CROSS-CUTTING ISSUES IN THE APPLICATION OF THE GUATEMALAN “NEPA”: ENVIRONMENTAL IMPACT ASSESSMENT AND THE RIGHTS OF INDIGENOUS PEOPLES

LEONARDO A. CRIPPA*

INTRODUCTION ......................................................................................... 104

I. COMPARATIVE ANALYSIS OF THE U.S. NEPA AND THE EQUIVALENT GUATEMALAN LEGISLATION ...... 107
   A. AN OVERVIEW OF THE GUATEMALAN LAW FOR ENVIRONMENTAL ASSESSMENT, CONTROL AND FOLLOW-UP (LEACF) ....................................................................................... 108
      1. Environmental Impact Assessment .............................................. 110
      2. The Requirement of Public Participation Under Guatemalan Law .............................................. 112
   B. THE REQUIREMENT OF AN ENVIRONMENTAL IMPACT STATEMENT UNDER THE U.S. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) .............................................. 114

II. THE RIGHTS OF INDIGENOUS PEOPLES UNDER GUATEMALAN LAW ...................................................... 116
   A. GUATEMALA’S EXTERNAL POLICY ON INTERNATIONAL HUMAN RIGHTS .................................................. 117
   B. SUBSTANTIAL HUMAN RIGHTS PRINCIPLES PROTECTING INDIGENOUS PEOPLES .............................. 120
      1. Indigenous Peoples' Property Rights to Land and Natural Resources ............................................... 121
      2. Indigenous Peoples' Right to Self-Determination .............. 125
   C. PROCEDURAL GUARANTEES IN PLAY .................................................. 127

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* LL.B. (with Honours), Tucuman National University, Tucuman, Argentina; LL.M., American University Washington College of Law. The author serves as Staff Attorney for the Indian Law Resource Center where he litigates on behalf of indigenous people in the Americas.

103
INTRODUCTION

Many domestic environmental laws and policies have been shaped by lingering myths about Indian Nations, including the colonial idea that indigenous peoples are disappearing. As U.S. Supreme Court Justice John Marshall Harlan said of Native Americans in 1898:

[The Indian race] is disappearing and probably within the lifetime of some that are now hearing me there will be very few in this country. In a hundred years you will probably not find one anywhere. . . It is as certain as fate that in the course of time there will be nobody on this North American continent but Anglo-Saxons. All other races are steadily going to the wall. They are diminishing every year.

Not surprisingly, the Justice who made these remarks was part of the majority in two of the most famous U.S. Supreme Court decisions on Federal Indian Law, determining Congress’s legal authority to unilaterally abrogate indigenous treaties, and its plenary powers to impose its laws on indigenous nations. In today’s world, myths such as the impending eradication of Indian populations are no

1. See Armstrong Wiggins, Indian Rights and the Environment, 18 YALE J. INT’L L. 345, 346 (1993) (discussing the need to respect Indian rights, starting with dispelling the myth believed by most people in the United States that the indigenous American populations have been and will continue to diminish until they disappear).
2. Id. (citing Justice John Marshall Harlan, Lectures on Constitutional Law Given at the George Washington University 12 (Jan. 8, 1898) in The Papers of John Marshall Harlan (1833-1911) (unpublished manuscript, on file with the Manuscript Division of the Library of Congress)) (basing his prediction that Native Americans are disappearing on the Social Darwinist idea that only the fittest survive, and assuming that the Anglo-Saxon race is the fittest).
longer sustainable. More than thirty million Indians presently live in
the Americas, "a number roughly equal to the combined populations
of Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica and
Panama." Indians are the majority of the population in both
Guatemala and Bolivia, where an indigenous individual was
recently elected President.

Considering the continued presence of indigenous communities in
the Americas, this paper analyzes the cross-cutting issues that arise
when dealing with extractive industry projects developed on
indigenous lands in Guatemala. In particular, the analysis found in
this paper focuses on the Environmental Impact Assessments (EIA)
issued by project-proponents as imposed under domestic
environmental law, and the intersection with the collective human
rights of indigenous peoples under domestic and international law.
The interconnection of these issues is critical for the purpose of
connecting environmental policies and indigenous rights.

Part II will undertake a comparative legal analysis of the U.S.
National Environmental Policy Act (NEPA) with the equivalent
Guatemalan legislation, The Law for Environmental Assessment,
Control and Follow-up (LEACF). Both laws established a specific
agency within the executive branch to implement and enforce their
safeguards, measures, and rules, as well as to handle the
corresponding procedure for addressing environmental concerns.

5. Wiggins, supra note 1, at 347.
6. Id.
7. See Oscar Arias, Democracy Now: The War and Peace Report, Evo
Morales Sworn In as Bolivia’s First Indigenous President, Hails Election as “End
.org/2006/1/23/evo_morales_sworn_in_as_bolivias (reporting that Evo Morales’s
inaugural speeches focused on the need for justice in the vast indigenous
community of Bolivia); see also Editorial, Latin America’s Shift to the Center,
WASH. POST, Mar. 15, 2006, at A19 (describing the democratic significance of
electing an indigenous president in Bolivia).
9. Reglamento de Evaluación, Control y Seguimiento Ambiental, Acuerdo
Gubernativo No. 453-2007, Diario De Centro América [Law for Environmental
Assessment, Control and Follow-up, Governmental Agreement No. 453-2007,
[hereinafter LEACF].
Part III focuses on the rights of indigenous peoples located in Guatemala, including the procedural guarantees established within the domestic legal framework that protect those rights. Guatemalan law includes both domestic and international legal norms to protect rights that exclusively benefit indigenous individuals and communities. When dealing with extractive industry projects, the collective rights of indigenous peoples, including the property rights over lands and natural resources and the right to self-determination, must be taken into account. This field of law is critical for the survival and well-being of indigenous peoples living as distinct peoples within existing nation-states. Therefore, the state agency handling the environmental procedure must take into account these rights so as to prevent compromising Guatemala’s responsibilities under international human rights law.

Part IV analyzes the aforementioned issues and applicable norms on a concrete basis, through examination of an EIA issued by a mining company in El Estor, Izabal. The discussion focuses on two key issues. First, there is a private mining company that must comply with correspondent obligations in order to obtain a permit to explore and exploit nickel, a sub-surface resource located within indigenous lands. Second, there are Maya-Q’eqchi’ indigenous communities whose land, natural resources, and environment will be affected by the mining, and who seek Guatemalan compliance with its own domestic law and international human rights obligations with respect to indigenous peoples.

Finally, Part V will conclude that both actors, the private company and the state, failed to uphold their obligations related to extractive industry projects developed on indigenous lands in Guatemala. The same is true with regard to the necessary interconnection between

Executive Office of the President the Council on Environmental Quality to oversee implementation of NEPA); LEACF, supra note 9, art. 2.

environmental and human rights standards for the protection of both a healthy environment and the collective rights of potential project-affected indigenous communities.

I. COMPARATIVE ANALYSIS OF THE U.S. NEPA AND THE EQUIVALENT GUATEMALAN LEGISLATION

This part compares the U.S. NEPA with the equivalent Guatemalan legislation, taking into account two key considerations: the EIA process and public involvement. This comparative legal analysis is based on the procedures established by the relevant law for the purpose of achieving project-proponent compliance with the states' corresponding obligations. The aforementioned institutions play a critical role in assuring such compliance, apart from implying political advocacy tools for potential project-affected individuals and groups.

As the first major environmental law in the United States, NEPA serves as the foundation for many U.S. national environmental policies. According to the Council on Environmental Quality, to implement these policies NEPA instructs federal agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions regarding such actions. NEPA's procedural requirements apply to a federal agency's decisions for actions regarding financing, assisting, conducting, or approving projects or programs, as well as agency rules, regulations, plans, policies, or procedures, and legislative proposals.

12. Heather N. Stevenson, Environmental Impact Assessment Laws in the Nineties: Can the United States and Mexico Learn From Each Other?, 32 U. RICH. L. REV. 1675, 1675-76 (1999) (portraying NEPA as the initial environmental law, and stating that NEPA could integrate environmental policies from other countries, which have also proved to be effective).

13. COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD 4 (Dec. 2007) [hereinafter COUNCIL ON ENVIRONMENTAL QUALITY].

14. Id.; see also 40 C.F.R §1508.18 (2005).
A. AN OVERVIEW OF THE GUATEMALAN LAW FOR ENVIRONMENTAL ASSESSMENT, CONTROL AND FOLLOW-UP (LEACF)

The Guatemala LEACF creates a comprehensive system in order to assess the environmental impacts and risks in proposed projects, and control and follow up with safeguard and mitigation measures. Under the authority of the Ministry of Environment and Natural Resources (MENR), the following agencies are responsible for applying the Guatemalan LEACF: (1) the Department of Environmental Proceedings and Natural Resources (DEPNR) and (2) the Department of National Coordination (DNC), with the assistance of the Department of Legal Enforcement (DLE). The Guatemala LEACF applies to projects, industries and activities whether they are new or existing—not to policies.

The LEACF does not include a provision suggesting it applies to only government projects. On the contrary, the term “project-proponent” has a broad meaning including both natural persons, and other legal entities, whether they are private or governmental. The law applies to all projects that might affect the environment, and renewable or non-renewable natural resources. In addition, other relevant provisions clearly establish its application to all projects whether they are existing or new. LEACF’s evaluation system is based on the involvement of the aforementioned agencies, the submission of technical instruments by project-proponents to MENR

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15. LEACF, supra note 9, art. 11 (dividing the technical documents necessary to identify environmental effects into two: the instruments of environmental evaluation and the instruments of control and environmental continuance).

16. LEACF, supra note 9, art. 2 (stating that the General Department of Environment and Natural Resources (“DIGARN”) will administer the evaluation and control system for environmental development).

17. LEACF, supra note 9, art. 29.

18. LEACF, supra note 9, art. 3 (defining the proponent as anyone who will develop or is already developing a project, and is legally responsible for it).

19. LEACF, supra note 9, art. 4 (establiishing the evaluation system as any procedure or entity which helps the development of evaluation mechanisms for projects that affect the environment and natural resources).

20. LEACF, supra note 9, art. 29.
or the corresponding agency, and procedures created for the purpose of addressing environmental concerns.\textsuperscript{21}

For environmental assessment purposes under LEACF, projects are divided into three comprehensive categories based on the level of potential environmental impact. Category A refers to those projects with the highest potential environmental impact, including development mega-projects.\textsuperscript{22} Category B deals with projects with medium potential environmental impact.\textsuperscript{23} Finally, Category C includes those with low potential environmental impact.\textsuperscript{24} The classifications are exhaustive and based on international standards so as to facilitate access to information and ease comprehension of the technical instruments for environmental assessment purposes that project-proponents must submit to MENR.\textsuperscript{25}

The procedure begins with the submission of a technical instrument by the project-proponent to the DEPNR. The instrument that is required for the purpose of launching the procedure depends on the nature of the project: a Primary Environmental Assessment is required for all new projects;\textsuperscript{26} an Environmental Diagnostic is the technical instrument that proponents must submit for existing projects.\textsuperscript{27} In the meantime, there is a period for public involvement when elaborating upon the subsequent instruments for environmental assessment, once the MENR officially notifies the submission of the technical instrument.\textsuperscript{28} Finally, the system is completed when the MENR goes through the DEPNR's Environmental Quality Unit, which makes a final decision on the matter at issue, having taken into

\textsuperscript{21} LEACF, supra note 9, art. 4; see also LEACF, supra note 9, art. 6 (establishing that DIGARN will be composed of operative and administrative structures, utilizing the assistance of a group of experts).

\textsuperscript{22} LEACF, supra note 9, art. 28 (splitting the evaluation of projects into three categories: category A for high risk projects, category B for moderate risk projects, and category C for low risk projects).

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} LEACF, supra note 9, art. 27 (stating that the taxation listing is modeled after the International Standards for the system).

\textsuperscript{26} LEACF, supra note 9, art. 29 (establishing the initial evaluation procedures, which DIGARN, or the proponent of the project presenting an environmental diagnosis, can direct).

\textsuperscript{27} Id.

\textsuperscript{28} LEACF, supra note 9, art. 72.
account public comments. According to the LEACF, such decisions can be challenged by filing a petition, as guaranteed by the Administrative Law for Contentious Disputes.

1. Environmental Impact Assessment

In Guatemala, there are seven technical instruments required by the LEACF for the purpose of assessing potential environmental impacts. The EIA is the most important instrument for environmental assessment purposes, and constitutes the technical basis for the decision and plan regarding not only the prevention of environmental impacts, but also the consequent control and follow up by MENR corresponding agencies. It is mandatory for project-proponents to submit an EIA with respect to those projects that fall under Category A, those with the highest potential environmental impact.

The technical instruments are those documents which contain the necessary information for the overall environmental assessment, control and follow up. These documents are divided into two separate categories: (1) those for environmental assessment, facilitating the determination of potential environmental impacts and risks, as well as the subsequent commitments to be adopted by

29. LEACF, supra note 9, art. 45 (establishing that the Ministry of Environment and Natural Resources will determine the final resolution, and that category C projects will not need a compliance mechanism, as they are low risk projects).

30. LEACF, supra note 9, art. 46.

31. LEACF, supra note 9, art. 12 (stating that the Ministry of Environment and Natural Resources will define the specific procedural terms for each instrument and listing the seven environmental evaluation instruments: (1) Environmental Strategic Assessment, (2) Environmental Primary Assessment, (3) Environmental Impact Assessment (EIA), (4) Environmental Risk Assessment, (5) Social Impact Assessment, (6) Environmental Diagnostic, and (7) Cumulative Effects Assessment).


33. LEACF, supra note 9, art. 17 (defining the study of environmental impact evaluation as the document identifying low and high risk projects, and suggesting more eco-friendly alternatives of development).

34. LEACF, supra note 9, art. 11.
project-proponents; and (2) instruments for environmental control and follow up, which are relevant in assuring project-proponents’ compliance with the aforementioned commitments.\(^{35}\)

First, in the most accurate fashion, the EIA allows for the identification and prevention of potential environmental impacts in Category A projects, where the potential of such impacts is high.\(^{36}\) Second, the EIA provides a preventative and interdisciplinary analysis, constituting the technical basis for the decision-making and plan-making process regarding projects’ potential impacts in a certain geographic area.\(^{37}\) Finally, the EIA establishes ways to prevent, mitigate, and compensate for negative environmental impacts, as well as to strengthen positive environmental impacts.\(^{38}\) The period for public participation begins once the MENR officially notifies the public of the submission of a technical instrument.\(^{39}\)

Guatemalan law also requires an EIA for the granting of mining permits to explore and exploit sub-surface resources. According to the Guatemalan Law for Environmental Protection and Improvement, all proponents must present an EIA when the project has the possibility of affecting the environment and renewable or non-renewable natural resources.\(^{40}\) Furthermore, the Guatemalan Mining Code also requires proponents to submit an EIA for environmental evaluation and approval prior the commencement of activities, as a requisite for granting the mining permit.\(^{41}\)

\(^{35}\) Id.
\(^{36}\) LEACF, supra note 9, art. 17.
\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) LEACF, supra note 9, art. 75.
\(^{40}\) Ley de Protección y Mejoramiento del Medio Ambiente, Decreto No. 68-86, Congreso de la República de Guatemala [Law for Environmental Protection and Improvement, Decree No. 68-86, Congress of the Republic of Guatemala], art. 8 (Oct. 5, 2005) (Guat.), available at http://www.mspas.gob.gt/menu/marco_legal/legal.html (last visited June 14, 2008) (providing a fee penalty for not conforming with requirements of environmental impact studies, and a penalty of business closure if such requirements are unfulfilled after a six month period).
2. The Requirement of Public Participation
Under Guatemalan Law

Under Guatemalan law, public participation is the means through which any person or group can submit comments or opposition to a particular instrument that is under the MENR’s review for environmental assessment purposes. In fact, public participation constitutes an explicit requirement when elaborating upon these instruments during the procedure before MENR, except with respect to an Environmental Primary Assessment. As a guiding principle, public involvement should be as broad and early as possible in the proceedings.

Nevertheless, the Guatemalan LEACF imposes limits on the principle of “broad” public involvement. First, the public will only be asked to submit comments relating to technical instruments regarding new projects. When it comes to existing projects, the only technical instrument that is required for environmental assessment purposes is the Environmental Diagnostic. Additionally, this requirement is not always mandatory, provided that the project does not result in environmental harm. Second, public involvement can only take place according to the conditions approved by MENR for each particular project, based on the draft plan for public participation produced by the project-proponent. Under the aforementioned limitations, it is clear that the broad character of the principle of public involvement is somewhat undermined.

The public involvement within the entire procedure depends on the extent to which the MENR coordinates with the project-proponent. Earlier in the proceedings, when submitting the Environmental Primary Assessment for new projects, the project-

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42. LEACF, supra note 9, art. 76.
43. LEACF, supra note 9, art. 72 (requiring public participation from the early stages of the evaluation).
44. Id.
45. Id.
46. LEACF, supra note 9, art. 35.
47. LEACF, supra note 9, art. 36 (providing that existing projects which do not have a negative impact on the environment do not require an environmental diagnosis).
48. LEACF, supra note 9, art. 72.
proponent has to propose a draft plan on public involvement, which the MENR must then approve. During the procedure when elaborating upon the instruments for environmental assessment, the project-proponent must draft and execute a plan for getting public involvement, which requires MENR’s approval. The plan for public involvement has to contain, at least: (1) the means to promote public involvement; (2) methods through which the public can request information as well as submit comments; and (3) ways to resolve potential conflicts. Consequently, the level of public participation within any approval procedure depends on the agreement between MENR and the project-proponent for each project.

There is a tight deadline for the submission of public comments to the MENR or DEPNR. Any person or group can submit comments or opposition to a particular instrument under the MENR’s review for assessment purposes within twenty days after the official notification of the corresponding instrument’s submission. In conjunction with the project-proponent, the MENR will make public any instrument for environmental assessment that has been presented in order to receive comments or oppositions, which must be well-reasoned and presented in a timely manner. This official notification to the public is accomplished through the news media as agreed upon by the MENR and the project-proponent, and according to the terms of reference approved for the corresponding environmental assessment.

Public comments or oppositions should be considered in MENR’s final decision regarding the instrument under review for environmental assessment. They will only be taken into account if they were submitted to MENR within the indicated deadline, and if

49. Id.
50. LEACF, supra note 9, art. 74.
51. Id.
52. LEACF, supra note 9, art. 76 (allowing for the public’s complaints within a twenty day period of the proponent’s project finalization).
53. LEACF, supra note 9, art. 75 (accepting the public’s comments after the proponent finishes a project, and arranging for different communication mechanisms when the community where the project took place does not speak Spanish).
54. Id.
their positions are based on technical, scientific or legal arguments.\textsuperscript{55} If so, MENR will notify the results of such consideration in order to determine means to resolve the issues at hand.\textsuperscript{56} As indicated earlier, since there is no public involvement with respect to the Environmental Primary Assessment, the MENR will not consider any related public comment or opposition in its final decision on that foundational technical instrument.\textsuperscript{57}

**B. THE REQUIREMENT OF AN ENVIRONMENTAL IMPACT STATEMENT UNDER THE U.S. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA).**

It is beyond the scope of this paper to fully discuss the machinations of the U.S. legislation while undertaking a comparative analysis of the U.S. NEPA and the Guatemalan LEACF, particularly regarding EIAs and public involvement. Nevertheless, it is important to bear in mind that while NEPA’s procedural requirements are applicable to every federal agency in the executive branch,\textsuperscript{58} they do not apply to the President, his immediate advisors, to Congress or to the federal judiciary.\textsuperscript{59}

According to the U.S. NEPA, the Environmental Impact Statement (EIS) is the primary instrument, similar to the EIA under Guatemalan law. Indeed, in the United States an EIS must be included in “every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.”\textsuperscript{60} The foundation of NEPA analysis is identifying and evaluating alternative ways to meet the purpose and need of a proposed action.\textsuperscript{61} In fact, the regulations mandate that agencies evaluate every reasonable alternative in an objective manner, and provide reasons for the elimination of any alternative from a more detailed study.\textsuperscript{62} The Council on Environmental Quality notes that

\textsuperscript{55} LEACF, \textit{supra} note 9, art. 78.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} COUNCIL ON ENVIRONMENTAL QUALITY, \textit{supra} note 13, at 2.
\textsuperscript{59} \textit{Id.; see also} 40 C.F.R. §1508.12 (2005) (clarifying that the term federal agency does not refer to the Congress, the Judiciary, or the President).
\textsuperscript{60} 40 C.F.R. §1502.3 (2005) (internal citations omitted).
\textsuperscript{61} COUNCIL ON ENVIRONMENTAL QUALITY, \textit{supra} note 13, at 16.
\textsuperscript{62} \textit{Id.; see also} 40 C.F.R. §1502.14(a) (2005).
reasonable alternatives are "those that substantially meet the agency’s purpose and need."  

An EIS primarily serves as a tool to ensure that NEPA’s policies and mandatory analysis are a part of an agency’s decision-making process. The EIS must provide “full and fair discussion of significant environmental impacts” and must “inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of human environment.” Finally, the statement can be prepared either by a federal agency or by a consultant of the agency’s choosing.

The draft EIS provides a basis for public involvement. The comment period starts after the circulation of the draft EIS, and ends before preparing the final EIS, where circulation of the draft EIS for comments must be at least 45 days. Proponents must file both draft and final statements with the Environmental Protection Agency’s Office of Federal Activities (OFA), who then publishes a “Notice of Availability.” Any comments submitted on an EIS or proposed action must specifically focus on at least the adequacy of the statement or the merits of the proposed alternatives.

In this regard, it is important to highlight who must or may submit comments on the draft EIS. For instance, federal agencies that have special jurisdiction by law or special expertise regarding any environmental impact involved, or which is authorized to develop and enforce environmental standards, must submit comments. Further, the following institutions have the option to submit

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63. COUNCIL ON ENVIRONMENTAL QUALITY, supra note 13, at 16.
66. See Bear, supra note 64, at 2 (clarifying that if an agency presents the statement, that agency has the duty to independently evaluate such information). If the statement is indeed prepared by a consultant, they must execute a sworn statement affirming their neutrality and objectivity. Id.
68. 40 C.F.R. § 1506.10(c) (2005).
69. Bear, supra note 64, at 3.
70. 40 C.F.R. § 1503.3(a) (2005).
71. See 40 C.F.R. § 1503.2 (2005) (indicating that these agencies should submit their comments only within their jurisdiction, expertise, or authority).
comments: "(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards; (ii) Indian tribes, when the effects may be on the reservation; and (iii) Any agency which has requested that it receive statements on actions of the kind proposed."  

Citizens can also submit comments on the draft EIS. Citizens generally possess a wealth of "information about places and resources that they value," and have keen insight into "the potential environmental, social, and economic effects that proposed federal actions may have on those places and resources." Students' submissions of comments on a proposal do not count as votes as to whether the proposed action should or should not move forward; however, these comments inevitably influence decisions by informing decision-makers of the potential environmental consequences of their actions.

After considering the comments received following notification of the draft EIS, the agency prepares a final impact statement. NEPA requires the agencies to consider potential impacts on social, cultural, economic, and natural resources. Related comments are included in the final statement, along with the agency's responses. The agency will additionally send copies of the final EIS to any entity that commented on the draft statement.

II. THE RIGHTS OF INDIGENOUS PEOPLES UNDER GUATEMALAN LAW

Indigenous peoples located in Guatemala are the beneficiaries of rights guaranteed under both domestic and international law. The
nature of these rights is both substantial and procedural according to the applicable legislation. While indigenous peoples—in either their individual or communal capacities—can exercise the same rights as other persons or groups subject to Guatemala's domestic jurisdiction, they are also subject to special protection under specific laws due to their recognized status as indigenous peoples. This comprehensive set of rights is particularly relevant when advocating for indigenous peoples against both private and governmental project-proponents.

In connection with the issue of EIAs, the legal framework in favor of indigenous peoples is comprised of both environmental and human rights standards. For instance, when it comes to environmental law, the Guatemalan LEACF should be considered when reviewing instruments submitted by project-proponents for environmental assessment purposes regarding extractive industry projects to be developed within indigenous lands. When it comes to human rights law, there are various principles related to collective property rights to lands and natural resources, as well as to a healthy environment as established by domestic and international applicable legal norms.

A. GUATEMALA'S EXTERNAL POLICY ON INTERNATIONAL HUMAN RIGHTS

At the international level, Guatemala has led efforts in promoting the human rights of indigenous peoples and assumed various international human rights treaty obligations to respect them. But, despite these diplomatic gestures, the reality on the ground is quite different. Many human rights violations continue to take place in Guatemala, especially to the detriment of indigenous peoples.


82. See generally LEACF, supra note 9, arts. 29–34 (providing background information on the administrative procedures to which new projects are subject).
Guatemala played a lead role in pushing forward the standard setting work on the rights of indigenous peoples. For instance Guatemala strongly supported the adoption of the U.N. Declaration on the Rights of Indigenous Peoples not only by the Human Rights Council in its First Session of June 2006, but also by the U.N. General Assembly in the September, 2007 session. Moreover, within the Organization of American States (OAS), Guatemala not only chaired the Working Group in charge of elaborating the Draft American Declaration on the Rights of Indigenous Peoples for several years, but also hosted the OAS Working Group’s Sixth Negotiation Session of October 2005.

Furthermore, Guatemala has assumed relevant human rights treaty obligations regarding indigenous issues. For instance, Guatemala ratified the International Labor Organization’s Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries [hereinafter Indigenous and Tribal Peoples Convention] on June 5, 1996. It also ratified the American Convention on Human Rights


86. See ORGANIZATION OF AMERICAN STATES, COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS, WORKING GROUP TO PREPARE THE DRAFT AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES; SIXTH MEETING OF NEGOTIATION IN PURSUIT OF POINTS OF CONSENSUS 1, OEA/Ser.K/XVI, GT/DADIN/doc.226.05 (2005) (providing information about the negotiation session).

on May 25, 1978, and accepted the jurisdiction of the Inter-American Court of Human Rights on March 9, 1987.88

Despite Guatemala’s actions, the human rights situation for indigenous peoples on the ground is grave. In fact, within the Inter-American Human Rights System, Guatemala has the second highest number of decisions issued against it by the Inter-American Court because of human rights violations.89 For example, Guatemala has ten judgments finding violations of human rights90 and thirteen resolutions requesting the adoption of provisional measures in order to prevent human rights violations.91 In all of these international decisions, there has been a considerable lack of domestic implementation.

In connection with the above, there are several contentious and precautionary measures cases, both in-progress and decided, before the Inter-American Commission on Human Rights regarding Guatemala. The Commission has clearly highlighted that the administration of justice in Guatemala is not working properly; there is on-going impunity with respect to systematic human rights

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89. See generally Inter-American Court of Human Rights, Jurisprudence by Country: Guatemala, available at http://www.corteidh.or.cr/pais.cfm?id_ País=18 (last visited June 6, 2008) (listing the cases that have been brought against Guatemala).


violations that occurred during internal armed conflict. Most of the victims of the conflict were indigenous peoples and their leaders.

Finally, it is important to bear in mind that international human rights law prevails over Guatemalan domestic law, including the national constitution. Accordingly, international legal norms must be taken into account by Guatemala's branches of government, especially the judiciary, when deciding cases related to international human rights standards.

B. SUBSTANTIAL HUMAN RIGHTS PRINCIPLES PROTECTING INDIGENOUS PEOPLES

There are a number of human rights law principles that specifically protect the rights of indigenous peoples. The most important rights threatened by proposed extractive industry projects include: (1) property rights to lands and natural resources, and (2) the right to self-determination. These rights are of a collective nature, and very important for the survival of indigenous peoples’ government and society.

Indigenous peoples, as distinct peoples, are entitled to collective rights such as property rights to land and natural resources, and the right to self-determination, among others. Contemporary international human rights law principles establish the collective nature of indigenous peoples’ rights. For instance, the U.N. Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples’ “collective rights which are indispensable for their existence, well-being and integral development as peoples.”


93. See Romeo Tiu López, Mayan Spirituality and Lands in Guatemala, 21 ARIZ. J. INT’L & COMP. L. 223, 223 (2004) (reporting that during Guatemala’s thirty-year internal armed conflict, 83.33% of the victims were Mayan).


95. See Anaya, supra note 11, at 36 (identifying the right to land and resources as central to the human rights claims of indigenous peoples).

96. Decl. on Indigenous Peoples, supra note 80, at pmbl.
addition, in identical language, the Proposed American Declaration on the Rights of Indigenous Peoples also clearly identifies indigenous peoples’ collective rights.\textsuperscript{97}

It is essential for these rights to be considered within domestic proceedings regarding environmental evaluation and follow-up handled by the corresponding Guatemalan agency. If not, Guatemala’s international responsibility under international human rights law will be compromised.

\textit{1. Indigenous Peoples’ Property Rights to Land and Natural Resources}

Indigenous peoples’ property rights to land and natural resources are critical to assuring their physical and cultural survival as distinct peoples within the existing nation states. As Armstrong Wiggins notes:

\textit{[w]ithout their land base, Indians may be able to survive as individuals in the dominant economy and culture of their non-Indian neighbors, but they will not be able to survive and prosper as distinct peoples with distinct cultures and traditions. Governments throughout the Americas, led by Europeans and their descendants, have sought to expropriate, allot, and control Indians lands and resources as a means of assimilating Indians.}\textsuperscript{98}

Consequently, legislation and policies built on the presumption of European superiority over native culture are no longer sustainable.

Indigenous peoples’ property rights to their lands are protected under a number of distinct domestic and international legal regimes. First, the National Constitution of Guatemala establishes the State’s duty to protect lands under possession of indigenous peoples since time immemorial, as well as to respect indigenous communities’ traditional land tenure systems.\textsuperscript{99} In addition, the Constitution


\textsuperscript{98} \textit{Wiggins, supra} note 1, at 348.

\textsuperscript{99} \textit{See Const. Guat., supra} note 79, art. 67 (granting special “credit assistance
establishes Guatemala’s duty to provide public lands to indigenous communities, when needed for their development through special programs and legislation.  

Second, international treaty law rules guarantee the protection of indigenous peoples’ property rights to land and natural resources. The Indigenous and Tribal Peoples Convention establishes that the rights of ownership and possession by indigenous peoples over lands “which they traditionally occupy” shall be recognized by State Parties, and further asserts that the rights of indigenous peoples to natural resources pertaining to their lands shall be specially safeguarded—including the right to “participate in the use, management and conservation of these resources.” Additionally, the American Convention on Human Rights affirms that “[e]veryone has the right to the use and enjoyment of his property,” which also includes indigenous peoples.

Third, customary international law protects indigenous peoples’ right to land and natural resources. The U.N. Declaration on the Rights of Indigenous Peoples contains several rules of customary international law on these issues. For instance, Article 26 affirms that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” Accordingly, the article also provides that “States shall give legal recognition and protection to these lands, territories and resources” with due respect to indigenous customs, traditions and land tenure systems.

Fourth, general principles of international law strongly protect indigenous peoples’ collective property rights to lands. Numerous national constitutions in Latin American countries have a specific provision related to such recognition and protection, including the

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100. Id. art. 68 (indigenous community lands).
101. Indigenous and Tribal Peoples Convention, supra note 87 (protecting indigenous rights to land “not exclusively occupied by [indigenous populations], but for which they have traditionally had access for their sustenance and traditional activities”).
102. ld. art. 15.
103. Pact of San Jose Signatories and Ratifications, supra note 88, art. 21.
104. Decl. on Indigenous Peoples, supra note 80, art. 26.
105. ld.
constitutions of Argentina, Bolivia, Ecuador, Mexico, Nicaragua, Panama, Paraguay, and Peru. Moreover, the United States has made a strong statement concerning indigenous peoples’ right to land and natural resources: “indigenous peoples should have the collective right to lands that they own or occupy, including sub-surface resources. States should give legal recognition to such lands and resources and this recognition should be conducted with due respect to the customs, traditions, and land tenure system of indigenous peoples.”

Finally, international human rights supervisory treaty bodies have made strong statements regarding the rights of indigenous peoples to their lands and natural resources. For example, the Inter-American Court of Human Rights has built consistent case law on this matter by recognizing indigenous peoples’ collective property rights to land. In Mayagna (Sumo) Awas Tigni Community v. Nicaragua,
(hereinafter *Awas Tingi*) the Court highlighted that among indigenous peoples there is a "communitarian tradition regarding a communal form of collective property to the land, in the sense that land ownership is not centered on the individual but rather around the community." Consequently, the Court said that Article 21 of the American Convention on Human Rights "protects the right to property in a sense which includes . . . the rights of members of indigenous communities within the framework of communal property."

At the U.N., the Special Rapporteur on Indigenous Peoples has clearly proclaimed indigenous peoples' permanent sovereignty over their natural resources, including sub-surface resources, is a collective right. States must "promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources." A state's failure to provide state protection over these indigenous peoples' collective rights would endanger any "meaningful economic and political self-determination, self-development," and may create such extreme poverty to deprive these people of their cultural identity. Further, unless they have lawfully and fairly disposed of their natural resources, indigenous peoples are the rightful owners of their land, and its fruits.

Accordingly, there is a clear duty to respect the aforementioned indigenous rights. In *Awas Tingi*, the Inter-American Court of Human Rights defined this duty by determining two obligations.

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physically delimit indigenous collective property rights); Mayagna (Sumo) Awas Tingi Cmty v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at ¶ 149,153 (Aug. 31, 2001) (classifying the state's failure to demarcate collective indigenous property rights as a violation of the right to use and enjoy property).


117. *Id.* ¶ 148 (basing this conclusion on the "evolutionary interpretation of international instruments for the protection of human rights . . . and pursuant to article 29(b) of the Convention").


119. *Id.* at ¶ 58.

120. *Id.* at ¶ 54 (also stressing the need for "particularized inquiry . . . to determine the extent and character of the indigenous ownership interests" in cases involving shared lands).
First, states have an obligation to delineate, demarcate, and title the territory belonging to the indigenous community. Second, until the delineation, demarcation, and titling is accomplished, states are obligated to abstain from carrying out actions that might lead state agents, or third parties acting with the state’s acquiescence or tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the indigenous community live and carry out their activities.

Therefore, whenever there is an extractive industry project proposed for development within indigenous lands, the corresponding environmental agency that is handling the domestic procedure must also consider Guatemala’s duty to respect indigenous peoples’ rights to land and natural resources. If not, Guatemala’s responsibilities under international human rights law will be compromised, with the violation determined by international supervisory treaty bodies.

2. Indigenous People’s Right to Self-Determination

The right to self-determination also plays a critical role in assuring the involvement of indigenous peoples’ government in the decision-making process regarding projects that might affect their collective interests, such as lands and natural resources. The right to self-determination includes the right to self-government and the collective right to exercise full authority over indigenous lands and natural resources. The concerned indigenous peoples’ customary law and decision-making institutions requires outsiders, whether private or governmental, to respect such authority and decisions.

Generally speaking, international treaty law rules have established the right of self-determination of peoples. For instance, common

122. Id.
123. See, e.g., Decl. on Indigenous Peoples, supra note 80, arts. 3, 4 (associating the right to self-determination with the ability to determine political status, pursue “economic, social, and cultural development,” and with autonomy over “internal and local affairs”).
124. See, e.g., id. arts. 4-5, 20, 25-26 (observing that self-determination implies self-government, the right to maintain economic institutions, and the right to traditional relationship to land).
Article 1 of the Covenant on Civil and Political Rights\textsuperscript{125} and the Covenant on Economic, Social and Cultural Rights\textsuperscript{126} states that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may people be deprived of its own means of subsistence.\textsuperscript{127}

Indigenous peoples’ right to self-determination is also recognized by international human rights law principles. Article 7 of the Indigenous and Tribal Peoples Convention provides indigenous peoples “the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”\textsuperscript{128}

Additionally, the U.N. Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples’ right to self-determination\textsuperscript{129} and self-government.\textsuperscript{130} The U.N. Declaration on the Rights of Indigenous Peoples also establishes the right of indigenous peoples to participate in decision-making processes dealing with matters

\textsuperscript{125} International Covenant on Civil and Political Rights, art. 1, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR].
\textsuperscript{126} International Covenant on Economic, Social and Cultural Rights, art. 1, 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter ICESCR].
\textsuperscript{127} ICCPR, supra note 125, art. 1; ICESCR, supra note 126, art. 1.
\textsuperscript{128} Indigenous and Tribal Peoples Convention, supra note 87, art. 7 (further requiring governments to conduct studies assessing “social, spiritual, cultural, and environmental impact” on indigenous populations and to “protect and preserve the environment of the territories [indigenous populations] inhabit”).
\textsuperscript{129} See Decl. on Indigenous Peoples, supra note 80, art. 3 (“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social, and cultural development.”).
\textsuperscript{130} Id. art. 4 (“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”).
which might affect their collective interests. In the United States, individual states should recognize that "indigenous peoples have the collective right to self-determination within the Nations in which they reside," which respects "the right to self-government" in matters relating to their internal affairs, including economic activities, land and resources management, environment.

The right to self-determination of indigenous peoples is a collective right deeply connected with property rights to land and natural resources. By virtue of these rights, indigenous peoples should participate in the decision-making process related to projects that might affect their collective interests. Consequently, the concerned indigenous peoples must be consulted by the corresponding state agency when reviewing instruments for environmental assessments dealing with extractive industry projects developed on indigenous lands.

C. PROCEDURAL GUARANTEES IN PLAY

When dealing with extractive industry projects to be developed within indigenous lands, environmental and human rights law norms also provide relevant procedural guarantees to ensure the respect of the aforementioned indigenous peoples' substantive rights. The environmental agency must consider these guarantees as a means to ensure State's compliance with applicable rules of law, whether domestic or international. In this regard, the most important procedural guarantee refers to the free, prior, and informed consent of the concerned indigenous people.

Indigenous peoples' free, prior, and informed consent must be connected to public participation as procedural guarantees determined within the Guatemalan LEACF process. It must be

131. Id. art. 18 (stating that indigenous peoples have the right to "participate in decision-making processes in matters which would affect their rights, through their own representatives, as well as to maintain and develop their own decision-making institutions").

132. U.S. INDEGENOUS RIGHTS PROPOSALS, supra note 114, ¶ 3 (also supporting self-government in matters related to "culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, . . . determination of membership, and entry by non-members . . . and means for financing [self-government] functions").

133. See generally LEACF, supra note 9, at arts. 72-78 (stating provisions for
understood as a special element of public participation, especially when reviewing technical instruments submitted by project-proponents for environmental assessment purposes related to projects developed within indigenous lands.

1. The Question of Free, Prior, and Informed Consent

Prior to the approval of any extractive industry project to take place within indigenous lands, the corresponding environmental state agency has to engage in, as early as possible, a consultation with the potential project-affected indigenous community. In Guatemala, both domestic and international law impose such consultation as a means to ensure the respect of indigenous peoples' collective rights.

When seeking consent, project-proponents must ensure the consent is free, prior and informed. Consent must be free, in that it should be given "without coercion, duress, bribery or any threat or external manipulation." Next, prior consent must also be given prior to each decision-making stage in the project's planning and implementation. Finally, the consent must be informed, given only after the project-affected indigenous community was provided with all relevant information related to the project in an appropriate language and format. This procedural guarantee has relevant legal effects in the context of processes created for environmental assessment purposes because it implies the prerogative of indigenous people to prohibit, control or authorize projects that occur within

participation of the general public in environmental evaluation).

134. See Decl. on Indigenous Peoples, supra note 80, arts. 1, 32 (requiring states to “consult and cooperate in good faith” with indigenous populations); see also LEACF, supra note 9, art. 72 (noting that state agency must carry out consultation “as early as possible”).

135. See, e.g., Decl. on Indigenous Peoples, supra note 80, arts. 1, 32 (providing all human rights to indigenous population members); Indigenous and Tribal Peoples Convention, supra note 87, arts. 14-16; see also LEACF, supra note 9, art. 72.


137. Id.

138. Id.
their land, that substantially affect their lands, or that might otherwise affect their human rights. \(^{139}\) Domestic and international human rights law provides the legal basis for such legal institution.

First, within Guatemala’s legal framework, two national laws impose on the DEPNR the duty to carry-out a special consultation with the potential project-affected indigenous community, taking into careful account native languages. The LEACF indicates that, within the framework of public participation, the DEPNR should have special consideration of the existence of indigenous peoples (e.g. Maya, Garifuna and Xinca) within the area where the project is meant to be developed. \(^{140}\) This provision requires the DEPNR to establish a special means to provide appropriate information to the concerned indigenous community. The Law on National Languages provides a legal basis for native language consultation in the project-affected indigenous community. \(^{141}\) While Spanish is Guatemala’s official language, the state must promote and respect native languages, such as Maya, Garifuna and Xinca, as national languages. \(^{142}\) Consequently, state agencies are required to use native languages in all levels of the executive branch of government, \(^{143}\) especially when providing public services to indigenous communities. \(^{144}\)

Second, international human rights law principles clearly establish the importance of free, prior and informed consent of indigenous peoples with regard to land rights. The U.N. Declaration on the Rights of Indigenous Peoples requires good faith consultation and cooperation between states and indigenous peoples “through their own representative institutions in order to obtain their free and

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139. Id.
140. LEACF, supra note 9, art. 75 (providing special procedures for divulging information in areas where indigenous languages predominate).
142. Id. at 1 (establishing principles behind legislation).
143. See id. at 3 (recognizing respect and promotion of “national languages” including indigenous languages as fundamental for government’s proper functioning).
144. See id. at 14 (noting further that employment of indigenous language in public realm will promote employment of these languages in private sphere).
informed consent prior to the approval of any project affecting their lands or territories and other natural resources.” Furthermore, the Indigenous and Tribal Peoples Convention requires States to create procedures to consult with indigenous populations where “the State retains the ownership of sub-surface resources . . . with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.”

Finally, human rights supervisory treaty bodies have also recognized the critical role of free, prior, and informed consent in assuring the respect of indigenous nations’ substantial rights in play. The Inter-American Commission on Human Rights stated in Mary & Carrie Dann v. United States that States should take the necessary measures “to ensure recognition of the particular and collective interest that indigenous peoples have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent.”

In sum, the corresponding State agency must carry out a special consultation considering the concerned indigenous community’s native language, customary law and self-determined decision-making institutions. Only by virtue of such consultation can the indigenous community’s involvement be considered as implemented in accordance with the collective rights and procedural guarantees in play within the scope of public participation.

It is important to underline that the free, prior and informed consent is a procedural guarantee—not a substantial right—recognized in favor of indigenous peoples whose lands and natural resources might be affected by extractive industry projects. Therefore, consent does not substitute for or diminish the substantial

145. Decl. on Indigenous Peoples, supra note 80, art. 32.
146. Indigenous and Tribal Peoples Convention, supra note 112, art. 15 (providing “special safeguards” to indigenous populations’ right to natural resources within indigenous-owned land).
rights in play, such as property rights to land and natural resources, and the right to self-determination.\textsuperscript{148}

III. A CASE-STUDY: EXTRACTIVE INDUSTRY PROJECT ON MAYA-Q’EQCHI’ INDIGENOUS LANDS

This Part focuses on a case-study related to an extractive industry project developed on indigenous lands in the El Estor municipality in the department of Izabal, Guatemala. The project affects the Maya-Q’eqchi’ indigenous communities located within the area granted for mining activities. Based on the applicable procedural and substantive law as developed above, this section’s goal is to determine whether Guatemala enforces the law when dealing with project-affected indigenous communities.

El Estor is an administrative district within the department of Izabal with a population of around forty-five thousand residents.\textsuperscript{149} The more than 100 Maya-Q’eqchi’ communities in El Estor comprise ninety-two percent of the population.\textsuperscript{150} Sixteen of these communities fall within the area where this project is being developed.\textsuperscript{151} The Maya-Q’eqchi’ people speak only their native language—they do not speak Spanish.\textsuperscript{152}

\begin{itemize}
  \item \textsuperscript{149} See Asociación Estoreña Para el Desarrollo Integral [AEPDI], El Estor, http://www.aepdi.org/elestoreng.html (last visited Oct. 1, 2008) (stating that the population is dispersed over 3000 square kilometers, constituting one hundred different small villages).
  \item \textsuperscript{150} \textit{Id.} (adding that El Estor is the only municipality in Izabal with a predominantly indigenous population). \textit{See also} HENRIK WIIG, NOR. INST. FOR URBAN AND REG’L RESEARCH, WORKING PAPER NO. 2008:102, PROMOTING RESPECT FOR THE COLLECTIVE RIGHTS OF THE Q’EQCHI’ POPULATION 12, 15 (2008); Grahame Russell, \textit{Canadian Mining, The Mayan-Q’eqchi’ People and the Cycles of Landlessness, Poverty and Repression}, UPSIDE DOWN WORLD, Dec. 6, 2006, http://upsidedownworld.org/main/content/view/534/33/.
  \item \textsuperscript{151} Russell, \textit{supra} note 150.
  \item \textsuperscript{152} See \textit{Wiig}, \textit{supra} note 150, at 13 (highlighting the importance of volunteer groups in the area, such as AEPDI, who are able to translate between the Q’eqchi’ people and the Guatemalan Nickel Company and government officials).
\end{itemize}
The project-proponent is a private mining company called Guatemalan Nickel Corporation, a subsidiary of Sky Resources of Vancouver, Canada. They submitted an EIA to the MENR in order to get a mining permit to explore nickel located on the lands of sixteen Maya-Q'eqchi' communities. The price of nickel, used to reinforce steel, has skyrocketed in the wake of the 9/11 terrorist attacks allowing unprofitable mines such as those located on the lands of the Maya Q'eqchi in El Estor to become profitable. This development gave cause for the entrance of Skye Resources, who actively seeks to usurp the lands of the Maya Q'eqchi to extract the increasingly valuable nickel deposits that lie beneath the villages, for their own profit.

The information contained in the EIA presented to MENR was not given to the project-affected communities for their comments. The Maya-Q'eqchi' communities claim they were never consulted on the EIA and expressed their opposition to the development of the mining project in the area. In a joint statement, the communities clearly proclaimed that no state agency has informed them about the mining project, or asked them to become part of a consultation process.


156. The certificate issued on Mar. 12, 2006 by a Notary Public, giving evidence that the joint statement was entered in the book of notarial records. See also Russell, supra note 152 (quoting a November 19, 2006 report by the Defensoria Q'eqchi', entitled "Land Conflicts in El Estor, Izabal, Guatemala & the Rights of the Maya Q'eqchi' People," in which the Defensoria Q'eqchi' criticizes
Moreover, as an outcome of communal assemblies—the communities' highest authority based on their own decision-making process—each of these communities decided not to support the development of the extractive industry project in question.\footnote{157}

On December 13, 2004, the Ministry of Energy and Mining granted a mining permit to Guatemalan Nickel Company for exploration without engaging in the prior consultation procedure in El Estor.\footnote{158} Within the area granted for exploration activities, there are sixteen Maya-Q'eqchi' communities, all of which are opposed to the development of the project.

There are on-going land disputes in El Estor with regard to Maya-Q'eqchi’ communities' ancestral lands. The ownership and status of these lands have not been standardized by the Guatemalan government. Therefore, several demarcation disputes are ongoing. In 1965, unbeknownst to the Q'eqchi, the Guatemalan government sold their lands to the Canadian mining giant, Inco which sold their rights to Skye Resources in 2004.\footnote{159} In 1997, at the urging of the World Bank, Guatemala dropped royalties to one percent of revenue while removing limits on foreign ownership in order to attract foreign investment.\footnote{160} Since that time, interest in exploiting Guatemala’s mineral resources grew exponentially. This growth led to a series of serious human rights abuses, including the burning of local villages

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Guatemalan Nickel Company’s unwillingness to consult the indigenous people as a violation of the Indigenous Lands and Peoples Convention).

\footnote{157} Following their customary law, each community reflects their communal decisions in a Book of Communitarian Certifications. Each book contains the community’s statement opposing the project. See Open Letter from Maya Q’eqchi Leaders in El Estor to the President of Guatemala (Aug. 16, 2005) (on file with author) \( \text{1-4} \).


\footnote{159} Maria Amuchastegui, Mining Misery: Guatemala is One of Many Countries that Has Attracted the Investment of Canadian Mining Companies – But at What Cost to its People?, THIS MAGAZINE, Mar.-Apr. 2007, available at http://www.thismagazine.ca/issues/2007/03/miningmisery.php (describing how, in September of 2006, a group of Q’eqchi’ set up tents on the disputed land, in an attempt to reclaim the land).

\footnote{160} Id. (implying that the promotion by the Guatemalan of this change in policy as a stimulant to local development was merely a façade).
and the eviction of hundreds of Maya-Q’eqchi’ villagers from their homes, as documented by This Magazine and on YouTube.

A. STRATEGY TOWARDS THE ENFORCEMENT OF THE CONSULTATION LAWS IN GUATEMALA

In light of this situation, environmental and indigenous advocates sought remedies in order to enforce the law. As part of a legal and political strategy, these applications were filed before Guatemala’s domestic courts, as well as before international supervisory treaty bodies. Moreover, indigenous advocates questioned the MENR in a public hearing held before the Guatemalan Congress. The strategy’s purpose was to address the MENR, because there was no consultation carried out regarding the submitted EIA with project-affected indigenous communities.

First, a lawsuit was filed before domestic courts. An environmental group, in coordination with indigenous advocates, filed an *amparo* lawsuit in January of 2006 before the Guatemalan Civil Court of Appeals challenging the project’s EIA. The lawsuit against the MENR noted that there was no

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161. Id. (describing two violent evictions which occurred in El Estor, in November of 2006 and January of 2007).

162. See YouTube, Violent Evictions at El Estor, Guatemala, available at http://www.youtube.com/watch?v=Q2VYxKm-CGI (last visited June 7, 2008) (referring to the Guatemalan government as a brutal and repressive military dictatorship that assisted the heinous acts of the mining companies).

163. Centro de Acción Legal – Ambiental y Social de Guatemala [Center for Environmental and Social Legal Action], http://www.calas.org.gt (last visited June 7, 2008) [hereinafter CALAS] (existing as a Guatemalan non-profit environmental organization based in Guatemala City, Guatemala).

164. Asociación Estoreña Para el Desarrollo Integral [Estoreña Association for the Integral Development], http://www.aepdi.org (last visited June 7, 2008) (existing as a Guatemalan non-governmental organization that fosters social progress in the Maya Q’eqchi’ community through justice). AEPDI is comprised by young Maya-Q’eqchi’ professionals and it is located in El Estor, Izabal, Guatemala. *Id.*

165. Const. Guat., supra note 79, art. 28. The *amparo* is a constitutional prompt and judicial effective remedy available in Guatemala’s domestic legal system for the purpose of getting a judicial protection of fundamental rights guaranteed by the National Constitution.

166. See Amparo Brief, Caal v. Director General de Gestión Ambiental y Recursos Naturales del Ministerio de Ambiente y Recursos Naturales, Jan. 13, 2006, 2 (on file with author) [hereinafter Amparo Brief].
consultation with project-affected Maya-Q'eqchi' communities on the EIA.\(^\text{167}\) Based on the Guatemala LEACF and the Law on National Languages, the *amparo* questioned the fact that the information on the EIA was neither circulated in the area where these Maya-Q'eqchi' communities live in the El Estor, nor available in their native language.\(^\text{168}\) Consequently, these communities were not able to make comments on the EIA submitted by the project-proponent, violating their constitutional rights of equal protection under the law and due process of law, as established in Articles 12 and 28 of the National Constitution.\(^\text{169}\) The Civil Court of Appeals admitted the *amparo*, and ordered the MENR to address the question of the lack of consultation regarding the EIA with the project-affected communities.\(^\text{170}\)

In connection with the above, the Constitutional Court of Guatemala does not consider the consultation's outcomes to be a binding communal decision or require mandatory enforcement by the government. In a case concerning a consultation carried out by a local Council asking for the people's opinion on an actual mining project, the Constitutional Court ruled that the consultation's outcome has no legal effect on matters falling under the competence of other state agencies, nor does it affect third parties' rights acquired through existing legal mechanisms related to the granting of mining permits.\(^\text{171}\) The Court highlighted that the consultation's outcome lacks legal effect because it interferes with the Ministry on Energy and Mining Affairs' competence.\(^\text{172}\) Finally, the Court determined the unconstitutionality of the local Council's regulation, the legal basis for carrying out public consultations, because it breached the national constitution's provisions relating to the Superior Electoral

\[\begin{align*} 
167. \text{*Amparo* brief filed by CALAS before the Civil Court of Appeals on Jan.} \\
168. \text{Id. at 7. The *amparo* was based on the Guatemala LEACF of 2003. This} \\
169. \text{Const. Guat., supra note 79, arts. 12 & 28.} \\
170. \text{Gerardo Tzalam Caal v. Ministry of Environment and Natural Resources,} \\
171. \text{Rosa Maria Montenegro de Garoz v. Consejo Municipal de Sipacapa's} \\
172. \text{Id. at 23.} \\
\end{align*}\]
Tribunal’s competence in regulating elections and the concerned peoples’ votes.\textsuperscript{173}

Second, a legal complaint was filed before an international treaty body regarding the lack of consultation on the EIA. In March of 2005, the Federation of Country and City Workers, a national labor union, coordinated with indigenous advocates to file a complaint before the International Labor Office, questioning Guatemala’s non-compliance with the Indigenous and Tribal Peoples Convention.\textsuperscript{174} The complaint alleged that on December 13, 2004, the Government issued Guatemalan Nickel Company a permit for nickel exploration, authorizing it to begin operations on the land of Maya Q’eqchi communities, “without having gone through the prior consultation procedure with the people concerned.”\textsuperscript{175} The complainant organization also stated that the Government of Guatemala failed to protect the rights of indigenous peoples and issued the mining permit “without respect for their social and cultural identity, their customs, traditions and institutions, thereby contravening its obligation to adopt measures to safeguard the integrity of the indigenous peoples” and the wishes they had expressed.\textsuperscript{176}

The International Labor Office admitted the complaint, and its Committee decided the case in June of 2007 in favor of the Maya-Q’eqchi’ communities’ rights to lands, natural resources, and prior consultation. First, regarding land rights, the Committee urged the

\footnotesize
\textsuperscript{173} Id. at 25.

\textsuperscript{174} The complaint was filed on Mar. 15, 2005 by the Federation of Country and City Workers based on art. 24 of the International Labor Organization’s Constitution. See ILO, Constitution, Chapter 2, art. 24, \textit{available at} http://www.ilo.org/ilolex/english/constq.htm (last visited June 7, 2008) [hereinafter ILO Const.] (permitting workers to initiate communications with the government of the member state that has misrepresented or failed to observe any article of the Indigenous and Tribal Peoples Convention).


\textsuperscript{176} Report of the Committee, \textit{supra} note 175, art. 25, ¶ 10. The complainant organization alleged that these actions were in violation of Article 2, paragraphs 1 and 2(b), Article 4, paragraphs 1 and 2, and Articles 6, 7, 13, 14, 15 and 17, paragraph 3, of the ILO Convention 169. Id.
Guatemalan Government to speed up processes for regularizing the titling of lands traditionally occupied by indigenous communities, and ensure "not only that their individual rights are guaranteed, but also their collective rights and the various aspects of their relationship with the land."\(^{177}\) Second, regarding prior consultation and natural resources, the Committee reaffirmed that the Convention does not require indigenous peoples to be in possession of ownership title for the purposes of the consultations envisaged by the Convention.\(^{178}\) The consultations are required for the exploration of state-owned resources, pertaining to lands occupied or otherwise used by peoples, whether or not they hold ownership title to those lands.\(^{179}\) Finally, the Committee found that the protected communities were not consulted prior to the issuance of a permit.\(^{180}\) Furthermore, since the original exploration permit was set to expire in December, 2007, "an exploitation license could be issued at that time, the Committee consider[ed] that prior to the delivery of any exploitation license, consultation should be held with all the communities concerned," regardless of whether they hold title of ownership, and that "the communities should be compensated for any damage that the exploration may have caused."\(^{181}\)

Third, the MENR was questioned in a public hearing held before the Guatemalan Congress in 2006 by requesting a hearing from the Congress Commission on Mining Affairs on the validity of the mining permit unlawfully granted to CGN.\(^{182}\) Even though a hearing

\(^{177}\) Report of the Committee, supra note 175, art. 25, ¶ 44 (relying on Article 14 to explain that ownership and occupation are not the only factors determining right to land; and that the survival of the indigenous people is also a determining factor); see Indigenous and Tribal Peoples Convention, supra note 87, art. 14.

\(^{178}\) Report of the Committee, supra note 175, art. 25, ¶ 47 (adding that in applying Articles 13(2) and 15(2), the cultures and values of the peoples concerned, as well as the extent to which their interests might be prejudiced by the action in question, will be taken into consideration); see Indigenous and Tribal Peoples Convention, supra note 101, art. 13(2), 15(2).

\(^{179}\) Report of the Committee, supra note 175, art. 25, ¶ 48; see Indigenous and Tribal Peoples Convention, supra note 87, art. 15(2).

\(^{180}\) Report of the Committee, supra note 175, art. 25, ¶ 51 (further noting that the license was granted in 2004, two years before meetings were held on the matter).

\(^{181}\) Report of the Committee, supra note 175, art. 25, ¶ 51.

\(^{182}\) Diario del Sesiones del Congreso de la República de Guatemala, Sesion Ordinaria Numero 041, Sept. 28, 2006, at 11.
was granted and was useful in publicly questioning the MENR, it did not stop the development of the project since exploration activities had already been executed on indigenous lands.

In sum, environmental and indigenous advocates have used the remedies available in Guatemala’s legal system in order to enforce applicable laws regarding the issue of EIA and public comments. Unfortunately, they did not achieve their goals because the MENR did not comply with its duty to make public the EIA with potential project-affected communities for comments and/or opposition. The EIA was not circulated in the area where the project-affected indigenous communities live, nor available in their native language—Maya Q’eqchi’. Furthermore, there was no meeting carried out with the potential project-affected communities located in the area where this extractive industry project was meant to be developed.\(^\text{183}\) Consequently, by not providing information, or making available the instruments for public comments to potential project-affected indigenous communities, MENR prevented meaningful public participation in the process.

Though this tactic was not successful in stopping the development of the concerned project, it did produce a positive outcome. It was instrumental in inserting the need to seriously address the issue of consultations with project-affected indigenous communities into the government agenda. As a matter of fact, there is now currently proposed domestic legislation in Guatemala, related to consultations with indigenous peoples.\(^\text{184}\)

**CONCLUSION**

The rights of indigenous peoples is a most serious consideration when dealing with extractive industry projects to be developed on indigenous lands, especially with respect to public involvement on submitted EIAs. On the one hand, Guatemala’s agencies, including the MENR, have the duty to consider both environmental and human rights standards.\(^\text{185}\) On the other hand, a project-proponent such as


\(^{185}\) Report of the Committee, *supra* note 175, art. 25, ¶ 51.
the Guatemalan Nickel Company must involve the public, especially project-affected communities, when reviewing technical instruments submitted for environmental purposes such as an EIA. The case-study on the El Estor shows that these duties have not been fulfilled by Guatemala’s agencies and the private project-proponent.

According to the above analysis of the substantial and procedural aspects of this legal framework, environmental and indigenous advocates built a comprehensive strategy based on the legal and political approaches to the issue. Yet the strategy, built within the domestic legal framework, was unsuccessful, due to the government’s lack of political will to enforce applicable laws. In addition, project-affected indigenous communities have opposed the mining project, and this decision was not taken into account by the branches of the Guatemalan government, including the judiciary.

Governments must respect democratic decision-making processes within indigenous communities, and must ensure the respect of their collective rights, especially when they have assumed related international obligations in that regard. Guatemala has such obligations in international law. Accordingly, by disregarding these aspects, it is in breach of its obligations.

The enforcement and improvement of domestic law can be achieved through the use of international human rights law, especially as developed within the Inter-American Human Rights System. It is of particular importance when there is no domestic enforcement of the law by state parties, and human rights violations continue to occur. This regional human rights system has, in many instances, been able to force domestic laws to comply with international standards.

For critical situations such as the development of extractive industry projects on indigenous lands, the Inter-American Human Rights System, and the indigenous and environmental approaches, have critical roles to play in promoting and protecting the rights of indigenous project-affected communities.

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186. Id.
187. Russell, supra note 150.
188. See Decl. on Indigenous Peoples, supra note 80; Pact of San Jose Signatories and Ratifications, supra note 88; Indigenous and Tribal Peoples Convention, supra note 87; ICCPR, supra note 125; ICESCR, supra note 126; ILO Constitution, supra note 174.