



1-1-2011

Transforming Students, Transforming Self: The Power of Teaching Social Justice Struggles in Context

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Available at: <https://scholarlycommons.pacific.edu/globe/vol24/iss1/6>

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Transforming Students, Transforming Self: The Power of Teaching Social Justice Struggles in Context

Raquel Aldana*

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The beauty of Waikiki did not mask the struggles of the island. What struck me were the moments of recognition about the nature of the struggles as I have experienced elsewhere in post-colonial settings outside of the United States, most recently Guatemala. Guatemala was present in my mind as I took in the island. I was there to present a talk at the Society of American Law Teachers (“SALT”)

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Teaching Conference on indigenous mining struggles in Guatemala.¹ My Guatemalan husband—who had just returned from a SALT human rights delegation in Guatemala and was being particularly Guatemalan in his inquiries about the island—added to my comparative fixation. But honestly, the comparison was easy and unsettling. Eric Yamamoto’s exhortation during the conference’s opening plenary about Native Hawaiians’ land struggles was perhaps an obvious beginning.² Also similar was the stress on our purse as we struggled to spend less on the island for basic things such as food; a practice we would continue even after leaving Waikiki, in search of “local” spaces. Hawaii does not grow much of its food anymore,³ and I confessed to Luis, my husband, that I was afraid for Guatemala’s food-production destiny in a world of U.S. farm subsidies and CAFTA.⁴ Later, Tagi, a Fijian local friend, took us on a journey to buy locally grown food, a huge commitment of both time and money. We drove for a while along the North Shore’s beauty, past pineapple and macadamia fields. Tagi and her partner Christine, talked about community gardening as an alternative, and I smiled with sadness as I recalled a conversation with an environmental activist in Guatemala, Yuri Melini: “Nosotros acá en Guatemala le proveemos el desayuno a los gringos; melón, bananas, y café; mientras la mayoría nos quedamos sin comer.”⁵ The day before we left, after spending a week on the island, I jokingly told my husband: “Let’s leave this island before we go broke.” Suddenly, the mass displacement of Native Hawaiians to Las Vegas, where I lived for a decade, made personal sense to me,⁶ as does the mass migration of Mayan farmers to the United States.⁷ Similarly, I recognized and understood the Filipino faces in the immigrants of Honolulu, who cleaned our hotel room, who had elevated themselves from a desperate situation to only trying conditions for survival.⁸ And I laughed a little, in resignation, as I bought

1. I was part of a panel of Pacific McGeorge professors titled *Localizing the Global: Social Justice, Corporate Responsibility and Sustainability Perspectives in U.S. Legal Education*.

2. ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 120-21 (1999).

3. See HAW. DEP’T OF AGRIC., *REPORT ON FOOD SELF-SUFFICIENCY IN HAWAII* 3-4 (2008).

4. See generally J.F. HORNBECK, CONG. RESEARCH SERV., RL 31870, *THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT (CAFTA): CHALLENGES FOR SUB-REGIONAL INTEGRATION* (2004).

5. “Here in Guatemala, we provide Americans their breakfast; melon, bananas and coffee; while the majority of us are left hungry.”

6. See, e.g., Joseph Pimentel, *Asian-Americans Yet to Be Seen as Political Force*, *ASIAN J.* (Jan. 18, 2008, 12:17 PM), <http://asianjournal.wordpress.com/2008/01/18/asian-americans-yet-to-be-seen-as-political-force/>.

7. See generally Alejandro Portes, *La nueva nación latina: inmigración y la población hispana de los Estados Unidos* [*The New Latin Nation: Immigration and the Hispanic Population of the United States*], 116 *REVISTA ESPAÑOLA DE INVESTIGACIONES SOCIOLÓGICAS* 55 (2006), available at <http://www.jstor.org/stable/40184808>.

8. Many workers in Hawaii must work two jobs to make ends meet. See, e.g., *Why Do so Many People Leave Hawaii?*, *ETURBO NEWS* (Jan. 9, 2011), <http://www.eturbonews.com/20437/why-do-so-many-people-leave-hawaii>. One of our housekeepers was back to work two months after birthing her fourth child.

“made in El Salvador” Hawaiian t-shirts and “made in China” Hawaiian relics, to bring a little bit of “Hawaii” home.

This essay is not about Hawaii, but about the teaching and learning lessons it left with me in the few meaningful days I spent there with my colleagues and its people. The first lesson relates to the importance of comparative perspectives on lessons for social justice. This comes from the simple Hawaiian-made realization about the shared commonality of how the poor and indigenous communities experience the brunt of globalization, particularly in the context of post-colonization. In this essay, I explore how the poor indigenous communities in Guatemala have experienced Canadian Mining. To the local Mayan communities of San Miguel Ixtahuacán and Sipacapa, global strategies and norms have inevitably shaped their daily struggles for cultural cohesiveness and sustainability, as they encounter transnational actors and forces. These struggles have radically transformed these communities, and their plight offers broader lessons to other communities faced with similar struggles.

The second lesson I explore in this essay relates to the importance of conscious, personal experiences in learning social justice. Personally, Honolulu transformed my relationship to Hawaii and influenced my reflection in this piece. Admittedly, I was transformation-prone. Bill Hing said it best during the lunch panel on *Rebellious Lawyering* at the SALT Teaching Conference, when he confessed the inevitability for him to see everything through a racial lens.⁹ This critical lens Bill described is one that many of us, concerned with social justice, have developed throughout our lives; and hopefully it is one that we seek to perfect and nurture as lawyers dedicated to social change. If you think back, those developmental moments most likely came from personal experiences directly, or through connection with the human struggles of others and their efforts to overcome. If we are to challenge the way we perceive and feel the world, transformative learning cannot be detached from experiences;¹⁰ nor can meaningful learning about social justice be separate from social struggles. As law professors, many of us come to teach, committed to the creation of equivalent meaningful opportunities for our students. Thus, in this essay, I also reflect on the opportunities for transformative learning experienced by some of our students at Pacific McGeorge, who have traveled to Guatemala to work with local human rights groups in their struggles for environmental justice.

The decision by Pacific McGeorge to start a program in Guatemala was quite intentional but not an easy one.¹¹ My colleagues and I rightly worried about

9. The lunch panel was titled *Teaching Rebellious Lawyering*.

10. For an explanation of what I mean by transformative teaching and learning, see Raquel Aldana & Leticia Saucedo, *Learning in Mulukukú: A Journey of Transformation*, in *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* 251 (Soc’y of Am. Law Teachers & Golden Gate Univ. Sch. of Law eds., 2010).

11. The Guatemala program is part of our Inter-American Program, a unique law program designed to graduate bilingual and inter-cultural competent lawyers to represent Latino clients in the United States or work

safety;¹² yet, Guatemala offered meaningful opportunities for the type of deep learning about transnational social struggles for justice I hoped to encourage in law students.¹³ Like Hawaii, Guatemala has a rich culture and natural wealth and beauty,¹⁴ yet Guatemala's social struggles are fierce and daunting.¹⁵ At its twenty-fifth anniversary of signing the peace agreement to end a civil war that lasted thirty-five years,¹⁶ it is hard sometimes to recognize progress. The country remains one of the most unequal in the world in terms of wealth distribution¹⁷ and the nation's commitment to social programs is shamefully weak, despite alarming degrees of poverty.¹⁸ And yet, Guatemala is also a land of tremendous opportunity for democratic and economic development, where public or private transnational actors have invested time and resources that have transformed the nation, even in its most local spaces.¹⁹ This transformation, while perhaps inevitable, necessary, and sometimes even beneficial, introduces new conflicts and challenges to issues of governance, legal development, economic sustainability, and cultural cohesion.²⁰

Transnational mining in Guatemala is one example of how the convergence of the local and global has divided a nation, introduced new powerful actors, changed power dynamics, and reshaped strategies for social justice.²¹ To some,

on transnational issues in Latin America. For more information, visit our website at *Inter-American Program*, UNIV. OF THE PAC., PAC. MCGEORGE SCH. OF L., http://www.mcgeorge.edu/Academic_Programs/Inter-American_Program.htm (last visited Nov. 2, 2011).

12. *Background Note: Guatemala*, U.S. DEP'T OF STATE (July 27, 2011), <http://www.state.gov/r/pa/ei/bgn/2045.htm>.

13. *Id.*

14. For example, indigenous people in Guatemala are the majority of the population. Guatemala has twenty-three language groups with fifty-two distinct languages. *Id.*; *Acts 1:8: Challenge in Guatemala and Ukraine*, ALSBOM, http://www.alsbom.org/clientimages/36469/publications_and_pdfs/Acts_1-8_Guatemala_Ukraine.pdf (last visited Oct. 21, 2011).

15. Beatriz Manz & Amy Ross, *U.N. Peace-Building in Guatemala*, 8 PEACE REV. 529 (1996).

16. *Id.*

17. Luis Alejandro Alejos, *Contribution of the Determinants of Income Inequality in Guatemala*, UWCAD 5 (Oct. 2003), <http://www.uwcades.org/papers/alejos2003.pdf>; see also *Guatemala: Poverty and Wealth*, ENCYCLOPEDIA OF THE NATIONS, <http://www.nationsencyclopedia.com/economies/Americas/Guatemala-POVERTY-AND-WEALTH.html> (last visited Oct. 21, 2011).

18. For example, social investment in Guatemala in education and health remains one of the lowest in the world. See *At a Glance: Guatemala*, UNICEF, http://www.unicef.org/infobycountry/guatemala_statistics.html#69 (last visited Oct. 21, 2011). In addition, resistance to tax reform in the country is intractable and the state can barely collect eleven percent. See Luis Pasara, *The Guatemala Peace Process: The Accords and Their Accomplishments*, CIAO 10 (Dec. 2001), <http://www.ciaonet.org/wps/pal01/pal01.pdf>.

19. *Mercy Corps, USAID and Wal-Mart Forge Alliance for Guatemalan Farmers*, INCLUSIVE MKT. ALLIANCE FOR RURAL ENTREPRENEURS (Mar. 5, 2008), http://guatemala.usembassygov/uploads/w0/iG/w0iGZjqpJvnx_OVob-eNFQ/IMAREReleaseEng.pdf [hereinafter *Mercy Corps*].

20. See *infra* Parts I & II.

21. Simon V. Yagenova & Rocio Garcia, *Indigenous People's Struggles Against Transnational Mining Companies in Guatemala: The Sipakapa People vs GoldCorp Mining Company*, J. OF THE RES. GROUP ON SOCIALISM & DEMOCRACY ONLINE, <http://sdonline.org/51/indigenous-people's-struggles-against-transnational-mining-companies-in-guatemala-the-sipakapa-people-vs-goldcorp-mining-company/> (last visited Oct. 19, 2011).

including the World Bank, private investors, the Guatemalan government, and some citizens in the country,²² transnational mining offers opportunities for needed economic development, including the creation of jobs, revenues that can help alleviate poverty, and the promotion of sustainable development.²³ To others, including an overwhelming number of indigenous communities, transnational mining has fractured communal lands, disrupted cultural identity, destroyed the environment, and left local residents sick and even more destitute.²⁴ Attempts to resolve these tensions in Guatemala have embroiled local communities in grass-roots global activism, which is concurrently bottom-up and top-down. Local communities, for example, have seized international norms to voice their struggles before international and domestic fora, mostly with disappointing results.²⁵ Simultaneously, local communities are searching for global strategies out of poverty, fully recognizing that their local sustainability must be global.²⁶ In this essay, I want to share some of these dynamics with you, partially through the lens of our students who have worked with non-governmental organizations (“NGOs”) in their struggles and taught all of us a great deal about the promise and limits of globalization for indigenous communities in Guatemala.

By way of background, Part I provides a brief factual description of transnational mining operations in Guatemala, with a particular focus on the Marlin Mine in San Marcos. Part II describes the tensions and conflicts surrounding the Marlin Mine and the various strategies adopted by the local communities and by the Canadian company, GoldCorp, Inc., and its subsidiary Montana Exploradora, as a response. Part III shares moments of deep learning for some of our students who participated in our Guatemala program, to affirm that incredible learning happens when students situate themselves in the context of social struggles.

22. Asociación de Investigación y Estudios Sociales, *Estudio de Opinión Pública sobre la Minería de Metales en Guatemala*, RESUMEN EJECUTIVO 1 (2010), http://www.asies.org.gt/sites/default/files/articulos/publicaciones/201007Opini3nMiner%3%ADaGTresumDICE_0.pdf (reporting that that fifty-seven percent of Guatemalans are against mining while only twenty-two percent are in favor, according to a public poll).

23. *See infra* Part I.

24. *See infra* Part II.

25. Grahame Russell, *Goldcorp in Guatemala: Despite the Despites, the Struggle for Human Rights and the Environment Continues*, RTS. ACTION (Sep. 22, 2010), http://www.rightsaction.org/Alerts/Goldcorp_alert_092210.html.

26. *Mercy Corps*, *supra* note 19.

I. CANADIAN MINING IN GUATEMALA: A STORY OF A PEOPLE'S STRUGGLE

A. *Background*

In Guatemala, mining operations have taken place since the beginning of the twentieth century, but on a much smaller scale as compared to its boom in the last two decades.²⁷ A great part of the explanation for this recent boom is attributable to recent transnational investment in mining, not only in Guatemala but throughout Latin America.²⁸ The end of the civil war in Guatemala in 1996, followed by the quick adoption of extremely flexible laws to promote foreign investment in 1997, favorably changed the landscape for transnational mining investment in the country.²⁹ These historical moments in Guatemala coincided with the increased need for metals by emerging Asian markets, which increased transnational mining operation throughout the Latin American region.³⁰

By 2008, according to official government data from the Ministry of Energy and Mines, Guatemala had granted 113 mining licenses—105 for exploration and 7 for exploitation.³¹ The majority of these concessions are concentrated in the mountainous areas of four Departments: San Marcos (17), Huehuetenango (15), Alta Verapaz (16), and Izabal (19), where the majority of its residents are Mayan.³²

In order to attract transnational investment, then Guatemalan President Álvaro Arzú (1996-1999) privatized the energy sector and procured the passage of a new Mining Law of 1997 (Decreto 48-97).³³ Each of these measures was adopted as part of the World Bank and the International Monetary Fund's structural adjustment policies in Guatemala, and combined were designed to increase international investment in the country.³⁴ Congress approved the 1997 Mining Law quickly, under tremendous pressure from multinational corporations and without prior popular consultation,³⁵ as is required by the Constitution.³⁶

27. Joris van de Sandt, *Conflictos Mineros y Pueblos Indígenas en Guatemala*, CTR. FOR INT'L ENVTL. L. 11 (Sept. 2009), <http://www.ciel.org/Lac/Guatemala/Cordaid%20Guatemala%20ES%20broch-DEF.pdf>. Transnational mining in Guatemala dates back to the 1950s, with investment from U.S. and Canadian companies that included INCO and its subsidiary Exmibal, and the U.S.-based Hanna Mining Co. The government of Guatemala granted generous concessions to multinational mining extractions and mining activities were controversial with indigenous communities. See also Shin Imai, et al., *Breaching Indigenous Law: Canadian Mining in Guatemala*, 6 INDIGENOUS L.J. 101, 105-06 (2007); Troy S. Floyd, *Bourbon Palliatives and the Central American Mining Industry, 1765-1800*, 18 THE AMERICAS 103 (1961).

28. See *infra* Part II.B.

29. van de Sandt, *supra* note 27, at 11.

30. *Id.* at 5.

31. *Id.* at 6.

32. *Id.*

33. *Id.* at 5, 11.

34. *Id.* at 11.

35. *Id.*

36. CONSTITUTION OF THE REPUBLIC OF GUATEMALA 1985, art. 173.

Essentially, the law reduced the percentage of royalties to be paid by mining companies, from six to one percent of the total Gross National Product (“GNP”) produced by the state; it permitted private mining industries the right to acquire complete property rights (100%), and created very generous corporate tax breaks, including the use of water and importation of machinery.³⁷ Additionally, administrative provisions for resolving disputes under the law were extremely vague, and there was no attempt to harmonize the 1997 Mining Law with pre-existing environmental laws in the country.³⁸ Moreover, the law failed to consider the rights of indigenous peoples, such as the right to prior consultation about major development investment in their communities and to communal property rights as codified in the International Labor Organization Convention 169 (“ILO 169”).³⁹ Finally, the Law made no provisions for closure of the mine, including any obligations to repair the environmental impact caused by mining activities.⁴⁰

B. The Marlin Gold and Silver Mine Operations

The first transnational mining operation license granted by the Government of Guatemala after the adoption of the 1997 Mining Law was the Marlin Gold mine in San Marcos in 1998.⁴¹ The Marlin Mine is the property of Goldcorp, Inc. of Canada, and is operated by its subsidiary in Guatemala, Montana Exploradora.⁴² Goldcorp is a large multinational corporation with assets equal to over half of Guatemala’s GNP and has become the largest taxpayer in the history of Guatemala.⁴³

Montana Exploradora obtained an exploration license in 1999 for the Marlin Area in San Marcos, and immediately proceeded to acquire title to the land through a series of individual land purchases.⁴⁴ Then, in 2003, the Government of Guatemala approved the company’s Environmental Impact Study, which allowed the company to begin construction of the mine in 2004 and to start exploitation activities in 2005, with a twenty-five-year exploitation license.⁴⁵ In June 2004, the

37. van de Sandt, *supra* note 27, at 11.

38. *Id.*; INSTITUTO DE AGRICULTURA, RECURSOS NATURALES Y AMBIENTE [IARNA], UNIVERSIDAD RAFAEL LANDÍVAR, MINERÍA EN GUATEMALA: UN ANÁLISIS SOCIOCOLÓGICO 197, 211-12 (2010) [hereinafter IARNA] (detailing and critiquing the weaknesses of the environmental impact assessment process under Guatemala’s law).

39. Guatemala ratified ILO Convention 169 in 1996 as part of a commitment under the Peace Agreements to respect the rights of indigenous communities. Victor D. Montejo, *Convention 169 and the Implementation of the Peace Accords in Guatemala*, J. S. & MESO AM. INDIAN RTS. CTR. (SAIIC), Fall 1997, available at <http://saiic.nativeweb.org/ayn/guatilo.html>.

40. IARNA, *supra* note 38, at 203.

41. van de Sandt, *supra* note 27, at 11.

42. *Id.* at viii.

43. Imai et al., *supra* note 27, at 118.

44. van de Sandt, *supra* note 27, at 11-12.

45. *Id.* at 12; see also Imai et al., *supra* note 27, at 109.

International Finance Corporation (“IFC”) of the World Bank approved a \$45 million (U.S.D.) loan to the project,⁴⁶ becoming the first World Bank loan in a mining extracting project after undergoing a review process related to Extractive Industries (“EIR”) in 2003.⁴⁷

This is the only mine in Guatemala that is exploited at a grand scale.⁴⁸ The Marlin Mine is also “the largest gold and silver mine in Central America.”⁴⁹ The municipalities of San Miguel Ixtahuacán and Sipacapa are largely indigenous with their own cultural identity and language.⁵⁰ Ninety-seven percent of the population lives in poverty and eighty percent lives in extreme poverty.⁵¹ The majority (who are agricultural peasants) grow corn or beans or graze cattle, but due to poor soil and the lack of an irrigation system, these activities are insufficient for self-sustainability.⁵² Many also perform seasonal work in sugar cane and coffee plantations, and some are dependent on remittances sent home from the United States.⁵³

The Marlin Project is part of a new generation of large mines at reduced costs.⁵⁴ The mine yields an estimated 250,000 ounces of gold per year and 3.6 million ounces of silver, and has a project lifeline of ten years.⁵⁵ This yields about \$125 million (U.S.D.) a year.⁵⁶ Total investments are calculated at \$254 million (U.S.D.), and it is estimated the mine will yield \$893 million (U.S.D.) in ten years.⁵⁷

46. ON COMMON GROUND CONSULTANTS INC., HUMAN RIGHTS ASSESSMENT OF GOLDCORP’S MARLIN MINE: EXECUTIVE SUMMARY 9 (Nadene Rehnby, Hands on Publication ed., 2010).

47. van de Sandt, *supra* note 27, at 13.

48. DIRECCIÓN GENERAL DE MINERÍA, GOBIERNO DE GUATEMALA, ANUARIO ESTADÍSTICO MINERO, 2008, at 5 (2008), available at http://www.mem.gob.gt/Portal/Documents/Magazines/2010-05/682/ANUARIO_ESTADISTICO_2008.pdf (attributing the largest growth in mining in Guatemala to the exploitation of silver and gold by the Marlin Mine).

49. Niladri Basu et al., *A Combined Ecological and Epidemiologic Investigation of Metal Exposures Amongst Indigenous Peoples Near the Marlin Mine in Western Guatemala*, 409 SCI. TOTAL ENV’T 70 (2010). The Marlin Project covers twenty square km, 85% of which is found in San Miguel Ixtahuacán and 15% of which is in Sipacapa. van de Sandt, *supra* note 27, at 19.

50. van de Sandt, *supra* note 27, at 21. Approximately 95% of the 29,650 residents of San Miguel Ixtahuacán are dispersed in twenty villages and identify as Mayas Mam, the fourth largest linguistic group of Guatemala. The vast majority of the 14,050 inhabitants of the thirteen villages that comprise Sipacapa are, according to the last census, 70% indigenous (although municipal statistics put the number more at 88%) and belong to the linguistic group Mayas Sipakapenses. *Id.*; see also Imai et al., *supra* note 27, at 110.

51. van de Sandt, *supra* note 27, at 22.

52. *Id.* at 21, 24.

53. *Id.* at 21.

54. VINCENT CASTAGNINO, METAL MINING AND HUMAN RIGHTS IN GUATEMALA: THE MARLIN MINE IN SAN MARCOS 10 (Peace Brigades Int’l ed., 2006), available at <http://goldcorpoutofguatemala.files.wordpress.com/2010/07/pbi-minenmarlin-en.pdf>.

55. Basu et al., *supra* note 49, at 70.

56. *See id.*

57. Just in 2006-2007 alone, the mine yielded Goldcorp \$312 million, in light of price increases for gold and silver. van de Sandt, *supra* note 27, at 20.

II. THE CONFLICT

A. *Indigenous Communities*

According to many members of the affected indigenous communities and groups who represent them, the Marlin Mine, from its inception, has operated overwhelmingly to their detriment and in direct violation of the sovereignty of indigenous communities in the region.⁵⁸

One significant issue of contention is that the government of Guatemala never undertook prior consultations with the communities before deciding to grant the mining license concession to Montana Exploradora,⁵⁹ as required by ILO 169.⁶⁰ In 2003, Montana Exploradora held a series of informational meetings and kept a log of names for each of the attendees, seemingly to comply with the community consultation requirement in order to receive loan approval from the World Bank.⁶¹ Most of the attendees, however, saw these meetings as principally promotional, with no opportunity for meaningful participation; in fact, as the meetings were held in Spanish, few actually understood what was happening.⁶²

Another major concern pertained to Montana Exploradora's practices of land acquisition to construct the mine, which not only ignored communal property rights but are alleged to have employed coercion, intimidation and lies to get individual land owners to agree to part with their land.⁶³ Montana Exploradora's land acquisition began as early as 1999, even before it owned the mining concession.⁶⁴ Montana Exploradora contracted a third-party company called Peridot, S.A., which, according to community leaders, paid repeated and persistent visits to individual families with offers of free food and misleading assurances of future jobs, or false promises of remuneration if minerals were found, in order to induce them to sell their land.⁶⁵ Further, in its Report on Land Acquisition ("LAP"), offered in 2004 to justify its loan request to the World Bank, Montana Exploradora downplayed the cultural significance of land ownership to the region,⁶⁶ although a more recent company-commissioned human rights assessment acknowledged that land acquisition procedures failed to respect

58. James Rodriguez, *Photo Essay: Gold Mine Worsens Social Tensions in Guatemala*, UPSIDE DOWN WORLD (July 31, 2007), <http://upside-downworld.org/main/content/view/836/33/>.

59. van de Sandt, *supra* note 27, at 13.

60. Article 6 of ILO 169 provides in part that governments shall "consult the [indigenous] peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."

61. van de Sandt, *supra* note 27, at 41.

62. *Id.*

63. *Id.* at 28.

64. *Id.* at 27.

65. *Id.* at 27-28.

66. *Id.* at 26.

indigenous peoples' land rights.⁶⁷ The lands of San Miguel Ixtahuacan and Sipacapa form part of an integral collective land title with property rights—known as “ejidos” or “tierras comunales”—dating back to the beginning of the twentieth century.⁶⁸ These communal properties are legally recognized in Guatemala and are formally administered by local governments in the name of indigenous communities.⁶⁹ Under this regime, individual families have the right to use, inherit, register, and even transfer land.⁷⁰ However, people are not 100% owners of the land.⁷¹ Rather, the land is owned collectively by the community, such that any sale of property must be formally recognized under domestic law by the municipal mayor and community leaders.⁷²

“Montana has purchased over 600 parcels of land from hundreds of Mam and Sipakapense land-holders within the 20 square kilometers of its mining license and continues to acquire land around the Marlin Mine.”⁷³ Ultimately, these purchases restricted access to land to families and communities adjacent to the mine.⁷⁴ Montana Exploradora excavates 5,000 tons of rock daily, and, as a result, the hills surrounding the towns have been transformed into huge craters and mounds of rock waste.⁷⁵ Residents must now live in severely reduced lots of land, forced to witness destroyed landscapes or risk losing their ties to community by moving.⁷⁶ As a result of dynamite explosions, residents must also endure the nearby dusty and noisy roads, as well as the large cracks that frequently occur along the walls and floors of their tiny adobe houses.⁷⁷

A third significant concern for indigenous communities has been the environmental harm caused to their communities as a direct result of mining activities.⁷⁸ To understand the nature and scope of this harm, it is necessary to explain the mining process used in the Marlin Mine. Mining is a mixture of two open pits and one underground facility whereby silver and gold is extracted through a cyanide leaching process.⁷⁹ The project extracts rock either from the

67. ON COMMON GROUNDS CONSULTANTS INC., *supra* note 46, at 21.

68. van de Sandt, *supra* note 27, at 25.

69. *Id.*

70. *Id.* at 26.

71. *Id.*

72. *Id.*

73. ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 20.

74. van de Sandt, *supra* note 27, at 25.

75. *Id.*

76. *Id.* at 29.

77. *Id.*; see also COMISIÓN PASTORAL PAZ Y ECOLOGÍA (COPAE) & UNITARIAN UNIVERSALIST SERV. COMM. (UUSC), DAMAGED BUILDINGS NEAR THE MARLÍN MINE: PRELIMINARY INVESTIGATION AND ANALYSIS OF BUILDING DAMAGE IN THE VILLAGES OF AGEL, EL SALITRE, SAN JOSÉ IXCANICHE, AND SAN JOSÉ NUEVA ESPERANZA, SAN MIGUEL IXTAHUACÁN AND SIPACAPA MUNICIPALITIES, SAN MARCOS DEPARTMENT, GUATEMALA (2009) [hereinafter COPAE & UUSC], available at <http://resistance-mining.org/english/?q=node/147>.

78. IARNA, *supra* note 38, at 201.

79. van de Sandt, *supra* note 27, at 20.

open pit or from a subterranean tunnel.⁸⁰ Minerals are then separated from the rock waste and sent to tanks for chemical processing, which separates the gold from other chemicals using a very toxic solution of cyanide.⁸¹ The sediment that remains is called “colas” and is transported to a lake; these sediments, which are highly toxic, end up at the bottom of the lake.⁸² The company estimates that during its lifetime, the mine will produce 44 million tons of rock and 14 million tons of colas.⁸³

The mining process also uses large quantities of water, close to 250,000 liters of water per hour—the equivalent of what a typical family in the area might use in twenty-two years.⁸⁴ Combined, these environmental impacts create water shortages and health risks for the community.⁸⁵ Since 2006, communities living below the river have complained of cattle and sheep dying, and since 2007, people have complained of skin rashes, hair loss, respiratory difficulties and other disorders due to the mine’s pollution.⁸⁶ Residents have also reported the drying up of wells and fruit trees in the area.⁸⁷

Finally, indigenous communities report that Montana Exploradora’s presence created community tensions and divisions that did not exist before—between those who oppose the mine and those who support it because of job creation—leading to serious governability problems, particularly in San Marcos.⁸⁸ Mining activities did create some jobs, which changed the way of life for the few families employed in the mine who earn about \$300 (U.S.D.) monthly, as well as families who came from outside the community.⁸⁹ In Sipacapa, a strong anti-mining resistance has existed from the beginning; but here too, there have been significant divisions.⁹⁰

B. Montana Exploradora and the State

From the beginning, the government of Guatemala has supported the Marlin Mine, who viewed it as a source of job creation and an opportunity for

80. *Id.* at 30.

81. *Id.*

82. *Id.* A human rights assessment report commissioned on behalf of Goldcorp states that mine wastes (tailings and rocks) are stored behind a cross-valley dam consisting of a rockfill shell with a low permeability core. ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 9.

83. van de Sandt, *supra* note 27, at 30.

84. *Id.* at 34.

85. *Id.* at 33-34.

86. *Id.* at 33; see Basu et al., *supra* note 49, at 71; see also *Canadian Mine Accused of Causing Skin Infections*, BBC (Mar. 11, 2009), <http://news.bbc.co.uk/2/hi/americas/7934513.stm>.

87. van de Sandt, *supra* note 27, at 35.

88. *Id.* at 37.

89. *Id.* at 38.

90. *Id.* at 39-40.

sustainable economic development in the country.⁹¹ As a result, Guatemala has sided with Montana Exploradora in its denial of the claims for violations and harms advanced by local indigenous communities, as well as the company's dismissal of findings of environmental impact studies conducted in the region.⁹² Furthermore, the Guatemalan government has failed to conduct its own independent environmental impact studies,⁹³ as the mining law simply requires review of environmental impact studies submitted by the company.⁹⁴

For its part, Montana Exploradora stressed only the positive effects of the Marlin project (in annual periodic reports and its promotional material).⁹⁵ In terms of job creation, for example, Montana Exploradora's data shows that from 2005 to 2008, local employment ranged from 900 to 1300 local employees, generating an average payroll cost of approximately \$4.8 million (U.S.D.) annually.⁹⁶ A report commissioned by the University of Amsterdam, School of Law reports even fewer numbers.⁹⁷ According to those numbers, during the mine's construction, Montana Exploradora employed 870 workers from local communities, but only 160 of these were permanent jobs.⁹⁸ After the mine was constructed, very few families were actually employed.⁹⁹

Company data also reported important economic contributions to the Guatemalan government and the local communities, in terms of tax and royalty revenues.¹⁰⁰ In fact, in 2006, Montana Exploradora voluntarily relinquished the tax exemption, which immediately increased the revenue flows to the national government.¹⁰¹ Thus, from 2005 to 2008, the company reported to have paid an average of \$6.4 million (U.S.D.) in taxes per year, and about \$1.5 million (U.S.D.) in royalties to the Guatemalan government.¹⁰² Goldcorp claimed that by the completion of the mine, it will have paid Guatemala in taxes and royalties a total of \$69.9 million (U.S.D.) over a period of eleven years.¹⁰³

However, the Guatemalan government invested an incredibly low proportion of its national revenue into social programs, which, as acknowledged by a recent company-commissioned human rights impact report, makes it too difficult to

91. *Id.* at 11.

92. *See infra* Part II.D.

93. *See* van de Sandt, *supra* note 27, at 11.

94. Guatemalan Mining Law, 48-97, ch. II, art. 7-8 (Guat.), available at <http://www.mem.gob.gt/Portal/MEMDocuments/DGM/Ley/mining%20law%20and%20its%20regulation.pdf>.

95. A recent example includes ON COMMON GROUNDS CONSULTANTS INC., *supra* note 46, at 21.

96. *Id.* at 9.

97. van de Sandt, *supra* note 27, at 20.

98. *Id.*

99. *Id.* at 29. In a study conducted by the Ministry of Labor in Guatemala, at least in 2007, extractive mining represented only 0.27% of the labor force nationally. IARNA, *supra* note 38, at 207.

100. ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 9.

101. *Id.* at 24.

102. *Id.* at 9.

103. Imai et al., *supra* note 27, at 118.

track actual positive social impacts to the country.¹⁰⁴ As much as half of the royalties, however, are shared with local communities.¹⁰⁵ Some figures published in a report by the University of Landívar show Sipacapa received an average of \$920,000 (U.S.D.) between 2006 and 2008.¹⁰⁶ This same report highlighted that this has led Sipacapa to develop a robust program of economic development that included ecological and environmental preservation and sustainable agricultural production.¹⁰⁷

In terms of land acquisition, Montana Exploradora's position is that the sales of land were entirely voluntary, and that a price higher than market value was paid to each land owner.¹⁰⁸ On the issue of consultations, Montana Exploradora maintained having complied with the prerequisites as part of the approval of mining licenses and World Bank requirements.¹⁰⁹ In regard to the consultative process, the sole concessions that Goldcorp has made is the need to interact more with the Guatemalan government, encourage implementation of an appropriate framework for consultations with indigenous peoples, and to provide training to its staff on ILO 169.¹¹⁰ Heeding this call, the government of Guatemala, adopted an administrative code to implement ILO 169's consultative process in May 2011, but it did so in secret and without consulting any of the indigenous communities.¹¹¹ The code was rejected by indigenous and labor groups for disrespecting the very nature of the ILO 169 by adopting standardized procedures that did not respect the sovereignty of each Indigenous nation; indeed, the code was labeled an attempt to circumvent ILO 169 entirely.¹¹² The Constitutional Court of Guatemala appeared to share some of the same concerns and in May 2011, granted a provisional measure enjoining the code's implementation.¹¹³

In terms of environmental and health harms, Montana Exploradora has, as a general matter, denied environmental risks through a series of environmental impact assessments and reports that have minimized the environmental harms of the project.¹¹⁴ As to water, for example, Montana Exploradora claims that the

104. van de Sandt, *supra* note 27, at 24.

105. See IARNA, *supra* note 38, at 215.

106. *Id.* The calculation takes the average of revenues received between 2006 and 2008 (7.3 million quetzales) and multiplies it by .216, the Quetzal rate conversion for U.S. dollars.

107. *Id.*

108. van de Sandt, *supra* note 27, at 28. Montana Exploradora reports to have paid the \$4,567 (U.S.D.) per acre to landowners for land that usually sells for less than a third of that price. See also Imai et al., *supra* note 27, at 109.

109. *But see* ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 12.

110. *Id.* at 4-5.

111. Julio F. Lara, *Amparo Provisional Favorece a Comunidades Indigenas*, PRENSA LIBRE (May 26, 2011), http://www.prensalibre.com/noticias/Amparo-provisional-favorece-indigenas_0_487751246.html.

112. Por Agencia EFE, *Confederación Denuncia Intento Reglamentar Consultas a Indígenas*, PRENSA LIBRE (June 6, 2011), http://www.prensalibre.com/noticias/comunitario/Confederacion-reglamentar-consultas-indigenas-Guatemala_0_494350718.html.

113. Lara, *supra* note 111.

114. van de Sandt, *supra* note 27, at 30.

company does not impact local water use.¹¹⁵ Rather, Montana Exploradora claims to have recycled eighty-five percent of the water used and that the rest is taken from a well that is 300 meters deep.¹¹⁶ This finding, however, has been disputed by other studies.¹¹⁷ Also, more recent company studies continue to diverge in results from those commissioned by local human rights groups or conducted by independent experts, as discussed in Part D *infra*.¹¹⁸ In fact, Montana Exploradora has made few concessions with regard to the need to change any of its environmental practices.¹¹⁹

Montana Exploradora worked hard to improve its image as a socially responsible corporate entity in Guatemala and abroad, by investing in local social programs through a foundation called Sierra Madre, which is partially funded by World Bank loans.¹²⁰ The Sierra Madre foundation has invested in community projects and social investment initiatives that included “funding of additional teachers, some training of teaching staff, improvement of school facilities,” and the provision of scholarships.¹²¹ Sierra Madre has also contributed to health programs, including building a health center, and projects that improved access to potable water systems.¹²² Even company commission reports have found, however, that there is a lack of clarity about the foundation’s actual and yearly contributions.¹²³ The lack of clear objectives, social indicators, and monitoring and evaluation standards has made it difficult to assess the effectiveness of

115. DENNIS KEMP, KP CONSULTING, ENVIRONMENTAL REVIEW FOR THE HUMAN RIGHTS IMPACT ASSESSMENT—MARLIN MINE GUATEMALA 2 (2010), available at http://www.hria-guatemala.com/en/docs/Human%20Rights/HRA_Appendix_H_External_Environmental_Review_KP_Consulting.pdf.

116. van de Sandt, *supra* note 27, at 34; KEMP, *supra* note 115.

117. van de Sandt, *supra* note 27, at 34; see also *infra* Part II.D.

118. See *infra* Part II.D.

119. The few concessions the company has made, based on its most recent environmental assessment report, is the need to study the causes of damage to houses; to improve community participation in the company’s water contamination studies; to initiate a health monitoring system with the government’s Ministry of Health; to support municipal government efforts to protect and improve watersheds; and to agree to pay the “costs of closing the Marlin Mine,” stating that said amount will be reached in consultation with the government of Guatemala and in accordance with corporate accounting standards. ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 6-7. Those standards are the Canadian and U.S. Generally Accepted Accounting Principles (“GAAP”) relating to Asset Retirement Obligations (“ARO”). *Id.* at 6.

120. van de Sandt, *supra* note 27, at 13. On its website, Goldcorp includes a link to Corporate Responsibility, which has the company’s voluntary code of conduct, and states that “Goldcorp is committed to conducting our business responsibly at all times, which means respecting the safety and health of our employees, protecting the environment, respecting the human rights of our employees and the residents of the communities in which we operate, and contributing to the sustainable development those communities.” This page also details the various community based projects associated with its mining activities. *Goldcorp’s Social Responsibility Policy*, GOLDCORP, <http://www.goldcorp.com/Theme/GoldCorp/files/CSR%20Policy%20Statement.pdf> (last visited Oct. 31, 2011).

121. ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 24.

122. *Id.*; see also Imai et al., *supra* note 27, at 119.

123. ON COMMON GROUND CONSULTANTS INC., *supra* note 46, at 24.

Montana Exploradora's social investment.¹²⁴ To those who critique these efforts, they point to the persistent extreme poverty in the region and the harm to communities caused by the mine, which is much greater than the company's social investment.¹²⁵

C. Push Back and Resistance

Since 2003, local community actors comprised of the local Catholic Church, traditional indigenous and community leaders, and Guatemalan and international environmental justice groups, have organized to carry out several local and global strategies to stop the Marlin project.¹²⁶ In turn, Montana Exploradora and Goldcorp have aggressively defended their corporate interests by intervening in domestic or international legal strategies that sought to curtail mining activities, and commissioned their own environmental impact studies that denied or undermined any environmental or health harms to the communities.¹²⁷ For its part, with few exceptions,¹²⁸ the Ministry of Mining has been an outspoken supporter of Montana Exploradora, resorting to policing and prosecutorial intervention to stop local protests against the mine.¹²⁹

National dialogue around the issue of mining in Guatemala has been fractured and divisive from the beginning, particularly along ethnic lines.¹³⁰ Indigenous communities, along with various national organizations, organized in late 2004 to spark a dialogue of resistance against mining activities in their communities.¹³¹ As a response, the Guatemalan government organized its own National Mining Conference in December 2004 in order to turn the tide in favor of mining in the country.¹³² The government-sponsored mining Conference was

124. *Id.*

125. *See, e.g.,* ASOCIACIÓN DE INVESTIGACIÓN Y ESTUDIOS SOCIALES, ESTUDIO COSTO BENEFICIO DE LA MINA MARLIN EN SAN MARCOS, GUATEMALA, (2010), available at http://es.oxfamamerica.org.s3.amazonaws.com/publications/Estudio_costo_beneficio_mina_marlin_guatemala.pdf.

126. van de Sandt, *supra* note 27, at 14-16, 23, 47-54.

127. *See, e.g.,* KEMP, *supra* note 115.

128. One such exception has been the Human Rights Ombudsman Office of Guatemala, which has been critical of mining activities in the country. In fact, in 2005, Montana Exploradora filed a writ against the Human Rights Ombudsman, claiming the company's rights were violated when the Ombudsman issued a resolution citing the company's human rights violations. The Constitutional Court of Guatemala denied the writ in 2006 because the Ombudsman's findings were mere recommendations and, thus, did not represent a real harm to the company. *Appendix F: Overview of Legal Cases Involving The Marlin Mine*, HRIA GUAT., http://hriaguatemala.com/en/docs/Human%20Rights/HRA_Appendix_F_Legal_Cases.pdf (last visited Oct. 14, 2011). Another exception included when the Ministry of Environment and Natural Resources administratively faulted the company for environmental non-compliance. Montana Exploradora has appealed the Ministry's findings, which await resolution. *Id.*

129. *See, e.g.,* Bernadette Maheandiran et al., *Goldcorp and HudBay Minerals in Guatemala*, 6 OSGOODE HALL COMP. RES. IN L. & POL. ECON. 3, 5 (2010).

130. van de Sandt, *supra* note 27, at 14.

131. *Id.*

132. *Id.*

supported by the Canadian Embassy and was attended by representatives from the World Bank, the United Nations Development Program, Montana Exploradora, and the Catholic Church, but excluded very important sectors of civil society.¹³³ No dialogue between the indigenous community and government has taken place, even as similar topics discussing the need for reform were addressed at each conference.¹³⁴

The divisiveness of the issue between indigenous communities on the one hand, and the government and mining companies on the other, came to a head in popular demonstrations of physical resistance.¹³⁵ In 2005 in Sololá and again in 2007 in San Miguel Ixtahuacán, residents joined forces to block the road to prevent the entrance of Montana Exploradora equipment and personnel to the mine.¹³⁶ At each of these protests, Guatemalan police forcibly removed the participants, which produced some casualties, and subsequently filed criminal charges against some of the organizers.¹³⁷

One of the most significant achievements by indigenous communities has been the organization of a resistance movement through the implementation of popular consultations among indigenous communities, all of which have voted a resounding “NO” to mega-mining project activities.¹³⁸ The first community-organized referendum was held in Sipacapa in 2005 against the Marlin Mine.¹³⁹ Montana Exploradora not only tried to publically discredit the referendum process, calling it “patently corrupt,”¹⁴⁰ but also filed an action with the Ministry of Mining of Guatemala alleging unconstitutionality and seeking an injunction against the referendum, maintaining that the very act of voting was unconstitutional.¹⁴¹ Initially, the Court of Constitutionality granted the injunction, but lifted it the day before the referendum was to take place, allowing it to proceed on June 18, 2005.¹⁴² The mine was rejected by an absolute majority.¹⁴³ The victory of the Sipacapa vote, however, was short-lived, at least in terms of its legal power. In 2007, the Constitutional Court of Guatemala declared that the

133. *Id.*

134. *Id.*

135. *Id.*

136. Sololá residents blocked, for forty days, the Panamerican road to keep mining machinery from reaching its destination, with the support of the local Mayan mayor, demanding revocation of the mining license. Then, in 2007, a group of citizens in San Miguel Ixtahuacán blocked the road to the entrance of the Marlin mine. *Id.* at 14, 54. See also Amanda M. Fulmer et al., *Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine*, 50 *LATIN AM. POL. & SOC'Y* 4, 91 (2008); see also Imai et al., *supra* note 27, at 110.

137. van de Sandt, *supra* note 27, at 54; see also Maheandiran et al., *supra* note 129, at 3, 5.

138. van de Sandt, *supra* note 27, at 16.

139. *Id.*; see also Imai et al., *supra* note 27, at 111.

140. Imai et al., *supra* note 27, at 112.

141. *Id.* at 125; see also Maheandiran, et. al., *supra* note 129, at 6.

142. van de Sandt, *supra* note 27, at 44.

143. Of the total number of registered voters (2,564), 2,448 voted against (98%), thirty-five voted in favor, and thirty-five did not vote. *Id.* at 16.

popular referendum, while permissible, had no binding legal effect.¹⁴⁴ The Court's conclusions were based on the fact that under Article 121 of the Guatemalan Constitution, the Government retained the property rights to the subsoil of any land containing mineral deposits.¹⁴⁵ Thus, the municipality lacked legal standing to decide the fate of these mineral resources, to which the government may grant licenses to exploit based on public necessity.¹⁴⁶ Montana Exploradora claimed that the Court's decision vindicated the Marlin Mine's operations; in truth, the Constitutional Court's position was more nuanced since it was sharply critical of the state for its failure to adequately consult the community prior to the mining concession, and for curtailing community efforts for a referendum.¹⁴⁷ Despite the ruling of the Constitutional Court, the popular referendum process continued with tremendous momentum. The same referendum was adopted in fifty-seven municipalities in the Western highlands (the majority in San Marcos and Huehuetenango),¹⁴⁸ and each declared its opposition to the mines in overwhelming numbers.¹⁴⁹

Indigenous communities and environmental justice groups have also employed legal strategies locally, internationally, and transnationally to try to stop or reform the Marlin mining operation. Domestically, in November 2003, community leaders from San Marcos and Sipacapa solicited the revocation of the mining license concession from the Mining Ministry in November 2003.¹⁵⁰ Then, in 2006, a Guatemalan environmental NGO, Colectivo Madre Selva, filed criminal complaints against Montana Exploradora for contaminating the Tzalá River.¹⁵¹ The suit was dismissed when the Ministry of Energy concluded that water samples collected by the prosecutor's office did not show contamination.¹⁵² Beginning in 2007, several administrative complaints were filed with the Ministry of Environment and Natural Resources, but none have been served to the company.¹⁵³ In 2007, the Central Latinoamericana de Trabajadores and the Comisión Latinoamericana por los Derechos Humanos y las Libertades de los Trabajadores y Pueblos alleged that residual waters from the mine were being

144. HRIA GUAT., *supra* note 128.

145. REPUBLIC OF GUATEMALA 1985 CONSTITUTION WITH 1993 REFORMS Nov. 17, 1993, art. 121 available at <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html>.

146. See van de Sandt, *supra* note 27, at 53-54; Maheandiran et al., *supra* note 129, at 45.

147. Maheandiran et al., *supra* note 129, at 6; see also Imai et al., *supra* note 27, at 126.

148. *Civic Opposition Throughout Guatemala Through Community Consultations*, COMISIÓN PASTORAL PAZ Y ECOLOGÍA [COPAE] (Sept. 13, 2006, 3:12 PM), <http://www.resistance-mining.org/english/?q=node/9>.

149. According to the website of the Pastoral Commission of Peace and Ecology (COPAE), to date, 717,968 persons have voted "NO" in fifty-seven different consultative processes. *717,968 Personas han Dicho NO a los Megaproyectos en 57 Consultas*, COMISIÓN PASTORAL PAZ Y ECOLOGÍA [COPAE] (Dec. 1, 2010, 4:03 PM), <http://www.resistencia-mineria.org/espanol/?q=node/334>.

150. See van de Sandt, *supra* note 27, at 14.

151. ON COMMON GROUND INC., *supra* note 46, at 1.

152. *Id.*

153. See *id.*

dumped into rivers close to the Marlin Mine.¹⁵⁴ Madre Selva complained again in 2008 of contamination of the Tzalá River by Montana Exploradora, although it appeared the Ministry has not found evidence of mercury in the river.¹⁵⁵ The Municipality of Sipacapa also complained of the drying up of wells in the community that have resulted from Marlin Mine's activities.¹⁵⁶

Guatemalan domestic efforts have also sought broader reforms to Guatemala's mining laws. In 2008, another Guatemalan NGO, the Center for Environmental Legal and Social Action ("CALAS"), filed a petition with the Constitutional Court of Guatemala to declare sections of the Mining Act unconstitutional as a breach of environmental standards.¹⁵⁷ The Constitutional Court granted the petition in 2009 and found in favor of CALAS.¹⁵⁸ In addition, several mining law reform initiatives have been introduced in Congress.¹⁵⁹ Some of the initiatives sought, for example, to increase the royalties that must be paid from mining extraction from one to ten percent;¹⁶⁰ other laws sought to suspend all metal mining indefinitely.¹⁶¹ Unfortunately, none of these various law reform proposals have been successful, in part due to the inability of the proponents of the reforms to reach a consensus about the types of reforms that are necessary for Guatemala.¹⁶²

Internationally, the first complaint was filed in 2005 by the World Bank and local communities (represented by Madre Selva), and principally alleged water misuse contamination.¹⁶³ That same year, the World Bank issued a report admitting that the government had not established a clear standard for monitoring water regulation compliance and water contamination, and acknowledged that the environmental impact from wasted rock was greater than initially estimated.¹⁶⁴ However, the report minimized the environmental impact with regard to contamination.¹⁶⁵ Since 2006, the Central Union of Guatemalan Workers and the

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 2.

158. The decision (in Spanish) can be found at Corte De Constitucionalidad, Republica de Guatemala, C.A. (2009) Case File 1491-2007, available at <http://blog.reportero.org/wp-content/ley-minera-inconstitucionalidad.pdf>.

159. See IARNA, *supra* note 38, at 216.

160. Mike McDonald, *Retired General Promises Security in Guatemala Vote*, REUTERS (Sept. 9, 2011, 1:40 AM), <http://www.reuters.com/article/2011/09/09/us-guatemala-election-idUSTRE7881BE20110909>.

161. *Id.*

162. Interview with Dr. Yuri Melini, Dir., CALAS (Jan. 2011).

163. See Eric Holt-Giménez & Lyra Spang, *Glamis in Guatemala: A Project Alert on the Marlin Mine*, BANK INFO. CTR. USA (Mar. 23, 2005), <http://www.bicusa.org/en/Article.2019.aspx>.

164. See OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, ASSESSMENT OF A COMPLAINT SUBMITTED TO CAO IN RELATION TO THE MARLIN MINING PROJECT IN GUATEMALA (2005), available at <http://www.cao-ombudsman.org/cases/document-links/documents/CAO-Marlin-assessment-English-7Sep05.pdf>.

165. *Id.*; see also Imai et al., *supra* note 27, at 120.

Union of Guatemalan Workers initiated a series of communications with the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations ("CEACR") about the need for Guatemala to establish mechanisms for implementing ILO 169.¹⁶⁶ The CEACR continues to monitor the situation pending Guatemala's adoption of legislation to implement ILO 169.¹⁶⁷

In 2007, eighteen Maya-Mam communities filed a complaint in the Inter-American Commission on Human Rights against the Guatemalan government for its failure to heed the will of indigenous communities against the Marlin Mine operations (as evidenced by the popular referendums) and for its failure to protect indigenous communities against serious environmental and health harms resulting from the mine's operation.¹⁶⁸ The Inter-American Commission granted the petitioner's request for precautionary measures in May 2010, asking the Guatemalan government to suspend the Marlin mining operations on the basis that they were causing irreparable harm to the petitioning indigenous communities.¹⁶⁹ In June 2010, however, Guatemalan President Álvaro Colóm publically stated that he would not seek the mine's suspension, calling the Commission's findings of irreparable harm baseless.¹⁷⁰ Ten months after the Inter-American Commission issued its precautionary measures, Oxfam International initiated a campaign in March 2011 to urge the U.S. Congress to send a letter to President Colóm, requesting the suspension of the Marlin Mine operation.¹⁷¹ Fifteen U.S. Congress members sent a letter dated March 30, 2011 to President Colóm, urging him to comply with the Inter-American Commission ruling.¹⁷² However, the Guatemalan government formally resolved not to suspend mining operations in June 2011.¹⁷³ To date, mining operations continue.

The Latin American Water Tribunal, a non-governmental international body,¹⁷⁴ issued a moral condemnation against the Guatemalan government during

166. ON COMMON GROUND, INC., *supra* note 46.

167. *Id.*

168. *CIDH Pide que se Suspensa la Mina Marlin*, COMISIÓN PASTORAL PAZ Y ECOLOGÍA [COPAE] (June 14, 2010, 10:58 AM), <http://www.resistencia-mineria.org/espanol/?q=node/285>.

169. *Id.*

170. *Id.*

171. *See Suspend the Marlin Mine Campaign*, OXFAM INT'L, <http://actfast.oxfamamerica.org/index.php/issues/business> (last visited Oct. 14, 2011).

172. Letter from Jan Schakowsky, James P. Moran, Sam Farr, Lynn Woolsey, James P. McGovern, Pete Stark, Donald Payne, Jesse L. Jackson, Jr., Barney Frank, John W. Olver, Hank Johnson, Michael Michaud, Grace F. Napolitano, Maurice Hinchey, & David Wu, Reps., H.R., to Alvaro Colom Caballeros, President of Guatemala (Mar. 30, 2011), *available at* http://www.rightsaction.org/articles/Congressional_letter_on_Marlin_mine_040711.html (last visited Nov. 1, 2011).

173. *Guatemala Descarta Cierre de Minera Canadiense Pese a Fallo de CIDH*, PRENSA LIBRE (June 12, 2011, 11:11 AM), http://prensalibre.com/noticias/comunitario/Guatemala-descarta-minera-canadiense-CIDH_0_497950301.html.

174. For more information about the Latin American Water Tribunal, visit IRC INT'L WATER AND SANITATION CTR., <http://www.irc.nl/page/7081> (last visited Oct. 14, 2011).

public hearings held in Antigua in 2008, for not adequately regulating the Marlin Mine and for disregarding indigenous sovereignty and rights in its mining concession. The Tribunal also condemned Montana Exploradora for the damage caused to the environment and indigenous populations of San Miguel Ixtahuacan and Sipacapa.¹⁷⁵

In Canada, efforts have more directly targeted Goldcorp's corporate responsibility and have involved litigation, shareholder accountability initiatives, and legislative reforms. Accountability efforts in Canada have become difficult, however, because the Canadian government, or at least its embassy in Guatemala, has been very active in promoting and praising Canadian mining in Guatemala.¹⁷⁶ In 2006, the Canadian government held a series of roundtables on corporate responsibility in response to a Parliamentary report which called for the strengthening of programs and policies with regard to mining practices by Canadian companies in developing countries.¹⁷⁷ The result was the release of an Advisory Group Report which recommended, *inter alia*, the development of a Canadian corporate social responsibility framework, including the creation of an ombudsman to investigate complaints against Canadian extractive companies in developing nations.¹⁷⁸ However, the Canadian government only adopted a policy known as "Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector," which fell short of the recommendations in the Advisory Report.¹⁷⁹ In response, Bill C-300 was introduced, which would require, *inter alia*, the Minister to establish corporate accountability standards for Canadian extractive companies and create a mechanism for complaints with the Minister which would result in divestment from the corporation by the Canada Pension Plan.¹⁸⁰ C-300 was largely supported by many NGOs and equally despised by the mining industry,¹⁸¹ which said it could affect the competitiveness of the Canadian resource companies.¹⁸² Ultimately, Canada rejected the legislation in a close vote of 140 to 134 in the Canadian House of Commons in November 2010.¹⁸³

In 2009, a coalition of indigenous communities and others filed a complaint with the Canadian government against the Marlin Mine operation under the Guidelines for Multinational Enterprises of the Organization of Economic Co-

175. *Third Latin American Regional Public Hearing, Guatemala City, 2008*, LATIN AM. WATER TRIBUNAL, http://www.tragua.com/english/hearing/2008/guatemala_2008.html (last visited Nov. 1, 2011).

176. Imai et al., *supra* note 27, at 131-32.

177. Maheandiran et al., *supra* note 129, at 13.

178. *Id.*

179. *Id.*; see also Imai et al., *supra* note 27, at 133-35.

180. Maheandiran et al., *supra* note 129, at 13-14.

181. *Id.* at 14; *Bill C-300 Defeated in Canadian Parliament*, MINING, PEOPLE AND THE ENV'T (Nov. 15, 2010, 5:09 PM) [hereinafter *Bill C-300*], available at <http://www.mpe-magazine.com/enviromine/bill-c-300-defeated-in-canadian-parliament>.

182. *Bill C-300*, *supra* note 181.

183. *Id.*

operation and Development (“OECD”),¹⁸⁴ of which Canada is a member.¹⁸⁵ The complaint asked the National Contact Points (“NCPs”), the OECD complaining body,¹⁸⁶ to investigate Goldcorp’s activities at the Marlin Mine and make recommendations to ensure the company’s compliance with the OECD guidelines.¹⁸⁷ The complaint is still pending.¹⁸⁸ Canada’s National Contact Point, the office designated to receive OECD complaints,¹⁸⁹ publically acknowledged receiving seven submissions from interested stakeholders, regarding corporate conduct and the OECD Guidelines.¹⁹⁰ Only four of the complaints, not including Guatemala’s complaint, have been considered by the NCP as specific instances.¹⁹¹ Canada’s NCP website provides no additional information about the status of the Marlin Mine complaint.¹⁹²

Also in 2009, Goldcorp’s shareholder pressure forced the company to undertake a Human Rights Impact Assessment.¹⁹³ Under Canadian law, the directors of a corporation typically set the agenda for discussion at shareholder meetings, but shareholders may request to add an item, subject to meeting several procedural and substantive requirements.¹⁹⁴ In Canada, environmental activists have used the shareholder proposal to influence corporate social responsibility.¹⁹⁵ In 2008, Goldcorp refused to circulate the proposal relating to the Marlin Mine; however, a consortium of investors circulated a second proposal, which was withdrawn only after Goldcorp agreed to conduct a Human Rights Impact Assessment.¹⁹⁶ The Assessment, however, was controversial from the very

184. *Guidelines for Multinational Enterprises: About*, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/about/0,3347,en_2649_34889_1_1_1_1_1,00.html (last visited Nov. 1, 2011).

185. Maheandiran et al., *supra* note 129, at 9.

186. In 2000, the OECD Council created a system of NCPs with representatives from each of the member states with some capacity to investigate complaints and seek resolution from the parties. The resolutions of the NPC are only recommendations and are not binding. *Id.* at 9.

187. *Id.* at 10; *see also Guidelines for Multinational Enterprises, supra* note 184 (explaining the OECD Guidelines).

188. Maheandiran et al., *supra* note 129, at 10.

189. *Id.* at 9.

190. *See Canada's National Contact Point (NCP)*, FOREIGN AFF. & INT’L TRADE CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng&menu_id=7&menu=R (last modified Feb. 24, 2009) (listing the Specific Instances considered by Canada’s NCP).

191. *See id.*

192. *Id.*

193. Maheandiran et al., *supra* note 129, at 3.

194. *Id.* at 10-11 (explaining shareholder procedures and substantive requirements for influencing a shareholder meeting agenda under the Canadian Business Corporation Act, R.S.C. 1985, c. C-44).

195. *Id.* at 11.

196. *Id.* at 11. A group of socially responsible investors that own shares in Goldcorp, including the Public Service Alliance of Canada (“PSAC”) Staff Pension Fund, the Ethical Funds Company, the First Swedish National Pension Fund and the Fourth Swedish National Pension Fund proposed the Assessment. ON COMMON GROUNDS CONSULTANTS INC., *supra* note 46.

beginning.¹⁹⁷ As explained below, the Marlin Mine has been the subject of study after study with regard to environmental and other types of harms; and yet, the results have varied vastly depending on who is sponsoring the report, having the effect of polarizing the issue further. Goldcorp has simply refused to accept the validity of any study that has linked environmental and other types of harms to the Marlin Mine operations.¹⁹⁸ Moreover, the company's previous environmental impact studies of the mine have invariably concluded that mining operations will produce few environmental and other human rights harms to the communities.¹⁹⁹ It is not a surprise, then, that there has also been a great deal of skepticism around this new effort.²⁰⁰ Furthermore, the Assessment assumed that the Goldcorp would remain in the area, and hence its focus would be on damage mitigation rather than a decision to stop mining activities.²⁰¹ Ultimately, the Assessment was awarded to a Canadian consulting company, Common Ground Consultants, Inc.²⁰² During its implementation, organizations complained that the Assessment provoked further tensions between the corporation and local residents, while several civil society organizations simply refused to participate.²⁰³ Despite this, the HRIA was completed in May 2010, after an eighteen month period of data collection and investigations; some of the findings and Goldcorp's responses are taken up in the next section.²⁰⁴ Apparently, at least a few of the shareholders remain quite unsatisfied with the results to date.²⁰⁵ On March 24, 2011, the Guatemalan press reported that two shareholders have now called for the suspension of the Marlin Mine based on the Inter-American Commission's precautionary order.²⁰⁶

Another type of community resistance to mining activities has come in the form of efforts to create alternative means of economic sustainability. Since

197. Maheandiran et al., *supra* note 129, at 11.

198. *See infra* Part II.D.

199. *Id.*

200. "Professor Douglas Cassel of the University of Notre Dame's Centre for Civil and Human Rights turned down Goldcorp's offer to tender a bid for the Assessment stating that he was not confident that the terms set by Goldcorp would yield a full and independent analysis." Maheandiran et al., *supra* note 129, at 11.

201. *Id.* at 12.

202. *Id.* at 11.

203. *Id.* The Assessment's validity came under serious question when the Public Service Alliance of Canada, one of the shareholder proponents of the Assessment, withdrew from the process, citing increasing concerns over the impartiality of the HRIA, as well as the coercive nature of its implementation with local communities. Bill Law, *Canada Goldmine Worries Grow*, BBC (Mar. 30, 2009, 2:20 PM), <http://news.bbc.co.uk/2/hi/7968888.stm> (citing a PSAC statement as follows: "PSAC has become increasingly concerned with the HRIA process and its relationship with the local communities. We have been especially concerned about the lack of free and informed prior consent of the communities in regards to the HRIA, and that the interest of Goldcorp are being put before the interests of the local people.").

204. *See infra* Part II.D.

205. *See* Alberto Ramírez, *Accionistas de Goldcorp Inc. Exigen el Cierre de Mina Marlin*, PRENSA LIBRE (Mar. 24, 2011), http://www.prensalibre.com/noticias/Accionistas-exigen-cierre-mina-Marlin_0_449955024.html.

206. *Id.*

2007, the association Rex Ulew, in cooperation with the Comisión Pastoral Paz y Ecología [The Pastoral Commission on Peace and Ecology] (“COPAE”), organized several participatory forums to develop alternative sustainability projects, such as organic coffee, and international funding for the project emerged.²⁰⁷ There is also a plan to grow fruits and vegetables with the aim to promote the cooperative model and rid the market of the middle-man between exporters and local growers, so that profits can be kept local.²⁰⁸

D. Environmental Impact Assessments of the Marlin Mine

Advocacy for and against the mine has called for the production of several, often contradictory, environmental impact studies of the mine’s activities. One study conducted in 2005 was commissioned by Madre Selva and completed by Robert Moran, who also reviewed the company’s environmental impact statement.²⁰⁹ Moran is highly critical of the World Bank’s restrictive focus which looked only at the quality of water in Sipacapa and ignored the larger impact to surrounding communities.²¹⁰ In 2006, Madre Selva commissioned Flaviano Bianchini to take samples of the water, which showed high levels of various metals that exceed the standards of potable water as established by the World Bank.²¹¹ The Guatemalan government claimed that Bianchini’s findings were false, and shortly after, Montana Exploradora filed suit against Madre Selva while Bianchini received several threats in the weeks that followed.²¹² COPAE conducted a series of periodic tests of water samples in 2007 and published their findings in October 2008, again finding high concentrations of heavy metals, particularly arsenic, that exceeded levels authorized by the World Bank.²¹³ The Guatemalan government criticized these studies for lacking scientific soundness.²¹⁴ The Guatemalan government also suggested conducting joint studies, but these ventures have not been executed.²¹⁵ Additionally, from 2007 to 2009, COPAE and the Unitarian Universalist Service Committee (“UUSC”) conducted an investigation of building damage resulting from the nearby mining activities, and found that buildings located in the villages near the mine were more prone to cracks than buildings in the control villages.²¹⁶ At the request of

207. van de Sandt, *supra* note 27, at 47.

208. *Id.*

209. See Memorandum from Dr. Robert E. Moran on CAO Marlin Mine Assessment: Technical Responses (Sept. 28, 2005), available at <http://www.saviaguade.org/doc/guatmarlinCAO9-28-05.pdf>.

210. *Id.*

211. van de Sandt, *supra* note 27, at 32.

212. *Id.*

213. *Id.* at 33.

214. *Id.*

215. *Id.*

216. COPAE & UUSC, *supra* note 77.

Archbishop of Guatemala's office, Physicians for Human Rights conducted a study of Marlin Mine in August 2009.²¹⁷ Relying on diverse scientific methods that included an array of samples collected from both human (blood, urine, survey answers) and environmental (drinking water, river water, sediment and soil) sources, a three-member research team found evidence of metal contamination related to the mine.²¹⁸ In August 2010, an environmental research nonprofit, E-Tech International,²¹⁹ also raised concern in a study about the groundwater and surface water contamination around the mine.²²⁰ Professor Doug Cassel, who earlier refused to conduct the Goldcorp Human Rights Assessment,²²¹ more recently, at the request of the Archbishop, agreed to conduct a separate human rights impact assessment of the situation of the Marlin Mine, the results of which are still pending.²²²

For its part, Montana Exploradora submitted environmental impact studies as a requirement of applying for a mining license in Guatemala and to receiving loan approval from the World Bank.²²³ Moreover, Montana Exploradora has also commissioned ongoing environmental studies in response to the several NGO-sponsored studies.²²⁴ In 2005, Montana Exploradora created the Asociación de Monitoreo Ambiental Comunitario ("AMAC"), which carried out its first field job to collect water samples in 2006.²²⁵ In collaboration with technical experts from San Carlos University, the local samples were sent to a Canadian laboratory for testing.²²⁶ The company claims that these tests do not show any contamination.²²⁷ Local groups have questioned the independence of AMAC due to the fact that it is employed by Montana Exploradora.²²⁸ In May 2010, Goldcorp announced the receipt of the final human rights assessment report, prepared at the

217. Basu et al., *supra* note 49, at 71.

218. *Id.* at 71, 76 (finding that individuals near the Marlin Mine have higher exposures to some metals compared to those living farther away and that levels of certain metals were elevated in water and sediment samples, and that water quality and quantity in the region are of concern).

219. E-TECH INT'L, <http://etechinternational.org/> (last visited Sept. 24, 2011).

220. E-TECH INT'L, EVALUATION OF PREDICTED AND ACTUAL WATER QUALITY CONDITIONS AT THE MARLIN MINE, GUATEMALA (Aug. 2010), available at http://www.etechinternational.org/082010/guatemala/MarlinReport_Final_English.pdf.

221. Maheandiran et al., *supra* note 129, at 11; *Canadian Mine Accused of Causing Skin Infections*, *supra* note 203.

222. See *A Human Rights Impact Assessment of the Marlin Mine, San Miguel Ixtahuacán, Guatemala*, UNIV. NOTRE DAME L. SCH., <http://law.nd.edu/center-for-civil-and-human-rights/independent-international-panel/> (last visited Feb. 8, 2011).

223. van de Sandt, *supra* note 27, at 13.

224. See *id.* at 31.

225. *Id.* at 31-32.

226. *Id.* at 32.

227. *Id.*

228. *Id.* One former employee has stated that there is no community input into the selection of who works at AMAC and that he was forced to resign after he became critical of Montana Exploradora. *Id.*

request of a group of its shareholders.²²⁹ The report does not make legal assessments of the Marlin Mine's past performance, nor was it designed to suggest the closure of operations. Rather, the report identified areas of concern to enable Montana Exploradora and Goldcorp to implement modifications to safeguard human rights.²³⁰ The report acknowledged challenges to implementation, including limited or reluctant stakeholder participation, as well as weaknesses in the documentation provided by Montana Exploradora in some areas.²³¹ Specifically on the issue of the environment, the report concluded that "independent technical review found that at present, Montana has achieved performance consistent with good industry standards with regard to most issues having direct impact on human rights including: air emissions monitoring and mitigation, dust mitigation, noise mitigation and monitoring, water monitoring . . . , erosion control, and mine and liquid effluent management."²³² The report also concluded that there was no evidence that Montana Exploradora had infringed indigenous group's right to water, except in the need to promote greater information and dialogue with the community.²³³ With regard to health-related problems, the report simply asserted that there was not an apparent increase in health-related issues, while simultaneously acknowledging insufficient diagnostic capacity to determine the cause of current health problems.²³⁴ The report identified the following serious concerns only as areas that require improvement: "disclosure and consultation with communities about health and safety issues, resolving the controversy over vibration damage to houses, coordinating emergency response plans with local authorities and civil organizations, and insufficient provision for closure and post closure monitoring and maintenance."²³⁵ In public documents, Goldcorp only reports that it has posted an eight million quetzales bond for the closure of the mine.²³⁶ In stark contrast, a recent study conducted by the UUSC of the United States, in collaboration with COPAE, reported that the closure of the Marlin Mine would cost 389 quetzals, 96 of which would go to treat the contaminated waters.²³⁷

229. See ON COMMON GROUND CONSULTANT'S INC., *supra* note 46, at 4.

230. *Id.*

231. *Id.* at 8.

232. *Id.* at 14.

233. *Id.*

234. *Id.* at 15.

235. *Id.* at 14.

236. Alberto Ramírez E, *Cierre Técnico de la Mina Marlin, Costaricia Q389 Millones*, PRENSA LIBRE (July 28, 2011, 12:00 AM), http://www.prensalibre.com/noticias/Cierre-tecnico-costaricia-Q389-millones_0_525547478.html.

237. *Id.*

III. LEARNING OPPORTUNITIES AND DEEPER LESSONS FROM THE MARLIN MINE

The detailed discussion of the Marlin Mine conflict and the ensuing responses by the affected communities provide the necessary backdrop for discussing the teaching moments and learning opportunities experienced by teachers and students alike, who have traveled to Guatemala as part of the Inter-American program. The program in Guatemala has operated for only three years and is small. During the past three years, fifteen U.S. and fifteen Guatemalan law students have participated in the program, all except two with moderate to high levels of proficiency in the Spanish language. About half of the U.S. students had traveled to Latin America prior to the program, although only two had spent more than a few months in the region. None had ever been to Guatemala, and only one had spent significant time in a country comparable to Guatemala in terms of its indigenous communities and social inequality (i.e., Ecuador). Thus, for all the students, the experience proved to be very unique and eye opening, as well as challenging and difficult. Nine of the fifteen U.S. students would spend a total of eleven to twelve weeks in the country, not only enrolling in substantive law classes taught in Spanish but also completing externships with NGOs in Guatemala City. Two of these externships, CALAS and the Rigoberta Menchú Foundation, focused on environmental justice issues and the rights of indigenous communities and offered work on issues arising out of the Marlin Mine situation.

The focus of this essay is primarily on the four students who completed externships directly related to the Marlin Mine and the indigenous struggles for environmental justice in Guatemala. However, all fifteen students who traveled to Guatemala were affected and transformed in some way by this struggle. It is nearly impossible to arrive in Guatemala, even in Guatemala City or Antigua, and not recognize the importance of transnational mining for the country.²³⁸ The issue is even present on the highway billboards, which denounce or praise mining exploitation in the country, and of course, it is nearly a daily story in the front page news of the Guatemalan newspaper. One of the student participants once remarked to me that even the youth who shine shoes in Guatemala seem to know something about the Marlin Mine.

The program also intentionally strives to develop in students the critical lens that Bill Hing described during the Hawaii teaching conference, which is a key precursor to a life of social justice activism.²³⁹ All of the fifteen U.S. students

238. The Inter-American program in Guatemala consists of a three-week bilingual legal program held in Antigua, Guatemala, where students with some proficiency in the language enroll in substantive law courses taught in Spanish that are specific to the region or enroll in Legal Spanish and a law course with a Latin American Comparative legal perspective taught in English. During the program, students also visit the Guatemalan Congress and the Constitutional Electoral Court, and travel to the highlands in Guatemala where the largest concentration of Guatemalan Mayans reside.

239. See *supra* notes 9-10 and accompanying text.

enrolled in courses that touched on the tensions between liberalizing trade and sustainable development in Guatemala; emphasized historical and sociological studies; or provided political science explanations for Guatemala's most pressing social problems, including the plight of indigenous communities. In the summer of 2010, for example, the course titled *Derecho Comercial Para Inversionistas Extranjeros en Guatemala* (Commercial Law for Foreign Investors in Guatemala)²⁴⁰ used a hypothetical case throughout the class involving a foreign investor client seeking, among other things, the possibility of engaging in mining exploitation in the country.²⁴¹ The course on International Trade and Development in the Americas, taught in English, benefited richly from the perspectives of Guatemalan law students in the discussion with U.S. students on "free trade" vs. "free and fair trade," and the exploration of how and whether U.S.-Latin American bilateral trade agreements have contributed to development in the region.²⁴² The program also demanded the students' reflection and engagement with the country. The course titled *Derecho de América Latina Comparado: El Caso de Guatemala* (Comparative Latin American Law: The Guatemala Case Study), which I taught, required students to write reflective journal entries that applied what they had learned about Guatemala's difficult history or its current social problems to what they were experiencing in their daily living in Guatemala. In the summer of 2010, for example, nine U.S. students submitted fifty journal entries. Nearly half of them dealt with issues that directly involved indigenous communities and their struggles for sustainable development and cultural survival in a globalized economy, in a country still struggling with democratic transition post-war. Students were thoughtful and reflective about such topics as corporate social responsibility; the role of a weakened state; international entities and civil society, including consumers to improve the plight of Mayans in the country; the potential and challenges of fair trade in Guatemala; and the struggles to retain traditional weaving in a competitive global market. This did not surprise me. Despite a bloody thirty-six-

240. See course descriptions at *Summer Program in Guatemala*, UNIV. OF THE PAC., MCGEORGE SCH. OF L., http://www.mcgeorge.edu/Academic_Programs/International_Study/Summer_Program_in_Guatemala.htm (last visited Oct. 18, 2011) (general information about the program).

241. This course was taught by Professor Enrique Sánchez Usera, the Director of Private Law at the Faculty of Juridical and Social Sciences of Universidad Rafael Landívar in Guatemala City. In addition to his position as an academic, Professor Sánchez, who is originally from Spain, consults with foreign investors who are doing or are seeking to do business in Guatemala. Professor Sánchez was very knowledgeable and sensitive to the tensions around foreign investment, sustainable development, and the rights of indigenous communities in Guatemala, having lived in the country for over fifteen years.

242. This course was taught by Professor Marjorie Florestal from the University of the Pacific, McGeorge, School of Law. Originally from Haiti, and having worked significantly in Africa on issues of sustainable development as Assistant General Counsel in the Office of the U.S. Trade Representative, as Senior Legal Advisor to Cape Verde, as a trade lawyer with the U.S. Department of Commerce, and also as a consultant with the African Development Bank, Professor Florestal brought a keen sensitivity to potential and limits of liberalizing policies in countries like Guatemala.

year civil war that tried to annihilate the indigenous “problem” in Guatemala,²⁴³ indigenous peoples and their plight are blatantly visible, even in the splendor of Antigua, Guatemala. Take, for instance, the indigenous street children who flock to foreigners, demonstrating their merchant English skills in their desperate and persistent plea to sell their dirt-cheap, hand-made products in the Central Park of Antigua. Or consider the quickly-changing landscape from millionaire homes in Antigua, to adobe structures that house dirt-poor indigenous children, who cannot afford to go to school in the highlands of Guatemala. These images, which were particularly haunting after our students witnessed the devastation of an entire indigenous community around Lake Atitlan following the tropical storms, left lessons that will be hard to forget.²⁴⁴ One student commented during our difficult journey back to Antigua from Sololá, after being temporarily trapped by road closures: “Professor Aldana, I know that after this trip I will not be able to simply ignore Guatemala if the plight of its people ever makes it to the mainstream U.S. media. I will have to pay attention.”²⁴⁵

A. *The Lessons from the Marlin Mine*

Guatemalan indigenous struggles with transnational mining, and especially the Marlin Mine, offered a few of our students the opportunity for even deeper learning. The learning opportunities were plentiful, frustrating at times, challenging, fearful, and full of mixed emotions of hope and despair, as well as faith and cynicism. In general, their involvement uncovered a grassroots activism and a bottom-up movement of resistance, largely dependent on transnational and international legal norms and strategies that failed to provide a satisfactory remedy to the community.²⁴⁶ Students experienced, for example, how the confusion of legal norms and the decentralization of accountability through the development of so many new and overlapping laws and institutions to address transnational problems were, unfortunately, adding up to less than the sum of its parts in this struggle. Already a group of scholars have thoughtfully examined the failed promise of ILO 169, the Inter-American System litigation, accountability mechanisms in International Financial Institutions (namely the World Bank), and of corporate social responsibility norms in this struggle.²⁴⁷ Perceptively, these

243. See COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA MEMORY OF SILENCE, available at <http://shr.aaas.org/guatemala/ceh/report/english/concl.html>.

244. For a story about the tropical storm experience by the students, see *Law Students Bear Witness to Devastation in Guatemala*, UNIV. OF THE PAC., MCGEORGE SCH. OF L. (June 10, 2010), http://www.mcgeorge.edu/Newsroom/News_Archive/2010_News_Archives/Law_Students_Bear_Witness_To_Devastation_in_Guatemala.htm.

245. Interview with Roberto Contreras, 2011 J.D. candidate, Penn. State School of Law, in Sololá, Guat. Statement made in Spanish and translated by the author.

246. For a perceptive description of this bottom-up grassroots resistance and an assessment of its limits, see Fulmer et al., *supra* note 136; Imai et al., *supra* note 27, at 129-31.

247. Fulmer et al., *supra* note 136, at 101-12.

scholars noted, *inter alia*, the dependence of these various strategies and norms on stronger domestic laws and legal institutions, which are sorely lacking in Guatemala.²⁴⁸ Indeed, through their projects, some of our students would experience first-hand the weaknesses of Guatemala's legal institutions; worse yet, Guatemala's political unwillingness to take indigenous peoples' struggles against the Marlin Mine seriously, even targeting those who protest against it or failing to protect those made vulnerable by their activism. Our students would also be asked to focus, then, on transnational or international mechanisms for accountability, including exploring the possibility within CAFTA or pushing for corporate social responsibility in Canada. Here, they would unfortunately uncover similar lessons: nations are unwilling to add teeth to corporate social responsibility, preferring instead to insist on voluntary corporate compliance, which is all the more difficult, if not impossible, to achieve in a country like Guatemala.

Before delving more specifically into the students' involvement in the Marlin Mine struggles and lessons learned, the following context is necessary. Safety considerations kept our students away from the Marlin Mine and from the communities directly affected by the activities there. This was unfortunate, but when we first began working with local NGOs in 2008, the tensions in the community were high. Protesters of the mine have received death threats from unknown individuals for their support of indigenous communities, and several protesters and residents were facing criminal prosecutions for resisting the mine.²⁴⁹ As a previous human rights lawyer who has worked and lived for a short period of time in Guatemala, I had a good sense of the risks involved in a program like ours. The program takes student safety very seriously, and it meant that we insisted on students living in very safe communities of Guatemala, traveling with a private driver, and not traveling outside of Guatemala City without our accompaniment (except with guided tours for tourism purposes in safe areas of Guatemala), and not to areas where tensions were high.²⁵⁰ Thus, the work of our students involved principally legal research, conducted in Guatemala City. All of them, however, had opportunities to attend forums on some of these issues (attended by community leaders in the City), to meet with government officials, or to attend meetings in Congress to lobby for change. All of these experiences were invaluable to their learning.

The student projects related to the Marlin Mine included the creation of four legal guides explaining and making recommendations on the use of domestic or

248. *Id.* at 102-03 (discussing Guatemala's failure to implement ILO 169, despite ratification); *id.* at 110 (concluding that the World Bank's oversight and accountability mechanisms over the Marlin Mine failed because it unduly relied on Guatemala's poor assessment of the Company's project, rather than conducting its own meaningful on the ground review of the project).

249. Maheandiran, *supra* note 129, at 5-7.

250. This piece is not focused on safety. However, we have thought a lot about this issue and would be happy to share any and all materials and best practices we have developed in this regard.

international strategies for environmental justice accountability. Two guides focused on transnational or international mechanisms of accountability: one guide looked at the mechanism under CAFTA's environmental chapter for filing civil society complaints; the other assessed the challenges and opportunities for filing a complaint against mining activities in Canada. The other two guides examined opportunities for remedies under Guatemala's domestic mining laws. The first looked at provisions for seeking suspension of a mining exploitation license under Guatemala's mining laws on the basis of irreparable harm. The second examined the case law precedent for how and when the Guatemalan government had imposed criminal sanctions for environmental justice violations. Below, I describe the deeper legal lessons that resulted from this work for our students and what it teaches us about social justice struggles of indigenous communities in the context of globalization. Moreover, I share a few of the invaluable inter-cultural and social justice lawyering lessons that would impact our students.

B. Lessons on Law's Potential for Social Change

1. Guatemala's Environmental Justice Norms and Legal Institutions

Two students closely examined Guatemala's environmental laws to explore domestic possibilities for legal remedies arising out of the Marlin Mine dispute. As a legal research exercise, the experience would prove extremely frustrating. As a lesson about the law's limits, the experience was deeply illuminating.

The first project looked specifically at Article 51(a) of Guatemala's Mining Law (Decree 48-97), which contemplates the suspension of a mining exploitation license in cases involving imminent harm to life or property.²⁵¹ The Rigoberta Menchú Foundation was interested in a guide that would explain how such a remedy could be sought in Guatemala and what standard would apply to the definition of "imminent harm." The student approached the project naively, the way he would have approached a similar research project in the United States. His initial instinct, in fact, was to ask me about searching Guatemalan case law interpreting the provision. The student's mistake went beyond the typical error of importing common law systems traditions into a civil law system. The student assumed too much. While he was never able to ascertain this fact definitively, it did not appear that, in 2009, Guatemala's Mining Ministry had ever implemented or awarded an Article 51 remedy. Unfortunately, the student was not even able to

251. Ley de Minería de Guatemala y su Reglamento Decreto N° 48-97 y Acuerdo Gubernativo 176-2001 de las leyes de Guatemala [Mining Law of Guatemala and its Regulation], at art. 51, available at <http://www.mem.gob.gt/Portal/MEMDocuments/DGM/Ley/ley%20de%20mineria%20y%20su%20reglamento.pdf>.

confirm whether an Article 51 petition for suspension has ever been requested.²⁵² The student's outreach to the Mining Ministry and to several Guatemalan NGOs that might have pursued such a remedy never yielded clear answers. For example, in a series of e-mail exchanges with the agency, the student was told by the Mining Ministry that Article 51 findings were not made public, nor could the student find evidence of a case in Guatemalan courts appealing an administrative denial.²⁵³ All the student received as guidance from the Mining Ministry was a referral to the Mining Law, sent to the student in English, and a suggestion that the student look at Guatemala's Administrative Code.²⁵⁴ Yet, the statutory research proved equally limiting to clarify substance or procedures. Article 51(a) of the Mining Law contained no definition of irreparable harm, for example.²⁵⁵ Moreover, Article 51 begins with the language, "subject to verification," the [Mining] Ministry shall order a mining license concession, without specifying whether Article 51 created a mandate to verify this and what substantive and procedural norms would be implicated in the verification process.²⁵⁶ The rest of the Mining Law provided no additional guidance on this. The Mining Ministry confirmed to the student that neither the Mining Law, its implementing regulations, nor any other law specified the norms or procedures to be followed for this verification process. Thus, the agency interpretation, at least as communicated to the student, was that the agency could verify any allegation informally and anonymously.²⁵⁷ In light of this, the student's guide consisted of explaining as best as possible, by relying on the Administrative Procedure Code, what steps the Menchú Foundation would need to follow to seek the suspension of an exploitation mining license in Guatemala.²⁵⁸ To provide guidance on the type of evidence that the Menchú Foundation would need to put together to present a strong case of irreparable harm, the student looked principally at cases with similar facts (i.e. indigenous communities affected by development activities in their land) in which the Inter-American Court and Commission on Human Rights has granted precautionary measures. The student discovered, in fact, that the evidentiary threshold before the Court and Commission was high,

252. For me, it was not until researching for this paper that I discovered that a mining suspension had been requested back in 2003 by the local communities affected by the Marlin Mine. *See supra* note 128 and accompanying text.

253. Manual para La Fundación Rigoberta Menchú sobre la Explotación Minera en la Comunidad de San Marcos (July 30, 2009) [hereinafter Manual sobre la Explotación Minera] (on file with author).

254. Ley de lo Contencioso Administrativo y Sus Reformas de Guatemala Decreto 119-96 [Administrative Litigation Law and its Reform in Guatemala], available at <http://www.scribd.com/doc/534608/DECRETO-NUMERO-11996-LEY-DE-LO-CONTENCIOSO-ADMINISTRATIVO-y-sus-Reformas>.

255. *See Ley de Minería de Guatemala y su Reglamento, supra* note 251.

256. *See id.*

257. Manual sobre la Explotación Minera, *supra* note 253, at Part II.

258. Article 59 of the Mining Law states that the Administrative Procedure Code may be used to seek resolutions with the Mining Ministry. *Id.*

requiring not mere allegations but actual evidence of facts that pointed to the likelihood of irreparable harm.²⁵⁹

The student understood the limited utility of his guide to the Menchú Foundation. One issue he raised, having spent by then about eight weeks with the Foundation, was how the Menchú Foundation could gather this type of evidence regarding irreparable harm in the affected communities given its limited resources. The student's initial reaction was to assert that the Foundation need not concern itself with this as it was the responsibility of the Guatemalan government to verify the allegations made by the Menchú Foundation in an Article 51 complaint. This reaction indicated to me that the student needed to be better informed about the Guatemalan government's position with regard to the Marlin mining activities. The student, therefore, added Part I to the Guide, which included a discussion of publically available reports produced by the Mining Ministry related to the Marlin Mine.²⁶⁰ In this section, the student conceded that the Mining Ministry's report of the mining activities from 2008 to 2009 completely contradicted the allegations made by the Menchú Foundation about the effect of the mine on the health and property of local residents.²⁶¹ The student noted that the government cites exclusively to environmental studies conducted by the Montana Exploradora-sponsored environmental monitoring team, AMAC, while ignoring other studies, including one completed by Robert Moran, which was referenced several times by international NGOs.²⁶²

In several conversations with the student during the project, I recall his frustration over the results of this guide. It was not clear to him how and whether the Menchú Foundation intended to pursue an Article 51 remedy, which also left him wondering why he needed to produce a guide in the first place. We had conversations about the fact that, even if the strategy was to pursue an international human rights case, local remedies in Guatemala needed to be exhausted. I asked the student to consider, as well, whether it generally would be good practice for civil society to bypass local legal institutions, however unlikely the odds of success there, and replace them automatically with international mechanisms. The student acknowledged the benefits of pushing for change domestically. This prompted the student to seek to strengthen the facts available to the Foundation. While he did not complete this part of the project, he tried to contact a few Canadian environmental NGOs, to prompt them to come and conduct environmental impact studies in the region. I appreciated his dedication and let him explore. The postscript, of course, is that many such environmental impact assessment studies have since been conducted of the mine. Unfortunately, however, these studies have not resolved the political, legal or social tensions

259. *Id.* at pt. III.

260. *Id.* at pt. I.

261. *Id.*

262. *Id.* at pt. I.3.

around this mining project.²⁶³ Nonetheless, the student had learned an invaluable lesson about the need to understand law contextually, taking into account not only the potential weaknesses of legal institutions but the political forces that dictated action or inaction in a given case. Legal analysis is often only the starting place. This is not a lesson that law professors get to explore in a traditional law school classroom as often or as effectively as can occur when learning is contextual and experiential.

The second student who engaged Guatemala's domestic laws was asked to create a jurisprudential guide of cases in which the Guatemalan government had imposed penal sanctions for environmental justice violations. It took the student nearly two months to be able to get his hands on seventeen case decisions. During this entire time, I experienced his growing frustration in his journal entries and over e-mail and phone communications, as he described having to travel from agency to agency, and from law office to office, collecting judgments (including, in a few instances, to remote areas of Guatemala). The student also recognized that he only had access to these few judgments based on the deep networking connections enjoyed by CALAS, the NGO with which he worked. The lawyers who provided the opinions were friends and law colleagues of some of the lawyers in CALAS. The fact that the student was able to get his hands on the opinions revealed a culture of professional favors that at once fascinated and bothered the student. The student reflected on the value of Westlaw or Lexis and lamented more than once how the absence of technology and information kept Guatemala's legal development backwards. He wrote about the lack of access to information as a way to control knowledge, and with it democratic development and progress. He also reflected about nepotism and networking in Guatemala and suggested that it could be both good and bad. The student's observations were perceptive, even if colored by his own legal culture. For one, I insisted to the student that our fixation with judgments revealed our roots in common law and Guatemala's roots in a civil law system. I suggested to the student that rather than wait for the opinions, his guide should start with a comprehensive explanation of what environmental violations had been typified as crimes in Guatemala. The student resisted this part of the assignment. I can only guess at perhaps his unfamiliarity with statutes and statutory research; but perhaps it was also that CALAS was looking for a jurisprudential analysis, a rarity in the country, as well as statistical analysis of what the judgments revealed about the Code's implementation. As to the student's perceptions on the value of "who you know" in Guatemala, the student was not wrong about Guatemala, but I also challenged him to consider whether this similar culture was truly a thing of the past in the United States. The issue is not as present in the United States, given prohibitions on *ex parte* communications²⁶⁴ in the courts and the public's greater

263. See *Manual sobre la Explotación Minera*, *supra* note 253, at pt. II.D.

264. See 5 C.F.R. § 1201.102 (2011) (prohibition on *ex parte* communications).

access to published opinions. It is more evident, however, in the legislative process, through the participation of lobbyists and powerful interest-groups who rely on power and networking to influence law.²⁶⁵ My point in doing this with the student was simply to encourage greater self-awareness about the limits of our own legal system and to discourage over-projections of superiority over other nations confronting similar challenges to democratic governance and transparency.

In the end, even with very limited data, the student made some interesting and useful findings. In addition to the seventeen cases the student was able to find and digest, the student examined some statistics provided by the Attorney General's Office [Ministerio Público] pertaining to crimes against the environment in the years 2007-2010.²⁶⁶ Based on this, the student was able to conclude that there is a great gap (of one to thirty-two in 2008) in the number of complaints received versus judgments rendered in the area of environmental justice crimes.²⁶⁷ The student also discovered backlogs and, at least in the cases examined, a tendency toward very lenient sentences, resulting mostly in nominal fines and hardly ever in incarceration.²⁶⁸ Moreover, the cases examined revealed that those targeted have been principally poor residents engaged in illegal practices for survival, including deforestation.²⁶⁹ Unfortunately, the guide is not sufficiently exhaustive in its statutory analysis and is limited to too few cases to draw broader conclusions about the availability of criminal sanctions related to mining against multinational executives. For example, cases against Montana Exploradora were not included in the guide, as they were dismissed for lack of sufficient evidence of environmental contamination.²⁷⁰ Still, the guide taught the student invaluable lessons about the benefits of transparency in legal systems and the importance of the availability of case law beyond its precedential value, as a revelation of implementation weaknesses of statutes. CALAS was probably less interested in the guide to file a case; rather CALAS, which often pushes for legislative reform, probably wanted to document the limitations of existing statutes to protect the environment. Unfortunately, in the traditional classroom, we teach cases to our students primarily to illustrate doctrines; contextual and experiential learning opportunities help students identify patterns and data that can be helpful to push for legislative reform. Of course, this student will probably never underestimate the revolutionary role that Westlaw and Lexis have in

265. Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADM. RES. THEORY 353-70 (2005).

266. Untitled student project for CALAS examining Guatemala's criminal environmental law cases (Summer 2010) (on file with author).

267. *Id.* at 5.

268. *Id.* at 6.

269. *Id.* at 7.

270. See *supra* notes 124-28 and accompanying text (discussing Guatemala's domestic complaints related to the Marlin Mine).

strengthening our own legal system, not solely because it provides a tool for litigators in a given case, but also because it is a database of empirical richness, useful to legal reformist thinkers who want to push for systemic changes to improve social justice.

2. Seeking Corporate Social Responsibility

Many legal scholars have lamented the limits of law to impose corporate social responsibility, faulting, in particular, the non-compulsory nature of many norms seeking to regulate the activities of multinationals, the overreliance on the strength of domestic legal systems where multinationals operate to achieve compliance, and the weaknesses of the liberalizing regimes to sufficiently regulate foreign investment or trade for environmental compliance.²⁷¹ The two students who worked on projects related to seeking corporate social responsibility would affirm some of these same lessons for Guatemala.

The first student prepared a guide at CALAS's request to examine the procedures and viability of filing civil society complaints for environmental harms under Chapter 17 of the CAFTA-DR.²⁷² CALAS did not ask that the student prepare this guide on the basis of any specific conflict; however, its lessons on corporate social responsibility have application to the Marlin Mine conflict as well. The student completed this project in 2009, when only one case had been filed against the Dominican Republic under CAFTA's provisions.²⁷³ Thus, the student relied on a comparative analysis of similar provisions under the NAFTA and other free trade agreements ("FTAs") in the Americas, to explain the likely interpretation and viability of Chapter 17 complaints. The purpose of this discussion is not to update the guide or elaborate on its technicalities; rather, it is to highlight some of the broader lessons the student learned about the limitations of environmental justice accountability in regional trade agreements. Before embarking on this project, in her first summer of law school, the student had never engaged in the study of trade agreements, and her exposure to a complex subject for the first time was incredibly enriched through seeing what

271. See generally EVARISTUS OSHIONEBO, *REGULATING TRANSNATIONAL CORPORATIONS IN DOMESTIC AND INTERNATIONAL REGIMES: AN AFRICAN CASE STUDY* (2009).

272. Article 17.6(1) of Chapter 17 of the CAFTA-DR provides that "[e]ach Party shall provide for the receipt and consideration of public communications on matters related to this Chapter. Each Party shall promptly make available to the other Parties and to its public all communications it receives and shall review and respond to them in accordance with its domestic procedures." Central American Free Trade Agreement, U.S.-Dom. Rep., art. 17.6(1), Aug. 23, 2010, 119 Stat. 462 [hereinafter, CAFTA-DR], available at http://www.caftadr-environment.org/left_menu/Chapter_17_CAFTA_-_DR.pdf.

273. Of the six complaints filed under CAFTA's Chapter 17 to date, all were filed in 2010 except the first case involving the protection of turtles in the Dominican Republic, which was filed in 2007. *CAALA/07/01 Tortugas Marina Rd*, SECRETARIA DE ASUNTOS AMBIENTALES, <http://www.saa-sem.org/index.php/g/temple/nuevo-registro-publico-de-comunicaciones/2007/83> (last visited Nov. 2, 2011).

was occurring in Guatemala, as related to the environmental issues in the country, including in the Marlin Mine. Through that lens, the student immediately understood the significance of the fact that complaints against Chapter 17 could only be filed against states for non-compliance in the effective application of domestic environmental laws, rather than involve suits directly against the multinational.²⁷⁴ While the student was drafting the guide, she attended congressional hearings and lobbying efforts by CALAS to discuss the weaknesses in Guatemala's environmental laws and, in particular, their implementation.²⁷⁵ As a result, the student wondered whether mere recommendations from CAFTA's Secretariat on Environmental Matter would really make any difference in Guatemala. A study of NAFTA civil society complaints offered a glimpse into other challenges that would make the CAFTA mechanism less than desirable for seeking corporate compliance in the Marlin Mine.²⁷⁶ For one, NAFTA environmental cases revealed that complaints had been few, perhaps in part due to the difficulty of the process; that even fewer resulted in a case being opened; that the process had been slow; and that procedural requirements, such as exhaustion of local remedies, made very few cases ripe for adjudication.²⁷⁷ I recall the moment when the student informed me that she worried a lot about the strict application of an exhaustion of local remedy requirement, especially when she had been comparing notes with the student who, at the same time, was writing about Guatemala's administrative proceedings to seek suspension of a mining license. I doubt the student would have captured this profound realization so well and so quickly had we been studying CAFTA's Chapter 17 solely in the classroom. Also, the student's guide asserts several times that the procedures are so complex that only a few organizations, such as CALAS, would probably know how to access the process. Nearly three years since the student prepared the guide, her predictions have proved almost prophetic. Only seven complaints have been filed under CAFTA-DR to date, three of which are against the Guatemalan government, including one presented by CALAS.²⁷⁸ None, however, relate to the Marlin Mine situation.

The second student prepared a guide more directly related to the potential for transnational litigation against Goldcorp for Montana Exploradora's mining activities in Guatemala. The student prepared a thirty-five page, singled-space

274. Article 17.7 of CAFTA provides that "[a]ny person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with a secretariat or other appropriate body ("secretariat") that the Parties designate." CAFTA-DR, *supra* note 272, at art. 17.7.

275. For a thoughtful discussion of environmental justice legal institutions in Guatemala, see generally Susan A. Berger, *Environmentalism in Guatemala: When Fish Have Ears*, 32 *LATIN AM. RES. REV.* 99 (1997).

276. See H. Hamner Hill, *NAFTA and Environmental Protection: The First 10 Years*, 2006 *J. INST. JUST. & INT'L STUD.* 157 (2006).

277. See generally *id.*

278. *Registro de Comunicaciones*, SECRETARIA DE ASUNTOS AMBIENTALES, <http://www.saa-sem.org/index.php/gt/template/nuevo-registro-publico-de-comunicaciones/2011> (last visited Nov. 2, 2011).

guide discussing very complicated doctrines of *forum non conveniens* and the liability of the parent company for the acts of its subsidiaries.²⁷⁹ Aside from learning about the extreme complexity in this area of law, this particular student was also transformed in thinking about social corporate responsibility. First, with close connections to Canada (his fiancée is Canadian), the student questioned his own preconceptions of Canadian attitudes toward sustainable development and socially responsible investment in foreign countries.²⁸⁰ Through this project and the example of the Marlin Mine, the student would discover Canada's struggles to put teeth into corporate social responsibility through the efforts of shareholders and Parliament. This particular student put a great deal of faith in consumer and shareholder accountability to improve issues of labor and environmental justice compliance in developing nations. In fact, he envisioned himself considering a career in corporate law, ideally to promote best social norms practices. He was very much drawn to projects related to fair trade. I very much hope that this student continues to pursue his laudable career interests. This student now, however, has a greater appreciation for the limits of solely voluntary norms or consumer-driven accountability to improve social justice conditions in developing nations. This realization did not come from the legal lessons learned through the project. The project certainly taught him a lot of law regarding significant defenses available to multinationals against transnational litigation. He also learned that Canada is even further behind than the United States in permitting suits to be brought against Canadian companies in Canadian courts.²⁸¹ But it was working on this issue, while completing an externship with the Menchú Foundation, that showed the student a human face to the struggle; and with that, I think, greater conviction that corporate responsibility must go beyond models of voluntary compliance in cases where people's struggles can be undermined based on their vulnerable status as indigenous communities.

C. Lessons on the Possibilities of Social Justice Lawyering

I do not think a single student who has participated in the Guatemala project has walked away without feeling proud of the legal profession and the role that lawyers play in promoting social change. For many of our students, this was a unique and rare gift. The cynicism against lawyers and the disrespect for the legal profession in popular culture can make law students forget the heroism, dignity, and worth of lawyers needed to create significant change in the lives of

279. Proyecto Final, Pasantía 2010, Fundación Rigoberta Menchú (Sept. 2010) (on file with author).

280. For accounts of the government of Canada's political and economic interest in Latin America starting in the 1980s, see generally Peter McKenna, *Canada's Policy Towards Latin America: A Statist Interpretation*, 49 INT'L J. 929 (1994); George W. Schuyler, *Perspectives on Canada and Latin America: Changing Context...Changing Policy?*, 33 J. INTERAM. STUD. & WORLD AFF. 19 (1991).

281. Imai et al., *supra* note 27, at 134-36 (discussing challenges to establishing jurisdiction in Canadian courts to sue Goldcorp for mining in Guatemala).

individuals and to improve society. In Guatemala, however, the intractable problems that society faces²⁸² made many of our students wonder why lawyers stayed; why they woke up every day to create change; why they did not give up. This was especially true of the students who worked with the environmental justice NGOs that taught our students so much about the courage and dignity of our profession. Through the experience, some would also discover their own courage and their profound humanity to connect very deeply with people so different from themselves.

1. *Courage*

One recurring theme for lawyers who fight for social change in Guatemala is their safety. One incident that hit closest to home for our students was the attack in September 2008 against Dr. Yuri Melini, the head of CALAS.²⁸³ Dr. Melini “was shot seven times in his stomach and legs on a Guatemala City street” shortly after CALAS won the constitutionality challenge against Guatemala’s mining law.²⁸⁴ Dr. Melini believed that his attack has something to do with his stance against mining given the timing of the attack, although the crime has not been investigated conclusively.²⁸⁵ Thankfully, Dr. Melini survived and is currently doing well, and improving every day. But when we first met him, a year after the attack, he was still on crutches and traveling with bodyguards.

It is impossible to meet Dr. Melini and not be transformed by him. A man of small stature, his presence is as large as his conviction over the struggle for environmental justice in Guatemala.²⁸⁶ For him, it began early, as a teenager; he studied medicine, not law, to please his parents. But his love of nature drew him to activism, and all his work is related to the use of law and legal institutions to push for change in his native Guatemala, a country he is literally willing to die for.²⁸⁷ In the process of deciding to work with CALAS, our students would discover their own courage as lawyers. As Director of the Inter-American program, I was open with my students and with my school about the incident. The two students who chose to work in CALAS included a female and a male student in their early twenties. They were not unduly dismissive of the dangers,

282. *Guatemala: Country Background Information*, GLOBAL YOUTH CONNECT, http://www.globalyouthconnect.org/country_guatemala.html (last visited Nov. 2, 2011).

283. *Guatemala: Threats Against Human Rights Defenders Dr. Yuri Giovanni Melini Salguero and Mr. Pedro Rafael Maldonado Flores*, FRONT LINE DEFENDERS, <http://www.frontlinedefenders.org/node/15797/action> (last visited Oct. 20, 2011).

284. Mahearnidiran et al., *supra* note 129, at 6.

285. *Id.*

286. For a very nice and representative video of Yuri Melini discussing his work on human rights after his attempted murder, see Front Line Human Rights Defenders, *Dr. Yuri Melini—Testimony at the 5th Dublin Platform*, YOUTUBE (Nov. 18, 2010), <http://www.youtube.com/watch?v=EXMAYRJKUq8>.

287. Ken Ellingwood, *Bullets Don't Stop the Guatemalan Green Activist*, NATIVE FOREST COUNCIL (June 11, 2009), <http://news.forestcouncil.org/2009/06/12/bullets-dont-stop-guatemala-green-activist-lat/>.

but were very thoughtful about the assessment of safety, risk, and their commitment to work on these issues. Ultimately, they acknowledged that there was a risk, but that it would be mitigated by their status as U.S. citizens, their low profile in the organization and project, and the safety precautions they would be required to take while in Guatemala.²⁸⁸ While I shared this assessment, I still very much admired the students' courage and determination.

2. Dignity and Perseverance

In our comparative law class on Guatemala, given Guatemala's long and terrible history of repression against indigenous communities,²⁸⁹ we inevitably spent a great deal of time discussing the victimization of indigenous communities. And as much as I repeatedly reminded students that Guatemalan Mayans are proud and dignified peoples, they have been through the shared spaces with indigenous professionals that some of our students have also been transformed by. All of our students who worked in Guatemala with NGOs had the opportunity to meet indigenous lawyers in the country, but the Menchú Foundation has been the richest of these experiences. I observed this especially in the guided reflections from the two students who worked in the Menchú Foundation and who became good friends with the people they worked with. One student spoke of dignity and perseverance as characteristics he observed and admired in his dealings with Mayan lawyers and other community leaders. These are lessons I could never have taught my students in the classroom.

IV. CONCLUSION

The day before we left Waikiki, we visited a local craft store where we would find authentic native products from the island. I admit to being shocked at how expensive the beautiful craft pieces were and could not help but compare them to the inexpensive cost of equally beautiful crafts in Guatemala. The socially-minded spirit in me wanted to do the right thing. So I bought a few things in the store, although the critical scholar in me made me wonder if any of it made any difference in the life of the artist who had crafted the piece. I did, moreover, buy one CD. You have probably heard of the artist, Israel "IZ" Kamakawiwo'ole, and if not the artist, certainly his rendition of the song "Over the Rainbow."²⁹⁰ If you have not heard it, you should. It is so melodious and

288. We have very strict safety rules for the program, all of which are explained in a Training Manual (available upon request).

289. *Guatemala: Memoria Del Silencio*, AM. ASSOC. FOR THE ADVANCEMENT OF SCI., <http://shr.aaas.org/guatemala/ceh/report/spanish/toc.html> (last visited Oct. 20, 2011); *Truth Commission: Guatemala*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-guatemala> (last visited Oct. 20, 2011).

290. *Biography*, THE OFFICIAL SITE OF ISRAEL "IZ" KAMAKAWIWO'OLE, <https://www.izhawaii.com/biography/> (last visited Oct. 20, 2011).

sweet, it sends chills down your spine. I had not realized until then that he was Native Hawaiian, although I had heard his Hollywood-famed voice.²⁹¹ Somehow, IZ transformed this song for me, to give it meaning, and it reminded me of the powerful lesson that my U.S. students taught me in Guatemala. It was one student in particular who said to me, “Professor Aldana, we are learning a lot in your class and we appreciate what you are doing, but we are depressed. Can we please talk about what is positive about Guatemala and its people?” So I want to leave you with the lyrics of this song and a few positive reflections about this mining struggle that are intended not to make light of the issue, but rather to take to heart the lesson from my student:

Social justice struggles need hope.

*Somewhere over the rainbow
Way up high,
And the dreams that you dream of
Once in a lullaby.*

*Somewhere over the rainbow
Bluebirds fly,
And the dreams that you dream of,
Dreams really do come true.*

*Someday I'll wish upon a star
And wake up where the clouds are far behind me.
Where troubles melt like lemon drops
High above the chimney tops
That's where you'll find me.*

*Somewhere over the rainbow
Bluebirds fly.
And the dreams that you dare to
Oh why, oh why can't I?*

So in honor of IZ, who passed away in 1997,²⁹² I close with the following observations. The success of nearly 800,000 “No” votes against the mine cannot be captured in a simple legal story of the failures of ILO 169.²⁹³ Rather, let’s look at what it said about a social movement among indigenous communities to stand up to defend their lands and resources. Let’s also consider the cohesiveness of the

291. *Id.*

292. Catherine Kekoa Enomoto & Gregg K. Kakesako, *The Revered Isle Singer, Beset with Respiratory and Other Medical Problems, Dies at 38*, STAR-BULLETIN (June 26, 1997), <http://archives.starbulletin.com/97/06/26/news/story1.html>.

293. COPAE, *supra* note 149. To date, 717,968 persons have voted “NO” in fifty-seven different consultative processes. *Id.*

purpose that this struggle has brought to the local communities, to reaffirm their desire for communal land ownership, and to consider alternatives to sustainable development. Let's hope and collectively support the efforts for fair trade in Guatemala. Let's praise the efforts of a few Canadian shareholders to give meaning to corporate social responsibility. Let me also celebrate the courage of our students, and the transformation that happened in each of them from this experience. Let me honor the incredible experience of my own transformation as a teacher, as a lawyer, and as a person, each time I make my way back to Guatemala.

