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# Canada's Mining Industry in Guatemala and the Right to Health of Indigenous Peoples

on AUGUST 18, 2017 · in [PERSPECTIVES](#)

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Congratulations to Leah Shipton—this essay is a winner in the Harvard FXB Health and Human Rights Consortium 2017 Student Essay Competition. Leah Shipton is a Master of Public Health student at the University of Toronto.

## Introduction

Guatemala entered the capitalist world economy in 1523 by force of Spanish conquistadors, emerging first as an agricultural export economy and then, in response to globalization, moving toward a resource-based economy.<sup>1</sup> The ensuing centuries of oppression and marginalization of indigenous peoples have made them vulnerable to the extractive industry in Guatemala, including the actions of Canadian transnational mining corporations (TNMCs).

This paper explores the extent to which international human rights instruments are

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used to ensure that Canadian TNMCs operating in Guatemala respect, protect, and fulfill the right to health of indigenous peoples, wherein the health of these communities is inextricably tied to traditional and ancestral lands and territories.<sup>2</sup> The paper begins with a description of Canadian TNMCs in Guatemala in relation to indigenous peoples' health and lands. It then defines the international human rights framework used for analysis and critiques its implementation by Canadian stakeholders.

### **Historical-to-present day context of Canadian TNMCs in Guatemala**

Canada's mining industry has a history of displacing indigenous peoples from their lands within its borders for profit, and by the mid-20th century, Canada began exporting this exploitative approach to Latin America.<sup>3</sup> Early into the Guatemala Civil War (1960–1996), the Canadian International Nickel Company (INCO) created a domestic Guatemala subsidiary and negotiated with the Guatemalan government for creation and control of El Estor nickel mine.<sup>4</sup> In order to secure the mining site as required by INCO's contract, the Guatemalan military forcibly evicted indigenous peoples from the region, during which 3,000 to 6,000 indigenous individuals were killed.<sup>5</sup> In 1997, Guatemala passed the Mining Law, drafted with the assistance of INCO executives, which opened Guatemala to TNMCs without substantial protections for indigenous peoples.<sup>6</sup> More broadly, TNMCs turned to Latin America for low-cost operations and less strict environmental laws. Currently, Canadian TNMCs are involved in 50–70% of mining activities in the region.<sup>7</sup>

The "hands off" approach taken by Canadian lawmakers and politicians to regulating Canadian TNMCs abroad contributes to Canada being a hub where 50% of the world's publicly listed mining and exploration companies are headquartered.<sup>8</sup> Moreover, the Canadian government uses its diplomatic services to facilitate Canadian TNMC activities abroad.<sup>9</sup> For example, shortly after a 2004 community meeting about the Marlin Mine operated by the Canadian TNMC Goldcorp Inc. in Guatemala, the Canadian ambassador in Guatemala published a local newspaper article promoting the Canadian mining sector as socially and environmentally responsible.<sup>10</sup> Such a claim is highly contestable in light of a 2014 report by the Observatory of Mining Conflicts in Latin America, which identifies 198 cases of human rights violations associated with Canadian TNMC projects.<sup>11</sup> Currently, there are six cases in Guatemala, including situations where indigenous peoples were forcibly evicted, which mirrors Guatemala's colonial history of systematically dispossessing indigenous peoples of their land for capital gain.<sup>12</sup> For example, colonizers forced indigenous communities into separate towns for tax collection and labor exploitation. Currently, the political and military power to control and profit from Canadian TNMCs remains with European-descended

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elites, while indigenous peoples are isolated in rural areas where mining disproportionately affects their lands.<sup>13</sup>

## Health impacts of mining

### Environmental impacts

Mining is highly destructive to and demanding of the environment.<sup>14</sup> It requires mass amounts of water and clearing of lands, the dumping of waste rock, and leaching. Explosives and equipment heighten the risk of occupational injuries and fatalities.<sup>15</sup> Simultaneously, miners endure prolonged exposure to silica and coal dust, increasing their risk of chronic health problems.<sup>16</sup>

The accumulation of heavy metals in crops, fish, and livestock by-products through soil and water pollution extends the health risks of mining to the inhabitants of mining areas.<sup>17</sup> In gold mines, such as the Marlin Mine, the leaching process uses water and cyanide.<sup>18</sup> The leftover product from this process, called tailings, is stored in dams that can overflow during heavy rainfall or earthquakes and that have high amounts of heavy metals, which can be detrimental to neurological, dermatological, pulmonary, and cardiovascular health.<sup>19</sup> Investigations found that water sources downstream from the Marlin Mine were contaminated with heavy metals and that local inhabitants had higher amounts of aluminum, manganese, and cobalt in their blood.<sup>20</sup> In China, research from the Suxian District found that disease mortality decreased with increased distance from mining sites.<sup>21</sup> Correspondingly, the highest rates of heavy metal pollution and disease mortality were clustered around mining sites.

### Economic impacts

Mining projects are often presented to indigenous communities with promises of economic growth.<sup>22</sup> At the national level, mining projects bring economic benefit to Guatemala through royalties, tax payments, and the purchasing of equipment and supplies. However, these economic benefits do not necessarily reach indigenous communities living near mines. An analysis of the Marlin Mine found that the two nearby communities received only 5.1% of the revenue.<sup>23</sup> Ninety percent of the revenue flowed to outside businesses, contractors, and, to a lesser extent, the national government. In Ghana, a population-level analysis of the economic impact of mining from 1993 to 2004 found that mining areas were associated with increased poverty.<sup>24</sup>

One way that mining projects compromise the economic vitality of nearby indigenous communities is by removing their access to land and water resources, which they rely on for subsistence farming and livelihood.<sup>25</sup> Even when these communities have access

to lands, the quality and quantity of agricultural yields can be compromised by water scarcity, land intensification, and pollution of soil and waterways due to mining.<sup>26</sup> In communities surrounding the Marlin Mine, the worsened conditions for agriculture and farming forced many indigenous individuals to pursue migrant work in Mexico, the United States, and the coast of Guatemala.<sup>27</sup>

### Human rights abuses

Two Canadian TNMCs—Tahoe Resources Inc. and HudBay Minerals Inc.—are currently defendants in precedent-setting lawsuits advancing through the Canadian legal system.<sup>28</sup> In these lawsuits, private security personnel hired by subsidiaries of these TNMCs are alleged to have injured, gang-raped, and murdered indigenous individuals protesting mining activities and forced evictions. In these cases, TNMCs did not consult with indigenous communities about their mining activities. Meaningful consultation requires that TNMCs obtain free, prior, and informed consent from indigenous peoples before and throughout mining operations.<sup>29</sup> Failing to obtain such consent is a longstanding trend of Canadian TNMCs in indigenous Guatemalan communities.<sup>30</sup> Therefore, the relationship between the forced eviction of indigenous peoples and consultation and consent, in the context of Canadian TNMCs in Guatemala, will be the focus of this right to health analysis.

### International human rights framework

The forced eviction of indigenous communities from their lands exemplifies how mining in Guatemala has the potential to affect a number of “indivisible, interdependent, and interrelated” human rights, including the right to health.<sup>31</sup> Indigenous understandings of health highlight “the harmony that exists between individuals and communities and the universe that surrounds them,” because “human beings, nature, and the collective history of the ancestors are indivisible from each other.”<sup>32</sup> Indigenous health is “closely related to the wellbeing of the land,” which makes mines that are environmentally destructive and intrusive to lands a direct risk to indigenous peoples’ health in Guatemala.

### The right to health

In 1966, the right to health was explicitly recognized in article 12(1) of the International Covenant on Economic, Social and Cultural Rights.<sup>33</sup> In 2000, the Committee on Economic, Social and Cultural Rights (CESCR) articulated a more comprehensive definition of the right to health in General Comment 14.<sup>34</sup> In paragraph 27 of General Comment 14, the CESCR states that because “in indigenous communities, the health of the individual is often linked to the health of the society as

a whole," the right to health of indigenous peoples must "consider that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."<sup>35</sup> The Inter-American Commission on Human Rights emphasizes that indigenous peoples experience "extreme misery" when disconnected from their lands and that states have an obligation to rectify situations where indigenous peoples' health has been compromised in relation to land access.<sup>36</sup> In this way, land is an "underlying determinant of health," and states are obligated to respect, protect, and fulfill its availability for indigenous peoples in accordance with paragraph 12(a) of General Comment 14.<sup>37</sup>

In addition, paragraph 39 of General Comment 14 requires states "to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries ... by way of legal or political means."<sup>38</sup> In June 2017, the CESCR reinforced this stance by adopting General Comment 24, which declares that states are obligated to respect, protect, and fulfill Covenant rights with regard to the activities of businesses domiciled in their territories.<sup>39</sup> The CESCR highlights the particular risk of indigenous peoples suffering rights violations associated with the exploitation of their lands for business activities.<sup>40</sup> General Comment 24 and preceding documents assert that indigenous peoples' right to health and adequate housing with regard to extractive sector activities must be safeguarded.<sup>41</sup>

### Indigenous land rights

There is no explicit human right to land.<sup>42</sup> Rather, land issues are addressed in relation to the enjoyment of specific human rights, such as the rights of indigenous peoples to land ownership, possession, and control.<sup>43</sup> Indigenous peoples' right to health is linked to their use of land for collective purposes.<sup>44</sup> However, these communities are vulnerable to forced evictions because their land tenure security is fragile, in part because they have customary land tenure that is not always recognized under statutory law.<sup>45</sup> Without stable land tenure security, indigenous peoples' right to health cannot be enjoyed.

International human rights law upholds a minimum standard of land tenure security to protect against forced evictions.<sup>46</sup> In General Comment 7 on the right to adequate housing, the CESCR declares that states "must refrain from forced evictions."<sup>47</sup> The CESCR identifies indigenous peoples as a vulnerable group overly subject to forced evictions, which often occur in the context of "conflict over land rights, development, and infrastructure projects." Indeed, the CESCR has called on states to protect

indigenous peoples from forced evictions in relation to mining, which clearly violates their land tenure rights.<sup>48</sup>

#### State extraterritorial obligations to TNMC conduct

Prior to General Comment 24, the non-binding United Nations' Guiding Principles on Business and Human Rights (UNGPs) declared that states "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."<sup>49</sup> With the introduction of General Comment 24, the rights framework safeguarding the right to health now explicitly declares that state obligations to implement Asbjorn Eide's "tripartite typology" in the context of TNMC activities must "not stop at territorial borders."<sup>50</sup> General Comment 24's extraterritorial obligations encompass the UNGP and the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, which note that states must respect, protect, and fulfill human rights "within their territories and extraterritorially."<sup>51</sup> Extraterritorial obligations reflect the interconnectedness of global stakeholders, such that the action or inaction of states in regulating business activities can impede the realization of rights worldwide.<sup>52</sup>

Under General Comment 24, the extraterritorial obligation to respect requires states to refrain from interfering with the enjoyment of Covenant rights, while the extraterritorial obligation to fulfill requires states to create an international environment that facilitates the realization of those rights.<sup>53</sup> These obligations attend to the role that states' foreign policies, legislation, diplomacy, and trade agreements have in regulating the extraterritorial human rights conduct of businesses, and indeed TNMCs. The extraterritorial obligation to protect requires states to exercise control over business entities operating abroad to "prevent and redress infringement of Covenant rights."<sup>54</sup> Although the CESCR primarily regards state responsibility toward Covenant rights in the context of business activities as indirect, paragraph 32 of General Comment 24 declares that states which fail to "take reasonable measures" to prevent a violation of Covenant rights that was "reasonably foreseeable" are subject to direct responsibility.<sup>55</sup> Failure to meet due diligence standards in mining projects, despite knowledge of the "risks associated with the extractive industry," is used as an example by the CESCR as grounds for violating the extraterritorial obligation to protect.<sup>56</sup> The duty to protect also requires state efforts to assure due diligence on the part of subsidiaries and business partners of business entities domiciled in their jurisdiction.<sup>57</sup>

#### TNMC obligations to the right to health

The UNGP states that TNMCs "should avoid infringing on the human rights of others

and should address adverse human rights impacts with which they are involved” by implementing policies and procedures, regardless of the ability or willingness of host states to meet their human rights obligations.<sup>58</sup> These guiding principles apply to “internationally recognized human rights,” such as the right to health and the right to an adequate standard of living, which encompasses rights related to forced eviction.<sup>59</sup> Furthermore, TNMCs are responsible for the human rights conduct of stakeholders with which they have “business relationships.”<sup>60</sup> These principles are referenced in the Organisation for Economic Co-operation and Development’s Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (OECD-SE), which provides recommendations for TNMCs on upholding human rights obligations.<sup>61</sup>

Nicola Jager (2002) argues that Eide’s tripartite typology can be used to interpret the obligations of transnational corporations with regard to the right to health.<sup>62</sup> The obligation to respect entails “refraining from interfering directly or indirectly with the enjoyment of the right to health,” which in the context of this analysis requires that TNMCs do not infringe on indigenous peoples’ land.<sup>63</sup> Under the obligation to protect, TNMCs are required to understand land as an underlying determinant of indigenous peoples’ health and implement policies that protect their lands.<sup>64</sup> The obligation to fulfill refers to transnational corporations coordinating the provision of health services to groups affected by their activities, such as TNMCs providing health benefits to mine employees.<sup>65</sup>

Ultimately, existing standards are non-binding under international human rights law. However, the United Nations Human Rights Council is leading a working group “on transnational corporations and other business enterprises with respect to human rights” that has the mandate to develop an “international legally binding instrument” which would operate under international human rights law to regulate the activities of transnational corporations.<sup>66</sup>

## Consent

The Indigenous and Tribal Peoples Convention of the International Labour Organization affirms that indigenous peoples have the right to “not be removed from the lands which they occupy” and that any relocations require “their free and informed consent.”<sup>67</sup> These protections against forced evictions and requirements for consent are reinforced by the United Nations Declaration on the Rights of Indigenous Peoples, General Comment 23 of the Committee on the Elimination of Racial Discrimination, and, most recently, CESCR’s General Comment 24.<sup>68</sup> Indigenous communities’ decision to forgo negotiations or decline consent must be respected.<sup>69</sup>

Consent must be obtained through consultation with institutions representing indigenous communities, wherein these communities are free to oppose activities without fear of violent reprisal or inappropriate incentives.<sup>70</sup> Former United Nations Special Rapporteur on the Rights of Indigenous Peoples James Anaya regards “principles of consultation and consent function as instrumental ... safeguards for all those rights of indigenous peoples that may be affected by external actors.”<sup>71</sup> Anaya specifies that the rights safeguarded by consent and consultation include, but are not limited to, the right to “health and physical wellbeing in relation to a clean and healthy environment” and “non-discrimination in relation to lands, territories, and natural resources.”<sup>72</sup>

Consent as defined in these instruments is not integrated into the UNGP or OECD-SE.<sup>73</sup> Rather, these guidelines narrow expectations to consultation with indigenous communities about the potential impact of TNMC activities.<sup>74</sup> For example, the OECD-SE notes that TNMCs should acknowledge rights specific to indigenous peoples, such as customary land tenure, and should understand how activities that require “resettlement” may compromise indigenous peoples’ right to health and an adequate standard of living by disrupting their relationship with land.<sup>75</sup> Moreover, it stipulates merely that TNMCs attend to the conditions of consent legislated by host states.<sup>76</sup>

Overall, the rights framework does not directly compel TNMCs to obtain consent from indigenous peoples for use of their lands. Instead, TNMCs are accountable to whichever definitions of consent are enforced by host states or the states in which the companies are domiciled.<sup>77</sup> As a result, TNMCs operating or domiciled in a state that does not mandate consent can proceed with activities that violate indigenous peoples’ land rights, and subsequently right to health.

### **Canadian stakeholders and the rights framework**

Canada still does not have domestic laws that require TNMCs to uphold human rights obligations in other countries or provide a mechanism to prevent and potentially remedy violations of the right to health of indigenous peoples.<sup>78</sup> In lieu of domestic legal reform, Canada has implemented Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad (CSR Strategy).<sup>79</sup> The CSR Strategy incentivizes TNMCs to adhere to the international practice standards outlined in the UNGP and OECD-SE, among other guidelines, by offering “enhanced Government of Canada economic diplomacy.” TNMCs that do not meet standards risk losing government support in foreign markets.

In accordance with the CSR Strategy, Canadian TNMCs in Guatemala are expected to

respect indigenous peoples' right to health by considering how mining affects lands.<sup>80</sup> However, the absence of consent obligations from the UNGP and OECD-SE makes indigenous peoples vulnerable to right to health violations. This is because, in accordance with OECD-SE, Canadian TNMCs are primarily accountable to Guatemalan law with regard to obtaining indigenous peoples' consent.<sup>81</sup> The Mining Code and the Constitution of Guatemala do not clearly or explicitly contain the expectation that TNMCs conduct prior consultations with indigenous communities.<sup>82</sup> Therefore, failure to obtain consent from indigenous peoples is not a legal violation under Guatemalan law.

Until the recent adoption of General Comment 24, Canada's obligation to respect and protect the right to health of indigenous peoples in Guatemala in the context of Canadian TNMC activities was vaguely defined in paragraph 39 of General Comment 14.<sup>83</sup> Under General Comment 24—and in combination with paragraph 27 of General Comment 14, which connects indigenous peoples right to health with land—Canada has an indirect, and in lesser circumstances direct, responsibility to respect, protect, and fulfill indigenous peoples' right to health in the context of TNMC activities in Guatemala.<sup>84</sup> With the expanded state obligations defined in General Comment 24, the CSR Strategy is an inadequate attempt by Canada to meet its extraterritorial obligations to respect, protect, and fulfill the right to health of indigenous peoples in Guatemala.

Indeed, in the context of Canadian TNMC activities in Guatemala, paragraph 29 of General Comment 24 compels Canada to respect indigenous peoples' right to health by refraining from "interfering directly or indirectly" with their land tenure security.<sup>85</sup> Obtaining consent from indigenous communities, as defined by numerous international human rights instruments, such as paragraph 12 of General Comment 24, is perhaps the clearest way to avoid interfering with their right to health.<sup>86</sup> Since the guidelines endorsed by the CSR Strategy do not require TNMCs to obtain consent, Canada indirectly contributes to conditions where TNMCs can violate indigenous peoples' right to health by proceeding with activities on their lands without consent.<sup>87</sup> Guided by General Comment 24, the Canadian government might consider pursuing efforts to act beyond industry standards and prioritize expert recommendations to compel TNMCs, through legislative or administrative action, to obtain consent from indigenous communities for all activities affecting their lands.<sup>88</sup>

To protect indigenous peoples' right to health in Guatemala in relation to TNMCs, Canada has obligations to use legislative action and incentives to prevent and redress circumstances that compromise indigenous peoples' land tenure security by enforcing due diligence mechanisms and remedy processes for victims.<sup>89</sup> Considering that Canada has no legislated grievance mechanism for victims of TNMC human rights

violations and that two human rights cases against Canadian TNMCs are currently progressing through Canadian courts, the CSR Strategy is severely lacking in its ability to fulfill Canada's extraterritorial obligations to protect.<sup>90</sup> Moreover, in accordance with paragraph 32 of General Comment 24, the Canadian government can be held directly responsible for right to health violations experienced by indigenous peoples in relation to Canadian TNMC activities in Guatemala.<sup>91</sup> This is because "the well-documented risks associated with the extractive industry" illustrate that Canada has sufficient knowledge to reasonably foresee that severing indigenous peoples' relationship with their lands, through unconsented mining activities and forced evictions, directly violates their right to health.<sup>92</sup> A well-resourced and empowered extractive sector ombudsperson and comprehensively enforced legislation requiring TNMCs and their subsidiaries to meet or exceed due diligence guidelines might be viable avenues for Canada to pursue its extraterritorial obligations to protect indigenous peoples' right to health in Guatemala.<sup>93</sup>

Canada's extraterritorial obligations to fulfill indicate a role in "creating an international environment" that enables the fulfillment of indigenous peoples' right to health in the context of TNMC activities.<sup>94</sup> Employing diplomatic tactics to promote Canadian TNMCs that do not meet due diligence standards, as demonstrated by the Canadian ambassador's support to Goldcorp, illustrates one way that Canadian "diplomatic and foreign relations measures" fail to "promote and help create" a transparent, unbiased, and non-coercive environment where indigenous peoples can give or deny consent with regard to TNMCs using their lands.<sup>95</sup> The CSR Strategy focuses on providing guidance to TNMCs with regard to human rights conduct, and less on addressing broader systems that influence the realization of indigenous peoples' right to health.<sup>96</sup> The strategy only briefly summarizes Canada's contributions to an "open [and] transparent" extractive sector investment environment through its support of anti-corruption initiatives and participation in multilateral forums. Bilaterally, the strategy offers a voluntary option for trade and foreign investment agreements to incorporate corporate social responsibility provisions.

In the spirit of bringing "lasting prosperity" to "those living in the areas in which our companies are active," the Canadian government might take direction from paragraph 37 of General Comment 24 to assess how its role as a safe haven for TNMCs contributes to an international environment that impedes the fulfillment of indigenous peoples' right to health in Guatemala.<sup>97</sup> This shift in perspective highlights the systemic supports that Canada provides for TNMCs, which include tax incentives for investing in TNMCs, precedence favoring the right to reputation that silences critiques of TNMCs, and support from development and diplomatic agencies.<sup>98</sup> In broadening state

obligations to create an environment that enables the fulfillment of Covenant rights, General Comment 24 may be used as grounds for stricter human rights standards on investments made by the Canadian Pension Plan and Export Development Canada.<sup>99</sup> The Canadian Pension Plan, to which most Canadians in the formal workforce make mandatory contributions, "holds equity worth about \$2.5 billion in publically traded Canadian mining companies that operate in developing countries," and Export Development Canada "facilitated Canadian businesses in the Latin American extractive sector worth more than \$4 billion" in 2008.<sup>100</sup> Legislation requiring that these systems make capital investments based on the adherence of TNMCs to the rights framework, including by evaluating TNMC approaches to obtaining indigenous peoples' consent, may serve as an avenue for Canada's extraterritorial obligations to fulfill the right to health of indigenous peoples in Guatemala under paragraph 37 of General Comment 24.<sup>101</sup>

## Conclusion

Canadian TNMCs are not obligated under international human rights law or Canadian law to respect, protect, or fulfill the right to health of indigenous peoples in relation to their lands. With the introduction of General Comment 24, there is potential to strengthen Canada's extraterritorial obligations by regulating the conduct of TNMCs and broader domestic systems that enable TNMCs to violate human rights in international contexts. These actions, guided by indigenous Guatemalans, Canadian civil society advocates, and expert committees, should strive to ensure that indigenous conceptualizations of health as indivisible from land are realized through corresponding indivisible rights in international human rights law.

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