

BANNING METAL MINING IN GUATEMALA

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Water and life are more valuable than gold.

—Roadside sign in the vicinity of San Rafael mine in Guatemala

Metal mining is unsustainable for Guatemala and its harms insurmountable for its people. Guatemalans who oppose metal mining have been fighting for decades domestically and internationally against the environmental degradation and other human rights abuses from metal mining activities in the country with little to show for their efforts. The State is too weak and corrupt to offer much hope for reform. Guatemala requires extensive governance reforms to become the type of strong democracy capable of reaping the potential benefits of metal mining in its territory. This is a long-term project. Most Guatemalans opposed to metal mining already know this, and the struggle is largely to ban all metal mining in the country. However, the prospect of a ban is elusive, in part because the country may face liability from investors affected by the ban. This Article presents the best case for a metal mining ban while exploring alternatives to minimize the investor liability costs to the country. First, the Article recommends that Guatemala exercise its sovereign right to adopt a law banning all future metal mining concessions. Second, Guatemala should rely on existing domestic laws to close the metal mines and mitigate the substantial damages resulting from these activities. Under either approach, Guatemala is likely to face investor liability in the millions and perhaps lose future investment in the country. This Article offers Guatemala suggestions for defending and mitigating these costs by relying on comparative studies of similar actions taken by Costa Rica and El Salvador.

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† We are especially indebted to Dr. Yuri Melini of the Center for Legal Action and Environmental Justice of Guatemala (CALAS) who has enlightened our understanding of mining in Guatemala. We dedicate this article to Rafael Maldonado and the hundreds of environmental justice defenders in the country who have endured so much to defend their lands, homes, and dignity. Finally, we thank the editorial team of the *Vermont Law Review* who worked diligently and professionally to improve this article.

INTRODUCTION.....	598
I. METAL MINING IN CONTEXT	602
A. The Metal Mining Industry in Guatemala	604
B. The Environmental, Health, Property, and Social Effects of Metal Mining in Guatemala.....	611
1. Environmental and Health Impacts	611
2. Property Conflicts	613
3. Social Impacts	614
C. The Financial Benefits of Metal Mining: Who Profits and How Much?	619
II. THE METAL MINING REGIME IN GUATEMALA	624
A. The 1985 Constitution and Norms Relevant to Natural Resources .	624
B. The 1997 Mining Law	626
C. Guatemala's Environmental Laws	633
D. Governance Gaps.....	635
1. Water Usage and Water Quality.....	635
2. Free, Prior, and Informed Consent	636
3. Property Rights.....	646
E. Mining Revenues and Public Spending	646
III. RECOMMENDED SOLUTIONS FOR GUATEMALA'S METAL MINING PROBLEM.....	648
A. Inadequacy of Mining Reforms in Guatemala to Date	649
B. Banning Metal Mining in Guatemala: A Comparative Assessment of Domestic Law and International Liability.....	651
1. Banning Future Metal Mining.....	651
a. Nature and Scope: Costa Rica as a Model.....	652
b. Assessing Costs	656
2. Shutting Down Current Metal Mining	658
a. Guatemala's Investor Rights Regime	659
b. Closure of the Mines and Claims of Expropriation: El Salvador and Costa Rica as Precursors	662
c. Defending Against International Arbitration Liability	665
CONCLUSION	669

INTRODUCTION

Metal mining is not big business in Guatemala. It generates less than one percent of the country's gross national product and employs less than one

percent of the official workforce in the country.¹ The metal mining industry has also been in decline since 2012,² and a significant subpart of the industry will disappear completely in a matter of decades when all of the gold, silver, and other metals have been extracted.³

For such a small industry, metal mining represents a giant problem for Guatemala. Metal mining has generated chaos in the country and provoked ire among many within and beyond its borders. Metal mining in Guatemala is controversial for significant reasons. First, at an alarmingly quick pace, metal mining is destroying much of the country's beautiful environmental resources.⁴ Second, this destruction is occurring largely without the consent of the affected communities—both indigenous and non-indigenous.⁵ For these communities, the few benefits—mostly in the form of jobs with higher wages for some of the local residents—pale in comparison to the short-term and long-term harms.⁶ In the short term, residents in metal mining communities are disturbed by noise; sickened by contamination; impoverished by reduced water supply and food production; divided by conflict even among friends and family; and criminalized and physically harmed during protests.⁷ In the long term, water depletion and contamination linger, mountains and landscapes disappear, and the jobs and monies that mines brought dissipate. The affected communities—and the entire country as a result—are left with an even bleaker future than prior to exploitation, literally and figuratively.

These environmental and human rights harms alone justify a rejection of the industry in Guatemala. The disdain for metal mining, however, lies exactly in the reasons for its presence in the country. Why is an industry that represents such an insignificant economic investment and with such destructive characteristics allowed to operate in the country? The answer is cynical but tragically true. Metal mining makes a great deal of investment sense to the foreign investors and shareholders⁸ and to the economic elite and

1. *See infra* Parts I.A & I.C.

2. *See infra* Part I.C.

3. INSTITUTO DE AGRICULTURA, RECURSOS NATURALES Y AMBIENTE [IARNA], PERFIL AMBIENTAL DE GUATEMALA 2008–2009: LAS SEÑALES AMBIENTALES CRÍTICAS Y SU RELACIÓN CON EL DESARROLLO § 3.8.2.1, 198–200 (2009) [hereinafter IARNA], <http://www.infoiarna.org.gt/media/file/PERFAM2008/PERFAM2008.pdf>.

4. *See infra* Part I.B.

5. *See infra* Part II.D.2.

6. *See infra* Part I.C.

7. *See infra* Part I.B.3.

8. Investors that support metal mining operations in Guatemala are largely foreign, principally from Canada. *See infra* Part I.A.

self-interested politicians who profit from it.⁹ In turn, as a struggling democracy with weak laws and institutions, but strongly favorable investment laws and practices, Guatemala is the ideal host for the continuation of corporate practices that are senseless and destructive.¹⁰

This same assessment of metal mining in Guatemala applies across the region and globally, particularly in developing nations with similar democratic and social struggles.¹¹ It also applies to several other types of industries that extract natural resources or cheap labor for global consumption.¹² Unlike Guatemala, however, some of these nations are stepping back and instituting important reforms to limit or ban certain types of mining.¹³ There are important lessons in these reforms for Guatemala.

This Article proposes recommendations for managing Guatemala's metal mining problem. It proceeds from the premise that metal mining is a bad investment for Guatemala, at least in the short term. Metal mining is never a sustainable practice for any country because metal is an exhaustible and non-renewable natural resource and its extraction is inherently toxic and destructive.¹⁴ There is a legitimate argument that metal mining may be necessary for development and that it could be done in ways that significantly reduce the harms to the environment and communities. This Article does not address whether or how Guatemala might choose to engage in metal mining in the future. Rather, it asserts that Guatemala is ill prepared to implement a metal mining regime that makes sense for the country at this time.

Guatemala is now grappling—in good ways—with significant and visible democratic problems. For the first time in the near decade of the United Nations Commission against Impunity's (CICIG) operation in Guatemala, its investigations are finally exposing the shameful and cynical acts of corrupt politicians.¹⁵ Not a single Guatemalan is surprised by the dirty secrets the CICIG's wiretaps and secret recordings revealed.¹⁶ Several high-level officials resigned following the revelations, including the Vice

9. See *infra* Part I.C.

10. See *infra* Part II.

11. See *infra* Part III.B.

12. See *infra* Part III.B.

13. See, e.g., *infra* Part III.B.1.

14. See *infra* Part I.B.

15. See, e.g., COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA, JUSTICIA PARA TODOS, BOLETÍN INFORMATIVO, CIUDADANOS CONTRA LA CORRUPCIÓN (2015), http://www.cicig.org/index.php?page=boletin_informativo.

16. OBSERVATORIO DE CONFLICTOS MINEROS DE AMÉRICA LATINA, CONFLICTOS MINEROS EN AMÉRICA LATINA, EXTRACCIÓN, SAQUEO, Y AGRESIÓN: ESTADO DE SITUACIÓN EN 2014, at 2 (2015), http://www.conflictosmineros.net/agregar_documento/publicaciones-ocmal/conflictos-mineros-en-america-latina-extraccion-saqueo-y-agresion-estado-de-situacion-en-2014/detail.

President and the President who now face criminal charges for their acts of corruption.¹⁷ This alone represents remarkable progress for Guatemala.

These potentially monumental transitions in Guatemala, however, do not guarantee real and sustained reforms in the country. Today, nearly 20 years after the signing of an ambitious peace agenda, Guatemala is nowhere near a strong enough democracy as it needs to be to manage metal mining in order to minimize harms and maximize benefits for its citizens.¹⁸ Much needs to happen first, including electoral reform, eradication of deep inequality, greater transparency in public spending, and tax and social spending reforms. This Article addresses the primary concerns that pertain to mining: reforming the 1997 Mining Law; the need to regulate water and the consultative process; and the need to improve transparency in tax collection, public spending, and social investment, particularly as it relates to the mining industry.¹⁹ These reforms must occur in tandem with the broader and systemic reforms already mentioned if metal mining is to be successful. Until then, Guatemala should consider banning metal mining in the country. This course would not be uncharted territory in the region. Other nations, with Costa Rica as one of the best examples, have paved the way.²⁰

Banning metal mining in Guatemala, even if temporarily, will likely face fierce opposition from investors and potentially from Guatemala's important trading partners. Guatemalans would be right to be concerned about two possible negative consequences from the decision to ban or limit metal mining: (1) companies already holding exploration and exploitation licenses could sue in international tribunals or foreign courts for millions alleging expropriation; and (2) Guatemala could damage its relationship with Canada, the United States, and other potential trading partners and international economic institutions. This Article addresses strategies and defenses for banning mining in Guatemala in response to expropriation claims in international tribunals. Also, it proposes standards and norms that arbitrators should apply to resolve these claims. As to the second concern, the potential impacts on trade and investment might be exaggerated and overstated. Guatemala nonetheless should explore alternatives for sustainable

17. Press Release, Comisión Internacional contra la Impunidad en Guatemala, *A Prisión Preventiva* Otto Pérez Molina (Sept. 8, 2015), <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=632&cntnt01showall=&cntnt01returnid=1377>.

18. *Guatemala's Peace Process: A Look Back on the 1996 Peace Accords*, COUNCIL ON HEMISPHERIC AFFAIRS (July 30, 2015), <http://www.coha.org/guatemalas-crippled-peace-process-a-look-back-on-the-1996-peace-accords/>.

19. See *infra* Part II.

20. See *infra* Part III.B.1.

development that would be better for the country in the long term. Costa Rica's ecotourism industry serves as a model for Guatemala in this regard.²¹

Part I of this Article explains the nature and scope of the metal mining industry in Guatemala. It also examines the environmental, health, property, and social impacts of metal mining and discusses the unbalanced costs and harms of the industry under Guatemala's status quo. Part II documents the challenges and gaps in the existing domestic and international legal frameworks that attempt to regulate metal mining activities in Guatemala. Part III proposes an incremental model for Guatemala to address its metal mining problem. First, this Article recommends that Guatemala exercise its sovereign right to adopt a law banning all future metal mining concessions. Second, Guatemala should rely on existing domestic laws to close the mines in order to mitigate the substantial damages resulting from these activities. Under either approach, Guatemala is likely to face investor liability in the millions, and perhaps lose future investment in the country. This Article offers Guatemala suggestions for defending and mitigating these costs by relying on comparative studies of similar actions taken by Costa Rica and El Salvador.

I. METAL MINING IN CONTEXT

In the late 1980s and early 1990s, investment in metals moved out of traditional middle- and high-income countries toward the developing world.²² And in the last ten years, due to increased demand in countries like Brazil, India, Russia, China, and South Africa, metal mining has grown exponentially in the world. Technological advances allowed for ever-more diffuse deposits of minerals to be profitably mined.²³ In turn, many developing nations, including in Latin America, adopted policies designed to encourage foreign investment, specifically in extractive industries.²⁴ Not

21. See *infra* Part III.B.1.

22. Michael L. Dougherty, *The Global Gold Mining Industry, Junior Firms, and Civil Society Resistance in Guatemala*, 10 BULL. LATIN AM. RES. 1, 4 (2011), <http://devstudies.wisc.edu/docs/BLAR%20Early%20View.pdf>.

23. *Id.*; see also JEAN ACQUATELLA ET AL., COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE, RENTAS DE RECURSOS NATURALES NO RENOVABLES EN AMÉRICA LATINA Y EL CARIBE: EVOLUCIÓN Y PARTICIPACIÓN ESTATAL, 1990–2010, at 11 (2013), <http://www.cepal.org/es/publicaciones/7044-rentas-de-recursos-naturales-no-renovables-en-america-latina-y-el-caribe>.

24. Dougherty, *supra* note 22, at 4.

surprisingly, Latin America's contributions to metal mining have been significant in recent years.²⁵

This transition in the metal mining industry was accompanied by the proliferation of small or junior exploration firms in new investment target countries.²⁶ In general, there are three categories of firms conducting metal mining operations in Latin America: senior firms, mid-tier firms, and junior firms. Junior firms account for a very small share of overall mineral production, yet they represent the majority of the metal mining companies today.²⁷ In practice, junior firms typically engage solely in exploration of potential sites and have limited production sites.²⁸ On the other hand, senior firms typically derive their revenue from production and sale, often taking sites explored by juniors into production.²⁹ These specific roles undertaken by each category of mining firm results in interdependence between them. Senior firms depend on junior firms to undertake the exploration and junior firms depend on senior firms to take their sites into production. Junior firms, in fact, conduct most of the exploration of new investment targets in the developing world and sometimes sell to senior firms only in exploitation phases.³⁰

While junior firms typically are not the ones engaging in the actual exploitation of a site, they still make up the majority of the mining companies in Latin America, and specifically in Guatemala.³¹ There are nine mining firms operating in Guatemala, seven of which are junior.³² Junior firms have proliferated for a number of reasons. Most notably, recent technological advances in mining techniques have resulted in an increased number of commercially viable sites, which in turn reduces the entry cost barrier for smaller firms.³³ In addition, the Canadian government incentivizes smaller

25. In 2010, for example, Latin America produced 45.3% of the world's copper and 30.8% of silver. The biggest producers of metals are Chile (copper), Peru (gold), Mexico (copper and silver), Cuba (nickel), and Brazil (gold and nickel). INSTITUTO CENTROAMERICANO DE ESTUDIOS FISCALES, *LA MINERÍA EN GUATEMALA: REALIDAD Y DESAFÍOS FRENTE A LA DEMOCRACIA Y EL DESARROLLO* (2014) [hereinafter ICEFI REPORT], <http://icefi.org/wp-content/uploads/2014/03/mineria-impresion.pdf>; see also ACQUATELLA ET AL., *supra* note 23, at 27–28.

26. Dougherty, *supra* note 22, at 4.

27. *Id.*

28. *Id.*

29. *Id.* at 4–5.

30. *Id.* at 5.

31. *Id.* at 4, 6.

32. *Id.* at 6.

33. *Id.* at 5.

firm investment by providing tax benefits that make 100% of capital invested in domestic junior activity tax deductible for the investor.³⁴

While technological advances and incentivizing policies have created an environment where newer, smaller firms can flourish, these junior firms now find themselves in intense competition with one another. This competition has led them to cut corners when it comes to adopting environmentally and socially responsible techniques—presumably in an effort to simply get ahead of the competition.³⁵ Additionally, lenient Canadian corporate oversight has contributed to this failure to meet environmental and social standards.³⁶ By the time senior firms become involved in mining, they inherit the controversies and conflicts that their junior colleagues left behind.³⁷

Another notable element of junior firms that leads to cutting corners has been their demonstrated lack of motivation to engage with the host communities in which they have set up shop.³⁸ This could also be a result of the intense competition these firms face, which leads them to cut corners in order to get ahead.³⁹ Another possible explanation for this lack of motivation could be the simple fact that junior firms, being only focused on the exploration of sites rather than the long-term exploitation, are less invested in trying to form relationships with the host communities.

A. The Metal Mining Industry in Guatemala

Guatemala is not a metal-rich country, at least as measured in terms of production. In fact, Guatemala's economy, workforce, and exports have traditionally been centered in agriculture.⁴⁰ While metal mining represents a significant share of the mineral industry of Guatemala, the entire industry recently represented only 0.5% to 2.83% of the Gross National Product

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 7 (discussing how Glamis Gold, a junior firm, did not adequately consult with the local communities about project development).

39. *Id.* at 12–13.

40. LYUBA ZARSKY & LEONARDO STANLEY, GLOB. DEV. & ENV'T INST., SEARCHING FOR GOLD IN THE HIGHLANDS OF GUATEMALA: ECONOMIC BENEFITS AND ENVIRONMENTAL RISKS OF THE MARLIN MINE 13 (2011), http://www.ase.tufts.edu/gdae/policy_research/marlinminereport.html.

(GNP).⁴¹ In 2014, the entire mining industry yielded Guatemala only 0.8% of its GNP.⁴²

In Guatemala, both precious and base metals are mined⁴³ and largely exploited for export by Canadian companies. Metal mining constitutes over 90% of all mining production in the country.⁴⁴ Non-metallic minerals, largely used for industrial domestic production, are much more abundant in volume;⁴⁵ however, non-metallic mineral mining represents less than 5% of the mining industry revenues in the country.⁴⁶ Both types of mining often lead to significant environmental harms, depending on the method of extraction employed.⁴⁷ Metal mining, however, generates more conflicts in Guatemala than other types of mining, including hydrocarbon and non-mineral mining.⁴⁸ Moreover, metal mining in Guatemala occurs principally in rural areas, which disproportionately affects indigenous communities and their communal lands.⁴⁹

While metal mining does not represent a significant portion of Guatemala's GNP, it has comprised an important, but steadily declining, portion of Guatemala's Direct Foreign Investment (DFI). Between 2010 and

41. In 2004, for example, the Ministry of Energy and Mining reported that the mineral mining industry comprised 0.3% of the GNP. MINISTERIO DE ENERGÍA Y MINAS, ANUARIO ESTADÍSTICO MINERO 2005, at 6 (2005), http://www.mem.gob.gt/wp-content/uploads/2012/05/1_Anuario_Estadistico_Minero_2005.pdf. At its peak of production in 2011, mining reached 2.83% of the GNP of Guatemala. ICEFI REPORT, *supra* note 25, at 53. In most years, mineral mining represents only about 1% of the total GDP. ZARSKY & STANLEY, *supra* note 40, at 13.

42. DEPARTAMENTO DE ESTADÍSTICAS MACROECONÓMICAS, BANCO DE GUATEMALA, PRODUCTO INTERNO BRUTO TRIMESTRAL, CUARTO TRIMESTRE DE 2014, at 7 (2015), http://www.banguat.gob.gt/cuentasnac/4T_2014_JM.pdf.

43. IARNA, *supra* note 3, at 199.

44. *Cuadro Flujo de IED por Actividad Económica y País de Procedencia 2012*, BANCO DE GUATEMALA, http://www.banguat.gob.gt/inc/ver.asp?id=/Publica/v_man_bpagos/flujo_IED_2012.htm&e=111758 (last visited Jan. 25, 2016); MINISTERIO DE ENERGÍA Y MINAS, ANUARIO ESTADÍSTICO MINERO 2014, at 8 (2014) [hereinafter ANUARIO ESTADÍSTICO MINERO 2014], <http://www.mem.gob.gt/wp-content/uploads/2012/05/ANUARIO-ESTAD%3%8DSTICO-MINERO-2014.pdf>.

45. Non-metallic mineral mining is projected to continue in Guatemala for several hundred years. In contrast, most metals in Guatemala will be exhausted in about a decade. IARNA, *supra* note 3, at 198, 200.

46. ANUARIO ESTADÍSTICO MINERO 2014, *supra* note 44, at 8.

47. PEACE BRIGADES INTERNATIONAL, LA MINERÍA: ¿BENEFICIO PARA GUATEMALA? 3 (2010) [hereinafter PBI MINING BULLETIN], http://www.peacebrigades.org/fileadmin/user_files/projects/guatemala/files/spanish/PBI_Boletin_21_es_p.pdf.

48. OBSERVATORIO DE CONFLICTOS MINEROS DE AMÉRICA LATINA, CONFLICTOS MINEROS EN AMÉRICA LATINA, EXTRACCIÓN, SAQUEO, Y AGRESIÓN: ESTADO DE SITUACIÓN EN 2014, at 2 (2014), http://www.conflictosmineros.net/agregar_documento/publicaciones-ocmal/conflictos-mineros-en-america-latina-extraccion-saqueo-y-agresion-estado-de-situacion-en-2014/detail.

49. *Id.*

2015, Guatemala's data (which combines agricultural and all mining investment) show those industries' highest share of DFI to have been in 2012 at 33.6%, or \$417.8 million.⁵⁰ Since then, however, the amount has dropped significantly to 10.3% in 2015, at only \$88.8 million.⁵¹ In the two years prior to 2015, investment from mining (and agriculture) comprised 25.8% (\$334.7 million) and 14.5% (\$201.2 million).⁵² The non-renewable characteristic of minerals, however, means that this rate of investment will likely only last for a few more years.⁵³

In recent years, Canadian companies have been the primary, and sometimes sole, investors in these metal-mining projects in Guatemala.⁵⁴ Most of these companies are junior, although some have established formal and informal strategic partnerships with senior firms.⁵⁵ Guatemala has become a target for junior metal mining investment because it possesses the right mix of flexible laws and policies and amenable mineralization to warrant investment.⁵⁶ Indeed, "this confluence of conditions has enabled Guatemala to become one of the lowest-cost gold producers in Latin America," if not the world.⁵⁷

Metal mining is not a new phenomenon in Guatemala,⁵⁸ but it has taken on a new intensity since the late 1990s with the end of the civil war and the

50. *Cuadro Flujo de IED por Actividad Económica y País de Procedencia 2012*, *supra* note 44.

51. *Flujos de Inversión Extranjera Directa Según País de Procedencia y Actividad Económica 2007-2015*, BANCO DE GUATEMALA, https://www.banguat.gob.gt/inc/ver.asp?id=/Publica/v_man_bpagos/flujo_IED_2007_2015.htm&e=122316 (last visited Apr. 21, 2016). The 2015 figures could reflect several factors discussed elsewhere in this paper, including the temporary moratorium on mining investment in the country.

52. *Cuadro Flujo de IED por Actividad Económica y País de Procedencia 2013*, BANCO DE GUATEMALA, https://www.banguat.gob.gt/inc/ver.asp?id=/Publica/v_man_bpagos/flujo_IED_2013.htm&e=111762 (last visited May 12, 2016) [hereinafter *2013 Chart of Guatemala's Economic Activity*]; *Cuadro Flujo de IED por Actividad Económica y País de Procedencia 2014*, BANCO DE GUATEMALA, www.banguat.gob.gt/inc/ver.asp?id=/Publica/v_man_bpagos/flujos_IED_2014.htm&e=115682 (last visited May 12, 2016) [hereinafter *2014 Chart of Guatemala's Economic Activity*].

53. IARNA, *supra* note 3, at 200.

54. The only other notable investor has been Russia, but only for the exceptional years of 2012 and 2013. *2013 Chart of Guatemala's Economic Activity*, *supra* note 52; *2014 Chart of Guatemala's Economic Activity*, *supra* note 52.

55. Dougherty, *supra* note 22, at 7.

56. *Id.* at 9. In Guatemala, mineral deposits are comprised generally of volcanically produced pyroclastic and epithermal deposits. Both are relatively superficial and amenable to surface mining techniques and cyanide leach milling processes. *Id.* at 12.

57. *Id.* at 9.

58. Indeed, metal mining in Guatemala dates back to colonial times, possibly as early as the year 1600. ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES, ESTUDIO COSTO BENEFICIO DE LA MINA MARLIN EN SAN MARCOS, GUATEMALA 15 (2010) [hereinafter *MARLIN MINE COST BENEFIT STUDY*], <https://goldcorpoutofguatemala.files.wordpress.com/2010/07/estudio-costo-beneficio-mina-marlin.pdf>.

adoption of very favorable laws for mining companies.⁵⁹ Metal mining, as an important modern industry, dates back only to 1999 when Guatemala granted its first major foreign investment project in more than 20 years. This project took the form of a mining exploration license granted to Montana Exploradora de Guatemala, a wholly owned subsidiary of Canadian company Montana Gold.⁶⁰ By the time Montana Exploradora began its exploitation at the Marlin I mine in 2005, Canadian ownership had transferred to Glamis Gold (a junior) and then to Goldcorp (a senior), where it remains today.⁶¹ The Marlin I project received support from the World Bank with a \$45 million loan granted through its private sector branch, the International Finance Corporation (IFC).⁶² The arrival of Marlin I was “soon followed by Canadian INCO (Hudbay Minerals since 2008), which had developed plans to reopen the EXMIBAL nickel mine in El Estor, Izabal.”⁶³

This Part of the Article focuses solely on the active metal mines in the country because there is little to no information available on inactive or pending licenses. Guatemala grants three types of mining licenses: reconnaissance; exploration (for three years and renewable for two more three-year periods); and exploitation (up to 25 years).⁶⁴ Active mines are those in operation pursuant to an exploitation license.⁶⁵ Today, piecing together the mining reports available from Guatemala’s Ministry of Energy and Mining (MEM), there are a total of six active metal mining sites in Guatemala. They are as follows: Marlin I in San Miguel Ixtahuacán and Sipacapa, San Marcos; El Sastre in San Antonio La Paz, El Progreso; Cerro Blanco in Asunción Mita, Jutiapa; Fenix, in El Estor, Izabal; El Escobal, in San Rafael, Las Flores, Santa Rosa; and Extraction Project in Sechol, Alta Verapaz.⁶⁶ The government’s 2015 data, however, puts the total number of operating metal mines (including inactive mines) at 79, with 320 more

59. *Id.* at 16.

60. JORIS VAN DE SANDT, *MINING CONFLICTS AND INDIGENOUS PEOPLES IN GUATEMALA* 11 (2009), https://www.cordaid.org/media/publications/Mining_Conflicts_and_Indigenous_Peoples_in_Guatemala.pdf.

61. *Id.* at 12.

62. *Id.* at 13.

63. *Id.* at 12.

64. Ley de Minería, Decreto Número 48-97 (1997) (Guat.) [hereinafter Mining Law], <http://old.congreso.gob.gt/archivos/decretos/1997/gtdcx48-1997.pdf>.

65. *Id.*

66. MINISTERIO DE ENERGÍA Y MINAS, ANUARIO ESTADÍSTICO MINERO 2013, at 8 (2013) [hereinafter ANUARIO ESTADÍSTICO MINERO 2013], <http://www.mem.gob.gt/wp-content/uploads/2012/05/ANUARIO-ESTAD%C3%8DSTICO-MINERO-20131.pdf>; see also ICEFI REPORT, *supra* note 25, at 28–30.

pending metal mining licenses.⁶⁷ The majority of the active mines are concentrated in the following departments: Izabal, San Marcos, Quetzaltenango, Huehuetenango, Alta Verapaz, and Baja Verapaz. These regions are largely inhabited by indigenous peoples. But licenses have also been approved in the following regions: Guatemala City, Santa Rosa, Jutiapa, Jalapa, Chiquimula, Zacapa, and el Progreso, where the non-indigenous population is the majority.⁶⁸

In the Department of San Marcos, MEM has granted a total of 22 mining licenses, 11 of which are to Goldcorp, Inc.⁶⁹ Marlin I, however, is the only current operation in the region.⁷⁰ The Marlin I mine is an example of a new generation of mines of large size and low cost. The total development costs of the mining project were estimated at \$254 million while the total sales of raw and exported product were estimated in 2005 to be \$893 million over ten years.⁷¹ It consists of a 20 km exploitation concession, which has been transformed into a combined 6 km open pit and underground mine in which gold and silver are extracted through a process of cyanide vat leaching.⁷² It is estimated to produce 2.5 million ounces of gold and 36 million ounces of silver over a lifetime of ten years.⁷³ The mine is located within two municipalities in the highlands populated by about 52,000 indigenous people—San Miguel Ixtahuacán (home to 87% of the mine's operations) and Sipacapa.⁷⁴ Poverty rates in these communities are above 97%.⁷⁵ The major industry is subsistence farming; individual families grow corn and beans and keep livestock but the land, while held individually, forms part of the collective property.⁷⁶ Agricultural income is low due to poor soil and little

67. *Licencias Vigentes y Solicitudes en Trámite por Tipo Según Categoría Mineral*, MINISTERIO DE ENERGÍA Y MINAS, <http://www.mem.gob.gt/mineria/estadisticas-mineras/> (follow “Licencias Vigentes y Solicitudes en Trámite” hyperlink) (last visited Apr. 21, 2016).

68. ICEFI REPORT, *supra* note 25, at 30.

69. *Id.* at 40.

70. *Id.*

71. VAN DE SANDT, *supra* note 60, at 20.

72. *Id.* at 19–20.

73. *Id.* at 20; ZARSKY & STANLEY, *supra* note 40, at 34.

74. AMNESTY INTERNATIONAL, GUATEMALA: MINING IN GUATEMALA: RIGHTS AT RISK 10 (2014) [hereinafter AI MINING REPORT], <https://www.amnesty.org/en/documents/amr34/002/2014/en/>. San Miguel has 17 villages and 43 communities with a total population of about 37,000; Sipacapa has about 14,000 residents in 12 villages and 19 communities. *San Miguel Ixtahuacán*, SIERRA MADRE FOUND., http://www.fundacionsierramadre.org/FSM16a_san_miguel_ixtahuacan.htm (last visited Mar. 27, 2016); *Sipacapa*, SIERRA MADRE FOUND., http://www.fundacionsierramadre.org/FSM17a_sipacapa.htm (last visited Apr. 21, 2016).

75. VAN DE SANDT, *supra* note 60, at 22.

76. *Id.* at 21.

irrigation infrastructure.⁷⁷ Other sources of employment include seasonal work at coffee and sugar cane plantations. The major source of income is derived from remittances.⁷⁸

El Cerro Blanco Mine, owned by Goldcorp of Canada and operated by Entre Mares, SA of Guatemala, is located in the Trifinio Biosphere Reserve. This mine is about 45 minutes from the border with El Salvador in Jutiapa, which is a protected area.⁷⁹ President Berger granted the mine's exploration license in 2004 and Goldcorp was expected to complete its final feasibility study by 2013.⁸⁰ Despite strong opposition focused on its expected environmental impacts, the mine is currently under excavation by Dumas, a French-Canadian underground mining contractor.⁸¹

The Fenix project is located in El Estor in Northeastern Guatemala, and on the shore of the country's largest freshwater lake, Lake Izabal.⁸² The area is known for its rich biodiversity and its substantial nickel reserves.⁸³ Also, "Indigenous Maya Q'eqchi' communities represent more than 90% of the population, most of whom make a living through subsistence farming and fishing."⁸⁴ The mine has operated intermittently and with significant violent strife since 1965 by Mining Exploration and Exploitation of Izabal (EXMIBAL).⁸⁵ A significant cause of conflict is that nearly 400 km² of the acquired land is located on indigenous historical land, which has led to massive forced displacements of indigenous peoples.⁸⁶ In June 2008, Hudbay minerals bought Skye Resources; however, the tension over the project in the communities remained high. In addition to the land conflicts mentioned

77. *Id.*

78. *Id.*

79. *Gold and Silver Mining in Cerro Blanco (Guatemala, El Salvador, Honduras)*, ENVTL. JUST. ORGS., LIABILITIES & TRADE (Jan. 16, 2015), http://www.ejolt.org/wordpress/wp-content/uploads/2015/01/FS_005_Cerro_blanco.pdf.

80. *Id.*; INT'L BUS. PUBL'N, CENTRAL AMERICA MINERAL INDUSTRY HANDBOOK, VOL. 1, STRATEGIC INFORMATION AND REGULATIONS 35 (2015) [hereinafter CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK]. As of 2011, Cerro Blanco contained an estimated 39,500 kilograms (kg) of measured and indicated gold resources. *Id.*

81. *Raising in Challenging Conditions at Cerro Blanco: Entre Mares Guatemala S.A. (Goldcorp)*, DUMAS MINING, <http://www.dumasmining.com/Projects/InternationalProjects/CerroBlanco.aspx> (last visited May 12, 2016).

82. *Fénix Project, Guatemala*, MCGILL RES. GROUP INVESTIGATING CANADIAN MINING LATIN AMERICA, <http://micla.ca/conflicts/fenix-project/> (last visited May 12, 2016).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

above, the communities claim they were never properly consulted.⁸⁷ In August 2011, Hudbay divested itself of the Fenix project by selling it for \$170 million to the Russian owned Solway Group.⁸⁸

The Escobal mine operates in San Rafael Las Flores and neighboring communities—Santa Rosa, the municipalities of Mataquescuintla and San Carlos Alzatate, Jalapa.⁸⁹ This mine is fairly close to the city and consists of 40 km² to exploit gold, lead, zinc and other minerals.⁹⁰ The exploitation license was granted to Tahoe Resources Inc. in April 2013.⁹¹ The mine is supposed to have 71.7 million ounces of recoverable silver, with a production rate of 20 million ounces per year at a cost of less than \$3 per ounce.⁹² The region is generally poor,⁹³ although there is agricultural and cattle industry in neighboring communities.⁹⁴ This project will affect indigenous peoples, especially the Xinca.⁹⁵

In 2011, the subsidiary Exploraciones Mineras de Guatemala (Exmingua) of Radius Gold Inc. was granted a 20-km² exploitation license in the municipalities of San Pedro Ayampuc and San José del Golfo, San Pedro Ayampuc.⁹⁶ Not unlike other mines in Guatemala, this mine has transferred ownership several times during different phases of operation.⁹⁷ Most recently in 2012, Radius Gold sold 100% of its shares in this project to Kappes, Cassiday & Associates (KCA), a United States corporation.⁹⁸ This project, known as El Tambor, is comprised of a concession of 20 km² to exploit gold and silver.⁹⁹ KCA's own webpage projects that the mine will operate for five years and expects to mine 456 thousand tons of ore.¹⁰⁰ San

87. *Id.*

88. *Solway Closes \$170mln Deal with Hudbay to Acquire Fenix*, SOLWAY GROUP, http://www.solwaygroup.com/news_7.htm (last visited Apr. 21, 2016).

89. ICEFI REPORT, *supra* note 25, at 42, 44.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. AI MINING REPORT, *supra* note 74, at 17.

97. SIMONA V. YAGENOVA, MADRESELVA COLECTIVO ECOLOGISTA, LA MINA EL TAMBOR PROGRESOS VII DERIVADA Y LA RESISTENCIA DE LA PUYA 28 (2014), <http://www.alainet.org/es/articulo/171685>.

98. *Id.* at 29. KCA's investment in the mine began in 2008 when it loaned Radius Gold \$6.5 million dollars at a 51% interest rate for four years. *Id.*

99. *Id.* at 29, 31.

100. *Id.* at 30.

Pedro is a largely indigenous community of Maya-Kakchikel, whereas San José del Golfo is predominantly Ladino.¹⁰¹

B. The Environmental, Health, Property, and Social Effects of Metal Mining in Guatemala

Metal mining firms “in Guatemala have fallen far short of environmental and social responsibility.”¹⁰² “Guatemala’s mix of lenient [laws and] policies and appropriate geology has made it a world epicenter of low-cost” metal mining production, which is happening largely in rural and indigenous communities and very close to residents of those communities.¹⁰³ The result has been devastating environmental and social impacts, which have provoked an active anti-mining social movement that has precipitated repressive responses from the State.¹⁰⁴

1. Environmental and Health Impacts

Mineral mining in Guatemala severely impacts the environment because mining companies chiefly engage in surface mining and direct cyanidation milling.¹⁰⁵ This is because mineral deposits in both the Western Highlands and the East are relatively close to the surface.¹⁰⁶ These types of deposits are the least expensive and the most environmentally destructive type of gold deposits to extract.¹⁰⁷ All metal mining projects in Guatemala employ surface extraction and vat leaching cyanidation to mill the ore; some, such as the Marlin I mine, also employ underground extraction.¹⁰⁸

Gold mining, like all metal extraction operations, is inherently destructive of the local environment.¹⁰⁹ Gold mining requires multiple, land-degrading steps: (1) clearing vegetation and topsoil from large tracts of land; (2) blasting large open-pit mines and underground tunnels and hauling the waste rock into large nearby mounds or valleys; (3) excavating a massive amount of ore and pulverizing it into a fine powder; (4) treating the ore with

101. For a detailed socioeconomic and cultural assessment of the communities affected by the El Tambor mine, see *id.* at 46–62.

102. Dougherty, *supra* note 22, at 6.

103. *Id.* at 2. For example, the El Tambor mine is less than a mile away from all of the neighboring communities. Yagenova, *supra* note 97, at 42.

104. Dougherty, *supra* note 22, at 8.

105. *Id.* at 12.

106. *Id.*

107. *Id.*

108. *Id.*

109. ZARSKY & STANLEY, *supra* note 40, at 30.

a mix of water, lime, and sodium cyanide; (5) leaching the solution to separate the gold and sending it to a refining smelter, on- or off-site; and (6) channeling leftover tailings slurry to storage in a retention pond.¹¹⁰ The environment bears a heavy burden from the aforementioned steps in this extraction process. The initial clearing destroys productive topsoil and forests; dumping of waste rock into nearby areas destroys additional habitats; the use of explosives damages buildings and stresses wildlife and farm animals; smelting causes severe air pollution; acid mine drainage contaminates local waters with heavy metals such as aluminum, arsenic, cadmium, lead, nickel, and zinc that would have otherwise remained buried in intact rock; and the use of cyanide leachate, even diluted, can kill fish and sicken livestock.¹¹¹

Mining also poses environmental risks to water supply and water quality. The leaching process uses vast amounts of water, often in very dry environments.¹¹² For example, Marlin I requires 250,000 liters of water per hour.¹¹³ A typical family in the area consumes approximately 30 liters a day. At that rate of consumption, it would take a family 22 years to use the same amount of water that the mining company uses in one hour.¹¹⁴ Consequently, some have expressed doubt about the feasibility of sharing water resources between the Marlin project and small farmers and residents of the area.¹¹⁵

Toxic metals in water pose special risks given the absence of water infrastructure. Roughly half of the households near the Marlin I mine depend on ground and river water for drinking, crop irrigation, and livestock.¹¹⁶ The mine's operations have led to major water contamination.¹¹⁷ The Inter-American Commission on Human Rights concluded that technical studies demonstrate the presence of heavy metals such as iron, aluminum,

110. *Id.*

111. *Id.*

112. *Id.*

113. VINCENT CASTAGNINO, METAL MINING AND HUMAN RIGHTS IN GUATEMALA: THE MARLIN MINE IN SAN MARCOS 17 (2006), http://www.pbi-guatemala.org/fileadmin/user_files/projects/guatemala/files/english/PBI-mining-human-rights-guate.pdf.

114. *Id.*

115. *Id.*

116. ZARSKY & STANLEY, *supra* note 40, at 40.

117. WORKING GR. ON MINING & HUMAN RIGHTS IN LATIN AM., THE IMPACT OF CANADIAN MINING IN LATIN AMERICA AND CANADA'S RESPONSIBILITY 12 (2014), http://www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf.

magnesium, and arsenic in local rivers, including the Tzala and Riachuelo, downstream of the tailings dam.¹¹⁸

All of the environmental impacts described above have health consequences to humans and wildlife. Cyanide alone is acutely toxic to humans and wildlife and is an important part of the extraction of gold.¹¹⁹

Inhalation of gaseous hydrogen cyanide of 100–300 parts per million (ppm) can lead to death within an hour, while exposures of 20–40 ppm can lead to symptoms such as headache, weak and rapid pulse, nausea, and vomiting. Skin exposure to a hydrogen cyanide concentration of 100 milligrams per kilogram of body weight can be fatal. Lower concentrations can cause severe pain, burns, and deep ulcers that heal slowly.¹²⁰

These health impacts are worse in communities in close proximity to the mines in Guatemala.¹²¹ For several metals—lead in blood, and mercury, arsenic, copper, and zinc in urine—concentrations were higher in residents that lived closest to the mine (generally sites adjacent to or downstream from the mine) when compared to individuals living farther away.¹²²

2. Property Conflicts

Guatemala has ceded the second-highest amount of square miles in mining concessions in Central America.¹²³ Not surprisingly, this reality has

118. *Id.*; see also ASOCIACIÓN INTERAMERICANA PARA LA DEFENSA DEL AMBIENTE, *IMPACTOS HUMANOS Y SOCIALES: LA MINA MARLIN, GUATEMALA 3* (2011) [hereinafter *HUMAN AND SOCIAL IMPACTS: THE MARLIN MINE*], <http://www.aida-americas.org/sites/default/files/MARLIN%20MINE%20SPANISH%20FINAL%202011-05-27%20LN.pdf> (discussing water wells drying out after mining operations commenced at the Marlin mine and the increased risk of water contamination with cyanide, mercury, and arsenic).

119. ZARSKY & STANLEY, *supra* note 40, at 31.

120. *Id.*

121. NILADRI BASU & HOWARD HU, *TOXIC METALS AND INDIGENOUS PEOPLES NEAR THE MARLIN MINE IN WESTERN GUATEMALA* 13 (2010), <http://physiciansforhumanrights.org/library/reports/guatemala-toxic-metals-2010-05-18.html>.

122. *Id.* at 10, 12 fig.2. See also *HUMAN AND SOCIAL IMPACTS: THE MARLIN MINE*, *supra* note 118, at 3–4 (reporting health effects such as hair loss and skin rashes since mining operations commenced at the Marlin mine and residents who live in closer proximity to the mine have higher levels of metals such as zinc, arsenic, copper, and mercury in urine).

123. A 2011 report from the Research Center on Investment and Commerce found that over 14% of the entire Central American region has been ceded to mining companies in mining concessions. The report states that Guatemala has ceded over 3,000 square miles, relying on MEM official figures. The study concedes the figure is contested by civil society, which argues the concessions are at least four times that figure. Silvia Nolasco, *Impactos de la Minería Metálica en Centroamérica*, CENTRO DE INVESTIGACIÓN SOBRE INVERSIÓN Y COMERCIO [CEICOM] 5, 17, 19,

generated a number of complex property conflicts around metal mining in the country in both indigenous and non-indigenous communities.

With regard to indigenous peoples, these include legal conflicts resulting from the State granting mining licenses without prior consultation from indigenous peoples in both communal lands and in lands that are still contested as communal but lack juridical certainty.¹²⁴ Unfortunately, legal uncertainty over communal lands in Guatemala is common because of years of forced displacement of indigenous peoples, particularly during the civil war; agrarian conflicts; and the absence of a functioning land titling system in the country.¹²⁵ In some cases, forced displacements have been caused directly by mining projects.¹²⁶ Moreover, land policies adopted as part of the peace agreements have favored individual property rights over collective ones, the latter of which are not even formally recognized in Guatemala's legal regime.¹²⁷ Bad practices in mining companies' acquisition of title have aggravated tensions. Mining companies have opted to negotiate with small private landholders of parcels adjacent to the mine without the involvement of the state or of local communities.¹²⁸ They have engaged in these practices without even disclosing who they are and why the land is being acquired.¹²⁹

3. Social Impacts

The human rights threatened by the work on the mines include rights to health; food and subsistence; access to lands and resources; and property; as well as human rights violations against women. Human rights violations from metal mining projects for indigenous peoples include: "(1) loss of traditional territories and land, eviction, migration and eventual resettlement; (2) depletion of resources necessary for physical and cultural survival; (3)

international.org/wp-content/uploads/2012/11/Impactos_de_la_Mineria_Metalica_en_Centroamerica.pdf (last visited Apr. 21, 2016).

124. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Observations on the Situation of the Rights of the Indigenous People of Guatemala with Relation to the Extraction Projects, and Other Types of Projects, in Their Traditional Territories*, at para. 58, U.N. Doc. A/HRC/18/35/Add.3 (June 11, 2011).

125. *Id.*

126. A well-documented example is the mining project El Fénix, affecting five communities in the municipalities of El Estor, Izabal, and Panzós. *Id.* at para. 62.

127. *Id.* at para. 59.

128. *Id.* at para. 60.

129. See, e.g., Raquel Aldana, *Transforming Students, Transforming Self: The Power of Teaching Social Justice Struggles in Context*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 53, 61–62 (2011) (explaining that communities typically receive little opportunity for meaningful participation in mining licensure).

destruction and pollution of the traditional environment; (4) social and community disorganization; (5) long-term negative health and nutritional impacts; and (6) harassment and violence.”¹³⁰

The impacts of metal mining on indigenous peoples’ land and resources, food sources, and culture are devastating. These activities “have contaminated rivers, lakes, and other ground water; left toxic wastes that damage soils; driven away animals on which they depend for subsistence; and devastated local ecosystems.”¹³¹ These impacts have also impaired indigenous peoples’ human rights, including their rights to food and water and their right to a healthy environment.¹³² Moreover, extractive industry activities, including metal mining, “can result in dramatic loss of biodiversity” on the biodiversity-rich indigenous lands.¹³³ The failure to respect indigenous peoples’ right to land is a violation of a right recognized under international law,¹³⁴ and precipitates conflicts and violence.¹³⁵ While states have the responsibility “to identify, demarcate, and protect indigenous peoples’ rights over their traditional lands, it is also the responsibility of companies to exercise due diligence and ascertain that there are no prior claims to lands and resources by indigenous peoples.”¹³⁶ Failure to do so may result in “human rights violations where indigenous peoples assert their rights over lands they have traditionally occupied since time immemorial.”¹³⁷

The social organization of communities and their way of life is impacted by large-scale mining projects in many ways.¹³⁸ Forced displacement disintegrates communities and social fabric and thus violates the right to the preservation of culture. Many residents in Guatemala anticipate future ill-health and luck given that the degradation of mountains via mining activities conflicts with Mayans’ reverence of mountains and the ritualistic and spiritual role that mountains play in Mayan culture.¹³⁹ In other indigenous communities plagued with toxic pollution, traditional outdoor activities, such

130. JULIAN BURGER, *INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND HUMAN RIGHTS* 8, 12 (2014), <http://www.enip.eu/web/wp-content/uploads/2014/11/Julian-Burger-EU-report-on-extractives.pdf>.

131. BURGER, *supra* note 130, at 12.

132. *Id.*

133. *Id.* at 13.

134. *Id.* at 12.

135. *Id.*

136. *Id.*

137. *Id.*

138. WORKING GR. ON MINING AND HUMAN RIGHTS IN LATIN AM., *supra* note 117, at 12.

139. Basu & Hu, *supra* note 121, at 16.

as hunting and medicine gathering, which play integral roles in the community's culture, spirituality, economy, and diet, are limited.¹⁴⁰

The forced displacement of indigenous peoples from metal mining operations causes extensive cultural and spiritual impacts. "When a community is driven from their lands, losing all cultural reference points, and moves to an urban center where its members are marginalized, impoverished, discriminated against, and dispersed, there is inevitably and with time a forced assimilation into mainstream society."¹⁴¹ Such displacement and assimilation can lead to a loss of values, customs, and languages in these indigenous communities, as well as erosion of social and political structures.¹⁴² Moreover, the lands that indigenous peoples traditionally occupy generally represent "their cultural identity, the spirits of ancestors, and sacred sites indispensable to their religious practices."¹⁴³ Consequently, "removal from that familiar landscape effectively denies them their religion and the specificity of their culture."¹⁴⁴

Social conflicts around metal mining in Guatemala are commonplace¹⁴⁵ and surfaced around 2003 when it became clear that Guatemala intended to open up its territory to mega-development projects as a concerted strategy of development.¹⁴⁶ These conflicts exist not only in the alliance between the State and the corporation against communities opposed to the mine, but also within communities and families.¹⁴⁷ In Guatemala, conflicts around mining are intensified given the divergent and diverse perspectives on nature and natural resources between indigenous and non-indigenous communities.¹⁴⁸ Opposition to mining, however, is expressed by both the indigenous and non-indigenous communities most affected by the activity.

Mining conflicts in Guatemala between the affected communities and the State stem from several factors. These include the Mining Law, which prioritizes business interests over those of the community; weak institutions without the legitimacy to implement laws; a lack of transparency and

140. *Id.*

141. *Id.* at 13–14.

142. *Id.* at 14.

143. *Id.*

144. *Id.*

145. A 2010 study conducted by the Regional Institute of High Political Studies found that in the 101 municipalities where mining licenses have been granted in Guatemala, 78 reported some type of conflict, in contrast to 10% reporting conflict in non-mining municipalities. INSTITUTO REGIONAL DE ALTOS ESTADOS ESTUDIOS POLÍTICOS, COMPRENDIENDO EL CONFLICTO SOBRE MINERÍA EN GUATEMALA PARA TENDER PUENTES DE GOVERNABILIDAD 27 (2010).

146. Yagenova, *supra* note 97, at 12.

147. Anaya, *supra* note 124, at paras. 64–67.

148. INSTITUTO REGIONAL DE ALTOS ESTADO ESTUDIOS POLÍTICOS, *supra* note 145, at 1.

information about mining projects; a lack of meaningful consultation with the affected communities in the mining concessions; the environmental harms caused by mining; and the pre-existence and continuation of historical struggles related to land and water.¹⁴⁹

Community opposition to mining in Guatemala has involved resistance initiatives, which have turned violent when the State has intervened in an attempt to repress them.¹⁵⁰ People have been killed, arrested, and raped while protesting the mine and in locally run referenda. Notable examples include the resistance to the Marlin I mine for more than a decade, which has turned violent.¹⁵¹ Anti-mining resistance against other mining projects has also turned violent. The oldest mine in Guatemala, El Estor, has reported grave violations of human rights linked to the mine since 2006. Some of these violations were filed as civil complaints against the company in Canadian courts.¹⁵²

In 2012, community members of San Pedro Ayampuc and San José del Golfo blocked the road to the mine as a resistance strategy against El Tambor mine.¹⁵³ They were able to stop the company's machinery, even though hundreds of police agents accompanied the corporation.¹⁵⁴ In May 2014, however, the government decided to remove protesters by force and several

149. *Id.* at 7–8.

150. See HUMAN AND SOCIAL IMPACTS: THE MARLIN MINE, *supra* note 118, at 4 (describing violence that erupted as a result of communities protesting operations at the Marlin Mine).

151. In early 2004, local environmental NGOs and the Catholic Church started to draw attention to the social and environmental damage caused by the Marlin I mine. In turn, Montana Exploradora and the Ministry of Energy and Mining (MEM) started to campaign to appease the population by emphasizing the industry's creation of jobs and development. In November 2004, several national organizations organized a National Maya Congress and declared their opposition to mining concessions in Mayan territory. In turn, the government in early December 2004 organized a First National Mining Forum with support from the Canadian Embassy and invited representatives from the government, inter-governmental groups such as the World Bank, the mining industry, and the Catholic Church, but excluded important sectors of society. This led civil society groups to create an Alternative Forum of Resistance against Mining. Tensions erupted into violence in January 2005 when inhabitants in the town of Los Encuentros, Sololá launched a 40-day road blockade to stop mining machinery destined for the Marlin I mine. In response, the government sent 1,500 police troops and 300 army soldiers to clear the road. In the confrontation that ensued, several civilians and police officers were severely wounded and one indigenous protester was killed by military fire. VAN DE SANDT, *supra* note 60, at 12, 14.

152. One case involved the murder of Adolfo Ich Chaman in 2009, a well-known indigenous anti-mining activist who was allegedly killed by the company. A second case, filed in 2011, involved German Chub Choc who survived a gun attack that left him paralyzed. The third case, also filed in 2011, involved 11 Mayas-Q'eqchi women who allege being raped by the mining company's security forces. AI MINING REPORT, *supra* note 74, at 18–19. El Estor has been violent since its inception in the 1960s and was singled out in the U.N.-sponsored Commission for Historical Clarification Report as a place associated with forced disappearances and extrajudicial killings. *Id.* at 18.

153. *Id.* at 17. Yagenova, *supra* note 97, at 66.

154. AI MINING REPORT, *supra* note 74, at 17; Yagenova, *supra* note 97, at 66.

were wounded.¹⁵⁵ Violence has also affected the Escobal Mine in San Rafael, Las Flores, resulting in death. By 2013, the Guatemalan government declared states of emergency in some zones affected by protests against metal mining and hydroelectric projects, including San Rafael, Las Flores.¹⁵⁶ In San Rafael, the state of emergency followed at least two deadly confrontations between anti-mining protestors and the mine.¹⁵⁷ The plaintiffs attempted to seek justice in a Canadian court, but a judge of the British Columbia Supreme Court declined to take jurisdiction of their complaint.¹⁵⁸

Unfortunately, social tensions around mining have also led to a generalized climate of harassment, threats, attacks, criminalization, and even killings of human rights defenders. These defenders have played a key role in defending the rights of the affected communities.¹⁵⁹ Arresting and bringing criminal charges against persons engaged in anti-mining resistance has become a strategy for delegitimizing any effort to stop mining operations.¹⁶⁰ Indigenous and non-indigenous leaders alike are labeled as terrorists or violent people stubbornly opposed to all development efforts in the country.

Intra-community and intra-familial conflicts usually arise from inequalities created by a few employees earning higher wages. Higher wages improve the lives of the few who earn them but also increase prices for goods in the community, which further impoverishes others.¹⁶¹ Similar and even bigger impacts arise from the immigration of workers to the mine and the emigration patterns provoked by the mine. This dynamic not only yields

155. AI MINING REPORT, *supra* note 74, at 17–18. In this area as well, Yolanda Oqueli, one of the protesters, received protective measures ordered by the Inter-American Commission on Human Rights after she was shot by unknown men. *Id.* at 17. For a more detailed description of the resistance movement, see Yagenova, *supra* note 97, at 62–78.

156. AI MINING REPORT, *supra* note 74, at 3, 12.

157. In January 2013, two security guards and another person belonging to a group of protesters were killed. Also, in April 2013, six protesters were wounded. Disparate versions of the violent events exist with local communities disputing accounts by the government and company of armed resistance against the mine. The April 2013 incident led to criminal charges against the head of the mining company's security, which are pending. The state of emergency meant that 3,500 soldiers and police came to the area. After eight days, the state of emergency was changed to a state of prevention, all of which ended in May 2013. There is military presence in the region still today. Cecilia Jamasmie, *Ontario Securities Commission Asked to Probe Tahoe Resources for Alleged Violence in Guatemala*, MINING.COM (June 3, 2013, 6:30 PM), <http://www.mining.com/ontario-securities-commission-asked-to-probe-tahoe-resources-for-alleged-violence-in-guatemala-79241/>.

158. *Tahoe Resources Lawsuit (re Guatemala)*, BUS. & HUM. RTS. RESOURCE CTR., <http://business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala> (last visited May 13, 2016).

159. Anaya, *supra* note 124, at para. 68.

160. EQUIPO REGIONAL DE MONITOREO Y DE ANÁLISIS DE DERECHOS HUMANOS EN CENTROAMÉRICA, INFORME SOBRE DERECHOS HUMANOS Y CONFLICTIVIDAD EN CENTROAMÉRICA 2013–2014, at 40 (2014), <http://www.fespad.org.sv/wp-content/uploads/2015/01/Dddhh20141.pdf>.

161. ICEFI REPORT, *supra* note 25, at 33.

demographic and cultural shifts, but also increases the demand for social services and infrastructure that are simply not there.¹⁶²

C. The Financial Benefits of Metal Mining: Who Profits and How Much?

While metal mining in Guatemala is not big business, it is still a multi-million dollar industry. For example, the overall mineral production in Guatemala in 2014 generated \$765 million.¹⁶³ In the last decade, mineral production in Guatemala has fluctuated year to year. This fluctuation, sometimes significant, occurs in response to factors such as changes in the price of metal, increases in mining activity, and social conflict. From 2004 to 2011, Guatemala experienced exponential increases in mining production revenues from \$9 million to \$941 million.¹⁶⁴ To date, 2011 represents a peak in mining production in Guatemala.

However, in 2012, mining production dropped significantly to \$596 million.¹⁶⁵ Two factors caused this decline in mining production. First, production at the Marlin I mine has slowed down considerably since all surface minerals were exhausted as of 2012 and only underground excavation is currently taking place.¹⁶⁶ Second, in 2011, in response to significant social conflicts around metal mining, the government of Guatemala imposed a moratorium on mining licenses awaiting approval of a new mining law.¹⁶⁷ The moratorium, however, was lifted in 2012 without the approval of a new mining law. This lifting of the moratorium, and the increased production in the Escobal Mine in San Rafael, explains the recent increases in mining production in the last two years.¹⁶⁸

Unfortunately, Latin America in general, and Guatemalan people in particular, have failed to profit from their natural resources, except for the

162. *Id.* at 32.

163. ANUARIO ESTADÍSTICO MINERO 2014, *supra* note 44, at 6 (reporting that mineral production in Guatemala yielded 5,926.4 million Quetzales, which converts to approximately \$765 million).

164. MINISTERIO DE ENERGÍA Y MINAS, ANUARIO ESTADÍSTICO MINERO 2011, at 5 (2011), <http://www.mem.gob.gt/wp-content/uploads/2012/05/ANUARIO-ESTAD%C3%8DSTICO-MINERO-2011.pdf> (currency converted at 1 Guatemalan quetzal to 0.12 U.S. dollars).

165. MINISTERIO DE ENERGÍA Y MINAS, ANUARIO ESTADÍSTICO MINERO 2012, at 6 (2012), <http://www.mem.gob.gt/wp-content/uploads/2015/06/ANUARIO-ESTAD%C3%8DSTICO-MINERO-20121.pdf>.

166. *Id.*

167. *Id.* at 8.

168. MINISTERIO DE ENERGÍA Y MINAS, ANUARIO ESTADÍSTICO MINERO 2013, at 5 (2013), <http://www.mem.gob.gt/wp-content/uploads/2012/05/ANUARIO-ESTAD%C3%8DSTICO-MINERO-20131.pdf>.

economic elite.¹⁶⁹ The true costs and benefits of mineral mining in Guatemala are uncertain due to a lack of knowledge and transparency about the industry. In general, the evidence suggests that economic growth is slower in mineral-rich than mineral-poor countries, a phenomenon known as the “resource curse.”¹⁷⁰

The metal mining industry in Guatemala reflects the “resource curse” phenomenon. One explanation is based on the weak mining laws in the country, which fail both to capitalize adequately on the financial gains from metal mining and to fairly allocate the environmental costs produced from mining to the mining corporations.¹⁷¹ Moreover, elites appropriate mine royalties and other revenues for personal consumption. This money is not invested in building productive capacities that could capture and absorb potential spillovers.¹⁷²

For the Guatemalan elite, the expansion of mining presents a number of advantages. First, it provides direct fiscal revenue for the State.¹⁷³ This is particularly important given how little the State collects in taxes. Guatemala’s tax revenues as a percentage of its GDP are among the lowest in the world, significantly below the Latin American average of 11.7%.¹⁷⁴ As a result, more than 85% of Guatemala’s economy is based in the private sector, with the government contributing only about 13%.¹⁷⁵ Guatemala’s share of metal mining profits is relatively small compared to other countries in the region.¹⁷⁶ Nevertheless, the metal mining industry is still a significant taxpayer, even though it benefits from laws to avoid paying more taxes.¹⁷⁷

169. *Id.* at 52. See also ACQUATELLA, *supra* note 23, at 10.

170. ZARSKY & STANLEY, *supra* note 40, at 15.

171. See discussion *infra* Parts II.B & II.C.

172. ZARSKY & STANLEY, *supra* note 40, at 15.

173. *Id.* at 14.

174. *Id.*

175. *Id.*

176. For example, the Marlin I mine’s payment in 2010 in royalties and taxes was only about 15% of its reported earnings. *Id.* at 4. Another study found that between 2005 and 2009, the Marlin I mine contributed only 13.9% of its profits to the Guatemalan economy. MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 10. One more study puts the figure at 12.9% between 2004 and 2009, which is well below the regional average and other international benchmarks on best practices. ACQUATELLA, *supra* note 23, at 18–19 (citing other examples in the region where the share of mining profits is much higher than in Guatemala during similar periods: Colombia (30–35%), Chile (22.1%), and Canada (38%)).

177. For example, the Ministry of Mining has allowed them to take advantage of Decree 29-80, The Law for the Promotion of Development and Exports and of Manufacturing (Ley de Fomento y Desarrollo de la Actividad Exportadora y de Maquila), which has allowed them to avoid paying taxes on the importations of equipment and goods that will be used in exploitation projects. ICEFI REPORT, *supra* note 25, at 58.

The highest tax rate paid by the industry has been less than 6%, which is lower than the average 10–11% that applies generally in the country.¹⁷⁸

Still, when considering all payments generated from mining, including royalties, taxes, and licensing fees, Guatemala's total annual gain is significant. In the data provided by the Guatemalan government in its 2013 annual report on mining, the fiscal benefits to the State from 2010 to 2013 were as follows: \$5.8 million in 2010, \$9.5 million in 2011, \$7.3 million in 2012, and \$6.3 million in 2013.¹⁷⁹ These amounts do not include taxes on profit (calculated at 5% on gross sales or 31% over net gains), nor the voluntary royalties that mining companies have paid since 2012.¹⁸⁰

Moreover, in January 2012, 22 mining companies were reported to have agreed to increase royalties from 1 to 4% for precious metals and from 1 to 3% for non-precious metals, which would potentially yield an exponential increase of \$64 million in revenues for Guatemala.¹⁸¹ These royalties are voluntary and cease when mineral prices drop below a certain level.¹⁸² Interestingly, the government has not disclosed the revenues from mining in its annual reports since this agreement was reached. Perhaps because of this failure to disclose, Guatemala's reported earnings from metal mining diverge significantly from those reported by the industry itself. According to the World Gold Council data, in 2013, Guatemala received \$52 million in payments to the government.¹⁸³

In addition to public revenues, mining companies stimulate the economy in other ways. Mining companies source a number of goods and services in host countries, including machinery and equipment; energy and water; and

178. *Id.* at 60.

179. ANUARIO ESTADÍSTICO MINERO 2013, *supra* note 66, at 14 tbl.2 (currency converted at 1 Guatemalan quetzal to 0.12 U.S. dollars).

180. *Id.*

181. *Guatemala: Gold, Silver Mines to Pay 4% Royalties*, CENTRALAMERICADATA.COM (Jan. 27, 2012), http://www.centralamericadata.com/en/article/home/Guatemala_Metal_Mines_to_Pay_Royalties_of_4.

182. ICEFI REPORT, *supra* note 25, at 57; Sigfrido Lée L. y María Isabel Bonilla de Anzueto, *Contribución de la Industria Minera al Desarrollo de Guatemala*, CENTRO DE INVESTIGACIONES ECONÓMICAS NACIONALES [CIEN] 45 (Sept. 24, 2009), <http://www.tequila-guatemala.com/cien/wp-content/uploads/2013/10/mineria2009.pdf>.

183. WORLD GOLD COUNCIL, RESPONSIBLE GOLD MINING AND VALUE DISTRIBUTION, 2013 DATA: A GLOBAL ASSESSMENT OF THE ECONOMIC VALUE CREATED AND DISTRIBUTED BY MEMBERS OF THE WORLD GOLD COUNCIL 40–41 (2014), <http://www.gold.org/gold-mining/economic-contribution/value-distribution>.

construction, transport, and food services.¹⁸⁴ These procurement profits dwarf payments in royalties and taxes.¹⁸⁵

According to one study, procurement benefits that go directly to businesses and contractors constituted nearly two-thirds of the total economic gains from mining in 2013.¹⁸⁶ These procurement gains are typically substantial in the national economy but provide limited benefits to the localities.¹⁸⁷ Mining also offers other macroeconomic benefits such as export earnings, high-paying jobs, and technology and knowledge spillovers.¹⁸⁸ Metal mining produces few direct jobs but the average wage is more than double that in manufacturing and triple that in agriculture.¹⁸⁹ Moreover, an important indirect benefit from metal mining is the creation of indirect jobs.¹⁹⁰ Finally, although social investment by mining companies is low,¹⁹¹ there are some gains for local communities.¹⁹² When all of these contributions are calculated, they can be substantial.¹⁹³

However, there are three significant reasons why the economic gains from metal mining in Guatemala do not represent a good investment for the country. First, few of these gains ever reach the majority of Guatemalans. Royalties and all other revenues generated from mining go into the general public funds. This allocation of funds makes it impossible to tell how the State spends the revenue. Rampant corruption in Guatemala, and a lack of

184. “According to the Guatemalan think tank CIEN, for every 100 quetzales worth of production, mining companies source an average 27 quetzales from local sectors. It also found the number of indirect jobs generated by procurements in the mining sector was six times greater than the number of direct jobs.” ZARSKY & STANLEY, *supra* note 40, at 14 (citing Sigfrido Lée L. y María Isabel Bonilla de Anzueto, *supra* note 182).

185. For example, in 2009 alone, procurement payments for materials, equipment, and supplies was \$86.6 million. ZARSKY & STANLEY, *supra* note 40, at 23–24. The industry’s data puts this figure at \$189 million dollars, which is 68% of the total in-country expenditures for the country. WORLD GOLD COUNCIL, *supra* note 183, at 40–41.

186. WORLD GOLD COUNCIL, *supra* note 183, at 40–41.

187. ZARSKY & STANLEY, *supra* note 40, at 24 (suggesting only a 5% gain from procurement by localities in 2009).

188. *Id.* at 14.

189. *Id.* By the industry’s own data, in 2013, there were 3,142 employees and contractors working for the gold industry in Guatemala, which produced \$33 million in wages and salaries. WORLD GOLD COUNCIL, *supra* note 183, at 40–41.

190. ZARSKY & STANLEY, *supra* note 40, at 23.

191. There is no precise data on the types and amount of social investment from metal mining in Guatemala. *Id.* at 42. The industry’s own 2013 data, however, has identified four million dollars in community investments. WORLD GOLD COUNCIL, *supra* note 183, at 40–41.

192. Social investment from the Marlin I mine, for example, included the provision of primary school teacher salaries and the building of a health clinic. ZARSKY & STANLEY, *supra* note 40, at 24.

193. At least two reports estimate the Marlin I mine’s contributions to the Guatemalan economy in a period of four years to be between \$97 and \$182.5 million. *Id.* at 25. *See also* MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 10 (estimating a contribution of 748.87 million quetzales).

transparency in public spending laws and practices, guarantee poor accounting regarding how national and local governments spend the funds.¹⁹⁴ There is little evidence that much of these monies have been invested in public goods such as education, health, and infrastructure.¹⁹⁵

Second, environmental and social harms significantly outweigh any economic benefit, not only over the lifetime of the mine, but also in the post-closure phase.¹⁹⁶ As documented in Part I.B. of this article, there are significant property, environmental, and economic harms from metal mining, especially to local residents.¹⁹⁷ While these costs are difficult to calculate, a few studies suggest that they are much higher than the economic benefits that metal mining provides.¹⁹⁸ One reason for this reality is that under current Guatemalan law, mining companies bear little to no responsibility for repairing or mitigating environmental harms to communities.¹⁹⁹

Third, the current political structure unfairly forces local communities where mining occurs to bear the impacts from mining, while almost all economic gains from the activity are centralized. According to one study in 2009, over 90% of all economic gains from metal mining flowed to the national government or to workers and businesses outside of the local communities affected by mining.²⁰⁰ In Guatemala, this is particularly egregious because these rural communities, comprised largely of indigenous populations, have principally experienced oppression or abandonment by the central government.²⁰¹ Moreover, these mining projects have been imposed on these communities despite their strong opposition to metal mining in their territories.²⁰² However, local communities are not doing any better than the government in managing the funds they are receiving from mining. It is not clear how local communities are spending their royalty money, though most report it is principally going to infrastructure projects benefitting the mine

194. *See infra* Part II.E.

195. ZARSKY & STANLEY, *supra* note 40, at 4–5.

196. *Id.* at 42. *See also* MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 12.

197. *See supra* Part I.B.

198. According to a 2010 report of the Marlin I mine, ASÍES calculated that the costs of the Marlin I mine were 3.5 times greater than the benefits even without accounting for long-term environmental liabilities in the post-closure phase. MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 13.

199. *See infra* Part II.B.

200. ZARSKY & STANLEY, *supra* note 40, at 27.

201. *See, e.g.*, Comm. on the Elimination of Racial Discrimination, Combined Fourteenth and Fifteenth Periodic Reports of States Parties Due in 2013, Guatemala, U.N. Doc. CERD/C/GTM/14-15 (Oct. 28, 2013).

202. *See infra* Part II.D.2.

itself.²⁰³ It also does not appear that local governments, with some exceptions, are engaged in sustainable projects expected to last beyond the projected duration of the mine.²⁰⁴

II. THE METAL MINING REGIME IN GUATEMALA

Legal reforms, either to the Mining Law itself or to water and consultation laws, are necessary to improve the way mining is conducted in Guatemala. But legal reforms alone will not suffice. Guatemala's challenges with mining are structural and political. Guatemala's weak democracy reveals itself in its ineffective institutions and its corrupt political actors who are not accountable to the people and to the public good. Part II of this Article attempts to explain the challenging landscape that hampers the effective regulation of metal mining in Guatemala.

A. The 1985 Constitution and Norms Relevant to Natural Resources

The 1985 Guatemalan Constitution, which still governs today, is a fairly progressive document. Notably, it includes provisions governing environmental and human rights.²⁰⁵ The weakness has been in its implementation. Laws adopted subsequent to the Guatemalan Constitution have prioritized provisions that encourage development and foreign investment over provisions that protect the environment, natural resources, or human rights, including the rights of indigenous peoples. Moreover, poor funding, political marginalization, and decentralization weaken the state institutions charged with enforcing environmental norms and human rights affected by the exploitation of natural resources.²⁰⁶

Regarding natural resources, Article 121 of the Guatemalan Constitution declares that the subsoil and any minerals, hydrocarbons, or other organic or inorganic substances are the property of the State.²⁰⁷ Article 125 of the Guatemalan Constitution declares that the technical and rational exploitation of hydrocarbons, minerals, and other non-renewable natural resources is of public utility and need and further that the State will establish and appropriate its own conditions for their exploration, exploitation, and

203. See VAN DE SANDT, *supra* note 60, at 20 (explaining that local communities receive 0.5% of gross revenues as royalties that are invested in infrastructure projects).

204. *Id.* at 28. One such exception is Sipacapa, which has engaged in grassroots-led efforts to identify and implement sustainable productive projects. *Id.* at 47–50.

205. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 2, 97.

206. See *infra* Part II.C.

207. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 121(e).

commercialization.²⁰⁸ Thus, the Guatemalan Constitution centralizes decisions governing natural resources exclusively in the national government, not localities. In fact, Guatemala's Constitution only recognizes decentralized powers when these have been expressly delegated to localities by two-thirds of the Congress.²⁰⁹ The Guatemalan Congress has adopted laws that promote decentralization specifically to promote regional economic development and indigenous peoples' self-determination.²¹⁰ Moreover, Article 173 of the Guatemalan Constitution establishes a right to a referendum procedure whenever there are political decisions of special significance.²¹¹ Some have suggested that the nature and scope of mining in Guatemala warrants a referendum.²¹² However, in practice, mining decisions have been the exclusive jurisdiction of the central government.

Guatemala's Constitution also contains a number of important fundamental rights that are linked to environmental protection. To the extent that environmental preservation is linked to the protection of life, Articles 1–3 of the Guatemalan Constitution, which protect human life, can also be said to pertain to environmental protection.²¹³ In addition, if the right to health is linked to environmental protection, then Articles 93 and 98 of the Guatemalan Constitution are also relevant.²¹⁴ Article 64 governs per se environmental protection. That Article establishes that the State shall conserve, protect, and improve the natural resources that belong to the people.²¹⁵ As such, it requires the State to adopt laws creating national parks and protected areas.²¹⁶

In addition, Article 97 obligates the State at all levels and throughout the national territory to promote social, economic, and technological development that would prevent contamination of the environment and maintain ecological balance.²¹⁷ To support this objective, the State is obligated to issue the necessary regulations to guarantee that use of the fauna, flora, land, and water may be realized rationally, preventing their depredation.²¹⁸ Article 126, in turn, declares the urgent public need for

208. *Id.* at art. 125.

209. *Id.* at art. 34.

210. *See infra* Part II.D.2 (discussing the Municipal Code, the General Law on Decentralization, and the Law of Councils on Urban and Rural Development).

211. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 173.

212. MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 22.

213. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 1–3.

214. *Id.* at art. 93, 98.

215. *Id.* at art. 64.

216. *Id.*

217. *Id.* at art. 97.

218. *Id.*

reforestation and for the special protection of forest and vegetation on the banks of rivers and lakes.²¹⁹ Finally, Article 127 declares that water is a public good and an inalienable right. Furthermore, Article 127 declares that the law should govern water's use.²²⁰

Guatemala's Constitution also contains other important provisions addressing the right to property, cultural rights, and the rights of indigenous peoples. These provisions are relevant to regulating mining. For example, Article 64 protects the national heritage and establishes a state duty to protect natural sanctuaries.²²¹ Article 67 governs the protection of indigenous agricultural lands,²²² while Article 39 protects property as an inherent right and requires the State to create the conditions necessary to enable owners to use and enjoy their property.²²³ Many of these same rights are protected in international human rights treaties ratified by Guatemala, which under Article 46 of the Guatemalan Constitution are declared to have preeminence over internal laws.²²⁴

B. The 1997 Mining Law

Guatemala's Mining Law was adopted in 1997; a year after Guatemala signed the peace agreements ending its civil war.²²⁵ Then-President Álvaro Arzú, a businessman who represented the transition from a military to a civil, business-friendly government, simultaneously privatized the telecommunications industry, railroads, and the energy sector. Arzú devised the new mining and investment law as a strategy to attract foreign capital and jump start the Guatemalan economy.²²⁶ Privatization was a strategy throughout Central America, which spurred a race to the bottom between Guatemala, Honduras, and El Salvador to outbid one another for foreign investment in mining and energy.²²⁷

The first of the two most important changes to the Mining Law was the end to the proscription against 100% foreign ownership of mining enterprises. The next important change was the reduction of royalties on

219. *Id.* at art. 126.

220. *Id.* at art. 127.

221. *Id.* at art. 64.

222. *Id.* at art. 67.

223. *Id.* at art. 39.

224. *Id.* at art. 46. The most important international treaty pertaining to metal mining in Guatemala is ILO Convention 169 on the rights of indigenous peoples. *See infra* Part II.D.2.

225. Mining Law, *supra* note 64.

226. Dougherty, *supra* note 22, at 9.

227. *Id.* at 10.

gross revenues to the government from 6% to 1%, to be shared equally between the central and municipal governments.²²⁸ This 1% royalty became the lowest in the region, lower than the 3% adopted by El Salvador a year earlier.²²⁹ In addition, mining corporations are exempted from paying various taxes, including taxes on water use or on imported machinery.²³⁰

The 1997 Mining Law is also notable for what it did not include. One significant omission pertained to the relationship between the extraction of natural resources in indigenous territories and the rights of indigenous peoples. In 1995, as part of the peace agreements, Guatemala signed the Agreement on the Identity and Rights of Indigenous Peoples.²³¹ In 1996, Guatemala ratified International Labor Organization (ILO) Convention 169.²³² Each of these instruments was critical to ensure that development did not undermine the sovereignty or infringe the fundamental rights of indigenous peoples.

Yet the Mining Law does not include provisions requiring free, prior, and informed consent. Also, it does not recognize indigenous peoples' collective land rights or their cultural attachment to ancestral territories and natural resources. Quite the contrary, the Mining Law prescribes favorable easements in public and private property to permit mining activities. For public lands, it requires only prior consent from the responsible government agency, which the Law says should cooperate to grant the easement.²³³ On private lands, a mining company may either negotiate agreements with the private owners, subject only to arbitration to resolve disputes,²³⁴ or may compel such agreements simply by going to a trial judge whose decision is not subject to appeal.²³⁵ The Mining Law also does not exempt protected areas from mining activities.

228. Mining Law, *supra* note 64, at art. 63 (explaining that mining royalties shall be split evenly between the Guatemalan State and municipal governments); *see also* Dougherty, *supra* note 22, at 10.

229. Dougherty, *supra* note 22, at 10.

230. VAN DE SANDT, *supra* note 60, at 11.

231. U.N. Secretary-General, *Agreement on Identity and Rights of Indigenous Peoples*, U.N. Doc. A/49/882 annex (Apr. 10, 1995), http://peacemaker.un.org/sites/peacemaker.un.org/files/GT_950331_AgreementIdentityAndRightsOfIndigenousPeoples.pdf.

232. Convention 169, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Jun. 27, 1989, 72 ser. A INT'L LAB. ORG. OFFICIAL BULL. 59 (1989) [hereinafter *Convention Concerning Indigenous Peoples*]; *Official Measures Taken Regarding Decisions of the International Labour Conference*, 79 ser. A INT'L LAB. ORG. OFFICIAL BULL. 51 (1996) (listing Guatemala as having ratified Convention No. 169 on June 5, 1996).

233. Mining Law, *supra* note 64, at art. 73.

234. *Id.* at art. 77.

235. *Id.* at art. 79.

The Mining Law is extremely weak in its environmental requirements and contains notable omissions. The Law designates MEM to regulate mining in the country and to issue licenses.²³⁶ Mining licenses require that the petitioning company submit a “mitigation study” but fail to define or provide standards for such studies, except to establish that MEM must rule on the sufficiency of the study within 30 days. If MEM does not rule within the 30-day period, the study becomes approved by law.²³⁷ The company must also submit an Environmental Impact Assessment (EIA) to the Ministry of Environment and Natural Resources (MARN) (formerly known as the National Commission of the Environment) and, when mining occurs in protected areas, the company must also submit an EIA to the National Council of Protected Areas (CONAVI).²³⁸

The Mining Law, however, fails to provide standards or procedures for assessing the EIA or to establish monitoring mechanisms, except to state that the EIA must be resolved within 30 days.²³⁹ The accompanying regulations adopted in 2001 also failed to specify greater substantive norms and procedures for approving the EIA.²⁴⁰

Several amendments in 2003, 2007, 2010, and 2015 improved the procedures.²⁴¹ In general, the standards adopt three levels of environmental impact assessment. Category A has a set of procedures and applies to projects likely to have a high environmental impact.²⁴² These standards establish and define the scope of the technical instruments mining companies must submit for an EIA evaluation. The standards include an evaluation of environmental and social impacts,²⁴³ and prescribe monitoring steps, including audits, which MARN must undertake to ensure compliance.²⁴⁴ The new standards permit

236. *Id.* at art. 2.

237. *Id.* at art. 19.

238. *Id.* at art. 20.

239. *Id.*

240. Reglamento de la Ley de Minería, Acuerdo Gubernativo 176-2001, art. 7–9 (2001), *reprinted in* MINISTERIO DE ENERGÍA Y MINAS, LEY DE MINERÍA Y SU REGLAMENTO 30 (2001), http://www.mem.gob.gt/wp-content/uploads/2015/06/2_Reglamento_a_Ley_de_Mineria_Acuerdo_Gubernativo_176_2001.pdf.

241. *See generally* Ministerio de Ambiente y Recursos Naturales [MARN] Reglamento de Evaluación, Control, y Seguimiento Ambiental, Acuerdo Gubernativo Número 23-2003 (2003), *amended by* MARN Reglamento de Evaluación, Control, y Seguimiento Ambiental, Acuerdo Gubernativo Número 431-2007 (2007), *amended by* MARN Reglamento de Evaluación, Control, y Seguimiento Ambiental, Acuerdo Gubernativo Número 173-2010 (2010) *and* MARN Reglamento de Evaluación, Control, y Seguimiento Ambiental, Acuerdo Gubernativo Número 60-2015 (2015).

242. MARN Reglamento de Evaluación, Control, y Seguimiento Ambiental, Acuerdo Gubernativo Número 60-2015 at art. 13, 35–39 [hereinafter MARN Governmental Decree].

243. *Id.* at art. 11.

244. *Id.* at art. 49–52.

MARN to seek input from private and public entities, and mandate that MARN consult the National Commission on Protected Areas when mining projects occur in protected areas.²⁴⁵

The standards also require the reasons for denial of an EIA petition, including when the negative environmental impacts outweigh the benefits of the project, or when MARN inspectors have been denied access to the area.²⁴⁶ The new standards also demand that MARN determine the payment of a bond in case the mine closes. MARN may also determine a separate amount of necessary insurance coverage for environmental risks.²⁴⁷ Finally, the standards regulate sanctions and fines for non-compliance, though in general these tend to be low.²⁴⁸

These standards are not adequately enforced due to political and economic constraints. MARN has faced political pressure under different administrations to ensure that metal mining projects are not rejected based on environmental impact assessments.²⁴⁹ MARN is significantly understaffed, underfunded, ill-equipped, and politically marginalized in contrast to MEM, which is eager to promote mining investment.²⁵⁰ Critics have noted that MARN cannot—and does not—undertake the control and monitoring of the EIAs that these projects require.²⁵¹ The agency spends most of its limited resources on the bureaucratic process of approving mining licenses and does almost nothing to provide ongoing oversight and accountability for non-compliance after approval.²⁵²

Unfortunately, MARN's weakness in the EIA process has meant that mining companies can manage concerns over environmental harms by controlling the environmental impact studies.²⁵³ For example, the Marlin I mine continues to operate despite significant weaknesses in the EIA process revealed by the IFC and other independent assessments.²⁵⁴ Calls by the ILO

245. *Id.* at art. 17.

246. *Id.* at art. 19.

247. *Id.* at art. 56–64, art. 80–82.

248. *Id.* at art. 88–94.

249. Dougherty, *supra* note 22, at 11 (documenting that the presidency of Oscar Berger (2004–2008), in particular, aggressively pursued foreign mining investment and pressured MARN not to reject mining projects).

250. Yagenova, *supra* note 97, at 24–25.

251. *See, e.g.,* IARNA, *supra* note 3, at 211.

252. *Id.*

253. ZARSKY & STANLEY, *supra* note 40, at 7.

254. *Id.* at 35. In 2005, the Marlin I mine's own IFC Compliance Advisor Ombudsman (CAO) found that "the [EIA] prepared by Glamis failed to identify all water users downstream from the mine, fully assess the potential for acid mine drainage, fully assess the potential for other water contaminants, or establish water quality standards . . ." *Id.* at 34. Furthermore,

and the Inter-American Commission on Human Rights to suspend the Marlin I mine only led to an administrative process and an inter-ministerial investigation of impacts. Ultimately, that process concluded that the mine did not pose a threat to community water supplies or human health.²⁵⁵ Similarly, other experts have singled out the EIA study for the El Tambor mine and determined that it was significantly lacking.²⁵⁶ Other experts have diverged significantly from the official EIA approved by MARN to find that the El Tambor mine will have significant ill effects on the environment, including on water depletion and contamination.²⁵⁷

Aside from the mitigation and environmental impact requirements, the Mining Law does not require reclamation upon completion of mining operations. Mining reclamation, which seeks to minimize or mitigate the environmental effects of mining, is supposed to be a regular part of modern mining practices.²⁵⁸ Either during mining operations or after they cease, reclamation involves restoring mined land to a natural or economically usable condition.²⁵⁹

Article 66 establishes a nominal fee for opting to transfer an exploration or exploitation license;²⁶⁰ however, it is silent as to whether that transfer can

In 2010, the U.S.-based consulting firm E-Tech International produced a comprehensive evaluation of predicted and actual water quality around the mine. The report found that the [EIA] “provided limited information on the baseline environmental setting in and around the Marlin Mine” and should have included more information about “water quality, water quantity and levels, and the abundance and health of aquatic biota.” . . . The review also found that the [EIA] provided no evidence to support its claim that the “acid generation and contaminant leaching potential of the rocks [were] low.” . . . The lack of adequate baseline data continues to impede environmental and health oversight.

Id. at 35 (internal citations omitted) (quoting E-TECH INT’L, EVALUATION OF PREDICTED AND ACTUAL WATER QUALITY AT THE MARLIN MINE, GUATEMALA 5–6 (2010), <http://www.etechinternational.org/guatemala/> (follow link to “Download” under “Final Report”).

255. *Id.* at 12.

256. As Yagenova explains, the study was conducted by the Grupo Sierra Madre Internacional S.A. Yagenova questions their independence given that they are paid by the mining company to conduct the study. Moreover, an independent assessment of the EIA conducted by American environmental engineers Dr. Robert Robinson and Dr. Robert Durán found several deficiencies, including that water usage only focuses on access to water for mining and not on its effects on neighboring communities, and that monitoring plans are extremely vague as are recovery plans after the mine’s closure. Yagenova, *supra* note 97, at 35–36, 41–42.

257. *Id.* at 45–46.

258. See, e.g., *What Happens to Mine Sites after a Mine is Closed?*, MININGFACTS.ORG, <http://www.miningfacts.org/environment/what-happens-to-mine-sites-after-a-mine-is-closed/> (last visited May 15, 2016).

259. *Id.*

260. Article 66 establishes a fee from between three to nine units during each year that they hold an exploration license, as well as a fee of three units per km² for ending or transferring an exploration

simply be back to the government. Article 71, which governs water contamination, requires that those who make use of water in their mining operations must adequately treat the water to avoid environmental contamination.²⁶¹ Any regulation of the abandonment or closure of a mine is done indirectly through the EIA and mitigation studies. Nothing in the law requires MARN or the holder of the license to comply with the promises or commitments made in the original licensing agreement.²⁶²

Not surprisingly, mining reclamation practices in Guatemala have been poorly managed. For example, Montana Exploradora Mine provided a \$1 million dollar surety bond to be used to reclaim the mine in the event of a company default.²⁶³ This amount is trivial compared to reclamation bonds required of mining operations in developed nations²⁶⁴ and is vastly inadequate for the scope of the mining project.²⁶⁵ The insufficient surety funds for the Marlin I mine expose the government, local residents, and the environment to significant risks if the company fails to properly reclaim the mine. These risks include ongoing pollution from acidic toxic metals, erosion and sedimentation, and altered lands that cannot be returned to prior uses.²⁶⁶

Article 51 of the Mining Law does, however, regulate the involuntary suspension of a mining project. The suspension grounds include: (a) when there is imminent risk or danger to life or property; (b) when labor security has been violated; (c) when environmental laws have been violated; (d) when the subsoil fee has not been paid; (e) when royalties have not been paid; (f) for non-compliance with Article 85 of the law (a requirement that those who export mining products have a license to do so); (g) failure to submit reports required by law; and (h) when what has been approved for exploitation and what is actually being exploited are not proportionate.²⁶⁷ Although Article 51 contemplates suspension based on significant personal or property harms and

license and five units per km² for ending or transferring an exploitation license. Article 67 clarifies that one unit can mean from 100 quetzales (about \$12) to about 1000 quetzales (about \$130), as established by MEM. Mining Law, *supra* note 64, at art. 66–67.

261. *Id.* at art. 71.

262. IARNA, *supra* note 3, at 203.

263. KEITH CAMPBELL ET AL., RECLAMATION ISSUES AND ESTIMATED COST OF RECLAMATION MARLIN MINE, at 1 (Molly Butler et al. trans., 2011), <https://goldcorpoutofguatemala.files.wordpress.com/2010/07/reclamation-issues-and-estimated-cost-of-reclamation-marlin-mine.pdf>.

264. *Id.* (providing four examples of reclamation fees at mines in Colorado that range from \$7.4 million all the way to \$99 million dollars).

265. *Id.* at 9–12 (estimating that the surety bond should be \$49 million dollars (or approximately 389 million quetzales) to cover such costs as surface water treatment, removing and recovering land and revegetation, demolition and removal of buildings, and erosion control).

266. *Id.* at 1.

267. Mining Law, *supra* note 64, at art. 51.

based on violations to the environmental laws, its effectiveness is limited by weak enforcement as MEM is perceived to be deeply biased in favor of mining enterprises.²⁶⁸

The other significant weakness of the Mining Law pertains to public participation. The only mention of public participation in the law is found in Article 46, which governs procedures for stating opposition to a mine. Article 46 merely requires that opposition must be submitted prior to the issuance of the license and has to be based on failure to comply with Article 41.²⁶⁹ Article 41 lists the formal requirements for obtaining a license, such as the names and citizenship or passport information of those seeking the license, specification of the territory, and type of activity sought.²⁷⁰ It does not mention mitigation or environmental impact studies.

The most recent 2015 governmental decree, however, has improved the opportunity for public participation in the EIA, at least in theory. The process is supposed to involve a public notice of the EIA study of at least 20 days, during which time the public may express its opposition.²⁷¹ Unfortunately, the method chosen to provide this notice—a written notification in a public newspaper—is not effective in communities where many residents do not read. Notably, a reform to include such an announcement on the radio and in indigenous languages was expressly rejected in the promulgation of recent regulations.²⁷²

The new regulations also include other good practices that are not implemented because of MARN's limited resources. First, the EIA must post its resolution of the EIA online, in Spanish, and in the predominant local languages.²⁷³ In practice, this mandate is not met. In a recent interview with MARN officials, we confirmed that their distribution practice remains unchanged despite the new regulations.²⁷⁴ Second, MARN must make public a highly technical document—that few can understand—in Spanish for 20 days solely in its offices in Guatemala City.²⁷⁵ Unfortunately, these existing procedures for public participation simply do not work. In fact, it is not

268. See, e.g., Aldana, *supra* note 128, at 82–85 (explaining how it is critical to account for the political forces that dictate “action or inaction in a given case”).

269. Mining Law, *supra* note 64, at art. 46.

270. *Id.* at art. 41.

271. MARN Governmental Decree, *supra* note 242, at art. 32.

272. Interview with MARN official, Guatemala (July 2015).

273. MARN Governmental Decree, *supra* note 242, at art. 31.

274. Interview with MARN official, *supra* note 273.

275. Yagenova, *supra* note 97, at 21.

uncommon for communities affected by mining to learn about projects in their communities when the machinery appears.²⁷⁶

C. Guatemala's Environmental Laws

Guatemala's environmental legal regime is weak and largely decentralized. The problem is not so much an absence of laws²⁷⁷—although there are some important gaps discussed in Part II.D below—but rather numerous institutions with overlapping mandates and little coordination that are overworked and under-resourced.²⁷⁸ Moreover, there is simply no political will to enforce environmental laws that apply to mining activities; including laws regulating deforestation, protected areas, biodiversity, and water.²⁷⁹

For nearly 20 years from the adoption of Guatemala's constitution establishing the modern environmental regime, the environmental laws have been dedicated nearly exclusively to regulating protected areas and biodiversity. This is, in part, a response to priorities established by funders, such as USAID, and foreign environmental nongovernmental groups.²⁸⁰ In the last decade, however, environmental laws have shifted away from protected areas to address deforestation and climate change.²⁸¹ Despite these gains in some areas of environmental law, robust application of these laws to mining is not contemplated.

Technically, the general Law on the Protection and Improvement of the Environment²⁸² and its regulations are supposed to apply to mining activities in Guatemala.²⁸³ This Law contains several provisions that should regulate the adverse environmental consequences of mining. The Law, for example, calls for the rational use of natural resources in the subsoil in order to prevent

276. *Id.* at 64–65 (explaining that 14 years after the State first granted a license of acknowledgment to Glamis Gold and even months after the exploitation license was approved, the MEM finally admitted to the community that a mining license existed in the region).

277. Yagenova states that since 1930, more than 1,200 environmental laws and regulations have been adopted in Guatemala. *Id.* at 21.

278. *Id.*

279. *Id.*

280. Mario Mancilla, *Algunos Antecedentes y Estructura del Derecho Ambiental en Guatemala* 9–10 (2015) (unpublished thesis, Universidad Pontificia de Salamanca Spain) (on file with author).

281. *Id.* at 10.

282. Ley de Protección y Mejoramiento del Medio Ambiente, Decreto Número 68-86, http://www.vertic.org/media/National%20Legislation/Guatemala/GT_Ley_Proteccion_Medio_Ambiente_68_86.pdf.

283. MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 17.

contamination and achieve ecological balance.²⁸⁴ It prohibits the storage of toxic waste likely to contaminate the environment.²⁸⁵ It requires an environmental impact assessment prior to the approval of any development project likely to deplete natural resources.²⁸⁶ It calls for the regulation of water access and quality.²⁸⁷ When read in conjunction with the Mining Law, however, it is vague in determining, assessing, and imposing sanctions based on environmental harms caused by mining.²⁸⁸

Moreover, MARN, which is charged with enforcement, is too weak and is often undermined by MEM. Mining companies seize on these weaknesses to ignore environmental sanctions, even when they are imposed.²⁸⁹ MARN is only involved in mining concessions too late in the process—after the exploration phase, when it is clear that MEM has decided to push forward with the project.²⁹⁰ MARN has no role in the mitigation impact study, which is solely approved by MEM during the exploration phases of a mining project.²⁹¹ Also, the Mining Law does not even exclude mining from protected areas. Finally, Guatemala's Criminal Code penalizes certain environmental crimes where actions result in the intentional destruction of publicly-owned natural resources and goods. These crimes include the illegal exploitation of natural resources, illegal deforestation, and the destruction of protected species.²⁹² The codification of these crimes, however, has not resulted in prosecutions because prosecutors often rely on MEM for its technical evidentiary findings and often dismiss cases based on lack of proof.²⁹³

284. Ley de Protección y Mejoramiento del Medio Ambiente, Decreto Número 68-86, http://www.vertic.org/media/National%20Legislation/Guatemala/GT_Ley_Proteccion_Medio_Ambiente_68_86.pdf.

285. *Id.* at art. 6.

286. *Id.* at art. 8.

287. *Id.* at art. 15.

288. MARLIN MINE COST BENEFIT STUDY, *supra* note 58, at 17.

289. *Id.* at 17–18 (discussing a fine imposed by MARN to Montana Exploradora for the transportation of cyanide, which the company refuses to pay, alleging it has authority to transport it).

290. Yagenova, *supra* note 97, at 22.

291. *Id.*

292. MINISTERIO PÚBLICO, MÓDULO EDUCATIVO: NOCIONES DE DERECHO AMBIENTAL 72–76 (2011), <http://www.funsepa.net/guatemala/docs/mda.pdf>.

293. This happened, for example, in a case filed in 2006 against the Marlin I mine for water contamination, which MEM did not certify. ON COMMON GROUND CONSULTANTS, HUMAN RIGHTS ASSESSMENT OF GOLDCORP'S MARLIN MINE app. F at 1 (2010), http://s1.q4cdn.com/038672619/files/doc_issues/HRA_Appendix_F_Legal_Cases.pdf (discussing Case No. 1227-2007, filed by Colectivo MadreSelva, alleging that the Marlin I mine had contaminated the Tz'alá River).

D. Governance Gaps

1. Water Usage and Water Quality

There is a provision in the 1985 Constitution stating that water is an inalienable right the use of which should be regulated by law.²⁹⁴ But Guatemala has yet to adopt a water law, despite several attempts to do so.²⁹⁵ The absence of water laws and regulations in the country means that issues such as access to water, water usage, and water contamination from mining activities are left entirely unregulated.²⁹⁶ Indeed, in Guatemala, and throughout Latin America, a principal cause of water conflict is not necessarily water scarcity, but rather unregulated and unsustainable use of water for commercial purposes.²⁹⁷ The extractive industry produces two types of problems for Guatemala: excessive uses of water and water contamination.²⁹⁸ Moreover, mining's reliance on large bodies of water means that mining companies strategically place mining operations near water basins. This puts pressure on that water, which is felt by several communities that depend on that water source.²⁹⁹

There are a few provisions in existing laws that Guatemala could use to regulate mining companies' water use. Guatemala's Mining Law grants those who have acquired mining licenses the right to make rational use of water as long as it does not affect the permanent exercise of other rights. The Law also establishes that waters running in their natural riverbeds or found in lagoons that are not in public domain or common usage shall be regulated by the Civil Code and other relevant laws.³⁰⁰ However, these norms are not implemented. MARN also sets standards for water quality, but enforcement is lagging because MARN does not regularly monitor water quality.³⁰¹

A significant ruling of the Guatemalan Constitutional Court on September 28, 2015 revealed the promise and perils of water law as applied

294. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 127.

295. FRANZ ROJAS ORTUSTE, POLÍTICAS E INSTITUCIONALIDAD EN MATERIA DE AGUA POTABLE Y SANEAMIENTO EN AMÉRICA LATINA Y EL CARIBE 38–39 (2014), http://www.pseau.org/outils/ouvrages/cepal_politicas_e_institucionalidad_en_materia_de_agua_potable_y_saneamiento_en_america_latina_y_el_caribe_2014.pdf.

296. Anaya, *supra* note 124, at para. 53.

297. LIBER MARTÍ & JUAN BAUTISTA JUSTO, ANÁLISIS, PREVENCIÓN Y RESOLUCIÓN DE CONFLICTOS POR EL AGUA EN AMÉRICA LATINA Y EL CARIBE 11 (2015), http://repositorio.cepal.org/bitstream/handle/11362/37877/S1500220_es.pdf?sequence=1.

298. *Id.* at 13–14.

299. *Id.* at 14.

300. Mining Law, *supra* note 64, at art. 71.

301. ZARSKY & STANLEY, *supra* note 40, at 35.

to mining, however, strong pronouncements of law yield little effect when implemented by weak institutions.³⁰² The ruling established a novel precedent by declaring water a fundamental human right that requires prioritizing human consumption of water over commercial uses.³⁰³ The ruling resulted from a challenge to the El Escobal mining license concession alleging that mining threatened to significantly contaminate water quality.³⁰⁴ While the Constitutional Court seriously considered the challenge, the Court could not verify its factual veracity because MARN had not monitored the mine since its operation began two years earlier.³⁰⁵ The insufficient record prevented the Court from granting the claimant's requested remedy—the suspension of the mine.³⁰⁶ Instead, the Court simply ordered MARN to do its job and assess the degree to which mining affected water access and quality in the affected communities.³⁰⁷ The impact of this ruling is not yet known and is likely to be negatively affected by the political transition in the country.³⁰⁸

2. Free, Prior, and Informed Consent

In Guatemala, the right to free, prior, and informed consent (FPIC) with respect to metal mining suffers from an implementation gap. This gap results from a lack of political will to determine the nature and scope of this right. Guatemala has a legal regime governing the consultative process that could be implemented effectively. But this legal regime requires further regulations and clarity, which the State has refused to provide. As a result, there is

302. Corte de Constitucionalidad [Constitutional Court] Sept. 28, 2015, Expediente Número 4617-2013 (on file with author).

303. *Id.* slip op. at 27–28.

304. *Id.* slip op. at 1–2.

305. *Id.* slip op. at 8.

306. *Id.* slip op. at 29–31.

307. *Id.*

308. In a recent workshop held at the McGeorge School of Law titled “From Extraction to Emancipation: Reimagining Development for Guatemala,” Dr. Yuri Melini, the Executive Director of CALAS, the group that filed the claim, explained that the new Guatemalan President, Jimmy Morales, will support mining companies and is likely to appoint to MEM, MARN, and the Constitutional Court persons who will impede the faithful execution of the few “green” rulings of the Constitutional Court. Dr. Yuri Melini, Exec. Dir., Ctr. for Envtl., Legal, & Soc. Action of Guat., Keynote Address at Reimagining Development for Guatemala Study Space Workshop (Dec. 4, 2015); see also *Reimagining Development for Guatemala Study Space Workshop*, UNIV. PAC, https://calendar.pacific.edu/event/from_extraction_to_emancipation_reimagining_development_for_guatemala?utm_campaign=widget&utm_medium=widget&utm_source=University+of+the+Pacific+%2F+Sacramento#.VmYXRuL__d (last visited Apr. 24, 2016) (lecturing on lack of corporate responsibility leading to environmental degradation in Guatemala).

significant uncertainty regarding the nature and scope of FPIC. Unresolved conflicts pertaining to non-renewable resources especially exacerbate this uncertainty problem. There are three groups competing for rights related to exploiting non-renewable resources: (1) the central government under its exclusive constitutional authority to extract resources; (2) the localities under decentralized forms of government to control their own natural resources and territory; and (3) indigenous peoples' right to FPIC under ILO Convention 169.

Guatemala's failure to conduct local consultations following its own legal procedures increases legal uncertainty. With some exceptions in a few localities, the State refuses to engage in consultative processes.³⁰⁹ This failure, in turn, causes mining corporations and those opposed to mining to fill this void. Predictably, this process yields tremendous confusion and uncertainty around the consultative process and renders the process legally ineffective. The affected communities, which are largely opposed to mining, question the legitimacy of consultative processes initiated by private corporations.³¹⁰ Likewise, mining corporations and the central government often challenge the legality of local community-led consultation procedures in subsequent litigation.

A helpful starting point in addressing this scenario is the existing legal framework pertaining to indigenous peoples' right to FPIC. This right is distinct from consultation laws that apply to non-indigenous communities. The principal reason for this distinction is that Guatemala ratified ILO Convention 169 in 1996, a convention that applies only to indigenous and tribal peoples and governs the consultative process.³¹¹ Moreover, Article 46 of Guatemala's Constitution³¹² establishes the preeminence of international human rights norms, which means ILO Convention 169 is not only a binding convention, but a fundamental constitutional right. Indeed, in 1995, Guatemala's Constitutional Court issued an advisory opinion requested by the Guatemalan Congress finding that ILO Convention 169 is a human rights

309. Anaya, *supra* note 124, at para. 9 (describing how the Rapporteur struggled to get the government to create a process that adequately consulted with the local indigenous peoples affected by mines).

310. *Id.* at paras. 32–33.

311. See Convention Concerning Indigenous Peoples, *supra* note 232, at art. 6 (“In applying the provisions of this Convention, governments shall: consult the peoples concerned, through appropriate procedures . . . establish means by which these peoples can freely participate . . . [and] establish means for the full development of these peoples own institutions . . .”).

312. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 46.

instrument as contemplated in Article 46 of the Guatemalan Constitution, and that none of its provisions conflict with the Guatemalan Constitution.³¹³

Guatemala enacted laws governing the consultative process, some of which predate the country's ratification of ILO 169, but there is a great deal of uncertainty regarding these laws. The conflict lies in the laws' hierarchical value over other potentially conflicting norms, their normative vagueness, and potential inconsistency with international obligations, at least in how these laws pertain to indigenous peoples. Substantial non-implementation of these laws is also a problem. This landscape provoked a chorus of international governmental institutions to conclude that Guatemala is not respecting indigenous peoples' rights to FPIC.³¹⁴

Before examining Guatemala's domestic laws, the nature and scope of ILO 169's requirements must be considered. Article 6 of ILO 169 requires states to consult "the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."³¹⁵ This consultation shall be undertaken "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."³¹⁶ The provision implements procedural safeguards (by requiring the involvement of representative institutions) to conduct consultative processes through appropriate procedures.³¹⁷ The institutions shall conduct the consultations in good faith with the objective of reaching a substantive goal, consensus, to safeguard indigenous peoples' right to self-determination.³¹⁸

Under international law, the procedural and substantive goals of Article 6 mean that States must consult indigenous peoples to obtain their consent.³¹⁹ Prior consent is actually required before a state can undertake activities or measures that are likely to impact indigenous peoples' rights over their lands and natural resources.³²⁰ This consent goal includes development projects at a grand scale likely to have a major impact on the physical and cultural

313. Corte de Constitucionalidad [Constitutional Court] May 18, 1995, *Opinión Consultiva*, Expediente Número. 199-95.

314. See Anaya, *supra* note 124, at para. 21 (discussing the conclusions of ILO, the Committee on the Elimination of Racial Discrimination, and the Rapporteur that Guatemala is failing to comply with the consultative process).

315. Convention Concerning Indigenous Peoples, *supra* note 232, at art. 6(1)(a).

316. *Id.* at art. 6(2).

317. Anaya, *supra* note 124, at paras. 38-40.

318. *Id.*

319. *Id.* at para. 41.

320. *Id.*

survival of indigenous peoples.³²¹ Indeed, such projects require, as part of the consultative requirements, commitments to execute environmental and social impact assessments by independent and competent bodies, and a guarantee that the affected indigenous peoples will receive a reasonable share of the profits.³²²

Nevertheless, prior consent does not require a referendum process that calls for a vote on development projects. Procedurally, Article 6 contemplates a process of dialogue and negotiation between the State and indigenous communities, executed in good faith with the goal of reaching consensus.³²³ While ideally the end result of this process is full agreement, failure to reach such an outcome does not violate Article 6.³²⁴ Partial agreement to key aspects can suffice, and sometimes the State can proceed without reaching consensus.³²⁵ In such cases, however, the State bears the burden of justifying why agreement was not possible, and the State is still obligated to execute the project in ways that protect or repair any harms to the substantive rights of indigenous peoples.³²⁶

Guatemala's laws that seek to fulfill the consultation requirements in metal mining projects do not conform—procedurally or substantively—to ILO 169. Procedurally, Guatemala's laws contemplate an up-or-down referendum process instead of meaningful dialogue and do not contemplate environmental impact assessments or profit-sharing as part of the necessary requirements.³²⁷ By ignoring overwhelming expressions of disapproval by local communities attempting to engage in referenda, Guatemala is not acting in good faith to achieve consensus. Many mining projects have violated the substantive rights of indigenous peoples with little regard for amelioration or reparations.

Several Guatemalan laws require consultation with local communities on development projects. These laws, adopted in 2002, are the Law of the Councils on Urban and Rural Development (Law of the Councils),³²⁸ the

321. *Id.*

322. *Id.* ¶ 52.

323. *Id.* at para. 43.

324. *Id.* at para. 44.

325. *Id.*

326. *Id.* at paras. 45-47.

327. *Id.* at para. 45.

328. Ley de los Consejos de Desarrollo Urbano y Rural, Decreto Numero 11-2002, art. 26 (2002), <http://old.congreso.gob.gt/archivos/decretos/2002/gtdcx11-2002.pdf>.

Municipal Code,³²⁹ and the General Law on Decentralization.³³⁰ These laws establish a process for consulting with indigenous authorities, local communities, or both. The Law of the Councils mirrors the constitutional obligation to promote administrative, economic decentralization in order to achieve adequate regional development of the country.³³¹ The Law of the Councils establishes the principal means by which Mayan, Xinca, Garífona, and non-indigenous peoples of Guatemala can engage in democratic participation in development projects, taking into account the country's multi-ethnic and multi-lingual characteristics.³³² The Councils are formed at five different levels of government: national, regional, departmental, municipal, and community.³³³ In communities where there is indigenous presence, the law explicitly requires participation of indigenous leaders elected in accordance with the customary practices of each community.³³⁴ Councils are expected to work toward ensuring greater decentralization in development decisions.³³⁵ Among the Councils' principles are respecting different Guatemalan cultures, promoting inter-cultural harmony, and seeking balance between the environment and human development.³³⁶ Article 26 of this Law is the only provision expressly regulating consultations, and it is limited to the participation of indigenous communities.³³⁷ Moreover, the law appears to create solely a permissive—not obligatory—procedural mechanism for consultation. It does not clarify either procedural mechanisms or safeguards for participation, nor does it give legal recognition or effect to the process.³³⁸ In this way, Article 26 does not appear to conform to ILO Convention 169.

The General Law on Decentralization similarly contemplates ample community participation in prioritizing public projects and distributing

329. Código Municipal de Guatemala, Decreto Numero 12-2002, art. 65 (2002), <http://old.congreso.gob.gt/archivos/decretos/2002/gtdcx12-2002.pdf> [hereinafter Municipal Code of Guatemala].

330. Ley General de Decentralización, Decreto Numero 14-2002 (2002), <http://old.congreso.gob.gt/archivos/decretos/2002/gtdcx14-2002.pdf>.

331. Ley de los Consejos de Desarrollo Urbano y Rural, Decreto Numero 11-2002, pmb. (citing CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 119(b), 224).

332. *Id.* at art. 1.

333. *Id.* at art. 4.

334. *Id.* at art. 23.

335. *Id.* at art. 8–14.

336. *Id.* at art. 26.

337. “Consultation with Indigenous Peoples. Until a law is passed that regulates consultation with the Maya, Garífona and Xinca indigenous peoples with regard to development projects promoted by the Executive Branch that affect directly these communities, consultation may be implemented by means of the representatives in the development councils.” *Id.* (translation by author).

338. *Id.*

public funds.³³⁹ The Law's guiding principles include respect for municipal sovereignty; the promotion of citizenship participation through dialogue and negotiation; and the preservation of environmental equilibrium and human development.³⁴⁰ The Law's objectives include increasing local management of a sustainable environment and reinforcing the identity and organization of communities.³⁴¹ Specifically for mining projects, Article 18 provides that community organizations (recognized by law) shall participate in executing public projects, programs, and services with the municipal authorities.³⁴²

Finally, the Municipal Code similarly promotes a decentralized government, which is a response to the need to recognize Guatemala as a multi-lingual and multi-cultural society.³⁴³ The Code gives municipalities the ability to administer municipal funds—including the 0.5% royalties paid by mining companies—preserves and promotes the cultural identity, and protects renewable and non-renewable natural resources.³⁴⁴ The municipal government is different from indigenous forms of government. In Guatemala, indigenous leaders coexist parallel to the official leaders of the municipality.³⁴⁵ Although the Municipal Code recognizes this coexistence, it does not dictate a specific form of relationship; rather, the Code suggests that the relationship be determined locally, and according to practice.³⁴⁶ The Code expressly mentions indigenous, communitarian, and auxiliary municipal forms of government.³⁴⁷ Furthermore, the Code states that the official municipality must recognize and respect these governmental forms.³⁴⁸ Communitarian and auxiliary municipal forms of government, defined as customary forms of local governance, are also charged with overseeing the protection of renewable and non-renewable resources in their jurisdiction.³⁴⁹ In practice, the official municipal government receives and controls all local

339. *Id.* at art. 2.

340. *Id.* at art. 4.

341. *Id.* at art. 6.

342. *Id.* at art. 18.

343. Municipal Code of Guatemala, *supra* note 330, at pmb1.

344. *Id.* at art. 35.

345. See generally Carlos Fredy Ochoa, *Trayectoria Histórica de las Alcaldías Indígenas* [Historical Trajectory of Indigenous Mayoralties], 28 MOMENTO, no. 4, 2013, at 3, <http://www.asies.org.gt/download.php?get=Momento-2013-4-Trayectoria-historica-de-las-alcaldas-indigenas.pdf> (providing examples of municipalities incorporating indigenous mayors as part of the official local government).

346. Municipal Code of Guatemala, *supra* note 330, at art. 20–21.

347. *Id.* at art. 55–56.

348. *Id.*

349. *Id.* at art. 56, 58.

public funds.³⁵⁰ Unfortunately, this Law does not resolve the frequent conflicts between the official municipal governments and indigenous leaders.³⁵¹

Under the Municipal Code, seven separate provisions govern public access to information and citizen participation. Article 60 generally charges Municipal Councils with an obligation to provide information to the community and facilitate its participation.³⁵² Access to public information under the Code pertains solely to municipal matters.³⁵³ The Municipal Council decides by a two-thirds vote whether the issue before it merits a consultative process.³⁵⁴ Alternatively, a minimum of 10% of registered community voters may sign a petition to request a consultation.³⁵⁵ If 20% have signed, the Municipal Council must implement it.³⁵⁶

Article 65 of the Municipal Code expressly codifies indigenous peoples' right to consult. It provides that, when indigenous peoples' interests and rights are affected, the Municipal Council shall undertake a consultative process at the request of the community or indigenous leaders.³⁵⁷ The process includes adopting the customary laws and traditions of the indigenous peoples.³⁵⁸ Therefore, the provision requires a consultative process upon the request of indigenous communities and relies on procedures that conform to local indigenous customs.

Article 66 governs consultation procedures and their legal effect.³⁵⁹ This provision reiterates that the Municipal Council may fulfill its obligations through an official ballot or in accordance with the community's legal norms.³⁶⁰ The results of the consultation are binding if at least 50% of eligible voters in the municipality participate and the majority favors a particular course of action.³⁶¹ Thus, the Municipal Code provides indigenous

350. See generally CARLOS FREDY OCHOA, *ALCALDÍAS INDÍGENAS: DIEZ AÑOS DESPUÉS DE SU RECONOCIMIENTO POR EL ESTADO* (2013), <http://www.asies.org.gt/download.php?get=2013--disop-alcald--as-ind--genas--diez-a--os-despu--s-de-su-reconocimiento-por-el-estado--tomo-i.pdf>.

351. *Id.* at 32, 36 (discussing tension between indigenous mayors and official city public officials).

352. Municipal Code of Guatemala, *supra* note 330.

353. *Id.* at art. 62.

354. *Id.* at art. 63.

355. *Id.* at art. 64.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at art. 66.

360. *Id.*

361. *Id.*

communities with the ability to compel a binding, consultative process according to their customs so long as a majority participates.

The Municipal Code leaves unresolved whether the consultative process binds the Guatemalan central government, which has the exclusive power to authorize mining licenses. Article 125 of the Guatemalan Constitution places the decision of whether to exploit renewable and non-renewable resources with the central government.³⁶² Perhaps this explains why the 1997 Mining Law does not address a consultative process. At most, the Mining Law's regulations contemplate the participation of affected communities through interviews, surveys, workshops, assemblies, or working group meetings.³⁶³ This process, however, does not consider the cultural and socioeconomic characteristics of the affected community.³⁶⁴ Even Guatemala's Constitutional Court found that the Mining Law fails to comply with international norms.³⁶⁵

There have been either no consultations by the central government at all—at least for early mining projects—or consultations have been less than ideal with actors involved in mining conflicts.³⁶⁶ Civil groups opposing metal mining have engaged in community-led referendum processes in approximately 30 municipalities³⁶⁷ and the results overwhelmingly demonstrate opposition to mining.³⁶⁸ These referenda consist of ballots with

362. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 125.

363. MARN Reglamento de Evaluación, Control, y Seguimiento Ambiental, Acuerdo Gubernativo Número 431-2007, at art. art. 74(b) (2007).

364. *See Anaya, supra* note 124, at para. 22.

365. *See id.* (citing Corte de Constitucionalidad [Constitutional Court] Dec. 21, 2009, Expediente Número 3878-2007 (2007)).

366. Almost the entire population around the Marlin I mine, for example, was uninformed about the project when exploitation began. VAN DE SANDT, *supra* note 60, at 20.

367. ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES, ESTUDIO DE OPINIÓN PÚBLICA SOBRE LA MINERÍA DE METALES EN GUATEMALA: INFORME DE RESULTADOS 5 (2010), <http://www.asies.org.gt/download.php?get=201007opinionmineriagt dice.pdf> [hereinafter PUBLIC OPINION STUDY]. *See also* VAN DE SANDT, *supra* note 60, at 15–16 (discussing Sipacapa as a model used by other local communities to organize their own consultation regarding mining operations).

368. *See, e.g.,* ZARSKY & STANLEY, *supra* note 40, at 11; VAN DE SANDT, *supra* note 60, at 44 (describing the 2005 community-led referendum process executed by the Municipality in Sipacapa in which 98% of the 2,564 persons participating voted no to mining activities (the Marlin mine) in their territory); *see also* PBI MINING BULLETIN, *supra* note 47, at 7 (discussing two community-led consultative processes in the Quiché region, one in Ixcán in 2007 and another one in Cunén in 2009, with only the latter conducted with the backing of the municipality and yielding a 100% vote to not allow mining with 58% of all residents taking part). A 2010 public opinion survey conducted by the Association of Investigation and Social Science also reports that 57% of the population living in mineral mining areas reject mining, while people residing in rural sectors reject it at an even higher rate of 70%. PUBLIC OPINION STUDY, *supra* note 368, at 7 fig.1, 9 fig.3. When one considers all development projects, including hydroelectric plants and petroleum, the number of community-led consultative processes between 2005 and 2013 rises to 73. Yagenova, *supra* note 97, at 14.

broadly worded questions that ask for a vote on whether a specific project should go forward, whether to exploit natural resources, or both questions.³⁶⁹ These processes are held with or without the municipality's participation. Whether consultation takes place usually depends on the local mayor's position toward mining.³⁷⁰ These processes are diverse and inconsistent in terms of the actors who participate in the consultation.³⁷¹

Mining companies respond to the conflicts generated by the lack of consultation by starting their own dialogues. The companies hold voluntary workshops that involve certain community members, military and police representatives, and mining employees.³⁷² In an attempt to generate this dialogue between the State, the private sector, and communities, mining companies support government initiatives that bypass the electoral process.³⁷³ Members of civil society criticize these methods. First, they question the legitimacy of those who represent the community. Second, they argue that the purpose is largely to appease opposition with nominally beneficial offers that do not address the looming problems that mining causes in the communities.³⁷⁴

The Guatemalan Constitutional Court does not recognize these non-governmental consultations as binding on MEM when issuing mining licenses, even if the consultative process satisfies Municipal Code procedures.³⁷⁵ In 2005, in a challenge filed by Montana Exploradora against the consultation process executed in Sipacapa in accordance with a municipal agreement, the Constitutional Court declared that the procedures followed were not contrary to the Guatemalan Constitution.³⁷⁶ However, in 2007, the Guatemalan Constitutional Court held that the central government had sole

369. PBI MINING BULLETIN, *supra* note 47, at 7.

370. *See, e.g., id.*

371. Anaya, *supra* note 124, at para. 48.

372. *See, e.g.,* GOLDCORP, GOLDCORP'S SECOND UPDATE TO THE MARLIN MINE HUMAN RIGHTS ASSESSMENT REPORT 4 (2011), http://www.goldcorp.com/files/docs_operations/Goldcorp_Response_to_Marlin_Mine_HRA_Report_Update_04_29_2011_English.pdf (describing how Goldcorp and Montana are trying to improve consultation and collaboration with the local communities by working with the Guatemalan government to implement ILO 169).

373. Since 2010, Guatemala put in place a round table discussion initiative that involves the Vice Presidency, MEM, MARN, other national government organizations, mayors, community representatives, and mining companies to try to appease the conflicts generated by the Marlin I mine. Goldcorp has expressed strong support for this initiative. *Id.* at 4–6.

374. *See, e.g.,* Aldana, *supra* note 129, at 63–65 (demonstrating how Montana Exploradora provided some benefits, yet overall denied environmental risks and harm to the community).

375. *See* VAN DE SANDT, *supra* note 60, at 43–44 (discussing the 2005 judicial proceedings); Corte de Constitucionalidad [Constitutional Court] May 8, 2007, Expediente Número 1179-2005.

376. *See* VAN DE SANDT, *supra* note 60, at 44.

jurisdiction to conduct consultative processes for projects involving renewable resources.³⁷⁷ It further declared unconstitutional Article 27 of the Municipal Act insofar as it bound the central government to the results of the consultative process contrary to Article 125 of the Constitution, which grants the central government sole authority over natural resources.³⁷⁸ In 2009, the Constitutional Court again recognized the State's duty to guarantee the collective right of indigenous people to consultation but insisted that the results of such consultation are non-binding.³⁷⁹ In nearly all of these rulings, the Constitutional Court called on the Guatemalan Congress to enact a law governing the consultative process.³⁸⁰ This implies that the Court does not view the three laws promoting decentralization as relevant to this process.³⁸¹ Between 2010 and 2011, Guatemala attempted but failed to adopt a regulation governing the consultative process consistent with ILO 169.³⁸²

Not surprisingly, international bodies charged with overseeing the consultative process under ILO 169 criticize Guatemala's implementation. In 2010, for example, the ILO and the Inter-American Commission on Human Rights requested that Guatemala suspend operations of the Marlin I mine due to inadequate consultations.³⁸³ In June 2010, the U.N. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, called on the Guatemalan government to adopt a law defining and assuring indigenous peoples' rights to consultation on resource development projects.³⁸⁴ Anaya, however, emphasized the importance of Guatemalans moving beyond a narrow focus on the binding nature of referendum results, and focusing instead on the importance of adopting a more robust process that conforms to the procedures and goals of ILO 169.³⁸⁵ Five years later, Guatemala continues to operate the Marlin I mine while the consultative process remains unchanged.

377. Corte de Constitucionalidad [Constitutional Court] May 8, 2007, Expediente Número 1179-2005; *see also* Anaya, *supra* note 124, at para. 31.

378. Anaya, *supra* note 124, at para. 45.

379. PBI MINING BULLETIN, *supra* note 47, at 5.

380. DUE PROCESS LAW FOUNDATION & OXFAM, DERECHO A LA CONSULTA Y AL CONSENTIMIENTO PREVIO, LIBRE E INFORMADO EN AMÉRICA LATINA 32 (2015), http://www.dplf.org/sites/default/files/informe_consulta_previa_2015_web-2.pdf.

381. *Id.*

382. *Id.* at 33.

383. *OAS Human Rights Commission Urges Suspension of Mining Activity at Goldcorp's Marlin Mine in Guatemala*, MINING WATCH CAN. (May 24, 2010), <http://miningwatch.ca/news/2010/5/24/oas-human-rights-commission-urges-suspension-mining-activity-goldcorps-marlin-mine>.

384. Anaya, *supra* note 124, ¶ 88.

385. *Id.* ¶ 32.

3. Property Rights

The Guatemalan mining regulatory regime is silent on several important issues that pertain to property conflicts. Consequently, there is no regulation or accountability over mining practices that affect property rights.

In contrast to countries like the United States,³⁸⁶ mineral rights in Guatemala are severed. This means that private citizens or corporations own surface rights while the central government retains all mineral rights under Article 121 of the Guatemalan Constitution.³⁸⁷ Guatemalan law poorly defines the relationship between the central government's ownership of mineral rights and the rights of indigenous peoples over communal lands. No law in Guatemala proscribes mining in indigenous territory or on lands that have a special cultural or spiritual significance to indigenous communities.³⁸⁸ In 2005, Guatemala adopted a cadastral law—a law to map out the country's land and real estate ownership.³⁸⁹ Unfortunately, this law does not consider the historical record of land ownership or require consultation with indigenous peoples.³⁹⁰ The Mining Law makes generous property concessions to mining companies in terms of territory and access,³⁹¹ and it does not require the environmental impact study to consider the potential impact on properties around the mine.³⁹² If mining activities make it impossible for local communities to remain in an area, no law contemplates who should bear relocation costs or what practices should follow. At a minimum, Article 16 of ILO 169 requires that, in the exceptional case when indigenous peoples must be relocated, the State must guarantee their safe return after addressing the reasons for their displacement.³⁹³

E. Mining Revenues and Public Spending

Guatemala's existing legal framework lacks transparency and accountability requirements for metal mining revenues. The Guatemalan

386. In the United States, the owner of surface rights also owns the right to minerals below the surface. Denis Collins, *The Failure of a Socially Responsive Gold Mining MNC in El Salvador: Ramifications of NGO Mistrust*, 88 J. BUS. ETHICS 245, 252 (2009).

387. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 121.

388. Anaya, *supra* note 124, at para. 63.

389. Ley del Registro de Información Catastral, Decreto Número 41-2005, pmbi., art. 2 (2005), <http://old.congreso.gob.gt/archivos/decretos/2005/gtdcx41-2005.pdf>.

390. Yagenova, *supra* note 97, at 20, 38.

391. The Mining Law contemplates an exploration mining concession of up to 3,000 km², while the entire country is barely over 100,000 km². Mining Law, *supra* note 64, at art. 15.

392. Yagenova, *supra* note 97, at 20.

393. Convention Concerning Indigenous Peoples, *supra* note 232, at art. 16(3).

government has a history of collaborating with the private sector to rob Guatemalans of their public funds.³⁹⁴ Indeed, Guatemala consistently scores quite low on the Corruption Perception Index, ranking 115 out of 175 countries in 2014.³⁹⁵ In Guatemala, corruption is hard to fix because it is systemic. The major factors contributing to corruption include outdated laws, weak institutions, inadequate access to public information, limited public participation, conflicts of interest, and impunity.³⁹⁶ Public expenditures in Guatemala are particularly vulnerable to corruption because they are dispersed through a system of trusteeships that involve poorly-regulated committees comprised of public and private actors who lack transparency and accountability.³⁹⁷ This means that the national and municipal governments do not keep or make public records of total mine-related royalties and taxes received, or how these revenues are spent.³⁹⁸

Addressing fiscal transparency in Guatemala is key to the country's democratic development. Fiscal transparency laws are weak and may require constitutional amendment. Access to information is a constitutional guarantee³⁹⁹ and Guatemala passed the Law on Access to Public Information (LAPI) in 2008.⁴⁰⁰ But the Guatemalan Constitution and LAPI⁴⁰¹ make it illegal to publicly disclose the amount of taxes paid by any private individual or corporate entity.⁴⁰² As a result, all disclosures from the mining industry of

394. INSTITUTO CENTROAMERICANO DE ESTUDIOS FISCALES & OXFAM, LA CORRUPCIÓN: SUS CAMINOS, SU IMPACTO EN LA SOCIEDAD Y UNA AGENDA PARA SU ELIMINACIÓN 7 (2015), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ints_la_corrupcion_sus_caminos_s_u_impacto_en_la_sociedad_y_una_agend.pdf [hereinafter ICEFI & OXFAM].

395. Guatemala's score was 32 out of 100 in 2014, 29 out of 100 in 2013, and 34 out of 100 in 2013. See *Corruption Perceptions Index 2014: Results*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2014/results> (last visited May 15, 2015).

396. ICEFI & OXFAM, *supra* note 395, at 13.

397. *Id.* at 22–23.

398. ZARSKY & STANLEY, *supra* note 40, at 28.

399. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 30–31.

400. Ley de Acceso a la Información Pública, Decreto Número 57-2008 (2008), <http://old.congreso.gob.gt/archivos/decretos/2008/gtdcx57-0008.pdf>.

401. *Id.* at art. 21–22.

402. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA May 31, 1985, art. 24. Article 24 reads in relevant part:

The books, documents, and records connected with the payment of taxes, rates, charges, and levies can be revised by the competent authority in accordance with the law. To disclose the amount of taxes paid, earnings, losses, expenses, and any other data referring to audited accounts to individual or juridical persons, with the exception of general balances, whose publication is mandated by law, is punishable.

Id. (translation by author)

taxes paid are discretionary and self-reported.⁴⁰³ In practice, the information provided by the metal mining industry is too incomplete or piecemeal to be helpful; transparency from the metal extractive industry in Guatemala is, in fact, among the weakest in Latin America.⁴⁰⁴ Regulatory agencies exacerbate this problem by failing to provide timely, public information about mining that is clear, such as mining activities' fiscal contributions.⁴⁰⁵ Since 2012, the additional mining royalties have further concealed what happens with mining money in Guatemala because these are not taxes collected by law.⁴⁰⁶

III. RECOMMENDED SOLUTIONS FOR GUATEMALA'S METAL MINING PROBLEM

This Part of the Article examines potential options for Guatemala to ban future mining and manage ongoing mining concessions, including possibly shutting down these operations under existing law. Guatemala has been engaged in a process of reform for at least a decade without success.⁴⁰⁷ However, Guatemala did not start with reforms that banned mining, but modified existing laws to continue mining operations. As discussed below, this approach is not effective.⁴⁰⁸ A better alternative for Guatemala is to ban metal mining. To support this proposal, this analysis reviews metal mining bans in neighboring Central American countries and extracts potential lessons for Guatemala. These countries have comparable economies, shared histories, and similarities in some of the issues confronting mining; therefore, these countries provide a compelling case for a potential metal mining ban in Guatemala.

403. ICEFI & OXFAM, *supra* note 395, at 31.

404. *Id.* at 32.

405. *Id.*

406. *Id.* at 40.

407. *See infra* Part III.A.

408. This Article does not take a position on whether metal mining will always be bad for Guatemalans; rather, it merely asserts that metal mining is an extremely detrimental activity for the country at this moment in its history and that there are better mining models in the region for Guatemala to emulate. One study, for example, views Chile as ahead of the curve, at least financially, in terms of the share of gains it captures from mining and the degree to which it funds state spending through mining operations. JUAN CARLOS GÓMEZ SABAÑI ET AL., EL IMPACTO FISCAL DE LA EXPLOTACIÓN DE LOS RECURSOS NATURALES NO RENOVABLES EN LOS PAÍSES DE AMÉRICA LATINA Y EL CARIBE 5 (2015), http://repositorio.cepal.org/bitstream/handle/11362/38235/S1500128_es.pdf?sequence=1.

A. Inadequacy of Mining Reforms in Guatemala to Date

Guatemala attempted to amend its mining laws 11 times in the past decade alone.⁴⁰⁹ Moreover, on June 19, 2008, the Constitutional Court declared seven articles of the 1997 Mining Law unconstitutional for failing to comply with the Constitution's environmental obligations.⁴¹⁰ Specifically, the Constitutional Court agreed with the Center for Environmental and Social Legal Action (CALAS) that the Mining Law's provision implying approval from administrative inaction for longer than 30 days in response to an EIA violated the State's obligation to protect the environment.⁴¹¹ The Constitutional Court also agreed that the Law's failure to define or limit the depth of exploitation permitted for mining also violated the State's obligation to protect the environment.⁴¹² Moreover, the Constitutional Court held that the law's permissiveness in allowing the release of contaminated waters from mining activities violated the State's obligation to protect the environment.⁴¹³ Finally, the Constitutional Court held that requiring that mining operations only mitigate waste and noise to the "extent possible" violated the State's obligation to protect the environment.⁴¹⁴

In response to this holding, Guatemala imposed a moratorium on mining until reforms to the Mining Law were adopted.⁴¹⁵ Former President Otto Pérez Molina and MEM presented the last set of reforms to Congress on October 12, 2012.⁴¹⁶ To date, Congress has not adopted these reforms.⁴¹⁷ The proposed reforms recognize that mining makes positive economic contributions to Guatemala but also acknowledge several deficiencies in the 1997 laws that gave rise to conflict.⁴¹⁸ One category of reforms focuses on strengthening government institutions charged with implementing the

409. Yagenova, *supra* note 97, at 25.

410. Corte de Constitucionalidad [Constitutional Court] Apr. 1, 2008, Expediente 1491-2007, Considerando § III (2007) (declaring article 19 of the Mining Law unconstitutional).

411. *Id.* (declaring article 19 of the Mining Law unconstitutional).

412. *Id.* at Considerando § IV (declaring articles 21, 24, and 27 of the Mining Law unconstitutional).

413. *Id.* at Considerando § V (declaring article 75 of the Mining Law unconstitutional).

414. *Id.* at Considerando § VI (declaring article 81 of the Mining Law unconstitutional).

415. *See supra* notes 166–68 and accompanying text.

416. Iniciativa Que Dispone Aprobar Reformas al Decreto Número 48-97 del Congreso de la República, Ley de Minería, Número de Registro 4590 at 2 (Oct. 2, 2012), <http://www.congreso.gob.gt/manager/images/99420C1A-337F-70CF-79EF-D05AD84E5BE3.pdf> [hereafter Bill to Amend Guatemala's Mining Law].

417. The last reported action taken by Congress was finalizing public hearings on the proposed law in September 2014. *Finaliza Etapa de Audiencias Públicas para Reformas a la Ley de Minería*, CONGRESO REPUBLICA GUAT. (Sept. 17, 2014), www.congreso.gob.gt/noticias.php?id=6042.

418. Bill to Amend Guatemala's Mining Law, *supra* note 417, at 4.

Mining Law. For example, one of the identified deficiencies pertains to MARN's institutional weakness in enforcing environmental laws under the 1997 Mining Law. This law did not specifically grant MARN authority to apply the Improvement and Protection of the Environment Law to mining activities.⁴¹⁹ The proposed reform simply includes a new provision explicitly demanding that MARN monitor environmental compliance prior to resource extraction, but it fails to specify how early and in what capacity.⁴²⁰ It also fails to instruct how to resolve conflicts between the decisions of MEM and MARN.

A second category of reforms focuses on social aspects by proposing improved communications between MEM and the Municipal Development Councils.⁴²¹ For example, MEM should hold a meeting in person with the Municipal Council to explain—in a culturally appropriate way—the environmental and technical aspects of a mining project compared to its economic benefits.⁴²² These meetings should not replace the ILO 169 consultative process.⁴²³ These reforms also create a broad principle of corporate social responsibility, and requires periodic health assessments for the mine.⁴²⁴ A separate provision permits the State to create public mining companies and declares, in absolute terms, that the State exclusively holds the property rights to any substance found in the subsoil.⁴²⁵ This provision does not attempt to clarify how property rights in the subsoil relate to surface property rights. For example, it does not address what should happen when the surface property belongs to an indigenous community's ancestral lands or is located in a similarly protected area.

Another important section fills some gaps from the 1997 Mining Law by addressing mining's effect on the environment. For example, it requires closing the mine to restore affected areas to the land's original state or to an alternative state—so long as the community can productively use the land.⁴²⁶ The reforms also contemplate the need for a plan that monitors water use and contamination resulting from mining activities.⁴²⁷ Finally, there are provisions related to taxes and royalties.⁴²⁸ The reforms would no longer

419. *Id.* at 5.

420. *Id.*

421. *Id.* at 6.

422. *Id.*

423. *Id.*

424. *Id.* at 7.

425. *Id.*

426. *Id.* at 10.

427. *Id.* at 9.

428. *Id.* at 12.

exempt mining companies from taxes; instead, royalties would increase from 1% to a variable system that depends on the type of mineral being mined.⁴²⁹ Under this system, royalty payments for precious metals would increase to 5%.⁴³⁰ The law also contemplates that 55% of the royalties would go to local communities and be invested in sustainable projects beyond the life of the mine.⁴³¹ A United States State Department report noted that “[o]n November 28, 2014, however, the Guatemalan Congress passed the 2015 national budget that increases royalties from 1 to 10% on most private mining operations,” 90% of which would go to the central government and only 10% to the municipalities.⁴³² Investors are challenging the legality of this change.⁴³³

If adopted, some of the proposed changes to the Mining Law would be an improvement from the status quo. However, they are neither sufficient nor likely to be well-executed. The reforms fail to address critical issues, such as meaningful decisionmaking, economic participation by local communities, and reforms to public spending laws and policies. Second, the proposed reforms depend on political will to produce change, such as significantly increasing MARN’s resources to enable the agency to do its job. Third, these reforms will be meaningless when applied to Guatemala’s weak democracy. To enhance accountability, Guatemala must strengthen its democratic institutions and entities charged with enforcing environmental laws, and improve public participation in the democratic process. These types of changes require long-term, systemic reforms. Guatemala is simply not ready for metal mining.

B. Banning Metal Mining in Guatemala: A Comparative Assessment of Domestic Law and International Liability

1. Banning Future Metal Mining

In Central America, three countries—Costa Rica, Honduras, and El Salvador—imposed restrictions on future mining in their territories.⁴³⁴ The

429. *Id.*

430. *Id.*

431. *Id.* at 13.

432. U.S. DEP’T OF STATE, GUATEMALA INVESTMENT CLIMATE STATEMENT 2015, at 5 (2015), <http://www.state.gov/documents/organization/241790.pdf> [hereinafter GUATEMALA INVESTMENT STATEMENT].

433. *Id.*

434. EQUIPO REGIONAL DE MONITOREO Y DE ANÁLISIS DE DERECHOS HUMANOS EN CENTROAMÉRICA, INFORME SOBRE DERECHOS HUMANOS Y CONFLICTIVIDAD EN CENTROAMÉRICA

moratoriums on mining in Honduras and El Salvador, however, are ad hoc and temporary, similar to the moratorium Guatemala has already attempted. Citing water contamination and other environmental concerns,⁴³⁵ El Salvador's former President Antonio Saca imposed a moratorium on mining in 2008, which three subsequent administrations followed.⁴³⁶ The ad hoc nature of El Salvador's ban means the nature, scope, and temporal parameters of the ban are unknown; however, El Salvador is still attempting to ban mining.⁴³⁷ Similarly, in Honduras, the mining sector had been closed to new investment since 2005 after the country's Supreme Court struck down portions of its 1999 Mining Law.⁴³⁸ However, Honduras lifted the ban in 2014 after adopting a new mining law in 2013.⁴³⁹ Unfortunately, the lift of the ban, as in Guatemala, renewed and intensified ongoing social conflicts around mining.⁴⁴⁰ In contrast, Costa Rica passed a law that delineates the parameters of its permanent mining ban.⁴⁴¹ Accordingly, this Article looks to Costa Rica as a model.

a. Nature and Scope: Costa Rica as a Model

Costa Rica's democratic stability during Central America's civil wars made the country an early target of mining investment.⁴⁴² Canadian and United States companies became involved in a number of gold and silver

2013–2014, at 47–48 (2014), <http://www.fespad.org.sv/wp-content/uploads/2015/01/Dddhh20141.pdf>. In contrast, Nicaragua, the largest producer of gold in Central America, and Panama, predicted to become a major copper-exporting country, have increased mining in recent years. CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK, *supra* note 80, at 34.

435. Despite the moratorium, water contamination problems from mining persist. In 2012, tests completed by El Salvador's Ministry of Environmental and Natural Resources revealed high concentrations of cyanide and iron at a location in the San Sebastian River, which flows by the site of the San Sebastian gold mine. The agency also reported that approximately 25% of the community lacked access to safe drinking water. CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK, *supra* note 80, at 35.

436. *Id.*

437. *Id.* at 100.

438. U.S. DEP'T OF STATE, HONDURAS INVESTMENT CLIMATE STATEMENT 2014, at 3 (2014), <http://www.state.gov/documents/organization/230898.pdf>.

439. Jennifer Moore, *No Small Coup: The Honduras Free Trade Agreement*, RABBLE.CA (July 14, 2014), <http://rabble.ca/blogs/bloggers/miningwatch/2014/07/no-small-coup-canada-honduras-free-trade-agreement>.

440. *Id.*

441. Código de Minería, Decreta No. 6769, art. 8 (Aug. 23, 1982) (Costa Rica), <http://faolex.fao.org/docs/pdf/cos67718.pdf>, amended by Ley para declarar a Costa Rica País Libre de Minería Metálica a Cielo Abierto, Decreta No. 8904, art. 1, (Nov. 9, 2010) (Costa Rica), <http://www.imprenal.go.cr/pub/2011/02/10/alca11.pdf>.

442. CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK, *supra* note 80, at 38.

exploration and mining operations.⁴⁴³ Beginning in the 1990s, however, Costa Rica became a focal point for the international environmental movement, which challenged the viability of mining operations in the country.⁴⁴⁴ This anti-mining resistance ultimately affected gold exploration and development in the country.⁴⁴⁵ National gold production has virtually disappeared since 2001, mainly due to low international prices and increased mine operating costs from stricter regulations, which made mining unprofitable.⁴⁴⁶ Costa Rica also discouraged mining by enacting a moratorium and underfunding the agencies charged with approving mining concessions, which made mining investment too risky.⁴⁴⁷ Ultimately, the Costa Rican government permanently banned certain types of mining. Today, mining investment in Costa Rica is practically zero.⁴⁴⁸

Citing environmental concerns, Costa Rica became the first country in Latin America to ban open-pit mining in November 2010.⁴⁴⁹ The effort to implement a mining ban in the country started in 2002, with President Abel Pacheco signing a ban on new open-pit mining.⁴⁵⁰ However, in 2008, the President and his Environment and Energy Minister were under criminal investigation for issuing a permit to a local subsidiary of a Canadian mining company, Infinito Gold, to develop “a \$66 million open-pit gold mine in the fragile ecosystem of the Cerro Crucitas.”⁴⁵¹ The government granted a permit to Infinito to clear approximately 500 acres of old-growth rainforest.⁴⁵² Moreover, two endangered species, the *almendro amarillo* (yellow almond) tree and the Great Green Macaw, reside in this area.⁴⁵³ Former President Oscar Arias and his Environment and Energy Minister, Roberto Dobles could be held liable for “knowingly approving the clear-cutting of the *almendro* trees (*Dipteryxpanamensis*), and . . . destroying the habitat of the green

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.* at 52.

447. *Id.* at 53.

448. *Id.*

449. *Law Makers Ban Open Pit Mining*, LATIN AMERICA PRESS (Nov. 24, 2010), <http://www.lapress.org/articles.asp?item=1&art=6269>.

450. *Costa Rica Bans Open Pit Mining*, EARTHJUSTICE (June 7, 2002), <http://earthjustice.org/news/press/2002/costa-rica-bans-open-pit-mining>.

451. Zach Dyer, *Costa Rica: From 'Green' to Gold?*, NORTH AMERICAN CONGRESS ON LATIN AMERICA (Dec. 26, 2008), <https://nacla.org/news/costa-rica-green-gold>.

452. *Id.*

453. *Id.*

macaw (*Araambigua*).”⁴⁵⁴ Infinito is also under investigation for illegally cutting trees and encroaching on protected areas.⁴⁵⁵

The proposed gold mine threatened to tarnish Costa Rica’s image as a haven for ecotourism.⁴⁵⁶ The mine also poses serious threats to public health and the environment.⁴⁵⁷ Moreover, mining has been insignificant in the national economy of Costa Rica, contributing only 0.1–0.2% of the country’s GDP annually from 2008 to 2012.⁴⁵⁸ For these reasons, Costa Rica decided that “tourism’s long-term economic gains would be more sustainable than the timber and precious metals industries in the country.”⁴⁵⁹ Costa Rica’s national park system is among the most extensive in Latin America.⁴⁶⁰ It includes nearly 4% of the country’s total land area and has 12 parks, 6 nature reserves, 4 recreation areas, and several habitat and wildlife areas.⁴⁶¹ In addition, 23% of Costa Rica’s total land area is protected from all forms of mining.⁴⁶² Finally, Costa Rica is widely recognized as the safest country in the region for travelers, which has helped increase its popularity as a vacation destination.⁴⁶³

Shortly after taking office in May 2010, President Laura Chinchilla issued a decree banning new open-pit mining contracts in the country, but indicated that she would allow the courts to determine whether the Crucitas mine would be allowed to proceed.⁴⁶⁴ Costa Rica banned cyanide leaching mining because it was perceived—though not proven—that inadequate regulation of cyanide leaching facilities was causing significant environmental degradation.⁴⁶⁵ The mining industry and interested companies have challenged the validity of the mining ban on various constitutional grounds.⁴⁶⁶

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK, *supra* note 80, at 34.

459. *Costa Rica Gold Mining History and Current Ban*, RAREGOLDNUGGETS.COM (July 30, 2015), <http://raregoldnuggets.com/blog/?p=1566>.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Law Makers Ban Open Pit Mining*, *supra* note 450.

465. Jan G. Laitos, *Cyanide, Mining, and the Environment*, 30 PACE ENVTL. L. REV. 869, 911 (2013).

466. Casey Dawson, *Why Honduras Should Not Jump on the Ban Wagon: A Study of Open Pit Mining Bans and Their Pitfalls*, 37 SUFFOLK TRANSNAT’L L. REV. 67, 85 (2014). For a helpful discussion of the history of the approval and implementation of Costa Rica’s open-pit gold mining ban, see generally Eugenia Wo Ching, *The First Latin American Country Free of Open-Pit Gold Mining*, in THE EARTH

Although seemingly ambitious, Costa Rica's mining ban is consistent with bans in other domestic and international environmental law contexts. Ample precedent exists for prioritizing environmental conservation goals over economic gains in contexts ranging from regulation of the atmosphere to management of the oceans. Bans on economically lucrative, but environmentally destructive practices first appeared in the marine law context. One of the earliest examples is the moratorium on commercial whaling under the International Convention for the Regulation of Whaling (ICRW).⁴⁶⁷ Commercial whaling was highly lucrative because of high market demand for whale products, which pushed many whale species to the brink of extinction. The moratorium was initially intended to be temporary, but has remained in effect for decades with very limited exceptions.⁴⁶⁸ Other bans on lucrative yet destructive marine practices include national and subnational bans on shark finning⁴⁶⁹ and bans on the use of driftnets on the high seas.⁴⁷⁰

A successful ban of an environmentally destructive practice also exists in the atmospheric protection context. A well-known example is the ban of stratospheric ozone-depleting chlorofluorocarbons (CFCs) under the Montreal Protocol, which began in the late 1980s.⁴⁷¹ CFCs are chemicals used in the production of air conditioning and refrigeration that were linked to depletion of the stratospheric ozone layer, which is essential to protect biological life from the sun's harmful UV-B rays.⁴⁷² In response to this challenge, the international community developed and implemented one of the most successful environmental treaties, which phased out CFCs and replaced them with ozone-friendly alternatives.⁴⁷³

CHARTER, ECOLOGICAL INTEGRITY AND SOCIAL MOVEMENTS 216, 228 (Laura Westra & Mirian Vilela eds., 2014).

467. See International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, 74 (organizing a league of nations to regulate the whaling industry).

468. The two exceptions under the ICRW are: (1) scientific research and (2) aboriginal subsistence.

469. See, e.g., Shark Conservation Act of 2010, Pub. L. No. 111-348, 124 Stat. 3668 § 102(a)(1)(C) (2011) (prohibiting the removal of shark fins); CAL. FISH & GAME CODE § 2021 (West 2016).

470. Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 24, 1989, 1899 U.N.T.S. 1. (also referred to as the "Wellington Convention").

471. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, T.I.A.S. No. 11,097, 1513 U.N.T.S. 323.

472. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 567 (3d ed. 2007).

473. See Ian Rae, *Saving the Ozone Layer: Why the Montreal Protocol Worked*, CONVERSATION (Sept. 9, 2012), <https://theconversation.com/saving-the-ozone-layer-why-the-montreal-protocol-worked-9249> (explaining the Montreal Protocol and the reasons for its success).

Consequently, Costa Rica's metal mining ban and the proposed Guatemalan ban draw support from these marine and atmospheric success stories. The proposed Guatemalan ban is even more compelling than these examples because of the extensive property and social impacts involved.

b. Assessing Costs

Guatemala's decision to ban mining would result in some costs for the country. Mining revenues are significant for Guatemala,⁴⁷⁴ a country experiencing a fiscal deficit due to a weak tax regime and corruption.⁴⁷⁵ If Guatemala's Mining Law were reformed to increase royalties, these revenues could be even greater. Although there are other indirect economic gains from mining,⁴⁷⁶ mining's environmental and social costs overshadow them.⁴⁷⁷ Guatemala cannot simply ignore these costs when assessing mining's fiscal benefits, especially when those most harmed by the activity are not the beneficiaries of its revenue. Guatemala will not benefit from mining until it adopts a law that accurately accounts for mining's environmental and social costs. Moreover, Guatemala needs to address the distributional unfairness of the existing mining regime. Guatemala must first reform the mining industry so that its economic benefits flow to those communities most negatively affected. Finally, Guatemala has options to make up the fiscal impact from lost mining revenues. Such options could include: reengaging comprehensive tax reforms that also tackle fiscal mismanagement and transparency;⁴⁷⁸ effectively capitalizing on remittances that Guatemalan emigrants send to the

474. *See supra* Part II.E (explaining how the lack of transparency and accountability requirements for mining revenues enable corruption in Guatemalan government).

475. ESTUDIO ECONÓMICO DE AMÉRICA LATINA Y EL CARIBE, GUATEMALA 2 (2015) [hereinafter CEPAL ECONOMIC REPORT], http://repositorio.cepal.org/bitstream/handle/11362/38713/Guatemala_es.pdf?sequence=65 (estimating a 2% fiscal deficit for Guatemala).

476. *See supra* Part I.C (comparing mining costs with social and environmental costs).

477. *See supra* Part I.B.1 (explaining mining's environmental and health impacts).

478. Guatemala has always collected few taxes compared to other Latin American countries and its investment is extremely low in social programs. In 2012, the Economic Commission for Latin America and the Caribbean and Spain produced an in-depth study of the tax reforms that Guatemala put in place that year. The report concludes that while the reforms moved in a positive direction, they did not achieve sufficient gains because Guatemala continues to lose revenues to corruption, did not engage in administrative reforms necessary to improve the collection of taxes, and also adopted regressive tax policies that failed to sufficiently tax the private sector. *See generally* MAYNOR CABRERA, ANÁLISIS DE LA IMPLEMENTACIÓN DE LA REFORMA TRIBUTARIA DE GUATEMALA (2012), http://www.cepal.org/ofilac/noticias/paginas/3/43813/Documento_15_Guatemala.pdf.

country;⁴⁷⁹ and encouraging the development of industries with great potential, such as ecotourism.

Another potential economic impact from a ban is a reduction in foreign direct investment (FDI). But concern about this impact is probably misplaced. As in other Central American countries,⁴⁸⁰ low FDI can be attributed to other factors including: confusing laws and regulations, an ineffective judiciary, bureaucratic impediments, undeveloped human capital, political instability, corruption, and widespread crime.⁴⁸¹ Indeed, economists estimate that Guatemala's recent corruption scandals are likely to impede the steady economic growth of the country, particularly by reducing FDI.⁴⁸² Moreover, Costa Rica's FDI has not suffered as a result of its ban on mining. Even after the ban, Costa Rica continues to be a popular destination for investment with a record to prove it.⁴⁸³ Further, Guatemala has better FDI options than mining. Currently, Guatemala's FDI is principally focused on mining and energy infrastructure, manufacturing, and agriculture.⁴⁸⁴ Yet Guatemala has great potential for economic development through ecotourism, for example.⁴⁸⁵

479. In contrast to mining, the contribution to Guatemala's GDP from remittances is substantial: 9.4%, or \$5.5 million, in 2014 alone, a number that is projected to increase. CEPAL ECONOMIC REPORT, *supra* note 476, at 4. Other countries, including Mexico, have instituted effective programs to encourage local development. See, e.g., Martin Chavez, *Remittances and the Charitable Deduction: A New Approach to Encouraging Development in Mexico*, 14 N.Y.U. J. LEG. & PUB. POL'Y 565, 601–02 (2011) (discussing the benefits of remittances for developing countries); Laura L. Norris, *The Revolving Door of Emigration: The Economic Influence of Remittances in Developing Countries*, 31 NW. J. INT'L L. & BUS. 479, 479–80 (2011) (emphasizing the significance of remittances in developing countries); Pablo Acosta et al., *Remittances and Development in Latin America*, in THE WORLD ECONOMY 957 (2006).

480. According to the State Department, for example, El Salvador's low foreign investment numbers are attributable to political uncertainty, inconsistent and burdensome commercial regulations, an ineffective judicial system, and violent crime. U.S. DEP'T OF STATE, EL SALVADOR INVESTMENT CLIMATE STATEMENT 2015, at 3 (2015), <http://www.state.gov/documents/organization/241758.pdf>. Nicaragua's low FDI numbers are attributable to the country's weak judicial system, land titling issues, and corruption. U.S. DEP'T OF STATE, NICARAGUA INVESTMENT CLIMATE STATEMENT 2015, at 3 (2015), <http://www.state.gov/documents/organization/241895.pdf>. Honduras's low FDI is due to high levels of crime, a weak judicial system, corruption, low educational levels, and poor infrastructure. U.S. DEP'T OF STATE, HONDURAS INVESTMENT CLIMATE STATEMENT 2015, at 3 (2015), <http://www.state.gov/documents/organization/241799.pdf>.

481. GUATEMALA INVESTMENT STATEMENT, *supra* note 433, at 3.

482. CEPAL ECONOMIC REPORT, *supra* note 476, at 1.

483. U.S. DEP'T OF STATE, COSTA RICA INVESTMENT CLIMATE STATEMENT 2015, at 3 (2015), <http://www.state.gov/documents/organization/241737.pdf>.

484. GUATEMALA INVESTMENT STATEMENT, *supra* note 433, at 3.

485. Ecotourism, if managed properly, can even be an important conservation tool for developing nations. Christina M. Argueta, *Mending Guatemala's Tourism Industry Through Private Regulation*, 89 N.Y.U. L. REV. 1381, 1407–08 (2014); Tim Wallace & Daniela N. Diamante, *Keeping People in the Parks: A Case Study from Guatemala*, 23 NAPA BULL. 191 (2005). See also LAURA DRISCOLL ET AL., CTR. FOR RESPONSIBLE TRAVEL, THE IMPORTANCE OF ECOTOURISM AS A DEVELOPMENT AND

Finally, a mining ban—depending on its scope—may cost Guatemala millions in arbitration costs. At a minimum, companies with an exploration mining license could attempt to sue Guatemala in the same way they have sued the government of El Salvador.⁴⁸⁶ Canada's Pacific Rim Mining Corporation filed an arbitration complaint against El Salvador through the International Center for the Settlement of Investment Disputes (ICSID) and sought damages of more than \$77 million it claimed to have invested in El Salvador since 2002, primarily in its El Dorado gold project.⁴⁸⁷ Initially the ICSID dismissed the case because Pacific Rim attempted to use a United States subsidiary to file a Central American Free Trade Agreement claim; however, the complaint proceeded under El Salvador's domestic investment law, which allows arbitration of disputes with foreign investors.⁴⁸⁸ Pacific Rim, which only holds an exploration license, alleged nonetheless that El Salvador's refusal to grant environmental permits was unjustified.⁴⁸⁹

2. Shutting Down Current Metal Mining

This Part will focus on shutting down mining concessions that are in operation, either in the exploration or exploitation stages. Mining exploration

CONSERVATION TOOL IN THE OSA PENINSULA, COSTA RICA (2011), http://www.responsibletravel.org/resources/documents/reports/tinker_final_report_master.pdf (concluding that ecotourism in the Osa represents a different, and better, form of development than the existing extractive alternatives).

486. Two international arbitration claims have been filed by mining companies against El Salvador before the ICSID for the country's decision to shut down mining operations, but only the one filed by Pacific Rim is pending. The ICSID dismissed the other claim filed by Commerce Group Corp. and San Sebastian Gold Mines, Inc. in 2011 based on their failure to comply with CAFTA's waiver provisions. *Commerce Group Corp. et al. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (Mar. 14, 2011). The claimants sought to annul the 2011 judgment, but the proceedings were closed in 2013 due to the claimants' non-payment of filing fees. *Commerce Group Corp. et al. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Order of the Committee Discontinuing the Proceedings and Decision on Costs (Aug. 23, 2013). While this judgment represented a victory for the Salvadoran government, the decision is solely procedural and not a decision on the merits.

487. CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK, *supra* note 80, at 35. *See also* Collins, *supra* note 387, at 253–62 (reviewing the facts and events of the Pacific Rim El Dorado project EIA process).

488. CENTRAL AMERICAN MINERAL INDUSTRY HANDBOOK, *supra* note 80, at 35. Article 15 of El Salvador's Investment Law, however, limits a foreign investor's access to international dispute resolution and may obligate them to use national courts, but only if the foreigner comes from a country without a preexisting trade agreement with El Salvador. EL SALVADOR INVESTMENT STATEMENT 2015, *supra* note 481, at 10. Canada does not currently have a trade agreement with El Salvador. *See Canada-Guatemala, Nicaragua and El Salvador (Formerly Canada – Central American Four) Free Trade Agreement Negotiations*, GLOBAL AFF. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/ca4.aspx?lang=eng> (last visited May 16, 2016).

489. EL SALVADOR INVESTMENT STATEMENT 2015, *supra* note 481, at 9.

can take years and usually involves significant investment.⁴⁹⁰ Exploring minerals, for example, requires companies to acquire surface property rights and to drill with expensive equipment.⁴⁹¹ Once the mine is in full operation, the investment is even greater because it requires, among other expenses, purchasing expensive equipment, building infrastructure, and hiring employees. Mining companies that must shut down existing mining operations undoubtedly face significant investment losses. Companies may claim lost revenue from unmined minerals. Therefore, this Part explores whether these companies may seek an expropriation claim in an international arbitration. If so, the next issue is how to determine just compensation under these circumstances.

International arbitration claims against developing nations threaten the adoption of more sustainable mining policies. According to a recent report by the Institute for Policy Studies, of the 169 cases pending at the ICSID, 60 involved mining or hydrocarbons extraction and half of these disputes arose in Latin America.⁴⁹² This Part proposes how Guatemala could carefully proceed to ban current mining operations while minimizing investor liability. To draw lessons for Guatemala, this Part examines both Guatemala's investor rights regime and the expropriation claims pending before international tribunals against El Salvador and Costa Rica. Finally, this Part recommends how Guatemala's existing environmental regime could ban current mining projects while reducing the specter of mining company compensation.

a. Guatemala's Investor Rights Regime

Guatemala's regime protecting FDI assets and interests, as well as the resolution of disputes involving FDI claims, is quite favorable toward foreign investors. In 1998, Guatemala adopted the Foreign Investment Law, which eliminated trade-related investment restrictions to ensure that it was compliant with the World Trade Organization (WTO) obligations under the Agreement on Trade Related Investment Measures (TRIMS).⁴⁹³ Guatemala is also a party to 11 free trade agreements (FTAs), including the CAFTA-

490. For example, Pacific Rim in El Salvador alleges that its investment had been \$77 million over a period of about six years between 2002 and 2008. *See* Collins, *supra* note 387, at 260.

491. *Id.* at 252.

492. SARAH ANDERSON & MANUEL PÉREZ-ROCHA, INST. FOR POLICY STUDIES, *EXTRAYENDO GANANCIAS EN TRIBUNALES INTERNACIONALES 1* (2013), <http://www.ips-dc.org/wp-content/uploads/2013/05/Mining-for-Profits-2013-SPANISH.pdf>.

493. Ley de Inversión Extranjera, Decreto Número 9-98 (1998) (Guat.), <http://old.congreso.gob.gt/archivos/decretos/1998/gtdcx09-1998.pdf>.

DR, which covers the Central American region, the Dominican Republic, and the United States.⁴⁹⁴ Guatemala also has 15 bilateral investment treaties (BITs) in force.⁴⁹⁵ The country does not, however, have either an FTA or a BIT with Canada.⁴⁹⁶ Collectively, these instruments have created a number of important substantive and procedural foreign investor rights. Foreign investor rights include the right to establish, acquire, and operate an investment in Guatemala on par with local investors, and the right to receive fair market value for property in the case of expropriation.⁴⁹⁷

Under Guatemala's Foreign Investment Law and a number of international agreements, foreign investors have the right to resolve disputes against the country in an international arbitration process.⁴⁹⁸ For example, CAFTA-DR's Chapter 10 contemplates resolution of investor suits against a state through the World Bank's ICSID or the United Nations Commission on International Trade Law (UNCITRAL).⁴⁹⁹ Guatemala's Arbitration Law of 1995 uses UNCITRAL's Model Law as the basis for its rules on international arbitration.⁵⁰⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards—to which Guatemala is a signatory—enforces foreign arbitral awards.⁵⁰¹ In addition, Guatemala is a party to the Inter-American Convention on International Commercial Arbitration (the Panama Convention).⁵⁰²

494. See *List of Guatemala's International Investment Agreements*, UNITED NATIONS CONF. ON TRADE & DEV., <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/86#iiaInnerMenu> (last visited May 16, 2015).

495. See *id.* (listing Guatemala's bilateral investment treaties).

496. In 1998, Canada, Guatemala, Honduras, El Salvador, and Nicaragua entered into a Memorandum of Understanding on Trade and Investment to work toward adopting a regional trade agreement. See Memorandum of Understanding on Trade and Investment (MOUTI) (Mar. 18, 1998), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2478>. To date, however, this has not happened.

497. *List of Guatemala's International Investment Agreements*, *supra* note 495.

498. David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 374 (2007).

499. *Id.* at 368.

500. Ley de Arbitraje, Decreto Número 67-95 (Oct. 3, 1995) (Guat.), <http://old.congreso.gob.gt/archivos/decretos/1995/gtdcx67-1995.pdf>; Iniciativa que Dispone Aprobar Reformas al Decreto Número 67-95 del Congreso de la República, Ley de Arbitraje, Número de Registro 4802 (Jan. 30, 2014) (Guat.), <http://www.congreso.gob.gt/manager/images/3A8FC4D1-11BB-34AA-D283-1C7E8DDC29F3.pdf>.

501. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, June 7, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; *List of Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/list+of+contracting+states> (last visited May 16, 2016).

502. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1989.

Guatemala's liberalizing trend in trade and investment law, however, still recognizes the State's important role in protecting human, animal, and plant health. Some of Guatemala's international trade or investment agreements contain, for example, environmental provisions that require Guatemala to ensure that investors do not undermine preexisting environmental obligations through development.⁵⁰³ CAFTA-DR is the most important example of this type of regime. For example, its preamble instructs parties to "implement th[e] Agreement in a manner consistent with environmental protection and conservation, promote sustainable development and strengthen their cooperation on environmental matters."⁵⁰⁴ CAFTA-DR's Chapter 17 also promotes environmental protections as part of trade and investment.⁵⁰⁵ Article 17.2.2 recognizes that "it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in environmental laws."⁵⁰⁶ In addition, Article 17.3.1 creates an obligation on each Party to "ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violation of its environmental laws."⁵⁰⁷ Article 17.13.1 defines environmental law as "any statute or regulation . . . or provision . . . the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health."⁵⁰⁸ It does not, however, include "any statute, regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation . . . of natural resources."⁵⁰⁹ Thus, foreign investors must accept the regulatory regime in which they invest and include this factor into their economic assessment of the investment project.⁵¹⁰

503. Dominican Republic-Central America-United States Free Trade Agreement pmbll., Aug. 5, 2004 [hereinafter CAFTA-DR], http://www.sice.oas.org/trade/cafta/caftadr_e/CAFTADRinpdf_e.asp.

504. *Id.*

505. *Id.* at art. 17.2.

506. *Id.* at art. 17.2.2.

507. *Id.* at art. 17.3.1. Chapter 17 also allows citizens to file a submission that asserts that a Party is failing to enforce its environmental laws effectively. See Note, Vivian H.W. Wang, *Investor Protection or Environmental Protection? "Green" Development Under CAFTA*, 32 COLUM. J. ENVTL. L. 251, 272 (2007) (discussing the Chapter 17 enforcement provisions).

508. CAFTA-DR, *supra* note 504, at art. 17.13.1.

509. *Id.* This definitional limitation opens up ambiguities and tensions around what "primary purpose" means—whether the primary purpose of a law is commercial regulation or environmental protection. Wang, *supra* note 508, at 277–80. In Guatemala's case, however, if the mines are shut down not to continue operations by the government but to repair and prevent further environmental damage, this should not be an issue.

510. Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811, 819 (2001).

b. Closure of the Mines and Claims of Expropriation: El Salvador and Costa Rica as Precursors

Guatemala has a poor record with international arbitration claims with losses in the millions of dollars.⁵¹¹ Guatemala should be concerned about liability from investor lawsuits were it to decide to shut down current mining projects. Guatemala, however, would not be alone. Two other Central American countries—El Salvador and Costa Rica—have opted to shut down ongoing mining operations in their respective countries.⁵¹²

El Salvador's moratorium on mining affected Pacific Rim's exploration license; the company's shares dropped 30% following the moratorium.⁵¹³ In 2013, Pacific Rim sold its shares to OceanaGold, an Australian mining company.⁵¹⁴ By then, Pacific Rim had already filed an arbitration complaint with ICSID, alleging damages of over \$300 million.⁵¹⁵ Pacific Rim contends, in a pending complaint, that it relied on El Salvador's assurances that a mining license could be obtained for the property.⁵¹⁶ In 2004, Pacific Rim submitted the initial environmental permit application to El Salvador's environmental protection agency.⁵¹⁷ But the application became embroiled in significant social unrest arising from opposition to the mine based on environmental concerns.⁵¹⁸

Despite strong and growing opposition to the mine, and an environmental impact report that questioned Pacific Rim's own EIA,⁵¹⁹ El Salvador's environmental protection agency granted preliminary approval for a mining permit for Pacific Rim to operate the El Dorado mine in the neighboring Cabanas province in 2006.⁵²⁰ This approval depended on a final EIA report that responded to concerns raised by the agency and community

511. For example, in the last decade alone, Guatemala has lost two important investment disputes involving American businesses filed in 2007 and 2010. The 2010 claim, which involved an allegation of expropriation based on Guatemala's regulation of electricity rates, resulted in an award of \$21 million in damages and \$7.5 million in legal expenses against the government of Guatemala. The appeal for this award is still pending. GUATEMALA INVESTMENT STATEMENT 2015, *supra* note 433, at 9–10.

512. Dawson, *supra* note 467, at 85; Collins, *supra* note 387, at 245.

513. Collins, *supra* note 387, at 245.

514. Dawson, *supra* note 467, at 85.

515. *Id.*

516. Collins, *supra* note 387, at 253.

517. *Id.* at 256–62.

518. *Id.*

519. The report, funded by Oxfam, the Anglican Church, and several other organizations, solicited Robert Moran of Michael-Moran Associates to assess Pacific Rim's EIA. The Moran report expressed many concerns, including the impact of the mining activity on the Rio Lempa, mining explosions that damaged homes and caused landslides, and mining trucks that restricted highway access. *Id.* at 256.

520. *Id.* at 257.

groups.⁵²¹ According to Salvadoran law, the agency had 2–4 months to either deny or accept Pacific Rim’s mining license application; however, this never happened.⁵²² Instead, ongoing protests and unrest led then-President Sacá to order the agency not to issue any new mining permits in 2006, a moratorium that continues today.⁵²³ Ultimately, Pacific Rim suspended all of its mining operations in 2008, and blamed its financial demise on the 2009 presidential elections, during which candidates targeted the mining project to gain votes.⁵²⁴

For its part, in a domestic judicial proceeding, Costa Rica shut down San Carlos’s Crucitas mine.⁵²⁵ In 2010, Infinito Gold lost its mining concession when a Costa Rican judge found irregularities and environmental harms resulting from the operation of the mine, including illegal deforestation.⁵²⁶ Then, in 2011, the Supreme Court of Costa Rica permanently annulled the concession and applied Costa Rica’s new ban on surface or open-pit mining to this mining project.⁵²⁷ As a result, Infinito Gold alleged that it lost \$93.9 million directly and another \$1 billion in potential future profit in a complaint filed with ICSID.⁵²⁸

There are important lessons for Guatemala from the experiences of these two countries. In El Salvador, the normal legal process for considering whether to grant an exploration license was not followed. Rather, these processes were interrupted by social unrest such that the country’s environmental protection agency never issued a final decision on whether to grant the mining concession. These disruptions to the process should not, however, minimize the significant environmental problems that the mine posed for El Salvador. The mine would draw water from El Salvador’s Lempa River.⁵²⁹ The Lempa is El Salvador’s largest river and one of the few remaining uncontaminated sources of water in the country on which more than three million Salvadorans rely each day for drinking, farming, fishing, supporting livestock, and hydroelectric power.⁵³⁰ The El Dorado mine is a

521. *Id.*

522. *Id.* at 258.

523. *Id.* at 259.

524. *Id.* Ironically, President Sacá was from the conservative ARENA party, which had supported laws and practices that opened the country to mining in the first place.

525. Dawson, *supra* note 467, at 84–85.

526. ANDERSON & PÉREZ-ROCHA, *supra* note 493, at 16.

527. *Id.*

528. *Id.*

529. Emily Achtenberg, *Resistance to Mining in El Salvador: A Battle for Water, Life, and National Sovereignty*, REVISTA, Winter 2014, at 62, <http://revista.drclas.harvard.edu/book/resistance-mining-el-salvador>.

530. *Id.*

significant threat to rural economies and local drinking water supplies because it is likely to deplete and contaminate water through a water-intensive cyanide ore process.⁵³¹

The ICSID may dismiss the Pacific Rim claim if it does not recognize OceanaGold's status as an American company.⁵³² However, if the case proceeds, the procedural irregularities expose El Salvador to potential liability. Given the highly technical nature of EIAs in mining projects, the arbitration tribunal will not conduct its own EIA but will either defer to the technical environmental findings of the Salvadoran government or actually examine the validity of those findings.⁵³³ Yet, El Salvador likely lacks official domestic documentation of the negative environmental impacts from the Pacific Rim to the Lempa River. Its environmental protection agency never even made a final determination regarding the mining license's EIA. This allows Pacific Rim to frame its complaint not against El Salvador's environmental regulations of mining projects per se but rather against El Salvador's inconsistent and unexpected implementation of its own environmental regime.⁵³⁴ Unfortunately, during the arbitration process, El Salvador's weak environmental regime is likely to be on trial rather than the merits of the country's environmental objections to the mine.⁵³⁵

Because Costa Rica's case is distinguishable from El Salvador's, Costa Rica may be in a better legal situation. In Costa Rica, documented environmental violations substantiated the domestic judicial shutdown of the Crucitas mine.⁵³⁶ As explained in Part III.B.2.c below, a nation that follows

531. *Id.*

532. Damien Kingsbury, *Australian Mining is Poisoning El Salvador. It Could Soon Send It Broke*, *Too*, *GUARDIAN* (Oct. 2, 2014), <http://www.theguardian.com/commentisfree/2014/oct/03/australian-mining-is-poisoning-el-salvador-it-could-soon-send-it-broke-too>.

533. Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 *AM. U. INT'L L. REV.* 383, 411 (2015) ("Some awards suggest that tribunals prefer deferring to the State's scientific findings and their analysis focuses on the scientific process that regulators follow. In other cases, tribunals have opted to evaluate the soundness of the scientific findings.").

534. *See* Waelde & Kolo, *supra* note 511, at 819 (arguing that investors complain not about a highly regulated environmental regime that is applied evenly and consistently but about unpredictable shifts in implementation).

535. Subjecting developing nations to investor liability based on their weaknesses or corruption is another significant flaw of the international investor legal regime. Investors rely on these weaknesses to their economic advantage in ways that harm the people of nations with weak democracies. This Article does not attempt to resolve this flaw; rather, it merely makes recommendations for Guatemala to comply with its obligations to protect the environment.

536. *Court Shuts Down Crucitas Gold Mine, Citing Environmental Harm*, *INTER-AM. ASS'N FOR ENVTL. DEF.*, <http://www.aida-americas.org/our-work/freshwater-preservation/court-shuts-down-crucitas-gold-mine-citing-environmental-harm> (last visited Apr. 25, 2016).

due process to implement its domestic environmental regime in a non-discriminatory fashion should not face liability for its decision. The retroactive surface mining ban could result in liability for Costa Rica. The mining company could assert unfairness arising from a change in the country's legal regime that invalidated their reliance on the existing law at the time of the investment. Yet Costa Rica is not necessarily bound to a fixed environmental regime if it can establish changed circumstances and new information that merit a different approach.⁵³⁷ In such cases, the arbitration tribunal is likely to consider the investor's reasonable expectations, including whether the reforms in the law constituted a reasonable foreseeable risk.⁵³⁸

c. Defending Against International Arbitration Liability

Across the globe, governments are asserting domestic environmental regimes to stall or stop development projects involving foreign investors.⁵³⁹ In turn, this trend has fueled a new generation of complaints in arbitration tribunals like the complaints against Costa Rica and El Salvador.⁵⁴⁰ This Part examines how Guatemala can best defend itself against a claim of expropriation were the country to shut down a current mining project.⁵⁴¹

Guatemala would likely defend itself against an expropriation claim based on shutting down a currently-operating mine by claiming that either the company's exploitation license was never valid because the company

537. See, e.g., Anna Cederstav, *Costa Rica Bans Open-Pit Metal Mining*, EARTHJUSTICE (Nov. 23, 2010), <http://earthjustice.org/blog/2010-november/costa-rica-bans-open-pit-metal-mining> (explaining that the Costa Rican government banned open pit mining in 2010).

538. See, e.g., Jill Replogle, *Canadian Mining Company Reorganizes to Seek Damages from Costa Rica*, TICO TIMES, <http://www.ticotimes.net/2016/01/21/canadian-mining-company-reorganizes-seek-damages-costa-rica> (last visited May 16, 2016) (outlining the arbitration claims by a Canadian mining company against Costa Rica).

539. See, e.g., Cederstav, *supra* note 538 (explaining that the Costa Rican government banned open-pit mining in 2010).

540. See Waelde & Kolo, *supra* note 511, at 838–39 (documenting arbitration complaints based on denial of permits to operate landfills, prohibiting the manufacture of toxic chemicals, refusing to grant a license for water extraction, disallowing mining activities, tackling claims of environmental harms from oil extraction, and halting tourist development projects in ecologically-sensitive locations). See also Rahim Mollo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 2 (2011).

541. There are also a number of procedural and technical defenses that Guatemala could raise against expropriation claims. These include, for example, lack of jurisdiction under CAFTA-DR. For example, El Salvador successfully defended against another mining claim, this time by Commerce Group Corp. and San Sebastian Gold Mines, Inc., American mining companies, because those companies did not comply with CAFTA-DR's waiver provision and therefore ICSID did not have jurisdiction over the complaint. *Commerce Group Corp et al. v. The Republic of El Salvador*, Award, ICSID Case No. ARB/09/17 (Mar. 14, 2011). An analysis of these types of defenses is beyond the scope of this Article.

failed to secure an EIA, or by claiming that it revoked the exploitation license because the company violated Article 51 of the Mining Law.⁵⁴² Ideally, the EIA guarantees that the project will not contaminate the environment and will ensure ecological equilibrium.⁵⁴³ Article 51 of the Mining Law governs the causes for suspension of mining operations, which include “when risks or imminent danger to the life of persons or property” exist.⁵⁴⁴ The primary purpose of both the EIA requirement and Article 51 is to protect the environment or prevent danger to human, animal, or plant life or health—a purpose that falls squarely within the environmental requirements of investment treaties, including the CAFTA-DR.⁵⁴⁵ Thus, if Guatemala follows both the substantive and procedural requirements of the EIA requirement and of Article 51 respectively, Guatemala should have a strong defense against investors’ expropriation claims. In fact, some scholars have even suggested that an investment made in violation of a host state’s environmental regulation falls outside the protection of CAFTA-DR, depending on the nature and gravity of the violation.⁵⁴⁶ This argument, however, remains largely untested.

Guatemala’s more likely defense, therefore, is that the ban is legitimate and proportionate to the need asserted—that is to say, necessary to achieve a public purpose.⁵⁴⁷ Guatemala will also want to assert that the measure does not merit compensation because it constitutes a legitimate exercise of preexisting regulatory norms that bind investors.⁵⁴⁸ Important precedents in comparative domestic legal systems limit expropriation claims by a state’s application of preexisting regulatory requirements, so long as the state notified companies and followed due process.⁵⁴⁹ Until recently, this regulatory-takings exemption to expropriation had not been part of the international investment regime.⁵⁵⁰ International investment law does not

542. Mining Law, *supra* note 64, at art. 51.

543. MARN GOVERNMENTAL DECREE, *supra* note 243, at pmb1.

544. Mining Law, *supra* note 64, at art. 51(a).

545. *Id.*

546. Beharry & Kuritzky, *supra* note 534, at 397.

547. *Id.* For a discussion of the necessity/proportionality standard, see also Waelde & Kolo, *supra* note 511, at 827–35; Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT’L L. 1, 36, 47–50 (2014).

548. Mollo & Jacinto, *supra* note 541, at 16.

549. See generally Rachelle Alterman, *The U.S. Regulatory Takings Debate Through an International Lens*, 42/43 URB. L. 331 (2011) (providing a comparative analysis of regulatory takings jurisprudence in several countries); Harvey M. Jacobs, *An Alternate Perspective on United States-European Property Rights and Land Use Planning: Differences Without Any Substance*, 61 PLANNING & ENVTL. L. 3, 3–4 (2009).

550. See Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 35–62 (2004) (providing a history of expropriation provisions).

prohibit all expropriations per se; rather, it draws no distinction between compensable takings (i.e., those that lack a legitimate public purpose) and non-compensable regulatory measures (i.e., those that serve a legitimate public purpose).⁵⁵¹

Fortunately, this legal landscape is changing as investment and trade agreements incorporate provisions that explicitly recognize the need to balance the individual rights of investors with the regulatory needs of societies to protect health and the environment.⁵⁵² Indeed, some of these trade agreements, like CAFTA-DR, have limited expropriation claims arising from nondiscriminatory regulatory actions that protect legitimate public welfare objectives, such as safeguarding the environment.⁵⁵³ In negotiating CAFTA-DR, the participating countries proactively addressed dangers posed by an overly broad definition of expropriation by including an Annex imposing certain limitations on arbitral tribunals' discretion in construing expropriation provisions too broadly.⁵⁵⁴ Specifically, the Annex establishes a presumption that "nondiscriminatory regulatory actions by a Party [intended] to protect legitimate public welfare objectives, such as . . . the environment, do not constitute indirect expropriations."⁵⁵⁵ Only in "rare circumstances" is this presumption rebuttable.⁵⁵⁶

For Guatemala to assert this type of regulatory exemption (i.e., a non-compensable taking), it needs to be able to officially document the environmental and social harms that justify the measure.⁵⁵⁷ This will require sound scientific evidence.⁵⁵⁸ Admittedly, under the existing status quo, this

551. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 264 (2015) ("Tribunals that have introduced standards of review like 'proportionality' and 'the margin of appreciation' have varied wildly . . ."); see also Mildred E. Warner, *Regulatory Takings and Free Trade Agreements: Implications for Planners*, 41 URB. L. 427, 427–28 (2009).

552. See Arato, *supra* note 552, at 263–64. See also Wagner, *supra* note 548, at 36, 67–85; Mollo & Jacinto, *supra* note 541, at 17–24; Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 101 AM. J. INT'L L. 475 (2008) (explaining how international institutions and actors influence the future of regulatory takings); Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 852–55 (2003) (examining the global transformation in regulatory takings and the implications for future proceedings).

553. Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-State Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L.J. 103, 112–16 (2007) (comparing CAFTA expropriation reforms to the broader definition that exists under NAFTA).

554. *Id.* at 116.

555. CAFTA-DR, *supra* note 504, at Annex 10-C(4)(b).

556. *Id.*

557. Mollo & Jacinto, *supra* note 541, at 25.

558. *Id.* at 25–32.

would be difficult to provide. Like El Salvador, Guatemala is also vulnerable to having its weak institutional practices—approving mining projects and EIAs despite significant evidence of environmental and social harms— weaken the legitimacy of any decision to close a mine. This, however, does not preclude Guatemala from starting to take its job of environmental regulation seriously. Existing laws may be weak but they do impose standards that, if seriously implemented, could yield substantial good faith and a legitimate record with which to substantiate any closure decision’s legal justification. This would take time and resources, but it is not impossible. The 2015 EIA regulations are better already and could be the basis for significantly improving the work of MARN when considering new applications for exploitation licenses.

For already-approved mines, Guatemala may still apply Article 51 of the Mining Law to account for new information on adverse impacts to Guatemala’s environment. Some information may not have been known prior to the mine’s exploitation, and thus would not have been reflected in the company’s EIA.⁵⁵⁹ Guatemala may rely on the deficiencies of the mining company’s EIA or it may rely on changed environmental expectations, resulting from new information, in order to call for a revised regulatory response.⁵⁶⁰ However, to do this well, Guatemala must follow the domestic procedures established by law and not act in abrupt, unexpected ways.⁵⁶¹ Guatemalan civil society must persist in filing domestic proceedings to pursue an Article 51 remedy.⁵⁶² Further, Guatemala must cease conducting delayed and sham proceedings to stall or deny these claims. This is especially important because Guatemala would have to assert that it acted in accordance with due process.⁵⁶³ Article 51 calls for administrative proceedings that are subject to judicial review.⁵⁶⁴ This process requires due diligence to shut down

559. Mining Law, *supra* note 64, at art. 51.

560. Waelde & Kolo, *supra* note 511, at 824.

561. *Id.*; see also Wagner, *supra* note 548, at 50 (discussing the standard of legitimate investment-backed expectation that accounts for changes in the regulatory structure so long as these changes are foreseeable).

562. Guatemalan civil society should also consider utilizing CAFTA-DR’s Chapter 17 more in these mining cases, although it must do so only after exhausting local remedies. The Secretariat on Environmental Affairs can provide both political pressure and eventually a scientific record that could strengthen not only Guatemala’s domestic process but also any expropriation claim filed in an arbitration tribunal were Guatemala to shut down a mine. To date, this mechanism has been underutilized. Not a single mining dispute in Guatemala has been submitted. See *Registro Público*, SECRETARÍA DE ASUNTOS AMBIENTALES <http://www.saa-sem.org/registro> (last visited May 16, 2016).

563. *Id.*

564. Mining Law, *supra* note 64, at art. 51.

existing mining projects that represent an imminent threat to life, property, and the environment.

To determine if a regulation constitutes a disguised protectionist measure that discriminates against foreign investment, a tribunal is likely to examine the motive behind Guatemala's mine closure. Guatemala could not, for example, simply take over the mine or sell it to another company without addressing the environmental concerns that led to the mine's seizure in the first place.⁵⁶⁵ The regulatory measures would need to be applied evenly to all metal mining projects and any exemptions would need to be substantiated based on sound scientific evidence.

Even if Guatemala takes all of these measures, an arbitration tribunal may still determine that the environmental regulations constitute an indirect expropriation and could mandate compensation to mining companies.⁵⁶⁶ Damages, however, should be more limited than what mining companies currently claim. For example, mining companies should only recover what they have invested to explore the presence of minerals in the country. Damages should not be based on speculative expected profits from exploitation.⁵⁶⁷ For exploitation licenses, a mining company's claim to future profits should be reduced by the cost of preexisting environmental obligations.

CONCLUSION

Shortly after the resignation of former President Otto Pérez Molina on September 3, 2015, the Constitutional Court of Guatemala issued two important environmentally-friendly decisions involving the El Escobal mine in San Rafael, Las Flores. The first decision recognized the fundamental human right to water, which requires MARN to closely monitor the effect of the El Escobal mine on the availability and quality of water.⁵⁶⁸ Presumably, MARN would close the mine if its operation infringes on the human right to consumption of water.⁵⁶⁹ The second decision affirmed that MEM violated

565. See Beharry & Kuritzky, *supra* note 534, at 397 (explaining jurisdiction of investment treaty settlement mechanisms). See also Waelde & Kolo, *supra* note 511, at 835–37 (discussing how courts disfavor discriminatory regulations aimed at foreign investors).

566. See generally Wang, *supra* note 508, at 259–63 (discussing indirect expropriation claims in the context of CAFTA-DR and NAFTA).

567. See Porterfield, *supra* note 551, at 5–6 (noting that international arbitral tribunals have a broader interpretation of what constitutes an expropriation compared to the American concept of regulatory takings).

568. See *supra* notes 303–09 and accompanying text.

569. See *supra* notes 301–09 and accompanying text.

due process rights by denying a hearing to hundreds of individuals who filed environmental opposition claims against the mining concession.⁵⁷⁰ This second ruling rolled back the entire administrative process to the date of the original opposition filings prior to the mining license concession, and ordered MEM to grant a hearing with regard to the opposition's filings. Presumably, this voids the mining concession, at least according to an interpretation held by CALAS—which filed the claim—and many other environmental groups. But that interpretation is contested in the Guatemalan media.⁵⁷¹

There is uncertainty in either case whether the rulings will lead to a closure of the mine, but it is the closest Guatemala has come to shutting down a mining project based on environmental concerns. Tahoe Resources, the company that owns El Escobal, claims that it is the third largest mine in the world with a deposit of silver, lead, zinc, and gold valued in the billions.⁵⁷² Tahoe Resources has also invested millions in the two years the mine has operated.⁵⁷³ Were the mine to be shut down based on these rulings, Guatemala would likely face an international arbitration claim in the millions of dollars. If this happened, the institutional environmental weaknesses that were the basis for the judicial challenges in Guatemalan courts could compromise Guatemala's defense.

This does not mean that the environmental concerns lack merit. Ample evidence documents the significant environmental, health, and other social harms resulting from mining in the country.⁵⁷⁴ In June 2015, we visited the El Escobal mine and heard directly from more than 30 residents of several communities around the mine about the depletion and contamination of water sources.⁵⁷⁵ But it is not too late for Guatemalan environmental institutions to remedy their weak track record of documenting mining's environmental harms. The Constitutional Court gave MARN not just a mandate, but an opportunity to build a record of how the El Escobal mine is affecting water in the region. When we visited MARN, our sense was that the agency—at least under the interim leadership—wanted a larger role to define the environmental impacts from mining, but it lacked the resources and the

570. Sentencia de la Corte Constitucional [Constitutional Court], Expediente Número 4617-2013.

571. See, e.g., Joel Suncar & Byron Vásquez, *CC Ordena Revisar Oposición a Mina Escobal*, PRENSA LIBRE (Nov. 26, 2015), <http://www.prensalibre.com/guatemala/comunitario/cc-ordena-cierre-de-mina-el-escobal>.

572. Cf. *Escobal Mine*, TAHOE RESOURCES, <http://www.tahoeresources.com/operations/escobal-mine/> (last visited Apr. 25, 2016).

573. *Id.*

574. See *supra* Part II.B.

575. *Aldana Co-Organized LatCrit Study Space Project in Guatemala*, MCGEORGE SCH. L. (July 15, 2015), http://mcgeorge.edu/News/Aldana_Co-Organized_LatCrit_Study_Space_Project_in_Guatemala.htm.

political space to act. MARN now has the backing of Guatemala's highest court and civil society. And it should act, not only for the sake of the residents near the El Escobal mine, but also for the State, to avoid the risk of putting MARN's institutional weakness on trial before an international arbitration tribunal.