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Respecting the "Guardians of Nature:" Chile's Violations of the Diaguita Indigenous People' Environmental and Human Rights and the Need to Enforce Obligations to Obtain Free, Prior, and Informed Consent

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RESPECTING THE "GUARDIANS OF NATURE:" CHILE'S VIOLATIONS OF THE DIAGUITA INDIGENOUS PEOPLES' ENVIRONMENTAL AND HUMAN RIGHTS AND THE NEED TO ENFORCE OBLIGATIONS TO OBTAIN FREE, PRIOR, AND INFORMED CONSENT

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INTRODUCTION

On the 20th anniversary of the International Year of the World's Indigenous Peoples,[1] Chile's Diaguita Huascoaltino community celebrated a victory for indigenous peoples' rights,[2] but not before enduring almost twenty years of repeated human rights violations. Despite having specific protections carved out under international human rights laws, the Diaguita experienced serious infringements of their international rights at the hands of the national government and one of the largest gold producers in the world.

Despite the wide range of domestic and international laws protecting the rights of Chile's indigenous peoples, the Diaguita found these rights challenged when Canadian mining giant, Barrick Gold, through its subsidiary Nevada Mining Co., began constructing the world's largest open pit mine, Pascua Lama, on lands historically belonging to the

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[1] *Living History: Inauguration of the International Year of the World's Indigenous Peoples*, 3 TRANS NAT'L L. & CONTEMP. PROBS. 165, 168 (1993).
[2] Sarah Tory, *Chilean Court Rules in Favor of Suspension of Pascua-Lama Mine*, THE SANTIAGO TIMES (July 15, 2013), http://santiagotimes.cl/chilean-court-rules-in-favor-of-suspension-of-pascua-lama/ (last visited Apr. 6, 2014).

indigenous community.[3] With the approval of the Pascua Lama mining project, Chile violated the Diaguita community's international and domestic rights, including the right to free, prior, and informed consent and the right to property and natural resources. This case illustrates the problem Chile's indigenous peoples face: the existing bodies of domestic law have been unable to adequately enforce the rights of the indigenous peoples in Chile, opening the door for the continued damage and depletion of already scarce natural resources. Chile must address this problem by modeling Venezuela's and Peru's legal frameworks and implementing domestic laws that will enforce its international obligations as well as encourage the compliance of the private sector.

Located in Northern Chile's Huasco Valley, the Diaguita Huascoaltinos are a silvopastoral community. As such, they rely on the herding of goats and mules, in addition to small scale farming as a means of survival.[4] Between the 1500s, when the Spaniards arrived in the Huasco Valley, and the early 2000s, the Diaguita community was largely an unrecognized group in Chilean society.[5] In 2006, the Chilean government enacted Law No. 20.117, recognizing the "existence and cultural attributes of the Diaguita ethnicity and the indigenous nature of the Diaguita people."[6] With their status as indigenous peoples solidified, the Diaguita community is now entitled to the special protections afforded to Chile's indigenous peoples under its domestic laws.

In the international realm, various treaties and declarations recognize and extend specific rights to the indigenous and tribal peoples. These instruments outline protections ranging from the right to property and natural resources in the American Convention on Human Rights to

[3] Diaguita Agric. Cmty's of the Huascoaltinos & Their Members v. Chile, Petition 415/07, Inter-Am. Comm'n H.R., Report No. 141/09, ¶ 7 (2009), *available at* http://www.cidh.oas.org/annualrep/2009eng/Chile415.05eng.htm (last visited May 15, 2015) [hereinafter *Diaguita Agric. C*mty'*s of the Huascoaltinos*].
[4] *Id.* at ¶ 3.
[5] Nancy Yañez & Sarah Rea, *The Valley of Gold,* 30.4 LAND & RES.S AM.'S (June 9, 2010), http://www.culturalsurvival.org/publications/cultural-survival-quarterly/chile/valley-gold (last visited Apr. 6, 2014) [hereinafter *The Valley of Gold*].
[6] *Id.* (citing Law No. 20.117, Agosto 28, 2006, DIARIO OFICIAL [D.O.] (Chile)).

the right to self-determination in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). For these rights and other rights to be fully respected, they depend on the fulfillment of the obligation to obtain free, prior, and informed consent (FPIC). International Labour Organization Convention 169 (ILO Convention 169) extends this right to consultation to indigenous peoples. However, ILO Convention 169, like other international instruments, relies on implementation and enforcement to occur on the domestic level, which often results in an "implementation gap."[7]

Part I of this article will discuss the impact of Barrick Gold's Pascua Lama mining project on the Diaguita Huascoaltino community; and how the country's failure to consult with the community before approving the project resulted in water contamination, violations of property rights, and depletion of the community's natural resources. Part II describes the international legal framework that currently addresses the human rights of indigenous peoples, as well as Chile's domestic laws regulating the environment and mining projects.

Part III proposes that Chile consider aspects of successful legal frameworks of other Latin American countries and implement domestic laws to fulfill the international obligations of FPIC and implement educational measures that compel private extraction companies to adhere to the FPIC process. By implementing this proposal Chile will enforce the rights of its indigenous peoples, and prevent the public and private sectors from continuing to destroy and deplete the indigenous peoples' scarce natural resources.

[7] Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties*, 22 DUKE J. COMP. & INT'L L. 153, 153 (2012).

I. THE DIAGUITA HUASCOALTINOS AND THE PASCUA LAMA MINE

Chile's Huasco Valley is one of the most arid regions in the world.[8] Located along the Huasco River, the valley is the main source of water for the Diaguita people.[9] The river, measuring 700 miles in length, is fed by two tributaries and several glaciers.[10] As a result of climate change and local mining activity, these glaciers are now limited both in size and in number.[11] The Diaguita community depends on the Huasco River to maintain its traditional way of life.[12] Any reduction or contamination of its water source would result in a dramatic socio-cultural impact on the community's customs and traditions.[13]

The Diaguitas' claim to the Huasco Valley originated from the Juzcado de Letras de Vallenar, in March 1902.[14] This judgment granted legal title through adverse possession to persons occupying a parcel of land immemorial, thus legitimizing the Diaguitas' possession of their traditional lands in 1903.[15] Between 1903 and 1993, when Chile passed amendment No. 19.233 Ley de Comunidades Agricolas (Law of Agricultural Communities), the Diaguitas encountered challenges to their property rights as local farmers produced subsequent titles, bereft of legal value, and claimed ownership of the property.[16] The 1993 legislation allowed the Diaguita community to once again register and retain title to its

[8] SUSTAINABLE DEV. STRATEGIES GRP., REPORT: CURRENT ISSUES IN THE CHILEAN MINING SECTOR 8 (2010), *available at* http://www.sdsg.org/wp-content/uploads/2010/02/10-10-08-CHILE-REPORT.pdf (last visited May 19, 2014).
[9] *The Valley of Gold*, *supra* note 5.
[10] *Id.*
[11] Lindsey Nicholson et al., *Glacier Inventory of the Upper Huasco Valley, Norte Chico, Chile: Glacier Characteristics, Glacier Change and Comparison with Central Chile*, 50 ANNALS GLAC. 111, 117 (2009), *available at* http://lindseynicholson.org/wp-content/uploads/2011/07/Nicholson-et-al..-2010.-Annals-Of-Glaciology.-Glacier-inventory-of-the-upper-Huasco-valley-Norte-Chico-Chile-glacier-characteristics-glacier-change-and-comparison-with-central-Chil.pdf (last visited May 19, 2014).
[12] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶ 14.
[13] *Id.*
[14] IVAN PIZARRO ET AL, EL VALLE DE LOS NATURALES: UNA MIRADA HISTÓRICA AL PUEBLO DIAGUITA HUASCOALTINO [THE VALLEY OF THE NATIVES: A HISTORY OF THE DIAGUITA HUASCOALTINO PEOPLE] 3 (2006) [hereinafter VALLEY OF THE NATIVES].
[15] *Id.*
[16] *Id.* at 99-100.

land in 1997, this time as an agricultural community.[17] Chile had not yet recognized the Diaguita as indigenous peoples in 1993, and this law was intended to protect the lands of agricultural communities that did not fall within the protections of Chile's indigenous laws.[18] Unfortunately, this law failed to protect the community's title and served as the genesis of the current controversy facing the indigenous community.

As a result of the 1997 registration, the Diaguita Huascoaltinos ultimately lost a significant portion of their land to the fraudulent title holders.[19] One parcel of land in particular was eventually sold to Nevada Mining Co, Barrick Gold's subsidiary in Chile, and is now the location of the Pascua Lama mining project.[20] A small group of Diaguita, and an individual landowner, subsequently filed civil suits against Barrick challenging the land transfers.[21] Both suits, however, were decided in favor of Barrick, and the plans to construct the open pit mine moved forward.[22]

A. Procedural History of the Dispute

Public disproval of the Pascua Lama mining project began early on when Barrick Gold submitted an environmental impact assessment (EIA) to Chile's regional environmental commission (COREMA).[23] The EIA requires companies and project owners to disclose all adverse consequences the proposed project will have on the environment, as well as on human life.[24] Where injurious ramifications are identified, such as the displacement of the community or a significant disturbance to the

[17] Law No. 19.233, Julio 21, 1993, DIARIO OFICIAL [D.O] (Chile).
[18] VALLEY OF THE NATIVES, *supra* note 14, at 112-3.
[19] *Id.* at 113.
[20] *Diaguita Agric. Cmty's of the Huascoaltinos supra* note 3, at ¶ 8.
[21] NANCY YAÑEZ, LAS IMPLICANCIAS DEL PROYECTO MINERO PASCUA LAMA DESDE LA PERSPECTIVA DE LOS DERECHOS INDÍGENAS [THE IMPLICATIONS OF THE PASCUA LAMA MINING PROJECT FROM THE PERSPECTIVE OF INDIGENOUS RIGHTS] 2 (2005) [hereinafter IMPLICATIONS OF PASCUA LAMA]; Steve Anderson, *Chile Appeals Courts in Favor of Barrick Gold*, THE SANTIAGO TIMES (Oct. 3, 2007), http://santiagotimes.cl/chile-appeals-court-in-favor-of-barrick-gold/ (last visited May 19, 2014).
[22] IMPLICATIONS OF PASCUA LAMA, *supra* note 21, 7-8.
[23] *Id.* at 3.
[24] *Id.* at 5.

community's customs and way of life, the company must define the measures that will be taken to mitigate or redress the damage.[25] Public dissension followed the approval of Barrick Gold's EIA because the study failed to disclose that the Pascua Lama ore deposits were located underneath three Andean glaciers.[26] For the barren, desert-like Huasco Valley, these glaciers and the water they supply are an essential element to the Diaguita Huascoaltino agricultural way of life.[27]

In response to this initial submission, COREMA returned the environmental study to Barrick Gold, noting its failure to describe the destruction of the three glaciers as a result of the project, and instructed the mining company to evaluate the impact of its activities on the glaciers with a higher level of precision before resubmitting a detailed report describing the measures that will be taken to mitigate the damage.[28] Barrick Gold complied, submitting plans to use explosives and bulldozers to remove thirteen hectares of ice from the Esperanza, Toro I, and Toro II glaciers,[29] transporting them by truck, before dumping the ice onto another glacier.[30] Dissatisfied with this proposal, COREMA again returned the study to Barrick Gold, requesting additional information regarding the impact of the mine on the Esperanza, Toro I, and Toro II glaciers, but

[25] *Id*.
[26] SUSTAINABLE DEV. STRATEGIES GRP, *supra* note 8.
[27] Raimundo Pérez Larrain, *El caso Pascua Lama: los Huascoaltinos y el derecho humano al agua in* GLOBALIZACIÓN, DERECHOS HUMANOS, Y PUEBLOS INDÍGENAS 409, 420-1 (2008), *available at* http://www.observatorio.cl/sites/default/files/biblioteca/GLOBALIZACION,%20DERECHOS%20HUMANOS%20Y%20PUEBLOS%20INDIGENAS.pdf (last visited May 19, 2014).
[28] COMISION REGIONAL DEL MEDIO AMBIENTE REGION DE ATACAMA, INFORME CONSOLIDADO DE SOLICITUD DE ACLARACIONES, RECTIFICACIONES Y AMPLIACIONES AL ESTUDIO DE IMPACTO AMBIENTAL DEL PROYECTO 065/2000 "PASCUA LAMA" DE LA COMPAÑIA MINERA NEVADA, S.A., 5 (2000), *available at* http://seia.sea.gob.cl/expediente/expedientesEvaluacion.php?modo=ficha&id_expediente=3053 (last visited May 19, 2014).
[29] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶ 11.
[30] IMPLICATIONS OF PASCUA LAMA, *supra* note 21, at 11.

ultimately approved the EIA on the condition that Barrick Gold resubmit a detailed glacier management plan.[31]

In 2004, Barrick Gold submitted a modified EIA, expanding its plan for Pascua Lama further into Diaguita territory, and again proposing to remove large portions of ice from the three glaciers.[32] In response, COREMA rejected Barrick Gold's plan to remove the glaciers, and presented it with a detailed study of ways the company could prevent and mitigate environmental damage.[33] After allegations surfaced that they had manipulated scientific studies to reflect findings that the Toro I, Toro II, and Esperanza glaciers were, in fact, not glaciers and only large ice reserves,[34] Barrick Gold presented a new proposal explaining that the three glaciers would not be "removed, relocated, destroyed or physically affected"[35] during the course of the mineral extraction and the project would not impact the quality of the Huasco Valley's water.[36] Despite public opposition, COREMA granted final approval of the Pascua Lama project on the condition that Barrick Gold could not remove any of the three glaciers, and that it had to construct a water management system.[37]

After receiving the long-awaited approval from COREMA, a dispute in tax obligations between Chile and Argentina,[38] and challenges to the

[31] Daniela Estrada, *Conflict Over Andean Glaciers Heats Up*, INTER PRESS SERV. NEWS AGENCY (Nov. 12, 2005), http://www.ipsnews.net/2005/11/environment-chile-conflict-over-andean-glaciers-heats-up/ (last visited May 19, 2014) [hereinafter Estrada, *Conflict Heats Up*].
[32] *Id.*
[33] Emily Byrne, *Chile's Environmental Commission Opposes Glacier Removal Plan*, THE SANTIAGO TIMES (June 1, 2005), http://santiagotimes.cl/chiles-environmental-commission-opposes-glacier-removal-plan/ (last visited May 19, 2015).
[34] Estrada, *Conflict Heats Up*, *supra* note 31.
[35] Daniela Estrada, *Activists Try to Block Start of Pascua Lama Mine*, INTER PRESS SERV. NEWS AGENCY (May 18, 2009), http://www.ipsnews.net/2009/05/environment-chile-activists-try-to-block-start-of-pascua-lama-mine/ (last visited May 19, 2014) [hereinafter Estrada, *Activists*].
[36] *Id.*
[37] Wanda Prassmsma, *Chile Gives Pascua Lama Condition Green Light*, THE SANTIAGO TIMES (Feb. 16, 2006), http://santiagotimes.cl/chile-gives-pascua-lama-conditional-green-light/ (last visited May 19, 2014).
[38] Construction of Pascua Lama was placed on hold when a tax dispute arose between Chile and Argentina. Unable to agree on how to divide the tax revenues from the mining

project's approval[39] forced Barrick to put the construction of the mine on hold. During this period, the Diaguita Huascoaltinos filed a petition with the Inter-American Commission on Human Rights challenging the ownership of the land used for the Pascua Lama mine and alleging violations of their rights under international law.

B. Nature of the Diaguita Huascoaltinos' Claims Against Chile

The Diaguita Huascoaltinos' petition went before the Inter-American Commission on Human Rights on December 30, 2009.[40] The indigenous community's claims against Chile were based on rights protected under the American Convention on Human Rights[41] and Article 34 of Chile's 1993 Indigenous Law N° 19.253.[42] The community alleged violations of its rights to property, consultations, and participation; interference with the practice of their customs and traditional way of life; and deprivations of their ability to provide food for themselves and make a living.[43] Following this petition, the Commission deemed the following claims admissible and approved the Diaguita Huascoaltinos' petition.[44]

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project, the countries engaged in discussions for over two years. Argentina and Chile eventually determined that mining profits would be taxed by the country in which they were produced, as well as how and by which country "transborder services" would be taxed. Pav Jordan, *Chile, Argentina nearing Pascua Lama Tax Deal*, REUTERS (Jan. 29, 2009), http://uk.reuters.com/article/2009/01/29/idUKN2931258920090129?sp=true (last visited Apr. 6, 2014); Victoria Bolf, *Tax Dispute Delays Chile's Pascua Lama Mine*, THE SANTIAGO TIMES (Jan. 3, 2008), http://santiagotimes.cl/tax-dispute-delays-chiles-pascua-lama-mine/(last visited May 19, 2014).

[39] Jen Sotolongo, *Last Chance for Opponents to Appeal Pascua Lama Project*, THE SANTIAGO TIMES (June 6, 2006), http://santiagotimes.cl/last-chance-for-opponents-to-appeal-pascua-lama-project/ (last visited May 19, 2014).

[40] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3.

[41] *Id.* at ¶ 2.

[42] *Id.* at ¶13.

[43] *Id.* at ¶ 2.

[44] After approving the claims asserted in the admissibility report, the IACHR subsequently held a hearing for this case in October 2011. Information related to the events following this hearing was unavailable. Molly Hoffsommer, *Case 12.741 Agricultural Community of Diaguita de los Huascoaltinos, Chile,* HUM. RTS. BRIEF (Nov. 11, 2011), http://hrbrief.org/2011/11/case-12-741-agricultural-community-of-diaguita-de-los-huascoaltinos-chile/ (last visited May 19, 2014).

1. Chile Violated the Diaguita's Right to Consultation and Participation

In its petition to the Inter-American Commission on Human Rights (Commission), the Diaguita community alleged that the government failed to inform it of the Pascua Lama project and the results of the environmental studies conducted on its land.[45] As a result, the community was unable to participate in any community consultations when the project was first proposed and when the exploration concession was granted to Barrick Gold. Access to information, under the American Convention's Freedom of Thought and Expression, is a central element of the right to prior consultation, and is essential for the protection of indigenous lands.[46] The Diaguita Huascoaltinos argued that by failing to provide the needed information regarding the project, Chile violated its right to FPIC and consultation under international human rights law. Regarding this issue, the Commission concluded:

> [O]ne of the central elements to the protection of indigenous property rights is the requirement that States undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories . . . [and that member States are obliged] to ensure that any determination . . . is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.[47]

Here, the environmental agency that issued Barrick Gold the approval for Pascua Lama did not take into consideration the effect that

[45] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶. 9.
[46] *Id.* at ¶ 60.
[47] *Id.* (citing *Maya Indigenous Community of the Toledo District (Belize)* Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, No. 142 (2004).

the extraction project would have on the indigenous community.[48] The Diaguita were particularly susceptible to irreparable harm at the hands of Barrick Gold and the Pascua Lama mine, considering the impact the project would have on the social, cultural, and economic aspects of the indigenous way of life.[49] By failing to consider these potential risks and denying the Diaguita the right to access information and participation, Chile threatened the entire community's survival.

2. COREMA's Approval of Barrick Gold's EIA Violated the Diaguita's Right to Property and Natural Resources

The Diaguita Huascoaltinos argued that the approval of the Pascua Lama mine deprived them of their land and the natural resources found on it.[50] They alleged that although the government had knowledge of the alleged fraudulent transfer of Diaguita Huascoaltino land and the pending civil suit regarding the matter, it granted Barrick Gold's 2000 EIA and the subsequent 2006 modification.[51] In addition, the approval of the project without the consideration of the potential cultural and environmental impacts on the indigenous community was also a violation of their right to property.[52] Studies conducted during the approval process discovered that, since Barrick Gold was granted its exploration concession, the size of the Toro I, Toro II, and Esperanza glaciers had experienced fifty to seventy percent reduction in size. [53] The project also threatens the

[48] *Id.* at ¶ 61-2.
[49] *See Id.* at ¶ 62.
[50] *Id.* at ¶14.
[51] *Id.* at ¶ 57; *see also Reclamo Huascoaltinos es Admitido por la Comisión Interamericana de Derechos Humanos*, OBSERVSATORIO LATINOAMERICANO DE CONFLICTOS AMBIENTALES (Feb. 21, 2010), http://www.olca.cl/oca/chile/region03/pascualama448.htm (last visited May 19, 2014).
[52] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶ 14.
[53] Camila Quieroz, *Greenpeace Revela que Actividades de la Minera Barrick Gold Afectaron los Glaciares*, ADITAL (July 20, 2011), http://site.adital.com.br/site/noticia.php?boletim=1&lang=ES&cod=58565 (last visited Apr. 6, 2014); *see also* Thomás Rothe, *Government Study Confirms Chile Glaciers Receding Quickly*, THE SANTIAGO TIMES (Jan. 21, 2009), http://santiagotimes.cl/govt-study-confirms-chile-glaciers-receding-quickly/ (last visited May 19, 2014).

community's access to natural resources, specifically, its water supply, and compromises its survival.[54]

The Diaguita have a distinct and deeply-rooted connection with their ancestral lands. This connection is born from a spiritual and cultural place, as these lands have been the site where sacred rituals and worship ceremonies took place.[55] This indigenous community, in particular, has lived on this same land without interruption since colonial times, passing the land, and the cultural bond to it, from generation to generation.[56] The international community has acknowledged and respected this bond in its treaties and declarations as well as its judicial decisions.[57] The Inter-American Court of Human Rights has declared that "for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[58]

In addition, the natural resources on, and around, the lands play an integral role in the special relationship between the Diaguita and their territory. The community's ways of life is often centered on natural resources within their land, and are approached in a highly respectful and spiritual manner.[59] Thus, when development and extraction projects interfere with traditional indigenous lands—as is the case here—the

[54] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶ 14.
[55] *See* Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 56 (2009).
[56] VALLEY OF THE NATIVES, *supra* note 14, at 99.
[57] *See infra* Part II.A.
[58] INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, ¶ 56, OEA/ Ser.L/V/II. Doc. 56/09 (Dec. 30, 2009) (citing *Case of the Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua, Merits, Reparations and Costs*, Inter.-Am. Ct. H.R., (ser. C) No. 79, ¶ 149, (Jan. 31, 2001)) [hereinafter NORMS AND JURISPRUDENCE].
[59] Raimundo Pérez Larrain, *El Caso Pascua Lama: los Huascoaltinos y el Derecho Humano al Agua, in* GLOBALIZACIÓN, *supra* note 27, at 420-1.

community's entire system of life is compromised, and the cultural and territorial integrity of the indigenous people is threatened.[60]

3. Construction of Pascua Lama Deprived the Diaguita of the Ability to Make a Living and Interfered with Their Customs and Traditions

Upon receiving approval for the Pascua Lama mining project, Barrick Gold blocked access to public roads traditionally used by the Diaguita Huascoaltinos.[61] These roads lead to Barrick Gold's construction site, but they also lead to the mountainside pastures where the goats and mules graze, as well as to the river on which the community relies as a source of water.[62] In addition to interfering with the free movement of vehicles, people, and animals along this public road, the location of the mine itself interferes with the community's ability to earn a livelihood in its customary and traditional way.[63]

The construction of the mine has compromised the quality of the water, and depleted the natural resources deemed essential to the community's ability to make a living.[64] The Diaguita depend on the water not only to sustain themselves and their animals, but also to grow the grapes, avocados, peaches and other crops they eat and sell.[65] Protection of these natural resources is necessary to ensure the physical and cultural survival of the community.[66] Under international law, Chile was obligated to seek the Diaguita Huascoaltinos' consent and consultation, and provide for effective participation before exercising any control over the natural resources that play a fundamental role in their survival.[67]

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[60] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶ 14.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *See Id.* at ¶14.
[65] Marianela Jarroud, *Chilean Court Suspends Pascua Lama Mine*, INTER PRESS SERV. NEWS AGENCY (Apr. 10, 2013), http://www.ipsnews.net/2013/04/chilean-court-suspends-pascua-lama-mine/ (last visited May 19, 2014).
[66] NORMS AND JURISPRUDENCE, *supra* note 58, at ¶183.
[67] *Id.* at ¶ 187.

C. Nature of the Diaguita Huascoaltinos' Claims Against Barrick Gold

Following the finding of admissibility by the Commission, the Diaguita Huascoaltinos filed a claim against Barrick Gold in Chile's domestic courts, alleging that the mining company failed to comply with the conditions of the environmental impact study resulting in a threat to their water source.[68] In April 2013, Chile's Copiapo Court of Appeals ordered an injunction, suspending all work on the project while it made its determinations in the case.[69]

The Pascua Lama project had received its environmental approval conditioned on the construction of a proper drainage system to prevent any damage to the water supply and the Toro I, Toro II, and Esperanza glaciers.[70] The Diaguita asserted that in addition to not constructing the drainage system, Barrick Gold contaminated the indigenous community's water source with "heavy concentrations of arsenic, aluminum, copper, and sulfate."[71] The General Water Department also presented studies confirming the significant deterioration of the nearby glaciers.[72] That July, the court upheld the suspension, citing twenty-three environmental violations,[73] and effectively shutting down the project until Barrick Gold put the proper water canals and drainage systems in place.[74]

Simultaneously, Chile's newly created Environmental Superintendent (SMA) completed a thorough investigation of Barrick Gold and its alleged environmental violations in the construction of the Pascua

[68] Jarroud, *supra* note 65.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Sarah Tory, *Indigenous Groups to Appeal Chilean Court's Ruling on Pascua-Lama*, THE SANTIAGO TIMES (July 20, 2013), http://santiagotimes.cl/indigenous-groups-to-appeal-chilean-courts-ruling-on-pascua-lama/ (last visited May 19, 2014).
[74] Sarah Tory, *Chilean Court Rules in Favor of Suspension of Pascua-Lama Mine*, THE SANTIAGO TIMES (July 15, 2013), http://santiagotimes.cl/chilean-court-rules-in-favor-of-suspension-of-pascua-lama/ (last visited May 19, 2014).

Lama mine.[75] Finding *serious violations*, SMA also suspended construction on the Pascua Lama project, and imposed the highest fine permitted by law, $16 million.[76] Although the fine was a promising step in the right direction, the indigenous community and environmental activists agreed that the fine was only a small percentage of the project's total budget and insignificant to a mining giant like Barrick Gold.[77]

In response to SMA's sanction and the Court of Appeals' suspension, the Diaguita Huascoaltinos appealed to the Supreme Court of Chile.[78] Similar to the Diaguita's prayer for relief in their case against Goldcorp,[79] the Diaguita asked the court to revoke Barrick Gold's environmental permit and order the company to submit a new EIA.[80] The court, finding the suspension and the penalties imposed by SMA sufficient, declined to suspend the permit, allowing Barrick Gold to resume construction once they put the appropriate water management systems in place.[81]

II. INTERNATIONAL PROTECTIONS FOR INDIGENOUS PEOPLES AND THE SHORTCOMINGS OF CHILE'S DOMESTIC LAW

Various legal frameworks, both international and domestic in nature, govern indigenous environmental and human rights. These rights are inherently linked to the indigenous community's ownership and use of traditional lands. With the increase of mineral extraction projects carried

[75] *Chile Fines Barrick Gold $16m for Pascua-Lama Mine*, BBC NEWS (May 24, 2013), http://www.bbc.co.uk/news/world-latin-america-22663432 (last visited May 19, 2014).
[76] *Id.*
[77] *Id.*
[78] Eric Lopez, *In Relief for Barrick, Chile Court Doesn't Nix Mine Permit*, REUTERS (Sept. 25, 2013), http://www.reuters.com/article/2013/09/25/chile-pascua-lama-suspension-idUSL2N0HL2E720130925 (last visited May 19, 2014).
[79] The Diaguita Huascoaltinos brought a claim against Goldcorp for violating their right to FPIC when Goldcorp began constructing El Morro mine without consulting with the indigenous community. Jade Hobman, *Chilean Supreme Court Suspends Approval for Mining Project*, THE SANTIAGO TIMES (May 1, 2012), http://santiagotimes.cl/chilean-supreme-court-suspends-approval-for-mining-project/ (last visited May 19, 2014); *infra* Part III.B.
[80] Lopez, *supra* note 78.
[81] *Id.*

out by transnational companies and Latin American states, these rights are frequently being challenged.[82] Where international law recognizes and seeks to protect certain rights, domestic law often falls short of implementing and enforcing those protections.[83]

A. International Protections for the Rights of Indigenous Peoples

The existing international legal frameworks recognize the indigenous right to property,[84] consultations,[85] and FPIC;[86] and protection of the environment and natural resources;[87] as well as subsistence and economic activities.[88] Flowing from the inter-connectedness of the indigenous community and its traditional lands,[89] these rights are classified into three distinct, yet often overlapping categories of protection: (1) an environmental dimension, which acknowledges the crucial function of the natural resources in the advancement of an indigenous community's cultural, social and economic rights; (2) a cultural dimension, which embraces the principle that the land is closely tied with the community's traditional livelihood, customs, and way of life; and (3) an economic

[82] Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America,* 10 OR. REV. INT'L L. 419, 420 (2008).
[83] *See* Alexandra R. Harrington, *Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties*, 22 DUKE J. COMP. & INT'L L. 153 (2012).
[84] Int'l Labour Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 16, June 27, 1989, 72 ILO Official Bulletin, 1650 U.N.T.S. 383 [hereinafter ILO Convention 169].
[85] *Id.* at art. 16.
[86] United Nations Declaration on the Rights of Indigenous Peoples, art 19, art. 32(2), G.A. Res. 61/295, U.N. Doc. A/RES/61/295, Oct. 2, 2007) [hereinafter UNDRIP].
[87] *Id.* at art. 4, 7, 15.
[88] *Id.* at art. 20.
[89] Siegfried Weissner, *Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime*, 15 UCLA J. INT'L L. & FOREIGN AFF. 239, 254 (2010) [hereinafter Weissner, *Re-Enchanting the World*].

dimension, which recognizes the essential role that traditional lands play in the community's livelihood.[90]

1. ILO Convention 107 and ILO Convention 169

The ILO was the first body of law to seriously address the issue of indigenous peoples and their rights.[91] ILO Convention 107, adopted in 1957, promoted the international community's commitment to protect the rights of indigenous peoples with an emphasis on the progressive assimilation of the indigenous community into their respective countries.[92]

As the international community shifted from an assimilative basis for protection to recognition of the right to self-determination[93] and the cultural diversity within the indigenous community, ILO Convention 107 was no longer consistent with this viewpoint.[94] In 1989, ILO Convention 169 was adopted[95] and, as of 2013, ratified by twenty-two countries.[96] Chile became a party to Convention 169 on September 15, 2008, and the

[90] *Diaguita Agric. Cos of the Huascoaltinos*, *supra* note 3, at ¶ 2; IMPLICATIONS OF PASCUA LAMA, *supra* note 21, at 6.
[91] Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 VT. L. REV. 565, 566 (2006).
[92] Weissner, *Re-Enchanting the World*, *supra* note 89, at 248.
[93] In this context, the term "self-determination" refers to indigenous peoples' general right to determine their own political status and economic and cultural development and not the extreme interpretation of the term, which implies the right to secession. Fodella, *supra* note 91, at 578; Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*,10 NW. J. INT'L HUM. RTS. 54, 55 (2011), *available at* http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1125&context=njihr (last visited May 19, 2014).
[94] Fodella, *supra* note 91, at 585.
[95] INT'L LABOUR ORG., C169 – INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (last visited May 19, 2014).
[96] INT'L LABOUR ORG., RATIFICATIONS OF C169 – INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (NO. 169), http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314, (last visited May 14, 2014).

treaty entered into force in September 2009.[97] This new legal framework codifies the principle of FPIC and consultations, and establishes a procedure for the exploitation of mineral resources on indigenous lands.[98]

Article 6 introduces the right to FPIC and participation, requiring states to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."[99] It also creates avenues through which indigenous peoples may freely participate at all levels of decision-making in policies or projects that concern them.[100]

The process of consultation must include certain elements to comply with ILO Convention 169. First, the consultations should occur before the decision affecting the indigenous community is made. The purpose of FPIC is to reach an agreement or obtain the indigenous community's consent.[101] To fulfill this objective, the consultation must occur before any decision is made. In addition, the parties must carry out the consultation in good faith. This *good faith* provision implies that the consultation should occur voluntarily and the indigenous peoples should have access to all the information needed to fully participate in the consultation.[102] Another critical component to the effectiveness of the FPIC process is the need for the consultation to occur through appropriate procedures. Although ILO Convention 169 does not explicitly create a standard that it considers *appropriate*, it does make reference to the need

[97] INT'L LABOUR ORG., RATIFICATIONS FOR CHILE, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102588 (last visited May 19, 2014).
[98] Fodella, *supra* note 91, at 587.
[99] ILO Convention 169, *supra* note 84, at art. 6(1)(a).
[100] *Id.* at art. 6(1)(b).
[101] Jorge Contessee Singh, *El Derecho de Consulta Previa en el Convenio 169 de la OIT: Notas para su Implementacion en Chile, in* EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN 189, 194 (2012), *available at* http://www.derechoshumanos.udp.cl/wp-content/uploads/2012/06/udp_convenio_digital.pdf (last visited May 19, 2014) [hereinafter *El Derecho*].
[102] *Id.* at 196.

to ensure the indigenous communities understand the proceedings.[103] This allows each indigenous community taking part in the FPIC to employ its own unique form of communication based on its traditions and customs.[104]

Through this process, FPIC is able to serve as the foundation for other indigenous rights, such as the right to a clean environment and right to property. The rights to a clean and healthy environment, and the right to environmental protection, are emerging rights in the international human rights arena.[105] ILO Convention 169 addresses and codifies these environmental rights in the context of indigenous and tribal peoples.[106] Article 4 creates a duty for the ratifying state to adopt special measures to safeguard the environment of the people concerned, and requires that these measures be consistent with the wishes of the indigenous peoples.[107] The state must also consider the environmental impact any proposed development project will have on the indigenous community through public participation of that community.[108] The results of these assessments are considered fundamental to the implementation of the development project.[109] Article 7 concludes by requiring the state to protect and preserve the environment inhabited by the indigenous communities.[110]

Articles 13 and 15 of ILO Convention 169 describe different aspects of the indigenous community's right to property.[111] ILO Convention 169 opens this section of the treaty by acknowledging the importance of land to indigenous peoples, and interprets the term "land" to mean the *total*

[103] *Id.* at 198-9.
[104] *Id.*
[105] Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System,* 27 WM. & MARY ENVTL. L. & POL'Y REV. 365, 371-2 (2002).
[106] ILO Convention 169, *supra* note 84, at art. 4.
[107] *Id.*
[108] *Id.* at art. 7.
[109] *Id*.
[110] *Id*.
[111] *Id.* at art. 13, 15.

environment of indigenous territory.[112] This provision extends the protections not only to the property the indigenous peoples occupy, but also to the nearby land whose use is a necessary component to their traditional way of life.[113]

Recognizing the critical link between the land, its natural resources, and the indigenous communities, ILO Convention 169 offers special safeguards to the indigenous peoples' right to participate in the use, management, and conservation of the natural resources on the land they inhabit.[114] Furthermore, Article 15 speaks to states, like Chile, where the government owns the minerals. In these instances, the state must consult with the affected peoples and determine how the implementation of a development project may infringe on their rights.[115] These consultations must occur before exploration or exploitation rights to the concerned land are transferred.[116]

2. American Convention on Human Rights

The Organization of American States (OAS) is made up of thirty-five independent states that came together in 1967 for the purpose of promoting solidarity and cooperation amongst the states.[117] The member states of OAS approved the incorporation of the American Convention on Human Rights into The Charter in 1967.[118] This international instrument recognized that man's fundamental rights arose from his status as a

[112] *Id.* at art. 13.
[113] Dominique Hervé & Sergio Pérez, *Adecuación de la Legislación a los Estánderes Impuestos para la Administración de Recursos Naturales, in* EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN 15, 59 (2012), *available at* http://www.derechoshumanos.udp.cl/wpcontent/uploads/2012/06/udp_convenio_digital.pdf (last visited May 19, 2014) [hereinafter *Recursos Naturales*].
[114] ILO Convention 169, *supra* note 84, at art. 15.
[115] *Id*.
[116] *Id*.
[117] Organization of American States (OAS), Charter of the Organization of the American States, art.1, Feb. 30, 1948, O.A.T.S. No. 41, 119 U.N.T.S. 3.
[118] Organization of American States (OAS), American Convention on Human Rights, preamble, Nov. 22, 1969, O.A.T.S. No. 36, 1144 U.N.T.S. 123. [hereinafter American Convention].

human being, not his citizenship within a country.[119] The American Convention recognized principles set out in the Universal Declaration of Human Rights; for instance, that freedom can only be fully enjoyed if the conditions are established where man can pursue his economic, cultural, and social rights free from fear of persecution.[120]

The American Convention outlines both the right to participate in government,[121] as well as the freedom of thought and expression, under Article 13.[122] These articles provide two essential elements to the informed consultation process. Article 13 facilitates the consultation process by recognizing the freedom to "seek, receive, and impart" information; and ensuring indigenous peoples have the information necessary to be fully informed.[123] In addition, the right to participate in government recognizes "the right of every citizen to take part in conduct of public affairs,"[124] ensuring that the indigenous community has the opportunity to "participate in decision-making on matters and policies that affect or could affect their rights."[125] For the indigenous community, both the right to participate and the freedom to access information are fundamental elements of the right to consultation, and are linked to other human rights, including the indigenous peoples' right to property.[126]

This right to property is laid out in Article 21 of the American Convention, which recognizes the right to the use and enjoyment of private and communal property.[127] In the context of indigenous peoples, the right to property is often considered in conjunction with Article 25's right to judicial protection when it is alleged that the community's right to use and enjoy their property has in some way been infringed and the state

[119] *Id*.
[120] *Id*.
[121] *Id.* at art. 23.
[122] *Id.* at art. 13.
[123] *Id.*
[124] NORMS AND JURISPRUDENCE, *supra* note 58, at ¶ 274.
[125] *Id.* (citing *Case of Yatama v. Nicar.. Preliminary Objections, Merits, Reparations and Costs*, Inter-Am. Ct. H.R., (ser. C) No. 127, ¶225 (June 23, 2005)).
[126] *Id*.
[127] American Convention, *supra* note 118, at art. 21.

has failed to provide prompt recourse.[128] Two examples of this are *Awas Tingni Community v. Nicaragua* and *Saramaka v. Suriname*; in both cases, the state granted concessions to natural resources found within indigenous territory, and then failed to respond to the community's claims in regards to those concessions.[129]

In *Awas Tingni Community v. Nicaragua*, the indigenous community petitioned the Inter-American Court of Human Rights to stop Nicaragua from granting a logging concession on traditionally communal lands.[130] Nicaragua argued that the lands claimed by the community belonged to the state, and that the community did not have a real property title deed to the land.[131] The court stated that in this context, the term "property" had a distinct meaning from the meaning it had in domestic law.[132] At the international level the term encompassed those items that were movable and immovable, tangible and intangible.[133] The court also described human rights treaties as "live instruments whose interpretation must adapt to the evolution of the times, and specifically, to current living conditions."[134] The court concluded that the Awas Tingni community had possessed the land in question, and based their ownership of it as a community, not as individuals.[135] The court held that, under Article 21 of the American Convention, the indigenous peoples had a communal property right to the land, and by granting logging concessions without the community's consent, the state had interfered with the community's fundamental basis of culture, integrity, and economic survival.[136]

[128] *See generally* Mayagna (Sumo) Awas Tingni Cmty v. Nicar., Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter *Awas Tingni*]; Saramaka People v. Suriname, Inter-Am. Ct. H.R., (ser. C) No. 172 (Nov. 28, 2007) [hereinafter *Saramaka*].
[129] Awas Tingni, *supra* note 128; *Saramaka*, *supra* note 128.
[130] Awas Tingni, *supra* note 128, at 3; *see also* SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY 174 (2008).
[131] Awas Tingni, *supra* note 128, at 61.
[132] *Id.* at 79-80.
[133] *Id*. at 78.
[134] *Id.*at 79.
[135] *Id*. at 80.
[136] *Id*.

Similarly, in the landmark case of *Saramaka v. Suriname*, the Inter-American Court of Human Rights found that indigenous communities have the right to own the natural resources they have traditionally used within their lands just as they have the right to own the land they have traditionally occupied.[137] The court declared that protection of these natural resources was essential to ensure the physical and cultural survival of the community.[138] The court also identified safeguards that the state was obligated to enforce for the protection of indigenous rights to land and natural resources, starting with the effective participation of the Saramaka people "in conformity with their customs and traditions."[139] These safeguards would be implicated in all government acts "regarding any development, investment, exploration, or extraction plan within Saramaka territory."[140] In addition, the state was required to comply with its obligation to ensure that it did not issue any concessions within indigenous territory until an independent environmental and social impact study was completed and approved.[141]

3. United Nations Declaration on the Rights of Indigenous People

Concerned with the increasingly prevalent discriminatory practices towards minority populations, a United Nations Economic and Social Council established a Working Group on Indigenous Populations in 1982.[142] The group was charged with reviewing developments related to the human rights and fundamental freedoms of indigenous peoples and developing an international standard concerning these rights.[143] With the participation of indigenous representatives and national governments, the group began drafting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 1985, submitting the complete draft for

[137] *Saramaka*, *supra* note 128, at 61.
[138] *Id*.
[139] *Id.* at 38.
[140] *Id*.
[141] *Id*.
[142] Weissner, *Re-Enchanting the World*, *supra* note 89, at 249.
[143] *Id.*

consideration in 1993.[144] Twenty years, and several consultations and revisions later, the final version of UNDRIP was adopted in 2007. As of December 2010, it has reached a global consensus.[145] Chile was among the 144 countries to adopt UNDRIP on September 13, 2007.[146]

Although not legally binding on its signatories, UNDRIP carries with it the expectation that member states will comply with its subject matter,[147] and may in time rise to the level of customary law. This international instrument outlines the rights of the indigenous peoples recognized and protected by the international community, building on earlier frameworks, such as ILO Convention 169.[148] UNDRIP affirms that indigenous peoples are equal to all people, and at the same time recognizes their right to be different.[149] It was developed, in part, out of concern for the manner in which indigenous lands had historically been taken, preventing the communities from development in accordance with their customs and traditions.[150]

The legal protections extended to indigenous lands are derived from the deeply intertwined relationship between the communal lands and the peoples' spirituality and traditional way of life.[151] Article 26 describes the indigenous community's right to use and control the lands they have traditionally owned or occupied and the state's obligation to grant legal protection and recognition to the lands.[152] The community also has the

[144] *Id*. at 249-250.
[145] *Id*. at 251-53.
[146] *Id* at 252, 253. (Four countries, the United States, Canada, New Zealand, and Australia, voted against the declaration, while eleven countries abstained. However, all four countries have since adopted UNDRIP).
[147] *Id.* at 256.
[148] Siegfried Weissner, *United Nations Declaration of Indigenous Peoples' Rights*, UN AUDIOVISUAL LIB. INT'L L. 1, 2 (2009), *available at* http://legal.un.org/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf (last visited Apr, 5, 2014) [hereinafter *United Nations*].
[149] UNDRIP, *supra* note 86, at preamble.
[150] *Id*.
[151] *Id.* at art. 25; *see also* Weissner, *Re-enchanting the World*, *supra* note 89, at 254.
[152] UNDRIP, *supra* note 86, at art. 26.

right to the conservation and protection of the environment and the use of their land and natural resources under Article 29.[153]

UNDRIP also takes the principle of consultation set forth in ILO Convention 169, and reintroduces it as an obligation to obtain consent.[154] Where ILO Convention 169 only requires the indigenous community to give consent in decisions that will result in its displacement,[155] UNDRIP requires that FPIC be obtained in all decisions that affect them.[156] In addition, Article 10 requires FPIC be obtained where the indigenous community will be relocated and prohibits the state from forcibly removing them from their land.[157] The state is also responsible for facilitating the participation of the community in decisions concerning their rights in a manner consistent with their customs.[158]

Article 3 of the declaration recognizes an indigenous community's right to self-determination and its ability to freely pursue economic, social, and cultural development,[159] while not being subject to forced assimilation and the destruction of its culture.[160] Article 20 further safeguards the development and survival of the indigenous communities by protecting enjoyment of their unique means of providing food for themselves and making a living.[161]

These international instruments as a whole identify and establish the rights and protections guaranteed to indigenous and tribal peoples; however, there exists a gap between the creation of the obligation on an international level and the implementation and enforcement of the treaty

[153] *Id.* at art. 29.
[154] *El Derecho in* EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN 189, 201 (2012), *available at* http://www.derechoshumanos.udp.cl/wpcontent/uploads/2012/06/udp_convenio_digital.pdf (last visited May 19, 2014).
[155] ILO Convention 169, *supra* note 84, at art. 6, 16.
[156] UNDRIP, *supra* note 86, at art. 19.
[157] *Id*. at art. 10
[158] *Id*. at art. 18.
[159] *Id.* at art. 3.
[160] *Id*. at art. 8.
[161] *Id*. at art. 20.

domestically.[162] International treaties rely on the political will of domestic governments to adequately implement and enforce its obligations.[163] The resulting *implementation gap* has allowed member states to comply with international commitments on paper, while in reality not completely adhering to the requirements of the treaty.[164]

B. Chile's Domestic Laws Fail to Satisfy its International Obligations under ILO Convention 169

A party to an international treaty must adjust its law to ensure consistency with the treaty.[165] Upon signing ILO Convention 169, Chile became obligated to implement its provisions within its domestic law. Chile responded by implementing Executive Decree 124; however, this law severely limited the FPIC process and was inconsistent with ILO Convention 169.[166] In addition, Chile was required to modify its laws regulating the environment, the mining industry, and other areas that have an impact on indigenous peoples, but again Chile's modifications came up short.[167]

1. Indigenous Law No. 19.253 and Executive Decree 124

Enacted in 1993, the Indigenous Law recognizes and protects various aspects of Chile's indigenous communities, including its customs, education, and development.[168] In particular, Articles 12 and 13 describe protections to indigenous lands; however, the emphasis is on identification

[162] Harrington, *supra* note 6, at 153.
[163] William M. Carter Jr., *Treaties as Law and The Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 344-5 (2010).
[164] *Id.* at 374.
[165] Vienna Convention on the Law of Treaties, art. 27, *opened for* signature May 23, 1969, T.S. No. 1155.
[166] See Decreto 124, Septiembre 4, 2009, DIARIO OFICIAL [D.O.] (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=1006486&buscar=decreto+124 (last visited May 15, 2015) [hereinafter Decree 124].
[167] MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN 15, 57 (2012), http://www.derechoshumanos.udp.cl/wpcontent/uploads/2012/06/udp_convenio_digital.pdf (last visited Apr. 6, 2014).
[168] *See* Law No. 19.253, Septiembre 28, 1993, DIARIO OFICIAL [D.O.] (Chile) [hereinafter Indigenous Law].

and transfer of indigenous territory.[169] The Indigenous Law fails to grant any protection to the indigenous community's right to use and occupy the land.[170] It is also more restrictive in its interpretation of indigenous territory, in comparison to ILO Convention 169.[171] Here, the limited protections offered do not extend to the natural resources used by indigenous peoples, only to the actual land they occupy within the boundaries of their territory.[172]

Chile ratified ILO Convention 169 on September 15, 2008.[173] Soon after the treaty entered into force one year later, then-President Michelle Bachelet enacted Decree 124, severely limiting FPIC in Chile.[174] The purpose of the decree was to regulate the manner in which consultations and indigenous participation occurred.[175] Nevertheless, the language of the decree is inconsistent with ILO Convention 169, only extending indigenous peoples the right to express their opinion regarding new government actions that directly affect them, excluding actions of investment and extraction companies, in accordance with the procedure established by the decree.[176] Instead, these companies are subject to the consultation and participation procedures established by the relevant government agencies through, for example, the environmental or mining laws.[177] However, Chile's Mining Code, discussed below, makes no provision for consultation with indigenous peoples.[178]

Decree 124 limits the obligation to obtain FPIC by only requiring that certain sectors of the government complete the consultation

[169] Indigenous Law, art.12-3, Septiembre 28, 1993, DIARIO OFICIAL [D.O.] (Chile).
[170] *Recursos Naturales*, *supra* note 113, at 57.
[171] *Id.*
[172] *Id.*
[173] *Int'l Labour Org.*, *supra* note 95.
[174] *El Derecho in* EL CONVENIO 169 DE LA OIT Y EL DERECHO CHILENO: MECANISMOS Y OBSTÁCULOS PARA SU IMPLEMENTACIÓN 189, 205-6 (2012), *available at* http://www.derechoshumanos.udp.cl/wp-content/uploads/2012/06/udp_convenio_digital.pdf (last visited Apr. 6, 2014).
[175] *Id*. at 205.
[176] *Id*. at 206.
[177] Decree 124, art. 5, Septiembre 4, 2009, DIARIO OFICIAL [D.O.] (Chile); *El Derecho*, *supra* note 101, at 208.
[178] *Id.*

process.[179] In addition, municipalities, which tend to have the most contact and impact on indigenous peoples, are not required to participate in the FPIC process.[180] Decree 124 makes FPIC optional for municipalities so they may engage in the consultation process, if it deems it necessary.[181] Adding to the list of limitations, Decree 124 imposes a time limit on the consultation process.[182] The municipality will only accept community observations up to thirty days from the date the indigenous community received the last notice regarding the project that triggered the FPIC process.[183] In contrast, ILO Convention 169 provides for the right to consultation, participation, and FPIC at every stage of development, of any matter that affects their rights, and in a manner consistent with the indigenous peoples' procedure.[184] Despite efforts to repeal Decree 124 and adopt new consultation laws,[185] it continues to be in force.

2. Chile's Environmental Framework

Ley de Bases del Medio Ambiente, or Ley 19,300, enacted in 1994 and amended in 2010,[186] is the principal framework for regulating the country's environmental protection.[187] Before the 2010 amendment, the statute was responsible for reestablishing the role of Chile's national environmental authority (CORAMA) and the regional counterpart (COREMA), identifying a formal system of review for EIA studies, and establishing liability for environmental damage.[188]

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[179] *Id.* at 207.
[180] *Id.*; *See* Decree 124, art. 4, Septiembre 4, 2009, DIARIO OFICIAL [D.O.] (Chile).
[181] *See* Decree 124, art. 4, 16, Septiembre 4, 2009, DIARIO OFICIAL [D.O.] (Chile).
[182] *Id.* at art. 18.
[183] *Id.*
[184] ILO Convention 169, *supra* note 84, at art. 6.
[185] *El Derecho*, *supra* note 101, at 209.
[186] *See* Law No. 19.300, Marzo 1, 1994, DIARIO OFICIAL [D.O.] (Chile). (Law No. 19.300 was amended by Law No. 20,417, which created the Ministry of the Environment to replace CONAMA, the Environmental Assessment Agency, and the National Bureau of the Environment.)
[187] *See Id.*
[188] *Id.*

Article 1 of the Chile's Environmental Framework Law, Law No. 19.300, establishes the "right to live in an environment free of pollution,"[189] a principle shared by the Chilean Constitution of 1980.[190] Article 10 identifies mining development projects as an activity that is likely to cause environmental damage, while Article 11 requires that an EIA be completed before the projects that "have significant adverse affects on the quality or quantity of renewable natural resources, including land, water, and air" are executed or modified.[191] Once submitted, COREMA,[192] along with the National Mining and Geology Service (SERNAGEOMIN), and any other relevant public agency, will evaluate the EIA study and return it to the project owner with its observations and concerns.[193] The project owner is then responsible for responding to those concerns and complying with any requirements made by the agencies. Upon full completion of the observations and requirements, COREMA issues an Environmental Approval Resolution (EAR), granting the project permission to move forward under Article 16.[194]

These laws also provide for specific public participation procedures to take place during the evaluation of the EIA.[195] Article 27 requires the project owner to publish an excerpt of the EIA in the Official Gazette, where laws and decrees are published, as well as in local and national newspapers.[196] COREMA must also send the excerpt to the communities that will be impacted by the proposed work,[197] and the community then

[189] *Id.* at art. 1.
[190] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, [C.P] art. 19, cl. 8 ("The Constitution guarantees to all persons: The right to live in an environment free from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature").
[191] *Law No. 19.300, supra* note 186, at art. 10-11.
[192] *Id.* (After the enactment of the 2010 Amendment, COREMA no longer serves in this capacity. The Environmental Assessment Agency is now responsible for evaluating and approving the Environmental Impact Assessment studies. However, Barrick Gold submitted their initial EIA before the 2010 Amendment, therefore, COREMA processed the EIA study).
[193] *Id.*
[194] *Id.* at art. 16.
[195] *Id.* at art. 76-8.
[196] *Id*. at art. 27.
[197] *Id*. at art. 31.

has sixty days to submit any concerns to the commission.[198] COREMA takes into consideration the citizens' concerns at the conclusion of the approval procedure,[199] but this protocol serves more as a way to inform the public because citizen concerns are not binding on the agency.[200] This environmental framework is not intended to protect the rights of indigenous peoples, as it only extends the opportunity for participation without making any commitment to act on the observations.[201] Furthermore, the public participation procedures are not accommodating to the usual and customary methods of communication used by indigenous communities.[202] The lack of specific procedures allows the agency and project owners to carry out the public participation component with an unacceptable degree of discretion and reduces the effectiveness of the provision.[203]

One reason Chile's environmental framework has not been fully implemented is due to a conflict between the country's economic interests in the mining industry and the legal obligations under these laws.[204] The Catchments Management and Mining Impacts in Arid and Semi-Arid South America Project released the results of an environmental study in Peru, Bolivia, and Chile, identifying four reasons why Ley 19,300 has not been fully implemented:

> (1) economic criteria are often weighed more heavily than technical or environmental concerns; (2) stakeholder and public participation in the process is hindered by insufficient

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[198] *Id*. at art. 29.
[199] *Id*.
[200] *See id.*
[201] *Recursos Naturales*, *supra* note 113, at 74.
[202] *Id.*
[203] EDESIO CARRASCO & JOSÉ ADOLFO MORENO, INDIGENOUS CONSULTATION AND PARTICIPATION UNDER CHILEAN ENVIRONMENTAL IMPACT ASSESSMENT (2013), *available at* http://www.iaia.org/conferences/iaia13/proceedings/Final%20papers%20review%20process%2013/Indigenous%20Consultation%20and%20Participation%20under%20Chilean%20Environmental%20Impact%20Assessment%20.pdf (last visited May 15, 2014).
[204] Lindsey B. Masters, *Free Market Environmentalism: Desalination as a Solution to Limited Water Sources in Chile's Northern Mining Industry*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 257, 271(2012) [hereinafter *Free Market Environmentalism*].

> administrative support and assistance and the environmental impact assessment time frame "is not long enough for people to understand the depth of the implications for each project;" (3) control of the projects is technically under jurisdiction of local administrative services, but these services generally do not have sufficient resources to adequately process proposed projects; and (4) Law No. 19,300 allows projects to start before approval.[205]

Other criticisms of this environmental law include the inadequacy of the EIA; the lack of proper policies and regulations; the lack of enforcement and sanctions; and the agency's tendency to make political decisions as opposed to technical ones.[206] Critics also disapprove of the framework's reliance on political will for enforcement and the inadequate protection of natural resources.[207]

3. Chile's Mining Laws: Mining Code, Mining Concession Law, and Bilateral Mining Treaty

Today, mining is the largest and most lucrative industry for Chile, and brings in the most foreign investment to this Latin American country.[208] Prior to the enactment of Chile's Mining Code and Mining Concession Law in 1983, the government owned and operated all of the country's mines and mineral deposits.[209] The mining laws brought privatization of all *new* mines and mineral deposits, and an influx of transnational mineral extraction companies.[210] Article I of the Mining Code provides that Chile has exclusive and inalienable rights to all mines and

[205] *Id.* at 271-272.
[206] ANDRES SAEZ, LEGAL FRAMEWORK OF CHILEAN EIA: NEW AGENCIES / EIA IN DISASTERS 7 (2011), *available at* http://www.iaia.org/conferences/iaia11/proceedings/presentations/IAIA%202011%20Chilean%20Environmental%20Framework.pdf?AspxAutoDetectCookieSupport=1. (last visited Apr. 6, 2014).
[207] *Id.*
[208] Karin Ranta, *Balancing Hardrock Mining and the Environment: The Chilean Model*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 423, 428 (1995).
[209] *Id*. at 426.
[210] *Id*. at 428.

subsurface mineral deposits.[211] The state is, however, able to grant concessions under Article 2, which confers property title to the holder of the concession.[212] This title applies only to subsurface minerals and mines, and is distinct from the title to the surface land on which the mining project is taking place.[213]

The Constitutional Mining Concession Law supplements the Mining Code, describing the basic doctrine laid out in the Mining Code and also outlining the rights of concession holders.[214] The Concession Law grants the concessionaire the exclusive right to prospect and excavate, while the Mining Code limits the right to "prevent damages to the owner of the land or to protect public interest purposes."[215] This limited reference to the rights of the surface property owner is indicative of Chile's typical approach of undermining the rights of its indigenous peoples in favor of the mining industry.

While the Mining Code and the Mining Concession Law detail the rights of the government and of concession holder, they do little to identify the rights of indigenous landowners. Specifically, there is no express reference to the consultation process that should be undertaken when subsurface minerals are located on indigenous territory, in violation of Article 15 of ILO 169.[216]

[211] CÓDIGO DE MINERIA (MINING CODE) [COD. MIN.] art. 1 (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=29668 (last visited May 19, 2014).
[212] *Id*. at art. 2.
[213] *Free Market Environmentalism*, *supra* note 204, at 268.
[214] *Id*.
[215] *Id*. at 269; Law No. 18.097, art. 7, Enero 7, 1982, DIARIO OFICIAL [D.O.] (Chile), *available at* http://www.leychile.cl/Navegar?idNorma=29522&buscar=LEY+18.097 (last visited May 19, 2014).
[216] Gonzalo Aguilar Cavallo, *Pascua Lama, Human Rights, and Indigenous Peoples: A Chilean Case Through the Lens of International Law*, GOETTINGEN J. INT'L L., 215, 245 (2013), *available at* http://www.gojil.eu/issues/51/51_article_cavallo.pdf. (last visited May 19, 2014).

III. MODIFYING CHILE'S LAW TO REFLECT THE PROTECTIONS UNDER INTERNATIONAL LAW

Although moving towards increased protection of indigenous peoples' rights, existing domestic law has failed to adequately implement and enforce international protections. While having the potential to guarantee that rights to land and natural resources are not infringed, ILO 169 and FPIC have fallen short of that goal in Chile.[217] This article proposes that Chile implement a domestic legal framework similar to Venezuela and Peru. These countries have each been able to successfully implement FPIC into their respective constitutions and enforce it adequately.

Chile and its indigenous populations would also benefit from establishing private sector compliance incentives. ILO Convention 169 and UNDRIP do not impose legal obligations on the extraction companies themselves; however, the Chilean government must still satisfy its commitments to the indigenous peoples regardless of the transnational company's involvement in the project.[218] Failure to consult indigenous peoples and obtain FPIC in the Pascua Lama mining project has led to highly publicized litigation and extensive financial consequences for Barrick Gold.[219] This negative result to what was to be the world's largest open pit mine may drive mining companies to seek locations outside of Chile for future mining projects. Chile would benefit from encouraging transnational companies to respect FPIC obligations at the inception of the project, and thereby reduce the likelihood that this series of events will repeat itself.

A. Implementation of Domestic Laws Recognizing the Obligation to Obtain FPIC

To fulfill its obligations under ILO Convention 169, Chile must repeal Decree 124. Rather than enact a new executive decree, the right

[217] *El Derecho*, *supra* note 101, at 192-3.
[218] Tendai Zvobgo, *Free, Prior, and Informed Consent: Implications for Transnational Enterprises*, 13 SUSTAINABLE DEV. L. & POL'Y 37, 37 (2012).
[219] Tory, *supra* note 2.; BBC NEWS,

to FPIC should be a part of the national constitution, and Congress should create a law establishing the procedures that model Venezuela's and Peru's approaches.[220] Executive decrees tend to be inconsistent and depend on the will of the executive office.[221] In contrast, constitutional recognition of the FPIC process would provide "a greater stability over time, as well as security" as opposed to an executive decree.[222]

1. Venezuela's Constitutionalization of ILO Convention No. 169 and Comprehensive Bill of Indigenous Rights

Venezuela's 1999 National Constitution codifies the social, cultural, and economic rights of the country's indigenous peoples.[223] It recognizes their customs, their language, and the "original rights to the lands they ancestrally and traditionally occupy."[224] Under this new constitution, indigenous property rights are non-transferable, inalienable, and collective, protecting traditional lands from the common threat of seizure.[225] Article 120 addresses the exploitation of natural resources located on Native lands and requires that the state engage the indigenous peoples in informed consultations prior to the implementation of any exploitation project, implementing domestically the country's international obligations.[226] Article 125 recognizes the right to participate in the government and provides for indigenous representation in the legislature.[227]

This constitutional recognition of indigenous rights—specifically FPIC—has been implemented in several Latin American countries,

[220] *El Derecho*, *supra* note 101, at 226.
[221] *Id.* at 227.
[222] *Id.*
[223] CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 119, *translated at* http://www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf (last visited May 19, 2014).
[224] *Id.*
[225] Marc Becker, *Venezuela and Indigenous Rights*, VENEZUELA ANALYSIS, (Feb. 25, 2004), http://venezuelanalysis.com/analysis/373 (last visited May 19, 2014).
[226] CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZ., art. 120.
[227] *Id.* at art. 125.

including Colombia, Ecuador, and Bolivia.[228] By incorporating the indigenous right to FPIC into the national constitution, Chile would extend to the indigenous community special protections already in place in its neighboring Latin American countries.[229] Constitutionalizing the international indigenous right to FPIC will ensure the enforcement of these rights and improve the political status of the indigenous community, as has been the case in Venezuela.[230]

Venezuela has also adopted a comprehensive bill of indigenous rights within the constitution, in addition to the constitutional recognition of indigenous rights. The Organic Law for Indigenous Peoples and Communities (LOPCI), adopted in 2005, outlines in language similar to ILO Convention 169, the procedure for FPIC.[231] Article 54 requires informed and freely expressed consultation when natural resources found on Native lands will be exploited.[232] Article 55 extends this obligation to all projects, whether public or private, and whether located entirely on Native lands, or on only a portion of Native lands.[233] In addition to the right to consultation, indigenous peoples also have the right to object to proposed projects when they affect their cultural or environmental integrity.[234] Venezuela also goes further than Chile's Decree 124 by offering technical and legal assistance to indigenous peoples to ensure that they are fully informed and have access to the FPIC process.[235]

[228] Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1587 (2011).
[229] *See Id.*
[230] Becker, *supra* note 225.
[231] Ley Orgánica de Pueblos y Comunidades Indígenas, art. 54-5 GACETA OFICIAL [G.O.] (Venez.), *available at* http://www.sumate.org/documentos/Marco_Legal_Electoral_Venezuela/XLey_Orginica_Pueblos_indigenas.pdf (last visited May 15, 2015).
[232] *Id*. at art. 54.
[233] *Id*. at art. 55.
[234] *Id*.
[235] *Id*.

2. *Peru's Cooperative Effort and Database of Indigenous Peoples*

Although Peru ratified ILO Convention 169 in 1994,[236] Peru's legislature did not enact domestic laws regulating the FPIC process until September 2011.[237] During the seventeen years before the enactment, Peru was the most problematic state in the Inter-American System with regard to indigenous rights, having been issued the most adverse judgments by the Inter-American Court of Human Rights and having the most individual petitions filed against it.[238] Peru's Law on the Right to Prior Consultation of the Indigenous or Native Peoples (Law Decree No. 29785) serves not only to identify the policies and procedures of FPIC in Peru, but as a way to prevent the violent protests the country had been experiencing in relation to the violation of internationally recognized indigenous rights.[239]

Article 1 requires that Law Decree No. 29785 be interpreted in conformity with ILO 169's obligations. The law goes on to describe the process and purpose of the consultations. Unlike Chile's Decree 124, the Peruvian framework uses language very similar to that used in ILO Convention 169, closing the implementation gap between international and domestic law.[240]

In addition, the law calls for the collaboration of Congress and other government agencies, such as the Ministry of Energy and Mining and the Ministry of Transportation and Communication, to implement FPIC.[241] Through this cooperative effort, for example, Congress is charged with

[236] *Ratifications for Peru*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102805 (last visited May 19, 2014).
[237] Elizabeth Salmon, *The Struggle for Law of Free, Prior, and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of IP*, 22 PAC. RIM L. & POL'Y J. 353, 379 (2013).
[238] *Id.* at 367.
[239] *Id.* at 379.
[240] Christina Feterhoff, Column, *Latin America: Peru Enacts Law of Prior Consultation with Indigenous Peoples*, 19 No. 1 HUM. RTS. BRIEF 26, 27 (2011).
[241] Salmon, *supra* note 237, at 382.

creating the laws, policies, and procedures that govern FPIC, the Ministry of Energy and Mining is responsible for investigations into proposed development and extraction projects, and the Ministry of Transportation and Communication ensures the full participation of indigenous peoples in the consultation process.[242]

To further implement the FPIC process and facilitate information sharing, Law Decree No. 29785 creates a database of indigenous communities and their representatives, ensuring that project owners and government agencies share information regarding projects that affect indigenous rights in a timely manner.[243] The database must identify the indigenous community's leader or representative, the community's geographical location, languages spoken within the community, as well as any relevant cultural information.[244]

Chile should adopt a law similar to Venezuela's indigenous law and Peru's cooperative effort, as well as the indigenous database to more effectively abide by its FPIC obligations. This law would create a system of checks and balances where each relevant government agency is responsible for a particular aspect of the FPIC process. Each agency would then be held accountable to the other agencies, making it more likely that the obligations will be respected. Accordingly, the indigenous database will facilitate the consultation process and safeguard the rights of the indigenous community by gathering and sharing all relevant information before any decision affecting it is made.

B. Private Sector Incentives to Encourage Compliance with the FPIC Process

A unique element of Peru's Law Decree No. 29785 is its requirement for private sector compliance through the adoption of

[242] *Id.* at 382-3.
[243] Feterhoff, *supra* note 240, at 27.
[244] Law Decree No. 29785, art. 20, Septiembre 7, 2011. (Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la organización internacional del trabajo (OIT)] (Peru)).

education measures.[245] All investment companies whose proposed projects concern indigenous rights must engage in FPIC discussions at the inception of the process under this law.[246] By educating the extraction companies about the obligations and process of FPIC, Peru has ensured the protection of indigenous interests.

Chile could implement a similar requirement, in which a prerequisite for receiving a mining concession would be the participation in an FPIC education session. During these FPIC forums, the private companies would be informed of the obligation and procedure of FPIC, in addition to the ramifications resulting from a failure to comply. A major concern for private companies with FPIC is the risk that indigenous consultation will result in extensive delays and cost the company millions of dollars;[247] however, failure to respect the FPIC procedures can and likely will be an even costlier risk.

One example of the consequences of not respecting FPIC is that of the El Morro mine. Goldcorp, a Canadian mining company, learned an expensive lesson after also failing to obtain the consent of the Diaguita Huascoaltino community during the construction of El Morro; a gold and copper mine located in the Huasco Valley.[248] Goldcorp lost its environmental permit in May 2012 when the Chilean Supreme Court upheld suspension of the $3.9 million project and ordered it to seek the consent of the Diaguita community.[249] The court found that SMA did not adequately consult with the Diaguita community when its construction was likely to compromise the community's water supply, harm their herding animals, and interfere with the rights to their traditional lands.[250] The

[245] *Id.*
[246] Salmon, *supra* note 237, at 383.
[247] *Id.* at 384.
[248] Jade Hobman, *Chilean Supreme Court Suspends Approval for Mining Project*, THE SANTIAGO TIMES (May 1, 2012), http://santiagotimes.cl/chilean-supreme-court-suspends-approval-for-mining-project/ (last visited May 19, 2014).
[249] Alexandra Ulmer & Euan Rocha, *Chile Court Suspends Goldcorp $3.9 Billion El Morro Project*, REUTERS (Apr. 30, 2012), http://www.reuters.com/article/2012/04/30/us-goldcorp-idUSBRE83T0CL20120430 (last visited May 19, 2014).
[250] *Id.*

suspension resulted in a year-long delay and a significant increase in the mining company's operating costs.[251]

Barrick Gold and the Pascua Lama mine is also a perfect illustration of just how costly failure to comply with FPIC can be. After Chile's environmental regulator found that Barrick Gold had seriously violated their environmental permit and then tried to conceal their violations, it imposed a $16 million fine, the highest permitted by law.[252] When calculating the initial cost of the project, the cost of delays, the fines, and the cost of the modifications ordered by the court, Pascua Lama has cost Barrick Gold over $5 billion.[253] In fact, Barrick Gold recently made the decision to call off all work on the Pascua Lama mine in order to sell off shares and pay off some of its debt.[254]

Aside from seeking legal recourse, indigenous peoples have the ability to greatly hinder the plans of an extraction company. The International Finance Corporation (IFC) released their Sustainability Framework in August 2011, in which it presented the result of a year and half's worth of public consultations.[255] In it, the IFC described the various routes an indigenous community can take to block a mining project it has not consented to. Some of these measures are peaceful, including protests and rallies, roadblocks, and permit appeals.[256] However, at times these challenges can turn violent and lead to instances of excessive use of force by police or the company's private security, thus, opening up the company to liability for human rights violations.[257]

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[251] *Id.*
[252] BBC NEWS, *supra* note 75.
[253] Allison Martell & Euan Rocha, *Barrick to Shelve Pascua-Lama, Issue Shares to Cut Debt*, REUTERS, (Oct. 31, 2013), http://www.reuters.com/article/2013/10/31/barrick-results-idUSL1N0IL0ER20131031 (last visited May 19, 2014).
[254] *Id.*
[255] Irene Sosa, *License to Operate: Indigenous Relations and Free, Prior, and Informed Consent in the Mining Industry*, SUSTAINALYTICS 2 (Oct. 2011), *available at http://www.sustainalytics.com/sites/default/files/indigenouspeople_fpic_final.pdf* (last visited May 19, 2014).
[256] *Id.* at 3.
[257] *Id.*

Conversely, where private sector extraction and development companies have complied with the FPIC process, public opinion of the companies has improved, while difficulty in obtaining approval permits has decreased.[258] Chile and Argentina's Bilateral Mining Treaty[259] has paved the way for more transnational and multinational corporations to propose extraction and development projects in this region.[260] By implementing an education condition into domestic law, these figures may deter private companies from moving forward with their projects without complying with FPIC.

CONCLUSION

The right to FPIC and consultation is fundamental to the protection of key human rights in the indigenous community.[261] In particular, when FPIC is not respected, an indigenous community's right to property and natural resources is severely threatened.[262] The existing body of international jurisprudence identifies and outlines the indigenous community's right to FPIC, consultation, participation, and property, in addition to several others. These instruments recognize the uniquely intertwined relationship between indigenous peoples and the land they have traditionally occupied.[263] Nevertheless, the domestic implementation of these rights has fallen short of the intended goal.[264]

In particular, Chile's failure to implement and enforce adequate FPIC laws threatens the cultural and physical survival of the country's indigenous peoples.[265] In a country like Chile, where the extraction industry is such a vital economic activity, indigenous communities are at a

[258] *Id.* at 7.
[259] E. Dale Trower & Pilar Pineiro, *Mining "En La Frontera": New Mining Treaty Between Argentina and Chile*, COLO. L. 135-6 (1998)(Chile and Argentina signed the Treaty Concerning Mineral Integration and Facilitation in 1997. This treaty allowed, for the first time, private extraction companies to exploit the mineral deposits found on the border of the two countries).
[260] *Id.*
[261] NORMS AND JURISPRUDENCE, *supra* note 58, ¶ 274.
[262] *Id.* at ¶ 57.
[263] *Id.* at ¶ 20.
[264] Salmon, *supra* note 237, at 372.
[265] *Id.*

greater risk of having their right to FPIC violated when the country weighs its economic interests more heavily than indigenous and environmental rights.[266] In the case of the Pascua Lama mine, the Diaguita Huascoaltinos were deprived of their right to FPIC at every stage of the project. Barrick Gold made no attempt to consult with the Diaguita Huascoaltinos, and after manipulating the EIA process, was granted a mining concession that gave them free reign of Diaguita land.[267]

This article submits a proposal that addresses this two-part problem by enforcing the obligations on the state and encouraging the compliance of the private sector. First, Chile should amend its constitution to include their FPIC obligations and pass a comprehensive bill outlining the process and procedure of FPIC obligations. This law should create a cooperative system of checks and balances among the relevant government agencies to ensure full compliance and an indigenous database that will facilitate the dissemination of information. This type of domestic law would not only close the implementation gap, but it would also ensure that enforcement does not depend solely on Chile's political will. Second, Chile should create an educational prerequisite and require private extraction and development companies to engage in FPIC forums before they are eligible to obtain exploration concessions. During this process, the financial and social risks of non-compliance with FPIC would be made known, while also providing the company with the information and tools needed to respect the FPIC obligation. By implementing these changes, Chile will be able to protect the rights of its indigenous communities and reduce the likelihood that what happened in the case of the Diaguita Huascoaltinos and the Pascua Lama mine will continue to repeat itself.

[266] *Free Market Environmentalism*, *supra* note 204, at 271-2.
[267] *Diaguita Agric. Cmty's of the Huascoaltinos*, *supra* note 3, at ¶ 2, 9, 11-4.