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Grassroots and Litigation-Based Approaches to Advancing Indigenous Rights: Lessons from Extractive Industry Resistance in Mesoamerica

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Grassroots and Litigation-Based Approaches to Advancing Indigenous Rights: Lessons from Extractive Industry Resistance in Mesoamerica

Justin Wiebe[1]

Abstract

Indigenous peoples are frequently recognized as excellent stewards of their traditional territories. These territories, which often exhibit extraordinary levels of biodiversity, face disproportionate and growing threats from extractive industry. In opposing these threats, Indigenous peoples increasingly rely on internationally-defined Indigenous rights, including those set out in UNDRIP and ILO Convention 169. It is uncertain, however, how these rights are most effectively advanced. In this paper, I tease out strategies – both grassroots-based and litigation-based – that show promise in this regard. Drawing on Waorani resistance to an oil auction in Ecuador and Indigenous resistance to a large-scale mining project in Guatemala, I show that grassroots-based and litigation-based approaches, while necessarily context-specific, should be deployed in concert. I argue that the Waorani's success is derived from their robust, multi-faceted, and inclusive campaign. In contrast, Guatemalan resistance relied almost exclusively on a narrower grassroots-based approach, which may have limited its impact. Even so, both case studies demonstrate that Indigenous rights-based arguments hold considerable promise vis-à-vis environmental protection.

Keywords

Indigenous Rights; Grassroots; Litigation; Extractive Industry

Contents

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1. Introduction

In recent years, there have been growing discussions by academics[2] and non-governmental organizations[3] concerning the potential for Indigenous rights to lead to environmental benefits. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[4] and, to a lesser extent, the 1989 International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169)[5], outline the notion of Free, Prior and Informed Consent (FPIC). The consequences of FPIC and related standards for development projects on the traditional (or otherwise occupied or used) lands of Indigenous peoples is the subject of growing discussion.

The traditional lands of Indigenous peoples are crucial in the global fight against environmental degradation. The Worldwide Fund for Nature, for example, asserts that 95% of the 238 most important eco-regions for conservation efforts are inhabited by Indigenous or traditional peoples.[6] In addition, while Indigenous peoples represent approximately 5%

[2] See, for example, Al Gedicks, "Transnational Mining Corporations, the Environment, and Indigenous Communities" (2015) Brown JWA [Gedicks].
[3] See, for example, Gonzalo Oviedo & Luisa Maffi, "Indigenous and Traditional Peoples of the World and EcoRegion Conservation: An Integrated Approach to Conserving the World´s Biological and Cultural Diversity" (2000) WWF & Terralingua [EcoRegion Conservation].
[4] United Nations Declaration on the Rights of Indigenous Peoples (2007) <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [UNDRIP].
[5] International Labour Organization (ILO) Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) [ILO Convention 169].
[6] EcoRegion Conservation, *supra* note 3 at pages 1-2.

of the world's population, they protect more than 80% of global biodiversity.[7] Lands under Indigenous control are often located in remote and (relatively) intact ecosystems, making them attractive targets for extractive industry and conservation efforts alike.[8]

Mining activities are particularly relevant in this regard. As environmental protection gains urgency, demand for the fruits of mining activity have simultaneously increased.[9] Factors including population growth and increased demand for electronics have led to significant growth in metal, industrial mineral, and construction material extraction. Increases in these three areas range from 53-106% between 1970 and 2004.[10] Fossil fuel extraction has also increased.[11]

Reliance by Indigenous peoples on rights defined in UNDRIP and ILO Convention 169, as well as their translation into national constitutions, may serve as a buffer against resource extraction in their territories. Given that Indigenous peoples are often recognized as the best environmental stewards of their own territories[12], this possibility has significant implications for environmental protection. If Indigenous peoples can harness these rights-based arguments[13], they may be able to maintain their stewardship practices – often recognized as highly sustainable – in their territories. Environmentally damaging activities may also be deterred. An examination of lessons learned from attempts to rely on Indigenous rights-based approaches, therefore, is timely and urgent vis-à-vis environmental protection.

This paper relies on two case studies to argue that Indigenous rights, as outlined in international documents, hold great promise for environmental protection. Given the strong potential for resource extraction to lead to environmental degradation, both case studies are situated in this context. The paper proceeds in the following manner. First, I outline an instance where robust and inclusive grassroots resistance is combined with litigation. The example focuses on the Waorani people of the Ecuadorian Amazon, who have invoked Indigenous self-determination in opposition to the Ecuadorian government's auction of oil rights on their traditional territory. Next, I analyse an example of (more limited) grassroots resistance, where Indigenous groups in Guatemala have staged *consultas* (akin to municipal plebiscites) to give voice to community opposition to a large-scale mining project on their ancestral lands. Drawing on these case studies, I analyse strengths and weaknesses of litigation-based and grassroots approaches, finding that resistance may be most effective where these approaches are combined. A combination of

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[7] Victoria Tauli-Corpuz, "Indigenous People are Guardians of global biodiversity – but we need protection too" (2019) Ethical Corporation <http://www.ethicalcorp.com/indigenous-people-are-guardians-global-biodiversity-we-need-protection-too>.
[8] *Ibid.*
[9] Gedicks, *supra* note 2 at pages 129-130.
[10] *Ibid.* at page 129, citing Donald G Rogich & Grecia R Matos, "Global Flows of Metals and Minerals" (2008) (Reston, VA: US Geological Survey).
[11] BP PLC, "BP Statistical Review of World Energy" (2019) <https://www.bp.com/en/global/corporate/energy-economics/statistical-review-of-world-energy.html>.
[12] See, for example, David Hill, "'Indigenous Peoples are the Best Guardians of World's Biodiversity': Interview with Special Rapporteur Victoria Tauli-Corpuz to mark the International Day of the World's Indigenous Peoples" (2017) <https://www.theguardian.com/environment/andes-to-the-amazon/2017/aug/09/indigenous-peoples-are-the-best-guardians-of-the-worlds-biodiversity> [Hill].
[13] In this paper, references to "rights-based" arguments or approaches refer to arguments that either invoke UNDRIP and/or ILO Convention 169 directly or contain arguments that align with the rights outlined in these documents.

robust grassroots and litigation-based approaches has the potential to significantly raise costs for entities that choose to disregard Indigenous rights. In this way, entities will pay a high price for engaging in environmentally destructive activities on Indigenous territories.

2. UNDRIP and ILO Convention 169

Internationally, Indigenous rights advocates rely heavily on two documents to advance their arguments. These are UNDRIP and ILO Convention 169. ILO Convention 169 was adopted in 1989 and is legally-binding on ratifying countries. UNDRIP, a declaration passed by the United Nations General Assembly, is not, without more, legally-binding on states.[14] UNDRIP was developed over a period of 25 years with extensive input from Indigenous peoples.[15]

Generally, UNDRIP provides for stronger rights-protecting language than ILO Convention 169. UNDRIP contains five references to FPIC, including in the context of the potential removal of Indigenous peoples from their lands[16], the removal of cultural and intellectual property[17], the implementation of legal measures affecting Indigenous peoples[18], and the storage or disposal of hazardous materials on Indigenous lands.[19] In contrast, ILO Convention 169 does not include reference to FPIC. One reference to "free and informed consent," however, is included.[20] Further, while UNDRIP includes the "right to conservation and protection of the environment,"[21] ILO Convention 169 refers only to the provision of "studies [where appropriate]. … to assess environmental impact".[22] Still, both documents contain significant rights-protecting language that can be relied upon by Indigenous rights advocates.

[14] Without more, UN General Assembly declarations are never legally-binding. Non-binding declarations can be tremendously influential, however. The right to a healthy environmental espoused in the Stockholm Declaration of 1972, for example, has been integrated into the national constitutions of at least 100 countries. See David Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment" in John H Knox & Ramin Pejan, eds, *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018) 17 for a full discussion on this topic.
[15] Former UN Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz makes the point that Indigenous peoples could not accept a UN declaration if it was made without their full participation. See Hill, *supra* note 12.
[16] UNDRIP, *supra* note 4 at Article 10.
[17] *Ibid.* at Article 11 (2).
[18] *Ibid.* at Article 19.
[19] *Ibid.* at Article 29 (2).
[20] ILO Convention 169, *supra* note 5 at Article 16 (2).
[21] UNDRIP, *supra* note 4 at Article 29 (1).
[22] ILO Convention 169, *supra* note 5 at Article 7 (3).

3. Waorani Resistance to the Auction of Oil Rights in Ecuador: Grassroots and Litigation-Based Approaches in Concert

In our first case study, I consider Waorani resistance to the auction of oil rights on their traditional territory. The Waorani are an Indigenous society of the Ecuadorian Amazon.[23] Today, the Waorani population is estimated as between 2,000 and 3,000 people.[24] Considered an ethnic minority in Ecuador, the Waorani are predominately located within the Yasuní National Park. Traditional Waorani Territory comprises approximately 6,786 square kilometres.[25] This territory is located within the lowland rainforest portion of the Western Amazon basin (known as the *Oriente*). The *Oriente* contains some of the most biodiverse ecosystems on Earth.[26] The Waorani are currently distributed amongst five dozen communities within this area.[27]

3.1 Background

Prior to 1958, the Waorani had little contact with the outside world.[28] Until the mid-twentieth century, they relied almost exclusively on the rainforest for their survival. At the time, it was relatively intact. Prior to the 1960s, Waorani society was organized around the *nanicabo* (familial units of 30 to 50 people).[29] Property was held in common. Common property is defined as "private property for the group". The *nanicabo* held all natural resources in common.[30] The holding of resources in common was done in an economically self-sufficient manner. Starchy tubers were consumed many times per day. Plantain, corn, and peanuts were also cultivated. Foraging, hunting and fishing rounded out the Waorani's semi-nomadic lifestyle.[31] The Waorani were known to vigorously guard their territory from incursions by outsiders, including against other Indigenous peoples, as well as loggers and trappers. This vigorous "border enforcement" still constitutes a significant part of the Waorani identity today.[32]

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[23] Much of the background material on the Waorani is from an excellent article looking at the effects of shifting Waorani and colonial borders pre and post-contact. See Flora Lu & Néstor L Silva, "Imagined Borders: (Un)Bounded Spaces of Oil Extraction and Indigenous Sociality in 'Post-Neoliberal' Ecuador" (2015) Soc Sci [Imagined Borders].
[24] *Ibid.* at page 442.
[25] *Ibid.* at page 440.
[26] See, for example, Matt Finer, Clinton N Jenkins, Stuart L Pimm, Brian Keane & Carl Ross, "Oil and Gas Projects in the Western Amazon: Threats to Wilderness, Biodiversity, and Indigenous Peoples" (2008) *PLoS ONE*.
[27] Imagined Borders, *supra* note 23 at page 440.
[28] Clayton A Robarchek & Carole Robarchek, *Waorani: The Contexts of Violence and War*, (Fort Worth: Harcourt Brace, 1998).
[29] Imagined Borders, *supra* note 23 at page 435.
[30] *Ibid.* at page 441.
[31] *Ibid.*
[32] Patricio Trujillo Montalvo, *Boto Waorani, Bito Cowuri: La fascinante historia de los Wao*, (Quito: Fundación de Investigaciones Andino Amazonicas, 2011) in *Ibid*. at page 442.

"First Contact" with the Waorani resulted from a collaboration between missionaries and private oil companies.[33] The semi-nomadic lifestyle of the Waorani constituted a threat to the exploitation of oil. With the financial and logistical support of several oil companies, missionaries formed a government-sanctioned "protectorate." The Waorani were "pacified" into concentrated settlements through missionary activities.[34]

Today, the life of many Waorani is considerably different from pre-contact. In a case study of a Waorani man in his mid-to-late seventies, it was shown that one particular Waorani community is almost entirely dependent on the oil industry for its livelihood.[35] The man, who grew up in a world of minimal contact with the outside world, now lives in a Waorani community circumscribed by an oil field. The community is bisected by an access road. At the time of the case study, the man was saving money to purchase a sound system and flat screen TV from a yearly stipend from an oil company.[36]

Continuous contact with the "outside world" has led to substantial change in the lives of those living in Waorani communities. As referenced in the above case study, modern technology has permeated the lives of many community members. An influx of Western commodities, including mass-produced foods and alcohol, has occurred. In addition, the use of cell-phones and televisions is typical.[37] Despite the use of these staples of "western" technology and culture, however, many Waorani continue to live in villages without road access.[38] Indeed, traditional Waorani territory remains central to the lives of numerous Waorani. Many believe that this traditional territory is fundamental to their survival as a people.[39]

3.2 Oil Auctions, Environmental Issues, and a Community Response

The Ecuadorian government uses a bidding process that allows companies to purchase the oil rights to particular blocks of land (known as oil auctions).[40] In 2010, the Ecuadorian government began a new round of such auctions, wherein (estimated) reserves of 120 million barrels were on offer.[41] This new round of oil auctions would affect over 7 million acres of traditional Indigenous territory, including approximately 500,000 acres of

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[33] Imagined Borders, *supra* note 23 at page 440.
[34] *Ibid.*
[35] Oil operations in Ecuador were initially largely private. The Ecuadorian government is increasingly a major producer, however.
[36] Imagined Borders, *supra* note 23 at page 435.
[37] Flora Lu, "Integration into the Market among Indigenous Peoples: A Cross-Cultural Perspective from the Ecuadorian Amazon" (2007) *Current Anthropology*.
[38] Rachel Riederer, "An Uncommon Victory for an Indigenous Tribe in the Amazon" (2019) The New Yorker <https://www.newyorker.com/news/news-desk/an-uncommon-victory-for-an-indigenous-tribe-in-the-amazon> [An Uncommon Victory].
[39] *Waorani v PIAV* (2019) <https://www.fundacionlabaka.org/index.php/observatorio/waorani-y-piav/125-sentencio-wao-1-instancia> [*Waorani v PIAV*] at "Background". The judgment was translated from Spanish to English using Google Translate. Precise paragraph references are often unavailable.
[40] "Six Companies Bid in Ecuador Oil Auction, Investment Likely Lower Than Expected" (2019) Reuters <https://www.reuters.com/article/us-ecuador-oil/six-companies-bid-in-ecuador-oil-auction-investment-likely-lower-than-expected-idUSKBN1QT2PT>.
[41] *Waorani v PIAV, supra* note 39 at "Background".

traditional Waorani territory.[42] In addition, the auction would affect the traditional territory of six other Indigenous groups.[43]

Previous oil projects on traditional Waorani territory have had devastating environmental impacts.[44] Resources that were once held in common, including the forests and waterways, have been devalued. These devalued resources have often been "replaced" by resources from the "outside world," such as health centres and recreation facilities funded by oil companies and/or the Ecuadorian state. Indeed, the state frequently claims that "Oil improves your [the Waorani's] community."[45]

The general attitude from the Ecuadorian state is that natural resources, such as wildlife, belong to the Waorani people. On the other hand, oil is said to belong to the Ecuadorian people.[46] Unfortunately, this attitude ignores the danger that little wildlife will be left if oil continues to be exploited. At a court proceeding (described below), an amicus curiae intervention pointed to significant sulfur dioxide emissions associated with oil projects.[47] Sulfur dioxide emissions leads to acid rain. Sulfur dioxide also negatively affects the pH of water, compromising aquatic life and drinking water. On a global scale, oil projects increase CO_2 emissions, leading to global heating.[48]

The Waorani's grassroots resistance must be considered to fully appreciate their invocation of Indigenous rights. Indeed, the community-based responses supported and interweaved with their legal response. Perhaps the most significant community-based response was an initial gathering of the Waorani People of Pastaza (CONCONAWEP).[49] The gathering laid out the Waorani position with respect to the oil auction. It played a major role in the decision to take court action. The gathering led to the "Mandate of the Waorani People of Pastaza for the defense of our territory and our ways of life." In invoking the importance of future generations, the Mandate declared: "Our territory is sacred and our ways of life depend on it; any exploration or exploitation activity will mean irreversible damage to our territory and our life. In the jungle is our knowledge, the essence of being Waorani." The mandate further states: "As it is determined in Ecuador, the consultation processes does not guarantee the ultimate purpose of consent, nor are they carried out according to clear standards of participation, suitability, [or] reasonable deadlines."[50] This Mandate provided CONCONAWEP with the legitimacy to go to court on behalf of the Waorani.

The gathering led to countless further community meetings where strategies were developed to defend Waorani territory.[51] Many of these strategies were put into action.

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[42] In Ecuador, the state *prima facie* owns subsurface mineral rights. See Imagined Borders, *supra* note 23 at page 443.
[43] An Uncommon Victory, *supra* note 38.
[44] See Judith Kimerling, "Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil, and Ome Yasuni" (2016) VtLRev.
[45] Imagined Borders, *supra* note 23 at page 449.
[46] *Ibid.* at page 446.
[47] *Waorani v PIAV, supra* note 39 at "Amicus Curiae Intervention".
[48] *Ibid.*
[49] *Waorani v PIAV, supra* note 39 at "Background".
[50] *Ibid.*
[51] Nemonte Nenquimo, the first female president of CONCONAWEP, was instrumental in developing the Waorani's community-based response. For her efforts, she was recently awarded the Goldman Environmental Prize (also known as the "Green Nobel"). See: "Indigenous Amazonian Leader Nemonte Nenquimo Is Named TIME 100 Most Influential People In the World" (2020) Amazon Frontlines

Modern technology was used, including the development of maps of Waorani ancestral lands placed at risk by the oil auction. The maps were produced using GPS, drones, and cameras.[52] In this regard, young Waorani community members received training in documentary filmmaking and photography.

Videos and images of Waorani territory, taken by Waorani members themselves, became part of the "Our Rainforest is Not for Sale" initiative[53], a campaign targeting potential investors worldwide and all members of the global community. In support of the campaign, many Waorani engaged in the mapping project described above, whereby crucial community features, such as turtle nesting locations and the directional flow of rivers and their effects on the broader territory, were documented.[54]

Based on the fruits of initiatives such as the mapping project, a petition in support of "Our Rainforest is Not for Sale" was issued, which eventually garnered hundreds of thousands of signatures.[55] The Waorani's community-based campaign was amplified by celebrity voices such as Leonardo DiCaprio[56] and Mark Ruffalo[57].

Waorani women were particularly involved in the resistance. Several Waorani women, for example, sang a traditional song about their role as protectors of the forest.[58] In Waorani communities, such an occurrence would normally be unextraordinary. However, the song interrupted the court process, and the judge suspended the hearing and moved it to a later date. The women were objecting to the hearing being held in Puyo, a city far from their traditional villages. They were also objecting to the lack of a court-certified translator.[59]

The Coordinating Council of CONCONAWEP, which counts as its members several Waorani groups in the Ecuadorian province of Pastaza, brought a court action against the Ecuadorian government.[60] The major issue was the alleged failure of the Ecuadorian government to adequately consult the Waorani prior to the auction.

<https://www.amazonfrontlines.org/chronicles/time-100-influential-nemonte-nenquimo-waorani-indigenous-amazon/>. When interviewed following her win, she stated: "What happens on our territory is our decision. Our territory is not up for sale". See also Anastasia Moloney, "Amazon ancestral land not up for sale, says 'Green Nobel' Winner" (2020) Reuters <https://www.reuters.com/article/us-ecuador-environment-amazon-interview/amazon-ancestral-land-not-up-for-sale-says-green-nobel-winner-idUSKBN28A0UO>.

[52] "Mapping Waorani Territory: In Defense of a Forest Homeland, a Culture, a Way of Life" (2021) Amazon Frontlines <https://www.amazonfrontlines.org/chronicles/mapping-waorani/#:~:text=The%20aim%20of%20the%20Waorani,territory%20is%20important%20to%20them>.

[53] "Protect the Amazon from Oil Drilling" (2021) Amazon Frontlines <https://waoresist.amazonfrontlines.org/action/> [Protect the Amazon].

[54] "8 Reasons the Landmark Ruling in Ecuador Signals Hope in the Struggle to Save Amazon Rainforest" (2019) <https://www.amazonfrontlines.org/chronicles/8-reasons-waorani-victory/>.

[55] Protect the Amazon, *supra* note 53.

[56] See: <https://twitter.com/LeoDiCaprio/status/1121538595855249408>.

[57] See: <https://www.instagram.com/p/BzYR44DAtB1/>.

[58] "Waorani Women Forces Judge to Call Lawyers to the Bench, Hearing for High-Stakes Lawsuit Suspended Until Further Notice" (2019) Amazon Frontlines <https://www.amazonfrontlines.org/chronicles/suspended-waorani-lawsuit/>.

[59] An Uncommon Victory, *supra* note 38.

[60] "Waorani people win historic appeal against Ecuador's government: Final verdict protects a half-million acres of Amazon rainforest from oil drilling" (2019) Amazon Frontlines <https://intercontinentalcry.org/waorani-people-win-historic-appeal-against-ecuadors-government/> [Final Verdict].

3.3 The Judgment: Affirming Indigenous Rights Through Litigation

The court action was brought by CONCONAWEP and the Ombudsman's Office of Ecuador (for Human Rights) on behalf of the Waorani people.[61] They were successful. The Court at first instance found that the Waorani's collective rights to self-determination and free, prior and informed consultation[62] were violated. The Court pointed out that these rights are enshrined in the Ecuadorian Constitution, which gives effect to international standards.[63] Counsel for the Waorani also argued that the oil auctions violated Article 71 of the Ecuadorian Constitution, which protects rights of nature.[64] In contrast to the argument on Indigenous consultation, the rights of nature angle failed. The Court reasoned that harm to nature had not occurred because no oil exploration and/or exploitation resulting from the oil auction had commenced.[65] Put simply, the Court was unwilling to accept that anticipated harm could amount to a violation of the Ecuadorian Constitution in this context.

The Court relied on Article 18 of UNDRIP to find that Ecuadorian state bodies, and in particular, the Ministry of the Environment and the Ministry of Hydrocarbons, violated the Waorani's right to self-determination.[66] The Court emphasized the right of Indigenous peoples to participate in decision-making processes where the outcome of such processes may affect them. Similarly, the Court noted that several articles of ILO Convention 169 support the proposition that good faith consultations must occur when projects affect the traditional territories of Indigenous peoples. For example, the Court cited Article 7.4, which states: "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."[67] Further, the Court found that a lack of consultation – or inadequate consultation – can lead to distrust between Indigenous peoples and outsiders.[68]

Impressively, the Court relied on a 2011 report of the Special Rapporteur on the Rights of Indigenous Peoples.[69] The Court referenced a portion of the report connecting loss of Indigenous control over traditional lands with environmental degradation.[70] The consequences of such violations include pollution of the atmosphere and water. Also of

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[61] *Ibid.*
[62] The judgment, at least at the first instance, uses the language of "free, prior and informed consultation" as opposed to FPIC.
[63] *Ibid.*
[64] The Court at first instance indicates that rights of nature protect nature by moving beyond the traditional conception of human rights as solely protecting humans. Rights of nature protect nature for its own sake, rather than as an extension of the interests of human beings. See 1(e) ("If the questioned prior, free and informed consultation violated the rights of nature?").
[65] *Ibid.*
[66] *Ibid.* at "Considerations and Fundamentals of the Court of Criminal Guarantees with Headquarters in the Canton Pastaza-Constitutional Judges for the Present Cause" 3.7.
[67] *Ibid.*
[68] *Ibid.*
[69] The referenced report was by the then Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. See "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive Industries Operating Within or Near Indigenous Territories" (2011) UN Human Rights Council.
[70] *Ibid.* at para 35.

note is that the Court recognized that any process of consultation is not a single event, but must be ongoing.[71]

The Court found that consultation must not be a mere formality. Instead, it must be an "instrument of participation."[72] Consultations should aim to achieve the consent of the group concerned, rather than simply disseminate information concerning the proposed project.[73] The Court found that the "consultation" strayed significantly from this standard. Secretariat of Hydrocarbons (SHE) officials, for example, used overly technical language that was not understood by Waorani communities.[74] In addition, attempts to translate concepts such as "Sociopolitical Management Model" from Spanish into the Waorani language was fraught with difficulty.[75]

The Court found that consultations must be performed in a culturally appropriate manner. Therefore, consultations will differ depending on context. In this case, SHE officials entered villages that had only recently been contacted by outsiders.[76] Indeed, these communities were not even aware of the purpose of the consultation visits.[77] Only much later did they understand that the purpose of the visits was to allow an oil company to explore their territory.

Article 7.3 of ILO Convention 169 states: "Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities." The SHE did produce a study on the expected social and environmental impacts of the oil auction. The Court found, however, that this study did not adequately consider these impacts.[78]

The Court ruled that the Ecuadorian government's consultation process was inadequate. Unsurprisingly, the Ecuadorian government quickly appealed the judgment. They were unsuccessful. In fact, the judgment on appeal strengthened the findings for the Waorani by ordering the Ecuadorian government to provide training in proper consultation techniques to officials tasked with consulting Indigenous groups.[79] Additionally, an investigation was ordered into the deficient consultation process.[80]

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[71] *Waorani v PIAV, supra* note 39 at "Considerations and Fundamentals of the Court of Criminal Guarantees with Headquarters in the Canton Pastaza-Constitutional Judges for the Present Cause" 3.7.
[72] *Ibid.* at "To guarantee this right to prior, free and informed consultation, the Inter-American Court of Human Rights has indicated that several standards must be observed such as …" 1 (b). This was one of the standards that the Court pointed to which had been adopted by the Inter-American Court of Human Rights.
[73] *Ibid.* at 1 (e).
[74] *Ibid.* at 1 (b).
[75] *Ibid.* at 1(e).
[76] *Ibid.* at 1(c).
[77] *Ibid.*
[78] *Ibid.* at 1 (d).
[79] *Ibid.*
[80] *Ibid.*

3.4 Evaluating the Waorani Resistance

The consequences of these positive rulings are monumental. Although the rights of nature argument failed[81], the successful invocation of Indigenous rights is expected to have strong benefits for environmental protection. Half a million acres of traditional Waorani territory are currently free from the oil auction process. In addition, the ruling provides a precedent for other Ecuadorian Indigenous groups to argue that adequate consultation is required before development may occur on their territory. In relation to the 2010 oil auctions alone, 6.5 million acres of Indigenous territory are potentially affected.[82] The ruling is all the more consequential given the traditional lifestyle of many Waorani. The Waorani are known to vigorously defend their territory from outsiders. If the Waorani are able to continue this defence from forces that would cause environmental harm, the consequences for environmental protection could be transformative. Finally, the ruling is a positive precedent for Indigenous peoples around the world in relation to consultation and FPIC.

The Waorani's resistance was multi-faceted. Their litigation-based resistance was assisted by inclusive community organizing. From youth involvement in filmmaking to impressive organizing by CONCONAWEP's president, the community-based involvement was broad. This broad base of support eventually attracted international attention. Although direct evidence that Ecuadorian judges were influenced by such attention is (obviously) lacking, international support for an otherwise marginalized and isolated community may have given judges pause.

While the Ecuadorian courts did not recognize the Waorani's right to FPIC (including consent), they did recognize a relatively robust form of consultation. The Court at first instance found that government consultation should be more than a mere formality, and that it should instead be an "instrument of participation." Further, the Court cited with approval a report by the Special Rapporteur on the Rights of Indigenous Peoples that drew an explicit link between the dispossession of Indigenous lands and environmental harm. Based on this case study, therefore, Ecuadorian courts may be a promising forum vis-à-vis environmental protection. As we will see in the Guatemalan case study below, litigation in that country is less promising.

4. Grassroots Resistance to Mining in Guatemala: The *Consultas*

In our second case study, I consider grassroots resistance to a large-scale mining project on the traditional lands of several Indigenous groups in Guatemala. As of October 2013, private companies operating in Guatemala retained 84 active licenses for mineral exploration. In addition, 284 licenses allowed for the exploitation of subsurface minerals.[83]

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[81] The reasons for this argument's failure may be particular to the Ecuadorian context. There seems to be no principled reason that demonstrated environmental harm need occur before a rights of nature argument could be successful. In fact, the inability to invoke the argument pre-emptively seems to defeat the purpose of rights of nature – environmental protection.

[82] Final Verdict, *supra* note 60.

[83] Jennifer N Costanza, "Indigenous Peoples' Right to Prior Consultation: Transforming Human Rights From the Grassroots in Guatemala" (2015) JHumRights [Transforming Human Rights] at page 261.

These licenses often permit exploitation on traditional Indigenous territories.[84] As of 2011, Natural Resources Canada reported that Canadian mining assets in Guatemala were valued at around $1.3 billion.[85] Following the Peace Accords of May 1996, Guatemala implemented a new mining code, which reduced the royalty rate payable by companies to the state from 6% to 1%.[86] The mining code likely had the effect of "opening up" vast swaths of traditional Indigenous lands to exploitation by extractive industry.

4.1 Background

Alongside the signing of the Peace Accords, Guatemala also ratified ILO Convention 169.[87] ILO Convention 169 takes precedence over domestic law due to Article 46 of the Guatemalan Constitution.[88] This Article states: "Human rights treaties and conventions that are accepted and ratified by Guatemala take precedence over domestic law."[89] The Constitutional Court of Guatemala has affirmed that "the [ILO] Convention … in its entirety, does not contravene the Constitution."[90] Guatemala has also voted in favour of UNDRIP at the UN General Assembly. Unfortunately, this decision may have been a political move more than anything, as UNDRIP, without more, is not legally binding.[91]

While Guatemala may, and often does, promote Indigenous culture as a symbol of its national identity[92], Indigenous calls for control over traditional land and resources are rarely supported by government actors (indeed, they are often vehemently opposed).[93] Article 67 of the Guatemalan Constitution recognizes, however, that "Indigenous communities and others which may own land that historically belongs to them and which they have traditionally administered in special form will maintain that system."[94] Of course, the fact that Guatemala has acceded to international conventions, and possesses constitutional protections for Indigenous rights, does not mean that these protections "play out" on the ground. Indeed, the opposite often occurs. As will be seen in our discussion of a large-scale mining project, ILO Convention 169 is not respected in practice despite being constitutionally protected through Article 46. The same is true of Article 67.

Following the signing of the Peace Accords, Glamis Gold Ltd. (which later became Goldcorp Inc., hereafter referred to as Goldcorp) was the first transnational mining

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[84] Gedicks, *supra* note 2.
[85] *Ibid.* at page 136.
[86] *Ibid.* at page 137.
[87] Amnesty International, *Guatemala: Mining in Guatemala: Rights at Risk* (London: Amnesty International Ltd, 2014).
[88] AJS Monterroso Uijl, *Indigenous land rights in Guatemala: Analysis on (inter)national norms and the Margin of Appreciation of the State* (Tilburg: Master's thesis, Tilburg University) [Indigenous Land Rights in Guatemala] at page 17.
[89] *Ibid.*
[90] Lucia Xiloj, "Implementation of the right to prior consultation of Indigenous Peoples in Guatemala" in Claire Wright and Alexandra Tomaselli, eds *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap* (Abingdon: Routledge, 2019) 243 [Xiloj] at page 244.
[91] Transforming Human Rights, *supra* note 82 at page 265.
[92] *Ibid.* at page 266.
[93] See, generally, Gedicks, *supra* note 2.
[94] Indigenous Land Rights in Guatemala, *supra* note 88 at page 20.

corporation to arrive in Guatemala.[95] Operating through its wholly owned subsidiary, Montana Exploradora, a large-scale gold mine (known as the Marlin Mine) was developed in a remote mountainous region in the Department of San Marcos. The region around the mine is inhabited by two separate Indigenous groups – the Mam Maya and the Sipakapense Maya.[96] Many members of these groups participate in subsistence agricultural activities, such as growing corn, beans, and coffee.[97]

4.2 The Marlin Mine and Its Impacts

In its wake, the Marlin Mine brought community tensions and violence. The San Miguel Ixtahuacán Defence Front, a community group opposed to the mine, has pointed to several threats against the lives of its members.[98] A major case was that of Diodora Antonia Hernández Cinto.[99] Hernández, a Maya Mam woman, refused to sell the land that she uses to graze her animals – in the same manner that her ancestors have done for centuries. In July 2010, Hernández was shot through her right eye by unidentified armed men on her property.[100] Later, Hernández's opponents blocked her access to water, with the aid of corrupt local leadership. The blockage had significant effects on Hernández and her family, as well as her livestock.[101] Individuals living near the mining site have also suffered assassination, intimidation, and fraudulent land acquisitions.[102] Finally, Indigenous communities in close proximity to the mining site only learned of the sale of the mining rights to Goldcorp after the fact.[103]

The environmental impacts of the Marlin Mine were expected to be, and were, severe. Writing in a 2004 report, a hydrologist determined that the "Negative environmental impacts [associated with the project] are likely to be considerably more significant than those discussed in the Marlin EIA [the company's environmental impact assessment]. Based on experience at numerous similar mine sites, the most significant impacts are likely to be: increased competition for water … [and the] likely degradation of local surface and ground water quality."[104] The importance of water for communities around the mine was emphasized in a statement by an Indigenous community organizer: "Primarily it is about water, for us water is extremely important. People cannot live without

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[95] Alexandra Bailey Pedersen, *¡Somos La Puya! (We Are La Puya!): Community Resistance to Canadian Mining Company Operations in Guatemala* (Department of Geography and Planning PhD Thesis, Queen's University, 2018) [*¡Somos La Puya!*] at page 129.
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.* at page 132.
[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.* at pages 132-133.
[102] JP Laplante & Catherine Nolin, "*Consultas* and Socially Responsible Investing in Guatemala: A Case Study Examining Maya Perspectives on the Indigenous Right to Free, Prior, and Informed Consent" (2014) SocNatResour [Consultas] at page 234.
[103] *Ibid.* at page 237.
[104] Robert Moran, *New Country, Same Story: Review of the Glamis Gold Marlin Project EIA, Guatemala* (2004) at page 10 <https://miningwatch.ca/sites/default/files/moran_marlin_rpt_feb_2005_0.pdf > at page 10.

water, right?"[105] In addition, cyanide was used in the mining process, and residents worry that this toxic chemical might seep into water used for the household and for agriculture.[106]

Despite significant concerns over Indigenous and other human rights violations, as well as the potential and actual environmental damage, the Marlin Mine enjoyed significant support both within Guatemala and internationally. For example, the International Finance Corporation – an arm of the World Bank – provided the project with a US$45 million loan. In addition, the then Canadian Ambassador to Guatemala stated: "Through sustainable development of our mining resources, these communities [in Guatemala] are creating the economic, cultural and social infrastructure necessary to secure their future and the future of their children."[107] In addition, the Guatemalan president at the time, Óscar Berger, argued that it was the duty of the Guatemalan government to "protect the investors."[108]

4.3 Grassroots Resistance Through *Consultas*

Significant grassroots activism arose in resistance to the Marlin Mine. Activists have consistently invoked international norms including FPIC and Indigenous self-determination. Community opposition has been channelled through *consultas communitarias* (*consultas*). *Consultas* are municipal plebiscites used by Indigenous communities in Guatemala to voice opposition to (most often) resource extraction projects.[109] Between 2005 and mid-2013, 78 Indigenous Maya communities in Guatemala (representing around 1 million people) have initiated *consultas*.[110] The number of Guatemalan Indigenous communities who have held *consultas* likely now measures in the hundreds.[111]

Consulta organizers opposing the Marlin Mine are clear that their aim is not merely to advocate for fairer mining laws or a more just distribution of the products of extraction. Rather, *consultas* are about re-affirming the right of communities to say "no" to Goldcorp.[112] They are about the right to FPIC. Indigenous Sipakapan leader Mario Tema, for example, described the purpose of the vote as "revindicating the rights of people who have been the owners of these territories for at least the last 5,000 years."[113]

The results of *consultas* regarding the Marlin Mine have been overwhelming. A 2005 *consulta* in the community of Sipakapa, for example, revealed that of the 2,504 community members who voted, 2,415 opposed the Marlin Mine on their traditional territory.[114] The Sipakapa Municipal Council relied on Articles 6 and 15 of ILO Convention 169 in staging the

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[105] Consultas, *supra* note 102 at pages 241-242.
[106] Other notable environmental impacts include the contamination of water sources more generally, as well as high levels of heavy metals found in individuals living near the mine. See Consultas, *supra* note 102 at page 234.
[107] *¡Somos La Puya!*, *supra* note 95 at page 130.
[108] *Ibid.*
[109] Consultas, *supra* note 102 at page 233.
[110] *Ibid.* at pages 231 and 236.
[111] This number continues to grow. See *¡Somos La Puya!*, *supra* note 95 at page 8. The "*consultas* movement" began several years earlier in 2005, sparked by Indigenous opposition to a hydroelectric project. See Consultas, *supra* note 102 at page 235.
[112] Consultas, *supra* note 102 at page 236.
[113] Dawn Paley, "Turning Down a Gold Mine" (2007) The Tyee <https://thetyee.ca/News/2007/02/07/MarlinProject/>.
[114] Consultas, *supra* note 102 at page 239.

"consultation in good faith,"[115] showing that community leaders explicitly invoked international norms as the impetus for the *consulta*. Another *consulta* in the community of Cabrican revealed a similarly high level of opposition – 13,610 of 13,813 community members voted "no to mining."[116]

In interviews, community members from Indigenous groups near the Marlin Mine have been asked for their reflections on the *consultas*. A recurring theme of responses is that the *consultas* reflect the "voice of the people."[117] A statement from an organizer in Cabrican is illuminating: "It is the right of the people to say yes or no. What has happened in other examples in Guatemala is that the people have not been taken into account, they [the Guatemalan government] have not listened to our voice, and the people are not given the opportunity to decide. Because Guatemala has good written laws, but they are sometimes not in favor of the Maya people."[118]

Community members see the *consultas* as expressions of the will of the community, rather than the accumulation of individual views. *Consultas* are often characterized by public votes, where community members line up behind either the "yes" or the "no" table. The votes, therefore, are often not secret.[119] Community members see this "voice" in terms of the Indigenous right to self-determination, even if they do not use the scholarly language of FPIC.[120] Community members also saw the concepts of "consultation" and "consent" as deeply interrelated. One interviewee indicated that consultation was effectively meaningless without the right to say "no." He realized that Goldcorp believed it had consulted, but dismissed the process as disingenuous.[121]

Although the Guatemalan Constitution ostensibly protects Indigenous territories and the right to self-determination, the broader legal and power structure is less favourable. Most lawyers in Guatemala believe that ILO Convention 169 does not require municipalities to hold consultations prior to moving forward with project development.[122] In addition, the Guatemalan government has sought to "regulate" *consultas*[123], although it is unclear how this "regulation" would occur. Guatemalan courts interpret the right to consult narrowly.[124] Their interpretations are far removed from FPIC or the "voice of the people." Guatemalan courts make little reference to international standards of consultation, much less FPIC. In addition, even in the case of successful court judgments, there is often little willingness on the part of government and corporate officials to effectively implement them.[125]

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[115] Xiloj, *supra* note 90 at page 245.
[116] Consultas, *supra* note 102 at page 239.
[117] *Ibid.* at page 240.
[118] *Ibid.*
[119] Transforming Human Rights, *supra* note 82 at page 274. Although unusual or even suspect by Canadian electoral standards, *consultas* aim to ascertain the will of the community rather than the position of individual members. The focus is not on the voting patterns of individuals, but on the general direction that the community wants to move towards.
[120] Consultas, *supra* note 102 at page 240.
[121] *Ibid.* at pages 240-241.
[122] Transforming Human Rights, *supra* note 83 at page 267.
[123] Consultas, *supra* note 102 at page 243.
[124] Xiloj, *supra* note 90 generally.
[125] *Ibid.* at pages 258-259.

4.4 Evaluating the *Consultas*

The success of the *consultas* in relation to the Marlin Mine have been mixed. A judgment of the Guatemalan Constitutional Court (after an action brought by Goldcorp's Guatemalan subsidiary) found that it was acceptable for communities to initiate *consultas* for the purpose of determining community views.[126] The Court also found, however, that they are non-binding. The Court determined that ILO Convention 169 was insufficiently precise in terms of the particular entity that owes Indigenous peoples a duty to consult.

The Marlin Mine ceased operations in May 2017.[127] Goldcorp provided no explanation for the mine's shutdown. Although many community groups welcomed this development, they also condemned Goldcorp for its failure to pay reparations for the (well-documented) harms associated with the project.[128] They also drew attention to the lack of adequate laws addressing the shutdown of massive extraction projects.[129]

There have been some successes. The mine's closure is one – although this cannot be directly tied to the activism of Indigenous communities in the area. In addition, that the Guatemalan government is seeking to regulate the *consultas* indicates that they have had some effect. *Consultas* have become an effective grassroots tool for Indigenous groups to demonstrate a lack of consent. They can be seen as expressions of Indigenous rights – which have been codified at the international level – at the local level. *Consultas* can also strengthen community ties, given the overwhelming opposition to the Marlin Mine. While it is unclear whether *consultas* have managed to halt any projects, they have likely managed to slow some.[130]

5. The Ecuadorian and Guatemalan Contexts Compared: The Benefits of a Multi-Faceted Approach

The Waorani and the Guatemalan Indigenous communities used the language of human (including Indigenous) rights. Doing so may not have always been intentional, although it was in some instances. In any event, notions such as the "voice of the people" and the stewardship of ancestral lands correspond closely with principles found in UNDRIP. Using the language of rights increases solidarity across borders. Notions of solidarity reinforce the fact that communities opposing the exploitation of their traditional territories are not isolated entities – they are connected with similar groups facing similar struggles across the globe. Indeed, Waorani community leaders as well as counsel representing the Waorani pointed to their belief that the ruling is a victory for the entire world, not simply the Waorani.[131]

Opposition to the Marlin Mine relied almost entirely on a grassroots approach to advancing the principle of FPIC. Grassroots approaches have strengths and weaknesses. A major strength of community-based approaches is that they need not rely on government authorities or corporate actors to carry them out. Therefore, a grassroots approach may be

[126] Consultas, *supra* note 102 at pages 235-236.
[127] *¡Somos La Puya!*, *supra* note 95 at page 133.
[128] *Ibid.* at pages 133-134.
[129] *Ibid.* at page 134.
[130] Transforming Human Rights, *supra* note 83 at page 277.
[131] Final Verdict, *supra* note 60.

more appropriate where such entities are unsupportive. In Guatemala, it is clear that neither the government nor company officials had any interest in adequately consulting the affected communities, much less admitting that FPIC applied. This is demonstrated by the ferocious support for the Marlin Mine by government and corporate actors alike – despite well-documented concerns and opposition from community members.

Currently, FPIC – as well as the lesser right to consultation – is not sufficiently recognized in Guatemalan jurisprudence, much less by the Guatemalan government. In this context, grassroots campaigns, such as *consultas*, may be one of the only (relatively) effective options. Grassroots campaigns come with significant downsides, however. Their aims are unenforceable – those with the power to stop environmentally destructive projects can disregard them. There is nothing compelling the Guatemalan government or Goldcorp to heed the results of these *consultas*. Indeed, Goldcorp was satisfied with the "consultation" they carried out. The Guatemalan government was stridently opposed to the *consultas*. In this context, and without more, the "voice of the people" may fall on deaf ears.

While the judicial and governmental environment in Guatemala is less favourable than that in Ecuador, the development of a more holistic strategy of resistance may have been beneficial. The *consultas* could have benefited from additional strategies such as those employed by the Waorani. For example, there may have been opportunities to combine the *consultas* with other forms of grassroots activism, such as mapping, filming, and photographing areas of environmental and cultural significance put at risk by the Marlin Mine project. There may also have been opportunities to document the harms caused by mining activity.

Further, Indigenous groups did not bring a legal challenge to the Marlin Mine (rather, Goldcorp's Guatemalan subsidiary initiated litigation). Even though such a challenge might have had little chance of success, it would present an opportunity to draw further attention to the project by, for example, targeting international investors of the mine.

Unlike the (relatively narrow) opposition to the Marlin Mine through *consultas*, the Waorani-led opposition to the oil auction combined litigation with a robust and diverse grassroots approach. These approaches were interwoven; each supported the other.

Litigation has the advantage of compelling decision-makers to act or to refrain from acting. Indeed, there is no suggestion that the Ecuadorian authorities will not comply with the final judgment. The Ecuadorian and Guatemalan contexts are therefore different in this regard. In contrast to the Guatemalan context, FPIC – or at least a relatively robust form of consultation – is being applied by Ecuadorian judges. Here, advancing Indigenous rights-based arguments through litigation is more likely to succeed. While Guatemalan judges should theoretically apply the principles of consultation and consent, the country's judicial system gives weak effect to that country's international commitments.

Although the litigation of internationally-defined Indigenous rights shows less promise in Guatemala, that step was not attempted in relation to the Marlin Mine. If Indigenous communities brought a case in a Guatemalan court arguing that their rights were violated by the Marlin Mine, and if they combined the case with a robust and inclusive grassroots campaign, their chance of success would have vastly increased.

The Waorani counsel's mandate from community members meant that they maintained a close connection with the Indigenous group. Generally, there is a danger that litigation-focused strategies lead to a disconnect with the actual members of the Indigenous

group concerned. This danger did not appear to be realized in the Waorani context, perhaps due to the multi-faceted and inclusive approach taken by the Waorani, demonstrated by, amongst other things, Waorani women attending the courthouse for the initial hearing. As well, the court case was brought, in part, by an organization (CONCONAWED) that was tasked with representing the various Waorani communities.

While the Court at first instance only accepted the need for consultation, counsel argued that FPIC was required. In my view, without the close connection between counsel and the community, counsel would be more likely to tailor their arguments – likely more conservatively – to what Ecuadorian judges might accept. The danger would be that robust conceptions of internationally-defined Indigenous rights would not be heard in court. In this case, such a situation seems to have been avoided. Despite the reliance on litigation in the Ecuadorian context, the Waorani were able to advance similar arguments in court to what Guatemalan groups advanced through their *consultas*.

6. Indigenous Rights as a Vehicle to Raise Costs Associated with Environmentally Harmful Activities

Naturally, an analysis based on two case studies is limited in its generalizability. Nonetheless, Indigenous peoples around the globe face similar issues. As well, all Indigenous peoples can rely on the principles found in UNDRIP and ILO Convention 169 to protect their ancestral lands.

The ability to rely on internationally-defined Indigenous rights-based arguments represents a fundamental shift in power relations between Indigenous communities on the one hand and national governments and corporations on the other.[132] Even if Indigenous communities are ultimately unsuccessful in "defeating" a particular project, resistance using the language of internationally-defined Indigenous rights has the potential to raise costs for entities that would disregard these rights.[133] Corporations and governments that disregard these rights do so at their peril. Therefore, invoking principles such as FPIC where there is substantial community opposition to a project can be an effective means of resistance. As we have seen, resistance that combines litigation with robust and inclusive grassroots resistance may be most effective.

The argument that Indigenous rights can be leveraged to disrupt existing power relations between Indigenous communities and national governments is bolstered by the fact that Indigenous rights-based arguments may succeed where other arguments fail. This was certainly the case in Ecuador. There, Indigenous rights proved to be a powerful tool in halting environmentally destructive projects. These arguments were more persuasive to Ecuadorian judges than the rights of nature approach, despite also being enshrined in Ecuador's Constitution.

The Waorani resistance was more effective in raising the cost to proceed with an environmentally harmful activity than its Guatemalan counterpart, due to robust grassroots and litigation-based resistance. This resistance garnered international attention, notably, amongst investors. In contrast, opposition to the Marlin Mine failed to extend far beyond the *consultas*, meaning that investors in that mine may not have been aware that

[132] Al Gedicks makes a similar point. See *supra* note 2 at page 147.
[133] See *Ibid.* at page 135.

Indigenous rights were at issue. Discussion of the Marlin Mine in relation to Indigenous rights remained largely limited to the academic literature.

The differences in approaches present an opportunity for future invocations of Indigenous rights in opposition to environmentally harmful projects. Given the promise of Indigenous rights vis-à-vis environmental protection, Indigenous groups should attempt to increase their influence to more effectively invoke the principle of FPIC. In Guatemala, Indigenous groups had some success in grassroots organizing. Another way of expanding grassroots resistance would be to bring additional Indigenous voices into positions of power, such as within government and the judiciary. In this way, decisions affecting Indigenous people would be more likely to be taken by those with a personal understanding of their issues. In addition, Indigenous perspectives would be shared with others in positions of power who are less inclined to agree with them.[134]

Our cases studies emphasize that change must also come from countries fuelling the demand for the products of extractive industry. Given the growing calls for transparency and due diligence in corporate supply chains[135], as well as the recognition by most companies that greater transparency is necessary[136], "business as usual" cannot continue. Indigenous groups, drawing on the Waorani model, can leverage these growing calls by publicizing their stories to audiences within these countries.

Although corporate social responsibility initiatives may be insufficient on their own, corporations can voluntarily decide to implement UNDRIP principles throughout their operations. Corporations should undertake UNDRIP training within their workforce, particularly at the highest levels. There is no question that had Goldcorp's decision-makers taken UNDRIP principles into account, the Marlin Mine would have been a substantially different project. If relevant corporations fail to take UNDRIP into account in their planning processes, there will be calls for mandatory legislation to compel them to do so. Indeed, even in the absence of such legislation, victims of alleged abuses have made their voices heard in Canadian courtrooms.[137] In the future, such would-be victims may specifically invoke UNDRIP.

Finally, connections between environmentalists and Indigenous rights advocates should be strengthened. It is unfortunate that conservation efforts and Indigenous rights have often clashed.[138] The connections between Indigenous peoples and the environmental movement, however, have strengthened in recent decades.[139] In my view, the general objective of environmentalists – to protect nature – would be well-served if the traditional lands of Indigenous peoples were maintained under the stewardship of the Indigenous

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[134] Of course, there is a danger that Indigenous voices would be co-opted by the pro-extractivist state. In my view, however, it is more likely that these activists would continue to advocate for Indigenous rights.
[135] See Allard International Justice and Human Rights Clinic, *In the Dark: Bringing Transparency to Canadian Supply Chains* (Vancouver: Allard School of Law, 2017).
[136]See COERB at the Schulich School of Business, SHARE & World Vision Canada*, The Straight Goods: Canadian Business Insights on Modern Slavery in Supply Chains* (Toronto & Mississauga: COERB, SHARE & World Vision, 2019) <https://share.ca/wp-content/uploads/2019/05/Cdn-Business-Insights-on-Modern-Slavery-in-supply-chains_final2.pdf>.
[137] See, for example, *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 (CanLII) and *Garcia v Tahoe Resources Inc,* 2017 BCCA 39 (CanLII).
[138] See Hill, *supra* note 12. The current UN Special Rapporteur on the Rights of Indigenous Peoples counts conservation efforts as amongst the top 3 threats to Indigenous peoples.
[139] Gedicks, *supra* note 2 at page 135.

peoples who have lived on them for centuries. From our cases studies, environmentalists have every incentive to maintain and form strong connections with Indigenous peoples. In Ecuador, the Waorani were successful in halting the auction of oil rights on their traditional territory by invoking Indigenous rights. In contrast, the rights of nature argument – associated with the environmentalist movement – was unsuccessful. In Guatemala, where Indigenous rights principles such as FPIC are rarely applied by national institutions, grassroots resistance to environmentally destructive practices nonetheless coalesced around them.

7. Conclusion

Indigenous rights-based arguments have the potential to shift power relations from governments and corporations to Indigenous communities. In this paper, I show that Indigenous rights – as defined in international documents such as UNDRIP – hold great promise for slowing and/or halting environmentally destructive extractive projects. Based on case studies from Ecuador and Guatemala, I tease out strategies that may be most effective in this regard. Indigenous rights-based arguments appear most effective when robust grassroots initiatives are combined with litigation. While grassroots approaches are preferable where power structures are less unfavourable, as in Guatemala, success is more likely when such approaches are diversified. In Ecuador, where the power structures were more favourable, litigation had a greater chance of success. Crucially though, the Waorani combined litigation with a robust, multi-faceted, and inclusive grassroots strategy. Combined approaches therefore hold significant promise vis-à-vis environmental protection.