Consulta Previa
Country study: Guatemala
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Although they constitute 40 percent of Guatemala's population, Indigenous Guatemalans face great inequality in terms of access to health, education, housing and—most critically—political representation.[1]

In 1995, the Guatemalan Constitutional Court asked Congress to approve and ratify International Labour Organization Convention 169 (ILO 169). Ratified on June 5, 1996, the Convention was elevated to the category of law, committing the Guatemalan government to adapt national legislation in compliance with it.

The Guatemalan government has since attempted to pass regulation on *consulta previa* numerous times, but has not yet succeeded.[2] In 2011, with the goal of determining how consultations should be carried out, who should participate, and the degree to which the consultations would be binding, the administration of then-President Álvaro Colom proposed a regulation intended to ensure the adoption of the norm—the *Reglamento para el proceso de Consulta del Convenio 169 de la Organización Internacional del Trabajo sobre Pueblos Indígenas y Tribales en Países Independientes* (Regulation for the consultation process of ILO Convention 169 on Indigenous and tribal peoples in independent countries).

But many Indigenous organizations rejected the resolution, claiming they were not adequately consulted while the regulation was being developed and that the regulation gave too much power to government entities. Furthermore, many claimed there should not be regulation for consultations, because ILO 169 already delineates how the process of *consulta previa* should be carried out in a way that accommodates local methods of implementation.

After the *Consejo Plurinacional del Pueblo Maya* (Plurinational Council of Maya Peoples—CPO) petitioned the Constitutional Court for an *amparo de inconstitucionalidad* (appeal) to provide emergency protection from the regulation in 2011, its passage was suspended indefinitely.

Communities have meanwhile relied on alternative channels—including c*onsultas comunitarias de buena fé* ("good faith" consultations), which apply to communities, and *consultas de vecinos* (neighborhood or municipal consultations), which apply to municipalities—to make their opinions heard.[3] Between 2005 and 2012, 74 *consultas comunitarias de buena fé* were carried out by Guatemalan Indigenous communities, who expressed their opposition to natural resource extraction in their territories by margins that exceeded 90 percent.

However, the degree to which such community consultations are considered valid has been widely contested among different stakeholders. The Ministry of Energy and Mines has not considered the results of these consultations when awarding new mining licenses, arguing that popular consultations with Indigenous communities are not within its jurisdiction, and that the ministry is solely responsible for implementing the 1997 Mining Law, which does not require consultations. The Mining Law is currently being reformed, and the status of the consultations is not yet clear.

As a result, Indigenous consultation in Guatemala has been reduced to a simple exercise in citizen dialogue carried out by municipal governments, which, while important for the local communities, is irrelevant to state decisions on awarding licenses to the extraction industry. This has done little to mitigate the high levels of conflict and violence that surround extractive projects in Guatemala.

Weak State, No Law, Weak Consensus

The Guatemalan Constitution (1985), ILO 169 (ratified in 1996), the Municipal Code (2002), and the United Nations Declaration on the Rights of Indigenous Peoples (2007) all recognize the rights of Guatemalan citizens to be consulted on important matters that could affect their lives and territories.[4]

Yet in the absence of any national regulation on *consulta previa*, the primary national legal channel that regulates consultations in Guatemala is the Municipal Code, which, unlike ILO 169—an international legal instrument that provides guidelines for carrying out consultations with Indigenous and tribal peoples—applies to all citizens, both Indigenous and non-Indigenous. However, Indigenous Guatemalans make up 40 percent of the population, according to Guatemala's most recent census—an estimate that most Indigenous groups consider conservative.

Passed in 2002, the current Municipal Code requires local citizens to submit requests for consultation to the Municipal Council (the city government agency comprising the mayor, representatives and council members) by presenting a request signed by at least 10 percent of the municipality's registered residents. For the consultation of Indigenous communities, which is described in Article 65, there are no established minimum percentages for participation. Consultations are to be carried out in a way that is sensitive to the customs and traditions of Indigenous communities.

But Guatemala's Municipal Code suffers from some internal contradictions that have not yet been resolved. Article 64 declares that the result of any municipal consultation is binding if 20 percent of a municipality's registered residents participate in the consultation, but Article 66 says that at least 50 percent of registered residents must participate for the decision to be binding. This explains the systematic opposition the government and the private sector have expressed toward *consultas comunitarias de buena fé*—which critics describe as informal and not serious because there are neither voter registries nor clear mechanisms for carrying out the vote.

The Guatemalan justice system, meanwhile, has issued contradictory decisions about the legal status of consultations. For example, the Constitutional Court has recognized that Indigenous communities possess a fundamental right to be consulted, affirming in Sentence 3878-2007 that "[…] all recognition, exploration and extraction licenses for mining and hydroelectricity awarded by the Ministry without consultation are illegal and arbitrary for having violated the constitutional right to consultation, and by extension, all the other collective and individual rights recognized in the Political Constitution of the Republic and the international conventions ratified by Guatemala on matters of human rights."

Yet the Constitutional Court has also said that consultations, while valid, are merely informative, rather than legally binding. In 2013, the Court rejected an emergency protection order sought by the CPO against the current Mining Law. The case involved the Ministry of Energy and Mines' approval of a mining license in San Marcos that was granted without carrying out a proper process of prior consultation with Indigenous peoples.

So far, there are no successful examples in which the government has carried out a process of *consulta previa* before awarding extraction licenses. Guatemalan courts do not recognize popular consultations carried out under the Municipal Code as legally binding. Therefore, the unresolved debate about the binding or non-binding nature of the consultations is one of the main obstacles to advancing the application of ILO 169 in Guatemala.

No Consensus, No Precedent

One example of the way the validity of popular consultations has been challenged is the case of El Escobal mine in Santa Rosa, an area that contains a mix of non-Indigenous communities and Indigenous groups like the Xinca.

When the Ministry of Energy and Mines awarded an extraction license for El Escobal mine to Minera San Rafael S.A., a subsidiary of Tahoe Resources Inc., the local communities in Santa Rosa Department,

including the Xinca, were not consulted. In response, five municipalities near the mine—Mataquescuintla, Jalapa, Casillas, Nueva Santa Rosa and Santa Rosa de Lima—carried out *consultas municipales*. Nine *consultas comunitarias de buena fé* also took place in the communities of San Juan Bosco, Los Planes, Volcancito, La Cuchilla, Barrio Oriental, Aldea Chan, Caserío El Renacimiento and Caserío Las Delicias, organized by the *Consejos Comunitarios de Desarrollo* (Community Development Councils—COCODE). In the 14 consultations, an overwhelming majority of community members were opposed to the mining.

Yet when residents requested a consultation in the San Rafael municipality, where El Escobal mine is located, the San Rafael Municipal Council challenged the validity of the signatures that residents submitted to begin the process. Though a *mesa de coordinación* (coordinating roundtable) was eventually formed to carry out a consultation, the Council ultimately annulled the entire process, arguing that the petitioners had not followed correct procedure.

Residents opposed to the mine say the Municipal Council ignored their objections due to the substantial mining royalties the mine has generated, and have launched several legal challenges to the mine, while continuing to carry out consultations in surrounding communities.

Enter the Demand for Natural Resources

In the past 20 years, the increase of natural resource extraction projects in Guatemala has been, perhaps, the greatest source of social conflict in the country. The *Instituto Centroamericano de Estudios Fiscales* (Central American Institute of Fiscal Studies—ICEFI) demonstrated in its 2014 report that mining revenue has not compensated for the high cost of mining-related social conflict in Guatemala.

The government and extraction companies have argued that the Indigenous movement—and especially Indigenous opposition to extractive projects—threatens the business climate and potential investments in Guatemala, exacerbating a weak rule of law, a lack of secure property rights and legal uncertainty.

But the Guatemalan government has been flexible on tax obligations and royalties. It currently requires mining companies to contribute 1 percent of the value of their sales to the state—which is split in half between the central government and the municipality where the project is located. Unfortunately, there are no institutional mechanisms in place to determine the amount that different companies owe and to conduct regular audits of mining companies to ensure compliance with the law, nor to compensate Indigenous peoples for damages or give them a share in revenues.

In January 2012, the Guatemalan government negotiated an agreement with Montana Exploradora, the owner of the Marlin Mine and a subsidiary of Goldcorp, to contribute an additional "voluntary"4 percent royalty to the state and to municipalities near the mine.[6] In April 2013, it reached a similar agreement with Minera San Rafael S.A., owner of El Escobal mine and a subsidiary of Tahoe Resources, and the company made its first royalty payment to seven local communities in January 2014.[5]

The unrest caused by the lack of consultations in the above examples has not prevented either company from operating in Guatemala. Minera San Rafael S.A. was awarded an extraction license in April 2013, after two years of intense conflicts with the local population. In fact, construction began on El Escobal mine before the extraction license was awarded, indicating that the company was confident it would obtain the license.

Shortly thereafter, in June 2013, the administration of President Otto Pérez Molina decreed a two-year mining license moratorium in an effort to reduce social conflict related to mining projects and to reform the country's Mining Law.

But social activists and Indigenous groups remain skeptical, believing that the moratorium represents only a temporary pause in the avalanche of the country's natural resource exploitation.

As of January 2014, the Ministry had awarded 359 licenses for construction and mining (76 for exploration and 283 for exploitation), with another 601 solicitations in process, although no new licenses have been issued since the moratorium was declared.[6]

Investment, Community Rights at Loggerheads...Until?

Guatemala is facing ever-stronger pressures from businesses interested in exploiting the potential of natural resources through mining, dams and the expansion of mono-crop farming. Most of these investments irretrievably affect the territorial rights of native peoples, which is why *consulta previa* is critical.

At the moment, Guatemala does not possess the institutional capacity or the legal framework necessary to regulate consultations at a national level, and it falls to local municipalities and communities to carry out these processes. There is currently no authority at the national level charged with carrying out consultations, and given Guatemala's historical legacy, Indigenous groups are skeptical of the prospect of increased interaction with the national government. Meanwhile, the government has yet to validate the community consultations that have already occurred.

But even if Guatemala had the institutional and legal framework in place to regulate consultations and an adequate budget to finance them, *consulta previa* requires a climate of trust and mutual respect among the government, companies, social organizations and Indigenous groups to be successful—conditions that do not currently exist in Guatemala.

Nevertheless, different stakeholders agree that prior consultation is an opportunity to establish best practices in the use of natural resources. It must not be the final step, but rather the starting point of a process of dialogue to reduce unrest, improve governance, ensure the protection of rights, and foster development that is socially, culturally and environmentally responsible.