Mining Conflicts and Indigenous Peoples in Guatemala
Mining Conflicts and Indigenous Peoples in Guatemala
Author: Joris van de Sandt

September 2009

This report has been commissioned by the Amsterdam University Law Faculty and financed by Cordaid, The Hague. Academic supervision by Prof. André J. Hoekema (a.j.hoekema@uva.nl)

Guatemala Country Report
preparation for the study:
Environmental degradation, natural resources and violent conflict in indigenous habitats in Kalimantan-Indonesia, Bayaka-Central African Republic and San Marcos-Guatemala
I would like to express my gratitude to all those who gave me the possibility to complete this study.

Most of all, I am indebted to the people and communities of the Altiplano Occidental, especially those of Sipacapa and San Miguel Ixtahuacán, for their courtesy and trusting me with their experiences. In particular I should mention: Manuel Ambrocio; Francisco Bámaca; Margarita Bamaca; Crisanta Fernández; Rubén Feliciano; Andrés García (Alcaldía Indígena de Totonicapán); Padre Erik Gruloos; Ciriaco Juárez; Javier de León; Aníbal López; Aniceto López; Rolando López; Santiago López; Susana López; Gustavo Mérida; Isabel Mérida; Lázaro Pérez; Marcos Pérez; Antonio Tema; Delfino Tema; Juan Tema; Mario Tema; and Timoteo Velásquez.

Also, I would like to express my sincerest gratitude to the team of COPAE and the Pastoral Social of the Diocese of San Marcos for introducing me to the theme and their work. I especially thank: Marco Vinicio López; Roberto Marani; Udiel Miranda; Fausto Valiente; Sander Otten; Johanna van Strien; and Ruth Tánchez, for their help and friendship. I am also thankful to Msg. Álvaro Ramazzini.

Equally, I am indebted to many colleagues and people that were willing to share their insights and knowledge with me. Special mention is reserved for: Clara Arenas; Santiago Bastos; Edgar Chután; Amílcar Funes; Joel Hernández; Guisela Mayén; Yuri Melini; Benito Morales; Gustavo Palma; Amílcar Pop; Magali Rey Rosa; Martín Sacalxot and Irma Alicia Velásquez.

In the Netherlands, I would like to express gratitude to my colleagues from the research project on “Environmental degradation, natural resources and violent conflict in indigenous habitats” at Cordaid and the University of Amsterdam: Eelco de Groot; André Hoekema; Nico van Leeuwen and Frans Wierema; Elly Rijnierse; and Martua Sirait. Thank you for your supervision and accompaniment of the study, as well as for your trust and patience.

Last but not least, I would like to thank several people that have helped me with the photography, illustrations and proof readings of earlier versions of this work: Andrea Boccalini; Michael Dougherty; Ruud van Dorst; Beth Geglia; Dawn Paley; and Sjouk van de Sandt. A special thanks to all of you.
# Part A

**Metal mining, environmental degradation and conflict in Guatemala: social-environmental impacts and community organizational responses**

## 1 Introduction

1.1 Problem definition and justification

1.2 Guatemala’s indigenous peoples

1.3 Upsurge in (metal) mining activity

1.4 Conflict surrounding metal mining

## 2 Resurgence of mining and emerging contradictions (historical overview)

## 3 Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

3.1 The mine, the communities and other actors

3.2 Environmental and social impacts of mining on local communities

3.2.1 Loss of access to land and territorial integrity

3.2.2 Water contamination and competition for water

3.2.3 Socio-economic impacts: social disruption and ungovernability

3.3 Community organizational responses to mining

3.3.1 Sipacapa’s community consultation and its national reverberations

3.3.2 Municipal elections in Sipacapa, “Rex Ulew” and the alternative development project

3.3.3 Bringing Sipacapa’s case before the Inter-American Commission of Human Rights

3.3.4 Organized resistance and the resurrection of the indigenous mayoralty in San Miguel Ixtahuacán

3.3.5 Bottom-up regional integration of anti-mining resistance: the Peoples’ Council of the Western Highlands

## 4 Notes on the relation between community resistance against mining and the revitalization of indigenous identity
Foreword

Herewith, I proudly present the report “Mining conflicts and indigenous peoples in Guatemala”. The increasing scarcity of natural resources and the relationship with violent conflict has been widely investigated. But the relationship of these two phenomena with environmental degradation and their implication for indigenous peoples is less understood. In July 2006, Cordaid started a first investigation into the relation between the exploitation of natural resources, environmental degradation and violent conflict and its specific impact on indigenous peoples. This resulted in a pilot study on the oil palm exploitation in Indonesia and Colombia.

This pilot study not only raised interest from our partners and the local populations, but also in academic and political circles. The project “Environmental degradation, natural resources and violent conflict in indigenous habitats” in collaboration with the University of Amsterdam was born.

Two in depth case studies were executed in Indonesia (Kalimantan) and Guatemala. Cordaid has a long-term experience in Kalimantan regarding oil-palm exploitation and its implications for the Dayak people. Cordaid is also involved in Guatemala regarding the gold-mine exploitation and its implications for the Maya, in conjunction with CIDSE’s Extractives and Poverty in Latin America (EPLA) program. A third case study was conducted for the timber-logging effects in the Central African Republic for the Pygmy population, but due to unforeseen circumstances this study has not been finalized.

Under supervision of professor André Hoekema of the University of Amsterdam, an expert on plurality of law and interlegality, the two studies have been conducted and published in English, respectively in Bahasa Indonesia and Spanish. I sincerely hope that these studies strengthen the cause of local communities struggling for survival as a distinct people. I also hope that this English version contributes to further insight on the ancient conflict between tradition and modernity, which intensifies at high speed in current times. I am convinced these studies will lead to fruitful discussions and perspectives for action in our Communities of Change for a better world.

Eelco de Groot
Senior Program Officer
Cordaid
Executive summary

Over the past decade there has been a strong upsurge in mining investments by transnational mining companies in Guatemala. The first large mining project, the Marlin gold mine in San Marcos (owned by Goldcorp Inc. of Canada and operated by Montana Exploradora de Guatemala S.A.), has generated much controversy among the Maya indigenous communities affected by it. This study of the conflict surrounding the Marlin mine analyzes the economic, environmental and social impacts of mining and describes how these communities have responded to defend their interests.

The land acquisitions for the construction of the mine have directly affected the livelihoods of families in mine-adjacent communities through decreased access to and control over land. Moreover, as has been set out in more detail in an addendum to this study, they severely impair the territorial integrity of the larger communities of San Miguel Ixtahuacán and Sipacapa. Five years after the land transactions – many of which took place as a result of coercion and intimidation of rights-holders by the company – it becomes clear that temporary or part-time mining employment does not make up for the losses suffered.

In view of deficient legislation and weak institutional capacity of government agencies to control and regulate mining, there are considerable risks of water-related environmental degradation. These risks, along with possible decreasing water availability, are categorically denied by Montana. However, several water monitoring studies by local NGOs illustrate a tendency of increasing water contamination downstream of the mine. Moreover, anxiety over water competition is leading to tensions and occasionally leads to outbursts of conflict among communities and between communities and the mining company.

The presence of the mining project adversely affects the social fabric and cohesion of both indigenous municipalities, not in the least as a result of the machinations (information management) by the company. Discord between proponents and opponents of mining, which is being actively manipulated by Montana, is dividing communities and has created an atmosphere of fear and mistrust, leading to serious problems of governability, especially in San Miguel Ixtahuacán. In Sipacapa, the company through Fundación Sierra Madre is undermining community efforts to create an alternative development program.

Far from passively accepting these threats to their livelihoods and community life – as well as to their cultural identity and self-determination – indigenous highland communities have mobilized to defend their interests in several ways.

Where the government failed to inform and consult indigenous peoples about mining projects, Sipacapa and other communities have organized their own popular referendums or community consultations to pronounce themselves against the exploration and exploitation of minerals in their territory, thereby making use of the legal resources available to them (Municipal Code and ILO C169). While the consultations have been very successful socially and politically, the government has until now refused to accept their results as legally binding. In relation to this fact, Sipacapa has recently brought a case before the IACHR.
In Sipacapa, community involvement in resistance to mining has resulted in increased participation in local government and the creation of a new community structure for participatory development. Groups of community members have begun to prioritize and develop sustainable agricultural projects, explicitly as an alternative to large-scale mining-based development. In San Miguel Ixtahuacán, communities protesting the mining project decided to re-create their traditional indigenous authority structure, the alcaldía del pueblo, as a counterweight to the autocratic municipal government in favor of mining.

Recently, resisting communities have taken their representation towards the government and companies in their own hands with the creation of the Peoples’ Council of the West (CPO), which is rapidly growing and functions as a regional platform for the coordination of the resistance against “megadevelopment”.

Community organizational responses to mining show interesting signs of a revitalization of indigenous identity. Some observers for example interpret the community consultations as a recuperation of the indigenous community as a collective subject. Others, on the other hand, have noted that the struggle against mining up to now has barely been discursively articulated with claims for the recognition of collective indigenous rights and that communities have not yet succeeded in translating their demands into a clear and comprehensive political program for reform of the State. They imply that communities should link up their struggle with aspects of their identity as a source of socio-political capital.

Finally, the study addresses the impasse in the national debate on the validity and legal effect of consultations of indigenous peoples in Guatemala, which indicates a fundamental lack of understanding of the international consensus on norms for such consultations – both in the government and in the communities. This points to the urgency to adequately regulate the mechanism for consultation in line with the provisions of ILO C169. Recently, there has been a valuable attempt, by a committee of indigenous congress members, to draft an Indigenous Peoples’ Consultation Bill. However, this effort a priori threatens to founder on the opposition from powerful business interests as well as a lack of involvement of the indigenous movement in national legislative processes.

In an addendum to the study, an effort has been made to clarify the situation with regard to indigenous collective land rights in mining-affected communities. Historical research shows that the lands of the inhabitants of both Sipacapa and San Miguel Ixtahuacán form an integral part of larger ancestral territories over which there exist early twentieth century title deeds that are still legally valid. During the land acquisition process that preceded the construction of the Marlin mining project, Montana purposely ignored the existence of these collective titles, which casts doubts on the legitimacy of the company’s property rights.

While the transformation of the mining conflict will require the involvement of a wide range of actors, it would first seem necessary to empower local indigenous communities through the promotion of legal rights, capacity and leadership building and the elaboration of culturally appropriate development strategies.
Part A

Metal mining, environmental degradation and conflict in Guatemala: social-environmental impacts and community organizational responses
Notes on the relation between community resistance against mining and the revitalization of indigenous identity

Introduction
1.1 Problem definition and justification

The resurgence of mining activity in indigenous territories in Guatemala has led to considerable problems of social conflict and environmental degradation. Due to deficient legislation and weak institutional capacity of the government as well as lack of community participation in decision-making on mining projects, vulnerable indigenous communities, which continue to be discriminated against and marginalized by the dominant society, threaten to become victims of these fast-moving new developments. The natural resources on which they depend for their livelihoods (survival) are being taken away from them or damaged, and a model of development is being imposed on them without their consent. This inventory of the situation of indigenous communities in mining areas and of their efforts at organized resistance is a first contribution to the newly defined objective of Cordaid – through its program “Identity, Diversity and Social Cohesion” – to support empowering and participatory processes that strengthen the position of these communities in their dealings with transnational mining companies and government agencies.

1.2 Guatemala’s indigenous peoples

According to the census of 2002, Guatemala at that time had a population of 11.2 million, of which 4.4 million identified as indigenous Maya, 16.2 thousand as Xinka (a non-Maya indigenous people) and 5 thousand as Garifuna (people of African descent), amounting to 39 percent of the total population; the remaining 6.8 million (61 percent) identified as Ladino (non-indigenous). (The UNDP 2004 Human Development Report, however, reports the indigenous population’s percentage for Guatemala to be as high as 66 percent). The indigenous Maya, divided into 21 ethnic groups or peoples, generally maintain a strong cultural identity that finds expression, amongst other things, in language, dress, and customs. The four dominant groups are the K’iche’ (1.27 mln), Q’eqchi’ (0.85 mln), Kaqchikel (0.83 mln) and Mam (0.62 mln) (INE 2002). In the colonial and republican period, the Maya peoples were increasingly pushed away to smaller land plots and communal lands at higher elevations and were forced to perform wage labor on non-indigenous owned lands through seasonal migration – a practice that still continues (and that finds new expression in labor migration to the Mexico and the US). Today, the largest indigenous populations are concentrated in the departments north and west of Guatemala City, in particular Quiché, Alta and Baja Verapaz, Sololá, Totonicapán, Huehuetenango and San Marcos.

Although the number of indigenous people that live in the city is increasing (31 percent of the indigenous population in 2002 – also a considerable number of indigenous people live in Mexico and the US), the majority of the indigenous population still lives in rural communities. These are the areas where the great asymmetries (inequalities) that have always characterized Guatemalan society find their strongest expression in poverty and social, economic and cultural exclusion (MINUGUA 2001; MAR 2004; CEPAL 2006). The Maya were also the most

---

1 The surveys and censuses that are being held by the government are – for obvious reasons – on the conservative side.
2 Other (18) Maya indigenous peoples (linguistic groups) are: Achi, Akatek, Awakatek, Chuj, Ch’orti’, Itza’, Ixíl, Jokalek, Mopan, Poqomam, Poqomchi’, Q’aqch’el, Sakapultek, Sipakapense, Tektitek, Tz’utujil, Uspantek, Chaltíchitek.
3 The departments where most of the indigenous population lives, are also the departments where the highest levels of poverty are found (highest poverty levels are found in San Marcos, Totonicapán en Huehuetenango).
affected by the internal armed conflict between the army and the guerrillas (1960-1996). During the ethnocidal counterinsurgency campaigns of the army in the 1970s and 1980s, hundreds of villages were completely destroyed and an estimated 200,000 people were killed, primarily (83%) among the indigenous population (CEH 1999). The violence systematically transformed the social organization of indigenous communities. Traditional community structures such as cofradías and councils of elders were abolished or subordinated to military control and the cooptation of many people by the paramilitary civil patrols (Patrullas de Autodefensa Civil, PAC) exacerbated local divisions.

After the signing of the Peace Agreements (on December 29, 1996) greater political liberalization seemed to offer more space for the recognition of the multicultural nature of Guatemalan society. Over the past decade, however, efforts to translate the promises contained in the 1985 Constitution and subsequent Peace Agreements (specifically the Agreement on the Identity and Rights of Indigenous Peoples) into specific indigenous rights legislation have largely failed. Conservative elites and the powerful business sector continue to obstruct even modest attempts to recognize indigenous (collective) rights, insisting on a unitary rule of law in order to defend their historical privileges. The indigenous movement in Guatemala is weak in comparison with other American countries: it is lacking major political allies and is internally divided between popular-Leftist and pan-Mayan ideologies, resulting in problems of representativity and legitimacy (Sieder 2002; Bastos & Camus 2003a/b). Meanwhile the indigenous population in rural and urban communities continue to demand more rights and mobilize around specific themes – e.g. the continued violation of human rights, economic liberalization, and, recently, the destructive effects of mining and other mega projects – in order to defend their livelihoods and secure their future.

4 The armed conflict also left an estimated 1 million people internally displaced and up to 150,000 refugees in Mexico.
1.3 Upsurge in (metal) mining activity

The increasing demand for metals from Asian growing economies combined with the discovery of local presence of rich mineral deposits between 1990 and 2000 has caused Latin America to become the largest destination for international mining investments; in this period, the percentage of global mining capital that was invested in the region grew from 12 to 30 percent (mainly directed to Peru, Chile and Brazil). Although Guatemala was known to possess vast and almost untapped mineral deposits (principally gold, silver and nickel, but also various other minerals, both metallic and non-metallic), until the late 1990s the country attracted little mining investment as a result of the internal armed conflict. This changed after the signing of the Peace Agreements and the promulgation of a new Mining Law (1997), which through the creation of favorable investment and business conditions set off a remarkable upsurge in mining exploration. Since 2005 – the year in which the first gold mine, the “Marlin project” in San Marcos, came into production – State revenues from mining have increased strongly (López 2007; MEM 2007), and it is the aim of the government to further stimulate mining production in the coming years (Government Decree 499-2007).
According to the latest available official data of the Ministry of Energy and Mining (April 2008), in Guatemala there are 113 permits for mineral mining in force: 1 reconnaissance permit, 105 exploration permits and 7 exploitation permits (Rosal 2008) – the government has issued many more mining permits for non-metallic mining (exploration and exploitation). More than half of these concessions, along with many pending permit applications, are concentrated in the mountainous areas in four departments: in the west San Marcos (17) and Huehuetenango (15), and in the east of Alta Verapaz (16) and Izabal (19). Although all of these departments have a majority Mayan indigenous population, local communities were not consulted before these permits were granted, which is a violation of ILO Convention 169 on indigenous peoples, ratified by Guatemala in 1996. Four large transnational companies that operate in Guatemala

---

5 A reconnaissance permit allows the holder to identify and locate potential areas for exploitation; and exploration permit allows the holder to locate, study and evaluate deposits; an exploitation permit allows the holder to exploit the deposits (Mining Law [Decree 48-97], arts. 21, 24, 27; Castagnino 2006).

6 According to some sources, already in early 2005 “ten per cent of Guatemala [was] covered by mining licenses, the majority of which are held by foreign interests; 90% of the land covered by these licenses is in indigenous territory (BIC 2005: 2).”
under various registered names (subsidiaries), dominate mining activity in these areas. Three of these companies are Canadian: Goldcorp (based in Vancouver), through its wholly-owned subsidiaries Montana Exploradora de Guatemala and Entre Mares de Guatemala, operates 17 exploration concessions and 1 exploitation concession in San Marcos and Huehuetenango; Nichromet Extractions (based in Montreal), represented by its subsidiary Nichromet Guatemala, has 8 exploration concessions in Izabal and Alta Verapaz; and HudBay Minerals (based in Toronto), through its subsidiary CGN (Compañía Guatemalteca de Níquel), is working in 2 exploration concessions and 1 exploitation concession in Izabal. The fourth company is Australian: BHP/Billiton (based in Melbourne), through its subsidiaries Maya Níquel and Jaguar Níquel, operates 18 exploration concessions in Izabal and Alta Verapaz (MEM 2008; \^ various internet sources).

\footnote{Most of these companies also own concessions in other departments, for example Montana Exploradora de Guatemala also operates concessions in Totonicapán, Quetzaltenango and Huehuetenango; Entre Mares de Guatemala in Jutiapa and Chiquimula; Nichromet in Baja Verapaz; and Maya Níquel in Jalapa. Another large player in mining in Guatemala is Radius Gold Ltd. (based in Vancouver), which operates 8 concessions in El Progreso, Jalapa, Chiquimula and Guatemala through its subsidiary Exploraciones Mineras de Guatemala S.A. (Rosal 2008).}
Currently in Guatemala there is only one large-scale mine in production: the Marlin project, an open pit gold and silver mine owned by Montana Exploradora in San Marcos, situated in the largely indigenous municipalities of San Miguel Ixtahuacán and Sipacapa. The old EXMIBAL nickel mine in El Estor, Izabal, which briefly operated between 1977 and 1981, has recently become the property of CGN and, renamed as the Fénix project, was scheduled for being reopened in 2009. Other gold mining projects are being developed in El Progreso (El Sastre, property of Canadian company Aurogin Resources) and Jutiapa (Cerro Blanco, operated by Goldcorp’s subsidiary Entre Mares) (MEM 2007; Rosal 2008).

1.4 Conflict surrounding metal mining

The conflict over the issue of mining essentially revolves around different visions of development: neoliberal development in the form of mega projects versus alternative development that is based on local identities (see Blaser 2004). Indigenous communities affected by mining projects all of a sudden find themselves at the center of a transnational political playing field involving a multitude of actors: multinational companies, international financial institutions, national governments, nongovernmental environmental and development organizations, indigenous peoples organizations, academic/research institutions, and various international agencies. Indigenous communities and their allies are mobilizing in a context that is characterized by highly uneven power balances, entrenched political positions, and – most importantly – lack of dialogue. By assessing the mining conflict in Guatemala, focusing particularly on two local cases (in San Marcos and in Izabal, respectively), this report aims to describe how this complicated context is shaping these communities’ attempts to take control of their own development, and point to some starting points for assisting them in overcoming major challenges and differences.

PICTURE 2. “IN DEFENSE OF OUR RESOURCES, OUR CULTURE AND OUR DIGNITY”, SIPACAPA, SAN MARCOS © Andrea Boccalini

8 Exploraciones y Explotaciones Mineras de Izabal.
Resurgence of mining and emerging contradictions (historical overview)
Although Guatemala has an early twentieth-century history of mining and oil exploitation (Solano 2005), the mid-1990s marked the beginning of a new episode for mining. At that moment, two events coincided: the ending of a decades-long internal armed conflict (1960-1996) and a transition from a military to a civil-entrepreneurial type of government (gobierno empresarial), personified by the government of Alvaro Arzú (1996-1999). In an effort to attract foreign capital and jump-start the Guatemalan economy, the Arzú government decided at that time to privatize the energy sector and devise a new Mining Law, measures which, like elsewhere in Latin America, were implemented within the framework of neo-liberal Structural Adjustment Programs imposed by the World Bank and International Monetary Fund. The most important aspects of the Mining Law (Decree 48-97) are that it reduces the percentage of royalties on gross revenues to the government from 6 to 1 percent\(^9\) and that foreign companies are permitted 100 percent ownership of mining enterprises and are exempted from paying various taxes, amongst other things on the use of water and on imported machinery (PDH 2005: 15; Solano 2005; López 2007).

The 1997 mining law was quickly approved in congress under pressure from transnational mining companies\(^10\) and without public consultation as prescribed by Guatemala’s constitution.\(^11\) Also, it does not explicitly take into account the special position of indigenous peoples that inhabit the areas that are earmarked for mining operations. It fails to include a paragraph on the consultation of indigenous communities concerning planned projects, and does not give consideration to their collective land rights (titles) or their cultural attachment to ancestral territories and to the natural resources in these areas. This despite the fact that the Mining Law was promulgated after the ratification by the Guatemalan government, in 1996, of ILO Convention No. 169 concerning Indigenous and Tribal Peoples (henceforth ILO C169) as well as the signing, in 1995, of the Agreement on the Identity and Rights of Indigenous Peoples (PDH 2005). Moreover, environmental regulations contained in the law are vague or loosely formulated – particularly with regard to Environmental and Social Impact Assessment (ESIA) processes – or nonexistent – when related to accountability mechanisms for environmental damages. In this sense, the law is not harmonized with environmental legislation currently in force (Decree 68-86 and Governmental Resolution 23-2003) (El Periodico 02/11/2004; López 2007).\(^12\)

One of the first enterprises that reacted to the new mining legislation was the Canadian company Montana Gold, which in 1998 created its wholly-owned subsidiary company: Montana Exploradora de Guatemala. In 1999, this company obtained from the government an exploration license for the “Marlin area” in the department of San Marcos (municipalities of

---

\(^9\) It was 6% pursuant to the Mining Law of 1993 and this percentage had been 10% under the Mining Code of 1935 (PDH 2005).

\(^10\) Investigative journalist Luis Solano (2005) shows the intertwinement of the interests of foreign extractive companies and the Guatemalan political elite and points to the fact that these companies have repeatedly demanded legal reform to make their operations in the country more profitable.

\(^11\) Guatemala’s 1985 Constitution (reformed in 1993) states in article 172, paragraph 1, that “all political decisions of transcendental importance must be subjected to the mechanism of a popular referendum” (PDH 2005: 20).

\(^12\) Other relevant environmental laws are the Law for the Protection and Improvement of the Environment and the Environmental Evaluation, Control and Monitoring Regulation. Moreover, Guatemala ratified, in 1995, the Convention of Biological Diversity and consequently drafted, in 1999, a National Biodiversity Strategy and Action Plan.
San Miguel Ixtahucán and Sipacapa) in which a gold and silver ore body was discovered.\(^{13}\) In the exploration phase, the Marlin concession was the object of speculation and changed owners more than once.\(^{14}\) In 2000, Montana Gold merged with the American-Canadian company Francisco Gold, which in turn in 2002 came into the hands of yet another Canadian Company, Glamis Gold. After the approval of the Environmental and Social Impact Assessment (ESIA) in November 2003\(^ {15} \) (MEG 2003) – under the departing Portillo administration (2000-2004) – Glamis Gold began constructing the mine through Montana Exploradora in May 2004, and started exploitation operations in the third quarter of 2005 (CAO 2005; Castagnino 2006). At the time, the annual yield of the mine was estimated at 220,000 ounces of gold and 3.4 million ounces of silver over a projected 10 year mine life – with 2004 gold and silver prices averaging USD 409.72 and USD 6.67 per ounce approximately USD 125 million per year (El Periodico 02/11/2004; CAO 2005; Solano 2005).\(^ {16} \)

The arrival of Glamis Gold (Goldcorp since 2006) in San Marcos – soon followed by Canadian INCO (HudBay Minerals since 2008), which had developed plans to reopen the EXMIBAL nickel mine in El Estor, Izabal – caused a resurfacing of social conflicts surrounding mining,\(^ {17} \) leading to a national debate with two opposing views slowly developing. In late 2003, Sipakapense traditional authorities in Sipacapa and Q’eqchi’ community leaders in El Estor with the help of local Catholic church organizations (MTC and AEPDI, respectively)\(^ {18} \) drafted protest declarations in which they expressed their fears of environmental degradation and water contamination and claimed not to have been sufficiently informed about the upcoming mining projects (Comunidades Sipacapenses 2003; Comunidades Q’eqchi’ 2002). In early 2004, environmental NGO Madre Selva had started to draw attention to the social and environmental damage caused by Glamis Gold’s practices in the San Martín mine in Valle de Siria, Honduras (operated by its subsidiary Entre Mares). At the same time, Montana Exploradora (henceforth Montana) and the Ministry of Energy and Mining (MEM) had started a campaign to appease the population by emphasizing the opportunities that arise from mining: jobs and development. In September 2004, the Church entered into the debate, leading to a confrontation between President Oscar Berger and the Archbishop of Guatemala, Cardinal Rodolfo Quezada Toruño, who had publicly expressed his concerns about the government’s failure to mention possible

---

\(^{13}\) MARLIN LEXR-388.

\(^{14}\) According to Solano (2005) mining companies commonly engage in speculation and transfers of mining concessions in order to find the capital to cover the start-up costs of the exploitation phase.

\(^{15}\) With Resolution No. 3329, dated November 27, 2003, the Ministry of Energy and Mining resolved to grant an exploitation license, which it named “Marlin I.” Thereby, the “derecho de exploración” converted into “derecho de explotación”.

\(^{16}\) According to Goldcorp, currently the owner of the Marlin project, the mine in its first full year of production (2006) achieved a production of 161,000 ounces of gold and 1.6 million ounces of silver; the next year production figures already closely resembled projected yields (227,200 Au/oz and 2.8 mln Ag/oz) (www.goldcorp.com). Meanwhile, gold prices have increased dramatically, with prices having doubled since 2004 (around 900-950 to 1,000 USD/oz in the first half of 2008), making the Marlin Mine Project a very profitable endeavor for the Canadian company.

\(^{17}\) The EXMIBAL nickel mine had already generated social conflict in the 1970s and 1980s (related to indigenous protests against land dispossession and ensuing human rights violations against community leaders; moreover throughout the 1970s there was also conflict over the tungsten and antimony mine in San Idelfonso Ixtahucán in the department of Huehuetenango (mainly concerning exploitative labor conditions), not far from the actual Marlin project location (Solano 2005).

\(^{18}\) Movimiento de Trabajadores Campesinos and Asociación Estoreña para el Desarrollo Integral.
negative effects of mining (Siglo XXI 26/09/2004 & 02/10/2004). Around this time, the Berger administration (2004-2008) had already granted hundreds of mining licenses without having consulted the local population (McBain-Haas & Bickel 2005; Castagnino 2006).

Meanwhile, the Marlin project had received the support of the World Bank with a USD 45 million loan granted through its private sector branch, the International Finance Corporation (IFC). To apply for this loan, Montana had prepared, in early 2004, a number of required documents, such as a Public Consultation and Disclosure Plan and Indigenous Peoples Development Plan, in which the company claimed to have acted in accordance with the stipulations of ILO 169 concerning the consultation of affected indigenous communities (MEG 2004a/c) – an assertion that was denied from the beginning by the concerned communities and their leaders (based on this criticism, AEPDI had called on the World Bank to delay the approval of the loan; see Halifax Initiative Coalition 2005). The IFC loan to Glamis Gold was the first World Bank investment in an extractive project following the release of its own Extractive Industries Review (WBG 2003), which was highly critical of past Bank involvement in the oil, gas and mining sector (Halifax Initiative Coalition 2006; COPAE 2007b). Part of the loan was used to finance the operations of the Sierra Madre Foundation (FSM), an organization created by Montana with the aim to win over communities by involving them in small projects as part of a so-called “program for integrated community development” (MEG 2004a; McBain-Haas & Bickel 2005; Castagnino 2006).20

19 Montana, a company with considerable capital and a strong cash flow, probably applied for this loan not so much for financial as for political reasons. The approval of this publicly-owned international financial institution (IFI) can be used as political leverage when a project like Marlin becomes contested nationally/internationally: “foreign governments [will] think twice before interfering in a World Bank project” (Cuffe 2005: 25).

20 IFC also gave a grant of USD 89,000 to support a reforestation project to be executed by FSM (CAO 2005).
Towards the end of 2004, communities and civil society increasingly began to mobilize. In November, Sipakapense and Mam community leaders in Sipacapa and San Miguel Ixtahuacán demanded that the government revoke the mining license of Montana in San Marcos (Comunidades 2004). By the end of the same month, various indigenous organizations – from the Western highlands and from Izabal, as well as several national organizations – organized a National Maya Congress on the Inter-American Highway in Iximché-Tecpán, Chimaltenango, to discuss the mining issue and pronounce themselves “against mining concessions in Maya territory” (Congreso Nacional Maya 2004). In response to this, the government in early December organized a First National Mining Forum – a late attempt to reverse the emerging negative public opinion regarding mining. The Forum received support from Canadian Embassy and was attended by representatives of MEM, Montana, World Bank, United Nations Development Program (UNDP), and the Catholic Church but excluded important sectors of society. This led civil society groups and communities to arrange an Alternative Forum of Resistance against Mining. While participants of both forums concurred on the need to better inform the public about the benefits, risks and dangers of mining, dialogue between the most important parties, the government and communities, did not occur. For many participating community representatives, the event made them for the first time aware of the planned mining activities in their (own) territories and of the potential implications these might have for their daily lives (El Periodico/Prensa Libre 03/12/2004; McBain-Haas & Bickel 2005; Pollack & Tyynela 2005).

Tensions broke out into violence the following month, when inhabitants of the town of Los Encuentros, Sololá, spontaneously launched a road blockade – which lasted 40 days – to protest the dismantling of a pedestrian bridge that blocked the passage of a convoy transporting heavy mining machinery, including a giant milling cylinder. Rumors had it that the cylinder was to be used in the operation of a future mine in their department. In reality it was destined for the processing plant of the Marlin project in San Marcos, but the responsible authorities had not considered it necessary to inform the people about this beforehand. When the government sent the National Police to the area, thousands of residents on both side of the Inter-American Highway came to reinforce the blockade. With the indigenous mayor of Sololá as their spokesperson, the protesters demanded that the mining licenses in their territory be revoked, and invited high-level government officials to enter into dialogue. Demonstrating the government’s lack of willingness and incapacity to negotiate, the Interior Minister on January 11, 2005, ordered 1,500 police troops and 300 army soldiers to clear the road blockade by force. In the violent confrontation that ensued, several civilians and police officers fell severely wounded and one indigenous protester was killed by military fire. President Berger later

---

21 The congress in Iximché – the pre-columbian capital of the Maya Kaqchikel people – was organized by the organization Coordinación y Convergencia Nacional Maya Waqib’ Kej, which brings together a union of Maya organizations. The congress was attended by various community organizations from San Marcos, Totonicapán, Sololá (Western Highlands) and Izabal (eastern Guatemala), as well as national indigenous (CONIC, COMG, Waxaqib’ Noj) and non-indigenous organizations (CALAS, Rights Action).

22 The Alternative Forum of Resistance against Mining was organized by, amongst others, the Frente Nacional de Resistencia a la Minería de Metales, a platform for Guatemalan (non-indigenous) NGOs with an active role in opposing metal mining that was founded in mid 2004.

23 An indigenous mayor is the head of the “alcaldía indígena”, an indigenous authority structure that in some Guatemalan municipalities with a majority indigenous population (such as Sololá, Totonicapán, Chichicastenango) exists parallel to official (majoritarily non-indigenous) municipal authorities.
defended his authoritarian decision with the argument that “[the government has] to protect the investors” (Solano 2005: 112; Vogt 2005; Castagnino 2006; Yagenova 2006a/b).

The confrontation in Sololá caused much social and political upheaval, which forced the government to concede to the creation, in February 2005, of a High Commission on Mining (CAN), which was presided by Bishop Alvaro Ramazzini of San Marcos and was made up by government officials, representatives of the Catholic and evangelical churches, academics and members of civil society organizations. Strangely, the commission did not include representatives of indigenous organizations or affected communities. With the explicit goal to revise the existing mining policy and legislation, the discussion sessions of the CAN focused on the points of environmental conservation, transparency, participation/consultation and monitoring. In August 2005, the commission presented its recommendations in a proposal of guidelines for a new mining policy. Concurrently, MEM had begun the elaboration of a reform of the Mining Law and had promised to propose in Congress to temporarily suspend the issuance of mining licenses. When this did not occur and proposed reforms were not in accordance with the earlier drafted guidelines, in March 2006 several representatives decided to suspend or terminate their participation in the CAN (Prensa Libre 03/03/2006; Castagnino 2006). Congress still has not reached a decision regarding the adoption of the law proposal that MEM finally presented to the government on August 21, 2006. In the meantime, the Berger administration until the end of its term (January 2008) continued to issue decrees and policy documents to facilitate mining exploitation.

While the CAN was in deliberation on the future mining law and Guatemala witnessed a series of protests against the US-Central America Free Trade Agreement (CAFTA, approved on March 10, 2005), community leaders in Sipacapa and San Miguel Ixtahuacán kept on insisting that they had not been properly informed or consulted on the Marlin project, either by the company or by the government, before the start of the construction of the mine (early 2004). Even when mining activities had already begun, the indigenous communities of Sipacapa – informed about the benefits and risks of mining by their leaders and allied NGOs – decided to independently organize a community referendum in order to make known their position on mining to the Guatemalan public (Imai, Mehravan & Sander 2007; COPAE 2008a). In doing so, they based their action on international and national legal standards for such consultations, most importantly ILO 169 (art. 6 & 15) and the Municipal Code (Decree 12-2002, arts. 63-65). Despite attempts to obstruct the civic action by the company, the popular referendum (consulta de buena fe) was effectively held on June 18, 2005. With a turnout of about 45% mining was rejected by an absolute majority (98%). The consultation of Sipacapa stirred up much political debate on the question of whether such consultations are legally binding, the answer of which hinges on the interpretation given to the relevant laws (Castagnino 2006; Otzoy 2006). In May

---

24 Propuesta de Lineamientos de Política Minera (Proyecto Acuerdo Gubernativo No. XI), Comisión de Alto Nivel sobre la Minería, agosto 2005.
25 Proyecto de Iniciativa de Ley para modificar el Decreto 48-97 [Ley de Minería], Comisión de Energía y Minas, agosto/septiembre 2006.
26 Church and environmental organizations are indignant over the fact that MEM claims that the latest of these policy documents has been inspired by the discussions of the CAN, and has therefore been endorsed by it (see Prensa Libre 02/11/2007).
27 Currently Canada is also negotiating a free trade agreement with Central American countries Guatemala, Honduras, El Salvador and Nicaragua, the Canada-Central America Free Trade Agreement (often abbreviated as CA4FTA).
2007, almost two years after the consultation, the Constitutional Court decided that this kind of civil exercise is legitimate (válida) but not binding (no vinculante) (Prensa Libre 09/05/2007; see also Prensa Libre 05/04/2006).

Regardless of the decision of the Constitutional Court, the example of Sipacapa has since been followed by more than 35 municipalities throughout the Western highlands and in other parts of the country (most of them in Huehuetenango and San Marcos), whose populations, through organizing their own consultations, have all expressed themselves against mining (making a total number of over 500,000 people) (www.resistencia-mineria.org). In other parts of Guatemala, most notably in El Estor, Izabal, communities have objected to mining activities in their territories by following other strategies (Prensa Libre 14/09/2005; AEPDI 2008; ILO 2007a). During the Berger administration, the government did not in any constructive way respond to these popular expressions and continued to grant mining licenses to foreign companies without consulting with the directly and indirectly affected communities, as required by Guatemalan and international law (www.resistencia-mineria.org). In early 2007, moreover, conflict erupted in the mining-affected communities in San Miguel.
Ixtahuacán, where groups of disillusioned community members blocked the entrance roads to the Marlin mine, as well as in El Estor, where displaced Q’eqchi’ families reoccupied lands in the hands of Compañía Guatemalteca de Níquel (CGN) – actions that were followed by violent evictions and legal prosecution of community leaders (Comunidades en Resistencia 2007; Paley 2008). On June 19, 2008, the Constitutional Court (at the request of CALAS) ruled that seven articles in the Mining Law (Decree 48-97) are unconstitutional, specifically those that refer to the emission of licenses. In practice, this created a “technical moratorium” on granting further mining licenses until there is a national consensus about reforms to the Mining Law (CALAS 2008). All the same, and despite election rhetoric, the centre-left administration of President Alvaro Colom (2008-2012) has until now failed to come up with viable initiatives to find a way out of the mining conflict in Guatemala; it has not entered into a real dialogue with communities and reform on the Mining Law is still pending.
Resurgence of mining and emerging contradictions (historical overview)

Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos
3.1 The mine, the communities and other actors

The mine
The Marlin gold and silver mine is located in the northern section of the department of San Marcos in the Western Highlands of Guatemala – 25 kilometers west-southwest of Huehuetenango and 35 kilometers north-northeast of San Marcos, as the crow flies – in the municipalities of San Miguel Ixtahuacán and Sipacapa, at a distance of roughly 300 km by paved and gravel roads from Guatemala City. It is situated in a remote, mountainous region with an altitude of about 2,000 meters above sea level and very distinct wet and dry seasons.

The Marlin mine was discovered by the company Francisco Gold and developed by Glamis Gold through its fully owned subsidiary Montana Exploradora de Guatemala. Since June 2006, Glamis and Montana are the property of Goldcorp, a Vancouver-based company that is one of the largest and fastest growing gold producers in North America, having 16 mining operations in Canada, the U.S., Mexico, Guatemala and Honduras (www.goldcorp.com; Paley 2007d). The Marlin project consists of one 20-km² exploitation concession (Marlin I), granted in November 2003, and one exploration concession (Marlin II), granted in January 2004. Eighty-five percent of the exploitation concession is located in San Miguel Ixtahuacán and 15 percent in Sipacapa (CAO 2005).28

28 The exploration concession Marlin II (LEXR-776), which is considerably larger than Marlin I (LEXT-541), is almost entirely situated in San Miguel Ixtahuacán, with a small part in neighboring Comitancillo and Sipacapa. A Marlin III exploration concession (LEXR-827 – granted in January 2005) is owned by Entre Mares de Guatemala, another subsidiary of Goldcorp. The surface of this intermediate-size concession is equally divided between San Miguel Ixtahuacán and Sipacapa (www.mem.gob.gt; Rosal 2008).
After Montana had acquired surface rights from local land users, construction work on the Marlin project began in early 2004 (costs that were partly covered by a USD 45 million loan from the IFC, approved in June 2004). In December 2005, the mine commenced production (Goldcorp 2007). Over the last two years, the area – situated on the former lands of the villages San José Nueva Esperanza, Agel, San José Ixcaniche in San Miguel Ixtahuacán and Tzalem in Sipacapa – has been transformed into a combined 6-km² open pit and underground mine in which gold and silver are extracted through a process of cyanide-vat leaching. The project also includes a waste rock facility, tailings storage facility, and mineral-processing and tailings neutralization plants (CAO 2005).

The Marlin project is one of a new generation of mines of large size and low cost. It will have an average production of 220,000 ounces of gold and around 3 mln ounces of silver per year and has a processing capacity of 1.82 million tonnes of ore per year, which is calculated to also accommodate ore from other possible future mining sites (Goldcorp 2007). The total development costs of the mining project have been estimated at USD 254 million while the total sales of raw and exported product (unrefined) were estimated in 2005 at USD 893 million in 10 years (www.ifc.org). In 2006 and 2007, the mine already earned Goldcorp USD 312 million due to a sustained increase of gold and silver prices (www.goldcorp.com).

Montana has always claimed that the mine will bring local and regional development through job creation and social investment. During the construction of the mine, Montana had employed 880 people from local communities; however, only 160 of these jobs involved long term employment (MEG 2005: 1; Gómez 2005: 3). Mining-affected municipalities also have a 50% share in the 1% royalties on gross revenues that are paid by the company to Guatemala – communities do not share in the tax on surface area (canon de superficie) and other taxes. In December 2007, Montana claimed to have paid an accumulated Q9.42 (USD 1.26) million in royalties to San Miguel Ixtahuacán and Q11.88 (USD 1.58) million in voluntary contributions to communities. So far, royalties have been invested only in infrastructure projects (Prensa Libre 26/08/2008).

Although IFC judged that Montana was “committed to socially-responsible mining” and argued that Marlin would “set the standard for future mining projects in Guatemala” (IFC 2004), since its inception the project has generated much criticism and protest from affected communities. Community leaders in San Miguel Ixtahuacán have stated that almost the entire population was uninformed about the project before mining exploitation started. Inhabitants of nearby villages complain that despite the implementation of small “cement” projects, vocational training and health programs, most people’s basic needs go unsatisfied. The community of

---

29 The estimated production costs in the Marlin project are USD 93 per ounce of gold; the locally found ore contains 5.4 grams of gold per tonne (1 ounce = 28.35 grams) (www.ifc.org).

30 This has been calculated on the basis of 2006 and 2007 production figures as presented by Goldcorp, multiplied with average gold and silver prices for those years (see www.kitco.com).

31 Pursuant to the 1997 Mining Law, the 1% royalties on gross revenues from mining that accrue to Guatemala are equally divided between the affected communities and the State.

32 These data have been taken from the display boards that Montana has installed in the centre of the towns of San Miguel Ixtahuacán and Sipacapa, which present data on specific and total investments the company has made in local communities and in Guatemala in general.
Sipacapa has voted overwhelmingly against the expansion of the mine in their territory and has declined to accept Montana’s large money offer to the municipal government (Paley 2007a).

Besides indignation over lack of consultation, resistance against the mine has been fueled by concerns related to Montana’s environmental management plan for the Marlin project, which according to independent experts has grossly underestimated risks of contamination and cumulative impacts on local water availability, amongst other things (Moran 2004). The fears of communities are not unfounded. Goldcorp’s San Martín mine in the Siria Valley in Honduras has cause severe health problems among the local population due to pollution of rivers with heavy metals and cyanide (Bianchini 2006); its subsidiary Entre Mares de Honduras, which operates the San Martín mine, was fined by a Honduran court for non compliance with environmental regulations in June 2007 (Paley 2007c).

The communities
The municipalities of San Miguel Ixtahuacán and Sipacapa are predominantly populated by Maya indigenous communities with their own language and distinct culture. Approximately 95% of the 29,650 inhabitants of San Miguel Ixtahuacán, who live spread out over about 20 communities (aldeas), identify themselves as Maya Mam, the fourth largest indigenous language group in Guatemala. In Sipacapa the large majority – according to the latest census about 70% of the 14,050 inhabitants of 13 communities (88% according to municipal counts) – belongs to the Maya Sipakapense language group, a small ethnic-linguistic enclave wedged in between the territories of the Maya Mam and Quiché (INE 2002; CAO 2005: 5; Sipacapa 2006: 12).33

In Guatemalan highland communities, indigenous traditional authority is closely intertwined with the state-recognized municipal authority. At the level of the (indigenous) village (aldea), community mayors (alcaldes comunitarios) – a culturally appropriated authority figure that stems from late colonial legislation – are subordinate (subservient) to the municipal government. Similarly, the village development councils (Consejos Comunitarios de Desarrollo), recently instituted as a result of Guatemala’s development process (pursuant to Decree 11-2002), are integrated in the municipality’s Development Council System. Outside municipal government structures, indigenous families are also organized through informal social networks, Catholic and evangelical church and community groups and independent grassroots development associations.

Most inhabitants of San Miguel Ixtahuacán and Sipacapa are peasant farmers. Farming families primarily cultivate corn and beans on one or several plots of land (commonly referred to as milpa) – land they hold and use individually, but that forms part of the collective property of the community as a whole (see section 3.2.1.). In addition, many families keep domestic livestock. Due to general poor soil quality and lack of irrigation, income from agricultural activities is insufficient to feed a family year-round. Seasonal labor on the sugar cane and coffee plantations on the coast has traditionally provided an indispensable supplementary income. Currently, remittances from migrated family members in the U.S. are also an important source of income for many families.

---

33 The outcome of censuses depends on the criteria that are used. In Sipacapa, 70% of the population speaks Sipakapense, but more people self-identify as such, though some of these people may not speak the language.
In San Miguel Ixtahuacán as well as in Sipacapa, the majority of the population suffers from poverty, malnutrition and illiteracy – 97.5% lives in poverty and 80% in absolute poverty (SEGEPLAN 2001 in PDH: 35). Despite the Peace Agreements, which promised to resolve the situation of chronic poverty and social exclusion among the country’s rural (mainly indigenous) population, in the past decade the Guatemalan State has failed to provide even the most basic social services in these and other highland communities. Community development committees and associations set up with the help of Church and civil society organizations have had to work with very limited funds mostly obtained from locally operating NGOs or via donor agency programs. Until now, the handful of mining jobs and the (individually oriented) development activities undertaken by Montana’s Sierra Madre Foundation have not brought any significant change.

Particularly in Sipacapa, local leaders were soon to conclude that mining, or community development designed and controlled by the mining-company, is completely at odds with their own visions of community development (cf. Cuffe 2005: 25-26). After having resoundingly rejected the expansion of the mine into their municipal territory, Sipacapa’s population has started to articulate an alternative development plan that does not rely on mining and gives priority to strengthening the agricultural sector (Paley 2007a). But more recently also in San Miguel Ixtahuacán, large sectors of the population have come to realize that the number of jobs and benefits from the mine do not compensate for the loss of agricultural jobs and environmental and social deterioration.

Actors involved in the mining conflict
The struggle around the issue of mining in San Marcos and in Guatemala more generally is taking place in a complex arena in which a large number of actors play a specific active role. While the proponents of industrial metal mining are limited to a handful of transnational companies, supported by some ministries, high-level politicians and the IFC/World Bank, resistance to it is being carried out by a wider variety of players. For a better understanding of the next sections of this report, it is important to characterize the more important of these players, which roughly can be classified into several groups.

In Sipacapa, village development councils (COCODES), together with parochial church committees, were instrumental in organizing the community consultations that almost unanimously rejected mining. While the COCODES remain an important channel for community mobilization, local participation and activism in municipal governance found continuity in the creation of a politically independent civic committee that managed to win the municipal elections of September 2007. In San Miguel Ixtahuacán, communities near the mine have also started to voice their protests against the Marlin project through their grassroots development association ADISMI (Asociación para el Desarrollo Integral San Miguelense) and, more recently, resurrected alcaldía indígena.

On their request, mining-affected communities are being supported by a number of San Marcos-based NGOs. COPAE (Comisión Pastoral Paz y Ecología), attached to the Diocese of San Marcos, has recently developed into an influential organization that specifically provides technical, legal and logistical assistance and representation to communities in their conflict with Montana; it regularly teams up with MTC (Movimiento de Trabajadores Campesinos), the organization from which COPAE emerged but which has recently separated itself from the
structures of the Catholic Church. Ajchmol Maya Development Association (or simply Ajchmol) is another grassroots organization that was early in speaking out against mining and is the only one that manages a discourse of indigenous rights and identity-based development.

Community-based organizations and local NGOs from the outset have had strong ties with, and continue to be supported by a number of nationally operating NGOs. Most notably, Madre Selva, an ecologist collective, has been mediating between communities and government agencies and the IFC/World Bank and has commissioned an early independent water study, while FRMT (Fundación Rigoberta Menchú Tum) and CALAS (Centro de Acción Legal, Ambiental y Social) have been offering legal assistance to communities. The Human Rights Ombudsman’s Office (Procuraduría de los Derechos Humanos), is the only governmental agency with a critical stance towards mining. In 2005 it wrote an extensive report on mining and human rights and in 2007 acted as mediator in the conflict between Montana and communities near the Marlin mine.

Being the “first modern mining project in Guatemala”, Marlin has also been the focus of attention of various North American NGOs and networks that have been directly supporting community initiatives in San Miguel Ixtahuacán and Sipacapa or have been campaigning on behalf of these communities against mining activities on their lands. Supported by environmental, social justice, aboriginal and labor organizations at home (Canada), Mining Watch and the Halifax Initiative provide advocacy information about threats to the environment and communities posed by irresponsible mineral development. With its main office in Guatemala, Rights Action moreover has been channeling funds directly to local community-based organizations carrying out their own human/environmental rights projects. Peace Brigades International wrote an influential report on the consequences of mining for human rights in the country (Castagnino 2006).
In the context of this research, it is also worthwhile to point out that several of the above-mentioned local and national NGOs are being financially and technically supported by Dutch non-governmental development organizations (COPAE receives funds from Cordaid and Solidaridad, MTC from ICCO and Madre Selva from Hivos).

Previous research on the subject of mining-related environmental and social conflict has been conducted by researchers from the San Carlos University in Guatemala (Gómez 2005) and the national and regional research institutes: CEDFOG in Huehuetenango and AVANCSO (e.g. Salvadó 2007), FLACSO-Guatemala (e.g. Yagenova 2006a/b) in the capital.

3.2 Environmental and social impacts of mining on local communities

The now following section is a description of the effects of gold mining by Montana Exploradora on the indigenous (Mam and Sipakapense) population of San Miguel Ixtahuacán and Sipacapa, the two indigenous highland municipalities directly affected by the Marlin project. The focus is on important areas of contention between the mining company, the indigenous communities and – passively – the government, regarding the real and perceived damages to the livelihoods of local communities. Besides loss (“dispossession”) of productive assets (e.g. land and water resources), both in terms of quantity and quality, damages also encompass the cultural and psychological losses that arise from the disarticulation of forms of social organization – the latter aspect of livelihood thus is directly related to indigenous peoples’ cultural identity (Bebbington, Humphreys, Bury et al. & 2008). In describing the effects and threats of mining, information from publicly available documents produced by the mining company – especially its reports to the International Finance Corporation (IFC, part of the World Bank Group) and its later Annual Monitoring Reports – is being contrasted with information from studies commissioned or conducted by civil society groups on behalf of the communities (particularly the environmental impact assessment reviews that independent hydrogeologist Dr. Robert Moran conducted at the request of the Guatemalan environmental NGO Madre Selva). Another important source of information is the assessment of a complaint of the communities of Sipacapa by the Compliance Adviser Ombudsman (CAO) – IFC’s internal watchdog that evaluates the impact of the development projects the agency has invested in (the objectivity of this information is being questioned by CSOs). The description is also based on observations and interviews with people from local communities and organizations that were recorded during extensive fieldwork conducted by the researcher between September 2007 and April 2008.

3.2.1 Loss of access to land and territorial integrity

Until now the most tangible and dramatic effect of the Marlin project in San Miguel Ixtahuacán (and Sipacapa) is loss of access to land suffered by the local indigenous population of the communities (aldeas or villages) near the mine. The intense activities of Montana, which excavates 5 thousand tons of rock each day, the hills in the surroundings of the villages of Ajei, Nueva Esperanza and San Jose Ixcaniache have in the last five years been transformed into immense craters and heaps of waste rock. The original land users, who before they sold their

---

34 Concerns have been raised about the ability of CAO, a sister agency of the IFC, to present independent opinions when IFC is moneylender to the Marlin project (CAO is physically located in the same building as portions of IFC and CAO staff even have “IFC” in their email addresses) (Madre Selva 2005: annex).
land to the mine were mostly unaware of what was coming to them, now live pushed back on miserable pieces of land that border a destroyed landscape. Apart from the ecological damage, this development also has far-reaching socioeconomic and cultural impacts. The World Bank, which partly funded the project, concluded on the basis of its previous experiences that: “The resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival” (Operational Policy 4.12 on Involuntary Resettlement). In addition to the consequences for the families directly involved, the presence of Montana also has wider repercussions in the sense that it has affected the integrity of the collective territory of the larger community of San Miguel Ixtahuacán and with that its prospects for autonomy/self-determination.

The lands of the indigenous families and communities that inhabit the municipalities of San Miguel Ixtahuacán and Sipacapa form an integral part of a larger (more inclusive) ancestral collective territory over which there exist early twentieth century title deeds (from 1908 and 1918 respectively). Archival evidence suggests that both collective titles are still valid, although only Sipacapa’s title seems to be duly registered (San Miguel Ixtahuacán’s title apparently is not; see part B). Due to Guatemala’s particular history of land ownership, these collective titles (“ejidos” or “communal lands”) are being formally administered – for and on behalf of the indigenous communities – by the local governments of both municipalities. Whereas local traditional authorities (alcaldes comunitarios) have always maintained the memory of these collective titles, among the ordinary community members that cultivated the land, this consciousness until recently was likely to have been present only latently, which can be explained by the fact that for centuries there was no need to protect these lands against the interests of powerful economic actors from outside the community. In daily life, land use rights are being administered at the local level of the village (aldea), where everybody knows the extent of his lands and that of the lands of his neighbors. Individual families enjoy inheritable and locally registered use rights to parts of the land, usually several separate plots of land scattered across the terrain. These use rights are not inalienable and can be sold from one resident family to another. People however do not have ownership of the land, which remains in the hands of the community as a whole. This is why contracts to “buy or sell lands” – i.e. for transferring use rights – must (pursuant to the Municipal Code, articles 3 & 109) be formally validated by the municipal mayor as well as the community mayors (see also ADISMI & Rights Action 2007).

From official documents produced by Montana it seems that the mining company at the time of land purchase for the Marlin project did not understand the complicated land tenure situation on the Altiplano Marquense (MEG 2004b: 4; MEG 2004d: 6). Consequently, it ran roughshod over these essential collective rights of the indigenous communities of San Miguel Ixtahuacán and Sipacapa and dealt with family rights to land as individual property (ownership). The Land Acquisition Procedures (LAP) report, which Montana elaborated in 2004 in order to qualify for a loan from the IFC (World Bank), reads: “Montana owns the rights to the subsurface minerals within the Marlin project area, but the land surface is held in private ownership” (MEG 2004b: 3). In reality, however, Montana may well have been aware of these collective land titles. Montana’s assertion that the land surface in the project area is held in private ownership is, in fact, at odds with the statement that before initiating land negotiations with individual families (use rights holders) in San Miguel Ixtahuacán and Sipacapa, “municipal mayors or their staff were notified [in 1999] of land transactions and were called to witness the
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

This would mean – as community leaders in San Miguel Ixtahuacán contend – that Montana acted in bad faith: by publicly ignoring the collective titles and privately striking a deal with the municipal government, the company kept local indigenous authorities (alcaldes comunitarios) out of the decision-making concerning the land transactions (interviews with Javier de Leon 16/10/2007 & Francisco Bámaca 30/10/2007).

In considering families with interests in land in the Marlin area exclusively as individual owners of the land, Montana also ignored the cultural attachment of local indigenous communities to the land, and in particular the collective nature of this attachment. In its official documents to IFC, especially the LAP report, Montana consistently downplays the economic and cultural significance of the land for the local population. It concludes that “cultural attachment to the land is not strong” considering that “many landowners do not live on the property” and “much of the land is minimally used, primarily for supplemental subsistence farming, occasional grazing and firewood gathering” (MEG 2004b: 1). The company moreover writes in its report that “it was early on determined” that families “prefer to sell their properties rather than being resettled” (ibid.: 1), supposedly because they “view the land sales transactions as strict business arrangements” and “have interest to use the proceeds of the sales to pursue business opportunities” (ibid.: 4-5). In other words, the mining company denies that these are indigenous communities with a traditional land-based mode of production and ignores its centuries-old occupation of these lands – as is testified by the colonial and republican land titles of both communities. The conclusion that the families do not have a close attachment to the land moreover is not well founded, considering that such relationships in the case of indigenous peoples generally are not only individual or economic-utilitarian, but also collective and socio-cultural in nature.

By representing the indigenous communities of San Miguel Ixtahuacán and Sipacapa in this way – as lacking both close attachment to land and traditional authority (and thus “indigenousness”) – in the official documents to IFC and the Guatemalan government, Montana evaded its legal obligations under ILO Convention 169 – which is national law in Guatemala since 1996 – as well as the World Bank’s Operational Policy 4.12 (concerning Involuntary Resettlement), especially regarding consultation procedures. While ILO 169 in article 17.1 states that “the peoples concerned shall be consulted whenever consideration

---

35 The special relationship/cultural attachment between indigenous peoples and their lands, as well as the collective nature of this attachment, is acknowledged in ILO Convention 169 (art. 13.1: “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, [...] and in particular the collective aspects of this relationship”); in the World Bank’s OP 4.10 on Indigenous Peoples (art 4: “collective attachment to geographically distinct habitats or ancestral territories”); and in the UN Declaration on the Rights of Indigenous Peoples (art. 25: “their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, [...] and other resources”).

36 The World bank’s OP 4.10 on Indigenous Peoples (art. 4 note 7) takes “collective attachment” to mean: “that for generations there has been a physical presence in and economic ties to lands and territories traditionally owned, or customarily used or occupied, by the group concerned, including areas that hold special significance for it, such as sacred sites.”

37 The World Bank’s OP 4.20 (on Indigenous Peoples) – OP 4.10 since July 1, 2005 – considers these characteristics two of the five defining features of indigenous peoples, along with “self-identification”, “indigenous language”, and “subsistence-oriented production” (article 4).
is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community”, OP 4.12 demands that borrowers “[explore] all viable alternative project designs to avoid physical displacement of these groups”.

Montana submitted its documents on the land purchase process to the IFC for review in early 2004 (MEG2002b/d), but according to local community members it had started purchasing land in an area as early as 1999, when Montana Exploradora as well as the Marlin concession were still in the ownership of the company Francisco Gold. Interviewees recount that company-contracted engineers approached individual families that owned land where nowadays is the mining site (in the communities of Agel, Nueva Esperanza, San José Ixcaniche and Salitre in San Miguel Ixtahuacán, and Salem in the municipality of Sipacapa). With free meals, services and promises of future work, these company contractors succeeded in convincing a first group of families to sell their land – transactions that were formalized at a later date. These land purchases were all made by land buyers working for an intermediary company named Peridot (interview with Francisco Bámaca 30/10/2007). In the course of the following 5 years, Montana purchased 439 separate parcels of land from a total of 294 local people (“property owners”) amounting to a total surface area of 18,870 cuerdas (825 ha or 8.25 km²). Parcel sizes ranged from 1 cuerda to 501 cuerdas; the average parcel size was 46 cuerdas. Montana paid a total of Q72,138,307 (USD 9,092,168) for these parcels, or Q4000/cuerda (USD 11,537/ha). The average amount paid per parcel was USD 23,194 (per person) (MEG 2005: 12; MEG 2006: 14). The LAP report assumes that this money would allow the families to acquire land more suitable for agriculture elsewhere. Many of the land sellers are said to also own other lands, and most of these people are supposed to have found employment in the mine (MEG 2004b: 3-4).

The mining company claims that all land transactions occurred on a voluntary basis according to the principle of “willing buyer/willing seller”, and that families involved in these transactions received a fair price (MEG 2004b: 1) - in its later assessment, CAO (2005: 29) states that it found no evidence to the contrary. The families that sold land to the mine, however, already in 2003 complained that in the land negotiations they had been cheated and tricked with false promises and were being intimidated (Cuffe 2005: 24, referencing a community communiqué from 2003). Not all community members seem to have been directly willing to sell their land. In these cases, Peridot’s representatives (according to Montana, the “land acquisition team” or simply “land group”, which also included Mam-speaking staff that are residents of the affected communities; MEG 2004b) pressured these families – who were almost always approached individually – to sell their land through constant (repeated) visits and the use of lies, coercion, and intimidation. Testimonies collected from people who sold

---

38 Inspired by ILO 169, Guatemala’s 2002 Municipal Code in a similar way also recognizes this obligation (on the part of municipalities) when it states in article 109 that the mayor is obliged to consult with the alcaldes comunitarios concerning any decision regarding the alienation of “tierras comunitarias” that are under the administration of the municipal government.

39 CAO (2005: 29) maintains that land purchase process for the Marlin mine property began in 2002, “except for a small amount of land, roughly one quarter of a km², that was purchased before 2002”. Neither its LAP report (MEG 2004b) nor in its first Annual Monitoring Report (MEG 2005) is Montana clear on the starting date for its land acquisition process, although it was already buying properties in 2003. It also states that Francisco Gold purchased 638 cuerdas (28 ha) for the Marlin Project before selling the concession to Glamis in 2002 (MEG 2005: 13).

40 This number does not correspond with the number maintained by ADISMI & Rights Action (2007: 6), which claims that in total no less than 670 families were “affected” by Montana’s land acquisitions.
their land to the mine provide telling examples. “They said they wanted to rent the land for a field study” when it turned out later they had sold the land; or “they said that if they found minerals on their land, they would compensate the former owners”, which they never did. If this still did not work, they “were told that even if they didn’t sell, machines would be moving in on their land nonetheless, so if they did not accept the Q4000 per cuerda offered for the land, they were going to lose it anyway” (ADISMI & Rights Action 2007: 6-7; see also interviews with Crisanta Fernández & Marcos Pérez 16/01/2008 in Part B of this report). Thus, a contrasting picture emerges of an aggressive, individual-oriented land negotiation strategy, whereby local traditional authorities (alcaldes comunitarios) were purposely avoided.

Nowadays most inhabitants of the mine-adjacent communities of Agel, Nueva Esperanza, San José Ixcaniche and Salem – together about 1,500-2,000 people – live in a difficult and disadvantaged situation. While they have little or no land left, the work opportunities that convinced them to sell their land to the mine have decreased after the completion of mine construction (the number of jobs has been reduced or jobs have become temporary). Only a small group of families has made good money from the land transactions; most families sold considerably smaller amounts of land. The possibilities for these families to buy (better) land elsewhere are very limited because locally there is little land available (collective land reserves have long-since become exhausted). For many families buying land outside San Miguel Ixtahuacán is no option because it would mean that they have to sever their ties with the community. This is why most people have remained in their communities and today live along dusty roads, over which more than 40 heavy trucks pass every day, in poor houses of which the walls have cracked as a result of the frequent dynamite explosions in mine (ADISMI & Rights Action 2007; Ibañez 2008).
3.2.2 Water contamination and competition for water

Some people have interpreted the resistance of Maya indigenous communities against mining mainly in terms of a struggle for water (Salvadó 2007), which seems too limited as an explanation of the whole issue. It is however certainly true that the issue of (risk of) water contamination and competition for water – both real and perceived – plays an important role in the discussion and social conflict around mining.

Water contamination

In order to understand the risk of water-related environmental degradation, it is first necessary to have a rough picture of the gold mining production process. — The Marlin project extracts rocks from two open pits (the Marlin pit and the Cochis pit), as well as from an underground tunnel. Before the mineral processing begins, the mineral ore is separated from the useless waste rock, which is deposited in a designated dumping site or so-called “waste rock facility”. The valuable minerals are then crunched and led into a pair of cylinder tanks in which gold is recovered from the rock in a chemical reaction after bringing it into contact with a highly toxic cyanide-water solution. The leftover ground ore, which is commonly called “tailings”, is then transported towards a refuse lake or “tailings storage facility” (TSF, or tailings pond). There, the cyanide-containing sediment precipitates to the bottom where the chemicals will slowly decompose and detoxify. The company estimates that the Marlin project in its productive life will generate 44 million tons of waste rock and 14 million tons of tailings. Because the water level in the tailings pond is continually rising, the mine from time to time has to discharge treated wastewater from the dam that contains the tailings pond. This flows in the Quebrada
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

Seca towards the Riachuelo Quivichil and then into the Cuilco River (CAO 2005). Construction of the tailings dam was completed shortly before the mine was taken into production in late 2005 and a tailings reservoir of considerable dimensions has been forming behind it in the following two production years; at the same time, tons of rock have been piling up, uncovered, at the waste rock facility.

Most people in San Miguel Ixtahuacán and Sipacapa only learned about the arrival of the mine after the initiation of the mine’s construction works in early 2004. Yet in the Environmental and Social Impact Assessment (ESIA), Montana (MEG 2003) claimed that the affected population had been consulted. This anomaly raised the suspicion of local leaders, who became worried about the consequences of mining activities on their territory. Based on experiences with similar gold mining operations throughout the world, environmental organizations and experts had begun to warn about environmental risks, more specifically about the possibility of contamination of the surface and groundwater on which local people depend for their daily needs. The company however consistently denied environmental risks during its community information campaign in 2004. In January 2005, local communities in Sipacapa with the help of Madre Selva filed a complaint with the IFC’s Ombudsman (CAO), in which they expressed (among other things) their concerns regarding local water supply quality and quantity:

“We believe that [environmental] risks to be suffered by the people in the area have not been objectively evaluated. We know [from] other sources that contamination from cyanide and other products used for this activity, as well as the use of our water [...] resources, will sooner or later cause damages to our health, since our environment has already been affected” (Rey Rosa 2005: 3-4).

CAO assessed the complaint from the municipality of Sipacapa throughout the first half of 2005, mainly on the basis of a desk review of project documentation.41 In an elaborate report, published in September, CAO admitted that the Guatemalan government had “not established a clear and comprehensive system for regulating the Marlin site that includes water quality standards and government monitoring of adherence to regulations and standards”.42 The report also concluded that “Montana’s development and implementation of some specific management and mitigation plans” – e.g. waste rock design and management plan and dam safety plan – had “not kept pace with the project schedule”, i.e. had not been completed by Montana in a timely manner (CAO 2005: 17-18). Even so, the report seemed to downplay potential water quality impacts – most likely to assuage local concerns – by stating that “there is no possibility that (planned or unplanned) discharges from the processing plants will affect the river system in the Sipacapa municipality” and that “Montana has put in place a rigorous and recently enhanced system for monitoring water quality” (ibid.: 16-17). Due to the contradictory information and concealing use of language, CAO’s assessment of the Sipacapa complaint had exactly the opposite effect: it increased suspicions/fears of communities and environmental organizations towards the Marlin project. Before responding to the assessment report, Madre Selva therefore invited U.S. hydro geologist Robert Moran, who had previously reviewed the Marlin project’s ESIA (Moran 2004), to review CAO’s environmental risk analysis.

---

41 CAO also visited the project area in April 2005, but none of the members of the CAO assessment team had specific expertise in hydrogeology, water quality, geochemistry or technical aspects of mining. CAO also hired an independent hydrogeologist (David Atkins) but this person never visited the Marlin mine (Moran 2005; see also CAO 2005, Annex B).

42 This is a veiled way of saying that the CAO questions the capacity of the Guatemalan government to supervise or regulate the project (see CAO 2005: iii).
In his technical response to CAO’s assessment, Moran (2005) began by criticizing the IFC’s Ombudsman for its restrictive approach by only focusing on potential impacts to water quality in Sipacapa, thus ignoring potential impacts to communities near the mine in San Miguel Ixtahuacán and further downstream along the Cuilco river in the department of Huehuetenango. Then Moran went on to conclude that the assertion that there “will not be any significant risk from water contamination as a result of the mine” (to the people of Sipacapa) is based on unjustifiable optimistic interpretations of incomplete data and that, according to his own analysis, “there is [instead] reasonable likelihood of significant degradation of water quality” (ibid.: 3). The communities in the Quivichil micro-basin in San Miguel Ixtahuacán will be impacted by periodical wastewater (effluent) discharges from the tailings facility, which may contain cyanide and other contaminants. He notes that Montana will – according to its ESIA – construct a water treatment facility only if the water to be discharged exceeds appropriate use standards, but that neither the government nor the mining company have determined what these norms should be. Moreover, the waste rock piles above the Tzalá River are likely to become acid through oxidation and release contaminants that will flow towards the river via surface and groundwater flow paths. This process, which is called acid rock drainage, will thus also directly impact water quality in the Tzalá basin in Sipacapa (ibid.).

As recommended by CAO, Montana in late 2005 started facilitating the creation of a local community environmental monitoring committee (Asociación de Monitorio Ambiental Comunitario, AMAC), which in February 2006 conducted its first quarterly water sampling fieldwork. Amongst the members of the committee are representatives of various communities near the mine – all but one from San Miguel Ixtahuacán – who received basic training in water sampling and chemistry. In planning and implementing its activities, AMAC is assisted by two technical experts: a mining engineer from the San Carlos University in Guatemala and a hydrogeologist. Locally collected samples are sent to an internationally certified laboratory in Canada (ALS Laboratory Group) for analysis. The results of the analysis of the AMAC samples are later compared with the water quality test data from Montana’s own laboratory. In its 2006 Annual Monitoring Report, Montana claims that neither the mine nor AMAC had found mining related contamination in the rivers around the mine. Montana emphasizes that AMAC is independent and democratic; the participating communities are said to choose their representatives from amongst themselves while they make rules according to local traditions (MEG 2007: 18). Civil society organizations and other community members question AMAC’s independence however and point out that both its members and technical experts are being paid by Montana. One ex-committee member said there is no community-based selection process and that he was forced to resign from AMAC after he had expressed criticism towards the company (interview with Lázaro Pérez 14/02/2008).

43 At the insistence of the Ministry of Environment and Natural Resources (MARN), Montana built a water treatment plant in 2008, which apparently has entered in operation in 2009.
44 “Montana and the government of Guatemala should, in collaboration with community members and independent experts, create a comprehensive program of participatory environmental monitoring [...]” with the objective to “achieve the critical purpose of building public trust in Montana commitments. [...] The participatory monitoring program should monitor surface and groundwater sources to [...] ensure public scrutiny of compliance of the operation with determined water quality standards” – thus contributing to a periodical audit of the mine’s environmental performance (CAO 2005: 21-22).
45 Montana claims to have analyzed local water samples since July 2002 (El Periodico 06/01/2007).
Apart from and simultaneously with the activities of AMAC, other organizations also have been sampling water near the Marlin project site. In November 2006 at the request of Madre Selva and Bishop Ramazzini of San Marcos, a water quality study was conducted in the Tzalá River in Sipacapa by the Italian analyst Flaviano Bianchini, who had previously demonstrated water contamination near Goldcorp’s San Martín gold and silver mine in Valle de Siria in Honduras (Bianchini 2006). In Sipacapa, analytical results of downstream water samples showed elevated levels of various heavy metals exceeding drinking water standards as determined by the World Bank. The cause of the contamination was attributed to acid drainage from the waste rock facility (Bianchini 2007). Directly upon publication of the water study, the Vice-Minister of Energy and Mining publicly declared that the research was unsound; samples would not have been properly collected and analyzed (La Hora 11/01/2007). Shortly after, Montana filed a lawsuit against Madre Selva (Prensa Libre 09/03/2007). Bianchini himself was repeatedly threatened in the weeks that followed (Amnesty 27/01/2007).

On closer inspection of various technical reports on the Marlin mine, COPAE discovered in August 2007 that Montana was planning to release part of the residual waters from the tailings pond into the Quivichil and Cuirco Rivers. One report stated that this was expected “between late in the 2007 rainy season, or during the rainy season of 2008” (MEG 2007: 53). As communities near the mine had not been informed about these plans and in view of the steadily rising water in the tailings pond, this discovery was cause for alarm and prompted COPAE to write a formal “letter of concern” to MEM and MARN. In this letter, which was co-signed by the bishops of San Marcos and Huehuetenango as well as 15 civil society organizations, it was pointed out that “there is no information available about the quantity and chemical composition of the residual waters that will be released, nor about the time these
waters have remained in the tailings pond to allow for the cyanide compounds to decompose”. Because of the problematic track record of Goldcorp and its subsidiaries in the Americas regarding illegal discharges and water contamination (e.g. in Canada, Mexico and Honduras), it was demanded that “on the shortest possible notice information be made public regarding Montana’s discharge practices at the Marlin site as well as about the control mechanisms that have been implemented to avoid all kinds of contamination in the rivers near the mine” (COPAE 2007a: 2). In the months that followed, neither MEM nor MARN responded to the letter of concern. In its 2007 Annual Monitoring Report on the Marlin project, Montana sustained that it had postponed the effluent discharge until the rainy season of 2009 (MEG 2008: 55).

Following up on the Bianchini-study, which was based on only one measurement at the end of the rainy season, COPAE in May 2007 decided to set up a water-monitoring scheme with the collaboration of local community members in order to assess changes in water quality over a longer period of time. To this end, it purchased equipment for determining levels of heavy metals and other contaminants in water samples taken monthly from two upstream and three downstream monitoring sites. After more than a year of sampling, COPAE’s first analysis results were officially presented by Bishop Ramazzini in October 2008. The organization reported that downstream in the Tzalá River and Quivichil Stream it had found high concentrations of various heavy metals (iron, aluminum, manganese and arsenic) and that some of these levels – particularly of arsenic – were exceeding appropriate (World Bank and U.S. EPA46) use standards. Moreover it reported that one of the sample points, which is also one of the sources of the Quivichil Stream, had dried up over the course of the measuring period (COPAE 2008b).

A representative of the Miners Trade Union acknowledged the work of the Diocese of San Marcos but emphasized that the study was not sufficiently thorough and lacked scientific character. The Minister of Environment and Natural Resources (MARN), which had also attended the presentation, proposed that the Diocese, the Ministry and company in the future conduct monitoring activities together (Prensa Libre 02/10/2008). Until now, neither MARN nor the Ministry of Energy and Mining (MEM) have been independently monitoring water quality in or near the Marlin project site.

All the while, fears of degradation of water quality have been periodically stirred up by reports of actual or reputed water contamination. Late in 2006 communities downstream the mine reported the dying of cattle and sheep. In the autopsy of one of the animals, toxic poisoning could not be ascertained. In 2007 there were regular complaints of local people with problems of skin irritation. Medical research on these complaints is still ongoing. Montana has systematically (and a priori) denied any relation between these occurrences and its mining activities. Notwithstanding the legitimate concerns about water quality degradation on the short term, experts like Dr. Moran point out that the biggest risks of water contamination are likely to occur in the long term, especially in the years following mine closure. Under current institutional conditions and regulation, oversight to the mining installations will then be stopped and the specific geological characteristics of the area make it likely that groundwater flow paths potentially impact water quality in large areas. In this context it is disquieting that none of the publicly available Marlin documents contains a provision on financial assurance mechanisms for long-term environmental and resource related liabilities – or in case of dam failure in the possible event of an earthquake (Moran 2005; see also COPAE 2008b).

46 United States Environmental Protection Agency.
Competition for water

Fear that the Marlin project will negatively impact local water availability – leading to competition for water between the mine and resident communities – is grounded in the fact that the mine uses large quantities of water in the various stages of its operations: for processing ore in the cyanide vat leaching process, during underground mining activities, for the spraying of water on roads and machinery as a means of dust control, but also during reforestation activities and for personnel use (CAO 2005). Montana’s ESIA (2003) states that the mine uses 250,000 liters per hour. Critics of the project have calculated that the amount of water used by the mine in a single hour amounts to what a typical family in the area uses in 22 years, and estimate that this is sure to cause problems in an area characterized by a semi-arid climate where there is local water shortage in the dry season (Moran 2004, 2005; Madre Selva 2005; Castagnino 2006; Salvadó 2007). Montana maintains that it recycles 85% of its water needs from the tailings pond and that the remaining 15% is drawn from a 300m-deep production well in the Tzalá watershed in Sipacapa. This way, the company says, it can prevent the water demands of the project to impact local water users. In its assessment of the complaint by Madre Selva and Sipacapa, CAO simply repeats this information by concluding that “the people of Sipacapa will not experience increased competition for water as a result of the operations of the mine” (CAO 2005: ii).

In their response, Madre Selva and Dr. Moran pointed out once more that the CAO had given a misleading representation of the facts by (deliberately) ignoring the importance of the impacts to water availability for the mine-adjacent communities in San Miguel Ixtahuacán. In between the lines, the CAO assessment does admit that “some depletion in stream flow and changes in the [Quivichil] basin water balance should be expected downstream of the TSF” (CAO 2005: 18). Moreover, according to Dr. Moran, the conclusion of the CAO – that “there will be no impact from long-term pumping to the flow in the Tzalá River” – is not technically defensible (Moran 2005: 7). This is mainly because this conclusion is based on the assumption that there is no hydrogeologic connection between the geothermal well from which the water is pumped, on the one hand, and the surface waters in the Tzalá watershed on the other. Moran contends that the aquifer tests that were conducted by Montana to prove the assumption were ill designed and incorrectly interpreted. The proximity of the well to the river and the fractured nature of the bedrock can in his view only warrant the conservative assumption that a hydrogeologic connection does exist (Ibid.). In this context, it is telling that the CAO after drawing its conclusion (“there is no connection”) immediately continues by stating that this assumption “needs to be rigorously tested and monitored over the life of the mine” (CAO 2005: 18).

Besides the long-term risk of competition for water, the mine has already caused (short-term) problems of water availability through its interference in established community practices of purchasing water rights. Families that have water sources (streams or springs) on the land over which they hold use rights have, according to Mam and Sipakapense local norms, the right to individually exploit this resource (i.e. water rights are individualized). Neighboring families that depend on these water resources for the irrigation of their plots have to pay the “owners” for the right to access to water. In most communities, the distribution of water is organized by a local water committee in which both parties have representation (Interview with Roberto Marani & Santiago López 12/03/2008). During construction of the mine (2005), Montana had purchased one or more springs from “private owners” to supply water to its workers as well as to provide assistance to a mine-adjacent community (Nueva Esperanza) that as a result of the
activities had been cut off from its drinkable water supply. This intervention caused local water prices to rise and led to unrest and conflicts between water clients and providers within and between neighboring communities (particularly between the aforesaid community and Chiningüitz). Thus, the presence of the mine has also given rise to competition for water between communities (see also CAO 2005; McBain-Haas & Bickel 2005). (The intercommunity water conflicts for the moment seem to have been resolved.)

PICTURE 9. INDIGENOUS WOMEN DOING HOUSEHOLD CHORES, SIPACAPA - © Andrea Boccalini

In March 2007, the Communities in Resistance, a local action committee in San Miguel Ixtahuacán that has mobilized (campaigned) against the Marlin project since 2006, reported that in the nearby villages of Agel and San José Ixcaniche several water wells had dried up. In the first village these dried-up wells had previously provided 40 families in their daily water needs. The problems would have been caused by the water consumption of the mine, or by a technical defect in water provision installations caused by the mining activities (Comunidades en Resistencia 2007). In May this notification was reiterated by ADISMI. In total 6 wells are reported to have dried-up; also fruit trees were drying out, supposedly due to lack of water (ADISMI & Rights Action 2007). Except for one case/well (COPAE 2008b), assertions of both local organizations have not been verified by outside experts.

3.2.3 Socio-economic impacts: social disruption and ungovernability
As has been noted by various observers (e.g. Madre Selva 2005; BIC 2005; BIC, FoE Canada, Halifax Initiative Coalition et al. 2006; López 2007), Montana’s Environmental and Social Impact Assessment, or ESIA (MEG 2003), has largely ignored some of the most important and until now by far the most pervasive (wide-ranging) effects of the Marlin mine, namely the project’s social, economic and cultural impacts in the indigenous municipalities of San Miguel
Gold mining in San Miguel Ixtahuacán and Sipacapa. As can be expected, the parties involved in the conflict surrounding the mine (company vs. communities and allied NGOs) each have very different readings of the project’s social effects.

Montana – in its Annual Monitoring Reports (MEG 2005, 2006, 2007, 2008) and promotional materials – and, to a lesser degree, CAO (2005, 2006) tend to only emphasize the positive economic effects of the Marlin project, first and foremost in terms of the employment it has created locally. Around the peak of the construction phase (late 2004), Montana said to have 870 local people in fulltime employment (of a total of 1500), mostly coming from San Miguel Ixtahuacán (175 from Sipacapa) (MEG 2005: 8). In late 2007, after two full years of production, still 780 people continued to work, albeit part-time, in the mine (135 from Sipacapa) (MEG 2008: 7). Montana claims that because of the creation of direct and indirect job opportunities, families would no longer be forced to migrate for several months each year to the coast to work as day laborers in the coffee and sugar cane harvests. The greater permanence of families in the villages surrounding the mine is said to have substantially increased the school enrollment of children. Direct investments of Montana in infrastructure projects (paved roads) would have improved the accessibility of communities, while the projects of Fundación Sierra Madre (FSM) facilitated access to health services. Other FSM projects, involving the creation of communal banks, micro lending and vocational training for enterprise development moreover is said to have increased economic opportunities among these rural populations. In its own assessment, CAO (2005: 25) positively writes: “On balance, [...] Montana has made considerable efforts to overcome some of the major criticisms of social and economic aspects of mining project”.

Although it cannot be denied that as a result of the mining project the quality of life has increased for a certain, relatively small group of families, it is also true that it has decreased the wellbeing of other, larger sectors of the communities of San Miguel Ixtahuacán, and – to a lesser extent – Sipacapa. Aside from loss of “livelihood assets” in terms of both quantity (land, water, pastures) and quality (water and air pollution), this is caused by the socially disruptive effects of the mine, which has led to social divisions within and between communities and threatens to result in a situation of (near) ungovernability. In a way, this was acknowledged by CAO (2005, 2006) early on in its assessment of the situation in the communities, although the agency’s analysts seem to have largely misinterpreted the causes and effects of the disruption.

---

47 In February 2004, Montana (MEG 2004c) published its Indigenous Peoples Development Plan (mainly for IFC in order to meet with the requirements for a World Bank loan), but this does not as such form part of the ESIA (which was published in June 2003).

48 Montana initially had a policy to mainly contract members of former landowning families from mine-adjacent communities (PDH 2005). These generally poor educated people mostly occupied lower-paid jobs, performing “a variety of maintenance, environmental restoration, community improvement and road construction and maintenance tasks” (MEG 2007: 7).

49 After the construction phase, the number of mining jobs for local people was expected to drop to below 400. On the request of municipal authorities in San Miguel Ixtahuacán, the company in 2006 introduced a rotational employment system to be able to keep more local people employed (MEG 2007: 6:7).

50 Montana (MEG 2005: 23) claimed already in 2005 that there had been a notable increase in commerce around the mining site, particularly through the establishment and expansion of shops selling basic goods, nixtamal mills and hardware stores; this claim seems wildly optimistic and unfounded however (PDH 2005: 36). The company hardly quantifies the creation and expansion of local businesses (also see later Annual Monitoring Reports, MEG 2006, 2007, 2008).

51 Uncritically following Montana, CAO (2005: ii, 26) describes the unfair and irregular land purchases as successful (from the perspective of the land selling families) and unproblematic.
Upon investigating Sipacapa’s allegation that “the mine exacerbates social tensions, violence and insecurity” (CAO 2005: i), CAO concluded that indeed there is “simmering tension, threats and intimidation associated with the project” as a result of “a heightened level of conflict between groups for and against the development of the mine” (ibid.: iii). On its effects, it says that “poor relations with some local communities, particularly in Sipacapa, are undermining attempts by Montana to promote sustainable development projects and generate goodwill” (ibid.: 26). Contradictory, the agency subsequently claims that the severity of the tension “can be largely attributed to resentment and perceptions of exclusion and isolation” – read: jealousy – on the part of people and communities in Sipacapa due to the fact that “the distribution of benefits and opportunities arising from the project are focused more on San Miguel than Sipacapa” (ibid.: 37; see also CAO 2006: 11). Accusingly, the CAO then goes on to insinuate that the social unrest in the area is not so much created by the faulty information disclosure policy and divisive activities of the mining company as it is the result of an “aggressive and at times factually unfounded campaign [by] Guatemalan and international civil society organizations critical of mining” (CAO 2005: iv, 37) – or even “outside provocateurs” (CAO 2006: 11 – emphasis added in all quotes).

In-depth interviews with local people make clear that the discord between proponents and opponents of mining is currently dividing communities – much more dramatically so in San Miguel Ixtahuacán than in Sipacapa – and is creating serious problems of governability. Recorded stories and events furthermore suggest that this is being actively manipulated by the mining company to undermine the growing opposition against the project in both municipalities.
In San Miguel Ixtahuacán, Montana worked its way into the communities near the actual mine by convincing or pressuring individual families to sell their land. As we have seen, this process started in 1999, directly after Mayor Sergio González (2000-2004) authorized the company to enter into land negotiations with local residents. Other communities in San Miguel Ixtahuacán were completely left in the dark about the imminent mining project until late 2003. In a 2007 interview, the subsequent mayor of San Miguel Ixtahuacán, Oswaldo Avila (2004-2008), admitted that when the mining activities started in San Miguel Ixtahuacán, “almost the entire population was uninformed. They didn’t know what agreements had already been signed between the municipal government at the time, the people who sold their lands, the [national] government and the company” (Paley 2007a: 2). By selectively informing people and communities, the mining company had avoided consulting the larger community of San Miguel Ixtahuacán, thus evading its legal obligations under national and international law (i.e. Guatemala’s Municipal Code and ILO 169). Many inhabitants of the mine-adjacent communities initially supported the mining project because they were placated with money from land transactions, (temporary) mining jobs and promises of material support. Families in other communities were soothed by the company and the municipal government with promises of indirect job opportunities, paved roads and other infrastructural works, as well as prospects of participation in small projects for “integrated community development” offered by Fundación Sierra Madre.

The readily available cash earned by a relatively small group of local mine employees – who suddenly earned average salaries of USD 300 per month – and several hundred migrant workers from outside San Miguel Ixtahuacán created new consumption patterns (food, clothing and other consumer goods) and related problems such as: increased liquor consumption, prostitution, and carrying of firearms. This behavior elicited the disapproval of a group of community members, amongst whom opinion-leaders that had already been alarmed by the ongoing national debate on mining and/or had become suspicious towards the Marlin mine upon learning from information they received from civil society organizations. These critics of the mining project say that local authorities (i.e. political bosses) have been bribed and are being used by Montana to make propaganda for their project; they moreover claim that these people have made sure that many of the available mining jobs were shared out among the families of their supporters. The critical faction in San Miguel Ixtahuacán has however been very cautious of expressing its dissatisfaction with the mining project due to the fear created in the municipality following a series of unexplained and uninvestigated murders and disappearances from 2005 through 2007 (ADISMI & Rights Action 2007; Rodríguez 2008).52

In addition, many of them report feeling intimidated by the hostile attitude displayed by proponents of the mining project, including municipal officials (interviews with anonymous persons, town of San Miguel Ixtahuacán 04-05/12/2007).

Thus, over the past five years, the Marlin mine has become a source of discord for the local population of San Miguel Ixtahuacán, causing strong divisions and tensions within and

---

52 On March 13, 2005, Álvaro Benigno Sánchez, an open critic of the mine, was killed by multiple shots fired by an employee of a private security company working for Montana; in May 2007 Byron Lionel Bámaca and Marco Tulio Rodríguez, both working as cooks in the mine, disappeared while sent on an errand for Montana - they were never heard from again; on June 15, 2000, the decapitated body of Pedro Miguel Cinto, an elderly and active opponent of the Marlin project, was found lying by the side of the road nearby his house – his head was found several days later in Huehuetenango (ADISMI & Rights Action 2007; Rodríguez 2008; see also: www.business-humanrights.org).
between families and communities between those in favor of mining and those against it. A minority believes there has been progress, but these people are generally those who have benefited with a steady job or from an indirect job generated by the mining industry. Many people with a critical opinion are afraid to talk for fear of reprisals from the mineworkers who manifest themselves through their own network (cf. López in Ibañez 2008: 2). 53 The atmosphere of fear and mistrust is well illustrated by an event that occurred in April 2006. At that time, a “boletín” appeared in San Miguel Ixtahuacán in which one or more anonymous writers strongly criticized the mining project and explicitly accused certain municipal officials of corruption and having taken bribes. The letter caused great consternation, especially among people who had previously expressed themselves critical of Montana and municipal officials. They feared their fellow-community members would suspect them of having written the letter and might take reprisals against them. In order to “protect” themselves, they approached Montana’s general manager - and not their Mayor - to dissociate themselves from the letter and ask him to calm down the agitation (Interview with Anonymous, town of San Miguel Ixtahuacán 05/12/2007). At the time of fieldwork for this research, tension was still clearly noticeable in San Miguel Ixtahuacán, where a curfew had been imposed and people were cautious or reluctant to talk, sometimes for fear of losing their job (either in the mine or for the municipal government).

In Sipacapa, Montana from the outset encountered a much stronger and more united front of resistance against mining. This reaction can be explained in various ways. In the first place, Montana only started its campaign to promote the mining project in this community – on whose territory it wanted (and still intends) to expand its operations – at a time when the excavations in San Miguel Ixtahuacán were already in full swing, i.e. when the first negative consequences of mining were beginning to become obvious to everybody (e.g. deforestation, passing of heavy machinery, open pit mine blastings, and ensuing problems of damage to homes and other buildings, noise and dust pollution, people with respiratory ailments etc.; see Prensa Libre 26/08/2007, 05/10/2008). Secondly, civil society organizations focused their attention mainly on Sipacapa because their entry in San Miguel Ixtahuacán had been cut off by the polarized situation that had emerged there. Finally, some observers have explained the collective resistance in Sipacapa with the stronger social cohesion that would exist in this community. This cohesion is partly attributed to a cultural factor: Sipacapa is a relatively small ethnic enclave wedged in between the much larger Mam and Quiché ethnic groups. Additionally, a religious factor seems to have played a role: local opinion leaders and a charismatic Italian pastoral worker were able to rally communities behind their cause by making effective use of existing social networks provided by local parochial committees (catechists).

Notwithstanding the resistance, company attempts to win the public for the mining project, have led to social divisions in Sipacapa as well. Also here, Montana has attempted to exert influence in the municipal government. The previous mayor (Alejandro Mazariégos, 2004-2008), a weak leader and a person who does not self-identify as indigenous, apparently had yielded to this pressure and adopted a typically ambivalent position towards mining (mildly

53 This assertion is disputed by ADISMI, which to the outside world prefers to paint a picture of a united local front against mining. In a public document ADISMI writes: “It is clear that despite the attitude and actions of the mine, there is solidarity between the communities and those who chose to work for the mine. The CAO report [...] claims, erroneously, that there is friction between those who work in the mines and the communities” (ADISMI & Rights Action 2007: 8).
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

obstructing community actions against Montana with a conformist attitude). In addition, the mining project had contracted a small number of people from Sipacapa, who later turned out to be staunch promoters of the mine. As a result, several communities began to incline towards supporting the Marlin project. Emerging differences of opinion within the COMUDE, a local development committee that according to the 2002 Municipal Code is supposed to advise the municipal government, already have repeatedly come to expression in conflicts between its members. Community leaders who are leading the resistance against the mine have at various occasions been intimidated with anonymous threats and claim to be the target of a smear campaign orchestrated by Montana. According to some of these persons, a situation of ungovernability threatened to emerge. In this respect, the community consultation that was enforced by the resistance in June 2005, and at the occasion of which a large majority of communities pronounced itself against mining on their communal territory, to some extent closed ranks against the Marlin project.

But Montana continued its various strategies to enter into Sipacapa. Shortly after the consultation, the company presented the municipal government with a “gift” of 100,000 EUR. The offer was rejected on the grounds that it is contrary to the will and the dignity of the people of Sipacapa. Montana also stepped up its efforts to convince individual families of the benefits of mining – amongst other things by offering them material improvements through its community relations program. According to Mario Tema (interview 31/10/2007), one of the foremost local leaders, promotion of the mining project locally is led by persons who do not originate from Sipacapa and has found resonance principally among the evangelical part of the municipality’s population. People are influenced by priests who “promote” the mine in their sermons (he goes as far as to suggest that community divisions are principally grounded in religion). But also many poor and less well-informed (non-evangelical) community members seem to incline positively towards the mining project (interview with Manuel Ambrocio, 01/11/2007). Slumbering tensions came to expression during the September 2007 municipal elections, when a civic committee set up by the leaders of the resistance won the mayoral seat with only a slight majority of the votes. While the new municipal government since its installation in January 2008 has been raising funds to finance its plan of genuine alternative (non-mining based) development, Montana continues to buy the support of families with jobs, money (until recently through the payment of the salaries of the teaching staff in local schools) and small development projects.

Meanwhile in the mine-adjacent communities in San Miguel Ixtahuacán, initial support of the mine has increasingly turned into opposition. Hundreds of disillusioned families have started to raise their voice in protest, demanding renegotiation of the company’s earlier promises or simply the discontinuation of the project. Continuing its strategy of community fragmentation, Montana has reacted by pressing legal charges against the alleged leaders of the protest (September 2007) and ordering arrest warrants against a group of women for sabotaging the company’s electric supply in an attempt to press the mine to remove electric posts from their land (June 2008) (ADISMI & Rights Action 2007; NISGUA 2008).

The researcher (JvdS) was present during one of the last COMUDE meetings under mayor Mazariegos (29/09/2007), during which the communication between anti-mining COMUDE members and the pro-mining mayor was at times very confrontational.
3.3 Community organizational responses to mining

The following section describes the ways in which the indigenous communities of Sipacapa and San Miguel Ixtahuacán, and elsewhere in the Western Highlands of Guatemala, have organized themselves in resistance to the threats of mining in their territory. In describing these efforts, it is demonstrated how these communities make creative use of both national and international legal resources at their disposal in an effort to harness their own forms of social organization – part traditional and part new.

3.3.1 Sipacapa’s community consultation and its national reverberations

In the course of 2003 – MEM had already granted an exploration license (LEXR-388) – certain groups and organizations in Sipacapa received invitations by Montana to attend information meetings where they could learn about the plans for the upcoming Marlin project. From descriptions by some of the invitees it appears that the agenda’s for these meetings had been determined by Montana, which only provided selected information (advantages of mining) and did not have the intention to enter into dialogue with the communities.

To them [Montana’s representatives] the meeting seemed right, but we were left behind unsatisfied, more so because they gave us little time (opportunity) to speak. When we came in they handed out papers to fill in our name on a list. They also invited us to eat something. They did not give us any written document, only some illustrated promotional flyers. The meeting was held in Spanish, there were no interpreters and I don’t think everybody understood what the meeting was about. (Affidavit, Santos Ambrocio, Sipacapa town 05/07/2007).

The names of the people presented were taken down (registered) so they could later be presented (listed) as having been consulted. It is important to emphasize that the meetings were not open to a wider public and that not all 13 communities in Sipacapa (making up the municipality) were informed about the supposed benefits of mining.

In our community no government official ever approached us prior to the mining activities, they never gave us any information: I have never received information from Montana, I never participated in the meetings the company held. We were not informed that we could check with the official documents (ESIA) […]. I never heard about the inquiries that had been realized. I don’t know the Mining Law. I know the municipal government approved of the mining project but without consulting us. (Affidavit, Eva López, Estancia 05/07/2007).

Suspicious of the conduct of the mining company as well as of the ambivalent attitude of its municipal government, leaders from these indigenous communities approached several of the NGOs working in Sipacapa – MTC, the Diocese of San Marcos, CALAS and Madre Selva – to further inform themselves of the benefits and disadvantages (the possible environmental, economic social and cultural impacts) of chemical metal mining. An Italian pastoral worker pointed out to some leaders the possibility of having (organizing) a community consultation,

55 These and other quotes (in this section) are excerpts from formal interviews or testimonies (affidavits) recorded and transcribed as part of the preparations for the elaboration of a complaint before the Inter-American Court of Human Rights.

56 It later came out that the mayor of Sipacapa, who had not been properly informed by Montana either, had, by means of a formal act, approved the mining project on September 18, 2003 (CAO 2005: 30; affidavit, Manuel Ambrocio, Llano Grande, Pie de la Cuesta 05/07/2007).
taking the example of the emblematic case of the population of the district of Tambogrande, an important agricultural region in the department of Piura in northern Peru. In June 2002, municipal officials, exercising their legal prerogatives, had organized a community consultation as a means to protest against the activities of the Canadian mining company Manhattan Minerals and about which the partly indigenous populations had not been consulted beforehand. The resistance was successful: in 2003, the mining company dropped the project due to community opposition, leaving it in the hands of the State (Bebbington, Connarty, Coxshall et al. 2007: 12; Bebbington 2008).

In Guatemala, the Municipal Code (Decree 12-2002, articles 63-65) offered similar legal resources for the organization of a community consultation. In line with the stipulations of ILO Convention 169 (articles 6 and 15.2), article 65 of this law states that: “when the nature of a matter affects the rights and interests of the indigenous communities of the municipality or its authorities, the municipal council shall hold consultations at the request of the communities or indigenous authorities, and shall apply the criteria [for holding such consultations] established by the customs and traditions of the indigenous communities themselves”. As it had become clear that the community of Sipacapa had not been consulted in conformity with ILO 169, – considering that the meetings organized by Montana had not been undertaken through appropriate procedures, in good faith, and through the representative institutions of the indigenous communities (www.ilo.org) –, a group of about 1000 concerned people on February 19, 2004 organized a public protest in Sipacapa requesting their municipal government to hold a community consultation. Alejandro Mazariegos, the mayor of Sipacapa objected to this possibility, arguing that the project had already been approved and was supported by the government.

In the meantime, opposition to the mining project had rapidly increased among the population of Sipacapa. After the start of the construction phase (early 2004), soon the first negative (social) consequences were being felt: an influx of laborers from outside the local community and a ensuing increase in alcohol consumption, possession of firearms, and incidences of sexual abuse. The indigenous population felt intimidated by these developments. Moreover, after an instructive visit to the San Martin goldmine in Valle de Siria in Honduras, community leaders in Sipacapa had started an information campaign among the population, which had made more people aware of the possible negative environmental and social effects of metal mining – an information campaign which the mining company had been systematically trying to thwart by discrediting the authority of the most vocal of these community leaders. All of this resulted, in late 2004, to the creation of a coordinating body (provisional organizing committee) in which representatives of the various villages (aldeas) and hamlets (caseríos) had taken place and which was charged with drafting a formal request for community consultation and the supervision of the preparation process.

58 It appears however that Peruvian mining company ARASI is currently developing plans to “reactivate” the Tambogrande mining project (Céspedes 2008).
59 Montana’s actions had also contravened the Mining Law, which “obliges the MEM to publish a decree before granting any permit in order to encourage the population to give its opinion on the matter, and even state its opposition in writing” (Castagnino 2006: 22). MEM contends that such an announcement was published in the Official Gazette (Diario Oficial) – this Gazette was not available to the concerned indigenous communities however. The Mining Law moreover gives a period of only 5 days to protest MEM’s decision (interview with Udiel Miranda 28/11/2007).
After the confrontation between the national security forces and indigenous communities protesting against the passing of the cylinder in Sololá on January 10, 2005 (see chapter 2), a dramatic event that had also caused considerable commotion in Sipacapa, the mayor was forced to convene a public meeting to discuss the mining issue with the population. During this meeting, which was held on January 19, the community representatives that were present (alcaldes comunitarios and COCODES) urged the municipal government to hold a community consultation on mining, while the Municipal Development Council (COMUDE) was appointed the institution responsible for the planning and carrying into effect (of the community consultation). Thus it was officially decided by municipal agreement, laid down in municipal act 04-2005, to carry out a consultation, in good faith and according to the custom and traditions of the Sipakapense people, of the indigenous population of Maya descent of the municipality of Sipacapa, to pronounce itself in favor or against the exploration and exploitation of minerals and to determine in what ways their interests are prejudiced by such activity.

60 People in Sipacapa had been willing to travel to Los Encuentros, Sololá, in order to support their “indigenous brothers” during the road blockade. They were unable to do so however because the military as a preventive measure had blocked the public road out of Sipacapa at La Cruz de la Lacha – one of Sipacapa’s 13 communities – with a contingent of 500 security forces. Frustrated over this “militarization of their territory”, they burned the car of one of Montana’s supplying companies in the town of Sipacapa (affidavit, Mario Tema 04/07/2007).

61 The last part of this formula is almost literally taken from article 15.2 of ILO Convention 169, which reads: “... with a view to ascertaining whether and to what degree their interests would be prejudiced.”
On February 24, a definitive agreement was drafted (laid down in municipal act 09-2005), which officially approved the rules (protocol) for the consultations and determined that the COCODES, under the supervision of the COMUDE, would be responsible for carrying out the consultations in each of the 13 communities (aldeas) in Sipacapa. A technical committee, made up of selected representatives of the nongovernmental organizations working in Sipacapa, would take care of operational and methodological support (accompaniment), thereby advised by experts from other organizations. The date of June 18, 2005 was chosen for the actual consultations, to be held in the community salons or schools of the communities.

Montana had received note of the upcoming community consultation and shortly before the planned date had decided to take legal action against it. On June 7, the company’s lawyer filed a protest (acción de inconstitucionalidad) with the Constitutional Court (Corte de Constitucionalidad) to have the respective municipal agreements of Sipacapa declared in violation of the constitution. A week later, on June 13, Montana’s legal representative moreover sought an injunction against the consultation through the Amparo Tribunal on the grounds that the proceedings of the municipal government would affect the rightful interests of the company. On June 16, the judge of the tribunal notified the municipal council of Sipacapa that it had decided to provisionally suspend the community consultation. This notification caused a great deal of confusion in Sipacapa, where the preparations for the consultation were already in full swing; the mayor decided to postpone the consultation. A day before the planned consultation however the Constitutional Court declared that the procedures followed by the municipal government in relation to the community consultation had not been contrary to the constitution. Strengthened by this decision and supported by the Human Rights Ombudsman’s Office (Procuraduría de los Derechos Humanos), the communities (through the COCODES and COMUDE) decided to carry out the consultations on June 18.

At the crack of dawn and under the watchful eye of numerous journalists and national and international observers, in all of Sipacapa’s 13 communities at once, community meetings were held. After an explanation of the procedure (to follow), the people assembled were asked to answer the question with raised arms “whether the Sipakapense people agreed to have chemical metal mining activities on their territory, yes or no?” Of the total number of 2,564 enfranchised voters, 2,448 persons voted against (98%), 35 persons voted in favor and 35 persons abstained from voting. The votes and results of the consultations in each community were carefully recorded with names, identification numbers and fingerprints of the voters, and subsequently handed in with the COMUDE. On June 20, a large group of proud and cheerful community members moved to the town center of Sipacapa to officially present the final results of the community consultation to their municipal government. There a tense situation emerged as a result of the presence of a large group of heavily armed policemen had had been called in from San Marcos by the municipal officials (the mayor), who had felt threatened by the large crowd of people. After the policemen had been urged to leave the town square by the alcaldes comunitarios, the agitated population brought the mayor to order and forced him to validate the results of the community consultations in an official document (municipal act 26-2005). A week later, a delegation of community members traveled all the way to the capital to hand over their decision to the Human Rights Ombudsman, the Ministry of Energy and Mining and National Congress (Caracol 2006).
Soon afterwards, a fierce debate emerged – principally held among businessmen, politicians, lawyers and observers – over the validity of community consultations of Sipacapa and Rio Hondo, a community that on July 3, 2005 had held a comparable community referendum in relation to the construction of a hydroelectric dam. First of all, this discussion was concerned with a contradiction within the Municipal Code on the question of the minimum voter participation required to make the consultation legally binding. Article 64 establishes it at 20%, while Article 66 states that participation must be 50% or more. In Sipacapa, consultation voter turnout was 45%. On April 4, 2006, the Constitutional Court clarified the matter with a decisive answer: it ruled that the popular consultations in Sipacapa and Río Hondo, were procedurally correct en the results therefore valid (Prensa Libre 05/04/2006). This seemed to be an important support for all those highland municipalities which in the meantime had also held community consultations, or were planning to do so. However, on May 8, 2007 the Constitutional Court overturned its own previous verdict, declaring one of the articles (27) of the regulation of the consultation in Sipacapa – contained in Municipal Act 09-2005 – “unconstitutional” and thus not legally binding. Because the State retains the ownership of subsurface and mineral resources, municipalities, according to constitutional article 125, have no competency to decide over the destiny of these resources, whose exploitation is in the interests of the nation (El Periodico 18/05/2007).
THE IMPACT AND IMPORTANCE OF THE COMMUNITY CONSULTATIONS

Despite the ruling of the Constitutional Court, many indigenous communities in the Western Highlands of Guatemala have followed the example of Sipacapa, assisted by a number of local and regional civil society organizations. Late in May 2008, already hundreds of communities in 20 highland municipalities had pronounced themselves against mining in consultations that differed only slightly in applied methodology and legal justification – and in all cases with an overwhelming majority of votes. This development is of great importance because the indigenous communities have given practical effect, where the government has failed to do so, to laws that were intended to promote decentralization and increase community participation in local municipal-level decision-making (FRMT 2008). While doing this, they have appropriated elements of state-imposed laws and structures of municipal government, which to some extent were complemented and resignified with local customs and traditions, and have turned them to their own ends.62

It is worrisome that the Guatemalan government has until now proved unable to establish a dialogue with the communities about the results of the consultations. Mining companies continue to discredit the results of the consultations, which they maintain have been instigated by outsiders. This results in a standoff rather than rapprochement between three parties. In the current situation, every basis of trust for such a dialogue on mining is lacking.

3.3.2 Municipal elections in Sipacapa, “Rex Ulew” and the alternative development project

After the rejection of mining by the population of Sipacapa, community leaders saw themselves forced to take new steps. Together with a group of local development associations and parochial committees, they started with the formulation of a new development plan,63 explicitly as a sustainable alternative to neoliberal, mining-based development. In March 2006, they presented to the community an 80-page plan for an economic development that “benefits the poor, promotes unity and sociopolitical cohesion and has the goal to transform Sipacapa into an example of agro-ecological development that is competitive in the market” (Sipacapa 2006: 17). However, at the time, conditions for the implementation of the plan were not favorable. The communities had no access to the financial resources and technical assistance necessary to reactivate the local economy, and they lacked the support of the municipal council, which was internally divided due to the influence of party politics.

To break out of this situation, a group of leaders that had played an important role in the organization of the community consultation, decided to make an effort for the election of a municipal government that would be more responsive to the needs and concerns of the communities. To this end, they created a civic committee – a possibility pursuant to the Law

62 A great number of evaluations of, guides for, and analyses on community consultations have by now been published in Guatemala (see, amongst others, Otzoy 2006; Celba 2007; Madre Selva 2007; Mérida, Herrera & Krenmayr 2007; Mérida & Krenmayr 2008; Salvadó 2007; García-Ruíz 2008; COPAE 2008a).

63 Already in 2002 the municipality in collaboration with CARE and FONAPAZ had produced a development plan. However, this planning document was considered to be too generic and failed to include a public investment plan. Also it had grown out of date due to the arrival of the mining project, “which had radically changed the municipality’s development context” (interview with Mario Tema 31/10/2007).
…of Elections and Political Parties (Decree 01-1985, article 99) – and, under the telling slogan “Wake up, let’s protect our lands!”, launched a campaign for the municipal elections of September 2007, nominating Delfino Tema Bautista as their candidate for mayor. Despite the much larger campaign funds of its rival parties, amongst which that of sitting mayor Alejandro Mazariegos, who ran for re-election and according to many had received money from Montana Exploradora, Delfino Tema’s Civic Committee was able to pull off a victory with a narrow margin of 46 votes.64 Directly after the outcome of the elections, the organizers of the Civic Committee started deliberations for the creation of a community structure for participatory development, thereby receiving assistance from a number of allied NGOs (COPAE, MTC and Madre Selva, amongst others).

A first series of meetings, that were held in the town of Sipacapa, centered on defining the roles, functions and objectives of the new local organization, which was given the name Rex Ulew (“Green Countryside” in the Sipakapense language). A central coordinating role in this new community structure is to be played by the executive council, which is elected for a term of 2 years and made up of 1 representative of each of the 13 aldeas (communities) plus 2 members of the municipal council (5 positions are reserved for women). It is to be assisted in its work by a financial administration unit and a technical committee consisting of personnel recruited or contracted for particular projects. The executive council will be accountable to a general assembly (held 3 times per year), which consists of minimally 3 delegates from each of the 13 aldeas and 17 caseríos (90 persons) and is the highest authority in the structure of Rex Ulew, making final decisions on projects and community plans. The new organization, which takes the legal form of an association and integrates already existing community organizations, defined 4 main working lines: environmental monitoring, economic reactivation, social organization and education & training. To finance its projects it will need to attract funding from external development agencies. In a first assembly, it was decided to prioritize economic projects to achieve the participation of all of Sipacapa’s communities. The community association Rex Ulew is to operate separately from but complementary to the municipal government, with which it may enter into co-financing agreements.

Late in 2007, Rex Ulew in cooperation with COPAE organized in each of the three micro-regions that make up the municipality, participatory meetings for the identification and prioritization of sustainable productive projects. From these meetings it appeared that the upper section had a preference for horticulture (hortalizas), the middle section was interested in establishing fruit orchards (frutales), while the lower section was more apt for the cultivation of organic coffee. On the basis of these results, COPAE produced a working document titled: “Impulse to the development program of the municipality of Sipacapa” (COPAE 2008c) in which it further elaborated existing ideas on the productive projects. The sustainable and organic coffee project foresees an active involvement of groups of coffee farmers (indigenous families) that bring their harvest to a central bodega and sell it collectively in order to obtain better prices on the market. The central marketing of the coffee is supposed to break the traditional power of the intermediary coffee buyers. In the course of 2008, the Dutch NGO Solidaridad and the German Hans R. Neumann Foundation came into the picture as possible sponsors of the

---

64 The narrow election result revealed a division in the community along geographical and religious lines. Whereas Catholics and inhabitants of the upper section mostly voted for the Civic Committee, many evangelicals and inhabitants of the more economically depressed lower section voted for one of the other parties (mostly GANA or PP). This division coincides to an important extent with differences in the standpoints on the desirability of mining (for and against).
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos project. Both organizations have years of experience with setting up coffee projects with local producer organizations and with assisting farmers in developing countries to develop people-friendly and environment-friendly production chains. For the other two productive projects that are planned for the middle and upper section of Sipacapa (vegetable gardens and fruit orchards), it has proven difficult to find suitable sponsors.

It is interesting to see how much the description (in the case of the coffee project, also the execution) of the projects place emphasis on the cooperative aspects of the economic activities. They are aimed at increasing the income (by raising the productive capacity) of families through their involvement in the creation of various producer group associations, explicitly as a strategy to strengthen the larger community organization (Rex Ulew). Economic development so is considered as a means of constructing community, as opposed to development through individual achievement and growth, as is being propagated by the mining company. At the same time, the proposed productive projects are also meant to serve the purpose of strengthening the communities’ autonomy. The projects clearly draw on the agricultural potential of the communities and besides increasing the living standard of families, they also aim to counter the appeal of working for the mining company or

65 Late 2007, the coffee project already counted with 800 producers divided over 6 producer groups (COPAME 2008c).
On December 5, 2007, FSM organized its second commercial fair in the town square of San Miguel Ixtahuacán. The public presentations with music accompaniment as well as the hundreds of people that were demonstrating and selling their self-made products and services attracted a great deal of attention from the crowd that had come to the event. Particularly eye-catching was a series of slick promotional banners that had been placed in the town’s new park – supposedly one of the “social investments” by the mining company Montana – and which provides us with a look at FSM’s individualized approach to development, quite tellingly advertised with the slogan “development begins with one”.

Vision:
The communities that are backed by FSM enjoy a better living standard, with institutions that provide better services and persons that make responsible decisions about the creation of their present and their future.

Small business development:
In the community there are persons that already have businesses or are ready to begin one. FSM accompanies this process with: personalized technical assistance; seminars and entrepreneurship fairs; business set-up course and business training.

Capacity-building:
Offers a person a set of capabilities so that a person can work in a more competent way and is better prepared to solve the problems that arise. With capacity-building a person can: elevate its living standard, be more productive, increase its financial income, have better work and aspire for better salary.

Training activities are provided in:
Bread making, carpentry, tailoring, computing, weaving, cultivating vegetables, hairdressing, pastry-making, making handicrafts, cooking, making sausages, poultry raising, and many more ...

Many similar banners, which are illustrated by beautiful photos, make clear that FSM’s “community development” program is basically oriented towards individuals and heavily emphasizes entrepreneurial development (as a complementary source of income to mining).

FSM does not offer any projects aimed at community building or supporting participatory processes.

In their provocative analysis of similar privately or state-financed “poverty relief programs” in Latin America, development anthropologists Alvarez, Dagnino and Escobar (1998: 22-23) contend that these programs “operate by creating new client categories among the poor and by introducing new individualizing and atomizing discourses such as those of ‘personal development’, ‘capacity-building for self-management’, ‘self-help’, ‘active citizenship’, and the like.” As a result, they argue, “participants in these programs come to see themselves increasingly in the individualizing and economizing terms of the market”. It is therefore that the authors consider such programs as part of a “neoliberal cultural project” that has the effect to “depoliticize the basis for mobilization and collective action”.

SIERRA MADRE FOUNDATION (FSM): “DEVELOPMENT BEGINS WITH ONE”
participating in the “community projects” that are being offered by the Sierra Madre Foundation. Also it is hoped that local, small-scale agro-ecological development can prevent families from being forced to engage in seasonal labor migration to the agro industrial sugar cane and coffee plantations on the coast. In this sense, the community of Sipacapa strives for a locally-controlled or place-based community development, in contrast to neoliberal (capitalist) mega development, “with its claim to political necessity, the greater good and market demands in the context of globalization” (Blaser 2004: 28), which they feel is ultimately being done at their expense.

Although the coffee project is slowly taking shape, its success is far from guaranteed and the project is only a small first step to the realization of the ambitions goals of Rex Ulew. The new community structure may have played an important role in consciousness-raising and organizing mobilizations against mining on the Altiplano Marquense, the future of Sipacapa's independent municipal government depends to a large degree on whether it succeeds in offering its population an economic alternative to mining or labor migration to the coastal plains or the US. Only when its approach to holistic, participatory development bears fruit, will Sipacapa's model have an inspiring effect on other communities in San Marcos.

3.3.3 Bringing Sipacapa's case before the Inter-American Commission of Human Rights

With the negative decision of the Constitutional Court on May 8, 2007, which declared article 27 of Sipacapa's municipal agreement 09-2005 – relating to the binding character of the results of the community consultation – unconstitutional, all remedies under domestic law to gain recognition for its popular decision had been pursued and exhausted. To further their cause on an international level, the community filed a petition with the Inter-American Commission on Human Rights late in December 2007 (Sipacapa 2007). In drafting the petition, the anonymous presenters had received legal assistance from various national NGOs. Early 2008, the petition was declared admissible by the Commission.

The main thrust of the petition is that the Guatemalan Government has not lived up to its obligation to consult the Maya Sipakapense people in good faith regarding the granting of
exploration and exploitation licenses to the Canadian mining company Montana Exploradora. According to the petitioners, the Government (in the decision of the Constitutional Court) does not make an effort to prove that such a consultation did in fact take place. Consequently, they claim that it has violated the guarantee of due process as required by article 8.1. of the American Convention.\(^\text{71}\) In substantiating this claim, the indigenous communities of Sipacapa appeal to various articles in the Constitution, ILO 169, ratified by Guatemala in 1996, as well as the Municipal Code, Decree 12 of 2002:

1. Article 66 of the Constitution: regarding the obligation of the Government to offer special protection to Guatemala’s indigenous communities and those of ethnic groups.\(^\text{72}\)

2. Article 253 of the Constitution: concerning the administrative autonomy of Guatemalan municipalities and their responsibilities in the selection of their own authorities and the management of local resources and services.\(^\text{73}\)

3. Article 6 of ILO 169: relating to the consultation of indigenous peoples, in good faith, following appropriate procedures and through their own representative institutions.\(^\text{74}\)

4. Article 15 of ILO 169: with regard to the consultation of indigenous peoples in the case of planned programs for the exploration or exploitation of state-owned mineral and subsurface resources.\(^\text{75}\)

5. Article 35 of the Municipal Code: as regards the responsibility of the municipal council in the administration of renewable and nonrenewable resources within the municipality boundaries.\(^\text{76}\)

6. Article 65 of the Municipal Code: relating to the responsibility of the municipal council in the realization of consultations requested by the indigenous communities and to be conducted according to indigenous criteria and custom.\(^\text{77}\)

\(^{71}\) Artículo 8. Garantías Judiciales. (1.) Toda persona tiene derecho a ser oída, con las debidas garantías y dentro de un plazo razonable, por un juez o tribunal competente, independiente e imparcial, establecido con anterioridad por la ley, en la sustanciación de cualquier acusación penal formulada contra ella, o para la determinación de sus derechos y obligaciones de orden civil, laboral, fiscal o de cualquier otro carácter.

\(^{72}\) Artículo 66. El Estado reconoce, respeta y promueve sus formas de vida, costumbres, tradiciones, formas de organización social, el uso del traje indígena en hombres y mujeres, idiomas y dialectos.

\(^{73}\) Artículo 253. Los municipios de la República de Guatemala, son instituciones autónomas. Entre otras funciones les corresponde: elegir a sus propias autoridades; obtener y disponer de sus recursos; y atender los servicios públicos locales, el ordenamiento territorial de su jurisdicción y el cumplimiento de sus fines propios. Para los efectos correspondientes emitirán las ordenanzas y reglamentos respectivos.

\(^{74}\) Article 6. Governments shall: (1.a) 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; (2) The consultations [...] 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.

\(^{75}\) Article 15. (2.) In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

\(^{76}\) Artículo 35. Le compete al Concejo Municipal: (y) la promoción y protección de las recursos renovables y no renovables del municipio.

\(^{77}\) Artículo 65. Consultas a las comunidades o autoridades indígenas del municipio. Cuando la naturaleza de un asunto afecte en particular los derechos y los intereses de las comunidades indígenas del municipio o de sus autoridades propias, el Concejo Municipal realizará consultas a solicitud de las comunidades o autoridades indígenas, inclusive aplicando criterios propios de las costumbres y tradiciones de las comunidades indígenas.
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

The reasoning followed is that the Guatemalan Government pursuant to constitutional article 66 is obligated to consult with indigenous communities on planned mining activities in their territories according to the criteria established by ILO 169 (according to appropriate procedures and through representative institutions), and that the results of such consultations – contrary to the findings of the Constitutional Court – are legally binding on the basis of the constitutionally mandated municipal autonomy, as well as according to articles 35 and 65 of the Municipal Code.

If we look critically at this line of reasoning, the argumentation goes awry on the central point in the debate on the interpretation of article 6.2 of ILO 169 “as to whether indigenous peoples’ right to participation in decisions affecting them extends to a veto power over State action” (Anaya 2005: 7). On closer interpretation, ILO 169 is very clear on the fact that this is not the case. However, when no agreement or consensus to the proposed measures can be reached, the government should negotiate an appropriate solution with the affected indigenous communities, a “compensation package” (ILO 2003: 16). Article 8.1. of the American Convention does not offer an alternative interpretation because it does not refer to words like “consent” or “veto”). It is therefore not very likely that the Inter-American Court on the basis of the facts presented in the petition will proceed to retroactively declare the community consultation of Sipacapa (and of other communities) legally binding, because it leaves unaffected the argumentation of the Constitutional Court – following constitutional article 125 – that municipalities have no competency to decide over state-owned mineral and subsurface resources. At best, the Inter-American Court orders the Guatemalan Government to repeat the consultations with the indigenous communities considering that these were not conducted in good faith, through appropriate procedures and through their representative institutions. In any event, in Sipacapa – and certainly in the case of San Miguel Ixtahuacán – a new consultation will not be timely (and therefore not constitute prior consultation) because the mining exploitation activities are already in full swing.

The petition brought before the Inter-American Commission also puts forward a secondary, “territorial” argument. The argument is that in the case of Sipacapa, the Guatemalan Government, by granting mining licenses over indigenous territories without prior consultation of the local indigenous community, has failed to comply with its duty to protect the lands and territories of indigenous peoples according to the principles of the Constitution (this is an implicit reference to constitutional article 67) and of ILO 169 (again referring to article 15 of Convention 169). It is important to remember here that families in particular villages in Sipacapa have sold, in an “irregular way” (see 3.2.1.), lands to the mining company – although far less so than in San Miguel Ixtahuacán; for obvious reasons, this second fact is not mentioned in the petition. Based on the first fact (granting licenses without consulting indigenous peoples) the communities of Sipacapa claim that the Guatemalan Government has

---

78 The elaborate manual to ILO 169 (2003) provides an example in which: “In 1977, five Cree communities in Manitoba, Canada, were faced with ecological damages and loss of land caused by the construction of a hydroelectric megaproject. They could not stop the project, but negotiated a compensation package with the federal government, known as the Northern Flood Agreement. It includes the provision of lands as restitution for flooding, wildlife management under Cree responsibility, as well as control and guarantee of the availability of potable water” (ILO 2003: 16)
violated their “right to the use and enjoyment of territory”, as it is stated in the petition. In justifying this claim they invoke article 21 of the American Convention (the right to property).79

This claim is based in the fact that the Maya Sipakapense indigenous people is the original owner of its territory, because this indigenous municipality holds a 1918 collective formal title to the land, which is duly registered in the Second Land Registry in Quetzaltenango (SRP) and therefore valid. Accordingly, the Ministry of Energy and Mining (MEM) in 1999 and 2003 was not authorized to grant exploration and exploitation licenses in Sipacapa without the prior approval of the legitimate owners, that is, the community of Sipacapa as a whole. By doing this nonetheless, the Government would have committed the crime of “usurpation”, according to articles 256 and 257 of the Criminal (Penal) Code. This crime would furthermore be aggravated by the water contamination caused by the mining company (according to the Bianchini water study; Bianchini 2006), which is a criminal offence according to article 347 in relation to “industrial contamination”.

RELEVANT PRECEDENT CASES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Substantiating the claim of the alleged violation of the territorial rights of Sipacapa, the petition also refers to two previous decisions of the Inter-American Court of Human Rights. The first, from 2005, is the “Case of the Indigenous Community Yakye Axa v. Paraguay”. In this case “the Court considered Paraguay had failed to adopt adequate measures to ensure its domestic law guaranteed the community’s effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture and traditional practices” (www.escr-net.org). Only in passing and strangely out-of-context – and thus inadequately – the petition of Sipacapa refers to the 2001 landmark ruling of the Inter-American Court in the “Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua”. In this case the State of Nicaragua was found to have failed to protect the indigenous community’s collective property rights over its ancestral lands and natural resources (article 21 of the Convention). In what is the most significant and far-reaching part of its decision, the Court held as a general rule that “the concept of property as articulated in the American Convention includes the communal property of indigenous peoples that is defined by their customary land tenure, apart from what domestic law has to say”. This means that even in cases where indigenous communities lack real title to the land where they live and carry out their activities “possession of the land should suffice for [these communities to] obtain official recognition of that property” (Anaya & Grossman 2002: 12).

The rest of the petition consists of an elaborate attempt to prove the legitimacy of the community consultations and in this way refute the decision of the Constitutional Court. It seems to forget however that the Court’s decision does not deny the validity of the community consultations but instead the presumed powers (autonomy) of Guatemalan

---

79 Article 21. Right to Property. (1.) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2.) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
municipalities to decide over state-owned mineral resources. From this point of view, a petition before the Inter-American Commission would have had more chances of success if more emphasis was placed on the claim of the indigenous communities to their right to influence the decisions made concerning the exploitation of mineral resources, emphatically in view of the special collective relationship of indigenous peoples with their territory (including both surface and subsurface resources). In this respect, it is telling that the petition as it was filed does not invoke article 13 of ILO 169.80

3.3.4 Organized resistance and the resurrection of the indigenous mayoralty in San Miguel Ixtahuacán

The inhabitants of the mine-adjacent communities (Agel, San José Ixcaniche, Nueva Esperanza and Salitre), had, placated with job opportunities and promises of development, initially welcomed the arrival of the Marlin project. But by mid 2006, they had become disenchanted with the mine. This was because by this time – with the mine entering its second year of operation – they had opened their eyes to the negative effects of the mining operations. Also they felt treated unfair by the company, especially with regard to labor conditions in the mine and Montana’s dubious practices of land acquisition. With the assistance of members from the local development association ADISMI81 – some of whom had previous organizing experience through their work for Ajchmol – they decided to establish a dialogue with Montana’s management. Although they were given the opportunity to present a formal petition of complaints (on January 9, 2007), their plea was not taken seriously by the mining company, which assumed a legalistic attitude (insisting on its legal right and title to the mining area and stating that past negotiations could not be reopened). In response to this rejection, about 600 community members organized into a movement “Communities in Resistance” and decided to block three entrance roads to the mine. Despite a display of force by the national police (PNC) and Montana’s private security forces, they successfully paralyzed mining operations for 10 consecutive days (until January 22, 2007). The blockade was only removed after Montana’s director promised to reopen negotiations, which however never took place. Instead, in early February, the police held raids in nearby villages to arrest the leaders of the resistance, who were imprisoned without charge. Although they were eventually released, 7 of them were accused of incitement to crime, threats and aggressions against the chief of security of the corporation. After a month-long trial in the District Court of San Marcos, on December 11, 2007 two of these leaders were ultimately convicted to two years of “prison suspended” (a form of house arrest).

The legal actions taken by Montana against the leaders of the communities near the mine – which had also created outrage in other communities in San Miguel Ixtahuacán – was interpreted by the population as a clear attempt of the company to break the growing resistance. The communities however refused to be silenced and on March 7, 2007, issued a communiqué in which they labeled the actions of Montana as: “an arrogant and insulting treatment towards the dignity of community members” (Comunidades en Resistencia 2007; see also ADISMI 2007). People were at least as incensed about the fact that the elected mayor Joel

80 Article 13. (1.) In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

81 Asociación para el Desarrollo Integral de San Miguel Ixtahuacán. In the 1990s, very similar community associations were also set up in neighboring indigenous municipalities, like Sipacapa, partly through the encouragement of MTC.
Domingo (like his predecessor) had refused to mediate in the conflict between the mining company and the communities and defend its leaders. This situation was illustrative of the sharp division that had emerged in the municipality – between a small circle of local elites and supporters of the mine, on the one side, and protesting and politically excluded communities on the other – and added to the widely felt frustration that the municipal government is not representing the interests of the (indigenous) majority. This in turn strengthened the conviction of a group of critical leaders that it was urgent to bolster traditional indigenous authority in San Miguel Ixtahuacán to be able to unite the communities and increase their participation in local governance (as a counterweight to the autocratic municipal government). For this purpose, they considered it necessary to create an integrative and coordinating body that would be able to unite the alcaldes comunitarios of the various villages (aldeas). In doing so, they reverted to the model of the alcaldía indígena (indigenous mayoralty), which still exists in some other indigenous municipalities in the Western Highlands.

The alcaldía indígena stems from the colonial cabildo indígena, an indigenous administrative entity with a certain degree of autonomy originally created by the Spanish to control the indigenous population and that in the nineteenth century was made subordinate to the “ladinized” (mestizo) municipal government. However, in some municipalities, often those with an indigenous majority population, indigenous communities – which in the course of time had culturally appropriated the institution – had managed to convince the state-recognized municipal government to maintain the parallel indigenous authority structure. Although the remaining alcaldías indígenas under modern municipal legislation no longer have formal responsibilities, in places where this parallel authority remains, it still often has strong de facto authority and legitimacy among the indigenous population in rural areas (cantons and aldeas). These alcaldías indígenas impart justice according to indigenous law (derecho consuetudinario) and are responsible for the management of communal land and forest reserves. They also have the power to exert influence on the decisions of municipal councils concerning matters that directly affect the indigenous population. In Guatemala, there still exist about 18 of these parallel indigenous authority structures. Most famous are the alcaldías indígenas of Totonicapán and Sololá and the auxiliatura indígena of Chichicastenango (Barrios 2001; Ochoa 2002; Larson 2007; Rasch 2008).

According to the leaders of ADISMI and the Communities in Resistance, until the second half of the twentieth century a similar institution existed in San Miguel Ixtahuacán that was known as the alcaldía del pueblo. Its members, the alcaldes del pueblo, were selected in an assembly of community representatives of the various aldeas in the municipality. This representative council regularly congregated in the so-called casa del pueblo, a small building situated adjacent to the town hall on San Miguel Ixtahuacán’s central plaza, in order to reach agreement (consensus) on particular communal affairs, and afterwards communicated their position to the municipal government. Since the 1950s, this practice (institution) had grown into disuse to such an extent that in the late 1980s the alcaldía indígena was dissolved by the then mayor and the casa del pueblo closed. In 2006 a group of critical community leaders that was
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

concerned with the situation in the municipality proposed to reinstitute (reinvigorate) the indigenous authority. This idea found resonance with a larger group of alcaldes comunitarios. After they had selected from among San Miguel Ixtahuacán’s 59 aldeas and caseríos a council of 11 alcaldes del pueblo, they finally requested the newly elected mayor Joel Domingo (UNE, 2008-2012) to reopen the casa del pueblo in late 2007. A description by Anicetto López (11/03/2008) provides insight into the initial reaction of the mayor regarding the popular initiative, as well as into the underlying motivations of the indigenous leaders.

The Mayor said: “You want to create a parallel institution outside the municipal corporation?” — We replied: “We want to validate that which our grandfathers used to have in former times, merely to validate this, because we are a Mam people (pueblo). The ‘lifting up of the staffs of office’ (varas de mando) may not be recognized by the (laws of) of the government, but this (tradition) was already there before the Guatemalan State came into existence.” — The Mayor said: “No, I won’t have it! Meetings can only be convened by the municipal corporation and are to be held in the town hall; I don’t want to see you around here (in the casa del pueblo)!” — (He said this in that authoritarian manner.) — We replied: “Señor Alcalde, we don’t want to impose us, we only want to find back ourselves; we do not deny the authority of the municipal government, but we have a right to deliberate among ourselves and we would like you to recognize our organization, which belongs to us being a Mam people.”
In the knowledge that they are supported by article 55 of the Municipal Code, which obligates municipalities to recognize, respect and promote existing parallel indigenous authorities, the alcaldía del pueblo of San Miguel Ixtahuacán has organized a number of meetings on particular subjects, such as the possible organization of a community consultation against the planned expansion of the Marlin mine in their territory. Also it has presented itself publicly as the representative traditional authority of the municipality’s indigenous communities, amongst other occasions during the visit of a group of representatives of Canadian ethical investment funds (in February 2008), and during the Social Forum of the Americas (hosted by Guatemala in October 2008). The mayor and municipal council however seem to remain suspicious of the new participatory process, which they probably see as a threat to their power base, and by mid 2008 the alcaldía del pueblo still had no representation in the meetings of the municipal council. It remains to be seen whether the reinvented traditional authority of San Miguel Ixtahuacán will in the near future be able to exert influence on the decisions of its municipal government. Contrary to alcaldías indígenas elsewhere, the alcaldía del pueblo of San Miguel Ixtahuacán is still very much in gestation and the question is whether it will be able maintain its critical stance towards mining and local politics and achieve political unity within and among the communities. This will not be easy as long as Montana or the municipal government attempt to win over community leaders – who receive no payment for their representative tasks – with jobs and other special favors.

3.3.5 Bottom-up regional integration of anti-mining resistance: the Peoples’ Council of the Western Highlands

In the first three years after the protests in Sololá (January 2005), spontaneous and coordinated expressions of resistance against mining and other mega projects – road blockades, public manifestations, community consultations – had mostly taken place on the municipal level and had been initiated by local communities (i.e. through their development associations, catechist groups and other grassroots organizations). Meanwhile, the representation of the communities in the mining debate with the government and mining companies had largely been taken on by spokespeople of Catholic Church structures and NGOs that had been assisting them in their mobilizations. This state of affairs made it easy for critics of the anti-mining movement to delegitimize the resistance by suggesting that the indigenous communities had been instigated to protest (“against the interests of the country”) by internationally funded church groups and NGOs.

Early in 2008, various community leaders from San Marcos and Huehuetenango – departments that together largely correspond with the ancestral territory of the Maya Mam indigenous people – came up with the idea to join the diverse local expressions of resistance into a single regional grassroots movement for “the recuperation of territorial sovereignty” (Tomás 2008:

---

83 Alarmed by reports on the conflict surrounding the Marlin mine, these representatives of ethical investment and pension funds from Canada and Sweden, which have invested in Goldcorp, had decided to go on a verification mission in San Miguel Ixtahuacán and Sipacapa to investigate whether the mining project had been developed in an environmentally and socially responsible way. In its final report, the representatives were only moderately critical of the project and were satisfied with Montana’s promise to collaborate with the implementation of a Human Rights Impact Assessment, which later turned out to be fundamentally flawed (Coumans 2008; Law 2009).

84 When closing this investigation (mid 2008), the alcaldía del pueblo and the alcaldía municipal kept each other informed about their decisions by word of mouth, and at some occasions council members (consejales) were invited to be present during community meetings organized by the alcaldía del pueblo.
Gold mining in San Miguel Ixtahuacán and Sipacapa, San Marcos

As an example they took a new development that had been taking place in Huehuetenango. Here the communities of the 13 municipalities that had held community consultations, together with progressive municipal authorities and representatives of civil society organizations (e.g. CEDFOG, CEIBA, AGAAI), had decided to create a regional platform to coordinate and expand the resistance against mining and other mega projects in the highlands. During its second meeting, on March 28, 2008, this so-called “Asamblea Departamental por la Defensa de los Recursos Naturales” – to which several members of parliament and government officials from Guatemala City had been invited as guest of honor – presented itself emphatically as “a new way of constructing participatory democracy”. The speakers publicly condemned the negative influences of large-scale development projects on the environment, culture and the social fabric of indigenous communities, spoke about the necessity of integrated and participatory territorial planning, and demanded more competencies for the decentralized development committees. The government officials that were in attendance were also presented an alternative development plan not based on mining.

A group of prominent community leaders that had been present during the second Departmental Assembly, decided to take the lead in the expansion of the model of Huehuetenango and to organize an interdepartmental meetings of indigenous community authorities. Thus, a first meeting of what was to become the Peoples’ Council of the Western Highlands (Consejo de los Pueblos del Occidente) took place on May 9, 2008, in Huehuetenango and was attended by more than 60 representatives of community organizations and municipal committees that had pronounced themselves against large scale mining in San Miguel Ixtahuacán and Sipacapa, San Marcos.

DECENTRALIZATION LAWS AND TRADITIONAL INDIGENOUS AUTHORITY

The new Guatemalan legislation relating to municipal government only gives limited recognition to indigenous practices of self-government. The Municipal Code (Decree 12-2002) recognizes the existence and role of indigenous communities’ own “internal organization” and “traditional authority”, but makes these subservient to the municipal government. The Law on Urban and Rural Development Councils (Decree 11-2002) allows the COCODES, the development councils on village (aldea) level, to organize themselves according to the “principles, values, norms and procedures” of the indigenous communities. In practice this means that the formation of the COCODES since 2002 flowed easily from existing grassroots structures. The problem is, however, that the COMUDE has a strictly advisory role and all decision-making power remains with the municipal council.

In many rural municipalities in Guatemala, such as San Miguel Ixtahuacán, the COMUDE is in reality nonexistent because the efforts of the COCODES to institute this body are met with opposition from municipal governments dominated by party politics. Recent studies and experiences elsewhere suggest that in situations in which elected municipal authorities are not representative or downwardly accountable, the institution of the alcaldía indígena – in places where these still exist – may fulfill an important function in making municipal governments work on behalf of local communities, provided these institutions succeed in harnessing their authority and representativity by articulating the interest of excluded indigenous communities (Larson 2007, 2008; interview with the Alcaldía Indígena de Totonicapán 14/03/2007).
metal mining, coming from 5 departments: Huehuetenango, San Marcos, Quiché, Sololá and Totonicapán. The aim of the meetings was first of all “to defend and continue with the community consultations” and to “arrive at a concerted action program that sets out the correct path of struggle, based on the indigenous cosmology” (cosmovisión propia). It was decided that the movement should be “guided by the proposals of the communities themselves, and not by those of external organizations, and based in the wisdom of [their] grandfathers”. The new grassroots organization was to function as the independent mouthpiece of the communities towards Congress, the government and companies and “make a strong effort to effectuate their rights” (Tomás 2008: 8-9). The Peoples’ Council would not absorb or replace existing local and regional organizations, but instead unite these in a federative coordinating body, while at the same time acknowledging the particular circumstances in each of the departments.

In San Marcos, various representatives of the resisting communities resisting, as well as of the civil society organizations that assisted them (e.g. COPAE/Pastoral Social, MTC, Ajchmol, Consejo Mam and the Red de Mujeres Maya), decided to replicate the model of the Consejo de los Pueblos del Occidente (CPO) on a departmental level. On June 7 and 8, 2008, they organized a first “Peoples’ Meeting of San Marcos” (Encuentro de los Pueblos de San Marcos) in the departmental capital. At this occasion, they decided to convince the teaching staff (magisterio) of their communities to refuse their wages to be paid by the mining company, warned that municipal authorities should not subordinate the interests of the communities to political party interests, and agreed to link up the resistance against mining and hydropower projects with the struggle for access to more land as the material basis for an agrarian-oriented alternative development plan. In addition, they set themselves the task to convince other highland municipalities to organize their own community consultations (two new consultations were held in Tajumulco, on June 12, and in San José Ojeténám, on July 4). It was also decided to establish contact with Mam communities in Chiapas, Mexico, which are fighting similar struggles against mining (Tomás 2008; interview with Susana López 03/11/2008). The Consejo de los Pueblos de San Marcos (CPSM) publicly presented itself for the first time during the third anniversary of Sipacapa’s community consultation, on June 18, 2008. During the celebrations, to which the Consejo de los Pueblos del Occidente had also sent representatives, a declaration was made in which the government was urged to show respect for the rights and decisions of the communities and stop the legal persecution of their leaders (CPO 2008a).

In the second half of 2008, the number of indigenous and peasant organizations that joined CPO increased rapidly and follow-up meetings were organized in Sololá, Quiché, Totonicapán and Quetzaltenango. The action program of CPO was further elaborated around three central themes: chemical metal mining, hydroelectric projects and access to land. On August 8, International Day of Indigenous Peoples, CPO was actively involved in the organization of a public manifestation whereby intersections on major traffic arteries throughout the highlands were blocked and a protest march towards the capital was held (Prensa Libre 08-09/08/2008). At the end of the day, CPO and Plataforma Agraria presented a list with demands and proposals for resolving the social and economic crisis in indigenous communities (CPO, Plataforma Agraria & Waqib’ Kej 2008). CPSM separately addressed a letter to the three powers of state: it urged the legislature to no longer promulgate legislation that directly prejudices against the interests of indigenous peoples and peasant farmers and only benefit the business sector; it insisted towards the executive that it should live up to its obligations regarding the implementation of the fundamental collective rights of indigenous peoples, as stipulated by
ILO Convention 169; and demanded from the judiciary that it stop the criminalization of the struggle of communities that try to defend their territory. It concluded by stating that: “the exclusion of the (indigenous) peoples from decision-making on the development and future of the country has reached an intolerable point” and recommended the government “to confront the governmental crisis by means of dialogue and cooperation with the population” (CPSM 2008).

The impressive development of CPO over the past year has considerably increased the legitimacy of community resistance against mining and other mega projects. Even so, some of its foremost leaders are worried that the rapid expansion of CPO – that now already integrates dozens of organizations from 6 departments – might jeopardize the decisiveness and unity of the regional federation of indigenous and peasant organizations (interview with Susana López 03/11/2008). In this respect, it is worrisome that CPO’s appeal to dialogue towards the government threatens to be at odds with the position of a group of members organizations that wants to remain faithful to the absolute rejection of mining as expressed in the community consultations and which consequently have canceled their support of more moderate proposals for reform of the mining law (thereby implicitly rejecting the position of the Episcopal Conference and the former High Commission on Mining). Finally, it is interesting to see that the style and wording of CPO’s declarations seem to be increasingly inspired by identity politics and indigenous rights discourse. This can be explained by the recent intensification of
relations between CPO and the Coordinación de Convergencia Maya Waqib’ Kej (CPO 2008b). It is doubtful whether this outward presentation reflects an increasing awareness of identity and rights within the communities it represents.

**AFFIRMING INDIGENOUS PEOPLES’ CLAIMS TO COLLECTIVE RIGHTS**

A good example of CPO being influenced by the wider indigenous movement in Latin America and a striking formulation of a proposal for an alternative, anti-neoliberal and multicultural model of development, was articulated in a full-page declaration that CPO published in various national newspapers in October 2008.

**We propose to collectively build a people’s project for integral development with equity, diverse and plurinational in character, that strengthens our own collective forms of “good living” (i.e. the good way of life) in which no culture dominates; that is to say, to construct harmonious forms of coexistence that defend Mother Nature.** (CPO 2008b)

Despite CPO’s invitation to dialogue towards the government, the administration of President Colom and the indigenous communities have not yet entered into a constructive mutual engagement. On the contrary, on January 10, 2009, the CPO assembly in Huehuetenango issued a statement in which the “weak” Guatemalan State was boldly declared “bankrupt and obsolete” since it would be:

...incapable to comply with its constitutional mandate to look after the common good of the majority of the population” (CPO 2009: 2) and because “most public policies implemented by subsequent elected governments go against the individual and collective rights of our peoples. (ibid.: 3)

The same statement unilaterally declares the results of the community consultations to be legally binding, regardless of the decision of the Constitutional Court (or, of that matter, of the Inter-American Court of Human Rights) “because they are ancestral legal mechanisms for the affirmation of processes of collective decision-making”, and announces “the reinstitution of Maya Law in the whole of (indigenous) territory”.

The document, which in Guatemala can be considered as one of the first affirmations of indigenous peoples’ claims to collective rights, finally declares all national and transnational commercial enterprises as “unwelcome in indigenous territory” (ibid.: 2).

---

85 Waqib’ Kej is a Guatemalan indigenous and peasant organization that since 2003 has worked to “promote the articulation of the struggles of indigenous communities” and aims to achieve “organizational strengthening that is based on the philosophy and cosmogony of the (greater) Maya people” (www.waqib-kej.org).

86 The concept of “buen vivir” is an expression of the Latin American indigenous philosophy on development which principally rejects the “commoditization” of nature and wants to replace (neoliberal) development based on individual self-enrichment and accumulation with a form of development that is based on solidarity between communities and peoples and a sustainable relationship with “Mother Earth” (See, amongst others, Burch, Tamayo & Corral 2008; www.villageearth.org; www.movimientos.org).
Notes on the relation between community resistance against mining and the revitalization of indigenous identity
Cultural or ethnic identity is a complex and elusive subject in Guatemala. The country has a population of which an estimated 50 to 60 percent belong to 23 Maya and other indigenous/ethnic groups (UNDP 2004). Expressions of this “indigenousness” are discernible in many aspects of everyday life, in rural areas in the highlands but also in smaller towns, most notably in traditional dress and language. Yet in the media and in daily speech, indigenous peoples are most often referred to, and primarily refer to themselves, as “peasants” (campesinos). Partly a legacy of decades of internal conflict and state repression, in Guatemala there still is no strong indigenous movement with a well-articulated political agenda. Indigenous organizations are divided between Mayan organizations employing a pan-Mayan, cultural essentialist discourse, and popular indigenous organizations employing a Leftist class discourse. This leads to serious problems of representativity and legitimacy, particularly in rural communities (Warren 2002; Rasch 2008). Legal recognition of indigenous collective rights is extremely weak, despite the country’s ratification, in 1996, of ILO 169 – thus providing a good example of a model of “neoliberal multiculturalism” (Hale 2004) or “multiculturalism light” (Ba Tiul 2008). On a national level, indigenous political representation is very low, and almost never independent from established political parties. In some locations, such as in Totonicapán, Sololá and Quetzaltenango (Rasch 2008), indigenous participation in local government is higher, but this has failed to have repercussions on the national political system. Post 1996 administrations have, as a rule, only paid lip service to the subject of the protection of indigenous identity and rights. The government of Alvaro Colom (2008-2012) – who campaigned with the slogan “social democracy with a Maya face” – has yet to become an exception to this rule. Violations of indigenous rights are, for the most part, ignored or taken up by a small number of indigenous legal defense organizations and a handful of NGOs.

Matters relating to cultural or ethnic identity in the indigenous communities that are resisting mining and other development projects in the Western Highlands of Guatemala should be considered against this national background. The above-described “contradictions of identity” in Guatemala may provide an explanation for the fact that, even though the rural population of the Altiplano Marquense, including San Miguel and Sipacapa, is predominantly indigenous, identity-related issues receive little attention in local discussions on mining in indigenous areas. This does not mean they do not exist. It is likely that the environmental and social impacts that were described in the first part of chapter 3 will have an impact on cultural identity, certainly in the communities that are directly affected by the mining activity – impacts that could be considered detrimental. It will, however, be difficult to attribute these effects to mining exclusively since other factors have also affected or are affecting cultural practices. These factors, which continue to have their effect simultaneously with the cultural impacts of mining, include the armed conflict, the rise of evangelical Protestantism, and temporary labor migration to the US. Even as mining decomposes (destroys) social structures and traditional

87 The granting of certain indigenous rights, mostly social and cultural rights, as well as the ratification of ILO 169, has been primarily the consequence of the “highly internationalized peace process” in the 1990s – rather than of indigenous organizing and demands – and explains to a great extent why in Guatemala there is no genuine governmental commitment to guarantee rights to indigenous peoples (Sieder 2007: 217 ff), particularly not economic rights. Guatemala’s model of multiculturalism can therefore be most aptly labeled as “neoliberal multiculturalism”, that is: multiculturalism as “a mechanism for reconstituting the hegemony and legitimacy of [a] weak [state] and fragile [democracy]” (Sieder 2007: 214; see also Hale 2004).

88 This is evidenced by the fact that various previous administrations have not advanced with the adoption of measures to protect the lands of indigenous peoples or with the elaboration of suitable instruments for their consultation (despite constitutional articles and ILO 169).
practices and thus contributes to the erosion of indigenous identity locally, it has also galvanized “ethnic reorganization” on the part of opponents in the wider region, and in so doing, also leads to identity (re)construction. The second part of chapter 3 described a series of community organizational responses to mining, which can be interpreted in terms of ethnic reorganization, understood as those processes that occur when an ethnic group – or an indigenous people – “undergoes a reorganization of its social structure, redefinition of ethnic group boundaries, or some other change in response to pressures or demands imposed by the dominant culture” (Nagel & Snipp 1993: 203). Ethnic reorganization involves processes of creative adaptation, cultural (re)appropriation and the (re)creation of cultural forms that serve to guide the subsequent thoughts and actions of communities. Looking at the phenomenon of the community consultations from this perspective, it is possible to distinguish interesting aspects of the revitalization of identity.

In the past 3 years, much has been said and written about the meaning and significance of the community-organized consultations, but little in terms of identity construction. There are exceptions. In a description of events during the consultations that were held in Huehuetenango, political scientist Iván Castillo Méndez (2009: 4) points to the fact that the execution of the consultations did not strictly conform to articles 63 and 64 of the Municipal...
Code and that the procedures followed also included traditional (indigenous) elements. In Santa Eulalia, for example, children older than 7 years as well as women and men without identity papers or voting rights participated in the popular referendum. Community leaders explained and legitimated this conduct towards outside observers by making reference to ILO 169, which recognizes the communities’ right to practice their own forms of government. Castillo considers this to constitute a recuperation of “Community” in a traditional, inclusive sense – as a collective subject – and as a victory against “State-imposed, fragmenting forces”, such as the voting procedures and eligibility requirements set forth in the Law of Elections and Political Parties (Decree 1-85). In addition, he points out that in the organization of the consultations by the COCODES, political party interests did not play a role of any significance; they had been subordinated to the interest of the local indigenous community. Castillo emphasizes that in the consultations decisions were made by consensus, and were thus reminiscent of the traditional, indigenous consensus-based model of decision-making. According to the author, this is significant because the local Development Councils (COCODES/COMUDE) normally are at the mercy of party politicking by local political bosses. In that sense, the socially and politically successful consultations, for the communities involved, constitute an emancipation from the imposed model of liberal democracy, which by means of its system of majority vote “destructures” indigenous communities and their distinct forms of government and functions as a “mechanism of political domination” (Ibid.: 17).

In some highland indigenous municipalities, up to now mainly in Huehuetenango and Quiché, another interesting response to the imposition of the neo-liberal model of development is the process of the (re)creation of Alcaldías Indígenas, where these had been lost or did not exist previously, taking the example of the traditional authority structures of the indigenous communities of Totonicapán or Chichicastenango (http://defensoriawajxaquibnoj.org; Castillo 2009). This process of ethnic reorganization is interesting because it can be considered as wresting free from the denial of the Guatemalan State of indigenous forms of government, in practice and legally – such as is the case with the 2002 Decentralization Law and the Law on Urban and Rural Development Councils. In some communities, this reestablishment of indigenous forms of government goes beyond the borders of the municipality, like with the 8 municipalities with a population of the Q’anjobal linguistic group, which as a consequence of the community consultations instituted a Q’anjobal Parliament, the Pat’qum. On February 22, 2008, this new indigenous structure publicly proclaimed the political territorial autonomy of the Q’anjobal region and called for the establishment of a new relationship between the Guatemalan State and indigenous peoples – the fist declaration of its kind in Guatemala (Castillo 2009: 25). This development differs from that of San Marcos (with the exception of San Miguel Ixtahuacán), where, in the absence of overarching institutions of indigenous authority on the level of the municipality, communities appropriated the imposed structures of the Development Councils for their own ends. It remains to be seen, however, whether this offers a durable solution in these communities for the problems of political clientelism (within these same COCODES) and the lack of a centralized indigenous authority structure.

---

89 Article 55 of the Municipal Code (Decree 12-2002) recognizes the existence of the alcaldías indígenas as a form of indigenous authority and government but does not attribute them with specific competencies. In practice, municipal governments are obstructing alcaldías indígenas. The two decentralization laws mentioned do not mention the existence of indigenous forms of government and in this way are undermining them in ongoing decentralization processes (see also Castillo 2009).

90 San Juan Ixcoy, Santa Eulalia, San Pedro Soloma, San Rafael La Independencia, San Miguel Acatán, San Mateo Ixtatán en Santa Cruz Barillas.
Castillo tends to see the community consultations and the re-creation of the Alcaldías Indígenas as the (potential) beginning of a series of new “indigenous reivindications”, as an emerging indigenous (Maya) movement of the Altiplano Occidental that is an integral part of a movement for indigenous rights (ibid.: 2). But this conclusion is based on the personal interpretation of the author and in the Guatemalan context seems to be premature. One of the most striking characteristics of the regionalized resistance of the (“campesino indígena”) communities of the Western Highlands, like elsewhere in Guatemala, is that this struggle up to now has not or barely been discursively articulated with claims, towards the Guatemalan State, for the recognition of collective indigenous rights. This was also observed by the indigenous intellectual Irma Otzoy (in 2006, but the situation has not significantly changed) who concludes that the consultas are an expression of de facto territorial autonomy, but that in the context of organized resistance to mining and mega development in the Guatemalan highlands a cry for the legal recognition of autonomy (expressed in the recognition of indigenous communities and peoples as “collective subjects” as well as of the matching collective right to territorial autonomy) is rarely heard (Otzoy 2006: 41). This is most notable when resisting communities and their allies among NGOs and church organizations present “their consultations” as a means for defending territory, but at the same time fail to make a connection between the right to consultation and their – also internationally recognized – entitlement to collective land rights, which could prove a much more effective mechanism for the defense of their livelihoods. Among the Mam and Sipakapense of San Marcos and Huehuetenango, up to now, no clear call has been made for further recognition of traditional authority and indigenous forms of government. It is hard to come up with a clear explanation for this paradoxical situation, but it is certainly related to a reduced ethnic self-consciousness – the result of, amongst others, the abovementioned social factors and influences (for a recent work on the experience of identity in Guatemalan rural communities, see Bastos, Cumes & Lemus 2007).

This observation links up with the ideas set forth in a recent article by Mayan anthropologist Kajkoj (Máximo) Ba Tiul (2008), which he presented at the occasion of the International Day of Indigenous Peoples (August 9) and which carries the title: “Revitalizing identity – from resistance to power.” In this article, Ba Tiul notes that there is a separation – that still has not been bridged – between, on the one hand, an “official indigenous movement” made up of Mayan public intellectuals, which is divided among itself, and, on the other, a “movement of resistance” against mining, hydroelectric projects and neoliberal development in general that springs from local, rural communities with a largely indigenous population. While this resistance movement of communities is steadily growing, it has not yet succeeded in translating its demands – relating to the compliance with the right to consultation and the right to a clean environment – into a clear and comprehensive political program. According to Ba Tiul, this is mainly because communities and their leaders, up to now, have not connected the articulation of their demands to fundamental aspects of indigenous identity. This failure to use indigenous identity as a source of power (social and political capital) is the consequence of neoliberal globalization, which erases non-western worldviews and ways of life and affects the self-consciousness of indigenous peoples. At the same time, the Maya movement – with its often essentialist focus (mainly preoccupied with pan-Mayan cultural reaffirmation and self-representation) – has not proven capable to communicate with (appeal to) the resistance movement, to give it new direction, and thus strengthen it. The process of organizing the consultations in the communities has contributed to the necessary awakening to the workings of neoliberal globalization and the persistent “Estado criollo, oligárquico y empresarial”. The next step – according to the author – is that the mobilizing communities should again get
in touch with (tap in to) their indigenous identity. Only through the articulation of a self-conscious (identity-based) communal project – the bottom-up creation of a "new indigenous political subject" – will the resisting communities be able to demand that the State reform itself into a truly "pluriform State" with public policies that will benefit the great majorities that historically have been marginalized, excluded and discriminated against (Ba Tiul 2008: 5). Also, only this kind of State, with a broad conception of multiculturalism (i.e. as opposed to neoliberal multiculturalism), can be expected to create the political space for the recognition of the collective rights of indigenous peoples.

From the perspective of the revitalization of identity, from Ba Tiul's assignment for the indigenous communities of the Altiplano Occidental, at least three challenges for the future can be identified. In the first place, it will be necessary for them to articulate – with the help of civil society organizations and indigenous intellectuals – a comprehensive plan for alternative, "culturally sustainable" development that is based on indigenous cosmovisions as well as local identities, to make sure a plan does not consist of only abstractions, but is also rooted in the historical practices of communities. The discussion on this topic in Guatemala has only just begun. Secondly, the time has come up with new strategies for the defense of territory – complementary to the organization of community consultations – that give expression to their cultural attachment to ancestral lands and that give them the matrial rights for the realization of their aspirations to territorial autonomy (Otzoy 2006). Legal instruments for such a strategy may be found in the establishment of legal capacity for indigenous communities and the Cadastral Information Registry Law (Decree 41-2005) (interview with Amílcar Funes, 06/08/09).

In the third place, indigenous leaders and professionals will need to become more assertive towards, and engaged with, national political and legislative processes that enable the protection of the collective rights of indigenous peoples.

In connection with the last point, one disturbing observation should be made. Recently, in indigenous communities that have organized their consultation and feel indignant over the dismissal of the validity of the results, there is a tendency to a total rejection of national political and legislative processes that may result in mechanisms for conflict prevention and resolution in mining conflicts, such as the ongoing discussions on the reform of the Mining Law and the Indigenous Peoples Consultation Bill (see chapter 5). When indigenous leaders, particularly in relation to the last-mentioned bill, openly raise the question: "Why do we need the laws of the State if we have our own consultas?", this amounts to communities' unilaterally renouncing their faith in the legality and legitimacy of the State and as a new expression of the former Guatemalan indigenous strategy of withdrawal in their "cultural and communal refuge" (Otzoy 2006: 34). Although the sentiment is understandable, this is an alarming development, and in the long run can hardly be thought of as a solution to the problems at hand. However much mining-affected communities are in their right to take recourse to international legal instruments and courts (such as ILO and IACHR), eventually the recommendations and decisions of these institutions have to be taken up and translated into new national standards involving collaboration and cooperation between indigenous communities and the Guatemalan State.

91 During a recent meeting of the Consejo de Pueblos de San Marcos (31/07/09), one of the indigenous leaders present formulated this question even more precisely: "Our consultas are ancestral practice, so why do we need an external [State] legal framework to regulate them?"
International norms for indigenous peoples’ consultation and their application in legislative projects in Guatemala – a way out of the conflict?
In Guatemala, the theme of consultation occupies a central place in the conflict surrounding mining in indigenous territories. It seems that the community consultations that were organized in numerous indigenous municipalities in the highlands and elsewhere were in large part an expression of feelings of concern and indignation caused by the unwillingness and incapacity of the government to take responsibility in the organization of adequate mechanisms for the consultation and participation of indigenous peoples in the elaboration and implementation of plans for mining and other large scale development projects on their lands. The reluctance of the successive Berger and Colom administrations to enter into a direct dialogue with the indigenous communities concerning the outcome of the community consultations has resulted in a stalemate situation. Meanwhile positions have hardened and mutual distrust has mounted. This state of affairs is precisely the opposite of the objective of indigenous peoples’ consultation as envisaged by article 6 of ILO Convention 169. In view of this situation, it seems worthwhile in this chapter to examine in some detail the emerging international consensus on norms for the consultation of indigenous peoples as these have been developed over the past few years by the various control organs of the ILO as well as in the growing jurisprudence by the Inter-American Court of Human Rights (IACHR), and apply these to the situation on the ground in the case of Guatemala’s ongoing mining operations. Subsequently, it is also interesting to see how and to what extent these norms have been applied in recent legislative attempts by the Congressional Commission on Indigenous Peoples (Comisión de Comunidades Indígenas al Congreso, CCIC) and by one of Guatemala’s national indigenous organizations.

5.1 Normative precepts on the consultation of indigenous peoples

Prof. S. James Anaya, since May 2008 the new United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, provides an adequate overview of the current state of the art in the normative interpretation of ILO 169 and the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) in a document he presented to the Government of Chile in April 2009. Regarding the questions as to when and how consultation of indigenous peoples should take place, this document is taken as a reference.

When is consultation with indigenous peoples required?

International legal instruments on the rights of indigenous peoples, like ILO Convention 169 and the UN Declaration, are quite clear on the question when – in which cases and at what time – indigenous peoples should be consulted: generally, according to ILO 169 (article 6.1a), this should be the case “whenever consideration is being given to legislative or administrative measures which may affect [indigenous peoples] directly”, which implies that consultation must take place “before adopting and implementing such measures” (UN DRIP article 19).

More concretely, all legislative or administrative decisions relating to development activities that may have an economic, social, cultural or spiritual impact on indigenous peoples or on their environment constitute actions that require consultation (ILO 169 article 7.3; UN DRIP article 32.3). These development activities logically include all policies and programs in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security that involve indigenous peoples (i.e. that intend to improve their economic and social conditions) (UN DRIP article 23).
In view of the special relationship that exists between indigenous peoples and their territories, international standards further specify that these peoples should be consulted – and this is the central issue here – on the granting of all permits/licenses for the exploration or exploitation of natural resources on indigenous lands, including in cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to these lands (ILO 169 article 15.2; UN DRIP article 32.2). Consultation is also required – and this is also of great relevance to the cases under consideration (see paragraph 3.2.1. and Part B) – whenever consideration is being given to the capacity of indigenous peoples to alienate their lands or otherwise transmit their rights outside their own community (ILO 169 article 17.2; UN DRIP article 8.2b).

In the case of ongoing operations of mineral or natural resource exploitation on indigenous lands, the control organs of the ILO have emphasized that the consultation of indigenous peoples – including studies to assess the social, spiritual, cultural and environmental impacts on them – is also required in the case of an extension or expansion of these operations. ILO’s experts moreover have pointed out that for the purposes of consultation (as envisaged by ILO 169 article 15.2) indigenous peoples are not required to have rights of ownership over land. In the case of a complaint concerning the granting of exploration licenses to the Guatemalan Nickel Corporation (CGN) in El Estor (Izabal), in which the failure to consult several Maya Q’eqchi communities was defended by the government on the grounds that the license was granted in relation to private or State-owned lands, ILO’s investigative committee pointed out that the requirement of consultation is applicable to all indigenous communities that have historically occupied the area, whether or not they hold ownership title to those lands (ILO: representation Guatemala - 2005, par. 48).92

---

92 Report of the Committee set up to examine the ILO: representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (ITCC), GB.294/17/1; GB.299/6/1 (2005).
How should consultation with indigenous peoples take place?

“Consultation should take place in advance (with a prior character)”

According to the Special Rapporteur, the phrase in ILO 169 article 6.1a “whenever consideration is being given to legislative or administrative measures which may affect them directly” (emphasis added), means that indigenous peoples and communities are to be consulted not just when a law proposal (bill, legislative measure) is presented to congress or before the start of a project, but already during the formulation phase of the bill or in the stage of the conception of the project – so: “not only when the need arises to obtain approval from the community, if such is the case” (IACHR: Saramaka People v. Suriname - 2007, par. 133).

Control bodies of the ILO have stated in this respect that: “the consultation must be ‘prior’ consultation, which implies that the communities affected are involved as early on as possible in the process, including environmental impact studies” (ILO: representation Colombia - 1999, par. 90).

For these reasons, in Guatemala, in the case of both mining projects (the Marlin Project in San Marcos and the Fénix Project in Izabal), the so-called consultations with local indigenous communities (Mam/Sipakapense and Q’eqchi’, respectively) did not conform to ILO’s regulations, considering that these communities were only first consulted after the government had granted exploration (and exploitation) licenses to Montana Exploradora and CGN.

“The Consultation is not complete with only providing information”

Beyond the fact that so-called consultations with indigenous communities organized by governments or companies are usually based on a one-sided representation of the facts (the supposed “benefits” of mining for the local population), these encounters are also often limited to brief/cursory procedures of informing and answering questions. In Guatemala, this was also the case with the “consultations” of indigenous peoples in San Marcos and Izabal. According to Anaya (2009), this is not in accordance with the provisions of the Convention because in these cases there is no room for negotiation and coming to an agreement between the parties – the central objective of ILO 169.

With reference to a similar case, the ILO’s expert committee reached the following general conclusion: “A meeting conducted merely for informational purposes is not consistent with the terms of the Convention. [...] The concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith, and the sincere desire to reach a consensus” (ILO: representation Colombia - 1999, par. 90).

“Consultation should be in good faith, as part of a procedure that generates trust between the parties”

The provision that consultations have to be conducted in good faith refers to the objective to foster mutual trust between parties (indigenous communities on the one hand, and the government and/or the companies on the other). According to the control organs of the ILO, the
International norms for indigenous peoples’ consultation and their application in legislative projects in Guatemala – a way out of the conflict?

To achieve the final aim of consultation, both parties must be willing to make an effort to create a climate of mutual respect and acceptance. The ILO stresses this point because “the validity of the consultative processes provided for by the Convention, as a mechanism to prevent and resolve conflicts, depends on the creation of fruitful mechanisms for dialogue. The consultation laid down in the Convention is therefore not merely a formal requirement but a genuine instrument for participation” (ILO: representation Brazil - 2006, par. 42). According to this line of thought, consultations having met this requirement have the potential to “attenuate social tensions” and become the mechanism to ensure that development plans and programs are truly “inclusive” (ILO: representation Guatemala - 2005, par. 53).

According to Special Rapporteur Anaya (2009: 7), in order to strengthen a climate of mutual trust, governments should take the consultation as an opportunity to start a normative dialogue on the legitimate claims of indigenous peoples in light of their internationally recognized rights. This would help bring together divergent positions and achieve greater participation and inclusion of indigenous peoples in the institutional structures of the State. In the case of Guatemala, the lack of mutual trust and dialogue between the government and indigenous peoples is the greatest obstacle to effective consultation on mining and other large development projects. Instead of entering into dialogue, the government is failing in its duty by delegating its responsibility regarding the consultation of communities to the mining companies. At the same time, it has shown no willingness whatsoever to meet their collective rights claims, for example by entering into debate on the recognition of indigenous territories.

“Consultation should be appropriate and through representative indigenous institutions”

Both ILO 169 and the UN Declaration give great weight to the use of appropriate procedures and the principle of representativeness. IACHR likewise in its decisions emphasizes that the State has the obligation to consult indigenous peoples taking account of their “traditional methods of decision-making” (IACHR: Saramaka People v. Suriname - 2007, par. 133).

According to Anaya (2009: 7) as well as ILO experts, the appropriate character of a consultation, through representative indigenous institutions, cannot be reduced to an absolute formula or definition, but depends to a large extent on the range and scope of the measure that is being proposed. This means that the procedure to be followed has to be determined beforehand in consultation with the potentially affected indigenous communities, whereby account should be taken of “the opinions of the various peoples involved in order to facilitate

---

94 Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Convention by the Authentic Workers’ Front (FAT), GB.283/17/1; GB.289/17/3 (2001).
95 Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Convention by the Union of Engineers of the Federal District (SENGE/DF), GB.295/17; GB.304/14/7 (2006).
96 Inter-American Court of Human Rights; Case of the Saramaka People v. Suriname, Judgment of November 28, 2007.
an exchange of information and ensure that the procedure used is considered appropriate by all parties” (ILO: representation Brazil - 2006, par. 42).

In view of the great diversity of indigenous peoples, it is neither possible to prescribe in advance what is or should be considered a representative institution. For this reason, the control organs of the ILO have emphasized that the criterion of representativeness should be interpreted in a flexible way. “The convention does not impose a model of what a representative institution should involve, the important thing is that it should be the result of a process carried out by the indigenous peoples themselves” (ILO: representation Mexico - 2001, par. 102).

In consequence of the above considerations, ILO in relation to indigenous peoples' consultations has prescribed the following minimal criteria of representativeness (Anaya 2009: 8): (i) they depend contextually on the scope of the proposed measure to be consulted; (ii) they have to follow systematic and pre established criteria; (iii) they have to include distinct forms of indigenous organization, provided that these respond to internal processes among those peoples; and (iv) they have to conform to principles of proportionality and non-discrimination, and they have to accommodate a plurality of identity, geographical and gender perspectives.

Finally, regarding the appropriateness of consultation, international bodies require that consultation take place according to accessible procedures to enable the participation of the largest possible number of indigenous peoples or communities. In this respect, account should be taken of the linguistic diversity among indigenous peoples, especially in those areas where the majority of the indigenous population does not speak the official language of the country. In addition, the appropriate character of consultations also has a temporal dimension. In the words of the ILO: “sufficient time must be given to allow the country’s indigenous peoples to engage in their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions” (ILO: representation Colombia - 1999, par. 79).

For the situation in Guatemala, it can be concluded that the so-called consultations of indigenous communities by the mining companies Montana and CGN on the Altiplano Marquense and the shores of Lake Izabal (respectively), neither followed appropriate procedures nor complied with minimal requirements of representation because they did not take place according to systematic and preestablished criteria, because they were inaccessible to a large part of the affected indigenous population and because they did not provide sufficient time to allow for meaningful participation.
5.2 Legislative projects on the consultation of indigenous peoples

In view of the controversy resulting from the implementation of projects for the exploration and exploitation of natural resources in Guatemala, some sectors of Congress in 2005 had concluded that it was “urgent and necessary” to adequately regulate the mechanism of consultation of indigenous peoples in line with the provisions of ILO Convention No. 169, which was ratified by Guatemala in 1996. The Congressional Commission on Indigenous Peoples (Comisión de Comunidades Indígenas al Congreso, CCIC) acknowledged that, through the realization of community consultations, local communities had developed in practice a “transitional consultation machinery” regulated by the Municipal Code (Decree 12-2002) and the Law of Urban and Rural Development Councils (Decree 11-2002), but it considered that its results in protecting the rights of indigenous peoples had been limited (Comisión de Comunidades Indígenas 2007: 51). This coincides with an observation on the situation in Guatemala by ILO’s Commission of Experts (ILO 2007b),97 which noted that community consultations are not based on dialogue and do not establish responsibilities on the part of the State and private companies to compensate communities which may be adversely affected by mining and hydroelectric projects.98

Although the MEM’s 2006 proposal to amend the Mining Law – which was controversial and still has not been adopted – includes a provision (article 46bis) on the consultation of indigenous peoples (in this, MEM followed the recommendations of the High-level Commission on Mining from August 2005), this provision was included for transitory purposes until specific legislation on the consultation of indigenous peoples comes into force.99 Thus, in 2006 the Congressional Commission on Indigenous Peoples (CCIC) was entrusted with the task to begin with the drafting of a bill that would establish specific institutional mechanisms for the consultation of indigenous peoples, for which the government requested the technical cooperation of ILO. The OAS and the Embassies of Sweden and Norway played a role in facilitating the process. Substantive discussions concerning the content of the consultation bill were inspired by the emerging international consensus on the normative interpretation of ILO 169 as well as a thorough revision of constitutional jurisprudence and legislation on the topic from various other Latin American countries (Colombia, Bolivia, Nicaragua, Panama).100 Mayan anthropologist Victor Montejo, President of CCIC, formally presented the first draft of the Indigenous Peoples Consultation Bill to Congress on September 25, 2007. The bill was declared admissible on November 28, 2007 (Wetherborn 2008).101

---

97 CEACR, the Committee of Experts on the Application of Conventions and Recommendations, is a legal body responsible for the examination of the compliance by ILO member States with Conventions and Recommendations. This examination takes place on the basis of reports sent by governments pursuant to questionnaires prepared by the ILO Governing Body. The Committee of Experts meets once a year.

98 Relating to community consultations in Guatemala, ILO (2009) later also observed that: “belated consultation after the plans of the region have already been defined without the participation of the indigenous peoples, would not be effective”.

99 Iniciativa [de ley] que dispone aprobar reformas al Decreto Número 48-97 del Congreso de la República, Ley de Minería (número de registro 3528; 19 de septiembre de 2006).

100 In Latin America, only Colombia has developed specific regulation with respect to the right of indigenous peoples to prior consultation (Decreto 1320 de 1998 [13 de julio], por el cual se reglamenta la consulta previa con las comunidades indígenas y negras para la explotación de los recursos naturales dentro de su territorio).

101 Iniciativa [de ley] que dispone aprobar ley de consulta a los pueblos indígenas (número de registro 3684; 25 de septiembre de 2007).
The Indigenous Peoples Consultation Bill (Comisión de Comunidades Indígenas 2007) responds to the decision of the Constitutional Court of Guatemala in relation to the case of the community consultation of Sipacapa of May 8, 2007, in which Congress is exhorted “to define with precision when consultations should have binding effect”. In compliance with the order of the Constitutional Court, the Consultation Bill is an attempt to lay down “the form in which consultative procedures are to be developed, which institution must convene and organize the consultations, who is entitled to participate, the moment consultations are to be held, as well as the consequences of the results obtained”. Before these aspects are elaborated, in 6 titles and 32 articles, it is explicitly acknowledged in the bill that “consultation constitutes a common and traditional practice among indigenous peoples, and that its recognition, respect and exercise forms part of the forms of life and social organization that are guaranteed by the Political Constitution of the Republic of Guatemala”.

Title I provides the general provisions of the proposed law. It lists the events or circumstances that require consultation of indigenous peoples and describes the objective and principles of consultation. The central objective of the bill is to enable indigenous peoples to freely exercise their right “to participate in […] and decide on their own priorities for the process of development”. In a more concrete way, the aim is to “reach the agreement and consent of indigenous peoples in relation to proposed measures and, in particular, the circumstances, conditions, limits and scope under which these should be authorized or implemented – after
having determined how and to what extent their interests will be affected”. From the reasoning of the authors of the bill, it is very clear that the term “consent” should not be construed to mean that indigenous peoples have the right to veto development projects promoted by the State. Finally it spells out the guiding principles of the consultation, which are: good faith; veracity; transparency; access to information (accessibility); opportunity (prior character); and respect for indigenous cosmovisions.

Title II speaks of the actors involved in the consultation and their responsibilities in the process. The State is designated as the entity responsible for the promotion of the consultation of indigenous peoples, and for the provision of information on the object of consultation (law or project). This obligation can under no circumstances be delegated to third parties or persons of private law. Consultations must be promoted by the executive through the ministries entrusted with the authorization of an administrative measure, by autonomous decentralized entities, or, in case of a legislative measure (law proposal or bill), the Congressional Commission on Indigenous Peoples. The convocation to a consultation as well as the certification of its results, is the responsibility either of the Supreme Council of Elections (TSE), when it concerns matters that may affect indigenous peoples on a national or regional level, or of the municipality, when it concerns matters that may affect local communities or linguistic communities. Consultations can be held on the level of territorial entities (departments, municipalities, or localities), linguistic communities, or on the level of “other forms of traditional social organization of indigenous peoples”.

Title III deals with access to information. The bill defines the State as being responsible for providing information on the possible impacts on indigenous peoples of the proposed measure (project or activity) before, during and after the consultation, in coordination with the entity that is proposing (is the beneficiary of) the measure. In case the latter is a private company, the information provided should also include a track record of the company that plans to implement a project in indigenous territory (i.e. information on the results of previously implemented projects in other contexts). The information provided must be truthful, complete and appropriate and should be distributed through appropriate channels, taking into account the geographical characteristics of the area where the consultation is to be held as well as the linguistic characteristics of the indigenous population that is to be consulted, whereby preference will be given to the use of radio media and audiovisual teaching materials. At all times, indigenous peoples have the right to procure additional information, which can be obtained without unnecessary bureaucratic steps and free of cost from the government, or from civil society organizations or dependent experts. In the event that the distributed information on the object of consultation appears inaccurate, misleading or incomplete, the consultation will be presumed in bad faith and indigenous peoples are entitled to revoke the authorization of the project.

103 The authors of the bill (i.e. the Congressional Commission on Indigenous Peoples) cite a decision of the Constitutional Court of Colombia in a similar case (Sentence 652 of 1998), in which the court determined that ILO 169 (article 15.2) does not mean to imply “that the consultation has a determinative or definitive character in order to obtain the acquiescence of [indigenous] peoples, without which it would be impossible to exploit the subsurface resources that are the property of the State; rather, the norm under analysis imposes the obligation [of the State, not companies] to consult on the degree to which their interests may be affected so that they can be properly and fairly compensated” (Comisión de Comunidades Indígenas 2007: 36).
Title IV lays down the way in which the procedure for consultation has to be developed. The consultation must take place before (prior to) the authorization of the proposed measures that may affect indigenous peoples. In respect of their distinct forms of life and social organization, indigenous peoples are always allowed to decide for themselves on the mechanism for consultation that is appropriate according to their traditional decision-making and governance processes. For this reason, the call to hold a consultation must be made well in advance (1 to 3 months) by the responsible institutions (TSE or municipalities), depending on the level on which the consultation is to be held. As soon as the consultation is completed, the entities that convoked (called for) it, must draft within the period of 5 days a corresponding certificate that minimally specifies the following substantive points: the aspects in which the consulted indigenous peoples consider themselves to be affected (or benefited) by the measure; the conditions under which indigenous peoples consider the measure can be authorized or implemented, expressed in terms of concrete activities for the protection of their rights; the agreements between the parties in case conciliation has been achieved. Also in cases where consent has not been achieved, the results of the consultation are fully binding. This implies the need to further negotiate the conditions and forms of protection of the rights of the indigenous peoples that have to be proportional to the degree to which their interests are being affected. The certification of the results of the consultation, including the restrictions and protective measures, are part of the authorization dossier or contract and will be legally enforceable. Noncompliance with these restrictions and conditions will lead to the annulment of the resolution that authorized the measure or project and to an application for indemnification on the grounds of violation of indigenous peoples’ rights.

The Indigenous Peoples Consultation Bill as presented by CCIC seems to comply to a great extent with the international consensus on norms for consultation (free, prior and informed consent) of indigenous peoples as has been developed over the past decade by ILO’s control bodies and other international agencies like the IACHR (as outlined in paragraph 5.1.) and the UN Permanent Forum on Indigenous Issues. Nonetheless, there has also been criticism of the law proposal. In a recent (January 2008) review of legislative projects on indigenous peoples’ consultation (Wetherborn 2009), Carlos Guarquez of the Association of Indigenous Mayors and Authorities (Asociación de Alcaldes y Autoridades Indígenas, AGAAI) stated that prior to submission of the bill to Congress there had been insufficient efforts to seek consensus on the contents of the bill among indigenous and civil society organizations; a criticism that was echoed by Cecilia Mérida of the Departmental Assembly Against Mining in Huehuetenango. The most important points of contention among opponents and proponents of the bill revolve around the varying normative interpretations of the term “consent”, as well as the (State) entity that should carry responsibility for organizing the consultative process.

While the Indigenous Peoples Consultation Bill was awaiting debate in Congress, in the final months of 2008 another, alternative bill was circulated by the Council of Mayan Organizations of Guatemala (Consejo de Organizaciones Mayas de Guatemala; COMG 2008). Largely coinciding with CCIC’s bill, the most notable difference between the two law proposals is that the one by COMG considers the creation of an Indigenous Consultations Council (Consejo de Consultas Indígenas) as a new autonomous structure within the State that is to play a leading role in the consultation process.

---

role in the organization of indigenous peoples’ consultations. The proposed structure is made up of an executive committee of 7 persons and a general assembly of 33 persons, consisting of representatives of Guatemala’s 23 indigenous groups (Maya and Xinka) as well as the Garífuna. Seats in the assembly are distributed according to the relative size of the various groups (the K’iche’ have 5 seats, the Q’eqchi’ and Kakchiquel 3, the Mam 2, while the remaining 17 Maya groups and the Xinka and Garífuna have only one). The members of the council are elected for a term of four years and decisions by the assembly are taken by majority of vote. The council is described as the “principal mediator” (interlocutor principal) between the various government entities, on the one hand, and the indigenous peoples to be consulted, on the other, and is entrusted with a large number of tasks. The most important of these are: determining what legislative and administrative measures should be subjected to consultation, as well as the level at which the consultations must be held; advising indigenous peoples and communities on the appropriate procedures and watching over the distribution of relevant information, including the commissioning of studies into the social and environmental impacts of proposed measures; and, finally, making sure that the actual consultations are being held effectively and its results are respected.

It is not entirely clear what has motivated COMG to propose an alternative Indigenous Peoples Consultation Bill.\(^{105}\) It does not give a different interpretation of the term “consent” (construed as a right to veto legal and administrative measure) and neither does it express, in its technical and legal justification (“exposición de motivos”), explicit criticism of the bill that is promoted by CCIC. According to Udiel Miranda, coordinator COPAE’s political and legal program, the adoption of the Indigenous Peoples’ Consultation Bill would nonetheless represent a significant advance compared to the present situation for the indigenous communities in potentially mining-affected areas. It would give recognition of the right of indigenous peoples to be consulted and it would place considerable restrictions on national and multinational companies that want to exploit mineral and natural resources in indigenous territories. In Miranda’s view, the bill of CCIC is preferable to the proposal by COMG. The setting up of an Indigenous Peoples Council as a mediating structure between the government and indigenous communities would be a laborious process and carries a significant risk of bureaucratization. In contrast, the CCIC bill links up with existing forms of social organization of the various indigenous peoples and this would make it (much) less difficult to put the law into practice.

Due to lack of political support as well as pressure from indigenous peoples’ organizations – whose attention seems to have been deflected by ongoing discussions concerning the reform of the Mining Law –, the issue of indigenous peoples’ consultation so far has not been given any priority on the legislative agenda of the Colom administration (in office since January 2008), most likely due to strong opposition of Guatemala’s powerful business sector. In the meantime, the deficient institutional machinery for consultations of indigenous peoples as regulated by existing legislation (Decrees 11 and 12 of 2002) will remain in place. However legitimate the results of the community consultations of indigenous communities, it is not likely that the government will ever be willing to accept their results as binding. As long as

\(^{105}\) The structure of this council with proportional representation of Guatemala’s various indigenous/ethnic groups is very similar to the structure of the National Council for Sacred Places (Consejo Nacional de Lugares Sagrados), which is proposed in one of the versions of a bill – also awaiting debate in Congress – for the Protection of Indigenous Peoples’ Sacred Places (Ley de Lugares Sagrados de los Pueblos Indígenas; iniciativa de ley no. 3825, 17 de junio de 2008).
indigenous peoples and their political allies do not collectively rally behind and strongly push for adoption of the (a) Indigenous Peoples Consultation Bill, the prospects for attenuating disputes over mineral and other natural resources in indigenous areas are very limited and the risks of escalation of mining and resource conflicts substantial.
Conclusions
Although further research is warranted, this study of the social and environmental effects of mining in indigenous communities in Guatemala has brought several important findings. Its conclusions fall into three main themes:

In the first place, the conflict surrounding mining in Guatemala has shown that the institutional context – as defined by laws and institutions – in which this extractive industry operates, is extremely weak. The mining law is deficient mainly in the sense that it is lacking criteria for the prior consultation of local indigenous communities. This despite the fact that the Mining Law was promulgated after the ratification by the Guatemalan government – as part of the Peace Agreements – of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in 1996. In addition, the procedures regarding the granting of mining licenses demonstrate that the environmental legislation as well as the capacity of responsible government departments (Ministry of Energy and Mining and the Ministry of Environment and Natural Resources) are severely lacking, among other things with regard to the evaluation of Environmental Impact Assessments and later environmental monitoring. This has caused the indignation of indigenous communities in the Western Highlands and subsequently pushed them to organize more than 35 community consultations in which the indigenous population – amounting to more than 500,000 people – have unequivocally rejected mining in their territories. This illustrates that for Guatemala’s indigenous peoples, but also for the society as a whole, it is urgent that the Mining Law is reformed and that clear criteria are developed for their prior consultation (free, prior and informed consent). In order to be able to achieve this, it is however first necessary to overcome the formidable barrier to mutual trust between the government and indigenous communities.

The communities that are directly and indirectly being affected by mining have collectively mobilized in reaction to its adverse effects and threats. In so doing, they have especially directed their efforts at increasing their influence in decision-making processes from which they have long been excluded. Initially they tried to achieve this on a local level, in municipal government, but later also at regional level in the context of the Peoples’ Council of the Western Highlands. The resistance of these communities points at the “democratic deficit” in local government and the management of natural resources – despite decentralization legislation which since 2002 has been implemented partially and with difficulty. Another conclusion of this study therefore is that it is of the utmost importance that community organizations are supported and strengthened so that they can defend the interests of indigenous communities against closed and autocratic local governments and corruption and play a greater role in decision-making. Should mining under strict conditions be acceptable and feasible, then the strengthening of the capacities of community organizations is urgent in view of the benefit-sharing mechanisms that are provided for in the Mining Law. In those cases in which mining is not desirable, indigenous organizations have an important role to play in the formulation and execution of comprehensive plans for culturally sustainable development that is based in the identities and historical practices of local communities. At all times, care should be taken that the decentralized development committees (COCODES) do not weaken or undermine the functioning of still existing forms of indigenous government.

In the mining debate in Guatemala, the demand for the recognition of the right to be consulted – the right to participate in decision-making – until recently was disconnected from the demand of indigenous communities for the recognition and allocation (titling) of collective rights to land. In this respect the struggle of indigenous peoples in Guatemala differs from
indigenous mobilizations in many other countries in Latin America. On the one hand, this can be explained by Guatemala’s extremely formalistic legal system with its hegemonic discourse of individual property rights and neglect for the recognition of collective rights. On the other hand, this is due to legacy of the internal conflict (1960-1996) as a result of which it has proven difficult for the internally divided indigenous movement to adequately deal with this issue, which is very sensitive in Guatemala. These factors also explain why the resistance against mining (and mega development) up to now has not or barely been discursively articulated with claims for the recognition of the collective rights of indigenous peoples. However, the mining debate is reinvigorating the debate on collective land rights. Gradually, indigenous communities are becoming aware that consultation is a function of the more substantive rights to land and material resources – besides being an instrument for the development of participative democracy. Currently, communities and civil society organizations are carefully deliberating the question of reaffirming their historical but long-forgotten entitlements to ancestral lands – which this study has demonstrated for two mining-affected indigenous communities – in order to protect their lives and livelihoods.

In the polarized context of Guatemala, access to reliable and useful information is often lacking. The information provided by this study – the anthropological description of ongoing and emergent social and normative processes – may therefore serve as the foundation for arguments in the debate on mining. In the text and conclusions, several suggestions are made for new directions this debate could take (How to achieve culturally sustainable, alternative development? – What new strategies for the defense of territory? – How to strengthen community organizations and increase their engagement with national political and legislative processes? – Should resistance to unsustainable mega development be linked to claims for the recognition of collective indigenous rights?). Hopefully, the study offers the starting point for constructive attempts to avoid or resolve current and future mining conflicts in Guatemala.
To clarify the confusing situation with regard to indigenous collective land rights – or claims to such rights – in San Miguel Ixtahuacán and Sipacapa, it is first necessary to give a brief overview of the historical background and development of indigenous land rights (territoriality) in highland Guatemala. Second, the early-twentieth century attempts by both communities to secure their collective tenure as well as the resulting tenure situation at the beginning of the twentieth century will be looked at in some detail. Third and finally, the current legal status of indigenous land rights and communal tenure in Guatemala will be set off against the known and likely facts on the land acquisition process undertaken by the mining company Montana Exploradora – fully-owned subsidiary of Canadian company Goldcorp – in San Miguel Ixtahuacán and Sipacapa, which leads to a number of urgent questions that require further investigation before any legal action can be undertaken.
The historical development of indigenous territoriality in highland Guatemala
In an attempt to damp the growing power of the colonists and tighten its grip on the indigenous population, the Spanish Crown in the late sixteenth century started granting tracts of land to newly formed indigenous communities, “reducciones” or “pueblos”, in the form of “ejidos”. These lands, granted free of charge, were defined as inalienable and indivisible, and generally measured one square “legua” (equaling 1792 hectares or 17.92 square kilometers – or 38.8 caballerías) with the town (church) situated in its centre. Colonial authorities appointed locally elected indigenous councils, “cabildos”, which were charged with the collection of taxes, the organization of collective labor (both inside and outside the community in haciendas and mines) and overseeing the functioning of the market. The ejido was used for three purposes: collective agriculture, cattle grazing, and the collection of firewood and construction materials, and in this way guaranteed the material survival of the community. The agricultural harvest from the ejido, which was cultivated collectively, was used for the food supply of the population, the payment of taxes in kind (tribute) to the Crown and – in case of surpluses – for sale or trade of local markets (Palma 1998: xiii & interview 14/04/2008). The boundaries of the ejido were not directly recorded in a land title; usually only years after their creation indigenous communities felt the need, because of the creation of other pueblos and the advancing properties of the colonizers (haciendas and church lands), to have their land rights formally recognized (PTI 2006: 8).  

At a later stage, colonial legislation also allowed indigenous communities to expand their community lands through the purchase of unused lands from the Crown, outside and adjacent to the ejido, which were paid with the proceeds of a collection held among the members of the community. A part of these so-called communal lands was divided up among individual families, which received shares according to their contribution in the acquisition; the remaining part was collectively held in reserve for future use. Although communal lands were to an important extent cultivated by individual families and inheritable from father to son, these families never became owners but remained usufructuaries – that is, they were not entitled to sell their usufruct rights to people from outside the community. The ownership of communal lands, including the power of decision with regard to their possible alienation, remained in the hands of the community as a whole, since the community, represented by its leaders, had negotiated them with the Crown. Over the course of time, some indigenous communities managed to acquire large tracts of communal lands and expand their territory far beyond its original boundaries. Despite changes in colonial laws and continuous outside threats, the complex of ejido and communal lands, both demarcated by collective land titles, during the whole colonial period offered indigenous communities a space for limited self-government whereby the socio-political and economic organization of the community was governed by a communitarian logic characterized by collective as well as individual rights and obligations (interview with Gustavo Palma 14/04/2008; see also Tú López & García 2002; Thillet 2003).

After achieving independence in 1821, and the proclamation of so-called equal citizenship, the specific (protectionist) legal regime for indigenous communities was gradually dismantled.  

---

1 Dictionary of Units of Measurement (http://www.unc.edu/~rowlett/units/dictL.html)  
2 San Miguel Totonicapán for example was founded as pueblo in 1548-1550 and was granted an ejido in 1600, but only in 1635, on the request of local indigenous authorities, a first land title was issued.  
3 An example: San Cristóbal (Totonicapán) in 1744 had a legally recognized territory of 113 caballerías, divided between an ejido of 36 caballerías and communal lands of 77 caballerías (Palma 1998: xxix).  
4 The Decreto de la Asamblea Legislativa of August 13, 1836, prohibited – for the first time since the creation of the “pueblos de indios” in the sixteenth century – the granting of lands in the form of ejidos to indigenous communities; as of that moment, ejido lands could only be assigned to municipalities (PTI 2006: 35).
The historical development of indigenous territoriality in highland Guatemala economy, numerous new laws were promulgated which had a great impact on the tenure situation in indigenous communities. In a first move, uncultivated parts of collective lands (ejidos) – which were branded uneconomical – were declared state lands (tierras baldías) in order that they could be sold to outsiders (mostly ladino coffee farmers). Secondly, indigenous communities were ordered to parcel out their communal land reserves and offer these small/medium-sized properties in long-time lease (censo enfitéutico) to interested parties. Several years later, the holders of these “censos” were offered the possibility to redeem (buy free) their leases and thus acquire the ownership of these lands. This way, many communities, particularly but not only (see below) – those in which the ladino population had steadily increased in the preceding decades, soon lost a considerable part of their territorial patrimony. But these measures were not implemented everywhere with equal efficiency or speed, in part due to indigenous resistance. Some communities, especially those with a strong social organization (such as Totonicapán), managed to preserve at least their ejido lands through political lobbying and using still available legal resources. Other isolated communities and with a largely indigenous population – such as San Miguel Ixtahuacán and Sipacapa in San Marcos – called in “their” municipal authorities to request the remeasurement (remedida) of their lands with the central government (cf. Cambranes 1992: 322, 327; Palma 1998: xv & interview 14/04/2008).

The reorganization of the property regime, as laid down in the Civil Code of 1877, was coupled with the creation, in the same year, of a national Land Registry Office (Registro de la Propiedad Inmueble). This new institution, which was built on earlier efforts to set up a land registry, was intended to provide legal security to property (i.e. prevent infringements of property rights) and served to further legitimate the new legal order. Property law continued to work with the concepts of ejidos and communal lands, even if these now had been classified as municipal property (i.e. it had taken the authority over these lands away from the communities and transferred it to the state’s municipal governments) (PTI 2006: 36, 61). In practice, this left indigenous communities with the possibility of having their remaining collective lands registered, be it that they now needed a formal request by the municipal authorities (Tíu López & García 2002: 43–44). As a precondition for such registration, previous land titles had to be updated by means of a thorough remeasurement, whereby an appointed surveyor had to provide detailed account of: border shifts or extensions (excesos), unsolved boundary

---

5 This possibility was guaranteed by the Ley de Redención de Censos (censos here referring to the aforementioned censo enfitéutico arrangements), also known as Decree 170 of January 8, 1877.

6 In Guatemala, the term “ladino” – derived from “latino” – commonly refers to non-indigenous Guatemalans, as well as mestizos and westernized amerindians. The demonym Ladino came into use during the colonial era and referred to the Spanish speaking population that didn’t belong to the colonial elite of Peninsulares or Criollos, nor to the indigenous peoples (http://en.wikipedia.org; see also Bastos, Cumes & Lemus 2007: 23).

7 In the late colonial period the policy of the “pueblos de indios” was no longer successful in isolating the ladino population from the indigenous communities. Already before independence many ladino families had settled in the towns, and this process continued in the republican period (Palma 1998: xiv).

8 These lands, which were never taken into cultivation, are no longer referred to as ejidos, but are commonly known as the communal forests (bosques comunales) of Totonicapán (interview with Gustavo Palma 14/04/2008).

9 The communities of the Altiplano Marquense (San Marcos highlands) like San Miguel Ixtahuacán and Sipacapa (but also Comitancillo and others) at the turn of the century were assured of the support of their municipal governments because the remeasurement of land titles could offer them a solution to the enduring boundary conflicts between neighboring indigenous communities/municipalities (AGCA, SM. P. 29, E. 17).
conflicts, landmarks (mojones), and topographic and land use characteristics (PTI 2006: 31).
Various communities used this opportunity to have their land titles renewed, but only few succeeded in successfully completing all the procedures for registration, either because they had no legal adviser, could no longer pay the costs involved in the process, or due to faulty communication between the various regional offices of the land registry (see § 2). In these cases, the new land title (ejidos del municipio) remained unregistered and thus legally dormant, although they were – and may still be – respected by the local communities (interview with Martín Sacalxot 02/04/2008).

Meanwhile, however, the republican legislation in the administrative realm had resulted in the erosion of traditional indigenous authority. In the municipal offices (alcaldías) – which had replaced the colonial cabildos – important functions were always in the hands of ladinos, who subjected the municipality and its territory to new conceptions of modern government. In some cases, the municipality allowed the indigenous population to maintain its own parallel authority structure, the “alcaldía indígena” or “alcaldía del pueblo”, which had representation in the state-recognized municipal alcaldía (Palma 1998: xxvi; Thillet 2003: 72-73). Even if some alcaldías indígenas enjoyed – and sometimes still enjoy – much authority within their community (such as in Totonicapán, Sololá, Chichicastenango), they remained – and still remain – formally subordinated to the alcaldía municipal. Elsewhere they were overshadowed by the municipal alcaldía and gradually disappeared altogether (e.g. in San Miguel Ixtahuacán). Also, the hegemonic discourse on property – in which private individual property stood paramount – had started to permeate indigenous communities. Distrustful of the alcaldía municipal as the guarantor of their rights, in the course of the twentieth century many people found their way to the notary in the city, where they traded their usufruct rights for a certificate of ownership (escritura pública), which they sometimes registered. In so doing, they often ignored – consciously or unconsciously – the existence of the collective title as well as the authority of the titleholder (municipality) and rights of other users (community members); thus in many cases they also failed to legally dismember their newly acquired properties from the more inclusive municipal property. In this way, a further fragmentation (disarticulation) of the collective property system took place, eventually leading to a situation of various overlapping but mutually exclusive forms of property (interview with Martín Sacalxot 02/04/2008).

10 In 1877, the Land Registry had five regional offices: Guatemala, Quetzaltenango, Jalapa, Zacapa, and Chiquimula. At the beginning of the twentieth century 2 of these offices had been dissolved or joined with another office, and 2 new ones had been created. The 5 regional offices now were: Guatemala, Quetzaltenango, Jalapa, Cobán and San Marcos. The Registry Office of San Marcos – which is of our concern here – covered all inscriptions of property in the departments San Marcos and Huehuetenango. In consequence of the new Civil Code of 1963, the Land Registry was reduced to 2 offices, the Central Registry in Guatemala (Registro de la Propiedad de la Zona Central, RPC) and the Second Land Registry of the West in Quetzaltenango (Segundo Registro de la Propiedad del Occidente, SRP). This implied that all the registration books of the to be cancelled office in San Marcos had to be brought over to the new registry office in Quetzaltenango (PTI 2006: 52 ff.).

11 Gustavo Palma (in PTI 2006: 38) in this context speaks of “destructuration of old forms of political-territorial organization”.

12 Braulia Thillet (2003: 72) refers to these processes as the “ladinization of municipal government”.

13 Forms of property include individual property with certificate (registered or unregistered), municipal property with collective title referring to ejido and communal lands (registered or unregistered), and so-called supplementary titles (títulos supletorios).
The remeasurement of colonial indigenous land titles in the department of San Marcos
During the nineteenth century, the indigenous population of the San Marcos highlands had steadily increased, and in the early twentieth century communities started spilling over their boundaries into neighboring communities, repeatedly sparking off border conflicts (disputes). Pursuing a definitive answer in these disagreements, indigenous and municipal authorities of some communities sought to re-demarcate the outer boundaries of their territorial patrimony.

2.1 San Miguel Ixtahuacán

One of the first communities that decided to do this was San Miguel Ixtahuacán. On September 20, 1907, the alcalde (municipal mayor) of San Miguel Ixtahuacán and his “síndico”\(^{14}\) – who were probably both indigenous\(^{15}\) – wrote a letter to the Jefe Político (Governor) of San Marcos.

Today we see ourselves obliged, in order to avoid difficulties with the municipalities that border our own, for our knowledge and that of our neighbors – and to pay for the extensions in case they exist – to verify what is the land area that belongs to us in property. For this purpose, we beg you señor Jefe, to pass on to the Sección de Tierras\(^{16}\) the proposed appointment of señor don Francisco Mejicanos, engineer (in San Marcos), to see if this tribunal is willing to commission him to conduct the re-measurement of all of the area of the municipality of San Miguel Ixtahuacán. And we offer, in due time, to exhibit to him the [prior colonial/republican] property (land) titles as well as other corresponding testimonies.

(“San Miguel Ixtahuacán” – ejidos, 1908, page 2)

It is not entirely clear to which prior land titles these local leaders refer. The researchers Edgar Chután and Joel Hernández of the Pastoral de la Tierra Interdiocesana (Chután, Fernández & Mayén 2008) have found in various national archives and registries\(^{17}\) a number of colonial and republican titles that pertain to San Miguel Ixtahuacán, of which the oldest goes back to the late seventeenth century.

• 1674: on behalf of the Spanish Crown, Corregidor\(^{18}\) Melchor de Mencos Medrano granted the “indios del pueblo de San Miguel Ixtahuacán” property rights to 4 caballerías

\(^{14}\) A síndico is a member of the municipal council and is entrusted with the protection, administration and registration of land - in indigenous communities mainly ejido or communal lands.

\(^{15}\) San Miguel Ixtahuacán (town) at the outset of the twentieth century is known to have been primarily inhabited by indigenous families. Even if the names of the alcalde (Tesorio González) and síndico (Gervacio Pérez) sound Spanish, they most likely would have self-identified as indigenous. The Mam and Sipakapense – in contrast to, for example, the Quiché or Q’eqchi’ Mayans – have long-since lost their indigenous family names, presumably because in this region they would have been forced to adopt the family names of their former Spanish landlords.

\(^{16}\) The Sección de Tierras (Lands Section, established 1886), is the department of the Ministry of Government and Justice that was/is responsible for the administration of municipal, state or privately owned rights over immovable (real) property. The Sección de Tierras has intervened in re/measurements (re/medidas), demarcations (deslindes), partitions (divisiones) and boundary markings (amojonamientos) of lands throughout Guatemala (PTI 2006: 59).

\(^{17}\) Archivo General de Centro América, including the colonial Archivo del Juzgado Privativo de Tierras, Archivo General de Medidas de Tierras (of the Escrituría de Gobierno), and the Registro de la Propiedad Inmueble.

\(^{18}\) A “corregidor de naturales” (colonial magistrate, tribute collector) in the Spanish colonial empire was a provincial official with certain administrative and jurisdictional authority over the indigenous population.
2 The remeasurement of colonial indigenous land titles in the department of San Marcos

(180 hectares) of land – which were already demarcated in 1627-1628 – on the banks of the “Sala” (Tzalá) River, a place that is also referred to as “Yxmulná”;¹⁹

- 1696: the “indios del pueblo de Ixtahuacán”, in the interest of themselves and the community (“el común del pueblo”), acquired property rights over 14 caballerías (630 ha) of land – already demarcated in 1600 – directly adjacent to their ejido, for which they paid the amount of 84 “tostones”; this place is being referred to as “Poyxió”;

- 1883: the municipality, though its síndico Silvestre Navarro, bought, in the presence of a notation from San Marcos, a terrain of 4 caballerías from landowner Ramón Rivadeneira and coheirs, for the amount of 250 pesos, lands that are situated between “San José y Canichel” (San José Ixcaniche) and Siete Platos, bordering the community lands of Sipacapa.²⁰

It is striking that this inventory of old land titles together covers only 22 caballerías in territory, while the actual territorial extension of the municipality of San Miguel Ixtahuacán is considerably larger. Likely, the community at the time also was – or had been – in the possession of other titles. The 1696 title, for example, mentions the existence of a colonial ejido; however no documentation of such a title has until now been retrieved. It is also conceivable that the inhabitants San Miguel Ixtahuacán did not have collective title to parts of their lands, where families simply exercised individual possession (informal) or even property (formal ownership) rights (see below), but over which they collectively maintained a territorial claim that was roughly known to them and neighboring communities, but not indisputable.

In contrast to previous applications for the (re)measurement of their collective title, in 1818 and in 1830,²² the request at hand was swiftly dealt with by departmental and national authorities. On September 26, the Jefe Político of San Marcos passed on the letter of San Miguel Ixtahuacán to the Sección de Tierras of the Ministry of Government and Justice in the capital, which on October 14 appointed engineer Mejicanos as surveyor for the execution of the requested re-measurement (title, p. 4). Six months later, on May 5, 1908, Mejicanos was able to conclude that the total surface area of the territorial patrimony of the community of San Miguel Ixtahuacán, which included the whole of its municipal jurisdiction, was 406 caballerías.

---

¹⁹ Sources: AGCA, S.A. 1, L. 5948, E. 52080 & S.A. 1, L. 6055, E. 53548; a testimony included in the Archivo del Juzgado Privativo de Tierras of January 14, 1819, corroborates this title. This land was first demarcated in 1627-1628 because the indigenous authorities (“alcaldes, regidores, principales and other indians”) had requested a “dispatch of protection” concerning these 4 caballerías so as to be able to expel members of the pueblo of Tejutla that had started colonizing these lands. Because the authorities did not pay for these lands in time, their legalization was temporarily suspended. In 1674 – after the community had finally paid for these lands – they were permanently recognized as belonging to the “común del pueblo” (communal lands) of San Miguel Ixtahuacán.

²⁰ Sources: AGCA, S.A. 1, L. 6055, E. 53350 & S.A. 1, L. 5955, E. 52149. In 1600 the measurement of these lands was conducted by the commissioned Judge Rodrigo de Cárdenas. The indicated lands were situated at a distance of two leguas from the (indigenous?) cattle ranch with the name of “Tigechulul” or “Tigechulul”, and also included a pasture ground called “Ysalitral” or “Chulubal”, which was added to it by way of compensation for damages caused by the cattle of the nearly and apparently unfenced property of the Spanish hacienda owner Miguel Rivadeneira.

²¹ Source: Registro de la Propiedad de Occidente (Registro de la Propiedad Inmueble), Libro 16, Folia 350, Finca 2009. In the colonial period, this property (cattle hacienda) of 8 caballerías (360 ha) belonged to Miguel Rivadeneira. It was sold in two equal parts to San Miguel Ixtahuacán and Sipacapa, which each paid 250 pesos.

²² Source: AGCA, S.A. 1, L. 5948, E. 52080. It is most likely that both requests for re-titling ended up unanswered due to the tumultuous political situation around the independence of Guatemala from Spain (1821).
The land surveyor had reached this conclusion after careful analysis of data – on border disputes, land-marks and other topographical features – collected with the help of local leaders from various neighboring communities. This analysis was put down in an official land measurement report that went accompanied by a detailed hand drawn map (see picture).

From the descriptions in this report two things stand out. Firstly, in many places along the boundaries, inhabitants of San Miguel Ixtahuacán were in some way involved in border conflicts with inhabitants of neighboring municipalities, but in particular with Tejutla – a protracted dispute between both municipalities that was finally decided in San Miguel Ixtahuacán’s favor by the land surveyor and the general revisor (title, p. 84, 145). Secondly, as a result of nineteenth-century liberal agrarian reforms, particularly the Law on Redemption of Censos (Decree 170 of 1877), many families had acquired individual property rights that had resulted from previous censo enfitéutico arrangements (title, p. 85). Engineer (land surveyor) Mejicanos writes in this respect:

Apart from the terrain that is mentioned in the corresponding documents [i.e. prior land titles], the inhabitants of San Miguel Ixtahuacán have redeemed great part of the cultivatable land as well as part of the land that cannot be cultivated, although its [total] amount could not be ascertained for it was not possible to set eyes on the numerous cancellation deeds that are in the possession of the members of the aforesaid community. (“San Miguel Ixtahuacán” – ejidos, 1908, page 85)

This partial privatization of collective indigenous or municipal property through lease redemption had compromised the collective property of San Miguel Ixtahuacán from the inside out – assuming that most of these new property owners were local indigenous families – and had resulted in an awkward situation to which re-demarcation as such (i.e. of outer boundaries) did not provide an immediate answer.

When the general revisor had authorized the land measurement report and the municipality had satisfied the costs of its certification with the Administration of Rents and Contributions – 50 pesos and 50 cents –, finally the National Judicial Office (Escribanía de Gobierno), in the name of President Estrada Cabrera, awarded title to the lands of San Miguel Ixtahuacán – which were again officially classified as “municipal ejidos” – on November 20, 1908.

With regard to the respective application, the Constitutional President of the Republic [Manuel Estrada Cabrera] agrees: That the Escribanía de Gobierno (National Judicial Office)33 extends certification in favor of the municipality of the community of San Miguel Ixtahuacán, San Marcos department, of the documentation concerning the re-measurement of their lands, which will be capable of being inscribed (inscribable) in the Registro de la Propiedad Inmueble (Land Registry Office), seeing that the primitive [colonial] title has gone missing. — Let it be communicated (comuníquese) ... (“San Miguel Ixtahuacán” – ejidos, 1908, page 143)

---

33 The Escribanía de Gobierno (National Judicial Office), joined to the Ministry of Government and Justice, works together with the Sección de Tierras of the same ministry in the sense that it is responsible for the authorization of all title deeds in which the government is involved (party) as seller of immovable (real) property (PTI 2006: 59).
Although the title of the ejidos of San Miguel Ixtahuacán was considered “capable of being inscribed” in the Land Registry Office, today no entry of this property can be found in the General Land Registry (Joel Hernández, pers. comm. May 2008); the title can only be found and consulted in the national archives in the capital (Archivo General de Centroamérica, AGCA). There can be two reasons for this. Either the local authorities of San Miguel Ixtahuacán did not secure registration of their title – due to lack of funds, lack of access to legal support, or lack of urgency –, or the registration of the title was not properly processed by the registry. In the latter case, this could have been caused by the fact that the land registry in the early twentieth century did not have enough processing capacity (it faced considerable backlogs caused by the enormous flow of newly issued title deeds resulting from the application of the Law on Lease Redemption in 1877), or by the joining together of the decentralized regional offices of the land registry, whereby the inscription of the title was not copied from one registry to the other (in casu from the books of San Marcos to those of Quetzaltenango) and thus got “lost” (PTI 2006: 54, 58). It could not be ascertained whether the title of San Miguel Ixtahuacán has ever been inscribed in the regional office of the Land Registry in San Marcos, because the researcher (jvdS) has not been able to visually inspect a copy of the land title – which indigenous communities usually have in their possession.
2.2 Sipacapa

Following the example of neighboring communities, the síndico of Sipacapa, Silberio Cruz, likewise submitted to the Governor of San Marcos a request for re-measurement of the lands of his municipality on March 18, 1908.

The title, map and other documents that exist and provide evidence of the property that the Sipacapa has in the lands that make up its ejidos find themselves in a bad state because they are about 90 years old. The municipal council, in its wish that the limits of its lands be put right (rectified) by an engineer, has commissioned me, in representation of the municipality, to apply for the remeasurement of those lands, for which I propose Engineer don J. Antonio Camey. (“Pueblo de Sipacapa” – ejidos, 1918)

Also in Sipacapa the municipal council kept a copy of a (late) colonial land title and possibly was also in possession of at least one lesser (less encompassing) republican title. Chután and Fernández (Chután, Fernández & Mayén 2008) found in this respect the following documents.

- **1816**: on August 29, the (Spanish) Captain General of Central America (Guatemala), José de Bustamante y Guerra (1811–18), conceded title to 291 caballerías (13,095 ha) of (ejidos and communal) lands to Sipacapa as a result of a land survey conducted between 1790 and 1801 (or 1807) by Subdelegate José Domingo Hidalgo.24

- **1883**: the municipality of Sipacapa, through its síndico, bought a terrain of 4 caballeras (180 ha) from landowner Ramón Rivadeneira and coheirs for the amount of 250 pesos, lands that border the community lands of San Miguel Ixtahuacán.25

As in the case of San Miguel Ixtahuacán, today the title of Sipacapa’s original (colonial) ejido is missing – if it ever had one – and neither has there been found documentation on later seventeenth- or eighteenth-century extensions of this community’s territorial patrimony in the form of collective purchases, from the Spanish Crown, of communal lands. Everything seems to indicate that Sipacapa at the outset of the twentieth century was in possession of the two above-mentioned title documents only.26

On April 2, 1908, engineer J. Antonio Camey was appointed by the Sección de Tierras as the land surveyor for the redemarcation of the lands of Sipacapa (title, p. 3). This land measurement (survey) took considerably more time than the one that was done in San Miguel Ixtahuacán. The primary reason for this was the fact that all of the municipality’s boundaries, with the exception of those with San Carlos Sija (in the department of Quetzaltenango) and San Miguel Ixtahuacán, at the time were under dispute (title, p. 53). These were complicated disputes, which first had to be solved through the intervention (mediation) of the land surveyor and his appointed colleagues in neighboring communities. On June 13, 1908, the Governor of San Marcos congratulated engineer (land surveyor) Camey with the successful mediation in

---

24 Source: AGCA, P. 24, E. 2, SM & AGCA P. 24, E. 16

25 Source: Registro de la Propiedad Inmueble, Libro 16, Folia 378, Finca 2023. This inherited colonial property of Miguel Rivadeneira was sold in two equal parts to San Miguel Ixtahuacán and Sipacapa.

26 The 1908 land measurement report concerning the lands of Comitancillo refer to 2 written agreements concerning boundary disputes with Sipacapa, the first mediated by land surveyor Lorenzo Meza and the corregidor of Quetzaltenango, signed January 31, 1843, and the second by land surveyor Luis Aguilar Peñón, signed August 25, 1896. However, these agreements do not constitute land titles of themselves.
a boundary dispute between Sipacapa and Comitancillo (the village of Tuimuj) and proposed the erection of stone and mortar (cal y canto) boundary markers to avoid the possible future resurgence of the conflict (title, p. 75). But the resolution of other disputes also took much time, reason why the re-measurement could not be concluded before June 25, 1909 – 15 months after it had started.

In the process, it had become clear that the prior land measurement of Sipacapa, by Subdelegate José Domingo Hidalgo, which had formed the basis for the 1816 title, left much to be desired. In July 1908, land surveyor Luis Aguilar Peláez, who was charged with the re-measurement of the lands of Comitancillo, had noted in this respect (that):

> These are erroneous measurements that shed no light whatsoever, because they are based on distances measured by the eye and the bearings are not even approximately calculated. ("Las tierras de Comitancillo", 1908)

This had as a consequence that the new calculation of the total extension (surface) of the municipality of Sipacapa deviated considerably from the previous calculation of 291 caballerías; now it was calculated at 336 caballerías in total.²⁷ Camey had concluded that all

---

²⁷ Something strange has happened here. In the land measurement report on Sipacapa (included in the title), land surveyor Camey calculates the extension of excess lands at 200 caballerías, while the prior land title would have included only 136 caballerías (p. 55). This information does not correspond with the information in the 1816 title that was based on the land survey performed by José Domingo Hidalgo, as a result of which Sipacapa was awarded title over a total of 291 caballerías. It is not clear to which title Camey is referring, because name and number of this title – that which would grant 136 caballerías – are not being mentioned in the 1918 title.
of these excess lands (excesos) had been in the possession of Sipacapa “since times immemorial” (title, p. 54-55) and hence belonged to this community by prescription. However, the land surveyor did not fail to notice a contradictory situation comparable to that in San Miguel Ixtahuacán: among the occupants of these excess lands there were many families that “each had titled its own piece”, and that these titles, probably also cancellation deeds of redeemed censos (long-term leases), had been “properly registered” – a situation that, like in the case of San Miguel Ixtahuacán, remained unresolved in the process of redemarcation.

On October 12, 1912, Sipacapa requested the State (Escribanía de Gobierno) the free adjudication of the excess lands “in order that they be fairly distributed among its inhabitants” (information taken from Chután, pers. comm. March 2008). It is unclear why the evaluation of this request took so much time; it was not before November 15, 1917, that the Secretary of the Ministry of Government and Justice pronounced himself on the case, and it took another year before Sipacapa was finally granted collective title, on August 27, 1918, to the total of 336 caballerías, defined as “ejidos of the community of Sipacapa” (title, p. 96).

Therefore, in order that the agreed upon enters into effect, and the municipality and residents of the community of Sipacapa acquire just and legitimate title, [...] whose surface with inclusion of the excess lands is 336 caballerías, 56 manzanas and 6,566 square varas, according to the remeasurement and the adjoined topographic map, I release the present title by which I, in the name of the nation, adjudicate as property of the municipality and residents of Sipacapa the aforementioned excess lands in order that within its limits and boundary markers they dispose of them as publicly owned property acquired with just and legal title, as represented by this document. — Issued in the Palace of Executive Power on May 27, 1918, signed by my hand, marked with the Great Seal of Arms of the Republic and endorsed by the Notary Public of Government, who subscribes after having notified to the interested party the obligation to present this title to the corresponding Land Registry Office [...].

(Copy of the title “Pueblo de Sipacapa – ejidos”, 1918.)

However, as in the case of San Miguel Ixtahuacán, nowadays no entry of the title of Sipacapa can be found in the General Land Registry, neither in the Guatemala office (Registro de la Propiedad de la Zona Central, RPC) nor in the office in Quetzaltenango (Segundo Registro de la Propiedad del Occidente, SRP) (Joel Hernández pers. comm. May 2008). This is curious, because the copy of the title that is in the hands of the municipality of Sipacapa provides evidence that it was in fact properly inscribed in the regional office of the Land Registry in San Marcos, namely as “finca rústica” # 30.05H on page # 58 in volume # 176 (see picture) on May 17, 1919. It seems that it can be concluded from this that Sipacapa’s title has gone “missing” somewhere in the transfer of its inscription to the registry office in Quetzaltenango in 1963.

---

28 In a letter to the Director of the Sección de Tierras (Montenegro), dated July 7, 1909 – which in its entirety is included in the 1918 title of Sipacapa (pages 53-57) –, the general revisor (Rodríguez) follows the judgment of land surveyor J. Antonio Camey in deciding all three mayor land conflicts between Sipacapa and neighboring communities-municipalities – La Cal in the municipality of Malacatancito (Huehuetenango), Malacatán (Quetzaltenango), Tuimuj in the municipality of Comitancillo (San Marcos) – in favor of Sipacapa.

29 On the hard-bound copy of the title it reads: “Title of the municipality of Sipacapa”.

30 A “finca rústica” means an agricultural farm or a piece of land that is not classified as building land.
The remeasurement of colonial indigenous land titles in the department of San Marcos

PICTURE 3. HAND-DRAWN MAP ACCOMPANYING THE 1918 TITLE OF SIPACAPA - © Joris van de Sandt

PICTURE 4. SEAL WITH REGISTRATION FOR THE LAND REGISTRY IN SAN MARCOS - © Joris van de Sandt
2.3 Observations and questions

Again, it is remarkable that in this process of collective re-titling of the lands of San Miguel Ixtahuacán the individual rights of the families that were in the possession of cancellation deeds (of their former censos enfitéuticos) were unproblematically incorporated in the more encompassing municipal property of the “ejidos”. Did these families at the time protest this (implicit) negation of their individual property rights, for which they must have had to pay dearly, or were they simply unaware of this? According to investigator Joel Hernández of Pastoral de la Tierra Interdiocesana, this question remains pending and it will require further (minituous) investigation to see (find out) whether during the titling of both ejidos these individual rights were being formally excluded (Joel Hernández, pers. comm. June 2008).31

At any rate, the land titles of San Miguel Ixtahuacán and Sipacapa are extraordinary because they cover the whole of the jurisdictions of both municipalities and thus pertain to collective, unpartitioned lands (land reserves, communal forests) as well as individually partitioned (distributed) lands of families. So most families do not have these lands in ownership but in usufruct only. This situation differs considerably from the one in (San Miguel) Totonicapán, for example, where the ejidos only cover part of the municipality, while families tend to have ownership rights (not usufruct) to cultivated lands (Palma 1998). On the other hand, also in both indigenous communities in San Marcos there is a significant group of families that at some point in time had themselves drafted a certificate of ownership (title deed) with a notary from outside the community, thus leading to a contradictory situation of “double-titling”.32

The titles of the ejidos of San Miguel Ixtahuacán and Sipacapa are comparable in nature, but also differ in two respects. First, the titleholder has been defined differently. Where the ejidos of San Miguel Ixtahuacán are titled to the name of the municipality (“a favor de la municipalidad”), the title of Sipacapa is granted to the municipality and the community residents at once (“la municipalidad y vecinos”) – in spite of the fact that both remeasurements had been requested in the name of the municipality. It is not entirely clear what the legal implications of this difference are, if there are any.33 Secondly, although both titles today cannot be found in the land registry, the title of Sipacapa was once registered, while there remains uncertainty regarding the title of San Miguel Ixtahuacán in this respect.34

---

31 Studying the titles (land measurement reports) of both communities, no indications were found as to how these individual rights were being treated during the re-titling process.

32 It remains to be investigated whether these ownership documents date back to the late nineteenth-century cancellations deeds (censos) or whether these unilateral privatizations are of a more recent date (occurred after the renovation of the land titles).

33 For example, in the case of a possible future attempt to reclaim the collective title for the community.

34 With regard to this question, further research is necessary and urgent.
Collective land rights and communal tenure in San Miguel Ixtahuacán and Sipacapa today
3.1 Status of land titles and legislation on indigenous land rights (and communal tenure)

The land titles of San Miguel Ixtahuacán and Sipacapa are still legally valid today because they were never repealed throughout the past century. While the fragmentation of the collective properties (ejidos) of municipalities advanced in other parts of Guatemala during the dictatorship of General Jorge Ubico (1931-1944), the communities of the Altiplano Marquense remained unaffected; in the revolutionary period (1944-1954), the ejidos and collective lands of agrarian communities enjoyed a certain protection in the Constitution and proposals for land reform; the agrarian laws and programs that were enacted during the US-backed counter-revolution (1954) were primarily aimed for the colonization of “state lands” in the northeast and north (Franja Transversal del Norte and Petén) and left municipal property (ejido and communal lands) in existing peasant communities by and large undisturbed (Thillet 2003; PTI 2006).

Those titles were granted by the Presidency of the Republic of those days (in 1908 and 1918), and they were never officially annulled; the State has never since taken a decision to divide (dismember) them, or expressly leave them without recognition, so today those titles have validity. (Interview with Martín Sacalxot 02/04/2008).

In the past 20 years, the legal situation regarding Indigenous Peoples’ land rights has even improved, at least on paper. Guatemala’s Constitution of 1985, which is still in force, gives a certain protection to ejido and communal lands that are in the hands of (being administered by) indigenous communities – even though they remain in the ownership of municipalities. Article 67 states: “The lands of indigenous cooperatives, agricultural communities or any other forms of communal or collective tenure of agrarian property will enjoy special protection from the state. [...] The indigenous and other communities that have land that historically belongs to them and which they have traditionally administered in a special form will maintain that system”.35 Article 67 thus gives constitutional rank to collective properties that fall under indigenous forms (institutions) of communal land tenure. Possibly more importantly, the constitutional article introduces the notion of indigenous communities’ historical rights to land, rights that implicitly – arising from the constitutional phrase “will maintain that system” – receive the status of imprescriptible, inalienable and irrevocable,36 which means that indigenous communities are entitled to have these rights in perpetuity (cf. Thillet 2003: 100). Furthermore, article 68 of the Constitution obliges the State “to provide state-owned lands to those indigenous communities that need lands for their development”.

In 1996, Guatemala ratified ILO Convention 169 concerning Indigenous and Tribal Peoples (1989), which in this way became national legislation.37 The convention obligates the State to recognize and protect the rights of ownership and possession of indigenous communities (peoples) over the lands they traditionally occupy, irrespective of whether or not they hold

---

36 In Colombia, where the 1991 Constitution explicitly recognizes indigenous collective lands of territories (resguardos), the terms that are habitually used to denote this status are: “inalienable, imprescriptible and non-seizable” (inalienables, imprescriptibles e inembargables. See Political Constitution of Colombia, art. 63).
37 This did not happen before the Constitutional Court had ruled that this international legal instrument is in no way in contradiction to the norms of the Political Constitution of the Republic.
Collective land rights and communal tenure in San Miguel Ixtahuacán and Sipacapa today

ILO 169 also clearly inspired the provisions regarding indigenous peoples in the Peace Agreements, in particular the Agreement on the Identity and Rights of Indigenous Peoples, which was already conceived in 1995 and includes a separate paragraph on land rights. In this accord, the State among other things commits itself to establish simple procedures for awarding title and registering ownership in the case of indigenous communities that do not have title deeds to the lands they historically possess, “including municipal or national lands with a clear communal tradition”; it also promises to modernize its land registry and surveying system.

Despite these commitments, however, Guatemala until this date has not followed up on them by transforming the constitutional principles and ILO 169 into secondary legislation for the promotion and protection of the “forms of communal or collective tenure of agrarian property” that persist (i.e. agrarian legalisation with regard to the regularization and titling of indigenous lands), nor did it enact a specific Law on Indigenous Communities, as promised by article 70 of the Constitution, including norms that guarantee indigenous peoples’ interests in land and natural resources (Thillet 2003: 98, 100, 107; Roldán 2004: 10-11).

The only secondary legislation that deals in a concrete way with the protection of communal lands in indigenous communities today is the new Municipal Code of 2002. Therefore, we have to turn to this law (Decree 12-2002), which relates to the organization of municipalities in which indigenous communities are situated, in order to identify the rights and obligations of users and authorities in the management and protection of (municipality-owned) ejidos and communal lands. Most important in this respect is article 109, which stipulates that: “The municipal government will establish, according to (following) consultation with community authorities [alcaldes comunitarios or alcaldes auxiliares; see art. 56], mechanisms that guarantee community members the use, conservation and administration of the community lands (tierras comunitarias) of which the administration has traditionally been entrusted to the municipal government”, and that the said consultation should be realized according to procedures for the “consultation of indigenous communities or authorities of the municipality” (as outlined in arts. 65 & 66). This article 109 then may be understood (construed) as an attempt, for the first time in national legislation, to affirm in law the powers of indigenous authorities and the community in general over the administration of ejido and communal lands that have historically been titled and inscribed to municipalities (cf. Thillet 2003: 110). By implication, this means that – above all – indigenous communities or authorities should be involved in any decision regarding the alienation (selling, leasing or...
mortgaging) of parts of ejido or communal lands to outside parties. In this respect, the Municipal Code pays heed to (follows) ILO 169, which orders that indigenous communities “shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community” (ILO 169, art. 17.2).

3.2 Violation of the right to collective property in San Miguel Ixtahuacán and Sipacapa

If there is ample evidence of the historical land rights of the communities of San Miguel Ixtahuacán and Sipacapa; if the land titles of the early twentieth century still have validity; and if the ejidos and communal lands of indigenous communities – by virtue of the Political Constitution, ILO 169 and the Municipal Code – enjoy special protection from the State, the crucial question that remains (lies at the heart of the inquiry) is: how could both communities lose a significant part of their territory to the mining company Montana Exploradora de Guatemala S.A.? In order to answer this question, it is first of all necessary to find out how exactly this appropriation of indigenous lands has taken place. What has occurred in these two communities from the moment the mining company entered the scene (1998) and the actual transaction of land rights (2005), and what was the role played by the various actors involved in the process?

a. Ignoring collective titles

The Land Acquisitions Procedures (LAP) report, which Montana Exploradora de Guatemala S.A. (henceforth Montana) elaborated in 2004 in order to qualify for a loan from the International Finance Corporation (IFC, part of the World Bank), suggests that the mining company, as represented in this case by another company called Peridot S.A.,42 was unaware of the existence of the still valid collective land titles of both communities at the outset of the land purchase process for the Marlin mine property (Montana 2004a). On the first page of the document, it reads: “Montana owns the rights to the subsurface minerals within the Marlin project area, but the land surface is held in private property”, and the document throughout refers to “individual properties” and “landowning families” (Ibid.). Also the company’s Indigenous Peoples Development Plan (IPDP) – another prerequisite for an IFC loan – and the Compliance Adviser Ombudsman’s (CAO) assessment of a complaint by the community of Sipacapa do not at any point mention the existence of such collective land titles (Montana 2004b; CAO 2005).43 This is strange: had these agencies or their representatives inquired about it, they would certainly have been able to review the certified copies of these titles on approval from the respective municipal authorities. According to experts, an explanation for this can be found in the fact that legal institutions and administrative entities in Guatemala have a blind eye for forms of property other than individual private property.

42 Peridot S.A. is (or, was) a Guatemalan company that was created in 1998 by Francisco Gold Inc., then owner of the Marlin project, with the special purpose of acquiring the lands for the Marlin project. Apparently this was a necessary step because the foreign mining company at the time did not have a national subsidiary in Guatemala with the legal capacity to perform the land acquisition procedure. Peridot later also drafted on behalf of Glamis Gold Inc. – successor of Francisco Gold – a Forestry Management Plan as part of the environmental footwork for the mining project; this plan was approved by the National Institute of Forestry (INAP) in May 2004 (Dorey and Associates Consulting 2005). Peridot seems to have gone dormant after Canadian Goldcorp Inc. acquired the Marlin project from Glamis Gold (in 2006); no other information has since been found on this company.

43 The Indigenous Peoples Development Plan on page 7 reads: “In the three villages directly affected by the project, individuals and families own the land, so the project will affect no communal lands.”
Collective land rights and communal tenure in San Miguel Ixtahuacán and Sipacapa today

[They] base their actions on the norms (categories) of the Civil Code (property law) without distinguishing or considering economic, social or cultural aspects related to land tenure in Guatemala. The legal forms in relation to land tenure that are regulated in the Civil Code are: “property”, “possession”, “usucapion”, “usufruct” and “servitude”. The Civil Code in article 504 stipulates that: “the forms of ‘community of lands’ (comunidad de tierras) among peasants will be regulated according to agrarian laws”. In the agrarian laws that are in force in Guatemala, “communal lands” or “lands of indigenous communities” are not included as a legal category, despite constitutional provisions. (Thillet 2003: 109)

The fact that the Civil Code also considers ‘joint property’ (“there is joint ownership when a thing or a right belongs pro indiviso to various persons”, see arts. 485-503) and, like the Municipal Code, ‘municipal property’ (“goods of public ownership with special use destined to [...] municipalities or decentralized state entities”, see CC art. 457 and 459.1; “communal and patrimonial goods of the municipality”, see CM art. 100) was not given any significance in the land acquisition process. Even the fact that many families who were ultimately willing to give up their individual rights in land were unable to prove ownership of the land did not form an impediment to consider these rights as individual private property for the purpose of the land transactions. The question is whether this ignoring of municipal property and collective title should be considered reprehensible behavior? And in case it should be, who must be reproached for it? According to the Defender of Indigenous Peoples of the Human Rights Ombudsman it certainly is, and he is of the opinion that the blame lies principally with the State, which following constitutional article 67 should have given preferential protection to indigenous land rights (interview with Martín Sacalxot 02/04/2008). However, it seems logical to conclude that also the company Peridot as well as the alcaldía of San Miguel Ixtahuacán was in default in this case (see below).

b. Denying collective attachment to land

Although the mining company and its representative (Peridot) did not properly investigate the existence of land titles, they were aware that the families living within the project area formed part of an indigenous community, judging by the LAP and IPDP reports. In the first of the two reports, Montana states that it was forced – due to its borrowing from the World Bank – to investigate whether the families in the directly affected villages should be the subject of a specific resettlement plan, according to World Bank OD (Operational Directive) 4.30 regarding “involuntary resettlement”.44 This was not deemed necessary, however, because “relatively few landowners have long-standing cultural attachment to the land” (MEG 2004b:4). This is concluded from the fact that these lands “have [only] been recently acquired”

44 OD 4.30 article 2 states that: “Development projects that displace people involuntarily generally give rise to severe economic, social, and environmental problems: production systems are dismantled; productive assets and income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition for resources greater; community structures and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished. Involuntary resettlement may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out”; and article 16 states that: “Vulnerable groups at particular risk are indigenous people. (A) resettlement plan must include land allocation or culturally acceptable alternative income-earning strategies to protect the livelihood of these people.”
many families “do not live on their properties” and “much of the land is minimally used”. The company moreover asserts that from discussions with the landowners it was early on determined that they “prefer to sell their properties rather than being resettled, either as a group or as individuals” (MEG 2004b:1), supposedly because they “view the land sales transactions as strict business arrangements” and “have interest to use the proceeds of the sales to pursue business opportunities” (MEG 2004b:4-5). In other words, the mining company denies that these are indigenous communities with a “traditional land-based mode of production” and ignores its centuries-old occupation of these lands – as could have been learned from the colonial and republican land titles of both communities. The conclusion that “landowners do not have a strong cultural attachment” moreover is not well founded, considering that such relationships in the case of indigenous peoples generally are not only individual or economic-utilitarian, but also collective and socio-cultural in nature.

c. Co-opting municipal authorities

Montana’s assertion that the land surface in the project area is held in private ownership (LAP report) is at odds with the statement that before initiating land negotiations, in San Miguel Ixtahuacán as well as Sipacapa, “municipal mayors or their staff were notified of land transactions and were called upon to witness the recognition of land rights to individuals prior to transactions with the project” (CAO 2005: 29). Even though this wording is cryptic, the fact that Montana asked municipal officials for permission to begin with negotiations for land purchases seems to indicate that the company may, in fact, have been well aware that the family possessions to be acquired were an integral part of a larger municipal property (ejidos). It also seems to point at the crucial role played by the mayors in the pre-transaction process – a detail that is conveniently left out of the LAP report. Some of the persons that were interviewed that have sold their lands to Montana kept an official letter they were presented with when people from Peridot’s land acquisition team came to their door.

Undersigned municipal mayor of the municipality of San Miguel Ixtahuacán, department of San Marcos: advises the carriers of this letter, and the representatives of the company

45 The LAP report claims that the families involved in land sales had only individually appropriated these lands over the past 50 years. It is not clear how this conclusion was reached. But even if it were true, this does not mean that families did not make economic use of those lands, for example through collective grazing.

46 This phrase is taken from OP (Operational Policy) 4.12 on Involuntary Resettlement, which replaced OD 4.30 on January 1, 2001, which in article 9 states that: “Bank experience has shown that resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival. For this reason, the Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of these groups”.

47 OD 4.20 on Indigenous Peoples – which, strangely, is not made reference to in the LAP report – listed “close attachment to ancestral territories and to the natural resources in these areas” as one of five characteristics to identify indigenous peoples in particular geographical areas (next to “self-identification”, “indigenous language”, “customary social and political institutions” and “subsistence-oriented production”), but did not emphasize the collective aspects/nature of this relationship (see for example ILO 169, art. 13). In OP 4.10 on indigenous peoples, which replaced OD 4.20 on July 1, 2005, this was changed into “collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories”. Moreover, OP 4.10 (art. 4 note 7) also explicitly defines what is understood by “collective attachment”: “that for generations there has been a physical presence in and economic ties to lands and territories traditionally owned, or customarily used or occupied, by the group concerned, including areas that hold special significance for it, such as sacred sites”.

103
Montana Exploradora de Guatemala, that the community members of the villages Agel, San José Ixcaniche, Nueva Esperanza y Tierra Blanca attend to these people in person in order that they realize their field work exclusively with the owners (proprietors) of the respective communal terrains. San Miguel Ixtahuacán, February 15, 1999. Sergio González Mejía.

According to community leaders from the villages, this authorization – in the form of a formal letter extended by the mayors to the mining company – to start with their individual land negotiation strategy was the key with which Peridot gained access to the targeted families in Agel, San José Ixcaniche, Nueva Esperanza (in San Miguel Ixtahuacán) and Salém (in Sipacapa). These same leaders also maintain that this decision at the time was not formally presented to the municipal council or to the alcaldes comunitarios. The latter, being the delegated local authorities in land matters, were in this way kept out of the decision-making process (interviews with Javier de Leon 16/10/2007; Francisco Bámaca 30/10/2007). It remains to be investigated whether this type of action is against the provisions of the Municipal Code in force at the time (Decree 58-1988) – as would be the case under the Municipal Code currently in force (Decree 12-2002).

d. Intimidating local residents

The mining company claims that all land transactions occurred on a voluntary basis according to the principle of “willing buyer/willing seller”, and that families involved in these transactions received a fair price (Montana 2004a: 1); CAO in its later assessment states that it found no evidence to the contrary (CAO 2005: 29). The families that sold land to the mine, however, already in 2003 complained that in the land negotiations they had been cheated and tricked with false promises and were being intimidated (Cuffe 2005: 24, referencing a community communiqué from 2003; ADISMI & Rights Action 2007). Interviews conducted with families in the area paint a picture of an aggressive, individual-oriented negotiation strategy and confirm that local traditional authorities were purposely avoided. To provide insight into the way these negotiations took place, it is worthwhile to include two of these testimonies.

Yes I sold my land to the mine, about 6-7 years ago (2001).— I really didn’t want to sell, the price they offered (me) was only 4 thousand Quetzal per cuerda. They said: you are going to be forced to sell to us in the end because we are soon going to start with the work in that place up there (arriba), and the machines we use will throw the earth on your land, which will totally bury you. —They said: all right, then we don’t pay you, also if you are buried under the earth, we will no longer pay you. I don’t want only 4 thousand, I won’t sell for that price, I said. That is your problem, they said, because there is no law for you anymore that is going to help you, because all the people around you have already sold their land, and there is nothing you can do about it anymore. Your land is the last piece we are going to buy here, if you want to receive

48 It certainly goes against article 17 of ILO 169 – applicable at the time – which stipulates: “1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. 2. The peoples concerned shall be consulted whenever consideration is being given to alienate their lands or otherwise transmit their rights outside their own community. 3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them”.

49 Following article 109 of the Municipal Code relating to “tierras comunitarias”, the mayor is obliged to consult with the alcaldes comunitarios concerning any decision regarding the alienation of municipal/community lands.

50 A “cuerda” is a Guatemalan area measurement unit and equals 437 m² (21 by 21 m). 10 cuerda amounts to approximately 1 acre (0.4 ha). Land prices of 4,000 Quetzal per cuerda at the time equaled 4,567 USD per acre.
4 thousand per cuerda fine, but if not, we are not going to be able to pay you anything later. — I still didn’t want to, but then I saw they had started road construction over there (arriba), which heavy machines and everything, and then I finally accepted the price they offered. But it is insufficient to buy land elsewhere, because over there prices are up to 25 or 30 thousand per cuerda. But they had already constructed this road (partly over her land), without me having given permission for it. I was just plain scared, because they said there was no law and I, who has no education, what did I know, what was I going to do about it?

(Interview with Crisanta Fernández, Agel 16/01/2008)

I sold my land in 2001. I sold 30 cuerdas exactly. — Why? — I will tell you my story. They negotiated with my father; I worked outside the community in Quiché at the time. Every time I came home to rest, he said an engineer had been visiting and this man had asked whose land it was. I had a terrain precisely on the spot they were going to work (excavate). The engineer spoke to my father and said he wanted to buy my land. I didn’t want to, I asked: where will I find other land? Land prices keep on going up these days. When I came back from Quiché, this man would also arrive, engineer Victor Valles was his name. He came in my house and said that I should sell my land, because if I didn’t, they were making a tunnel beneath it and would take out all the earth and materials. They would construct roads. If you keep the land it will be exploited and you wouldn’t even recognize it afterwards, he said. Sell it to me and I will pay you. I asked him how much, and they offered 3 thousand Quetzal (per cuerda). I did not go along with it. — Time passed and every time I arrived in San Miguel Ixtahuacán he knew where to find me, it was as if he knew my working schedule by heart. One day he took me for a ride in his car. Why would you go working all the way in Quiché if there are also possibilities in the mine? If you help us (sell), we will help you get work, because the mine will be there for many years and there are opportunities for you. But he still didn’t convince me. I went to Quiché and came back, and then he convinced me. He paid me 4 thousand Quetzal per cuerda. I sold all my land over there where they were going to start to work. — But I was left with nothing concrete, I should have asked them for a written document, but we only had a verbal agreement. They asked me what grade I had completed. I said them I was perito contador. Ah, they said then we have work or you, since you are from this area and speak the Mam language, you will be able to convince others. And so they employed me in the Land Acquisition Team. He (Valles) said: go to the people and ask them what needs they have and say them we will supply them in 15 days, basically construction materials but they have to sell first, because if we first provide those things they might not sell afterwards. But some people keep on refusing to sell, I said. Well you say them that in any case the land belongs to the State anyway. — In the case of some families they (Montana) lived up to their promises, in other cases they didn’t. Some people are angry with me nowadays, because they were being promised things that were never delivered.

(Interview with Marcos Pérez, San José Ixcaniche 16/01/2008)

The above-cited statements – like many more that have not been included – show that the experiences of community members concerning the sales of their lands do not in any way correspond with the assertions made by the mining company in the LAP report. It was not a matter of voluntarily ceding rights, nor were fair prices being paid. Families were being put under pressure, both in word and in actions, by intimidation and by the early startup of road and mine construction, partly on their lands. Also they were lured into transactions with promises of getting material goods and jobs in return. In addition, the second testimony shows that the company tried to instill fear in people by telling them they faced insecurity of tenure because they were living on state lands (which is legally correct, but should not be cause for
insecurity of tenure) – this argument contradicting the company’s earlier statement that the land was held in private property!

e. Exploiting weak indigenous authority (institutions) and poverty

It is striking that in the testimonies presented, no mention is made of traditional authorities that stood up to defend the community’s territorial patrimony. This may create the impression that in San Miguel Ixtahuacán and Sipacapa there no longer exist customary social and political institutions that take responsibility for the administration of land and natural resources. This is not true. The fact that tenure relations in the villages close to the mine are highly individualized, i.e. all land is taken into use by individual families (mainly the result of demographic growth), does not mean that these relations are no longer subjected to communal institutional arrangements. In communal land management in indigenous communities in Guatemala, “state” (municipal) and “traditional” (indigenous) institutions and authority are closely intertwined – a legacy of the particular tenure history of these communities. A special role is reserved for the síndico, who, in representation of the municipal government and in coordination with local traditional leaders (alcaldes comunitarios), is responsible for the delimitation, adjudication and registration of usufruct (use) rights to land to individual families, and mediates in the resolution of land disputes between adjacent land users. The practice of making adjudications, signed by the mayor, sealed by the alcalde comunitario and enlisted in a communal register (libro de registro común), today is still very much alive (interview with Santiago López 11/03/2008) – though maybe more so in Sipacapa than in San Miguel Ixtahuacán. Until quite recently, the mayor also assigned parts of collective (unpartitioned) lands to special village committees, which thus obtained delegated authority over the management of these lands. Today, this situation is all but nonexistent, because land reserves everywhere have strongly diminished (interview with Javier de Leon 16/10/2007). It is noteworthy that community members are left free in practice to sell their usufruct rights – only when under supervision of the mayor, síndico and alcalde comunitario – to other families, both from the same community and from neighboring communities. Also, until recently, community authorities did not exercise their authority to prevent families from taking recourse to a lawyer outside the community to obtain an additional certificate of ownership (interviews with Mario Tema 31/10/2007; Antonio Tema 10/03/2008; Santiago López 11/03/2008). These two practices, but particularly the latter, can be very hazardous since they weaken the communal regime from the inside out and thus threaten the territorial integrity of the indigenous community.

The “successful” appropriation of indigenous lands by the mining company in San Miguel Ixtahuacán and Sipacapa must in part be attributed to the erosion of customary institutions for administering land, coupled with a lack of indigenous authority (as opposed to state/municipal

---

51 The recognition in the 2002 Municipal Code of indigenous communities’ own traditional authorities (i.e. distinct forms of social organization) and the incorporation within the municipal legal order of the customary law of the place (art. 8.c&f), means in practice that communities have been assigned ample administrative space for communal land management according to their own practices and traditions. The only obligation that has been prescribed in this respect is that indigenous authorities are expected to cooperate with the municipal government in the keeping and updating of a municipal land registry (art. 58.e).

52 The Mam and Sipakapense over the course of the last century seem to have increasingly started to consider their land allocations as personal property (individual ownership), judging by the fact that a fair amount of families both has an act of adjudication from the municipality and a certificate of ownership from a local notary.
authority). In both communities there no longer exists a distinct, centralized indigenous
title in the form of an alcaldía indígena or alcaldía del pueblo, an institution in which the
various alcaldes comunitarios (i.e. traditional indigenous authorities) can confer on important
matters and which, if necessary, can take coordinated action against autocratic or negligent
municipal authorities. Such a central indigenous authority can also fulfill an important role in
activating and infusing the communal perspective and collective consciousness that is
necessary to defend the (territorial) interests of the larger community. While in other
indigenous communities, such as Totonicapán and Sololá, alcaldías indígenas still exist and
function very effectively alongside municipal governments, the alcaldía del pueblo in
San Miguel Ixtahuacán has gradually disappeared from the scene in the second half of the
twentieth century; in the case of the relatively small community of Sipacapa it is uncertain if
such an institution has ever existed (probably not, or it was not called alcaldía indígena).
In San Miguel Ixtahuacán and to a lesser degree in Sipacapa the memory of the collective title
was latent but the consciousness to defend and thus effectuate it was lacking. This
situation was exacerbated by the situation of grinding poverty existing in the communities of
San Marcos. This negative interplay between the collective consciousness and the individual
struggle for survival is put aptly into words by researcher Gustavo Palma of AVANCSO.

In relation to land in indigenous communities there have always coexisted two levels of
consciousness: one is the collective consciousness (imaginario colectivo) and the other is the
individual consciousness of everyday life (imaginario de lo cotidiano). The collective
perspective tells people: the land belongs to us together and therefore we have to defend it
together, but the perspective of everyday life makes people say: I do what I want with what
I have. This latter perspective emphasizes the relative autonomy of the family, because the
former (collective) does not offer people solutions to their everyday economic problems.
In San Miguel Ixtahuacán people are living in a context of extreme poverty and survival, which
unfortunately leaves little room for collective perspectives and discourses.

(Interview with Gustavo Palma 15/04/2008)

In other words, it is not unrealistic to say that Montana has purposely used the situation of
the absence of central indigenous authority in combination with the poverty of families to gain
access to their land – and in this way take possession of part of their collective communal
property. This, at least, is the way community leaders see it when they look back.

Those people fooled us with stupidities. They did not negotiate with the community, but went
from family to family to do business, from door to door to convince them. On the contrary,
if the company would have presented itself before the people, they might have had a better
understanding of their situation. But singled out, those families quickly came round. Because
they were offered money; those people are in need. For this reason, they were quick in turning
over their assets in land to those people. But the community has not been consulted. —
Afterwards, those families have opened their eyes, but by then they had given the mine
permission to take possession of their land. Today we lament this very much.

(Interview with Francisco Bámaca 16/01/2008)

f. Transforming usufructuary rights into ownership

After the families in the project area had been persuaded to sell their rights in land, the
“engineers” of Peridot, in a final turn, had to look for a way to transfer all these land rights at
once together to Montana and formalize (i.e. register) them as the company’s private property.
However, considering that most of these families did not have these lands in ownership but in usufruct, the crucial question is: how exactly was this done, or, in other words, how were these usufruct rights legally transformed into ownership? Unfortunately, this remains as yet unknown. Nonetheless, indigenous lawyer Amílcar Pop of the Asociación de Abogados y Notarios Mayas (ANMG) has previous experience with similar cases elsewhere in Guatemala (in Totonicapán en Chichicastenango) and suspects that Peridot has dealt with this problem by using a legal hat trick, or what he calls: “a perverse notarial procedure”.

It works like this: I, as representative of a (transnational) company, go to that community and convince let’s say Juan Pérez, Pedro López and Luís Fernández that they should sell their land. And then, with a notarial document I make a so-called “unification of possessionary rights”, and so all these persons bring together their rights under one single juridical person, and in the name of that single person these rights are finally sold to the company. That is when the community’s lands in fact are broken up (“donde se rompe el común”). When the company buys that unified title, it will inscribe this in the land registry and it becomes the owner of those lands. — JvdS: But many of those people did not even have a notarial certificate of possession, they only had an act of adjudication (of usufruct) from the municipality. — But that’s not a problem, those possessionary rights are being created out of nothing, created formally. It’s like this: I find myself in a certain place and I have no document whatsoever, but I appear before a notary and they have an instrument that is called a “sworn statement”. So I, as this-and-this person, declare under oath that I have been possessing a certain area and from then on this counts as a “possessionary title”. — JvdS: But what is the advantage of making a unification of possessionary rights? — It is much easier to get titled and registered, because then you have a legal antecedent to property, while this is not the case with only the sworn statement. I know it’s outrageous, but that’s how property law works. Because there is a prior
antecedent document, including map and border measurements, this possessionary title is unified and then acquired by a third party that is a multinational and then is being inscribed (in the land registry). The Civil Code accepts this inscription because there are antecedents to inscription and antecedents to property.

(Interview with Amílcar Pop 07/03/2008)

If it is probable that the transfer of land rights – and, in same the process, the transformation of the juridical nature of these rights – in San Miguel Ixtahuacán and Sipacapa was executed following a similar procedure, it is uncertain whether the company and its representatives (Peridot) have followed this procedure through to its logical conclusion. This conclusion would be that the land that today is in the ownership of the company has been dismembered from the collective property of the two communities, implicating a notarial amendment of the ejido title. This would presuppose the collaboration of the municipal authorities, which – as the titleholder of this collective municipal property – have to give final approval of the sale (alienation) of these lands. In case they did, and did so after 2002,53 these authorities would have been legally obliged, according to article 109 of Decree 12-2002 (Municipal Code), to consult this decision with the alcaldes comunitarios. In case the municipal authorities have been bypassed, i.e. the transactions would have been dealt with as an affair strictly between the company and individuals, this would imply that the lands are the property of Montana, but at the same time also still – due to “double titling” – the collective property of the community. These are pressing questions that urgently require further investigation.

---

53 CAO (2005: 29) claims that land purchase process began in 2002 and lasted through January 2005 and that only a small amount of land, roughly one quarter of a km² (of the 5 km² in total), was purchased before 2002.
Conclusions and perspective for future action
The preceding account on the historical and current validity of the collective rights of the indigenous communities of San Miguel Ixtahuačán and Sipacapa to the lands they have traditionally used and occupied, combined with the reconstruction of the process of the appropriation of these lands by the mining company Montana Exploradora, as analyzed in the light of current national and international legal regimes, offers various starting points for further legal investigation, which could to a formal complaint or lawsuit. Such efforts should first and foremost focus on the following “blind spots”.

- Investigate the existence of other colonial and republican titles and registrations relating to the lands of San Miguel Ixtahuačán and Sipacapa (e.g. of the original ejidos) in regional and national archives and registries; verification of the status of the nineteenth century cancellation deeds and twentieth century certificates of ownership of individual families in the Marlin concession. It would also be of use to have these questions answered for the other indigenous communities of the Altiplano Marquense.

- Review of the course of action followed by the “engineers” (i.e. lawyers) of the Peridot Company and the role played by other actors in the land transactions (i.e. their legal obligations and responsibilities in the matter), such as municipal authorities and (possibly) other administrative entities of the Guatemalan government. In case Peridot has formally dismembered individual possessionary rights from both collective titles, it has acted in bad faith (lied about and purposely ignored collective property rights).

- Study the transaction documents (deeds of sale) of land selling families and verify these with the municipal land registry (cadastre); investigate the completion of the land transfer by Peridot, the municipal council and other legal institutions involved; check when the formalization of the transfer to the company took place, i.e. before or after the entering into force of the 2002 Municipal Code; did the prior Municipal Code (Decree 58-1988) also provide for the consultation of alcaldes comunitarios?

Even if, after answering these pending questions, it is decided that a lawsuit against Montana is viable – which in Guatemala could be a landmark case (interviews with Yuri Melini 04/04/2008; Benito Morales 11/04/2008) –, this cannot undo the appropriation of indigenous territory by the company in San Miguel Ixtahuačán and Sipacapa because the company has completely and irreversibly destroyed these lands through mining. Then the question should be answered: what purpose does this line of action (and this kind of land rights study) serve?

In the first place, it can serve to attract attention to the fact that Montana Exploradora, contrary to its own statements, has not acquired these lands according to the law. This way, it pressures Montana and other mining companies in the future to respect indigenous communities’ collective land rights and comply with the directives of the Municipal Code, ILO 169 and – in case of World Bank involvement – Operational Policies 4.10 and 4.12.

In the second place, it may make indigenous leaders/authorities themselves start inquiring into the status of the historical land rights of their communities and have them make sure to get possibly still legally valid titles registered in the Registro General de la Propiedad – preferably to the name of the community itself (instead of the municipality). It may also serve to strengthen the territorial vigilance of the indigenous authorities and communities.

Finally, the specific case of the communities of San Miguel Ixtahuačán and Sipacapa could bring the issue of collective land rights of indigenous peoples back on the political agenda.
Bibliography

A


B


[Comunidades] (2004). Declaración comunitaria sobre la licencia de minería de metales a cielo abierto en el departamento de San Marcos (6 de noviembre de 2004). Sipacapa, Comunidades indígenas Sipakapense (Sipacapa) y Mam (San Miguel Ixtahuacán) y ladinas asentadas en la zona de la licencia minera.

[Comunidades Q'eqchi'] (2003). Declaración de las comunidades Q'eqchi' sobre las concesiones mineras (6 de octubre de 2003). El Estor, Defensoría Q'eqchi'.


CPO (2009). Declaración del Consejo de los Pueblos de Occidente (Huehuetenango, 10 de enero de 2009). Huehuetenango, Consejo de los Pueblos de Occidente (CPO).

CPO (2008a). Declaración “Por el derecho a la vida” – Los Pueblos de Occidente reunidos por la defensa del territorio y el derecho a la vida (Sipakapa Wa'jxalib' aj, 18 de junio de 2008). Sipakapa, Consejo de los Pueblos de Occidente (CPO).


CPO, Plataforma Agraria, Plataforma Agraria, Encuentro Campesino and Waqib' Kej (2008). Demandamos – “Que el poder del K’at nos perminta agrupar y reunir a las personas y los elementos necesarios para alcanzar lo que en las comunidades demandamos” (Guatemala, K’at 8 de agosto de 2008), Consejo de los Pueblos de Occidente (CPO)/Plataforma Agraria/Encuentro Campesino/Waqib’ Kej.


F FRMT (2008). Diagnóstico sobre el ejercicio del derecho a la consulta que tienen los pueblos indígenas y sus consecuencias jurídicas y políticas, a partir del caso de la explotación minera en el departamento de San Marcos. Guatemala, Fundación Rigoberta Menchú Tum.


MAR (2004). Assessment for indigenous peoples in Guatemala. www.cidcm.umd.edu/mar (accessed June 2008), Minorities At Risk (an online university website project that tracks 284 politically-active ethnic groups throughout the world from 1945 to the present).


Mérida, A. C., R. Herrera and W. Krenmayr (2007). Informe de los resultados y la observancia de la consulta comunitaria de “buena fe” sobre el reconocimiento, exploracion y explotacion minera en la Villa de Santa Cruz Barillas (23 de junio de 2007). Santa Cruz Barillas, Municipalidad de Santa Cruz Barillas/Progobih.


Annex I

Agreement on Identity and Rights of Indigenous Peoples, 1995

IV. Civil, Political, Social and Economic Rights

f. Rights relating to land of the indigenous peoples

1. The rights relating to land of the indigenous peoples include both the communal or collective and the individual tenure of land, rights of ownership and possession and other real rights, and the use of natural resources for the benefit of the communities without detriment to their habitat. Legislative and administrative measures must be developed to ensure recognition, the awarding of title, protection, recovery, restitution and compensation for those rights.

2. The lack of protection of the rights relating to land and natural resources of the indigenous peoples is part of a very wide-ranging set of problems resulting, inter alia, from the fact that both the indigenous and the non-indigenous peasants have had difficulty in having their rights legalized through the acquisition of title and land registration. When, in exceptional cases, they have been able to have their rights legalized, they have not had access to legal mechanisms to defend them. Since this problem is not exclusive to the indigenous population - although the latter has been particularly affected - it should be dealt with in the context of “Social and economic issues and the agrarian question”, as one of the considerations to be taken into account in connection with the reform of the land tenure structure.

3. However, the situation with regard to the particular lack of protection and plundering of indigenous communal or collectively held lands merits special attention within the framework of this agreement. The Guatemalan Constitution establishes the obligation of the State to give special protection to cooperative, communal or collectively-held lands; recognizes the right of indigenous and other communities to maintain the system of administration of the lands which they hold and which historically belong to them; and lays down the obligation of the State to provide State lands for the indigenous communities which need them for their development.

4. Recognizing the special importance which their relationship to the land has for the indigenous communities, and in order to strengthen the exercise of their collective rights to the land and its natural resources, the Government undertakes to adopt directly, when that is within its competence, and to promote, when that is within the competence of the legislative organ or the municipal authorities, the following measures, inter alia, which shall be implemented in consultation and coordination with the indigenous communities concerned.
Regularization of the land tenure of indigenous communities

5. The Government shall adopt or promote measures to regularize the legal situation with regard to the communal possession of lands by communities which do not have the title deeds to those lands, including measures to award title to municipal or national lands with a clear communal tradition. To that end, an inventory of the land tenure situation shall be drawn up in each municipality.

Land tenure and use and administration of natural resources

6. The Government shall adopt or promote the following measures: (a) Recognize and guarantee the right of access to lands and resources which are not occupied exclusively by communities but to which the latter have historically had access for their traditional activities and their subsistence (rights of way, such as passage, wood-cutting, access to springs, etc., and use of natural resources) and for their spiritual activities; (b) Recognize and guarantee the right of communities to participate in the use, administration and conservation of the natural resources existing in their lands; (c) Secure the approval of the indigenous communities prior to the implementation of any project for the exploitation of natural resources which might affect the subsistence and way of life of the communities. The communities affected shall receive fair compensation for any loss, which they may suffer as a result of these activities; and (d) Adopt, in cooperation with the communities, the measures necessary for the protection and preservation of the environment.

Restitution of communal lands and compensation for rights

7. Recognizing the particularly vulnerable situation of the indigenous communities, which have historically been the victims of land plundering, the Government undertakes to institute proceedings to settle the claims to communal lands formulated by the communities and to restore or pay compensation for those lands. In particular, the Government shall adopt or promote the following measures: (a) Suspend the awarding of supplementary titles in respect of property to which the indigenous communities have claimed a right; (b) Suspend the statute of limitations in respect of any action involving the plundering of the indigenous communities; and (c) When the statute of limitations has already expired, however, establish procedures to compensate the communities which have been plundered with lands acquired for that purpose.

Acquisition of land for the development of indigenous communities

8. The Government shall take the necessary measures, without detriment to peasant smallholdings, to discharge its constitutional mandate to provide State lands for the indigenous communities which need them for their development.

Legal protection of the rights of indigenous communities

9. In order to facilitate the defense of the aforementioned rights and to protect the communities effectively, the Government undertakes to adopt or promote the following measures: (a) Develop legal rules recognizing the right of indigenous communities to administer their lands in accordance with their customary norms; (b) Promote an increase in the number of courts dealing with land cases and expedite procedures for the
settlement of those cases; (c) Urge faculties of law and the social sciences to strengthen the agrarian law component of the curriculum and include a knowledge of the relevant customary norms; (d) Establish competent legal advisory services to advise on land claims; (e) Provide the indigenous communities with the services of interpreters, free of charge, in respect of legal matters; (f) Promote the widest dissemination, within indigenous communities, of information about land rights and the legal recourses available; and (g) Eliminate any form of discrimination against women, in fact or in law, with regard to facilitating access to land, housing, loans and participation in development projects.

10. The Government undertakes to give the fulfillment of the undertakings set out in this section F the priority, which the situation of insecurity and urgency that characterize the land problems of the indigenous communities deserves. To that end, the Government shall, in consultation with the indigenous peoples, establish a joint commission on the rights relating to land of the indigenous peoples to study, devise and propose more appropriate institutional arrangements and procedures. The commission shall be composed of representatives of the Government and of indigenous organizations.

Mexico City, March 31, 1995

[Signed:]

The Government of the Republic of Guatemala
The Unidad Revolucionaria Nacional Guatemalteca
Annex II

ILO C169 Indigenous and Tribal Peoples Convention, 1989

Ratified by Guatemala in 1996

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and
Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

Part I. General Policy

Article 1
1. This Convention applies to:
   a. tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   b. peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights, which may attach to the term under international law.

Article 2
1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:
   a. ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
   b. promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
   c. assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.
Article 3
1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4
1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5
In applying the provisions of this Convention:

a. the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

b. the integrity of the values, practices and institutions of these peoples shall be respected;

c. policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6
1. In applying the provisions of this Convention, governments shall:

a. 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;

b. establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

c. establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. 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.
Article 7
1. The peoples 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. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8
1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9
1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.
Article 10
1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11
The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12
The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

Part II. Land

Article 13
1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14
1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.
Article 15
1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

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

Article 16
1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17
1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.
Article 18
Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19
National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

a. the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

b. the provision of the means required to promote the development of the lands which these peoples already possess.

Part III. Recruitment and Conditions of Employment

Article 20
1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

a. admission to employment, including skilled employment, as well as measures for promotion and advancement;

b. equal remuneration for work of equal value;

c. medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;

d. the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers’ organisations.

3. The measures taken shall include measures to ensure:

a. that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

b. that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;

c. that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

d. that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.
4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Part IV. Vocational Training, Handicrafts and Rural Industries

Article 21
Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22
1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23
1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

Part V. Social Security and Health

Article 24
Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.
**Article 25**

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

**Part VI. Education and Means of Communication**

**Article 26**

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

**Article 27**

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

**Article 28**

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.
2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29
The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30
1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31
Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

Part VII. Contacts and Co-operation Across Borders

Article 32
Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.
b. the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

Part IX. General Provisions

Article 34
The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35
The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

Part X. Final Provisions

Article 36
This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37
The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38
1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39
1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.
Article 40
1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41
The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42
At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43
1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-
   a. the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
   b. as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44
The English and French versions of the text of this Convention are equally authoritative.

Cross-references

Conventions: C107 Indigenous and Tribal Populations Convention, 1957
Recommendations: R104 Indigenous and Tribal Populations Recommendation, 1957
Revised: C107 This Convention revises the Indigenous and Tribal Populations Convention, 1957
Annex III


The General Assembly,
Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,
Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights (2) and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, (3) affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,
Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

**Article 1**
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights (4) and international human rights law.

**Article 2**
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

**Article 3**
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 4**
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

**Article 5**
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

**Article 6**
Every indigenous individual has the right to a nationality.

**Article 7**
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

**Article 8**
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
   a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
   b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
   c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
   d. Any form of forced assimilation or integration;
   e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

   2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12
1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

   2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13
1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14
1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15
1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16
1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17
1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20
1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21
1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22
1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and
social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

**Article 24**
1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

**Article 25**
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

**Article 26**
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

**Article 27**
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

**Article 28**
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30
1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31
1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed
consent prior to the 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35
Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36
1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.
Article 39
Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43
The rights recognized herein constitute the minimum standards for the survival, dignity and well being of the indigenous peoples of the world.

Article 44
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be
non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

(2) See resolution 2200 A (XXI), annex.
(3) A/CONF.157/24 (Part I), chap. III.
(4) Resolution 217 A (III).
List of Pictures and Maps

Part A.

Picture 1. Maya Q’eqchi settlement, El Estor, Izabal 4
Map 1. Maya language map of Guatemala 5
Map 2. Political administrative divisions of the country 6
Map 3. Location of the Marlin mining project and the Fénix Mining Project 7
Picture 2. “In defense of our resources, our culture and our dignity”, Sipacapa, San Marcos 8
Picture 3. “Responsible mining”, Fénix Mining Project, El Estor, Izabal 13
Picture 4. Community consultation in Sibinal, San Marcos, April 18, 2008 16
Picture 5. Marlin mine, March 2008 19
Picture 6. Workshop on community development facilitated by COPAE, San Miguel Ixtahuacán 23
Picture 7. Heavy truck passing through the village of Agel, San Miguel Ixtahuacán 28
Map 4. The Marlin mining project and surroundings 29
Picture 8. Tailing Storage Facility at the Marlin Mine, March 2008 32
Picture 9. Indigenous women doing household chores, Sipacapa 35
Picture 10. Community meeting in San Miguel Ixtahuacán 37
Picture 11. Community meeting in Sipacapa 43
Picture 12. Community consultation in Sibinal, San Marcos, April 18, 2008 45
Picture 13. Market at the central plaza of Sipacapa 48
Picture 14. Staff of office of a member of the resurrected Alcaldía del Pueblo, San Miguel Ixtahuacán 56
Picture 15. Indigenous women attending a community meeting 60
Picture 16. Community consultation in Sibinal, San Marcos, April 18, 2008 64
Picture 17. Renovation of smelter plant at the Fénix Mining Project, El Estor, Izabal 70
Picture 18. Presentation for visiting Goldcorp investors, Agel, San Miguel Ixtahuacán, February 2008 75

Part B.

Picture 1. Hand-drawn map accompanying the 1908 title of San Miguel Ixtahuacán 92
Picture 2. Two random pages of the 1816 land title of Sipacapa, heavily eroded 94
Picture 3. Hand-drawn map accompanying the 1918 title of Sipacapa 96
Picture 4. Seal with registration for the Land Registry in San Marcos 96
Picture 5. Community meeting in Agel, San Miguel Ixtahuacán 108
Picture 6. Open pit of the Marlin Mine, March 2008 109
# List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADISMI</td>
<td>Asociación para el Desarrollo Integral San Miguelense</td>
</tr>
<tr>
<td>AEPDI</td>
<td>Asociación Estoreña para el Desarrollo Integral</td>
</tr>
<tr>
<td>AGAAI</td>
<td>Asociación de Alcaldes y Autoridades Indígenas</td>
</tr>
<tr>
<td>AGCA</td>
<td>Archivo General de Centroamérica</td>
</tr>
<tr>
<td>AIRIP</td>
<td>Agreement on the Identity and Rights of the Indigenous Peoples</td>
</tr>
<tr>
<td>AMAC</td>
<td>Asociación de Monitorio Ambiental Comunitario</td>
</tr>
<tr>
<td>AVANCSo</td>
<td>Asociación para el Avance de las Ciencias Sociales en Guatemala</td>
</tr>
<tr>
<td>CALAS</td>
<td>Centro de Acción Legal, Ambiental y Social</td>
</tr>
<tr>
<td>CAN</td>
<td>Comisión de Alto Nivel sobre la Minería</td>
</tr>
<tr>
<td>CAO</td>
<td>Compliance Adviser Ombudsman (IFC)</td>
</tr>
<tr>
<td>CCIC</td>
<td>Comisión de Comunidades Indígenas al Congreso</td>
</tr>
<tr>
<td>CEACR</td>
<td>Committee of Experts on the Application of Conventions and Recommendations (ILO)</td>
</tr>
<tr>
<td>CEDFOG</td>
<td>Centro de Estudios y Documentación de la Frontera Occidental</td>
</tr>
<tr>
<td>CEH</td>
<td>Comisión para el Esclarecimiento Histórico</td>
</tr>
<tr>
<td>CGN</td>
<td>Compañía Guatemalteca de Níquel S.A.</td>
</tr>
<tr>
<td>COCODES</td>
<td>Consejos Comunitarios de Desarrollo</td>
</tr>
<tr>
<td>COMG</td>
<td>Consejo de Organizaciones Mayas de Guatemala</td>
</tr>
<tr>
<td>COMUDE</td>
<td>Consejo Municipal de Desarrollo</td>
</tr>
<tr>
<td>CONIC</td>
<td>Coordinadora Nacional Indígena y Campesina</td>
</tr>
<tr>
<td>COPAE</td>
<td>Comisión Pastoral Paz y Ecología</td>
</tr>
<tr>
<td>CPO</td>
<td>Consejo de los Pueblos del Occidente</td>
</tr>
<tr>
<td>CPSM</td>
<td>Consejo de los Pueblos de San Marcos</td>
</tr>
<tr>
<td>ESIA</td>
<td>Environmental and Social Impact Assessment</td>
</tr>
<tr>
<td>EXMIBAl</td>
<td>Exploraciones y Explotaciones Mineras de Izabal</td>
</tr>
<tr>
<td>FLACSO</td>
<td>Facultad Latinoamericana de Ciencias Sociales</td>
</tr>
<tr>
<td>FRMT</td>
<td>Fundación Rigoberta Menchú Tum</td>
</tr>
<tr>
<td>FSM</td>
<td>Fundación Sierra Madre</td>
</tr>
<tr>
<td>IAHCHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labor Organization</td>
</tr>
<tr>
<td>ILO 169</td>
<td>ILO Convention No. 169 concerning Indigenous and Tribal Peoples</td>
</tr>
<tr>
<td>INCO</td>
<td>International Nickel Company</td>
</tr>
<tr>
<td>IFC</td>
<td>International Finance Corporation (World Bank Group)</td>
</tr>
<tr>
<td>IPDP</td>
<td>Indigenous Peoples Development Plan</td>
</tr>
<tr>
<td>LAP</td>
<td>Land Acquisition Procedures (report)</td>
</tr>
<tr>
<td>MARN</td>
<td>Ministry of Environment and Natural Resources</td>
</tr>
<tr>
<td>MEG</td>
<td>Montana Exploradora de Guatemala S.A.</td>
</tr>
<tr>
<td>MEM</td>
<td>Ministry of Energy and Mining</td>
</tr>
<tr>
<td>MTC</td>
<td>Movimiento de Trabajadores Campesinos</td>
</tr>
<tr>
<td>PBI</td>
<td>Peace Brigades International</td>
</tr>
<tr>
<td>PNC</td>
<td>Policía Nacional Civil</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>CAFTA</td>
<td>US-Central America Free Trade Agreement</td>
</tr>
<tr>
<td>CA4FTA</td>
<td>Canada-Central America Free Trade Agreement</td>
</tr>
<tr>
<td>TSE</td>
<td>Tribunal Supremo Electoral (Supreme Electoral Tribunal)</td>
</tr>
<tr>
<td>UNDRIP</td>
<td>UN Declaration on the Rights of Indigenous Peoples</td>
</tr>
</tbody>
</table>