

THE TWO FACES OF CANADIAN DIPLOMACY

*Undermining International Institutions to Support
Canadian Mining*

A Case Study of Goldcorp's Marlin Mine in Guatemala
February 2022



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Communities first!

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Authors: Charlotte Connolly and Charis Kamphuis

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Contact: Charis Kamphuis, Associate Professor, Faculty of Law, Thompson Rivers University

Email: ckamphius@justice-project.org

Website: <https://justice-project.org>

Photos: Janelle O'Meara



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Cover photo: The Marlin Mine's open-pit during the reclamation phase, May 2018. Credit: Janelle O'Meara

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List of Acronyms

AMAC	<i>Asociación de Monitoreo Ambiental Comunitario</i> (Community Environmental Monitoring Association)
ATI	Access to Information
CALAS	<i>Centro de Acción Legal, Ambiental y Social de Guatemala</i> (Centre for Legal Environmental & Social Action)
CAO	Compliance Advisor Ombudsman
CICADA	Centre for Indigenous Conservation and Development Alternatives
CIEL	Center for International Environmental Law
COPAE	<i>Comisión Pastoral Paz y Ecología</i> (Peace & Ecology Pastoral Commission)
COPREDEH	<i>Comisión Presidencial de Derechos Humanos</i> Presidential Commission for Human Rights (Guatemala)
CORE	Canadian Ombudsperson for Responsible Enterprise
CSR	Corporate Social Responsibility
DFATD	Department of Foreign Affairs, Trade and Development (Canada)
EDC	Export Development Canada
EIA	Environmental Impact Assessment
IACHR	Inter-American Commission on Human Rights
IFC	International Finance Corporation
ILO	International Labour Organization
JCAP	Justice & Corporate Accountability Project
MARN	<i>Ministerio de Ambiente y Recursos Naturales</i> (Ministry of the Environment and Natural Resources, Guatemala)
MEM	<i>Ministerio de Energía y Minas</i> (Ministry of Energy and Mines, Guatemala)
OAS	Organization of American States
OECD	Organisation of Economic Co-Operation and Development (OECD)
OIC	Office of the Information Commissioner

Executive Summary

In 2004, Glamis Gold began construction of Guatemala's first large-scale open-pit and underground gold mine. Acquired in 2006 by Canadian company Goldcorp Inc. ("Goldcorp"), the Marlin Mine is located in the northwestern highlands of Guatemala, between the municipalities of Sipacapa and San Miguel Ixtahuacán in the Department of San Marcos, one of the regions hit by the country's 36-year-long armed conflict. The mine was imposed without the consent of affected communities and has been associated with immense violence and conflict, alongside serious and credible allegations of environmental contamination and harms to human health.

Documents released from Canada's Department of Foreign Affairs, Trade and Development (DFATD) under federal access to information (ATI) legislation contain troubling information about the conduct of Canadian officials in response to the efforts of affected Indigenous Mayan communities to seek justice and defend their rights before an international human rights body. In May 2010, the Inter-American Commission on Human Rights (IACHR), an autonomous organ of the Organization of American States (OAS), issued precautionary measures requesting that the Government of Guatemala suspend Goldcorp's Marlin mine until the health, safety, and security of residents could be ensured. The request was a response to a petition filed by 13 affected communities alleging multiple human and environmental rights violations in connection with the mine. The IACHR's request was based on credible evidence, presented by independent international experts, expressing the view that the mine may be causing serious and irreparable harm to the environment and human health, including the contamination of waterways by heavy metals. In December 2011, the IACHR amended the measures by lifting the suspension request.

This report conveys what is publicly known about how Canadian officials undertook a course of action that undermined the efforts of Indigenous Mayan communities to access the inter-American human rights system to defend their rights. Between the issuance of the precautionary measures on May 20, 2010 and their modification on December 9, 2011, Canadian Ministers, DFATD Directors, Ambassadors, and Embassy officials heavily lobbied Guatemalan officials and sought information from IACHR representatives on behalf of Goldcorp, while dismissing or ignoring the concerns of communities, international human rights bodies, civil society groups, and international experts/researchers about the mine's negative social, environmental, and health impacts. While Canada knew about the growing body of research on the risks of environmental contamination, Canadian officials failed to conduct the due diligence necessary to assess and weigh all of the available evidence before taking a position singularly in favor of Goldcorp.

While the documents are redacted, the disclosed information gives rise to a strong inference that Canadian officials, including the Minister of International Trade, the Minister of State for Foreign Affairs, and the Canadian Ambassador to Guatemala, attempted to influence Guatemalan decision makers, including the Guatemalan President, *not* to implement the IACHR precautionary measures and to keep Goldcorp's Marlin mine open. The documents also reveal that Canadian officials took steps to strengthen Goldcorp's influence in the IACHR process. In the records reviewed, Canadian officials: relayed information from the IACHR to Goldcorp; took steps to leverage Goldcorp's influence during the IACHR site investigation to the Marlin mine; and strategized ways in which the company could influence the IACHR hearing on the case. Some of the records include communications between Canada's Ambassador and Permanent Representative to the OAS and

the highest ranking official and decision maker in the IACHR, the Executive Secretary. Canadian officials recognized that they were communicating with the IACHR on Goldcorp's behalf, and cautioned each other that they "should not *be seen* to be lobbying the IACHR on behalf of Goldcorp" (emphasis added).

Assessed in their context and as a whole, we believe that the actions of Canadian officials in this case were inconsistent with Canada's international obligations to promote the protection of human rights and to respect the independent of the IACHR, as required by the *OAS Charter*, the *American Declaration on the Rights & Duties of Man*, and other international human rights treaties ratified by Canada. Added to this, Canada's apparent failure to undertake any due diligence to verify the company's claims that communities' human rights and environmental concerns were unfounded, represents a serious failure to uphold its Corporate Social Responsibility (CSR) policies in place at the time.

Unfortunately, we do not have a complete picture of Canada's responses and interventions because the government continues to redact key portions of the records. However, our review of hundreds of pages of ATI documents reveals that Canadian officials provided robust political support to Goldcorp by engaging with the IACHR and the Government of Guatemala to advocate exclusively for the company's interests. There was no evidence in these records that the Canadian Embassy followed its own policies and engaged with affected communities to assess and investigate their concerns. While the Marlin mine officially closed in May 2017, communities continue to seek reparations for the impacts and justice for the harms suffered. The IACHR precautionary measures have yet to be implemented and communities still do not have access to potable water. We conclude that the coordinated and sustained actions of Canadian officials in favour of Goldcorp, and to the detriment of communities seeking to defend their rights at the IACHR, significantly increases Canada's responsibility to facilitate redress for past and ongoing harms in the mine post-closure phase.

The available ATI records show the following:

- Canadian officials and ministers promoted and defended Goldcorp and Canadian mining to the IACHR and Guatemalan officials during the IACHR process.
- Canadian Ministers did not promote actions to respect human rights or Indigenous rights.
- Canada tried to undermine the IACHR request by suggesting, without actually knowing, that it was based on flawed or out-of-date evidence.
- Canada appeared to put high level pressure on the Government of Guatemala not to comply with the IACHR precautionary measures.
- Canada strategized with Guatemala and Goldcorp about how to manage the IACHR on-site investigation to the company's benefit.
- At Goldcorp's request, Canada obtained information from the IACHR and then shared it with Goldcorp. IACHR officials cautioned Canada about respecting the independence of the IACHR.
- Canada strategized with Goldcorp about how to insert the company into the IACHR proceedings, for example, by investigating the potential of a Goldcorp amicus brief and the possibility of a friendly settlement procedure involving Goldcorp, a non-party.

Introduction & Overview

This report documents the Canadian government's political support for Goldcorp's Marlin Mine in relation to proceedings initiated by Indigenous Peoples in Guatemala before an international human rights body. It documents and analyzes the actions of officials from the then named DFATD and the Canadian Embassy to Guatemala ("the Embassy") in response to the IACHR's precautionary measures requesting that the Government of Guatemala suspend the Marlin Mine. Federal ATI records reveal that Canada undertook a multifaceted strategy to influence the IACHR proceedings in favour of Goldcorp and to counteract the suspension measure recommended to protect Indigenous communities from the harms alleged.

Part I begins with a primer on Canadian economic diplomacy in support of Canadian companies abroad and its human rights impacts. It then summarizes available reports and research on the Marlin Mine conflict and its roots in a lack of consultation with, and consent from, local populations, in addition to serious and unresolved concerns about environmental contamination, the criminalization of community leaders, intense protests, and numerous episodes of violence. These issues formed the basis of the petition filed by 13 Indigenous Maya Mam and Maya Sipakapense communities alleging human rights violations and their accompanying request for precautionary measures, which were later granted by the IACHR in May 2010.

Having established this context, Part II identifies Canada's domestic and international obligations with respect to the IACHR proceedings. This includes Canada's responsibilities to promote respect for human rights, including Indigenous rights; to protect the independence and impartiality of the IACHR; and to hold the company to a high standard and facilitate dialogue and dispute resolution. We identify these obligations by referring to Canada's CSR policy, the *OAS Charter*, the *IACHR Statue*, the *American Declaration of the Rights and Duties of Man*, and other international human rights treaties ratified by Canada.

Part III presents our empirical findings following our review of ATI records. It describes the conduct of the Canadian authorities in response to the IACHR request and details the myriad interventions made by Canada that appear to: 1) attempt to discredit the human rights and environmental concerns that formed the basis of communities' IACHR petition; 2) pressure the Government of Guatemala to disregard the suspension request; and 3) advocate on behalf of Goldcorp and leverage the company's influence in the IACHR proceedings. The section summarizes Canada's failures in this case study to uphold its domestic and international obligations to the IACHR and the OAS.

Part IV concludes by highlighting the environmental concerns that persist in the post-closure phase and the absence of redress and justice for affected communities. In this part, we describe how this case study demonstrates the need for reforms to Canada's law and policy framework with respect to economic diplomacy and human rights. We identify potential areas for reform that are consistent with an emerging consensus among international treaty bodies that if Canada chooses to provide political support to Canadian companies' operating overseas, it must comply with its international obligations to promote the respect for human rights. While Canada's current policies allow conditional state support for companies operating abroad with certain human rights related expectations, this report joins a growing body of evidence that Canadian officials are consistently

either unable or unwilling to follow those policies. As a result, there is an urgent need for reforms to curtail policy violations by requiring companies to undertake human rights due diligence, and by creating monitoring mechanisms to ensure the transparency, oversight and accountability of the actions of government officials in these contexts.

Methods and Sources

The report describes and analyzes over 900 pages of records obtained in response to ATI requests submitted to the federal government. The requests relate to communications between Canadian government representatives, in particular staff at the Canadian Embassy to Guatemala and DFATD, and other parties, including Goldcorp and the Government of Guatemala, following the IACHR's issuance of precautionary measures requesting that the Government of Guatemala order the temporary suspension of operations at Goldcorp's Marlin Mine.

The ATI records analyzed here were provided through a total of 5 different releases from DFATD. JCAP subsequently submitted two formal complaints to the federal Office of the Information Commissioner (OIC) with respect to redactions in the records. In these complaints, JCAP challenged many of the exemptions that DFATD used to justify the redactions under the *Access to Information Act*.¹ After the protracted OIC investigation concluded five years later, JCAP launched a judicial review of the DFATD redactions in July 2019, alleging that the redactions are not supported by applicable Canadian law and that there is a strong public interest in disclosure.² In December 2021, the Federal Court upheld the redactions.

In order to reconstruct the events described in this report, these government records were reviewed, organized, and summarized to create a detailed narrative of how Canadian officials responded to the IACHR's precautionary measures. This narrative was put into the larger context of the Marlin mine and the conflict between Goldcorp and surrounding communities. The report relies on a variety of primary and secondary sources, including scholarly materials, grey literature from governmental and non-governmental sources, company press releases, and media reports to provide a robust picture of Goldcorp's project in Guatemala and its impacts on Indigenous communities and the environment. However, this description is not exhaustive of all incidences of conflict between communities, the company, and the government of Guatemala.

The contextualized narrative is then analyzed in light of Canada's domestic and international human rights obligations. We have highlighted statements from international human rights bodies, directed at Canada or applicable to Canadian officials, when they act to support Canadian companies in their operations abroad. We then refer to these statements to inform recommendations for reforms to Canada's policy and practice of economic diplomacy. Notably, we have used external sources to evaluate the conduct of the Canadian government, and we do not explicitly incorporate community perspectives as these are well-documented elsewhere.³

¹ *Access to Information Act*, RSC 1985, c A-1.

² *Imai v Canada (Minister of Foreign Affairs)*, 2019 FC T-1170-19 [Imai].

³ See e.g. Catherine Nolin & Jacqui Stephens, "We Have to Protect the Investors: Development & Canadian Mining Companies in Guatemala" (2010) 5:3 *J Rural & Community Dev* 37 at 53; Joris van de Sandt, "Mining Conflicts and Indigenous Peoples in

PART I – Background: The Marlin Mine Conflict and Canada

A. Canadian Economic Diplomacy: A Primer

Canada has long provided political, economic, financial, and legal support for Canadian resource extraction companies operating abroad.⁴ In 2007, the federal government introduced the Global Commerce Strategy, followed by the 2013 Global Markets Action Plan, entrenching the practice of “economic diplomacy” as the “driving force behind the Government of Canada’s trade promotion activities.”⁵ This policy committed to marshalling “all diplomatic assets of the Government of Canada... on behalf of the private sector” in order to support the commercial success of Canadian companies and investors abroad.⁶ As part of this plan, Canada sought to “improve and coordinate [the] branding and marketing of Canada abroad” to make its private sector more competitive on international markets.⁷

Canada’s *Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad* (2014) elaborates on the policy of economic diplomacy as a suite of services offered to Canadian businesses engaged in trade and export, including the “issuance of letters of support, advocacy efforts in foreign markets and participation in Government of Canada trade missions.”⁸ The Trade Commissioner Service plays a key role in advancing Canada’s economic diplomacy mandate by offering companies “privileged access to foreign governments, key business leaders and decision-makers,” in addition to on-the-ground intelligence.⁹ Embassy personnel and government ministers also advocate on behalf of Canadian companies in meetings with foreign public officials and at major trade shows.¹⁰ Export Development Canada (EDC) provides credit and finance to get projects off the ground. Together, these state agencies aim to strengthen Canadian businesses in foreign markets.¹¹

A growing body of empirical research based on federal ATI records demonstrates that Embassy staff, Trade Commissioners, and senior government officials often continue to support and defend Canadian extractive companies amid strong community opposition, significant substantial

Guatemala” (2009), online (pdf): *Cordaid* <www.cordaid.org/nl/wp-content/uploads/sites/2/2012/12/Mining_Conflicts_and_Indigenous_Peoples_in_Guatemala.pdf> [perma.cc/4Y87-6E3C]; 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) 27:3 Soc & Nat Resources: An Int’l J 231; Shin Imai et al, “Breaching Indigenous Law: Canadian Mining in Guatemala” (2007) 6:1 Indigenous LJ 101.

⁴ See Todd Gordon & Jeffery Webber, *Blood of Extraction: Canadian Imperialism in Latin America* (Halifax: Fernwood Publishing, 2016).

⁵ Foreign Affairs, Trade and Development Canada, *Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians Through Trade*, (Monograph) Catalogue No FR5-84/2013E (Ottawa: Foreign Affairs, Trade and Development Canada, 2013) at 4 [perma.cc/Q9NH-VFG8] [FATDC, “Global Markets Action Plan”].

⁶ *Ibid* at 11.

⁷ *Ibid*.

⁸ Global Affairs Canada, *Canada’s enhanced corporate social responsibility strategy to strengthen Canada’s extractive sector abroad*, (Final Report) Catalogue No FR5-164/1-2014E (Ottawa: Global Affairs Canada, 2014) at 12 [perma.cc/8UN7-J44A] [GAC, “Enhanced CSR Strategy”].

⁹ Government of Canada, “Trade Commissioner Service – Eligibility and Services” (2021), online: *Government of Canada* <www.tradecommissioner.gc.ca/about-a_propos/services.aspx?lang=eng> [perma.cc/K855-5WXR].

¹⁰ Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on “economic diplomacy” as a tool for States to promote corporate respect for human rights*, UNGAOR, 38th Sess, UN Doc A/HRC/38/48 (2 May 2018) at paras 9, 24 [perma.cc/9C48-K6EY] [HRC, “Report of the Working Group”].

¹¹ *Ibid* at para 3.

evidence of violence and criminalization, and credible evidence of environmental contamination.¹² This research suggests that the policies and actions of the Canadian officials designed to ensure that extractive projects succeed have exacerbated conflicts in Guatemala, Peru, Mexico, Ecuador and Honduras, among other countries, and escalated the risk of harm for affected communities and human rights defenders who face threats, kidnappings, and assassinations.¹³ For example, in 2013, the Working Group on Mining and Human Rights in Latin America published a report profiling 22 case studies of Canadian mining operations, with strong support from the Canadian state, linked to Indigenous and human rights violations.¹⁴ A 2016 report by JCAP further documented 44 deaths, 403 injuries, and 709 cases of criminalization linked to 28 different Canadian companies in Latin America between the years of 2000 and 2015.¹⁵

International treaty bodies have taken note of this research and expressed concern about the adverse effects of Canadian companies' extractive activities abroad.¹⁶ The IACHR and the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ("the UN Working Group on Business & Human Rights") have expressed specific concern about the human rights impacts of economic diplomacy, and called on Canada to make state support conditional on corporate respect for human rights and to refrain from influencing the adoption of norms or policies that solely favour corporate economic interests.¹⁷ The Committee on

¹² MiningWatch, "Canadian Ambassador Sued for Defaming Documentary Film Maker Steven Schnoor" (29 April 2010), online: *MiningWatch Canada* <www.miningwatch.ca/news/2010/4/29/canadian-ambassador-sued-defaming-documentary-film-maker-stein-schnoor> [perma.cc/2KN6-CP93]; Jennifer Moore & Gillian Colgrove, "Corruption, Murder and Canadian Mining in Mexico: The Case of Blackfire Exploration and the Canadian Embassy" (2013), online (pdf): *MiningWatch Canada* <www.miningwatch.ca/sites/default/files/blackfire_embassy_report-web.pdf> [perma.cc/PAF3-CJVZ]; Jen Moore, "Unearthing Canadian Complicity: Excellon Resources, the Canadian Embassy, and the Violation of Land and Labour Rights in Durango, Mexico" (2015), online (pdf): *MiningWatch Canada* <www.miningwatch.ca/sites/default/files/excellon_report_2015-02-23.pdf> [perma.cc/2CVX-XSP5]; Charlotte Connolly, Jen Moore & Caren Weisbart, "Qualifying as Canadian: Economic Diplomacy, Mining, and Racism at the Escobal Mine in Guatemala" in Veldon Coburn & David P Thomas, eds, *Capitalism & Dispossession: Corporate Canada at Home and Abroad* (Blackpoint, Nova Scotia: Fernwood Publishing, forthcoming). See also MiningWatch Canada, "Backgrounder: A Dozen Examples of Canadian Mining Diplomacy" (8 October 2013), online (blog): *MiningWatch Canada* <www.miningwatch.ca/blog/2013/10/8/backgrounder-dozen-examples-canadian-mining-diplomacy> [perma.cc/K7LA-5T8B]; Kamphuis, Charis, Charlotte Connolly, Isabel Dávila Pereira, Mariela Gutiérrez & Sarah Ewart, "Report on the Government of Canada's Failures to Uphold the 2016 and 2019 Voices at Risk Guidelines in response to the Criminalization of Canadian Human Rights Defender Jennifer Moore by Peruvian Authorities" (forthcoming) Justice & Corporate Accountability Project.

¹³ Jen Moore, "In the National Interest?: Criminalization of Land and Environment Defenders in the Americas" (2015) at 14, online (pdf): *MiningWatch Canada* <www.miningwatch.ca/sites/default/files/inthenationalinterest_fullpaper_eng_1.pdf> [perma.cc/7834-AKHR]; Jen Moore, "More than a few bad apples: 'militarized neoliberalism' and the Canadian state in Latin America," (2016), online: *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/publications/monitor/more-few-bad-apples> [perma.cc/KL5E-XWKQ].

¹⁴ Working Group on Mining and Human Rights in Latin America, "The impact of Canadian Mining in Latin America and Canada's Responsibility" (2013), online (pdf): *Due Process of Law Foundation* <www.dplf.org/sites/default/files/report_canadian_mining_executive_summary.pdf> [perma.cc/AXT9-538H].

¹⁵ Shin Imai, Leah Gardner & Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (2017) Osgoode Hall Law School of York University Research Papers, Working Papers, Conference Papers, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1272&context=all_papers> [perma.cc/5ECZ-RMNL].

¹⁶ See e.g. Commission on Human Rights, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, UNECOSOCOR, 59th Sess, UN Doc E/CN.4/2003/56/Add.2 (2003) at para 126; Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined 21st to 23rd periodic reports of Canada: Committee on the Elimination of Racial Discrimination: addendum*, ICERD, UN Doc CERD/C/CAN/CO/21-21 (2019) at paras 21-2; Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Canada*, UNECOSOCOR, UN Doc E/C.12/CAN/CO/6 (2016) at paras 15-6, online.

¹⁷ OAS, Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OR OEA/Ser.L/V/II Doc. 47/15 (2015) at paras 79-80, 334 (not sure what the 13 is for), online (pdf):

Economic, Social, and Cultural Rights has also called on member states to revise relevant tax codes and export credits, and other forms of state support, privileges, and advantages in order to align business incentives and diplomatic support with human rights responsibilities.¹⁸

Currently, Canada makes trade advocacy support in foreign markets conditional on a company's participation (where requested) in two voluntary dialogue facilitation processes, namely the Canadian Ombudsperson for Responsible Enterprise (CORE) and Canada's National Contact Point, a dispute resolution process under the Organisation of Economic Co-Operation and Development (OECD) Guidelines.¹⁹ Researchers and civil society organizations have analyzed these mechanisms with reference to international standards and have concluded that they are ineffective due to their lack of independence, and investigatory or enforcement powers.²⁰

The federal government introduced another relevant policy in 2016 entitled, *Voices at Risk: Canada's Guidelines on supporting human rights defenders*, which creates specific obligations for embassies to promote respect for and support human rights defenders, "even when they allege or appear to have suffered human rights abuses by a Canadian company that receives support from Canada's Trade Commissioner Service."²¹ This policy states that "depending on the facts of a case, there may be an impact on the support that the mission offers to the Canadian company in question, including denying or withdrawing trade advocacy support."²²

However, in a recent report on Canada, the UN Working Group on Business & Human Rights noted that while the potential for loss of state support can be an important policy lever, "it was unclear how effective it had been in producing tangible results with respect to changes in corporate practices or in providing greater access to effective remedies," and that withdrawal of trade support appears to have happened in only two instances.²³ The Working Group suggests that Canada's policy framework in this area is inadequate. This report further demonstrates that when Canadian officials fail to follow applicable policies, they may undermine the protection of human rights and the environment for some of the most vulnerable communities and ecosystems on the planet, and

<www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf> [perma.cc/UF72-NG2H] [IACHR, "Indigenous Peoples"]; Human Rights Commission, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada*, UNGAOR, 38th Sess, UN Doc A/HRC/38/48/Add.1 (2018) at para 35 [HRC, "Working Group"].

¹⁸ Committee on Economic, Social and Cultural Rights, *General comment No 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UNECOSOCOR, UN Doc E/C.12/GC/24 (2017) at para 15 [CESCR, "General comment No 24"].

¹⁹ GAC, "Enhanced CSR Strategy", *supra* note 8.

²⁰ Charis Kamphuis & Leah Gardner, "Effectiveness Framework for Home-State Non-Judicial Grievance Mechanisms" in Amisssi M Manirabona & Yenny Vega Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis Canada, 2019) 75; See also MiningWatch Canada, "Canada's National Contact Point is Long Overdue for an Overhaul" (7 October 2020), online (blog): *MiningWatch Canada* <www.miningwatch.ca/blog/2020/10/7/canada-s-national-contact-point-long-overdue-overhaul> [perma.cc/TYT8-VE7T]; OECD Watch, "Substantiated Submission to the OECD Investment Committee concerning the Canadian NCP's handling of the complaint Bruno Manser Fonds vs. Saktó" (2021), online (pdf): *OECD Watch* <oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/09/OECD-Watch-substantiated-submission-vs.-Canadian-NCP-2020-09-22-1.pdf> [perma.cc/BLJ4-9EVG].

²¹ Global Affairs Canada, *Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders*, Catalogue No FR5-110/2019E (Ottawa: Global Affairs Canada, 2019) at 21, online: *Global Affairs Canada* <www.international.gc.ca/world-monde/assets/pdfs/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders-guide-defenseurs_droits_en.pdf?_ga=2.65464426.570807074.1624291594-1582140248.1619455244> [perma.cc/4MYK-6EZC] [GAC, "Voices at Risk"].

²² *Ibid* at 11. An updated version of the policy, released in 2019, adopted a similar approach and nearly identical language.

²³ HRC, "Working Group", *supra* note 17 at para 34.

moreover, that there are significant barriers to holding Canadian officials accountable for these failures and subsequent harms.

B. The Marlin Mine Conflict

The Marlin mine is an open-pit, underground gold mine that straddles the municipalities of Sipacapa and San Miguel Ixtahuacán in the Department of San Marcos, home to the Indigenous Sipakepense and Mam Mayan communities.²⁴ It was the first large scale mine²⁵ to begin operations following the country's 36 year-long internal armed conflict and genocide that resulted in the murder of over 200,000 Mayas and progressive Ladinos and 45,000 forced disappearances.²⁶ The northwestern highlands, a region where the Guatemalan state executed targeted killings of Indigenous leaders during the country's genocide, is the same area now impacted by the Marlin mine. Although the mine officially closed in May 2017, communities continue to live with the social, economic, and environmental harms that it generated.

The mine was initially developed in 2002 by the Nevada-based company Glamis Gold through its Guatemalan subsidiary Montana Exploradora de Guatemala SA ("Montana").²⁷ In 2006, Goldcorp, a Canadian company headquartered in Vancouver, British Columbia, acquired Glamis in a \$8.6 billion deal.²⁸ In 2019, Goldcorp was acquired by Newmont Corporation, an American company based in Colorado.²⁹



*Memorial for victims of the Guatemalan genocide, Guatemala City, May 2018.
Credit: Janelle O'Meara*

Prior to the mine opening in 2005 and throughout its lifecycle, there were reports of a lack of free, prior and informed consent, fraudulent land acquisitions, criminalization and violent repression of human rights defenders, and concerns around water depletion and water contamination, among

²⁴ The majority of the mining area (85%) is located within the boundaries of San Miguel de Ixtahuacán.

²⁵ For other case studies of mining in Guatemala, See: Mara Luz Polanco, "La Minería en Guatemala" (February 2012), online (pdf): *Universidad de San Carlos de Guatemala* <www.albedrio.org/hm/documentos/MineriaGuatemalaMaraPolanco.pdf> [perma.cc/9UGA-X92B]; Coopération Internationale pour le Développement et la Solidarité, "América Latina: Riqueza Privada, Pobreza Pública" (January 2009), online (pdf): *América Latina En Movimiento* <www.alainet.org/sites/default/files/libro_cidse_0.pdf> [perma.cc/V33L-JEMC].

²⁶ Catherine Nolin, *Transnational Ruptures: Gender & Forced Migration* (Aldershot, UK: Ashgate Publishing Ltd, 2006).

²⁷ Glamis Gold Ltd, "Marlin Project Technical Report" (11 November 2003), online: *U.S. Securities and Exchange Commission* <www.sec.gov/Archives/edgar/data/782819/000120445903000514/glamistechreport.htm> [perma.cc/ZKR8-MQXY].

²⁸ Carolyn Pritchard & MarketWatch, "Goldcorp completes acquisition of Glamis Gold" *MarketWatch* (4 November 2006), online: <www.marketwatch.com/story/goldcorp-completes-acquisition-of-glamis-gold> [perma.cc/M2DE-REFQ].

²⁹ Cecilia Jamasmie, "Done Deal: Newmont Corporation becomes world's No.1 gold miner" *MINING.COM* (18 April 2019), online: <www.mining.com/case-closed-newmont-goldcorp-becomes-worlds-no-1-gold-miner/> [perma.cc/BD9Q-DMZU].

other issues. The following subsections highlight credible and serious allegations and findings of human rights violations and environmental contamination associated with the mine in the period of time leading up to the 2010 IACHR precautionary measures. The allegations described herein have been investigated and well-documented by international bodies, academics, NGOs, as well as Goldcorp.³⁰ In some cases, the relevant institutions made findings. This public body of research was shared by Canadian NGOs and representatives of Guatemalan civil society to the Embassy, and was known, or should have been known, to Canadian officials when they formulated their response to IACHR's precautionary measures.

1. Lack of Consultation and Consent

After acquiring an exploration license in 1999, Montana allegedly deceived and coerced some 600 families to sell their lands for Q4,000 per hectare (about CAD \$650 at current exchange rates).³¹ A human rights assessment commissioned by Goldcorp found that the company's "practice of negotiating payments...on an individual basis was inadequate to ensure the equal treatment and just compensation of all land sellers" and that this process violated the collective land rights of Indigenous peoples.³² In addition, the Compliance Advisor Ombudsman (CAO), the accountability mechanism of the International Finance Corporation (IFC), further concluded that there was "no evidence that [the] municipalities of San Miguel [Ixtahuacán] or Sipacapa or landholders were consulted or notified before/during granting of [the] exploration license" with regard to mining activities.³³

In 2003, Guatemala's Ministry of Energy and Mines (MEM) granted Montana a 25-year exploitation license.³⁴ Under domestic laws at the time, opposition to the license must be expressed within 30 days of the date of approval.³⁵ The CAO found that the Ministry of Energy & Mines published a notice for one day in the national newspaper, but it was not distributed in Sipacapa or San Miguel Ixtahuacán, nor was it published in the Sipakapense and Mam languages.³⁶ Most importantly, the Guatemalan government did not hold consultations with local people about the

³⁰ Several investigations have been undertaken, including a Human Rights Assessment commissioned by Goldcorp shareholders (2010), the United Nations Special Rapporteur for Indigenous Peoples (2010, 2011), in addition to several academic investigations (e.g. Physicians for Human Rights 2010; E-Tech International 2010; Zarsky & Stanley 2011). A number of NGOs have also published reports on the situation at the Marlin mine, including COPAE (2008, 2009, 2010), Cordaid (Van de Sandt, 2009), MiningWatch Canada (2010, 2013), and Peace Brigades (Castagnino 2006), among others.

³¹ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories*, UNGAOR, 18th Sess, UN Doc A/HRC/18/35/Add.3 (2011) at para 37; On Common Ground, "Human Rights Assessment of Goldcorp's Marlin Mine" (May 2010) at 201, online (pdf): <s24.q4cdn.com/382246808/files/doc_downloads/2020/09/OCG_HRA_Marlin_Mine_June_7.pdf> [perma.cc/XY8R-ZPKP].

³² *Ibid* at 201-2.

³³ Office of the Compliance Advisor/Ombudsman, International Finance Corporation & Multilateral Investment Guarantee Agency, "ANNEXES A-D: CAO ASSESSMENT of a complaint submitted to CAO in relation to the Marlin Mining Project in Guatemala" (7 September 2005) at 17, online (pdf): *Compliance Advisor Ombudsman* <www.cao-ombudsman.org/cases/document-links/documents/CAO-Marlin-assessmentannexes-English-7Sept-05.pdf> [perma.cc/PA5G-RGZG] [CAO "Annexes to Assessment Report"] See Table 7: Reported Disclosure and Consultation Activities Undertaken by the Marlin Project of Annex A.

³⁴ Office of the Compliance Advisor/Ombudsman, International Finance Corporation & Multilateral Investment Guarantee Agency, "ASSESSMENT of a complaint submitted to CAO in relation to the Marlin Mining Project in Guatemala" (7 September 2005) at 3, online (pdf): *Compliance Advisor Ombudsman* <www.cao-ombudsman.org/cases/document-links/documents/CAO-Marlin-assessment-English-7Sept05.pdf> [perma.cc/H3AQ-J7BL] [CAO, "Assessment of Marlin Complaint"].

³⁵ *Ibid* at 30.

³⁶ *Ibid*.

company's completed Environmental Impact Assessment (EIA).³⁷ Further, the company's EIA focused only on the potential impacts to San Miguel Ixtahuacán, despite the proximity of and potential for impact in Sipacapa.³⁸ A audio recording of the EIA summary was published only in Mam.³⁹ The IACHR petitioners described community engagement in the company's EIA process as a "public information campaign" that conveyed the potential benefits of the project without referring to its environmental and social risks.⁴⁰ For many of these reasons, the CAO found that affected communities were inadequately consulted and that the company and government failed to consider "local norms for community decision-making about community matters."⁴¹

Between 2003 and the beginning of operations in 2005, affected Mayan communities continually raised concerns over the mine's licenses. They complained that approvals had been granted without adequate consultation and without their free, prior and informed consent,⁴² in direct violation of their Indigenous laws and Guatemala's obligations under International Labour Organization (ILO) Convention 169 ("ILO 169")⁴³ as well as the *American Convention on Human Rights* ("American Convention").⁴⁴ Given the lack of consultation, community leaders worked with the Sipacapa Municipal Council to organize a good faith consultation ("*consulta de buena fe*"). The community organized consultation took place on June 18th, 2005, following Municipal Code procedures as well as Mayan laws and customs, and was observed by Guatemala's Office of the Human Rights Ombudsperson.⁴⁵ In total, 98.5 percent of the participating population (representing 43 percent of the total voting population)⁴⁶ rejected mining in the area.⁴⁷

³⁷ The EIA was only available for 20 business days at the MARN office in Guatemala City and San Marco, according to regulatory requirements. Although radio and newspaper announcements were made regarding the availability of these documents in both Mam and Spanish, only one person from Sipacapa was reported to have reviewed the documents in Guatemala City: *ibid* at 29-30.

³⁸ *Ibid*.

³⁹ *Ibid* at 30.

⁴⁰ OAS, Inter-American Commission on Human Rights, *Report on Admissibility: Communities of the Sipacapeense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, Guatemala*, OR OEA/Ser.L/V/II.150 Doc. 24 (2014) at para 9, online: <www.oas.org/en/iachr/decisions/2014/GUAD1566-07EN.pdf> [perma.cc/T4HP-38M2] [IACHR, "Admissibility Report"].

⁴¹ CAO "Assessment of Marlin Complaint", *supra* note 34 at 32-3.

⁴² Imai *et al*, *supra* note 3.

⁴³ Article 6(1)(a) of ILO 169 states that the State shall, "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, wherever consideration is being given to legislative or administrative measures which may affect them directly." Although Guatemala ratified ILO 169 in 1996, the national mining regulations "do not provide guidance on how project developers should seek approval from local people for either exploration or exploitation activities." The CAO found "no documentation that reflects any detailed consideration was [*sic*] given to the quality of consultation nor to the rationale in differentiating an approach between San Miguel [Ixtahuacán] and Sipacapa." See CAO, "Assessment of Marlin Complaint," *supra* note 34 at 32-3.

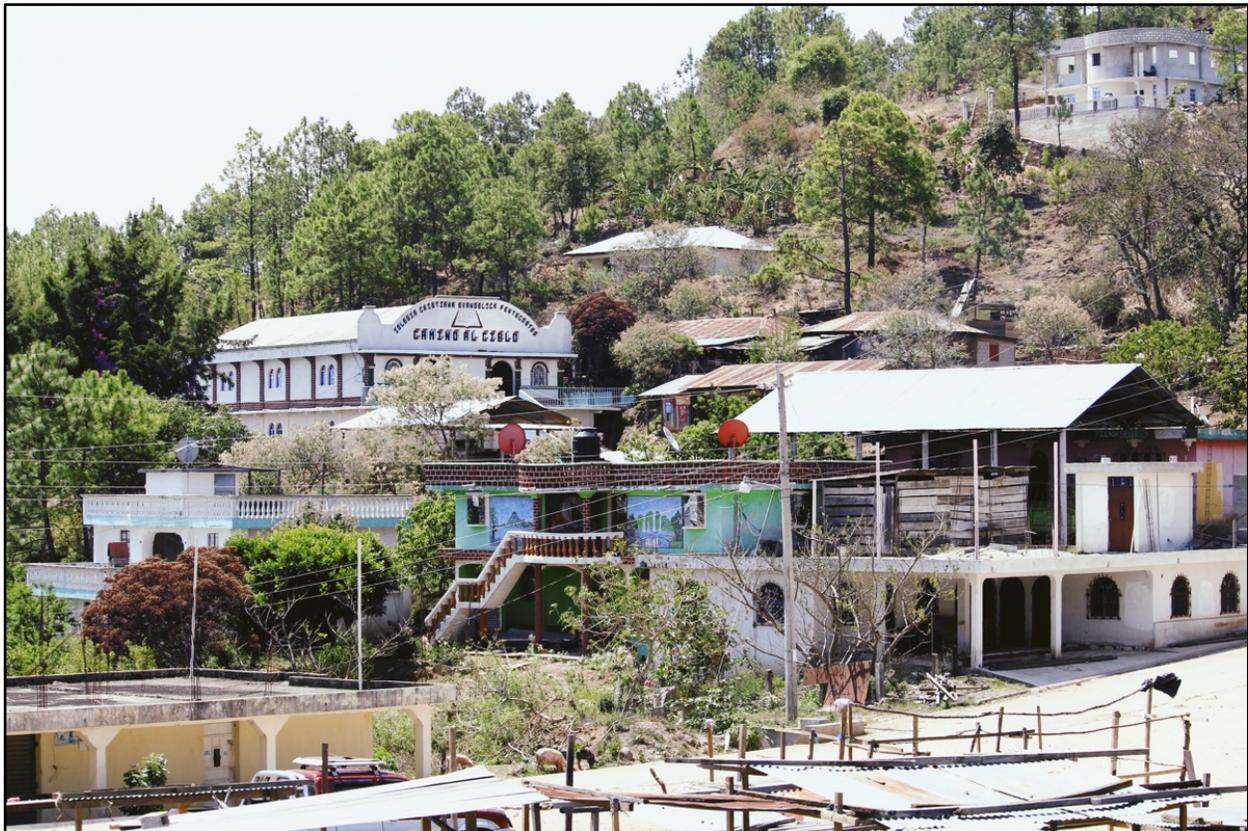
⁴⁴ Jurisprudence of the Inter-American Court for Human Rights concerning the provisions of the *American Convention*, ratified by Guatemala in 1969, enshrines the right to consultation. The state has a duty to ensure that consultation is prior, informed, culturally adequate, and conducted in good faith. OAS, Inter-American Commission on Human Rights, *Indigenous and Tribal People's Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OR OEA/Ser.L/V/II. Doc. 56/09 (2009) at 109-16, online (pdf): <www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf> [perma.cc/W3RL-YQNH].

⁴⁵ IACHR, "Admissibility Report", *supra* note 40 at para 11; Anaya, *supra* note 31 at para 11.

⁴⁶ Imai *et al*, *supra* note 3 at 114. As a benchmark, in the 2004 federal elements, 3,087 people in Sipacapa (54.6% of the population) participated in the voting process.

⁴⁷ In total, 2,426 persons voted against mining, 35 persons voted for mining, 8 ballots were ineligible, one was blank and 32 abstained. Of the 13 community assemblies, 11 rejected mining. See *ibid* at 113-114 for details on the methodologies followed in the different communities.

In response to community organizing, Montana brought two legal actions in Guatemala to halt the vote and request its provisional suspension.⁴⁸ On May 8, 2007, the Guatemalan Constitutional Court ruled that the results of the vote were valid but non-binding, on the basis that it is the Ministry of Energy & Mines and the Ministry of Environment & Natural Resources (MARN) that possess the mandate and authority to conduct consultations regarding mining projects.⁴⁹ The ruling did not include a remedy for communities impacted by the apparent failure of these two bodies to fulfill their mandates.



The municipality of San Miguel Ixtahuacán, May 2018. Credit: Janelle O'Meara

In February 2010, the ILO's Committee of Experts called on Guatemala to suspend mining exploitation at the Marlin mine until it had carried out appropriate environmental, social, spiritual, and cultural studies, and conducted prior consultation with the affected peoples, in accordance with ILO Convention 169.⁵⁰ The United Nations Special Rapporteur for the Rights of Indigenous Peoples James Anaya ("UN Special Rapporteur") echoed this call in his June 2011 report on Guatemala and stated very clearly that:

⁴⁸ IACHR, "Admissibility Report", *supra* note 40 at para 10.

⁴⁹ *Ibid* at para 12.

⁵⁰ International Labour Organization, "Report of the Committee of Experts on the Application of Conventions and Recommendations" (2010) at 770, online (pdf): *International Labour Organization* <www.ilo.org/public/libdoc/ilo/P/09661/09661%282010-99-1A%29.pdf> [perma.cc/L2XA-26L7] [ILO, "Report on Committee"].

There is no doubt that indigenous communities directly affected by the Marlin project were not consulted about it as per the obligations set out in international standards that are binding for Guatemala in this matter. The lack of evidence of consent from the affected indigenous communities is especially striking. Instead, there has been significant opposition and conflict in the municipalities of Sipacapa and San Miguel Ixtahuacán as a result of the mine being built in the area.⁵¹

In its 2014 Admissibility Report, the IACHR found that Guatemala's domestic legislation did not afford due process of law for the protection of the human rights allegedly violated.⁵² The IACHR found many obstacles to legally challenging the Marlin mining licenses, including: documentation was not produced in Indigenous languages; the time available to prepare and file an appeal was too short; the geographic distances involved were significant; and communities lacked economic and technical resources.⁵³ The IACHR characterized the community-organized *consulta de buena fe* as an effort on the part of affected communities to protect their Indigenous right to consultation and consent in accordance with their cultural customs and traditions; a right guaranteed by Guatemalan law.⁵⁴ The IACHR also observed that Guatemala had failed to offer information with respect to how it had responded to the results of the *consulta*.⁵⁵

2. Criminalization and Repression

The Guatemalan state and the company responded to local opposition to the Marlin mine by criminalizing human rights defenders and violently repressing protests, including multiple declarations of a state of emergency.⁵⁶ Between 2005 and 2011, there were several violent clashes between communities, the Guatemalan police, military personnel, and Montana security forces, resulting in at least 4 deaths, 24 injuries, and 30 arrests.⁵⁷

In December 2004, shortly after the Marlin mine began construction in October 2004, several neighbouring communities in Maya Kaqchikel territory initiated a blockade of the Pan-American Highway to stop Montana from dismantling a pedestrian bridge to allow for the transportation of a large milling cylinder to the mine site.⁵⁸ The blockade lasted about six weeks. In January 2005, the Ministry of the Interior dispatched approximately 1,800 security forces to the site and the bridge was dismantled despite opposition.⁵⁹ Officers fired at the peaceful protestors, resulting in 15 arrest warrants, 18 injuries, and the killing of Raúl Castro Bocel.⁶⁰ After these incidents, the

⁵¹ Anaya, *supra* note 31 at paras 68, 70.

⁵² IACHR, "Admissibility Report", *supra* note 40, at para 41. Petitions to the IACHR are only admissible where domestic remedies are exhausted, pursuant to Article 44 of the Convention. This requirement is not applicable, however, where the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights allegedly violated (Article 46.2.a): *ibid* at para 30.

⁵³ *Ibid* at para 36.

⁵⁴ *Ibid* at paras 33-4.

⁵⁵ *Ibid* at para 34.

⁵⁶ Anaya, *supra* note 31 at para 56.

⁵⁷ Imai, Gardner & Weinberger, *supra* note 15 at 58-9.

⁵⁸ *Ibid* at 58; Anaya, *supra* note 31 at para 12.

⁵⁹ Vincent Castagnino, "Metal Mining and Human Rights in Guatemala: The Marlin Mine in San Marcos" (September 2006) at 13, online (pdf): *Peace Brigades International* <www.peacebrigades.org/fileadmin/user_files/projects/guatemala/files/english/PBI-mining-human-rights-guate.pdf> [perma.cc/NH4Z-YFTN].

⁶⁰ Imai *et al*, *supra* note 3 at 58.

Guatemalan President was reported to say, “we have to protect the investors” to justify the excessive use of force.⁶¹ Two months after Bocel’s death, community leader Alvaro Benigno was reportedly shot and killed by two off-duty mine security guards.⁶²

The year 2007 was particularly violent as protests increased against the coercive implementation of the mine and as the environmental and health impacts became more acute. In January, community members blocked access to the entrance to the mine in an effort to start a dialogue with the company who, until that point, had allegedly refused to discuss their concerns. The concerns included cracked houses, under-priced and forced land sales, dust contamination, and the drying of water sources.⁶³ There are reports that Goldcorp’s security forces threatened 28 community members with firearms and beat them in retaliation for the blockade.⁶⁴ Arrest warrants for seven protesters were issued on the basis of allegations of coercion, threats, and instigating delinquency, among other charges.⁶⁵ Police officers then forcibly removed two of these individuals from their homes and jailed them for three days. They were ultimately sentenced with two years’ probation and a fine, while the other five were acquitted.⁶⁶ In another incident, the decapitated body of Pedro Miguel Cinto, a vocal opponent of the mine, was found.⁶⁷

In July 2008, arrest warrants were issued against eight women from San Miguel Ixtahuacán accused of cutting the mine’s power lines.⁶⁸ The company negotiated the installation of electric poles to support power lines running to the mine processing plant, but failed to adequately inform the landowners as to their size. Guatemalan courts eventually annulled the arrest warrants and ordered the company to take down the electrical poles, but the women faced ongoing stigmatization and threats, with some forced to temporarily flee their homes.⁶⁹ In 2009, a community member opposed to the project was reportedly doused in gasoline and lit on fire by men who asked why he was “against mining” and “against the company”; he later died of his injuries.⁷⁰ Threats and violence

⁶¹ Nolin & Stephens, *supra* note 3 at 53.

⁶² Rights Action, “Killing of Alvaro Benigno Sanchez by Security Guards Working for Glamis Gold Subsidiary in Guatemala” (5 April 2005), online: *MiningWatch Canada* <www.miningwatch.ca/news/2005/4/5/killing-alvaro-benigno-sanchez-security-guards-working-glamis-gold-subsidiary> [perma.cc/M5N4-3SKW].

⁶³ John Ahni Schertow, “Trial of ‘Goldcorp 7’ Continues in Guatemala”, *IC Magazine* (28 November 2007) online: <intercontinentalcry.org/trial-of-goldcorp-7-continues-in-guatemala/> [perma.cc/EKX5-9GX8].

⁶⁴ James Rodríguez, “Mina de Oro Agrava Situación Social” (2007), online: *MiMundo.org James Rodríguez* <www.mimundo-fotorreportajes.org/2007/07/mina-de-oro-agrava-situacin-social.html> [perma.cc/6GUL-DBVE].

⁶⁵ Schertow, *supra* note 63.

⁶⁶ *Ibid.* (Montana had asked for 4-11 years of jail time and significant monetary compensation).

⁶⁷ Rights Action, “URGENT ACTION: Crackdown on Local Citizens Opposing Goldcorp’s “Marlin” Mine Escalates in San Marcos, Guatemala” (18 July 2008), online (blog): *Breaking the Silence* <breakingthesilencenet.blogspot.com/2008/07/urgent-actioncrackdown-on-local.html> [perma.cc/6XNB-BDGW].

⁶⁸ San Miguel Ixtahuacán, “Minería en San Miguel Ixtahuacán: Conflictividad y Criminalización San Miguel Ixtahuacán” (30 November 2008), online: *MiMundo.org James Rodríguez* <www.mimundo-fotorreportajes.org/2008/11/minera-en-san-miguel-ixtahuacn.html> [perma.cc/9JME-CMLZ].

⁶⁹ ACOGUATE, “2012: Defense of Territory and Natural Resources” (11 January 2013), online (blog): *Nisgua* <nisgua.blogspot.com/2013_01_01_archive.html> [perma.cc/WC9E-4HN3]; Centro de Información y Servicios de Asesoría en Salud, “Todas y todos somos Crisanta” (10 August 2010), online: *Centro de Información y Servicios de Asesoría en Salud* <cisasmic.org/story/todas_y_todos_somos_crisanta> [perma.cc/3CXH-HH2B].

⁷⁰ David Hill, “Welcome to Guatemala: gold mine protestor beaten and burnt alive,” *The Guardian* (12 August 2014), online: <www.theguardian.com/environment/andes-to-the-amazon/2014/aug/12/guatemala-gold-mine-protester-beaten-burnt-alive> [perma.cc/NMF5-4JG2].

against community members continued after the issuance of the precautionary measures in May 2010, and continued during the visit of the UN Special Rapporteur.⁷¹

3. Environmental Contamination

The opposition to the Marlin mine described above resulted in part from widespread and growing concerns that its operations were causing environmental contamination. There were numerous credible and independent reports of the mine's potential and actual adverse impact on water sources. However, the Guatemalan government and Goldcorp published studies that contradicted the technical results of independent experts. The CAO's 2005 assessment, described below, identified a lack of impartial information about the risks and impacts of the mine as a key cause of conflict.⁷² This section summarizes the findings from the most significant studies conducted in the period prior to the issuance of the IACHR's precautionary measures in 2010.

Early in the mine's life cycle, in 2005, the CAO commissioned a desk-review by an independent hydrologist. This review determined that there was "no possibility that discharges originating from the processing plants will affect the water courses [*sic*] in Sipacapa," the municipality upstream and farther away from the mine than San Miguel Ixtahuacán.⁷³ In the same year, an American hydrogeologist, Rob Moran, performed a technical review of the CAO Assessment. Moran evaluated all project documents relating to water quality and made site visits to Marlin Mine between 2004 and 2005.⁷⁴ He found that no member of the CAO Assessment team that visited the mine had specific expertise in hydrogeology, and that their conclusions were based on incomplete data and optimistic assumptions. In his professional opinion, there was a reasonable likelihood that the waste rock piles would become acid through oxidation, releasing contaminants in surface and groundwater.⁷⁵ Moran further predicted that the communities downstream from the mine would be impacted by periodical wastewater discharges from the tailings facility, which may contain cyanide and other pollutants.⁷⁶ These concerns appear to have been confirmed by one analyst who reported acid drainage and water contamination in the Tz'alá river in a 2006 study.⁷⁷

Other studies organized by community-based organizations, NGOs, academics, and religious institutions also identified an elevated presence of heavy metals in local rivers used for consumption and subsistence activities downstream from the tailings dam.⁷⁸ For example, in 2008, 2009, and 2010, the Comisión Pastoral Paz y Ecología (COPAE) of the Diocese of San Marcos

⁷¹ James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Preliminary note on the application of the principle of consultation with indigenous peoples in Guatemala and the case of the Marlin mine*, UNGAOR, 15th Sess, UN Doc A/HRC/15/37/Add.8 (2010) <undocs.org/A/HRC/15/37/ADD.8> [perma.cc/6X4G-NEFA].

⁷² CAO "Assessment of Marlin Complaint", *supra* note 34 at 38.

⁷³ CAO "Assessment Report", *supra* note 33 at 16.

⁷⁴ Robert E Moran, "CAO Marlin Mine Assessment: Technical Responses" (28 September 2005) at 1-2, online (pdf): *MiningWatch Canada* <www.miningwatch.ca/sites/default/files/marlin_cao_response_0.pdf> [perma.cc/Z2D2-RKH2].

⁷⁵ Moran, *supra* note 74 at 3; See also van de Sandt, *supra* note 3 at 31.

⁷⁶ See Robert E Moran, "New Country, Same Story: Review of the Glamis Gold Marlin Project EIA, Guatemala" (February 2004) at 4-5, online (pdf): *Michael - Moran Associates, LLC* <remwater.org/wp-content/uploads/2015/10/Moran-Robert-E.-2005-February-New-Country-Same-Story-Review-of-the-Glamis-Gold-Marlin-Project-EIA-Guatemala.pdf> [perma.cc/Y8KW-TUFD]. See also van de Sandt, *supra* note 3 at 31: the communities downstream from the mine include those in San Miguel Ixtahuacán along the Quivichil Creek and Cuilo River.

⁷⁷ Flaviano Bianchini, "Estudio técnico. Calidad de agua del Río Tz'alá (municipio de Sipakapa; departamento de San Marcos)" (2006), online (pdf): *Reportero* <blog.reportero.org/wp-content/estudio_de_agua_del_rio_tzal.pdf> [perma.cc/3MFW-PAZE].

⁷⁸ Anaya, *supra* note 31 at para 14.

detected high downstream concentrations of iron, aluminum, manganese, and arsenic that exceeded national and international water use standards.⁷⁹ There were also first-hand reports of health problems such as skin infections, and livestock deaths, believed to be caused by contaminated waterways and heavy metal-infused dust.⁸⁰



*A portion of the Marlin Mine's open-pit, atop a mountainside in San Miguel Ixtahuacán, May 2018.
Credit: Janelle O'Meara*

Meanwhile, studies conducted by the company and the Guatemalan government found that the mine's operations were not causing pollution and that water sources were suitable for human consumption.⁸¹ Following a recommendation issued by the CAO for an independent and participatory monitoring program at the mine, Goldcorp established the Community Environmental Monitoring Association (AMAC) in 2006, which involved representatives from ten

⁷⁹ COPAE, "Situación actual de los ríos Tzala y Quivichil en el área de influencia de la mina Marlin, ubicada en los municipios de San Miguel Ixtahuacán y Sipakapa, Departamento de San Marcos, Guatemala" (August 2008), online (pdf): *Catapa* <old.catapa.be/files/Informe%20Anual%20del%20Monitoreo%20y%20Análisis%20de%20la%20Calidad%20del%20agua.pdf> [perma.cc/EAR6-JQHV]; COPAE, "Segundo Informe Anual de Monitoreo y Análisis de la Calidad del agua. San Marcos, Guatemala" (2009), online (pdf): *Scribd* <www.scribd.com/document/258914328/Segundo-Informe-Anual-Del-Monitoreo-y-Analisis-de-La-Calidad-Del-Agua-COPAE> [perma.cc/8PBH-3EJ6]; COPAE, "Tercer Informe Anual Del Monitoreo y Análisis de la Calidad del Agua" (August 2010), online (pdf): *Goldcorp Out of Guatemala* <goldcorpoutofguatemala.files.wordpress.com/2010/07/tercer20informe20anual20del20monitoreo.pdf> [perma.cc/8PBH-3EJ6].

⁸⁰ IACHR, "Admissibility Report", *supra* note 40 at para 16.

⁸¹ On Common Ground, *supra* note 31 at 69-70.

communities near the mine and technicians from San Carlos University.⁸² AMAC was dependent on the company for funding and conduct its water testing in cooperation with Goldcorp and the Ministry of Energy & Mines under a joint agreement.⁸³ The Canadian Embassy also provided some funding for the initiative.⁸⁴ Surface and ground water locations, including two discharge locations, were sampled quarterly on an alternating basis. All water samples were sent to a lab in Canada where testing was performed, and the results were later shared with Canadian Jim Rader of Avanzar, a CSR firm hired by Goldcorp.⁸⁵ The reports were eventually published on a public website.⁸⁶

In 2009, Goldcorp also signed an agreement to provide the Guatemalan government with funding to independently monitor mine discharges.⁸⁷ The arrangement intended to facilitate government oversight by allowing the company to fund its own system of environmental monitoring. The lack of independence created a serious conflict of interest, undermining the credibility of the arrangement. A Human Rights Assessment commissioned by Goldcorp, released in May 2010, found that “independent, external auditing of the water monitoring program has not yet been implemented in accordance with international standards.”⁸⁸ The Human Rights Assessment also reviewed the studies conducted by Guatemalan regulators between 2005 and 2010, and reported that, although they had not detected water contamination,⁸⁹ the available information was insufficient to support clear conclusions on potential health impacts resulting from mine-related pollution.⁹⁰

Critically, the Human Rights Assessment found that “the absence of on-site technical performance review by independent auditors means there is no verification of Montana’s [Goldcorp] claims.”⁹¹ A body of the Canadian government, the National Contact Point (NCP), agreed that the information available at the time was inadequate and further assessments were necessary. The NCP had conducted an initial assessment based solely on desk research in response to a March 2010 complaint submitted by a local organization in San Miguel Ixtahuacán requesting a full investigation and a field visit to the mine.⁹² The NCP stated that it “was not in a position to verify the technical details of many of the submitted reports” or “to carry out a field visit,” but that “the issues raised merited further examination.”⁹³

⁸² *Ibid* at 68-99. AMAC included representatives from ten communities in the middle of the watershed who were elected on a two-year basis. Communities farther downstream, i.e., in the lower watershed, were not included in the initiative.

⁸³ E-Tech International, “Evaluation of Predicted and Actual Water Quality Conditions at the Marlin Mine, Guatemala” (August 2010) at 40, online (pdf): *E-Tech International* <static1.squarespace.com/static/52d71403e4b06286127a1d48/t/530d2ca6e4b0238c30f90539/1393372326990/Evaluation+of+Predicted+and+Actual+Water+Quality+Conditions+at+the+Marlin+Mine%2C+Guatemala+August+2010.pdf > [perma.cc/MMP4-6E9T]; On Common Ground, *supra* note 31 at 69.

⁸⁴ E-Tech International, *supra* note 83 at 41.

⁸⁵ *Ibid*.

⁸⁶ On Common Ground, *supra* note 31 at 69.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at 61, 73.

⁸⁹ *Ibid* at 61-83. See also Anaya, *supra*, note 31 at paras 15, 16; CAO “Assessment Report”, *supra* note 33 at 16.

⁹⁰ On Common Ground, *supra* note 31 at 78-9.

⁹¹ *Ibid* at 66.

⁹² Global Affairs Canada, “Final Statement of the Canadian National Contact Point on the Notification dated December 9, 2009, concerning the Marlin mine in Guatemala, pursuant to the OECD Guidelines for Multinational Enterprises” (3 May 2011), online: *Global Affairs Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/npc-pcn/final_stat-marlin-decl_finale.aspx?lang=eng> [perma.cc/L6WN-T6SX][GAC, “NCP Final Statement”].

⁹³ *Ibid*. In lieu of an on-site investigation, the National Contact Point offered to facilitate a dialogue between Goldcorp and FREDEMI. FREDEMI did not want to dialogue with the company because FREDEMI members had been falsely detained and

There were significant problems with respect the Guatemalan government's monitoring and regulation of the mine, including a lack of transparency and proper oversight. For example, of the 23 environmental and water-related government studies referenced in the Presidential Commission for Human Rights (COPREDEH) March 2010 report, none had been made public.⁹⁴ Moreover, the limitations and deficiencies of Guatemala's regulatory agencies have been widely recognized.⁹⁵ The Goldcorp-commissioned Human Rights Assessment remarked on regulators' "lack of capacity and limited experience with the issues required to enforce environmental standards in the mining industry," noting that the regulators' limited budgets constrained their ability to hire personnel with the required expertise.⁹⁶ Despite Guatemala's low environmental standards and limited regulatory capacity, the Ministry of Environment & Natural Resources (MARN) filed three complaints against Montana/Goldcorp between 2008 and 2010 related to the location of the tailings dam, a spill of toxic materials, and unauthorized discharges from the dam into a local river.⁹⁷ Notably, in 2009, Guatemala's Congressional Transparency Commission found that the company's EIA did not include a hydrological study of the potential interaction between ground and surface water used by the communities, nor did it include a study of the permeability of the tailings area, calling for an independent study to address these gaps.⁹⁸

The following year, in August 2010, the NGO E-Tech International evaluated water studies conducted by Montana/Goldcorp, COPAE, and MARN, and concluded that the water in the Marlin tailings dam exceeded IFC guidelines for allowable concentrations of cyanide, copper, and mercury, and that the mine wastes had a moderate to high potential to generate acid and leach contaminants.⁹⁹ The 2010 study reiterated the shortcomings of the company's EIA (identified the year prior by Congress) in relation to Marlin's potential impact on surface and underground water sources.

After communities voiced their concerns to the Human Rights Office of the Archbishop of Guatemala, the Archbishop asked a Professor at Notre Dame University to chair a four-member Independent International Panel to oversee a study on the environmental health impacts of the mine, conducted by the NGO Physicians for Human Rights (PHR).¹⁰⁰ The 2010 preliminary study found higher concentrations of blood lead and urinary mercury, arsenic, copper, and zinc in those

prosecuted for defending their rights. As a result, the complaint was closed in May 2011. Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201200344* at 75, online: *Dropbox* <www.dropbox.com/s/ewtsn4l8738fesd/A201200344_2013-10-28_11-03-58.PDF?dl=0> [perma.cc/JGK4-SUDA][DFATD, "ATI Request A201200344"].

⁹⁴ MiningWatch Canada, "FAQ Sheet Sources: What You May Not Know about Goldcorp's Marlin Mine in Guatemala" (May 2010) at 2, online (pdf): *MiningWatch Canada* <www.miningwatch.ca/sites/default/files/Sources_FAQ_What_you_may_not_know_about_Goldcorp_Marlin_Mine_in_Guatemala_May_2011.pdf> [perma.cc/4GHS-L3JC].

⁹⁵ See Anaya, *supra* note 31 at paras 5, 26, 49. See also Lyuba Zarsky & Leonardo Stanley, "Searching for Gold in the Highlands of Guatemala: Economic Benefits and Environmental Risks of the Marlin Mine" (2011 September), online (pdf): *Justice & Corporate Accountability Project* <justice-project.org/wp-content/uploads/2018/07/Tufts-marlinemine-2011.pdf> [perma.cc/HT7B-8AB3].

⁹⁶ On Common Ground, *supra* note 31 at 62.

⁹⁷ Anaya, *supra* note 31 at para 16.

⁹⁸ *Ibid* at n 72.

⁹⁹ E-Tech International, *supra* note 83. To compare operational water quality to pre-mining conditions, E-tech relied on results from Goldcorp, the Community Environmental Monitoring Association, COPAE and MARN.

¹⁰⁰ The international organization Physicians for Human Rights ("PHR") is composed of professors from the University of Michigan, including Niladri Baus, MSc, PhD, Assistant Professor of Environmental Health Sciences, and Howard Hu, MD, MPH, ScD, NSF International Department Chair, Professor of Environmental Health Science.

residing closer to the mine, and recommended further investigations to monitor likely increases.¹⁰¹ Participants in the study reported health effects such as skin rashes, vision problems, and respiratory difficulties.¹⁰² As elaborated upon in Part III of this report, the PHR study informed part of the IACHR's decision to call for a temporary suspension of Marlin's operations.

The ongoing controversy over environmental contamination in 2011 led UN Special Rapporteur James Anaya to call for an independent investigation into the mine be carried out by qualified technicians, and participation of impacted communities.¹⁰³ The Special Rapporteur concluded that problems relating to water contamination existed and that the latest technical assessments carried out by government bodies did not offer conclusive data.¹⁰⁴ The Special Rapporteur also commented on the limitations of the company's initial EIA on account of the inadequacies of Guatemala's mining legislation and highlighted weaknesses in the government's environmental monitoring and evaluation mechanisms.¹⁰⁵

In sum, when the IACHR issued precautionary measures recommending the temporary suspension of Marlin Mine in 2010, there was a consensus between communities, international bodies, and external evaluators that Guatemalan regulators lacked the capacity and resources necessary to properly regulate the mine. Numerous independent studies had also concluded that Marlin's operations may be causing harmful contamination, along with potentially long-term environmental risks, and that more fulsome and independent monitoring was necessary. As demonstrated in Part III, Canada knew about these reports as well as MARN's complaints against the company.¹⁰⁶ However, there is no evidence that Canada took any steps to investigate community concerns or to support calls for better regulation and environmental studies. Instead, Canada adopted Goldcorp's position on these matters as its own and then attempted, not only to discount the idea that there were legitimate concerns at play, but also took steps to specifically discredit certain studies done by independent academics and international experts.

4. Cozying up with Goldcorp: Wine Bars and Private Jets

Throughout these controversies, Canadian officials continued to support Goldcorp, securing it privileged access to high-ranking Guatemalan officials. In March 2010, Canadian officials wined and dined Guatemalan representatives, key mining industry players, Goldcorp Executives, and DFATD Trade Commissioners in meetings that took place at high-end locations like the Fairmont Royal York and Crush Wine Bar in Toronto, Canada.¹⁰⁷ DFATD reported that the delegates were

¹⁰¹ Niladri Basu, "Toxic Metals and Indigenous Peoples Near the Marlin Mine in Western Guatemala: Potential Exposures and Impacts on Health" (18 May 2010), online (pdf): *Physicians for Human Rights* <phr.org/wp-content/uploads/2010/05/guatemala-toxic-metals-1.pdf> [perma.cc/3WB3-RGPH]. Due to the limitations of the study, the report could not conclusively determine whether these levels posed a significant threat to human health.

¹⁰² Basu, *supra* note 101 at 12-3.

¹⁰³ Anaya, *supra* note 31 at paras 50, 67.

¹⁰⁴ *Ibid* at paras 45-7.

¹⁰⁵ *Ibid* at paras 5, 26, 49.

¹⁰⁶ Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201100925* at 5-7, online: *Dropbox* <www.dropbox.com/s/hp5astr235o5cbv/A201100925_2012-01-06_11-57-02.pdf?dl=0> [perma.cc/5G24-WX33] [DFATD, "ATI Request A201100925"]. Canadian officials distributed press clippings which spoke to the MARN lawsuit against Goldcorp and pondered whether to update their briefing note on the Marlin Mine for the Minister of State for Foreign Affairs.

¹⁰⁷ The Embassy organized an all-expenses paid trip to Canada for Guatemalan officials, including Guatemalan Vice-Minister of Foreign Affairs Manuel Estuardo Roldan, Advisor to the Minister of Energy & Mines Alejandro Palmieri and Secretary of

“quite satisfied with their experience and were impressed with the manner Canada manages its resources.”¹⁰⁸ Goldcorp later reciprocated Canada’s hospitality, including by organizing an all-expenses trip to the Marlin mine via a company jet for four Canadian Members of Parliament and a Senator in August 2012.¹⁰⁹ In December of that same year, Canada officials refused to meet with San Miguel Ixtahuacán and Sipacapa community members who travelled 8 hours to protest outside the Canadian Embassy during Canadian Governor General David Johnston’s visit to Guatemala.¹¹⁰ This pattern of behaviour, whereby DFATD and Embassy officials prioritized their relationship with Goldcorp and commercial interests over the lives and wellbeing of Indigenous Peoples in Guatemala, is further depicted in Canada’s response to the IACHR request, described in Part III of this report.

C. IACHR Precautionary Measures

In December 2007, 13 Sipakepense Mayan communities brought a petition to the IACHR alleging that the Government of Guatemala had authorized the Marlin Mine without a process of free, prior, and informed consent and, further, that the government had ignored the outcome of a community-organized consultation (described above in Part I.B.1).¹¹¹ The petition was accompanied by a request for precautionary measures which alleged that the mining project was producing grave consequences for the life, personal integrity, environment, and property of the communities, in violation of Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 13 (freedom of thought and expression), 19 (rights of the child), 21 (right to property), 23 (right to participate in government), 24 (right to equal protection), 25 (right to judicial protection), and 26 (progressive development) of the *American Convention*. This petition represents just one attempt of many other national and international complaints and processes that communities pursued in their effort to defend their rights in relation to Marlin Mine.¹¹²

Planning and Programming of the Presidency of Guatemala Delfina Mux. On March 9, 2010, the delegates travelled to Toronto to have breakfast at the Fairmont Royal York with the President of the Prospectors Developers & Association of Canada, Jon Baird, and Guatemalan Advisor to the Minister of Energy and Mines, Estuardo Roldan, followed by an afternoon presentation by Fasken Martineau and the PDAC Committee on Indigenous Issues. Guatemalan representatives then had a two-hour meeting with Goldcorp executives at Crush Wine Bar and were joined by Senior Trade Commissioners Christopher Wimmer and Anne Castle from DFTAD. Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201002404_2011-12-05_11-52-19* at 16-20, online (pdf): *Dropbox*

<www.dropbox.com/s/ulrwus1ctiq73sm/A201002404_2011-12-05_11-52-19.PDF?dl=0> [perma.cc/57AH-CYBF].

¹⁰⁸ DFATD, “ATI Request A201100925”, *supra* note 105 at 506.

¹⁰⁹ MiningWatch Canada, “Goldcorp Organizes Junket to Guatemala for Canadian Parliamentarians” (28 August 2012), online: *MiningWatch Canada* <www.miningwatch.ca/news/2012/8/28/goldcorp-organizes-junket-guatemala-canadian-parliamentarians> [perma.cc/J25X-67U4].

¹¹⁰ The communities presented a letter to the Governor General and shared their concerns directly with Embassy staff in the lobby. Political Counsellor Colleen Pigeon summarizes their message as follows: “The government of Guatemala is corrupted and was financially supported by these companies. They have bought the legal and political system— no justice can be obtained. No consultation process has been put in place and the companies are blocking any attempts for consultation. Specifically to the Embassy...the message is that we operate under two different morals, advocating for Canadian investments which do not respect HR [human rights] and human rights at the same time. The Embassy should not be having our Governor General speak of investment with the President if we truly defend and stand for HR.” Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201301117* at 170, online: *Dropbox* <www.dropbox.com/s/7zdxz4a6ffopx7d/A201301117_2014-12-23_08-19-27.pdf?dl=0> [perma.cc/N8SJ-CA52] [DFATD “ATI Request A201301117”].

¹¹¹ IACHR, “Admissibility Report”, *supra* note 40. The municipal mayors of Sipacapa and San Miguel Ixtahuacán asked to join as petitioners on behalf of the impacted communities of Sipakepense Mayan people and the impacted communities of the Mam Mayan people in their respective municipalities.

¹¹² Community members submitted several complaints regarding unresolved grievances against the Marlin mine to: the International Finance Corporation’s Compliance Advisor Ombudsman (2005) and Canada’s National Contact Point under the

Timeline of Key Events: IACHR Precautionary Measures

May 20, 2010	Precautionary measures granted.
June 23, 2010	Guatemalan government announces an administrative process to determine if suspension of the Marlin mine is warranted.
October 25, 2010	IACHR holds two hearings on the precautionary measures: one public hearing between Guatemala and the petitioners (the parties); and one private hearing between the parties and Goldcorp.
July 8, 2011	Guatemala declares that Marlin mine is operating in compliance with domestic law and petitions the IACHR to lift the precautionary measures.
December 11, 2011	IACHR amends the precautionary measures by lifting the suspension request, but retains the requirements that Guatemala prevent environmental contamination and ensure access to potable water for affected communities.

On May 20, 2010, the IACHR granted the petitioners request and issued precautionary measures PM-260-07¹¹³ requesting that the Government of Guatemala suspend the Marlin Mine within 20 days and implement effective measures to prevent environmental contamination, decontaminate water sources, ensure access to potable water, and address health, safety and security problems until the IACHR issued a decision on the merits of the petition.¹¹⁴ The IACHR also asked Guatemala to plan and implement the protection measures with the participation of the beneficiaries.

On June 23, 2010, the Government of Guatemala publicly announced it would initiate an administrative process under domestic law to determine if the suspension of the Marlin mine was

OECD Guidelines for Multinational Enterprises (2010), in addition to a host of national institutions such as the Public Ministry, the Presidential Commission for Human Rights (2018), Congress, and the Human Rights Ombudsman (2018). The Regional Office of the Guatemalan Human Rights Ombudsman in San Marcos found several human rights violations associated with the Marlin Mine, but the Constitutional Court later ruled that those findings were non-binding. Anaya, *supra* note 31 at para 13.

¹¹³ A precautionary measure is a protection mechanism of the IACHR through which it can request a state to protect persons in a serious and urgent situation, from suffering irreparable harm, under Article 25 of the Rule of Procedures. The granting of precautionary measures does not constitute a prejudgment of the violation of the rights protected in the *American Convention*. Instead, the measures' precautionary function aims to preserve legal situations while the bodies of the Inter-American system analyze a petition or case, and their protective function seeks to protect the exercise of human rights, taking into account the particularities of each specific situation and the nature of the risks and harm that the request seeks to prevent from occurring. OAS, Inter-American Commission on Human Rights, "Precautionary measures: their practice as a guarantee of respecting fundamental rights and preventing irreparable damage" (last visited 21 August 2021), online: *Organization of American States* <www.oas.org/en/IACHR/jsForm/?File=/en/iachr/decisions/mc/about-precautionary.asp#:~:text=A%20precautionary%20measure%20is%20a,situation%20from%20suffering%20irreparable%20harm> [perma.cc/3WKL-5GJH] [IACHR, "Precautionary Measures"].

¹¹⁴ OAS, Inter-American Commission on Human Rights, "PM 260-07 - Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala" (20 May 2010), online: *Organization of American States* <www.oas.org/en/iachr/decisions/precautionary.asp?Year=2010> [perma.cc/Q4C6-89Q6].

warranted as per the IACHR's request.¹¹⁵ At the same time, the government took the position that there was no evidence to support communities' claims of water contamination according to studies conducted by government regulators. In July 2010, the IACHR conducted an on-site investigation to the Marlin mine to assess the allegations of the petitioners on a preliminary basis.

Three months later, on October 25, 2010, the IACHR held two preliminary hearings: one public hearing for the petitioners and the Government of Guatemala, where the parties were able to present information relevant to the petition, and another private hearing, involving the parties and Goldcorp. On July 21, 2010, the communities of San Miguel Ixtahuacán and Sipacapa applied for an injunction against government authorities, alleging non-compliance with the IACHR precautionary measures, particularly regarding the suspension of operations at the Marlin mine.¹¹⁶

On July 8, 2011, the Guatemalan Ministry of Energy and Mines issued directive No 0104, declaring that the Marlin mine was operating in compliance with the law and that there was no basis for suspending its operations.¹¹⁷ On July 11, 2011, Guatemala petitioned the IACHR to declare the precautionary measures to be without further effect.¹¹⁸

A year later, on December 9, 2011, the IACHR amended the precautionary measures by lifting the suspension request despite Guatemala's lack of compliance. However, the modified measures remained in place, and the IACHR retained the requirement that Guatemala take necessary measures to ensure that water resources are not contaminated by mining operations and to provide access to potable water for human consumption and household use as well as for irrigation purposes.¹¹⁹ The IACHR conveyed that its decision to change the content of the precautionary measures came "after examining additional information from the two parties."¹²⁰ Part III examines Canada's role in advocating for this outcome, by attempting to increase Goldcorp influence in the IACHR's proceedings, by lobbying the Guatemalan government not to implement the IACHR suspension order, and by working with Guatemala and Goldcorp to manage the IACHR's on-site investigation to the Marlin mine.

¹¹⁵ Gobierno de Guatemala, "Posición del Gobierno de Guatemala respect de la solicitud de medidas cautelares realizada por la Comisión Interamericana de Derechos Humanos de la OEA" (23 June 2010), online: *No a la mina* <noalamina.org/latinoamerica/guatemala/item/4396-logran-la-suspension-de-mina-marlin> [perma.cc/837V-PRHG].

¹¹⁶ Anaya, *supra* note 31 at para 23.

¹¹⁷ DFATD, "ATI Request A201200344", *supra* note 93 at 43-5.

¹¹⁸ *Ibid* at 96.

¹¹⁹ IACHR, "Precautionary Measures", *supra* note 113.

¹²⁰ IACHR, "Admissibility Report", *supra* note 40 at para 4.

PART II – Canada’s Policies & International Obligations

As stated previously, this report documents and analyzes Canada’s response to a human rights petition brought to the IACHR by Indigenous Guatemalans against the Government of Guatemala, and the precautionary measures subsequently issued by the international institution. While the petition alleged human rights violations associated with Goldcorp’s Marlin mine, neither Canada nor Goldcorp were parties to the proceedings.¹²¹ The first section reviews the applicable provisions of Canada’s domestic policies in place at the time, sections two and three identify and summarize the obligations in international law that applied to Canada in the circumstances, and section four synthesizes Canada’s relevant obligations by creating a simple list.

A. Canada’s 2009 Corporate Social Responsibility Policy

Canada’s 2009 CSR policy applied, given the timing of the 2010 IACHR precautionary measures. Entitled *Building the Canadian Advantage: A CSR Strategy for the Canadian Extractive Sector Abroad* (“CSR Strategy”),¹²² the strategy asserted that Canada “*expects and encourages* Canadian companies operating abroad to respect all applicable laws and internationally-agreed principles of responsible business conduct,”¹²³ and that as part of this strategy, Canada “*will take steps to ensure* that government services align with high standards of corporate social responsibility” [emphasis added].¹²⁴ Companies are specifically expected to “operate transparently and in consultation with host governments and local communities and to develop and implement CSR best practices.”¹²⁵ The added emphasis of these commitments highlight the fact that, in order for them to be meaningful, they required Canadian officials to take due diligence steps towards satisfying the expectation that companies comply with CSR standards and respect human rights.

Canada’s CSR Strategy specifically outlined a CSR-related role for Canadian Embassies and the Trade Commissioner Service when responding to conflicts between companies and affected communities. Namely, this role was to facilitate dialogue, dispute resolution, and human rights reporting and disclosure.¹²⁶ At a minimum, these activities imply a duty to meet with the affected communities to assess their concerns and to investigate the conduct of the company and verify its

¹²¹ DFATD, “ATI Request A201100925”, *supra* note 105 at 115, 452. Canada explicitly recognizes that both it and Goldcorp are not parties to the proceedings in a briefing note prepared for the Minister of International Trade Peter Van Loan in advance of his June 16, 2010 meeting with Goldcorp.

¹²² Global Affairs Canada, “Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector” (March 2009), online: *Global Affairs Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng> [perma.cc/MH2G-7M45] [GAC, “CSR Strategy”].

¹²³ RBC Guidelines referenced include the Voluntary Principles on Security and Human Rights, the IFC Performance Standards, the Global Reporting Initiative, and the OECD Guidelines for Multinational Enterprises. It is also informed by internationally accepted documents such as the UN Global Compact, the Extractive Industry Transparency Initiative, the OECD Anti-Bribery Convention, and Canada’s Corruption of Public Officials Act. DFATD, “ATI Request A201200344”, *supra* note 93 at 66.

¹²⁴ GAC, “CSR Strategy”, *supra* note 121.

¹²⁵ DFATD, “ATI Request A201100925”, *supra* note 105 at 493.

¹²⁶ GAC, “CSR Strategy”, *supra* note 121. In a briefing note on the IACHR proceedings, Canada explains that the Embassy’s role is to “provide space and information for balanced and open dialogue on the subject with all responsible stakeholders, including local and national governments, company representatives, environmental and social groups, and members of the community”: DFATD, “ATI Request A201100925”, *supra* note 105 at 493.

claims. Canadian law required public officials to comply with government policies; the Supreme Court of Canada has acknowledged that the CSR Strategy is a government policy.¹²⁷

B. Canada's Obligations in the Inter-American System

The inter-American system consists of various inter-governmental bodies and international treaties designed to promote and protect human rights in the Americas. The Organization of American States is the principal regional organization created by member states to advance this objective. Canada became a full OAS member in 1990 with its ratification of the *OAS Charter*. As such, Canada is obligated to abide by the provisions of the *Organization of American States Charter* (“*OAS Charter*”), the *Statute of the Inter-American Commission for Human Rights* (“*IACHR Statute*”) and the *American Declaration on the Rights and Duties of Man* (“*American Declaration*”). This section identifies and describes two obligations that were engaged in the circumstances of Canada's response to the IACHR precautionary measures: the duty to respect the independence and impartiality of the IACHR, and the duty to promote the respect for human rights.

1. The Obligation to Promote Respect for Human Rights

The *OAS Charter* seeks to establish “a system of individual liberty and social justice based on respect for the essential rights of man [*sic*]” in the Americas¹²⁸ and promotes the “full participation of [member states'] peoples in decisions relating to their own development.”¹²⁹ The *American Declaration* affirms the inalienable rights of human beings and grounds the responsibilities of American states to guarantee these rights.¹³⁰ It also asserts that “[t]he international protection of the rights of man [*sic*] should be the principal guide of an evolving American law.”¹³¹

The *American Declaration* is legally binding on all OAS member states and automatically subjects Canada to the jurisdiction of the IACHR “without any requirement for an official acceptance of this jurisdiction.”¹³² As a signatory to the 1948 *American Declaration*, Canada has an obligation to affirm human rights and to increasingly strengthen the system of protection of human rights in

¹²⁷ The *Public Servants Disclosure Protection Act*, SC 2005, c 46, establishes a procedure for the disclosure of wrongdoings in the public sector, including breaches of public codes of conduct. Global Affairs Canada follows two codes of conduct: the general code of conduct for all Canadian public servants, the *Value and Ethics Code for the Public Sector* (Archived) (2003), online (pdf): *Treasury Board of Canada Secretariat* <www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve-eng.pdf> [perma.cc/37QY-3YRJ], and the *Code of Conduct for Canadian Representatives Abroad* (2006), online (pdf): *Global Affairs Canada* <gac.canadiana.ca/view/oe.b4231661E/1?r=0&s=1> [perma.cc/QW2P-2LDH]. Both codes expect Canadian officials to follow government policies, including the *CSR Strategy*. For judicial reference to the *CSR Strategy* as a government policy: see *Nevsun Ltd v Araya*, 2020 SCC 5 at para 115.

¹²⁸ OAS, *Charter of the Organization of American States (A-41)*, (1993) preamble; art 3(j), online: *Organization of American States* <www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp> [perma.cc/Z9XM-FDUW] [*OAS Charter*].

¹²⁹ *OAS Charter*, *supra* note 127, Preamble; Chapter VII: art 34, 45(a).

¹³⁰ OAS, Inter-American Commission on Human Rights, *American Declaration on the Rights and Duties of Man*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) at paras 2, 4, online (pdf): *American Association for the Advancement of Science* <www.aaas.org/sites/default/files/American_Declaration_Rights_and_Duties_Man_Eng.pdf> [perma.cc/2VXL-GYJF] [*OAS, American Declaration*].

¹³¹ *OAS, American Declaration*, *supra* note 129 at para 3.

¹³² Standing Senate Committee on Human Rights, *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*, 37-2, (May 2003), online: *Senate of Canada* <sencanada.ca/Content/SEN/Committee/372/huma/rep/rep04may03-e.htm#B.%20Canada%E2%80%99s%20entry%20into%20the%20OAS> [perma.cc/23EP-86Q4] [Standing Senate Committee on HR, “Enhancing Canada's Role in OAS”].

the international field wherever possible.¹³³ In particular, the *American Declaration* requires that OAS member states “refrain from supporting, tolerating, or participating in acts or omissions that contravene their commitments in the area of human rights.”¹³⁴

2. The Obligation to Respect the Independence and Impartiality of the IACHR

The *OAS Charter* established the IACHR with a mandate to promote the observance and protection of human rights in accordance with the provisions of the *American Declaration*.¹³⁵ To this end, the IACHR hears allegations of violations of the rights guaranteed in the *American Declaration* and the *American Convention*.¹³⁶ In this capacity, the IACHR may analyze and investigate individual petitions which allege human rights violations and order precautionary measures in “serious and urgent cases to avoid irreparable damage to persons.”¹³⁷

The *IACHR Statute* contains provisions that aim to protect the independence and impartiality of the IACHR and IACHR Commissioners. Article 8 establishes that “membership in the IACHR is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his [*sic*] post on the Commission.”¹³⁸ The same year that the IACHR issued precautionary measures in the Marlin case, Canada publicly recognized and endorsed the principles of independence and impartiality. In 2010, Canada’s Minister of State made a public address at an OAS meeting where he stated that Canada works to defend the integrity and independence of OAS human rights institutions.¹³⁹

C. International Human Rights Treaties Ratified by Canada

There is an emerging body of international law that establishes duties on states to ensure that the conduct of transnational companies registered or domiciled in their territories is respectful of human rights abroad, particularly in the context of projects that receive state services like economic diplomacy.

¹³³ *OAS, American Declaration*, *supra* note 129 at para 4.

¹³⁴ OAS, Inter-American Commission on Human Rights, “Remarks by IACHR President, Commissioner Margarete May Macaulay, at the Special Meeting of the OAS Permanent Council to commemorate the seventieth anniversaries of the American Declaration of the Rights and Duties of Man and Universal Declaration of Human Rights (1948)” (2018), online: *Organization of American States* <www.oas.org/en/iachr/activities/Speeches/2018.12.04.asp> [perma.cc/3KZP-399X].

¹³⁵ *OAS Charter*, *supra* note 127 art 106.

¹³⁶ See OAS, Inter-American Commission on Human Rights, *Rules of Procedure of the Inter-American Commission on Human Rights*, (2013) arts 1-2, online: *Organization of American States* <www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> [perma.cc/44PX-UQPQ] [IACHR, “Rules of Procedure”]. See also OAS, Inter-American Commission on Human Rights, “Mandate and Functions of the Commission” (last visited 1 September 2021), online: *Organization of American States* <www.oas.org/en/iachr/mandate/functions.asp> [perma.cc/RMC9-UV4A] [IACHR, “Mandate and Functions of the Commission”].

¹³⁷ IACHR, “Rules of Procedure”, *supra* note 135 art 25.1: if a state fails to implement the requested precautionary measures, the IACHR may ask the Inter-American Court on Human Rights to order the state to take provisional measures, which have the binding force of a court order; however, a request for precautionary measures does not prejudice the IACHR’s final decision on a case.

¹³⁸ OAS, Inter-American Commission on Human Rights, *Statute of the Inter-American Commission on Human Rights*, OR OEA/Ser.P/IX.0.2/80 (1979), art 8, online: *Organization of American States* <www.oas.org/en/iachr/mandate/basics/statuteiachr.asp> [perma.cc/3YED-AKXS] [*IACHR Statute*].

¹³⁹ Global Affairs Canada, “Address by Minister of State Kent at 20th Anniversary Commemoration of Canada’s Membership in OAS” (10 November 2010), online: *Global Affairs Canada* <www.international.gc.ca/media/state-etat/speeches-discours/2010/2010-094.aspx?lang=eng> [perma.cc/EZP5-VH6E].

A number of UN treaty bodies, including the Human Rights Committee,¹⁴⁰ the Committee on Economic, Social and Cultural Rights,¹⁴¹ the Committee on the Elimination of All Forms of Racial Discrimination,¹⁴² the Committee on the Rights of the Child,¹⁴³ and the Committee on the Elimination of All Forms of Discrimination Against Women,¹⁴⁴ have commented on Canada's extraterritorial responsibilities to uphold and foster adherence to international human rights law in the context of Canadian extractive projects abroad, including when they attract the support of public officials. For example, in her 2020 report on Canada the United Nations Special Rapporteur on Human Rights and Toxins raised concerns about the federal government's complicity in human rights abuses by virtue of Canadian diplomats' use of pressure tactics to weaken environmental standards and impede the enforcement of environmental laws.¹⁴⁵

With respect to the Marlin mine conflict, Canada had a duty to protect against human rights abuses by Goldcorp, a transnational corporation domiciled in Canada. International human rights law required Canada to exercise due diligence, promote compliance with the precautionary measures, and avoid forms of interference that could undermine human rights.¹⁴⁶ The Committee on Economic, Social and Cultural Rights has elaborated upon the extraterritorial obligations of states to prevent third parties from violating human rights in other countries, "if they are able to influence these third parties by legal or political means."¹⁴⁷ The findings presented in Part III demonstrate that Canada was in a clear position to influence Goldcorp through its economic diplomacy services.

The IACHR has observed that foreign states may be held accountable under international human rights law for the conduct of private actors operating in another country where "the first state's acts or omissions cause human rights violations."¹⁴⁸ In making these statements, the IACHR singled out Canada and noted that "Canadian Embassies are directly involved in procuring [foreign] investment, labelled *economic diplomacy*, thereby deepening the necessary state connections for a framework for foreign state accountability."¹⁴⁹ In other words, a failure by Canada to protect individuals and communities from human rights violations committed by

¹⁴⁰ Human Rights Committee, *Concluding Observations on the sixth periodic report of Canada*, UNHCROR, UN Doc CCPR/C/CAN/CO/6 (2015) at para 6 <undocs.org/en/CCPR/C/CAN/CO/6> [perma.cc/BXW4-JNHV].

¹⁴¹ Committee on Economic, Social and Cultural Rights, *Concluding Observations on the sixth periodic report on Canada*, UNESCOR, UN Doc E/C.12/CAN/CO/6 (2016) at paras 15-6 <undocs.org/E/C.12/CAN/CO/6> [perma.cc/3NTF-RDB3].

¹⁴² Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UNHCROR UN Doc CERD/C/CAN/CO/18 (2007) at para 17

<undocs.org/CERD/C/CAN/CO/18> [perma.cc/DV8C-G43H]; Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, UNHCROR UN Doc CERD/C/CAN/CO/19-20 (2012) at para 14, online (pdf): <www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.19-20.pdf> [perma.cc/7E4V-DS5J].

¹⁴³ Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, UNOHCHROR UN Doc CRC/C/CAN/CO/3-4 (2012) at paras 28-9 <undocs.org/en/CRC/C/CAN/CO/3-4> [perma.cc/D9M3-JN9J].

¹⁴⁴ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the combined eighth and ninth period reports of Canada*, UNOHCHROR UN Doc CEDAW/C/CAN/CO/8-9 (2016) at para 18 <undocs.org/en/CEDAW/C/CAN/CO/8-9> [perma.cc/B3SM-5HAC].

¹⁴⁵ Marcos Orellana, *Visit to Canada: Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, UNGAOR, 45th Sess, UN Doc A/HRC/45/12/Add.1 (2020) at para 95.

¹⁴⁶ See: Standing Senate Committee on HR, "Enhancing Canada's Role in OAS", *supra* note 131.

¹⁴⁷ See: Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UNECOSOCOR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 39. See also CESCR, "General comment No 24", *supra* note 18 at paras 32-3.

¹⁴⁸ IACHR "Working Group", *supra* note 18 at para 79.

¹⁴⁹ *Ibid.*

companies where it exercises clear influence can lead to international responsibility in the inter-American system.

D. Summary of Canada's Normative Obligations in the Circumstances

This section has drawn on Canadian policies in place at the time, as well as Canada's international human rights obligations, to establish that Canada had the following duties with respect to the 2010 IACHR precautionary measures.. In our assessment, Canadian officials were required to:

1. Take reasonable due diligence steps to satisfy Canada's "expectation" that Goldcorp was respecting local laws and international standards, including the human and environmental rights of affected communities;
2. Respond to conflicts between Goldcorp and affected communities by facilitating dialogue and dispute resolution;
3. Promote respect for the human and environmental rights of communities impacted by the Marlin Mine and to encourage Guatemala to implement the IACHR precautionary measures; and
4. Respect the independence and impartiality of the IACHR and IACHR decision-makers.

We draw the first two obligations from Canada's commitments in its CSR policy in place at the time, and we derive obligations three and four from OAS and IACHR treaties and statutes. In Part III of this report, we will analyze Canada's serious failures to abide by all four obligations based on the known facts.

PART III – Canada’s Failures to Uphold its Domestic & International Obligations

This part presents an account of how, almost immediately after the IACHR precautionary measures order was issued in May 2010, Canada undertook a multifaceted lobbying strategy that aimed to influence both the Government of Guatemala and the IACHR in order to promote Goldcorp’s interests and secure a favourable outcome for the company. This account is based on government records collected and analyzed pursuant to the methodology described in this report’s introduction. We find that these actions were inconsistent with Canada’s obligations outlined in the previous section. Neither Canada nor Goldcorp were parties to the proceedings between the Indigenous petitioners and the Government of Guatemala, and so any application of pressure by Canada on behalf of Goldcorp in the context of the IACHR process was inappropriate. The following sections are organized according to the four obligations set out above. Each section begins with a narration of the relevant facts of Canada’s response to the precautionary measures, followed by an analysis of Canada’s failure to uphold each obligation.



The Marlin Mine straddles the municipalities of San Miguel Ixtahuacán and Sipacapa in the Department of San Marcos, located in the northwestern highlands of Guatemala. Credit: Janelle O’Meara.

A. Canada Failed to Undertake Due Diligence and Consider all the Evidence

1. Summary of Relevant Events

Canada seeks to undermine the basis of the IACHR precautionary measures and unquestioningly adopts Goldcorp's position as its own

The precautionary measures were based in part on the results of a scientific report by Physicians for Human Rights on the environmental and health impacts of the mine. The report had been commissioned by the Human Rights Office of the Archbishop of Guatemala.¹⁵⁰ The study, published on May 18, 2010, found that individuals residing closer to the mine had higher levels of certain heavy metals in their blood and urine compared to those living farther away.

When the IACHR issued its precautionary measures on May 20, 2010, the Canadian Ambassador to Guatemala (“the Canadian Ambassador”) Leeann McKechnie quickly jumped into action, participating in an emergency meeting with the Government of Guatemala and speaking with Goldcorp representatives twice over a period of three days.¹⁵¹ On May 23, 2010, the Canadian Ambassador wrote to DFATD officials in Ottawa to notify them of the precautionary measures and the Physicians for Human Rights report upon which it was based. She emphasized the report’s disclaimer that the findings “are preliminary and non-conclusive,” and that both the “Guatemalan Ministry of the Environment and Ministry of Mines [*sic*] have publicly indicated that these findings contradict their own studies.”¹⁵²

As described in Part I.B.3, prior to the issuance of the precautionary measures, there were multiple independent expert) studies that raised concerns about the mine’s environmental impacts. This public body of research was known, or should have been known, to Canadian officials when they formulated their response to the IACHR request. Added to this, Canada’s own National Contact Point issued a statement in March 2010 referring to the need for further investigation of environmental impacts.¹⁵³ Further, the Human Rights Assessment commissioned by Goldcorp, released on May 20, 2010, remarked on the absence of an independent verification of the company’s claims. Despite this state of uncertainty, Canada immediately adopted Goldcorp position as its own, discounted the legitimate concerns of the affected communities, and took steps to discredit certain studies completed by independent academics and international experts.

On May 25, 2010, Canadian Ambassador McKechnie asked Senior Trade Commissioner, Sebastien Moffett, to seek out Goldcorp’s evaluation of the Physicians for Human Rights report to inform Canada’s response. She says she spoke with James Lambert, DFATD General Director for Latin America and the Caribbean, and they agreed to the following:

¹⁵⁰ DFATD, “ATI Request A201100925”, *supra* note 105 at 168.

¹⁵¹ *Ibid* at 164.

¹⁵² *Ibid*.

¹⁵³ *Ibid* at 117: DFATD was aware of the NCP processes, as it was noted in a June 2010 briefing note prepared for the Minister of International Trade in advance of his meeting with Goldcorp.

[...]it will be important to do a thorough evaluation of the [PHR] report...in order to form a response. Eduardo [Villacorta, Goldcorp's Vice-President for Central & South America] and his team will likely already have done this work so you should be able to get something from him. This will then need to be "translated" from the generally very technical response they provide...into the main lines of response.¹⁵⁴

As shown by this excerpt, Canadian officials relied on Goldcorp's evaluation of the Physicians for Human Rights report to form Canada's policy position, without undertaking any independent investigation or verification whatsoever. There was no deliberation by the Embassy as to whether, in light of the precautionary measures, it needed to independently evaluate Goldcorp's activities. If the Embassy had undertaken its own due diligence in the months to follow, it would have referred to and analyzed the many reports and studies summarized in Part 1.B.3 that raised serious and credible concerns with respect to the risk of environmental contamination, the safety of the mine, and the capacity of Guatemalan regulators to fulfill their mandates.

It is worth noting that Eduardo Villacorta, the Goldcorp executive referenced in the excerpt above, was later accused of illicit campaign financing, an incident which formed part of the broader *La Linea* corruption scandal concerning election fraud that resulted in the incarceration of the former Guatemalan President Otto Pérez Molina and former Vice-President Alejandro Maldonado.¹⁵⁵ A 2016 DFATD report on mining in Guatemala describes corruption allegations revealed by the International Commission against Impunity in Guatemala against a "Marlin Mine employee" who funneled money through a hotel to the political party *Patriota*.¹⁵⁶ The report remarked that Canada completed its reporting allegations under Canada's *Corruption of Foreign Public Officials Act*. Presumably the report is referring to Eduardo Villacorta, who is now a fugitive.

Canada ignores the evidence and advocates for Goldcorp's record when engaging with Guatemala and the IACHR

After formulating a policy position that aligned with Goldcorp's view of the issues, Canadian officials went on to advocate for the company's record when engaging with Guatemalan government and IACHR officials with respect to the precautionary measures. Canada did this without paying any apparent attention to the human rights concerns summarized in Part 1.B of this report and raised repeatedly by communities, expert researchers, civil society organizations, and international bodies. Instead, there is evidence to suggest that Canada simply relied on Goldcorp's self-reported CSR initiatives to justify the company's continued operations in Guatemala. For example, on June 23, 2010, just hours before the Guatemalan government issued its interim response to the precautionary measures, an urgent conference call took place between Canada's

¹⁵⁴ *Ibid* at 168.

¹⁵⁵ See Diario La Hora, "Siguen prófugos 17 señalados de corrupción", *La Hora* (29 June 2016), online: <lahora.gt/siguen-profugos-17-senalados-corrupcion/?fbclid=IwAR2iV7yXF AeAQmnLZ96CrH9T6reWPO9hZ14WSFIYxseeuAjcE43UwOXGY-I> [perma.cc/7C54-NHLK].

¹⁵⁶ Government of Canada, Department of Foreign Affairs, Trade and Development, "Access to Information Request A201702339" (05 November 2018) at 277-8, online (pdf): *Dropbox* <www.dropbox.com/s/yaf0imv3tjk3p01/A201702339_2018-11-05_14-21-39.pdf?dl=0> [perma.cc/QZ3L-LRUF] [DFATD, "ATI Request A201702339"].

Minister of State for Foreign Affairs Peter Kent, Ambassador McKechnie and Guatemalan Vice-President Espada. The following talking points are suggested for the call:

- We know of the positive socio-economic impacts responsible mining has in Canada and elsewhere
- We also know that responsible Canadian mining companies, such as Goldcorp, operate in foreign jurisdictions *in compliance not only with local laws and regulations but with internationally recognized standards* [emphasis added].
- The Government of Canada adopted a corporate social responsibility policy in March 2009. In line with this approach, Canada works with companies and stakeholders in Guatemala and around the world to broaden the awareness and understanding of responsible investments and sustainable economic development.
- I am told that Marlin
 - Has continued regular environmental monitoring
 - Implemented a number of community-based corporate social responsibility initiatives
 - Commissioned an innovative human rights impact assessment and is currently preparing a response to this report which will include drafting a human rights framework...¹⁵⁷

The talking points above clearly state Canada's position that Goldcorp complies with local laws and international standards, even though DFATD conducted no form of due diligence under its CSR Strategy to verify that this was the case. Moreover, compliance with international human rights law was precisely the issue at play in the IACHR proceedings. In making these statements, it appears that Canada already predetermined the case. These statements directly contradict the findings of the ILO Committee of Experts and the UN Special Rapporteur, which called on Guatemala to suspend the mine until the appropriate studies and consultations were carried out in accordance with international standards.

In the lead up to the IACHR hearings in October 2010, Canada also applied pressure to the IACHR by advocating for Goldcorp's CSR record and, in so doing, attempted to undermine the credibility of the communities' petition. Sometime after October 5, 2010, the Canadian Minister of State for Foreign Affairs, Peter Kent, had a meeting in Washington with OAS/IACHR officials where the precautionary measures were likely discussed.¹⁵⁸ DFATD and Embassy officials prepared a brief for Minister Kent, which referred extensively to the IACHR and Marlin Mine. It stated that studies conducted by Guatemalan regulators found no evidence of water contamination or human illness caused by Marlin Mine, and that the company is fully cooperating with Guatemalan authorities. The following responsive points are also included:

¹⁵⁷ DFATD, "ATI Request A201100925", *supra* note 105 at 216-7.

¹⁵⁸ *Ibid* at 49-50.

- Canada recognized the significant investment made in the Goldcorp Marlin Mine, which is positively impacting Guatemalans and the Guatemalan economy...
- Since the petition was filed in 2007, Goldcorp has continued regular environmental monitoring and has implemented a number of community-based corporate social responsibility initiatives. The company recently commissioned an innovative human rights impact assessment, and is drafting a human rights framework for their operations.
- The decision of the Commission [IACHR] is of [redacted] to the Government of Guatemala and the Guatemalan economy. [Redacted] it is essential that all future decisions be made based on a comprehensive review of the full range of available information.
- Canada enjoys strong and diversified bilateral relations with Guatemala, and is confident that under President Colom's leadership, the Government of Guatemala will follow a process that considers the interests and well being of all involved.¹⁵⁹

The unredacted portions of these statements seem to indirectly question the validity of the IACHR precautionary measures by putting forward a favorable view of Goldcorp's economic and environmental records and by appearing to suggest that the IACHR had not made a sound decision. The redactions appear positioned to hide the statements that are most critical of the IACHR.

Even more disconcerting is the fact that, in preparing these briefing materials, DFTAD officials were actually aware that the Guatemalan Minister of Environment had filed criminal charges on September 28, 2010 against Montana/Goldcorp for unauthorized discharge of contaminated wastewater from the tailings dam into the Quivichil River.¹⁶⁰ The Canadian Trade Commissioner for Guatemala, Sebastien Moffett, sent his colleagues a document from Goldcorp which provided the company's "exact position on this matter" so that they could update the brief accordingly.¹⁶¹ The company document was not included in the ATI release and there is no evidence that the information was independently verified before being added to the government's briefing materials. This is yet another example of how Canada appears to have adopted Goldcorp's position as its own without conducting the necessary due diligence to ensure the company was in fact respecting local and international laws.

In other records produced the following year, Embassy officials appear to accept that Goldcorp-funded environmental monitoring is likely incapable of producing critical results. In one email, Canadian Trade Commissioner Nathalie Samson referred to a planned meeting with the Goldcorp-funded Community Environmental Monitoring Committee and admitted that since "AMAC's [the

¹⁵⁹ *Ibid* at 242-3.

¹⁶⁰ Alberto Ramirez, "Ministro presenta acción legal contra Montana", *Prensa Libre* (4 October 2010), online: <www.prensalibre.com/guatemala/justicia/ministro-presenta-accion-legal-montana_0_347365300.html> [perma.cc/8V25-5MZB].

¹⁶¹ Goldcorp responded to the allegations by claiming that the press was reporting false information, that the discharge was authorized, and inspectors from both MEM And MARN took samples from the tailings prior to the discharge. DFATD, "ATI Request A201100925", *supra* note 105 at 379-81.

Community Environmental Monitoring Association] creation was supported by Montana (Gold Corp [*sic*] Marlin), we do not expect many surprises.”¹⁶²

Nearly a year and a half after the IACHR’s issuance of the precautionary measures request, in late October 2011, Canadian officials received a report authored by Tufts University Professor Dr. Lyuba Zarsky on the costs and benefits of the Marlin Mine. The report contradicted Canada’s assertions about the overall benefits of the mine. MiningWatch Canada invited DFATD officials to a press conference on October 7, 2011 organized to publicize the report.¹⁶³ In the days prior, Canadian officials characterized the study as “anti-Goldcorp”¹⁶⁴ and suggested that if they were to participate in the meeting, Goldcorp should also be given a seat at the table since “they have articulate people on their side, and should know better than anyone what the costs of the mine are.”¹⁶⁵ DFATD Deputy Director of Trade & Investment Relations between Canada & Latin America Robert Shaw-Wood and Trade Commissioner for Central America Suzan Redwood were reluctant to meet with MiningWatch, expressing scorn for the idea of supplying a room and providing coffee to host the NGO.¹⁶⁶

In this context, Robert Shaw-Wood explained to the new Canadian Ambassador to Guatemala Hughes Rousseau that Dr. Zarsky will speak about how “this gold mine will bring very limited or even negative benefits to Guatemala.”¹⁶⁷ He elaborated that:

We [DFATD] have Goldcorp’s perspective on the benefits of the mine, and we are shortly to get a very contrary opinion. It would be very helpful to have other perspectives that we can refer to going forward, since the accounts of both Goldcorp and Mining Watch [*sic*], it could be said, reflect their self-interest. Are you aware of any credible positions that have been adopted in Guatemala by independent authorities? What is the perspective of the Embassy?

These statements reveal that Deputy Director Shaw-Wood had a weak understanding of the concept of independence, which is essential to the kind of due diligence needed to fulfill Canada’s CSR policy commitments and international obligations. While the report in question was conducted by an independent academic with no self-interest in the result, Shaw-Wood attributed the report’s findings to MiningWatch merely because the NGO was disseminating it. Moreover, Shaw-Wood appears to equate Goldcorp’s self-interest in profiting from Marlin Mine with MiningWatch’s interest in pursuing its mandate in the public interest. While this is the first time

¹⁶² DFATD, “ATI Request A201200344”, *supra* note 93 at 51.

¹⁶³ *Ibid* at 51-2.

¹⁶⁴ *Ibid* at 23.

¹⁶⁵ *Ibid* at 25. Goldcorp’s 2011 Stakeholder Update claimed that the report was incomplete and inaccurate. Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201201480* at 14, online: *Dropbox* <www.dropbox.com/s/mdsqwunpdpml1s1/A201201480_2013-03-07_11-40-25.PDF?dl=0> [perma.cc/369V-YKFB] [DFATD, “ATI Request A201201480”].

¹⁶⁶ DFATD, “ATI Request A201201480”, *supra* note 164 at 22.

¹⁶⁷ DFATD, “ATI Request A201200344”, *supra* note 93 at 51. In a different email chain containing a transcription of the MiningWatch conference, Robert Shaw-Wood comments that “Zarsky’s main point from the interview does not seem to be that the mine should be closed permanently, but that they [Goldcorp] should provide more benefits to the country. A very good point. But they should be telling this to the Guatemalan Government, not to us.”: *ibid* at 46.

in the records that there is some indication of an openness to “other perspectives” (more than a year after the IACHR measures were issued), the public officials involved demonstrated that they lack the legal? understanding necessary to undertake due diligence.

Further, there is no indication in the records that the Zarsky report altered Canada’s talking points about the economic benefits of Marlin to Guatemala in any way. Rather, Deputy Director Robert Shaw-Wood doubled-down just a few days later with an email dated November 1, 2010 entitled, “improving the story line on Guatemala” where he provided a list of “thoughts”:

1. The Government has formally stated the mine is important for Guatemala and should not be closed even as a precautionary measure pending further water analysis
2. *There is no evidence to support the claim that the mine has contaminated the water supply* [emphasis added]
3. Goldcorp paid \$70 million in taxes and royalties in 2010, which was 1.5% of the total revenues available to the Government in that year
4. As a significant exporter (the largest in Guatemala?) Goldcorp contributes to employment all along the transportation system of the country.
...
10. These mining companies are in the middle of centuries old land disputes, and Guatemala has a history of violence in these situations, so we should not be surprised by the spillover. Lynchings are a common occurrence [redacted...].
11. The position of the Government of Canada is that responsible mining is beneficial to economic and social development.¹⁶⁸

Trade Commissioner for Central America & the Caribbean Laura Dalby responded to Shaw-Wood with this statement: “[w]hile it’s important to engage with Goldcorp and all stakeholders involved, I think the bottom line should be that we support the work of the IACHR. No need to create extra files that will be ATIP-ed in the future.”¹⁶⁹ Shaw-Wood disregards this cautionary note and responds with another positive “story line,” writing that: “Goldcorp as a good corporate citizen complies fully with the regulatory framework that exists for mining in Guatemala,” and stated that “any shortcoming that may exist need to be addressed through amendments to that framework.”¹⁷⁰ This position was specifically rejected by the World Bank’s CAO (2005), the ILO Committee of Experts (2010), the Goldcorp-commissioned Human Rights Assessment (2010) and the UN Special Rapporteur (2011) on the basis that the lack of a regulatory framework for consultation in Guatemala does not exempt Goldcorp from international requirements.¹⁷¹

¹⁶⁸ *Ibid* at 51.

¹⁶⁹ DFATD, “ATI Request A201201480”, *supra* note 164 at 11.

¹⁷⁰ DFATD, “ATI Request A201200344”, *supra* note 93 at 50.

¹⁷¹ CAO, “Assessment of Marlin Complaint”, *supra* note 34 at 29-30; ILO, “Report on Committee”, *supra* note 50 at 770; Anaya, *supra* note 31 at paras 33-4; On Common Ground, *supra* note 31 at 13.

At this point, Dalby offered a “friendly reminder” to Shaw-Wood, reiterating that “Canada is not a party to these proceedings, and we support the OAS and IACHR.” She drew his attention to the March 2011 report by the UN Special Rapporteur James Anaya that called for support of the IACHR precautionary measures.¹⁷² On this basis, she advised that “we should be cautious about ‘improving the story line.’” Dalby further proposed that it is important for Canada to engage all stakeholders, as per the Embassy’s role to “provide a space and information for balanced and open dialogue on the subject with all responsible stakeholders, including local and national governments, company representatives, environmental and social groups, and members of the community.”¹⁷³ She then emphasized to Shaw-Wood that they should “chat further *in person*”¹⁷⁴ [emphasis in original].

In short, Dalby chided Shaw-Wood for his zealous support for the company and carefully made written statements about the importance of respecting the IACHR, while suggesting that further discussions should be in person to avoid access to information laws. This conclusion is bolstered by the fact that there is no evidence in the records that Canadian officials took any steps to actually fulfill the commitments that Dalby listed in her email.

Later that month, on November 25, 2011, in response to a “due diligence” inquiry from an investment company, Trade Commissioner Nathalie Samson reported that the Embassy had visited the operations and is “so far satisfied that international standards are being uphold [*sic*] at the Marlin mine,” but acknowledged that “there is an ongoing investigation process about the events related to HR [human rights] issues.”¹⁷⁵ In making these statements, Samson failed to refer to the findings of the ILO and the UN Special Rapporteur that Marlin was in fact not in compliance with certain international human rights requirements.

2. Analysis

Canada failed to undertake the required due diligence

In the 897 pages of available ATI documents reviewed in order to prepare this report, there is no evidence that information supplied by Goldcorp was independently vetted or verified before it was added to the Canadian government’s briefing materials. Further, there is no evidence that Canada performed a fulsome analysis of, or even acknowledged, the many reports of human rights violations, environmental contamination, and regulatory deficiencies published prior to the precautionary measures and while they were in place. Instead, Canadian officials consistently relied on Goldcorp’s view of the issues and, in coordination with Goldcorp, immediately sought to find weaknesses in the Physicians for Human Rights report in order to challenge or undermine the basis of the precautionary measures. The Embassy then relied on the company’s analysis of

¹⁷² Dalby later included a summary of the Anaya report in a brief dated June 3, 2011 for the Minister of State for Foreign Affairs. She writes that the “report found that Goldcorp had not acted with due diligence with respect to the rights of indigenous populations in some cases,” specifically regarding the issue of consultation, and further that the inadequacy of Guatemala’s legal framework does not exempt Goldcorp from international requirements. Importantly, Dalby highlighted the report’s recommendation that Guatemala comply with the precautionary measures. DFATD, “ATI Request A201100925”, *supra* note 105 at 43-4.

¹⁷³ DFATD, “ATI Request A201201480”, *supra* note 164 at 10.

¹⁷⁴ *Ibid.*

¹⁷⁵ DFATD, “ATI Request A201200344”, *supra* note 93 at 27.

the Physicians for Human Rights report to inform Canada's "main lines of response" and did not contemplate conducting their own research or fact-finding. Perhaps most concerning, is the fact that some of Canada's talking points make assertions about Goldcorp's compliance with international standards and local laws that omit publicly available evidence to the contrary, including evidence in the possession of Canadian officials.

Canada's failure to adhere to its own CSR policies is evident in DFATD's preoccupation with managing "the storyline" as opposed to responding to the substantive issues underlying the IACHR petition. The discussion of Dr. Zarky's report represents the first time Canadian officials refer to the concept of an independent evaluation of the mine's impacts, nearly a year and a half after the issuance of the precautionary measures. However, as explained above, the discussions that took place reflect a serious misunderstanding of the concept of independence and a lack of interest in taking a meaningful independent critique of Goldcorp's record into account. There are also apparently cynical references to holding discussions (of the IACHR proceedings and Canada's CSR policy commitments) in person in order to avoid public access to the records of these discussions.

These failures, first to verify Goldcorp's claims and second, to seek out, evaluate and give proper weight to independent studies of the mine's impacts, represent a failure to uphold Canada's CSR Strategy in place at the time, namely that Canada expects companies to respect human rights and will condition its support on this expectation. The policy required Canadian officials to take steps to gain a full understanding of the evidence with an open mind. This is consistent with the IACHR's position on economic diplomacy, which requires states like Canada to conduct the necessary due diligence to ensure that a company's operations are respectful of human rights prior to offering political support.¹⁷⁶ According to the IACHR, any omission to do so can result in foreign state accountability, particularly where diplomatic officials are directly involved in procuring foreign investment and rights violations result.¹⁷⁷ Canada appears to have defended Goldcorp and advocated on its behalf with both the Government of Guatemala and the IACHR, without taking any steps to properly verify the company's compliance with international standards, as required by Canada's 2009 CSR Strategy.

While Canadian officials urged Guatemala to make its decisions on the precautionary measures based on a "comprehensive review of the full range of information" which "considers the interests and well-being of all involved," they clearly failed to follow their own advice. Rather, they wholeheartedly adopted Goldcorp's analysis of the Physicians for Human Rights report, and failed to make any effort to obtain all relevant sources of information on the issues, or to meet with affected communities.

Canada failed to facilitate dialogue and dispute resolution

In our view, meeting with affected communities and other civil society stakeholders is a fundamental part of the due diligence requirement discussed above. Under the 2009 CSR Strategy, Canada had committed to responding to conflicts between Goldcorp and affected communities by facilitating dialogue and dispute resolution. Between the IACHR's issuance of the precautionary

¹⁷⁶ IACHR, "Indigenous Peoples", *supra* note 17 at paras 13, 79-80.

¹⁷⁷ *Ibid* at para 79.

measures on May 20, 2010, and the lifting of the suspension request on December 9, 2011, we have recorded at least 37 communications between Canada and Goldcorp about the Marlin mine.¹⁷⁸ While there was clearly “continuous communications with Goldcorp on the evolution of the situation,”¹⁷⁹ we have found no evidence in the ATI records that the Embassy facilitated dialogue between the affected parties despite its stated role to “remain engaged with all stakeholders as the resolution of the issues can only come from a better and more sustained dialogue with all involved (Government of Guatemala, NGOs, Investors etc.).”¹⁸⁰

There is no evidence that Canada sought out information from the petitioners, local communities, or civil society groups. Instead, it appears Canada focused exclusively on Goldcorp’s concerns. When a Canadian NGO brought Dr. Zarsky’s report to DFATD’s attention, officials characterized it as an “anti-Goldcorp study” and discounted its findings by illogically conflating the work of Dr. Zarsky with MiningWatch and then characterizing MiningWatch as “self-interested.” The Canadian officials involved were reluctant to even meet with MiningWatch and did not want to offer the NGO anything but water at the meeting. In stark contrast, Part I described how Canadian officials took Goldcorp and Guatemalan representatives out to wine bars and high-end restaurants.

On the whole, Canada officials seemed willing to presume Goldcorp’s “continued compliance” with CSR standards and coordinate extensively with the company, while ignoring or discounting other perspectives. Overall, the records appear to reveal a deep and systemic bias within the Canadian public service in favour of Goldcorp and against affected communities and civil society groups. This observation raises serious questions about the capacity of government officials to facilitate dialogue or dispute resolution in good faith and with any degree of trust from all parties. The human rights concerns underlying the IACHR measures were credible and demanded a proper evaluation so that Canada could fulfill its expectation that Goldcorp respects human rights. At minimum, Canada should have advocated for a proper system of assessment and monitoring to ensure the “safety and security of all people in the situation,” described as Canada’s “absolute priority” in DFATD briefing materials on the IACHR precautionary measures.¹⁸¹ The next section will describe how the behavior of Canadian officials went beyond a failure to comply with applicable domestic policies and extended to a violation of Canada’s international obligations.

B. Canada Failed to Promote Respect for Human Rights & Appeared to Promote Non-Compliance with the IACHR

1. Summary of Relevant Events

About one month after the IACHR issued precautionary measures calling for the temporary suspension of Goldcorp’s Marlin Mine, Guatemala announced its official response on June 23, 2010. Based on our review of the records, we conclude that the Canadian government sought to

¹⁷⁸ See the following chart [perma.cc/H2H4-ADWT] tracking the communications between Canada and Goldcorp found in the following ATI Requests: DFATD, “ATI Request A201100925”, *supra* note 105; Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201401607/JL* (28 February 2018), online: *Dropbox* <www.dropbox.com/s/a4noacsv6jnw5t/A%202014%2001607%20JL.pdf?dl=0> [perma.cc/K9W3-7M2V] [DFATD, “ATI Request A201401607/JL”]. Communications encompass meetings, phone calls, and emails.

¹⁷⁹ *Ibid* at 492

¹⁸⁰ *Ibid* at 114

¹⁸¹ *Ibid* at 493.

pressure Guatemala in order to influence its response. There is evidence that Canada lobbied the Government of Guatemala so that it would refrain from complying with the precautionary measures. Unfortunately, this diplomatic effort involved countering the influence of UN Special Rapporteur James Anaya during his in-country site visit to Guatemala and Marlin Mine in June 2010, and his clear message that Guatemala should abide by the decisions of the IACHR and implement the mandatory and legally binding precautionary measures.¹⁸²

In his initial and preliminary response, Guatemalan President Álvaro Colom told the press that the allegations against the Marlin project were unfounded and that his government would not order the closure of the mine.¹⁸³ On June 3, 2010, the President slightly adjusted his position, stating that “the reports against the Marlin mine were unsubstantiated,” adding that he “would wait for the report ordered from an inter-institutional commission headed by Vice-President Espada before answering to the IACHR.”¹⁸⁴ These statements meant that in the coming weeks, Guatemala would be formulating its formal response to the IACHR. In this context, Canadian officials developed an intense lobbying strategy in coordination with Goldcorp.

On June 7, 2010, Ambassador McKechnie met with Guatemalan Vice-President, Rafael Espada, as well as the Minister of Energy & Mines and the Minister of the Environment. Two days later, on June 9, the Canadian Ambassador and Trade Commissioner Moffett met with Goldcorp Vice-President Eduardo Villacorta. Later that day, McKechnie asked Moffett to update Ottawa as to “apparent changes in the [Government of Guatemala]” position since her meeting with Guatemalan officials two days prior.¹⁸⁵ Moffett’s update to Ottawa was intended to “help place in context the possible importance of a conference call.” In his email to Ottawa the following day, Moffett writes:

Although the position of the government shared publicly was one of rejection of the allegations...[redacted]

After the meeting with the Ambassador and the Vice-President, other meetings took place between the Vice-President and different groups, including COPREDEH [Presidential Commission for Human Rights], different civil society groups (like CALAS [Centre for Legal Environmental & Social Action]) and certain ministers, including the Minister of Foreign Affairs of Guatemala¹⁸⁶...

The change in the Government of Guatemala’s position came after Vice-President Espada met with human rights groups. Further, it appears that it was Goldcorp that informed the Embassy of this change during their June 9 meeting. The content and patterns of these communications suggest

¹⁸² See James Anaya, “Guatemala should refrain from issuing new licenses for natural resources extraction in indigenous territories, in the absence of an effective consultation mechanism (June 2010)” (19 June 2010), online: *James Anaya Former Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples 2008-2014* <unsr.jamesanaya.org/?p=87> [perma.cc/RG2V-LEJL]; Anaya, “Preliminary Note”, *supra* note 71 at para 27.

¹⁸³ DFATD, “ATI Request A201100925”, *supra* note 105 at 132-3.

¹⁸⁴ *Ibid* at 9, 115, 124, 132-3.

¹⁸⁵ *Ibid* at 13.

¹⁸⁶ *Ibid* at 12.

that Canadian officials were worried that Guatemalan officials had changed their position and intended to fully comply with the precautionary measures, including the temporary suspension of Marlin's operations. In response, it appears that Canadian officials began to escalate their work to advocate against full adherence to the measures. Four communications provide strong evidence of this inference:

First, on June 21, 2010, the Canadian Minister of International Trade Peter Van Loan sent a letter to Guatemalan President Colom, Vice-President Espada, and the Vice-Minister for Small & Medium Business Rodolfo Cardona.¹⁸⁷ Minister Van Loan sent this letter less than a week after his June 16 meeting with Goldcorp's legal counsel, and just two days before the Guatemalan government announced its official response. The letter itself was not provided in the ATI records.

Second, on June 23, 2010, just hours before the Guatemalan government issued its formal response to the precautionary measures, an urgent conference call took place between Canada's Minister of State for Foreign Affairs Peter Kent, Ambassador McKechnie, Guatemalan Vice-President Espada (on behalf of President Colom) and the Guatemalan Vice-Minister for Foreign Affairs. Ambassador McKechnie stated that the reason for the conference call is that "nothing is final until announced."¹⁸⁸ The talking points prepared for the call defended Goldcorp's CSR record and emphasized "the positive socio-economic impacts mining has had in Canada and elsewhere," indirectly dismissing the human rights concerns of affected communities and international bodies.¹⁸⁹ As reproduced in the previous section, the talking points also asserted that, "responsible Canadian mining companies, such as Goldcorp, operate in foreign jurisdictions in compliance not only with local laws and regulations but with internationally recognized standards."¹⁹⁰

A day later, on June 24, 2010, Ambassador McKechnie, Canadian Trade Commissioner Moffett and Goldcorp Vice-President Eduardo Villacorta met to discuss Guatemala's position on the precautionary measures. After the meeting, Moffett reported on the company's viewpoints which it intended to announce in a press conference this same day, namely, that Goldcorp is in "agreement with the Government of Guatemala in relation to the environmental results indicating that there is no contamination," and that it will "actively participate in the investigation process."¹⁹¹ Trade Commissioner Moffett added that while "the majority of the population here thinks the activities of the mine are suspended,...the mine is still in operation."¹⁹²

Third, on May 10, 2011, Trade Commissioner Moffett facilitated a meeting between Guatemalan Vice-President Espada, the Vice-Minister of Energy of Mines, the Director General of Energy & Mines, and Goldcorp Executive Director for Central America Mario Marroquin on the subject of the IACHR's precautionary measures. According to Moffett, "this meeting allowed for the sharing of Canadian concerns related to this file and in a more comprehensive fashion with Canadian commercial interests in the country [translated from French]."¹⁹³

¹⁸⁷ ATI Request A201100925, *supra* note 105 at 112.

¹⁸⁸ *Ibid* at 217. Later in the day, Ambassador McKechnie met with the President's private secretary and spoke twice on the phone with the Foreign Minister of Guatemala: *ibid* at 218.

¹⁸⁹ *Ibid* at 216-7.

¹⁹⁰ *Ibid* at 216.

¹⁹¹ *Ibid* at 101.

¹⁹² *Ibid*.

¹⁹³ *Ibid* at 47-8.

Fourth, Canada's policy position against the IACHR request is further evinced by the congratulatory emails that were circulated between DFATD and Goldcorp officials after the precautionary measures were modified and the suspension request was lifted on December 9, 2011. This same day, a Goldcorp employee sent the press release to Canada's Permanent Representative to the OAS, Allan Culham, and wrote "looks like we are making some progress. Happy Holidays and see you in the new year."¹⁹⁴ Culham forwarded the email to his OAS staff, embassy officials, and DFATD Directors. This congratulatory email confirms a high level of collaboration and common purpose between Canada and Goldcorp from the issuance of the precautionary measures to their amendment.¹⁹⁵

In sum, the available records support the view that Canada pressured Guatemala to keep Marlin Mine open despite the IACHR's precautionary measures, and despite strong statements from UN Special Rapporteur James Anaya that the measures should be followed and treated as mandatory and binding on Guatemala. This conclusion will be analyzed in greater detail in the following section.

2. Analysis

The evidence described above gives rise to a strong inference that Canada promoted non-compliance with the IACHR rulings in favour of Goldcorp, but wanted to avoid being "*publically* [sic] perceived as...promoting non-compliance with its rulings."¹⁹⁶ Canada intensely advocated for Goldcorp's record in all communications with Guatemalan officials, despite the internal recognition among some officials that it would "not be appropriate for the Government of Canada to make representations on the IACHR process to the Government of Guatemala."¹⁹⁷ There is no evidence within the 897 pages of ATI documents to show that Canada encouraged Guatemala to comply with the precautionary measures, in accordance with its obligations to the IACHR and the OAS system itself. Instead, the record strongly suggests Canadian officials were actively pressuring for non-compliance with the IACHR's precautionary measures.

When it appeared that Guatemala may change its initial position against ordering the closure of the mine, the Ambassador was quick to move into action and call on Ottawa to intervene. After meeting with Goldcorp, and just days before Guatemala announced its response to the IACHR, Canada's Minister of International Trade sent a letter about the matter to Guatemala's President and Vice-President. Then, just hours before the announcement, the Canadian Minister of State for Foreign Affairs phoned the Guatemalan Vice-President, with talking points stating that Canada believes Goldcorp already complies with all international standards. The UN Working Group on Business & Human Rights recognized in its 2018 report on economic diplomacy that, "having a senior minister advocate for a company is a substantial benefit," and advised that states "should

¹⁹⁴ Further, on January 5, 2012, the new Canadian Ambassador to Guatemala Hughes Rousseau hosted a Goldcorp representative at the Embassy, where the two discussed MiningWatch and the Center for International Environmental Law's (CIEL) criticism of the IACHR's lifting of the suspension request: DFATD, "ATI Request A201200344", *supra* note 93 at 1.

¹⁹⁵ The day after their meeting, a Goldcorp employee sent the Ambassador an article published by MiningWatch and CIEL titled, "Caving to Mining Interests: A Wake-Up Call to the Inter-American Commission on Human Rights." Apparently, they had discussed this article in their in-person meeting the day prior: *Ibid* at 115-7.

¹⁹⁶ This statement was made in official government briefing materials prepared for the Canadian Minister of International Trade Peter Van Loan in advance of his June 16, 2010 meeting with Goldcorp. DFATD, "ATI Request A201100925", *supra* note 105 at 112.

¹⁹⁷ *Ibid* at 122.

only advocate for companies that respect human rights and screen requests to make that determination.”¹⁹⁸ As explained in the previous section, there is no evidence that Canada performed the requisite due diligence to verify Goldcorp’s human rights record before providing intense high-level political support to the company.

These direct personal communications (letter and phone call) from Canadian Ministers to Guatemala’s President and Vice-President must be understood in the larger context of: (1) the Embassy’s effort alongside Goldcorp to develop an analysis that would undermine the weight given to the Physician for Human Rights report, (2) numerous meetings and communications between the Canadian Ambassador, embassy staff, Goldcorp and Guatemalan officials; (3) the presumption among Canadian officials that the human rights concerns of Marlin-affected communities were no longer valid or pressing, and (4) consistent talking points asserting that Goldcorp already complies with all international standards and touting its importance to the Guatemala economy.

Canada bears a clear obligation in international law not to intervene in the affairs of another country to undermine respect for human rights as per the *OAS Charter*. Moreover, Canada had, and continues to have, a positive duty under the *American Declaration* and other international human rights treaties¹⁹⁹ to promote respect for the human and environmental rights of communities impacted by the Marlin mine and to encourage Guatemala to implement the IACHR precautionary measures. We conclude that Canada failed to uphold these standards in this case by surreptitiously working against the suspension of the mine, in contravention of recommendations issued by numerous international institutions, including the IACHR, the ILO, and the UN.

C. Canada Failed to Respect the Independence and Impartiality of the IACHR

1. Summary of Relevant Events

Canada seeks information from the IACHR for Goldcorp

At the same time that Embassy officials were seeking out Goldcorp’s evaluation of the Physicians for Human Rights report, Goldcorp Vice-President Eduardo Villacorta reached out to Canada for help in dealing with the IACHR’s precautionary measures.

On May 24, 2010, Villacorta emailed Ambassador McKechnie a summary of his meeting with Guatemalan Vice-President Espada and wrote, “Anything Ottawa can do to help will be much appreciated.”²⁰⁰ The Ambassador forwarded Goldcorp’s request to DFATD headquarters, and then phoned Villacorta the following day to receive further updates to relay to Ottawa.²⁰¹ Ambassador McKechnie then asked Canada’s Ambassador and Permanent Representative to OAS (“Canada’s

¹⁹⁸ HRC “Working Group”, *supra* note 17 at para 25.

¹⁹⁹ Including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Universal Declaration on Human Rights*, as cited in Canada’s *Voices at Risk* policy: GAC, “Voices at Risk”, *supra* note 21 at 5-6.

²⁰⁰ DFATD, “ATI Request A201100925”, *supra* note 105 at 190.

²⁰¹ *Ibid.*

Permanent Representative to the OAS”), Graeme Clark, for “any information that you and your team might have on this.”²⁰²

DFATD officials made further requests of the Canadian Mission to the OAS two weeks later, in preparation for a meeting between Minister of International Trade Peter Van Loan and Goldcorp’s legal counsel on June 16, 2010. Jeffrey Marder, DFATD Director for Strategic Relations in Latin American & the Caribbean, asked Keltie Patterson, First Secretary to Canada’s Permanent Mission to OAS, to contact the IACHR to obtain information needed for this high-level meeting between a Canadian Minister and Goldcorp. The requested information is redacted in the records, but Patterson conveys concerns about respecting the independence and autonomy of the IACHR:

I spoke to [redacted] of the IACHR. She provided the following information [redacted]...indicated that she could not provide any further information on the case...

*Given that we are consistently [sic] calling for others to respect the independence and autonomy of the IACHR [redacted]...[emphasis added].*²⁰³

DFATD Director Jeffrey Marder replies thanking Patterson for the “very helpful” information and adds remarks which seem to question the basis of the IACHR request with a view to defending Goldcorp against the allegations:

....given that the petition was submitted in 2007, there may be studies or steps taken in the interim period by the company that can answer the claims of the petitioners, at least to the satisfaction of the Government of Guatemala (and perhaps the IACHR).²⁰⁴

Marder’s suggestion is reflected in a draft briefing note prepared for the Minister of International Trade in advance of his meeting with Goldcorp. The brief reads: “the petition from the Indigenous communities was filed in 2007 so [sic] clearly does not reflect the current situation at the mine.”²⁰⁵ This statement suggests the concerns of community members are no longer an issue, however, the precautionary measures were based on the May 2010 Physicians for Human Rights report, and Canadian officials knew this (see Part III.A above).

The briefing note prepared for the Minister of International Trade, Peter Van Loan, also refers to Canada’s duty to respect the integrity and autonomy of the IACHR and the principle of non-interference in its proceedings:²⁰⁶

²⁰² *Ibid* at 189.

²⁰³ DFATD, “ATI Request A201401607JL”, *supra* note 177 at 36.

²⁰⁴ *Ibid*.

²⁰⁵ DFATD, “ATI Request A201100925”, *supra* note 105 at 135.

²⁰⁶ Note there are various versions of the briefing note disclosed in the ATIP files. It is unclear which one is the final draft. See *ibid* at 121-6, 130-5, 449-55.

- As Canada is not a party to this petition, [...redacted]
- Canada supports the IACHR and in recent months has publicly defended the integrity and independence of this important hemispheric rights body on its work on human rights observation in Venezuela.²⁰⁷ Canada also recognizes the significant investment made in the Marlin mine, its importance to Goldcorp, a Canadian company, and indeed its importance to the Guatemalan economy.²⁰⁸
- As a historical supporter of the IACHR and a strong promoter of human rights within the Americas, *it is neither in Canada's interest to be perceived as interfering in the operations of the Commission nor to be affiliated with efforts to promote non-compliance with its rulings.*²⁰⁹
- *It would not be appropriate for the Government of Canada to make representations on the IACHR process to the Government of Guatemala.*²¹⁰
- However, Canadian officials in Washington, D.C. could enquire with the IACHR about the methodology normally used in determining the need for precautionary measures.²¹¹
- In explaining the *limitations on Canada's ability to intervene in this process...*²¹²
- Any Canadian Engagement on this issue should be done in such a fashion as to not suggest we expect influence or special treatment because of our financial contribution.²¹³
- However, this does not preclude our efforts to ensure that all parties and decisions are adequately informed. [emphases added]²¹⁴

With respect to this final bullet point, it is worth recalling that Goldcorp's own Human Rights Assessment, published in May 2010, acknowledged that "the absence of on-site technical performance review by independent auditors means there is no verification of Montana's

²⁰⁷ Another earlier briefing note provides much stronger language with regard to Canada's respect for the IACHR, suggesting DFATD officials adjusted the wording to better align their stated policies and actual behavior. The stronger wording removed from the earlier note is emphasized here: "Canada has a strong record of promoting respect for human rights in the Americas, both bilaterally and multilaterally, and *has vigorously defended the integrity, autonomy and credibility of the human rights institutions of the OAS, including the IACHR*": *ibid* at 134-5, 454.

²⁰⁸ *Ibid* at 121 450.

²⁰⁹ *Ibid* at 130.

²¹⁰ *Ibid* at 122.

²¹¹ *Ibid* at 134-5.

²¹² *Ibid* at 451.

²¹³ *Ibid* at 453-4. Note that at the time the precautionary measures were issued, Canada was the largest funder of the IACHR, contributing CAD \$3.2 million over four years (2008-2012) to support the work of the IACHR, focusing on reducing the backlog of cases. Canada also participated in a working group on the review of OAS programs intended to address financial pressures: *ibid* at 471.

²¹⁴ *Ibid* at 454.

[Goldcorp] claims.”²¹⁵ In light of Canada’s failure to undertake due diligence and its continuous promotion of Goldcorp’s positive impacts on Guatemala (despite evidence to the contrary), Canada’s statement that it will “ensure that all parties and decisions are adequately informed” is problematic.

The background material prepared for Minister Van Loan included several statements that served to undermine, rather than support, the IACHR, in contrast to the bullet points to that effect above:²¹⁶

Canada as a member state of the Organization of American States (OAS) is committed to its obligations under the OAS Charter and the *American Declaration of the Rights and Duties of Man*, and is subject to the jurisdiction of the IACHR. *While decisions of the IACHR are non-binding*, Canada recognizes that the IACHR represents an integral part of the regional legal framework for the protection of human rights, and *Canada has consistently indicated a willingness to take the decisions of the IACHR into account*. Canada values the central role played by the IACHR in the promotion and protection of human rights in the Americas and is actively working to strengthen the position of the IACHR. [emphasis added]

Canada’s stipulation that the “decisions of the IACHR are non-binding” is wholly inaccurate. In a June 7, 2010 article on the Marlin mine, IACHR Press Director Maria-Isabel Rivero conveyed that the suspension request is “binding” and pointed out that the IACHR is “not a non-governmental organization” but “an intergovernmental organization created by the states themselves.”²¹⁷ UN Special Rapporteur James Anaya also underscored the mandatory nature of compliance with the precautionary measures in his March 2011 report, where he quotes a 2005 statement by the IACHR:²¹⁸

[P]recautionary measures are an important working mechanism of the Inter American Commission on Human Rights that has contributed to saving numerous lives throughout the hemisphere. Precautionary measures are issued in compliance with the Commission’s functions to promote and defend human rights, as set forth in Articles 106 of the OAS Charter, 41 of the American Convention on Human Rights, and 18 of the Statute of the IACHR. *The juridical basis for the precautionary measures is found in the obligation of States to respect and ensure the human rights of all persons subject to their jurisdiction, and the general practice of compliance with them on the part of the great majority of States is based on the existing understanding of their binding nature* [emphasis added].²¹⁹

²¹⁵ On Common Ground, *supra* note 31 at 66.

²¹⁶ DFATD, “ATI Request A201100925”, *supra* note 105 at 125.

²¹⁷ Martin Mittelstaedt, “Goldcorp mine in Guatemala ordered to shut”, *The Globe & Mail* (7 June 2010), online: <www.theglobeandmail.com/globe-investor/goldcorp-mine-in-guatemala-ordered-to-shut/article1389743/> [perma.cc/KDJ5-ZLQL].

²¹⁸ Anaya, *supra* note 31 at para 62.

²¹⁹ See OAS, Inter-American Commission on Human Rights, *Regarding the public expressions of Commissioner Freddy Gutiérrez Trejo*, Resolution No. 1/05 (8 March 2005) at para 9, online: *Inter-American Commission on Human Rights* <www.cidh.oas.org/resolutions/resolution1.05.htm> [perma.cc/9HG6-KX6X].

As reflected in the statement above, the very purpose of the precautionary measures was to ensure that local conditions did not worsen by continued mining activity over the period required for the IACHR to investigate the alleged environmental and human rights concerns. International human rights law required Canada to exercise due diligence, promote compliance with the precautionary measures, and avoid forms of interference that could undermine human rights.

Canada strengthens Goldcorp's influence and tries to manage Guatemala's response to the IACHR investigation

The IACHR petition was a matter between the Indigenous petitioners and the Government of Guatemala. DFATD officials were aware that neither Canada nor Goldcorp were parties to the proceedings.²²⁰ In spite of this, DFATD officials took steps to strengthen Goldcorp's influence in the process and to manage the Guatemalan government's response to an on-site investigation conducted by the IACHR in July 2010.²²¹

The available unredacted records reveal that, at the company's request, Canadian officials initiated communication with IACHR officials specifically about the precautionary measures and the on-site investigation in order to supply the information obtained to Goldcorp. In the week of June 21, 2010, DFATD Director for Latin America & the Caribbean James Lambert, Deputy Director for Latin America & Caribbean Edmund Lee, and Deputy Director of Inter-American Relations Karine Asselin met with Goldcorp Vice-President Dina Aloi in order to provide the company with "support for this situation with Marlin Mine & the IACHR."²²² Following this meeting, Goldcorp VP Aloi thanked the Canadian officials for their "very valuable insight and advice."²²³ Lambert then asked Asselin to send a follow up email to Aloi, "reiterating [his] interest and concern and that of Alex [Bugailiskis, DFATD Assistant Deputy Director for Latin America & the Caribbean] and our Ministers."²²⁴ Lambert asks Asselin to further note that Canada's Permanent Representative to OAS, Graeme Clark, will be speaking to the IACHR Executive Secretary Santiago Canton and "on the basis of that [conversation] we [DFATD] hope to be able to respond to their [Goldcorp's] useful set of questions."²²⁵

In a partially redacted letter dated June 29, 2010 to Goldcorp VP Aloi, DFATD described Canada's approach to the upcoming IACHR on-site investigation to the Marlin mine:

²²⁰ DFATD, "ATI Request A201100925", *supra* note 105 at 492.

²²¹ Article 39 of the IACHR's *Rules of Procedure* allows the Commission to carry out an on-site investigation in serious and urgent cases. In preparing this report, we were unable to find information on the IACHR website about the site visit. However, it was referenced extensively in the ATI records cited throughout this section. Special Rapporteur James Anaya also referred to the IACHR site visit in his preliminary note following his own in-country visit to Guatemala in June 2010. The Special Rapporteur called on Guatemala to "act on the guidelines drawn up by the IACHR on completion of its visit and conduct an objective and impartial review of the allegations concerning the adverse impact of the project on the daily lives of indigenous communities in the area": Anaya, "Preliminary Note", *supra* note 71 at para 27.

²²² DFATD, "ATI Request A201100925", *supra* note 105 at 88-9.

²²³ *Ibid* at 65.

²²⁴ *Ibid* at 88.

²²⁵ Canton was out of office, and so Patterson spoke with the Assistant Executive Secretary of the Commission. *ibid* at 98.

Our Permanent Mission to the OAS will be in contact with the IACHR to seek more details about this visit to Guatemala [...] The Embassy of Canada in Guatemala City will be working closely with the Government of Guatemala to encourage a comprehensive approach to the Commission's visit so that the Guatemalan authorities are equipped with all the required information to address concerns. We will encourage the Government of Guatemala to allow direct access to all interested parties, NGOs, Church, scientists, and the company itself.

On July 6, 2010, Aloi thanked DFATD for the information, to which Lambert sent another follow-up, drawing Goldcorp's attention to the IACHR *Rules of Procedure* and welcoming the company to direct any additional questions to Jeffrey Marder, DFATD Director for Strategic Relations in Latin America & Caribbean.²²⁶

On July 9, 2010, in response to further requests from Goldcorp Vice-President Aloi, DFATD sought out the "best contacts in the Government of Guatemala for Goldcorp to communicate with during the IACHR/investigative process."²²⁷ Although one Embassy official expressed concern and urged further discussion before proceeding with suggested communications, commenting that it is "a bit of an odd request," Ambassador McKechnie directed her staff to provide the requested information so that the letter to Aloi is "ready asap."²²⁸ Two hours later, Embassy officials provided contact information for officials at the Guatemalan Ministry of Energy & Mines, Ministry of the Environment, Ministry of Foreign Affairs, the Transparency Commission, and the President.

In sum, Canadian officials took numerous steps to strengthen Goldcorp's position with respect to the IACHR investigation and on-site investigation to the Marlin mine: they sought and acquired information from IACHR officials and shared it with Goldcorp; they discussed and developed a strategy for the visit in coordination with Goldcorp; and they facilitated Goldcorp's contact with officials in the Guatemalan government. It also appears that Canada attempted to help Goldcorp manage or influence Guatemala's response to the visit.

Canada strengthens Goldcorp's influence in the IACHR hearing

On October 25, 2010, the IACHR held an official public hearing between the parties to the complaint, namely the Government of Guatemala and the Mayan petitioners.²²⁹ This public hearing was recorded and made available online.²³⁰ We uncovered evidence that Goldcorp participated in a private hearing involving the petitioners and the Guatemalan government

²²⁶ *Ibid* at 67-8.

²²⁷ *Ibid* at 77.

²²⁸ *Ibid* at 767.

²²⁹ According to the lawyer for the petitioners, Carlos Loarca, several Goldcorp representatives attended the public hearing as observers. Carlos Loarca, "Siguen vigentes las medidas cautelares contra la mina Marlin?" (May 2012) at 14-20, online: *Dropbox* <www.dropbox.com/s/qozh6yx8f04dtin/Siguen_vigentes_las_Medidas_Cautelares%20%28Loarca%202012-05-28%29.pdf?dl=0> [perma.cc/ZNC8-FKCK].

²³⁰ OAS, Inter-American Commission on Human Rights, *Precautionary Measure PM 260/07 – Communities of the Sipakapense and Mam Maya People, Guatemala* (25 October 2010), Audio Recording (Washington, D.C.: Inter-American Commission on Human Rights, 2010), online: *Inter-American Commission on Human Rights* <www.cidh.org/audiencias/140/4.mp3> [perma.cc/SLC4-AHWV].

immediately following the public hearing, even though the company was not a party to the proceedings. The ATI record reveals that Canadian officials may have played a key role in facilitating Goldcorp's participation in the private hearing, by investigating the possibility of a "friendly settlement" and the submission of an *amicus curiae* by the company.²³¹ This section describes the relevant events leading up to the IACHR hearings on October 25, 2010.

On August 31, 2010, Goldcorp/Montana's lawyers sent a letter to the Executive Secretary of the IACHR, Santiago Canton, requesting a private hearing pursuant to Article 68 of the IACHR's *Rules of Procedure*.²³² Turning to Canada's role, the ATI records reveal that Canadian officials undertook several meetings with Goldcorp and Guatemalan officials to help prepare for the IACHR hearing. On October 12, 2010, less than two weeks before the hearing, Trade Commissioner Moffett met with two Goldcorp Vice-Presidents, and then with officials from Guatemala's Foreign Affairs division at the deputy ministerial level, to discuss the IACHR petition.²³³ On October 13, 2010, Moffett updated DFATD colleagues on the outcomes of these meetings and recommended that Canada demonstrate its "support and collaboration regarding the process."²³⁴ Moffett specifically requested the help of Canada's Permanent Representative to the OAS, Allan Culham, in encouraging a "rapprochement of the parties in Washington," "with the goal of reaching a friendly settlement" [translated from French].²³⁵

Trade Commissioner Moffett's comment suggests that Canadian officials contemplated the possibility of "friendly settlement" process under Article 40 of the IACHR *Rules of Procedure*.²³⁶ On October 13, Canada's Permanent Representative to the OAS, Allan Culham, replied to the Trade Commissioner and reminded him that "it is worth remembering that the IACHR operates at arm's length from OAS member states as well as businesses, NGOs, and other organizations." Culham continued:

I was just talking to Santiago Canton, the head of the IACHR, yesterday and he was commenting on *how political pressure being brought to bear upon the IACHR for specific cases has dropped off measurably during the last few years*. This growth in the independence of the IACHR has been in large measure due to the support of countries such as Canada and our like-minded counterparts. As such, *it would not be appropriate for us to be seen to be lobbying the IACHR on behalf of Gold Corp [sic]...it would also not be appropriate for Gold Corp [sic] to be at the table with the Government of Guatemala representatives at the time of the hearing...* [emphases added]²³⁷

²³¹ An *amicus curiae* is a legal brief where an organization or individual who is not a party to a particular litigation is permitted to advise a court in respect to a matter of law.

²³² Montana de Exploradora, "Solicitud de Audiencia de Terceros Interesados" (31 August 2010), online (pdf): *StudyLib* <studylib.es/doc/8047263/solicitud-de-audiencia-de-terceros-interesados-final-sp> [perma.cc/T9E9-2V5J].

²³³ Government of Canada, Department of Foreign Affairs, Trade and Development, *Access to Information Request A201401607/DL1* (15 December 2015) at 7-8, online: *Dropbox* <www.dropbox.com/s/72saszy4d8r9ke7/A-2014-01607_DL1%20Disclosure%20received%20December%2015%202015.pdf?dl=0> [perma.cc/X7RY-PEC2] [DFATD, "ATI Request A201401607/DL1"].

²³⁴ DFATD, "ATI Request A201401607/JL", *supra* note 177, at 12.

²³⁵ DFATD, "ATI Request A201100925", *supra* note 105 at 182.

²³⁶ *Ibid* at 473-4.

²³⁷ DFATD, "ATI Request A201401607/JL", *supra* note 177 at 11-2.

Nevertheless, Culham went on to suggest that Goldcorp may consider filing an amicus brief, based on information he received from Barrick Gold in another IACHR case concerning Chile.²³⁸ An amicus brief is a mechanism that allows third parties to present information in regard to a complaint. He indicated that Canada's OAS Mission "will do some checking with the IACHR as to the status of this 'amicus brief,' if any, and let you know."²³⁹ Culham also noted that he would undertake to have a meeting with the Guatemalan Ambassador to OAS, Jorge Skinner Clay, to ensure the two are on "the same page as to what the various parties can and cannot do. I will be sure to let you know his reaction."²⁴⁰ There is no record of this meeting or related discussions in the ATI record. OAS Coordinator Marc Labrom also responded to Trade Commissioner Moffett by noting that "the petitioner is looking to establish a precedent and is unlikely to be interested in settling, I gather" based on information he had received from Deputy Director Shaw-Wood.²⁴¹

On the morning of October 14, 2010, Trade Commissioner Moffett met again with Goldcorp after the company's meeting with Guatemalan Vice-President Espada. In this meeting, Goldcorp provided Canada with details on Guatemala's position.²⁴² Immediately following this meeting, Trade Commissioner Moffett wrote to Canada's OAS staff and outlined what he believed was at stake for Canada in the IACHR case, to which it was not a party:

... What is important in Canada in this case resides in three (3) points mainly: 1 – support for the IACHR and the transparency of its processes; 2 – respect for human rights; and 3 – Canadian investment in the region and the *defense and promotion of commercial interests*. *If this case creates precedent, it will have enormous consequences for all investments in the region*. Already, some of the companies are reluctant to continue with their planned investments, given the current climate of instability and the different processes currently underway [translated from French]. [emphasis added]²⁴³

In the evening of October 14, 2010, Moffett began to investigate whether the submission of an amicus brief by Goldcorp was possible in the context of the IACHR process. According to the IACHR *Rules of Procedure*, there is no specific provision for an *amicus curiae* submission from a third party.²⁴⁴ Nonetheless, Trade Commissioner Moffett sent Goldcorp Vice-President Eduardo Villacorta a link to the amicus brief submitted by Barrick Gold in another case at the IACHR, suggesting it may be an option for the company.²⁴⁵

²³⁸ DFATD, "ATI Request A201401607/JL", *supra* note 177 at 11.

²³⁹ *Ibid* at 4.

²⁴⁰ *Ibid*.

²⁴¹ DFATD, "ATI Request A201100925", *supra* note 105 at 473.

²⁴² DFATD, "ATI Request A201401607/JL", *supra* note 177 at 8.

²⁴³ DFATD, "ATI Request A201401607/DLI", *supra* note 233 at 8.

²⁴⁴ Canadian OAS Coordinator Marc Labrom comments that this is "odd but perhaps PRMAS will be able to clarify whether the Commission interprets its own RoPs [Rules of Procedure] differently or willing to accept that it is within its discretion to accept such an application." Labrom also notes that the "petitioner is looking to establish a precedent and is unlikely to be interested in settling, I gather": DFATD, "ATI Request A201100925", *supra* note 105 at 473.

²⁴⁵ DFATD, "ATI Request A201401607/JL", *supra* note 177 at 14. Moffett forwards this email thread and asks DFATD communications staff about classifying documents as confidential. She tells them they must be marked as "protected" or to use "C5." He thanks her saying they have received a number of ATI requests and that Ottawa told them to use "confidential" to protect themselves against these requests: DFATD, "A201401607/DLI", *supra* note 233 at 1.

On October 25, 2010, the IACHR held two hearings related to the Marlin mine: an official public hearing between the petitioners and the Government of Guatemala, and a private hearing between Goldcorp, Guatemala and the petitioners. On October 26, 2010, the day after the hearings, Trade Commissioner Moffett sent his DFATD colleagues a summary of both events, based on information shared with him by an unknown party.²⁴⁶ It seems reasonable to presume that the individual who shared this information was a Goldcorp representative who attended both the public and private hearing.

As for the first hearing between the petitioners and Government of Guatemala, Moffett stated that it “went well” and noted that IACHR Commissioner and Special Rapporteur for the Rights of Indigenous Peoples Dinah Shelton “opened the issue of whether is [*sic*] precautionary measures need to be maintained,” specifying whether they “should be continued, be modified, stopped.”²⁴⁷

In his communications, Trade Commissioner Moffett refers to the private hearing as a “non-official meeting.”²⁴⁸ While IACHR hearings are generally public, Article 68 of the *Rules of Procedure* allows for a private hearing in exceptional circumstances:

When warranted by exceptional circumstances, the Commission, at its own initiative or at the request of an interested party,²⁴⁹ may hold private hearings and shall decide who may attend them. This decision pertains exclusively to the Commission, which shall notify the parties in this regard prior to the beginning of the hearing, either orally or in writing. Even in these cases, the minutes shall be prepared in the terms set forth in Article 70 of these Rules of Procedure [emphasis added].

According to the lawyer for the petitioners, Carlos Loarca, the petitioners, Guatemala, and Goldcorp were all present at the private hearing. Loarca reported that the purpose of the private hearing was to explore the possibility of a “friendly settlement.”²⁵⁰ Under Article 40(1) of the IACHR’s *Rules of Procedure*, only the Commission or the parties to the petition may initiate a friendly settlement process.²⁵¹ While Goldcorp participated in the private hearing, it is unclear who initiated the friendly settlement process and why Goldcorp was directly involved.²⁵²

²⁴⁶ DFATD, “ATI Request A201401607/JL”, *supra* note 177 at 24.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ In our reading, the term “interested party” is used to refer to an external entity who is not party to the proceedings.

²⁵⁰ Loarca, *supra* note 229 at 16-20.

²⁵¹ Article 40(1) reads: “On its own initiative or at the request of any of the parties, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments.”

²⁵² Article 40(2) of the IACHR *Rules of Procedure* states that the friendly settlement procedure “shall be initiated and continued on the basis of the consent of the parties.” Further, under Article 40(4), the Commission “may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to such a resolution or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on the respect for human rights.” Under Article 40(6), if no friendly settlement is reached, the Commission shall continue to process the petition or case.

Despite Canada's lack of official or public participation, the ATI record suggests that Canada may have played a role in encouraging Goldcorp's participation in the friendly settlement process. The summary of the non-official or private hearing between Goldcorp, Guatemala, and the petitioners is completely redacted. However, Trade Commissioner Moffett notes that the company "will have to respond by writing to the questions asked by [IACHR] Commissioner Shelton" and that Canada "will then wait to see ... the commission's reaction."²⁵³

On November 8, 2010, two weeks after the IACHR hearings, Goldcorp Executive Vice-President David Deisley met with Canada's Permanent Representative to the OAS Allan Culham to provide "a debrief on two sessions that took place on Oct. 25."²⁵⁴ In this meeting, Culham stressed "that, in his role as Permanent Representative, he does not engage in questions of substance, but rather of process."²⁵⁵ However, he also stated that "the situation faced by Goldcorp should be seen as an opportunity, rather than a challenge," noting that the IACHR is "examining the ways to reduce litigation by encouraging the use of alternative dispute resolution systems."²⁵⁶

In sum, it is clear that Canada tried to strengthen Goldcorp's influence in the proceedings by repeatedly contacting the IACHR about the hearing, sharing strategies and suggestions for Goldcorp's participation, and debriefing and strategically analyzing the hearings, including the private hearing that Goldcorp secured with the IACHR.

2. Analysis

DFATD officials acknowledged that neither Canada nor Goldcorp were parties to the IACHR petition and that the independence of the IACHR should be respected.²⁵⁷ Yet, when evaluated against Canada's conduct, these statements are mere lip service. The records clearly demonstrate that one of Canada's main goals was to broker, facilitate, and promote Goldcorp's participation and influence in the IACHR process, for fear that the outcome could adversely affect Canadian commercial interests. At the same time, Canadian officials showed no apparent concern for the fact that the issue at stake was the international protection of human rights, and that they were working at cross purposes with marginalized Indigenous communities and international human rights bodies.

The evidence shows that Canadian officials repeatedly initiated communication with IACHR officials directly about the precautionary measures in advance of the IACHR's on-site investigation and proceedings, and that Canadian officials undertook these communications on behalf of, and in coordination with, Goldcorp. Canada's Permanent Representative to the OAS repeatedly tried to contact and eventually did communicate with the IACHR Executive Secretary at the time. Canada also supplied Goldcorp with strategic contacts in the Guatemalan government and proposed the *amicus curiae* option, sought information about it, and provided examples to the company. Finally, certain Canadian officials sought to encourage a friendly settlement process involving Goldcorp, a decision reserved for the Commission and the parties (i.e., Guatemala and the petitioners) under the IACHR's *Rules of Procedure*.

²⁵³ DFATD, "ATI Request A201401607/JL", *supra* note 177 at 25.

²⁵⁴ *Ibid* at 26.

²⁵⁵ *Ibid* at 27.

²⁵⁶ *Ibid*.

²⁵⁷ DFATD, "ATI Request A201100925", *supra* note 105 at 452.

Ultimately, it appears that Canada's information, advice and support for Goldcorp culminated in the company's attendance at the public hearing and its participation in a second private, off the record hearing with the IACHR and the parties to the petition. Recall that after Canada's Permanent Representative to the OAS, Allan Culham, spoke with IACHR Executive Secretary Santiago Canton, Culham transmitted the advice that it would not appear appropriate for "Gold Corp [*sic*] to be at the table with the Government of Guatemala representatives at the time of the hearing."

As stated, these diplomatic efforts countered the influence of UN Special Rapporteur James Anaya, who issued a clear statement calling on Guatemala to abide by the decisions of the IACHR and fully comply with the suspension request. In his June 2010 preliminary note, Anaya expanded on Guatemala's duty under international law:

As a matter of principle and under the duty of good faith with regards to its international human rights obligations, the State must abide by the decisions of the IACHR, which is one of the main organs of the Organization of American States responsible for promoting and protecting human rights in the region.²⁵⁸

Despite international calls for the suspension of the mine, Canada took many steps to strengthen Goldcorp's influence during IACHR's on-site investigation, the hearings, and afterwards. Cautionary references to "political pressure" and "lobbying" appeared in the unredacted portions of communications between Canadian officials and the IACHR less than two weeks prior to the public hearing. One wonders whether or not this may in part explain the strong language that appeared in an IACHR report published four years later on extractive industries. In this report IACHR explicitly named Canada when stating that home states should refrain from offering public support to companies involved in human rights violations abroad, and to refrain from influencing the adoption of norms or policies that solely favor that country's economic interests to detriment of human rights protection in developing countries where company operations are located.²⁵⁹

In our assessment, Canada's persistent efforts to strengthen Goldcorp's influence in the IACHR proceedings, including its direct contacts with high level IACHR officials about the matter and its repeated concern for Canadian commercial interests, fell below the standard of conduct necessary for Canada to respect the independence and impartiality of the IACHR. The records contain no meaningful guidance from senior government officials about how to protect these principles in the context. Rather, Canada's Permanent Representative to the OAS explicitly focused on perception (i.e., to avoid being seen as interfering in IACHR processes and to avoid being seen at the table with Guatemala). At one point, Canada's Permanent Representative to the OAS explicitly stated that engaging with the IACHR on questions of process would nonetheless be appropriate. However, Canada went beyond seeking the answers to technical or procedural questions, and crossed the line by using its political power to signal Canada's support for Goldcorp and to increase the company's influence in the IACHR investigation and hearing.

At no time in the available records did Canadian officials express concern for the rights and well-being of the petitioners and affected Indigenous communities. Instead, Trade Commissioner

²⁵⁸ Anaya, "Preliminary Note", *supra* note 71 at para 27.

²⁵⁹ IACHR, "Indigenous Peoples", *supra* note 17 at para 334.

Moffett suggested that Canada's Permanent Mission to the OAS should encourage a rapprochement between the parties, with the goal of reaching a friendly settlement. Canada was advocating for Goldcorp's interests in suggesting this approach, as the petitioners wanted a hearing, not a mediation process. The idea that Canada could facilitate a friendly settlement while actively and systematically pushing for non-compliance with the IACHR measures, and working to strengthen Goldcorp's influence in the process, is disingenuous at best. This resonates with the point we made in Part III.A, that Canada has aligned itself with extractive industries to such an extent that it is incapable of credibly facilitating a dialogue when conflicts arise.

We conclude that, on the whole, Canada's actions undermined the rule of law and the inter-American human rights system. Goldcorp's congratulatory note to Canadian Permanent Representative to OAS regarding the lifting of suspension underscore that the two shared a common purpose. Ultimately, Canada and Goldcorp's coordinated action in defense of the company's commercial interests undermined the efforts of affected Indigenous communities to defend their rights and access justice.



The Marlin Mine processing plant, May 2018. Credit: Janelle O'Meara

D. Summary of Findings

This part of the report presented known facts about Canada's response to the IACHR precautionary measures based on the available and unredacted portions of ATI records. It then analyzed these facts in light of the commitments in Canada's CSR Strategy and its obligations to the IACHR and

the OAS system. The record shows a sharp discrepancy between Canada's words and actions when it comes to the promotion and protection of human rights in this context. Publicly, Canada touted its support for the integrity and independence of the IACHR, as well as its expectation that Canadian companies abide by the highest CSR standards. Privately, Canada acted to influence Guatemala's position on the IACHR request, and provided information obtained from the IACHR to Goldcorp in order to enhance its influence in the investigation process and in the formal proceedings. In implementing Canada's economic diplomacy policy, Canadian officials focused on exercising influence in favour of commercial interests, while not being seen to do so.

Despite a pro forma statement from Canada's Permanent Representative to the OAS that Canadian officials should avoid being seen "encouraging non-compliance" with the IACHR's rulings, it appears that DFATD, the Canadian Embassy and the Canadian OAS mission embarked on a focused strategy aimed at undermining the precautionary measures. First, Canada attempted to diminish the weight given to the Physicians for Human Rights report which had formed the basis for the measures. In doing so, Canada failed to undertake due diligence to verify Goldcorp's claims and to fully understand the available evidence corroborating communities' concerns. Second, Canada pressured Guatemalan officials in advance of their formal response to the precautionary measures, including communications from the Canadian Ambassador and two Canadian Ministers. Third, they worked with Goldcorp to manage the IACHR on-site investigation and increase the company's influence vis-à-vis Guatemalan officials. Fourth, Canada communicated with IACHR and OAS officials to defend Goldcorp's record, including communications from a Canadian Minister and the Canadian Ambassador. Fifth, Canada extracted information from the IACHR to pass on to Goldcorp and explored strategies to enhance Goldcorp's position in the IACHR proceedings.

In the course of all of the above, Canadian officials ignored their own CSR policies and failed to promote human rights and respect the decisions of the IACHR, as required by international law. Canada's apparent attempts to influence Guatemala to keep the mine open and to not suspend operations pursuant to the precautionary measures took place despite DFATD's own recognition that "it would not be appropriate for the Government of Canada to make representations on the IACHR process to the Government of Guatemala." Neither Canada nor Goldcorp were parties to the IACHR petition, yet Canadian officials directly communicated with the independent decision makers involved. These communications took place despite DFATD's recognition that it would not be in Canada's interest "to be *publically [sic] perceived* as interfering in the operations of the Commission or promote non-compliance with its rulings [emphasis added]."

The actions and communications of Canadian officials, including the Canadian Ambassador, Embassy staff, the Minister of International Trade and the Minister of State for Foreign Affairs, reflected a single-minded concern for Goldcorp and Canadian commercial interests. The cumulative effect of these actions was to undermine the efforts of the Indigenous communities impacted by Marlin to seek justice and defend their rights. Because of the heavy redactions, there is much that we do not know about the full impact of Canada's actions on the IACHR, Guatemala and the proceedings. However, the pattern and nature of the communications between Canada, Guatemala, and the IACHR and Goldcorp raise serious concerns that the actions of Canadian officials ran afoul of Canada's domestic and international obligations. As such, there is a strong public interest in more fulsome disclosure to the Canadian public of the redacted portions of the ATI records. This issue is taken up in the following portion of this report, Part IV.

PART IV – Conclusion & Recommendations

This section begins by first outlining some of the concerns in Marlin mine’s post-closure phase surrounding environmental remediation and monitoring, as well as redress for affected communities for past and ongoing harms. Second, it summarizes the overarching deficiencies with respect to the political support that Canadian Embassies provide to resource extraction companies and Canada’s existing policy framework. Following the recommendations issued by international bodies and civil society advocacy (groups?), we identify some potential starting points for law and policy reforms. We conclude by reflecting on the contributions and significance this report has in the context of government involvement in the lack of corporate accountability for the human rights abuses committed by Canadian companies operating abroad.

A. Post-Closure Concerns

Since the IACHR first issued the precautionary measures in 2010 to protect the rights of communities affected the Marlin mine, the proceedings have continued at a slow pace. In April 2014, the IACHR deemed the complaint admissible for the purpose of examining the alleged violations of the rights enshrined in Articles 5, 8, 9, 13, 19, 21, 23, 24 and 15 of the *American Convention*.²⁶⁰ Shortly after, in March 2015, the Government of Guatemala asked the IACHR to lift the precautionary measures entirely.²⁶¹ The IACHR refused and instead renewed the December 2011 amended measures, and in particular its requirement that the Guatemalan government provide access to potable water and ensure that water resources are not contaminated.²⁶² The IACHR also required Guatemala to present a holistic reparation plan for the communities.²⁶³

In October 2015, the Guatemalan government, the affected municipalities and certain representatives from local communities signed an agreement to initiate a friendly settlement process under Article 40 of the IACHR’s *Rules of Procedure*.²⁶⁴ It is unknown whether Canada played a role in reaching this agreement or facilitating the “Mesa de Diálogo” (dialogue table) subsequently established to help resolve the IACHR petition.²⁶⁵ In September 2016, however, Goldcorp withdrew from the dialogue table and, in May 2017, the company announced the closure of Marlin Mine and began reclamation activities in June of that year.²⁶⁶ At that point, civil society

²⁶⁰ IACHR, “Admissibility Report”, *supra* note 40 at para 4. A *primaefacie* evaluation of admissibility does not constitute a decision on the merits of the case; the IACHR at this stage must only determine whether, if proven, the alleged facts would establish violations of the Convention under Article 47.b and whether the petition is “manifestly groundless” or “obviously out of order” pursuant to Article 47c (12).

²⁶¹ Government of Guatemala, “Informe del Estado de Guatemala” (16 March 2015) at 2, online (pdf): *Dropbox* <www.dropbox.com/s/11gk61iki3s5w1y/Informe-de-Estado-observaciones-MC-260-07-13anexos-1.pdf?dl=0> [perma.cc/ UN53-KFEU].

²⁶² DFATD, “ATI Request A201702339”, *supra* note 155 at 268.

²⁶³ *Ibid.*

²⁶⁴ Government of Guatemala, “Acuerdo de Inicio del Proceso de Solución Amistosa” (7 October 2015), online (pdf): *Google Drive* <drive.google.com/file/d/1dnCjlb1wD3RAQxJJMrejuf03CMsV3fB/view> [perma.cc/HS4Y-XX8D]; See also Government of Guatemala, “Informe Sobre el Inicio del Procedimiento de Solución Amistosa” (13 July 2015) at 2, online (pdf): *Dropbox* <www.dropbox.com/s/pn4dh6x0r3biocm/COPREDEH.%202015.%20Informe-inicio-Procedimiento-soluci%C3%B3n-amistosa-P-1566-07-2.pdf?dl=0> [perma.cc/ 9XV7-JDCC].

²⁶⁵ See Newmont, “Mesa de Diálogo” (12 July 2019), online (video): *Newmont Marlin* <newmont-marlin.com/mesa-de-dialogo/> [perma.cc/2K2K-DKVS].

²⁶⁶ Newmont Corporation, “Marlin Mine Status Update” (30 January 2020) at 3, online (pdf): *Newmont Corporation* <s24.q4cdn.com/382246808/files/doc_downloads/2020/07/MSCI-Response-Marlin-Mine-January-2020.pdf> [perma.cc/8HAP-

groups reported that only 24 of a total of 42 recommendations in the 2010 Human Rights Assessment commissioned by Goldcorp had been fulfilled completely.²⁶⁷ At the time of writing, more than 14 years after the petition was first filed, the IACHR has yet to pronounce on the merits of the case, and Guatemala has yet to comply with the IACHR precautionary measures, first issued in 2010 and amended in 2011.²⁶⁸



The tailings pond at the Marlin Mine during reclamation, May 2018. Credit: Janelle O'Meara

In April 2019, US mining company Newmont Corporation (“Newmont”) acquired Goldcorp, and the latter company ceased to exist as a separate and independent legal entity. Newmont assumed responsibility for the closure until 2026,²⁶⁹ and subsequently claimed that four of the five requests in the original IACHR petition are “resolved,” and that the fifth grievance is partially resolved, namely that the government ensure access to water suitable for human consumption.²⁷⁰ In late September 2021, a congressional audit committee called on the state actors responsible for the

PTHN] [Newmont “Marlin Mine Status Update”] This document contains a chart summarizing the status of the grievances addressed by the dialogue table starting in 2017.

²⁶⁷ See Jackie McVicar, “When you benefit from destruction: United Church Pension Board, Federal Government put economic inte” (last visited 1 September 2021), online: *United for Mining Justice* <www.unitedforminingjustice.com/single-post/2019/05/14/when-you-benefit-from-destruction-united-church-pension-board-federal-government-put-econ> [perma.cc/6WP2-S64L].

²⁶⁸ Under Article 40(6) of the IACHR *Rules of Procedure*, the Commission is directed to continue to process the petition if no friendly settlement is reached.

²⁶⁹ Goldcorp, “Goldcorp Reclamation & Closure Best Practices” (2018) at 11, online (pdf): *British Columbia MEND ML/ARD Workshop* <bc-mlard.ca/files/presentations/2018NL-7-CORMIER-Closure-Practices-at-Goldcorp-Closed-Sites.pdf> [perma.cc/9TTN-EGM6].

²⁷⁰ Newmont, “Marlin Mine Status Update”, *supra* note 266 at 2. Newmont claims that “18 water projects were identified for implementation. Goldcorp completed 11 projects assigned to the company and eight projects remained to be completed by the government”.

²⁷⁰ See Ministerio de Energía y Minas, “Mining Law and its Regulation: Guatemala” (last visited 1 September 2021), online (pdf): *Ministerio de Energía y Minas* <www.mem.gob.gt/wp-content/uploads/2015/06/2_Mining_Law_and_its_Regulation.pdf> [perma.cc/CT9M-33LF]. See also Raquel Aldana & Randall S Abate, “Banning Metal Mining in Guatemala” (2016) 40 *Vt L Rev* 597 at 630, online (pdf): *Vermont Law Review* <lawreview.vermontlaw.edu/wp-content/uploads/2016/07/40VtLRev597-Aldana-Abate.pdf> [perma.cc/UZ4V-6QWM].

implementation of the precautionary measures to ensure that communities had access to an adequate water supply and planned a follow-up field visit to monitor progress.²⁷¹

Guatemala's mining law, enacted in 1997, does not regulate mine closure and thus does not impose responsibility on either the government or mining companies to reclaim and remediate the mine site and mitigate current and future environmental harms.²⁷² Neither Goldcorp nor Newmont have disclosed detailed information on the closure process. In a recent securities commission filing, Newmont warned investors that “[m]ine closure, reclamation and remediation costs for environmental liabilities may exceed the provisions we have made,” referring to, among others, an unnamed closed mine site in Guatemala.²⁷³ It is unclear who, if anyone, will take responsibility for post-closure monitoring once Newmont abandons the site in 2026. As described in Part I of this report, early on in Marlin's lifecycle, independent analysts reported that the environmental risks of the mine are likely to increase overtime.²⁷⁴ This risk is certainly exacerbated by the lack of adequate regulation and oversight of the mine closure plan, and the lack of financial assurance for long-term post-closure remediation and monitoring.²⁷⁵ Inadequate management of the tailings dam poses a particular risk of future catastrophic impacts.²⁷⁶

This brief summary of the post-closure situation at Marlin Mine shows that affected communities have been left dealing with the mine's environmental legacy and the ongoing risks with very little government oversight. This report has presented extensive evidence of how Canada ran afoul of its domestic policies and its international obligations when it worked to undermine the efforts of communities to defend their rights at the IACHR, including the right to a healthy environment. Canada helped to ensure the continued operation of Marlin mine, despite the IACHR's request for its temporary closure and a full and independent investigation of the impacts and risks.

Additional evidence gathering and legal analysis are required to determine if Canada's support for Goldcorp in the circumstances could render Canada responsible in international law for the alleged harms to local communities and the lasting impacts of the mine. However, beyond outstanding questions of Canada's potential international legal responsibility, the findings in this report certainly strengthen communities' claim that Canada's support for Goldcorp was such that Canada bears a clear ethical duty to help redress past and ongoing harms suffered by affected communities.

²⁷¹ In September 2021, Guatemalan Congresswoman Vicenta Jerónimo called a meeting with the institutions responsible for the implementation of the precautionary measures, including the Ministry of Energy & Mines, the Ministry of the Environment and Natural Resources, the Presidential Commission for Human Rights, and the Institute for Municipal Development, to receive an update on compliance. The Congresswoman visited the Marlin Mine mid-November 2021 to check on the status of promised water projects. See “Fiscaliza Cumplimiento De Medidas Cautelares a Favor de 18 Comunidades de San Marcos” (28 September 2021), online: *Congreso de la República* <www.congreso.gob.gt/noticias_congreso/7213/2021/1> [perma.cc/5Z3Z-HHBG].

²⁷² See Ministerio de Energía y Minas, “Mining Law and its Regulation”, *supra* note 270. See also Raquel Aldana & Randall S Abate, *supra* note 270.

²⁷³ Newmont Corporation, “Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2019” (20 February 2020) at 14, online (pdf): *Newmont Corporation* <www.sec.gov/Archives/edgar/data/1164727/000119312512075918/d263670d10k.htm> [perma.cc/5VVQ-LV73].

²⁷⁴ See Zarsky & Stanley, *supra* note 95; Moran, “New Country”, *supra* note 76. See also van de Sandt, *supra* note 3.

²⁷⁵ On Common Ground, *supra* note 31 at 66, 73, 81-2.

²⁷⁶ Charles Roche, Kristina Thygesen & Elaine Baker, “Mine Tailings Storage: Safety Is No Accident” (13 November 2017), online (pdf): *GRID-Arendal* <gridarendal-website-live.s3.amazonaws.com/production/documents/:s_document/371/original/RRA_MineTailings_lores.pdf?1510660693> [perma.cc/7N49-FA9E]. This 2017 report by GRID-Arendal and the United Nations Environment Programme (UNEP) on the increasing number of mining waste failures highlights the risks and costs of perpetual management to human health and the environment.

B. Reforms to Canadian Economic Diplomacy are Necessary

There is significant public debate in Canada and internationally over Canada's CSR policies and the terms and conditions of Canada's diplomatic support for Canadian companies abroad through its foreign service.²⁷⁷ Respect for human rights is a core issue in this debate, which has taken place since the turn of the century among members of federal government committees and in the House of Commons in response to proposed legislation.²⁷⁸ The federal government has also developed a number of policies in this area, which are cited throughout this report.²⁷⁹

This debate underscores the strong public interest in the disclosure of the ATI records reviewed in this report, which document Canada's political support for Goldcorp with respect to its overseas operations and specifically in response to alleged human rights abuses and the IACHR request. Canadians and affected communities have a right to scrutinize the actions of their public officials in relation to international human rights bodies, to ensure that these actions are consistent with Canada's international obligations as well as its domestic policies and regulations.

This report adds to a growing body of empirical research²⁸⁰ that has consistently made two troubling findings:

1. Canadian Embassies are failing to adequately inquire and investigate to ensure that companies are respecting human rights. This failure occurs before Embassies provide support and continues when Embassies maintain or even increase their support for companies facing serious and credible allegations of human rights violations.
2. Modalities of Embassy support for companies are undermining communities' efforts to defend their rights, including their ability to influence their democratically elected representatives and access justice in relation to the impacts of mining.

²⁷⁷ The key messages prepared for International Trade Minister Peter Van Loan in advance of his June 16, 2010 meeting with Goldcorp recognizes this policy debate: "Convey that this issue is being taken seriously by the Government of Guatemala and that the challenges being faced by Goldcorp in Guatemala are part of a larger debate on CSR which finds echoes in Canada through Bill C-300": DFATD, "ATI Request A201100925", *supra* note 105 at 131.

²⁷⁸ For more details, see: Charis Kamphuis, "Advocating for a Home-State Grievance Mechanism: Law Reform Strategies in the Canadian Resource Justice Movement" in Isabel Feichtner, Markus Krajewski & Ricarda Roesch, eds, *Human Rights in the Extractive Industries* (New York: Springer, 2019). See also Ottawa, House of Commons, Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries - Corporate Social Responsibility*, 38-1, (22 June 2005) (Bernard Patry), online (pdf): *House of Commons Canada*.

<www.ourcommons.ca/Content/Committee/381/FAAE/Reports/RP1961949/FAAE_Rpt14/FAAE_Rpt14-e.pdf> [perma.cc/LNX9-FNZM]; The Advisory Group, "National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries: Advisory Group Report" (29 March 2007), online (pdf): *MiningWatch Canada* <miningwatch.ca/sites/default/files/RT_Advisory_Group_Report.pdf> [perma.cc/E8T2-958M]; Ottawa, House of Commons, "Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries", *House of Commons*, 40-3, (9 February 2009) (John McKay).

²⁷⁹ GAC, "Voices at Risk", *supra* note 21; Government of Canada, "Office of the Canadian Ombudsperson for Responsible Enterprise" (2021), online: *Government of Canada* <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng> [perma.cc/XKP9-34RV].

²⁸⁰ See MiningWatch 2010; MiningWatch 2013; Moore & Colgrove 2013; Moore 2015; MiningWatch 2015; Connolly *et al*, forthcoming *supra* note 12; Kamphuis *et al*, forthcoming, *supra* note 12.

Alongside this report, this same body of research has documented the following serious deficiencies in the mechanisms of public oversight that ostensibly govern the support that Canadian embassies provide to companies abroad.²⁸¹

- 1. Standards:** There is no clarity with respect to the standards that govern *how* Embassies should promote the respect and protection of human rights from the outset, and when deciding whether or not to support companies. Companies receiving assistance from the Trade Commissioner Service must sign an integrity declaration attesting that they understand the ethical and legal expectations of Canada, however, there is no requirement that companies conduct due diligence to identify risks to human rights and possible prevention and mitigation measures.²⁸² This coincides with the UN Working Group on Business and Human Rights' observation that Canada's policies are reactive in nature, only withdrawing benefits if a problem arises.²⁸³
- 2. Transparency:** There is no effective mechanism for scrutinizing the actions of Canadian Embassies to ensure they comply with applicable CSR and human rights policies. There is no process by which affected communities and human rights defenders can obtain information with respect to how, if at all, Embassies are ensuring that the companies they support are respecting human rights. Disclosures in response to ATI requests are often delayed by months or even years. Once received, they are extremely time consuming to review, and the process of challenging redactions is onerous and protracted.²⁸⁴
- 3. Accountability:** There is no effective mechanism for reviewing the conduct of Embassy and other public officials and holding them to account when there are grounds to believe that their actions have contributed to harm or served to undermine human rights protection in the context of economic diplomacy.²⁸⁵

These documented Canadian policy failures, both the failures of public officials to follow existing policy as well as the deficiencies in the existing policy and governance framework, put Canada at odds with the expectations of international human rights bodies. Both the UN Working Group on

²⁸¹ *Ibid.*

²⁸² Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, UNGAOR, 47th Sess, UN Doc A/HRC/47/39/Add.2 (2021) at para 50 [UN Working Group, "Guiding Principles"].

²⁸³ See UN Working Group "Guiding Principles", *supra* note 282 at para 34. See also GAC, "Enhanced CSR Strategy", *supra* note 8; GAC, "Voices at Risk", *supra* note 21.

²⁸⁴ *Imai v Canada (Minister of Foreign Affairs)*, 2021 FC 1479 [Imai]. In 2019, JCAP brought a case against Global Affairs to the Federal Court of Canada challenging the redaction of records related to diplomatic support for Marlin Mine, after a four-year long investigation by the Office of the Information Commissioner.

²⁸⁵ See Justice and Corporate Accountability Project, "Submission to the Public Sector Integrity Commissioner in Relation to the Embassy of Canada in Mexico" (5 February 2018), online (pdf): *MiningWatch* <miningwatch.ca/sites/default/files/2psicpublicfinal.pdf> [perma.cc/D6QP-N5ZH]. In 2017, JCAP identified one potential avenue for accountability in Canada, the Public Service Integrity Commissioner (PSIC), but this body refused to investigate a pioneering complaint submitted in 2018, and as a result, JCAP launched a judicial review and is now waiting for the Federal Court of Appeal to determine whether or not the PSIC is required by law to investigate. See also *Gordillo et al v Canada*, 2019 FC 950.

Business & Human Rights and the UN Special Rapporteur on the Rights of Indigenous Peoples have called upon states to take appropriate steps to ensure that all business enterprises domiciled in their territory and/or jurisdiction respect human rights, including by enacting mandatory due diligence obligations for companies.²⁸⁶ The Working Group on Business & Human Rights has noted that most home states, including Canada, are not doing enough to ensure the protection of human rights through their trade policies and economic diplomacy. As a result, it directs states to require agencies dealing with development aid, export credit, pensions, and sovereign investment funds to develop effective policies for the protection of human rights.²⁸⁷

In the context of these and other recommendations by international bodies (see Part 1.A) and civil society organizations, and in light of the findings in this report, it is clear that fundamental reforms to Canadian economic diplomacy are required. It is also clear that the development of this reform agenda should be done in broad consultation with civil society groups and affected communities. The findings in this report point to governance-focused areas of reform. We articulate these here in order to offer them as a possible starting point for civil society groups seeking to advocate for more comprehensive policy and law reform:

1. **Strict & Effective Conditions on Political Support for Companies:** This area could involve calls on the Government of Canada to condition its diplomatic support for companies on mandatory human rights due diligence and respect for human rights.²⁸⁸
2. **Meaningful & Stronger Norms for Government Officials:** This area could involve engagement with the Government of Canada to create binding laws and codes, rooted in international human rights principles and Canada's duty to respect and protect human rights, that govern how embassies engage with Canadian companies, affected communities, and local governments.
3. **Transparency & Oversight of Government Actions:** This area could involve identifying how the Government of Canada might create a transparent and effective mechanism to oversee Embassies' compliance with applicable laws and policies.

In light of its mandate, and notwithstanding its limitations,²⁸⁹ the Canadian Ombudsperson for Responsible Enterprise could play a role in pursuing these reforms. It has a mandate to provide advice to Ministers and may make recommendations for Ministerial review of responsible business

²⁸⁶ UN Working Group, "Guiding Principles", *supra* note 282 at paras 42-3; Francisco Calí Tzay, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Attacks and Criminalisation of Indigenous Human Rights Defenders*, UNGAOR, 39th Sess, UN Doc A/HRC/39/17 (2018) at para 91(c).

²⁸⁷ UN Working Group, "Guiding Principles", *supra* note 282 at paras 48-51; HRC, "Working Group", *supra* note 17 at para 22.

²⁸⁸ Canadian Network on Corporate Accountability, "Corporate Respect for Human Rights and the Environment Act: Executive Summary: CNCA's Draft Model Human Rights and Environmental Due Diligence Law" (May 2021), online (pdf): *Canadian Network on Corporate Accountability* <cnca-rcrce.ca/site/wp-content/uploads/2021/05/Executive-Summary-Corporate-Respect-for-Human-Rights-and-the-Environment-Act.pdf> [perma.cc/XYS2-5SY3]. The Canadian Network for Corporate Accountability's draft model human rights and environmental due diligence legislation imposes mandatory reporting requirements on companies.

²⁸⁹ See CESCR, "General comment No 24", *supra* note 18.

conduct and due diligence policies. This includes policies related to funding and services provided to Canadian companies by the Government of Canada.²⁹⁰

While we call for governance-oriented policy and law reform, in our view, this should not preclude opportunities for more ambitious and visionary interrogations of the appropriate relationship between the Canadian state and the Canadian private sector in the overseas context. This includes the question of whether or not it is appropriate *at all* for Canada to provide diplomatic support to Canadian companies in light of existing power relations between companies and affected communities, and in light of the ways in which domestic corporate law and international economic law currently constitute, enable, and protect the transnational corporation from accountability. We firmly believe this is an important line of inquiry and we hope that this report will feed into its development.

C. Conclusion

This report began with a detailed description of Goldcorp and the Guatemalan government's violent imposition of the Marlin mine in the communities of San Miguel Ixatahuacán and Sipacapa. Beginning in 2003, Indigenous Maya Mam and Maya Sipakapense peoples resisted foreign incursions into their territories and defended their land, water, and ways of life. In a post-genocide context, the conflict around the mine began with concerns around land acquisition, lack of consultation and consent, and escalated in response to the social and environmental impacts of the mine. The ongoing conflict frequently culminated in massive protests, blockades, and acts of violence that in some moments led to the tragic deaths and injury of community leaders.

The conflict attracted the attention of many external actors, including international bodies, academics, doctors, engineers, consulting firms and civil society organizations. There were numerous studies that found Indigenous communities had not given consent, that environmental contamination concerns were credible, and that Guatemala's regulation of the mine was inadequate and under-resourced. There were many calls, including from international bodies, for a rigorous, credible, and independent study of the environmental impacts of the mine.

This is the larger context for the IACHR's 2010 precautionary measures, calling on Guatemala to temporarily suspend Marlin Mine, undertake a proper study of the impacts, and secure access for affected communities to clean and potable water, among other things. The ATI records reviewed in this report demonstrate that Canada was well-positioned to positively influence Goldcorp at this critical moment. Unfortunately, this did not occur. Our research demonstrates that Canada's approach to economic diplomacy undermined the efforts of Indigenous Guatemalans to defend their rights and access justice before an international human rights body.

Instead of advocating for compliance with the IACHR's precautionary measures, the records suggest that Canada actively worked against the suspension request by pressuring the Government of Guatemala not to comply. Canadian Ministers, Ambassadors, and other officials consistently defended Goldcorp and provided extensive and unconditional political support to the company.

²⁹⁰ See articles 4(f) and 12 of the *Order in Council* establishing the powers of the CORE: Government of Canada, Canadian Ombudsperson for Responsible Enterprise, PC 2019-1323, September 6, 2019, online: Government of Canada <orders-in-council.canada.ca/attachment.php?attach=38652&lang=en> [perma.cc/3ABA-VMTR].

This included executing a multifaceted strategy that positioned Goldcorp to influence the IACHR investigation and hearings. In doing so, Canadian officials failed to take steps to consider all of the evidence and to verify the company's compliance with human rights standards. We find that Canada's actions were contrary to its CSR policy in place at the time, and its international obligations to promote the respect for human rights and the independence of the IACHR.

The findings revealed in this report would have been hidden forever but for the work of JCAP, a group of Canadian law students and law professors working in conjunction with civil society groups. These efforts led to proceedings at the Federal Court of Canada, where JCAP and other Canadian NGOs, with a team of volunteer lawyers,²⁹¹ sought further disclosure of redacted records of Canada's communications with IACHR and Goldcorp officials.²⁹² In December 2021, the Federal Court upheld the redactions, finding that further disclosure of the truth about the conduct of Canadian and Goldcorp officials in relation to the IACHR could injure Canada's conduct of its international affairs, and may have resulted in financial loss to Goldcorp.²⁹³ These judicial findings strengthen the findings in this report that the conduct of Canadian officials did not abide by applicable international and domestic requirements. They also further demonstrate that the Canadian economic diplomacy suffers from serious deficiencies in transparency and accountability.

Access to the truth about Canada's actions in cases like this one should not depend on the *pro bono* work of law professors and law students. Canadians should have the right to fully scrutinize the conduct of Canadian officials to determine whether or not they measure up to Canada's international obligations and its own policy commitments. Public scrutiny is crucial to inform ongoing debate about the terms and conditions of Canadian political support in these kinds of contexts.

Given the international statements and domestic policy debates around economic diplomacy, as well as the growing evidence that the actions of Canadian officials in support of Canadian mining companies can undermine the work of human rights defenders and put them at even greater risk,²⁹⁴ there is an urgent need for policy reforms and legal reforms in line with the recommendations above. In one recent report, the UN Special Rapporteur on Indigenous Peoples called the treatment of Indigenous environment defenders an unfolding "global crisis."²⁹⁵ We believe that Canadian missions abroad should prioritize Canada's duty to protect human rights over economic objectives, and we hope that this report will add strength to calls for change.

²⁹¹ Luke Hilderbrand, Yana Sobiski and Will Major from Major Sobiski Moffatt LLP.

²⁹² The civil society groups include: the Canadian Network for Corporate Accountability, InterPares, MiningWatch Canada, and Amnesty International.

²⁹³ *Imai*, *supra* note 284.

²⁹⁴ MiningWatch 2010; MiningWatch 2013; Moore & Colgrove 2013; Moore 2015; Connolly *et al* forthcoming, *supra* note 12; Kamphuis *et al*, forthcoming, *supra* note 12.

²⁹⁵ Tzay, *supra* note 286 at 40.

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Appendix

Cast of Characters

Government of Canada

Ministers	Peter Van Loan	Minister of International Trade (2010–2011)
	Peter Kent	Minister of State for Foreign Affairs (2008–2011)
DFATD	James Lambert	Director General for Latin America & the Caribbean (2006–2010) Ambassador to Guatemala (2002–2005)
	Edmund Lee	Deputy Director for Latin America & the Caribbean (2009–2012)
	Laura Dalby	Trade Commissioner for Central America & the Caribbean
	Alex Bugailiskis	Assistant Deputy Director for Latin America & the Caribbean (2008–2010)
	Jeffrey Marder	Director of Strategic Relations for Latin America & Caribbean (2010–2012)
	Karine Asselin	Deputy Director of Inter-American Relations (2009–2011)
	Robert Shaw-Wood	Deputy Director of Trade & Investment Relations between Canada & Latin America (2010–2012) Commercial Counsellor, International Business Development, Canadian Embassy to Guatemala (2010)
	Suzan Redwood	Commissioner for Central America
Embassy	Leeann McKechnie	Canadian Ambassador to Guatemala (2008–2011)
	Sebastien Moffett	Senior Trade Commissioner (2009–2011)
	Hugues Rousseau	Canadian Ambassador to Guatemala (2011–2015)
	Nathalie Samson	Senior Trade Commissioner (2010–2014*)
OAS	Graeme Clark	Ambassador & Permanent Representative to the OAS (2006–2010)
	Allan Culham	Ambassador and Permanent Representative to the OAS (2010–2014)
	Keltie Patterson	First Secretary to Canada’s Permanent Mission to OAS (2006–2011)

Guatemala

Álvaro Colom President (2008–2012)
Rafael Espada Vice-President (2008–2012)
Rodolfo Cardona Vice-Minister for Small & Medium Business (2009–2010)

IACHR

Santiago Canton Executive Secretary (2001–2012)
Dinah Shelton Commissioner and Special Rapporteur on the Rights of Indigenous Peoples (2010–2013)

Goldcorp

David Deisley Executive Vice-President, Corporate Affairs & General Counsel (2010–2012)
Eduardo Villacorta Senior Vice-President for Central & South America (2009–2016)
Dina Aloï Goldcorp Vice-President for Corporate Social Responsibility (2009–2012)
Mario Marroquin Executive Director for Central America (2010–2016)