Human Rights and International Law from the Ground Up: Mining, Indigenous Communities, and the Community Consultation Movement in Latin America

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Abstract

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Abstract

My dissertation analyzes the role that international human rights treaties play in local struggles over natural resources in Latin America. I examine how the right of indigenous communities to consultation in the event of a proposed project or law that affects them, protected in Convention 169 of the International Labor Organization, influences the politics of battles over three controversial mines in Peru and Guatemala. Based on extensive field research, I argue that the treaty protection of the right to consultation is central to the region-wide political mobilization against unwanted mines, but that its importance has rested not on the use of formal legal institutions like courts, but on the cultural importance of international law and human rights norms. Community activists and their nonprofit allies have been able to use Convention 169 and the right to consultation to their advantage by rhetorically invoking the legitimacy and authority of international human rights law, even though there have been few legal victories in court based

on the right. My study complements "compliance" studies of international law and contributes to work on the cultural power of law.

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Chapter 1: Introduction

"People don't give one damn about Latin America." Richard Nixon tutoring Donald Rumsfeld in 1971 on foreign policy

"Why didn't anybody tell me about this?" Maggie Thatcher in 1992, shocked to see signs of great wealth and infrastructural development from a helicopter ride over Latin America.

Introduction

As the bus sped south through the nighttime fog gripping the Peruvian coast, I was trying hard to figure out what was going on. It had only been a few hours since I had volunteered to be an "international observer" at a community consultation in the Arequipan province of Islay, where a US mining company had plans to expand, and I wasn't entirely certain what I had signed up to do. I knew that Convention 169 of the International Labor Organization, which Peru had ratified, guaranteed the right of indigenous communities to a consultation in the event of a project or law that affected them, but I wasn't sure what an actual consultation would look like in practice. I was travelling from Lima with a representative of the CONACAMI[1], the National Confederation of Communities Affected by Mining, himself from the Arequipa region, and with a young Dutch man who worked with the organization and who was also to be an observer. As people around us on the bus began to snore, my companion from Holland filled me in on the consultation, a local vote on whether or not the mining project, named Tía María, should proceed.

He was pleased at my last minute addition to the observer contingent, which consisted of the two of us. "I think our presence will really help elevate the importance of the consultation," he commented. That remark caught me up short; why should the presence of outsiders serve to validate a referendum intended to demonstrate how local residents felt about a project? What was our role? What did the organizers hope to accomplish with the whole exercise? What did it mean that civil society leaders and local authorities were convening the vote, rather than the national government, which in theory should be the entity responsible for upholding Peru's treaty obligations and thus the right to consultation? And what, exactly, does an international observer do, anyway? These questions were to gnaw at me through 16 months of fieldwork in Peru and Guatemala, during which I tried to understand how communities grapple with large multinational mining projects in their midst, and how law might fit into their grappling.

This dissertation, through an examination of the right to consultation and its role in mining conflicts in Latin America, constitutes an attempt to answer these questions. I draw on an analysis of three in-depth case studies of social conflicts around large mining projects backed by multinational capital, two in Peru and one in Guatemala. I further trace the emergence and development of the region-wide consultation movement, loosely based on the principles articulated in ILO Convention 169, the Convention concerning Indigenous and Tribal Peoples in Independent Countries, but, as I will explain below, not strictly bound by the text of the treaty. The story that emerges is one that blends together international law, indigenous and peasant communities, and activists of all stripes mobilizing from Chile to Canada.

A Strange Right

As new technologies have enabled multinational mining conglomerates to pursue profits from low-grade ores that were previously inaccessible, over the past generation the nature of mining projects around the world has changed, and with it the nature of resistance to or criticism of these endeavors. A highly lucrative activity, mining has long been associated with both major efforts to gain wealth and major criticisms of the processes by which that wealth is extracted and distributed. Critics note common patterns associated with large-scale mining, ranging from environmental devastation, to violent and unethical corporate security forces, an unjust division of profits which favors elites in the global north and disfavors poor populations adjacent to the mine, social and economic dislocation in those neighboring communities, disregard for cultural and spiritual practices tied to the land and mountains being destroyed, and an overall radical lack of regulatory capacity at the national and international levels. While not all mines attract significant resistance or controversy, and while even controversial mines often have pockets of local support, especially among local elites or those lucky enough to be employed by the mine, given the host of negative outcomes that all too frequently follow the entry of a mine into a community, it should not be surprising that existing or proposed mines often provoke staunch and widespread opposition.

What is sometimes surprising is the form that that opposition takes. When the right to consultation was first articulated and codified, no one predicted the consequences for political mobilization around mining. The above-mentioned consultation I observed in Islay province, in the town of Cocachacra, was one of the nearly 100 instances to date in which a community in

Latin America has undertaken to organize its own consultation. As such, it was part of a region-wide trend that was striking on several levels. When ILO 169, the main global treaty on indigenous rights, was created, it included some references to consultation, but they were hardly considered the focal point of the convention, which dealt with a broad range of indigenous concerns. Indeed, on both a legal and a political level, the requirement for treaty signatories to conduct consultations was for the most part roundly ignored. This was perhaps unsurprising, given that the nature of the requirement was not fleshed out beyond being stated, and given that the right seemed tame to the point of being trivial. During the process of drafting the treaty text, indigenous advocates had pushed for a stiffer standard of requiring "consent" before a proposed project could begin, and the meek language of consultation that instead made its way into the treaty prompted disappointment. What could one do with such a bland guarantee?

From the text of ILO 169 itself and from activists' initial cool reception to the language of consultation, it would have been difficult to predict the turn events would take in Tambogrande, a town in northern Peru, in 2002, a little more than a decade after the convention entered into force. Faced with the prospect that a controversial mining project would begin there, the residents of Tambogrande formulated a plan to hold a referendum on the project. While the proceeding was not undertaken by the state, but in cooperation with local and international NGO's, they still elected to refer to this vote as a "consultation," invoking ILO 169 and promoting the exercise as one that ought to conclusively determine the future of the mine in their community. Thus occurred what is generally acknowledged as the world's first community consultation.

In subsequent years, dozens of communities around Latin America, some in Peru, some in other countries, but most of all in Guatemala, have emulated the example of the citizens of Tambogrande and staged a locally organized referendum on a proposed "development" project (in most cases a mine), labeling the vote a "consultation" and claiming the mantle of legitimacy of ILO 169, although any straightforward reading of the Convention would reserve the term of consultation for a state-led exercise, and these community referenda have been organized in the absence of, or sometimes in the face of the active opposition of, the state. The term "consultation" has thus become associated with a particular kind of community organizing and activity, and beyond that has become an organizing principle for indigenous and anti-mining mobilization around Latin America. Various large demonstrations against mines have highlighted the right to consultation, which is now often referred to as an "ancestral right" of indigenous communities. Alongside the characteristic substantive concerns in many communities about mining or other projects, such as the environmental and economic effects, indigenous and anti-mining activists often highlight the state's violation of the right to consultation (by not having held one) as a major count against a proposed project. While some take the state to task for failing to consult, and others hold their own consultation, other activists in some countries are pushing for the passage of national implementing legislation intended to strengthen the institutional position of ILO 169's guarantee of consultation.

In sum, in the space of a decade, a mostly forgotten provision of an international law was revived and appropriated by grassroots actors for their own purposes, and put to use to legitimate (via the authority of international law and human rights) activities that are seemingly

unsupported by the text of the treaty. Consultation had taken on a life of its own. It had gone from being a forgotten right to a marquee right. The more I learned about consultation, however, the more it came to seem to me a strange right.

In the first place, while I had gone to Latin America with the intention of studying indigenous rights through the prism of consultation, in the case of Cocachacra, the communities claiming their "right" to consultation according to ILO 169 and the United Nations Declaration on the Rights of Indigenous Peoples were themselves not indigenous. Neither were the communities that staged the very first community consultation in Tambogrande. Neither were various other communities that carried out consultations in Argentina and elsewhere. In many other cases communities organizing consultations were indeed indigenous, but the fact of non-indigenous communities claiming rights based on indigenous law still seemed curious. Furthermore, this political mobilization taking place under the mantle of indigenous rights got its start in Peru, a country about which much ink has been spilled to address the apparent puzzle of why there is so little indigenous activism there, compared to its Andean neighbors with similarly significant indigenous populations (though see García and Lucero 2004 for another perspective.)

Finally, for a proceeding that aroused such political passions, consultation didn't seem terribly efficacious, terribly successful. The right to consultation, in its newly developed form, has been at the center of considerable political energy and enthusiasm, despite the fact that consultation, even as referendum, infrequently generates any kind of obvious legal or political "victories" for the people wielding it, at least not ones that have been observable in the near term. Out of the dozens of consultations staged throughout Latin America, the number that have

been followed by the retreat of a mining company can be counted on one hand, and even these are not cases of formal legal enforcement, but rather of public pressure generated in part by the referendum, as in the Tambogrande case described above. The far more typical scenario is for a community to stage a consultation, vote overwhelmingly against a mine or other project, claim that international (and sometimes national) law and human rights have been violated, and then see that project proceed anyway. An indigenous right, claimed by indigenous and non-indigenous alike, first pushed in a country supposedly known for lack of indigenous activism, pressed into service in pursuit of a goal that seemed hardly ever to materialize: consultation, it seemed to me, was truly a "riddle wrapped in a mystery inside an enigma."

And yet, despite an awareness of consultation's "track record," activists for indigenous rights and mining issues continue to promote the right and call for community consultations (though, as will be described in later chapters, this promotion of consultation is by no means monolithic.) Paradoxically enough, the very fact that communities were so often denied their legally guaranteed right to consultation began to enable a new sort of activism aimed at protecting those communities' rights. Communities facing mines, together with their allies, have waged local, national and transnational campaigns that highlight the failure of the state to follow through on treaty commitments to conduct consultations. If states had chosen to fulfill these commitments by simply holding informational meetings with indigenous communities about mining projects that would take place no matter what, as was originally feared by advocates hoping for a stricter standard than consultation, then communities likely would have gained very little, politically, though their "right" to consultation would have been fulfilled, in some insipid sense. But the broad failure of states to take any action at all to honor this treaty commitment

left them unexpectedly open to a new sort of political mobilization. Communities have been able to shame states for the lack of consultation in politically productive ways. This opportunity may vanish if states begin to more aggressively implement their own, more constricted vision of consultation, as indeed seems to be beginning to happen in some contexts. But for now, and over the past decade and a half, communities have had political space to develop their own, more expansive vision of consultation, which relies on the failures and inaction of the state. Thus, in some ways it has proven more advantageous for communities to see their right to consultation violated (a violation they can then publicly advertise) than it would be to see their right to consultation upheld (in a bureaucratic fashion that returns the right to its bland status.) A strange right indeed.

Case Studies

My dissertation empirically revolves around three major case studies. Each is a well-known case of a community struggling against a major internationally backed mine, and each is emblematic in its own way. These three cases, with important similarities and differences, inform a comparative analysis that serves to illustrate key features of the consultation movement. My dissertation principally examines the case of Yanacocha, in the northern Cajamarca region of Peru; the case of Río Blanco, also known as Majaz, in the neighboring Peruvian region of Piura; and the case of the Marlin mine in Guatemala, in the western region of San Marcos, on the border with Chiapas.

Given that I was interested in studying consultation, I particularly wanted to understand a case in which consultation was *not* a feature, as is true in most mining conflicts in Latin America as a whole. Thus, I chose to study the Yanacocha mine, an enormous sprawling project in Peru's northern highlands. Yanacocha was the first major project in Peru in the new generation of technology-driven mining starting in the 1990s, and as the largest gold mine in Latin America it quickly came to define transnational mining investment in the region. While it has generated large and ongoing protests in many phases of its development, it has not prompted any sort of major call for consultation, nor has there been a community consultation for the project. Critics have taken the U.S.-based company to court in various circumstances, but have not pressed the issue of consultation in court. Thus Yanacocha stands as a crucial case in which a mine has attracted major controversy but in which none of that controversy has been directed towards lack of consultation.

The Río Blanco case, also in Peru, is another in which communities have protested a multinational mining conglomerate, though importantly the protests concern a proposed, rather than actual, mining project at this point. It, too has become a case of major significance. A British report notes that "the Rio Blanco Project has over the last four years become perhaps the most emblematic and significant mining conflict in Peru." (2007: 50) It has been one of the bloodiest recent mining battles in the country, and one that holds the potential to open up a new region of the country to mining which had not previously experienced significant mineral development. It would also set a precedent for waiving the prohibition on mining within a short distance of a national border. The Río Blanco case is also important in that it is one where the

neighboring populations have convened a community consultation, one of only a handful to date in Peru. These communities, however, have not pressed the lack of legally mandated state-led consultation using formal legal institutions, either national or international ones.

Finally, the Marlin mine case in Guatemala, the third major case I consider, is one of significance that exceeds the consequences for the immediate neighbor, large and grave though those are. While Peru has long had a tradition of mining, the same is not true for Guatemala or Central America more broadly. The Marlin mine was the first large multinationally backed mine in Guatemala, and also the first to receive financing from the World Bank after that institution was advised by a major internal review to cease funding extractive industry projects, given their capacity for harm. In another first, the Marlin mine was the first project to be subject to a community consultation in Guatemala, in which the surrounding communities roundly rejected the mine. In addition to expressing their resistance in this manner, these communities have also taken their case to the Inter-American Commission, protesting the lack of state-led consultation.

Through a comparative analysis of these three cases, I draw conclusions about the factors that influence the turn (only in some cases) to community consultation, about the differences between the consultation movements in Peru and in Guatemala, and about the multi-faceted politics they help generate and enable.

Existing Approaches

The community consultation movement fundamentally revolves around law. Organizers continually point to international law as a basis and justification for the activity; organizers and opponents alike concern themselves with whether laws are being broken in the course of consultations; participants carefully stage a lawful, democratic tableau featuring consultation voters as the very epitome of upstanding law-abiding citizens. The obsession with the relationship between consultation and legality is pervasive and consistent. Yet how to understand the multiple ways in which concepts of law play a role in the politics of consultation is far from clear. The existing literatures help shed light to an extent on the nature and significance of this role, yet are to varying degrees ultimately unsatisfying.

One substantial body of literature on international law that seems directly relevant examines the "compliance" or "impact" of international conventions. These studies (see for example Hathaway and Hafter-Burton and Tsutsui) are designed to measure, typically using quantitative methods and a large sample size, whether or not international treaties are truly effective. Does state ratification produce a higher rate of compliance with the terms of the treaty than would exist otherwise? This is a crucial question for anyone who cares about law and human rights. No one would want to spend time and effort crafting conventions and seeking ratifications if it were all for naught. And so the question posed in these studies must be asked: are international human rights treaties successful?

The question must be asked. And yet, I maintain, it is utterly the wrong question to pursue in the case of the community consultation movement. If one were to measure "compliance" with ILO 169, the results would seemingly indicate that the provisions concerning

consultation are almost uniformly ignored by the Convention's signatories, apparently leading to the conclusion that the treaty is toothless and irrelevant. As I argue here, however, it is not the case that the legal protection for the right to consultation is irrelevant, only that its relevance must be understood outside of the conventional framework for evaluating human rights treaties.

There is a related branch of scholarship on human rights treaties which might help us make some sense of consultation. Some scholars explore the ways in which international treaties influence behavior in subtle, psychological fashion. (Merry's landmark 2006 study is a key example.) Merry's work on international law and gender discrimination convincingly demonstrates that norms codified in human rights treaties must often adapt to local contexts before they may be successfully implemented. She further concludes that treaties are effective not because they are directly enforceable, but because their promotion of certain norms encourages ordinary people to adopt those norms as their own, modifying their conduct accordingly. Other studies make related points. These works have the virtue of allowing us to think about compliance with a good deal of sensitivity and nuance. Perhaps international treaties have important effects, without those effects being exactly to the letter what is written in the treaty text.

That is certainly consistent with the experience of the community consultation movement. And yet this movement does not seem to follow the logic of Merry's study. Her model, complex and insightful as it is, flows from the proposition that an official treaty is the prime mover, in effect, in a situation in which astute policy makers are trying to achieve a particular outcome. They may have to gracefully accept a certain amount of deference to local

sensibilities, which may demand certain alterations of the original text. But the human rights treaty may still be viewed, in essence, as a "treatment" that is applied to a context in which human rights are being violated. This sort of approach does not capture what is so important about the emergence of community consultations. In a sense they flow from an international treaty text, but from there they have developed into something entirely their own. Far from being mostly passive recipients of a treaty, who at most gently tweak the official language, consultation activists have used ILO 169 as a launching pad to create their own norm. National and international officials have been forced to be the ones who must react to this new creature, which has been sent to them, whereas they are used to being the ones in the position to send norms "downward". Thus, consultation is ill-suited as a phenomenon to be understood through the lens of models that take authoritative treaty texts as the center from which change and action radiate.

One could perhaps look to other studies which examine the indirect or mediated effects of legal battles and strategies, looking beyond a straightforward assessment of whether or not a given law leads directly to social change (see Koh 1999 for this perspective regarding international law, and Scheingold's classic study (1974) regarding law in the United States). Yet even these approaches leave us with an incomplete understanding of the role of law in the consultation movement. These approaches go far beyond courts and other formal state institutions, but they still start with them. The endpoint of Koh's analysis is formal institutions; Scheingold is fundamentally concerned with lawyers, legal institutions and litigation, even as he rightly tells us that their link to social change is anything but direct. Courts, litigation, and other formal institutional guises of law are simply not the main thrust of the region-wide consultation

movement, even though these things play significant roles in particular instances. When they do play a starring role, it is often also a losing one: witness the roundly flouted order from the Inter-American Commission on Human Rights for Guatemala to suspend operations at the Marlin mine, or elsewhere in the region, the ruling of the Colombian high court that a perfunctory meeting between indigenous community members and state officials was enough to satisfy the legal requirement for consultation. Consultation activists are certainly not unconcerned with litigation, but they look far beyond it. Indeed, they often cite ILO 169 in the same breath as the UN Declaration on Indigenous Rights as proof that the right to consultation exists and as a rallying point for asserting the validity of community consultations. While ILO 169's potential use in litigation is limited at best, the UN Declaration has no binding power whatsoever and no conceivable direct link to any kind of formal institutional apparatus or enforcement capacity. Existing scholarship, for the most part, while affording some tools to analyze the role of international law in the consultation movement, does not offer many models that allow for a convincing and complete understanding of what law means to this movement.

A Grassroots Reading of International Human Rights Law

In this dissertation, I propose that the community consultation movement should prompt us to broaden our understanding of the nature of the relationship between law and political mobilization, particularly international human rights law. Rather than seeing international treaties as a treatment applied by elites to civil society, which may or may not have the desired effect, in the context of the community consultation movement it is most helpful to understand

law as operating chiefly as a generally agreed upon source of legitimacy, authority, and prestige, and as an unarguable standard that allows people to criticize deviations from it or violations of it. Rather than insisting on viewing international law as primarily the province of formal institutions, we should be open to the idea of scenarios in which it can derive its main significance from the interpretations and maneuverings of people acting outside the formal sphere. There is certainly an institutional and formal dimension of the ways in which law is deployed in these struggles, but this dimension takes a backseat in the case of consultation to boldly creative applications of law's useful legitimacy, undertaken primarily by grassroots social movement actors (rather than legal or governmental elites at the local or transnational level.)

International law, examined through its role in the community consultation movement, proves to be highly malleable, capable of being appropriated and reimagined by civil society actors who are typically envisioned as powerless and essentially passive beneficiaries of treaties. These activists, who as the term would suggest are anything but passive, have demonstrated that while the authority connoted by international law can play a crucial role in political mobilization, that authority may not always be wielded by those whom we typically think of as being "authorities," that is, in this instance, international legal elites. The codification of a norm in an international treaty proves important because people believe it to be important, regardless of the legal particulars. This importance attached to international law is all the more striking in a regional context in which law is broadly perceived to be corrupt and even brutal. "Hecha la ley, hecha la trampa," as the popular saying would have it: whenever a law is made, a trick is played, or, less literally, the law is meant to be broken. Scheingold writes within the context of the U.S., "The myth of rights rests on a faith in the political efficacy and ethical sufficiency of law as a

principle of government." (p. 17) This faith is utterly lacking in broad swathes of Peru and Guatemala; indeed, a faith in the opposite might be more common. Nonetheless, consultation activists are able to use an abstract faith in rights, and in particular in human rights and international law, to press onward with a campaign for social change that revolves around law even as it largely sidesteps its formal trappings. The power of rights as political resources that Scheingold describes holds true even when far removed from or completely separated from formal legal institutions. That is one lesson the consultation movement holds for us.

A second lesson concerns the historical window of opportunity in which consultation activists have developed and promoted their own interpretation of consultation, utterly at odds with the official state-sanctioned version of consultation. As Cover (1983) notes, state law has an inherently jurispathic quality; that is, official state legal actors act to kill off competing normative understandings of issues before the court. It is the aim of state law to have and be the final word; any alternative worldviews that promote conflict with the rule of the state constitute a threat to the state. This process may be beginning to assert itself regarding consultation, as I discuss in later chapters. While to date official legal rulings on consultation have often been confined to opinions permitting community consultations to proceed, increasingly states, regional courts and international bodies are starting to weigh in on what consultation ought to look like. Peru has passed a detailed law on consultation, clearly defining it as a state-led process. Guatemala and other countries may be poised to follow that lead. The ILO's own manual on consultation clearly states that communities do not have the right to a "veto" and are instead to "use their rights as bargaining tools in negotiations." (Project 2003:40) The basis for jurispathic action is readily available.

And yet, states (and to a degree, corporations) have been slow to insist on their own official version of consultation, and their hesitancy or disregard has created political opportunity for activists and communities. The idea of community consultation as a legal act, backed fair and square by ILO 169 and other sources, has taken firm hold in the minds of many people in communities facing mines and among their transnational supporters. Ratifying states may well yet clamp down and aggressively promote their own idea of consultation, which would favor state and corporate interests, but they are late to that process.

If ILO 169 signatories do indeed start insisting on a version of consultation as state-led dialogue, then we might begin to see the full jurispathic potential of this human rights convention. This is another lesson that the community consultation movement has to offer: international human rights treaties can foreclose valued political opportunities for the intended beneficiaries, as well as create or strengthen opportunities for progressive political action. International human rights law, too, can be jurispathic. While some scholars (for instance, those associated with the Third World Approaches to International Law) approach treaties critically, often human rights conventions are purely celebrated, and the associated scholarship is dedicated to analyzing how best to promote them. In this regard, the community consultation movement, in all its complexity, offers a cautionary tale as well as a hopeful one.

Finally, the consultation movement offers a window onto the way in which social movements operate in Latin America. While the turn to community consultation is widespread, it is far from ubiquitous. Both the differences between cases and between countries are instructive. Guatemala has had by far the highest number of community consultations in Latin

America, well over 80 at last count. Peru, while having the distinction of having had the region's first community consultation, has since seen only a handful. In both countries, there are cases where community consultation has occurred, and relatively similar cases where it might have, but did not. The differences speak to both the characteristics, at the local and national levels, of indigenous and mining activism in both countries, and the quite different historical moments at which modern large-scale multinational mining has asserted itself vis-a-vis the timing of the community consultation movement in the region.

A community consultation may take place, or not, for a complex constellation of reasons, but holding one certainly requires, at a minimum, the strong presence in the region of a proposed project of activist networks that can inspire and support local actors in their quest to prevent a mine. In both Peru and Guatemala, certain of these networks are strong in some regions and circumstances, and weaker or absent in others. Thus, it seems that a community consultation is not simply an organic result of free-form discontent with a mining project, but is much more likely to take place given the active presence of a national activist network that promotes consultation as a tactic and can offer advice and support in holding a consultation and later politically promoting the result.

Finally, as noted above, Peru has a long history of major mining activity that is not the case in Guatemala. Thus, the rejection of a major mining project holds somewhat, though certainly not entirely, different implications in the two national contexts. In Peru, community consultation has played a role geared toward preventing or beneficially altering certain projects, and toward changing the national conversation about land use planning and environmental

standards. While some scholars are pushing for a discussion of how to move Peru towards a "post-extractive" economy and reality, even the most optimistic know that this is a long-term project, and that attention must be paid to regulating mining in the meantime.

In Guatemala, by contrast, there is still a sense that the Marlin mine serves as something of a pilot project, and how it continues to unfold could have major consequences for later proposed projects. Many communities have held community consultations rejecting mining when the prospect of an actual mine beginning there is still rather remote. The hope is to preemptively create "mining-free" regions, or, perhaps, a mining-free country. Thus, many communities are holding consultations that might not occur in a different context. The historical moment, as well as the reach and make-up of mining and indigenous activist networks, have proven to be crucial factors influencing how the community consultation movement has unfolded in both Peru and Guatemala.

Research Methods

The research for this dissertation consisted primarily of a 16-month period spent in Peru and Guatemala in 2009 and 2010. I lived in Peru between September 2009 and April 2010, spending the bulk of my time in the Piura and Cajamarca regions while also typically spending a short period each month in the capital city of Lima. I spent May 2010 through October 2010 in Guatemala, residing in San Marcos, the capital of the region where the Marlin mine is located, and travelling periodically to other places in the Western highlands and to the capital, Guatemala City. During November and December of 2010, I returned to Peru for additional research there.

Additionally, I returned to Guatemala for a brief period of research in 2012, and to Peru for a short visit in 2016. While in Lima, I was informally affiliated with CooperAcción, a small nonprofit advocacy organization known for its work on consultation, mining, and other natural resource issues. I also travelled on multiple occasions with members of the organization in the Piura region, where they do work with regional counterparts, and observed some workshops they led with residents of the area. During my time in Cajamarca, I was informally affiliated with Grufides, a small local advocacy organization well-known regionally for its critical stance on mining.

I conducted approximately 150 semi-structured interviews in Peru, Guatemala, Canada, and Washington, DC with a broad range of actors. These interviews, which constituted my primary research method, typically lasted at least an hour, though some were shorter and some lasted several hours. In the interviews, I asked subjects for basic information about their biography and their involvement with mining issues, and probed their views on the issue of "citizen participation" ("*participación ciudadana*") in decisions on mining projects. I typically did not introduce the word "consultation" into the conversation unless and until the interview subject used the word him or herself. While there were some questions I put to every subject, I did not follow a rigid questionnaire format, and most of the content of the interviews was dictated by topics that the research subjects themselves raised, and in many cases by questions that they asked of me.

My interview subjects comprise a broad range of actors related to each of my case studies and to the larger consultation or natural resource movements in both countries. I spoke

with residents of the communities surrounding the three mines, representatives of the Catholic Church who were involved in advocacy around mining issues, activists in nongovernmental organizations doing related work, lawyers and legal experts, representatives of the three mining companies indicated by my case studies, and officials of the corporate social responsibility outfits connected to the Yanacocha and Marlin mines. I tape recorded some of these interviews, but in the many cases in which it was my judgment that tape recording would greatly inhibit the speaker, I did not tape and relied instead on extensive written notes taken during the interview and augmented immediately afterwards with additional information and impressions. In most cases interviews and other conversations were conducted in Spanish, although a few fluent English speakers preferred to use that language. Unless otherwise noted, translations from Spanish to English are my own. Given the sensitivities and very real stakes for some activists on mining issues (some of whom have received credible death threats and/or been physically harmed or even killed in connection with their work), and given University human subjects restrictions, in most cases I do not refer to my interview subjects by name or personally identifying detail.

In addition to interviews, I served as an official international observer at three community consultation, one in Peru and two in Guatemala (these were, to my knowledge, the only such consultations that took place while I was in-country.) I was an observer at the above-mentioned consultation in September 2009 in Peru, in the province of Islay in the Arequipa region, and at two consultations in October 2010 in Guatemala, one in the western Quetzaltenango region, in Cabricán, and one in the regional capital of Quiché. At each, I was identified by my role as a student from the United States studying mining. I was also able to observe much of the

proceedings for a consultation process undertaken by the Peruvian state in December 2010, which focused on a proposed forestry law. I sat in on a two-day regional forum in Satipo, in the central jungle, one of four such regional meetings, and attended the nearly week-long subsequent meeting in Lima between representatives of the national government and leaders of indigenous communities from the Amazon region. At all of these consultations of both varieties, I spoke with a good number of participants about their views on a more informal basis than an interview. Additionally, I reviewed extensive archival documents (mostly newspaper coverage) related to the three conflicts, in order to construct the history of how each developed and to gain an understanding of who the crucial actors were at each stage and of how the conflicts were viewed by national audiences.

I also conducted participant-observation at other workshops and events related to the topics of mining, communities, or consultation. Whether it was helping collate pages of a petition brought by Mayan communities to the national authorities of Guatemala, or conducting *capacitaciones* (trainings) on international law in Peru, or giving radio interviews about my work, I was frequently something other than a passive, invisible observer. While my research could not be called a classic ethnography, it is certainly inspired by the deep value of this method, and bears some resemblance to what Marcus (1998) calls "multisited ethnography" and what Merry (2006: 29) calls "deterritorialized ethnography." These terms refer to a study of a phenomenon or set of practices that exists in different geographical locations that are nonetheless linked in such a way that they constitute a social world unto themselves. In my study, the meaning that people ascribe to "consultation" in the ILO headquarters is connected in a socially and politically significant way to the meaning people give it in a small town in southern Peru.

While my research certainly did not follow a classical ethnographic script, it differed from a study based entirely on interviews or archives. In addition to relying on these sources, I also spent time doing what Geertz famously called "deep hanging out," that is, living or staying (at some sites) with people connected to my research, getting to know them personally and informally, well past the end of an interview. I took inspiration from the recent resurgence, small but powerful, of interest in using ethnographic methods in political science. (See Schatz 2009) Given that my research questions fundamentally revolved around subjective perceptions of the goals and outcomes of political mobilization, and of the nature and value of international treaties, this assemblage of multiple, overlapping methods seemed to me the best suited one to pursue a grounded understanding of the complex social world of consultation activism.

Structure of the Dissertation

In the following pages, I begin by offering some recent historical context to situate the consultation movement. Chapter 2 analyzes a number of overlapping, interlocking trends that enabled and shaped activism around international law and the right to consultation, enabling the reader to place the case studies in historical and legal context. While the consultation movement was and is in many ways surprising, and no one truly could have predicted its existence or nature before it began, it nonetheless has roots that have been growing and apparent for decades (and of course, in a deeper and more general sense, for centuries.) I examine the development of norms around participation, the regulatory regimes surrounding corporate extraction, and the resurgent region-wide indigenous rights movement. I conclude the chapter with an overview of the mining

industry and the historical and social landscapes pertaining to indigenous rights in Peru and Guatemala. In Chapter 3, I turn to my empirical material, introducing the first of my three major case studies, the Yanacocha mine in Cajamarca, Peru. Chapter 4 continues with an analysis of my other Peruvian case, the Río Blanco mine (sometimes referred to as the Majaz mine) in the neighboring region of Piura. In Chapter 5, I present the last of my three major case studies, the Marlin mine in Guatemala, located in the western region of San Marcos. Chapter 6 offers a synthesis of the empirical material, connecting the individual cases to the broader national and regional contexts. I compare the sharply divergent paths of the efforts in both countries to institutionalize the right to consultation. In Chapter 7 I link the Guatemalan and Peruvian experiences to the theoretical literatures on international human rights law and legal mobilization. I argue that the transnational consultation movement demonstrates that we need to adopt a new, grass-roots understanding of international law in order to understand its role in community consultations. Finally, in Chapter 8 I offer some concluding thoughts on the meaning of consultation and its implications for both activists and scholars.

Activist Scholarship

Of course, there are many who fuse the roles of activist and scholar (see for example Scheper-Hughes 1995 and Hale 2008), and in this project I endeavored to count myself among their ranks. This does not mean, I emphatically emphasize, that I approached my time in the field with any certainty whatsoever about the answers to my research questions, about what those questions ought to be in the first place, or about the path that communities resisting mining ought

to take. Indeed, one of the central lessons of my study of consultation is a recognition of the importance of the fluidity of the term; for me to try to instruct communities in Peru and Guatemala what they should do regarding consultation would be politically pointless, tone deaf and offensive. Rather, it means that I undertook research influenced by certain political commitments, for several key, interrelated reasons.

In the first place, I began this project having already had some significant experience with the topic of mining and communities, and thus with a sense of personal moral obligation to those living in a position of cultural, political and economic vulnerability because of extraction. I had conducted a minor research project on the Indigenous Law of Chile in 2000, which gave me some knowledge of indigenous activism in the region, but truly first immersed myself in the topic in 2004-5, when I spent a year working in Lima with Oxfam America, a nonprofit advocacy group focused on human rights and development, on projects in the programmatic area of extractive industry and indigenous communities. Naturally, Oxfam fosters a wide-ranging conversation and a diverse set of views on these subjects, but it works explicitly to promote social justice and reduce poverty, goals that are certainly not objective, even if they are unobjectionable by most standards. In both the Peruvian and the Guatemalan contexts, particularly among people who follow mining, Oxfam is instantly recognizable regarding its position and orientation. Thus, my personal history meant that I was viewed in a certain light, both by people who view Oxfam favorably and by people who despise it. I did not always volunteer all aspects of my personal biography in all conversations in the field, but many people knew of me from my time at Oxfam, and many more told me they had discovered my past affiliations by googling me (and doubtless others did the same without informing me.) Besides

the association, my own views were inevitably shaped by my time supporting their work and speaking with my colleagues there. There was no use pretending, either to myself or to others, that this was not the case. Extraction on indigenous lands (or indeed anywhere) is shot through with moral considerations, and I felt a strong sense of obligation to the principles I carried with me into the research. Attempting to set aside these values while I did research, I felt, would constitute a serious violation of them.

Rather than viewing this as a disturbing crime against objectivity, however, as many social scientists more committed to strict positivism might do, I embraced the sense of ethical entanglement as a benefit. In an immediate practical sense, others' knowledge of my biography and the fact that I had "aligned" myself with a certain position in the sharp debates over mining facilitated contact and more open conversations with key actors than otherwise would have been possible. Much business and socializing in Latin America operates according to a crucial sense of who is "*de confianza*," someone trustworthy, deemed reliable by your own observations or by your social circle. Politically charged research is hardly an exception; no research subject would casually tell me (as some in fact did) how they burned down part of a mining installation or that they planned to attack mining company vehicles or how they had "borrowed" key corporate documents unless they were dead certain that I was not going to report their confidence to the authorities. In some cases I could build trust over a period of months, but in many others I was to speak to someone only once or a handful of times, and being able to say that a trusted friend or organization had sent me often meant the difference between an informative interview and a circumscribed one, or no interview at all. Conversely, officials at all three mining companies connected to my major case studies treated me with extreme, even comically exaggerated

suspicion. Such is the nature of research in deeply polarized contexts. But in these cases the alternative, coming from nowhere, from a forced position of studied neutrality, would likely also have meant getting nowhere, in terms of valuable research. My experience in this regard echoes that of many others doing ethnographic or ethnographically-inspired work (see for example Speed 2008).

Finally, besides viewing the personal, ethical dimension of my project as inevitable and pragmatic, I understood it as an active boon to the intellectual inquiry. As Hale (2008:2) argues, "research and political engagement can be mutually enriching." The vistas that present themselves to the engaged researcher are not always ones that readily reveal themselves to someone approaching a topic with clinical detachment, though the reverse may also be true. To take one example from my work, when I marched alongside Guatemalans (and a handful of others from outside the country) on the national government, I was not only honoring (in a small way) my own ethical commitments, not only meeting new people and reconnecting old friendships in ways that might be tactically useful for my project, but also experiencing firsthand some of the dynamics at my field sites that I had only begun to appreciate. Without participating in this march, I likely would never have learned about which groups worked smoothly together to organize this type of mass event, and which groups or individuals worked in tension with one another. I would not have appreciated on a personal level the frustration of waiting on the streets for important officials who might or might not address us. I would not have realized who was chosen to speak and represent the group at this public event. Participating in a rally as an activist marching in solidarity afforded me the opportunity to pick up on gossipy tidbits and broader

insight into the relationships between key individuals and organizations involved in the struggle over mining and consultation.

Never did I feel both the tensions and the possibilities of activist research so strongly as when I served as an international observer at community consultations. It seems to me impossible to play this role without at least tacitly expressing approval of or support for the activity. Yet as someone motivated by the study of consultation, I thought it equally impossible to pass up the opportunity to play a public role in one. Had I simply watched a consultation from the background, I would not have been privy (as in fact I was) to casual conversations among organizers while we drove around before, during and after the polling. I might well have assumed that international observers went through some rigorous selection and training process, rather than becoming an observer simply on request and doing one's best. Thus, by serving as an international observer, I was acting as both an activist and a scholar, not in separate capacities but in a way that could not help but join these roles. The double task was nerve-racking, but, I think, among the most valuable experiences of all my research, not despite but precisely because of the fact that my roles as activist and scholar were co-mingling. In what follows, I hope to honor each responsibility.

Chapter 2

"Permits? No…perhaps they have those in your country."

Introduction

In some ways the idea of community consultation seems to have arrived as a bolt out of the blue. Who would have predicted that this particular creative application of international law would surface, and gain such political traction? Viewed in light of a number of interconnected trends that have been developing for decades, however, the current panorama becomes somewhat less puzzling. In this chapter I introduce a number of historical processes that all played a role in setting transnational expectations for how mines and related projects ought to be governed in indigenous, post-conflict settings. Widespread violence targeting indigenous populations in the context of armed internal conflict, in both Peru and Guatemala, the global resurgence of the indigenous movement, a growing global norm around the idea of popular participation in policy decisions, and a backlash against ill-conceived large-scale extractive industry projects have all contributed in crucial ways to the context in which community consultation became possible, common and politically important.

In some ways, the historical context that gave rise to the phenomenon has been responsible for greater opportunities, and expectations, for indigenous communities to have input when a project is slated to enter their territories. In other, equally important ways, especially in the wake of devastating armed national conflicts, consultation and ILO 169 can actually be read as reflecting a greatly narrowed space for the sorts of claims that indigenous peoples can advance

if they are to be considered legitimate. The story of how a newly conceived right came into existence as a double-edged sword of sorts is one of both irony and ambiguity, and also very much one of complicated politics that have evolved and continue to evolve in surprising and unpredictable ways. In what follows in this chapter, I discuss several of the main trends that helped set the scene for consultation before detailing its appearance in international law, in the form of ILO Convention 169, and the legal and institutional as well as the non-legal and non-institutional responses to the idea of consultation that arose after the passage of the treaty.

A legacy of violence

Both Peru and Guatemala (as well as several other countries in Latin America) experienced extended periods of internal armed conflict in which indigenous populations were disproportionately the victims, in terms of death rates but also in terms of targeted repression. These periods of mass violence, which roughly coincided with one another, were quite different in some important aspects, but also share some common features. In both cases the violence left a legacy of devastation in many realms, with important consequences for political expression. ILO 169 and the right to consultation likely would not have taken the same path in either country absent the history of state-led violence against indigenous peoples and the responses from indigenous communities.

Guatemala

Although Guatemala has, by some counts, a population that is half or more indigenous, indigenous communities in the country have never held anything approaching half the wealth or political power in the country. Guatemala's indigenous population consists mainly of approximately two dozen communities descended from the Mayas, and also includes a distinct indigenous group, the Xinca. People in these communities may speak one of the Mayan languages (related to each other but distinct), Spanish, or both. The indigenous communities most affected by mining in the country, including in the case of the Marlin mine (see Chapter 5), are predominantly Mayan populations in the Western highlands, a mountainous region extending to the border with Chiapas, Mexico. The Mayan communities of the highlands suffer from extraordinarily high rates of poverty, nutritional deprivation, and other social ills.

In 1944, after long periods of dictatorship, Guatemala had an election recognized as free, and its first democratically elected president to complete a term in office. Under President Juan José Arevalo, it started to seem possible that Guatemala might finally experience greater equality and democratic opening. His successor, Jacobo Árbenz, in 1952 instituted a national program of agrarian reform, intended to redistribute unused lands from large estates to peasants and indigenous communities who largely lacked access to land resources. This redistribution, while welcomed by those who benefitted, quickly earned the ire of the United Fruit Company, a major US corporation that stood to lose significant amounts of valuable land holdings under the policy. Partly at the behest of this enormously powerful company, in 1954 the US government helped orchestrate (through the Central Intelligence Agency) a coup, which put a quick end to agrarian reform.

Soon afterward, Guatemala slid into a decades-long civil war, generally dated as occurring between 1960 and 1996. Approximately 200,000 people lost their lives in the conflict, a staggering sum, especially given Guatemala's relatively small population (currently around 15 million.) There were many violent groups and forces at work in the complex conflict, which shifted somewhat in nature over time, but some broad facts are clear. According to the widely respected national Historical Clarification Commission, government and paramilitary forces were responsible for the overwhelming majority of the killings (93%), and most of the people murdered (83%) were Maya indigenous. There were exceptions on both counts, but the trends were clear. The historical Commission declared the wholesale slaughter of indigenous peoples in this war to be genocide. In 1996, the government and the guerrillas signed a series of Peace Accords, after negotiations with significant input from international forces, including individual governments and the United Nations. As part of the peace process, in 1996 Guatemala ratified ILO Convention 169. The Peace Accords officially closed the chapter of civil war in Guatemala, but did not change the underlying dynamics that had made it possible: blatant systematic bias and discrimination against indigenous people, sky-high rates of poverty, shocking economic inequality, and political exclusion. Nor did an era of mass casualties magically retreat in terms of social relations. The violence in Guatemala left people very mutually mistrustful (*desconfiados*) and splintered in terms of civil society, mused one woman in a nonprofit in the capital working to address impunity (PH 2010). Guatemala had unfortunately not moved from civil war to peaceful and harmonious prosperity, but from civil war to a new era of insecurity and violence, in which the actors were often shadowy. While nothing on the scale of the civil war deaths is currently occurring, Guatemala still suffers from a high rate of violent and even lethal

crime, and while there is currently no genocide, indigenous communities still suffer disproportionately from violence, economic deprivation, and ethnic exclusion. The cauldron that exploded during the civil war still simmers.

Peru

Peru's recent history of mass violence against indigenous communities is dramatically different in some respects, but there are striking parallels all the same. The size and nature of Peru's indigenous population, generally considered to consist of between 25 and 40% of the national population of 30 million, is itself an object of serious ongoing political debate. There are no state statistics that count "indigenous" people; the 1993 census was the only one to ask about ethnicity, and it did so in a way that likely undercounted the indigenous population (Vittor: 2009: 187). The nomenclature itself is very much at issue in the country. Most people considered to be indigenous in Guatemala would readily identify as "*indígena*," the direct Spanish equivalent of the word indigenous, or would otherwise identify with one of the broadly recognized cultural-linguistic groups seen rather uncontroversially as indigenous (Maya Mam, Maya Kakchiquel, Xinca, and so forth.) The same is not at all true in Peru. While some people in the country do identify with the term "*indígena*," many, likely a clear majority of people who would be classified in international law and opinion as "indigenous," would actively repudiate the Spanish term, or at least consider it irrelevant to their identity. Figuring out who is indigenous in Peru presents unique difficulties, and there are often major differences between the vantage points of national law, international law, various national conceptions and various community conceptions of who in the country "counts" as someone indigenous, or one of the

labels that may be recognized as a proxy for the term. (ILO 169 refers to both indigenous and "tribal" populations, but the latter term generally is not used in its Spanish form of "tribu" in either Peru or Guatemala.)

Part of the difference in terminology follows geographical divisions. Peru is generally divided into coastal, mountainous and Amazonian regions. The Amazon has many communities that speak a variety of languages other than Spanish, and that may live in remote locales reachable from urban centers only by lengthy boat trips. These communities are often referred to as *comunidades nativas*, directly translated as "native communities," and are the type of community most readily accepted by the Peruvian national government as deserving of recognition as "indigenous" under national and international law. Speaking a language other than Spanish (or whatever the dominant language of a country is) is not a legal prerequisite for being considered indigenous, but it is a convenient fact to point to, and an easier thing to establish than a contention that a community has preserved distinct cultural traditions. These communities (numbering about 1200) constitute a fairly small part of the overall population, less than 5%. They often feature in conflicts around oil or gas, but less so in mining conflicts, simply based on the sort of natural resource located in the Amazon basin.

In the mountainous middle of the country, in the Andes, *comunidades campesinas* (*campesino* communities) predominate. *Campesino* is translated as "peasant," but when referring to these communities throughout, I leave the word in untranslated Spanish, to emphasize both the fact that this term has a formal legal meaning in Peruvian law, and the fact that in the Peruvian context the label and the identity mean something more than communities

relying on subsistence agriculture. Most advocates for indigenous rights would argue that *campesino* communities are indigenous communities, even if the national Peruvian government often disagrees, and even if people in these communities would not always identify with the term "*indígena*". In the southern Andes, many culturally distinct communities speak Quechua, the "lingua franca" of the Andes. In the northern Andean region of Peru, Quechua is far less prevalent, though some people speak it. In Cajamarca and Piura, the regions of my major Peruvian case studies, Quechua is not nearly as dominant as Spanish, even among populations that international law would recognize as indigenous.

There are also *campesino* communities in the coastal plains of the country that arguably could be classified as "indigenous" according to national law. Their legal protections are weaker than that of the equivalent communities in the Andes. *Campesino* communities in the Andes and native communities in the Amazon must have two thirds of Communal Assembly members vote to dispose of their community lands (a relatively high bar), but *campesino* communities on the coast are regulated by their own law, 26845, which requires only 50% of Assembly members to vote to break up communal lands (Castillo 2007: 72). A final sort of group that is often recognized as possessing indigenous rights is known as a *ronda campesina*, often translated as "peasant patrol" or "peasant militia". I leave this term also untranslated throughout, since the term in English can be more misleading than clarifying, and no direct equivalent of the concept exists anywhere in any other country of the world. The *rondas*, a deeply important force in Peruvian life and politics, emerged originally in the 1970s in the Cajamarca region as a response to insecurity. When haciendas ceased to exist, there was no security, and a school in the town of Chota was robbed, noted Pastor Paredes (2009), in the Cajamarca Ombudsman's office. The

response was a national movement for self-defense through *rondas*. They began with a wave of assaults, according to a *ronda* leader in Ayabaca, Piura (RJC 2009). People could not walk alone. Their first function was a simple matter of community self-defense. Cattle rustling and other theft prompted people to patrol their communities themselves, since the state was largely absent in their areas, unwilling to confront the problems community members most cared about. They evolved over time into something more than community defense patrols, however. They still provide security, sometimes acting like a form of the police. In many communities they became much more far-reaching organizations, constituting an alternate political authority, as well as an alternate legal authority. *Rondas* in some instances began to establish their own courts and justice systems. They might also monitor elected authorities and improve income through local economic development schemes. "The *ronda* is the community itself," the Ayabaca leader told me. Another Ayabaca leader concurred. *Rondas* are our form of authority, he told me. The state takes money without helping, whereas the *ronda* is free and helps, providing communal justice (MH 2010). The *rondas* have transformed themselves, noted Hernán Coronado (2010), indigenous peoples specialist at the National Human Rights Coordinator. Before, they dealt with animal theft; now, they deal with environmental issues and social monitoring.

The *ronda* in Peru is a key social institution in many respects, but it is particularly important to consider in the current context of contested claims to indigeneity in the country. There have been multiple national laws regulating the *ronda*, as well as constitutional recognition, and the law currently in effect, the *Ley de Rondas Campesinas* (27908), dating to 2003, states clearly that any rights accorded to indigenous peoples apply to *rondas* as well. In Article 1, it states (author translation), "The rights recognized for indigenous peoples and

campesino and native communities apply to Rondas Campesinas as far as what may correspond to or favor them." According to national legal standards, this means that indigenous rights in the constitution and ILO 169 apply to *rondas* (Merino 2006). A *ronda* must be officially registered with the state to receive legal recognition as far as these rights may apply, but once registered the extension of indigenous rights should be straightforward. No one would state that a *ronda* is the same thing as an indigenous (*campesino* or native) community, and indeed most *rondas* are based in and around these communities as separate entities, but as far as the opportunity to claim legal rights in a formal institutional setting, a *ronda* can clearly qualify. (For more on the *rondas*, see Starn 1999).

To add to the already considerable complexity and confusion regarding terms, in the 1990s and 2000s, some people, notably first lady Elianne Karp, began pushing for use of the term *pueblos originarios*, or original peoples (roughly equivalent to the term "First Nations" in Canada.) This extraordinary fragmentation of indigenous identity and nomenclature in Peru is partly an outgrowth of geographic factors (Amazonian communities and Andean communities were long effectively separated by the long distances and difficult terrain separating them, and developed quite differently in cultural and linguistic terms), but also a product of recent history. Until 1970 (Paredes 2009), it was more common than it is today to be known as indigenous. June 24 was the national Day of the Indian. Then President Juan Francisco Velasco, the left-wing general who was leading a process of agrarian reform, sought to change both the concept and the name, to Day of the Peasant ("*Campesino*.") This move was intended to include indigenous peoples in the national project, and to emphasize the viewpoint that their difficulties stemmed from economic, rather than racial, oppression. As one indigenous rights advocate put

it, “Velasco said, ‘Lift yourself up, Indian, you’re a peasant!,’ changing the image from ‘savage’ to ‘people’” (Landeo 2009). The wisdom of this approach is debatable and debated, but certainly one effect was to further complicate the vocabulary pertaining to identity in Peru. Little consensus developed around the question of the differences, if any, between indigenous, peasant, native, and so forth.

These distinctions are beginning to blur and crumble, in the eyes of many, partly due to the growing global implications of being recognized as “indigenous”. The term has often been seen as an insult in Peru (Paredes 2009), but this too has greatly changed recently. As an environmental activist in Ayabaca put it (MH 2010), *pueblos originarios*, *campesino* communities, and indigenous peoples are all pretty much the same. Even if peoples in the north of the country have lost their language [meaning Quechua], they still have indigenous blood, and many of their particular customs. The ILO has tended to agree. In a report examining Peru’s compliance with the Convention, the authors state, “[t]he Committee reiterates that the concept of ‘indigenous peoples’ is broader than that of the communities to which such peoples belong and that, whatever such communities are called, it is irrelevant for the purposes of the application of the Convention, as long as "native", "rural" or other communities are covered by Article 1(1)(a) or (b), of the Convention. Therefore the provisions of the Convention should be applied to all of them equally” (ILO 2009). But no matter how people in various sorts of communities see or label themselves, or what the ILO may opine, the Peruvian government has, under current president Humala and previous regimes as well, tried hard to minimize the number of people and communities who may classify as “indigenous” and therefore qualify for special (and perhaps inconvenient) legal protections. The national government of Peru has steadfastly tried to limit

indigenous rights to Amazonian communities, dismissing other claims to indigeneity as opportunistic and inadmissible.

A few years after the administration of General Velasco and the process of agrarian reform, Peru entered its own period of lethal armed internal conflict, generally dated to 1980-2000. The conflict, which left nearly 70,000 dead, according to the report of the Truth and Reconciliation Commission, (more than all who had died in all wars since national independence) differed in some important ways from the conflict in Guatemala. As in the Guatemalan civil war, the Peruvian conflict featured massacres and numerous other human rights abuses committed both by military and paramilitary forces and by rebel groups, chiefly Shining Path. Unlike in Guatemala, however, the guerrillas were determined to have committed a substantial share of the killings, just more than half, according to the Commission's report. This fact is exceptional among comparable contemporaneous conflicts in Latin America. Certainly government forces and their allies were responsible for a significant share of extrajudicial deaths in the conflict, but in the judgment of the (generally credible) Commission, their share was smaller than that of the rebels. Peru shared in common with Guatemala, however, a conflict in which indigenous peoples suffered and died disproportionately. The Commission found that 75% of the victims spoke primarily Quechua or another native language, compared to the 16% of the general Peruvian population. As noted, this statistic does not include all who may be considered "indigenous" in Peru, some of whom speak primarily or only Spanish. Unquestionably, overall populations that were already marginalized and disadvantaged (poor people and peasants as well as non-Spanish speakers) suffered the brunt of the violence of the conflict. Peru's conflict is not typically discussed in terms of genocide, as the Guatemalan

conflict is, but the conflict clearly harmed ethnic and other minorities more than the dominant population. In 1994, while the massacres of indigenous communities and others were still ongoing, Peru ratified ILO Convention 169.

Since the conclusion of the official period of civil conflict in Peru, several important developments have taken place regarding indigenous rights in the country. One is the formation of CONACAMI, the National Confederation of Communities Affected by Mining (Confederación Nacional de Comunidades Afectadas por la Minería). While its name refers to mining and not to any ethnic concern, CONACAMI has developed into one of the major indigenous rights organizations in Peru, while still retaining a focus on mining issues. Mirroring the fractured nature of indigeneity in Peru, unlike in some countries there is no one indigenous organization that is truly nation-wide in scope. In 1997, leaders of different groups attempted for the first time to unite all indigenous peoples in the country, bringing together Andean and Amazonian organizations to a pan-indigenous organization known as COPPIP, the Permanent Coordinator of the Indigenous Peoples of Peru (la Coordinadora Permanente de los Pueblos Indígenas del Perú). Vittor (2009: 198) notes that "COPPIP started a stage in which the term indigenous stopped being exclusively Amazonian and became an issue on the national political agenda." The group dissolved over internal tensions, however. Shortly after the establishment of COPPIP, CONACAMI was founded, in 1999. It had its origins in CooperAcción (the organization where I was based in Lima), and was supported since its inception by Oxfam America (CONACAMI 2009a). It was not an attempt to replace COPPIP; CONACAMI was at first organized around environmental issues and the idea of just compensation for land (Vittor 2009: 199-200). From the beginning it was understood that mining and other environmental

issues were tied strongly to ethnic identity: “The foundational congress (1999) was marked by the strong presence of quechua communities and its conclusions referred to instruments like ILO Convention 169, especially to the right to consultation, although we deduced that the indigenous identity was not a visible factor of articulation for the communities around Conacami” (Vittor 2009: 205). However, CONACAMI began to assume an indigenous identity and orientation, largely through connections to groups in other countries (Vittor 2009: 207). At its second Congress in 2003, CONACAMI more formally took an organization turn towards indigenous issues. It hardly abandoned mining, but more heavily began to promote activism around it through the framework of indigeneity, and became de facto one of Peru’s most important indigenous rights organizations (though still hardly the only one). For more on CONACAMI, see analysis of the organization’s role in specific conflicts in subsequent chapters.

A second major development pertaining to indigenous mobilization post-civil conflict was the 2009 massacre at Bagua. Native populations in northern Peru, had been speaking out about oil concessions on their lands, in Amazonas region, bordering Cajamarca (location of the Yanacocha mine featured in Chapter 3.) The opposition was led in large part by AIDESEP, the Spanish initials for the Inter-ethnic Association for Development in the Jungle. Bowing to demands of a trade agreement with the United States, President Alan Garcia’s administration passed laws allowing for easier access of oil companies to the Amazon, sparking months of protest. Communities in Bagua province set up roadblocks, incurring the anger of the United States government. According to cables released by Wikileaks, the State Department was advocating for the forceful removal of the roadblocks days before things came to a head. It sent a cable to Peru warning, “Should Congress and President Garcia give in to the pressure, there

would be implications for the recently implemented Peru-US Free Trade Agreement" (de Echave and Wallach 2014). President García was apparently persuaded. In June 2009, he declared a state of emergency in the province, suspending civil liberties and sending in the military to quell the unrest. The result was deadly violence. In the confrontation between police and protesters at a road known as the Devil's Curve, dozens of indigenous residents died, and almost as many police officers. More than 100 protesters were wounded as well. The laws that had sparked the protests were repealed, but a sense of shock remained. Few had expected the conflict to rise to this level. Bagua is located in a region that is not particularly well-known or prominent in the country, and suddenly everyone was talking about it and the fact that indigenous peoples lived there. The sadness and shock were in good measure responsible for the passage of Peru's consultation law a few years later (see chapter 6). People became very motivated to avoid another Bagua, stated a consultation expert in the Ombudsman's office (Abanto 2009). As one commentator noted, the events in Bagua awoke solidarity; "we are all indigenous" became a common phrase (CONACAMI 2009a). Post-Bagua, consultation and indigenous rights are "in fashion," stated a Peruvian human rights lawyer (Pérez 2010).

Just as the social conditions that gave rise to Guatemala's civil war did not start nor end with the war, the end of the civil conflict in Peru did not abolish the conditions that shaped it. The same people are affected by the problems of the day, this human rights lawyer sighed. Before it was Shining Path, and now it's mining—[persecution by] the police, mercury, rivers disappearing. It's as if, she said, nothing had changed in the country.

Implications of ethnically-based violence for the right to consultation

In both Guatemala and Peru, the mass deaths and decades of terror and suspicion left a legacy of trauma in many senses, and one of the most significant of these was the association, in the collective imagination and political discourse, of leftist political activity and terrorism. Guatemala ratified ILO Convention 169 around the time that the national era of state-sponsored terror was officially over, and Peru before the close of the conflict, meaning that the right to consultation became legally enshrined at a time of great national sensitivity to perceived radical political discourses and action. Just as the regional trend became for national laws to be loosened in order to attract and facilitate significantly greater levels of multinational investment in extractives, it also became more difficult for affected populations to voice certain kinds of criticisms or propose certain kinds of reforms. Since the political space for vigorous disruptive protests calling out broadly exploitative macro-dynamics had drastically narrowed, critics of mines and other projects came increasingly to frame their dissatisfactions in terms that would be palatable for national and international audiences, like health and safety. In this environment, consultation, because it seemed to be an inoffensive procedural standard, highly unlikely to delay or prevent a project or have any kind of far-reaching implications, emerged as an acceptable standard to call for.

The norm of Participation

In the decades before the passage of ILO 169, the concept of "participation" as a key part of democratic experience was catching hold in many countries, and in important ways the value placed on participation was a forerunner of the idea of the right to consultation, even if the

particular term was not always used. According to the International Institute for Democracy and Electoral Assistance, Switzerland was the first country to introduce the citizens' initiative. Other countries have followed suit, in national laws or constitutions, sometimes adopting the practice after a period of dictatorial regimes. "As in many US states after the 1890s," the Institute Handbook notes (2008: 64), "these instruments were intended to curb the misuse of representative institutions by powerful business interests." The focus on participation was sometimes even phrased as a preference for "consultation," even if the term did not have all of the meanings it came to take on after the passage of ILO 169. National Park Service guidelines stated that "[c]onsultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information." "In 1994, a Clinton administration memo outlines principles for government relations with tribes, including the injunction to "[c]onsult, to the greatest extent practicable, with tribes prior to taking actions that affect tribes. These consultations must be open and candid so that all interested parties may determine the potential impact of proposed actions." The memo notes that "[w]hile these terms do not have standardized definitions and mean different things to different people…in Indian country, consultation is a distinct concept." In the same year, the US Bureau of Land Management issued General Procedural Guidance for Native American Consultation. In 2000, the National Environmental Justice Advisory Council/Indigenous Peoples Subcommittee, a federal advisory committee to the US EPA, published a "Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision

Making." The guide (2000: 5) makes some attempt to define consultation, asserting that it consists of more than conventional public participation (like information sharing) and should find consensus. Even in the United States, a country that is not currently thought of as anything like a leader in indigenous rights on the global context, there have been substantial efforts to promote and define consultation, and even legal cases based on it. In a 1979 case (Oglala), a court ruled that the failure of a federal agency to follow consultation guidelines violated trust obligations to the tribe in question.

The growing vogue for participation was sometimes general and sometimes specifically linked to the idea of indigeneity. Speaking in 1992, an anthropologist at the World Bank mused that "[p]erhaps one of the major lessons of the past decade is the recognition on the part of international development agencies that indigenous peoples need to be provided with the enabling conditions, technical skills and financial resources to participate actively in the planning and implementation of their own development." (Cited in Rodríguez-Piñero 2005: 320.) This shift in thinking about indigenous development mirrored a broader trend toward more "participatory development," as the professional development community began to realize that projects imposed on communities from above were frequently unwanted by or unhelpful to the community they purportedly benefited. Szablowski argues that the recognition of the faults of "expert-led development" led to a "participation explosion." (Szablowski 2007: 123) Pring and Noé attribute this "explosion," in part, to global democratization trends, and the "international legal paradigm of 'sustainable development,' of which public participation is a central tenet." (Pring and Noé 2002: 13) If local people have no input into or involvement with a project, the

reasoning goes, then that project is likely to be clumsily out-of-step with particular local conditions, which are unknowable from the remove of central development planners.

In Peru specifically, the meaning of participation has shifted substantially over the years, now seemingly meaning less than it once did rather than more, at least in terms of the generic term of participation. At at least some points in the past decades in Peru, Stokes (1995:72) argues that the term had a robust meaning, even a central one for political struggle:

> "The notion that a state, although basically hostile to the poor, can be forced into greater evenhandedness through community activism is linked to the idea of participation, a key concept for radicals. It was so encompassing an idea that we can speak of an ideology participation in Lima's shantytowns. The prevalence of the word participation in local political discourse again links the radical political subculture to the Velasco period, when the term gained currency: the Velasco regime defined its method as a 'Revolution of Full Participation.'"

Radicals linked participation to changing your attitude and questioning authority, Stokes (79) explains; it meant seeing your problems not as isolated but as linked to broader contexts. In the Peruvian context specifically, then, participation was understood by many to be a profoundly political concept, quite capable of being radical and subversive.

However, in more recent times, Li (2009) argues that, ironically, *not* participating is now often cast as undemocratic. Campesinos, she notes, are often dismissed as uninformed and unscientific, in comparison with the learned "experts" who often demand their "participation". "In communities affected by mining activity in Peru," Li states, "people often feel that the very processes that elicit their participation actually disempower and exclude them." Thus, while "participation" has been developing for many decades, in Peru, the United States, and elsewhere,

as a key norm of democratic governance, the term and concept are deeply contested, and shift over time and according to the person using the word. Elites promoting participation often view it as a way to defuse tension and avoid resistance to their plans, while looking suitably inclusive, while people struggling against elite interests often agitate for what they view as real "participation" while simultaneously chafing against the efforts of elites to extract their passive consent to projects while labelling this process with the same word.

A changing context for Extractive Industries

Part of the context for the development of the right to consultation is tied to the changing global role for extractive industries (a term that typically includes mining as well as oil and gas projects.) Production is up, and non-specialist interest in the sector (on the part of NGOs, residents affected by extraction, and others) has also increased dramatically in the past decades. At the same time, state regulation for extractive industry has overall decreased over the past quarter century. This complex changing scenario has led to greater public scrutiny of the sector, and, in many countries in Latin America and elsewhere, an increase in voluntary initiatives and so-called self-regulation on the part of companies, as state oversight has been cut back.

The mining "boom" over the past quarter century correlates with rising mineral prices. After falling to their lowest prices in decades over the 1980s and early 90s, prices began to rebound, going through an especially rapid increase between about 2002 and 2010. According to Zarsky and Stanley (2011), this is particularly true of gold, though silver follows much the same

pattern and global mineral prices generally have followed this trend. Gold is distinctive economically in large part due to its cultural meanings. Zarsky and Stanley note (2011: 17):

> The ballooning price of gold is driven by surging global demand. In 2010, world demand for gold increased by 9 percent over the previous year, its highest level—in both tonnage and value--in ten years…The growing global demand is fuelled by a confluence of two major economic trends: rapid growth in incomes as a result of fast-growing emerging market economies, especially China and India; and global economic recession and financial instability. Both trends promote growing expenditure on gold jewelry and investment in gold bars and coins as a store of value, including by Central Banks. In 2010, jewelry accounted for 54 percent of global gold demand and investment for 35 percent. Electronics and other industrial uses accounted for around 10 percent and dentistry for 1 percent.

As the fantastic rise in prices enticed gold and other mining companies, world gold production increased significantly since the slump of the 80s. The modern "gold rush" stems not only from corporate demand, but also from the perceived need on the part of states to drum up additional revenue flows. As Latin American countries find themselves faced with a high debt burden and decreasing income from the agricultural sector, they have sought to profit more from the extractive sectors of oil, mining and gas. Whether or not a country ultimately benefits from such deposits is itself questionable; the resource curse has been well-documented. (See, for example, Karl 1999.) In many cases, states have given mining companies and other extractive endeavors such extensive tax breaks and other financial incentives that the "sweetheart deals" make it questionable how much states are netting from the activity on their soil, even aside from the questions of how the taxes are distributed and how the profits affect the political terrain. Nonetheless, Peru, Guatemala, and most other states in the region have invited extractive

investment over the past generation, and multinational corporations have been only too happy to oblige.

As mines in South Africa, a traditional gold powerhouse, began to be tapped out, companies sought out other markets, and Latin America's share of gold production rose (Zarsky and Stanley 2011: 17). From 1990 to 2007, mining exploration grew by 90% in the world generally, by 400% in Latin America, and by 2000% in Peru (Bebbington et al 2007). Both the ever-ballooning consumer hunger for gold and new technologies for extracting it pushed mining companies into areas previously considered inaccessible or not worth the effort.

These increases have not affected all populations equally. In Peru, "[o]ver half of the country's formally constituted peasant communities are influenced…in one way or another by mining" (Bebbington 2007: 3). Many of the petroleum, gas and mineral deposits from which Latin American states hope to benefit lie in lands that have traditionally belonged to indigenous communities, with or without a formal title (Jimeno Santoyo 2002). Within the Peruvian context specifically, the increasing prevalence of mining affected *campesino* communities in particular, as they are the type of community more typically found in the Andean region of the country, the mountains, where mineral resources naturally occur. Oil and gas projects have more commonly affected native ("*nativas*") populations in the Amazonian region, where those resources tend to be clustered. Changes in the global economy and in technology thus intensified the gold rush (and hunt for other minerals) in Latin America and resulted in ever-greater proximity of global mining corporations and indigenous communities. In some cases this development went unremarked, viewed as a simple consequence of the location of desirable natural resources. In

other cases, people have sought to justify the encroachment on indigenous lands by arguing that developing the resources on them will be good for the communities. Past Peruvian president Alan García, in a notable statement on The Manger Dog (*El Perro del Hortelano*), a fabled figure defined by its unwillingness to eat or let others eat, offered a version of this theory, writing: "There exist true campesino communities, but also artificial communities that have 200,000 hectares on paper but only agriculturally use 10,000 hectares and the others are vacant property, 'dead hand' land, while the inhabitants live in extreme poverty, waiting for the State to take them every kind of help instead of making use of their own mountains and lands." Out of both a desire for export revenue boosters and an ideological commitment to a certain kind of development, leaders in Peru, Guatemala and neighboring countries started to implement more liberal economic regimes, allowing mining and other extractive industry to come in more easily than ever before.

Meanwhile, in the 1990s, states seeking foreign direct investment (FDI) in the extractive sectors engaged in a massive and systematic overhaul of their regulatory policies governing extractive industries, especially the mining sector (Albavera et al 2001). Peru's neoliberal turn took hold in earnest with the beginning of Fujimori's dictatorial regime. In 1991 DS 653, the law for Promotion of Investment in the Agrarian Sector, replaced the Agrarian Reform law from the Velasco regime, which had sought to divide up territory more equally among Peru's people. The new law stated that allegedly barren or unused lands belong to the state, as opposed to the *campesino* communities recognized as the owners by other laws (Castillo et al 2007: 76). 1995 saw the passage of laws that further deepened the process of economic liberalization in Peru, with the Lands law, 26505, and the Law for Promotion of Investment in Economic Activities on

the lands of the National Territory and of the Campesino and Native Communities. These ratified the constitutional prohibition on foreign ownership of lands within 50 km. of the national border and opened the possibility of individual land ownership in the middle of *campesino* community lands. (Castillo et al 2007: 72) The Lands law (*Ley de Tierras*) required mining companies to reach agreement with land owners before initiating mining activity (a provision that theoretically affects indigenous individuals or communities with official rights to their territories), but the companies quickly got around this burden with the passage the following year of a law (26570) allowing easements (*servidumbre*) for companies hoping to mine on lands belonging to owners reluctant to offer up their property for that purpose. This legal loophole allows companies to get rights to use land despite any community opposition, without drawing the scrutiny of formal expropriation (Christian Aid 2005: 8). Land rights are also weakened in Peru by the fact that even when an individual or a community has a formal title for property, that person or group has no right to the "subsoil" resources. Thus even with formal ownership Peruvians do not have rights to minerals or other commodities under their own lands. This arrangement is common; in only a handful of countries worldwide, typically those with a common law system, are subsoil rights recognized (Alayza 2007: 102). The liberalizing period in Peru in the 1990s also saw several actions to weaken Peru's environmental regulatory burden, allowing companies to submit fewer environmental impact assessments than previously (Christian Aid 2005: 8). On one occasion when I was waiting in the lobby of the Peruvian Mining and Energy Ministry for an interview to start, I struck up a conversation with a man who was waiting nearby. Since he worked for a mining company, I asked if, perhaps, he was visiting the Ministry to obtain permits. He was puzzled by my question. "Permits?" he asked. "No, we

do not have permits here. Perhaps in your country." There is certainly paperwork associated with the mining industry in Peru, but his comment pointed to the low profile role the national regulatory regime plays.

Guatemala went through a series of similar legal and regulatory shifts, described in greater detail in Chapter 5. All of these changes were intended to facilitate foreign investment, in particular in the extractive sector. As José Luis López (2010), the leader of a Peruvian mining dialogue group put it, "the market does not like the word 'stop'."

Alongside these changes, at least partially in response to them, there was a growing demand and expectation for scrutiny of extractive industries through means other than traditional state regulation. These have included voluntary actions, at the level of individual companies or of whole sectors, and also attempts at oversight emanating from nonprofits or other non-state bodies. At the individual corporate level, many mining companies initiated corporate social responsibility (CSR) programs, a broad term encompassing voluntary attempts to behave as good corporate citizens. This might take the form of a donation to a community affected by a mine of a new school building or hospital. CSR is notable as a common and frequently touted way of responding to a regulatory gap, but has also been roundly criticized for being inadequate to take the place of actual state regulation or action. Bebbington (2007) argues that CSR helps build up dependence of mining companies, at the center of community life, and can in effect create a "modernized hacienda," with the mining (or other) corporation in broad control. For more on how this dynamic can play out, see chapter 4.

Companies also rushed to burnish their image by signing up for voluntary agreements to honor social, environmental, or economic standards. These voluntary commitments have no formal or legal consequences if not upheld, but do provide the potential for a company to be publicly shamed if activists are aware of the failure to honor stated commitments and able to publicize the fact effectively. One example of this sort of agreement is the Global Reporting Initiative (GRI), a non-governmental network that encourages participating corporations to report publicly not just on their finances, but on their performance as far as their environmental, economic and social influence on the communities they touch. There are many other such organizations that companies can choose to take part in. Overall, this trend toward voluntary self-regulation, as inadequate or self-serving as it may be, speaks to a developing global public reaction to extractive industry companies over the past generation. There is an ever-strengthening sense that the diminished state capacity and willingness to regulate has left an unacceptable void; a sense that corporate action should be accountable to ordinary citizens; and a sense that it is up to communities and interested nonprofit groups to be industry watchdogs where governments refuse to play the part.

Part of this urge for public scrutiny of extractive industries has extended to the World Bank and other major lending institutions, which are often significant funders of extractive projects, in the name of development. The Bank Information Center is a nonprofit watchdog group, for example, that follows and highlights the role of major lending institutions in funding contested projects. As more and more controversial extractive projects underwritten by the World Bank and other institutions became known publicly and globally, a movement got underway to demand that the Bank cease funding these types of projects altogether. The charge

was that they were too often contributing to social disruption, environmental harm, and actual worsening of poverty, rather than the positive developmental goals the World Bank is supposed to promote. Faced with substantial public pressure over mining and other extractive projects, the Bank commissioned an independent review of its own role in funding extractive industry development projects. The Extractive Industries Review, which published its final report in 2003, set out to answer two fundamental questions: "Can extractive industries be a vehicle for poverty alleviation through sustainable development and, if so, is there a role for the World Bank Group to play to achieve this aim?" Ultimately, the authors answered both questions in the affirmative, but argued strongly that several major conditions had to be met for the bank to justify investing in extractive industries. Governance, human rights, and social and environmental sustainability all must be respected before the bank could hope to support extractive projects that made a positive contribution to development. Under the status quo, the report asserted frankly, the Bank's support for extractive industries had failed to reduce poverty. The World Bank responded by acknowledging that some particular projects it had funded may have fallen short, but elected to continue funding extractive industry projects in the name of development, with more caution and sensitivity going forward. This intensely followed process and report illustrate the frequent dynamic of the past generation of public scrutiny of extractive industries in an increasing relative vacuum of state regulation: intense citizen interest in dubious development outcomes associated with extraction leads to public participation in discussions of the role of the sector, without prompting a major change in policy, at the level of the state, the corporation or a financial institution. The increasingly common clashes between multinational corporations and indigenous communities took place in what David Szablowski calls the

"selective absence of states" (Szablowski 2007: 27). A discontent with this absence and a desire for greater citizen control over extractive projects helped pave the way for community consultation; people were hungry for a way to have an actual voice in decisions that fundamentally affected them, if their states were not going to play the role they believed was needed.

Resurgent Indigenous Movement

ILO 169 and the right to consultation might never have come about in anything like their current forms if not for the context of a global indigenous movement that was bringing certain issues to a prominence they had not enjoyed for some time. The dynamics of indigenous mobilization are distinct in important ways from country to country, and within countries, but they have developed against the backdrop of a greater context of the resurgence of the global indigenous movement. Starting in the 1970s, a worldwide indigenous rights movement arose, asserting the collective indigenous right to autonomy and self-determination. The movement has sought, variously, recognition for indigenous languages, culturally appropriate education, and rights to communally held lands, among other things. Indigenous communities have forged links across borders with each other and with international NGOs that champion their causes. Rodríguez-Garavito and Arenas argue that "the rise of the transnational indigenous movement is explicitly rooted in a reaction against the expansion of the frontiers of predatory forms of global capitalism into new territories…and economic activities." (Rodríguez-Garavito and Arenas 2005: 242). Without the knowledge shared within the transnational movement and the collective push

for legitimation of indigenous concerns, individual national-level movements could not have achieved as much as they did. García and Lucero (2004: 169) highlight the positive role for indigenous peoples in Peru in the post-Shining Path era enabled in part by "the stunning advances that indigenous peoples had made in placing indigenous concerns on the agendas of bodies like the United Nations and in the programs of national and multilateral development agencies." The UN declared a Year of Indigenous Peoples and subsequently declared an Indigenous Decade, 1995-2005, and created a Special Rapporteur position for indigenous issues. Major international organizations and institutions began to take up the issue of indigenous rights in the 1990s, often referencing ILO 169 explicitly. "The ILO standards have been incorporated in guidelines of international financial institutions, national development assistance policies, and government negotiations with indigenous rebels in Mexico and Guatemala," according to Brysk. (2000: 126) In several cases organizations have adopted a newfound concern for indigenous issues into their work, sometimes in direct response to ILO 169. Brysk notes that the World Wildlife Fund, a major conservation organization which did not originally include indigenous issues in its mission or core work, "has evolved in response to both pressure and consciousness-raising," in 1995 adopting "a set of guidelines pledging partnership with indigenous community organizations and citing ILO 169" (Brysk 2000: 230). ILO 169 became itself part of the worldwide resurgence of the indigenous movement, and a catalyst in deepening and perpetuating it, but the Convention might not have ever come about, or become important, without the demands for action emerging from a global network of actors.

Convention 169 of the International Labor Organization

Amidst all of these processes, the International Labor Organization (ILO) was undergoing its own evolution in connection with protections for indigenous communities. It is not intuitively obvious that the institutional home for the world's main treaty on indigenous peoples should be the ILO, which is principally concerned with labor issues, as its name would suggest, but the organization has a decades-long history of engaging with them as vulnerable populations, and this engagement would one day turn into the unexpected source of a politically important right few had thought to name previously. In various older (less politically significant or well-known) treaties, the ILO has extended protections for indigenous workers and other vulnerable indigenous populations. The United Nations eventually requested that the ILO address indigenous concerns as a coherent whole; the result was a more far-reaching convention. In 1957 it approved Convention 107, the Indigenous and Tribal Populations Convention. This treaty, which addresses indigenous issues broadly and attempts to be systematic, was the first global convention to lay out in treaty form states' obligations to indigenous populations. In that sense it could be viewed as an advance for indigenous rights. In keeping with the dominant developmental discourses of the time, however, Convention 107 promoted an idea of modernism predicated on the eventual disappearance of the indigenous "populations" it ostensibly sought to protect, in the form of their inevitable absorption into the greater mainstream societies surrounding them. This treaty was intended to protect indigenous people as they became integrated into the larger population, an endpoint assumed to be positive as well as assured.

As norms around development and indigeneity began to shift, however, Convention 107, which had attracted over two dozen state signatories, widely began to be seen as outdated and inappropriate, particularly in its orientation of integration. These changing norms coincided with the resurgence of the global indigenous movement. Speaking of ILO 169's predecessors, Rodríguez-Piñero notes that, "Rapidly forgotten within an organization in which indigenous issues were peripheral to areas of institution interest and technical expertise, these instruments would surely have fallen into oblivion had they not been 'rediscovered' in the context of the emergence of the indigenous rights movements of the early 1970s" (Rodríguez-Piñero 2005: 9). In 1986 the ILO convened a committee of experts, who concluded that "the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world" (International Labor Organization 2015). The consensus view was clear: it was time for a new treaty. In the years following the expert report, the ILO set about gathering input on a new document intended to replace, update and improve Convention 107.

The drafters of the new document agreed that they needed to discard the now discredited paradigm of "assimilation," and that the new treaty should be based on "consultation," "participation," and "respect for identity" (Rodríguez-Piñero 2005: 299). But beyond these broad pillars of seeming agreement, there was little consensus on what overarching vision should replace integration, and the process of creating a new convention became an arena for political conflict over many aspects of the new document. The team creating the new treaty was charged with "the insertion of some provisions requiring an increased level of participation of and consultation with the peoples concerned" (Rodríguez-Piñero 2005: 295). Mild as this task might have seemed at face value, a major battle ensued over whether the new treaty ought to enshrine

the right of indigenous communities to offer or refuse their "consent" for a proposed intervention that might affect them, or merely the right to experience a "consultation." The standard of consent was assumed to be a higher, stricter one, while the standard of consultation was seen by many as something of a copout or a letdown. "The latter was dismissed by many as meaningless, a license to ignore the will of the indigenous and tribal peoples after *pro forma* consultations," according to Swepston (1990: 690; italics in the original.) Even at this stage, then, the concept of consultation was the subject of intense political disagreement. The debates over the language of the new treaty took place "in a climate of severe conflict, struggle for understanding, and offstage maneuvering" (Swepston, cited in Rodríguez-Piñero 2005: 300). The final product was inevitably a compromise document, establishing standards that many advocates for indigenous rights deemed weaker than what they had sought or than what was needed. The new treaty, intended to replace ILO Convention 107, became ILO Convention 169, the Indigenous and Tribal Peoples Convention. ILO 169 ultimately settled on the language of the right to consultation, discarding the language of consent as a general standard.

ILO 169 was approved in 1989 and entered into force in 1991. Convention 169, like its predecessor, takes a broad and comprehensive approach to protecting indigenous rights, addressing a wide array of aspects of indigenous life. At its core the treaty emphasizes recognition and respect for indigenous communities (now recognized as "peoples," in an important shift from the previous language of "populations"), their distinctive and communal ways of life, and their right to self-determination. In many quarters the convention was greeted enthusiastically, understood as a watershed event and a historic accomplishment. Rodríguez-Piñero argues that ILO 169 has "a central position in the contemporary defence of

indigenous peoples' rights at the international and domestic levels…" (Rodríguez-Piñero 2005: 3) Rodríguez-Garavito and Arenas label it a "key instrument" and note that "the convention has marked the turn of international law away from assimilationist views and provided a blueprint for legal reform and adjudication in favor of indigenous rights in Latin America and elsewhere" (Rodríguez-Garavito and Arenas 2005: 247). Sargent questions whether the Convention represents "real rights" or merely "rhetoric," but ultimately concludes that it has an important, and positive, role to play in the protection of indigenous rights. To date nearly two dozen countries have ratified it, principally in Latin America, including Peru and Guatemala. Signatory states which had previously ratified Convention 107 were automatically released from the old treaty, although ILO 107 is still in force for countries that ratified it but have not yet ratified ILO 169. The Convention addresses everything from labor conditions to vocational training to handicrafts, as well as broad themes of development, but by far the most politically and legally salient provisions as the treaty has been interpreted and reacted to have revolved around consultation.

ILO 169 has multiple components that refer to a requirement for consultation in the event of a proposed project or law that would affect indigenous communities. Article 6 states that "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." Article 15 requires signatory states to "establish or maintain procedures through which they shall consult these peoples…before undertaking or permitting any programmes for the exploration or exploitation of…resources pertaining to their lands." The disappointment of indigenous rights advocates was understandable; not only was the suggested language of consent abandoned, but

the convention does very little to give a robust character to the standard of consultation that it does use. Beyond the provisions quoted above which lay out the requirement for consultation, there is essentially nothing else in the Convention which directly helps to support the right. ILO 169 in no way ever defines a consultation, or detail any sort of mechanism for carrying one out. From the language of the treaty, it is impossible to know whether or not a particular action or process would satisfy the requirement for consultation or not. In "most respects," Swepston reports, "Convention No. 169 sets out basic obligations, leaving the means of action to each national government, subject to supervision of the implementation of the Convention" (1990: 690). Thus ILO 169 created a legal right in signatory states to consultation, but gave the right no specific meaning. Encountering the term in the convention at the time it was first promulgated, one might easily dismiss it as a throw-away line.

Legal and Institutional responses to ILO 169 and consultation

Reactions to the new treaty and the specific requirement for consultation proceeded along multiple paths. In the formal sphere, the inclusion of the term in ILO 169 helped spur the development of a legal and institutional architecture that further ensconced the term and the right. Many institutions adopted ILO 169 as their main guidance on indigenous issues, incorporating it into official guidelines, and consultation in particular developed an institutional vogue. Major international organizations and institutions began to take up the issue of indigenous rights in the 1990s, often referencing ILO 169 explicitly. "The ILO standards have been incorporated in guidelines of international financial institutions, national development

assistance policies, and government negotiations with indigenous rebels in Mexico and Guatemala," according to Brysk. (2000: 126) International institutions from the United Nations to the World Bank have publicly upheld the standard of consultation in the years following the adoption of ILO 169. Rodríguez-Piñero notes the influence the Convention has had:

> International financial and development institutions and organizations, from the World Bank to the Asian Development Bank and the Inter-American Development Bank, from the European Commission to the UNDP, have implicitly or explicitly endorsed the convention's standards in defining their own policy guidelines. Political bodies worldwide…have called for its ratification. International human rights bodies, from the UN Human Rights Commission to the Permanent Forum on Indigenous Issues, to the Inter-American Court and Commission on Human Rights, have used Convention No 169 as a reflection of a universal consensus on the rights of indigenous peoples…(Rodríguez-Piñero 329-30)

In September 2007, after more than a decade of deliberations, the United Nations issued a Declaration on the Rights of Indigenous Peoples, which in both philosophical and discursive terms shares much in common with ILO 169. The UN Declaration holds that "[s]tates 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." (United Nations 2007, Article 32(2).) The Declaration contains similar language on consultation concerning legislative or administrative measures affecting indigenous peoples. The draft Inter-American Declaration on Indigenous Rights, with the exception of dropping the language of "good faith" found in the Convention, "replaces verbatim Article 15(2) of ILO 169 requiring states to consult indigenous peoples where it owns mineral or subsoil resources" (Sargent 1998:

491). (This Declaration was finally approved in 2016, after years of debate.) Influential international financial institutions also endorse the standard of consultation. World Bank policies on indigenous peoples highlight a requirement of consultation. The 2005 policy on Indigenous Peoples states:

> The Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples' communities have provided their broad support to the project. The Bank pays particular attention to the social assessment and to the record and outcome of the free, prior, and informed consultation with the affected Indigenous Peoples' communities as a basis for ascertaining whether there is such support. The Bank does not proceed further with project processing if it is unable to ascertain that such support exists. (World Bank 2005)

The World Bank is frequently criticized for lax enforcement of its own social and other policies (some of these criticisms are discussed in subsequent chapters), but on at least a few occasions it has shown the willingness to act concretely on them. "Significantly, the World Bank has conditioned a financial aid package set for Nicaragua on the development by the government of a specific plan to demarcate the traditional lands of the Miskito and Mayagna communities," Anaya and Williams note. (2001: 38) "This was the first time that the World Bank had placed such a condition on an aid package." The influence of Bank policies is magnified by the so-called "Equator Banks," including dozens of major international institutions, have committed to adhering to policies based on the social and environmental "safeguard" policies of the World Bank, including consultation. The Inter-American Development Bank exhibits a similar discursive commitment to consultation. In 2005 it published a document on "Indigenous

Development" that referred to "consultation" 126 times in its 28 pages (Inter-American Development Bank 2005). Its indigenous policy makes extensive references to the need for consultation. Multinational corporations (mining companies and others) also sometimes highlight the term "consultation" as a basic standard or expectation. Some mining companies publicly state on their websites that they have taken care to "consult" with the relevant indigenous populations that may be affected by their projects. ILO 169 has no binding effect on corporations, only on state signatories, but the corporate effort nonetheless underscores how important the term has become and how it has become an expectation, legally mandated or not. In the wake of ILO 169, consultation has become established as a norm, sometimes in the context of a specific legal requirement, but often simply as part of institutional or corporate governance.

ILO 169 and above all the right to consultation are increasingly recognized in the formal legal sphere, not just in the context of the ILO itself but in national and international law (for more on these processes in Peru and Guatemala specifically, see Chapter 6). This process has played out in several ways: new national laws, renewed energy to enforce domestic law already on the books, the passage of related domestic legislation, domestic court cases, and court cases and other formal hearings in international venues. Rodríguez-Piñero argues that ILO 169 "became a fundamental point of reference in the process of constitutional change in Latin America." (2005: 326) He maintains that the Convention has had an influence even in countries that are not parties to it: "The convention's notions of 'territory,' 'consultation' and 'participation' infuse the legislation of countries that have not yet ratified the convention."

(Rodríguez-Piñero 2005: 329) Thus the right to consultation has become a legal norm as well as an institutional one in a broad sense, at multiple levels of the legal system.

Convention 169 has played a central role in several legal battles over indigenous lands and development, both in national courts and in the Inter-American system. Both domestic courts and the Inter-American Commission have demonstrated a willingness to take the standards of ILO 169 seriously, holding multiple times that a state has violated its obligations under the Convention. The ILO Committee of Experts, charged with oversight over ILO Conventions, has also on various occasions declared that a member state is in violation of Convention 169. In 2000 in Costa Rica, the Constitutional Court "declared null and void the concession to MKL Exploration Inc [an oil company]….and asked the Government to consult with the indigenous peoples affected in an appropriate manner, in accordance with Convention No. 169. Furthermore, it asked the State to provide compensation for damages." (United Nations 2004) In 1998, the Colombian Constitutional Court ruled that the Embera-Katio people had not been adequately consulted regarding a hydroelectric project, and it issued an injunction pending the completion of a proper consultation procedure. (Rathgeber 2004: 123) Despite a string of pro-indigenous rights court rulings in national courts, however, the state organs responsible for enforcement of these edicts have largely remained reluctant to implement the rulings. Colombia ultimately forged ahead with the hydroelectric dam, ignoring the court-imposed duty to consult with the Embera-Katio people. (Semple 2000)

The right to consultation and indigenous rights more generally in the context of natural resource battles have been invoked multiple times in cases before the Inter-American system

(subsequent chapters explore the role of the Inter-American Court and Commission in major case studies.) In 2001 the Court ruled in the Awas Tingni case the indigenous peoples have collective rights to their land and its resources. In a more recent decision, in 2012 the Court issued a ruling faulting Ecuador for failing to consult with an indigenous community, the Sarayaku people, before granting oil concessions on their ancestral territories. In the 2007 Saramaka decision, the Court held Suriname responsible for failure to consult the tribal community before granting forestry and mining concessions on ancestral lands. In other cases the Inter-American Commission and Court have declined to hear cases in which consultation is at issue, or have reacted with only lukewarm statements instead of robust rulings protecting the right, but there is a sufficient record to establish that the right to consultation is considered relevant, important and legally actionable within the Inter-American system. These cases are part of the evolution of a considerable legal and institutional architecture of support for the right to consultation which has developed largely in response to the passage of ILO 169.

Community Consultation

While many legal and other kinds of institutions committed themselves formally and discursively to the right to consultation, for the most part they left it as undefined as in Convention 169. Many policies stated that there "should" be a right to consultation, and various court cases have chided governments for failure to consult, but these high-minded pronouncements did little to develop the idea of what an actual consultation would look like in the positive, if actually completed. For some time the norm, even as it grew in popularity,

remained nearly content-free. In the official, formal sphere it was typically referred to, when it was fleshed out at all, as a sub-type of participation. Perhaps a series of dialogues would suffice. Workshops or explanatory pamphlets might be involved. Indigenous populations might wish to proffer suggestions about a proposed project, and government officials might take those into account if they were reasonable and practical within the scope of the project. But the right to consultation was, for more than a decade after ILO 169 entered into force, more of an ideal than an actual practice.

This all changed quite unexpectedly in 2002, when the right to consultation came to assume a meaning that few had envisioned, certainly not the drafters of ILO 169. In that year, the people of Tambogrande, Peru, a community in the coastal plain in the northern region of Piura, staged what would become known as the world's first community consultation, on a proposed mining project. One of the more surprising attributes of this development was that the people of Tambogrande are not indigenous. As noted above, indigeneity in Peru is an extraordinarily complex identity, but even allowing for that complexity, the people claiming their right to consultation in this instance simply were not indigenous, nor did they or anyone else claim themselves to be. In many ways the consultation of Tambogrande was an unlikely act to inspire a community consultation movement throughout the region, but events unfolded in that way nonetheless. The people of Tambogrande reacted in their own way to ILO 169 (among other laws and circumstances), just as legal bodies and formal institutions had reacted in theirs.

Tambogrande is the main town in a hot, dusty region that has benefitted enormously from the introduction decades ago of a major irrigation works project. Because of the irrigation,

Tambogrande and the surrounding region have developed nationally noted production of mangoes, limes, and other agricultural products. According to Christian Aid 2005: 30, "[t]he region of Tambogrande boasts 8.2 per cent of Peru's cultivatable land." Thus water, land and a relatively successful economic production model were sensitive issues in the area. In the late 1990s, Manhattan Minerals, a Canadian company, was preparing to begin a major zinc, copper and gold mine in the area. The town sits less than 50 km. from the border with Ecuador, but President Alberto Fujimori passed a public necessity decree allowing an exemption for the project (Christian Aid 2005: 30). According to Eduardo Cherres (2010), a musician/provocateur/self-styled social communicator who lives in Tambogrande and has been active in the struggle against the mine, in 1999, when the issue was first gaining prominence, many people were in favor of the mine. For many the promise of "development," meaning, above all, jobs, seemed irresistible, and in a region that had not seen as much major mining activity as many others in Peru, the potential drawbacks seemed remote or were altogether unknown. Some residents of the region, however, had grave doubts, especially considering the cardinal importance of water and agriculture, which economically sustained the region. A thirsty, disruptive mine could seriously interfere with the principal existing economic backbone of the town and the region.

I wrote songs against mining exploitation, Eduardo told me, as he led me on a brisk-paced walking tour of the town and introduced me to the story and some of his many, many friends. People cried when they heard the songs, he told me, and this was one of the best ways of raising consciousness against Manhattan. Minds began to change, he said, and a front against the mine formed which did consciousness-raising door-to-door. Then, he said, the spill in

Choropampa happened, in which many people in a neighboring region were sickened, some seriously, from a mining company's mercury spill and subsequent failure to deal quickly, honestly or effectively with the accident (for more on this incident, see chapter 3). People in Tambogrande were startled, he said, and began to pay more attention to the mine knocking at their own door. One friend of Eduardo's recalled how one leading opposition voice, Godofredo García Baca, started to give public talks, saying mining and agriculture were not compatible. As one mango grower put the concern to me, "Where would we go? The mine is beneath us."

The front, consisting of Tambogrande residents, coordinated the growing opposition with a technical support roundtable in Lima. Francisco Ojeda, became mayor of Tambogrande in 2002, based in part on his leadership in opposition to the mine. He described a series of workshops that the roundtable and the front put on. It was during these discussions, he told me (Ojeda 2010) that the idea of a consultation emerged. There had been no exercise like it in Peru, and at this time there was no pattern of community consultations elsewhere in Latin America. Tambogrande pioneered the response to a controversial mine. There had been a fear that the results would be pro-mining, but they conducted a focus group, and 60% liked the idea of a consultation (Aroca 2010). Alfredo Rengifo, the mayor at the time, explained (Rengifo 2010) that the idea of consultation came partly from "a good lawyer," one with much experience in municipal law, on which the vote was to be based. We got 28,000 signatures and created the neighbors consultation ("*consulta vecinal*") he told me. According to Javier Aroca, a long-time lawyer for Oxfam America in Lima, Oxfam and FEDEPAZ suggested to the mayor that he pass a law allowing the consultation. The idea posed some legal hurdles. There was no law at the time in Peru implementing ILO 169, though a legal ruling had established the human rights treaties

have constitutional rank, so even without domestic implementing legislation, Convention 169 was binding. Peru's legal system follows the European style, Aroca explained; authorities and judges can interpret the law, at least technically. However, he continued, the legal tradition in Peru sees this authority as insufficient; it a law does not specify a sanction, nothing will be done if it is not followed. So a law is needed that lays out what will happen if the law is not followed, and ILO 169 does not speak to this possibility. But, he said, the Tambogrande consultation followed the constitution, which had established a municipal assembly. The constitution does not contemplate a referendum or a consultation, specifically, but a municipal law at the time allowed for the exercise to proceed. According to exacting legal standards, then, it was possible to legally hold an event styled as a referendum and labelled as a consultation, even if no one was legally obliged to do anything about the results.

So, a consultation it was. But what, precisely, would that entail? The vision was for a proceeding unlike anything discussed to that point by government officials or by the framers of ILO 169. Rather than organizing or demanding that the national government organize dialogue or provide information in some capacity or listen to general feedback, the organizers of what people in Tambogrande decided to name a "consultation" were intent on something utterly distinct: a vote, a referendum, in which residents of Tambogrande would weigh in on the decision, framed as a binary yes or no, of whether they wanted Manhattan Minerals to start mining in their land or not.

Carrying it out was not easy, Mayor Rengifo said. ONPE (the Peruvian national office in charge of election oversight) said that it would help, but then reneged on this offer. It was a

years-long struggle to organize, he recounted. NGOs like Oxfam helped, as well as did the international observers who came. (Transparency International helped as well.) No one could quite predict how everything would play out, but in the end, the people of Tambogrande, or at least the ones who participated in the consultation, voted overwhelmingly against the mine. Celebrations erupted. It was "a civic party," Mayor Rengifo said, ("*una fiesta cívica*"), beautiful and good. The consultation was not binding, he conceded, but it did have "a moral weight, of rights."

Just as no one could predict what would happen in a community consultation, no one could predict the company's response either. Manhattan had been caught rather flat-footed by the intense mobilization against it, and did not prepare as much of a counter-campaign as perhaps it could have. In the wake of this outpouring of public opposition, prominently reported on, the company ultimately withdrew from the project, which as of this writing has never been implemented. The company did not leave because of any sort of legal obligation to leave, but its position and standing had come to seem untenable nonetheless. This move by the company allowed the drama of the Tambogrande consultation to be even more heightened: the story line was irresistible. A plucky band of citizens unearthed a legal provision in municipal law which allowed them to defend their rights, and they did so democratically, legally according to international law, peacefully and honorably, and in the face of this expression, an international mining company was forced to flee. The narrative of community consultation as a response to an unwanted transnational mining project, bolstered by ILO 169, as both feasible and powerful was thus established.

Perhaps the most puzzling aspect of the consultation was why organizers should turn, in part, to ILO 169 in their promotion of the consultation and its legitimacy. The right and the Convention had languished, largely unenforced, for over a decade, and the community of Tambogrande was not indigenous. It certainly included small-scale agriculturalists, but it was and is not a *campesino* community, nor a coastal community thought of as anything connected to the idea of indigeneity (by either members of the community or outsiders). Indeed, according to the Oxfam lawyer who helped with the consultation, organizers actively considered the idea of including the three *campesino* communities in close proximity to the town, but ultimately decided against it. They did not think of themselves as indigenous, he said, though today they would probably say yes. But these communities, which under international law could be considered indigenous, were not part of the consultation, whereas the urbanized non-indigenous community was. Why would a non-indigenous community be the first to invoke ILO 169 and its protection for the right to consultation in legitimating its own creative take on the endeavor? Eduardo, the social communicator and my main guide to Tambogrande, offered a simple explanation: the organizers were casting about for every possible way they could think of to justify the consultation and make it seem more legitimate, he said. When holding a vote you are calling a "consultation," why not invoke the respectability of international law that protects the right by that name, even if said law does not apply in the strictest of senses? This explanation of how ILO 169 and the right to consultation first coincided with an anti-mining struggle make the link between mining and consultation sound almost incidental. Within a few years, however, the model of community consultation had captured the imagination of the continent. (For more on the connections between the Tambogrande consultation and the subsequent community

consultations, in Guatemala, see Chapter 5.) Mobilization around mining and around indigeneity have not always mixed smoothly (for a discussion of the tensions within CONACAMI regarding this dual focus, see Vittor 2009: 211). Paredes (2006) asserts that CONACAMI has pushed a discourse of a mining-indigenous nexus, even though it simply isn't what motivates people. "The indigenous-mining discourse has the problem of being inflexible in assuming that in the populations mobilized around mining there exists a single ethnic identity based on a homogenous conception of territory as ancestral and the campesino community as the relevant authority for the community's organization," Paredes argues. However, whether or not the framework, new to Peru, of resisting mining through reference to indigeneity always authentically represented the heart of a particular struggle, it clearly became recognized as strategic. The confluence of mining struggles, municipal "consultation," ILO 169 and indigenous rights may have started off as incidental, but quickly became politically important. Consultation as understood in ILO 169 and consultation as practiced in Tambogrande started off as nearly separate ideas, but they came together and gathered force for a variety of historically contingent reasons. Consultation started to acquire a more significant indigenous face only when it was "exported" as a protest technique to Guatemala (see Chapter 5). As the indigenous movement region-wide was becoming more relevant and strong for a variety of reasons, indigenous rights were increasingly becoming a politically crucial frame. Over the past quarter century, indigenous activism had a region-wide resurgence, mining became more prevalent and more scrutinized, ILO 169 changed the formal international recognition of indigenous rights, and searing violence targeting indigenous peoples in Peru and Guatemala changed the national political environment for indigenous activism.

These conditions and circumstances helped pave the way for the politics of consultation to emerge and develop as they did.

While states for the most part let their treaty commitment to consultation languish, communities in Peru, Guatemala, and other countries in Latin America used the space to develop their own, alternative conception of consultation and how it should be carried out. For most of a decade, the consultation model of Tambogrande held sway in Peru, and caught on elsewhere, without a serious competitor. The energy of anti-mining struggles, indigenous rights activism, and international law came together in a form that no one had predicted, but around which many would mobilize. For years, the right to consultation now meant, to many, a referendum organized by the community being consulted.

Chapter 3: Yanacocha

King Ferdinand of Spain, sending off the conquistadores to the New World: "Get gold. Humanely if possible, but at all costs, get gold."

Introduction

When tourists arrive to the beautiful city of Cajamarca, capital of the northern Peruvian region of the same name, they are encouraged to visit the historic Ransom Chamber, where the Inca emperor, Atahualpa, was imprisoned by the newly arrived Spanish conquistadores while his supporters rushed to rescue him with a ransom of gold. The emperor was promised his freedom in exchange for precious metals. A king's fortune was indeed assembled, but mutual suspicions doomed the deal; Atahualpa, fearing after nearly a year's imprisonment that he might not ever be freed after all, sent for reinforcements, and the Spanish, in turn alarmed, responded by sentencing him to death. Thus the last ruler of the Inca empire met his gruesome fate in the middle of the town square, where the modern *Plaza de Armas* now stands.

Today, nearly five centuries later, two doors down from the Ransom Chamber there operates a well-kept jewelry store, where gleaming trinkets of gold and silver are sold without any obvious reference to the fact and nature of the extraction that enabled their existence, past or present. The seeming banality of this little shop, however, one of many in Peru, is belied by the bitter drama enfolding the source of much of the gold and silver sold nationally and globally: the nearby Yanacocha mine, a sprawling, giant extractive complex in the hills just a few miles outside of town. For more than two decades this mine, the largest gold mine in Latin America and one of the largest in the world, has generated both enormous profits (over $7 billion to date) and equally enormous controversy. Local residents have accused Yanacocha, owned by

Denver-based Newmont Mining Co., of wreaking havoc on the local environment, in particular the water supply, and also on the social and economic fabric of the region. Critics of mining have long ruefully observed that in Latin America one can be a peasant atop a mountain of gold, ironically living in poverty despite the staggering riches that lie just beneath. Indeed, despite the great wealth emerging from the mine, Cajamarca remains one of the poorest regions of Peru. In the scenic town square, I often observed professional-looking men getting a shoeshine, in marked contrasts to barefoot peasant women strolling through the plaza, shouldering large baskets of wares for sale. Wherever the profit from Yanacocha is accumulating, it is not in the pockets of these women's poufy, colorful skirts.

The politics of the Yanacocha mine have had significant implications not just for the region of Cajamarca, but for the whole of Peru. In a country full of conflicts over mining and other natural resources, there is none more emblematic than the one surrounding Yanacocha. This is the case for several reasons. The size of the mine is one obvious one. Everything about Yanacocha can be described with superlatives, from its physical size, to its profits, to the number of people and communities affected. The scope of the controversies linked to the mine is also large. The significance of Yanacocha extends beyond its sheer size, however. It was the first new mining investment in Peru since the 1970s, and the first in a region not previously known for mineral extraction. Most observers date the current "mining boom" in Peru to Yanacocha. Furthermore, the Yanacocha project was the first to begin operations under a new legal and political regime in Peru intended to attract foreign investment and mining. (See Chapter 2). The Fujimori dictatorship had just been established, and had changed national law to reflect radically different political and economic commitments than the ones in force previously. The Yanacocha

mine was a pilot case in an important sense for major multinational mining companies operating in a neoliberal climate in Peru. The company reacted and evolved in response to the political climate, at both the national and local levels, and critics of mining in turn evolved as they began to understand the repercussions of this new project in a new era. The story of mining in Peru over the past generation cannot be told without reference to the Yanacocha gold mine.

My work in Cajamarca

My understanding of the Yanacocha mine was facilitated by and immeasurably enhanced by two primary circumstances. The first was my informal affiliation with Grufides, the principal nonprofit organization in the region that deals with the Yanacocha case and other mining issues. Grufides is extraordinarily well-known Cajamarca, and is typically cast as an activist anti-mining group, though of course within the organization individuals vary in their analysis of mining in general and Yanacocha in particular. Grufides receives funding from Oxfam, among other sources. During my time in Cajamarca, I worked out of the Grufides office, and benefitted greatly from conversations with people who work for the organization and with people who visited the office seeking help for problems related to the mine. I also accompanied Grufides staffers and associates on various excursions around the area to conduct research related to the mine, and was given access to the organization's archives of materials relating to mining in Cajamarca. Besides my connection with Grufides, I also learned a great deal about Yanacocha and the larger regional context through the graceful hospitality of the Huachecorne family, which had a small farm at the edge of town where I stayed during my time in Cajamarca. Various

members of the family, which has been in the region for decades, have worked at various points in Grufides or on environmental issues at other organizations, and all were helpful in teaching me about the history and present of the region.

The Yanacocha gold mine

The Yanacocha mine, under the direction of a corporate conglomerate led by Denver-based Newmont mining company, arrived to the Cajamarca region in 1992, and began full-blown extractive activities the following year. Yanacocha was originally anticipated to operate for ten years (Lingán 2008). The sheer physical size of the operation is astounding. The operation is spread over 600 square miles; the total concession is larger than Rhode Island. The mine is bigger than Cajamarca itself, and includes the biggest leaching operation in the world (Bebbington 2007). The only larger gold mine in the world is in Indonesia. Unlike many mining operations (including the Río Blanco project or the Marlin mine in Guatemala, the other subjects of major case studies in this dissertation), the Yanacocha mine is quite close to a sizeable city, just 35 kilometers outside of the regional capital of Cajamarca; it can hardly escape notice. Also unlike Río Blanco and Marlin and many other major mines, the Yanacocha project consists of several open pits that are far enough apart to exist as quasi-independent projects, generating their own individual, if interconnected, dynamics and responses. In some cases, when discussing the project as a whole, I refer to the Yanacocha mine, as it is commonly referred to in Peru and internationally. In other cases, when discussing an individual component or proposed component of the overall project, I refer to that initiative by its own name, to distinguish it from

other components or the greater project when the context of that individual component may be distinct. The overall project since its inception has encompassed several major open pits: Carachugo (opened in 1993); Maqui Maqui (1994); San José (1996); Yanacocha (1997), and La Quinua (2001). The first three of those pits are now tapped out and closed, though the latter two are still in active operation, and the concession includes other major deposits not yet mined for various reasons. Yanacocha doubles as the name of the individual open pit and the project as a whole. It means "black lake" in Quechua, though, one blogger noted, the lake in question is long gone (Caballero 2008), in some ways like a suburban subdivision in the United States named after trees that were cut down to accommodate the development.

Newmont mining has long been the dominant corporate owner of the mine. Initially it owned a third financial stake, as did its Peruvian counterpart, Buenaventura (associated with the powerful Benavides family). A French company also owned a substantial part of the project, and the World Bank's International Finance Corporation provided 5% financing, in the form of a $150 million loan. In a process described in more detail below, however, Newmont quickly became the majority owner, and by the time mining operations were in full swing, the company owned just over 50%, with Buenaventura owning nearly as much, still in partnership with the IFC. The company also contracts with a broad array of small companies based close to the mine, which provide a variety of services necessary to sustain the operations of the mine.

Yanacocha's area of influence, itself sometimes an object of dispute, is universally acknowledged to be large. More than 40 communities are in the direct path of the mine, in the sense of having sold land to the company or having their property directly affected. Described in

more detail below, these communities vary in their composition and legal status. Few of them are legally recognized as *campesino* communities (and many argue that the region of Cajamarca has none at all, though this is a highly controversial assertion). Nonetheless, the social organization of the region as a whole is clearly different from what one would find in hyper-urban Lima. According to Paredes, residents of Cajamarca self-identify as "campesinos ronderos," or peasants with strong links to the *rondas*, which are prevalent in the region, and often constitute the social articulating organization. Residents of Cajamarca "identify strongly as 'Cajamarcans,' 'individual landowners,' and always as 'ronderos,'" Paredes explains. They are also often organized around water; some political mobilization springs from associations of water users, who identify and organize themselves around water sources. Some residents of Cajamarca (in the Yanacocha-affected region and elsewhere) speak Quechua, either as a primary language or in addition to others, but Spanish is considerably more prevalent. Since populations affected by Yanacocha are not primarily Quechua-speaking and often or mostly lack official legal status as *campesino* communities, their classification as "indigenous" (or not) in the eyes of international law is complex, despite the obvious social and cultural differences between these communities and wealthier urban dwellers.

What is inarguable is that most residents of the region are poor and rural, and were so when Yanacocha arrived. At the onset of the company's operations, 90% of the department of 1.3 million was rural (Bury 2007: 236). It is still about 70% rural today, the most rural of any region in Peru (Lingán 2008). It has traditionally been an agricultural region, producing dairy, corn, peas and beans (Lingán 2008:35). According to an economist at the National University of Cajamarca, the region has three primary productive areas (Vargas 2010). In the north, bordering

the jungle, cacao and coffee are dominant. In central Cajamarca, cereals and fruits are the focus. In the south (where the mine is located), dairy is the main agricultural commodity (international giant Nestle sources considerable amounts of milk products from the area.) None of these activities produces great profits for the local populations, and none of them competes with mining for corporate profitability. Yanacocha has indisputably played a key role in economic development in the region over the past quarter century, leaving the regional economy irrevocably changed, but its role in poverty reduction is murky at best. When the mine began, Cajamarca had some of the lowest levels of development in the country, by any relevant measure (Bury 2007: 194). In 1990, shortly before the official start of the mine, the average income in Cajamarca was less than half the national average, and less than a third of the average in Lima. 80% of dwellings had no running water or electricity. Two thirds of young children were considered chronically malnourished (Bury 2007: 236). The mine has been beneficial for Cajamarca, said agricultural expert and long-time regional leader Pablo Sánchez (2009). There are more restaurants and stores, because the economy is better, he stated. Many others disputed that assessment, however. Inequality is growing in Cajamarca, said the leader of an NGO working on watershed management and development (Chunga 2009). Income is up, true, but only for rich people, she continued. Cajamarca has changed greatly in a generation, with restaurants, services and nightclubs geared towards people who are of means because they work for the mine. A biologist in Cajamarca active on mining issues concurred. Cajamarca was in fourth place nationally for poverty, he stated, but now, with the mine, it is in second place (Deza 2010). Proponents of the mine would dispute analysis concluding that the presence of the mine has increased poverty, pointing to the profits it has generated, and perspectives differ on the

distribution of wealth to local neighbors of the mine, but it would be hard to argue with the fact that Yanacocha continues to generate enormous profits in a region that continues to experience stark poverty.

Origins of the Conflict

In the early 1990s when Yanacocha was buying land and conducting early explorations, few people in Cajamarca understood that a mine was coming in, and even fewer grasped the transformational power that the project would have. No one knew that there was going to be mining, said Nélida Chilon (2010), an activist law student working in Grufides. My father sold my land to the company, she said, but no one told us the land was for mining. Yanacocha arrived as a surprise, agreed Rafael Escobar, of ITDG, a development technology assistance organization (2009). Perhaps Pablo Sánchez (the regional agricultural expert) and one or two others knew, he said, but no one else. While Yanacocha was a special case in several ways, in this it was probably unexceptional. Even now, in a time when cell phones and internet are widely used in much of the region, many people are caught unawares by the onset of new mining activity, whether the secrecy is deliberate or incidental. Communication is very poor about new activity, said Sergio Sánchez (2009); the concession must be announced in an official newspaper, but this publication has a quite low circulation, and doesn't even reach the airport, much less the countryside. In the case of Yanacocha, when people did begin to understand that a large foreign mine was starting, it initially provoked little opposition. To the contrary, it generated huge and optimistic expectations about jobs and development (Lingán 2008). People thought 40% of the

local population would work for the mine, said Victor Vargas, the Cajamarca economist (2010). But this was an old model of mining, he continued, and the mine instead brought in people from outside the region as its employees. On the one hand, he said, Yanacocha was immediately successful, benefitting from high gold prices. On the other hand, he stated, the community had been deceived; the mine was less labor-intensive than previous mines, and the jobs generally required qualifications that most local labor did not possess. The expectations were unsurprising, given that not only was this the first large mine in Peru in decades, but also that Cajamarca in particular had no recent experience with this scale of mineral development to serve as a reference. Furthermore, even in regions where mining had been more prevalent, many of them had followed the older model of using mass low-skilled labor. In essence, the appearance of what was for most a new economic activity, conducted in a radically different and unanticipated form than anyone was familiar with, primed Cajamarca for disappointment.

The first stirrings of discontent were not against the presence of the mine per se, but arose from the sense people started to have that the company's dealings had not been fair, particularly relating to land acquisition. As the overall plans to develop a huge mine became known and better understood, grievances arose concerning both the price the company had paid for land and its overall approach to acquiring property. Various people who had sold land to the company began to see how profitable that property was going to be for the mine, and realized that the prices they had been paid were comparatively quite low. One man, Señor Nicolas, sold 300 hectares of land to the company, said Sergio Sánchez, a natural resources expert in the regional government (2009). He didn't know how to read, Sergio explained, and wound up being paid 100 *soles* per hectare (less than $50 at the current exchange rate). It should have been much

more, he stated; the price constituted "an abuse". Two decades later, the figure of 100 *soles* is broadly recalled, and often recounted with a disgusted shake of the head. After these sales, the company had what it needed for a mega-project, while the peasants who had sold their land were left without their traditional means of supporting themselves. The *campesinos* who sold their land to the mine for cheap are now the ones selling candies, said Andrés Caballero (2010), describing a common scenario of people in economic near-desperation trying to scrape by through selling sweets for pennies on the streets. Yanacocha generated conflicts by buying up land for low prices, in essence ripping people off, said an official in the Ministry of the Economy (Caballero 2009). It didn't buy anything local, not even gum or soda. It set an extreme example of how a company ought not to behave.

Besides the actual prices paid for land in the initial acquisition, criticism focused on the way the company bought up land, demonstrating what for many was secrecy and lack of good faith. The company bought land through "evil legal arts," according to Escobar (2009). Part of the national context for Yanacocha's arrival was both the upheaval of the civil violence and a property regime that would have seemed patchwork, opaque and completely disorganized to someone used to operating in the context of Colorado, where the company was headquartered. According to Bury (2005), "[p]rior to Fujimori's reforms, many rural land holdings in Cajamarca were managed communally or informally negotiated." It would be inaccurate to say that there was no sense of property before the arrival of the mine, but it was understood and dealt with in a different way than that envisioned by an idealized Western private property regime. As one source has it, "Campesinos have explained that the practice of selling land was almost unknown in their communities before the advent of the mine, although the practice of transferring land for

land and negotiating for different uses of land was common. Many families said they had not fully understood that 'selling' their land would prevent them from any further use" (Langdon 2000). Essentially, the company had to quickly create a standardized private property regime on the fly so that it could then proceed to take advantage of it. It played a key role in clarifying property ownership and transforming it; the government had largely stayed out of this in rural Cajamarca. "In the absence of effective state mechanisms to facilitate the transfer of these lands, mining corporations have frequently assumed this role," explains Bury (2005). Once the company had facilitated individual land titles, it could legally (in the eyes of the Peruvian state) purchase them. Unsurprisingly, land prices rose astronomically in connection with the new mine (Bury 2007: 76). In some cases the company turned to the state for help with forceful expropriation, paying what it determined to be market rates (Bury 2007: 77). In those first few years, Yanacocha became the largest landowner and investor in the region. Between 1992 (the year the company officially entered Cajamarca) and 1996, land values rose by more than 600%. The company had made itself a very, very good deal, and when former property owners began to appreciate the nature and magnitude of that deal, some of them began to feel as though they had been tricked. Neither the company's plans nor the company's methods, nor the true price of the land, had been fully apparent to most of the neighbors of the mine, a fact they mulled over as they began to understood that life in their communities had been substantially altered, and not necessarily in the positive sense of the ready option of steady or lucrative employment.

The first complaints to surface publicly were made to the Catholic church, to a parish priest (Bebbington et al 2008). At that time the locus of discontent was Porcón (Bebbington 2007: 177), a small community near the regional capital. Protests in this initial phase of

resistance were not geared toward stopping or ejecting the mine, but rather toward "a different relationship between mine and communities: a relationship characterized by fair compensation, more civil treatment, and greater participation in the benefits that the mine was generating" (Bebbington et al 2008). At this stage, people criticizing Yanacocha were not interested in resisting it per se, but rather in reforming it. In retrospect they wanted better prices for the land that had been sold, and the jobs it was thought that such a large and powerful economic actor surely ought to be able to provide. The next actor to serve as a focal point in hearing and mobilizing around complaints was "the nascent federation of rondas campesinas" (Bebbington et al 2008), FEROCAFENOP. The *rondas* in Cajamarca are generally stronger in rural areas than directly in the regional capital, and the mobilization around the Yanacocha project was at first primarily rural in character. FEROCAFENOP was linked to environmental groups in San Francisco (such as the now-defunct Project Underground), and the movement at this point received more support from international sources than from urban Cajamarca itself.

This first overarching phase of conflict, marked by mostly rural complaints regarding land sales and the tone of corporate behavior, lasted essentially through the end of the 1990s. These complaints of course concerned the company, but they were also mainly addressed to the company, since most discounted the government as a relevant actor. Many people commented on how the company had acted as the state or replaced the state, particularly in its first decade of operations. Yanacocha turns into the state in the area, said the regional government's natural resource expert (Sánchez 2009). Campesinos identify with the company as the relevant actor, and see the regional government just as a "mediator". As Pastor Paredes, a knowledgeable expert on Cajamarca in the regional Ombudsman's office explained, Cajamarca was traditionally

hacienda territory, with a particularly high concentration of these large landed estates (Paredes 2009). The *hacendado*, the estate owner, historically resolved people's problems (to the extent they were resolved). Yanacocha, he said, replaced the hacendado at first; the owner-laborer relationship was the same, and the company simply forked over money to resolve complaints. When the company first arrived and for years afterwards, the state was not present, he asserted, in terms of providing justice, basic necessities, or anything else. In 1992, the year of the company's arrival to Cajamarca, the state was on the one hand drastically reducing regulatory barriers to extractive activity, and on the other profoundly preoccupied with the internal conflict, which was at a height of violence at this point. 1992 was the year of the Guzmán capture; most in the state were focused on that drama, and on Fujimori's self-coup, rather than on aiding the rural population of Cajamarca or sorting out their property rights. The mining company played the role of the state in this vacuum, partially for its own benefit (as in the land acquisition process described above) and in a piecemeal effort to get rid of people petitioning it with bothersome complaints and demands.

Two major incidents played an important role in shining the national and international spotlight on Yanacocha and shifting somewhat the dynamics of the overall conflict. The first was a wrenching accident, a chemical spill in a town more than 50 miles southwest of the regional capital called Choropampa. On June 2, 2000, a truck operated by a contractor for the mining company was transporting mercury, a byproduct of gold production also sold in its own right. On its way to Lima, the truck spilled a significant quantity of mercury. There were reports of local residents rushing forward to collect it with their bare hands, thinking that if it had come from a mining company vehicle, it must be valuable. The health consequences were horrifying.

Dozens of people were treated for mercury poisoning, severe in some cases. The event itself was, in all senses, sickening. The response that followed, from the government and the company, did little to help matters. The Fujimori government was sluggish to acknowledge what had happened, and even sent operatives to cover it up at first, according to an official in the Ministry of the Economy and Finance (Caballero 2009). More than 1,000 of those affected filed lawsuits in US federal courts, and a half dozen won judgments, provoking jealousies within the community given the vast majority who were not awarded compensation (Sánchez 2009). In other cases, Peruvian lawyers merely eyeballed people and gave them payouts (or not) based on their casual judgment, said the environmental expert in the regional government (Sánchez 2009). As for the company, it tried to minimize the damage to its reputation and claim that the incident was neatly wrapped up. "'Nobody was dead, '" says Roque Benavides, the CEO of Newmont's partner, Buenaventura. He also says that the company provided health insurance. "'So it was not all that bad'" (Frontline 2005).

Regardless of Mr. Benavides' view, the spill and its aftermath were bad enough to constitute a major scandal, one that attracted sustained regional, national and international attention and prompted more thorough environmental investigation than had occurred previously. An internal audit following the incident found 20 key environmental problems with the mining operation, some so dire that a company memo to Newmont's CEO warned that senior executives could face "criminal prosecution and imprisonment" (Frontline 2005). When Yanacocha first arrived, they had no intentions of investing in the environment, said a Cajamarcan biologist (Deza 2010). They had no laboratory facilities, not even a bottle, he said. The shame of Choropampa and the attending publicity at least started to push the company to

pay more attention to water and contamination issues. On Earth Day 2010, I saw a Yanacocha-sponsored celebration in the town square of Cajamarca. Many might question the sincerity, or even the propriety, of a major mining company being in charge of a celebration of the 40th anniversary of Earth Day, given the environmental risks of mining in general and the accusations against Yanacocha in particular, but the event at least underscored the growing sense the company has that it has to seem like an environmentally responsible and concerned actor.

After the mercury spill at Choropampa, the second major incident in Yanacocha's history that shifted the nature of the mobilization around and against the mine took place when the company announced plans to mine a new site within its concession: Mt. Quilish (*Cerro Quilish*). The first protests against this plan took place in late 2009, before the Choropampa spill, though the main eruption over Quilish did not occur until years later. After years of operation, the company had mined several major pits without more than sporadic complaints, and those complaints that were made, as discussed above, focused on how the company operated, not on whether it should be mining at all. When it came to Quilish, however, new sensitivities came into play. For many in the surrounding communities, this mountain was more than just a tower of rock, representing instead a sacred *apu*, a sacred mountain with its own spirit. For urban Cajamarca-dwellers, another issue was at stake. As Sergio Sánchez in the regional government put it, "Quilish is the water I drink." Though the company would dispute that its proposed project would disrupt the drinking water supply for the city, many Cajamarcans in the regional capital saw the nearby mountain as the key to their own water supply. For these regions, Quilish became more than just one more name on the list of Yanacocha projects.

In the initial 1999 protest, *ronda* leaders closed the pass to the mountain. At this point they started to focus more attention on the issue of mining in the region, criticizing it as a form of development (Lingán 2008: 44). After this action, the mayor sent a letter to the Mining and Energy Ministry in Lima, asking it to declare Quilish a protected area. The Ministry responded that there was no reason for concern, and that it would ensure that contamination was avoided. Six months later, in 2000, it approved the EIA for Mt. Quilish, as well as for another site, Cerro Negro. The government tried to address the growing discontent over Quilish by convening multiple dialogue roundtables, a common tactic for the Peruvian government when faced with social conflicts. None of these roundtables persisted, however (Lingán 2008: 47). One led to an independent environmental study (by Ingetec; see below), but the company and the Mining Ministry abandoned the discussions when community leaders pressed the issue of their desire to make Quilish legally off-limits to mining (*intangible*, directly translated as untouchable or inviolable). In response to the municipality's declaration that Mt. Quilish was a reserved municipal zone, the mining company sued, and it lost some initial rounds of litigation, but it ultimately won the case in Lima. At that point, in July 2004, the Ministry authorized exploration activity at Quilish. This move unleashed a quickly growing tide of protest. People marched insistently in the streets, in demonstrations including up to 10,000, and some burned mining installations. The ensuing mobilizations, building over the course of weeks, ended in a dramatic confrontation when residents blocked the road to the mine in large numbers, obligating the exploration work to halt and the company to reassess. On November 5, 2004, the week that in the United States saw the reelection of President George W. Bush, Newmont issued a public statement conceding that it had underestimated the depths of resistance to mining on Quilish,

apologizing, and announcing its request for the Mining Ministry to formally revoke its permit for activities there, which the Ministry complied with. For the moment, at least, the threat to Quilish was over. By any measure it was a major victory for mining critics.

Nearly everyone credits the uproar over Quilish as having been a major turning point in the conflict. Some analysts suggested that it demonstrated that direct action got more done than negotiation, and changed the internal structure of the company (Bebbington 2007: 191). Pastor Paredes (2009) in the Ombudsman's office agreed. The owner-laborer relationship inherited from the *hacienda* social structure completely changed after this conflict, he argued. Yanacocha was no longer willing to pay more money to resolve individual conflicts. At the same time, he said, an environmental consciousness was dawning, largely thanks to Grufides. The social context for resistance was also changing, he stated; after many years of repression, people could take to the streets without fear (the confrontation over Quilish took place a few short years into the official restoration of democracy, after decades of civil violence and a decade of Fujimori's authoritarian rule). Quilish was a breaking point for Yanaochca—it showed that people in Cajamarca could be strong and unified, and was a symbol in the struggle for respect, though no one knew how to create a broader movement afterward, said leaders in the Cajamarca office of a nonprofit research group, SER (*Servicios Educativos Rurales*) (Villatay and Lucio 2009). An anthropologist at the National University of Cajamarca who has done some consulting for Yanacocha, Archie Villar, argued that the neighboring communities were in a better position after the events of Quilish than previously. They had won their particular battle, but for the long term, the high-profile episode led individual communities to form alliances with each other, he argued, and with national and international NGOs like Oxfam and FEDEPAZ. Few had

understood the magnitude of the mine afterward, he said, and after Quilish, this was clearer. Communities in Cajamarca learned how to take the highways, he stated (2010), a tactic that is effective in getting the attention of the government. Finally, Quilish symbolically marks the point when the resistance to Yanacocha became more of an urban-rooted struggle (mainly in the regional capital of Cajamarca), whereas previously the locus of criticism had tended to be more rurally based. This process was happening for other reasons as well, but the Quilish episode of 2004 made it all but irrevocable. Around the same time as the major mobilization to protect Mt. Quilish, it was discovered that FEROCAFENOP, the *ronda* that had served as a major actor coordinating complaints against the company, had in fact accepted some funds from the mining company, reportedly $10,000 for microfinancing. This disclosure was understood to be a major embarrassment (Bury: 186). The circumstances surrounding the acceptance of this money were contested (Bebbington et al 2008: 2903, fn. 19), but this particular *ronda* was effectively unable to be a credible actor any more. The dawning realization that Yanacocha might affect the city of Cajamarca, not just a few remote villages, plus the scandal of the Choropampa mercury spill, plus the highly visible Quilish protests, added to the discrediting of a key rurally-based actor, all helped transform the conflict from a rural one to an urban one. "As a direct consequence" of urban contestation and the embarrassment of accepting company money, (according to Bebbington et al 2008: 2896) "the anchor of the social movement around the mine quickly shifted from rural to urban organizations, and from organizations based in rural community groups to ones based in urban intelligentsia and professional groups. In the process, movement discourses also began to change." Whereas rural villagers had often pursued local grievances related to land purchase prices or how the company treated them in specific circumstances, urban

activists tended to push the environmental angle, calling for more national oversight of the industry and greater control of the profits. By the time the 2004 Quilish mobilizations had subsided, the main actors, their perspective, their alliances, and the scope of their concerns and demands had all changed. Certainly rural actors continued to care deeply about their own predicaments, and to act on their grievances, but the momentum of the overall conflict had undeniably shifted.

The environmental problems that concerned people in an increasingly public way encompassed a variety of issues. Some revolved around the deaths of animals attributed to the mine, such as a trout die-off in Bambamarca that provoked a major confrontation (Paredes 2009). Reports of dead cows or other livestock, allegedly harmed by drinking mining-polluted water, have been common throughout the project. Toads and fish are dying because of the mine, and flora and fauna, said a local teacher connected to the religious opposition to the mine (VS 2010a). Most of all, however, water became a main focal point of environmental fears and frustrations in the region. "With water one does not play," said Pastor Paredes in the Ombudsman's office. "It has a different value." Some harms could be compensated in a straightforward monetary way, but the perception that the company was damaging the quantity or quality of the water supply in Cajamarca never failed to instigate conflicts, both major and minor. The head of the water users' association in Porcón, where the first complaints about Yanacocha had been voiced, told me he was upset with the company for taking too much water from the springs he and his neighbors use. He pointed out three springs to me that the company has tapped since 2001. They don't have any permission to be taking as much as they are, even though they say they do, he complained. There should be a study about the pipes taking up

water, but there is none. My greatgrandfather used to farm here, farming potatoes, he said, but now conditions make this difficult. Water levels are very low. The company says we have enough water and won't invite us to meetings where we could discuss this. When they do invite us to meetings, they have a tendency to be deceptive; I would like a signed letter about their intentions, but they won't give this to me. There is no work; the mine doesn't want to give it to us, he said. The mine itself is all right, but it's not all right that we don't have work or enough to live on (Zembrano 2009).

A few months later, I accompanied several members of the community of Pajuela, as well as a law student working in Grufides and a German filmmaker to their home, in a small island of property otherwise surrounded by land owned by the mine. We ate lunch in their small house, which had plywood floors, mud walls, and a simple metal roof. Like Señor Zembrano, they were intent on pointing out to me the environmental problems they were experiencing because of the mine. We were close enough to the mining installations that we could see the large tubes leading away from the operations, leaking water or perhaps another fluid in small but steady spurts. They pointed out the reddish color of the water running over the rocks nearby, asking me to photograph it as evidence of pollution.

It is difficult to independently and scientifically verify every claim of environmental harm connected to Yanacocha, but at least some of them have been largely substantiated by outside neutral observers. The climate of distrust is such that very few people will believe the conclusions of outside bodies unless they support the reality that one already perceives. When there are recommendations for strengthening environmental oversight, there is often very little

political will to implement any concrete suggestions coming out of a technical report. Stratus Consulting (2004) (like Newmont mining, based in Colorado) conducted a technical evaluation of Yanacocha at the behest of the IFC, testing and corroborating accounts of decreased water supply because of the mine. The report made recommendations for mitigating this problem, but, said a law professor in Cajamarca, no one was in charge of overseeing the implementation of these recommendations, so they were largely ignored (Aliaga 2010). In 1998, the municipal water authority concluded that the water contained unacceptable levels of cyanide and heavy metals, used in mining operations (Lingán 2008: 43). Ingetec, an independent Colombian consulting firm, also found water and soil pollution problems in its investigation (2003). The report made over 300 specific recommendations, but, according to Aliaga (2010) and several others, they were largely ignored. The report added to the mounds of independent evidence that the Yanacocha project was causing scientifically recognizable and quantifiable environmental problems for the region. More recently, Barenys et al (2014) surveyed a group of rural Peruvians within about 10 kilometers of the mine on their food intake and measured concentrations of metals in food samples. They concluded that the population was at serious risk because of dietary exceedances of European standards for arsenic, cadmium, and lead, and further concluded that these risks increase the closer one is to the mine. Based on their research, they reported of the community I visited surrounded by the mine that "it is reasonable to advise to La Pajuela population not to drink from the water sources in their area". The company's response was to criticize the relatively small sample size, and to claim, somewhat bizarrely, that the findings should be discounted since the research focused on adolescent males, who, they claimed, would have a poor memory of what they ate. Regardless of the wide scientific

applicability of the findings, they also added to the evidence from outside investigators that the mine had serious implications for environmental health.

In theory there is a system of legal protection that would prevent the worst of environmental problems from occurring, but most observers view this regulatory system as weak, both currently and at the time the mine came in. The Environmental Impact Assessment that allowed Yanacocha to begin came under strong criticism. It was deceptive, said members of Cajamarca's anti-poverty roundtable (Sánchez et al 2009). It was too technical, they complained, and even relatively educated people couldn't understand it, let alone people who couldn't read or who had limited education. At any rate, it isn't binding, they shrugged. The problem with EIAs is broader than this one project. They are approved if 50% of the people present vote for them, said Sánchez of the regional government (2009), but the people voting don't have to be from the zone where the project would be developed, so companies will often bring in busloads of people to vote for approval. Other aspects of national environmental oversight are weak as well. Peru has a legal classification system for water, whereby water intended for human consumption must meet a high standard, and water for agricultural use a lower standard, and water for industrial use a lower standard still. Mining companies can easily get the government to switch the classification of a particular body of water so that it need only meet a lower standard than previously, said Sánchez. The body in charge of oversight at the national level, charged with ensuring compliance with legal and technical standards and environmental norms, the OSINERGMIN (*Organismo Supervisor de la Inversión en Energía y Minería*), added mining to its portfolio of responsibilities in 2007, but has not proven a strong regulatory presence. It takes Yanacocha's side without even doing a study, three members of the

community of Pajuela (near the mine) told me (EJP 2010). The Mining and Energy Ministry periodically sends visitors from Lima, but, Sánchez noted, they don't really understand what's going on from just occasional visits. The regional government is really quite weak in terms of what authority it is accorded, he asserted, and doesn't have the power to oversee mining concessions, EIAs, mine closure plans, or communication. The Ministry of the Economy official also brought up the weakness of the institutions charged with oversight of mines like Yanacocha. The state does oversight through the Mining and Energy Ministry, OSINERGMIN, and DIGESA (the national environmental health department) but any fines they impose are very low, and would never cause a mine to close, he said (Caballero 2009). A major gas company, Camisea, for example, was fined for an explosion, but not specifically for harming the people nearby; the company claimed that having destroyed a village wasn't its problem, but the responsibility of the state, he said. Companies like Yanacocha think they enter into a land without people, he said, and governmental oversight in Peru is hardly equipped to make them change their thinking.

The vast majority of social and environmental problems in Cajamarca come down to conflicts over water, said Sánchez (2009). The company may say that it has rectified a particular problem, or that it never existed in the first place, but in a climate of strong skepticism and distrust, those statements are usually greeted as wholly unconvincing. Do you believe in technical or in human knowledge? Sánchez asked. If the company says the water is fine, but animals don't want to drink from it, which are you going to believe?

In addition to controversy over the way the mine came in, the spill at Choropampa, the outrage over Mt. Quilish, and mounting environmental concerns, one other issue came to define

the mine's entrance into Cajamarca and to contribute to the controversy surrounding the project. In the early 2000s, after Fujimori's ignominious departure from the presidency, many embarrassing revelations about his conduct in office began to surface, and one set of them cast light on a major corruption scandal concerning Newmont mining and its maneuvering for control of the Yanacocha project. The release of the infamous "Vladivideos," the video and audio recordings of Fujimori's secret police chief, Vladimiro Montesinos, captured the chief executive of Newmont cutting a secret backroom deal. The French company (BRGM) that had initially owned a partial stake in the Yanacocha project, had announced plans to sell its shares to an Australian company, and Newmont did not want another major mining company involved with the project, competing for influence; nor did the US company want the French company to sell the shares at a price disadvantageous to the remaining shareholders. The price of the mine's shares had risen sharply since the beginning of the project, leaving the French company in a position to profit. Arguing that the initial contract allowed it to veto this sale, Newmont sued in Peruvian courts, winning multiple rounds of initial litigation. In 1997, when the Peruvian Supreme Court agreed to hear the case, top Newmont officials decided to take action. A top executive, Lawrence Kurlander, was dispatched to speak with Montesinos and ask for help in the case. Montesinos was already broadly known as an unsavory figure—a US army report had branded him "Rasputin, Darth Vadar, Torquemada and Cardinal Richlieu" combined (Perlez and Bergman 2005)—but he was also broadly known at the time as the one man who could get things done in Peru. The CIA was paying Montesinos one million dollars per year for anti-drug efforts in Peru, perceiving him as the man needed to accomplish goals in the country, whatever the means. And so Kurlander asked Montesinos for a favor. Kurlander offered to personally help

Montesinos rally support for Peru in its disagreement with an Israeli businessman, and the spy chief responded, “Love is repaid with love.” At one point in the recorded exchange, later publically released, Kurlander tells Montesinos, “Now you have a friend for life.” Montesinos responds in kind. The deal was sealed.

After Montesinos directed the Peruvian Supreme Court to be packed and pressured the justices, the Supreme Court voted for Newmont and against the French company, and Newmont got the shares at the low purchase price established in 1993. Newmont was now the undisputed head of the multinational corporate mining project. The US Department of Justice and the Peruvian government investigated the allegations of corruption, but the inquiries came to nothing when the Peruvian government would not cooperate within the statute of limitations. For its part, Newmont claimed that it broke no laws, but merely sought a “level playing field”. Kurlander, the executive whose wheelings and dealings were incontrovertibly caught on tape, for his part, complained that the transcript was “terribly unfair,” leaving out the points in his meeting when had emphasized his desire merely for fairness in the case (Perlez and Bergman 2005). While the whole scandal did little to damage Newmont in a legal or financial sense—indeed, in those senses, the company probably came out far ahead—it did contribute to the image of the company, nationally and internationally, as a rapacious corporate titan, willing to do whatever it took, sordid or not, to get its gold and its profits.

Development of the Conflict

After the 2004 turning point of Quilish, resistance to Yanacocha continued on multiple fronts. Individual people and communities continued to press the company for action on specific grievances; certain proposed projects drew opposition to their existence per se, lacking a "social license" to operate; and another layer of activism sought to reform the mine and its practices as a whole, demanding more fairness in profit sharing, better environmental controls, and more responsible corporate behavior with more sensitivity to the macro social dynamics of mining in Cajamarca. The company, for its part, tried to reform its image in the region, though many felt the damage had already been done. It had already greatly increased local contracting and purchasing in the years before Quilish in response to community pressure, but it accelerated efforts to forge better relationships with the surrounding communities in the mid-2000s. The Quilish protests had been a major reckoning for the company in and of themselves, but the increasingly urban nature of the protest movement also pushed the company to start making changes. In general, Yanacocha has responded more to urban than to rural or peasant protest, seeing it as more truly threatening (Bebbington et al 2008).

One flash point in the conflict came in 2006, not quite two years after the dramatic showdown at Mt. Quilish. Residents of the village of Combayo grew suspicious when the company announced plans to expand the Carachugo open pit. The planned Carachugo II project was widely seen to pose a danger to the quality and quantity of Combayo's main water source, the Chaquicocha river. Residents blocked the road to the dam that was to be part of the extension, and in the ensuing struggle with members of Forza, Yanacocha's security company, Isidro Llanos Canvar, a local protester, was killed in gunfire. The project was temporarily

blocked as community anger prompted an investigation into his death. After the blockade, a high-level government-led commission helped broker a compromise agreement, whereby the project would continue, with agreements to take steps to protect the water supply (Salazar 2006). Outrage also followed the death a few months later of Edmundo Becerra Cotrina, an environmentalist and one of the main "opponents of the activities of Yanacocha" (CooperAcción et al 2008: 4). His murder was never solved, the killers never found, but there was great suspicion surrounding his death; he had received death threats shortly before dying, and was murdered mere days before he was supposed to meet with the Ministry of Energy and Mining to press his criticisms of the mine.

Many individual mining projects within the greater Yanacocha project faced complex mixtures of acceptance, tolerance, criticism and outright opposition. Only a select few became known as projects that were actively opposed on an absolute basis, lacking an overall "social license" to begin. One analysis (Noticias SER 2013) cites five projects of Yanacocha blocked by community opposition: Mt. Quilish (2004); Carachugo II (2006); La Quinua Sur (2007); Solitario (2009), and Minas Conga (2011). Since the Quilish protests a decade ago, the last of these conflicts, over proposed mining at the Conga site, has been by far the most prominent protest against Yanacocha.

In 2010 the company announced plans to invest several billion in a new project called Minas Conga, where it hoped to mine gold as well as some copper (El Comercio 2010). Located northeast of the regional capital, the project was projected to contain up to 10 million ounces of gold. The Environmental Impact Assessment (EIA) was approved in 2010, under President

García, but quickly building opposition to the project prevented Yanacocha from moving forward with the project. The main issues centered, once again, on water. Residents expressed fears that the new project would contaminate or dry up crucial water sources, in particular several lagoons considered spiritually significant near the town of Celendín. Some protesters blocked roads on various occasions; the government tried its usual strategy for calming tensions, a dialogue roundtable. In 2011, complaints began to emerge about the quality and validity of the EIA greenlighting the Conga project; as high a profile an institution as the Ministry of the Environment officially voiced doubts. In November 2011, as Conga protests became so major as to practically immobilize the region, the deputy minister of the Environment, José de Echave, resigned his post in disgust. The government, led now by President Humala, had not only rejected the Environment Ministry's official critical review of the proposed Conga project, it had also announced plans to further weaken the authority of the Ministry, which already played a secondary institutional role to the Mining Ministry in oversight and approval of mining projects. De Echave, a nationally recognized economist and expert on mining, as well as head of the environmental NGO CooperAcción (my institutional host in Lima), charged that Humala's government was essentially creating a shadow Environment ministry, further undermining Peru's already weak ability to manage social-environmental conflicts.

Meanwhile, the region of Cajamarca was in a state of ever increasing uproar over the Conga project. The company, in the initial stages of building infrastructure associated with the eventual planned project, was forced to suspend operations multiple times amidst widespread protests. In December 2011 Cajamarca was declared to be in a 60-day state of emergency. The regional government passed an ordinance declaring the project illegal, a move that some saw in

itself as unconstitutional, but in any case the ongoing mobilizations were so massive that the project was effectively stalled on practical grounds, amidst ceaseless marches, road blockades, flight cancellations, and so on. As protests continued into 2012, a major focus of the criticism was the allegedly deeply flawed EIA. The case was beginning to attract significant international attention, as one of the main natural resource conflicts in the region. Robert Moran, noted hydrology expert from the United States, issued a report criticizing the planned project, and an international expert report, led by a Spanish researcher, concluded that Conga would pose unacceptable environmental risks. These conclusions were, of course, rejected by the company. The government announced that it was convening its own 'expert' panel to review the project, but invited controversy by refusing for months to reveal who exactly these experts were.

President Humala naturally commanded a leading role in directing the handling of the crisis, but he and his family became players in the conflict in a personal sense as well. The president's brother, Antauro Humala, was discovered to be exchanging e-mail messages with a Yanacocha employee, which the company claimed were of a personal nature. Even from prison, Antauro managed to continue to be a sought-after figure, who around that time interceded with the *rondas* of Cajamarca on behalf of a Canadian mining company. The president's father opposed the project, and at one point tried to participate in the protests against it, though was unable to travel to the region given flight cancellations amidst the uproar. The president's sister weighed in from her home in Paris, joining protests there, stating publicly that the project would harm human rights, pollute the environment and leave people worse off than they already were. For his part, President Humala continued to back the project, saying that he had inherited it and that Conga was like a fetus, and that he could not "abort" it.

In April 2012, after many mysterious postponements, the government released its new expert report, which took a measured view of the project and indicated it could proceed. President Humala officially authorized the project, setting off new waves of major protests. Newmont stated that it would make water a priority and create a social fund to help the region, but at this point these overtures were all but ignored by the massive numbers of protesters on the streets. In July 2012 the conflict grew even more fraught. In a struggle in Celendín between police and protesters, two protesters were killed, and police officers were wounded. Marco Arana, a nationally prominent priest and environmental leader who had founded Grufides, was detained and beaten, in an assault caught on videotape. Amnesty International issued a statement calling for an immediate halt to the violence, and the IACHR expressed concern over the conflict as well, which by now counted five dead, including a minor child, and dozens wounded (IACHR 2012).

The following month, as the state of emergency continued, Newmont announced that it was suspending work on the mine itself, though it would continue work on reservoirs and other projects meant to benefit the community. There was a significant degree of ambiguity and confusion surrounding the suspension, as the Ministry of the Environment stated that there was no need to consider the project "officially" suspended, and residents elected to camp out around the lagoons that would be affected by the project to protect them, concerned that the project was continuing, despite assurances that it was on hold. Indeed, in late 2012 the Mining Ministry claimed that the project would restart the following year. Instead, the status quo prevailed, of repeated suspensions, major protests and regional upheaval, and violence against protesters.

Rumors swirled that the company had announced plans to leave the region by 2016, but the company denied what by some reports had been its own statement. Meanwhile, it sued local resident Máxima Acuña, accusing her of illegally occupying land wanted by the company. International observers expressed concern over threats made to her. In August 2014, she was sentenced and jailed. Her backers in Grufides and elsewhere denounced the charges as illegitimate and even absurd. Months later, she was released, but the threat of this kind of treatment for protesters remained a very plausible-seeming possibility. Dozens of others faced legal charges related to protesting Conga; if the project was not destined to proceed as the company had thought, it was far from letting the issue drop.

Echoing the several previous sets of convoluted or contradictory reports related to Conga or the company, in May 2014 the IACHR denied a request from Grufides to suspend Conga, on the basis of various violations of rights including life, personal integrity, private property and political rights. The following day, news reports were so muddled that the Commission had to issue a clarification that it had not ruled on whether Conga can go forward, only on cautionary measures which it granted for life and integrity of community leaders. It appeared that the Commission had declined (at least for the moment) to rule on the permissibility of the project itself, rather reverting to its original ruling calling for protection for the protesters. That avenue of resistance was for the moment closed to Conga's opponents.

Meanwhile, as early as 2012, there began to be talk over the possibility of holding a consultation over the Conga project (SER Noticias 2012). The vice president of the region stated that there would be a consultation if the ruling went against them on the legality of the ordinance

barring Conga. A date was even set for a popular consultation on Conga in certain locations, for mid 2012, and another tentative date was later set after plans for the first did not firm up. Despite the fact that the Constitutional Tribunal did in fact rule the ordinance unconstitutional, the planned consultation never took place. There were multiple factors at play. The Ombudman's office, often effectively an ally of protesters, opposed the plan, saying it would not stimulate dialogue, and that the project had already had its participatory phase. Perhaps more importantly, there were major divisions in the protest movement over whether or not there should be a consultation, and over Conga strategy more generally. The Unified Command of Struggle backed the idea, but other major factions involved in the protest were opposed. One final, related reason emerged as an explanation for why the planned consultation never took place. In May 2014, just days after the multi-part IACHR ruling, major allegations of corruption surfaced regarding Yanacocha and Conga. A tape was found of regional authorities asking the company for money to support Conga and oppose a proposed consultation. Given that the meetings were clandestine and the recordings also made in secret, unverified by the company, it is difficult to know exactly the role corporate money may have played in stifling a consultation, but the revelation was treated as yet another major scandal for the company.

While Quilish, Conga and selected other proposed or actual projects drew broad outright opposition, the local reception of Yanacocha's continued presence in the region continued to develop in complex, multi-faceted, ambiguous ways. Not everyone opposed the company's activities, by any stretch of the imagination; some residents were glad of the possibility of a relatively high-paying job connected to the mine, while others, not altogether opposed to the existence of mining in Cajamarca, continued to be rankled by aspects of the company's behavior,

typically on a hyper-local or even personal scale. Several people mentioned in positive terms the internal changes that the company made in 2006; after the disastrous Quilish protests and the very public apology and suspension of that project, the company put in place some high-ranking officials who focused on community relations, an effort that did not go wholly unnoticed. These corporate changes, however, were hardly able to put an end to all controversy and bad feeling surrounding the company, even aside from subsequent high-profile conflicts like the one over Conga. Even people whom the company specifically worked with as allies were often ambivalent or worse about Yanacocha. In April 2010 I spoke with two brothers in Cajamarca whom the company had recommended to me as its supporters; they had a business that provided services to the company, so presumably had personal financial reasons to sing the company's praises. One brother, involved in health education efforts, did indeed seem relatively sanguine about the company, citing how the management changes in 2006 had improved overall relations with the company. The other brother was less enamored, complaining that Yanacocha was suing him on bogus charges, that the company creates problems with water, and that they tried to minimize the problems they created. Do you want to talk to my wife? he asked me. She hates them.

The following day I accompanied representatives of the company to a small village near Combayo, where the deadly protests had taken place a few years earlier. They were holding a celebration of the completion of a corporate-sponsored "healthy dwellings" project, for which the company had paid for the installation of several cleaner-burning stoves than the firewood set-ups common in the area. Full of pep and enthusiasm, company spokespeople gave short speeches about the benefits of the new enclosed stoves, and demonstrated newly installed

hand-cleaning stations. They went over the rules they had been emphasizing in recent health outreach sessions: wash your hands before and after you eat, after using the bathroom, and so forth. Animals like the ubiquitous guinea pigs should be separated from cooking activity. Community members helped stage a short drama about the stoves and how good they were and how to take care of them, and sang a *huayno*, a type of music popular in this part of the Andes, with invented lyrics thanking Yanacocha and praising the new stoves. After these festivities, we sat down to lunch in the new schoolhouse, which the company had built a few feet from the still-existing previous structure. Women preparing lunch squatted on the ground just outside, cooking roast guinea pig on an old-style stove, which emitted large quantities of thick, choking smoke. As guinea pigs were distributed to guests to eat, Yanacocha employees cracked jokes about how we should have washed our hands before we began lunch, though no one made a move to perform this particular ablution. After lunch was done, the company officials suggested I speak to some of their invited guests, a president of a *ronda* and a local landowner. We stood a distance away from company officials to chat, though not so far away that our conversation was guaranteed not to be overheard. They were only tepidly supportive of the company. The company never used to help us at all, and we met with them over and over when we needed things, with no result, they told me. Since the Combayo problems of 2006, they have changed. The company could do more, they said, but it does support them. The overall impression from the visit and from the brothers the company sent me to was of residents who were pleased to be given concrete benefits from the company when those materialized, but who had no particular loyalty to the company, nor positive feelings that extended beyond how they perceived it to be treating them at any given moment.

A few days later I spoke to several people in the community of Porcón Alto. A woman who was indirectly employed by the company introduced me to a group of señoras she was teaching to knit. Work is a huge desire regarding the company, they told me. We know some people who work in the mine, but it mostly gives jobs to foreigners. Yanacocha does help out with some educational centers and hands out treats at Christmas, but apart from that it doesn't do anything for the community, they said. When I asked if the company created pollution problems, they responded that it did. We used to be able to turn to our fields for medicine, our mothers tell us, but not anymore, not these days. As we ended the conversation, the knitting circle leader, whose job depended on the mining company, gave me a long list of suggestions of places I should go to hear complaints about the mine. I walked a stretch of the way back from Porcón Alto to Cajamarca, and a man, woman and child on the side of the road called out to me. Immediately perceiving my light skin, they thought I might have some influence with the dominant economic actor in the area. Can you get the company to give us work? they asked me. They were understanding but disappointed when I had to tell them I could be of no help with this request.

The following week, after months of being given an elaborate run-around in response to my requests to join one of the official tours of the mine, I was finally permitted to schedule a visit, an outcome I suspected resulted from my willingness to accompany the Yanacocha representatives on their outing, which presumably would cast the most favorable light possible on the company. I complied with the written instructions for the tour: no showing up drunk or stoned, and be sure to wear sensible footwear. Our company guide, wearing gold earrings,

addressed the guests on the bus up from Cajamarca, mainly high school students from the regional capital and their chaperones. What do we do when we enter someone's house? she asked. We have to knock on the door—and that's what Yanacocha does, she continued, commenting on the company's relationships with the surrounding communities. The workers also have a great life, she claimed, saying they enjoyed access to a sauna and a video room, among other perks of the job. Videos shown on the bus ride reinforced her upbeat message, emphasizing how mining is more responsible nowadays, in comparison with the admittedly poorly controlled "old" mining. In other moments, the guide made comments of a less carefully controlled upbeat tone. Father Arana (the well-known Cajamarcan priest and activist) complains, she said, but what's important to him is money and power. Environmental NGOs get money from global NGOs, which want Peru to remain underdeveloped, she claimed (echoing a common refrain among Peruvians who disagree with NGOs that criticize Peru's environmental management). In addition to foreign meddlers, she blamed Peruvians themselves for their predicaments, as she saw them. Mineral production is lower now because there are no new sites to start on and the gringos got tired with all the social conflicts and began to seek out mines in new places like Chile, she said disparagingly. We're still like beggars sitting atop a mountain of gold, but because of *ourselves*, and we could develop ourselves much more, she stated.

The whole expedition had the feel of any student field trip: vaguely educational, and a fun escape from the monotony of the classroom. As we toured some of the vast mining installations and corporate facilities, the students giggled, bantered, took endless photos, and asked few questions. I asked some of them if they ever talked about the mine, and they shrugged and said no. My father works in the mine, offered one. When the topic of Mt. Quilish came up,

our guide said casually, In five, ten, or 15 years, we will probably exploit [mine] it, when a new generation is here, meaning replacing the ones steeped in the conflict. Based on the blasé attitudes of these students, it seemed that the new disengaged generation might already be at hand.

Role of International Law and Institutions

Unlike the trajectory of the two other main case studies of this dissertation, the development of the Yanacocha conflict has not involved a consultation or significant activism based around the demand for one (as of this writing), through either legal institutional or social protest channels. International law and institutions have played a part in this case, however, if rarely in flashy or definitive ways. Both the World Bank's Compliance Advisory Ombudsman and the Inter-American Commission have served as focal points for grievances at various times in the project's two-decade history, and as noted above, there has been some suggestion that a consultation should take place, even though to date that has not occurred, and advocacy for one has been relatively subdued and less relevant in this case than in many other cases in Peru, Guatemala or other countries. The comparatively subtle role of international law, norms and institutions in the Yanacocha case has multiple explanations and implications.

The first major international institution to be called upon to play a role in a dispute over the mine was the Compliance Advisory Ombudsman (CAO) of the World Bank, whose private sector arm, the International Finance Corporation (IFC) had helped to finance the project with a loan. In 2000, the year of the Choropampa mercury spill, there were two dialogue roundtables convened to address complaints about the project (Aliaga 2010). The regional government

organized one; the other fell under the auspices of the CAO, an independent actor within the World Bank that project-affected communities can invoke to attempt to address or mediate complaints about the course of a project. The CAO, established only the year before in 1999, first got involved in the project after the mercury spill, issuing an independent report on the incident (Langdon 2000). It received two separate complaints: one from the Choropampa Defense Front following the accident, and another a few months later from a group of *rondas* (FEROCAFENOP), alleging that Yanacocha was harming air, water, livelihoods and operating without community consultation as required by IFC policy. The complaint was prompted in part at the suggestion of Oxfam America (Bebbington 2007: 189). The roundtable recommended, among other things, studies on water and health, though the latter was never done. In addition to supporting the dialogue roundtable, the CAO sponsored a water study in 2003 and funded water monitoring until it concluded its process in 2006 (see earlier in this chapter).

Since the CAO has no binding authority to change World Bank policy or practices, or those of the mining company, the effects of the roundtable process were limited at best. It did establish the technical report, issued by an ostensibly credible global actor, that backed at least some of the concerns of neighbors of the mine that the project was negatively affecting the water. It further demonstrated some interest in appeals by project-affected local residents to international institutions when faced with difficulties the responsible corporation is not addressing. Beyond these outcomes, however, the influence of the World Bank's CAO was weak. Its roundtable was widely questioned; the CAO was not seen as a neutral actor, complained a Cajamarca professor (Aliaga 2010). The CAO was seen as coming from outside, agreed an NGO worker (Escobar 2009). Why not have the process run by local people? he

asked. The whole thing eventually petered out, he stated; no one wanted it, so it had no relevance. People never even missed it, he shrugged. In this instance of intervention by an international institution, the neighbors of the mine pushing for changes were left with a collection of largely shelved written recommendations, and little else.

In the case of the Inter-American system, which as of this writing is not exhausted as a remedy and could plausibly play a future role in a Yanacocha dispute, the role of this international institution has been similarly muted. The Commission has officially recognized through its rulings that the case is an important one, and that mining critics have a legitimate case when they complain of persecution and physical threats. To date, however, the Commission has elected to stay away from the potentially stickier issues concerning the legal legitimacy of the project itself. While consultation has occasionally come up as a possibility for some aspect of the Yanacocha mine, it has not been a significant factor in the case presented to the Commission, and the rulings have not addressed the possible role of a consultation in this case. Contrary to some other noted rulings concerning natural resources and peasant or indigenous communities (see for example the Marlin mine case, chapter 5, or the Awas Tingni case), in the case of Yanacocha (specifically Conga) so far, the Commission has stayed away from any major pronouncements on the basis of international law. Its rulings have rather stayed firmly on "safe" territory; Peruvian national law, after all, already provides for rights to property and physical safety, some of the rights at issue in the Commission's rulings. The Commission has so far carefully sidestepped any ruling here that might be seen as flashy, unexpected, or remotely

noteworthy. The international institution has spoken, but warily, and without much need of recourse to the body of potentially relevant international law.

Finally, the issue of consultation, which has played such a prominent role in other well-known cases in Latin American mining disputes, in this case has been more important for its absence than for its presence. Some voices have called for one for years. They should have done a neighbors consultation first, said the activist law student from Porcón (Chilon 2010). But, she sighed, it never happened. It should be a vote, like the one that took place with Majaz (see chapter 4), she argued. The population here has proposed a consultation, but the mine would not accept it. The lack of a major defining role for consultation at any point during the 20-year history of the Yanacocha project could be explained by a number of factors. One could argue that since Peru had not ratified ILO Convention 169 at the time the project began, consultation was not a legal requirement, and so would have been unlikely to generate mobilization to demand one. The ground-breaking popular consultation of Tambogrande did not take place for several more years, and thus it may not have been readily available as an option even to imagine. The issue could simply be timing. This argument has some appeal and some validity; Yanacocha was the mining project that inaugurated the new wave of mining in Peru, and the project was well-established a full decade before community consultation came to exist as a concept or be seen as part of the toolbox of options for neighbors protesting a mine. One Cajamarca analyst, working in rural education services, followed this line of thinking. In Cajamarca there has been no consultation, he told me, because it's where large-scale mining started (Torres 2009). This does little, however, to explain why consultation never became a mobilizing frame for controversial sub-projects of Yanacocha that emerged after the establishment of consultation as

law and practice. Communities protesting the proposed developments at Mt. Quilish or the Conga site could quite conceivably have organized a consultation, as almost happened in the latter case. The fact that Yanacocha was a well-established player and Newmont a powerful company did not stop major, paralyzing mobilizations from taking place against these proposals; these mobilizations could have involved consultation, but did not. Timing is not, then, a sufficient explanation for the absence of consultation in this case.

One might also argue that the lack of push for a consultation, supposedly an "indigenous right," could be linked to the weak or absent indigenous identity of the neighboring populations in question. There are few people in the region, and particularly few in the southern part of the region where the mine is located, who would characterize themselves as "indígena" though some do identify as part of a *campesino* community, and many others are strongly linked to the *rondas*, either of which affiliation or identity could lead to a designation of "indigenous" under international law, for individuals or for communities. In speaking to people in Cajamarca, I found that some people vehemently denied the presence of indigenous or *campesino* people in the region, some insistently affirmed it, and most approached the question as one too complex and ambiguous to admit easy and clear-cut answers. Some of the voices speaking most strongly on behalf of the contention that there is widespread indigeneity in Cajamarca come from outside, internationally-based institutions. The now defunct Project Underground (2000), in a report on the IFC's involvement, argued that the communities affected by Yanacocha were indigenous:

> "Contrary to MYSA's [Yanacocha's] assessment, the rural communities of Cajamarca meet the definition of indigenous under the IFC policy. They both self-identify as indigenous peoples and are recognized as such under the Constitution of Peru. They have a close attachment to ancestral territories and the mountains in particular, speak Quechua as a primary language, produce primarily

> for subsistence and have their own social and cultural institutions (land exchanges, *campesino* justice for example). The failure to define the rural communities as indigenous peoples and to apply the indigenous peoples policy may well have aggravated the adverse social and environmental impacts of the mine."

Similarly, Oxfam America, in some of its informational materials on the conflict, promoted the idea of the dynamic as one of mining company versus indigenous peoples. In web materials (Hufstader 2009), it states that "Many of the Quechua-speaking indigenous people in the area consider Quilish their apu, a mountain spirit and a sacred place." While it is certainly true that some people in Cajamarca, including some in the mine's path, speak Quechua, and also true that many have a spiritual attachment to Mt. Quilish, beyond practical concerns about the implications for the water supply of mining in that site, Oxfam's statement here likely overstates the case for the centrality of Quechua speakers. The majority of people in Cajamarca speak Spanish, not Quechua, as their primary language. Some speak both (or in a few cases, other languages), but Quechua is simply not the dominant language of the region, unlike in some other Andean regions of Peru, particularly in the south of the country. This does not by any means imply that no resident of Cajamarca should be considered indigenous, or to have a related identity (*rondero*, *campesino*), but it does speak to a certain anxiety about the perceived need to promote critics of the Yanacocha mine as indigenous in the eyes of the international community, presumably so that they can be unquestionable subjects of the attendant rights and sympathies. It is an easy shortcut to seemingly demonstrating indigeneity to state that people speak the local language most clearly identified with indigenous identity, even though that is not legally or in any other sense a prerequisite for considering oneself to be indigenous or to be considered a legitimate holder of "indigenous" rights. Outsiders were not the only ones claiming an

indigenous identity for residents of Cajamarca—though they often seemed to promote it more heavily and more frequently than the residents themselves.

That said, certain people I spoke to in Cajamarca volunteered that they were part of a *campesino* community. Others in the region spoke about the importance of the *ronda* in their lives. Porcón is a *campesino* community, my activist lawyer friend from there told me, but people deny this. "Wherever a rural zone beings, it's a *campesino* community," she argued, (in a statement others would likely dispute). Porcón has existed since the Incas, she said, but people from outside Cajamarca don't understand all this. She described her community of origin as one with clearly distinct customs. We still wear the traditional poncho, she said. For us, a mountain is a sacred thing, she said. We can tell the weather from the sky—and to them (miners) this is not important. We had customs, like the *minga* (a traditional shared work system in the Andes dating to Inca times), but not since the mine arrived. They disappeared, and are no longer seen.

The community with the strongest legal claim to being an officially recognized *campesino* community in Cajamarca is San Andrés de Negritos, and even in this strongest of cases the claim is disputed. At the very start of Yanacocha's operations, the company got the Mining Ministry to expropriate some land from this small community of about 40 families, which is now entirely surrounded by mining-owned territory. The community received payment for the land, but several members became unhappy when the company changed the highways to cut through the area, affecting the residents and their livestock. The World Bank gave us little money for our land, the president of the community told me, and people didn't realize what was happening; there was no general meeting. Now, people lack work, and the company doesn't give

us the electricity and potable water we ask for. We have nothing good, despite being their neighbors; we are abandoned, he stated. We want Yanacocha to disappear.

The recent legal history of this Yanacocha-affected community offers little clarity on the issue of whether it should be "officially" recognized as a *campesino* community or not. According to Kamphuis 2012, the community was recognized officially in 1990, prior to the mining company's arrival, and the communal title registered the following year. Some residents signed a petition later that year asking for individual property titles, which were granted, but a legal case currently in the Peruvian national court system alleges that these residents did not understand what they were signing. It seems they thought they would get greater property rights protection with the additional title, not a change in the fundamental nature of their communal property rights. In 1995 the state annulled the legal personhood of the community altogether. The expropriated property and the easement were essential to Yanacocha's early operations, since they allowed the company key access to strategically located lands needed for essential infrastructure and critical access roads near the gold deposits. Working with Grufides, community members decided to press a legal complaint about their plight, and set their sights on the Inter-American system (for a detailed account, see Kamphuis 2012). Thus the possible status as a *campesino* community, recognizable in international law as an indigenous community, became highly relevant. However the Peruvian courts or the Inter-American system may choose to view the matter of whether the community should be treated as a legally constituted *campesino* community according to Peruvian law, however, lawyers or activists could still make a legal or a moral claim that the community should be treated as "indigenous," as this appellation depends on the international legal principle of self-recognition above all, and on the social

descriptive principle of distinctive customs and historic presence and continuity, regardless of the status under Peruvian law. Thus, while the case is highly important for its own merits, and noteworthy given that this is the community with the strongest legal claim to indigeneity of any in the path of Yanacocha, its fate in the justice systems does not offer any definitive guidance on the question of whether the mine is or is not affecting "indigenous communities".

Some people took great pains to convince me that Cajamarca positively does not have indigenous residents. My question of whether there were *campesino* communities in the region frequently met with an eye roll and a resounding, categorical "no". In Cajamarca there are no *campesino* communities, stated an indigenous rights specialist working in an ILO project in Lima to promote Convention 169 (Landeo 2009). Some lawyers want to count *rondas* as indigenous peoples, she said—this is the only reason the *Negritos* community was formed. A true community goes back centuries, she argued, whereas in Cajamarca no one knows where they are from. People should look at the specific rights Yanacocha is violating, she maintained, and criticize them on that basis, not on the issue of indigenous rights. As for Porcón, which my friend stoutly defended as a traditional community, other residents of Cajamarca said with just as much assurance that it was a creation of President Velasco, that it used to be an hacienda up until a few decades ago, and did not match the characterization of a community existing with continuity since pre-colonial times.

Many people who cared deeply in the fate of the Yanacocha mine and the people it affected were much less deeply invested in a clear-cut answer to the question of whether these people should be defined as indigenous peoples or not. The head of the human rights division

for Yanacocha told me that while there were not "officially" indigenous peoples in Cajamarca, rural people were from a different culture (Scerpella 2009). Resolving the question simply was not a priority for him. Yes, there are communities in Cajamarca, a consultation scholar told me (Alayza 2010). To say there are not is a stupidity. But younger generations are abandoning the countryside, for up there [in the mountains] one doesn't eat, so people go to cities, she noted. Living in an urban setting does not disqualify one from being indigenous, certainly, but it does stretch the traditional, stereotyped conception of membership in an indigenous community as defined by a lifestyle of subsistence agriculture practiced in a small, physically and culturally remote setting. Finally, there is the matter of the *rondas*. The regional expert in the Ombudsman's office (Paredes 2009) told me that while historically there have been no indigenous communities in Cajamarca, a region characterized instead by a great concentration of haciendas, there is "a great debate": are *rondas* indigenous communities? No one disputes the presence and importance of *rondas* in Cajamarca, so a good deal hangs on the question. Raquel Yrigoyen, he noted, wrote a widely discussed thesis in the 1980s arguing that they are indigenous. Accordingly, he continued, members of the *rondas* said: fine. If it's advantageous, we'll adopt that identity. Thus it was a strategic matter of labelling. There is no answer in the legal sphere, he argued, so people have to search for it in the social sphere.

Altogether, the fact that there is greater debate about the presence or not of indigenous communities in Cajamarca does little to shed light on the question of why consultation has not emerged as a bigger issue in resistance movements to Yanacocha. Indigenous identity, or in some cases its legal equivalent, is certainly not entirely lacking in the region. It is even being used in some legal cases and in some mobilization rhetoric and materials—just not concerning

consultation. Furthermore, of the community consultations that have taken place in Peru, most of them have *not* concerned communities that were unarguably or even plausibly indigenous. The very first community consultation, in Tambogrande, was not billed as an indigenous consultation, and in fact strategically did not engage the *campesino* communities in the vicinity who theoretically could have been drawn in to the exercise. The consultation for which I was an international observer, in Cocachacra, was not understood primarily as an indigenous consultation, though some I spoke to there indicated that the ancestors of the people being consulted might have been seen as indigenous. Río Blanco (see the following chapter) did explicitly involve *campesino* communities, but the record in Peru is mixed enough to indicate that communities affected by Yanacocha could quite conceivably have called for a community consultation at any of various stages, despite the complex set of views on whether any indigenous people live in the region or not.

Ultimately, the explanation for the lack of consultation as a defining feature of the resistance to Yanacocha seems to have more to do with the social and political particulars of the region and the protest movements than it does with abstract debates or legal claims. Consultation, it seems, will not take place, even if some conditions seem ripe, unless certain constellations of groups are present and in agreement that a community consultation should take place. Several interrelated factors seem to have conspired in Cajamarca to lessen the chances of a consultation (setting aside the distinct possibility of outright bribery by the company, discussed above.) One is a general lack of social articulation in the region. The second is the lack of a regional affiliate of CONACAMI, which has been a strong force advocating for and helping to support or organize other community consultations in Peru. The last is a specific disagreement

between different factions of the social and environmental groups in the region interested in mining.

Several residents of Cajamarca brought up the lack of a strong regional coherence in discussions of regional politics. Cajamarca is not a unified region, culturally, according to two leaders in a local rural education organization, SER (Villatay and Lucio 2009). There are no important regional actors or regional agenda, they stated, as distinct from Piura (region where the Río Blanco mine is located; see following chapter), where society is articulated and has notable regional actors. In Cajamarca civil society is weak and polarized, agreed another member of the organization in Lima (Torres 2009). There is no capacity for mobilization, he argued. Even after the massive mobilization around the proposed Mt. Quilish project in 2004, which showed the people in Cajamarca could be strong and unified, no one knew how to create a broader movement, an anthropologist in Lima told me (Burneo 2009). No region in Peru operates in anything like coherent lockstep, of course, but observers singled out Cajamarca for its particular lack of regional unity, as manifested in weak social and political ties on the level of the region as a whole.

Perhaps as an outgrowth of this phenomenon, CONACAMI, the national alliance of communities affected by mining, has never been able to establish a regional affiliate in Cajamarca, as it has in nearly every other region substantially affected by mining, and thus has little regional presence or influence. There was an attempt at one point to establish a Cajamarca CORECAMI (regional affiliate), but the effort foundered over conflicts around the *ronda* leader who accepted money from the mining company. The regional group was never formed (Bury

2007: 186). This absence does not imply a total lack of political leadership in the region. Referring to CONACAMI, Paredes (2006) writes that "in Cajamarca, with a weaker organization, the deputy mayors of population centers and water user association presidents have been the ones who have taken leadership in conflicts, but the participation of the rondas has been decisive in important moments." The leadership in Cajamarca-specific conflicts of locally-based groups has meant that the political world of mining conflicts in the region is less tied to the experience, expertise, resources and agenda of national groups like CONACAMI. It is certainly possible to stage a community consultation in Peru without the intervention of the organization, but a consultation may be less likely to occur in the absence of long-term mobilization aided by this key constituency, which has been involved in mining mobilization and consultation promotion and support in other cases in the country.

Finally, the absence of consultation in the case of Yanacocha can be traced to personal and institutional conflicts on a micro level in the region. The Environmental Defense Front of Cajamarca and the Defense Front of the Interests of the region have clashed with each other over tactics, despite the shared critical stance on Yanacocha. In 2013 they both organized marches against the company at the same time. The groups came under criticism for the pointless and harmful divisions, but they existed regardless. The Environmental Defense Front criticized the Unified Command of Struggle over its approach to opposing the Conga project (Arribasplata 2013). The latter group wished to organized a community consultation on the proposed project, and the former group opposed this plan. The president of the Defense Front stated, "We must continue insisting that a referendum is not the path forward. The resistance process has been devalued" by these efforts. His group complained that the rival group did not work sufficiently

with other social organizations and spoke inappropriately of the possibility of a "responsible mining," which in the view of the Defense Front did not and could not exist. This and other conflicts within the social and environmental movements, even with a common orientation of criticizing Yanacocha and a common goal of preventing Conga, made it exceedingly difficult to carry off a community consultation, which requires at least some coordinated and nationally plugged-in leadership, if not total agreement and conformity.

The Yanacocha project today

After more than two decades of operation as Latin America's largest gold mine, the Yanacocha project, it seems clear, will continue until the precious metals have been carted off to the point where the mine is no longer profitable. While the company will surely continue to evolve, and may make modest concessions regarding its behavior, siting of certain facilities, and so forth, it is exceedingly unlikely to leave because of any criticism directed against it. Whether or not the company ever begins the long-discussed projects at Mt. Quilish or Minas Conga is more difficult to predict. It may continue to be the case that these particular sub-projects are delayed because of opposition, or even that they are never able to begin. The terms (environmental and financial) of the mine's closure plan also loom as an issue, especially as the end of the mine draws within a dwindling number of years.

In the decades the company has had a presence in the region, its relationship with various surrounding communities has changed a great deal. The company is more sensitive to its image now, both domestically and internationally, and has taken steps, at least at a cosmetic level, to

reduce conflicts with its neighbors. Creating a human rights department, sponsoring community events and programs, and meeting with disgruntled neighbors (not on every occasion requested, but sometimes) are all examples of the company's efforts in this regard. At the same time the company (or parts of it) is trying to stave off conflict, whether out of principle or pragmatism, however, it is generating new conflicts, over the proposed existence of projects like Conga, emerging allegations of serious corruption, or perceived insensitivity with regard to water usage, environmental contamination, and other chronic complaints.

The role of international law and institutions in influencing the dynamics of these conflicts has been comparatively modest in this case, compared to some other high profile mining cases in Peru, Guatemala, and beyond. The CAO of the World Bank initially drew some interest as a powerful international institution with a connection to the case, but its role proved to be minor, ineffective and disappointing for those hoping that it would substantially change the behavior of either the Bank or the company. The Inter-American Commission, and the greater Inter-American system, still serve as a focus and source of hope for Yanacocha critics in some specific instances, but to date the Commission has not shown any willingness to play a major or precedent-setting role in this case, beyond cautious steps urging bodily protection for threatened protesters. Neither have mining opponents in this case looked to this international legal institution, or any other, for overarching relief regarding the broader conflict; unlike in some other cases of embattled natural resource projects, there has not been an effort to frame the dispute as a multinational corporation violating principles of international law that might be addressed in an international legal forum. That is not to say that Yanacocha opponents have not faulted the company for violations of specific national and international laws, both rhetorically

and in terms of concrete lawsuits, but these violations and their possible remedy in a court have not provided the dominant frame or focus of the conflict. Finally, even as Tambogrande emerged as the famous first community consultation in Latin America, in a neighboring region of the country, and even as Peru instituted a national consultation law, in the case of Yanacocha, the paradigmatic first modern mine of the mining "boom" era of Peru, consultation has not developed as a major issue. There has been no state-led consultation (and there is likely to be none); there has been no community consultation (although one conceivably could still take place over a particular sub-project); and consultation has not developed as an overarching frame for neighbors discontented with the mine. Some have expressed frustration that there has been no consultation, and there was the active attempt to organize one for the Conga project specifically, but these attitudes and efforts have not assumed anything like the importance in the Yanacocha case that they have in some others. Overall, international law, norms and institutions have been relevant to the case, but not in the central way they have been to some other cases of neighbors facing large multinational mining companies on their lands.

Even as the company makes attempts to build bridges with its neighbors and avoid conflicts, there remains a vast gulf between the way that people with different perspectives view the presence of the Yanacocha mine in Cajamarca. "We are in a zone where the state does not reach," said the company's human rights chief (Scerpella 2009). We have done much that the state should have done, he said. We've spent a lot here, he said, "so why does Cajamarca hate us?" On the other side of the gulf of perception, Nélida, the activist law student working with Grufides, expressed a kind of horror at the way the company and mining more generally were dominating more and more of her home region. Where will I go if all Peru is concessioned? she

asked me anxiously. She accompanied me, a German documentary filmmaker, and several members of the (possibly *campesino*) community of Negritos on our visit to their home in the Pajuela sector of the community (discussed above). As we gazed out on the mining tubes cutting across what used to be community property, watching them spurt out small jets of liquid through leaks in the pipes, I impulsively asked them if any of them owned any gold. They startled and answered "of course not," staring at me. "Do you have gold?" they asked me in return. I blushed, thinking of some gold earrings and necklaces given to me in years past, carelessly thrown into a drawer without much thought. Yes, I answered, I owned gold. They were immediately curious to know how much it cost. Having no true idea, I made up a figure that I hoped did not sound embarrassingly high. "All this," Nélida said, shaking her head and gesturing to Latin America's largest gold mine, a stone's throw away, "just for some jewelry."

Chapter 4

"In Peru, we have very good laws, but one is missing: a law that says that all the other laws should be complied with." President Piérola, 1895-1899

Introduction

In the mountains of the northern Peruvian region of Piura, neighboring Cajamarca region and on the border with Ecuador, great clouds of mist roll in and out of the cloud forests, alternatively obscuring and revealing glimpses of the undulating green pastoral landscape. Most foreigners who arrive to Piura are tourists who have their sights set on the waves of the surfer paradise on the coast in famed Máncora. The few who venture inland to the mountains most probably are headed to the mystical lagoons in the province of Huancabamba, where a shaman could guide them in a spiritual journey featuring ritualistic icy cold dips in the water and potent hallucinogenic drug use. Others might be headed to the neighboring province of Ayabaca[2] to take in the noted pageantry of the annual Señor del Cautivo celebrations. Since the 1990s, however, some foreigners have found an entirely different reason to visit the remote hills of Piura: the vast stores of precious metals, primarily copper, to be found within. With the arrival of this new class of visitor, the region has found itself frequently the center of national, and even international attention, for the tense battle over what, if anything, should be done regarding the discovery of this potential source of wealth, and by whom. After the dramatic rejection of the Tambogrande project, also in Piura, (see Chapter 2), the issue of mining in the Piura region became prominent again within just a few years, as word began to spread of a new proposed mine, which would be extensive and internationally financed: the Río Blanco project.

The contested Río Blanco copper mine has been viewed as a pivotal, emblematic case within the Peruvian context for more than a decade, despite existing (as of this writing) only as a proposed project, not as an actually functioning mine. It is only one of the hundreds of mining concessions in the country, only a small percentage of which will become fully fledged mines, but nonetheless this case has taken on a significance that would have been difficult to predict when the mineral deposit was first discovered. In part, the importance ascribed to the project stems from the particular sensitivities of its location: it would affect a delicate ecosystem found only in certain limited parts of the Andes, and would take place on the lands of two *campesino* communities. Most mining projects could be criticized for having the potential to harm the environment, however, and many or even most in Peru and some other countries are near indigenous communities or other vulnerable populations, however, so these factors do not fully explain the prominence of the Río Blanco case. Its perceived importance is also a product of the fear (or for some, hope) that the mine would be a test case for much broader mining development in the region, which is not nearly as known for mineral development as are many parts of Peru. Another dimension of Río Blanco's significance is the fact of its proximity to Ecuador. Close enough to the border that it had to get special legal dispensation to proceed, the project has sparked fears of resurgent tensions between the two countries. Finally, there is the fact of the consultation. In 2007, communities neighboring the proposed mine held a community consultation in which voters roundly rejected Río Blanco. More than a decade later, this exercise stands as one of only a handful of community-led consultations in all Peru, and thus the resistance to the project has become as emblematic as the proposed mine itself.

It remains to be seen whether or not the company will attempt to push the project forward again at some point—at present there is no legal barrier to doing so—but even while the longer term resolution of the controversy is still in doubt, the struggle over the Río Blanco mine has shaped and been shaped by the broader context of the politics of mining and indigenous resistance in Peru and the broader region. In the chapter that follows, I trace and analyze the politics of consultation as seen through the prism of this case. After providing the essential facts and context of the project, I discuss the origins of the conflict, the community consultation of 2007, and the development of the struggle that ensued, and conclude with commentary on the present status of the case and what it means for the politics of consultation.

The Río Blanco project

The Río Blanco mining project (also known as the Majaz project, though this name is not as commonly in use currently) consists of a large mineral deposit, containing copper and some molybdenum, located in a remote area of the mountains of northern Peru, quite close to the border with Ecuador. The naming of the project stems from geographical features of its location: it "is located in the sub-watershed of the White River [Río Blanco in Spanish], bordered on the east with the Río Blanco, on the north with the Majaz canyon, on the west with the source of the Parramata y el Gallo stream and on the south with the slope of the El Gallo mountain." (Ministerio de Energía y Minas 2008:7) If the mine were to be exploited, it would be expected to produce 100,000 tons of concentrated copper over a 32-year project (Alayza 2007: 97-98). The planned mine would be an open pit, measuring 2.2 by 1 kilometers, at a depth of more than

800 meters (Daffos 2008: 14). The project is located in the Piura region, encompassing territory in the Ayabaca and Huancabamba provinces, affecting lands recognized to belong to two *campesino* communities: the Segunda y Cajas community, in the district of Carmen de la Frontera (Huancabamba) and the Yanta community (Ayabaca district in Ayabaca province.) The mine would also affect Jaén, and Namballe, in San Ignacio de Cajamarca province, downstream from the mining site. These last locations are outside the Piura region, in the neighboring Cajamarca region, though they share no direct links, political, geographic, or otherwise, with the part of the Cajamarca region involved in the Yanacocha case (Chapter 3). The provincial capitals of Ayabaca and Huancabamba have well-established transportation links to the regional capital, but the mining site lies far from these towns, in a remote corner of the region; the only way to reach it without many hours on bus and then foot would be by private helicopter.

Unlike many other parts of Peru, often referred to by boosters as "a mining country" ("un país minero), the region of Piura does not have a well-established tradition of mineral development. Until about the turn of the millennium, Piura was "a region without a mining tradition" (CONACAMI 2009b: 8). Mining is a small fraction of the regional economy in Piura, around 5% (Propuesta Ciudadana 2006: 6-7). Agriculture is a more major economic motor, and services dwarf both activities as a share of the economy. Agricultural staples include cotton, rice, lime, mango and banana. In general, Piura is a poor region, and the provinces containing the Río Blanco mineral deposit are even less well off than the region as a whole. More than 60% of residents of the region are classified as poor, which is above the national level. More than 20% live in extreme poverty. (Gerencia Regional 2003). Most people classified as poor live in housing with dirt floors, without publicly supplied potable water or sewage systems. Piura's

Human Development Index, comparable to neighboring Cajamarca's, is lower than other neighboring regions in terms of basic services and human development (Gerencia Regional 2003: 9). A report notes that "[i]n both provinces [affected by the potential project], access to basic services is low, female illiteracy still a serious problem, and over half of the populations suffers some level of malnutrition." These problems are even worse in rural areas than they are in the provinces of Ayabaca and Huancabamba as a whole (Peru Support Group 2007: 16). Thus, major mining development stands to transform the region in multiple ways, though there is no agreement on exactly how it would affect the economy.

The basis for a major mine was originally discovered in 1994 by an Australian company, a subsidiary of Newcrest mining (Daffos 2008: 13). The rights to the project passed through a number of corporate hands without any mining activity taking place until it was acquired by Monterrico Metals, a British company, in 2001.[3] The first exploratory drilling took place the following year, at a site known as Henry's Hill. The company did have some contact around this time with members of the two *campesino* communities in the area, Yanta and Segunda y Cajas, and secured some sort of agreement with community leadership regarding exploratory activity, but the precise nature of this agreement, the legal validity of the form of the agreement, and the leadership's and communities' understanding of exactly what the project might entail would all later become the subject of bitter dispute.

In addition to seeking some sort of cooperation with the communities, (legal and convincing or not), the company was legally required to secure a special permit from the Peruvian state to conduct mining operations within 50 kilometers of the national border with

Ecuador, according to DS 024-PCM-2008 (Caballero 2009: 36). Peruvian law stipulates that special authorization is needed for projects in this sort of border zone, given the sensitivities and possible national security implications (Peru has a long history of periodic hostility with multiple of its neighbors). One report noted the pervasive fear in residents of the region that the project could restart the Peru-Ecuador border war, which would be particularly dangerous for those who live nearby (Peru Support Group 2007: 39). In this case, permission was granted; Río Blanco was declared "a project of public necessity and national interest," clearing the way for approval of the project, at least in the eyes of the national state.

Origins of the Conflict

Within a couple months of the first exploratory drilling for the potential Río Blanco project, by the beginning of 2003, serious opposition began to arise. Initially many people, even in the vicinity of the concession, had not realized what was afoot, but as word began to spread, people began to express a number of serious concerns. These criticisms centered on the way the company had entered the region, the potential use of *campesino* community territory, including sites considered sacred, the economic effects of the mine, and the environmental damage that many feared would be incurred. As the conflict developed, the conduct of the company, in particular alleged use of divisionary tactics and violence, including torture, became a further issue of grave concern to those following the case. The lackadaisical approach to basic regulatory concerns also arose suspicions. These issues are strikingly similar to those identified in many conflicts over large-scale mining in Latin America. They took on a particular resonance

in the Río Blanco case given the perceptions that this project could represent the beginning of significant new mineral development, with its attendant problems, in an area of Peru that had not historically experienced much mining.

Many people gave consistent accounts of the secrecy and lack of knowledge surrounding the initial phases of the project. The company first appeared in San Ignacio (in Cajamarca), and we did not know anything, the president of one of the *campesino* communities told me (DS 2009). The company surprised community leaders when it entered the zone, informally and illegally, one activist stated (Canterac 2009). Another leading activist and biologist who has been active in Peruvian mining-critical circles contended that the company deliberately tried not to be visible, and was not clear about what it was going to do. We tried to find out information, he told me, about the location and the legal basis for the company's entry (Torres 2009). Members of the Piura regional government agreed that the company's initial entry had been little publicized. Río Blanco started off poorly, one official told me. The regional government did not know about it, and the company did not talk to people (Orellana 2010). In the early stages of information gathering, one Ayabaca activist told me, we spent three days walking in the mountains trying to find the mine, since we did not know exactly where the company was operating (GC 2010). This activist and others credited well-known Ayabaca activist Mario Tabra with playing a central role in raising awareness about the mine on its way to authorization in the region. Another central player was Monseñor Daniel Turley, a priest originally from the United States who has been serving in Piura since the 1960s. The communities woke up once they realized mining would be going on, he told me. They began to figure it out when they saw strangers in the zone. CONACAMI played a role in trying to wake up the communities, he

added. Even though there has not been extensive mining in Piura, he noted, people there are aware of the enormous Yanacocha project in the neighboring Cajamarca region, and this project has really influenced people. They became much more awake and aware of the issue as a result of hearing about that mine (Turley 2010). At a *ronda* meeting I attended in Ayabaca in March 2010, speakers addressing the assembly also invoked Yanacocha as a reference point and sort of a bogeyman. We "can't be like Cajamarca," one speaker said. We have to prevent mines from becoming established in Piura, so as not to risk becoming a mining center like the neighboring region. Others similarly invoked mining-affected regions in Peru as a motivating factor for avoiding that fate in Piura. The priest in Huancabamba told me that more people began to oppose the mine as they realized it would be hell, and they would "have to leave here". People can look at Ayacucho (a region in southern Peru) as a mirror of a ruined place, he said. He also brought up La Oroya, a metals refinery in the Peruvian central Andes that is routinely cited as one of the most polluted places in the world, as a cautionary tale. La Oroya used to have a lagoon, he said, as an example of what could happen to the beloved Huaringa lagoons in Huancabamba should the Río Blanco project go forward (PO 2010). At the first meeting of the Yanta community to discuss the mine, biologists publicly explained the case of Cerro de Pasco in southern Peru, another nationally notorious case of a population and a physical environment that have suffered dramatically from long-term intensive mining (CLMS 2009). A man I spoke to in Huancabamba province had been to Potosí, the mining center in Bolivia, and said he had seen how terrible conditions were there. The water levels in the lakes were so low, he told me, that they had to put out plastic ducks for show, to replace the live ones that had gone from the place. Magdiel, the Ayabaca and CONACAMI leader, said that in 2005, the MEM offered him a huge

sum of money to work elsewhere, plus a good house, but he refused. I'd seen La Oroya, Pasco, Yanacocha, and Huancavelica, he said (Carrión 2010a), and felt that the need was too great in his community to avoid the fate of these famed mining regions. Finally, as noted above, the lessons of Tambogrande, the mining project that wasn't, right in the Piura region, served as an important comparison. An international observer at the Río Blanco consultation concluded that "[t]he struggle of Tambogrande has become a reference point for the world, and a key example in the Ayabaca experience" (Hoetmer 2007) As people began to figure out what was afoot, and compare their future to that of other regions and countries, resistance to Río Blanco began to grow.

The company was able to claim, with at least some degree of legitimacy, that its conduct at this early exploration stage was not in any legal violation, though if this is so it may be at least part due to just how low a bar the national government set. Even given lax standards, it seems that the project's origins were illegal in at least some respects. There were two types of legal irregularities. The first concerns the aforementioned discussions with community leaders regarding use of their lands. While some of these leaders may indeed have given permission for some actions on community lands, their interactions with the company do not appear to meet Peru's legal standards for authorized use of *campesino* community lands. In this type of community, prevalent in the Andean regions of the country (less so the coastal and Amazonian areas), national law establishes that mineral development and other activities require the consent of the communities' general assemblies, not just of individual leaders. There is broad agreement that there was never a general assembly meeting in the Yanta or Segunda y Cajas communities in which Río Blanco received approval. Thus, the 1978 *campesino* community law was violated by

the project's authorization (Canterac 2009). An independent lawyer who sometimes advises the communities agrees that this much is clear. The company needs permission from the owners of the land it wishes to use, he told me. *Campesino* communities have their own governments, of which the general assembly is the highest authority, and these have not authorized Río Blanco, so the whole project is illegal, he maintained (Rodríguez 2009). The national ombudsman agreed with this legal assessment. The 2002 agreements with the company were approved by only the community councils (*Junta Directivas*) and not the general assemblies, as required (Defensoría 2006). The Segunda y Cajas community signed an agreement in 1997, but this was with a different company than the one in charge when permission was granted, and the legal transfer of the agreement to the new company was not clear (Defensoría 2006). The nature and extent of any initial permissions granted were further in doubt. A comprehensive report notes that "leaders had only given permission for 'seismic' tests, not for mineral exploration nor for the establishment of a large camp and fixed structures" (Peru Support Group 2007: 17) Peruvian mining laws are generous regarding permission to use lands; as in most Latin American countries, property owners own only the surface of their land, not the subsoil rights. Furthermore, the Ministry of Energy and Mining can declare a right-of-way (*servidumbre*) that obliges people to allow extraction (Rodríguez 2009). Even given these potential loopholes, however, the company did not satisfy even existing legal requirements to secure permission to acquire the land for Río Blanco.

The second dimension of the dubious legal dealings underpinning the Río Blanco project regards its environmental permitting. Given the project's legal classification, it required an environmental evaluation before explorations could begin (Alayza 2007: 122). The company did

submit some documentation, and on this basis the Mining and Energy Ministry (MEM) approved the project, but many criticisms quickly surfaced of this process. The MEM is the ultimate arbiter of legality in such cases, but many observers felt that the company was skirting the law, enabled by the Ministry. The Ministry so carelessly filled out the permit that it mistakenly wrote permission for mining in "Huamarca," while, as many noted, no such district exists (Alayza 2007: 123; see also Defensoría 2006: 21-22). The evaluation described the area of direct influence of the project as "characterized by the absence of population centers, absence of economic activity" (Ministerio 2008: Section 2.2.2) It described the area of indirect influence as nearly unpopulated, with just a few hamlets belonging to the Segunda y Cajas community. Thus the evaluation leaves out the Yanta community as irrelevant, but, some critics allege, this exclusion is unjustified; even if the communities are not currently actively using certain lands, this does not mean that they are not important or that they might not be wanted in the future (Ministerio 2008: 30). Even if lands are difficult to get to they might still be important, or have spiritual significance. Another report notes that "ethnographers in the area note that it [project land] is used by the communities for extensive pasturing and more generally as a 'reserve' (a sort of savings account)" (Peru Support Group 2007: 15). The process involved numerous other legal errors.

Furthermore, as the ombudsman noted (Defensoría 2006: 25), comments on the environmental evaluation had to be made in Lima, which it criticized as clearly sub-optimal. Even using the fastest available transportation, getting from one of the *campesino* communities to the provincial capitals of Ayabaca or Huancabamba takes hours, and it takes hours more to get to Piura. Flights are available from there to Lima, but the prices are unimaginably out of reach

for most who live in the provinces, and the still somewhat pricey bus ride would take the better part of 24 hours one way. Many might be unable to spare the time and money to make such a journey, even if they were aware of the opportunity while it was open and wished to make a comment. Very few were willing to defend the process and final product of this slipshod environmental evaluation. "The Ombudsperson concludes that the implementation of the Rio Blanco Project has violated community members' rights to property, to determine the ways in which their property will be used, and to informed participation in decisions about development," a report stated (Peru Support Group 2007: vi). "They conclude that these violations of rights derive from lack of clarity in the regulations and practices of the Ministry of Energy and Mines (MEM), and that with the information that MEM was given by Minera Majaz at the time of giving it the green light to begin large scale exploration, the Ministry would have known that it was violating these rights." Despite these sorts of widespread and sweeping criticisms, the Río Blanco project was given permission to proceed.

Concerns coalesced by late 2003 not only about the process by which the project was given a green light to operate on community lands, but about the use of those lands itself. These worries centered on possible environmental disruption and on spiritual significance of the lands, particularly the mountains and the regionally famous lagoons. At an NGO forum in Huancabamba, in October 2009, two *campesina* women participating told me that they did not want mining on their lands. "We live on agriculture," one told me. "Where are we going to go? If there are similar lands, we'll go happily. Show them to us. The mine would ruin the lagoons." The lagoons, also mentioned above, are a local and a tourist draw for spiritual seekers, especially those interested in purification and health rituals. A variety of shamans practice what is

recognized as both good and bad magic at the edge of the waters. There is great concern in the region that these practices could be disrupted by mining. When asked if there were communities that would qualify as indigenous in the vicinity of Río Blanco, one expert in Lima identified the lagoons and their importance as a central proof of the indigeneity of the communities in question, along with the traditional *ponchos* they often wear (Vittor 2009). As in many other places in Peru and the Andes, the mountains have special significance as well. Importantly, in Andean thought, mountains are alive; they provide water and have a will of their own, national experts explain (de Echave et al 2009: 206). Dramatically defacing a mountain, as this type of mining does of necessity, has greater meaning for most residents of these regions than straightforwardly practical concerns about agricultural production, as serious as those may be.

The question of whether or not these two particular communities in the vicinity of the proposed project would be properly termed "indigenous" (or "*indígena* in the Spanish direct equivalent) is, as is so often the case in Peru, a complex question. They without question qualify for indigenous status and the attendant rights and protections under international law, including ILO 169 (since they are legally, officially recognized *campesino* communities, and Peruvian law recognizes this formal category of community as being equivalent to indigenous for some purposes). The *rondas* tied to the communities and the region could also qualify from a legal standpoint as possessing the rights and privileges associated with indigeneity. Whether or not the members of these communities would actually choose to identify with the label of "*indígena*" is a less straightforward issue. Peru is a racist country, the alternative radio broadcaster in Piura said bluntly. People are born of Incas, but embarrassed about the "*indios*," which is an insulting term, he sighed (LL 2010). (The Spanish term "*indio*" in the Peruvian context might roughly be

compared to the now little used English term "injun," in its insulting tone and implied social distance between the speaker and the person described.) Given these associations, it is no surprise that many in the Piura region and elsewhere in Peru resist labels of indigeneity. When I spoke to the president of one of the *campesino* communities in the project zone, however, he asserted that a *campesino* community such as his was the same thing as an indigenous community. Some people felt the term was derogatory, so President Velasco changed it (under Peruvian's agrarian reform process), but, he said, there is no difference, and the rights are the same.

Several leading activists in the opposition to Río Blanco reinforced their claims to indigeneity both in speech and in dress. At a 2009 forum on mining in Piura, Magdiel Carrión and Mario Tabra, two of the leading figures in the struggle over the project, wore a rainbow scarf and a rainbow hat, respectively, prominently and proudly donning this regional symbol of indigenous rights. When I spoke later with Mario Tabra, he wore a rainbow scarf, and made repeated references to indigeneity and its role in resisting the mine. Several people commented on the resurgence of explicit indigenous identity in Peru (as opposed to identifying with a particular "*campesino*" community) in the specific context of mining struggles. Luis Vittor, a human rights activist in Lima, explained that Peruvian President Alejandro Toledo (2001-2006) and his politically active spouse, Eliane Karp, promoted the idea of indigeneity, as a positive, politically relevant label. CONACAMI, Vittor (2009) added, helped put mining and indigenous issues on the radar. Alejandra Alayza (2009), Peruvian researcher and author of a major study on consultation, agreed that the relationship to the concept and terminology of indigeneity had undergone a shift in recent years. Piura residents used to be seen as white within the context of

Peru, she said, so it was hard for them to identify as indigenous (an identity with presumably less status in the eyes of many.) However, she said, the identity of communities like the ones near Tambogrande has really changed since the 1990s. Before, she said, no one thought of themselves as indigenous, but these communities have since undergone a "utilitarian transformation". The tradeoffs between mining and agriculture are the issue in the Río Blanco case as they were for Tambogrande, she said, and ILO 169 is what drives the mechanism they've chosen to use in their resistance to mining, in a process similar to how the idea of women's rights changes opportunities. "Identity is a resource," she said, and people take advantage of it. Whether or not each person in the *campesino* communities wholeheartedly embraced the specific term of "indigenous" or thought of themselves as such, certainly some did, and indigeneity as an identity and political and legal assertion became a political player in its own right in the ongoing struggle over Río Blanco.

Besides concerns and resentments over the land acquisition and what this would mean for the communities (be they *campesino*, indigenous, both, or more) of Yanta and Segunda y Cajas, environmental issues quickly rose to the surface as some of the primary ones at dispute in the Río Blanco case. As with so many mines, many of these worries revolved around water, and what the mine would do to the quantity and quality available. In part these concerns revolved around agriculture. The rivers at the site of the mineral deposit flow into a larger watershed, and "the waters flowing from the mine pass by two provinces of the department of Cajamarca, Jaén and San Ignacio," where significant organic coffee cultivation takes place, including the population center of Namballe, according to one report (Peru Support Group 2007: 16).[4] Environmental advocates also raise issues about the location of the mine site in a delicate and

relatively rare Andean ecosystem known as the páramo (Salazar 2010), as well as the related ecosystem known as jalca. People contemplating the mine are worried about the páramos and the cloud forests, an activist told me (Canterac 2009). Both people and agriculture are threatened by the water issue, he said. The company said that we can put back the earth and restore the páramo, but this is impossible. There are further concerns, again quite typical in cases of large-scale mining, that the extraction process could threaten the surrounding environment. "The single largest source of environmental damage from the Rio Blanco project is AMD drainage [acid mine drainage] from the tailing and waste rock piles," noted one study (Peru Support Group 2007: 43). "There is the possibility that these areas could leach toxic AMD into the headwaters of the Amazon River for centuries after mine closure," the report continues (Peru Support Group 2007: 44). (Despite the fact that Piura extends to the Pacific coast and that the mine site is much closer to that ocean than to the Atlantic, the watershed is such that this particular part of Piura ultimately drains into the Amazon, far to the east.) Throughout the conflict, environmental concerns like these have dominated discussions of the dangers of the proposed mine. Even with more technology, said the Ayabaca *ronda* leader, mining will never be compatible with livestock and agriculture (because of the contamination issues and the competing water demands). We're not anti-mining as a rule, explained one Ayabaca activist (OG 2009). Pointing at my note-taking, he said, the pen you're writing with is possible thanks to mining. But, he concluded, water and air are more important.

The company and the mining Ministry, for their parts, maintained in the face of these criticisms that the mine would be beneficial. The director of mining promotion at the Mining and Energy Ministry articulated the view that I heard over and over again. Mining is important

because it generates money for Peru, he said simply (Luna 2010). Responding to commonly voiced objections of the Río Blanco and other projects, he replied that it happens only in the countryside, above 3,500 meters of altitude. There is no other productive activity there, only livestock and pasture, and not much agriculture, he continued. (Peruvians are used to thinking and speaking in terms of altitude, and many would associate high altitudes with remote desolation and inhospitality to much human, animal or plant life.) On average, he claimed, over half the workers in Peruvian mines are locals (implying that the wealth generated does indeed stay with and benefit local residents, rather than foreign workers or owners.) His overall appraisal, of this mine and others, was that it was good for the local population, good for Peru, and really the only viable option in any case. In 2007, a few months before the consultation, the company (then Minera Majaz) took out a large ad in one of the main regional newspapers, stating that Río Blanco means highways, electric lines, jobs , conserved areas, and a "vision of being the best mine in Peru in social and environmental responsibility" (El Tiempo 2007a). The current Chinese owner, Zijin, while not projecting a strong public presence, tried to promote the idea that the Río Blanco project would be good for its skeptical neighbors. "We pursue gold and silver, but care more about clear water and green mountains," its website proclaimed gauzily. "It is the model style for any enterprises in the socialist country [referring to China] to serve the country and benefit the people." (Zijin 2010)

Despite these assurances, however, many residents of the zone where the mine would be remained unconvinced. One member of the Ayabaca collective, organized to resist the mine in that province, told me, we have a "natural rejection" of the mine in our communities. We think, "I don't eat gold, I eat beans," he explained (MA 2009). We live on subsistence agriculture here,

he said. It isn't that they don't want any change or development at all, he said—they just want it to be sustainable, based on coffee, herding, or tourism. Ayabaca has some ruins that some exceptionally hardy tourists occasionally view, but the near total lack of infrastructure and amenities makes it unlikely that they will be a major tourist draw anytime soon, despite the hopes I heard expressed that they could become the next Machu Picchu (the extraordinarily popular tourist draw in southern Peru). But many people rejected mining as the path forward for development in the region.

In January 2003, some people arrived from the community of Yanta, this Ayabaca Collective activist told me, and said they had seen mining in their area. They attended a meeting in the community, also attended by mining Ministry officials, and people realized that a mine above would affect them below. Fidel Torres, the biologist activist from Piura, explained about the example of Tambogrande, and here, my friend from Ayabaca told me, the resistance started. Whatever permissions had been granted to the company before its presence was widely known or understood now began to seem almost beside the point. The community of Yanta had agreed to the project initially, when the company said it would do things like improve the highway, but then nothing happened, and so they revoked the permission (de Echave et al 2009: 296). As 2003 wore on, tensions only grew. In May of that year, more than 4,000 people marched in Piura, the regional capital, to demand cancellation of the mining concessions, as well as other steps concerning improvements to the provincial hospital, water system drainage, and watershed management (de Echave et al 2009: 293). In addition to peaceful marches and protests, critics of

the proposed project took direct action to express their opposition, setting fire to the initial mining installations that had been set up.

The company (still Monterrico Metals, the British company, at this point) attempted to mollify its critics. The company invited people to a "dialogue," a *campesino* community president told me (DS 2009). They fed us sandwiches and soda, he said, but when I raised my hand, they wouldn't recognize me. So, he said, I stood up and raised my voice. "What kind of dialogue is this?" he asked. You can't buy us off with sandwiches and soda, he said, and with that the community members in attendance all walked out of the meeting. Other members of the community also mentioned being offered cookies, snacks and more substantial food by the company, in a transparent bid to win their loyalty, or at least mute their open opposition. The Ayabaca Collective activist explained that the company donated 1,000 notebooks to the community of Yanta, in another attempt to forestall criticism. The community, however, he said, was angered that the company had abused them on their own community territory, even leaving one person dead. So, they decided to show their anger in dramatic fashion, by burning the notebooks in the central plaza. The press, he said, called them savages and terrorists for this act (MA 2009). But, he said, people are forced to use pressure tactics to get attention or results, because there are no institutional channels anywhere in Peru. The state does not pay attention to anyone, and does not want dialogue; it just sends highly armed police to deal with situations of unrest, he noted grimly. When the state says, "let's have dialogue," he stated, it means one starting with an agreement that the mine is good. Fidel Torres, the biologist and activist, explained why communities were unwilling to structure conversations that way. I wouldn't negotiate with a thief in my house, he said, and the community feels the same way with the mine

in their territory (Torres 2009). Thus, institutional channels, even where they exist, are often perceived as hopelessly biased toward the goals the state has already set, without regard to grievances that may challenge the state's preferences. A reporter at Radio Cutivalú, one of the major news sources in Piura and one of the few to give press to mining critics, echoed his point. In the face of repression, he said, institutions are not available to help. "It is as if there did not exist any law," he told me, or "government" or "state" (LL 2010). Rather, people and communities are left to their own devices, he suggested, aided by only a few heroic non-state actors.

The communities of Yanta and Segunda y Cajas began to close ranks against the mine on an official community level. A leader who had signed one of the original documents permitting mining was sentenced to six lashes of the whip for doing so behind the back of the community, a community president told me (DS 2009). (Whipping is a traditional punishment meted out by the *rondas campesinas* in this area of Peru. Many people took pains to impress upon me that a member of a *ronda* would never carry a firearm or other weapon, other than a whip for protection.) In May 2003, Segunda y Cajas voted unanimously as a community to reject a document permitting some mining activity that had been signed only by a few people years ago, and voted not to permit any mining (Alayza 2007: 123). In January 2004, the other *campesino* community affected by the Río Blanco project, Yanta, followed suit, signing an assembly pact disallowing any mining (Alayza 2007: 123). After this vote, company officials who had been present left without saying goodbye (de Echave 2009: 296). Two months later, an assembly of the Segunda y Cajas community gave the company an ultimatum: withdraw from the Río Blanco site by April 20, or residents will enter the mining installation. There was no such withdrawal,

and thousands marched on the mine, one of whom died of tear gas used by security personnel (de Echave 2009: 298). Soon afterwards, at a big meeting, residents created the Front for Defense of the Environment, Life and Agriculture in Ayabaca. Later in 2003 came the first assembly of the greater northern region of Peru, organized around the idea that the whole area was connected by the same watershed in need of collective defense against transnational mining companies (de Echave 2009: 303). Both the company and the communities had hardened in their respective public positions by this point, and the lines of conflict were clearly drawn.

The company took several major steps that it may have thought would serve to weaken the opposition or tamp down tensions, but instead wildly inflamed them. These acts fell into two major categories. The first was the corporate-led creation of a set of organizations that paralleled and rivalled already existing groups. The company created the ironically named Front for Unity for Segunda y Cajas, a decoy group that seemed to mimic other community groups in form, but in truth existed to sew divisions, for instance by accusing opponents of the mine of terrorism (CooperAcción 2009). It also created a parallel *ronda campesina*, wholly distinct from the actual organically self-organizing *campesino* defense groups. Finally, it created Integrando, a corporate-sponsored non-governmental organization. Integrando's operations have been somewhat murky, but its most visible actions center on small-scale community development projects intended to curry favor with the population, like transportation improvements. When I drove past a group of Integrando workers near Huancabamba with a group of people skeptical of the mine, the workers turned away from my companions' cameras, not eager to be publicly identified. The organization has been more successful in Huancabamba than in Ayabaca, where the opposition is more publicly unified. Integrando is not in Ayabaca, a local priest told me, but

in Huancabamba "they have won" in their stealth battle with the population (PD 2010). This is likely an exaggeration, but illustrates the sense many have that the organization has been antagonistic and competitive, rather than supportive.

These parallel organizations, while not successfully replacing their grass-roots doppelgängers, did cause and exacerbate tensions within the communities facing the possibility of the Río Blanco project. At an NGO forum in Huancabamba, two women from nearby communities said that while they were staunchly opposed to mining, they had many pro-mining family members. We can't tell them about our opposition to the mine, they said; in the past they had been physically hurt in altercations with pro-mining advocates. They further felt uneasy officially reporting these run-ins, out of lack of faith that government officials would take their side and do something meaningful to protect them. The president of the Segunda y Cajas community corroborated their points about both violence and community divisions. Since the arrival of the mining company, he stated, women are getting raped, including his handicapped niece (DS 2009). The company paid for the rapist's lawyer, he noted with disgust. He felt he could no longer attend parties with his friends because of the stark divisions in the community he had led for nearly a decade, and he did not wish to run for reelection at the end of his term. Managing the social divides was just too dispiriting. Many others commented on the polarized atmosphere in their communities regarding the proposed mining project, with some coming out strongly against it, others publicly in favor, others tacitly for or against, and others who wished no part in the slow-moving brawl. At a community forum on mining in 2009 in Sapalache (Huancabamba province), a father from the provincial capital invoked the common phrase, "mining contaminates" ("*la mina contamina*"). He stretched the statement metaphorically,

beyond how people typically use it: yes, he said, mining contaminates physically, but also socially, in that it creates divisions in the community.

Besides the corporate creation of parallel organizations that served mainly to exacerbate already strong fault lines within the communities confronting the possibility of a major mining project in their midst, Monterrico Metals (the British owners of Río Blanco pre-2007) took another, more acute action that inflamed regional tensions: representatives of the company detained and allegedly tortured a significant number of activists demonstrating in opposition to the project. In August 2005, hundreds of people from the region that would be affected by the mine staged a peaceful "sacrifice march" to the mine site. These marches, a staple of peaceful protest in Peru, are named as such because of their emphasis on the arduousness of the multi-day treks through often difficult terrain. That the marchers are willing to endure this difficulty, and the sacrifice it entails, is meant to underline their commitment to a cause (in this case, opposition to the mine). This march was intended to underscore the continuing unwillingness of the state and the company to engage in meaningful dialogue. It certainly served to raise awareness of the conflict, but in horrific and violent fashion, contrary to the peaceful nature of the march. Police and members of Forza, a private security company used by both Monterrico Metals company and Yanacocha in Cajamarca (see chapter 3), abducted a group of the marchers and proceeded to hold them captive for several days (Servindi 2011). They seriously abused the marchers, placing hoods over their heads and beating them severely enough to impose visibly significant wounds. Two of the female detainees alleged sexual assault and threats of rape (Business and Human Rights Resource Centre 2014). All in all, more than 20 people were tortured over the courses of three days, according to a lawyer who sometimes works with the communities (Rodríguez 2009).

Dozens of stark photos of the horrifying treatment of these protesters surfaced, leaving little doubt of the veracity of the many eye-witness accounts of the events. Physicians for Human Rights, the respected advocacy group, weighed in with an opinion that the accusers had been tortured (Peruvian Times 2009). There was nothing legal about the detention of the marchers, and certainly not about their torture. Rather, the actions of the agents of the company constituted solely a stunning demonstration of brute force. There was nothing subtle about this manifestation of the matchup between a powerful multinational corporation and the farmers and peasants who dared to oppose the corporation's plans.

Many incidents of alleged violence or mistreatment at the hands of international mining conglomerates end merely in accusations and perhaps some temporary bad publicity for the company, but this mass detention and torture was so large-scale, so egregious and so well-documented that it occasioned multiple high-profile lawsuits. A lawyer with a Peruvian human rights organization explained that there was both a criminal process in Peru and a civil process in the United Kingdom related to the case. People in the communities that suffered harm, she said, want reparations for communities, not just for individuals, since harm to indigenous communities harms the whole community, not just the person who directly experienced injury. The English lawyers, she sighed, were confused by this. Their logic is to win money, she said, while what the community most wants is a statement saying the company did something wrong (Pérez 2010). In the end, money was indeed the endpoint of the British legal process, however. In 2011, Monterrico Metals, by this time no longer the owner of the project, agreed out of court to compensate the villagers who had been tortured. The company did not officially admit fault, but the case against it in the High Court was so strong that a judgment

against the company seemed certain (Servindi 2011). The whole affair would seem an unambiguous black eye for the company, though the Wikileaks project revealed a memo written by the United States ambassador to Peru at the time of the tortures in which he addresses the allegations and ultimately faults the church, NGOs, ronderos, "violent radical leftists," and "perhaps narcotraffickers" for their role in opposing the mine (Guardian 2011). As of this writing, the Peruvian legal cases have not met a resolution (perhaps unsurprising considering the often slow pace of the judicial system). Despite the semblance of a type of victory through the British court system, the tortures remain a major reference point for critics of the Río Blanco project, few of whom feel that the situation was addressed with any adequacy or that the overall dynamic of the public and private security operations related to the mine has changed at all. The nationally and to some degree internationally notorious case, combined with the local divisive activities of the company, brought anger over the proposed project to a fever pitch.

The Consultation

Within a year or so of the mass torture incident, discussions began in the region of the possibility of conducting a community consultation on the Río Blanco project. The *rondas campesinas* were one of the principle forces pushing for the consultation and organizing and running it. An official with the *ronda* in Ayabaca explained to me that they had done marches, but that these had not worked. We did elections, (meaning the consultation) he said, to see who is for the environment and who is for the mine (RJC 2009). We did the consultation because the state said that only "four cats" were opposed to the mine, he stated, and so they wanted to

publicly demonstrate that in truth the opposition was deep, widespread, substantial and real. So, he said, we organized both men and women. Neighbors of the proposed Río Blanco mine were keenly aware of the experience of consultation around mining in Tambogrande, also in the Piura region. Ulises García, the consultation activist whose father was killed in the struggle over Tambogrande (for more on García see chapters 5 and 6), visited communities in Ayabaca and Huancabamba to share his experiences there. I helped motivate the Río Blanco consultation, he told me. Along with a lawyer, he showed people videos of nonviolent struggles, from mining consultations in Tambogrande and Sipacapa in Guatemala to the legendary Gandhi. This exposure to other related struggles, he asserted, helped convince these communities to stage their own consultation (García 2010). Consultation, he argued, breaks a company's principle strategy: division of the people. This point echoed comments by people in many contexts, that consultation represented an opportunity to forge and demonstrate unity. In crucial moments, people have come together, said a leader in the Ayabaca Collective (MA 2009). Before the consultation, there were differences in how to do it, but people put them aside to do the consultation, he stated. The consultation was a project with both technical and political dimensions, he told me. The state wants us to react, to be violent, but the peaceful way is the only way, he argued. Thus staging a consultation was a good way to demonstrate to the state, and everyone watching, that opponents to the mine were not thoughtless thugs, but rather peaceful, democratic and legitimate actors. Others in Ayabaca emphasized that "we believe in dialogue," not violence (CLMS 2009). Both the state and the critics of the mine, throughout the struggle, have frequently accused each other of violence and lawlessness; establishing the accepted narrative of who is the aggressor and who is the victim has been a key component of

the public relations battle over Río Blanco. The consultation was, in part, meant to be a key part of the public demonstration of the pacific, law-abiding nature of the opposition.

Most parts of the Peruvian state, unsurprisingly, criticized the idea of the proposed consultation, and in several cases actively opposed it or tried to prevent it. "This consultation was attacked by the State through all its sectors and organisms identified openly with the company like Energy and Mining, Interior, JNE [National Jury of Elections], ONPE [National Office of Electoral Processes], the Ombudsman's Piura office, the regional Piura education department, the regional government and the municipality of Piura, and with money offered by the mining company, with approximately 80 million soles [approximately $25 million in US currency at the time], as if life had a price," according to one thorough report (de Echave et al 2009: 310). The Mining and Energy Ministry and the central government argued that mineral resources were not the competency of local authorities, the Piura lawyer explained (Rodríguez 2009). The head of the ombudsman office, Beatriz Merino, issued an official opinion that agreed that a neighbors consultation was not binding on the state, in that results could not compel the Mining ministry to cancel or withhold a project license, but stated clearly that the consultation as an activity was legal.

Government representatives further tried to discredit the planned consultation by using the old line about outside agitators, claiming that there was a "foreign conspiracy" behind the plan. President Alan García expressed anger at foreign priests whom he accused of fighting for revolution (de Echave et al 2009: 313). This, from the president who as candidate only the year before the consultation stood in front of the public in Ayabaca and declared, "In my next

government, I will respect the will of the agrarian people of Ayabaca and I will not permit any mine to lord over the people of Ayabaca" (quoted in Hoetmer 2010: 164). (As noted above, there were indeed priests born outside Peru, as well as native Peruvian priests, who supported parishioners critical of the mine, and priests have been at the forefront of struggles in Cajamarca and elsewhere, though the charge of fighting for revolution seems far-fetched in the context of supporting a consultation.) A column in a leading Piura regional newspaper charged that while Oxfam, CONACAMI, the church, extreme leftists, and environmentalists try to stop mining, without the income it generated Peru would be back in the Stone Age (Tudelo 2005). Others threw around the terms of "terrorist" or "communist" to try to smear mining opponents. "It's ironic," said the president of CONACAMI. "The good communists come to invest in mining, and here we have the bad communists who want to avoid this" (referring to the Chinese owners of the project) (cited in Hoetmer 2010: 179). As bad or worse in the eyes of some Peruvians, some mining opponents were accused of being in bed with Chilean allies (an insult to many, given the long history of animosity between the two countries over everything from borders to the true origins of *pisco*, the regional grape brandy. The insinuation in this case would be that people were opposing mining development in Peru at the behest of mining concerns in Chile, which could presumably get some competitive benefit in this manner.)

The secretary of the *ronda* in Ayabaca complained that mining opponents were labelled as terrorists or as being anti-development (RJC 2009). An official in CIPCA, one of the main NGOs in Piura working on the Río Blanco case, said that the government thinks that only "four professional agitators" are the ones stirring up trouble. The resistance to the project, however, he argued, is genuine sentiment (Díaz 2010). At a 2009 forum on mining in Sapalache,

Huancabamba province, residents complained that anti-mining critics were accused of being financed by NGOs. The Ayabaca Collective activist agreed. The state says that people follow what one NGO says, but this is not true, he argued. Some people criticize NGOs, and there are plenty of disagreements within the community, he noted (MA 2009). Just as the government tried to assume control over the narrative of violence, and insinuate that people resisting the mine were the true, unruly authors of violent encounters, the government also worked to control the narrative of influence. The Peruvian government has consistently worked to portray communities that stage consultations as victims of a sort, in effect pawns of "outsiders," whether they be from outside the region, as in from NGOs in Lima, or from outside the country. If the government can successfully paint a picture of communities doing consultation as dupes, momentarily and unfortunately swayed by manipulative outsiders with their own interests, then it can more easily undercut the assertion that the results of a consultation speak to something democratic and legitimate, born of complaints truly springing from people whose lives would shift as the result of a mine.

After the National Office of Electoral Processes, which normally oversees elections, refused to organize the consultation, local municipal leaders formed an electoral committee and an ethics committee to oversee the proceeding, including religious leaders (Defensoría del Pueblo 2007: 11). Magdiel Carrión, a prominent leader in Ayabaca from the Yanta community, said that originally there was a suggestion to carry out the consultation in each community, using a show of raised hands to indicate which way people wanted to vote (Carrión 2010a). So, he said, people settled on a secret ballot, even though that meant that people would have to walk for hours to cast them; it was "more democratic" that way, he said. Ultimately three locations were

selected for polling: Ayabaca, Pacaipampa (Ayabaca province), and El Carmen de la Frontera (Huancabamba province). Beginning in March 2007, the municipalities created plans for the consultation individually (Congreso de la República 2008). The Pacaipampa mayor emitted a municipal ordinance approving a consultation on March 30. There followed a meeting of a general assembly of all the *campesino* communities of Ayabaca, which unanimously approved a consultation (El Tiempo 2007b). On April 18, the municipalities of Ayabaca and El Carmen de la Frontera passed ordinances creating the legal mechanism for the consultation in their respective locales (Congreso de la República 2008: 6). These ordinances meant that the local municipalities had a formal, legal basis for convening a vote, regardless of what the results would mean afterwards. Conceivably, people could have gathered in an informal demonstration, calling it a vote, but this way the consultation had at least a patina of legality, even if the central state begged to differ. Others argued that the legality of the consultation went further. According to the lawyer for the *campesino* communities, the proceeding had many legal bases: he named international treaties, the national constitution, the American Convention of Human Rights (regarding the right to participation), ILO 169, the Citizen Participation Law, and the Law on the Environment (Rodríguez 2009). Indisputably, though, whether or not the central government was going to help or approve, the legal architecture for the proceeding was now in place.

The *rondas campesinas*, by all accounts, played a major role in organizing and carrying out the consultation. We accepted help from NGOs, Magdiel told me, but we were the ones who were really in charge (Carrión 2010b). As part of the preparations, they invited a substantial number of international observers. One of these, a woman from Spain working in development

in Peru at the time, explained to me just how organized the observer contingent was. They received formal official invitations, she said, and their transport and lodging were paid for. They were distributed into teams composed such that people from the same country weren't all together at the same polling site. Each team had official spokespeople appointed. They were given written instructions and talking points, noting that the consultation was legal, despite the confiscation the night before the vote of a ballot box (Mediterrània 2009). Not every community consultation is this organized on a formal level (the ones for which I served as an international observer certainly were not), but the conveners of the Río Blanco consultation were leaving little to chance.

The national government, for its part, was frantically scrambling to try to stop, discredit or at least distract from the planned consultation. In addition to declaring the planned activity illegal, it organized a parallel consultation of its own, of a sort (de Echave 2009: 311). With less than 48 hours to go before Peru's second ever community consultation was to take place, at the urging of the national government, Talara province put together its own consultation on the Río Blanco project (Todo Sobre Rio Blanco 2007). The zone is coastal, far from the proposed project, its watershed, and any conceivable effects of the mine, and purporting to organize a consultation essentially overnight, when most of them take at least months to pull off, was somewhat preposterous. This decoy exercise did not become widely known, and is not typically included in accounts of community consultations in Peru, because of its lack of genuineness or significance. The national government was flailing. Facing the reality of the consultation, its last move was to flood the zone of the (true) consultation with police (de Echave 2009: 311).

On September 16, 2007, the consultation took place as planned, with more than half of eligible voters participating (Peru is one of several Latin American countries to require voting in standard elections, fining those who stay away, so high rates of participation are common, but in a voluntary election, this percentage was considered high.) People came on foot from their individual communities, the secretary of the Ayabaca *ronda* told me, to decide the question: do you or do you not want mining in your district (RJC 2009). Others came via truck, horse, or mule (Hoetmer 2010: 164). In some cases, people travelled to the polling sites the night before to be ready for the vote (some of the people voting lived quite far from the provincial centers, making the trip to the polls no small thing.) The government didn't want the schools to be used for the consultation, the secretary recalled, so they used the stadiums instead. People formed lines in the street before entering to cast their ballots. The *rondas* organized everything, holding hands to encircle the trucks with voting equipment to protect it from people who might attempt to tamper with it. Magdiel, the Ayabaca and CONACAMI leader, emphasized at a 2009 forum that the *rondas* had played a very important role in the consultation: because of their efforts, he said, there was no violence.

The proposed Río Blanco mining project was roundly rejected by margins of well over 90% at all three polling sites. There were no reports of conflicts or irregularities. According to the official observers report, everyone behaved "in a calm and responsible manner," and the question on the ballot was appropriately neutrally formatted. Beyond the absence of problems, the whole thing felt very festive, said the Spanish international observer, like—she sat back to think and then smiled—"like a festival of democracy" (Mediterrània 2009). This phrase echoed many comments that I heard in both Peru and Guatemala regarding community consultations,

which emphasized the happiness and high spirits associated with the gathering of the community involved with the activity. The Front for Sustainable Development on the Northern Frontier of Peru used a similar phrase, "the democratic festival," in a statement celebrating the consultation's second anniversary. Those who had participated in the consultation touted its meaning, effectiveness, and joyful energy. The consultation struck a great blow to mining and neoliberalism, said Magdiel, the Ayabaca and CONACAMI leader (Carrión 2010a). After the Río Blanco consultation, there was a widespread sense of accomplishment and energy.

Subsequent development of the conflict

As the immediate aftermath of the consultation subsided, the conflict entered a more ambiguous phase. Activists continued to celebrate the consultation, marking its annual anniversaries with parties and pronouncements. The tangible results, however, were not nearly so substantial as some had hoped. The government did not cancel the mining concession or acknowledge any sort of validity of the consultation; indeed, it lashed out at mining critics, often fiercely. The corporate ownership of the mine changed in early 2007, a few months before the consultation, from British Monterrico Metals to Chinese Zijin; neither company announced any plans to withdraw based on the consultation or for any other reason. A repeat of Tambogrande was not at hand. The communities that had participated were energized, at least for a time, but the consultation alone could not neatly heal longstanding personal rifts or political differences. Mining opponents continued to experience serious harassment, legal and otherwise, and some even lost their lives after the consultation, just as some had before it. Night watchmen for the mining company also lost their lives, in November 2009, when 15-20 people entered the

corporate office in Huancabamba and burned mining installations (the responsible parties were never satisfactorily identified.) The consultation itself was peaceful and orderly, but other aspects of the conflict, both before and after the referendum, were decidedly not. The struggle isn't over; it's just beginning, said the secretary of the Ayabaca *ronda* (RJC 2009). In the aftermath of the consultation, this seemed true in both a positive and a negative sense; the energy for fighting the mine did not disappear, but nor did opposing the mine become less of a struggle.

The day after the consultation, 10,000 people demonstrated on the streets of Piura, the regional capital, to demand that the consultation be respected (de Echave et al 2009: 316). This would have meant, for most, that the state "respect" the overwhelming vote against the proposed Río Blanco mining project by declaring it invalid and cancelling the license, or at the very least that the state issue some kind of statement honoring the consultation as an important reflection of democratic will to be valued and taken seriously. Nothing of the kind occurred, however. The central state completely ignored the consultation, even as an opinion to take into account, said the lawyer for the *campesino* communities. They even denounced the local authorities just for convoking it. Like everything about the aftermath of the consultation, this reaction—or overreaction—could be seen as ambiguous. It may have been optimal, from the point of view of mining opponents, for the government to cancel the mine and change its tune entirely, but given how unlikely that was to happen, the governmental backlash might actually have helped sustain enthusiasm for the struggle, however unwittingly. The consultations that have been done in the south of Peru have not been as useful, the lawyer argued, because the government ignored them

and didn't make a big issue out of them. Certainly this could not be said of the response to the Río Blanco consultation.

After it was all done, the Spanish international observer said, there was "a great letdown." People really thought the consultation would be the end of it, she said, meaning that it would represent the grand pinnacle of the fight against the mine, in which the company had to slink off in defeat, and now there is much less energy for the fight in the region. There is a sense of resignation, she argued, and divisions based on personal disputes wrapped up in political differences. Despite all this, she maintained, the consultation was useful; it serves, she said, as another instrument to make the point that people reject mining. 50% of the voters participated, she reminded me, and this was with voluntary voting.

We were all clear that the struggle didn't end with the consultation; afterwards began the second stage, said the Ayabaca Collective activist (MA 2009). This second stage involved a curious combination of being both assertive and defensive. Activists promoted and trumpeted the results of the consultation, insisting proudly that it must be respected; at the same time, they were forced to defend themselves from the second stage of the smear campaign, to accompany the second stage of the struggle against the mine, and in some cases to quite literally defend themselves against threats to their lives. The state ignored the consultation, and President Alan García started a campaign of verbal mistreatment against us, calling us narcos and communists, said the Collective activist. (Allegations of narco-trafficking are increasingly common in the region, which many feel is a pretext for militarizing the zone and thus further suppressing dissent on mining. On one bus trip from Piura to Ayabaca, police entered the vehicle and "searched" the

bags of each passenger, in a routine stop to supposedly detect drugs. Given that the search of my backpack consisted of a finger cursorily poking at the fabric on the outside of my closed bag, I was left rather dubious of the quality of the intelligence on the issue.)

Others attacked the consultation on other grounds. It wasn't credible, said the director of El Correo, a leading regional newspaper in Piura. Democracy has never existed among the people who did it, he said dismissively. They whip people and have vertical authority. Coercion is very strong and people don't say what they think, he asserted. If you observed a community meeting while hidden, he said of the communities that did the consultation, you would see whether or not they were really democratic (his unmistakable implication being that they were not). We live in different eras, he said from his comfortably air-conditioned, well-appointed and spacious office. There are people who are living in 1500, who use burros and cook with wood, parallel to the rest of us (Rodrich 2010). Here was one leading voice in the region, at least, of someone not in the least persuaded of the democratic legitimacy of the consultation. Others criticized the consultation in perhaps less biting terms. They did a consultation for Río Blanco on their own, complained a prominent Lima lawyer who had been in the Ombudsman's office, but that isn't what ILO 169 implies. It's a process, not a one-time event, he argued, and should not be undertaken by NGOs or local communities. The subsoil (the resources beneath the surface of the earth) is in the interest of the whole nation, he said, and thus not properly controlled by small bands of citizens (Santivestan de Noriega 2010). Overall, these sorts of comments represent lines of criticism that were directed at the consultation: assertions that it was not truly democratic, lawful, legitimate, or meaningful.

Despite these criticisms and attacks, proponents of the consultation continued to press for it to be respected. A few months afterwards, representatives of the opposition to the mine, including the Front for Sustainable Development for the Northern Border, met with Jorge Del Castillo, the cabinet chief, in Piura. They were to have a roundtable to discuss conflicts over the mine, and asked to discuss the consultation. Del Castillo refused, and abruptly walked out of the meeting (Peruvian Times 2007). The central government remained implacably hostile to the consultation and deaf to pleas that it be taken into account. A member of the social management team of the Mining and Energy Ministry conceded that relations between the government and the communities were poor and strained, though she threw back some of the blame on the communities. When we go near Río Blanco with the cabinet (Presidencia del Consejo de Ministros), she said, the population doesn't let us enter (Vásquez 2010). She also faulted the cabinet for not showing leadership in its dealings with Zijin. Certainly, the consultation had not left the communities and the government in agreement about what was required, legally, practically, or ethically.

The communities near the Río Blanco concession continued to organize in other ways. In July 2009, the Ayabaca *ronda* secretary said, there was a peaceful march in Piura (the regional capital), in which one thousand *ronderos* participated. In August 2009, he added, we had a meeting here, with thousands of *ronderos*, joined by members of the Shuar community from Ecuador. The idea was to unite, he said, and to struggle together against mining. We love our country, and we are free, he said, like it says in the national anthem. Now, he said, we are a regional front, and the world knows that in Ayabaca we don't want mining. Whether or not the national government was willing to meet, to listen, or to accept the message, residents of the

communities near the mine, particularly in Ayabaca, were continuing post-consultation to work hard to keep publicizing their opposition to the project.

Besides meetings, marches and continuing promotion of the consultation, another important tactic in sustaining criticism of the project revolved around the use of radio. The medium is a crucial one in this and other regions of Peru, for broadcasting news, as well as music and other programming. There are daily newspapers at the national and regional levels with substantial readership, and many other print publications, but outside of urban centers, these media are less widely available or consumed. The print forms are hardly available in smaller locales (and, as discussed above, many residents of the region would be unable to read them even if they were available.) Where internet is publicly or commonly available, which it is not in all locations, it can be so slow as to practically be absent (on one occasion in Ayabaca it took me approximately 20 minutes to send a plain text e-mail of a few lines.) The lawyer for the communities, remarking on the lack of relevance of print media to the communities affected by mining, said dismissively that anyone could publish the legally required notice in a newspaper that there is a concession on their lands, but that it would never actually reach the communities (Rodríguez 2009). This relative absence of print media leaves a gap, often filled by radio broadcasts (as well as other forms of communication like cellular phone conversations.) Not all radio stations in Piura show special interest in mining or environmental issues, and not all of them are necessarily aligned with mining opponents, but nonetheless, radio broadcasting has been an important feature of the struggle over Río Blanco, both before, during, and after the consultation. One station in particular, Radio Cutivalú, out of Piura, has played an important role in providing a space for mining opponents. We're a Jesuit station, said one broadcaster (LL

2010). Human beings are at the center of our philosophy, not the economy, he explained. In existence since 1986, the station is the only alternative media source in the whole region, he stated, with 80% educational programming. We are a tiny radio that struggles against a great monster that runs around all of Peru, he said, and the station is "the voice of the desert" (while Piura region contains various ecosystems, much of the zone around the regional capital where the station is located is desert.) Continuing with grand analogies, he compared the station to John the Baptist, in that it prepared "the path to the truth". We're able to operate partly because of some Spanish financing, he explained; they're "returning the gold they stole from us." His casting of the station as a heroic David to the Goliath of racism, corporate greed and an unresponsive government provided a clear contrast to the attitude of the editor of the regional newspaper described above, who dismissed consultation participants as so many uneducated obstacles to progress.

Not all radio stations in the region necessarily take the same approach. Radio Campesino, another station, is state-supported and pro-mining, claimed an Ayabaca Collective activist (MA 2009). When I asked them about these assertions at their Ayabaca office, they denied them, and said they had a strong interest in environmental issues, and had nothing to do with politics. But they are certainly not known as an activist radio station. It could credibly be seen as risky to be known this way; mining opponents in Ayabaca complained that the government was deliberately interfering with the signal for the community radio station, to hamper them from getting out their message. Several people in Ayabaca commented on the critical role of radio in disseminating information and providing space for critical political viewpoints on the mine. A member of the Ayabaca Collective (OG 2009) described a

progressive radio show that broadcasts every Wednesday and Saturday in the region, though he mourned the fact that radio is "persecuted," he said, by the state. The Collective in Defense of the Environment uses radio to inform the *campesino* communities and keep them aware of developments, said two women associated with the mine opposition (CLMS 2009). In the context of the consultation specifically, Magdiel Carrión, the Ayabaca *ronda* and CONACAMI leader, mentioned how he went on the radio frequently, to explain and promote it. On one of my first visits to Ayabaca, a little over two years after the consultation, Collective activists and a youth group arranged for me to speak about my research and views, given the interest they thought listeners would have in a foreigner involved in mining issues. The broadcast, they told me, would reach the *campesino* communities. The youth activists sat outside the recording booth as I spoke, using the station's space as a gathering place. Radio was clearly a key player for both mining opponents during every stage of the struggle over Río Blanco, and for those sympathetic to the mine who wished to get their message out as well.

Meanwhile, in the aftermath of the consultation, the company, now owned by Chinese consortium Zijin, and its affiliates for the most part lay low. Tensions ran too high for the company or its affiliates to be a visible presence in much of the region. Integrando, the corporate-sponsored NGO that many regard as a noxious decoy, had an office in Ayabaca, but, residents there told me, it had to close (CLMS 2009). The company's Ayabaca office also closed in the face of community pressure. In the early days of the conflict they had had a well-known office in the regional capital of Piura, but after the consultation and the transfer to the Chinese owners, they became more discreet, and that office closed. I began to hear rumors of an office in Piura, and in 2010 eventually tracked it down, far from the center on town, on a quiet side street.

I was unsure at first if the vague pointing someone in the area had done was correct, since the building was unmarked. But when I rang the bell, someone from Zijin's regional office did come out to take my card and information on my research. A while later, a Peruvian official with the company came out and introduced himself, and apologized politely, saying only that a meeting would not be possible there, since their office did not deal with the public, though perhaps one day I could speak to someone in Lima. I thanked him, using his name, and he turned ghostly pale. "How did you know my name?" he asked, sounding wavery and thunderstruck. When I reminded him that he had introduced himself mere moments earlier, he looked unconvinced. "Did I?" he asked, looking almost panicked. I took my leave, wondering what harm a doctoral student could inflict on a multinational mining company by knowing the name of a perfectly pleasant employee of a branch office. This encounter did not convey the impression of a confident company that wanted to be seen.

During time spent in Lima, I tried repeatedly to schedule an interview with someone at the main Zijin headquarters in the country, only to be politely put off each time. Whichever person I needed to speak to, it seemed, was perpetually unavailable at the moment of my call. On one occasion I was instructed to call back in five minutes, but when I did so, the person I was seeking reportedly had just left the office for the day, leaving me to wonder if the brief interval had been just enough time for this employee to flee out the back window. Only when I rang the doorbell of the office did someone agree to get back to me to set up an interview, for a later date. When I was finally able to speak to two representatives of the company at their office, the Chinese employee expertly filibustered for hours, talking serenely and obliquely about anything except the answers to the questions I had posed, offering a long disquisition on the history of

Confucianism going back millennia, leaving his Peruvian colleague to fiddle with his phone in increasingly desperate boredom (Wu and Navas 2010). At one point the Chinese representative did address the topic of community relations, giving an upbeat assessment and asserting that the opposition was lessening as years passed. Relations with communities proceed on two tracks, he said, one legal and one of perceptions. If the question is legal, he said, "I call the lawyer. The law is the law and must be obeyed." The other issue is also important, he added: that of legitimacy. His view was that tensions with the community were an obstacle to be smoothed out, and that the Confucian-inspired goal of harmony was reachable through intelligent management.

While post-consultation the company, under its new Chinese ownership, tried to lower the temperature of the controversy and avoid publicity, many in the national government seemed discomfited or anxious about the consultation and overall conflict. Even I don't understand why the government has such fear of the consultation if it's not binding, said the lawyer for the communities. I think it's fear, he said; the government is very open to investment, thinking it's the path to economic success, and consultation could start to be popular, and this could impede their economic plan. The leader of CIPCA, the Piura NGO, agreed. The government's model of development isn't helpful; it thinks, "we must invest in something, it doesn't matter what," he said. It is interested in poverty because it can blame it on a lack of mining (and thus justify more mining investment). The government is very neoliberal, he said, and wants to be classified as a first world country, defined as an average income of above $4,000 per year. Their "crazy idea" is that if we reach that, we're developed, he said—the statistics are the only important thing, though in health and education we're very far from the first world. Those are what's needed for real development, he argued. Some laws made under Fujimori (Peru's dictator between 1990

and 2000) were a disaster, he concluded. He said anyone could come in and extract, and some companies still don't even pay taxes (because of loopholes or special deals.)

Despite the government's enthusiasm for the perceived economic benefits of mining in general and the Río Blanco project in particular, many critics of the project echoed the CIPCA head's arguments about the illogic, on economic grounds, of pursuing the mine. Their points centered on the practical experience of a generation of modern mining and of the modern regulatory regime in Peru. Large-scale mining with modern technology generally dates to the early 1990s in Peru and the start of the Yanacocha project (see Chapter 3), and much of the relevant mining law does as well. Our laws are from the dictatorship era, the lawyer for the communities stated, and presidents García and Toledo never changed "even a comma' of the mining laws made under Fujimori (Rodríguez 2009). (President Humala if anything made the regulatory regime pertaining to mining even looser, with the possible exception of the passage of the consultation law, depending on one's viewpoint. See Chapter 6.) The state is weak and fragile in the face of corporations, and doesn't supervise what it ought to, complained a Piura activist (Canterac 2009). We're selling the little that remains in Peru, he lamented.

According to the landmark report by the Peru Support Group, the Río Blanco project was touted as an economic boon to the region based on three primary alleged factors: employment and services, corporate social responsibility (as in contributions to local schools, hospitals, etc.), and required corporate payments, in the forms of taxes, royalties, and the canon. However, the reports' authors contended (2007: v), long experience in Peru and the specifics of this proposed project cast doubt on the economic efficacy of any of these in stimulating the local economy.

Employment by multinational mining conglomerates tends to go to a small number of highly skilled laborers, often from outside a poor region (which may contain few people with the necessary technical skills). Corporate social responsibility (CSR) is by its nature completely voluntary, and thus often absent or scanty. In the context of this dispute, efforts by Integrando might be labelled CSR by some, but arguably inflame tensions more than contributing to the region's "development". Royalties are low in Peru, and some companies negotiate suspension of any royalty payments for years (2007: 35). Two residents of Ayabaca contemplating the possibility of the Río Blanco mine expressed skepticism that the project would lead to improved economic outcomes. Mining hasn't led to development for the majority, one said; you can see this with Yanacocha (CLMS 2009). There are people in extreme poverty there, she noted (widely accepted statistics on the Cajamarca region corroborate her assertion; see Chapter 3.) The secretary of the Ayabaca *ronda* agreed. We don't get the benefits of mining, he stated. The government lies, he said, and says that agriculture doesn't generate income, but we live off of it (RJC 2009). These debates on the projected economic effect of the Río Blanco project did not subside after the consultation. Project opponents saw the vote as confirmation that people who would be most closely affected by the project saw it for what it was, and rejected it on that rational basis, while project proponents dismissed that rejection as a sign of poor understanding of the great riches the mine would bring for all. The consultation and the debates that unfolded in the years following changed the minds of very few.

The Río Blanco project today

The conflict over the proposed Río Blanco project continues to percolate sullenly today, much as it has for more than a decade since the consultation. As of this writing, the mine still has not come to fruition as an active extractive project. On the other hand, neither has there been any definitive official rejection of the project, on the part of the national government, the company, or anyone else. In late 2014, provincial leaders met with the national Ombudsman office to express their concerns that the project seemed to be becoming active again (CooperAcción 2014). They noted that the Mining Ministry had hastily announced a meeting with residents in the area over the radio, and reported that Ministry officials at the meeting emphasized the importance of mining in daily life. They also expressed worry over the October 2014 detention without cause of an environmental leader in Huancabamba. They complained that as leaders they had been denounced over the radio, called "terrorists, anti-mining, and development opponents." Unfortunately none of these occurrences are new within the context of the region's divisions over mining, but these leaders worried that these latest events were a sign that Río Blanco might be on its way to active conflict again, after a time smoldering somewhat more under the radar.

And so the controversy continues on in a sort of state of suspended animation. Years later, the role of the consultation is difficult to characterize one-dimensionally. On the level of straightforward results, it did not achieve a legal rejection of the project or a departure of the company. Even after the passage of Peru's national consultation law (for more on this, see Chapter 6), there has been no mention of the possibility of either an official state-led consultation for the region, or a new commitment to respect the results of the community-led consultation of

2007. If the mine really does come to pass, as seems at least plausible, it might seem in some senses that the consultation simply never happened.

And yet, the consultation continues to generate energy and enthusiasm for the opposition to Río Blanco. Particularly within the context of Peru, which has seen only a handful of community-led, referendum-style consultations, this one makes the movement to oppose Río Blanco have a stature that it would not otherwise have. Activists can point to the consultation as evidence of one of the clear cases of community rejection of a mine. It serves as a clear-cut potential rallying tool should the project threaten to begin in earnest. In the absence of another consultation that yielded different results, it would be difficult to provide some sort of convincing evidence of support for the mine that crystallized the expression of public opinion like the consultation did. Should project opponents ever turn to an international tribunal, the cache of consultation could be useful in arming a case that the state has ignored the right, in its continuing refusal to meaningfully recognize or honor the results.

On a social level, the consultation contributed to a certain cohesion among project opponents, who can agree on the dignity of having carried out the extensive and serious undertaking, and it contributed to the possibility of regional mobilization, beyond local resistance. It did not, however, erase human jealousies between leaders who share an opposition to the project, or create any kind of unanimity of opinion on what kind of development would positively be best for the region. Nor could the consultation shield activists from ongoing attacks of either the verbal or the physical variety. Being part of the opposition to Río Blanco continues to be a fraught, risky and sometimes divisive endeavor.

What must change in this struggle is attitudes and laws, said noted environmental activist Lupo Canterac (2009). The consultation can be helpful here, he maintained. The president of one of the *campesino* communities facing Río Blanco, however, had another perspective. Reflecting on the rights Peru accords to indigenous and *campesino* communities, he said ruefully: the law is good; it is only that no one respects it, (DS 2009), in an echo, perhaps unconscious, of nineteenth century Peruvian President Piérola, who is quoted as saying, "In Peru, we have very good laws, but one is missing: a law that says that all the other laws should be complied with." The mining company, in its British and Chinese iterations, has broken the law on several occasions, as when its security forces have detained, injured or killed project opponents. It has on other occasions bent the law practically past recognition, as when it submitted an environmental impact assessment that was laughably inadequate. The national government, too, has seen fit to ignore its own law at will, from accepting this broken environment assessment as basis for mine approval, to falsely claiming that the consultation was illegal to carry out, to neglecting claims of torture pressed in national courts. Meanwhile, opponents of Río Blanco who claimed the mantle of law, both national and international, for themselves, continue to stoke the fractious fires of opposition while they wait to see what becomes of their uneasy limbo.

Chapter 5

"Guatemala is a good place to commit a murder, because you will almost certainly get away with it."

Introduction

As one approaches the Marlin mine, tucked away in a remote part of the western Guatemalan highlands in the region of San Marcos, it becomes possible to discern a large denuded patch of land among the trees, and adjacent to it a liquid pool comes into focus, a startling, unearthly shade of green. Bulldozers crisscross the bare land, efficiently removing tons of earth from the open pit of Guatemala's "first gold mine of significant size," (Goldcorp 2014). The unsettling greenish hue emanates from the mine's wastewater tailings pond, which captures and stores the runoff from the operations of this massive mine, which rely heavily on cyanide processing, banned in Europe and some parts of the United States for its high toxicity. An observer standing on the hillside gazing at the bulldozers and the sickly green reservoir can readily appreciate both the great wealth that motivates the mining company and its supporters, and the great risk that motivates many of the mine's neighbors and their supporters in turn to oppose the mine, notwithstanding the sign on the property that reads, "Reforesting. We take care of our environment."

The Marlin mine has, nearly since its inception, served as a symbol on several levels. The mine is Guatemala's "first major open-pit gold mine and the first major mining investment

in 20 years." (CAO 2005:5) It was the first project authorized following the passage of Guatemala's 1997 mining law (still in effect as of this writing), explicitly designed to generate foreign investment. The law lowered royalty rates from 7% to 1%, which represented a historic low for the country (and which is a comparatively low rate globally.) The Marlin project seemed to some to be the perfect example of the kind of investment that these incentives were intended for. Guatemala was just emerging from its decades-long civil war (see Chapter 2), and the discovery of Central America's largest mineral deposits led some to hope that the Marlin mine would be a valuable pillar of the post-war economy (Solano 2005, 110). To support these aspirations, in 2004, not quite a decade after the signing of the Peace Accords that signaled the formal end to the devastating conflict, the World Bank, through its private sector arm, the International Finance Corporation, awarded the project a $45 million loan. The loan was the Bank's first for a mining, oil or gas project since the conclusion of the Extractive Industries Review, which had recommended supporting extractive projects like mines somewhat reluctantly, and only given local conditions of firm support for human rights and environmental guarantees (see Chapter 2). Thus, the Marlin mine began its life as a project freighted with both national and international expectations, that it serve as a leading positive example of how Guatemala's economy and also global extractive industry could flourish in a respectable manner.

In addition to its significance in these respects, the Marlin goldmine came to symbolize a quite different, utterly unanticipated, historic "first". Despite the enthusiasm in governmental and corporate circles for the project, the communities who surrounded it began to raise serious reservations about the mine, based on similar concerns as the ones cited in the Yanacocha and Río Blanco cases: environmental issues, land rights, doubts about the economic contribution, and

community autonomy. Resistance and opposition were particularly heated in the municipality of Sipacapa[5], which contains part of the territory included in the mining concession; the rest, a much larger share, lies in San Miguel Ixtahuacán, where many critics of the project also emerged. As the vaunted mine drew harsh criticisms before it had even begun operations, its neighbors in Sipacapa sought a way to dramatize their plight and push for a halt to the mine. Inspired in no small part by the example of Tambogrande, in northern Peru, a group of communities in Sipacapa decided to stage a consultation, consisting of referenda in each of these communities, organized by local authorities, on whether or not the mine should proceed. Participating voters overwhelmingly expressed their opposition to the project. Thus, the Marlin mine became the first in the world subjected to a major indigenous community consultation.[6] As dozens of other communities in Guatemala organized similar consultations in the years following, Sipacapa became a sort of shorthand for community consultation in Guatemala. The Marlin mine had become a test case indeed, not just for extractive development in Guatemala and Central America, not just for World Bank financing of this type of activity, but for a new type of resistance that would come to be seen as broadly influential in Guatemala and beyond. Sipacapa, and with it community consultation, were now the face of indigenous resistance to mining in Guatemala, and even in the region.

To shed light on the role this consultation has played in the politics of mining in Guatemala, in this chapter I provide basic background information on the mine, analyze the origins of the conflict it generated, and detail the legal environment in Guatemala surrounding mining and indigenous communities. I then discuss the consultation itself, and the development

of the conflict afterward, including multiple layers of legal and political action. I conclude by placing the Sipacapa consultation in broader national perspective.

The Marlin mine

The Marlin deposit was initially identified by two Guatemalan geologists in 1998, the year following the passage of the new mining law intended to encourage foreign investment. (Daynes 2014) Initial explorations began the following year, as the concession changed corporate hands a few times. Named after a friend of one of the initial explorers, the Marlin mine was determined to be a likely profit center by Canadian company Glamis Gold, which acquired the project in 2002 and projected that the mine could produce 1.4 million ounces of gold, and significant silver as well. The mine's current owner is Goldcorp, also a Canadian company, which acquired Glamis and now operates the mine with the wholly owned local subsidiary, Montana Exploradora. Headquartered in Vancouver, Goldcorp operates several mines in Canada and the United States as well as some in Mexico and in South America. Founded in 1954, the company, as its name indicates, focuses primarily on gold extraction (Bloomberg Businessweek 2014). Goldcorp has done exceptionally well for itself economically in recent years. A good portion of that good fortune has come from the Marlin mine. Between 2000 and 2010 the value of its stock rose by more than 1400%. By 2011 it had become the second largest gold producer in the world. (Zarksy and Stanley 2011: 17) That same year, the *Prensa Libre* (2011) reported that Marlin's profits had gone up by 1671%, five times more than the increase of the amount going to the state in taxes and royalties.

The project referred to generally as the Marlin mine consists of several smaller component projects. One is Marlin I (the originally granted license); another is Marlin II (granted the following year). There is also a concession for exploration at a site dubbed Marlin III.[7] The company has looked at other possible production (for instance the Los Chocoyos site.) For ease of comprehension, unless the distinctions are relevant, I refer to these sites collectively as the Marlin mine, as is typical practice. The Guatemalan government issued a 25-year exploitation license for the mine in 2003. The World Bank loan came the following year, and in 2005 the Marlin mine went into production.

The mine is located in the San Marcos region of Guatemala, in the western highlands on the border with Chiapas, Mexico. The site is about a two hour drive north from the regional capital, also named San Marcos, and about an hour west of Huehuetenango, the capital of the neighboring region also of that name. The municipalities of Sipacapa and San Miguel Ixtahuacán lie far in every sense from the regions of Guatemala that typically see even the hardiest of tourists, who more commonly flock to the picturesque Lake Atitlán or the dazzling Mayan ruins in the north of the country. Any visitors who do arrive in San Marcos will encounter staggering levels of poverty and associated social evils. In Guatemala in general poverty rates are high, but in San Marcos the rates are astronomical. In the municipalities where the mine is found, 97.5% of the population lives in poverty, 80% in extreme poverty (see Van de Sandt 2009: 22). Residents survive primarily through subsistence farming, mainly of corn and beans. Families in the region also rely significantly on seasonal labor and remittances from

abroad. Levels of illiteracy and malnutrition are wrenchingly high. By any measure of social or human development, Sipacapa and San Miguel Ixtahuacán would have to rate abysmally low.

A few of the communities in these zones live "on or near the edge of the mine," (Zarsky and Stanley 2011: 10), making the trope of the Latin American peasant living in poverty atop a mountain of gold uncomfortably close to literal. Approximately 87% of the mine lies within three communities of San Miguel: San José Nueva Esperanza, Agel and San José Ixcaniche; the remainder is located in a Sipacapa community, Tzalem. San Miguel has more than 30,000 residents, who live in the municipal capital, 17 villages and 43 communities. Sipacapa's approximately 14,000 people live in 12 villages and 19 communities (2003 census, cited in Zarsky and Stanley 2011: 9).

The populations of these two municipalities are primarily indigenous. Both Sipacapa and San Miguel are home to Maya populations, although the predominant groups in these two places are distinct, culturally and linguistically. The majority of the residents of Sipacapa speak Sipacapense, a Maya language spoken only in that specific area. Nearly all the residents of San Miguel speak Maya Mam, a language spoken more broadly in the region. (See CAO 2005) Many people in the region speak Spanish in addition to a Maya language, though some speak only Mam or Sipakapense. The two areas also differ in their religious composition; two thirds are Catholic in Sipacapa, while only one third of residents are Catholic in San Miguel. (PG 2010). While residents of the two municipalities are certainly not completely insular or cut off from each other, they do operate fairly independently, and the story of political engagement with the mine they share has developed differently within the two neighboring areas.

Legal and Institutional Context

While marches, blockades, and demonstrations of all stripes have been mainstays of the Marlin opposition from the beginning up to the present, the movement has not limited itself to a protest paradigm, but has taken advantage of a number of rule-bound venues in which to press their case. Several legal and other institutional frameworks and mechanisms have come to play roles in the struggle, and indeed crucial ones. At various points, people resisting the Marlin mine have formally staked their claims based on rights protected in national law, international law, and other types of formal institutional codes. The results of drawing on these mechanisms has been ambiguous and decidedly mixed (see Fulmer et al 2008 for analysis on this point.) Importantly, the legal and institutional context also offers significant protections to and advantages for mining activity, and not just its critics.

Guatemalan domestic law contains several provisions that, at least in theory, might offer some relief for people seeking to press claims against Marlin. The national constitution, dating to 1985 and modified in 1993, seems to offer some protections for indigenous peoples. It recognizes Guatemala as pluricultural, and article 70 calls for a new law to allow for indigenous participation, but this law has never been passed. The constitution is also one of several sources in Guatemalan law that provide a legal basis for consultation. Article 173 establishes the right to a state-level consultation on matters of national concern. There have been only two of these since 1985, one on the Peace Accords that helped end the civil war. Other sources besides the constitution also allow for consultations under specific circumstances. Article 26 of the Law on

Councils for Urban and Rural Development regulates consultation under the auspices of Community Councils on Development (COCODE, by its Spanish abbreviation.) The 2002 Municipal Code provides further recourse. Article 20 gives indigenous communities legal personality, and Article 65 allows for municipalities to hold consultations.

By contrast, Guatemala's mining law offers no such protections or consideration for indigenous participation. The 1997 mining law (still in effect as of this writing) has been widely panned by indigenous and environmental advocates for emphasizing the facilitation of mining activity over the regulation of said activity. The law requires companies to conduct an environmental impact study, but does not specify what the study should contain. The environmental authorities have 30 days to review the study, a period they cannot extend. If the case has not been decided within those 30 days, the mine is automatically approved. "Such study…will be resolved within thirty days. After this time and not being resolved, it will be taken as accepted," according to the law (Congreso de la República de Guatemala 1999). This seems as clear an example of a regulatory rubber stamp as one could hope to find; this type of study is a complex, technical document that would take the overburdened environmental authorities considerably longer to review properly.

Furthermore, since Guatemala has ratified ILO Convention 169, indigenous communities enjoy full rights to consultation to the extent of that treaty. Guatemala as of this writing has not passed any domestic implementing legislation (for more on that point, see Chapter 6) but the treaty is formally binding on Guatemala in any case. The Guatemalan state has only just started in the past couple years to consult indigenous communities in keeping with its treaty

commitment, and only in a few cases that might call for consultation, and only under great legal duress. The formal legal opportunity for state-led consultation has not often translated into actual consultations thus far.

Finally, some other quasi-legal institutional codes apply. Since the Marlin mine was partially financed by the IFC, people in project-affected areas have recourse to the Compliance Advisor/Ombudsman, an independent entity within the World Bank which hears and responds to complaints "with the goal of enhancing social and environmental outcomes on the ground." (Compliance Advisor/Ombudsman 2014) Goldcorp is also now part of various international voluntary initiatives, including the global Voluntary Principles on Security and Human Rights (Goldcorp 2014), which commit adherents to pay special attention to human rights where they operate, especially regarding corporate security practices. Security staff at the Marlin mine were required to read the Universal Declaration of Human Rights once annually (Goldcorp 2014), as one example of part of their training under this commitment. Goldcorp's other related commitments are to other voluntary initiatives, so the company's participation does not give local residents any additional legally actionable rights, only the possibility of embarrassing the company if it does not live up to its stated commitments.

Whatever the particulars of the formal legal and institutional context in Guatemala, the unfortunate reality is that the state lacks the will or ability in many cases to enforce the laws, weak as they may be (as in the example of the environmental review for mines). A New Yorker article quoted a United Nations official who put it in stark terms: "Guatemala is a good place to commit a murder, because you will almost certainly get away with it." (Grann 2011) The state's

capacity to prevent or punish crimes, whether petty or violent, personal or corporate, is vanishingly small. The legal and regulatory lack of capacity certainly seems to apply in the case of mining. A lawyer in San Marcos told me that the state lacks capacity to oversee reporting on corporate profits, and that there is no will to take on this task. (UM 2010) Another San Marcos activist concurred; it is the *mine* that tells the state how much they earn, he said, and the state lacks the oversight capacity to verify the figures. (VPS 2010). Thus, despite the already low tax burden on mining companies in Guatemala, it is possible that even some of Goldcorp's income which ought to be taxed, in fact is not. In a related case, the Guatemalan government ordered Duke Energy to close its electric plant in 2003 because of noise pollution, but Duke flagrantly ignored the decision and continued to operate the plant. (Morales 2006; Ramírez 2003)

Overall, then, the legal institutional picture is mixed. On the one hand, indigenous peoples have some specific legal protections in Guatemala regarding participation and other rights. On the other, corporations also have some real advantages written into the laws, and furthermore, in many cases the Guatemalan government cannot or will not enforce its own laws, especially those that burden multinational corporations.

Origins of the Conflict

When the mine first began to enter the region, very few local residents had any idea of what was to come. The company entered as though "under water," (ML 2010) a local religious leader active in the resistance told me. People didn't even know what a mine was, and haven't been there and don't know where it is, another religious leader told me (PG 2010). Local

transport doesn't pass by it, and it is hidden behind a hill, so it initially flew beneath the radar of many. The surrounding communities were largely unaware of what was going on, even as the company was buying up land. Even if they had known initially that a major mine was in the offing, few in the local communities had any experience with mining that would have allowed them to assess the risks and rewards it might bring. Thus, when the company deployed people with megaphones to say, come to a meeting about the Marlin mine, people attended with legitimate curiosity, this religious leader told me. We went to listen and they made the mine sound wonderful, she said. It was just then we realized it was gold they were after. They said they were going to invest in community development, she stated, and so people by and large agreed to the idea. They thought that since the mining company came from the United States it was there to help, so few were initially disposed to be opposed.

A local opposition leader in rural Sipacapa described the mine's arrival similarly (MTC 2010). In the 1990s the company entered the zone without announcing that its presence concerned mining, he told me. Company representatives told us they'd use worthless land and help people get what they need. They told the people, "the mine is development for you." People were excited, and willingly signed legal documents pertaining to their lands, which, he maintained, turned out to be a trick. Once the land acquisition was legally in order, the company began to cut down trees, and people were surprised, according to this leader. They began to demonstrate against the company, but they had already signed away their lands.

The company holds out its process of land acquisition as fair, above-board, and wholly legal, but many analysts contest this characterization. Van de Sandt (2009:28) describes the

approach to buying up the land on which the mine would sit as aggressive and coercive, based at times on lies and intimidation. The company bought small land parcels from individual owners, thereby evading the necessity of airing the issue publicly, in a communal forum. The communities in the area, by some accounts, had collective rights to the land, which in that case should not have been sold off in individual plots, but the available information on their collective land titles is confusing and sometimes contradictory, and often not well documented. In any case, effectively the company was able to ignore with impunity any restrictions stemming from collective titles that may have applied (Van de Sandt 2009: 101-2). As with many other mines in Peru and elsewhere, there were further complaints that the prices paid for the land were unfairly low. The prices may have seemed high to peasants, but they were low, a research analyst in Guatemala City told me (Vargas Foronda 2010). They didn't tell them what they were going to do with the land, he said, and no one knew what they were selling for.

Organized public criticism of the Marlin mine first started to coalesce in late 2003, the same year in which the license was issued. Sipacapa authorities met to discuss concerns about water contamination and lack of information with members of the Peasant Worker Movement (MTC, by its Spanish initials), an organization connected to the Catholic Diocese in the San Marcos capital which has been one of the central groups coordinating resistance to the mine. Then and from that point forward, the bases for objections to the mine were based on several interlocking factors. As is common with large-scale mines, serious concerns arose about water, in terms of both quantity and quality. People in the area started to see evidence of pollution, the Sipacapa leader told me. Water sources dried up, and animals began to die of contaminated drinking water. Our rivers and forests are contaminated, residents told me at an MTC meeting

(2010). Many other residents corroborated these accounts, though the company dismissed them as unfounded. The CAO report (2005) also concluded that fears about the mine's effect on the local water supply were largely overblown. Other professional assessments came to different conclusions; E-tech, in a study commissioned by Oxfam America, asserted that Marlin causes risks for the water supply. (E-tech 2010) A prominent hydrologist, Moran, has published studies concluding that the high water use associated with mining is a problem in an area with regular seasonal shortages. COPAE released a report showing dangerous levels of heavy metals in the Tzalá and Quichivil rivers, which feed into the main watershed around the mine. (August 25 2010.)

Water has been the major focus of environmental concerns related to the Marlin mine, but there are others as well. The gold and other precious metals at the site are found in quite low concentrations. Any mining affects the surrounding environment, but the process required to extract the valuable particles in these low concentrations is particularly destructive. Mines of this nature mean that vegetation and earth are removed, and that a large pit is opened by means of explosives. The ore recovered from the pit is treated with cyanide to help separate out the gold, which is sent to a smelting facility. The waste product, or "tailings," are stored in a pond (as described at the beginning of the chapter.) According to Zarsky and Stanley (2011:30), "[e]nvironmental problems emerge at almost every stage of this process." Even under the best of environmental controls, mining entails or risks habitat destruction, respiratory problems from the dust, stress on livestock, cyanide exposure, air pollution from the smelting, and acid mine drainage resulting from rainwater mixing with the mine waste. All of these risks have been noted as realities by residents around the Marlin mine, who routinely complain of dead livestock.

Some neighbors told me that the liner underneath the tailings pond, intended to keep the waste product contained, barely extended higher than the level of the green liquid, meaning that whenever the heavy rains come (as they do seasonally in this part of Guatemala), the toxic chemical slurry sloshes over the top of the liner, soaking the surrounding earth and seeping into the groundwater supply from which animals and humans alike drink. Besides cyanide, mining often releases dangerous heavy metals into the surrounding environment. Arsenic has been a particular concern with Marlin. A study by the University of Ghent "found 'sharply rising' arsenic concentrations far above IFC and Canadian drinking water standards (Van de Wauw et al, 2010)." (cited in Zarsky and Stanley 2011: 40) Mining is stressful on the natural environment under the best of circumstances, and on many counts the Marlin mine seemed to be operated under far from ideal environmental management.

Another, related major source of unease over the Marlin mine was human health. We are "flesh and bone," the Sipacpa leader said, and the cyanide used for the mine is destroying us. Claims that the mine has damaged the health of local residents have found some scientific backing. A University of Michigan study revealed toxic metals in the blood of people living near Marlin, and differences in water quality in samples taken above and below the mine, respectively. (Basu and Hu 2010). Company officials and their associates, unsurprisingly, refute the allegations that the mine is harming health. One member of the Sierra Madre Foundation, the corporate social responsibility outfit funded by Marlin, told me that the media exaggerate or distort the facts in their coverage of this issue. The *Prensa Libre* (one of the main national newspapers) published a photo of a man with a swollen belly, supposedly because of the mine, but, he told me, that's nonsense; the man has a large gut solely because he drinks. (FSM 2010a).

A physician formerly employed by the mine, however, countered that the company itself spins the facts regularly. In his time working with the mine, he told me, he regularly saw people with respiratory, skin and digestive problems that he attributed to the nearby mining activity. The company tried to save money by buying cheap safety equipment, or none at all, he alleged. They neglected to do a baseline health study, and actively falsified medical reporting so to minimize the reported levels of illness, he reported. He told me that he has received death threats warning him not to speak out about the abuses and irregularities he saw. (MD 2010). Even after he (involuntarily) left his job with the mine, complaints about the health effects continued to accumulate. Rights Action, a small Canadian nonprofit that has been very active on the issue, has published ample photos and reports of alleged health problems stemming from the mine.

Further concerns about the mine revolved around not so much the existence of the mine per se, but the way in which the company entered the zone, interacted with local residents, and handled disputes. When one landowner initially refused to sell her land, "resisting, resisting, resisting," the local religious leader told me, she rebuffed the company's efforts to talk, blocking its entrance with rocks. The company responded by offering her a much higher price than others were getting, which angered neighbors offered the lower price. They helped start the resistance movement, demonstrating, blocking the highway and obliging the company to halt work for a week. The company ended the standoff with promises of money and dialogue, which it failed to follow through on. In June 2009 (ML 2010) the company entered forcefully into a property that the owner did not want to sell. Angry residents burned mining machinery, and again the

resistance movement swelled. The local development group in San Miguel, ADISMI, and the parish were both working against the mine, and at that point joined forces, creating FREDEMI.

Another set of tensions emerged, according to Bill Brasington (2010), when Sipacapa leader Mario Tema, who initially supported the mine, realized that Sipacapa would get no royalties, and would not be the beneficiary of as many jobs or as much community development as neighboring San Miguel, where the majority of the mine's footprint lay. This explanation sheds light on one of the reasons that resistance has often been more public and pronounced in Sipacapa, despite its smaller share of the mine's property, and illustrates the kinds of local tensions that can become aggravated by and in a way fused with the issue of the arrival of a large-scale, profitable foreign mine.

Electric posts needed for the mine's operations also became a highly contentious issue; they tended to fall on women's homes, the religious leader told me, and the company was not very responsive to this problem, so they had to push for them to be fixed. Eventually, in a well known incident, one woman tired of the lines running through her property and simply cut the electric line. The company was without electricity for 15 days, and the resistance continued to grow.

People also had complaints about the company's conduct in terms of security forces. The company has armed men, and rapes women, the Sipacapa leader told me (MTC 2010). Walking around the area of the mine on a visit in 2006, the human rights leader accompanying us picked up a spent bullet casing, which he said would have been unusual before but was now typical, given the security forces guarding the mine. Marlin's security force, the Grupo Colán, was also

blamed for the death of the son of a prominent opponent of the mine in March 2005 (Nisgua 2005). The security forces were further implicated in an attempted assassination in 2010. Late one night, not far from where I was staying at the time, Diodora Antonia Hernández Cinto opened her door in San Miguel to two men who were asking for a place to stay. When she offered them coffee, she was shot in the head at close range. Miraculously, she survived, but she was gravely wounded and lost eyesight in one eye. She had been active in the resistance to the mine, and the suspected attackers had links to the mine's security forces (Mining Watch Canada 2010).

There were further complaints related to the social effects of the mine's presence. The Sipacapa opposition leader told me that the mine workers have been responsible for an uptick in prostitution, echoing a common complaint I heard in areas around mines in Peru and elsewhere. Worst of all, the Sipacapa leader told me, was the way in which the mining company had deliberately, strategically caused or exacerbated divisions within communities and even within families. The company has paid off some resistance leaders so that they have flipped, losing credibility, he said. Leaders have sold off their conscience. In Guatemala, everyone is divided, he said, and "there is no unity" (MTC 2010).

Against these grievances, people grappling with the Marlin mine weighed the possible advantages, namely, economic gain. As noted above, neighbors of the mine are starkly poor, and to some, the mine promised wealth wildly beyond what would otherwise be available. Mining companies pay royalties and other taxes, and the direct economic investment should generate indirect economic growth, as increased demand for goods and services leads to jobs outside the

mining sector itself. Thus, the mine, the company and the government argued, ought to be a net economic benefit, a bonanza, even. After all, it would seem, no one would undertake the immense trouble of mining if it were not deeply profitable. True as this may be, however, questions quickly emerged about who stood to benefit from the profits to be had, and criticisms quickly emerged that the immediate neighbors of the mine, and Guatemala as a whole, were not going to garner the lion's share of the economic benefits. First, as previously stated, the royalty rate was extremely low. Secondly, the Guatemalan government put together a package of investment incentives for the company such that it did not have to pay some taxes for years (Sic 2006). Thus for the first portion of the mine's life, the Guatemalan state was benefitting from it very little in direct fiscal terms. There is also the issue of how taxes are distributed, assuming they are collected. Sipacapa and San Miguel, the two municipalities containing the mine, have received overall only 5.1% on average of the total revenues generated by Marlin (Zarksy and Stanley 2011: 27) "They say there is development, but for us there is not," a local leader said at a press conference in the capital (DV 2010). Overall, Zarsky and Stanley (2011) conclude, the mine does not generate all that much in terms of taxes and royalties, and the overall economic benefits in Guatemala are limited. A mainstream Guatemalan think-tank, ASIES (2010) came to a similar conclusion. This study quantified all possible benefits and costs to the mine, including things like water use, damage to nearby houses, the harm to the landscape, employment, etc., and reached a bottom line that, according to these figures, demonstrated that the Marlin mine was a net drag in Guatemala, rather than a net positive. In other words, when the true costs are taken into account, they outweigh the benefits, by two to one, according to the study's calculus. Its contribution to GDP is "irrelevant," said an author in the study's public presentation, and it is

neither economically nor socially viable. The presenters gave no advance clue of what they were going to say, calmly running through the quantified merits and demerits as though describing a straightforward math problem. When they first made clear their overall conclusion, a ripple of shock went through the crowd. "Lies!" one audience member cried. There was no public attempt, however, to present a similarly logical study that showed the opposite.

In addition to tax revenues, one might suppose that increased well-paying employment opportunities in a hardscabble area might be a significant benefit. Indeed, some people lucky enough to have jobs at Marlin are quite satisfied with their opportunity and with the continued operation of the mine. The difficulty is that there are relatively very few such jobs compared to the local population, and a good deal of the available jobs require expertise such that most local residents are not eligible. The Marlin mine is typical of many mines of the past three decades or so in that it is very capital intensive but needs comparatively little labor, and the labor it needs is often highly skilled. According to Castagnino 2006 (18), "the Vice-Minister of Energy and Mines himself acknowledges that [jobs created by Marlin] are few." The initial construction phase created some jobs, but after that was concluded, the number of longer term jobs fell, and those jobs tend to require special skills that most of the population in Sipacapa and San Miguel does not have (Human Rights Ombudsman of Guatemala 2005, cited in Castagnino 2006: 18). Besides the environmental issues, then, in economic terms the Marlin mine does not seem likely to be a driver of development.

Mining and government officials, and others, sharply contradict these sorts of claims, seeing national economics in their own way. There are contentious debates in political economy

over whether extractive activity actually makes a positive contribution to economic development (see Karl 1999 and others on the resource curse), but Guatemalan national authorities are often reluctant to consider the arguments against an extractive-led economic strategy. Mining revenues are highly symbolic for the government, one activist told me (García 2010) His comment echoed others I have heard in Peru about the desire to be seen at least as a middle-income country, not as a pitiable low-income country without much to recommend it or make it respectable, economically. Despite the conclusion reached by the ASIES think-tank report, that the Marlin mine was a net economic drag for the country, many in Guatemala (and elsewhere) view critics of the mine as irrational obstacles to much needed development. The brother of Crisanta Pérez, the woman who cut the electric line to the mine, said in a meeting with visitors that he is often asked why he doesn't want development for Agel, a small town near the mine. His interlocutors cannot fathom another reason for opposing the mine. (CB 2010). Guatemalans are poor because they want to be; they resist development, Marlin's corporate social responsibility (CSR) official told me (FSM 2010b). Mining is more important for Guatemala than agriculture, representing a better way forward, the CSR official said. The country should be focused on export crops, not the subsistence farming that is the norm in rural San Marcos and many other parts of the country. A community relations official for the mine told me (FM 2010) that now that people are more familiar with mining, they are beginning to trust it more, and that whole communities aren't against mining, but merely isolated groups. A local religious leader (ML 2010) described a different attitude, however, saying that people thought, we are poor with or without the mine, so better to be poor without the mine. This response captures the belief of Marlin critics that the mine not only fails to deliver on the

promise of being an economic boon to the area, but is actually worse overall than the absence of a mine, despite the grinding poverty that existed before Marlin arrives (and continues to exist.)

A final set of criticisms emerged that were of a broader nature, centered on spiritual or community-related concerns. The company sees land only in economic terms, but Maya people see it in personal, spiritual terms, a leader in Ajchmol told me. The company says it comes to take people out of poverty, but this is a lie; indigenous peoples see land in a different way. They live and survive from the land, but not to destroy Mother Earth, but to live alongside nature, he said. The company wants to exploit and destroy the land. People had to start over on new land; new land is cold and alone, while land is warm and alive when people work it, he explained. Others made related comments that tied together ideas of harm; many people I spoke to saw the mine's physical, economic and spiritual effects as inextricably intertwined. Mining has disastrous effects, one Maya Mam man told me; it creates horrible sicknesses, uses lots of water, destroys houses, and is a disaster for the Maya social fabric. We are poor economically, another leader told me, but also in terms of social contamination, and we are poor in health, a local religious leader told me (ML 2010).

Thus the opposition to the Marlin mine was complex, multi-layered, and in some cases fragmented and contradictory. Some people were concerned about personal issues concerning their own property; others were worried about environmental risks, and unconvinced of the economic benefits; some felt that the way the company had treated neighboring residents was unfair or disrespectful; still others felt that the entry of the mine was bad for the social fabric; and finally, some felt that mining was an affront to Maya principles concerning land and the

environment. Many had more than one of those objections. Some initially supported the mine and came to oppose it, and some first opposed it and later came to support it, at least to a degree. There was never a perfect unity of opinion among the individuals and organizations that raised criticisms of the Marlin mine. Nevertheless, the multiple levels of complaint were enough to elevate the Marlin mine to a controversy that was becoming known nationally, and even internationally.

Opposition continued to mount throughout 2004, as tensions percolated, and local residents connected with national and international groups. In November 2004, Mayan leaders in San Marcos demanded that the government cancel the mining license (van de Sandt 2009: 14). Unsurprisingly, this plea was not honored, though the government did convene a national forum to try to cool passions. In early 2005, the strains had reached a boiling point (the first of many). In January, a convoy started to pass through Los Encuentros, Sololá, a highway crossroads in western Guatemala. It was transporting heavy equipment for use in the Marlin mine, including a large milling cylinder, and the convoy leaders deemed it necessary to dismantle a pedestrian bridge to facilitate the passing of the machinery. Thousands of residents there launched a 40-day blockade in protest, blocking the way so that the equipment could not be moved. "We shall not let them pass," local leaders said (Solano 2005: 112). The Guatemalan president at the time, Oscar Berger, however, responded that "the government has to protect the investors." True to his word, Berger had his government send nearly 2,000 police and military troops to the standoff, whose ending was as predictable as it was tragic. The cylinder carried on its way, the investment duly shielded from harm, but the same cannot be said of Raúl Castro, a protester who lost his life in the line of military fire, or the 16 other indigenous protest leaders who were accused of

terrorism (Solano 2005) for their efforts. Protests and bloodshed notwithstanding, the march to extract in San Marcos continued on.

The Sipacapa consultation

As the struggle began to heat up, residents of Sipacapa started talking about consultation. As early as February 2004, 1,000 residents gathered publicly in Sipacapa to request that the municipal government hold a consultation, though the mayor was not supportive at that time (van de Sandt 2009: 42). One of the major activists involved in those discussions told me that Rights Action, the small Canadian advocacy group, was a big part of the push. (García 2010.) The inspiration for Guatemala's first major indigenous consultation came in no small part from Peru. Ulises García, an aptly named wandering heroic figure, played an important role in connecting the Central American community with a South American counterpart. García is the son of Godofredo García Bacas, who in 2001 was assassinated in Tambogrande, the northern Peruvian town where the first community consultation anywhere was held the following year. The circumstances of his murder by a hooded killer cannot be firmly established, but suspicions swirled around the fact that he was a leading opponent of the proposed mine by Manhattan Minerals, the project voted against in the famous first consultation. Godofredo's son Ulises has taken up the mantle of activism in the wake of his family's tragedy, and now lives in Canada, where he runs a nonprofit dedicated to promoting consultation worldwide, Tropico Seco.

Ulises, along with Rights Action, met with a big group of indigenous mayors[8] in San Marcos and told them about the consultation in Tambogrande. A resistance leader in San Miguel

described the lead-up to the consultation in similar terms. Delegations of people from other countries have come here, she said. Our consciousness was raised by learning about mining in Peru, she told me. (CL 2010) People saw videos of mining in Peru, and familiarized themselves with the issues by watching the news as well. An activist on mining issues in the neighboring region of Huehuetenango also cited Peruvian examples as a motivating factor; as an example of a bad outcome to be avoided, he cited Cerro de Pasco, the visually stunning town in the southern Andes where a mine, in operation for decades, has eaten away the town, leaving more of a stark strip-mined hole than a population center. (FMH 2010) Thus, other countries, but particularly Peru, served for activists in San Marcos as inspiration, for what to avoid and what for what steps to take to avoid it. The decision was made to hold a community consultation, like the one in Tambogrande.

As preparations were underway, various legal options for administratively carrying out the consultation were considered, and various legal challenges were raised. The municipal authorities of Sipacapa originally stated that they would be the ones to hold the consultation, "to be held via open community assemblies in different villages according to 'indigenous customary law.'" (Sieder 2010: 174) The mining company tried to legally maneuver to prevent the exercise from taking place, filing an injunction against the municipal authorities in civil court on June 7. Concurrently, the Ministry of Energy and Mining asked for an injunction from the Constitutional Court (Nisgua 2005). All the pressure "forced the municipal mayor to back down" (Sieder 2010: 174). The local community development council came forward to assume the institutional responsibility, however, and the consultation was set for June 18, 2005. The 7th Circuit court ruled in favor of the company on June 15, but the Constitutional Court rejected the

petition before it on the following day, citing in part ILO 169 (Nisgua 2005). The mayor withdrew his support.

In the end, amidst all the confusion and controversy, the consultation went ahead as scheduled. Polling took place at three sites in the town of Sipacapa and 10 rural locations (Nisgua 2005). Of the 13 participating sites, 11 saw vote totals against the Marlin mine. One village voted in favor, and one abstained. 95% of 2,486 participating voters voted "no" on the mine, a high rate of rejection that would come to be typical for future community consultations on mining. There were only 35 individual voters to vote for the mine (Oxfam America 2005). The proceedings were watched over by more than 70 international observers, who collectively endorsed the consultation as having been carried out legitimately (Oxfam America 2005). Ulises García, the international consultation activist, saw their role as pivotal, stating that they had rebalanced the power dynamic, giving more heft to the consultation organizers. Three days after the consultation, residents presented the results to the same municipal authorities who had abandoned the process days before it took place (Mines and Communities 2005).

Once the consultation had taken place, with the lopsided voting totals and staunch backing from the international observers, it became increasingly difficult to openly repudiate, though there were still efforts to discredit it. The mayor found himself compelled to accept the results (van de Sandt 2009), which residents presented formally also to the Ministry of Energy and Mining, the National Congress, the national human rights ombudsman office, and the president of the Commission of Energy and Mines (van de Sandt 2009 and Nisgua 2005.) Supporters of the consultation hoped to have the results recognized as binding at the national

level. The human rights ombudsman's office was supportive, but the Mining Ministry rejected the consultation. Meanwhile, the company's legal appeal went through several reversals before finally being heard by the Constitutional Court, which was asked to decide how to interpret the Municipal Code and its contradictory standards in different articles for participation levels in legitimate consultations. On April 4, 2006, the Court ruled that the Sipacapa consultation and another conducted in Río Hondo had been correctly carried out on a procedural level. In May of the following year, the Constitutional Court reversed itself, responding to an appeal from the mining company, and, in a legally suspect and confusing ruling, declared that the consultation had been unconstitutional, as it was based in part on an article of the Municipal Code that the Court found untenable (Nisgua 2007). The ruling stated that local referenda are relevant only within the confines of the local jurisdiction, and that therefore the municipality of Sipacapa had no right to expel a mining company licensed by the national state. Critics of the court noted that its former president had become a lawyer for a firm that represented Glamis Gold, then the multinational mining company in charge of the Marlin mine, and claimed that he had unduly politically influenced the decision (Nisgua 2007). In any case, national level jurisprudence did not support a push for ending the mine.

Regardless of the maneuverings at the national legal level, however, on a political level, the consultation became difficult to criticize. It did not achieve the direct legal result of halting the mine, but it did achieve a status of nearly beyond reproach. While not everyone was convinced that the referendum was, or should be, legally binding, open criticism of the consultation as a mode of community expression became hard to find. Even when the local Sipacapa leaders Juan and Mario Tema (brothers of the Sipacapa mayor for a time, Delfino

Tema) switched their allegiances and became proponents of the mine, they declined to criticize the consultation per se, publicly or privately. "Nowadays the consultation in Sipacapa is law," they told a small group of North American activists. (Tema 2010a). Mario Tema reiterated his support for the consultation at a public celebration on its fifth anniversary, praising the activity and stating that it had been very influential (Tema 2010b). The mining company, too, voiced general support for the concept of consultation, even though it vigorously contested a court ruling that would mean that the results of the consultation could stop the mine. After the Compliance Advisor Ombudman for the IFC issued an independent review of the IFC's Marlin financing, which among other things criticized the near total lack of consultation prior to the initiation of the project (International Finance Corporation 2005), the mining company (then Glamis Gold) voiced public support for increased consultation of the populations affected by the mine (Corkery 2005). Though the company said little about what these new consultations should look like, and certainly refrained from supporting any hint that they should be legally binding, the fact of their general support for the concept was part of the broader trend, both in Guatemala and beyond, of the political necessity of stating commitment to consultation, however artfully gauzy the details.

Development of the Conflict

As the national legal process regarding the legitimacy of the Sipacapa consultation ground to a confusing halt following the contradictory Constitutional Court rulings, opponents of the Marlin mine turned to other strategies to continue their battle to evict the mine. These

strategies relied centrally on both political mobilization and formal legal institutions. The two approaches were in some ways independent and in others interlinked. In particular, the mobilization drew much of its strength and rhetoric from the idea, backed by ongoing legal cases, that the government had violated the law.

The case by now had attracted substantial international attention, in part because of the advocacy of NGOs rooted in the United States, Canada, and elsewhere, and the next phase of the campaign took advantage of the international spotlight. In addition to turning to the CAO of the IFC, advocates also brought the case to the attention of other international institutions. They submitted a Specific Instance Complaint to Canada's National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises (in 2009), the UN Committee on Elimination of Racial Discrimination (CERD), and the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations (CEACR) (in 2006). Activists also filed additional petitions on specific grievances at the national legal level. Aside from the CAO report, none of these efforts achieved much prominence, though the CERD and the ILO recommended suspension of the mine (the Canadian National Contact Point concluded its process in 2011, recommended merely "constructive dialogue".)

A few months after the Constitutional court's final ruling on the subject, advocates turned to another legal venue: the Inter-American Commission on Human Rights (IACHR). The Constitutional Court's ruling enabled the plaintiffs to claim that they had exhausted all domestic remedies, legally clearing the way to take the case to an international legal body. In December 2007, residents of Sipacapa, working with legal representation in Guatemala City and nearby

Quetzaltenango, filed a case at the IACHR against the Marlin mine, which the Commission accepted to hear the following year (see Sipacapa 2007). The case had various legal components, but centrally revolved around lack of consultation. Given that the state had never properly consulted the people of Sipacapa, the petition stated, and given various legal guarantees of that right, the petitioners' right to due process had been violated. Article 8.1 of the American Convention, the international treaty undergirding the Inter-American system, speaks to due process, and became a legal focus of the case. To substantiate the claim that they had a legal right to consultation, the petitioners turned to the 2002 Municipal Code, the Guatemalan constitution, and ILO 169. Van de Sandt (2009: 52) explains that

> "[t]he 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."

The petition also included a reference to violations of the right of indigenous peoples to their lands. The crux of the case, however, was consultation.

The lawyers pressing the case and many residents had hopes that the Commission would provide a sympathetic hearing. No one believed in the case, but it has grown to be a more important one than anyone ever expected, one of the lead lawyers told me (Loarca 2010a). People had viewed anti-mining cases through the lenses of property and the environment, he

stated, but the Marlin case has really become emblematic because of the consultation angle. The community consultation in Sipacapa was key to jumpstarting the case, and the people there wanted it to be seen as a consultation-driven case, he said. Both the Commission and the petitioners were motivated by the importance of consultation, he argued. All professionals have an ego, he noted wryly, and the Commission wanted to show up the ILO and the UN by resolving an "avant-garde" case related to consultation. As for the lawyers, they were also keenly aware of the importance of consultation in the broader scheme, he said, and pitched the developing Marlin case to be more prominently about consultation after the Inter-American Court (the partner institution to the Commission) ruled in the path-breaking Saramaka case in Suriname that tribal communities there had a right to consultation.

Thus, in some quarters excitement about the case mounted. Others were more skeptical of the case's ability to meaningfully influence the outcome of the years-long dispute. When the IACHR finally rules, one human rights lawyer unaffiliated with the case told me while the case was pending, the investors will have left already anyway (UM 2010). The communities' true legal recourse would be to change the structure of property rights in Guatemala, so that indigenous communities owned the rights to the wealth beneath the ground, and not just the surface, he argued. But this proposition was not under consideration.

The Commission's eventual response to the petition would surprise many. On May 21, 2010, the Inter-American Commission asked the Guatemalan government to take cautionary measures to protect the health of the communities affected by the Marlin mine, including decontaminating drinking water and helping people suffering from health problems because of

the mining activity. Dramatically, it instructed the government to suspend operations at the mine until the Commission issued a final ruling. The measures listed 18 specific communities it considered affected by Marlin and asked the state for a response within 20 days on the allegations of persecution of anti-mining activists, damage caused to nearby houses, and arrest orders for anti-mining leaders. For everyone with an interest in the case, from activists to company employees to government representatives to neighboring residents, the ruling was electrifying.

In the immediate aftermath of the jolt, no one was certain how the government and the company might react. The responses were marked with twists, turns and reversals. On June 2, 2010, Guatemalan President Colóm announced that his government would not adhere to the ruling, which it deemed unfeasible. The next day, I accompanied demonstrators as they gathered in Guatemala City to protest this decision. They delivered petitions from communities in San Miguel and the neighboring region of Huehuetenango asking the national Congress and the president to respect the IACHR ruling. Speakers addressing the crowd outside the Congress highlighted how multiple international institutions, the CERD, the ILO, and now the IACHR had all spoken out against the mine, and further underlined how the mine had led to violations of human rights.

Later that month, on June 23, the official deadline to respond to the Commission, President Colóm's government agreed to suspend the Marlin mine. The official statement said that the suspension was being done "in order to company with international commitments in the area of human rights." This shocking announcement was fraught with complications from the

start. Despite issuing the suspension order, the president insisted that his cabinet's investigations had found no evidence of water contamination or health problems related to the mine. Furthermore, the government seemed to be complying only grudgingly; one of the president's legal advisors said it was unclear whether the Commission's ruling was an order or just a suggestion, thereby seemingly casting doubt on the authenticity and authoritativeness of the ruling. The Director General of the Ministry of Mining and Energy, however, told me that they would comply with whatever the Commission ultimately ruled (MEM 2010).

The ruling seemed like a major turning point. The ministers of Public Finance, Energy and Mines, and Economy all resigned. For its part, Goldcorp, the mining company, responded that it operates respectfully and that it was eager to have the opportunity to show this, and that it expected to operate normally while the administrative procedure took place. In San Miguel Ixtahuacán, meanwhile, many people reacted to the news with joy, erupting in a large-scale celebration. One activist described it as a strong political blow to the hierarchy (Ceiba 2010). Another advocate described the case as a support for indigenous communities, constituting a message to the world that what the company does is negative and affects the neighboring communities (Ajchmol 2010). After years of struggle, it finally seemed as though the dream were real, and the Marlin mine was about to go away.

Signs soon began to develop, however, that compliance with the international tribunal's ruling would not be so straightforward as many had hoped or assumed. The state announced that it would conduct an investigation to see if suspension of the mine was warranted, but that investigation seemed at best sluggish, at worst nonexistent. The response certainly did not

amount to the immediate suspension of the mine called for by the Commission. In the Sipacapa petitioners' formal response to the IACHR in late August, they concluded that the state had not complied with the cautionary measures at all (Loarca 2010b). Three months after the ruling had been issued, there was still no word on the suspension. The state had said it would start a program to promote the health of those near the mine, but there was no sign of that either. Neither was there any sign of official state protections for the affected communities, as required in the measures; indeed, as noted above, the activist near the mine suffered an assassination attempt mere days after the ruling came out (Loarca 2010c).

Disillusionment with the process spread quickly. One advocate said that the case was still positive, even if it was no more powerful than a mere recommendation to the government (ML 2010). For many others, however, the whole business was becoming very bitter. In February 2011, residents of San Miguel demonstrated in favor of enforcing the Commission's ruling. A busload of them were detained and some were beaten. Others were threatened with lynching. The mining company accused the local resistance front, FREDEMI, of provoking the situation, and accused human rights organizations of coordinating a response in order to stir up trouble. Later that year, in June, the Ministry of Energy and Mining officially announced what had long been clear to many, that they would not close Marlin, and that they considered the IACHR process concluded. On July 8, the Ministry published a resolution declaring that there was no reason to obey the Commission and suspend Marlin (Resolution 0104). Meanwhile, as noted above, at this moment Marlin's profits were soaring.

The IACHR, meanwhile, did little to publicly criticize a response to their order that most observers would have to deem a farce. In late 2011, they issued an official modification of their original cautionary orders, focusing the new ruling on access to water for the affected communities. Notably, these reformulated measures omitted any mention of suspending the mine. Goldcorp proudly trumpeted the reversal of the suspension order as evidence that it had been unwarranted all along.

The case limped on, though receding somewhat from public view. In March 2013, the IACHR ruled that the cautionary measures for Marlin (in their softened, revised form) should be maintained. It highlighted health and medical care as particular areas of concern. In July of that year, residents of San Miguel blocked the highway for over a week to protest lack of compliance with the IACHR ruling and the harm they found the mine was doing to the local water supply. The cautionary measures remained in effect, though not a primary focus of mobilization. The whole development of the case produced a strange, somewhat surreal scenario in which a national government admonished by an international tribunal, as well as the relevant multinational corporation, have been able to claim compliance with international law, though this legalistic claim flies in the face of any sense that a lay observer might make of the matter. If it was compliance, it was compliance without consequences, at least in the immediate sense that mattered most to the residents who had brought the suit originally. Extraction continued.

Consultation in the national Guatemalan context

The consultation in Sipacapa was the first significant indigenous consultation in Guatemala, but hardly the last; to date there have been approximately 80 community consultations in Guatemala, by far the highest reported number of any country in the world. Most of these have regarded mining, but some have asked participants about dams or other natural-resource-related issues (see Appendix A for a complete list.) Furthermore, activists in Guatemala have turned not just to the consultations in and of themselves, but to the promotion of consultation and the publicizing of the state's response as a major political strategy. The ultimate outcome of these consultations is uncertain, in the sense that it may take years to know if a particular project will proceed or not, and if not, whether the consultation was directly responsible. At most, that kind of direct influence has been halting; at least, it has been largely lacking. Without yet knowing the outcome in many individual cases or in the aggregate, however, it is possible to identify some ramifications of the channeling of so much political energy in the country into paths that revolve around consultation. Advocates of community consultation hope that a particular consultation may prevent an individual unwanted project, of course, and that the dozens of them carried out may make it more difficult in general for multinational corporations to extract natural resources in Guatemala. These advocates are also attentive, however, to the functions that community consultations play within communities and networks of communities, and at the level of the national politics of indigeneity.

Within communities, many advocates contend, the process of preparing for a consultation can promote pride, solidarity, and higher levels of education and political energy than existed previously. Consultations are helpful, since they promote unity, argued Bishop Álvaro Ramazzini, a member of the clergy with a high national profile for, among other stances,

supporting indigenous communities in their campaigns against mines (at the time we spoke, he was bishop of San Marcos; he has since been transferred to a neighboring region.) An activist with a Mayan organization told me that consultation is a space for discussion and decision-making. Communities haven't done it according to official law, he said, but in their own way (Ajchmol 2010). Consultation, as currently practiced by communities, gives them a way to practice and strengthen their own ways of coming to understand an issue and acting on it. An environmental activist in Guatemala City put the significance of consultation in similar terms. Consultation is not enough to achieve all of communities' goals he said, but it does generate education and organization, and offers a way to avoid community divisions, especially if done before the arrival of a mine, he noted (Ceiba 2010). Another Mayan advocate agreed that consultations promote knowledge within the communities that organize them. Communities have to be educated prior to a consultation, he said (VS 2010b). Informing people about the process and about mining through the use of videos, radio spots, and slideshows takes months; it is the work of ants, he said ruefully. The consultation activist, Ulises García, argued that during this long period consultations serve as "fuel" for a long fight, providing a "north star" that orients everyone and keeps people focused on the eventual goal. Like some other activists, he maintained that consultation can play a positive role in community relations. Their spread reunited people in Guatemala after the severe lack of trust that developed during the genocide, he argued (García 2010). Everyone I spoke to who had been involved in the organization of a community consultation described them in ultimately positive terms, as a long-term process that boosts community education levels, self-image, solidarity, and capacity for political advocacy.

Consultation has also served as an organizing principle or bond within networks of communities that face similar prospects of controversial natural resource development projects. Communities within broader regions or macro-regions of the country (e.g. the region of Huehuetenango or the general area of the western highlands) carefully coordinate with each other to organize community consultations in most or, preferably, all of the communities in an area so that the entire region can be declared "mining-free" (meaning, residents of the entire region have declared themselves through consultation to be opposed to mining on their territory.) Much of this work takes place through the efforts of the Peoples' Council of the Western Highlands, known for its Spanish initials as the CPO (Consejo de los Pueblos del Occidente.) The CPO is one of the clearest examples of how consultation has become a point of articulation between communities, and not just in local hamlets. The organization, now one of the most prominent in indigenous organizing in Guatemala, dates to 2008, when community leaders from the department of San Marcos and neighboring Huehuetenango convened to discuss a concerted strategy. At the CPO's first meeting, leaders set out their priorities as "'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'" (van de Sandt 2009: 59). The CPO coordinates action in six regions of the country, and continues to emphasize the theme of community consultations, by promoting and publicizing them and supporting efforts to undertake them.

Beyond the effects of staging a community consultation that occur internally in communities and in the networks that connect them, the nation-wide emphasis on mobilizing through and around consultation has shaped the public face of indigenous mobilization as a

whole in Guatemala. Activists speaking on indigenous rights and mining issues in Guatemala have, in the last decade, consistently emphasized that indigenous communities are democratic and law-abiding, using the example of community consultation to make their point. There is a lot of racism against indigenous communities in Guatemala, a legacy of the Cold War, said a Mayan activist, and when communities take a stance on something critics cry manipulation and say that indigenous people are unable to decide things for themselves (Ceiba 2010). Consultations, he argued, demonstrate that this is false, and that indigenous communities can indeed legitimately participate in decisions concerning their own affairs. The state's vision of participation is electoral and obedient, he stated; community consultation offers another honorable way to participate, without conforming to this constrained idea of how indigenous people should behave. In describing the Sipacapa consultation, the Tema brothers, the local leaders, also emphasized the adherence to respectable ways of pressing for action. We never used violent methods in opposing the mine, they stated, only democratic and legal means; that's why they took the electoral route (Tema 2010a). Mario Tema later criticized the opposition to Marlin, having changed sides in the controversy, but even given his critical stance, still praised the consultation. It contributed to the democratization of Sipacapa and Guatemala, he said, since democracy is the people making decisions, and this is what consultation represented (Tema 2010c).

Indigenous leaders made related comments in public meetings. In the midst of the drama over the IACHR ruling, the CPO and Waqib' Kej, another important national Mayan organization, organized a demonstration in Guatemala City to protest the Marlin mine (July 28, 2010). Key leaders delivered a legal complaint against the mine to the Supreme Court of Justice.

Outside the Congress building, Rigoberta Menchú, perhaps Guatemala's best-known indigenous leader, addressed the crowd. The occasion was significant, she said, because it represented the first time we have turned to the law. While some might note previous actions that arguably constituted use of the legal system, her emphasis on the law and its new centrality in indigenous organizing was still significant. Among the demonstrators, I spotted many carrying signs with slogans including "consultations are legal" and consultations are "an ancestral right of indigenous communities". The latter seems to be less a literal statement about the current formulation of consultations per se but more a reference to the form of consultations, a community assembly, which has long been a central part of indigenous self-governance. Both slogans emphasize the institutional, respectable nature of consultation; they self-consciously underline its legitimacy by pointing out its basis in law and rights, two things it would be difficult to criticize indigenous peoples for claiming.

The Marlin mine and resistance to it today

In the end, the Marlin mine continued to operate largely as it had since its inception, brushing away path-breaking consultations and legal rulings as so many inconvenient hiccups. The mine did not close before the company had declared its own end to the project, having exhausted profitable ore. The opposition, which remained vocal through it all, though bruised and divided, was complex in its stated aims. Many called throughout Marlin's operations for the mine to leave Guatemala, reiterating that the state should respect the results of the community consultation carried out more than a decade before the mine ran its course. Some focused on the

Inter-American system, advocating for respect for the IACHR cautionary measures, and discussed a possible continuation of the case at the Inter-American Court of Human Rights. As of April 2014, the Inter-American Commission had agreed to hear a case against Marlin. Other critics focused on calls for mitigation of harms caused by the mine, on water quality and quantity and on human health. Still others thought ahead to the mine's closure, concentrating their efforts on pursuing legal assurances that Goldcorp will pay the legitimate full price for seeing through the closure and its environmental aftermath. Now that the Marlin mine has ceased operations, this last category is the focus of critics.

Finally, some critics of the Marlin mine rallied around an attempt to block a new expansion of the project, the proposed Los Chocoyos site. In early 2014, as protests became heated, President Pérez Molina decided to order troops to Sipacapa to protect the mine. A Goldcorp representative announced to protesters that the company would suspend work at the mine, at least temporarily, and withdraw the equipment. In July of 2014, activists celebrated as residents of Sipacapa won an *amparo*, a legal injunction, against the proposed Chocoyos expansion. The ruling was based on consultation and ILO Convention 169, which buoyed supporters of the consultation movement. Indigenous rights advocates also hailed the ruling for recognizing the Mayan Council of Sipacapa as the relevant legal entity with authority to file the petition.

While the ultimate fate of the Chocoyos expansion of the Marlin mine is not certain, the development, viewed hopefully by advocates, illustrates something of both the promise and the perils of building resistance strategies around the legal right to consultation. The possible

advantages may be clear; at both the national and international levels, legal bodies have taken the indigenous right to consultation seriously, issuing definitive judgments in at least some cases that benefit the opposition to mines. Even if not complied with, these rulings offer a boost of momentum to the anti-mining movement that can lend itself to further mobilization, even though the ruling didn't provide the hoped-for immediate response. Consultation is an important legal and political tool. The pitfalls, drawbacks and limitations of the focus on the legal right to consultation, however, are also evident.

One possible limitation is that, of course, the company and the state may forge ahead with the Chocoyos expansion, ruling or no ruling. As discussed above, Guatemala's institutions are extraordinarily weak, and there is no convincing evidence that this ruling will be held in higher esteem than the famed judgment from the IACHR. In a twist on this concern, the ruling could be trumped by a successive court ruling that overturns it, whether or not on compelling legal grounds. (For a case in point of how seemingly definitive legal judgments can be quasi-legally bypassed in Guatemala, one has only to recall the trial of dictator Ríos Montt, whose historic conviction was rolled back only days after the sentence was handed down.)

Another way in which the centrality of the right to consultation could yield results other than the ones hoped for by advocates is for a consultation to actually occur, with unpredictable results. Highlighting the absence of consultation is a canny tactic with elastic capabilities. Claiming a lack of consultation does not commit activists to a particular claim about what would have happened if one had been properly held. As discussed at greater length in Chapter 6, if a consultation were to occur about the Chocoyos expansion of the Marlin mine, it might occur

more on the state's terms than activists would prefer. This could mean that the consultation consists of an insipid series of meetings which are taken to constitute a legal blessing for the start of the project. Alternatively, a consultation in the form of a community vote could, in theory, reveal support for the project. In 2013 the municipal mayor and council of Sipacapa floated the idea of a "re" consultation, which, it was feared, could result in a show of support for Marlin. The Council for the People of Sipacapa sharply objected to the proposal (Consejo del Pueblo Sipakapense 2013), but the outcome is not inconceivable, in the case of Chocoyos or of other projects. Once a consultation is established that all parties (state, company, community) agree to abide by, the possibilities for political action may be more limited by a concrete reality, rather than left to the political imagination. Consultation as enforced law may reveal its jurispathic tendencies, compared to the jurisgenerative capacity of the grievance of lack of consultation.

The fact that the Sipacapa council was worried what an 'updated' consultation would show underlines another key fact of the social landscape of mining and resistance following the community consultation on the Marlin mine. To wit, the population at large, and activists in particular, are extremely divided on the issue of mining, regarding tactics, strategies and even basic aims. These divisions are not new in San Marcos or in Guatemala, of course, scarcely a generation after the official end to the large-scale civil war and genocide. The advent of the Marlin mine hardly caused them. But neither has consultation salved them, a reality that, while not necessarily contradicting claims that consultation promotes unity, does tend to complicate them.

The civil violence left everyone in Guatemala very untrusting ("desconfiados"), said one activist who works in a nonprofit in the capital (PH 2010). Civil society is very splintered, she stated, and everyone operates only within their own little world, jealously wanting to claim leadership of projects. Yuri Melini, a prominent environmental advocate, echoed this point. Activists in Guatemala are very fractured, he told me. Everyone wants to take the lead and do it his or her way (Melini 2010). Others made similar points, mentioning over and over the "desconfianza" (lack of mutual trust) that they saw as pervasive in Guatemalan society. A common political purpose among critics of the Marlin mine was not enough to erase those divisions.

At no point were the tensions more clear than during the celebration to mark the 5th anniversary of the Sipacapa consultation, which I attended, on June 18, 2010. Representatives of the Catholic church had been the principal organizers of the event, but leaders of the municipality had asked to be involved at the last minute, and the two groups presided together despite frictions. At the event, attended by hundreds of neighbors and supporters, Mario Tema, the Sipacapa leader, gave a speech praising the consultation, saying it had been very influential. A priest gave an explicitly political sermon that directly addressed mining. Roberto Marani, an Italian leader of the Pastoral Commission for Peace and Ecology, (Comisión Pastoral Paz y Ecología, known as COPAE by its Spanish initials) then got up to make remarks. If the audience was expecting an upbeat focus on the lasting achievement of the consultation, it was in for a surprise. Marani proceeded to give a blistering denunciation of the Tema brothers for accepting money from the mining company, in effect selling out the community they were supposedly there to pay homage to. The Temas claimed that the community had authorized the acceptance

of the funds, but this was broadly understood to be false. Ripples of shock went through the crowd. Marani and the Temas had had a personal friendship and had worked together politically on opposing the mine for years, and this moment of community celebration represented a fundamental break in their friendship and partnership.

At a lunch following these speeches, a local resident told me he felt the municipality had "betrayed" the community by accepting corporate money. The activists from COPAE seemed downhearted as they ate, almost as though they were ready to give up the battle over Marlin entirely. That same week, James Anaya, the United Nations Special Rapporteur for Indigenous Peoples, was in Guatemala, speaking in the capital and later Huehuetenango, offering a spirited, rousing defense of indigenous rights. Looking at the national and international movements for indigenous rights, the moment might seem a high point for advocacy, as Anaya exulted over consultation in front of cheering crowds. The government had not yet responded to the recently issued IACHR ruling, and hopes still ran high that the judgment could propel real action. Near the Marlin mine itself, however, the focal point of consultation in Guatemala, the local movement seemed disoriented and almost lost. There was no unity to be found among neighbors of the Marlin mine, and little sense of connection between the local mood and the national mood.

Further bitter disputes emerged and alliances ruptured among key players in the Marlin mine drama. Later that year, during an audience at the IACHR in Washington, DC, the Tema brothers (Delfino and Mario) publicly repudiated the legal counsel for the case, Carlos Loarca, saying the legal team did not actually represent them in the case. Loarca reported this stunning announcement as a huge shock and a humiliation (Loarca 2010d). He ultimately prevailed

legally and was able to continue representing the case in the Inter-American system, but the whole episode underlined the fierce rivalries and lack of basic trust and respect between leaders who ostensibly were advocating for the same thing, a resolution of the Marlin mine controversy that respected the community and its wishes.

One could dismiss the actions of the Tema brothers as stemming from the payments the mining company made them, but the fact remains that the resistance to the Marlin mine is and has been fractured and fractious since it began, and not just because of one or two individuals. Thus, it is difficult to claim that the Sipacapa consultation forged or built on some sort of lasting unity that papered over deep social divisions with roots decades or even longer in the making.

In a way, however, the deep disputes about how to represent and follow up on the Sipacapa consultation serve to underscore the importance of the activity. Consultation became a resource, with dividends of power, and possibly material resources, for whoever was best able to claim it as their own. Various factions had their own narratives about what the consultation did and should mean, but they all agreed, at least publicly that it should be respected, whatever that might mean in the context of the person using the term. In a way, indigenous advocates and other actors were united by their dependence on consultation and the authority of law, even as personal trust or friendship was at times utterly lacking. Consultation gave activists something to collectively work for: respect for the Sipacapa consultation, and the propagation of community consultation as a tactic of resistance.

Chapter 6

"You'd be surprised. They're all individual countries." –United States President Ronald Reagan, returning from a 1982 trip to Latin America

Institutionalizing consultation

The nuanced portraits of consultation and, more broadly, international law as forces that can be harnessed for progressive change are instructive in considering more broadly how international law and human rights relate to each other. Most human rights advocates and many human rights scholars treat the passage of a law protecting rights (at either the national or global level) as something incontrovertibly to be celebrated. More rights, and more law, can only be positive, according to this perspective. In an example unrelated to consultation or indigenous peoples, we see this mindset borne out in the nascent effort to add the "right to water" (and sometimes other rights) to the Universal Declaration of Human Rights; more generally, we often see it reflected in a push for a country to ratify a given international treaty or codify it in national law. (The United States, for instance, has yet to ratify the widely approved International Covenant for Economic, Social and Cultural Rights, nor adopted most of its principles into federal law.) The relevant metrics, according to this perspective, are how many important human rights are protected in law, how developed the jurisprudence is surrounding the right, and broadly, how extensively codified a right is at all levels of law. The more built up the legal

institutional infrastructure for protecting a right, the line of thinking goes, the better chance it has of being protected in practice.

In one sense, this drive toward codification seems justified, in light of the politics enabled by the passage of ILO 169 and the institutionalization, at that level, of the right to consultation. Organizers of community consultations could certainly have convoked them in the absence of the Convention, but, I argue, their efforts would not have received nearly as much attention or respect without the legitimating cover of the international covenant. However, the overall lessons of the mobilization around consultation suggest a more complicated appraisal of the merits and risks of seeking to protect human rights by expanding the formal legal architecture surrounding them. Ultimately, I argue, efforts to institutionalize consultation at the level of national law are at best ambiguous and at worst will backfire, removing the potential for innovation and entrepreneurship that has enabled consultation to be a progressive force to the extent that it has been. While having the right to consultation protected in ILO 169 has been a boon on the whole, one of the main reasons that it has been so is the very fact of its vagueness, which leaves ample room for interpretation; further codification of the right, while well-intentioned, would do more to foreclose opportunities for mobilization than it would to promote them.

Recent developments in Peru regarding the right to consultation are illustrative of this dilemma. While the ways in which definitions of and approaches to consultation will develop over the next few years in Peru remain highly uncertain, the past few years indicate a trajectory forming that should be worrisome to admirers of the community consultation movement. In

2011, after years of debate over a draft law, a national law implementing the right to consultation was approved when a new president (Ollanta Humala) came into office who was willing to approve it. The law's passage owes much to a bloody confrontation in 2009 between police and indigenous protesters in the northern town of Bagua, which shocked the country with mass fatalities and brutality. The national sentiment in the wake of the killings was that something had to be done to address the dynamic of conflict that arose almost continually over controversial mining projects, not infrequently boiling over into violent clashes. Thus, the new consultation law responded both to the perceived need to channel potentially violent protests into more institutional and pacific fora, and the perception that something had to be done to protect long marginalized indigenous populations. The law goes a long way to fill in the considerable legal gaps left by Convention 169, offering detailed descriptions of key terms and specifying much of the detail of the legal expectations left unremarked in the treaty. It clearly identifies consultation as a state-led process in which indigenous communities may express their opinions, nothing more, and certainly nothing like the dramatic community consultations that took place before the law was passed. The technical regulations, or *reglamento* for the law, which were finalized in 2012 after another set of debates, further entrenches the state-led definition of consultation, laying out in greater legal detail the foundational premise that states are the only bodies empowered to undertake consultations.

The law, however, is hardly the end of the debate in Peru over consultation and the efforts to shape it to fit various differing and incompatible visions. The law has yet to generate a consensus backing of its vision of consultation among the groups most affected by it, and indeed there are strong signs that significant elements of the indigenous movement in Peru may reject it

outright. The National Confederation of Communities Affected by Mining (CONACAMI), a major national organization promoting indigenous rights, and other indigenous organizations issued a formal rejection of the proposed regulations before their final adoption, after years of advocacy for the passage of the consultation law (CONACAMI 2012). Perhaps not every faction of the indigenous movement in Peru will reject institutionalized consultation outright, but the terms of the public complaint have been strong and broadly phrased, and indicated a fundamental discomfort with the government's approach to guaranteeing consultation. The increasingly contentious issue of the regulations is already pushing some advocates in Peru to rethink their original advocacy for the law in general.

In Guatemala, concerns of just this sort have prompted indigenous rights activists to take a more cautious approach to backing a consultation law. Unlike in Peru, in Guatemala there have for some years been laws on the books expressly permitting and regulating a variety of types of consultation, but there has recently been a move to pass a new consultation law, not dissimilar to the one now in place in Peru, codifying indigenous community consultation in particular. This move, however, has met with opposition from consultation activists, who fear that the version of the law being debated would delegitimize the dozens of community consultations that have taken place so far in the country, and facilitate controversial development projects, rather than mobilization against them.

Ultimately, activists seeking to further institutionalize and codify consultation in national legislation may inadvertently be curtailing the main source of power currently available to grass roots actors and their allies. If consultation is closely defined and delineated, then inevitably one

or another version of it must win out over other potential versions, and the winning version is more than likely going to be the one that favors the government and the MNCs, the one that views consultation as a literally defined right coming out of ILO 169, a "dialogue" with indigenous communities that is a meager exchange of information. Community consultation is currently the powerful tool that it is because communities are able to insist that their voices be heard (however briefly) and that the debate be on their terms. Consultation has become meaningful precisely because it is, properly understood, meaningless.

This conclusion ought to make us doubt the contention that more legal protections for human rights necessarily leads to more protections for human rights. Of course, as the compliance study literature all too readily tells us, international treaties, and by extension laws at all levels, are too often ignored, but the politics of consultation, I argue, make clear that, on at least some occasions, legal codification of norms—that are in many ways admirable—can actually have the effect of foreclosing avenues of enforcing those norms, broadly conceived. That is, law can be not only ineffective in enabling or generating social change, but actively detrimental, under certain circumstances. The community consultation movement blossomed initially and has thrived, up to the moment, because it was able to take advantage of, in a sense, what proved to be just the right amount of law—enough to enable legitimacy and the authoritative mantle of an international convention, but not so much as to prevent the creativity of the movement in appropriating the terms of consultation and the label of law for itself.

In what follows in this chapter, I draw on a comparison of my three major case studies, and on a comparison of the national movements around consultation in Peru and Guatemala, to

ask what consultation can teach us about law and rights. What are the consequences of an transnational movement based on a right enshrined in international law? I begin by analyzing the conditions that make consultation more or less likely to occur. I discuss the results of specific modes of resistance (general protest, community consultation, and formal legal cases based on consultation.) I offer a detailed account of different types of consultation I witnessed, both community-led and state-led. I then compare the national consultation movements within Peru and Guatemala, and situate those national movements within the broader transnational movement for consultation. Finally, I analyze these different models of institutionalization of international law, and ask how these approaches have shaped the politics of mining and resistance.

Conditions for Consultation: a three-case comparison

This dissertation analyzes three major case studies: the Yanacocha mine in Cajamarca, Peru; the (proposed) Rio Blanco mine in Piura, Peru; and the Marlin mine in San Marcos, Guatemala. These are three cases of poor, rural, largely agricultural communities battling major mining projects backed by transnational capital as well as the national government. In each instance, the prospect of significant natural resource extraction and the social, environmental and economic consequences that flow from it has provoked serious, widespread and prolonged opposition from the neighboring populations. This is not to say that that opposition is unanimous, monolithic, ever-present, or static; far from it. It has been significant in all three cases, however, over a period of years or even decades. The controversy stems in each case from a series of interrelated reasons, chief among which are concerns over potential environmental

damage associated with large open-pit mining projects, fears that the mine will irrevocably alter (clearly for the worse) the local social world, doubts about the purported economic benefits of this kind of development for local communities, and suspicions about the fairness of the dealings (e.g. land purchases) of large, profit-driven companies. In each case, at various points members of the communities have staged large public demonstrations to underscore their dissatisfaction with the mines.

Despite these similarities, the thrust of the opposition has taken a different course in each case, particularly with regard to consultation. What explains the different role of consultation in these cases? At the time that significant opposition to these projects was beginning, both Peru and Guatemala had ratified Convention ILO 169, and while Peru has since passed national legislation on consultation, it had not yet done so during the relevant time period for these cases, so it appears that the varying role of consultation does not spring principally from the availability of international law or the encouragement or constraints of national law. Rather, community-led consultations, I argue, are most likely to occur when local actors are attuned to the transnational pro-consultation movement and open to viewing the struggle through this lens; when there is a local individual, typically a mayor, who is empowered by law to organize a consultation; when there is a local institution that is strong enough to be capable of shaping the agenda of an anti-mining struggle, and pro-consultation; and when national law on consultation does not effectively preempt the role of local actors in defining consultation.

In most cases of significant community opposition to a mine, there has been no community consultation and no real push for one, despite the fact that the option has been legally

available. Before the startling, path-breaking consultation in Tambogrande, it had simply never occurred to almost anyone that a community-led consultation might be a viable way of expressing and strengthening the resistance to a mine. The Yanacocha mining project, given the timing of its onset, was largely before the era of consultations, even if controversies over certain extensions of the project, like Quilish, were instituted after people had begun to be aware of community consultation. In Cajamarca, a local researcher told me, there was no consultation because that's where large-scale mining started, and people weren't really opposed to the project when it began, in the 1990s. They certainly had concerns, some of them serious, about the mine, but they had not yet coalesced into a unified opposition to the mine per se. Demonstrations were more small-scale and sporadic at first, and centered around specific facets of the mine's operation, rather than taking place as a full-throated expression of community opposition to the mine's very existence.

A Peruvian lawyer active in mining advocacy circles suggested another reason for the timing of Peru's wave of community consultations: a few years after the national consultation law was passed, other legislation curtailed the powers of mayors (Jahncke 2016). Mayors had often been the ones to call a community consultation, at least in the Peruvian highland context, and the new laws constraining this ability took away an important source of community consultation leadership.

There was no capacity for mobilization in the Yanacocha case; Grufides, the main NGO providing support to activists on mining, was really isolated in this respect, the Cajamarca-based research analyst told me. By contrast, he argued, in Piura (where the Rio Blanco site is) society

is more articulated, and the actors there were very united. The agricultural producers were tapped into the international market, and were really aware of what they had to lose. (Torres 2009) Both the strength of the local resistance and its institutional links to the transnational consultation movement prove important in generating a community-led consultation. In comparing the two Peruvian case studies, the role of CONACAMI comes into focus as highly important. CONACAMI (the National Confederation of Peruvian Communities Affected by Mining) is both the most important national organization in Peru that is critical of mining, and the most important national voice on indigenous issues. The organization started off as an effort to coordinate communities fending off mining projects; hence its name. As it reacted to the national and international dynamics around mining and indigenous identity, however, it began to be an organization that worked at the nexus of mining and indigenous issues, though it retained the mining-oriented name (for more on CONACAMI's original formation, see Chapter 2.) "The foundational congress (1999) was marked by a strong presence of Quechua communities and its conclusions referred to instruments like ILO Convention 169, especially the right to consultation." (de Echave et al: 205; translation by author) However, "the indigenous awakening" of CONACAMI occurred at its second congress in 2003 (204). As the organization went through its grand internal reworking, becoming more centered on indigenous identity as a foundational principle, some political work fell by the wayside during this crucial period. Its limited bandwidth was taken up by internal conversations, and the cost was lost time on mining issues, leaving CONACAMI largely absent over the struggle over Quilish, the extension of the Yanacocha mine that CONACAMI might otherwise have been ideally situated to help resist (given that the battle over Quilish was a classic struggle against a mining project as such.) (209)

Perhaps in part because of the limitations of the national group at a crucial political moment, CONACAMI was unable to establish a strong presence in the Cajamarca region. "It is worth pointing out that in Cajamarca, where Yanacocha is located, Conacami has not succeeded in consolidating a local partner," which is why its indigenous discourse hasn't held sway there. (212) Paredes (2006) argued that the local CONACAMI affiliate, (COPAMIC) never quite seemed to take hold, unlike in other regions. "The mining-indigenous discourse has the problem of little flexibility and of assuming that in populations mobilized by mining there exists an ethnic identity based on a homogenous concept of territory as ancestral and on the campesina community as the relevant authority for the community's organization." (Paredes 2006; translation by author) In Cajamarca, she argues, they self-identify as campesino ronderos, and CONACAMI did not seemed ideologically situated to organize around that circumstance. Given the importance of the role of CONACAMI in other community-led consultations in Peru, it seems that the lack of consultation in one of the paradigmatic mining conflicts of the last quarter century in Peru is at least in part due to the lack of effective organizing ability by CONACAMI, or any other group that would be willing to push consultation as a central strategy.

Finally, community-led consultation seems to flourish, as a pattern, when state-led consultations are *not* taking place, or at least when there is no widespread presumption that state-led consultations will take place. There has not been a community-led consultation in Peru since the national consultation law and the new era of state-led consultations. Any political energy that might previously have gone into organizing them has been poured into making sure that the state-led consultations take place and are sufficiently robust, or into strengthening the national consultation law. In Guatemala, by contrast, community-led consultations have

continued, even as a few state-led consultations have begun to take place. The pace of community consultations in Guatemala, however, has dwindled significantly over the past 2-3 years (see Appendix A), alongside an increased focus on criticizing the few state-led consultations taking place or ordered to take place. This trend may yet be reversed, but it fits the pattern of state-led consultations crowding out community-led consultations.

Community consultations for a time were a key focus of indigenous and anti-mining activism, but for the moment that tide seems to be receding, even though consultations have not completely stopped. The movement for community consultations was able to flourish best, once the precedent had been established, when there were individuals and institutions willing, able, and eager to lead them, and when national law and state-led consultations did not divert political energy to a critique of state deployment of consultation terminology.

Modes of resistance

Looking at my three major case studies in isolation, it is difficult to discern any clear pattern of the outcome of having a consultation, or of pursuing formal legal remedy in connection with consultation, vs resisting a mine via other means. The Yanacocha mine (in northern Peru) continues to operate to this day, with periodic flares of more or less localized conflict continuing to arise (over particular issues concerning water usage, for example.) The myriad protests, demonstrations, and other forms of resistance have not stopped this mine. Some particularly contested expansions of the mine, to new sites like Quilish and Conga, have not occurred, although they may still come to pass. Looking directly at these elements of this sprawling multi-part mining project that were rejected per se, as opposed to protests that were

geared towards getting specific concessions out of the company, the protests clearly played some role in delaying Quilish and Conga, though it is far from clear that they forestalled them permanently.

The Rio Blanco mining project (also in northern Peru) has not yet begun, and does not seem likely to become a reality in the near term, but the project certainly has not been called off or disavowed, and comments from both the investors and the national government indicate a working assumption that the project will proceed once the political climate in the region is no longer so daunting. The 2009 community consultation may have delayed the mine, since it played an important role as a focal point in galvanizing the opposition and raising awareness of the issue. Local leaders still refer to the consultation as a key way of legitimating their ongoing resistance to the mine. It is still possible that the mine may be cancelled altogether, if investors determine that the potential financial benefit does not justify the work of dealing with a hostile surrounding community, or if Peru's national governance on mining changes radically while the company is waiting for the political conditions to be more favorable. However, the most likely outcome at this point is that the mine does indeed start production at some point. If the project is indeed cancelled some day, it would be hard to draw a direct line from a community consultation rejecting the mine to a cancellation over a decade later. The consultation can be considered a factor in the mine's delay, and it be part of the story if the mine were one day cancelled, but the consultation did not play a heroic direct role in fending off the mine. Furthermore, it is not possible to establish that the status of the consultation as such was determinative in delaying the onset of the Rio Blanco mining project. What if, instead, neighbors had simply marched against

the mine (among other tactics), without reference to consultation? It is possible that the delay might have been achieved in this manner as well, without the power of consultation.

Finally, the Marlin mine in Guatemala continued, despite a much-heralded community consultation and layers of formal legalization around the case. The mine has now run its course; production has ceased, on the timetable established based on corporate profitability, without significant delay. Remaining resistance or criticism is largely focused on the perceived inadequacy of environmental protections during the years-long closure phase of the mine (an element of mines that often receives less political attention and is subject to less organizing than the initial establishment of a mine.) Consultation, in its moment, was a major focus for opponents of the Marlin mine. It helped draw everyone's attention to the political struggle. It generated a supportive ruling from the Inter-American Commission, in a landmark case. What it could not do was shut down the mine.

Looking at these three cases of contested mining projects as individual cases, it is not possible to draw strong conclusions about the role that community consultations played, or failed to play, in stopping or slowing the mine. However, this does not mean that the consultations played only minor political roles, or that all the effort poured into them was for naught. Rather, it means that to see the true effects of consultation on mining resistance, we must look at the roles these struggles played in larger political contexts, over a longer timeframe. As I argue below, consultations had a major role in the transnational politics of mining.

Cases of consultation

In my main case studies, I discuss the role of community-led consultations. Since the community consultation movement took off, however, some state-led consultations have started to occur, both in Guatemala and, especially, in Peru (as well as in other Latin American countries.) The two types of consultation vary dramatically, in ways that are relevant to our understanding of consultation as a general phenomenon. I was able to participate in several community consultations, in both countries, and to observe multiple phases of a state-led consultation in Peru. In this section, I describe these experiences, focusing on the significance of the differences between the two types.

The first consultation I witnessed was in September 2009, shortly after beginning my research. In this instance I served as an international observer for a community consultation on mining in the Arequipa region of Peru. Southern Copper, one of the world's largest copper mining companies, has had a presence in southern Peru for over half a century. In 2007, the company announced plans to begin a new mine in the province of Islay, the Tía María project, expected to produce 120,000 tons of copper annually. The proposed mine quickly generated opposition from local residents, who expressed fear that the project would significantly and negatively affect the area's water supply, a crucial resource for Islay province's largely agricultural economy. The Tía María mine "will have a devastating and fatal effect on human life and existing natural resources and ecosystems," (Kevany 2010) local mayors wrote in an open letter published in *La República*, a nationally prominent newspaper. Residents expressed particular concern over the potential effects of mining on the fragile and unusual ecosystem supporting freshwater shrimp, an important cash crop for the area.

In mid-2009, municipal authorities in the province, responding to a groundswell of opposition that increasingly seemed unlikely to fade, agreed to organize a community consultation. On September 27, the fourth community consultation in the country (Río Blanco, detailed in Chapter 4, was the second) unfolded at six polling places in Islay province, with special attention focused on the city of Cocachacra, considered to be one of the most potentially affected locales in the eventuality of the mine. I was present as one of two international observers, having been invited in the course of an interview days earlier with indigenous activists.[9] I spent the day circulating between various polling sites during the day and speaking to individual voters about their impressions of the proceedings.

The polls opened promptly at 8 in the morning, and voters surged past the heavy police presence (courtesy of the regional government) and through the doors of the town stadium, where they were directed toward the appropriate table given their name and national identity number. Literate voters (a strong majority of those I observed) signed their name on the voter registration list in the presence of the volunteer staffer; all voters, regardless of literacy, were asked to press a finger into a purple inkpad and "sign" again with their forefinger. Then they were asked to stain their middle finger as well. Cocachacra voters could now hold two purple fingers aloft, recalling the recent vote in Iraq where this gesture of pride in voting had become widely documented and circulated in news photos.

At 4pm when the polls closed, organizers began counting ballots, tallying, recording and announcing totals from each station for votes for the mine, against, or left blank (a traditional way in the region of expressing dissatisfaction with all of the alternatives.) Dozens of voters

stayed to watch the count proceed over the course of a few hours. As darkness fell, organizers opened their cell phones for a source of light by which to see the ballots. When the final total of 97% opposition to the mine throughout the province was announced, cheers and applause broke out. In the town square afterwards, hundreds of residents gathered to listen to endless rounds of speeches, a few dressed in vests made especially for the occasion. Consultation "should be the responsibility of the central government," one speaker told the crowd, but the people of Cocachacra had had to take up the slack instead. "The people did it: popular victory," he concluded, shouting to be heard over the large loudspeakers repeatedly blasting the classic protest song, *The People United Will Never Be Defeated*. "Long live democracy in Peru!" another speaker exclaimed. A party was underway.

The consultation marked what was merely the beginning of an intense phase of campaigning against the proposed Tía María mine. People opposed to the project pursued a variety of tactics, from multiple marches in Lima, to press conferences to highlight the lopsided opposition registered by the consultation vote. Their campaign drew intense and repeated attention in the national media, partially because of tragic incidents of violence associated with the marches and roadblocks. After months of protests and talks, the conflict finally came to a head. After a week-long blockade of the South Pan American Highway, representatives of the national and regional governments and the Southern Copper company agreed to put the project temporarily on hold while the environmental concerns were reassessed (Peruvian Times 2010). The project still has not occurred as of this writing. In the intervening years there have been violent clashes over Tía María, which at a few points seemed close to becoming a reality. After massive protests occurring over a series of years after the consultation, however, the government

and company have both publicly recognized that conditions are not right for the mine yet, and likely will not be for years to come. The stated presumption is that the mine will happen at some future point, but more than a decade after the consultation, that point has not yet arrived.

I also had the opportunity to be an international observer for two community consultations in Guatemala, which happened to occur within a couple days of each other. The first took place on October 21, 2010, in a community called Cabricán, in the Quetzaltenango region (in western Guatemala, bordering the San Marcos region where the Marlin mine is located.) I was one of several foreigners who volunteered to be an international observer. No particular credentials were required for this responsibility; anyone who was willing to show up could be an observer. Word of the opportunity and the request for observers spread through personal networks of ex-pats who were sympathetic to mining resistance movements, and available in the region on the day the consultation was planned. I and one other foreigner were assigned to a consultation site in the small community of Quiquibaj. When we were dropped off at our site, the consultation had already been in progress for hours. The two of us were asked to address the community leaders, who were anxious to get more insight on the basics of mining. Their first question was what the "advantages" of mining were. The question made me uncomfortable. We talked a little about our role as observers, then looked at each other hesitantly. To tell them too much as outside "experts" would seem wrong, but presenting mining "neutrally," bloodlessly, also seemed like a betrayal of sorts. I said something about how there certainly were advantages, but the question was how robust they were compared to the

disadvantages. The other observer started explaining the disadvantages. They said they simply didn't have information about mining, and were so eager for it.

After our conversation wound up, we took a break for lunch: They gave us tortillas with potatoes, soup, tamales, café. Our hosts said this was the first time in Guatemala that a consultation had been done by secret ballot, rather than by a show of hands. They collected the ballots as they came in garbage bags. By midafternoon, a decision was made that everyone who was going to vote had done so, and the consultation was declared over. The people handling the ballots (local residents) counted them up. There were only two votes in favor of the mine, and dozens against. Everyone within earshot was pleased with these results. Another international observer I spoke to mentioned that one "yes" ballot in favor of the mine at her site had been declared a spoiled ballot and thus not tallied, but that nearly all votes were against the mine. At another site I observed briefly, the international observers were being sticklers for accuracy, going over the counts with a fine-tooth comb. In general, there was no sign of widespread fraudulent voting; every community member I spoke to attested to having voted against the mine, even those who had said they were uncertain of what mining might mean for them. That evening, after all the votes from the various polling sites were totaled, there was a lengthy press conference to tout the results: another community consultation says "no to mining." The observer I had been paired with was asked to speak on behalf of all the observers. Lengthy speeches were made. One woman spoke harshly, criticizing the yes voters, saying they were ignorant and hadn't been educated.

The following day, several of us travelled together to be international observers for another community consultation, this time in the Quiché region. This consultation was more formally organized, with a mass training for all the observers. We extensively went through the form we would be required to fill out. There was only one other observer from the United States; there were many more Canadians, and observers from other countries, from Italy to Mexico. This time there were a significant number of national observers as well (Guatemalans from other regions.)

On October 23, 2010, we arrived at the main square at 5:30am. Breakfast was served. We got into the back of our respective pickups, each with a guide or two to lead us to our respective communities. The fog and cold lifted slowly as we rolled up into the hills. My community was Choacaman IV. I sat down by a teacher who was staffing the signup sheet for people without ID. People were told they'd need to stick around to sign the final Act if they registered, since the counts of voters needed to be the same. The guy I sat next to said they hadn't really discussed it as a community.

When everyone had registered, people gathered outside and a leader read out the proposition. He spoke in Quiche but the question was in Spanish. Confusingly, there were two questions, a positive and negative version. The question for the children was verbose and confusingly worded. They kept answering the negative question incorrectly, until the adults simply told them what to say. No adults supported the mine. They read out a formal Act announcing the results, including my name, passport number and full Gowen Hall address at the University of Washington, including box number and zip code.

People then signed with name or thumbprint. Someone counted the number of signatures up to 100, got bored, and, shrugging, said the numbers matched. The community leaders asked me to send pictures, saying the organizers would never share them with them.

At the central site people were anxiously counting and tabulating. There was not a single no vote in any community, but it seemed to be important to people to register that properly and officially. We observers helped with data entry. Eventually, fairly late into the night, they held a press conference to announce the results. They announced the results in the town square and set off a lot of fireworks.

Unlike most community consultations to date, which have almost (though not entirely) exclusively focused on mines, or at least particular development projects like dams, Peru's first government-led consultation was convened as a forum on a proposed new forestry law. Many indigenous communities in Peru's Amazon region live in and around forested lands, and their lives and livelihoods stood a significant chance of being affected by some of the changes being proposed. Thus, the national government suggested that these communities be systematically consulted, in an effort to avoid the roadblocks, violence and direct conflicts that could well result otherwise. There was no formula or template for carrying out such a procedure, no precedent to look to, and of course minimal legal guidance from ILO 169, so the format for the country's first-ever government-sponsored consultation was itself initially at issue.

Some of the major national indigenous organizations (there is no one single group that represents all indigenous communities in Peru) rejected the process altogether, deeming it insufficient and illegitimate. Others suggested a series of dozens of meetings in towns

throughout the Amazon region, so that a wide swath of the affected populations would be able to participate at a local event close to their homes. Eventually, the compromise reached was that the national government would send representatives to four central locations in the region for local gatherings, to be followed by a larger meeting in Lima. I attended the first of these four sessions, held in Satipo, a population center in the central Amazon region, as well as the meetings in Lima. These events had a strikingly and radically different character from that of any community consultation. In the first place, they were not an up-or-down vote on the proposed law; its passage was taken as a given. Rather, they were cast as a series of dialogues, in essence technical workshops, during which the government representatives gathered specific feedback on various portions of the law. Secondly, they were led by national authorities, rather than by community representatives. Indigenous community members were treated courteously and given ample opportunities to speak, but they were clearly not in charge of the event, a fact that initially went unremarked publicly in the Satipo meeting.

The meeting, attended by hundreds of people, began with informational presentations on basic aspects of the forestry law and of consultation. Early on the first of two days of meetings in Satipo, an audience member stood up in the middle of a presentation and asked if he could speak. He was graciously granted permission; after all, the national government representative noted, "this is a dialogue." The man went on to ask an informational question about the status of the national consultation law, which was answered. Not long afterward, another audience member rose to his feet to challenge the entire premise of the activity. "This is not a consultation," he charged. "We didn't come to listen, we came to express ourselves, to give our opinion. We have phones, we have radios, and we are informed. I want this methodology to

change." The national representative noted that there had been several previous meetings and today was not the final one, only a start. "This is a historic meeting," said a panelist. "It's the first time the Congress has asked, what do you think of this law? Why is it bad that we've come to listen to you? Make us understand. It's our obligation to listen to you. Your part is important. It's fundamental. We need you to help us." The meeting then paused for refreshments.

The next day, more objections surfaced. "All yesterday and today, we are being informed," an audience member stood up to say. "When are we going to be consulted?" The moderator calmly responded that they needed to finish the presentation in process and that we would then split up into working groups to continue the discussion. Later, another audience member rose to ask, "is this really a consultation?" "It's a consultation," the moderator responded firmly. "It's a consultation. It's a consultation." By the end of the second day, however, fewer and fewer people were voicing any fundamental criticisms of the process, at least in public; participants did as asked and split into technical working groups to generate suggestions on the wording of particular articles in the law or propose additional ideas for inclusion in the text.

The subsequent meetings in Lima, which took place over four long days in December 2010, brought together indigenous community leaders from the whole Amazon region. On my arrival, I was greeted warmly by some of the organizers I'd met a few times and invited to join them for coffee before the scheduled agenda began. One member of the government complained to those at the table about poor people in rural areas. "They're so backward," he said. "They go

around barefoot all the time, and their feet freeze every year, and they never learn." Moving on to the event about to happen, another organizer said happily, referring to the activity about to take place, that indigenous communities would be "co-authors" of laws, because they had "participated" in their formation. No one else seemed fazed by the abrupt transition from scorn to praise for marginalized fellow Peruvians, but the sincerity of the organizers' respect for indigenous people's decision-making authority could be called into question, given the condescending attitude many of them held towards the people they were about to consult.

These officials then began to complain about the protesters who had been outside one of the regional consultation meetings, calling attention to the shortcomings of a government-led process. My companions agreed that the protesters were not average indigenous people but only their leaders, who didn't understand the daily reality of their own people, who wanted the consultation process to go forward. The implication was that criticisms of this official consultation process could be dismissed, since they weren't representative of the 'true' indigenous community will, which approved of the process. With that conclusion, which the organizers seemed to find comforting, we finished our coffee and went inside for the start of the consultation.

These Lima meetings were given over entirely to the minutiae of the law, with no general meta-commentary on the process, except for requests to lengthen it to accommodate all comments, which were granted. The other thread running through critical comments concerned the capacity of participants; audience members not infrequently commented to the assembly that they were capable of understand and working on the issues presented by the law. An observer on

the sidelines, a representative of a national environmental organization, however, likely spoke for some others at the event when she leaned over and muttered to a representative from the national Ombudsman's office, "there's still a long way to go to train the indigenous communities." She noted that people kept asking for changes to the law that would violate other national laws or the Constitution, or that had nothing to do with the forestry law itself, but properly concerned other areas of indigenous life and were therefore irrelevant to the proceedings at hand. This woman, like most of the other non-indigenous attendees, was primarily concerned with producing a technically accurate and viable document, as opposed to grappling with the broad set of opinions and feelings on indigenous life that came up from time to time during discussions. Her comment illustrated two different understandings of what this (or any) consultation ought to be about: she, along with most government officials present, thought of the proceeding as a chance to defuse and avert tensions, yet without substantially changing the law under scrutiny, or rendering it legally incoherent; the people being consulted, while not uninterested in avoiding future conflicts or in contributing to a sensible law, were focused on respect and recognition.

The fourth day of the meetings concluded with a final chance for everyone to read through and individually sign the formal statement summarizing what had been achieved and decided on during the meetings. While some major indigenous groups chose to boycott the consultation, those that were present did not at this time voice fundamental criticisms of the nature of the consultation itself, rather choosing to confine themselves to specific complaints that had a particular remedy (for example, granting more time for certain elements of the meeting.)

At no point did anyone publicly mention or acknowledge that another form of consultation had been tried in the country or the region.

The community consultations for which I was an international observer and the state-led consultation exercises I witnessed were two entirely different undertakings. In the community consultations, the presumption was that the projects being consulted would be rejected, as befitting widespread community opposition. In the state-led consultation proceedings, the presumption was that the law being consulted would be approved, subject only to minor revisions of a technical nature. At the community consultations, the atmosphere was joyous and festive, even sometimes raucous. At the state-led consultation in Satipo, the day was so dull that some people fell asleep in their chairs, lightly snoring as they were consulted. The atmosphere was filled with tension and suspicion. At the community consultations, the mining companies and the national government were the main objects of criticism. At the state-led consultation, the communities being consulted were themselves criticized for not being up to the task of partnering in their own consultation. These consultations represent only a small sample of the consultations that have taken place in both countries, but from conversations I have had with people attending other consultations, these starkly different exercises are broadly representative of two proceedings that have only in common the term consultation. In terms of their character, community-led consultation and state-led consultation are polar opposites.

Consultation movements in Peru and Guatemala

Just as consultation has taken two completely different and irreconcilable forms in its community and state forms, the consultation movements in Peru and Guatemala have taken two

radically divergent forms. A quarter century after the passage of ILO 169 and nearly a decade after the passage of the national consultation law in Peru, indigenous and anti-mining activists are still vocally focused on protecting and strengthening the right to consultation. Nearly two decades after the modern era of large-scale mining came to Guatemala in the form of the Marlin mine, activists there are likewise passionately committed to the right to consultation. The similarities, however, end there. The visions of the future of consultation, and in particular the understanding of the role the state and formal national law should play in institutionalizing it, are quite different between Peru and Guatemala. In Peru, the push to protect consultation has largely taken the form of demanding that it be further ensconced in national law. The judgement has been made that institutionalizing consultation, on a formal legal national level, is the best way to promote it. There is widespread recognition of dissatisfactions around consultation in Peru, but the response from activists has been, essentially, to up the dose of law. Institutionalization, the argument goes, can be finetuned and improved upon. If the legal protections for consultation are inadequate for managing tensions over a project, then lawmakers can learn from missteps, and improve the administration of the laws surrounding consultation. In Guatemala, by sharp contrast, activism has focused on warding off further institutionalization of the right to consultation. The fear is that enshrining consultation in national law would shrink the space for communities to exercise the right as they see fit, in a politically meaningful way. The activism for the right to consultation in Guatemala has centered on avoiding a national law protecting the right to consultation. These attitudes in the two countries are of course not monolithic; some people in Peru are skeptical of the very existence of the national consultation law, and likewise some people in Guatemala would support a national consultation law there. By and large,

however, there exist two totally different consultation movements in Peru and Guatemala, oriented towards two mutually exclusive sets of aims.

On September 6, 2011, Peru formally enacted a national consultation law, under President Ollanta Humala. The law's passage in Congress was unanimous. One of the last major sticking points was Article 3, about the goal of consultation; the final version uses the word "consent" but eliminates the reference to the right to a veto. While there had been differences leading up to the final approval on the details of the legislation, the passage was largely greeted as a landmark step to protect indigenous rights in Peru, with continuity with Convention 169. The leader of AIDESEP, one of the leading indigenous organizations in Peru, hailed the law as a major achievement. "The prior consultation protects us," he said in an interview. The date that Congress passed the law "will be a historic date because for the first time in Peru the promulgation of a law has been achieved that protects the right of indigenous peoples to their territory and self-determination." (Noticias SER 2011) Many people connected the consultation law to the deadly clash between police and indigenous protesters in Bagua in 2009, viewing the consultation law as the logical conclusion of the painful process of national reckoning set off by those deaths. At a meeting in Lima during the debates leading to the passage of the law, various participants cited the violence as a shorthand for what the consultation law would avoid. "We can't get to June 5 [the anniversary of the violence] without a law," one participant stated. Everyone blamed the Bagua incident on lack of consultation, said another. Consultation became the "legitimate" demand post-Bagua, to the point where even right-wingers must admit that consultation is an obligation. One of Peru's major mainstream papers editorialized that Peru should never again witness "tragedies foretold, like Bagua," (El

Comercio 2011), and that consultation would be an "effective" way of preventing future such bloodshed. The other major newspaper (La República 2011a) reported on the aftermath of the deaths with a matter-of-fact explanation that the deaths could be attributed to "the lack of existence of prior consultation." Whatever people's political differences, there was an agreement that mass deaths of indigenous people and police could not reoccur. The national consultation law was seen as the obvious solution. The law was not without its critics, but it was generally viewed as a positive achievement.

This attitude has held as the law nears a decade old, even as specific components have been singled out as inadequate. The national Peruvian government in 2013 established a database of officially recognized indigenous communities to enable them to be eligible for consultations under the new law, and years of complaints followed that significant numbers of communities were omitted from this official listing. In particular Quechua-speaking communities in the Andes tended to be missing from the database, corresponding neatly to a much greater reluctance of mining companies (predominantly operating in the mountainous highlands) to support consultation, compared to oil companies (operating mostly in the lowland Amazon region.) Years after the law was passed, researchers concluded that not even half of communities that should qualify as indigenous were included in the database (Inguil and Zevallos 2017) This slow progress, however, towards making the law administratively feasible, has typically been interpreted in Peru as a technical problem, rather than some sort of sweeping indictment of the model of a consultation law itself. Criticisms of the faulty database have

tended to be construed as a push to improve and complete the database, not to upend the entire idea of a consultation law.

In the early days of the consultation law, other more searching criticisms of the law emerged from both the indigenous advocate side and the corporate booster side, making it uncertain whether a consensus could hold. Indigenous advocates became particularly concerned about the *reglamento*, the technical regulations detailing how the law was to be implemented, not published until the year following the passage of the law itself. Suspicions were growing as to whether or not the real-life application of consultation was going to live up to lofty expectations. In the year following the law's adoption, indigenous groups began to ask that the law be modified before the regulations be passed. One indigenous leader prominent in CONACAMI asked, "Why make a consultation law if the government must decide and you are not going to accept the self-determination of communities?" (La República 2012a). A few weeks later, CONACAMI and other indigenous groups issued a major statement on the law, which they called a "unity pact," rejecting the proposed regulations and demanding changes to the law itself, asking for a broader definition of indigeneity, a veto for mega-projects, and a broader definition of which people must be included in consultations (CONACAMI 2012). The regulations were approved a few weeks later, largely unchanged in response to the doubts of indigenous groups, in a victory for President Humala. Amidst this jockeying, the president's brother, Antauro Humala, was found to be exchanging e-mails with an employee of the Yanacocha mining company. Even while in prison, he remained a sought after figure, interceding with regional authorities on behalf of Canadian mining companies. (La República 2012b) A few weeks later, Peru signed a free trade agreement with the European Union, taking special care to trumpet its shiny new

consultation law. Some of my colleagues at CooperAcción suggested that Peru had initially ratified ILO 169 because the 1992 coup had just taken place, and the Convention was a good way to demonstrate that Peru was a state with rule of law, just as it wanted to enter the international market. In 2011, after Bagua, a consultation law served as an updated version of this approach. Evolving international norms demanded that states have the appearance of respecting their indigenous communities and effectively diffusing violent conflicts, particularly those that threatened major commerce. Personal, national, international, and indigenous interests barely overlapped, but the shaky consensus remained the consultation law. The need for one was the one thing almost everyone could agree on.

Meanwhile, the consultation law attracted grudging public support from national mining interests, even as they feared that the new law could crimp production. Kuczynski, who would later become president of Peru (La República 2011b), warned that it would be an "obstacle" to mining earnings. On an e-mail listserv made up of mining boosters as well as critics who meet regularly to discuss mining issues, members discussed the idea that "indiscriminate use" of prior consultation could be linked to authoritarianism or populism, since it is demagogic and hurts institutions. Some members complained about the right to consultation, some comparing it to other "non-existent" rights like abortion and same-sex marriage. Many people expressed skepticism that only legitimately indigenous communities would use the law. Consultation should not be available for "just anyone who puts a feather on," sniffed the president of the National Society for Mining, Petroleum, and Energy. (Organizaciones Indígenas Nacionales del Perú 2015: 29). Despite these fears and criticisms, however, no serious moves were made to completely undo the law altogether. Five years after it was passed, a Mining and Energy

Ministry head told me that companies had largely accepted the law. They merely want the process to be easy and streamlined, she said (Vásquez 2016) Another mining dialogue listserv member said the legal right to consultation was simply a fact of life we had to learn to live with, "like wrinkles on a woman's face." (Grupo de Diálogo 2013) The right to consultation became so assumed that even companies started asking for them—for themselves, according to a long-time member of the national Ombudsman office. "No joke!" he assured me, seeing my face. (Lévano 2010)

The tensions between those who wanted consultation to mean more and those who wanted it to mean less, in the Peruvian context, reached an uneasy truce, accepting the fact and framework of a national law protecting the right and mobilizing from that point. Those seeking to restrict the right to consultation have sought to minimize its use, particularly in the mining sector, and to ensure that the times that (state-led) consultations did occur did not come close to threatening the actual existence of a project. Consultation in the eyes of some was not terribly threatening if it meant mainly a series of dull meetings concluding with signed agreements to make minor adjustments to projects that were certain to go forward. Those seeking to promote the right to consultation began to focus, for the most part, on supporting communities that called for a consultation to solve a particularly fraught conflict, and on making sure that consultations that did happen were as robust as possible. The Peruvian consultation movement began to focus on things like establishing a pool of interpreters (between Spanish and the indigenous languages spoken by the communities to be consulted). Even as major national indigenous groups and their international supporters like Oxfam America expressed major criticisms about the adequacy of the law in practice, they framed their goals in terms of a better set of laws and institutions

protecting the right to consultation, not a return to ad hoc community consultations (see for example AIDESEP et al 2015) The legal infrastructure supporting consultation in Peru continues to grow. In 2017, for example, a new law established a permanent multisectorial commission for the application of consultation. (DS-001-2017-EM) A few communities have turned to the courts to protect their right to consultation. For instance, in 2015 the native community of Supayaku went to judicial authorities to protest the lack of consultation before mining exploration activity. This community did not hold its own community consultation, or propose one; it did not ignore the right to consultation in favor of generalized protests and roadblocks; rather, this community spent time and effort using the legal right to state-led consultation as a starting point in its struggle to have some say in a mining conflict. Other communities have similarly filed suit on the basis of not having had a state-led consultation as required by law (Gran Angular 2016)

In early 2018 CooperAcción and Oxfam America jointly established a new campaign, suitable for the hashtag era, called "Consúltame de verdad" ("consult me for real"), to highlight the problem that consultation in Peru has become an unsatisfying bureaucratic measure. Later that year the campaign delivered a petition to the Peruvian government urging that consultation be done better, for example with more involvement of indigenous communities on the what and when of consultation. The Ministry of Culture responded, agreeing to return oversight of the law to the Permanent Multisectoral Commission. It gave moderate responses to request to have indigenous communities have a say in which measures are consulted and to strengthen the consent element of the law for certain situations, and on a request to make consultation measures relevant and timely. It is notable that significant disappointments with the strength and

meaningful application of the consultation law have largely been channeled through institutional means in Peru: asking cabinet ministries to do more with the law, appealing violations of the law through the court system; asking for more state infrastructure to support better administration of the law. At some moments it seemed that the consensus on a consultation law as the focus of discussions might falter, but after nearly a decade of a national consultation law in Peru, it is still the center of the understanding of the right to consultation in the country.

The trajectory of the consultation movement in Guatemala, national leader in community consultations, could not be more different. While activists there have not neglected the legal system in their fight to protect the right to consultation, they have largely shunned the suggestion of a national consultation law, denouncing it as worse than useless, as actively counterproductive and even racist. One member of the archbishop's outreach team on social issues told me a national consultation law in Guatemala would be "another aggression" against indigenous peoples. (Pastoral Social 2010) Indigenous communities vary so much, he said, and a law would unjustly impose uniformity. An environmental activist echoed this point, saying that each community consultation had been different, according to the needs and desires of particular communities, and a law would wipe out that diversity. A consultation law in Guatemala would be a step back, he maintained; communities want no on mining, full stop (Ceiba 2010). A union official opposed a consultation law, saying that such a law would "legalize a lack of respect for Convention 169." (Prensa Libre 2011a) In 2011, the same year Peru passed its national consultation law, Maya Kiche representatives in Guatemala took over a government building and blocked roads to protest the proposed consultation law. There was a major concern that imposing a national definition of consultation would end the successful and meaningful string of

community consultations. Calling the dozens of those already carried out non-binding is "a racist interpretation" of national and international law, said a representative of the Council on Eastern communities (CPO). A law has "the objective" of "confusing public opinion on community consultations that have already been done…it restricts and diminishes the spirit of consultation, that is, the content of this process as an ancestral mechanism of the communities themselves." (Prensa Libre 2011b) Indigenous communities even objected in anger to the Guatemalan president's proposed moratorium on mining, stating that they never asked for it and that instead what they wanted was respect for the consultations that had been carried out (Prensa Libre 2013). A national Mayan group (Waqib' Kej 2011) issued a statement opposing a consultation law. "The exercise of consultation is an ancestral practice of indigenous peoples that never has been recognized by the Guatemalan State," they wrote. They worried that the proposal would impose "Western" concepts like workshops, polls, information and interviews. The statement argued that regulating consultation would *reverse*, not consolidate, the gains of ILO 169. A lawyer working on the Marline mine case in connection with the San Marcos diocese noted a central irony in efforts to tell indigenous peoples how they were to be helped: they "have not been consulted about consultation," he told me (Miranda 2010). There is a process to write a Guatemalan consultation law, he said, but people in San Marcos had not been consulted about such goings on far away in the capital. One Mayan activist took an intermediate view. A consultation law would be a positive thing, he argued but only if it came out of the communities themselves, and where they've actually done consultations. The problem in Guatemala, he stated, is that proposals come from outside. (Achjmol 2010)

Some people in Guatemala did support the creation of a national consultation law. Monseñor Ramazzini, a prominent Catholic clergy member well-known for his support of indigenous communities, told me that a consultation law would be a good thing. The Guatemalan government wants "a clean face" for the international community, he said (Ramazzini 2010) Yuri Melini, a well-known advocate for environmental and indigenous causes in Guatemala, agreed, saying that consultations would be more effective if they had a legal basis. He was critical of all the community consultations carried out, saying the courts would have backed the Sipacapa consultation, for example, if it had had legal footing. A consultation law would be a good thing, he argued, as long as it enshrined dialogue, not a veto, as the standard (Melini 2010). These are two important figures in indigenous advocacy in Guatemala, but theirs were the voices of dissent on the issue of a consultation law. Most others working on the same issues disagreed.

Along with opposing a national consultation law, Guatemalan activists sought to protect the right to consultation by turning to the court system, in terms of filing formal cases, and in terms of using the status of elite legal institutions to highlight consultation.. In 2010 I joined a march on the Supreme Court of Justice to present a petition on the Marlin mine. Rigoberta Menchú spoke, saying the occasion was significant, because "it was the first time we [indigenous communities] have turned to the law." Marchers in the crowd carried signs saying "consultations are legal" and "consultations are an ancestral right" of indigenous communities. This latter point is debatable, but the sign underscores the eagerness to link consultation with core respect for indigenous rights. In 2014 Maya Mam representatives marched at the Constitutional Court, protesting a ruling declining to give an injunction to stop a mine, based on

a case brought on the grounds that a consultation had not been carried out. In 2015 a Guatemalan appeals court ruled that the La Puya mine cannot proceed without a consultation. The ruling ordered suspension of construction activities. The legal complaint also mentioned water contamination and a construction permit. The following year the Constitutional Court upheld the suspension, based on lack of any consultation. In 2017 The Guatemalan Supreme Court of Justice suspended the license of San Rafael mine because the surrounding communities had not been consulted.

On June 18, 2010, I attended an anniversary celebration of the community consultation on the Marlin mine in Sipacapa, the grand day that kicked off an international movement. There was more critical national and international attention to the mine than ever. Just as this event was taking place, James Anaya, UN Rapporteur, was speaking in the capital, criticizing the mine. But everyone in Sipacapa seemed down-hearted, about to give up the struggle against the mine. At a meal afterwards with activists, people stared down at their food, almost at a loss for words. Personal conflicts and divisions in the local movement against the mine had grown to unsustainable levels. Just as the legal and political senses of consultation seem to have diverged, the local and national and transnational movements seemed to have completely lost track of each other.

To this date there has not been a national law on consultation passed on Guatemala as originally proposed, but in 2017 there was a national guide to consultations published by the national government. Social organizations, indigenous and environmental organizations rejected the guide, preferring to continue to rely on ILO 169. Businesspeople like the guide because it

could lay the groundwork for a consultation law. The guide says a court resolution in any case must be followed, no matter how the consultation was done. Some fear the guide would annul the 85 community consultations that have been done. A Mayan Council member complained that they were not consulted on the guide, again underlying the irony of indigenous peoples not being consulted about consultation. The Maya Council quickly filed an injunction at the SC of Justice against the consultation regulation, saying it hadn't been consulted. One member complained it was a total manipulation of the real spirit of Convention 169, and also a total manipulation of the community's own form of decision-making. According to one report, "The regulation of Free, Prior, and Informed Consultation is reducing a right of constitutional rank to a purely administrative hurdle." The president of American Chamber of Commerce said "the suspension of these projects violates the property rights of investors…the absence of such a regulation has made space for maliciously applied interpretations which are against corporate interests." (El Observador 2017: 26.) "The regulation of consultation has been refused by indigenous communities when they signal that the systematic and reiterated violation of the right to Free Prior and Informed Consultation according to Convention 169 does not come from the absence of regulation, rather than being, principally, a political decision of the Guatemalan state to omit its commitment in the same moment in which it receives a proposal that might harm its processes of production and reproduction," the report continued (El Observador 2017: 30). The Guatemalan mining ministry was using a consultation guide copied directly from Peru, according to this source (El Observador 2017: 31). It was the worst nightmare of many consultation activists: Guatemala was turning into Peru. The pioneer in community consultations was being subdued by the playbook from the pioneer in imprisoning consultation in a straightjacket of

national legislation. A national consultation law may yet be passed in Guatemala. NISGUA encouraged supporters to write Guatemala's Labor Commission and oppose a draft consultation law (#5416). "State and corporate actors seek to co-opt this mighty expression of direct democracy. By reducing community consultations to a state-controlled administrative process." (NISGUA 2018).

Transnational consultation movement

National movements around consultation in Peru and Guatemala have taken place amidst the broader context of a transnational consultation movement. Local movements arise in response to specific issues (a disputed mine), and actors in these movements connect, in person and over the internet, with actors in movements and organizations with national reach (for instance CONACAMI in Peru and the CPO in Guatemala.) These actors use international institutions as resources (the International Labor Organization, the World Bank, and the Inter-American Commission and Court, for example.) Local and national movements are also very much in dialogue with transnational NGOs, such as Oxfam America and Amnesty International, and with international networks of indigenous advocacy groups. The links between individual activists, local groups, international institutions, and transnational networks have also developed with the help of a few select transnational consultation activists. A few true believers in consultation have helped spread the trend of consultation.

One European activist who has spent years of his life working with mining-affected communities in both Peru and Guatemala (and who was my co-international observer at Cocachacra) told me a little about the ways in which the Peruvian and Guatemalan movements

encountered each other (Otten 2010). The Sipacapa consultation was very much inspired by the Tambogrande consultation, he noted. The son of Godofredo García Baca, a farmer and protest leader mysteriously murdered in Tambogrande not long before its consultation, travelled from Peru to Sipacapa, Guatemala, to talk about their experience and promote consultation. From there, word of that consultation spread quickly through Guatemala, as there are no vast uninhabited spaces as there are in Peru, he argued. He helped with this work as someone who helped found COPAE, the pastoral peace and environmental outreach team in San Marcos. We should not underestimate the pride that people take in consultations, he underlined: "People say, 'this is my land, damnit, and we can do a consultation here too.'"

Another key transnational consultation activist, like García Baca's son, is from the Tambogrande, Peru area and promoted consultation in Guatemala. I caught up with him in Toronto, Canada where he was studying law. As befitting a wanderer, he is named Ulises. Ulises García (García 2010) believes strongly in the power of consultation. The struggle to drive the mine from Tambogrande did not succeed overnight, he explained; it took years, and in this time "consultation was the fuel of the perseverance." He was so inspired by the role that consultation played in his own home that he travelled to Guatemala to promote the idea for Sipacapa. In a conference with 55 mayors, he said, he told them about Tambogrande. Along with Rights Action (a Canadian NGO long active on resource struggles in Guatemala) he convinced them to carry out a consultation. Consultation was the "north star" of the struggle he said, and international observers were an important part of its success, since they helped "rebalance power."

After Tambogrande and Sipacap, he was part of the consultation in Río Blanco (see chapter 4). He showed people there videos of non-violent struggles, of Tambogrande, Sipacapa, of Gandhi, and this helped tip them over into deciding to do a consultation. The government really wanted to avoid the consultation there, but international observers prevented savage repression, he stated. He tried to convince people to do a consultation in Cajamarca, but failed there. They should have done one for Quilish, he sighed; their self-esteem would be better.

Consultations are helping prevent future mining concessions, he argued. The practice helped unify people after genocide in Guatemala, he felt. It breaks companies' main strategy, of promoting division, since it brings people together. García though that consultations could be a savvy and satisfying move in many contexts. It is not just appropriate for indigenous peoples, but for everyone, he argued; witness the Esquel consultation in Argentina, which concerned a non-indigenous community. "You can vote for a president but you can't vote for your future?" he said quizzically. Consultations were a natural response for people try to take part in democracy.

With the help of people like García and García Baca, community consultation spread throughout Latin America, and movements promoting it in one way or another formed in several countries. In some contexts, the energy around consultation was directed at institutionalizing it, as in the Peruvian model. In others, activism favored fending off institutionalization, as in Guatemala. A Peruvian author on consultation (Alayza 2010) ascribed the national differences in consultation movements to preexisting differences in political culture. Consultation played out as a matter of respect for indigenous rights, she argued, since human rights groups there are

oriented towards an ethnic model for understanding conflict. After Guatemala's civil war, she argued, the international assistance in peace-building had "an indigenous vision," whereas the international aid Peru got after its conflict was not framed around indigeneity. After all the violence against indigenous communities, unity was weak, and left movements in Peru abandoned ethnic frames in favor of class identity, she stated. Political culture is again different in Colombia, where civil and political rights, not ethnic rights, have been traditional issues for human rights groups, she argued.

These national differences have shaped national conversations around consultation. In 2015 Evo Morales said that consultation leads to a lot of wasted time, and that indigenous communities should be careful not to make themselves instruments of NGOs. Bolivia has staved off proposals for national consultation laws. Several have circulated, including some with backing from indigenous organizations, but indigenous organizations in Bolivia increasingly lean towards applying ILO 169 and the UN Declaration on Indigenous Peoples directly, without the mediation of a national consultation law (Gran Angular 2016). In Brazil, the government discussed a consultation law with indigenous leaders in 2012, but they were focused on other things. Some communities made their own consultation protocols.

In Colombia, indigenous groups are not working on a consultation law. They see the constitutional court as sufficient, and criticize laws in other countries for establishing lower standards. (Gran Angular 2016)

In Peru and in Chile, however, national legislation on consultation drives the national conversations now. One political scientist in Lima ascribed the differences to broad political

orientations. Peru and Chile have consultation laws because they are neoliberal countries, she argued, whereas Bolivia and Ecuador are radical countries, and thus do not have national consultation laws (Sanborn 2014). In an opinion piece on consultation, a Guatemalan lawyer bemoaned the developments in Peru and Chile, arguing against formal laws for consultation (Plaza Pública 2017). Community consultations have led to court cases and made real change, the author argues. "In Chile and Peru, where they have regulated consultations, they have restricted these rights." Companies used to oppose consultation, but now that they see the power of self-consultations, they want regulations. In a recent statement by the CPO, the Guatemalan indigenous organization, a similar sentiment was expressed. Colombia and Mexico have "judicialized" consultation and these examples show that works out poorly. Indigenous communities can't participate. They don't comply with international standards. Regulating consultation "does not guarantee the right of communities to be consulted. To the contrary, it can facilitate…the exploitation of our territories." (CPO 2020)

International institutions and transnational human rights organizations have largely come down on the side of formalization. Amnesty International (2012) for instance, issued a statement calling the right to consultation "key" for indigenous peoples, lauding its increasing judicialization, and calling for more national laws to protect the right. There are few international institutional voices cautioning about the risks of further enmeshing consultation in formal law. Those voices can be found almost exclusively within local or national movements.

Institutionalizing international human rights law: lessons learned

Around the time of the Bagua massacre, in 2009, a cartoon showed the state entering a simple home and saying it was giving them certain amenities. They asked why the state thought they wanted those things, and the state said, "why because we've consulted you." (Gamboa 2009) This sentiment held even after the passage of the national consultation law that was supposed to be the grand answer to the problem of Bagua. In 2013, a leading Peruvian newspaper, *La República*, published a cartoon of miners bulldozing over land, laughing at neighbors who thought campaign promises of prior consultation were serious. (See Appendix B.) Cynics could be forgiven for believing that the internationally recognized right to consultation was nothing more than empty promises and distraction.

The enormous amount of time, money, and emotional energy poured into protecting the right, however, on the part of mining-affected community members, NGOs, lawyers, and more, tells a different story. People have put their lives on the line for consultation (and sometimes lost them, as in the case of the Honduran activist seeking a consultation murdered for her audacity in 2016). While heroic stories like the one of a plucky band of activists in Tambogrande defeating a major internationally backed mine through consultation are rare, consultation, as a legal category and a focus of political organizing, is far from meaningless.

The effects of the right to consultation can be seen when looking broadly at how national dynamics around mining and resource cases have developed, argued a Guatemalan environmental activist. The wave of consultations has prevented Guatemala from becoming another Peru, she stated. Sipacapa and Marlin have served as a lesson, which hasn't produced a united strong movement but has served as a catalyst to connect people in different places and

raised awareness about the dangers of mining. It if hadn't been for consultations Guatemala would have significantly more mines, like Peru. If Sipacapa didn't stop Marlin, it may well have detained a wave of mining that would have otherwise hit. It's a shame that some people insist on seeing consultation as a failure, in strictly legalistic terms, she mused. The danger of a consultation law is that a bad one could be passed. (Rey Rosa 2010)

Consultation is deeply meaningful to individuals, communities, and movements. It has arguably achieved some of the aims of these movements, in altering the trajectory as a whole of mining and resource development projects. The comparative experiences of Peru and Guatemala, however, seen in international context, show that the right to consultation risks, in a sense, being neutered. The entirely understandable drive to institutionalize, formalize, and judicialize consultation threatens to erase the political power of consultation, which rests with community consultations, not with state protections for the right. Already, as national laws and guides and legal cases accumulate, we see fewer and fewer community consultations taking place. A Chilean political scientist said indigenous communities had burned out after too many consultations. They have "consultavitis," he sighed (Agüero 2014). Energy once spent on maintaining the community consultation movement is dissipating as it is channeled into formal institutions. A political moment, the era of community consultations, may be coming to a close, even as consultation as a more formal legal phenomenon increasingly blossoms.

Chapter 7

"Larousse ran gun for the Resistance." "Which Resistance?" "He won't say. Apparently they didn't win." -Ratatouille, 2007 Disney Pixar film

For scholars of comparative law and courts, the community consultation movement presents a puzzle. Despite the intense enthusiasm surrounding the proceedings, which typically attract thousands of voters, they very rarely produce the concrete result hoped for by most voters: preventing the mine or other project from going forward. Community consultations characteristically feature an overwhelming vote (upwards of 95% of participating voters) against a project, yet most projects proceed despite this formally expressed opposition. There is nothing in national law nor in Convention 169 which supports the right of communities to run their own binding consultations. Furthermore, even a state-led consultation is legally non-binding, and there is nothing in the law to prevent the Peruvian government from disregarding opposition to a project expressed during a consultation. Why, then, would people in dozens of communities throughout Peru, Guatemala, and elsewhere in Latin America stage community consultations, expending considerable time, money and effort to pull off the events, given that they are not legally binding and rarely successful at achieving their stated aim of fending off an unwanted

project? Why devote substantial energy into defending a right that is only weakly enforceable and so vague as to be potentially meaningless even when it is enforced? Why turn to the law under these circumstances? What are the implications of doing so?

In this chapter, I consider what consultation can help us understand about the relationship between law and political struggle, in particular international human rights law and political mobilization around large and contested transnational resource extraction projects affecting vulnerable populations. Consultation, as an international legal and normative standard, as a community-based practice, and as a norm increasingly enshrined in national laws in Latin America, offers a novel vantage point from which to consider this relationship. Consultation is unusual as an international human right, in that it has been appropriated by grass-roots actors, often to the exclusion of engagement with national law in a conventional manner. Consultation helps us see international law in an unexpected light: international law is, or can be, malleable; international law can be democratic, and international law can be jurispathic. What it certainly is not is useless, or irrelevant to political struggle.

In this chapter, I discuss two major ways of analyzing international law, compliance studies and cultural approaches, and suggest what these modes of analysis may overlook. I argue that a legal mobilization approach may be better suited to helping us understand the true significance of consultation. This approach suggests that we must move beyond compliance studies in order to get a fuller picture of the "success" of consultation, which must be redefined so as not to measure only whether or not national governments are dutifully implementing ILO 169 or not. I argue that we should evaluate the political role of consultation not in terms of

simple success or failure, implementation or lack thereof, but in terms of the extent to which it promises to be transformative, or to tend to reinforce the status quo. Ultimately, consultation has proven to be both these things, I argue, and over time has been moving away from its initial more transformative character and more towards jurispathy.

A substantial body of research addresses the question of whether or not international treaties successfully achieve "compliance" with their provisions, and therefore whether or not they have the hoped for "impact" intended by their drafters (see Hathaway 2002 and Hafner-Burton and Tsutsui 2007 for classic examples of this sort of study.) Studies in this vein typically examine a large sample of countries to test whether or not having ratified a particular treaty increases the likelihood that a state will comply with a concretely measurable requirement of the law. This body of scholarship attempts to answer, in a directly pragmatic way, whether or not ratification "matters". Much of it argues, pessimistically, that the treaties, often a goal or focus for human rights advocates, serve little pragmatic value, based on a weak or essentially nonexistent enforcement capacity. This line of argument finds kinship with legal realism (e.g. Rosenberg 1990) which argues that litigation is unlikely to bring about true social change, and is thus not the promising strategy most right advocates presume it to be. Not all studies of this ilk reach this conclusion; Neumayer (2005) argues that international human rights treaties can effectively improve respect for human rights, under certain limited conditions (namely, a democratic domestic political environment). He shares with other compliance scholars, however, a focus on the empirical, direct, quantitatively observable relationship between ratification and compliance.

Some work analyzes states and official actors, but also explores the ways in which social interpretation of treaties may play a political role, at the state or grass roots level. Scholars working in the constructivist international relations tradition note that states may sometimes change their preferences in the course of becoming party to human rights treaties (Finnemore 1996). Thus, states may "comply" with treaties not because of a fearsome enforcement mechanism, but because the *process* of ratification influenced the thinking within the state apparatus such that there was a greater desire to follow the principles protected in a given covenant, somewhat apart from the actual consequences of violating the agreement. In a related vein, Risse, Ropp and Sikkink note that "international law and international organizations" are "the primary vehicle for stating community norms and for collective legitimation" (1999:8). They argue that states are "socialized" into obeying international covenants, in a process by which they internalize various widely shared norms. This body of work complements compliance studies by explicating the mechanism at work; the fundamental underlying assumptions and interests of this line of inquiry are similar.

In a further effort to understand the issue of compliance, several scholars have explored the relationship between international human rights law and social mobilization, often concluding that the former feeds and enables the latter. Simmons for example, argues that "a public treaty commitment can be important to popular mobilization to demand compliance," (2009: 15) as well as drive agenda and enable litigation. Her study, while it examines non-elite mobilization, remains one essentially concerned with elites in the final analysis; it is explicitly a study of behavior, of government compliance with treaties and "popular mobilization" is relevant

only insofar as it ultimately influences state action. Simmons, like most international relations scholars, assumes that the object of "compliance" is clear, objective, static, that it is generated directly by the language of the treaty, that it is ultimately carried out solely by the state, that it is the final goal and end of political mobilization, and that compliance is unproblematically good. As I will discuss below, these assumptions are not uniformly helpful in studying the case of the politics of consultation, though they generate an important set of questions, data and arguments in their own right.

Compliance studies provide an important empirical piece of the puzzle of the effect of international treaties, and justly make us appropriately cautious of claiming that raising human rights standards is as simple as signing a piece of paper. They help dampen what in many cases is a grossly exaggerated expectation of what ratification can achieve by pointing to the reality as borne out on a large scale of treaty effects. In some respects, the cautionary note that emerges from these studies seems apt regarding ILO Convention 169. There have been some skeptical inquiries into the effectiveness of this treaty in particular contexts (see, for example, Sargent 1998), and doubtless if a "large n"-style compliance study were conducted specifically of the right to consultation, it would inevitably conclude that ILO 169 was a failure at protecting the right, since the signatory states charged with ensuring the right seldom to never enforce it. It took two decades after the initial ratifications before any state self-consciously set out to undertake a "consultation" in accordance with ILO 169, and there have been only a handful of such exercises to date among all ratifying states. By the classic measure of a compliance study, then, international law is irrelevant or a failure in protecting the right to consultation.

This approach to studying international law, however, is not the only way to generate insight into the total effects of the existence and ratification of ILO Convention 169 regarding consultation. This type of study is crucial for certain kinds of questions, but cannot capture what is so important about consultation, which revolves around the political hay communities have made out of the near total lack of compliance by states in this matter. Asking, as Sargent (1998) does, whether ILO 169 constitutes "real rights" or merely "rhetoric" misses the very real ways in which it can be both, and in which the latter might crucially enable the former. As Scheingold argues, the rhetorical becomes material when people believe strongly enough in words that they are inspired and enabled by them to mobilize, as is most certainly the case with the community consultation movement. Consultation has provoked, and made possible, marches, protests, news conferences, media attention at the local and international levels, and generally more sustained attention to criticisms of mining than would be possible in the absence of the Convention. Furthermore, as O'Brien (2006) argues, it is exceedingly difficult to tease out the immediate effects of protest; in the long term, activists can forge ties with each other that may become relevant in future political mobilizations, and lives can be transformed through struggle. Even if a given mine proceeds, and even if governments continue to largely fail to conduct consultation proceedings, the politics of consultation is still capable of opening a space in which activists meet, strengthen ties, and deepen commitments. These effects are all but impossible to capture in a classic "impact" study, but they are still critical to people who are interested in the kinds of politics that international treaties can enable. To apprehend these sorts of phenomena, one would be better served by turning to legal mobilization theory (McCann 2004; Scheingold 1974), which views law not so much as something that acts directly on behavior, but as one of multiple social

and political forces that combine in complex ways that often defy straightforward prediction or unidirectional analysis. Thus, I propose that to understand the full political significance of the legal protections for the right to consultation, we must turn to an approach that is attuned to a broader and more subtle set of possible effects.

There is another scholarly tradition of analyzing international law that differs from the compliance study approach, in that it focuses on grass-roots actors, not state-level entities, and considers political effects of treaties other than straightforward compliance with them. This literature is perhaps better suited to understanding consultation than compliance studies, but still, I argue, is ultimately largely limited in its capacity to help us understand the full phenomenon of consultation. Various strands of scholarship have explored the ways in which international law becomes politically relevant through its use by grass roots or local actors, as opposed to agents of the state. Inquiries based on cultural theories of international law, as I term them, are in many ways better positioned than compliance-oriented studies to make sense of the politics of community consultations. Following Rajagopal 2003, I argue that international law cannot be understood as a wholly elite phenomenon; rather, it is something understood, debated, interpreted, and practiced at the grass-roots level. Compliance studies proceed as if law were an exogenous constraint on state behavior, whereas the story of consultation is one of law being made and remade at the level of civil society. This is not to deny that lawyers, state agents, and other elites play an important role in putting treaties into practice, but to emphasize that their role is far from the whole story or the only one we should be interested in. As we have seen, non-elites often have an intense interest in international law, a deep knowledge of aspects of it, and a desire to state for themselves what it means in their lives. Their visions of international

law, regarding consultation as with other topics, sometimes coincides neatly with the elite or lawyerly understanding, sometimes directly or even flagrantly contradicts it, and sometimes catches lawyers by surprise, even if it is not strictly speaking at odds with the letter of the law.

While compliance studies focus on a binary question of whether or not the lawyerly vision has been achieved, cultural approaches to international law permit asking what non-elite actors make of international law (in both the sense of what they think of it and what they do with it.) I echo Rajagopal's call to adopt "social movement perspective towards international law." (2003: 151) He criticizes what he calls the "institutionalist bias and jurocentrism" of current scholarly approaches to international law (2003: 152); cultural theories of international law open up room to move away from this bias and to decenter official state institutions as the focus of inquiry.

This important and recently growing body of scholarship explores the argument that while elites may draw up treaties in the hallowed halls of international institutions, it is people on the local level who make these treaties real and meaningful in their communities, even if they are forced to adapt somewhat to the vagaries of local conditions and cultural traditions. These studies move away from the uniform focus on compliance, and interrogate instead the ways in which the people upon whom treaties supposedly "act" are themselves an important part of the story, with agency and ideas that don't always reflect those of the elites who formulated the treaty texts. Several related strands of scholarship begin from this premise: one focusing on "local agents," on one "norm entrepreneurs," one on a "boomerang" theory of action, and one on what I term "institutional trickle down".

Sally Engle Merry provides a widely remarked upon model of how international law might "work," or in a loose sense be complied with, indirectly. In her study (Merry 2006) of the Convention to End all Forms of Discrimination Against Women (CEDAW), she makes the case that treaties function by way of a "global cultural flow." The first stage of the process Merry describes is "transnational consensus building," during which elite parties determine the text of an international treaty. In her model, this is followed by the "transplantation" of the norm into the "local context." The process culminates with "localization of transnational knowledge." Merry argues that the CEDAW treaty came into being and gained influence along these lines. Transnational elites created the treaty text. CEDAW was then "transplanted" into local contexts, as national-level laws and practices were created to enforce the treaty. The convention's norms against gender violence and discrimination were finally "localized," in the sense of being altered as necessary so as not to conflict with local culture.

Merry's argument centers on the contention that while CEDAW, like international human rights law more generally, has no direct enforcement capacity, it can still be pivotal in changing behavior. "CEDAW is law without sanctions," she states. "But a close examination of the way the CEDAW process operates suggests that although it does not have the power to punish, it does important cultural work" (Merry 2006:72). Countries that ratify international human rights documents have a tendency to want to be seen as compliant with the norms expressed therein, Once a treaty like CEDAW is officially on the books, it codifies certain norms, and thus solidifies the content of the norm and promotes it, by virtue of being an international convention. CEDAW as law is powerful not because countries fear being officially sanctioned if they violate

it, but because its existence generates a powerful way to embarrass states that do not observe its tenets. "Its power lies in exposure and shaming, not force," Merry argues. (Merry 2006:81)

Merry is surely correct that international human rights law does "important cultural work." Scholars of the consultation movement would be hard-pressed to conclude otherwise. That movement, however, casts doubt on her model of "global cultural flow," at least as an absolute. The story of consultation demonstrates that states are not the primary or only entities that can suffer "exposure and shaming." Even though states have largely neglected to respect, implement or institutionalize the norm, local communities have acted on their own and appropriated it in service of their own goals, on their own terms. This particular norm, at least as it is currently understood and used by many, hardly came in slickly packaged form from the minds of transnational elites, to be merely cosmetically adjusted as "local" culture necessitated. Instead, those transnational elites produced an official text and a norm that by themselves seemed unlikely to accomplish much, leaving it up to local non-elites to dream up and create the content of their own norm, thereby obligating the transnational elite (the ILO, regional courts, national governments, international corporations, and international financial institutions) to be the ones adjusting to a norm emanating from "local" consciousness and needs.

Finnemore and Sikkink (1998) present a related argument regarding what they call a "norms cascade". In their model, norms "emerge" largely thanks to "norm entrepreneurs," who promote a change to the status quo (typically through institutional means, using, for instance, the United Nations). When the entrepreneurs are successful, Finnemore and Sikkink argue, they can sometimes achieve a "norms cascade," whereby states adopt a norm generated at the

international level. This newly adopted norm then, on their model, becomes internalized by the general public. Their model is largely consistent with Merry's account: norms emerge from among transnational elites, then are self-consciously promoted by dedicated and admirable professionals, then are adopted by the larger, non-elite population, thanks to the work of the people intentionally trying to change a norm from above. International law might matter, according to this account, because it provides a legitimizing institutional platform from which to push for change. The people who must be influenced are more likely to follow the lead of norm entrepreneurs if they see them as tied to institutions that they already trust or regard as valid and authorized. In the face of the pressure these tactics generate, states may capitulate and adopt a norm into their own legal institutional framework; subsequently, elites push for compliance, and citizens eventually become habituated to the presence of the newly institutionalized norm, internalizing it to the point where they no longer think about it, but follow it as part of their own moral code.

It is difficult to discuss transnational social movements without reflecting on the well-known work on this topic by Keck and Sikkink. None of these three major cases I analyze would be as prominent as they are now without the attention and support of TANs (transnational advocacy networks), which Keck and Sikkink rightly highlight. Their work has much merit, but their model of TANs and political change does not neatly fit the experience with the transnational consultation movement. Their model of change that comes closer than an "impact" model to capturing some of the process of ILO 169's use and diffusion, though in the end it still, I argue, overemphasizes the role and activity of the state and underemphasizes the role that civil society has in crafting the norm in question. According to their famous "boomerang" model,

transnational advocacy networks (TANs) work with citizens in a particular country in order to put pressure on that government to live up to international norms. Keck and Sikkink posit a five step model: TANs exert influence over first 1) issue creation and agenda setting, then 2) the discourse of states and international organizations, 3) institutional procedures, 4) the policy of target actors (such as the World Bank), which finally lead to changes in 5) state behavior. Their understanding of transnational advocacy does allow for a substantial role for civil society in agitating for change, which matches the experience of indigenous communities and the battle over consultation. It does not contemplate, however, the possibility that civil society might have a major role not just in promoting a norm, but in shaping its basic content. Furthermore, it holds up state behavior, the final stage in their model, as the ultimate proof that a campaign has mattered, whereas I argue that the most important effects of the politics surrounding consultation are not to be found in state behavior.

Harold Koh (1999; see also Koh 1997) also makes a social argument about how international human rights law is enforced. In his model enforcement is the endpoint of a "transnational legal process" characterized by "institutional *interaction* whereby global norms of international human rights law are debated, *interpreted*, and ultimately *internalized* by domestic legal systems" (Koh 1999: 1399; emphasis in the original). Crucially, for Koh, as part of this process, national governments "internalize norm-interpretations issued by the global interpretive community into their domestic bureaucracies and political structures" (Koh 1999: 1411). In his examples, campaigns to end slavery and landmines, domestic institutions formally adopt and internalize the prevalent global norm. Koh is largely focused on interpretive work at the level of institutions; in his understanding of international law, the important minds to be changed are

those that reside in key institutions that ultimately direct behavior in the rest of us. His argument is that, once a norm is adopted by the international system, it will essentially trickle down to domestic legal systems, and from there will trickle down again to ordinary citizens not affiliated with legal bureaucracy. Koh's line of reasoning is similar in many respects to Merry's and to the one espoused by Finnemore and Sikkink; it differs somewhat in that the interpretive work is done in an official capacity, not at the "local" level primarily. From that point on, we are given to assume, the content of a norm is relatively fixed.

His model is helpful in the extent that it allows for a role for civil society in shaping international law, through the actions of "transnational norm entrepreneurs." I argue, however, that his account of "internalization" does not explain the critical process of norm development that can occur within civil society itself, without the mediation of official structures. The norm of consultation did not arrive in Peru and Guatemala and then become "internalized." Rather, it was a norm that was generated at the transnational level in name only, gaining its political meaning and force almost entirely outside the confines of official institutions. The experience of consultation suggests a process that is almost the inverse of what Koh describes; if there are norm entrepreneurs here, they are internal to civil society, and could be said to have "externalized" their vision of consultation, presenting it back to the elites who provided the term and the legitimating authority.

Koh, Merry and others hit upon important ways that international law and norms can be influential in the absence of direct state enforcement. I argue, however, that their models give too much privilege to the centrality of the state, thereby overlooking the critical importance of the

interpretive work done by civil society. Activism flowing from an international law or norm may very well be important and effective without achieving any change in state behavior, and indeed the consultation movement in its early days unfolded without much state support. In this context, the desired outcome may have little need of state intervention at all. In some cases, as with Peru's first community consultation, in Tambogrande, communities and their allies have brought great pressure on companies, leading to their withdrawal. In other cases, even if a controversial project proceeds, the company may be compelled to modify it or otherwise do something helpful for the community, lest they face pressure to leave and the accusation of having violated the spirit of international law. In these cases, human rights treaties have made their influence felt without any direct recourse to the state, ostensibly and officially the party responsible for enforcement.

The cultural approach to international law generates some important insights into the greater significance of consultation and the role of the treaty that guarantees it. Rather than focusing on the binary outcome of compliance or lack thereof, this body of scholarship assumes some central importance in the social interactions that occur in connection with the formulation, ratification, enforcement, interpretation, and following of treaties. As I have argued, the politics of consultation clearly point to a view of international law that encompasses these aspects of its existence. Following Merry and Koh, I argue that international law in this case matters because of how it is used symbolically (as one of multiple international discourses that carry symbolic rhetorical weight for the relevant national and transnational audiences.) International law matters because of, in Merry's phrase, its "cultural power".

However, I argue that Merry, Koh and other observers present a version of international law's cultural power that is too top-down and state-centric, characterizations that are not borne out in the example of consultation. The cultural power in this case does not emanate from powerful actors on the transnational stage and radiate outward and downward until it reaches marginalized peoples; rather, at least in the case of consultation, international law provides a source of authority and legitimation, but it is interpreted and put to use by the marginalized peoples themselves, who are a source of creativity and entrepreneurship, and who do not simply "receive" international law as understood and promoted from on high. Communities could simply choose to protest the "ordinary" way (and they often do, as an alternative or supplement to consultation), but, I argue, they style certain of these protests as "consultations" because they are then able to claim the mantle of law, and therefore legitimacy. International human rights law is more difficult to dismiss than a single unanchored complaint (e.g. about the effects of a project on crops in a particular context) and than other possible discourses (e.g. environmentalism). Activists at the grass-roots have been savvy and have exploited the legitimating character of international law in such a way to advance their own projects. This is in many ways consistent with O'Brien's findings; in the Chinese context, he argues that people mobilizing in resistance to certain state policies "assert their claims largely through approved channels and use a regime's policies and legitimating myths to justify their challenges." (2006: 3) Their stated goals are based on "letter of the law," (2006: 7), and so their resistance is thus based on "impeccably respectable demands." But while the Chinese activists he analyzes gain some traction in mobilizing by sticking scrupulously to the letter of the law, so as to be beyond legal reproach from an official perspective, consultation activists have adopted a related but

distinct strategy of using certain legal terms and general principles as a starting point or springboard for action. Community consultation does not enjoy the same legal backing as the norms O'Brien cites; "consultation" is legally required by states having ratified ILO 169, but beyond that, implications that states should follow the will expressed in a consultation, while often morally just and compelling, are not solidly backed by the letter of the law. It is not the official content of the law, but rather the status of law as law, that is so useful to consultation activists.

Thus, I advocate for retaining a focus on the cultural power of law, but for questioning oft-held assumptions of where, how and by whom this cultural force is put into practice. When studying the politics not just of consultation, but of any right protected in international law, we should be attentive to the possibility that the meaning and practice of the norm may shift over time, may be understood differently by differently situated people in different places, and may not be dominated by elite understandings or hopes. As Engel (2012: 442) notes,

> "It is one thing to suggest that legal ideas, institutions, and practices can travel from the global North to the global South, from the centers of cultural production in Europe and North America to societies that are portrayed as the recipients of the ideas and institutions of liberal legalism. But it is quite another thing to conclude that they necessarily take root and flourish once they arrive or that they predominate over the legal orders they encounter. Moreover, the characterization of so-called 'receiving' nations as relatively passive when it comes to cultural production can be highly misleading, since many of these same countries have

> produced some of the most dynamic forms of legality (or anti-legality) in our era."

In this vision, ratification becomes only one point of many in a long-term political struggle over meaning, and international law may be politically significant even without state compliance or engagement of any sort.

Returning to the central puzzle, why would people pour so much energy and resources into community consultations and the consultation movement, given that the right seems to be by and large unenforced and unenforceable? Most comparative law scholarship is centrally focused on the institutional aspect of law, and yet the transnational consultation movement, while centering on legal claims, is not primarily focused on formal legal actors or institutions. How, then, can we make sense of a movement that is centered around law but not around legal institutions?

I argue that the true "success" of the consultation movement must be evaluated far beyond the confines of a single case or a specific country. To understand whether or not consultation has played a positive role in efforts to exert community autonomy in transnational resource battles, we must examine the movement as a whole, over the span of years and through the entire region of Latin America. We must redefine success, away from meaning the success of fending off a mining project solely by deploying a community consultation or legal case pressing the right to consultation, and toward a more general shift in the direction of the political ability to mobilize in cases of resource development.

I argue that law has been a centrally important resource for the community consultation movement, but not in the institutional way in which law is commonly understood in existing scholarship. To grasp the role that law has played in the transnational community consultation movement, which features vulnerable and marginalized communities in the global South mobilizing against capital-rich multinational corporations based in the global North, scholars should analyze law as a richly symbolic resource, rather than as a primarily institutional one. Law is a useful tool for consultation activists because of its capacity to confer authority and legitimacy on their efforts, even if the details of legal texts may not, strictly speaking, support their claims. In this way, law's symbolic power generates material effects. Law is important to the consultation movement not because it frequently or reliably generates victories in courts, but because activists are able to draw on it rhetorically, and thus create opportunities for political mobilization that would not otherwise exist, or that would not otherwise be as effective. Indeed, the fact that the right to consultation is so frequently denied may be more politically useful to activists and other community members than if it were broadly upheld. In this way it is a strange right: one that is, arguably, better lost than won.

For scholars and activists alike, this argument upends or at least complicates the applicable standard of "success" for the right to consultation. Most discussions start from the assumption that "success" and "victory" depend on a right's being protected. Our common language for human rights treaties and human rights advocacy more broadly rests on the assumption that we must always push for robust implementation of human rights, and respect for laws that enshrine them. I propose, based on my study of the politics of consultation, an

alternate approach to the concept of "success" for marginalized communities facing controversial development initiatives. Rather than defining success as simply and solely seeing rights upheld and laws followed, we should consider whether a political development or dynamic enables the continuation of political mobilization on the terms of the very people whose rights we hope to see protected.

I argue that the politics of consultation demonstrate that rights play a central role in political struggle, but in ways that are not always straightforward. Rights are important not only because they provide access to institutional redress, or because they prospectively compel or encourage respect for themselves (although these happy outcomes can be and sometimes are the case.) Rather, I argue, the fact of formal protection of rights in law, under the right circumstances, fuels political mobilization with material effects, based on the symbolic power carried by the rights. In a political climate where powerful institutions feel the need to pay at least lip service to the ideals of protecting human rights and following the law, activists can use this social expectation to their benefit, by embarrassing institutions and leaders who can be painted as failing to live up to their own stated standards. Activists are able to use the fact of international law's prestige to generate and sustain concrete political mobilization.

My argument builds on the work done by scholars of international human rights law, but ultimately draws the most on the legal consciousness and legal mobilization literatures. My analysis represents a departure from most (though certainly not all) comparative law scholarship in that it emphasizes the role of grass-roots actors in shaping law, and deemphasizes the role of states and elites. Most scholarship on comparative law revolves around the courts and other

prototypical legal institutions, even, crucially, the work that links the "law" in courts to the "law" experienced by ordinary people. As Massoud (2015:335-6) notes, "Legal scholars and social scientists have been preoccupied with finding law in the most likely places—in courts in settings where courts are strong, or in human rights and rule-of-law promotion efforts in settings where courts are weak…But focusing on courts or other state and local institutions of justice means potentially missing the meaningful ways nonstate actors import legal norms and practices into civil society in the most troubled corners of the world."

It is precisely these ways in which non-state actors come to generate and shape legal norms, without direct dependence on formal legal institutions, that I argue are fundamental to understand the consultation movement, and more broadly a little-studied way in which law is significant to social movements. Massoud's insight is particularly apt for scholars of consultation, given just how prominent the role of non-state actors has been in mobilizing around this particular right. His point concerns legal scholarship in general, though it largely obtains regarding scholarship of international law in particular.

To an extent we can celebrate the achievements of indigenous communities and others who have drawn on consultation by practicing it by their own lights. In doing so, they have arguably succeeded in slowing down some projects, halting a few others, and drawing attention to a variety of issues and complaints that might not have otherwise received attention. Consultation is not an all-powerful club, but it is, in the words of an activist in Guatemala I spoke to, a "thorn" that communities can use to press for their needs. Consultation can thus be seen as an opportunity for these communities to press for their own priorities, a way to achieve

occasional practical results, and also a way of reinvigorating or creating activist networks. At its best, consultation, as protected in international law, can be a tool to encourage self-determination, win some practical victories, and breathe life into civil society.

In practice, however, consultation's transformational character is far from clear. At its worst, it can be seen as serving as a distraction from other, more radical or fundamental ways of conceiving struggle. Even if consultation comes one day to be regularly "respected" and ILO 169 is thoroughly "implemented," it is unclear that this will contribute to a major reworking of power relations or any widespread lasting change. At various points in time, advocates for indigenous and other marginalized populations in Latin America have called for far-reaching goals like land reform, constitutional recognition, a degree of legal autonomy from the official state system created by the majority, or even outright national independence. Softening the pressing needs reflected by these demands into a major focus on having a certain form of input over a certain set of decisions runs a very serious risk at siphoning off energy from campaigns for a different sort of goal. Furthermore, framing the core demand of indigenous populations as consultation could even stigmatize or delegitimize other demands. The very fact of consultation's impeccably legal basis, which lends it its effectiveness, could highlight the perhaps more unsettling nature of other goals, especially those that explicitly feature redistribution, or a massive political reordering (as in the case of partial or total national independence from current states.) If consultation succeeds because it appears so reasonable and law-abiding, then other goals may fail, because states can credibly assert that they are doing something to accommodate key indigenous needs (by holding consultations, praising them, and

codifying them in law), and cannot be expected to accede to the unreasonable, disorderly, less law-abiding demands of activists pursuing more radical goals.

The political struggle taking place throughout Latin America to define consultation and determine the parameters of the right and how it should be applied raises fundamental questions about the ways in which civil society, state and corporate actors choose to deploy and conceptualize law. I argue that, in light of the consultation movement, comparative law and courts scholarship should adopt a more expansive understanding of law, in order to be able to address questions about its role in transnational movements.

Consultations certainly serve an important expressive function, regardless of their practical effect in the final analysis. In terms of the specific conflict at stake regarding a mine or other project, a consultation in which (as happens almost invariably) overwhelming opposition to a controversial project is reflected in the voting tallies can be a way of legitimizing the resistance that may not have been previously recognized as substantial, widespread, or competently organized. "May [the mining company] respect" the results of the vote, a consultation organizer in Cocachacra stated in a meeting the night before the activity. "We simply want respect."

The motivation for and value of staging a community consultation stems from far more than the symbolic and expressive function alone, however. The exercises, and the weeks- or months-long organizing campaigns that precede them, I argue, play two critical strategic roles for activists hoping to prevent the incursion of a mine on their territory. First, they attract and generate crucial attention and resources from the media and both national and transnational allies. Second, on a related note, they help form, solidify and/or strengthen national and

international activist alliances. Consultations rarely serve to provide new information about a community's collective attitude toward a proposed project or law; the outcome of a vote is hardly ever in doubt, since organizers have staged consultations only when there is substantial opposition to a project and support for undertaking a vote. Rather, community consultations serve as a focal point in a longer, multi-faceted campaign to defeat a mine or other project. Nonprofits (local and transnational) and church workers pitch in to make the event a success, helping to raise the necessary funds, and often providing other services like legal research and information sessions. This kind of organization could doubtless take place in the absence of a symbolic consultation vote, but the scheduling and planning of this public activity produces a reason for allies to contribute their resources and expertise to a particular campaign at a particular moment, of the many possible causes they could choose to support in any given place. Furthermore, consultations offer an opportunity to get the message out to a national audience that there is serious principled opposition to a mine or other project. Rural peasants and indigenous people casting ballots or voting by a show of hands often attract prominent media coverage, and the organizers intend for consultations to be a public, noteworthy event, meaning that the consultation itself, and the broader environmental and social issues at stake, help generate media buzz around a particular disputed mine. The national media in Peru and Guatemala often portray indigenous mining opponents (or indigenous people in general) as uneducated and irrational, and community consultation news coverage offers an alternative perspective, showcasing indigenous and rural communities taking the initiative to organize a democratic vote. Consultations also help connect and energize activists around the country and indeed the region.

Another part of the answer to the question of why people would bother with a consultation lies in the fact of the few (yet significant) "successes" following consultations that have taken place in Peru and other countries in the region. The case of Cocachacra is atypical, in that rejections of mines expressed by consultations are more typically ignored outright, but there are other cases of consultations leading to the prevention of a mining project, albeit not because of the direct enforcement of any legal provision regarding consultation. The very first consultation to occur in Peru, in Tambogrande, in the same region as the proposed Río Blanco mine, was widely celebrated as a victory by activists. The company in question withdrew from the project in the wake of the decisive vote against the mine, although the reason given was difficulty in securing adequate financing for the project, as opposed to a response to a legal order to abandon the mine. Nonetheless, despite the fact that "consultation" was not responsible in any direct or legal sense for the prevention of the project, it seemed clear that the widespread public rejection of the mine and the months-long high-profile campaign leading up to the vote played a decisive and catalytic role in the company's decision to withdraw. This was certainly the perception reinforced by the narrative that emerged, in which the local community beat back a powerful transnational mining company by means of a consultation. Another parallel instance of a "successful" consultation took place in Argentina in the community of Esquel, which also saw the retreat of a mining conglomerate in the wake of a consultation in which voters overwhelmingly rejected the proposed project. (Strikingly enough, the residents of this community are decidedly non-indigenous, meaning that the provisions of ILO 169 do not apply to them in any sense, no matter how the convention is interpreted. Nevertheless, the perception of a consultation-fueled victory against a mining giant is important to the construction of the

overall appraisal of the approach.) Thus, while such outcomes as the ones in Tambogrande and Esquel are not the norm, they do serve to offer other communities a sense of hope that that outcome could be achieved in their struggle; consultation offers the power of possibility.

Furthermore, even though community consultations more often than not fail to achieve the objective of shutting down or preventing a mine or other project, few if any techniques are going to be highly effective in the face of multinational corporate power, and locally-led consultation must be understood as compared to the other options available to communities, which are few. They do, in some cases, have the option of turning to formal litigation, and some have taken advantage of this option. The results have been mostly ambiguous at best, and disappointing at worst. The U'wa people in Colombia turned to litigation after a sham consultation process regarding oil development on their lands (Rodríguez-Garavito and Arenas 2005). Their efforts were met with two contradictory high court rulings that together largely failed to clarify the crucial issues, and in the meantime much of their energies were diverted from possible political mobilization to legal efforts with limited effects. More recently, the Maya communities battling the Marlin goldmine in Guatemala took their case to the Inter-American Commission. That body initially issued an order to suspend mining activity that the Guatemalan government for all intents and purposes ignored, and subsequently reversed itself, softening its initial ruling and decreeing that the government was no longer obligated to suspend the mine. Other attempts to halt mines with litigation have similarly fallen flat. Thus, community consultations are actually potentially more effective than litigation, at least in some situations. Both make use of and rely on law, even the same law in many instances, but community consultations have the advantage of being able to take a sort of creative license with

legal particulars that better allow them to evade the sort of demobilization experienced by the U'wa.

Consultation's chief significance lies in its perceived embodiment of international law and human rights norms. Communities may be successful to some extent in campaigns to resist mines on the merits, but in the end logical arguments about the possible environmental or social damage associated with a project may not hold as much sway as the prestige of international law. Even when residents of a particular place are not indigenous and thus, strictly speaking, not covered by ILO 169, the fact that "consultation" more broadly has been unalterably defined as a right guaranteed by international law has meant in practice in Peru that communities facing controversial mines are able to mobilize particular support for their opposition if they link it to consultation. International law, regardless of the particulars or legal niceties, conveys authority and confers legitimacy in a way that few other things can. In the eyes of both national and international audiences, it is noteworthy if a national government violates fundamental indigenous rights under international law; advocacy groups from Oxfam America to Amnesty International have highlighted the lack of consultation for indigenous peoples as a human rights problem as such in recent statements. (See Niezen 2011 and Amnesty International 2013.)

Is, then, consultation a success? Is it effective? Following Rodríguez-Garavito 2011, I argue that consultation (in particular as an international legal standard) is nearly wholly empowering nor entirely disempowering; it has both emancipatory and disabling aspects and prospects. Returning to the what consultation can teach us about international law and its role in

political struggle, I highlight the multiple ways in which international law can be understood, some of them more positive and promising and others less so.

International law turns out to be unexpectedly malleable. When Convention 169 was drafted, no one foresaw that consultation would become a major transnational movement, or that it would even be politically important in any way. To the extent that people focused at all on the term or concept at the time the Convention was formulated, it was to express disappointment that such an underwhelming standard had been chosen, rather than alternatives that were considered to be more rousing and radical. But because people had the imagination to reconceptualize the word, consultation took on a life of its own, surprising everyone. This sort of malleability may strike one as inspiring, or possibly as dangerous. In the case of consultation, malleability meant that international law could enable a large grass-roots organizing initiative that was hailed in many quarters. It is not difficult to imagine, however, a scenario in which malleability has a darker side. Transnational corporations looking for profit, not just members of indigenous communities, can take advantage of malleability. If an internationally protected right, meant to be progressive, came instead to mean something quite different that benefitted corporate elites, then we would likely see malleability as a threat, not an achievement.

Similarly, the way in which international law is democratic can be seen as positive in some contexts and unnerving in others. Consultation shows us that the meaning of international legal instruments is not always, or totally, dependent on legal institutions and legal elites. Rather, the very people whose lives are supposed to be ordered and changed by international law sometimes themselves take charge of the ordering and changing. This runs counter to our

normal understanding of international law: "[D]espite its nominal counter-sovereign rhetoric, modern international law does not ordinarily concede mass movements and local struggles as makers of legal change. Instead, it continues to explain international legal change through either of two theories, both of which remain elitist: voluntarism (legal change occurs because the state have accepted them) and functionalism (legal change results from the tendency of law to reflect social reality, or to respond to social needs). In both, there is no indication of whether and how legal norms could be generated from the praxis of social movements. Rather, both theories accord the role of the agent of legal transformation to a small group of policy elites." (Rajagopal 2003: 167) In the case of consultation, it is easy enough to celebrate social movements and their victorious maneuverings over policy elites. However, social movements do not always promote goals and practices that are worthy of celebration. We might imagine, for example, an effort to wrest away control over international laws that are meant to protect women, efforts that might be democratic even as they are dubious.

Finally, we must grapple with the fact that international law can be jurispathic. There were years of great excitement around the astounding growth of the community consultation movement, particularly in Guatemala. As we see the development of the national consultation law in Peru, however, and recognize the disappointment, anger, and even fear of consultation activists in Guatemala as they see consultation becoming increasingly state regulated, it becomes clear that international law can destroy, as well as create, opportunities for legal mobilization. There was, in a sense, an odd, unusual window for the transnational community consultation movement to blossom. For a time, indigenous and other activists walking around small communities in Latin America clutching copies of international treaties were the ones calling the

shots about what the contents of those treaties ought to mean. International law, unwittingly on the part of the drafters of this particular law, created a crucial space in which multiple, sometimes competing visions of international human rights law could flourish. By the same token, however, international law ultimately is beginning to function, in this case, as a force that is closing off the very space that it initially opened. International law is now helping kill off the competing versions of consultation that it once helped create. Depending on whose version of a law you like best, this jurispathic quality of international law might in some circumstances strike you variously as a better or worse characteristic. For those who champion the rights of vulnerable and politically marginalized peoples to have at least some say over mighty multinational corporations pushing resource extraction projects, the jurispathic nature of international law, I argue, is a negative, even tragic turn. The malleable and democratic nature of international law allowed the consultation movement to become strong and politically meaningful in its defense of marginalized communities, but ultimately the jurispathic nature of international law threatens to halt or even undo the accomplishments of the movement.

Chapter 8: Conclusion

"Was there music?"

Law is famously associated with intricate rules and endless paperwork. The sets of laws surrounding consultation are no exception; and yet, the transnational consultation movement teaches us to question who is interpreting these rules, and in whose hands this paperwork lies. Heads of state and high-ranking national government officials are the people who signed official ratification documents, making ILO Convention 169 come formally into existence. Trade representatives from the global North draft guidance on national consultation laws for the global South, seeking assurance that consultation will not pose any substantial burden for profitable bilateral business propositions. In a small community in southern Peru, where the Cocachacra community consultation took place, an indigenous leader and CONACAMI representative strode around the streets holding his personal copy of ILO 169, seeking any resident who would listen, holding forth on the specific provisions of the treaty that were relevant to the consultation. He displayed an intimate familiarity with the law, citing, as it were, chapter and verse, article and paragraph. In Tambogrande, Peru, where the first community consultation took place, the mayor and NGO allies somewhat literally took the law into their own hands, creating the entire concept of a locally led consultation, signing community consultation into life with a few strokes of a pen.

In Quiché, Guatemala, where I was an international observer for a community consultation, I was given a formal printed checklist of things that I might notice that would mean the consultation was properly carried out. These included items such as ballots and official

signatures, and other commonplaces for votes. One item, however, caught me by surprise: I was to check a box indicating whether or not music had been played at the consultation. For me this question (which I did not see on forms at other consultations, only some of which had paper forms to begin with) underscored that community consultations mean something much more to people than an information-extraction exercise. People saw them as serious, certainly, but also as fun, as joyful, as a once-in-a-lifetime community party.

The idea of a festival atmosphere, with music blasting far into the night, contrasts sharply with the climate on display at state-led consultations. At the formal consultation events I attended in Peru, in Satipo (in the jungle region) and in Lima, chairs were set up in a classroom format, with government officials in front facing their constituents, sitting as pupils, who were by turns sullen, bored, or rebellious. No one appeared to be having fun. These two types of proceedings stem from radically different visions, on every level, of whose hands hold which laws, whose imaginations and experiences interpret them.

It is difficult to say what the future of consultation will be. Fifteen years ago, no one could have predicted the spread of the transnational movement. Today, both the consultation movement (led by indigenous and other marginalized communities and their allies) and the broader meaning of consultation are very much in a dynamic state of flux. It would have been all but impossible in 2005 to predict that consultation would become a driving force and organizing principle in indigenous mobilization in Latin America, and it is equally difficult to predict what role, if any, that consultation will be playing in the politics of the region in another 15 years. However, we can use the insights from the consultation movement to draw some

observations about the role of law, particularly international human rights law, in social struggles.

First, law is neither a force for human rights nor a handmaiden of power; or, rather, it is both simultaneously. There are aspects of law in general, and the laws on consultation in particular, that act to reinforce existing power relations, and others that can be used as a tool, however imperfect, for human rights activists in their struggles against both corporate and state power. Law cuts both ways when it comes to consultation. International and national law, and local legal authority, are what allowed communities throughout Latin America to elevate their doubts and grievances about extractive projects to a higher public profile than would otherwise be possible. However, international law and national law have also been tools that have allowed elites to crack down on what they see as fanciful interpretations of objective documents. National law in Peru makes clear that consultation is not a community party; it is a bureaucratic endeavor. The text of ILO 169 supports the latter version in any straightforward reading.

Second, there are particular features of international law, especially where it self-consciously regards human rights, that may make it more useful than is typically presumed, and in some ways even more useful than national law, in terms of mobilization in the global South. Because "international law" and "human rights" are phrases that carry considerable prestige (even though both are frequently violated), activists can (and do) demand that companies and governments live up to these standards. Invoking international human rights law can serve as an effective attention-getting measure; thus, indigenous leaders and transnational activists frequently complain that the "right to consultation" as protected in "international law"

has been violated, regardless of whether or not they think that lack of consultation is in fact the principle problem in a given scenario or that consultation would indeed solve much of anything.

Finally, the real strength and real meaning of international law lies in its interpretation, something that leaves room for vital entrepreneurship at the local level. It is not inaccurate to say that international law acts on marginalized peoples, but it would be incomplete to omit the other dimension of the relationship: those peoples have their own ideas about the content of international treaties, and those ideas do much to shape how international law becomes meaningful on the ground. International law likely seems esoteric and irrelevant to the vast majority of people living in the global North, but many people in the global South view it as quite concrete and directly relevant to their personal lives, and they see no reason they should be left out of shaping and using a tool that so immediately affects them.

The creativity of the team in Tambogrande opened up ways for international law to pass through an unexpected series of hands. People who were not formally experts in international law, or indigenous, nonetheless became their own sort of experts at interpreting the world's foremost law on indigenous peoples. This creativity opened up a political path for consultation and allowed it to become the basis for a major transnational justice movement. However, this movement, for all its energy, seems to be teetering on the edge of sputtering, slowing, or even stopping altogether, at least in terms of the original community consultation vision. It remains to be seen where the democratic energy around consultation will go, or whether it might completely dissipate. Allies of indigenous communities and other marginalized peoples facing the prospect of major extractive activity where they live should express their support by backing the visions

of international human rights law that emerge from those very communities. At the moment, that still seems to mean supporting community consultations, and calling for the results to be respected. As the consultation movement evolves, however, it might come to mean supporting some other expression or understanding of international law. While, bearing in mind that a democratic grass-roots interpretation of international law is not necessarily a good or a just one, no one must automatically support any given reading of treaties, we would do well in many cases to amplify the voices in communities most personally affected by international law when they communicate what law means to them.

As an international observer at a community consultation in Guatemala that night, and as a non-indigenous non-expert non-lawyer, I was ultimately able to check all the boxes on the official checklist I was issued. The designated procedures were followed, and, yes, at least that one night, there was music.

Appendix A

A select list of consultations that have taken place, both community-led and state-led, listed by country and by date

(Includes proceedings known as a local vote, referendum (optional, mandatory, or abrogatory), consultation (popular, local, or community), local initiative, or plebiscite.)

Guatemala

May 18 2005

Comitancillo, San Marcos, confirmed May 14 2008

June 18 2005

Marlin

July 17 2005

Río Hondo, hydroelectric project, non-indigenous, based on municipal law

July 25, 2006

Colotenango, Huehuetenango

July 25-27, 2006

Todos Santos Cuchumatán, Santiago Chimaltenango, Concepción Huista, and San Juan Atitlán, all in Huehuetenango, all on mining

August 29, 2006

Santa Eulalia, Huehuetenango

February 13, 2007

Concepción Tutuapa, San Marcos, mining rejected

April 2007

San Pedro Necta, mining rejected

April 2007

San Juan Sacatepéquez, mining rejected

April 20, 2007

Playa Grande Ixcán, Quiché, oil and dams rejected

May 12, 2007

San Antonio Huista, Huehuetenango

June 13, 2007

Ixchigan, San Marcos, rejected Montana mining

July 23, 2007

Santa Cruz y Barillas, Huehuetenango, mining rejected

August 11, 2007

Neutón, Huehuetenango

May 13, 2008

San Juan Ixcoy, Huehuetenango

May 14, 2008

Tacaná, San Marcos

June 12, 2008

Tajumulco

July 4, 2008

San José Ojetenám

October 27, 2009

Cunén, Quiché

June 2010

San Juan Sacatepéquez, cement mining

October 2010

Cabrican

October 2010

Quiché

November 24, 2010

Huitán overwhelmingly rejected mining

March 16, 2011

San Martin Chileverde, Quetzaltenango, about mining and dams

May 15, 2011

Palestina de Los Altos, Quetzaltenango, about mining

May 20, 2011

Sacapulas, dam rejected

July 3 2011

Santa Rosa, consulta municipal de vecinos, gold and silver mine, roundly rejected

July 11, 2011

Santa Rosa de Lima, no to metals mining

August 17, 2011

Casillas, rejected mining by a wide margin

January 18, 2012

San Juan Sacatepéquez, mining

February 12, 2012

Champerico, Retalhuleu, metals mining; offshore iron project

March 13, 2012

Chirinque, Quiché

April 8, 2012

First consultation in Petén, Las Cruces, about dams

November 11, 2012

Mataquescuintla, Jalapa, mining. Tribunal Supremo Electoral and PDH present as guarantors. [Constitutional Court ruled on December 4 2013 that results were earned in legitimate fashion.]

March 3, 2013

San Rafael las Flores, Santa Rosa, proposed mine rejected.

July 21, 2013

San Carlos Sija, Quetzaltenango, mining rejected

July 30, 2013

San Francisco El Alto, Totonicapán, mining rejected

September 1, 2013

Momostenango, mining widely rejected

November 11, 2013

Jalapa, mining rejected

January 12, 2014

Aldea Sabana Redonda, San Rafael Las Flores, Santa Rosa, a YES vote for mining, 53-47 (question was somewhat oddly worded but result not generally questioned)

Santiago Atitlán, Sololá, geothermal energy drilling inside the lake

October 26, 2014

Santa María Chiquimula, Totonicapán, mining rejected by 98.5%

November 9, 2014

Cantel, Quetzaltenango, mining rejected

November 9, 2014

Teculután, Zacapa, hydroelectric dam rejected

May 3, 2015

Totonicapán, mining, hydroelectric dams, electric cables and Monsanto law rejected

August 2, 2015

Malacatancito, Huehuetenango, territorial defense and natural resources

2016

Mining and Energy Ministry and corporate-led Fenix silver mine consultation (discussion of benefits)

August 27, 2017

Santa María Cahabón, dams Oxec I and II overwhelmingly rejected

2018

Hidro-Ixil (La Vega I and II), Quiché

November 2018

State-led consultation starting for El Escobal (per Constitutional Court order)

Peru

2002

Tambogrande

2004

Government-led "consultation" in the Amazon over the boundaries of a national park. The indigenous communities' demands, which had been met in the agreement, were ignored in favor of gold mining.

2007

Río Blanco

February 17, 2008

Candarave

2009

Cocachacra

2010

Achuar communities, Pastaza, oil rejected

2012

Two consultations, Cañaris, (Sept 30--against) and (July 8—in favor)

March 2013

Tacna, Ciudad Nueva, rejection of Pucamarca mining project of Minsur

State-led consultations begin:

2010

Forestry Law (prior to passage of consultation law)

2013

Maijuna-Kichua [also spelled Kichwa] not about resources or territory—led by regional Loreto government.) Concerned a conservation area. Carried out by Minister of Culture and the regional government. Agreements reached on specific areas. CooperAcción labelled it the first prior consultation. It was the first one carried out under the consultation law. October 21 2013 the agreements were finalized. December 2013 the technical element was finalized. June 17 2015 the reserve was actually legally created, through DS 008-2015-MINAM.

2014

Lot 169 consultation (related to Lot 195 consultation) concluded, in Ucayali—first prior consultation concluded in hydrocarbons sector

April 29-30, 2014

Hydrocarbons consultation, Lot 195, Ucayali and Huánuco, Perupetro is the company. Internal Evaluation Act, Kakataibo community, March 13-15 2014.

April 29-30 2014

First consultation agreement for Lot 195 between PERUPETRO and the Kakataibo community.

2013 to 2015

· Lots 189, 164, 175, 190, 191, 197, 198 (hydrocarbons), and:

· Sectoral Policy on Intercultural Health

2014

Parque Nacional Sierra del Divisor, concluded

2014 July

Beginning of consultation for el Rules for Forestry and Wild Fauna Law

April 2015

Lot 192, process begins. It is the only consultation, along with Maijuna, to end in agreement on the measure being consulted. The meeting to approve the consulta plan took place May 19-23. August 29 2015 the contract was signed for production to begin, thus in a sense officially ending this consulta process, though this decision was seen as unilaterally imposed by the state.

June 17-19, 2015

Lot 165, Loreto region

August 11, 2015

Lot 181, Tarapoto

2015, July 5-7

San José de Saramuro community, Loreto, dam project

July 10-12, 2015

Nauta, Loreto, dam project

April 2015

Ministry of Transport and Communications agreed to start a consultation

2015 September

The first state-led mining consultation was agreed on to start, for Aurora mine, Focus company

2016

Aurora consultation (mining) (process started September-October 2015)

2016

La Merced consultation (mining), Ancash region, May-June meetings conducted

Propuesta de Área de Conservación Regional Tres Cañones

Bosque Nublado (conservation Project), Huancavelica

Toropunto (mining), Áncash

Misha (mining), Apurímac

Proposal for National Plan on Bilingual Intercultural Education

Proposal for rules for Languages Law

Proposal for Master plan for Regional Conservation Area in Imiria (Ucayali) (first consultation with regional reach, conducted by regional government)

Canada

July 5, 2011

First consultation in Canada, in Ontario, 1st Nations voted 96% to keep waters divided and separated for industrial use. They developed a really complex guide for the consultation proceedings.

Ecuador

First consultation in Ecuador

Kimsakocha mine (near Cuenca); Kichwa indigenous community, company is Iamgold (Canadian)

Costa Rica

Government-led consulta over a dam, El Diquís

Bolivia

Morales doing consultation on proposed highway through the jungle. Indigenous groups criticize process as slanted, since even new arrivals can vote. Amnesty also has criticized the process.

Argentina

Esquel, and a few other provinces, such as Trevelín, Lago Puelo y Epuyén.

Philippines

December 2007

Vote on mining in Bakun, in Benguet province, spurred by GIPCO, local indigenous group

April 2008

Turkey

1996

"Unofficial local vote" held on proposed goldmine; later the Supreme Court of Turkey and the ECHR also ruled against the mine (Source: EDLC)

United States

November 3, 2013

Migrants from Totonicapán, Guatemala held a consultation on mining in their home region, in Los Angeles. The first time ever one is held outside the country. 4,260 people voted at 10 sites, all against mining.

Chile

March 2008

Unauthorized vote in Tortel against the Hidro Aysén Dam

Mexico

"Local vote" in Cerro de San Pedro opposing San Xavier mining project

Brazil

Munduruku and Juruna community consultations

Colombia

July 28 2013

Piedras, Tolima: nearly all voted against mining. Non-indigenous campesino community

15 de diciembre de 2013

Tauramena, Casanare, hydrocarbons

February 26, 2017

Cabrera, Cundinamarca, mining and hydroelectrics

March 26, 2017

Cajamarca, Tolima, mining

June 4, 2017

Cumaral, Meta, hydrocarbons

July 9, 2017

Arbeláez, Cundinamarca, mining and hydrocarbons

July 9, 2017

Pijao, Quindío, mining

September 17, 2017

Jesús María, Santander, mining and hydrocarbons

October 1, 2017

Sucre, Santander, mining and hydrocarbons

Appendix B

Community members: “Campesino Community. Welcome, prior consultation.”

Man in tractor: “How naïve they are! It seems that, when in the campaign we offered them prior consultation, they took it seriously.”

Tractor is labelled, “17 exonerated projects”

Appendix C

List of selected acronyms and abbreviations

AIDESEP Asociación Interétnica de Desarrollo de la Selva Peruana (Interethnic Association for the Development of the Peruvian Jungle)

ADISMI Asociación para el Desarrollo Integral Sanmiguelense (Asociation for Integral Development of San Miguel Ixtahuacán)

COICA La Coordinadora de las Organizaciones Indígenas de la Cuenca Amazónica (Coordinator of Indigenous Organizations in the Amazonian River Basin) It coordinates nine national Amazonian indigenous organizations, from Bolivia, Brazil, Colombia, Ecuador, Guyana, French Guyana, Peru, Suriname, and Venezuela.

CONACAMI Confederación Nacional de Comunidades del Perú Afectadas por la Minería (National Confederation of Peruvian Communities Affected by Mining)

CONAM Consejo Nacional del Ambiente (National Council on the Environment)

CONAP Confederación de Nacionalidades Amazónicas del Perú (National Confederation of Amazonian Peoples of Peru)

COPAE Comisión Pastoral Paz y Ecología (Pastoral Commission for Peace and Ecology)

FDSFNP Frente de Desarrollo Sostenible de la Frontera Norte (Front for the Sustainable Development of the Northern Border)

FREDEMI Frente de Defensa Miguelense (Defense Front of San Miguel) (ADISMI is part)

INDEPA Instituto Nacional de Desarrollo de los Pueblos Andinos (National Institute for the Development of Andean Peoples)

JNE Jurado Nacional de Elecciones (National Jury of Elections)

MEM Ministerio de Energía y Minas (Mining and Energy Ministry)

NISGUA Network in Solidarity with the People of Guatemala

ONPE Oficina Nacional de Procesos Electorales (National Office for Electoral Processes)

OSINERGMIN Organismo Supervisor de la Inversión en Energía y Minería (Supervisory Organism for Investment in Energy and Mining)

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[1] See Appendix C for a list of acronyms and abbreviations.

[2] Ayabaca is sometimes rendered as Ayavaca. The “b” and “v” are close to equivalent in Spanish pronunciation, and the two spellings reflect different habits or preferences. I use the more common spelling unless using a written quotation that uses the other spelling.

[3] Monterrico Metals initially acquired 75% of the project, and later acquired the rest of the shares.

[4] Their usage of “department” here is equivalent to my usage of “region” elsewhere. Several years ago Peru legally changed the name of the designation and some of the administrative structures concerning sub-national governance, but the boundaries of the geographic entities remained the same, despite the name change, and the difference is not significant for this analysis.

[5] Sipacapa is also spelled Sipakapa, following the preference of Mayan linguists. Both spellings are common and accepted in different contexts. For consistency, I use Sipacapa, following official state practice, unless quoting a written source that uses an alternate spelling. See Castagnino 2006: 7.

[6] The communities of Comitancillo, nearby the Marline mine, also in the region of San Marcos, completed a consultation on mining, also by Goldcorp, in the month before the better known Sipacapa exercise. The Comitancillo consultation was much smaller in scale and did not receive nearly the attention the Sipacapa consultation did. The Marlin consultation is generally considered the first community consultation in Guatemala, since it was the first well-publicized one and the proceeding that prompted mobilization around the country and transnational attention. Furthermore, while the Tambogrande consultation preceeded Sipacapa’s by three years, the residents of Tambogrande are not indigenous, so Sipacapa is considered to be the first indigenous community consultation.

[7] The Marlin III concession is not owned by Montana Exploradora, but rather by Entre Mares, another wholly owned subsidiary of Goldcorp. This particular concession extends partly into the municipality of Comitancillo. It was the prospect of activity by Entre Mares that prompted the Comitancillo consultation in May 2005. See Van de Sandt 2009.

[8] Article 55 of the Municipal Code recognizes indigenous mayors, in addition to the more common municipal mayors. As the Peace Accords suggested, an indigenous community can choose its own mayor, not just the one designated by the municipal mayor. Not every indigenous community has such a figure.

[9] The invitation came after I expressed interest in the event, and may have been issued in part because the interviewees knew of my past involvement with Oxfam America, perhaps making me seem more likely to be sympathetic to the opponents of the mine. In my experience as an

international observer at other community consultations, however, I have never seen a volunteer observer turned away for any reason.