Berkeley Journal of International Law

Volume 27 | Issue 2 Article 6

2009

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Recommended Citation

Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 Berkeley J. Int'l Law. 570 (2009).
Available at: http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6

Link to publisher version (DOI)
http://dx.doi.org/doi:10.15779/Z38T94C

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The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development

Brant McGee*

I. INTRODUCTION

Development projects, especially mining ventures by large multinational corporations, are often the subject of sustained—and sometimes violent—controversy in Latin America and other developing areas of the world rich in natural resources where resource extraction projects may have a devastating impact on the lives, health, resources, and culture of the local population. Among the most promising ideas to reduce violence and promote informed participation by citizens is an entirely democratic form of ascertaining community sentiment and determining policy—the community referendum or *consulta popular*—in which voters in the potentially affected localities can register their agreement or opposition to a specific development project by voting in free and fair elections. Such referenda, which have only recently arisen as a means to oppose unwanted resource extraction projects, represent a new, accurate, and democratic measurement of whether a community has provided the free, prior and informed consent (FPIC) to proposed development as required under international law. The use of community referenda as a means of ensuring the human rights of people whose communities may be threatened by large development projects had been intermittent and confined to just a few states but is now spreading rapidly. The idea of holding elections where people

* Counsel, Environmental Defender Law Center. I am forever grateful to Ruth-Ellen Perlman and Professor Ira Lupu, Georgetown University Law School for their past support and to Mary Holland, Director, Graduate Legal Skills Program, New York University Law School, Lewis Gordon, Director, Environmental Defender Law Center, Jay Porter, Jennie Hausler and Philomena Hausler for their invaluable assistance in the preparation of this article.

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can exercise a direct voice in planning the future of their communities must now be fully recognized as a fundamental human right with broad support in international law. Potentially damaging development must face the test of participatory democracy.

The requirement that indigenous peoples provide FPIC to any development on their lands is an internationally recognized, but controversial, human right. The right to FPIC was most recently set out in the 2007 UN Declaration on the Rights of Indigenous Peoples.[1] The necessary consent of indigenous peoples under the declaration is a recognition that the "historic injustices" outlined in the preamble have allowed for the exploitation of their lands in violation of their right to choose forms of development that best meet their needs and interests.[2]

The Environmental Law Institute, in an extensive study of its application to mining projects, defines FPIC as "the right of the local community to be informed about potential mining operations on a complete and timely basis and to approve the operation prior to the commencement of the operation."[3] This definition supports the proposition that the local population can withhold consent in order to stop a project. A free and fair community referendum with formal and appropriate voting standards is the most accurate and democratic way to allow people to shape their futures.

The concept of free, prior and informed consent is based on the rights of participation and consultation, self-determination, and indigenous property rights. The right to FPIC is a central issue in resource extraction projects, whose impact, according to the U.N. Commission on Human Rights' Special Rapporteur on indigenous peoples' rights, has been "one of the major problems faced by [indigenous people] in recent decades."[4] The catastrophic

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1. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 10-11, 19, 28-29, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/drip.html.

2. The U.N. Working Group on Indigenous Populations sponsored a paper entitled *Legal Commentary on the Concept of Free, Prior and Informed Consent*, which noted:

> "The principle of Free, Prior and Informed Consent (FPIC) of indigenous peoples to policies, programs, projects and procedures affecting their rights and welfare is being discussed in a growing number of international, regional, and national processes. These processes cover a wide range of bodies and sectors ranging from the safeguard policies of the multilateral development banks and international financial institutions; practices of extractive industries; water and energy development; natural resources management; access to genetic resources and associated traditional knowledge and benefit-sharing arrangements; scientific and medical research; and indigenous cultural heritage."

Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, Working Group on Indigenous Populations, *Legal Commentary on the Concept of Free, Prior and Informed Consent*, ¶ 3, U.N. Doc E/CN.4/Sub.2/AC.4/2005/WP.1 (July 14, 2005).

3. SUSAN BASS, ENVTL. LAW INST., PRIOR INFORMED CONSENT AND MINING: PROMOTING THE SUSTAINABLE DEVELOPMENT OF LOCAL COMMUNITIES, 1 (2004).

4. U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Indigenous Issues: Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and*

http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6
DOI: doi:10.15779/Z38T94C

consequences of unwanted and actively opposed development that stems from violations of the FPIC right are often lost in academic discussions. Conflict brings violence in the form of killings and injuries inflicted by soldiers and corporate security firms. Villagers are subjected to forced eviction from lands they have known for generations; roads and extraction sites destroy the habitat from which peoples derived their sustenance and bring crime and corruption; previous cultural norms disintegrate and the new cash economy brings divisiveness and promotes previously unknown self-centered conduct; land and water become polluted and destroy game and fish populations that were crucial to subsistence; and traditional tribal and family authority is replaced by indifferent corporate and governmental entities. Together, these impacts are not unlike those of war. Recognition and observance of the right to consent to development is critical to the cultural survival of hundreds of millions of people.[5]

The specific right to FPIC remains tied to indigenous peoples, and its application to other populations and communities in similar development contexts is an unsettled legal issue. However, court cases have extended the right to tribes that are technically non-indigenous.[6] For example, the Inter-American Court of Human Rights assumed that the N'djuka people, a tribe descended from slaves who escaped in the 17th century in Suriname who had an all-encompassing relationship to the land and whose ownership was both communal and spiritual, should have a status akin to what it referred to as the "indigenous community of the region," though their occupation of Moiwana village commenced in the late 19th century.[7] Moreover, the World Bank Group, through the new International Finance Corporation's Performance Standards, does require the "free, prior and informed *consultation*" of communities significantly affected by projects that receive its loans or guarantees.[8] The standards are applicable to all communities regardless of whether they contain indigenous populations.[9] The inclusion of this standard by one international entity remains, however, a mere signal that expansion of the FPIC requirement

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Fundamental Freedoms of Indigenous People, Mr. Rudolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2001/57, ¶ 56, U.N. Doc. E/CN.4/2002/97 (Feb. 4, 2002).

5. There are at least 350 million indigenous people divided into some 5,000 groups around the world. INT'L WORK GROUP ON INDIGENOUS AFFAIRS, MISSION STATEMENT, http://www.iwgia.org/sw17673.asp (last visited Mar. 7, 2009).

6. *See* Moiwana Village v. Suriname, Series C No. 124, Inter-Am. Ct. H.R., Preliminary Objections, Merits, Reparations, and Costs (2005) (distinguishing "indigenous peoples" from the litigants in the case), *available at* http://www1.umn.edu/humanrts/iachr/C/124-ing.html.

7. *Id.* at ¶¶ 86(1), 86(4), 86(6), 86(11). *See also id.* at ¶¶ 5-12 (Trindade, J., separate opinion) (emphasis added).

8. *Harder to Breath at High Altitudes*, INTERNATIONAL MINING, Apr. 2008, at 71; INT'L FIN. CORP., PERFORMANCE STANDARDS ON SOCIAL AND ENVTL. SUSTAINABILITY 5, 29 (2006), http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf.

9. *Id.*

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may be underway.

The phenomenon of community referenda on development projects that implicate human rights first arose in Tambogrande, a non-indigenous agricultural community in Northwest Peru in 2002.[10] Since then, communities in Peru, Argentina, Mexico, Guatemala, and several other countries have used national and local laws to hold elections that ask voters the single question of whether a project should go forward. These elections have been held after periods of community debate between those who support a particular project and those who oppose it. In this way, informed citizens have played an active role in determining what types of development are most appropriate for a community.

Mining development in Latin America has dramatically increased in the last 15 years. The price of minerals has surged until quite recently and mining companies have had many funding opportunities from commercial banks, local bond and stock markets, and the International Finance Corporation of the World Bank.[11] Some 22% of global corporate exploration resources were devoted to Central and South America in 2004 because of the extraordinarily high potential profits.[12] An industry that once consisted of large mines operated by national governments and independent local miners using picks and shovels is now comprised of hundreds of sites managed by multinational corporations. Many of these mining operations, both proposed and in production, are situated in areas where indigenous people have depended on the natural environment—for both their livelihoods and the maintenance of their cultural traditions—for millennia. In some rural communities current mining sites have had a decidedly destructive impact on local agriculture and the water supply, both from toxic downriver pollution and the mines' need for huge supplies of often scarce water.

Conflict over mining development is common, with the local population—often assisted by local, national, and international non-government organizations (NGOs)—opposing multinational corporations and their governments. Local mining opponents have faced death threats, intimidation, false criminal charges and imprisonment, and when they have organized and opposed specific mining projects, they have been assaulted, kidnapped, and even murdered. Violence against the opponents of mining projects is endemic in two of the countries that have held community referenda: Peru and Guatemala. In Peru, a former professor and leader of the opposition to a proposed mining project in Tambogrande was shot to death in an ambush by a lone gunman just before a referendum in which citizens decisively rejected the mine.[13] Other mining

10. Stephanie Boyd, *Tambogrande Referendum has Domino Effect in Peru*, AMERICAS PROGRAM, July 16, 2002, http://americas.irc-online.org/citizen-action/focus/0207tambogrande.html.

11. *Latin America: Mining Finance Soars With Metals Prices*, OXFORD ANALYTICA, Dec. 8, 2006.

12. Taos Turner, *South America Mining Industry Sees Investment Boom*, DOW JONES NEWSWIRES, Apr. 26, 2005.

13. *See* TAMBOGRANDE: MANGOS, MURDER, MINING (First Run/Icaraus Films 2007) (documenting the revolt against the Manhattan mining project in Peru and the discrediting of the

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DOI: doi:10.15779/Z38T94C

opponents have been killed by both the National Police and security contractors and many have been injured during demonstrations.[14] In Guatemala demonstrators have also been shot to death and many have been injured and subjected to death threats.[15] The referenda discussed in this article were all—with the exception of one in Argentina—accompanied by violence.[16]

Among the factors that contribute to the violence is that each situation is a zero-sum conflict—there is one winner and one loser; the mine will either be stopped or it will be developed. In these high-stake, winner-take-all conflicts there is little room for compromise. National governments universally side with corporate developers because of their interest in the royalties and taxes generated by resource extraction projects. Though the imbalance of power between small rural communities, multinational corporations, and the higher levels of government is obvious, the growth and ease of international communications engendered by the Internet allows opponents to access a huge reservoir of information about mining, its impact on other similarly situated communities throughout the world, the practices and history of specific multinational mining corporations, and, most importantly, organizations experienced in the political strategy and tactics of resistance to unwanted development.

Community referenda offer a solution to the problem of determining consent. A full debate between the supporters and opponents of a specific project, followed by a free and fair election, offers an accurate measure of community opinion on a proposed project and a democratic solution to issues that are far more important to the lives of voters than the typical election of the next set of government officials.

Fujimori regime).

14. Press Release, Front for the Sustainable Development of the Northern Frontier of Peru, Grave Attacks Carried Out by Monterrico Metals and Minera Majaz against Campesinos in the Hormiguero, Carmen de La Frontera District, Huancababa Provience, Perú (Nov. 6, 2006), *available at* http://www.minesandcommunities.org/action/press1276.htm [hereinafter Grave Attacks]; ANTHONY BEBBINGTON ET AL., MINING AND DEVELOPMENT IN PERU – WITH SPECIAL REFERENCE TO THE RIO BLANCO PROJECT, PIURA (2007) 17-18, *available at* http://www.perusupport group.org.uk/pdfs/Mining%20and%20Development%20in%20Peru.pdf.

15. *See, e.g.*, Kelly Patterson, *Canadian Mine Strikes Lode of Unrest*, OTTAWA CITIZEN, Apr. 26, 2005, *available at* http://www.minesandcommunities.org/Action/press609.htm.

16. *See id.* In other areas of the world mining companies have long used intimidation and violence to thwart opposition. Greenpeace reported that forest communities in Papua New Guinea have been forced at gunpoint to cede lands to Malaysian logging companies. Similarly, communities in the Visakhapatnam district of India have claimed that corporations involved in bauxite and aluminum mining bribe police and use "thugs" to frighten those who object to proposed mines and relocation plans. U.N. Dev. Program, Asia-Pacific Human Development Report on Corruption and Human Development, Aug. 14, 2007, *available at* http://www2.undprcc.lk/ext/HDRU/discussion /ND/Posting_14_August_e_discussion_on_NR_Andre.pdf. In Bangladesh some 30,000 protesters attacked the offices of a UK-based coal company whose plans included a huge mine that would displace a claimed 100,000 people. Randeep Ramesh, *Six Killed in Protests Over UK Mining Firm in Bangladesh*, THE GUARDIAN, Aug. 30, 2006, http://www.guardian.co.uk/world/2006/aug/30/ bangladesh. Paramilitaries fired shots into the crowd, killing six and wounding some 300 others. *Id.*

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The right to FPIC remains under dispute in many countries and among important international organizations and thus is only rarely fully implemented.[17] This article will address the application of the FPIC principle to the exploitation of indigenous lands and resources by third parties as well as the use of community referenda as a means of measuring that consent. The first two sections will address the legal foundations of FPIC and describe the current issues involving the meaning and application of the international right. The third section will examine the use of community referenda on mining projects in Latin American nations as a means of opposing unwanted mining projects by different populations under local and national laws. The final sections will describe the use of an accountability mechanism of the International Finance Corporation in a Guatemalan mining controversy and analyze factors that will influence the future use of community referenda as a measure of FPIC. Ultimately, this article will demonstrate that the common claim by mining multinationals that a majority of the local citizens support their proposed mines, typically a part of their public relations efforts to gain legitimacy, has been negated by an election in each case.[18]

17. See the list of international organizations that have recognized the right of indigenous peoples to free, prior and informed consent in Fergus Mackay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y 43, 43 (2004).

18. The results of referenda in several states reveal that the "lowest" level of opposition to a particular mine has been 81% of voters registering their disapproval with 94% to 99% opposition being more typical. *See* Naomi Klein, *Once Strip-Mined – Twice Shy*, TORONTO GLOBE & MAIL, Oct. 1, 2003, *available at* http://www.minesandcommunities.org/article.php?a=905 (81% of voters in Esquel, Argentina voted "no"); Boyd, *supra* note 10 (98% of town's voters in Tambogrande said "no"); Milagros Salazar, *Peru – Communities say 'No' to Mining Company in Vote*, Sept. 18, 2007, INTER PRESS SERV., http://ipsnews.net/news.asp?idnews=39295 (more than 90% said "no"); Dawn Paley, *Turning Down a Gold Mine: In Guatemala, Angry Locals Vote No, but BC Firm Presses On*, TYEE, Feb. 7, 2007, http://www.thetyee.ca/News/2007/02/07/MarlinProject/ ("voters from 11 of 13 communities in Sipacapa voted unanimously against mining activities in their land"). Multinational mining corporations make claims throughout the world of having the support of a majority of citizens in areas of planned mines, such as in Panama, Ecuador, the Philippines, and Indonesia. Gail Whiteman & Katy Mamen, *Community Consultation in Mining: A Tool for Community Empowerment or for Public Relations?*, *available at* https://www.strategicnetwork.org/index.php?loc=kb&view=v&id=4945&mode=v&pagenum=3&lang=; *Ascendant's New Creative 3rd Quarter Reports*, DECOIN Defenda y Conservacion Ecologica de Intag, Nov. 16, 2007, http://www.decoin.org/2007/11/ascendants-new-creative-3rd-quarter.html; Tito Natividad Fiel, *TVI Mining doesn't enjoy overwhelming support from local community in the Philippines*, Nov. 1, 2003, http://www.minesandcommunities.org/article.php?a=1607; Catherine Coumans, *"Spare our homeland" rainforest tribes plead with B.C. mining giant*, MININGWATCH CANADA, Sept. 14, 2005, http://www.miningwatch.ca/index.php?/Placer_Dome/Spare_our_homeland_r.

http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6
DOI: doi:10.15779/Z38T94C

II.
ORIGINS OF THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

A. The Post-Colonial Right to Self-Determination

The International Court of Justice recognized the principle of consent as the basis for relations between indigenous peoples in its 1975 advisory opinion in *Western Sahara.*[19] In that celebrated case, the Court quoted General Assembly resolution 1541 (XV) on the issue of options for the people of the Western Sahara and stated that "[t]he integration should be the result of the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted" and supervised by the UN.[20] The court later quoted another General Assembly Resolution, 2229 (XXI), which "invites the administering power to determine ... the procedures for the holding of a referendum under the United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination."[21] Thus, many years before the adoption of FPIC as a principle of international law on the use of indigenous lands, the U.N. General Assembly and the International Court of Justice had set out its foundations—the free and informed choice of the people as expressed through fair elections—including the specific reference to referenda.

The FPIC principle is therefore partially derived from the right to self-determination, enshrined in Common Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which states, "All peoples have the right to self-determination. By virtue of that right all people freely determine their political status and freely pursue their economic, social and cultural development."[22] No state recognizes an unqualified right to self-determination, and many fear that the right could authorize claims of independent statehood for ethnic, minority or religious groups.[23] Such claims, however, would only be considered valid if arising from colonial or apartheid states or where a segment of the population is denied rights equal to those of the population holding political power and is not afforded "full and free participation in the life of the

19. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 32-33 (Oct. 16).

20. *Id.*

21. *Id.* at 34.

22. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

23. *See* Andrew Huff, *Indigenous Land Rights and the New Self-determination*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 295, 315-316 (2005).

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state."[24]

U.N. entities and internationally recognized scholars confirm the claim that the right to self-determination applies to peoples within existing states.[25] In commenting on the right in 1984, the Human Rights Committee stated that it imposes "specific obligations on State parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising the right of self-determination."[26] More recently the Committee on the Elimination of Racial Discrimination referred to "the rights of all peoples within a state."[27] Finally, the Committee on Economic, Social and Cultural Rights, in a report on Russia, has reiterated its concern about

> the precarious situation of indigenous communities in the State party...recalling the right to self-determination enshrined in article 1 of the Covenant, urges the State party to intensify its efforts to improve the situation of the indigenous people and to ensure that they are not deprived of their means of subsistence.[28]

However, indigenous self-determination requires much more than equal rights. More recent international instruments addressing self-determination, such as the International Labour Organization's (ILO) Convention 169 and the recently adopted Declaration on the Rights of Indigenous People, implicitly reject the assimilationist approach to national inclusion of such peoples and accord specific rights regarding the protection and propagation of a separate culture and language as well as the protection of the lands of indigenous peoples.[29]

During the negotiations that led to the Declaration of Rights of Indigenous Peoples, where states expressed reservations about the possibility that such peoples might declare autonomy or try to create an independent state, the idea of

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24. *Id.* at 315.

25. James Crawford maintains:

> Just as a matter of ordinary treaty interpretation, one cannot interpret Article 1 as limited to the colonial case. Article 1 does not say that some peoples have the right to self-determination. Nor can the term 'peoples' be limited to colonial peoples. Article 1, section 3 deals expressly and non-exclusively with colonial territories. When a text says that 'all peoples' have a right—the term 'peoples' having a general connotation—and then in another paragraph of the same article, it says that the term 'peoples' includes peoples of colonial territories, it is perfectly clear that the term is being used in its general sense.

James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* THE PEOPLES' RIGHTS 27 (P. Alston ed., 2003).

26. Office of the High Comm'r for Human Rights, *CCPR General Comment No. 12: Article 1 (Right to Self-determination): The Right to Self-determination of Peoples*, ¶ 6 (Apr. 13, 1984).

27. Office of the High Comm'r for Human Rights, Comm. on the Elimination of Racial Discrimination, *General Recommendation XXI on the right to self-determination* ¶ 5 (1996).

28. U.N. Econ & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, ¶¶ 11, 39, U.N. Doc. E/C.12/1/Add.94 (Dec. 12, 2003).

29. Declaration on the Rights of Indigenous Peoples, *supra* note 1.

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DOI: doi:10.15779/Z38T94C

"internal self-determination" was introduced. In 2001, a U.S. National Security memorandum indicated acceptance of that term in this context: "Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-State (*sic*) and are free to pursue their economic, social and cultural development."[30] However, the memorandum went on to state that the right did not include "permanent sovereignty over natural resources."[31] Even with this qualification, the United States, Canada, Australia, and New Zealand (all countries with substantial indigenous populations) opposed the declaration while 143 nations supported it.[32]

The U.S. position undermines the second paragraph of common Article 1, which states,

> 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 co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[33]

If indigenous peoples are "peoples" who have the right to self-determination within the meaning of Article 1, then its second paragraph would seem to mean that indigenous peoples must have sovereignty over their natural wealth and resources in order that they may "freely dispose" of them. However, these seemingly contradictory positions between state sovereignty and indigenous rights can be resolved through recognition of the principle of free, prior and informed consent. Where states maintain ownership of mineral and subsurface resources on or under indigenous land—which is nearly always the case—they must obtain the free, prior and informed consent of indigenous people to access the resources under indigenous lands. Then it may be said that indigenous people freely pursue their own choice of economic development as required under Article 1.

A denial of FPIC or a reduction to mere consultation denies a people the right to their lands and threatens the peoples' existence. For example, large mining operations often require huge quantities of water from a limited supply that would otherwise be used for irrigation of food crops essential to their subsistence, an absolute right that admits of no exceptions under the second paragraph of common Article 1. Additionally, discharges of toxic chemicals poison waterways used by indigenous people, which kills the fish and mammals that such people hunt to survive. Where compromise is possible, the inclusion of conditions and monitoring in FPIC negotiations for a final agreement with the national government and the multinational corporation could promote

30. Huff, *supra* note 23, at 317.

31. *Id.*

32. *United Nations General Assembly Adopts the Declaration in September 2007*, INT'L WORKING GROUP FOR INDIGENOUS AFFAIRS, Sept. 14, 2007, http://www.iwgia.org/sw248.asp.

33. ICESCR, *supra* note 22, art. 1; ICCPR, *supra* note 22, art. 1.

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responsible development of resources under limitations and permitting processes designed to minimize the disruption to local populations and resources.

B. Unlawful Incursions on Indigenous Lands

1. Land is Life

The right to property and land ownership is another foundation of FPIC. Interpreting the American Convention on Human Rights, the Inter-American Court of Human Rights condemned the failure of states to establish formal boundaries on indigenous lands and provide for the effective participation of indigenous people in development decisions.[34] In a case that involved indigenous people in Nicaragua where the government had granted concessions to third parties, the court ordered that the "delimitation, demarcation and titling of the territory belonging to the Community" be accomplished before the state or third parties act to affect "the use or enjoyment" of lands where indigenous people live and subsist.[35] The court also held that the customary law of the indigenous community must be honored and that its possession of land should lead to official recognition.[36] While Nicaraguan law recognized the communal property of indigenous people, the government had not engaged in an official titling process.[37] In a more recent case that reached the participation issue and thereby supported the right to FPIC, the Inter-American Court again found that a state—in that case, Belize—had violated important rights by failing to demarcate and title the lands of indigenous people before granting a concession to a multinational oil and gas corporation "without effective consultations with and the informed consent of the Maya people."[38] However, the Court did not explicitly mandate FPIC or describe a process that would meet its requirements.

The United Nations Human Rights Committee, established by the International Covenant on Civil and Political Rights (ICCPR), regularly adjudicates complaints of individuals and peoples against states alleged to have

34. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Series C No. 79, Inter-Am Ct. H.R., ¶ 153 (2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.doc.

35. *Id.*

36. *Id.* at ¶ 151.

37. *Id.* at ¶¶ 150-53. The court did not reach other violations of the Convention, found in an earlier examination by the Inter-American Commission on Human Rights against Nicaragua, such as allegations that it had ignored the territorial claim by the indigenous community and had granted a logging concession and thereby allegedly breached Articles 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family), 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government). *See* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, *available at* http://www.hrcr.org/docs/American_Convention/oashr.html.

38. Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No.40/04, OEA/Ser. L/V/II.122, doc. 5. rev. 1 (2005).

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DOI: doi:10.15779/Z38T94C

violated rights accorded under the ICCPR.[39] While the land rights of indigenous people are not the specific subject of Article 27, which protects a minority's right "in community with the other members of the group, to enjoy their own culture, profess and practice their own religion, or to use their own language," the Committee has ruled that the article protects economic and social rights.[40] These rights are inevitably tied to the use of community lands. Moreover, the Committee has condemned a State's authorization of the environmentally destructive actions of corporate third parties that undercut the ability of indigenous communities to carry out traditional economic and cultural activities.[41]

In her 2001 Final Report, the Special Rapporteur on indigenous land rights, Erica-Irene Daes, described the "most fundamental and widespread problem" in two parts: "the failure of States to recognize the existence of indigenous use, occupancy and ownership, and the failure of States to assure appropriate legal status, juridical capacity, and other legal rights in connection with peoples' ownership of land."[42] Daes also attributed the rapid deterioration of indigenous societies in some countries to the denial of their rights to land and resources.[43] She condemned the historic and continuing exploitation of indigenous peoples' lands:

> The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands and resources for national economic and development interests. In every part of the globe, indigenous peoples are being impeded from proceeding with their own forms of development consistent with their own values, perspectives and interests.[44]

Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development.[45]

The destructive results of unimpeded and unlawful exploitation of indigenous lands, documented by Daes seven years ago, have only increased as the price of scarce mineral, oil, and timber resources shot upward and the profits of multinational resource extraction corporations surpassed all previous records. The control of lands and resources by indigenous peoples, a right granted in numerous human rights instruments and court decisions, continues to remain

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39. The Human Rights Council replaced the U.N. Human Rights Committee in 2006.

40. ICCPR, *supra* note 22, at art. 27. *See also* Huff, *supra* note 23, at 325.

41. Huff, *supra* note 23, at 325.

42. U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Indigenous Peoples and Their Relationship to Land*, ¶ 34, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (*prepared by* Erica-Irene A. Daes).

43. *Id.* at ¶ 21.

44. *Id.* at ¶ 66.

45. *Id.* at ¶¶ 49-50.

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largely theoretical.

In 2002, the Committee on Economic, Social and Cultural Rights, the organization charged with assuring the implementation of the International Convenant on Economic, Social and Cultural Rights (ICESR), linked the unlawful exploitation of indigenous lands to the failure of a State Party to obtain consent. In Colombia's mandated periodic report, the Committee used a description that could apply to many other states: "the traditional lands of indigenous peoples have been reduced or occupied without their consent by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem."[46] The Committee established a clear line of causation between exploitation without consent, environmental destruction, and the violation of cultural and other rights.

The Committee admonished Colombia to ensure the participation of indigenous peoples in decisions that will affect their lives and urged the government to

> consult and seek the consent of indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention 169 (1989) [which mandates participation and, arguably, consent by indigenous peoples] concerning indigenous and tribal peoples in independent countries.[47]

Both passages in the Committee's comments on Colombia strongly suggest that mere consultation is insufficient and that actual consent by indigenous people to development projects is essential.

The same 2002 examination of country reports by the Committee identified serious concerns about the treatment of indigenous people and their lands by the three other Latin American countries scheduled for review. The Committee "deplore[d]" the failure of Honduras to address discrimination against indigenous peoples' lack of access to land ownership and expressed concern about the adverse effects of natural resource exploitation on the "health, living environment, and way of life" in two mining regions.[48] The Committee condemned Bolivia's marginalization and discrimination against indigenous people and noted that the country did not acknowledge the economic, social and cultural rights of the indigenous population as a distinct group.[49] The Committee also noted the "marked disparities in Panama between the majority and indigenous people in terms of poverty and access to education, employment, health, and water."[50] The land rights of indigenous peoples remained unresolved and were threatened by Panama's government-approved

46. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, *Report on the Twenty-fifth, Twenty-sixth, and Twenty-seventh Sessions*, ¶ 761, U.N. Doc. E/2002/22 (2002).

47. *Id.* at ¶ 782.

48. *Id.* at ¶ 85.

49. *Id.* at ¶ 269.

50. *Id.* at ¶ 450.

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DOI: doi:10.15779/Z38T94C

encroachments by mining and ranching interests which resulted in forced displacements of indigenous peoples from their "traditional, ancestral, and agricultural lands."[51] Several years later, the Committee stated that it was "deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities."[52] The criticism by the U.N. Committee had failed to stop, or even slow, development that clearly violated international law.

Such U.N. reviews, court decisions and scholarly studies have convincingly established that the rights of indigenous peoples to their land are rarely recognized. The failure of States to seek indigenous people's consent before authorizing damaging incursions on lands essential to the well-being of those populations is routine. A pattern of blatant discrimination is the singular feature of States' relationships to their indigenous peoples despite the declarations and mandates of a wide variety of sources of international law. Exploitation without consent represents the greatest threat to the ability of these minority populations to protect their cultural traditions, social structures, means of livelihood, and way of life from myriad forms of destruction. The key protective measures, mandated by both international and national law, are formal recognition of indigenous lands and the extension of the right to withhold consent to incursions by governments and corporate entities seeking to access surface and sub-surface resources.

The U.N. Committee on the Elimination of Racial Discrimination, which is responsible for assuring progress in the implementation of the Convention on the Elimination of All Forms of Racial Discrimination, has recognized that the welfare, lands, resources, and very identity of indigenous peoples is threatened by discrimination.[53] More specifically, the Committee has called upon States to recognize the rights of indigenous people to control and use their communal lands and resources. Lands and resources taken without "free and informed consent" must be returned. If this is not possible, there must be fair compensation paid and, insofar as possible, in the form of other lands and territories.[54] The Committee thus recognized that for indigenous people, land is much more valuable than any financial compensation and mandated a scheme under which past wrongs—that is, exploitation of land and resources without consent—can be addressed.

Mary Robinson, the former U.N. High Commissioner for Human Rights, recognized the importance of land to the survival of all aspects of the lives of indigenous people when she told the World Bank, "Land and culture,

51. *Id.* at ¶ 121.

52. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, ¶ 12, U.N. Doc. E/C.12/1/Add.100 (2004).

53. Comm. on the Elimination of Racial Discrimination, *General Recommendation No.13*, ¶ 3, U.N. GAOR, 52d Sess., Supp. No. 18, U.N. Doc. A/52/18/Annex V (1997).

54. *Id.* at ¶ 5.

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development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all."[55] It is this precious connection with the land, universally understood by all who grow crops by hand and hunt and gather food in order to survive, that escapes the comprehension and recognition of modern "developers" and state institutions. The right to control the development of their lands and resources, as well as the right to choose or reject corporate activities on their land, are the fundamental prerequisites to indigenous peoples' survival as independent peoples with intact cultures and societies.

2. Government Expropriation of Land in the "National Interest"

Because most resource extraction and dam projects involve some level of expropriation, whether by exercising trespass rights on land owned by others to exploit sub-surface resources or actually taking property from the traditional or legal owners, it is important to understand the limits of that government power under human rights law. When a government does not observe the FPIC requirement grounded in international law, there remain other legal grounds for communities to resist unwanted forms of development.

The decisions by national governments to support natural resources exploitation in a particular locale are often justified by arguments based on the "national interest" or the "greater good," which are based on the government's perception of the interests of the majority. This almost always means that the rights and interests of indigenous peoples and others are subordinated to that majority interest. Strong evidence cited in this article demonstrates that when conflict over resource extraction projects arises, the rights of indigenous peoples are often violated and disregarded.[56]

Every government claims permanent sovereignty over its natural resources, including the right of taking or expropriation of subsurface resources like minerals, even when the rights of surface landowners are respected. But the recognized sovereign right of the State to manage natural resources in a manner that is detrimental to local residents, such as surface landowners, is circumscribed by national laws and human rights obligations under international law such as FPIC, the rights to be free of racial discrimination and to culture, self-determination, property, a healthy environment and others.[57]

International human rights law imposes significant constraints on state sovereignty and includes the obligation to respect and support indigenous peoples' right to self-determination under Common Article 1 of the two basic human rights conventions. It is frequently assumed by states that eminent domain conflicts with FPIC and that the right is therefore subordinate.

55. Mary Robinson, U.N. High Comm'r for Human Rights, Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance, Lecture at the World Bank (Dec. 3, 2001).

56. See, e.g., Part B, Unlawful Incursions on Indigenous Lands.

57. MacKay, *Indigenous Peoples' Right*, *supra* note 17, at 53.

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DOI: doi:10.15779/Z38T94C

However, as Fergus Mackay of the British Forest Peoples Programme and a long-time analyst of FPIC has pointed out, "eminent domain is subject to human rights law in the same way as any other prerogative of state and, therefore, should not be granted any special status or exemption, in this case, to justify denial of the right to FPIC."[58]

Any proposed use of indigenous lands must also be in the public interest, just compensation must be paid, and both those requirements must be subject to review, usually by a judicial process.[59] The public interest requirement is recognized in customary international law and specifically in the language of Paragraph Four of the 1962 U.N. General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources: "[n]ationalization, expropriation or requisitioning *shall be based* on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign."[60] International human rights bodies and national or state courts generally require "public interest" activities to have a legitimate goal and ensure that in any expropriation of property that there is a "reasonable relationship of proportionality" between that interest and the impacted rights.[61]

Recent legal scholarship holds that "proportionality" determinations turn on an examination of three factors: suitability, necessity, and absence of disproportionate impact. While the "suitability" requirement may be easily met where there are demonstrably large and potentially profitable quantities of a given resource, "necessity" requires that the project be "indispensable" to achieving the goal that is, presumably in this context, the development of resources to expand the economy and generate tax revenues.[62] Where there are known heavy deposits in areas that are less populated or locations where the environmental impact can be more easily mitigated, the necessity standard may be easier for a permit-seeking corporation or the relevant governmental entity to establish. Conversely, resource extraction projects in heavily populated areas where local subsistence would be threatened would be more difficult to justify under the proportionality standard discussed below. While few single projects could be described as "indispensable," it is certainly the case that governments must work to expand their nation's economies and generate tax revenue.

The evaluation of the disproportionate impact standard in U.S. courts and the European Court of Human Rights has dealt with expropriations of lands

58. *Id.*

59. Anne Perrault, Kirk Herbertson & Owen J. Lynch, *Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 497 (2007).

60. G.A. Res. 1803, ¶ 4, U.N. GAOR, 17th Sess., Supp. No.17 at 15, U.N. Doc. A/5217 (1962). *See also* Perrault, *supra* note 59, at 498.

61. Perrault, *supra* note 59, at 489.

62. *Id.* at 501.

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belonging to individuals.[63] However, the expropriation power of the State and its argued "public interest" in resource exploitation, when balanced against the preservation of indigenous lands and culture and other "public interest" values such as cultural diversity, subsistence agriculture, biodiversity, or tourism, faces an even greater barrier. The final article of the recent Declaration of the Rights of Indigenous Peoples, Article 46, states that the exercise of the enumerated rights is subject only to limitations imposed by law and to the government's human rights obligations—presumably those found in both national and international law.[64] Most important, any limitation on those rights shall be both "non-discriminatory" and "strictly necessary" to recognize the rights and freedoms of others and for "meeting the just and most compelling requirements of a democratic society."[65] It seems, therefore, that the rights of indigenous people can only be restricted when they clash with those of others in a democratic society and then only for the most just and compelling reasons. Expropriation of indigenous lands without consent, if considered "unjust" because it would violate the FPIC principle, could not proceed under a fair reading of the Article. In theory, the right of other citizens to the tax revenue and other general economic benefits from the resources of indigenous people—the only right that could conceivably be implicated in a particular resource extraction project—surely is not "strictly necessary" or "non-discriminatory," let alone "just" or a "most compelling requirement of a democratic society" because there are almost always other alternatives or other resource locations. Unwanted development cannot then, under the Declaration, be imposed on unwilling indigenous people.

III.
THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

A. Convention 169 of the International Labour Organization

The FPIC principle was first established in binding international treaty law in the International Labour Organization's (ILO) Convention 169, adopted in 1989, which includes a compliance mechanism that requires a national government both to respond to complaints and to enforce ILO decisions.[66] The ILO is a respected international body that requires its Member States, including most countries in Latin America, to meet strict and detailed labor standards. The Organization's complaint and enforcement mechanism is not designed for indigenous peoples (in fact, the formal complainant must be a union or an

63. *Id.* at 502-05.

64. Declaration of the Rights of Indigenous Peoples, *supra* note 1, at art. 46.

65. *Id.*

66. Int'l Labour Org. [ILO], *Indigenous and Tribal Peoples Convention*, ILO Convention No. 169 (June 27, 1989).

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DOI: doi:10.15779/Z38T94C

employer)[67] but, however slow, it offers the hope that an opinion by its Committee of Experts on an indigenous matter can embarrass a government sufficiently to assure at least a superficial effort at compliance.

Convention 169 sets out several mandates involving consultation and participation that fall far short of "free and informed consent," which is the explicit standard only in cases of forced relocation under Article 16. Article 6 sets out the general requirement that any consultations with indigenous people regarding the subjects of the Convention shall be conducted in good faith "with the objective of achieving agreement or consent to the proposed measures."[68] Unfortunately, the outcome of a failure to obtain the agreement or consent of the affected indigenous people is not described or even suggested in that or the other articles of the Convention.

The right most relevant to FPIC and community referenda is found in the strong language of Article 7(1): "The people concerned shall have 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."[69] However, the empowering initial clauses of Article 7(1) cannot be fulfilled where indigenous people can only control development that has a direct impact on them "to the extent possible"— a loophole that renders the previously stated right almost meaningless. It is through such qualifications that the rich resources in timber, minerals, and oil and gas claimed by indigenous people have rendered their lands subject to damaging and sometimes catastrophic incursions throughout the world.

The lands of indigenous peoples is the subject of Article 15, which first states that their rights to natural resources on their lands shall be "specially safeguarded" and that they have a right to participate in decisions regarding those resources.[70] In a passage that specifically addresses mining, the second part of the article describes the role of the state:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall whenever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.[71]

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67. Constitution of the Int'l Labour Org, art. 24, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35.

68. ILO, *supra* note 66, at art. 6, § 2.

69. *Id.* at art. 7, § 1.

70. *Id.* at art. 15.

71. *Id.*

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The prescription for formal consultative procedures to be established by governments has not been implemented by Latin American countries. Most consultation continues to take the form of one-sided information sessions conducted by the multinational corporations proposing a particular project with no input from the audience.[72] While Article 15 does not specifically contemplate a process of seeking consent to use indigenous lands, Article 6's mandate that consultations conducted in good faith with the goal of achieving "agreement" would certainly apply where the subject was the use of indigenous lands. But so long as mere "consultation" and "participation" remain the objective, the right to FPIC is denied.

The consultative procedures mandated by Convention 169 could include community referenda where, as will be discussed later, voter turnouts are extraordinarily high and the election results are universally and emphatically negative toward proposed mining projects. Unfortunately, the signatory governments expected to follow Article 15's mandate of consultation have a decided interest in choosing to ignore it. After all, real consultation might well lead to an informed and involved population more likely to be politically organized and attempt to create barriers to the proposed project. So long as indigenous peoples remain politically powerless, governments will continue to dismiss their obligations to them. Most governments have a distinct conflict of interest, where their interest in royalties and other revenues gained from mining production that stems from a national policy that promotes traditional forms of development clashes with their responsibility to all their people.[73] The well-intentioned mandates of the ILO's Convention 169 are often sacrificed to the powerful economic forces that guide national resource policies.

B. FPIC in Regional and International Bodies

Over the last 15 years, the right to FPIC has found increasing support, beyond that already described in Convention entities, in both regional and international bodies. In Latin America, the Inter-American Commission on Human Rights has repeatedly considered the FPIC principle. In its jurisprudence the Commission has stated that Inter-American human rights law mandates "special measures to ensure recognition of the particular and collective interest that indigenous people 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..."[74] In 2003, the Commission specifically addressed

72. *See, e.g.*, Whiteman & Mamen, *supra* note 18.

73. One commentator condemns Article 15 for legitimating state ownership of indigenous resources, a concept rooted in archaic, exploitative international law doctrines that rendered conquered or discovered lands part of the colonizing state, and assumed ultimate state authority over the lands of indigenous people. Huff, *supra* note 23, at 305.

74. Dann v. U.S., Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Serv.L/V/II.117, doc. 5 rev. ¶ 131 (2002); Fergus MacKay, FPIC in International and Domestic Law, Presentation at

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DOI: doi:10.15779/Z38T94C

resource exploitation by concluding that FPIC is applicable to "decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories."[75]

There is no question that the U.N. human rights bodies support FPIC and a meaningful definition of "consent." The U.N. Centre for Transnational Corporations concluded, in the final report of a series that examined the conduct of multinational corporations in indigenous lands, that companies' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision-making" and that this participation depended on "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development..."[76] More recently, the *Norms on Transnational Corporations*, developed by the U.N. Sub-Commission on the Promotion and Protection of Human Rights emphasized FPIC:

> Transnational corporations and other business enterprises shall respect the rights on local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards... They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects.[77]

Unfortunately, neither U.N. document explicitly designates FPIC as an essential process required by international law.[78]

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the World Bank 4 (June 14, 2004), http://www.bicusa.org/Legacy/FPIC_briefing_documents.pdf (last visited Mar. 18, 2009).

75. Maya Indigenous Cmtys. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 142; MacKay, *supra* note 74, at 4.

76. U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. Of Minorities, *Transnational Investments and Operations on the Lands of Indigenous Peoples*, ¶ 20, U.N. Doc. E/CN.4/Sub.2/1994/40(June 15, 1994); MacKay, *supra* note 74, at 4.

77. U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Commentary on the Norms on the Responsibilities on Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 10(c), U.N. Doc. E/CN.4/Sub.2/2003/38 /Rev.2 (Aug. 26, 2003).

78. In contrast, the European Community's Council of Ministers adopted a Resolution in 1998 entitled, Indigenous Peoples within the framework of the development cooperation of the Community and the Member States. The Resolution provides that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas." Council Resolution No. 13461/98, Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States, ¶ 5, (Nov. 30, 1998), *available at* http://ec.europa.eu/external_relations/human_rights/ip/res98.pdf. This statement was reaffirmed in 2002 by the European Commission when it stated that the E.U. interpreted this language to be the equivalent of FPIC. *See* TOM GIFFITHS, A FAILURE OF ACCOUNTABILITY: INDIGENOUS PEOPLES, HUMAN RIGHTS, AND DEVELOPMENT AGENCY STANDARDS 28, 29 (2003), http://www.forestpeoples.org/documents/law_hr/ip_devt_stds_failure _accountability_dec03_eng.pd.

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C. Free, Prior and Informed Consent: An Unrealized Mandate

Though the principle of FPIC is embedded in the legal framework of international human rights law, it lacks a common, internationally accepted definition.[79] Participation and consultation are key (albeit vague) concepts and are universally recognized, but the implementation of the FPIC principle has been inconsistent and has, in the eyes of many indigenous groups, generally failed to provide for adequate protection of their interests. Nonetheless, many statements by international institutions such as the United Nations, the Organization of American States, and the World Bank Group make mention of the legal principle of FPIC, and many countries have incorporated the principle into their domestic laws. Some scholars claim that the support for the concept of free, prior and informed consent of "indigenous peoples and other local communities suggests that [F]PIC is not only central to enforce key rights, but is also emerging as a norm of customary international law."[80] The use of community referenda to engender open debate on the advantages and disadvantages of a resource extraction or dam project and to obtain the most accurate measure of public opinion would fulfill the central goal of FPIC.[81]

FPIC has been generally described as a "consultative process whereby potentially affected communities engage in an open and informed dialogue with outsiders interested in using areas occupied or traditionally used by the communities at issue."[82] The same authors who offer this definition describe "consent" as kind of authority that representatives of an affected community can withhold at certain decision-making points in a project cycle, and whose

79. In 2004 the United Nations Permanent Forum on Indigenous Issues sent questionnaires to eight UN agencies to gather information on "how the principle of [FPIC] is understood and applied by United Nations programmes, funds agencies." U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report on Free, Prior and Informed Consent*, para. 3, U.N. Doc. E/C.19/2004/11(Mar. 12, 2004). The agencies responded that they did not have an official, working definition of FPIC but they recognized it as part of the human rights structure and maintained that, while not without challenges, they "implemented [FPIC] on an ad hoc basis in line with the general guidelines, legal instruments and principles through which they work" *Id.* at ¶ 7. It may thus be concluded that the agencies, unless they encounter difficulties, will frequently apply a principle they cannot define. This less than reassuring response illustrates the politics involved in protecting the rights of people who rarely have a voice and attempting to implement a right that most states and multinational corporations will either oppose or undermine at every opportunity in order to further their interests in revenues and profit.

80. Perrault, *supra* note 59, at 479-80.

81. CooperAccion, a consortium of NGOs in Peru, has observed that many affected communities are completely excluded from mining-related decision-making. See CooperAccion's website at http://www.cooperaccion.org.pe/cpli/en/index.php (last visited Mar. 18, 2009). The organization cited the 2002 Tambogrande experience and its referendum as "emblematic" of more recent efforts by communities to have a say in their futures. Letter from CooperAccion to World Bank Management (July 19, 2004), http://www.minesandcommunities.org/article.php?a=1876 (last visited Mar. 18, 2009). The success of the Tambogrande referendum in defeating mining development could be replicated through the adoption of transparent, formal and consistent mechanisms for seeking the consent of affected communities.

82. Perrault, *supra* note 59, at 477.

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DOI: doi:10.15779/Z38T94C

legitimacy the project's proponents must accept.[83] The specific characteristics of the principle can be partly explained by an analysis of the adjectives modifying "consent"—"free," "prior," and "informed."

That consent must be "free" means that community decision-making and information-gathering must not be tainted by "coercion, threat, manipulation, or unequal bargaining power."[84] However, these obvious and ubiquitous manifestations of the inevitable and dramatic difference in political power between States and multinational corporations on the one hand and potentially affected communities on the other have been present in each of the cases in which affected communities proposed or held referenda. As Mackay points out, "case studies show that consent is frequently engineered and indigenous institutions are out-maneuvered by competing interests seeking access to indigenous peoples' common resources."[85] But even where corruption has compromised local leadership or brought about its replacement, mobilized communities have forced officials to take action. In an urban and non-indigenous setting, citizens opposed to mining in Esquel, Argentina refused to leave an assembly meeting until officials voted to hold a community referendum.[86] In many instances, especially in communities that have held referenda, the mobilization of the community and the well-organized campaigns of local, national, and international NGOs proved effective at countering the inequality in initial political power between multinational corporations and citizens who opposed their plans. Community referenda offer an effective means to assure that community decision-making is free and fair.

The term "prior" means that consent must be pursued "sufficiently in advance" of any decisions made by the relevant governments and before the proposed activity commences.[87] In practice, the FPIC, or any "consultation" process, rarely begins before government decisions are taken, especially in mining operations, because mineral exploration, has usually generated positive results and governments have issued permits before they or the mining corporations even consider any consultation with local people. When government or mining officials do undertake any consultations with the local population after successful exploration they do not enter such discussions open to the prospect that local interests might override their plans. Such officials thus have an interest in delaying consultations as long as possible in order to organize any local allies, prepare the public relations campaign that now accompanies any

83. *Id.* at 522.

84. *Id.* at 521.

85. MARCUS COLCHESTER & FERGUS MACKAY, IN SEARCH OF MIDDLE GROUND: INDIGENOUS PEOPLES, COLLECTIVE REPRESENTATION, AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT 1 (2004), http://www.forestpeoples.org/documents/law_hr/fpic_ips_aug04_eng.pdf.

86. Bonnie Tucker, *Call for Cyanide Ban in Patagonia*, BUENOS AIRES HERALD, Feb. 9, 2003, http://www.minesandcommunities.org/article.php?a=903.

87. Perrault, *supra* note 59, at 521-22.

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presentation to potentially affected communities, and, most of all, to defer as long as possible the potential formation of organized opposition to the planned exploitation.

"Informed" consent implies that government and project operators must provide full and accurate disclosure, in the local language, of the anticipated risks and benefits of a proposed development in a form that is accessible and understandable to the affected population.[88] Again, it is unlikely that a State or corporation with a strong interest in the revenues and profits that will flow from a particular development will make full disclosure regarding risks. Sharing accurate and comprehensive information with potentially affected communities is simply against their interests. However, because of the dramatic increase in the availability of specific and relevant information from the Internet and the growth of national and international organizations devoted to researching the impacts of various types of development projects, there is now a greater likelihood that local communities will have access to a broad range of information regarding the risks of a particular kind of project, such as gold mining using the cyanide leach process.[89]

D. Confusion over "Consent"

The major focus of disputes over the meaning of FPIC is the definition of "consent." The dictionary definition, "capable, deliberate, and voluntary agreement or concurrence in some act or purpose...," also includes several synonyms—agreement, assent, and approval.[90] The original treaty source of FPIC, Convention 169 of the ILO, does not state that FPIC gives communities absolute veto power over a proposed project.[91] The ILO's manual on Convention 169 specifically concedes this point, but then further confuses the issue. The handbook's section on consultation states: "The objective of such consultation is to reach agreement (consensus) or full and informed consent."[92] However, the difference between "agreement" and "full consent," if there is any, is not explained. What can "full" consent mean other than complete agreement? Further, how can a process be considered fair if the "objective" is to "reach agreement or full and informed consent?" Has the process failed if the indigenous people refuse to reach agreement or provide consent? The ILO handbook and much of the institutional literature about FPIC seems to

88. *Id.* at 522.

89. The ultimate source for information helpful to anti-mining organizations is www.minesandcommunities.org, which collects articles from many sources on mining throughout the world. Other sources, such as www.nodirtygold.org, focus on particular types of mines.

90. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Merriam-Webster, 1993).

91. *See* ILO, *supra* note 66.

92. INT'L LABOUR ORG., ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL 16 (2003), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/instructionalmaterial/wcms_088485.pdf.

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presuppose an outcome favorable to project proponents.

The ILO handbook's approach to "consent" becomes even more ambiguous with the subsequent statement that "[t]he Convention specifies that no measures should be taken against the wishes of indigenous and tribal peoples, but this does not mean that if they do not agree nothing will be done."[93] The last, and apparently qualifying, clause of the statement that begins unambiguously with "no measures should be taken" implies that measures can or will be taken against the wishes of indigenous people if they do not agree. Such contradictory language in a document designed to be a helpful guide to FPIC for potential complainants can only engender continued confusion about the real meaning of "consent."

The Declaration on the Rights of Indigenous Peoples, adopted in September, 2007, represents a significant, but certainly not conclusive, step in the full recognition of the right to FPIC and the real meaning of "consent."[94] Six articles in the Declaration make explicit reference to FPIC, though only two—Article 10 on forced relocation (like Article 16.2 of the ILO's Convention 169) and Article 29 on the storage of hazardous materials—clearly prohibit any government action without the consent of the affected indigenous community.[95] Other articles, such as Article 32, require governments to obtain their "free and informed consent" before approval of "any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[96] While this might seem to conclusively establish a right to FPIC in this critical context there is no mention of the consequences of withholding consent. As in other contexts, the language in Article 32 on development on indigenous lands is weaker than that in Articles 10 and 29 but, most important, it does not clearly set out the right to prevent an activity by withholding consent.[97]

As has been seen, U.N. bodies have repeatedly supported the FPIC principle and have recognized its necessity in the context of resource extraction projects. In another example, the U.N. Committee on Economic, Social and Cultural Rights observed "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the

93. *Id.*

94. Declaration on the Rights of Indigenous Peoples, *supra* note 1.

95. Declaration on the Rights of Indigenous Peoples, *supra* note 1, at arts. 10, 29. *See also* ILO, *supra* note 66, at art. 16, § 2. Article 11 addresses the removal of cultural or religious property, Article 28 entitles indigenous people to avenues of redress when lands or resources have been used or taken without FPIC, and Article 30 bans military activities, except in emergencies, on indigenous lands without a free agreement. Declaration on the Rights of Indigenous Peoples, *supra* note 1, at arts. 11, 28, 30.

96. Declaration on the Rights of Indigenous Peoples, *supra* note 1, at art. 32.

97. *Id.* at arts. 10, 29, 32. *See also* Perrault, *supra* note 59, at 491-92.

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equilibrium of the ecosystem."[98] The Committee recommended that governments "ensure that indigenous peoples participate in decisions affecting their lives... and seek the consent of the indigenous peoples concerned..."[99] There can be little doubt that the U.N. convention body intended to give the common or dictionary meaning to "consent" given the context of its repeated remarks on the concept. Surely its carefully considered concluding observations would employ the word "consultation" if the committee intended to restrict its mandate to such limited and ultimately disempowering efforts.[100]

IV.
THE WORLD BANK GROUP AND FPIC

A. "Consent" and its Corruption

The World Bank Group's (WBG) has addressed "consent" via its treatment of the concepts of "consultation" and "participation" by the local inhabitants of an area affected by a project supported by WBG loans or guarantees.[101] In the

98. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, ¶ 12, U.N. Doc. E/C.12/1/Add.74 (Dec. 6, 2001).

99. *Id.* at ¶ 33.

100. Beyond the support for FPIC found in numerous sources of international law, some States have adopted the principle in their national laws and jurisprudence. The Philippines Indigenous Peoples Rights Act of 1997 recognizes the right to FPIC for any incursion on indigenous lands and specifically includes exploration and development of natural resources. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for Other Purposes, Rep. Act. 8371, § 7 (1997), S. No. 1728, H. No. 9125 (Phil.), *available at* http://www.sipo.gov.cn/sipo/ztxx/yczyhctzsbh/zlk/gglf/200509/P020060403599030158748.pdf. The Act states that FPIC "shall mean the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference [and] coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community." *Id* at § 3(g).

The Canadian Supreme Court has created a proportionality test whereby the duty of the state to consult hinges on the anticipated impact of the intrusion on indigenous lands. Where the effect is minor there is a duty to consult, but full consent is required for serious impacts. Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010. Like the Canadian Court, South Africa recognizes collective indigenous ownership of the subsoil, under both indigenous law and continuous occupancy, so there are no strictly legal issues regarding government issuance of permits or FPIC. *Alexkor Ltd. and the Republic of South Africa v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at ¶ 62 (S. Afr.).

101. The World Bank Group has, as its central purpose, the role of investing in projects that will reduce poverty through sustainable development. The powerful international influence of the WBG, aside from its loan support for specific projects, makes its policies, practices, standards and recommendations a subject of discussion and analysis on every continent. Civil society organizations throughout the world have been critical of its practices, especially of loans that promote industries whose byproducts often include social disruption and displacement, violence,

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DOI: doi:10.15779/Z38T94C

early 1990s, the WBG's Legal Department interpreted "meaningful," as in "meaningful consultation" and "meaningful stakeholder participation," to mean that communities had the right to veto a proposed project.[102] As one commentator has put it, "Consultation and participation ring hollow if the potentially affected communities cannot say anything except 'yes.'"[103] Indigenous groups would have no bargaining power if the opposite side did not know that they could withhold consent on any issue or at any point in the process of negotiation or consultation. Absent the ability to walk away from the bargaining table, indigenous groups would simply be participating in a meaningless exchange of views designed to fulfill a legal requirement. There is no such thing as partial consent in this context. The proposed project may well be subject to negotiated conditions and modifications but, ultimately, it will either go forward or it will be stopped. However, the WBG continues to refuse to recognize consent as the critical factor in the relationship of communities to national governments and multinational corporations.

B. Dissent in the Ranks: The Extractive Industries Review Points a Finger

In 2001, the WBG responded to concerns about its loan practices by ordering an Extractive Industries Review, a comprehensive effort to examine and analyze the local and national impacts of oil, gas, and mining projects.[104] The Review is important in that it represents the only effort by an international entity to conduct a full analysis of these industries and the outcomes of their conduct. In order to address civil participation by populations affected by such industries, the Review considered processes to obtain FPIC from affected populations, for access to meaningful and timely information, and for access to trusted grievance mechanisms for local communities.[105]

The Review found that ignoring the claims of local inhabitants to participate in decisions regarding extractive industry projects often led to ongoing conflict that was "detrimental to all stakeholder interests."[106] Then-current World Bank policies, as well as those of its sister agencies, the International Finance Corporation and the Multilateral Investment Guarantee

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long-term environmental damage, destruction of indigenous cultures, and the ruination of agricultural resources.

102. *See* Robert Goodland, *Current widespread and systematic use of force in economic development must be switched to Prior Informed Consent in order to attain Integrity* 7, Global Ecological Integrity Group Conference: Global Ecological Governance for Eco-Justice and Public Health, Montreal, July 12, 2004 (on file with author).

103. *Id.*

104. *See* Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review* 18-24 (Dec. 2003) [hereinafter EIR, *Striking a Better Balance*], *available at* http://www.milieudefensie.nl/globalisering/publicaties/rapporten/EIR_report_dec_2003.pdf.

105. *See generally id.*

106. *Id.* at 18.

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Agency, had no requirements relating to shared control over development decisions. In short, the World Bank entities took no responsibility for ensuring adherence to international or national law with respect to the human rights of the often unfortunate neighbors of such projects. The Review found that one of the weakest areas of "safeguard consistency" for the projects that were reviewed was consultation with the public and the disclosure of information regarding environmental and social impacts.[107]

The Review noted the results of exploitation without participation: in many communities where land ownership issues were unsettled, government grants of legal rights to extractive industry companies led to wholesale evictions, the destruction of cultures, and the loss of access to sources of livelihood.[108] The Review cataloged the many reports it received regarding the impacts of funded projects that included the destruction of sacred sites, increased corruption and crime, the loss of access to resources needed for both cash income and subsistence, including fish, forest animals and clean water.[109]

The Review cited several of the most important elements of international law governing indigenous rights, including the ILO's Convention 169.[110] The Review's authors referenced the Convention on the Elimination of Racial Discrimination and noted that its U.N. Committee had emphasized equal rights for indigenous peoples by calling on States Parties to ensure that "no decisions directly relating to their rights and interests are taken without their informed consent."[111] More specifically, as noted by the Review, the same Committee later reiterates the right to participation in "decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee,[112] which stresses the importance of ensuring the 'informed consent' of indigenous peoples."[113]

The Review also referred to the 2002 statement of the Inter-American Commission on Human Rights that "general international legal principles applicable in the context of indigenous human rights" include the right to "recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent

107. *Id.*

108. *Id.*

109. *Id.* at 18-19.

110. *Id.* at 19.

111. EIR, *Striking a Better Balance*, *supra* note 104, at 19. *See also* Committee on the Elimination of Racial Discrimination [CERD], *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc. CERD/C/51/Misc.13/Rev.4 (Aug. 18, 1997).

112. EIR, *Striking a Better Balance*, *supra* note 104, at 19. *See also* Committee on the Elimination of Racial Discrimination [CERD], *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc. CERD/C/51/Misc.13/Rev.4 (Aug. 18, 1997).

113. EIR, *Striking a Better Balance*, *supra* note 104, at 19. *See also* CERD, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, ¶ 9, U.N. Doc. CERD/C/56/Misc.42/rev.3 (Mar. 24, 2000).

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DOI: doi:10.15779/Z38T94C

between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property."[114] This interpretation strongly suggests that indigenous peoples, as titled owners of their lands, not only have the right to FPIC but also must be informed of the specific value of the land's resources before any grant of consent to its use. Corporations proposing use of their lands must inform such peoples of the projected financial benefits of an extraction project to the developer, national and local governments, and groups representing the indigenous owners of surface or sub-surface rights.

The Review also recalled that in 2003 the U.N. Permanent Forum on Indigenous Issues had requested that the WBG "address issues currently outstanding, including ...recognition of the right of free, prior informed consent (*sic*) of indigenous peoples regarding development projects that affect them."[115] Its authors thus recognized that the WBG had not yet recognized the FPIC principle or incorporated it into its loan evaluation policy or procedures.

The examples of international law cited by the Review would theoretically support the proposition that community referenda that accurately measure the position of local indigenous people on resource extraction projects that impact their land and livelihoods should be regarded by governments as legally binding. Those projects rejected by the people should be immediately terminated because the voting results represent an absolutely clear refusal of consent. However, as noted in the Review, "[s]ome governments embrace the issue of free, prior and informed consent (FPIC). Others are more hesitant to make the commitment."[116] Left unsaid in the Review is the fact that nearly all Latin American countries have chosen to willingly bind themselves to adherence to all of the above legal requirements by becoming signatories to these international treaties and by their membership in the ILO. In sum, those nations have already made the "commitment" and their many failures to even acknowledge their responsibilities under those treaties in managing resource extraction projects suggests willfully unlawful conduct.

Several oil trade associations, including the International Petroleum Industry Environmental Conservation Association and the International Association of Oil and Gas Producers, are credited in the Review for having acknowledged the importance of community support and identifying it as "critical to success," stating that "it is important for communities to be able to give free and informed consent."[117] It is difficult to imagine a more effective demonstration of community support than a strongly favorable referendum result, but the research conducted for this article has not indicated any occasion where a mining or other resource corporation did not condemn the effort to

114. *See* EIR, *Striking a Better Balance, supra* note 104, at 19.

115. *Id.*

116. *Id.*

117. *Id.* at 20.

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organize a referendum or to attack the result.

The Review does conclude that both indigenous peoples and other affected populations have the right to participate in decision-making and that they have a right to FPIC at all stages of a given project.[118] The report cites no example of any project that complied with this requirement. The Review states that such consent should be the "principal determinant of whether there is a social license to operate" and refers to the U.N. Permanent Forum on Indigenous Issues as an appropriate forum to make "FPIC a clearer and more effective tool."[119]

The Review addresses the need for access to timely and meaningful information in order to participate effectively in decisions regarding development projects and acknowledges that documents are often in a foreign language, affected communities are not informed of their rights, and that "people who oppose the project are often ignored, threatened or harassed."[120] They are also kidnapped, raped, murdered, and arrested, charged with crimes that they did not commit, and imprisoned.[121] The report fails to note that what communication is attempted by resource extraction corporations is often inaccurate and one-sided information delivered as propaganda designed solely to attempt to secure the support of local people.[122] The failure of any mining project to gain the support of voters in every community referenda conducted to date throughout the world could well be due partly to the perception of perfidy on the part on the corporate sponsors.

According to the Review, WBG staff members do not adequately monitor the process of consultation. The Review's investigators found communities in Bolivia and Turkey that were unaware of both the involvement of the IFC in projects and also of the available complaint mechanisms.[123] Bolivians near a mine site had not received information about environmental impacts and royalties paid to national and local governments.[124] The Review concluded that without transparency, "community members distrust the company and the

118. *Id.* at 21.

119. *Id.* According to a business publication, Business News Americas, the process of obtaining a "social license" is "gaining the approval of local communities and reducing environmental impact to a minimum." Executive Summary, *Social license and energy mega projects: democratic development*, BUS. NEWS AMERICAS (February 2008), *available at* http://www.bnamericas.com/store/products.jsp?sku=71110472687&idioma=I&sector=10&periodo=2008. This somewhat simplistic definition does convey the sense that community consent is essential to the implementation of a development plan.

120. *Id.*

121. *See* TAMBOGRANDE, *supra* note 13; Grave Attacks, *supra* note 14; BEBBINGTON ET AL., *supra* note 14, at 17-18.

122. The most common anti-mining sign in Ayabaca, Peru in the days before the September 16, 2007 referendum was "No Me Mientas" ("Don't Lie to Me"). Author's Observations, Ayabaca, Peru (Sept. 16-17, 2007).

123. EIR, *Striking a Better Balance*, *supra* note 104, at 22.

124. *Id.*

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government."[125] Left unanswered is the question of whether the community would trust either entity if it were told the complete and unadulterated truth about the impact of a proposed mine and whether it would ever have "granted" a social license for the project to proceed in that unlikely event.[126]

The Review suggests greater transparency to "encourage trust and participation in the whole project cycle of an EI [extractive industry] project" and states that this could have "very positive outcomes, especially for poverty alleviation."[127] The Review cites no example involving a multinational corporation operating in a foreign country that might serve as an example of a successful and authentic FPIC process. The Review is highly critical of the WBG throughout the report for failing to assure that its poverty alleviation mandate is sufficiently emphasized, and examples of EI projects where there has been significant local poverty alleviation are absent from the report.

Finally, the Review discussed the need for access to trusted grievance mechanisms and points to an Oxfam mining ombudsman project as demonstrating that indigenous people and others affected by mining operations are frequently denied their human rights, especially their rights to FPIC, self-determination, and to their "land and livelihoods."[128] The Review discloses that "many EI companies favor the transfer of the Compliance Advisor Ombudsman (CAO, the IFC compliance mechanism) to local institutions and people" to "build trust and confidence in each other's objectives."[129] This unsurprising suggestion would deprive local people of an international complaint mechanism, the CAO, with no assurance that a local process would be effective. Such a transfer would allow multinational corporations to manipulate local proxies while remaining outside of the process, create opportunities for the corruption of local official decision-makers, and relieve the WBG of any responsibility for ensuring its own compliance with international law and standards by eliminating its accountability mechanism.

Industry representatives did claim to want to see grievance mechanisms to prevent unresolved conflicts or human rights abuses. The Review suggested that the U.N. Economic Commission for Europe's Aarhus Convention's principles could serve as a long-term model for securing access to grievance

125. *Id.*

126. Frequently, it is only through the intercession of NGOs that comprehensive information regarding the impacts of a proposed project and legal rights are provided at all. Because those NGOs often have a strong orientation toward environmental protection, their analysis of risk may sometimes be questioned as biased. National governments are, almost without exception, strong supporters of development projects and have not hesitated to use force, through military and police action, to suppress non-violent demonstrations of community opposition in Peru and Guatemala. *See* Grave Attacks, *supra* note 14; BEBBINGTON ET AL., *supra* note 14, at 17-18.

127. EIR, *Striking a Better Balance*, *supra* note 104, at 22.

128. *Id.* at 23.

129. *Id.*

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mechanisms.[130] That Convention, adopted by nearly all E.C. members, calls for access to information, public participation in decision-making and access to justice, as its three stated objectives in Article I.[131] In its section on access to justice, however, the Convention refers only to domestic legal systems as a mechanism for enforcement of the first two pillars and environmental law.[132] Ironically, it is just those systems the Review called "weak legal frameworks" in reference to some countries where there had been a rapid expansion of the resource extraction sector.[133]

The Review ignores the accountability mechanism that offers the only real chance for ensuring compliance with the myriad positive guarantees now found in international law – that of the establishment or identification of legal fora in which multinational corporations could be held legally accountable for violations of international law, including FPIC. The report never suggests any level of corporate accountability that might offer hope that corporate violations of international law could be monitored and addressed by a competent authority.

The Review may be disappointing in its substantive analysis but it did serve to accurately identify the issues that affect nearly all interactions between resource extraction industries and the communities impacted by their activities. The debate over the reach of the principle of full, prior and informed consent will continue, but there is little question that the Review has forced WBG management to make general but important commitments regarding compliance with international law in the funding of future projects. The Final Report of the Review concluded that

> indigenous peoples and other affected parties [presumably non-indigenous communities] do have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principal determinant of whether there is a 'social license to operate' and hence is a major tool for deciding whether to support an operation.[134]

This sensible conclusion mirrors authoritative interpretations of FPIC in international law and would support the idea of community referenda as the means to determine whether a given development had a "social license."

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130. *Id.* at 24. The EIR also suggested the use of the model represented by the Business Partners for Development (BPD), an unenforceable set of standards set by industry, but unfortunately, its website, www.bpd.naturalresources.org expired on October 8, 2007 and "is pending renewal or deletion." *See id.* at 24.

131. U.N. Econ. Comm'n for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. I, U.N. Doc. ECE/CEP/43 (Apr. 21, 1998), *available at* http://www.un-documents.net/aarhus.htm.

132. *Id.* at art. 9.

133. EIR, *Striking a Better Balance, supra* note 104, at 23.

134. *Id.* at 21.

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DOI: doi:10.15779/Z38T94C

C. The WBG Ignores the Law and Creates its Own Standard

The WBG response to the Review is instructive - and disappointing - on a number of important issues. The response illustrates the continuing fundamental controversy over the meaning of "consent." Its general statement on the issue of social license is positive: "The Bank Group will only support EI projects that have the broad support of affected communities."[135] The management response offers no guidance on how such "broad support" might be measured, but its use of the adjective "broad" might be taken to mean not just several sectors of the community, such as businesses that might benefit from increased economic activity. It is also unclear as to whether "broad acceptance" means a simple majority of the affected population, or a larger regional population, or whether it refers to acceptance by a large cross-section of a population. But what happens if there is no "broad acceptance" and the community rejects the proposed project in a high-turnout referendum reflecting 98% opposition? Perhaps, under the language of the WBG response – which rejects "consent" and substitutes "consultation" – its project funding would, at least theoretically, be terminated.

The next sentence in the WBG response clarifies the rejection of consent: "This does not mean a veto power for any individuals or any group, but means that the Bank Group will require a process of full, prior and informed *consultation* with affected communities that leads to broad support by them for the project."[136] First, the word "consent" in the FPIC context employed by the authors of the Review has been inexplicably abandoned in the management response and replaced by "consultation." This is no mistake; the substitution is common in industry publications. Second, the management response, like the language in ILO Convention 169, assumes that the process will end in community acceptance and makes no commitment as to what action might or must be taken if the community rejects the project. Third, the only way for the WBG to know whether the "consultation" process is compliant with any standard or that the "support" is valid is to have monitors present, and no such commitment is made or even suggested. Again, a fair and open referendum process would provide the most accurate gauge of the community's position on whether the project should go forward.

The WBG response calls such consultation "an important component in ensuring that communities are well-informed about developments that will affect them and that they have an opportunity to make their views known and have them fully taken into account."[137] Left unclear is what it means to have views "fully taken into account." Is it different than merely considering the

135. World Bank Group, *Striking a Better Balance – The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review: World Bank Group Management Response* 7 (Sept. 17, 2004), *available at* http://siteresources.worldbank.org/INTOGMC/Resources/finaleirmanagementresponse.pdf.

136. *Id.*

137. *Id.* at 22.

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views of a community? How would decision-makers demonstrate that such views were considered?

In the face of the Review's criticism, the WBG did not resist the temptation to congratulate itself on its previous treatment of indigenous peoples: "The WBG's operational policy on Indigenous Peoples pioneered" among development banks "an approach that adverse impacts" on them "are avoided...or minimized and mitigated."[138] It is unlikely that those indigenous groups affected by mining projects share that judgment. The institution goes on to claim that its policies on indigenous peoples have historically played a role in setting "best practices" for extractive industries.[139] That claim, if accurate, is frighteningly myopic in light of all the evidence of extractive industries' impact on indigenous communities.

By simply replacing "consent," the word used internationally in this context, and replacing it with "consultation" the WBG, apparently intentionally, denies communities the right to choose their own preferred form of development.[140] Communities will be "informed" and engaged in discussions but will not exercise any decision-making power. The proposition that community views will be "fully taken into account" provides no guarantee that decisions will even be influenced by community needs and preferences, even when the community position is demonstrably nearly unanimous, as it was in the Tambogrande referendum.[141]

Further support for the proposition that consent should be given its common meaning rather than defined as an inevitable outcome of consultation and participation can be found in the debate among the Executive Directors of the WBG about whether the recommendations in its EI Review should be adopted. In 2004, a legal opinion by the General Counsel stated that recognition of FPIC would violate the WBG's Articles of Agreement with loan-receiving countries because it would give "the equivalent of a veto right to parties other than to those specified in the countries' legal framework."[142] Interestingly, the General Counsel's opinion thus assumes that FPIC grants a right to veto to local citizens opposed to a particular project. It is clear that those parties that oppose

138. *Id.* at 8.

139. *Id.* at 9.

140. In another legal context, that of the criminal law, an accused perpetrator's claim of "consent" by the victim is a defense to a charge of sexual assault. No lawyer in that arena believes that mere prior "consultation" with a victim of an alleged sexual assault by a defendant is sufficient for a successful defense.

141. *See* OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, INT'L FIN. CORP., MULTILATERAL INV. GUAR. AGENCY, ASSESSMENT OF A COMPLAINT SUBMITTED TO CAO IN REALTION TO THE MARLIN MINING PROJECT IN GUATEMALA, 5, *available at* http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf [hereinafter CAO ASSESSMENT]; Patterson, *supra* note 15; Jared Ferrie, *Mining, Gold, and Outrage, in Guatemala*, THE TYEE, Dec. 21, 2005, *available at* http://thetyee.ca/News/2005/12/21/GuatamalaOutrage/.

142. Fergus MacKay, *The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same*, 22 ARIZ. J. INT'L & COMP. L. 1, 65, 79 (2005).

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DOI: doi:10.15779/Z38T94C

the implementation of FPIC believe that the terminology means what it says, that is, "consent" is to be given the common meaning embodied in the terms "agreement" and "approval" and that the lack of consent means the project must be terminated.

The same legal opinion ignores the WBG's member-states' obligation to adhere to international treaty law. The General Counsel argued that to require FPIC would also be inconsistent with the Bank's role as an institution that is composed of sovereign states which have the right to decide whether "to follow the terms of any international convention."[143] However, as Mackay points out, international treaty law forbids the invocation of domestic law to justify the failure to adhere to treaty obligations.[144] The legal opinion also fails to acknowledge those internal WBG policies that forbid loans to countries for activities that would violate their obligations under ratified treaties.[145] Thus, it is only by ignoring fundamental and universally accepted principles of international law and the WBG's own policies that the General Counsel is able to avoid the obvious conclusion that the WBG must adhere to the FPIC requirement under international law.

D. "Consent" Remains Illusory

Setting aside the WBG's tortured interpretation of "consent", another attempt at a definition describes "consent" as an authority that can be withheld at certain decision-making points in a project cycle by representatives of an affected community whose legitimacy must be accepted by the project proponents.[146] Such a definition implies that FPIC is a process where the communities are consistently involved in a search for solutions to problems with project representatives. In fact, the "principles underlying the right to FPIC, including equity, sustainability, subsidiarity and peace and security, would be difficult to secure if communities were engaged only at the end of the process."[147] However, even where there is a process of consultation, one detailed case study of a mining project in San Marcos, Peru "suggests that, where community engagement does occur, corporate actors will seek to restrict the information and deliberative opportunities available to project-affected groups in order to avoid conceding control over matters that could affect timetables or budgetary allocations."[148] Obviously, where the fate of the entire proposed project is at stake, not just "timetables and budgetary allocations," the inclination of proponents, both corporate and governmental, to hide information

143. *Id.* at 80.

144. *Id.*

145. *Id.*

146. Perrault, *supra* note 59, at 522.

147. *Id.* at 523.

148. DAVID SZABLOWSKI, TRANSNATIONAL LAW AND LOCAL STRUGGLES: MINING, COMMUNITIES, AND THE WORLD BANK 304 (2007).

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and limit consultation would be much more powerful.

In fact, the FPIC requirement is often ignored by both governments and mining corporations. According to some experts:

> Different communities report militarization of isolated communities as a recurring element in engineering consent. Extractive industries have consciously manipulated communities, introducing factionalism, dividing communities and promoting individuals, who may have no traditional authority as leaders, to represent the communities. The illusion of free, prior and informed consent is achieved by the exclusion of the majority of community members from effective participation in decision-making.[149]

One sure way to include a significant part of an affected area's population in decision-making is, of course, to hold an election. Community referenda offer a potentially effective means to overcome efforts at the manipulation of information, avoid militarization and violence, measure the authority and legitimacy of local leadership, and promote community discussion.

While local opposition has succeeded in stopping projects, the research conducted for this article reveals no record of the FPIC requirement being cited as the sole basis for a court or executive decision to ban or withhold government approval of a proposed project.

V.
COMMUNITY REFERENDA:
AN EFFECTIVE RESPONSE TO UNWANTED DEVELOPMENT

The greatest advancement of the use of community referenda as a means to accurately gauge public opinion on resource extraction projects has been in Latin America.[150] The following four accounts describe referenda in several

149. COLCHESTER & MACKAY, *supra* note 85, at 26.

150. The use of referenda to express community opposition to natural resources extraction projects and dams has not been confined to Latin America. For example, in 1998, voters in the U.S. state of Montana used an electoral mechanism similar to a referendum to ban the use of cyanide in new gold and silver mines; this mechanism allowed voters to theoretically make a legally final determination on an issue. Mining companies attempted to overrule the ban through another initiative in 2004 but were unsuccessful. Montana Envtl. Info. Ctr., *The Citizen's Initiative Banning Cyanide Heap Leach Mining*, Nov. 2008, *available at* http://meic.org/mining/cyanide_mining/ban-on-cyanide-mining/i-137.

Likewise, indigenous Kanaks have strongly opposed the development of the Goro Nickel mine owned by Inco in southern New Caledonia. In April 2006, local protesters demanded a referendum on the mining project. Mineral Policy Institute/Mining Watch Canada, *Environmental Failures at Inco's Goro Mine Reinforce Kanak Concerns*, April 25, 2006, *available at* http://www.miningwatch.ca/index.php?/Inco_in_New_Caledoni/Goro_landslide. According to Catherine Coumans of MiningWatch Canada, the referendum was not held. Telephone Interview with Catherine Coumans, Research Coordinator, MiningWatch Canada (Feb. 10, 2008).

In Turkey, eight villages held an informal referendum in 1996 against a potential nearby gold mine, planned by Eurogold, an Australian company. The mayor of Bergama, Sefa Taskin, reported that 89% of the eligible voters turned out in a unanimous verdict against the mine. But, because it was not a formal election, it had no immediate legal import. Bob Burton, *Normandy's Turkish Mine*

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DOI: doi:10.15779/Z38T94C

states, the political conditions that gave rise to them, and the flexibility of referenda as a tool of participatory democracy. These accounts will examine the local and national legal foundations, including statutes and court decisions, for this electoral innovation. This survey also includes an analysis of the practical and political obstacles to community referenda in a variety of social and legal contexts, and documents the extraordinary fear and resistance such elections engender in national governments and multinational corporate enterprises.

A. Tambogrande, Peru: 2002

In June 2002, the town of Tambogrande, in Northwest Peru, held the world's first formal community referendum on a mining project. More than 98% of the mostly non-indigenous residents voted against the plans of a Canadian mining company, Manhattan Minerals, to develop a gold and copper mine in—and literally under—the town.[151]

Local residents opposed the mine when it was first proposed in 1999 because of the threat posed to the local water supply and the rich agricultural

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Stumped by Court Ruling, 2 Mining Monitor 3, 1,3, Aug. 15, 2005, *available at*, http://www.minesandcommunities.org/article.php?a=5794.

The case ultimately was resolved in the European Court of Human Rights where the court found, in a highly critical opinion, that the Turkish government's efforts to evade the judgment of the Supreme Court of Turkey violated the right to respect for family life, the right to a fair trial, and the right to an effective remedy. The Turkish Supreme Court had held that the mine's operating permit, which allowed the use of cyanide in the extraction of gold in Bergama and the surrounding villages, where the ten Turkish applicants lived, was not consistent with the public interest and the applicants' or the public's interest in effective enjoyment of the right to life and to a healthy environment. Mineral Policy Institute, *A number of jurisdictions have banned the use of cyanide in mining*, Nov. 19, 2004, *available at* http://www.mpi.org.au/default_098.html; Press Release, Chamber Judgment in the Case of Taskin and Others v. Turkey (Oct. 11, 2004), *available at* http://www.echr.coe.int/Eng/Press/2004/Nov/ChamberjudgmentTaskin&OthersvTurkey101104.htm.

When the citizens of Barangay Didipio, a town in the Philippines, wanted to stop an open-pit gold and copper mine proposed by a large Australian company, they collected more than twice the number of signatures required and filed a petition for a plebiscite against the activities of the mining company in their area. In 2000, the Commission on Elections denied the petition but the process helped organize popular opposition that led a regional entity to cancel the company's mining permit and withdraw its loans. Press Release, Legal Rights and Natural Resources Center - Kasama SA Kaliskasan (LRC-KSK) - Philippines, *Mining resistance another step forward - Petition to stop Climax Arimco*, *available at* http://www.minesandcommunities.org/Action/press68.htm.

In Krumovgrad, Bulgaria, 9,750 citizens out of some 11,000 eligible voters signed a municipally-initiated petition against an open-pit mining project that would have caused the resettlement of hundreds of people, destroyed ancient Thracian architecture, and located the tailings pond for the waste cyanide pulp directly above the town's water source zone. The project received a "silent denial" from Bulgarian environmental authorities in December 2005. *Ada Tepe gold mine, Bulgaria*, CEE BANKWATCH NETWORK, *available at* http://www.bankwatch.org/project.shtml?apc=147581----1&w==147581&s=368448. While not a typical electoral referendum, the petition demonstrated significant public participation in supporting a resolution passed by a municipal government against a mining project. *See* Res. 329, Protocol N. 17/16.09.2005, Municipal Council of Krumovgrad, *available at* http://www.cyanidefreerhodopi.org /index.php?articleid=106.

151. Boyd, *supra* note 10.

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lands near the town. An independent study concluded that the local river would have to be diverted and that 8,000 residents would require relocation.[152] The opposition engaged in repeated peaceful demonstrations until early 2001, when a mob burned down some "model" homes that the company had planned to give to the 1,600 families would have been displaced by the first phase of the project.[153] One month later, on March 31, 2001, Godofredo Garcia, a university professor and charismatic leader of the anti-mine movement, was shot to death by a lone gunman when his car, driven by his son, Ulises, was ambushed on the road to his home.[154]

Following the arson and the murder, Mayor Alfredo Rengifo, an admirer of Gandhi, attempted to find a non-violent solution to the volatile issue. He started a petition against mining development that received the signatures of more than 75% of Tambogrande's voters, which he then presented to Peru's congress. Manhattan Minerals condemned the mayor's efforts and the government refused to take any action on the petition.[155]

Mayor Rengifo then discovered an obscure provision in Peru's municipal law that allowed a "*consulta vicinal*" or community referendum to be conducted by municipalities on issues of local importance.[156] He requested funding from Oxfam UK, an international NGO, to help cover the cost of holding the referendum; additionally, more than a dozen national and international human rights groups supported the process.[157] The referendum was held on June 2, 2002 and the citizens of Tambogrande voted in emphatic opposition to the proposed mine in a formal, supervised election.[158]

Francisco Ojeda, president of the Tambogrande Defense Front and the target of persistent death threats from mine supporters, explained the referendum results: "Mines aren't an alternative to solving the problems of illiteracy, malnutrition, and poverty in communities, because here in Peru we have had too many examples of that kind of thing. Mining has only left a legacy of poverty in Peru."[159]

Though 73% of the voters participated in the referendum, the national government refused to recognize the community's emphatic rejection of the mine.[160] Even before the voting, Peru's Minister of Energy and Mines, Jaime

152. *Id.*

153. Scott Wilson, *A Life Worth More Than Gold*, WASH. POST, Sept. 6, 2002, *available at* http://www.minesandcommunities.org/article.php?a=1262.

154. TAMBOGRANDE, *supra* note 13.

155. Boyd, *supra* note 10.

156. *Id.*

157. *Id.*

158. *Id.*

159. Hannah Hennesy, *Gold Mine Fails to Glitter in Peru*, BBC NEWS, Dec. 3, 2003, http://news.bbc.co.uk/2/hi/americas/3256594.stm.

160. Press Release, Rights & Democracy, Manhattan Minerals Must Recognize the Legitimacy of the Municipal Referendum, (Aug. 14, 2002), http://www.dd-rd.ca/site/media/index.php?id=

http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6
DOI: doi:10.15779/Z38T94C

Quijandria, perhaps anticipating the results, condemned it as illegal and promised that it would carry "no legal weight."[161] Manhattan's chairman and chief executive, Lawrence M. Glaser, said that the fact that the referendum was held three weeks before the release of the company-funded environmental study "should be seen for what it is, a public relations ploy."[162] He condemned the foreign NGOs that opposed the project for not offering development alternatives.[163] Manhattan's president in Peru, Roberto Obradovich offered this analysis: "In developed countries, with educated people, such models may be able to work. But in our country, where the population is so easily manipulated, I believe that if more of these types of referendum (*sic*) follow, the state will be paralyzed."[164]

After the election, Manhattan launched a campaign against the involved NGOs and accused them of opposing development and "misinforming" the population. Roberto Obradovich, apparently critical of democratic processes in less developed countries, claimed that the people of Tambogrande had supported the mine before the NGOs arrived, an accusation belied by the immediate emergence of local resistance when the company arrived in Tambogrande in 1999 and the mayor's later petition effort.[165]

Oxfam America spent an estimated $20,000 in the community, including the funding of a hydrology study in 2001 that predicted dire environmental consequences if the project were allowed to proceed. Oxfam also contributed to the Defense Front of Tambogrande, a local resistance group, to help pay legal costs for residents facing criminal charges for the arson on company property, and who claimed to be targeted by false accusations due to their opposition to the mine.[166] In a particularly inflammatory attack on Oxfam UK in a popular weekly newsmagazine, columnist Augusto Elmore wrote, "I suspect the hand or the fingers of Sendero [Luminoso, a Maoist terrorist organization whose war with the government had killed over 60,000 Peruvians] are behind the nongovernment organization that has come from England to Peru to question foreign investment in our country."[167] Mr. Elmore failed to provide any evidence of a link between the defunct Maoist guerilla force and the internationally respected British NGO, but this accusation, combined with many other similar claims since 2002, has attempted to portray opponents of mining as traitors manipulated by sinister outside interests. Such allegations are used to justify harsh methods by government and multinational corporations against the

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161. Boyd, *supra* note 10.

162. Wilson, *supra* note 153.

163. *Id.*

164. Boyd, *supra* note 10.

165. *Id.*

166. Wilson, *supra* note 153.

167. Boyd, *supra* note 10.

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leadership and members of groups aligned against particular proposed mines.

International observers from Europe and North America disagreed. Stephanie Rousseau, an experienced election observer from Canada's Rights and Democracy Center, reported, "I believe that the people of Tambogrande have been able to express themselves through the referendum and I hope [the referendum] will help in lowering the level of conflict and finding a solution to the problems."[168] Her formal conclusion, shared by Francois Meloche of Groupe Investissement Responsible, stated, "In our opinion, the municipal referendum in Tambogrande was conducted in a free, democratic, and transparent manner, allowing citizens the opportunity to express their opinions through secret ballot with the effective guarantee that the votes would be counted correctly."[169]

Hugo Abramonte Ato, a local retired schoolteacher, summarized the potential influence of the voting outcome: "If they don't respect these results, we will have to rely on the power that comes from the whole world knowing that these are our wishes. We don't want to change our life in exchange for this supposed bonanza."[170]

Though Minister Quijandria promised to hold hearings in the affected towns, he warned that the national mining law assigned such decisions exclusively to the federal government.[171] He was right. Natural resource law often grants national ministries exclusive authority over the disposition of natural resources. However, such laws frequently conflict with environmental standards, local autonomy, and, of course, with national and international law, like FPIC, that would preclude government plans where there is a lack of consent by communities.

The citizens of Tambogrande continued public actions after the voting to remind both Manhattan Minerals and the national government of their strong opposition to mining in the area. In November 2003, a three-day general strike was followed by a large demonstration of more than 10,000 residents in the main square of Tambogrande.[172] One month later, Centromin, the Peruvian government's decision-making agency for mining matters, found that Manhattan had failed to meet essential criteria necessary to commence work on the mine. The corporation had also failed to demonstrate that it possessed the necessary $100 million in assets.[173] Early in 2004, Manhattan announced that it would

168. *Id.*

169. Rights & Democracy, *Peru: Overwhelming Opposition to Canadian Mining Project*, LIBERTAS ONLINE, Sept. 2002, at 2, www.dd-rd.ca/site/publications/index.php?id=622&page=2&subsection=newsletter&.html.

170. Wilson, *supra* note 153.

171. Boyd, *supra* note 10.

172. *Manhattan: Major Gold Project Implodes in Peru*, MINES & COMTYS., Dec. 12, 2003, http://www.minesandcommunities.org/article.php?a=1265.

173. *Manhattan pulls out after $US 60mn Tambogrande loss*, BUS. NEWS AMERICAS, Feb.7, 2005, *available at* http://www.bnamericas.com/news/mining/Manhattan_pulls_out_after_US*60mn

http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6
DOI: doi:10.15779/Z38T94C

seek arbitration of the agency's decision that the company had lost its right to an interest in the Tambogrande project. The arbitration was to be overseen by the Arbitral Tribunal that is part of the National Society of Mining, Petroleum and Energy, the Peruvian industry lobby association. The decision would be made in a closed process that allowed for no release of information to the public. At the time it seemed likely that Manhattan would attempt to sell its rights to another multinational mining company.[174]

However, in early 2005 the end finally came. Manhattan was unable to find a major mining multinational corporation to help it meet the conditions. Its president, Peter Guest, explained, "The trouble for us was that we weren't able to find a partner like that because the social conditions were so anti-mining that nobody wanted to touch it."[175] The company had spent $US60 million and "had nothing to show for it."[176] Its Board changed its name to Mediterranean Minerals Corporation and left for Turkey, a country Guest described as more "mining friendly."[177]

B. Tambogrande's Legacy

The historic referendum in Tambogrande had a multitude of political impacts. First, the community is safe from the scourge of an open-pit mining operation under their town and its rich agricultural lands are free of the threat of death by contamination or drought—at least from Manhattan, whose stock value had plunged from CDN$1.78 to $0.10 on the Toronto Stock Exchange in the aftermath of the referendum.[178] Second, while the referendum was certainly not accepted as legally binding on the national government, the powerful long-term political campaign against the proposed mine was the decisive factor in the victory because it made it clear to investors and the Peruvian government that Manhattan not only had no "social license," but had earned the passionate opposition of a united community as well.

Third, the government has acknowledged the effectiveness of the anti-mine campaign and the referendum by launching a retaliatory legal attack on local activists in violation of their rights to free expression, freedom of assembly, and freedom to participate in affairs of state.[179] A total of fifty-six individuals in Tambogrande were charged with crimes relating to the 2001 protest, including opposition leaders who had organized the peaceful march and the subsequent

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174. Press Release, CooperAccion, Tambogrande Updtate: The Arbitration is On (Nov. 22, 2004), *available at* http://www.minesandcommunities.org/article.php?a=487.

175. Manhattan pulls out, *supra* note 173.

176. *Id.*

177. *Id.*

178. Press Release, CooperAccion, *supra* note 174.

179. Environmental Defender Law Center, *Protecting Protest Leaders in Peru,* http:/www.edlc.org/cases/individuals/peru-leaders/ (last visited on Mar. 28, 2009).

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community referendum.[180] A judge acquitted forty-five of the accused, including all of the leaders, but the government appealed the verdict.[181] The defendants were tried and were acquitted a second time but a higher court again reversed the verdict so that in 2008, seven years after the protest, the defendants were facing a third trial.[182] The Environmental Defender Law center, a U.S. NGO that has recruited foreign lawyers to aid in the defense, maintains that the mine opponents are being targeted in a political prosecution by the government for their lawful actions against the project.[183] The government's efforts are obviously intended not merely to punish mining opponents in Tambogrande but to intimidate others who might demand community referenda on mining projects.

A fourth effect of the referendum is that the Tambogrande case has established a precedent that other Peruvian communities, and even other nations, have followed. In November 2003, a public hearing on a proposed project called Alto Chimera by Barrick Gold in the department of La Libertad was cancelled because 300 protesters shut down the hearing site.[184] The Ministry of Energy and Mines blamed the "Tambogrande effect" for the shut-down of the hearing.[185] Citizens in Cajamarca, after learning of the referendum, called on the government to hold a referendum on the Yanacocha project owned primarily by Colorado's Newmont Mining.[186] Even in communities that have not faced the threat of a mining project, citizens have demanded a referendum. In Arequipa, the mayor viewed the voting process as an alternative to the rioting that followed the government's decision to privatize a state-owned energy company.[187] The international impact of the Tambogrande referendum in other countries will be illustrated below.

Fifth, the proponents of referenda as a means of peaceful, democratic resolution in development conflicts defeated the opposition of both multinational corporations and governments. As illustrated by the defensive tone of the comments of government and company representatives before and after the voting and the criminal prosecution of the referendum organizers, they fear the power of participatory democracy as an established element of development policy.

Finally, CooperAccion (a Peruvian NGO that works with communities impacted by mining) observed that, before Tambogrande, affected communities

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Where is the Minister of Energy and Mines?*, COOPERACCION, Nov. 21, 2003, *available at* http://www.minesandcommunities.org/article.php?a=486.

185. *Id.*

186. Boyd, *supra* note 10.

187. *Id.*

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DOI: doi:10.15779/Z38T94C

in Peru were excluded from mining-related decision-making. The organization cited the Tambogrande experience and its referendum as "emblematic" of more recent efforts by communities to have a say in their futures.[188] Tambogrande demonstrated that referenda, in and of themselves, are a free, prior and informed consent process that can be replicated through the adoption of transparent, formal, and consistent mechanisms for seeking the consent of affected communities.

C. Rio Blanco, Peru: 2007

The second Peruvian referendum took place in the same region as Tambogrande, but in three smaller indigenous communities and their surrounding areas in the foothills of the Andes. In this case, the subject was a copper and molybdenum mine called the Rio Blanco project that was proposed by Minera Majaz, a subsidiary of UK-owned Monterrico Metals, which was later acquired by a Chinese investment concern in early 2007. Over 90% of the *campesinos* and townspeople voted against the mine at the referendum held on September 16, 2007 in yet another powerful community statement against mining operations perceived to do far more damage than good.[189] Only 285 votes out of the almost 18,000 that were cast favored the mine.[190]

The communities had opposed the mining plan since exploration began in 2002 and have since suffered extraordinary violence from the police and Monterrico's security forces. Two men have been killed, one by a gas grenade fired by the National Police and one shot by the company's security contractor while carrying a wounded demonstrator to an ambulance.[191] Many more opponents have been injured in demonstrations and direct confrontations, including deliberate attacks by paramilitary groups contracted to Minera Majaz.[192] In August 2005, twenty-eight *campesinos* were kidnapped and tortured for three days in the Majaz mining encampment after a march protesting the proposed mine.[193] In January 2009, the National Human Rights Coordinating Committee published photographs depicting police standing over men and women who have trash bags pulled over their heads and hands tied behind their backs.[194] In response to these photos, which were broadcast

188. Letter from CooperAcción to World Bank Management (July 19, 2004), *available at* http://www.minesandcommunities.org/article.php?a=1876.

189. Salazar, *supra* note 18.

190. Interview with unnamed electional officials in Ayabaca, Peru (Sept. 16, 2007); Author's Observations, Ayabaca Peru (Sept. 16, 2007).

191. *See* BEBBINGTON ET AL., *supra* note 14, at 17-18.

192. Grave Attacks, *supra* note 14; BEBBINGTON ET AL., *supra* note 14, at 17-19.

193. *Peru's Andeans Celebrate Mining Rejection Despite Torture, Killings,* ENVTL. NEWS SERV., Sept. 10, 2008, http://www.ens-newswire.com/ens/sep2008/2008-09-10-01.asp.

194. *Peru rights groups denounce torture at mines,* The Int'l Herald Tribune, Jan. 14, 2009, *available at* http://www.iht.com/articles/ap/2009/01/14/news/LT-Peru-Human-Rights.php.

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throughout Peru, Yehude Simon, the Chief Cabinet Minister said, "I'm horrified."[195] The images showed protesters caked in blood; one shows a man bleeding from the neck and another shows the man's corpse a day later. The large Peruvian security firm, Forza, retained by Monterrico Metals at the time and now owned by the Swiss firm Securitas, is now under investigation.[196] As is common in such circumstances, the mining company claimed that the allegations were just another in a long list of "opposition activity" designed to stop the mine – even in the face of photographic evidence.[197]

The Peru Study Group, an NGO from the United Kingdom with broad experience in resource issues, published a lengthy examination of the Rio Bravo project in March 2007 that detailed the history of conflict between the national government and the mining company on one side and local communities and citizens on the other.[198] The authors agreed with the finding of the Ombudsperson's Office (Defensoria del Pueblo) that Monterrico Metals had violated Law 26505, which required the company to obtain permission to explore in community-owned land from two-thirds of the members of the Yanta and Segunda y Cajas communities.[199] Ultimately, the authors recommended a referendum for two reasons: first, both sides were completely polarized and the parties believed there was little reason to attempt further negotiations; second, a referendum would provide a "clear statement on the balance of opinion" that all parties "would then have to live with and be bound by."[200]

The election was preceded by a series of strong condemnations by President Alan Garcia and the National Electoral Commission. Garcia called the referendum "absurd" and a "foreign conspiracy" organized by "communists," a particularly inflammatory accusation in a nation not yet recovered from a long and bloody civil war involving Maoist insurgents.[201] Ironically, Garcia had promised in his election campaign that he would support mining referenda.[202]

The Garcia administration claimed that the organizers were undermining the country, where 60% of the national budget comes from mining revenues, and asked, "Are we going to let misinformation and ideological manipulation stand in the way of the country's progress?"[203] Both President Garcia and the national election authorities repeatedly said the referendum was not considered legal by the country's election authorities, a claim that may have intimidated

195. *Id.*

196. Dana Ford, *Mine security firm under investigation in Peru over abuses,* Feb. 6, 2009 http://www.mineweb.com/mineweb/view/mineweb/en/page72068?oid=78066&sn=Detail.

197. *Id.*

198. *See generally* BEBBINGTON ET AL., *supra* note 14.

199. *Id.* at 24.

200. *Id.* at 55.

201. Salazar, *supra* note 18.

202. Interview with Ralph Hoelmer, International Observer at Referendum, Peru Representative, Network Institute for Global Democratization, in Ayabaca, Peru (Sept. 16, 2007).

203. *Salazar, supra* note 18.

http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6
DOI: doi:10.15779/Z38T94C

some voters who might have reasonably believed that voting was therefore illegal.[204] Just days before the election, the National Election Board ordered the confiscation of all election materials.[205] The local prosecutor ordered the release of the materials and stated, in a written decision, that the seizure had no legal basis.[206] The actual release of the critical materials from the National Police office in Piura was accomplished by twelve international observers led by Ulises Garcia, the son of the murdered leader of the anti-mining forces in Tambogrande.[207]

In Ayabaca, the largest town in the department, thousands of *campesinos* arrived from the countryside the night before and slept in frigid temperatures in the plaza and just outside the soccer stadium, where voting was to begin at 8:00 the next morning. After hurried negotiations with the National Police, who had arrived in busloads in each community the day before the elections, the officers were persuaded to stay away from the polling locations and the next day's voting proceeded peacefully. Inside the stadium, each of about seventy precincts were represented by three volunteer officials from each voting district, sitting at a small table, who processed the voters, each of whom had to present their national identification card and sign and fingerprint a form after casting a secret ballot. The sole question asked whether the voter supported mining activities in the area. The only answers were "Si" or "No."[208]

Ralph Hoelmer, a Dutch international observer with the Network Institute for Global Democratisation, a Finnish NGO, said that the referendum, as it occurred in Ayabaca, was completely legitimate. "This is a good thing because it allows people to express their views on their own destiny. These democratizing processes are rare in the world," he concluded.[209]

In Ayabaca, the vote was 93% against mining with a 50% turnout, while Pacaipamba had 97% "No" votes and a 70% turnout, and Carmen de la Frontera reported 92.5% opposed to mining with a turnout of 59%.[210] The majority of the remaining ballots were labeled, under strict standards, as "spoiled" even though nearly all of them revealed that the likely intention of the voters was to vote "no."[211]

The government attempted at every turn to stop the election and later denigrated the results of the referendum. Just before the voting, the head of

204. *Id.*

205. *Id.*

206. Author's Observations, National Police Regional Headquarters, Piura, Peru (Sept. 15, 2007).

207. *Id.*

208. Author's Observations, Ayabaca, Peru (Sept. 16, 2007).

209. Salazar, *supra* note 18.

210. *Id.*

211. Author's Observations, Ayabaca, Peru (Sept. 16, 2007); Interview with unnamed election official in Ayabaca, Peru (Sept. 16, 2007).

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Garcia's Cabinet, Jorge Del Castillo traveled to Piura with Bishop Luis Bambaren, the retired president of the Peruvian Bishop's Conference, to negotiate with the mayors of the three communities in an obvious attempt to persuade them to call off the election. They refused to meet with Del Castillo before the referendum but promised to forward the results of the voting to him after the voting.[212]

President Garcia also attacked local Church leaders for their support of their parishioners and the referendum. The Archbishop in the nearest city, Piura, had opened his compound to international observers and provided food and housing to them.[213] The President further accused the Vatican of meddling in Peru's internal affairs. In a national survey coincidentally released the day after the election, pollsters found that 71% of Peruvians trusted the Catholic Church and just 28% trusted the executive branch of the government.[214]

Even after the official count was completed, Del Castillo continued to insist that only 50% of the voters cast ballots. The actual total reflected an overall turnout of 60.2%, according to the organizers.[215]

Under one compelling analysis of Peruvian law, supported by the Ombudsperson's Office and research by the Peru Support Group, local communities must give permission for private companies to use their land.[216] Since the referendum, the Ombudsperson's Office has verified that the three communities have formally refused to allow Minera Majaz to trespass on lands owned by the communities, but has failed to provide an interpretation of the legal meaning of the refusal.[217] Meanwhile, the Ministry of Energy and Mines has announced that it will disregard the results of the referendum.[218]

In late September 2007, less than two weeks after the referendum, the Garcia administration proposed a measure to the Congress that would accelerate the government approval process for some mining ventures.[219] Rio Bravo was one of the initial twenty projects identified in the plan, and other mining companies could be included by simple decree in the future. The President cited "technicalities" in the referendum as the basis for his position that it was "invalid," but failed to identify such "technicalities" or any reason why they would render the election's outcome in any way invalid or unrepresentative of

212. Lucien Chauvin, *Peru's Pres Criticizes Vatican, Priest 'Interference' in Politics*, CATHOLIC NEWS SERV., Sept. 18, 2007, http://www.catholic.org/international/international_story.php?id=25399.

213. Author's Observations, Piura, Peru (Sept. 14, 2007).

214. Chauvin, *supra* note 212.

215. Salazar, *supra* note 18.

216. BEBBINGTON ET AL., *supra* note 14, at 7, 24-5, 30-1.

217. Salazar, *supra* note 18.

218. *Id.*

219. *Peru's Government Proposes Plan to Speed Up Mining Investments*, LIVING IN PERU, Sept. 27, 2007, http://www.livinginperu.com/news/4798.

http://scholarship.law.berkeley.edu/bjil/vol27/iss2/6
DOI: doi:10.15779/Z38T94C

the communities' position on the proposed mine.[220]

Since the referendum on the Rio Bravo project in September 2007, at least one other referendum has been held in Peru. In Tacna, the voters of the province of Candarave in southern Peru were asked whether they wanted the initiation of new mining activities and whether they agreed that surface and underground water resources should be used for mining.[221] Over 90% of the voters rejected new mining activities because crop production had dropped dramatically due to falling water levels in the area attributed to mining operations. Ordonez Salazar, the President of the regional government of Tacna, blamed Southern Copper for the losses and added that "80% of our social problems are caused by mining."[222]

In December 2007, President Garcia sought to undercut the necessity, under Article 11 of the Private Investment Law, for the consent of two-thirds of an undefined "general assembly" in indigenous villages to lease or sell community lands.[223] His proposed law would require only 50% plus one of the members of the communities for approval to contract with private investors. The President's rationale was set out in two articles in the Lima newspaper *El Commercial*: small farmers do not have the training or resources to add value to their properties so "there are many resources going unused that cannot be sold, and are not generating work. And all of this is because of the taboo of obsolete ways of thinking, and because of idleness and laziness."[224] The erosion of indigenous control over community property began in the 1990s when the current two-thirds law was passed during the regime of President Fujimori, now accused of mass murder and war crimes in the war against Sendero Luminosa, where previously communal land could not be sold or transferred in any way.[225]

Since the referendum, a "shadowy local group" has charged over three dozen anti-mine organizers, including lawyers and mayors with crimes, including terrorism.[226] The evidence provided to the prosecutor consisted merely of hundreds of newspaper articles while the individuals making the accusations have failed to give any testimony to the authorities.[227] While it is obvious that the charges were brought for the purposes of intimidation and harassment, just as they were against the organizers of the Tambogrande referendum, the process represents a real threat to the liberty of the defendants

220. *Id.*

221. *Candarave Says NO to Mining*, LA REPUBLICA, Feb. 19, 2008, *available at* http://www.minesandcommunities.org/article.php?a=8448.

222. *Id.*

223. Milagros Salazar, *Peru: Opening up Indigenous Land to Foreign Investors*, INTER PRESS SERV., Dec. 10, 2007, http://ipsnews.net/news.asp?idnews=40417.

224. *Id.*

225. *Id*

226. Environmental Defender Law Center, *Protecting Protest Leaders in Peru*, http:/www.edlc.org/cases/individuals/peru-leaders/ (last visited on Mar. 28, 2009).

227. *Id.*

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and is clearly designed to undercut the willingness of other Peruvian activists to advocate for community referenda.

More than 300 farmers from communities in the province of Ayabaca marched for five days in December 2007 to Piura to demand that the regional government recognize the September 16 referendum in which over 90% of the voters rejected the Rio Bravo mining project. They rejected the refusal of national government officials to recognize the referendum in the recent series of negotiation "Round Tables" on resource issues in Piura. On the way, the marchers passed through Tambogrande, the site of the world's first referendum on a local mining project. They were welcomed by large crowds, loud music, and expressions of "solidarity and support" from the community that had successfully defeated its local mining project after its referendum.[228]

D. Esquel, Argentina: 2005

Esquel, a town of 33,000 people in the Chubut mountain range in Patagonia, is a world-renowned destination for eco-tourism, fishing, and skiing.[229] When Meridian Gold, a Canadian firm headquartered in Reno, Nevada, proposed building an open-pit gold mine that relied on cyanide leaching just seven kilometers upstream from the community, the opposition quickly mobilized.

The company promised the creation of more than 400 jobs and said that the risks from a mine using 2,700 kilograms of cyanide per day were no greater than driving to work.[230] Meridian Gold tried to minimize the potential impacts of the mining operation in a flawed Environmental Impact Assessment. Those inadequacies were addressed in an independent environmental assessment written by Dr. Robert Moran and released in early 2003. Dr. Moran concluded that the proposal "is a classic example, which is all too common in Latin America, where an EIA describes short-term benefits and solutions but fails to even begin to consider long-term consequences."[231]

In February 2003, over 1,500 angry residents confronted the Esquel City Council and insisted that the eight councilors address the mining issue.[232] The residents said that unless effective action was taken, they would refuse to leave

228. Julio Talledo, *The March of Ayabaca Farmers Reaches Piura*, DIARIO LA RUPÚBLICA, Dec. 16, 2007, *available at* http://www.minesandcommunities.org/Action/press1795.htm.

229. Kevin G. Hall, *Residents of Remote Patagonian Town Protest Plans to Mine Gold*, KNIGHT RIDDER NEWSPAPERS, Feb. 25, 2003, *available at* http://www.minesandcommunities.org/Action/press122.htm; Klein, *supra* note 18.

230. Klein, *supra* note 18.

231. *Community Opposition Bring* [sic] *Mining Moratorium to Patagonian Region*, EARTHWORKS, online at http://www.bettermines.org/Esquel.cfm (last visited Mar. 8, 2009) [hereinafter *Community Opposition*].

232. Hall, *supra* note 229.

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until all the councilors had resigned.[233] The Council ultimately passed ordinances that banned the use and transport of cyanide within city limits, revoked the city ordinance that accepted national mining laws, and called for a referendum on the mine to be held on March 23, six days before the frequently postponed public hearing on the mine was scheduled to occur.[234]

Unlike other communities that have held referenda on development projects, Esquel is not an indigenous community and resistance to mining was motivated, in large part, in order to protect the attractiveness of the area to tourists and preserve local businesses. The anti-mining effort was led by middle-class citizens with a direct economic interest in the outcome, rather than by peasant farmers trying to preserve their culture and lands. Another difference was that the Argentinean referendum was based solely on local and national laws and not international mandates. These distinctive features illustrate the flexibility of community referenda as a tool of democracy that has universal application.

The community sentiment was strongly expressed in the referendum. Voter turnout was 75%, and 81% of the voters rejected the proposed mine.[235] (The opposition of 81% of the citizens here is the lowest rate of opposition reported in community referenda worldwide). Meridian Gold issued a press release in which it promised to "respect the will of the population of Esquel."[236]

The referendum drew immediate attention and was covered in the *New York Times*.[237] Meridian stock fell 22% on the New York Stock Exchange.[238] The publisher of an Argentinean mining publication expressed his concern that the "anti-mining forces will spread" and said the referendum "puts at risk all future mining investment in Argentina."[239] The president of an Argentinean gold mining company said, "There is a tremendous fear that this will affect other provinces."[240] He was right.

In April 2003, one month after the referendum, the province of Chubut passed Law 5001, which banned open pit mining and the use of cyanide in mining operations.[241] The law, however, provided that the Provincial Council

233. Bonnie Tucker, *Call for Cyanide Ban in Patagonia,* BUENOS AIRES HERALD, Feb. 9, 2003, *available at* http://www.minesandcommunities.org/article.php?a=903.

234. *Id.*

235. Klein, *supra* note 18.

236. Press Release, People's Assembly of Neighbors of Esquel, "If You Oppose the Mine, I Will Sue You" (Oct. 22, 2006), *available at* http://www.minesandcommunities.org/Action/press1262.htm.

237. Leslie Moore, *A Town's Protests Threaten Argentina's Mining Future,* N.Y. TIMES, Apr. 20, 2003.

238. *Community Opposition*, *supra* note 231.

239. Moore, *supra* note 237.

240. *Id.*

241. *Chubut Province is Canadian*, RADIOMUNDOREAL, July 14, 2005, *available at* http://www.minesandcommunities.org/Action/press683.htm.

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of Environment (COPRAM) would decide the areas of the province that would be excluded from the ban. COPRAM failed to take the necessary action because provincial officials decided that Law 5001 was inapplicable. Alejandro Corboletto, a leader of the Assembly of Self-Called Neighbors, a local civil society group, said that over 10% of the province's surface area was already subject to mining concessions. He reported, "We receive constant calls from the rural areas because they [the mining companies] enter the land with machines, regardless of the owners' authorization. There is a lot of tension about this issue."[242]

The status of the law was challenged, but by 2008 at least five other Argentine provinces had also taken prohibitive measures against mining. The province of Tucuman was typical. Its legislators passed a law that banned open pit metallic mining and the use of cyanide and mercury during mining processes.[243] A similar decision in La Rioja led the huge Canadian mining company, Barrick Gold, to suspend its exploration efforts in connection with the Famatima gold project.[244] The fear of the impact of mining projects led the legislature of the province of La Pampa to pass Law 2349 in September 2007, which prohibited the use of cyanide, mercury, and other "contaminative chemical substances," as well as open-pit mining operations.[245]

In late 2006, the local subsidiary of Meridian Gold initiated a legal action against six Esquel citizens, including a lawyer and two journalists, for releasing a tape recording of a 2003 meeting between the mining company and public relations firms from Argentina and the United States. During the meeting, the advisors and company personnel discussed their local and national political connections. One of the company's representatives said, "In Esquel, no one should know that we will twist the people's will."[246] Such litigation, known in the U.S. as SLAPP suits (Strategic Litigation Against Public Participation) is used to intimidate, harass, and waste the resources of groups that oppose resource extraction projects.[247] While U.S. law is now decidedly in favor of defendants in these actions, they have become more common worldwide, especially in countries that offer fewer free speech protections.[248]

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242. *Id.*

243. *Tucuman Bans Mining Activity—Argentina*, BUS. NEWS AMERICAS, Apr. 18, 2007, *available at* http://www.minesandcommunities.org/Action/press1472.htm.

244. Harvey Beltrán, *La Rioja Must Reverse Anti-Mining Bill—Argentina*, BUS. NEWS AMERICAS, Apr. 25, 2007.

245. *Latin American Update*, MINES & COMTYS., Oct. 9, 2007, http://www.minesandcommunities.org/Action/press1669.htm.

246. Press Release, People's Assembly of Neighbors of Esquel, *supra* note 236.

247. *See* The Anti-SLAPP Resource Center at http://www.firstamendmentcenter.org/antislappresourcecenter.html (last visited March 19, 2009).

248. The petition clause of the First Amendment protects speech that falls within the ambit of petitioning the government for redress of grievances. Lori Potter, *Strategic Litigation Against Public Participation and Petition Clause Immunity*, 31 ENVTL. L. REP. 10852 (2001); Press Release, People's Assembly of Neighbors of Esquel, *supra* note 236. *See also AngloPlat Threatens Lawyer*

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The Esquel referendum model has been replicated in other regions of Argentina where conflicts between communities and mining companies have arisen. By the third anniversary of the referendum, the residents of Epuyen, Trevelin, and Lago Puelo had organized similar popular consultations, and the results reflected overwhelming opposition to mining throughout those regions. Ricardo Alonso, the mining minister in Salta province, accused NGOs of telling lies in August 2006 and said the mining industry was "losing a province a year" to strong opposition by anti-mining coalitions.[249]

On April 17, 2007, the Supreme Court of Argentina ruled against the local subsidiary of Meridian Gold after it had failed in every court in Chubut province, where the proposed mine had been stalled for four years by local opposition.[250] The court upheld Law 5001, which banned open-pit mining and the use of cyanide. The Court's holding, which stated that national mining laws merely provided a "minimum protection standard" which could be increased by local communities, could have far-reaching impact because it reverses the common legal assumption that national laws will always trump local ordinances under a preemption doctrine which has broad adherence in the U.S.[251]

This important legal victory, which found its political impetus in the referendum, is tempered, however, by the fact that mining has "boomed" in the past few years because of dramatic increases in metal prices and the devaluation of the peso following the 2001-2002 economic crisis.[252] The Esquel referendum is an outstanding example of participatory democracy defeating powerful interests, and has served as a profound example for the rest of the country of how mobilized opposition can succeed in preventing unwanted development. While there is not yet a mass movement aimed toward the use of community referenda to defeat government and corporate forces determined to establish mines over the objection of local citizens, the number of referenda on development has continued to expand at a steady rate throughout Latin America.

E. Sipacapa, Guatemala: 2005

Indigenous communities in Guatemala are at the forefront of the effort to use referenda to express local opposition to development projects such as open pit mining. Citizens in several indigenous Guatemalan communities have held

with Court, MINES & COMTYS., July 6, 2006, http://www.minesandcommunities.org/article.php?a=3866 (owners of a platinum mine threatened to file a defamation action against an attorney who represented the local indigenous communities).

249. Emily Russell, *Anti-Mining Groups Pose Serious Challenge to Industry*, BUS. NEWS AMERICAS, Aug. 26, 2006, *available at* http://www.minesandcommunities.org/Action/press1243.htm.

250. Marcela Valente, *Supreme Court Rules Against Dangerous Mines*," INTER PRESS SERV., Apr. 20, 2007, *available at* http://www.minesandcommunities.org/article.php?a=450.

251. *Id.*

252. Helen Popper, *Argentine Province Halts Mining on Pollution Fears*, MINES & COMTYS., Dec. 14, 2006, http://www.minesandcommunities.org/article.php?a=184.

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community referenda on mining, often after the murders of mining opponents. Each referendum resulted in substantial majorities expressing opposition to the plans of multinational corporations to develop large mining projects adjacent to their communities. Guatemalan law on the subject of community referenda – including constitutional provisions, statutes on regional and municipal authority, the 1995 peace treaty, the ILO's Convention 169, and court decisions – is more developed than in any other nation and warrants extensive analysis. Most recently, Guatemala's Constitutional Court has recognized community referenda as a legitimate means of expressing community opinion and further defined the limitations and rights of local communities to express their will with regard to natural resource extraction projects.[253]

There is little mystery regarding the intense interest of multinational mining corporations in Guatemala: government mining royalties amount to only 1% of net revenues.[254] Even so, Goldcorp, Inc., a Vancouver-based corporation that is the third largest gold producer in North America with properties throughout Central America and Australia, is the largest taxpayer in Guatemala. In Canada, the company would be subject to royalties of 13% of production.[255]

Goldcorp's Marlin Project was the issue in Guatemala's first mining referendum. On June 18, 2005, thirteen indigenous villages in the municipality of Sipacapa cast 2,486 votes against open-pit mining with only thirty-five votes in favor of the project.[256] The original plan had been for the municipal government itself to conduct the voting, but a lawsuit by Glamis Gold, a Canadian company that was Goldcorp's predecessor, resulted in an injunction. The Catholic Church, together with a Guatemalan environmental NGO, Madre Selva, and a Mayan group, Ajchmol, quickly assumed responsibility for the voting.[257]

About 2,500 people out of some 5,200 registered voters participated in the voting, a percentage that would be considered a high turn-out in a municipal election in the U.S.[258] However, in Guatemala, this was considered a relatively low level of participation that was blamed on confusing and conflicting press reports as well as street broadcasts and leafleting, attributed to the mining company, announcing that the referendum was cancelled.[259] One initial

253. Expediente 1179-2005, Corte de la Constitucionalidad, Guatemala, "Caso Sipacapa (Minerías)" at 5, May 8, 2007 (Guatemala) (on file with author) [hereinafter *Caso Sipacapa*].

254. Paley, *supra* note 18.

255. *Id.*

256. *The People of Sipacapa Reject Mining Activities in Their Territories*, MINES & CMTYS., June 21, 2005, http://www.minesandcommunities.org/Action/press667.htm.

257. Daniel Vogt et al., *Mayans Struggle to Have Their Rights Recognized*, June 18, 2005, MINES & CMTYS, http://www.minesandcommunities.org/article.php?a=1066.

258. *See* Shin Imai et al., *Breaching Indigenous Law: Canadian Mining in Guatemala*, 6 INDIGENOUS L.J 101, 114, (2007), *available at* http://www.miningwatch.ca/updir/Cdn_Mining_Guate.pdf.

259. *Id.* at 113-14.

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interpretation of the results indicated that indigenous voters tended to oppose mining while non-indigenous locals favored mining activity.[260]

Three days after the election the Municipal Government Council, which had opposed the referendum, promised to support the decision of the voters and to assure that the outcome was respected. In Municipal Act #16-2005, the local government committed to the establishment of "the territorial limits of our municipality, recognize and delimit municipal lands, [and] that Montana's [Glamis' local subsidiary] offices [should] withdraw from the municipality this very day."[261]

The voting had been preceded by the type of violence that often accompanies proposed mining development. In December 2004, protesters began a forty-two day blockade of a convoy of mining equipment that ended with the police firing on the group, killing one and wounding others. The local bishop led 3,000 marchers in an anti-mine protest two weeks later but then had to be placed under government protection because of death threats. In March 2005, a Mayan leader's vehicle was set afire and death threats were made against him and two other anti-mining activists.[262]

Glamis Gold's senior vice president, Charles Jeannes, criticized the voting even before it occurred as a violation of national law and stated that it had been organized by a small group of people who "pressured" the municipality and threatened mining supporters.[263] After the voting, Mr. Jeannes condemned the referendum as "corrupt" and said neither Glamis Gold nor the government felt it necessary to obtain consent from local communities because it would undermine national law.[264] "If you take it to its logical conclusion, it's anarchy," added Mr. Jeannes.[265] He went on to note that the mine is closer to San Miguel Ixtahuacan and that "in a fair vote, a majority of the residents of both Sipacapa and San Miguel Ixtahuacan would support its activities."[266] Mr. Jeannes claimed the company had data that showed that "the majority of people in the vicinity of the mines are very supportive of it" but refused to disclose the numbers or even the method of measuring support.[267] A leading Guatemalan newspaper, Prensa Libre, reported in May 2005, one month before the referendum, that a poll performed by the Vox Latina Institute revealed that 95% of the people in both Sipacapa and San Miguel Ixtahuacan opposed the mining project because they feared that it would harm the environment and fail to

260. Vogt et al., *supra* note 257.
261. *Id.*
262. Patterson, *supra* note 15.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*

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benefit their communities.[268]

A Glamis Gold official claimed that the company had held 177 public meetings that were attended by more than 11,000 people in 2003 and 2004. This strategy, together with the claim that such meetings amount to consultation, is common in Latin America as mining companies become more sophisticated in their public relations efforts. In Sipacapa, Jamie Kneen of MiningWatch Canada observed that, "People thought these were information meetings. They were quite surprised to see their names on the documentation saying they had been consulted."[269] Such "consultations" may become less successful as awareness of the practices of mining multinationals increases internationally through access to the Internet. Such contacts with local residents are invariably one-way communications about the benefits the project will bring to the community and tend to underestimate potential disadvantages. Comments from the audience are typically not invited.

A major legal challenge to community referenda was brought by Montana Exploradora de Guatemala, a Glamis subsidiary, before the election but was not decided until May 2007.[270] The national Constitutional Court ruled that the consultative process planned by the municipality was not a violation of the Constitution even though it is not explicitly authorized and based its decision partly on ILO Convention 169.[271] This Convention is theoretically enforceable under international law because Guatemala ratified it in 1996, but that government had excused itself from compliance and made the novel argument that the norms for compliance must be established prior to its application.[272]

The Constitution of Guatemala supports the general idea of community referenda (known as popular consultations or *consultas popular* in Spanish) in Article 173, where it states that "political decisions of special transcendence should be put before the entire population in a consultative process."[273] There is also an implied promise of popular expression regarding land and resource management issues in Articles 66 through 68, which address indigenous rights and the government's responsibility to protect indigenous land claims and promote sustainable development.[274] The Constitution does not clearly outline rights to public participation or processes for carrying out referenda, and the

268. *Mining, Gold, and Outrage in Guatemala*, MINES & CMTYS., Dec. 21, 2005, http://www.minesandcommunities.org/Action/press853.htm.

269. Patterson, *supra* note 15.

270. The formal plaintiff was Rosa Maria Montenegro de Garoz, a lawyer for a private consulting firm advising Montana Exploradora and Glamis. *Constitutional Court's resolution ratifies the legitimacy of the community consultation*, Pastoral Commission: Peace and Ecology (COPAE), June 19, 2007, http://www.resistance-mining.org/english/?q=node/56.

271. *Caso Sipacapa*, *supra* note *253*, at 8-9.

272. Vogt et al., *supra* note 257.

273. Constitución de 1985 con las reformas de 1993 [1985 Constitution including 1993 Reforms], art. 173 (Guatemala) (Jay Porter, trans.).

274. *Id.* at arts. 66-68.

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DOI: doi:10.15779/Z38T94C

Guatemalan courts have interpreted narrowly even those references to local community referenda. For example, in the case involving the Sipacapa community, the Constitutional Court held that Article 173 was not relevant to the referendum in Sipacapa because of its specific reference to referenda carried out under the authority of the Supreme Electoral Tribunal (SET).[275] The jurisdiction of the SET is limited to four situations: general elections for President and senators, elections of representatives to the National Assembly, elections of members to the Parlamento Centroamericano, and *popular consultations* (emphasis added).[276] However, in discussing local referenda, the court pointed out that the Guatemalan Constitution does not define which kind of popular consultations fall under the authority of the SET.[277] Ultimately, the court found nothing in the Constitution of Guatemala that either allowed or prohibited a popular consultation within a community regarding a proposed development or resource extraction project.

However, the Court found that Guatemala's Municipal Code speaks directly to referenda or popular consultations.[278] Article 63 of the Code indicates that with a two-thirds majority vote of members on a Municipal Council, the council can choose to hold a referendum.[279] Alternatively, the community itself can request that the Municipal Council host a referendum if at least 10% of the residents of the community sign a petition in support of the effort.[280] The Municipal Code allows for this process to be carried out in conformity with local traditions, particularly when the issue involves the rights or interests of the indigenous population.[281] In some cases, the Municipal Code allows for the results of the referendum to be binding upon the community government.[282] There is no provision, however, that allows for community

275. *Caso Sipacapa*, *supra* note 253, at 7-8. The Court also considered, in the same case, a referenda held in Rio Honda, Zacapa on June 3, 2005 where some 2,800 citizens voted against a hydroelectric project. Sonia Perez, *Guatemalan Constitutional Court Upholds Environmental Consults*, PRENSA LIBRE, Apr. 5, 2006, *available at* http://www.minesandcommunities.org/article.php?a=5390.

276. *Caso Sipacapa*, *supra* note 253, at 3.

277. *Id.* at 3.

278. *Id.* at 3, 6-8. The Municipal Code of Guatemala, officially Decreto 12-2002 del Congreso de la República, is recent legislation that was passed by the Guatemalan Legislature that relates to the rights, organization, and processes that can be undertaken by local Municipal Councils. Because most of the recent referenda that have been held are local responses to the threat of natural resource development or dams and are organized by municipal councils, the law governing the Municipal Councils is often pertinent to the legal issues raised by referenda. Código Municipal de Guatemala [Municipal Code of Guatemala], Decreto No. 12-2002, art. 63, 2002.

279. Código Municipal de Guatemala, art. 64.

280. *Id.*

281. *Id.* at arts. 65-66.

282. There is some confusion within the code itself as to what circumstances would allow the results to be binding upon the government. In Article 64, in reference to actions that are brought by the community rather than the council, the code states that "the results will be binding if at least twenty (20) percent of registered residents participate in the consultation and the majority vote in

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referenda to be directly binding on the national government.

The Court also noted that in addition to the Municipal Code, the Law of Urban and Rural Development Councils addresses the issue of referenda.[283] It states that referenda involving issues that affect the Mayan, Xinca, and Garifuna populations (the most prominent indigenous groups in Guatemala) can be carried out by their representatives on the development councils.[284] However, the Law does not describe how these consultations should be conducted or what laws might govern their authority. The Court in the Sipacapa Case specifically noted the absence of legislative instruction on this issue.[285] Thus, the Law of Urban and Rural Development Councils expresses the legislature's intent to legalize referenda but does little to further define their character, legal authority, or the processes for carrying them out.

The Guatemalan Court also cited the ILO's Convention 169, which provides in Article 6 that

> [g]overnments shall... 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... The consultations carried out in application of this Convention 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.[286]

Guatemala ratified the Convention in June 1996.[287] The historical context in which the Convention was ratified, however, is unique.

Guatemala's ratification of ILO Convention 169 came as a result of multi-faceted negotiations during the peace process that ended a thirty-year civil war in which hundreds of thousands were killed – mostly indigenous peoples murdered by government forces.[288] Ultimately, the Peace Agreement between

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favor of the issue." *Id.* at art. 64. However, in Article 66, which governs how the referendum may be carried out, the code reads, "the results will be binding if at least fifty (50) percent of registered residents participate in the consultation and the majority vote in favor of the issue." *Id.* at art. 66. The Constitutional Court agreed that the Municipal Code creates some confusion on the issues of the authority and the binding nature of popular consultations. *Caso Sipacapa*, *supra* note 253, at 6 ("se advierte que no existe claridad con relación a cuando se produciría un resultado vinculante y con respecto a quién tendría carácter obligatorio"). The confusion surrounding the terms under which binding quality is created does not detract from the fact that the Guatemalan legislature clearly intended for there to be some circumstances under which a referendum could be binding.

283. *Caso Sipacapa*, *supra* note 253, at 6, 8.

284. Ley de Consejos de Desarrollo Urbano y Rural [Law of Urban and Rural Development Councils], Decreto No. 11-2002, art. 26, 2002 (Guatemala).

285. *Caso Sipacapa*, *supra* note 253, at 6.

286. *Id.* at 5. *See also* International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 72 I.L.O. Official Bull 59, 28 I.L.M. 1382, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169.

287. Press Release, International Labour Organization, Guatemala Ratifies Convention Guaranteeing Indigenous Rights (13 June 1996), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_008061/index.htm.

288. *Id.*

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DOI: doi:10.15779/Z38T94C

the Guatemalan government and the Guatemalan National Revolutionary Unity (URNG), the guerilla umbrella group, included an accord that specifically addressed the identity and rights of the indigenous peoples.[289] The accord committed the government to providing mechanisms by which the indigenous population would be consulted on issues that directly affected them.[290] The earlier Agreement on Identity and Rights of Indigenous Peoples states that, "it is necessary to institutionalize representation of the indigenous population at the local, regional, and national level to assure free participation in the decision making process of the different aspects of national life."[291] It further elaborated that the commission should consider reforms or measures in the area of "[o]bligatory consultative mechanisms with the indigenous populations" whenever a legislative or administrative measure might have a foreseeable effect upon the Mayan, Garífuna, or Xinca communities.[292] Further negotiations were to result in the reformation of the Municipal Code to guarantee local indigenous communities the right to "manage resources and to be the instruments of their own development" and to allow them "to join together in the defense of their rights... [regarding] communal and regional development projects."[293]

While not specifically mandating FPIC or community referenda, these provisions of the agreement certainly imply community autonomy in resource decisions. The Guatemalan ratification of ILO Convention 169, which arguably guarantees FPIC and goes beyond other international obligations or treaties, is directly relevant to the government's mandate to carry out the peace agreements.[294] In other words, the premise under which Mayan rebel forces were brought to the peace table in Guatemala included a guarantee by the government to recognize indigenous rights to control local development. Furthermore, the government undertook a responsibility to facilitate and enable those consultations in the accord. If the government denies, undermines, or neutralizes the effect of this right within indigenous communities, it implicates obligations related to the peace process.

The plaintiff, a lawyer representing Montana Exploradora, the Guatemalan subsidiary of Glamis, made six primary arguments against the Sipacapa referendum. First, the action constituted an electoral event over which the

289. Agreement on Firm and Lasting Peace, art. I(5), Guatemala-Unidad Revolucionaria Nacional Guatemalteca-U.N., Dec. 29, 1996, *available at* http://www.c-r.org/ourwork/accord/guatemala/firm-lasting-peace.php.

290. *Id.* at art. I(7).

291. Agreement on Identity and Rights of Indigenous Peoples, art. IV(D)(3), Guatemala-Unidad Revolucionaria Nacional Guatemalteca-U.N., Mar. 31, 1995, *available at* http://www.c-r.org/our-work/accord/guatemala/identity-rights.php.

292. *Id.* at art. IV(D)(5)(a).

293. *Id.* at art. IV(B)(4), (B)(5).

294. Victor D. Montejo, *Convention 169 and the Implementation of the Peace Accords in Guatemala*, J. S. & MESO AM. INDIAN RIGHTS CENTER (SAIIC), Fall 1997, *available at* http://saiic.native web.org/ayn/guatilo.html.

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Supreme Electoral Tribunal had authority to administer, not the Municipal Council.[295] Second, the Municipal Council resolution that created the consultation required that the results be binding.[296] Third, the object of the consultation was mining rights, an issue over which the Municipal Council has no authority.[297] Fourth, the vote was not carried out in secret.[298] Fifth, the results were not published in the *Diario Oficial* (National Registry) as required by law.[299] Sixth, the Municipal Council ignored the electoral process and recommendations of the Supreme Electoral Tribunal.[300]

In its decision, the Constitutional Court held that "the consultative process by means of a public vote constitutes an ideal method of participation in which the consulted communities can express their opinion, it being necessary that they be developed in compliance with the recognized electoral principles to guarantee the fidelity of the obtained results."[301] The court held that both the Municipal Code and the Law of Urban and Rural Development Councils allow for referenda, even if the scope and clarity of the statutory language is vague or confusing.[302] The court dismissed the idea that referenda have to be governed by the Supreme Electoral Tribunal.[303]

The court, however, characterized referenda as informational and ruled that a referendum held by a municipality on an issue over which the Municipal Council had no ultimate authority could not be binding on the national government.[304] The court observed that Article 125 of the Constitution gave the national government ultimate authority over mineral rights, and that this authority had been delegated to the Ministry of Mines and Energy.[305] The court stated:

> the character of a consultative process of this nature should be merely indicative,

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295. *Caso Sipacapa*, *supra* note 253, at 3. Specifically, the plaintiff argued that Art. 136(b) of the Constitution governed the action. *Id.* Later in its opinion, the Court addresses the assertion that the Municipal Council did not have the authority to convene a popular consultation because this authority is vested in the Supreme Electoral Tribunal. *Id.* at 6.

296. *Id.* at 3.

297. *Id.*

298. *Id.* In the municipal center, paper ballots were used to record the votes and in 13 rural communities, traditional Mayan consensus building practices were followed. *The People of Sipacapa Reject Mining Activities in Their Terriritory*, June 21, 2005, *available at* http://www.minesand communities.org/article.php?a=1066; Vogt, et al., *supra* note 257.

299. *Id.*

300. *Id.*

301. *Id.* at 5 ("la emisión del sufragio constituye un método de participación idóneo para recoger las opiniones de las comunidades consultadas, siendo necesario que, en su desarrollo, se observen los principios electorales reconocidos para garantizar la fidelidad de los resultados que se obtengan").

302. *Id.* at 8.

303. *Id.*

304. *Id.* at 7.

305. *Id.*

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DOI: doi:10.15779/Z38T94C

> with the goal of investigating the apparent status of a determined issue – with the rights to discuss any theme of community interest, as in the present case – but its effects cannot possess a regulatory character over issues that directly compete with the rights of a state agency different from the body that initiates the public consultation, or that may affect the rights of third parties who have legitimately acquired interests by legal means, licenses of acknowledgement, exploration, or exploitation of minerals. Although Articles 64 and 66 of the Municipal Code establish when the results of a popular consultation may be binding, it should be understood that these effects can only be produced with respect to issues over which the municipality has authority.[306]

While the Court's decision clearly upholds community referenda, finding support for them in both national and international law, it limits the legal impact of the outcome of any referendum to mere "popular expression." The case thus places the role of Guatemalan referenda squarely in the "consultation" arena and denies any notion that indigenous people must provide "consent" before a project can go forward. The constitutional assignment of authority over natural resources solely to the government was upheld with no limitations recognizing community interests. The court thus ignores the international law principle that States cannot employ domestic law as a defense to their failure to adhere to international law.[307] Though international law regarding the right of indigenous peoples to FPIC was directly implicated, the court unfortunately based its discussion of referenda solely on domestic law.

VI.
FPIC ENFORCEMENT: THE INTERNATIONAL FINANCE CORPORATION'S CAO REVIEW OF ITS CONDUCT IN SIPACAPA, GUATEMALA

As is common world-wide in the project investments of multinational corporations in financially poor but resource-rich countries, the International Finance Corporation (IFC), an arm of the WBG, provided a loan, this time of some $ 45 million USD to Glamis Gold for its proposed mine in Sipacapa, Guatemala. Even before the loan was approved in June 2004, local and international NGOs pointed out the failure of the multinational corporation to consult with the affected communities and the dramatic rise in local tensions

306. *Id.* Later in the opinion the court summed up its holding:

"This Tribunal holds that popular consultations constitute an important mechanism of popular expression, by which several constitutional rights are expressed including freedom of action and expression of thought, freedom of association and expression, but such consultative processes should comply with the appropriate juridical standards to establish with precision: the authorities that are charged with carrying out the consultation, the time at which the consultation is to take place and the effect of the results, with the understanding that the obtained results will reflect the intention of the community regarding a particular theme, but these consultations cannot be given regulatory character over issues over which the consulting body or the community itself has not authority." *Id.* at 8.

307. MacKay, *Draft World Bank, supra* note 142, at 80.

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caused by the proposed project.[308]

The long delays and the lack of enforceability, as can be seen in the court decisions and various UN observations discussed above, bring into question whether current international avenues of redress are effective when the right to FPIC is violated. As the international institution responsible for much of the financing for mining projects throughout the world, the WBG could be an effective leader in setting standards and enforcing compliance with the FPIC requirement by both governments and multinational corporations. Because of the international influence of the WBG, its operations with respect to local communities impacted by the projects it funds will likely be seen as examples of compliance with international law and representative of best practices in corporate-community interactions. By the same token, if the WBG does not act effectively, it can have the unfortunate effect of setting poor *de facto* standards. An examination of one WBG investigation into the lack of FPIC is illustrative of the practical futility of relying on the WBG for enforcement, even of its own standards.

The 2004 loan by the IFC brought the project within the jurisdiction of the Compliance Advisor Ombudsman (CAO). Madre Selva, a Guatemalan environmental organization that had been active in the referendum process, filed a complaint to the IFC's CAO in March 2005 (before the referendum) claiming that there had been inadequate consultation, a violation of the ILO's Convention 169, a failure to warn of the dangers of cyanide used in the mining process, and an exacerbation of social tensions and violence.[309]

The resulting CAO Assessment notes the referendum, which occurred during their investigation, but minimizes its significance.[310] The assessment states that, with regard to the referendum, there was "confusing, contradictory and often inaccurate information" about the mine's potential impacts.[311] The report also noted that the validity of the referendum had been questioned and the legal and practical realities were unclear.[312] While these observations seem to unfairly cast doubt on the referendum, it could be just as well observed that it is not unusual for disparate information to be offered by opposing sides before a popular vote is taken and that the existence of attacks on the legal validity of a referendum does not itself decide the question. Both are, of course, not uncommon realities in mining referenda in which both the corporations involved and national government have an interest in opposing. Aside from any disputes over the referendum's legal validity, it would seem that the rejection of mining

308. Press Release, MiningWatch Canada, Friends of the Earth Canada & the Halifax Initiative, Leaked Review Slams World Bank Over Canadian Mine (Aug. 22, 2005), *available at* http://www.minesandcommunities.org/Action/press718.htm.

309. *Id.*

310. CAO ASSESSMENT, *supra* note 141, at 5.

311. *Id.*

312. *Id.*

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by 98% of the voters – an uncontested result – should carry some weight with an entity like the IFC, whose mission is "to help people help themselves and their environment..." and to promote sustainable development.[313] The projected lifespan of the Marlin Mine is but ten years, which brings into question its sustainability.

The September 2005 report essentially defends Glamis Gold's efforts at "consultation" by blaming the lack of clear mining regulations in Guatemala that might have guided project developers in seeking the "approval from local people for either their exploration or exploitation activities."[314] The CAO also complains that no "protocols" for interpreting the intent of ILO 169 and its promise of "free, prior and informed consent" have been developed.[315] This overlooks the fact that the ILO's office in Geneva published a 112-page manual on Convention 169, together with specific and detailed guidelines for implementation, in 2003.[316] Further, the report claims, the absence of clear regulations has led to uncertainty on the part of both the corporation and local people.[317] However, the report cites no evidence that the local people were even slightly uncertain or confused, and ignores the support under international law for the people's efforts to hold a referendum to determine whether the proposed mine had the consent of the affected indigenous population.

The CAO Assessment did note that the people believed the question was *whether* the project should go ahead, while the company maintained that the issue was *how* the project should proceed.[318] In noting this distinction the CAO, incredibly, took no position even while citing the WBG's commitment stemming from the Extractive Industries Review of "supporting only projects that have the broad public support of affected communities," language that seems to mandate some significant level of consent or agreement of those populations to the initiation of the project.[319] Thus the CAO report completely ignores the only evidence of community sentiment regarding the mining project: a community referendum in which 98.5% of the voters rejected the mine. The report further minimizes the extraordinary level of local, national and international opposition to the mine in its statement: "Some civil society groups nationally and in Sipacapa have an expectation that locally affected indigenous people should participate in decisions of whether or not mining activities will proceed in their territories" without acknowledging that international law

313. INT'L FIN. CORP., WORLD BANK GROUP, IFC'S VISION, VALUES, & PURPOSE, http://www.ifc.org/ifcext/about.nsf/Content/Mission (last visited Mar. 9, 2009).

314. CAO ASSESSMENT, *supra* note 141, at 32.

315. *Id.*

316. INT'L LABOUR ORG., ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL (2003), http://www.ilo.org/public/libdoc/ilo/2003/103B09_345_engl.pdf.

317. CAO ASSESSMENT, *supra* note 141, at 32.

318. *Id.*

319. *Id.* at 8.

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mandates such participation.[320]

The September 2005 CAO report did, however, criticize the conduct of the IFC in issuing the loan. First, it confirmed the lack of consultation with the local population, which had already been documented by the Guatemalan Human Rights Ombudsman, who had called for a cancellation of the mining concession because the local population had not been consulted in accordance with ILO Convention 169.[321] Second, the report found significant failures in the IFC's environmental and assessment and the environmental management plan. [322] Third, it concluded that the IFC failed to adequately consider the Guatemalan government's failure to effectively intervene in the conflict and its probable inability to regulate the project in the future.[323] On October 14, 2005, the IFC responded by claiming that many of the report's recommendations were already implemented and made few concessions to the validity of the assessment's criticisms.[324] Local community leaders responded with outrage to the assessment, complaining especially that the CAO Assessment re-framed the issue, with clear deliberation and for no apparent reason, as a complaint solely from Sipacapa alone rather than also from the community nearest the mine—thus undercutting many of the complainant's claims.[325]

A second team of investigators was dispatched in January 2006. Their report acknowledges the May 2005 referendum with its 98.5% vote against mining activity, but also seems to attach little importance to the vote.[326] The CAO team found, to their apparent surprise, that the citizens of Sipacapa had no interest in any level of dialogue with the mining company and considered the issue resolved.[327] They remained opposed to any exploration activity or expansion of the mine into their lands. The CAO report contains detailed recommendations to somehow resume the dialogue at some future date and warns that conflict could easily return.[328] The current mining activity, confined

320. *Id.* at 31.

321. *Id* at 28, 31.

322. *Id.* at 20-21. The IFC also failed to adequately address potentially harmful social and cultural impacts from the planned mine. *Id.* at 26-27

323. *Id.* at 33.

324. Memorandum from Rashad Kaldany, Director, COCDR, World Bank/IFC/M.I.G.A. to Meg Taylor, Vice President, CAO, World Bank/IFC/M.I.G.A., CAO Assessment Report: Complaint Regarding Marlin Mining Project in Guatemala (Oct. 14, 2005), *available at* http://www.cao-ombudsman.org/ html-english/documents/Marlin-Responsetofinalreport_000.pdf.

325. Letter from Colectivo Ecologistica MadreSelva (Sept. 22, 2005), *available at* http://www.cao-ombudsman.org/html-english/documents/MadreSelvaResponseCAOAssessmentReportEnglishwith technicalReviewAnnexEnglish.pdf.

326. COMPLIANCE ADVISOR OMBUDSMAN, CAO FOLLOW-UP ASSESSMENT, GUATEMALA: COMPLAINT REGARDING THE MARLIN MINING PROJECT 3 (2006), *available at* http://www.cao-ombudsman.org /html-english/documents/CAOGuatemalaMarlinReport-english-May12006.pdf.

327. *Id.* at 4

328. *Id* at 9-14.

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largely to neighboring San Miguel Ixtahuacan, drew little of their attention and no effort was made to speak to those affected residents mentioned in the report.

It is difficult to conclude that the CAO investigations of the Marlin project were objective, thorough, or consistent with international law. Both the Assessment and the Follow-Up Assessment reflect a groundless naïveté in assessing Glamis Gold's conduct and a refusal to recognize and criticize Glamis' failure to even attempt to secure any level of legitimate community support for its plans. Particularly troubling was the blindness the CAO exhibited in its few comments on the referendum and its failure to recognize the referendum as a legitimate and accurate measurement of the absence of community support for the mine. Nowhere does the CAO suggest any means of ascertaining the position of community members on the project. This is particularly telling since WBG management defined, in September 2004, well before either CAO report, its first test of the propriety of an EI loan to be whether the project enjoys "the broad support of affected communities."[329] The CAO inaccurately faults the ILO with a failure to develop protocols, but it apparently has not considered just how such community "support," mandated by its management, might be measured. Moreover, the CAO ignores the most specific possible, fair, and accurate measurement and the one that conforms most closely to fundamental democracy – the community referendum.

The IFC's own board of directors criticized the IFC's provision of the loan for the corporation's reliance solely on information from the company rather than any independent assessment. Moreover, the board, in evaluating the development benefits to Guatemala, found that the project would create only 160 long-term jobs and pay royalties of but 1% of the mine's revenues.[330]

There were also local protests. In March 2006, the citizens of Sipacapa signed a lengthy petition that condemned the mine as a "business that enriches an international corporation at the expense of the good development of communities, facilitated by persistent and systematic corruption, impunity and the lack of real democracy..."[331] The petition referred specifically to military and police action to stop a blockade on January 11, 2005 in which Raul Castro Bocel was shot by the security forces and another incident on March 23, 2005 in San Miguel Ixtahuacan (the community closest to the mine) where an employee of the Israeli security company hired by Glamis Gold, the Golan Group, had shot and killed a resident, Alvaro Benigno Sanchez.[332]

Numerous international organizations also expressed their dissatisfaction with the CAO reports. Several international NGOs, including the Bank Information Center and Friends of the Earth Canada, detailed the failures of the

329. EIR, *Striking a Better Balance*, *supra* note 104, at 7.

330. *Id.*

331. Declaration, We Demand the Closure of the Marlin Mine in San Marcos (Mar. 4, 2008), *available at* http://www.minesandcommunities.org/Action/press975.htm.

332. *Id.*

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CAO process and the IFC response in a June 2006 letter to the executive directors of the World Bank calling on the Bank to explicitly recognize the June 2005 referendum and implement the CAO recommendations.[333]

The Sipacapa example of participatory democracy has been followed by other, and far larger, referenda on mining projects in Guatemala.[334] In July 2006, 29,266 voters in community referenda held in nearly 100 indigenous communities in the departments of Huehuetenango rejected mining projects.[335] In April 2007, the Huehuetenango municipality of San Pedro Necta voted unanimously against mining projects, according to one of the organizers of the referendum. Even though there were no current mines in the area, some 17,000 citizens in forty-eight of the fifty-three communities in the municipality came out against mining, largely because of fears of cyanide pollution and the potential impact on local water sources. The citizens were aware of a mining catastrophe in neighboring Honduras, where a 2002 cyanide spill had impacted 4.5 kilometers of the Lara River and immediately poisoned some 18,000 fish. Two mining firms had been granted government authorization without any consultation with the residents of the two townships. "This was what caused us to organize and express our disapproval. The indigenous people are owners of our riches and we are not going to permit them to carry them off to another country," said Marta Julia Gabriel Morales. San Pedro Necta was the seventh community in Huehuetenango in the previous eighteen months to ban open pit mining.[336]

On June 23, 2007, another Huehuetenango community, Santa Cruz de Barillas, voted, almost unanimously (46,481 to 9) against mining as a

333. Letter from Manish Bapna, Executive Dir., Bank Info. Ctr., et al., to Executive Dirs. to the World Bank, Re: Statement on the IFC-financed Marlin Mine, Guatemala by Civil Society Organizations (June 12, 2006) *available at* http://www.minesandcommunities.org/article.php?a=2999. *See also* WORLD BANK GROUP, IMPLEMENTATION OF THE MANAGEMENT RESPONSE TO THE EXTRACTIVE INDUSTRIES REVIEW (2006) (the World Bank Group's internal report on the impact of resource extraction projects that it has financed), *available at* http://siteresources.worldbank.org/INTOGMC/ Resources/implementationtomr2.pdf; PASTORAL COMM'N PEACE & EQUALITY [sic] – COPAE – SAN MARCOS DIOCESE, THE MARLIN MINE AND THE WORLD BANK (2007), *available at* http://www.resistance-mining.org/english/files/Marlin-WorldBankGroup.pdf (a criticism of the World Bank report by Guatemalan mining opponents).

334. See the website for the Pastoral Commission Peace and Ecology [sic], *available at* http://www.resistance-mining.org/english/index.php for an extensive collection of articles in English on community reactions to mining in Guatemala.

335. Thelma Mejia, *Gold Fever Strikes Again in Central America*, TIERRAMÉRICA, http://www.tierramerica.net/english/2006/0805/iarticulo.shtml (last visited Mar. 11, 2009). Between 2006 and 2008, community referenda were carried out in 22 municipalities of Huehuetenango, in which some 350,000 voters rejected resource extraction projects at different levels of development. Declaration, Departmental Assembly of Huehuetenango for the Def. of Renewable and Non-Renewable Natural Res. et al., The Peoples' Declaration of Huehuetenango, *available at* http://www.nisgua.org/ themes_campaigns/index.asp?id=3301&mode=pf.

336. Mike Castilo, *San Pedro Necta Rejects Mining and Opts for Sustainable Projects With Less Environmental Risks*, PRENSA LIBRE, Apr. 16, 2007, *available at* http://www.minesandcommunities.org/article.php?a=450.

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DOI: doi:10.15779/Z38T94C

development alternative.[337] The president of the Coordination of the Consultation, Rubin Herrera, said that the voting results were delivered to the Congress and other federal institutions along with a request that the authorities respect the outcome of the referendum. A representative of Madre Selva explained that more people participated in the community referendum than in regular elections because they are afraid of the environmental impact of mines.[338] This, along with the previous examples, shows how this model of participation garnered participation in part because of the growing fears among indigenous peoples about the impacts of mines on their communities.

Guatemalan citizens have clearly embraced referenda as an effective way to convey their position on resource extraction projects. It remains to be seen whether the process will receive formal legal recognition as a means to stop unwanted development, as could be achieved through the adoption of an interpretation of FPIC as meaning that the consent of a community is required for a proposed development. One insightful spokesman, Marco Venicio Lopez Maldonado, who works with the Peasant Workers' Movement (MTM), summed up the impact of mining in his country: "The map of mining interests, the map of indigenous people and the map of poverty all line up perfectly. Where there is mining, there is poverty and indigenous people."[339]

Goldcorp, Inc., the successor to Glamis Gold, has proceeded in the last two years to develop an open pit mine in the Sipacapa area that will eventually encompass five square kilometers in San Miguel Ixtahuacan. By February 2007, Goldcorp recovered over 105,800 troy ounces of gold at a value of $760 CDN per ounce.[340] Meanwhile, San Miguel residents say the company has not kept promises to the community to build a hospital, renovate a sports complex, improve the central park, or pave roads. However, in Sipacapa the company has offered to pay individual landowners to drill on their land and to provide the municipality with a "gift" of over $150,000 CDN. The citizens have turned down both offers.[341]

In March 2007, mining opponents in San Miguel Ixtahuacan, the community most affected by the mine, issued a press release that alleged that

337. Alberto Ramirez, *Demanding Rural Development Without Mining - The People of Santa Cruz de Barillas Speak Out*, PRENSA LIBRE, July 19, 2007, *available at* http://www.minesandcommunities.org/article.php?a=2048.

338. *Id.* It is important to note that Huehuetenango is the country's most productive department in terms of coffee exports and receives the highest level of remittances from residents employed in other countries so it is not in desperate economic straits, a factor that probably influenced the lopsided vote. *Id.*

339. Paley, *supra* note 18.

340. *Id.* The Canadian and US dollar achieved rough parity in "fall" or "late" 2007 so the approximate revenues by then were over $80 million in that initial phase. US Dollar Canadian Dollar Exchange Rate Forecast, *USDCAD vs. Yield Spread from 2007-2009*, http://www.dailyfx.com/story/currency/cad_fundamentals/US_Dollar_Canadian_Dollar_Exchange_1236102607482.html (last visited Mar. 29, 2009).

341. *Id.*

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Glamis and its successor, Goldcorp, had forced them to sell their lands through threats, lies, and intimidation. The press release claims that the corporations killed farm animals that drank from contaminated water that the company claimed was clean, dried up water sources in two nearby communities, accused twenty-two innocent mining opponents of crimes, opened roads illegally on communal land, erected barriers that prevent travel on public land, and violated other rights.[342] The author demanded that the Public Prosecutor's Office of Human Rights and the Inter-American Human Rights Commission investigate their circumstances, that the U.N. should uphold its mandate to protect the "autonomous territory, self-determination, and identity of indigenous peoples and that Goldcorp "withdraw from our territory and leave us in peace."[343]

An independent hydrological study released in November 2006 found that downriver deposits of heavy metals had accumulated and that measured levels of copper, aluminum, and manganese had surpassed the limits set by the World Bank.[344] The scientist who produced the study, Flaviano Bianchini, received so many death threats that in February 2007 Amnesty International issued an urgent international alert regarding its concerns for his safety.[345]

The people of Sipacapa may not be able to save themselves from the effects of the mine in their area but their persistence and commitment in organizing their opposition, including holding the first community referenda in Guatemala, has led to an important legal precedent in *Caso Sipacapa* and has provided a concrete example to the rest of the country of the use of participatory democracy to express views and protect rights.

VII.
CONCLUSION

Conflict between governments allied with extractive resource corporations, and indigenous and other local communities can be expected to increase. Governments will continue to seek much-needed revenue; extractive industries, bolstered by new investment capital from higher profits will seek ever more venues; and communities armed with more information about mining impacts and the strategies to battle unwanted development will become more effective defenders of their rights, environment, and livelihoods.

The international right to free, prior and informed consent will play a critical role in these conflicts. Despite the substitution of "consultation" for "consent" by the World Bank Group, the national governments' claim of a monopoly on extractive resource decision-making, the consensus of interests between those governments and multinational corporations, and the violence,

342. *See* Ramirez, *supra* note 337.

343. *Id.*

344. Paley, *supra* note 18.

345. *Id.*

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DOI: doi:10.15779/Z38T94C

intimidation, and myriad human rights abuses suffered by mining opponents, it is clear that local communities will continue to refuse to remain silent in the face of unwanted, and often catastrophic, development. Local people will use demonstrations, blockades, marches and all the other well-developed tools of dissent, and they now have recourse to a completely democratic and politically compelling means to formally register their opposition.

The idea of referenda as a means of fulfilling the right to free, prior and informed consent will become better known as a successful political and legal means to fight unwanted development. The tension between mere consultation and the consent of a "broad" majority of a local population cannot remain so long as the political difference is so great. The accepted international use of real "consent" will win out eventually because "consultation" is nebulous and fails to grant any power to the affected communities. The most difficult legal and political question is the consequence of a refusal to consent. As argued in this article, both the International Labour Organization and the World Bank Group deny indigenous and other people the right to veto a development project. Absent the power to veto, local communities will have no power. Consent must mean what it says. Daniel Pasqual, the director of the Committee for Peasant Union, a Guatemalan indigenous organization, summed up the importance of community referenda, identified this primary issue, and warned of the consequences of a state's failure to honor the right to FPIC:

> We believe that community consultations [referenda] are the use of reason, the use of a people's word of honor, and a direct manifestation of local peoples' rejection of the plunder of their territory. When the State does not recognize such consultations as binding, it only leaves the path to widespread disobedience. And such actions only precede other struggles, other uprisings, which are not going to be pacific. We are here to warn: the people are tired of declarations, tired of having their community consultations ignored, tired of dysfunctional dialogue roundtables and high level commissions.[346]

No government is likely to willingly give up its authority over natural resources, but there are developments in international law that could make it far more difficult for such governments to refuse to recognize the outcome of community referenda. It is likely that more international entities will recognize FPIC. Additionally, the new Declaration on the Rights of Indigenous Peoples sets out rights and standards that will be impossible to ignore, and courts, as institutions that seek to clarify its standards and principles in their application to particular cases, might well specifically recognize community referenda as vehicles for determining both lack of consent and the future of a proposed development project.

Just such a case has started its way through the judicial process in a widely respected forum. The people of Sipacapa have appealed the decision of the Constitutional Court of Guatemala, which recognized that their referendum

346. James Rodriguez, *Los Encuentros, Solola to Guatemala City*, MIMUNDO.ORG, *available at* http://www.nisgua.org/themes_campaigns/index.asp?id=3124&mode=pf.

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was allowable under existing law but undercut its legal significance by ruling that the Ministry of Mines and Energy had exclusive authority over the disposition of natural resources.[347] The decision thus renders the referendum a mere opinion poll and grants no rights to the community to affect the decision of the ministry. The appeal has been filed with the Inter-American Commission on Human Rights.[348]

There is good reason to hope for a positive outcome for the appeal. In the case involving the indigenous people of Nicaragua, the Inter-American Court of Human Rights held that a timber concession had to be cancelled because the state had failed to demarcate indigenous lands and confer title, and had not obtained the consent of the people.[349] In a similar case in 2005, the Court ruled that Belize had also failed to demarcate indigenous lands before granting a concession to a multinational oil corporation and must obtain the "informed consent" of the Mayan people before any development on their lands.[350]

Thus, the issue of consent, already recognized by the Commission and the Inter-American Court of Human rights, could run head on into the claimed state monopoly on resource decision-making in the Sipacapa case. In keeping with precedent, the Court cannot allow that monopoly to continue in the face of a refusal by an indigenous community to consent to a resource extraction project. The question then becomes how to determine or quantify consent. The one proven means of discovering the sentiment of a community, and fulfilling the international law right to free, prior and informed consent, is a formal, democratic election – the community referendum.

347. Dawn Paley, *Goldcorp: Occupation and Resistance in Guatemala (and Beyond)*, DOMINION, June 21, 2008, *available at* http://www.minesandcommunities.org/article.php?a=8699 (stating that the appeal was to the Inter-American Count of Human Rights but all such appeals are first considered by the Inter-American Commission on Human Rights).

348. *Id.*

349. *See Mayagna (Sumo) Awas Tingni Cmmunity, supra* note 34, ¶ 153.

350. *See Maya Indigenous Communities of the Toledo District*, OEA/Ser. L/V/II.122.

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DOI: doi:10.15779/Z38T94C