", *supra* note 89.

From the Indigenous perspective then, they are facing a huge mining company with seemingly unlimited resources to hire guards, access the legal system, and draw on the support of the Guatemalan president. The company has funds to invest in community sessions where it obtains information and decides what to do with the information.

The Indigenous people of Sipacapa and San Miguel Ixtahuacán, on the other hand, have precious little. They are showered with information but do not have a real say in the development of the mine. They cannot rely on the military or the government. They have little in terms of financial resources, political power, access to justice or even personal protection. One of the few avenues open to them is to protest publicly and blockade roads.

VII CONSTRAINTS WITHIN GUATEMALA

For Glamis, the fact that there was a breach of Indigenous law was perhaps of no concern. It believed that only Guatemalan law was valid and Goldcorp now relies on the fact that it is in compliance with Guatemalan law.[121]

In the days before the *consulta* was held, the Ministry of Energy and Mines brought a case to the Constitutional Court to stop the event from taking place. The Constitutional Court released its decision in the Sipacapa case on May 8, 2007, almost two years after the case was filed. The arguments used by the Ministry of Energy and Mines turned on the *illegality* of both the process of the consultation and the *illegality* of the attempt to make the decision binding on the mine. They said that the Indigenous community could only exercise authority granted under Guatemalan legislation. The Ministry also argued that subsurface minerals belonged to the state of Guatemala and a local municipality could not hold a consultation in relation to a matter that was not within its jurisdiction.[122]

The Constitutional Court sent a strong rebuke to both the government and the mine with respect to the consultation process. They found that the *consulta* was legal and that it "constituted an important mechanism of expression for the populace."[123] The decision pointed out that the municipal resolutions setting up the *consulta* called for widespread notice of the event and that there was no difficulty in obtaining certified copies of the resolution

121. "Wilhoit Email", *ibid.* "Two rulings by the courts at that time ruled the consultas to be unconstitutional. Those rulings are still in place. Goldcorp's perspective is that we will abide by the rule of law as defined by the courts and governmental bodies in Guatemala."

122. *Corte*, *supra* note 62 at 14, 15.

123. *Ibid.* at 26. "Este tribunal destaca que las consultas populares constituyen mecanismos importantes de expresión popular."

at the launch of the *consulta* process.[124] The Court then urged the government to make effective the requirement for consultation of Indigenous peoples found under the *ILO Convention 169* before mineral exploration by legislating a consultation process for the future.[125] Clearly, the Court did not accept assurances that adequate consultation had taken place or that the *consulta* organized in Sipacapa was unnecessary and "corrupt," as alleged by Glamis.

The Court goes further in its criticism, stating that the objective of consultation is not simply to discover community feelings, but to "reach agreements or arrive at a consensus with respect to the proposed measures."[126] The Court pointedly states that mining activity should "provide just compensation to the regions where the [mining] activities take place, through economic and social measures for community development."[127] The Court found, however, that the *consulta* was not binding within Guatemalan law because authority for mining was placed with the Ministry of Energy and Mines.[128]

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124. *Ibid.* at 25:

> [E]l Acta cero nueve-dos mil cinco (09-2005) establece que el Concejo Municipal y el Concejo Municipal de Desarrollo Urbano y Rural publicarán, por todos los medios a su alcance, el objeto del procedimiento consultivo por lo que no se aprecia que los acuerdos restrinjan la posibilidad de conocer la convocatoria. Además, la accionante expone, en el escrito inicial, que pudo obtener copias certificadas de las actas referidas a la convocatoria.

125. *ILO Convention 169*, *supra* note 103, Article 15:

> 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

126. *Corte*, *supra* note 62 at 27: "no sólo tienden a exteriorizar un sentimiento acerca de asuntos de importancia comunal, sino también, con el objeto de lograr acuerdos o alcanzar consensos acerca de las medidas propuestas."

127. *Ibid.*: "este Tribunal estima que el Organismo Ejecutivo en atención al principio de que las autorizaciones que se concedan para la actividad minera, debe generar mecanismos que propicien compensación justa a las regiones en donde se realiza dicha actividad, por medio de medidas económicas y sociales de desarrollo comunitario."

128. *Ibid.* at 21: "[L]a Ley del Organismo Ejecutivo designó al Ministerio de Energía y Minas, en su artículo 34, literal c), como responsable de las políticas de exploración, explotación y comercialización de minerales."

The courts in Guatemala have not been able to provide an effective counterbalance to the exercise of state power, in part because the Constitutional Court itself is beholden to the members of the legislature who appoint them, and the party of the former dictator Rios Montt was successful in manipulating the court appointments.[129] In addition, the Court is not immune to the threats from the still powerful military. In 1994 the President of the Court, Epaminondas González Dubón, was assassinated when a group of men opened fire on his vehicle in Guatemala City. He had just ordered the extradition to the United States of a military official accused of drug trafficking.[130]

In the Sipacapa case, the Constitutional Court made some fairly pointed remarks with respect to the conduct of Glamis and the government of Guatemala. Yet the Court did not go the extra step to actually stop the exploration. It was certainly open to the Constitutional Court to take the approach of the Supreme Court of Canada and require that consultation take place before further action is taken by the resource company.[131]

The Guatemalan state is still living with the power of the military and its dictators. There are strong democratic forces in Guatemala and individuals in government, the military and the churches who wish to move forward. However, the former dictators did not have to flee the country or face any legal accounting. In fact, they continue to run for office. Rios Montt, the dictator during the worst period of violence in Guatemala in the early 1980s, was the elected President of Guatemala's Congress in 2000.[132] After a ruling by the Constitutional Court, Montt was even able to run in the 2003 Guatemalan presidential election.[133]

In 2003, the colonel who ordered the death of the forensic anthropologist Myrna Mack in 1990 was freed by a lower court, only a year after he was sentenced. Despite a new Supreme Court ruling that reinstated his conviction due to public and international pressure, the colonel has eluded custody.[134]

Death threats and killings of human rights activists in Guatemala are all too common—even in 2007. Cases for Urgent Action are announced on the Amnesty International website at least twice every month for Guatemala.

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129. Sieder, "Guatemala Judiciary", *supra* note 4 at 224.
130. *Lethal Legacy*, *supra* note 39 at 40-43.
131. In Canada, there is a growing body of law defining the parameters of consultation. The leading case is *Haida Nation v. British Columbia*, 2004 SCC 73, 245 D.L.R. (4th) 33.
132. Susanne Jonas, "Democratization through Peace: The Difficult Case of Guatemala" (2000) 42:4 J. Interamerican Studies and World Affairs, Special Issue: Globalization and Democratization in Guatemala at 31.
133. "The Americas: General riot: Guatemala's Election Row" *The Economist* 368:8335 (2 August 2003) 53.
134. "International Court Condemns Guatemala over Murder" *Reuters News* (19 December 2003).

One of the Urgent Actions concerns the people who are carrying on the work of the murdered anthropologist, Myrna Mack, in attempting to identify victims of massacres.[135] Nobel Prize winning Indigenous activist Rigoberta Menchu is also surrounded by death. She is running for president in the 2007 elections heading a party called Encuentro por Guatemala. In August 2007 shots were fired at the home of candidate Olga Marina Lucas López, and her two daughters (aged 15 and 20) were hospitalized with gunshot wounds. A few days before, an attempt was made on the life of executive member César Montes. These attempts followed a string of previous murders. In April 2006, Esteban Tebalán, a party coordinator was assassinated. In October of that year, Eduardo Maaz, the uncle of a regional party official, was shot to death. In May 2007, Liverato Granados, a mayoral candidate, was shot to death.[136]

There are clearly problems within the state in extending protection to those who are pursuing human rights for Indigenous people. The state is also vulnerable to economic forces. It has few sources of income and its natural resources are an important source of revenue. Consequently, there is an enormous incentive to address poverty through natural resource exploitation. There is little economic incentive to impose barriers to mining and the Constitutional Court found that the state had no mechanisms for complying with the consultation requirements of *ILO Convention 169*.[137]

Related to the economic vulnerability of the state is the lack of capacity in the government to monitor the mines. The Compliance Advisor found, for example, that the government of Guatemala had no capacity to monitor the environmental obligations and other obligations undertaken by Glamis with respect to the operation of the mine.[138]

It can be seen that the state does not provide an effective counterbalance to a large corporation, partly because the democratic state itself is struggling to protect human rights, and partly because the country is vulnerable to economic necessity.

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135. Amnesty International, "Guatemala", online: Amnesty International, Urgent Actions <http://web.amnesty.org/library/eng-gtm/index>.
136. Julio Lara, Lorena Seijo, Jessica Osorio, "Se solidarizan con EG: Dos dirigentes de partido han sido atacados en menos de 48 horas" (9 August 2007), online: Prensa Libre <http://www.prensalibre.com/pl/2007/agosto/09/179303.html>.
137. *Corte*, *supra* note 62 at 27.
138. *CAO Report (2005)*, *supra* note 45 at iii: "CAO found no record of analysis of company capacity nor of government capacity to supervise or regulate the project."

VIII INTERNATIONAL CONSTRAINTS ON NON-INDIGENOUS ACTORS

There are a variety of possible avenues for attempting to put pressure on states to respect Indigenous rights including the enforcement mechanisms under the United Nations conventions and applications to the Interamerican Commission on Human Rights.[139] Here, we will focus on the instruments that are most relevant in the Sipacapa case: the International Labor Organization's *Indigenous and Tribal Peoples Convention (No. 169)* and the guidelines of the World Bank.

ILO Convention 169 requires governments to consult with Indigenous peoples when legislative decisions affect these communities directly.[140] Under *ILO Convention 169*, states must ensure that Indigenous peoples are free to participate in decision-making bodies through their appropriate representatives and that consultation efforts are conducted in good faith.[141] The goal of consultations is to either reach an agreement or to gain consent from the Indigenous community for the proposed action.[142] With respect to mining of minerals, states are required to consult with communities prior to exploration or exploitive activities.[143] As well, states must share the benefits of such mining activities with the Indigenous community.[144]

There are differing views on how the *Convention* should be implemented. A UN International workshop on the concept of free, prior informed consent discussed this issue in 2005. Consultation, according to the report of the workshop, involves a timely meeting with Indigenous peoples which allows them to influence the project or the decision to proceed with a proposal.[145] It requires the state to meet with those who represent the Indigenous community and must be more than an information session regarding the proposed action.[146] The report identified two fundamental

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139. For a general discussion see Anaya, *supra* note 81 and Szablowski, *supra* note 95. Among the international standards that could be potentially applicable are the *United Nations Global Compact* (2000), online: <http://www.unglobalcompact.org/>; *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), online: <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>; *The OECD Guidelines for Multinational Enterprises* (2000), online: <http://www.oecd.org/ dataoecd/56/36/1922428.pdf> and the *CERES Principles* (1993), online: <http://www.ceres.org/coalitionandcompanies/principles.php>.
140. *ILO Convention 169*, *supra* note 102 at Article 6.
141. *Ibid.*
142. *Ibid.*
143. *Ibid.* at Art. 15.
144. *Ibid.*
145. International Workshop on Free, Prior and Informed Consent and Indigenous Peoples, "Contribution of the ILO" (New York, 17-19 January 2005), online: United Nations <http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_ILO.doc> at 2 ["UN Prior Consent Workshop (2005)"].
146. *Ibid.*; Anaya, *supra* note 81 at 154.

principles of the *ILO Convention 169*. First, it promotes the right of Indigenous peoples to determine their own priorities relating to their future community.[147] Second, it states that Indigenous peoples must be able to make changes to proposed plans through participation in the decision-making process.[148] These principles place a burden on the state to justify its decisions on issues that affect, or are in conflict with, the wishes of Indigenous peoples.[149] Despite these principles, the report falls short of saying that the complete consent of an Indigenous community is a necessary requirement of the *Convention*.[150]

A review of Guatemala's compliance with *ILO Convention 169* in the context of the Glamis mine was conducted by the ILO Committee of Experts on the Application of Conventions and Recommendations in its 77th Session (2006). The Committee noted that Guatemala had said it was in the process of developing legislation and machinery to provide for consultation. However, the Committee expressed reservations about the continued exploration and exploitation by the mining company, asking whether "it will be possible to carry out the studies provided for in Article 7 of the Convention in cooperation with the peoples concerned before the potentially harmful effects of these activities become irreversible." The Committee also asked for an investigation into the killing during the road blockade at Sololá.[151]

The ILO has no ability to directly enforce its findings, relying instead on the good will of governments to follow recommendations of the Committee of Experts. The problem is one that is common in other international instruments. In the case of Guatemala, it has ratified the *Convention* and incorporated it into domestic law, but it has not implemented the consultation requirements in domestic legislation. In the Sipacapa case, the Constitutional Court exhorted the state to provide legislation, but did not go so far as to apply the provisions of the *Convention* directly.[152]

The operational policies of the World Bank offer another possible constraint. It has the advantage of applying directly to the borrowing corporation. The World Bank guidelines are similar to the principles of *ILO Convention 169*. They require borrowers to conduct "free, prior, and informed consultation" with the Indigenous community that will be affected

147. "UN Prior Consent Workshop (2005)", *supra* note 145 at 3.
148. *Ibid.*
149. Anaya, *supra* note 81 at 155.
150. "UN Prior Consent Workshop (2005)", *supra* note 145 at 3.
151. ILO Committee of Experts on the Application of Conventions and Recommendations, 77th Sess. (2006) at para. 7, online: ILO <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displayAllComments.cfm?hdroff=1&ctry=0270&conv=C169&Lang=EN>.
152. *Corte*, *supra* note 62 at 27.

by their activities[153] and stipulate that these consultations result in "broad community support" before they will provide funding for a proposed project.[154] The consultations themselves should be culturally appropriate and respect the institutions and customs of the community.[155]

The World Bank must rely on using their loans as leverage for compliance. The Compliance Advisor, discussed above in relation to the disputes at Sipacapa, was one mechanism used to determine whether Glamis was complying with the conditions of the loan. In November 2006, Goldcorp Inc. completed its acquisition of Glamis, and is the new owner and operator of the Marlin Mine. Almost immediately Goldcorp paid off its US $45 million dollar loan from the World Bank, thereby relieving itself of any obligation to comply with World Bank guidelines.[156]

IX WHAT IS THE RESPONSIBILITY OF THE GOVERNMENT OF CANADA?

The Canadian embassy in Guatemala has been very active in promoting Canadian mining in Guatemala. On November 4, 2004, just two days before a community meeting in San Marcos about the mine, the Ambassador for Canada, James Lambert, wrote an opinion piece in a Guatemalan newspaper praising the Canadian mining industry for being "in the vanguard of advanced technology, protection of the environment and social responsibility."[157] He gushed about similarities between Guatemala and Canada, and said that 1,200 Indigenous communities in Canada benefit from mineral exploration.[158] This was part of a campaign by the embassy to "shore up public support" and included arranging for a local Guatemalan community leader and journalist to fly to British Columbia for five days to

153. World Bank, *Operational Policy on Indigenous Peoples 4.10* (July 2005), online: World Bank <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/B52929624EB2A353825672E00775F66/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> at paras. 1, 6.

154. *Ibid.*

155. *Ibid.* at paras.1, 6, 10.

156. "Goldcorp Annual Report (2006)", *supra* note 87 at 68. The loan was repaid 29 December 2006.

157. James Lambert, "Colaboración Minería en Canadá" (4 November 2004), online: Prensa Libre <http://www.prensalibre.com/pl/2004/noviembre/04/100834.html>. "Hoy en día, las empresas canadienses están a la vanguardia en alta tecnología, protección del medio ambiente y responsabilidad social. Es por eso que en la actualidad son ellas las que están al frente de muchas de las operaciones mineras más exitosas del mundo."

158. It would be interesting to see where the ambassador got this number, since there are not that many Indian reserves in Canada. Even counting Inuit communities one would be hard pressed to reach that number. And certainly only a small percentage of the total number of communities are benefiting from natural resource exploitation. Many are, in fact opposing natural resource exploitation and some have set up blockades.

look at mining in a Canadian Indigenous community.[159] The embassy also arranged for First Nation chief Phillip Asp to attend a forum on mining in Guatemala City. It is ironic that Mr. Asp's pro-mining stance was not supported by Elders of his own band, some of whom occupied the band office in protest.[160]

In El Estor, the old INCO site associated with the Exmibal killings from the 1970s, another Canadian mining company, Skye Resources has taken over. In January of 2007, the company had the army evict hundreds of Indigenous people off disputed land. Rather than taking a neutral stand on the dispute, the Canadian ambassador lashed out at Canadians on the site who filmed the evictions, charging that the Canadians had used an actor and unrelated photos to fabricate a story. It is alleged that the ambassador even spoke to the Catholic church in the region to discredit the Canadian journalists. The story ran on the CBC radio show "As It Happens" with an interview with the video maker, Steven Schnoor, who said that he has offered to provide the negatives of the photos. Neither the ambassador, Kenneth Cook, nor the Department of Foreign Affairs would agree to be interviewed. Perhaps most damning to Cook was the fact that the president of Skye Resources, Ian Austin, did agree to be interviewed a week later by the CBC. In that interview he claimed no knowledge of the ambassador's accusations and would only say that it was up to the ambassador to clarify his remarks. Certainly, the strange silence from the ambassador has not helped the credibility of Skye Resources which is tarnished by association with what appears to be a fabricated accusation.[161]

We question whether this type of advocacy on behalf of the mining industry by the Canadian embassy is appropriate. Given the enormous power imbalances and the lack of checks and balances within Guatemala, should Canada be weighing in so heavily on one side? In June 2005, the 38th Parliament's Standing Committee on Foreign Affairs and International Trade ("SCFAIT" or "Standing Committee") issued its report, *Mining in Developing Countries and Corporate Social Responsibility*, which called on the Government of Canada to play a more responsible monitoring role in ensuring that resource companies adhere to internationally recognized human rights standards, particularly in relation to Indigenous peoples.

The Standing Committee heard submissions on a number of hearings into Canadian resource extraction activities in Colombia, Sudan, the

159. Celeste Mackenzie, "Canadian mine in eye of storm" *Toronto Star* (27 March 2005) A14.

160. Monte Paulsen, "Tahltan Resistence to Mining, Drilling Grows" (7 March 2005), online: The Tyee <http://thetyee.ca/News/2005/03/07/TahltanResistanceGrows/>. At the time the story was written, Elders had occupied the band office for eight weeks.

161. The video and the CBC interviews are available, online: <http://www.rightsaction.org/video/elestor>.

Democratic Republic of the Congo and the Philippines. The Standing Committee noted that Canadian companies were involved in countries "where regulations governing the mining sector and its impact on the economic and social wellbeing of employees and local residents, as well as on the environment, are weak or non-existent, or where they are not enforced." They expressed concern that "Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of [I]ndigenous peoples." The committee recommended that there be "clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies."[162]

The government's response was not to draft legislation for such legal norms, but rather to establish a process called the National Roundtables on Corporate Social Responsibility ("CSR") and the Canadian Extractive Industry in Developing Countries.[163] An Advisory Group representing civil society, investors, and mining and exploration executives met between June and November 2006, in Vancouver, Calgary, Toronto and Montreal. On the basis of the SCFAIT Report, five themes were selected to guide the Roundtables process: CSR standards and best practices; incentives for implementation; assistance to companies; CSR monitoring and dispute resolution mechanisms; and resource governance capacity building. The Report of the Advisory Group was released on March 29, 2007. It made recommendations on strengthening the monitoring of Canadian resource companies overseas.[164] It recommended that an independent ombudsman office be created to provide advisory, fact finding and reporting services regarding complaints with respect to the operations of Canadian extractive companies in developing countries. The Report also urges the government to create a Compliance Review Committee, which will be independent of the government and the parties. The role of the Compliance Review Committee is to ensure compliance with a set of Canadian Corporate Social Responsibility standards, based upon findings of the ombudsman with respect to complaints, and to make recommendations regarding appropriate

162. Canada "Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade: Mining in developing countries—Corporate Social Responsibility", online: <http://cmte.parl.gc.ca/Content/HOC/committee/381/faae/govresponse/rp2030362/faae_rpt14_gvtrsp-e.htm>["SCFAIT CSR Report"].

163. *Ibid.*

164. National Roundtables on Corporate Social Responsibility ("CSR") and the Canadian Extractive Industry in Developing Countries, "Advisory Group Report" (29 March 2007), online: Foreign Affairs and International Trade Canada <http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20%20March %202007.pdf> ["CSR Roundtable"].

responses in such cases.[165] The Report suggests that the federal government be more aggressive in using financial incentives such as the investments made by the Export Development Corporation and the Canada Pension Plan.[166] In the case of Goldcorp, this would put into play the Canada Pension Plan's CAN $181 million investment in Goldcorp.[167]

The Report envisions a role for Canada that is responsive to concerns about human rights abuses, especially in relation to Indigenous people. For example, the Report states:

> Determination by the Government of Canada of a serious failure by a company to meet the Canadian CSR Standards should lead to the withdrawal of this additional support. The Government of Canada should develop policies and guidelines for measuring serious failure. Among other things, in deciding whether there has been such a serious failure, the government shall take into account a finding by the Compliance Review Committee that the company is not in compliance with the Canadian CSR Standards and any accompanying relevant recommendations.[168]

In order to fulfil this monitoring role, the government would have to rely on assessments from Canadian embassies. This would imply that embassies and ambassadors should take a more neutral role in assessing the conduct of Canadian resource companies overseas than has been the case to date.

There was no consensus in the Advisory Committee on the necessity for the legislation recommended by the Standing Committee on Foreign Affairs and International Trade. While Canadian NGOs argued for the implementation of legislation, the industry representatives were not in favour of any legislation that was similar to the American *Alien Tort Claims Act*. The *Alien Tort Claims Act* allows American companies to be sued by foreigners from the host country in American courts for torts committed abroad.[169] It is under this legislation that Talisman Energy is currently being sued in the United States for its alleged complicity in the massacres in the

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165. *Ibid.*

166. *Ibid.* at xi-xiii, 39. Failure of companies to meet Canadian CSR standards should lead to withdrawal of EDC funding. As well CPP should monitor and report on implementation of its *Policy on Responsible Investing*.

167. CPP Investment Board, "Canadian Equity Holdings: As of March 31, 2007", Online: <http://www.cppib.ca/files/PDF/CDN_Equity_Holdings_March31_2007_-_ENG.pdf>.

168. "CSR Roundtable", *supra* note 164 at xiii, 48.

169. Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation" in C. Joerges, P. Sand & G. Teubner, eds., *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004) 287 at 294, 315; Madelaine Drohan, *Making a Killing: How and Why Corporations Use Armed Force to Do Business* (Toronto: Random House Canada, 2003) at 327.

Sudan.[170] A representative of Talisman Energy was a member of the Advisory Committee.

At the present time, the Report of the Advisory Committee merely provides recommendations for the future. It does not provide any immediate means for monitoring or providing checks and balances to the economic and political power wielded by Canadian resource companies today in countries like Guatemala.

Notably, however, the Report does discuss the possibility of using Canadian courts to provide some oversight through criminal prosecution and civil tort claims. For example, with respect to criminal prosecution, the Advisory Committee felt that Canada had a "reasonably long arm."[171] With respect to civil litigation, the federal government had earlier stated in its response to the Report of the Standing Committee on Foreign Affairs and International Trade:

> Legal remedies to address environmental or human rights violations can also arise from civil rather than criminal law. To the extent that crimes or wrongs, such as damage to the environment or personal injuries, committed outside Canada also constitute claims of the sort cognizable as a tort, civil law remedies may be available to the foreign plaintiff in Canadian courts. As such, Canadian corporations or their directors and employees may be pursued in Canada for their wrongdoing in foreign countries.[172]

Some of these avenues have been explored by academics[173] in Canada but there has been only one actual court case. In 1998, a class action was brought in a Quebec court against Cambior after a faulty dam resulted in cyanide contamination of a river in Guyana.[174] Although the court stated both Guyana and Quebec had jurisdiction to hear the matter, it found that Guyana was the appropriate forum. This decision is primarily based on the strong connection of the accident and victims to Guyana, and the victims' lack of association with Quebec. The court also stated that its decision not to hear the case did not deny the victims justice, since the Guyana court system

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170. For information on the law suit, see Business and Human Rights Resource Centre, online: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TalismanlawsuitreSudan>. See also Drohan, *ibid.* at 321, 323, 327, who argues that national governments need to take action when a company based in their country is responsible for misconduct abroad.
171. "CSR Roundtable", *supra* note 164 at 45.
172. "SCFAIT CSR Report", *supra* note 162.
173. See, for example, Scott & Wai, *supra* note 169 and Lisa North, Timothy David Clark & Viviana Patroni, eds., *Community Rights and Corporate Responsibility: Canadian Mining and Oil Companies in Latin America* (Toronto: Between the Lines, 2006).
174. *Recherches Internationales Québec v. Cambior Inc.* (1998), [1998] Q.J. No. 2554 at para. 4 [*Cambior*].

would provide them with a "fair and impartial hearing."[175] However, the real reasoning behind the decision may be the unwillingness to make a negative statement about judges and the legal system in another jurisdiction.[176] The victims did pursue their claim in the Guyana courts, but due to procedural issues, it was dismissed in 2002.[177]

Courts may be concerned about using Canadian law to try to affect conduct of corporations outside of Canada. The Supreme Court of Canada in *Shell Canada Products v. Vancouver (City of)* found that the City of Vancouver did not have jurisdiction to pass a resolution against doing business with Shell Oil. At that time, the city was objecting to Shell's business ties with the apartheid regime in South Africa.[178]

Courts may also be reluctant to take jurisdiction given that there should be more appropriate mechanisms for ensuring accountability, including the recommendations made by the Advisory Committee. The problem, however, cannot wait until a future enforcement system is in place. The reality is that in Guatemala today, there is a deficit in the mechanism for accountability—a deficit in the checks and balances needed to address the interests of Indigenous people in Sipacapa and San Miguel Ixtahuacán.

We have seen that the state of Guatemala does not have the legislative mechanisms for consultation nor the technical capacity to monitor the project. It does, however, benefit from the revenues generated by the mine.

The World Bank was aware of the shortcomings of the state of Guatemala and the importance of community projects. It provided a US $780 million aid package to Guatemala, announced in a Glamis press release.[179] There was a further proposal for the World Bank to provide funding to the government to ensure that it has the capacity to monitor the project.[180] The World Bank also provided funding to Glamis' Sierra Madre Foundation for community improvement projects.[181] It is important to

175. *Ibid.* at paras. 9-12.
176. Scott & Wai, *supra* note 169 at 301.
177. *Ibid.* at 302.
178. *Shell Canada Products v. Vancouver (City of)*, [1994] 1 S.C.R. 231. The majority of the Court held that the city did not have jurisdiction to make decisions based on matters on the conduct of a corporation overseas. However, it was a very close 5:4 decision and the current Chief Justice, McLachlin J. dissented.
179. Glamis Gold, Press Release, "Glamis Gold Comments on World Bank Financial Assistance Program in Guatemala" (19 May 2005).
180. *CAO Report (2005)*, *supra* note 45 at 39. "Given the high risk nature of the Marlin investment, the IFC should consider leveraging support from the WBG to improve the capacity of Guatemalan government agencies to effectively regulate the Marlin project and other projects in the mining sector."
181. "Annex to CAO Report (2005)", *supra* note 47 at 14. The Sierra Madre Foundation annual operating budget is US $400K+, of which IFC has contributed $89K.

remember, however, that the World Bank also had an interest in the mine being able to pay back its loan.

The appointment of the Compliance Advisor for the World Bank provided an opportunity for a third party to review the commitments made by Glamis to the IFC for the loan. However, the Compliance Advisor was not truly "independent," as the office is funded by and reports to the president of the World Bank.

The Canadian embassy could theoretically take a more neutral stance than it has, but this would require the embassy to rethink its mandate to vigorously support Canadian mines and their shareholders when there are disputes between the mine and Indigenous peoples.[182]

While the lack of an effective counterbalance is problematic, the intertwining of economic, political and military interests emphasizes a serious deficiency in checks and balances in this situation. We have discussed the accountability structures which may exist—the state of Guatemala, the World Bank, the Compliance Advisor, the embassy of Canada. All of these non-Indigenous actors have an interest in the mine being profitable. There are many politicians, officials and even members of the military in Guatemala who are struggling to deal with the past and move forward with integrity, recognizing the rights of Indigenous peoples. Given the fragility of internal mechanisms of accountability, their struggle would be enhanced with the availability of an effective external monitoring institution. In the admittedly un-ideal present, a Canadian court that could provide a forum to fairly hear evidence and provide appropriate sanctions may be the best for which we can hope.

X CONCLUSION

We began with the story of the Canadian mining company, INCO in the El Estor region of Guatemala. We described the years of brutal dictatorships during the 1970s and 1980s. While democracy has returned, in name, and Peace Accords have been signed, we have pointed out the tenuous ability of the state to ensure respect for human rights. We brought the story to the present by returning to El Estor and the evictions of hundreds of Indigenous people from disputed lands by Skye Resources in 2007.

We realize that we have focused on criticisms of the activities of Goldcorp, but the intent of this article is not raise the larger question of whether mining is "good" or "bad." Rather, the central theme in this article

182. Mackenzie, *supra* note 159, quoting Ginette Martin, Political Affairs Officer for the Canadian embassy.

is the exercise of Indigenous law and the deficit in the checks and balances for powerful economic actors who may be breaching Indigenous law.

We have shown that the people of Sipacapa intended the *consulta* to be binding. The Compliance Advisor noted that the community felt "intimidated" by the wave of exploration activities and made observations on the dangers of Glamis' activities.

> Without the possibility of broader formal dispute mediation process, the company relies upon a practice of engaging in bilateral relations, negotiating with individual villages rather than the municipality as a whole. The risk of this approach is that it may be contrary to what some members of the municipality say they have collectively decided. Such practice emphasizes narrow group identities and divisions among groups rather than broader, common identities and connections. It can also undermine rather than enhance social cohesion and contribute to conflict escalation. In addition, sometimes problems cannot be solved using bilateral or unilateral strategies.[183]

In spite of these significant concerns, the Compliance Advisor could not order compliance; it could only advise. In any case, Goldcorp, by paying off the World Bank loan, has put itself beyond the reach of the Compliance Advisor.

Goldcorp has several operational mines and development projects in Latin America including Mexico, Argentina, Chile, Dominican Republic and Honduras.[184] Protests regarding these projects have occurred in local communities near these mining operations. Just as in Guatemala, local communities in Honduras have protested that they were not consulted regarding the development of the mine.[185] As well, these communities claim that their water is polluted with lead and arsenic from the mine.[186] In Canada, Goldcorp illegally discharged 11,000 cubic metres of tailings into Red Lake, Ontario, and was required to pay a fine of $225,999.[187] The *Globe and Mail* awarded Goldcorp a D+ for corporate social responsibility.[188]

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183. "CAO Follow up Report (2006)", *supra* note 84 at 12.
184. "Goldcorp Gold Properties", online: Goldcorp <http://www.goldcorp.com/gold_projects/>.
185. Anna Cody, "Presentation to the Committee on Economic, Social & Cultural Rights: Gold Mining in Honduras", online: Center for Economic and Social Rights <http://cesr.org/node/62?PHPSESSID=97fa44e2dc20667a749c2fa25b763b99>.
186. Stephen Leahy, "Protests Mount Against Mining Giant" (24 February 2007), online: Mines & Communities <http://www.minesandcommunities.org/Action/press1381.htm>.
187. Ontario Ministry of the Environment, News Release, "Goldcorp Inc. Fined $225,999 for Non-Compliance with Ontario Water Resources Act" (1 November 2005), online: <http://www.ene.gov.on.ca/ envision/news/2005/110101.htm>.
188. "CSR Mining" *Globe and Mail Update* (22 February 2007), online: The Globe and Mail <http://www.theglobeandmail.com/servlet/story/RTGAM.20070222.rmcsrmining/BNStory/specialROBmagazine/>.

In Guatemala, Goldcorp continues to attempt to make inroads into Sipacapa and is not committed to respecting the results of the *consulta*.[189] There is now mounting opposition to the mine in the neighbouring municipality of San Miguel Ixtahuacán culminating in blockades and arrests. In January 2007, an Italian environmental activist, Flaviano Bianchini, released a report suggesting that the mine had caused problems with the water in San Marcos. Goldcorp responded by saying that the study was "deeply flawed if not patently false" and "quite possibly fraudulent."[190] During his time in Guatemala, Mr. Bianchini received a string of anonymous threatening calls on his phone and was the subject of surveillance. Amnesty International issued an Urgent Action on his behalf. Fearing for his safety, he cut short his stay and returned to Italy.[191]

This is the type of situation which begs for an effective, independent institution that can require accountability. There needs to be a body that can weigh the interests and actions of Goldcorp against the interests and rights of the Indigenous peoples in the area. The Advisory Committee of the National Roundtables has made a number of recommendations for monitoring activity from Canada in the future. For the present, the only avenue for providing appropriate checks and balances is litigation. We can only hope that Canadian courts will be open to an understanding of the crucial role that they can play in addressing the social and political vulnerability of Indigenous communities.

189. Dawn Paley, "Turning Down a Gold Mine" (7 February 2007), online: The Tyee, <http://thetyee.ca/News/2007/02/07/MarlinProject/>. "Goldcorp continues to employ various strategies to enter into Sipacapa, including offering to pay individual landholders to drill exploration perforations in their land, as well as presenting the municipality with a 'gift' of over $150,000 Cdn."

190. "Wilhoit Email", *supra* note 89.

191. "Fear for Safety", *supra* note 75.