

**Title:** “No Le Importa”: Examining Human Rights Abuse Allegations Against Pan American Silver Pertaining to Free, Prior, and Informed Consent in Guatemala

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**Abstract:** This paper represents an in-depth case study analysis of Pan American Silver’s Escobal mine in San Rafael Las Flores, Guatemala as it relates to social license and the right to Free Prior and Informed Consent (FPIC). More specifically, this paper critically examines the allegations that led to a series of legal actions against the corporation with regard to the Xinka indigenous community and their claim that prior consultation had not occurred. Through first-person interviews and literature review, this analysis revealed that Pan American silver did not take appropriate actions to ensure FPIC. It concludes with lessons learned on the importance of social license to ensure a sustainable, equitable future for the Xinka people and greater San Rafael Las Flores region.

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## Introduction

“No le importa.” *They don’t care.* This was what many members of the Xinka community members in San Rafael las Flores, Guatemala told me over a series of interviews in October 2017, nearly a decade after they first began their fight against Canadian mining company, Pan American Silver.<sup>1</sup> At the time, they were referring to the Tahoe Resources Group (Tahoe), the Canadian owners of the Escobal silver mine that would soon be acquired by the Canadian mining company, Pan American. The Xinka people, an indigenous group native to Guatemala’s southern departments, had been protesting against the Escobal project and Tahoe since mining representatives first appeared to gain exploration permits in 2007.<sup>2</sup> Their health, well-being, and overall livelihoods were at stake following the repeated violent and environmental impacts of the mine of their community. The months following my research in San Rafael Las Flores would be some of the most telling for the Xinka people and their 13-year fight. Weeks later, Guatemala’s government would rule in favor of the community, demanding Escobal halt operations until Tahoe completed consultations with the Xinka, as required by ILO Convention 169 on Indigenous and Tribal Peoples. In 2019, the mine would be at the forefront of groundbreaking litigation in Canada, representing the first time a transnational company was tried in a Canadian court for human rights abuses that occurred abroad. The court ruled in favor of the defendants, Xinka community members who received compensation from Pan American for violence during a peaceful demonstration in 2013.<sup>3</sup>

The lead-up to these rulings, and what has happened since, is a snapshot of the troubling history of the company behind the Escobal project and its relationship with the Xinka people. Pan American has faced recurring allegations of human rights abuse for actions that occurred both before and after their acquisition of the mine from Tahoe. The allegations include a series of violent attacks and targeting of community members in opposition to the mine, and repeated claims that Tahoe, with the help of Guatemala’s Ministry of Energy and Mines (MEM), ignored the community referendum against mining in their territory and evidence of environmental and health arms when they obtained an exploitation license for Escobal. This second allegation supports the notion that Tahoe never obtained social license to operate - something academics, business experts, and government actors alike agree is integral to any land-based project.

With this at the forefront, the purpose of this paper is to critically examine the allegations that led up to abovementioned legal action. After examining the allegations about prior consult and lack of a social license, this paper concludes that Pan American did, in fact, violate the human rights of the Xinka people when it neglected to complete consultations to obtain Free Prior and Informed Consent (FPIC).

I begin with an overview of Tahoe (now Pan American) and the Escobal operation in Guatemala, discussing their history with the community and their actions towards sustainable operations, human rights and community engagement. I then evaluate the allegations made by

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<sup>1</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. “Quelvin Jiménez: las consultas son fruto del derecho de libre determinación.” Ceppas.org.gt (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

<sup>2</sup> Brown, Alleen, and Martyna Starosta. 2019. “She Defended Her Land Against a Mine in Guatemala. Then She Fled in Fear for Her Life.” *The Intercept* (blog). June 23, 2019. <https://theintercept.com/2019/06/23/guatemala-land-defender-san-rafael-mine/>.

<sup>3</sup> Friedman, Gabriel. 2019. “Big win for foreign plaintiffs as Pan American settles Guatemala mine case.” *Financial Post*. <https://business.financialpost.com/commodities/mining/big-win-for-foreign-plaintiffs-as-pan-american-settles-guatemala-mine-case>

the Xinka community against Tahoe and Pan American, and conclude that the community's claim that the company never completed consultations to obtain FPIC, as required by international law and the World Bank, is accurate. I conclude by proposing next steps to hold Pan American accountable and possibly rectify the company's relationship with the local community.

### **Setting the Stage: The history of Tahoe in Guatemala**

Although the Guatemala did not experience the same mining boom as other places in Latin America, like Peru or Chile, the Central American country sits atop some of the largest mineral deposits in the world. Also unlike many of its Latin American partners, Guatemala does not have a history of artisanal, small-scale mining woven into cultural practices. Instead, the country's mining sector has largely revolved around interest from multinational corporations, many of whom began business in the country during and immediately following Guatemala's devastating civil war. In "History, Violence, and the Emergence of the Guatemalan Mining Sector," Samantha Fox explains that Guatemala's resource extraction industry notably grew at a time of intense internal conflict (which the UN has since recognized as a genocide) that spanned decades and left an estimated 200,000 dead, the majority of whom were indigenous.<sup>4</sup>

Guatemala's first large-scale mine, Compañía Minera de Huehuetenango, a subsidiary of the Hoover Mining Group (headed by former U.S. President Herbert Hoover's son), began operations as the armed conflict picked-up speed, and continued operating through the 36 years of conflict in the region.<sup>5</sup> Advocacy organizations and activists have since deemed many multinational companies like the Hoover Mining Group complicit in the Guatemalan government's violent rampage against indigenous peoples, resulting in a fraught relationship with indigenous communities that continues to this day.<sup>6</sup>

Today, Guatemala's extractive sector represents between 2-3% of its GDP.<sup>7</sup> Between 2013 and 2014, four new mining projects commenced in the country, one of which was Tahoe Resource's Escobal mine.<sup>8</sup>

In 2010, Canadian mining company, Tahoe Resource Group, bought a majority stake of the rights for three separate exploration and exploitation licenses for gold, silver, lead, and zinc in the Guatemalan departments of Santa Rosa and Jalapa from Goldcorp, leaving Goldcorp with a 26% stake in the project.<sup>9</sup> Guatemala's Ministry of the Environment and Natural Resources (MARN) together with the Ministry of Mines approved the company's environmental impact study and awarded Tahoe a 25-year operating license soon thereafter.<sup>10</sup> In 2012, Tahoe broke ground on the project, and by 2014, Escobal was ready for commercial production, which

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<sup>4</sup> Fox, Samantha. 2015. History, Violence, and the Emergence of Guatemala's Mining Sector. 3rd ed. Vol. 1. Pp. 26. Environmental Sociology.

<sup>5</sup> Ibid, pp. 154.

<sup>6</sup> Streeter, Stephen M. 2000. Managing the Counterrevolution: The United States and Guatemala 1954-1961. Pp. 201. Ohio University Press.

<sup>7</sup> "Tercer Informe Nacional de Conciliación EITI Guatemala." 2015. Extractive Industries Transparency Initiative (EITI). [https://eiti.org/files/documents/informe\\_eiti\\_gt\\_2014\\_-\\_2015\\_-\\_reporte\\_final\\_240117\\_0.pdf](https://eiti.org/files/documents/informe_eiti_gt_2014_-_2015_-_reporte_final_240117_0.pdf).

<sup>8</sup> Ibid.

<sup>9</sup> "Goldcorp Inc to Sell 26% Stake in Tahoe Inc in \$1-Billion Bought Deal | Financial Post." 2015. Bloomberg News. June 15, 2015. <https://business.financialpost.com/investing/goldcorp-inc-to-sell-26-stake-in-tahoe-resources-inc-in-1-billion-bought-deal>.

<sup>10</sup> Swan, Michael. 2019. "Probe Sought into Canadian-Owned Mine in Guatemala." The Catholic Register. January 9, 2019. <https://www.catholicregister.org/item/28740-probe-sought-into-canadian-owned-mine-in-guatemala>.

included a mixed open-pit and underground operation.<sup>11</sup> The mine is estimated to have a life of 19 years, which is typical for most silver operations.<sup>12</sup>

At the height of the mine's production in 2015, Escobal produced a record 20.4 million ounces of silver, reaching a daily operating production of 4,500 tons per day.<sup>13</sup> But as Escobal was progressing towards becoming the largest silver mine in the world, tensions with the community, which began before when the company started exploration in 2003, allegedly before completing an initial community consult, continued to escalate. In 2015, The Government Pension Fund of Norway, managed by Norges Bank Investment Management (NBIM), and Goldcorp both divested their stakes in the project with little warning.<sup>14</sup> Goldcorp dismissed their sale of Tahoe as a divestment of non-core assets and a key part of their growth strategy, and in doing so, neglected to attribute the divestment to problems associated with the mine itself.<sup>15</sup> But NBIM was more forthcoming. In a statement released following their divestment, the NBIM's Council of Ethics wrote that their exclusion of Tahoe was due "to an unacceptable risk of the company contributing to serious human rights violations through its mining activities".<sup>16</sup> Before diving into allegations that may have fueled this divestment, it is necessary to provide additional context about the environment surrounding the mine and relevant stakeholders.

### Key Stakeholders

The Escobal mine is located in southeast Guatemala, outside the town of San Rafael de las Flores, approximately 40 km from Guatemala City.<sup>17</sup> This region of Guatemala constitutes part of the *Corredor Seco*, or dry corridor, an arid area that spans Guatemala, Honduras, Nicaragua, and El Salvador, and has experienced some of the worst effects of climate change in profound droughts lasting decades.<sup>18</sup> The residents of San Rafael de las Flores have struggled to maintain their livelihoods through agriculture, producing predominantly corn and pineapples.<sup>19</sup>

The Xinka people, who make-up the local community in the Jalapa and Santa Rosa provinces, have led the opposition against Tahoe and Pan American over the years. The Xinka are a non-Mayan indigenous population native to Central America, and are one of the 24 estimated indigenous groups in Guatemala.<sup>20</sup> In 2018, the Guatemalan census identified nearly 300,000 Xinka across the country, making the Xinka the fifth largest indigenous group in the

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<sup>11</sup> "Tahoe Inc. - Operations." 2018. Tahoe (Web Archive). August 20, 2018. <https://web.archive.org/web/20180820171835/http://www.tahoeresources.com/English/operations/guatemala/default.aspx>.

<sup>12</sup> Ibid.

<sup>13</sup> "Escobal Mine: Key Facts." n.d. Tahoe (Web Archive). Accessed December 8, 2019.

<https://web.archive.org/web/20170403200454/http://www.tahoeresources.com/operations/escobal-mine/>.

<sup>14</sup> "Why Did Goldcorp Really Pull out of Tahoe' Troubled Guatemalan Mining Project?" 2015. Oxfam America: The Politics of Poverty (blog). July 7, 2015. <https://politicsofpoverty.oxfamamerica.org/2015/07/why-did-goldcorp-really-pull-out-of-tahoe-resourcess-troubled-guatemalan-mining-project/>.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> "Escobal Mine: Key Facts." n.d. Tahoe (Web Archive). Accessed December 2, 2019.

<https://web.archive.org/web/20170403200454/http://www.tahoeresources.com/operations/escobal-mine/>.

<sup>18</sup> "Dry Corridor Central America: Situation Report." 2016. Food and Agriculture Organization of the United Nations (FAO).

<sup>19</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. "Quelvin Jiménez: las consultas son fruto del derecho de libre determinación." Ceppas.org.gt (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

<sup>20</sup> "Guatemala - IWGIA - International Work Group for Indigenous Affairs." n.d. International Work Group on Indigenous Affairs. Accessed December 16, 2019. <https://www.iwgia.org/en/guatemala>.

country.<sup>21</sup> This figure was up from an estimated 16,000 who identified as Xinka in the last census, and the dramatic increase in reporting followed a movement by community leaders to increase visualization and representation of the Xinka in light of the Escobal case (described in greater detail below).<sup>22</sup>

The Guatemalan government sought swift approval of the Tahoe' project. They have since been at the center of a legal battle over the mine's operability. In 2017, Guatemala's supreme court demanded Tahoe halt operations until the Xinka community was appropriately consulted.<sup>23</sup> Although the ruling met multiple challenges in court over the last two years, the project remained shuttered, and the company claims to have received little guidance from Guatemala's Ministry of Mining, who had been tasked with working with the company, on how to proceed.<sup>24</sup>

Pan American acquired Tahoe in 2018 for \$1.1 billion at the height of allegations against Tahoe over the use of inappropriate police force.<sup>25</sup> The majority of the human rights allegations surrounding the Escobal project occurred during the period that Tahoe was the owner. However, in acquiring Tahoe, Pan American assumed liability for the mine. When reviewing the allegations and responsibilities of the company, I will discuss them with reference either to Tahoe or Pan American, depending on the timeline. When discussing means of accountability and next steps, I will refer only to Pan American.

## **Tahoe & Pan American: Assessing Corporate Policies and Practices**

When Tahoe purchased the rights to the Escobal project, it was a new company that had only been incorporated the year prior.<sup>26</sup> Its first acquisition was the Escobal mine, followed by two additional projects in Peru and one in Canada. Tahoe's 2016 US Security and Exchange Commission (SEC) filings describe a corporation eager to break into the Latin American mining market. In the "Specialized Skill and Knowledge" section of their SEC filing, Tahoe writes that they have "extensive experience" in "exploration and development in Guatemala and Peru," along with other parts of the Americas.<sup>27</sup> The Escobal project was promising due to its size and the favorable regulatory environment in Guatemala. Tahoe raced to purchase Escobal's assets, complete the impact assessments, purchase three additional mining assets across Latin America, and release its initial public offering over the course of just three years.<sup>28</sup>

Tahoe's website and documents are hard to find. Pan American formalized their acquisition of Tahoe, including their four active projects across Guatemala, Peru, and Canada in 2019. Since then, Tahoe's website, which housed sustainability reports, project descriptions, and their most recent 10k, is largely deactivated, and includes a redirect link to Pan American's

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<sup>21</sup> Vásquez Monterroso, Diego. 2019. "Los Xinka: ciclos históricos e invisibilización censal." Plaza Pública. September 26, 2019. <https://www.plazapublica.com.gt/content/los-Xinka-ciclos-historicos-e-invisibilizacion-censal>.

<sup>22</sup> Ibid.

<sup>23</sup> Jamasmie, Cecilia. 2018. "Tahoe's Escobal Mine Licence to Remain Suspended — Guatemalan Court." MINING.COM (blog). September 4, 2018. <https://www.mining.com/tahoes-escobal-mine-licence-remain-suspended-guatemalan-court/>.

<sup>24</sup> Ibid.

<sup>25</sup> Taylor, Susan. 2018. "Pan American Silver Offers \$1.1 Billion to Buy out Tahoe." Reuters, November 14, 2018. <https://www.reuters.com/article/us-tahoe-resources-m-a-pan-amer-silver-idUSKCN1NJ0ZD>.

<sup>26</sup> "Annual Information Form: Tahoe Inc.: Exhibit 99.1." 2016. The U.S. Securities & Exchange Commission. March 9, 2016. [https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page\\_5](https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page_5).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

website.<sup>29</sup> Using the online tool, The Way Back machine, which allows users to look at previous screen captures of websites to see if content has changed, one sees that many of the links on Tahoe's site are deactivated. What is left of Tahoe's webpage offers little insight regarding human rights or responsible business practices. The "Sustainability" Section available on the homepage remains, and lists core values of respect, transparency, leadership, and integrity, and show a snapshot of corporate social responsibility (CSR) projects.<sup>30</sup> Curiously, none of the images of corporate social responsibility projects appear to be from Guatemala, despite the fact that Escobal represented Tahoe's largest operation in size and revenue.<sup>31</sup> According to Tahoe's SEC filings, Tahoe is "committed to conducting business honestly and ethnically everywhere we operate."<sup>32</sup> The same SEC filing has a section titled, "Alignment with International Protocols and Best International Practices," which states:

*"The Company has aligned its policies and practices with the United Nations Guiding Principles on Business and Human Rights ('Guiding Principles'), the Voluntary Principles on Security and Human Rights ('VPS') and the Equator Principles. The Company finalized a comprehensive Social Impact Assessment and outlined its strategies to avoid, minimize or mitigate real or perceived social impacts in its Social Management Plan. We also implemented a new grievance mechanism in Guatemala in January 2015 to align with the Guiding Principles and the International Finance Corporation ("IFC") Performance Standards. This mechanism utilizes the NAVEX Global's case management software which provides for multiple communication options. The same grievance mechanism is being implemented at La Arena and Shahuindo Mines in Peru and is expected to be fully operational by the second quarter of 2016."*<sup>33</sup>

Here, Tahoe expresses their commitment to a series of principles that are recognized for their efforts to increase transparency, sustainability, and responsibility.

Additionally, Tahoe was a member of the Business for Social Responsibility (BSR) initiative, a global network of companies, thought leaders, and stakeholders focused on sustainability, and Centro para la Acción de la Responsabilidad Social Empresarial (CentraRSE), a corporate social responsibility organization in Guatemala of over 100 companies committed to operating using responsible business practices.<sup>34</sup> <sup>35</sup> They joined both of these organizations after their acquisition of the Escobal mine. Their memberships suggest their interest in upholding these organizations' principles, which include a focus on equitable and responsible development initiatives and transparent community relations. In 2018, Tahoe also joined the UN Global

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<sup>29</sup> I was able to access a small number of the former Tahoe website pages using a publicly available web archive, Wayback Machine.

<sup>30</sup> "Tahoe Inc. - Home." n.d. Tahoe. Accessed December 16, 2019.

<https://www.tahoeresources.com/English/home/default.aspx>.

<sup>31</sup> "Social Responsibility." n.d. Tahoe. <http://www.tahoeresources.com/social-responsibility/responsibility/>.

<sup>32</sup> "Annual Information Form: Tahoe Inc.: Exhibit 99.1." 2016. The U.S. Securities & Exchange Commission. March 9, 2016. [https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page\\_5](https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page_5).

<sup>33</sup> Ibid.

<sup>34</sup> "Membership | BSR." Accessed February 13, 2020. <https://www.bsr.org/en/membership>.

<sup>35</sup> Ibid.

Compact, which curiously occurred months before they began acquisition talks with Pan American.<sup>36</sup>

Pan American's website is more substantive. It contains references to sustainability and corporate social responsibility visible on their homepage. When Pan American acquired Tahoe, it was the seventh largest silver producer in the world,<sup>37</sup> and Escobal was set to represent nearly 25% of the company's future earnings.<sup>38</sup> The company's homepage proudly displays their commitment to "building the right projects," and says Pan American holds an "industry-leading reputation for operational excellence and corporate social responsibility."<sup>39</sup> Notably, the images and examples Pan American broadcasts appear to come from their Peru projects, and not Guatemala.

Pan American does not publish a separate corporate social responsibility policy, instead including it in their annual sustainability report. In their 2018 sustainability report, Pan American writes that their corporate social responsibility policy is meant to be integrated throughout the company, detailing their commitment to stakeholder engagement and development within local communities<sup>40</sup>:

*"A central tenet of our CSR Policy is to engage local communities in a timely inclusive, transparent, and culturally appropriate way throughout the mine life cycle."<sup>41</sup>*

This policy includes a social responsibility framework to measure and track social and environmental impacts across their projects. Although they acknowledge the different cultural and social contexts surrounding their projects, Pan American says their impact framework "provides a consistent methodology" while allowing for the flexibility to tailor their approach given the circumstances of each operation.<sup>42</sup> The framework includes: A baseline assessment, establishment of engagement teams and a feedback and response mechanism, implementation of various CSR programs, internal capacity building pertaining to social and environmental impacts, and ongoing social audits.<sup>43</sup> There is a dedicated human rights section of the report, in which Pan American commits to "abide by applicable local human rights laws" and to "align with key international human rights conventions."<sup>44</sup> Curiously, the human rights section, does not explicitly mention FPIC or local regulation on consults when it comes to interacting with local communities. Instead, it focuses primarily on security personnel and internal policies on contracting and training security personnel to ensure they uphold human rights of the

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<sup>36</sup> "Tahoe Resources joins UN Global Compact." 2018. BNamericas. Accessed December 30, 2019.

<https://www.bnamericas.com/en/news/tahoe-resources-joins-un-global-impact>.

<sup>37</sup> Bell, Terence. 2019. "Learn About the World's 10 Biggest Silver Producers." The Balance. November 2019.

<https://www.thebalance.com/the-10-biggest-silver-producers-2340234>.

<sup>38</sup> Croft, Valerie. 2019. "When Pan American Silver Bought the Escobal Mine, It Bought a Legacy of Violence." Rabble.Ca. May 8, 2019. <https://rabble.ca/blogs/bloggers/2019/05/when-pan-american-silver-bought-escobal-mine-it-bought-legacy-violence>.

<sup>39</sup> "Pan American Silver: Home." n.d. Pan American Silver | Corporate Site. Accessed December 16, 2019.

<https://www.panamericansilver.com/>.

<sup>40</sup> "Sustainability Report: 2018." 2018. Pan American Silver.

[https://panamericansilver.com/sustainabilityreport2018/wp-content/uploads/2019/05/PAS-Sustainability-Report-2018\\_Final-Web.pdf](https://panamericansilver.com/sustainabilityreport2018/wp-content/uploads/2019/05/PAS-Sustainability-Report-2018_Final-Web.pdf).

<sup>41</sup> Ibid, pp. 21.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, pp. 31.

communities they come into contact with. Pan American writes that they implemented a compliance program for armed security personnel, to provide “additional guidance and verification of [their] relationships , support, and interface with public security forces.”<sup>45</sup>

At the end of their report, Pan American acknowledges their need to enhance their social audit tool to include an improved human rights lens in the process, and expresses a desire to incorporate the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>46</sup> They write that key next steps include: “develop[ing] our security management framework focusing on company-wide processes influenced by international best practices, including the Voluntary Principles on Security and Human Rights, [...] the UN Guiding Principles on Business and Human Rights,” as well as revising “our social audit tool to include an improved gender, human rights, and security lens in the audit process.”<sup>47</sup>

That Pan American makes explicit reference to these integral components of upholding social responsibility and sustainability is important. The UNGPs, which were developed between 2005 and 2011 by then-Special Representative of the UN Secretary-General for business and human rights, John Ruggie, are leading global standards on business and human rights. The 31 principles, unanimously endorsed by the UN Human Rights Council, lay out expectations for states and companies about roles and responsibilities when it comes to preventing and addressing business’ negative impacts on human rights.<sup>48</sup> By expressing their desire to incorporate the UNGPs, Pan American is expressing their public commitment to respect human rights. If they were to follow through, they should expand and elaborate their processes for human rights due diligence to assess risks to human rights, and provide processes for remedies to anyone who is harmed either directly or indirectly by the business.<sup>49</sup>

In their 2018 report, Pan American does not make reference to human rights due diligence, nor to any access to remedy. Additionally, while Pan American does mention their interest in the UNGPs and provide high-level action items, the report neglects to include any sense of a timeline for when they might take further action.

Furthermore, as mentioned above, the need to consult with local communities is not explicitly mentioned at any point in the report. A footnote near the end reads:

*“We recognize the Indigenous communities near some of those mines and look forward to working with them to address any concerns and achieve mutually positive outcomes.”<sup>50</sup>*

This quote, while seemingly sincere, appears somewhat as an afterthought towards the end of the 72-page sustainability report. If Pan American were serious about working with indigenous communities, they might reference ILO convention 169, and their commitment to upholding the FPIC process and indigenous peoples’ right to prior consult. Notably, both Pan American and Tahoe came under fire for not disclosing sufficient information about steps taken

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<sup>45</sup> Ibid, pp. 21.

<sup>46</sup> Ibid, pp. 32.

<sup>47</sup> Ibid, pp. 31.

<sup>48</sup> Ibid, pp. 29.

<sup>49</sup> “UN Guiding Principles.” N.d. Shift Project. Accessed May 29, 2020. <https://www.shiftproject.org/un-guiding-principles>.

<sup>50</sup> Ibid, pp. 31.

to earn FPIC in the documents surrounding Pan American's acquisition of the mine.<sup>51</sup> Leading activist groups, EarthWorks, Breaking the Silence, and Mining Watch Canada asked the SEC to investigate the acquisition based on failure to disclose adequate information, citing U.S. and Canadian laws that require companies involved in mergers or acquisitions to disclose information warning investors of situations that may impact profitability.<sup>52</sup> The groups claim that the information provided little more than brief acknowledgment of the need to consult with indigenous groups, and failed to provide a timeline for doing so or a comprehensive community engagement plan.<sup>53</sup>

### **Assessing the Allegations against Pan American**

When Pan American acquired the Escobal mine, the project had already been severely criticized for human rights abuses. The allegations fall into two broad categories that are closely related. The first pertains to violent conflicts and targeted assassinations of activists, believed to have been carried out by a private security firm the mining company contracted. The second, the focus of this analysis, pertains to the failure to obtain FPIC of the Xinka. Both sets of allegations attracted significant press attention and ultimately resulted in lawsuits at the high courts in Guatemala as well as Canada. .

In 2013, security services contracted by Tahoe opened fire on peaceful protestors outside the mine, injuring a number of individuals present.<sup>54</sup> This followed what the local Xinka population described as years of intimidation and violent tactics in which indigenous activist leaders were followed, threatened, and in at least two cases, killed.<sup>55</sup> In 2014, seven Xinka community members filed a lawsuit in Canada against Tahoe seeking damages for the violence.<sup>56</sup> As the FPIC debates continued, this case for damages against the company for the violence the community suffered wound its way through the Canadian court system, eventually arriving at the Supreme Court of Canada. In 2019, less than four months following Pan American's acquisition of Tahoe, Pan American reached a settlement with the Guatemalan plaintiffs and offered a public apology.<sup>57</sup> This marked the first time in Canadian history that the court agreed to hear a suit against a Canadian company for alleged abuses abroad.<sup>58 59</sup>

As this case played-out in Canada's courts, Xinka community leaders were leading a fight over a greater and all-encompassing human rights abuse allegation - that they had never been consulted before Tahoe, now Pan American, began their project in Santa Rosa and Jalapa.

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<sup>51</sup> García, Jody. 2019. "La Minera San Rafael tiene nuevos dueños con otra actitud sobre la consulta." Nómada, Guatemala. (blog). January 10, 2019. <https://nomada.gt/identidades/guatemala-rural/la-minera-san-rafael-tiene-nuevos-duenos-con-otra-actitud-sobre-la-consulta/>.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> "Tahoe Lawsuit." 2019. Business & Human Rights Resource Centre. 2019. <https://www.business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala>.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Feldman, Gabriel. 2019. "Big Win for Foreign Plaintiffs as Pan American Settles Guatemala Mine Case." Financial Post (blog). July 31, 2019. <https://business.financialpost.com/commodities/mining/big-win-for-foreign-plaintiffs-as-pan-american-settles-guatemala-mine-case>.

<sup>59</sup> Notably, despite Pan America's apology and settlement, Xinka activists allege they have continued to face threats and intimidation. The Business and Human Rights Resource Center has reported on continued attacks against Xinka Parlamento Leader and head lawyer, Quelvin Jiménez. See article here: <https://www.business-humanrights.org/en/23072019-lic-quelvin-jim%C3%A9nez>

In 2013, the Xinka joined Mayan communities in a petition to the Inter-American Commission on Human Rights condemning the Guatemalan government and multinational mining companies for failing to respect their rights to be consulted.<sup>60</sup>

*“El Consejo de los Pueblos Maya y Xinka denunció al Estado de Guatemala ante la Comisión Interamericana de Derechos Humanos (CIDH) por afectar sus derechos a la participación, consulta y consentimiento e impedir que decidan sobre la instalación de proyectos mineros e hidroeléctricos en sus territorios.”<sup>61 62</sup>*

The notion of consulting communities living in a particular region before beginning a project is not new and has informally been seen as “the right thing to do” throughout the course of development.<sup>63</sup> But in the case of many countries, including Guatemala, consultation has somewhat of a legal backing (albeit not necessarily binding), and stems from the greater concept of Free, Prior, and Informed Consent (FPIC). FPIC originates from the ILO Convention 169, which the ILO adopted in 1989 as a new attempt to protect indigenous and tribal peoples.<sup>64</sup> Today, Convention 169 is still considered by many experts to be the most important mechanism in defense of the rights of indigenous and tribal peoples around the world.<sup>65</sup> Convention 169 contains 12 articles, each discussing a substantive right for indigenous peoples. FPIC originates from Article 6, which calls on governments to:

*“Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.”<sup>66</sup>*

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<sup>60</sup> “Los Pueblos Maya y Xinka: Petición Ante La Comisión Interamericana de Derechos Humanos.” 2013. Consejo de los Pueblos. <https://docs.google.com/file/d/0Bzx8UtC5qWPbVXFQTU9Ba3J0ZGM/edit?pli=1>.

<sup>61</sup> In English: “The Council of the Mayan Peoples and Xinka denounced the State of Guatemala before the Inter-American Commission on Human Rights (IACHR) for affecting their rights to participation, consultation and consent and preventing them from deciding on the installation of mining and hydroelectric projects in their territories”(original translation)

<sup>62</sup> “Pueblos Maya y Xinka Denuncian a Estado de Guatemala Ante La CIDH Por Imponer Ley Minera | Servindi.” n.d. Servindi. Accessed December 16, 2019. <https://www.servindi.org/actualidad/92817>.

<sup>63</sup> Stamatopoulou, Elsa. 2019. Interview: Professor Elsa Stamatopoulou.

<sup>64</sup> “Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).” 1989. International Labour Organization (ILO). 1989. [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169).

<sup>65</sup> “ILO169: The International Law for Tribal People.” n.d. Survival International. Accessed December 16, 2019. <https://www.survivalinternational.org/law>.

<sup>66</sup> “Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).” 1989. International Labour Organization (ILO). 1989.

These consultations must be carried out “in good faith and in the form of appropriate circumstances, with the objective of achieving agreement or consent to the proposed measures.”<sup>67</sup>

Guatemala ratified Convention 169 in 1996, nine years after the convention was first adopted by the ILO.<sup>68</sup> Some scholars surmise that Guatemala’s ratification was a political move meant to curry favor following the country’s genocide against indigenous communities.<sup>69</sup> Ratifying a convention typically obligates the country to implement FPIC, and also subjects Guatemala to audit by ILO’s monitoring arm.<sup>70</sup> And yet, Guatemala, as a country, has taken little-to-no action to implement FPIC per ILO guidelines. Like many countries that have ratified Convention 169, Guatemala still lacks specific regulation defining how FPIC should be carried out - when consultations should occur, who should be present, and what is necessary to gain consent.<sup>71</sup> This has not stopped consultations from occurring, however. In her book, “Indigenous Peoples’ Right to Prior Consultation: Transforming Human Rights from the Grassroots in Guatemala,” Jennifer Costanza writes how over the last decades, community consultations have occurred throughout Guatemala thanks to the efforts of indigenous groups who have organized and executed what in many cases is a “contentious political strategy to exercise their right to consultation” despite lacking support from the state.<sup>72</sup>

Although FPIC calls on governments to implement consultations, widely accepted international human rights standards (to be discussed in greater detail below) advise companies to play a role, especially when the state’s action is deemed weak or insufficient. In Guatemala and elsewhere in Latin America, mining companies have been known to approach communities on their own accord for consultations, sometimes employing third-party negotiators to oversee the process.<sup>73</sup> In many cases, these consultations are problematic and far from the criteria outlined in Convention 169. And yet, they represent, at a minimum, an attempt to acknowledge the community as a stakeholder, sometimes resulting in community development agreements.<sup>74</sup>

But in the case of Escobal, the Xinka people claim that at no point over the 4-year exploration period, nor when the mine broke ground, did they participate in a consultation with a Tahoe or Pan American representative.<sup>75</sup> Nor was a community development agreement drafted and publicly released.<sup>76</sup> This did not stop the Xinka community from holding their own referendums about the mine. With support from the La Comisión Diocesana de Defensa de la

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Progreso, Cementos. 2014. “Two Views of Consulta Previa in Guatemala: A View from the Private Sector.” *Americas Quarterly*. September 2014. <https://www.americasquarterly.org/content/two-views-consulta-previa-guatemala-view-private-sector>.

<sup>70</sup> Costanza, Jennifer N. “Indigenous Peoples’ Right to Prior Consultation: Transforming Human Rights From the Grassroots in Guatemala.” *Journal of Human Rights*, vol. 14, no. 2, Apr. 2015, pp. 260. Taylor and Francis+NEJM, doi:10.1080/14754835.2014.997871.

<sup>71</sup> Ibid, pp. 265.

<sup>72</sup> Ibid, pp. 260.

<sup>73</sup> Elías, Silvel, and Geisselle Sanchez. 2014. “Country Study: Guatemala.” *Americas Quarterly*. Spring 2014. <https://www.americasquarterly.org/content/country-study-guatemala>.

<sup>74</sup> Ibid.

<sup>75</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. “Quelvin Jiménez: las consultas son fruto del derecho de libre determinación.” *Ceppas.org.gt* (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

<sup>76</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. “Quelvin Jiménez: las consultas son fruto del derecho de libre determinación.” *Ceppas.org.gt* (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

Naturaleza (the Diocesan Commission for the Defense of Nature, CODIDENA), the Xinka Parliament organized 12 municipal referendums in which tens of thousands of residents participated.<sup>77</sup> The results to the referendums were abundantly clear - over 95% of participants opposed Tahoe's project.<sup>78</sup> With each referendum came increased violence and targeting of community organizers and human rights defenders.

## The Company's Response

In 2017, Quelvin Jimenez and his legal team won a huge victory when the Guatemalan Constitutional Court ordered the Escobal project to halt operations while it investigated allegations of lack of consultation, ruling in favor of the Xinka people who claimed their right to consult was denied.<sup>79</sup> The lawsuit has seen multiple appeals, and at one point, the mine started operations again. But as of 2018, with the mine again shuttered, it remained unclear when and how Pan American and the Guatemalan government will complete the consultation process with the Xinka people.

When the Xinka first raised the FPIC allegations in 2010, Tahoe was quick to issue a response. They admitted they had failed to hold formal consultations but said they did so on the basis of there being no indigenous communities living in the mine's area of impact.<sup>80</sup> This echoed earlier statements by Tahoe's CEO, Kevin McArthur, who told participants (including his shareholders present) at the 2010 Denver Gold Conference that the project would face no conflict because there were "no indigenous issues."<sup>81</sup>

Tahoe continued to use this rationale against FPIC abuse allegations for years. The way they saw it, consultation based on the FPIC framework was only necessary if there were indigenous communities in the impact zone. No indigenous people meant FPIC did not apply. In their report on the Escobal conflict, human rights activist organization, Nisgua, reported that individuals tied to Tahoe continued to intimidate the Xinka as their movement gained strength, even purchasing radio ads that said, "El pueblo Xinka no existe" ("The Xinka people do not exist").<sup>82</sup>

Tahoe's defense that FPIC only applied to indigenous communities, and that there were no indigenous communities in the region, was not unheard of, and followed a similar trope already popular among Guatemalan government officials despite widespread recognition of the Xinka by

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<sup>77</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. "Quelvin Jiménez: las consultas son fruto del derecho de libre determinación." Ceppas.org.gt (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

<sup>78</sup> Copeland, Nicholas. 2019. "Talking Like a Mining Company: The Escobal Mine in Guatemala." NACLA. October 2019. <https://nacla.org/news/2019/10/10/guatemala-mining-indigenous>.

<sup>79</sup> Ibid.

<sup>80</sup> "Guatemala: Silver Mine Owned by Tahoe (Part of Pan American Silver) Is Accused of Attacking Defenders and Denying Presence of Indigenous Communities." 2019. Business & Human Rights Resource Centre. 2019. <https://www.business-humanrights.org/en/guatemala-silver-mine-owned-by-tahoe-resources-part-of-pan-american-silver-is-accused-of-attacking-defenders-and-denying-presence-of-indigenous-communities-company-responds>.

<sup>81</sup> "Tahoe Licenses Suspended for Lack of Consultation with Indigenous Communities, While Company Denies Indigenous Presence and Opposition." 2017. NISGUA (blog). July 10, 2017. <https://nisgua.org/tahoe-licenses-suspended-for-lack-of-consultation-with-indigenous-communities-while-company-denies-indigenous-presence-and-opposition/>.

<sup>82</sup> Copeland, Nicholas. 2019. "Talking Like a Mining Company: The Escobal Mine in Guatemala." NACLA. October 2019. <https://nacla.org/news/2019/10/10/guatemala-mining-indigenous>.

academics and indigenous peoples scholars in Guatemala and elsewhere.<sup>83</sup> Indigenous identity continues to be a sensitive topic in Guatemala, just 23 years after the genocide that targeted predominantly Mayan ethnic minorities, but also the Xinka.<sup>84</sup> Following the 1996 Peace Accords, the Xinka began the long process of recuperating their identity, doing so as Guatemala's government continued to debate their existence.<sup>85</sup>

There is, admittedly, an additional argument about whether FPIC need only apply to indigenous people. But in this case, the allegations against Tahoe were made stronger, and the company's response deemed insufficient, in part due to the widely accepted international recognition of the Xinka's existence and classification as an indigenous group. In a statement released by the Xinka Parliament in conjunction with environmental activist organization, EarthWorks, and in interviews with Quelvin Jimenez, the Xinka demanded to be recognized as an indigenous group, citing their right to self-determination in addition to academic scholars who have studied the community.<sup>86</sup> And yet, the Xinka have continued to face attacks on their identity, predominantly by Guatemala's conservative politicians, who insist the Xinka are *mestizo* due to their lighter skin and the predominance of Spanish language.<sup>87</sup> As such, Tahoe claimed they were following the advice of Guatemala's Ministry of Mines, which had failed to alert them of any indigenous communities in the area of impact (thereby ignoring the Xinka's existence), when they bypassed consultations with community members. In the company's first official response to the allegations, they cite the Guatemalan census, which showed the greater department in which the project was located to be 98.6% non-indigenous.<sup>88</sup>

In this case, relying purely on the Guatemalan government proves problematic, and is in violation of international business and human rights standards that Tahoe claims to have been privy to per their SEC filings, in which they state their adherence to the UN Guiding Principles on Business and Human Rights.<sup>89</sup> The Guiding Principles state that corporations have a responsibility to respect internationally recognized human rights, and that this responsibility "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations."<sup>90</sup> It also exists "over and above compliance" with national laws or regulations.<sup>91</sup> As such, when states are unable or unwilling to comply with their human rights obligations, as would appear to be the case with the Xinka, corporations have the expectation to still respect human rights, which in this case, would have meant holding proper consultations.

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<sup>83</sup> Quiche, Sacor, and Hugo Fidel. 2009. *Comunidades Del Sur Oriente de Guatemala : Xinkas, Pipiles y Poqomames*. Ministerio de Cultura y Deportes UNESCO.

<sup>84</sup> "Genocide in Guatemala." n.d. Holocaust Museum of Houston. Accessed December 16, 2019. <https://hnh.org/library/research/genocide-in-guatemala-guide/>.

<sup>85</sup> Vásquez Monterroso, Diego. 2019. "Los Xinka: ciclos históricos e invisibilización censal." Plaza Pública. September 26, 2019. <https://www.plazapublica.com.gt/content/los-Xinka-ciclos-historicos-e-invisibilizacion-censal>.

<sup>86</sup> "Comunicado Prensa: Parlamento Del Pueblo Xinka de Guatemala." 2018. Parlamento del Pueblo Xinka.

<sup>87</sup> Vásquez Monterroso, Diego. 2019. "Los Xinka: ciclos históricos e invisibilización censal." Plaza Pública. September 26, 2019. <https://www.plazapublica.com.gt/content/los-Xinka-ciclos-historicos-e-invisibilizacion-censal>.

<sup>88</sup> "Guatemalan Court Issues Ruling on Tahoe's Mining License." Tahoe. 2017. <https://web.archive.org/web/20170808014020/https://www.tahoeresources.com/guatemalan-lower-court-issues-ruling-on-tahoes-mining-license/>.

<sup>89</sup> See section titled: "Alignment with International Protocols and Best International Practices" in previously cited SEC filings.

<sup>90</sup> "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework." 2011. Pp. 13 The United Nations Human Rights Office of the High Commissioner.

<sup>91</sup> *Ibid*.

Tahoe also appeared in violation of human rights standards due to their lack of a proper human rights policy. The UN Guiding Principles additionally identify the need for a company to have a human rights policy; due diligence to process, identify, prevent, and mitigate their human rights impacts; and a remediation process for addressing adverse effects.<sup>92</sup> The IFC Environmental and Social Performance Standards, which Tahoe also claimed to follow in their SEC filing, similarly require companies to have an appropriate grievance mechanism through which communities may provide feedback during the consultation process and throughout the project's lifecycle.<sup>93</sup> Tahoe's 2016 SEC filing states that the company adopted a new grievance mechanism in light of recent allegations, and to further align with the IFC performance standards.<sup>94</sup> Yet this mechanism, as described in the filings, revolved around a software system that would provide "multiple communication options."<sup>95</sup> There is no mention of planned, in-person, community engagement in Tahoe's official responses to the allegations, nor an explanation of what grievance mechanism was previously in place before the 2016 upgrade. UN Guiding Principle 31 on "Effectiveness Criteria for Grievance Mechanisms" clearly states that grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source for continuous learning.<sup>96</sup> The little information Tahoe provides about their grievance mechanism does not appear to align with these aforementioned qualities. Instead, Tahoe's official responses seem to miss the point entirely, instead referring multiple times to their environmental impact assessment, which concluded there were no indigenous people living in the area of impact.<sup>97</sup> The assessment was deemed insufficient by a number of activist organizations, in addition to researchers from Virginia Tech university, who found the assessment severely undermined the area of impact and contained "serious deficiencies."<sup>98</sup> Tahoe's official responses following the allegations also fail to mention any human rights due diligence performed in relation to the project - nor is there any record of such analysis on the company's website.

In addition to the above described conflicts with the UN Guiding Principles, Tahoe's actions and responses also conflicted with the guidelines laid out by Business for Social Responsibility (BSR), of which Tahoe was both a member and a client having retained BSR's consulting services for support in developing and implementing human rights policies.<sup>99</sup> Although BSR cautions member companies that there is "no universally applicable definition of FPIC," they suggest that companies participate in FPIC as a means of "mitigating risks

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<sup>92</sup> Ibid.

<sup>93</sup> See Standard 1. Source: "International Finance Corporation: Performance Standards: Assessment and Management of Environmental and Social Risks and Impacts." 2012. International Finance Corporation (IFC). [https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1\\_English\\_2012.pdf?MOD=AJPERES&CVID=jiVQIfe](https://www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQIfe).

<sup>94</sup> "Annual Information Form: Tahoe Inc.: Exhibit 99.1." 2016. The U.S. Securities & Exchange Commission. March 9, 2016. [https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page\\_5](https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page_5).

<sup>95</sup> Ibid.

<sup>96</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework." 2011. Pp. 33-34. The United Nations Human Rights Office of the High Commissioner.

<sup>97</sup> "Tahoe Provides Escobal Update." 2017. Business & Human Rights Resource Centre. June 2017. <https://www.business-humanrights.org/en/guatemala-police-use-teargas-against-protesters-blocking-tahoe-resources-mine-over-alleged-negative-impacts-company-points-to-prior-attempts-at-engaging-stakeholders>.

<sup>98</sup> Solano, Luis. 2015. "Under Siege Peaceful Resistance to Tahoe and Militarization in Guatemala." Pp. 8. Mining Watch Canada. <https://miningwatch.ca/sites/default/files/solano-underseigereport2015-11-10.pdf>.

<sup>99</sup> "Annual Information Form: Tahoe Inc.: Exhibit 99.1." 2016. The U.S. Securities & Exchange Commission. March 9, 2016. [https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page\\_5](https://www.sec.gov/Archives/edgar/data/1510400/000106299316008506/exhibit99-1.htm#page_5).

associated with social and legal license to operate”.<sup>100</sup> They also remind BSR members of the Equator Principles policy which states FPIC is mandatory for IFC-funded projects or projects where the financiers have signed onto the Equator Principles.<sup>101</sup> In the case of the Escobal project, HSBC were the lead financiers signatories of the Equator Principles.<sup>102</sup> HSBC is to blame for failing to take reasonable steps to pressure Tahoe to prevent human rights violations. However, in this case, Tahoe had obligations to implement FPIC independently of their financier’s responsibility.

Curiously, as the Xinka’s lawsuit made its way through the courts, Tahoe revised their original response against the FPIC allegations. In a statement issued in June 2017 after Guatemala’s lower court ruled in favor of the Xinka people, Tahoe’s new CEO, Ron Clayton, said the following:

*“We are extremely disappointed in the Court’s ruling suspending the license because we believe that there are no indigenous communities affected by Escobal’s operations. While the lack of indigenous communities in our area makes ILO 169 inapplicable, there is nevertheless extensive documentation evidencing that an ILO 169 consultation process was in fact conducted in the area of the mine. [...] We remain committed to protecting our employees’ livelihoods, as well as those livelihoods of the Company’s suppliers and the thousands of Guatemalan families that benefit from the responsible operation of the Escobal mine.”*<sup>103</sup>

Here, Tahoe continues to uphold the claim that there are no indigenous communities. But for the first time, they state that a consult did occur. They later clarify that the consult was carried out by the Guatemalan government, and that Tahoe did not have any direct involvement.<sup>104</sup> The Xinka community, in turn, denied that an official consult between the government and the community had ever occurred.<sup>105</sup> Even if it did, however, Tahoe’s lack of involvement still ignores the human rights standards that encourage companies to take a leading role in such consultations.

When Pan American acquired Tahoe at the height of the continued conflict, they promised to recommit to managing the mine’s operations “in a socially responsible manner with the utmost respect for human rights.”<sup>106</sup> In one of their first statements following the company’s acquisition earlier this year, Pan American wrote:

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<sup>100</sup> “Engaging with Free, Prior, and Informed Consent.” 2012. BSR. Pp. 5. [https://www.bsr.org/reports/BSR\\_Engaging\\_With\\_FPIC.pdf](https://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf).

<sup>101</sup> Ibid.

<sup>102</sup> “Tahoe: Licence Suspended for Escobal Mine, Guatemala, for Failure to Consult Indigenous Communities.” 2017. Facing Finance (blog). August 21, 2017. <http://www.facing-finance.org/en/2017/08/tahoe-resources-licence-suspended-for-escobal-mine-guatemala-for-failure-to-consult-indigenous-communities-hsbc-and-other-banks-continue-to-provide-funds-despite-clear-violation-of-international-n/>.

<sup>103</sup> “Guatemalan Court Issues Ruling on Tahoe’s Mining License.” Tahoe. 2017.

<https://web.archive.org/web/20170808014020/https://www.tahoeresources.com/guatemalan-lower-court-issues-ruling-on-taho-es-mining-license/>.

<sup>104</sup> Ibid.

<sup>105</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. “Quelvin Jiménez: las consultas son fruto del derecho de libre determinación.” Ceppas.org.gt (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

<sup>106</sup> “Pan American Silver Response July 2019.” 2019. Pan American Silver. [https://www.business-humanrights.org/sites/default/files/documents/PAAS%20response\\_Business-humanrightsorg\\_July%2015\\_0.pdf](https://www.business-humanrights.org/sites/default/files/documents/PAAS%20response_Business-humanrightsorg_July%2015_0.pdf).

*“We are working towards building enduring, positive relationships with all stakeholders in the region, and to establishing a reputation as an honest, credible partner. At this stage, we are focused on actively listening in order to create a space for dialogue and to gain a deeper understanding of people’s expectations and concerns about the mine. The Guatemalan government must also complete the ILO 169 indigenous consultation, which is being led by the Ministry of Energy and Mines. We will respectfully support and participate in the consultation process. We regard the process of consulting with communities of interest and indigenous peoples very seriously, and are committed to investing the time necessary to do this right. These are not processes where strict timelines can be established ahead of time. We are not providing any timeframe for the potential restart of the Escobal mine.”<sup>107</sup>*

However, in the years following the Guatemalan courts halting Escobal’s production and demanding the company consult with the community, Pan American faced their own human rights abuse allegations pertaining to the consultation process.

Most recently, the Business and Human Rights Resource Center reported that Pan American has continued to operate the mine despite the injunction halting production until the consultation is completed.<sup>108</sup> The allegations came from Xinka activist Luis Fernando García Monroy, who, during an interview in December 2019 said the mine is continuing to extract and, in conjunction with the Ministry of Mines, interfere inappropriately with the consultation process by spreading misinformation, threatening the “good faith” component of FPIC.<sup>109</sup>

It is important that Pan American adhere to the UN Guiding Principles about accountability and transparency with regard to FPIC. In examining the Guiding Principles, BSR calls on companies “to be careful not to rely entirely on the state sovereignty principle for addressing FPIC-related challenges.”<sup>110</sup> If Pan American allows Guatemala’s Ministry of Mines to carry-out the FPIC process, despite the problematic interests of the state and proven disregard for the Xinka peoples, they risk complicity in further human rights abuses.

## **Accountability & Next Steps**

The above analysis supports that overarching allegations that Tahoe, today Pan American, was complicit in denying the Xinka consultation, and in doing so, failed to uphold the corporate responsibility to protect human rights. The basis for Tahoe’s defense, that they did not need to complete consultations because of a lack of indigenous people, is riddled with inaccuracies, represents a lack of contextual knowledge surrounding the local community, and is in direct violation of the guidelines and principles to which the company claimed to adhere.

Accountability for these actions falls to Pan American. Although Pan American were not the owners when these first abuses occurred, they inherited the responsibility to act when they

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<sup>107</sup> Ibid.

<sup>108</sup> “Guatemala: Pan American Silver Sigue Operando La Mina Escobal a Pesar de Suspensión Dictada Por Tribunal Canadiense.” 2019. Business & Human Rights Resource Centre. December 11, 2019. <https://www.business-humanrights.org/es/guatemala-pan-american-silver-sigue-operando-la-mina-escobal-a-pesar-de-suspensi%C3%B3n-dictada-por-tribunal-canadiense>.

<sup>109</sup> Ibid.

<sup>110</sup> “Engaging with Free, Prior, and Informed Consent.” 2012. BSR. Pp.11. [https://www.bsr.org/reports/BSR\\_Engaging\\_With\\_FPIC.pdf](https://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf).

acquired Tahoe. So far, Pan American appears to have taken a step in the right direction by agreeing to a consultation process that is not limited in timeline nor scope. In November 2019, they also released their first-ever Global Human Rights Policy.<sup>111</sup> The policy itself is short - encompassing two pages in which Pan American lists 16 “commitments and standards of conduct” - and ensures the public that their commitment to upholding human rights is reflected in the relationships with communities and how they “interact with all stakeholders.”<sup>112</sup> Although the policy fails to mention FPIC or consultation, specifically, it does pledge to engage in meaningful dialogue with stakeholders.<sup>113</sup> The company has also publicly agreed to continue the suspension of operations until they have obtained a social license, suggesting an acknowledgement that those before them did not have a social license to operate in the first place.<sup>114</sup> And yet, much more should be done.

In light of recent accusations of meddling, combined with the history of the Guatemalan Ministry of Mine’s lack of acknowledgement and regard for the Xinka people, Pan American cannot and should not rely on the government to carry out the consultation process. Doing so would make Pan American complicit in any future human rights abuses to occur. Instead, Pan American, in the spirit of the UN Guiding Principles to respect human rights, should “increase leverage to influence the state’s actions in a positive manner.”<sup>115</sup> In the absence of strong national legislation and known gaps in a Guatemala’s FPIC process, Pan American should lean heavily on international frameworks and best practices on FPIC to mitigate risk and promote a social license to operate, namely by incorporating FPIC into their Stakeholder Engagement Management Plan (SEMP).<sup>116</sup> In their article, “Engaging with FPIC,” BSR recommends corporations conduct their own assessment of how a project is likely to impact indigenous communities, even if FPIC regulation is lacking in the local context or not believed to be immediately relevant.<sup>117</sup> These assessments should help ascertain land use, socioeconomic conditions, governance processes, and customary practices for decision making and conflict resolution.<sup>118</sup> They should also be updated continuously, and might help prioritize and target social investment initiatives and other local benefits for indigenous peoples, as well as the greater local community.<sup>119</sup>

Pan American might look to companies with explicit FPIC policies for guidance. In their book, “Making Free Prior & Informed Consent a Reality” Cathal Doyle and Jill Cariño identify Rio Tinto and De Beers as two mining companies with comprehensive policies in place related to free, prior and informed consent.<sup>120</sup> Both De Beers and Rio Tinto have explicit policy commitments to seek indigenous peoples’ free, prior, and informed consent before and during the lifecycle of a project. Rio Tinto includes obtaining FPIC as part of its initial community

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<sup>111</sup> “Global Human Rights Policy.” 2019. Pan American Silver.

<https://www.panamericansilver.com/assets/documents/23b3db8251/Human-Rights-Policy.pdf>.

<sup>112</sup> “Global Human Rights Policy.” Pp. 1. 2019. Pan American Silver.

<sup>113</sup> Ibid.

<sup>114</sup> Pan American Silver | Corporate Site. “Escobal.” Accessed February 13, 2020.

<https://www.panamericansilver.com/operations/north-and-central-america/escobal/>.

<sup>115</sup> “Engaging with Free, Prior, and Informed Consent.” 2012. BSR. Pp. 11.

[https://www.bsr.org/reports/BSR\\_Engaging\\_With\\_FPIC.pdf](https://www.bsr.org/reports/BSR_Engaging_With_FPIC.pdf).

<sup>116</sup> Ibid. Pp. 16.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Doyle, Cathal, and Jill Cariño. 2013. Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector. Pp. 41. Middlesex University School of Law.

agreement formation.<sup>121</sup> De Beers requires FPIC to first occur during the exploitation phase and be revisited as necessary, defining it as: “mean[ing] a community is to be consulting, and is free to make its own decision and give its consent without outside influence, in a sufficiently timely manner.”<sup>122</sup> The companies continues to deploy these policies in places where national FPIC regulation is weak or non-existent.

Additionally, Pan American might consider joining an industry initiative with its own policies and standards in place regarding FPIC, namely, the International Council on Mining and Metals (ICMM). Membership of ICMM requires a commitment to the initiative’s 10 principles for performance.<sup>123</sup> The need for consultation with local communities is present throughout ICMM’s principles, most notably in principle 4, which calls on corporations to assess environmental and social risks of projects, including changes to existing projects, in consultation with interested and affected stakeholders.<sup>124</sup>

## Conclusion

It is unclear if and when the Escobal mine will restart operations. There remains an additional debate among corporations, academics, governing bodies, and advocacy organizations as to whether or not the right to free, prior, and informed consent includes the direct power to veto, or reject, the project in its totality. The UN Independent Expert on the Rights of Minorities has stated that “right to withhold consent is implied in the ILO Convention 169.”<sup>125</sup> Similarly, organizations like Oxfam American have long upheld the belief that FPIC includes the ability for communities “to say no” indefinitely.<sup>126</sup> However, ICMM, for example, neglects to fully explain how companies might respond to a community saying “no” in their updated FPIC guidance, released in 2015.<sup>127</sup> Although ICMM acknowledges many indigenous communities’ perspective on FPIC includes a belief in their right to reject a project, existing intergovernmental and regulatory perspectives on FPIC requires governments to consult, with little explanation for what to do if consent is continually withheld.<sup>128</sup>

The Xinka community has continued to display intense opposition to Escobal, with many pledging to oppose the mine at any and all costs.<sup>129</sup> In June 2019, award-winning independent news organization, *The Intercept*, published a scathing and in-depth analysis of the Escobal mine in which it criticized the project’s exclusionary nature, entanglement with corrupt government

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> “Performance Expectations.” n.d. International Council on Mining & Metals (ICMM). Accessed December 16, 2019. <https://www.icmm.com/icmm-10-principles>.

<sup>124</sup> Ibid.

<sup>125</sup> Doyle, Cathal, and Jill Cariño. 2013. Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector. Pp. 8. Middlesex University School of Law.

<sup>126</sup> Greenspan, Emily. “Getting to ‘No’ in Mining and Community Consent.” Oxfam America. The Politics of Poverty (blog), November 24, 2015. <https://politicsofpoverty.oxfamamerica.org/2015/11/getting-to-no-in-mining-and-community-consent/>.

<sup>127</sup> “Good Practice Guide: Indigenous Peoples and Mining.” ICMM, 2015.

<https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9520.pdf>.

<sup>128</sup> Ibid. Pp. 27.

<sup>129</sup> Brown, Alleen, and Martyna Starosta. 2019. “She Defended Her Land Against a Mine in Guatemala. Then She Fled in Fear for Her Life.” *The Intercept* (blog). June 23, 2019. <https://theintercept.com/2019/06/23/guatemala-land-defender-san-rafael-mine/>.

authorities, and violent past.<sup>130</sup> At the same time, community members are eager to finally participate in an official consultation process, as is their guaranteed right. The Xinka have continued to hold vigils near the mine site and in the capital of Guatemala City to raise awareness of the impending consultation and ensure participation of citizens.<sup>131</sup>

Pan American's statements seem to suggest an optimism that, with patience, a renewed commitment to human rights, and sincere interest in bettering their relationship with the local community, the project will move forward. It will be important to watch the consultation process and see if Pan American is capable of gaining the community's trust and social license to operate. As one of the most vulnerable parts of Guatemala, San Rafael de las Flores and the greater Corredor Seco region of Guatemala are in desperate need of an economic boost. If Pan American is able to bypass Guatemala's corrupt institutions and prove itself as a transparent and accountable actor, then perhaps there is a way for Escobal to support equitable and sustainable development in the region. But if they continue operations without a new approach to corporate responsibility and transparency, Pan American's supposed commitment to human rights must be dismissed.

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<sup>130</sup> Ibid.

<sup>131</sup> Katz, Eleanor, and Víctor Quilaqueo. 2018. "Quelvin Jiménez: las consultas son fruto del derecho de libre determinación." Ceppas.org.gt (blog). January 24, 2018. <https://ceppas.org.gt/quelvin-jimenez-las-consultas-son-fruto-del-derech/>.

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