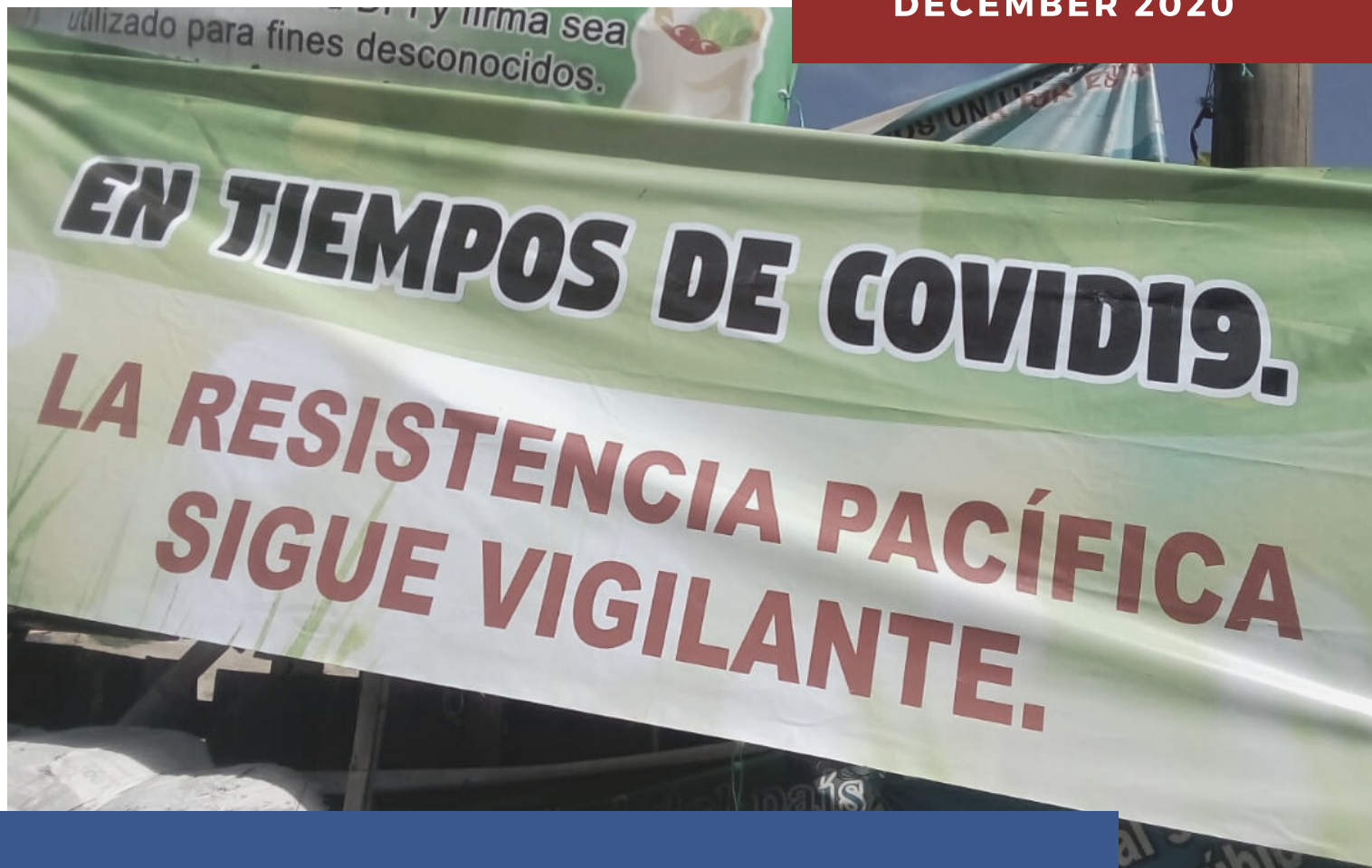


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CONSULTATION AT RISK

## Advances in the Escobal Mine Consultation Overshadowed by Constitutional Crisis

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MARITIMES-GUATEMALA BREAKING THE SILENCE NETWORK

## Summary

For more than two years, the Guatemalan Ministry of Energy and Mines (MEM) refused to accredit the 59 representatives elected by the Xinka to participate in a consultation over Pan American Silver's controversial Escobal mine. In September 2018, the Constitutional Court ruled that the state violated Xinka people's Indigenous rights when it failed to consult them prior to the start of mine operations. The Court suspended the project and ordered MEM to conduct a consultation with affected Xinka communities according to international standards. However, this two-year delay in accepting Xinka representatives – in violation of the court ruling – effectively halted all progress. Through persistent community-led action and a focused international advocacy campaign, the Xinka succeeded in pressuring MEM in October 2020 to finally concede, allowing for the stalled consultation to begin moving forward.

Yet the current political crisis in Guatemala and the weakening of judicial and human rights bodies threaten to derail the fledgling consultation process. Ongoing and widespread protests over a budget bill that benefits elite interests at the expense of the poor majority, coupled with accusations of corruption in the handling of COVID-19 aid, threaten the future of President Alejandro Giammattei's government. It is uncertain what implications this could have for recent agreements reached with MEM.

Perhaps even more troubling is the undermining of judicial independence and impartiality within the Supreme Court of Justice and the Constitutional Court. The latter, Guatemala's highest judicial body, has come under attack following rulings that are unpopular with the country's economic elite -- including the suspension of two transnational mining operations for lack of state consultation with Indigenous Maya people.

*The current political crisis in Guatemala and the weakening of judicial and human rights bodies threaten to derail the fledgling consultation process.*



Photo: An overview of the installations at the Escobal mine circa 2013. Credit: Giles Clake.



Meanwhile, trust in the Supreme Court has been severely damaged following a selection process for new judges that was marred by irregularities. The selection process has now been suspended for over a year. Because it is the main arbiter in the consultation, lack of confidence in an impartial Supreme Court jeopardizes the Xinka's access to due process, even when new judges are eventually selected. Concerns regarding corporate influence over the government-led consultation process have deepened since the former general manager of the Escobal mine was named Special Secretary to the Vice President earlier this year.

Xinka leaders and members of the Peaceful Resistance in Santa Rosa, Jalapa and Jutiapa are increasingly the targets of threats of violence and defamation by individuals supportive of the mining project, signaling worsening conditions for human rights in the region and jeopardizing the free nature of the consultation. Pan American Silver's ongoing community programs further complicate the situation, which the Xinka Parliament have denounced as violating the court-ordered suspension of the mine. According to the Xinka Parliament, the company is using the COVID-19 pandemic to expand outreach at the community level, increasing tension and conflict between communities willing to receive aid from a transnational mining company and those who are not.

Photo: A woman speaks at a gathering of Indigenous organizations to discuss issues related to Free, Prior and Informed Consent. Credit: Xinka Parliament



## *Background*

On September 3, 2018, Guatemala's Constitutional Court upheld a Supreme Court decision and ordered the Escobal mine to remain closed while MEM carries out a consultation process with Xinka communities. The Canadian-owned silver mine had already been effectively suspended since June 2017 due to direct action taken by the Peaceful Resistance of Santa Rosa, Jalapa and Jutiapa, who have peacefully blocked mine-related traffic from reaching the mine since this time. The closure was reinforced a month later by a suspension order from the Supreme Court, citing discrimination and lack of consultation with the Xinka. The final decision from the Constitutional Court sets out a four-stage consultation: 1) definition of the area of influence of the project, 2) a pre-consultation phase to determine the process, 3) the consultation, and 4) the presentation of consultation results to the Supreme Court.

The court ruling dictates that the Guatemalan state should ensure all opportunities to include the Xinka Parliament as the legitimate authority of the Xinka people in the consultation process, according to standards in the International Labor Organization Convention 169 on the rights of Indigenous and Tribal Peoples (ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples. The Constitutional Court called on the government to carry out the sentence in a holistic way, emphasizing that for the consultation to be effective, it must include legitimate representatives from affected communities and the people and/or organizations that they themselves designate as such. The decision further states that the Supreme Court is responsible for ensuring the process is carried out in strict accordance with the ruling.

### *I. Xinka overcome key barrier to participation in consultation*

On October 15, 2020, the Guatemalan government finally agreed to recognize the 59 representatives elected by the Xinka Parliament to participate in the consultation.<sup>1</sup> Until this point, MEM had refused to accredit the representatives and dismissed Xinka ancestral ways of organizing. For more than two years, the Xinka people, together with members of the broader resistance movement to the Escobal mine, used political advocacy, mobilizations, and international attention to pressure the government.<sup>2</sup> Finally, in order to have any possibility of legitimately advancing the process, MEM agreed to accredit the representatives.



In a joint statement with MEM, the Xinka Parliament laid out their conditions for stage two of the consultation, the pre-consultation stage. As one of the conditions, the Guatemalan government agreed to inform Pan American Silver that the Xinka consider the company's ongoing community outreach to be acts of bad faith that threaten the integrity of the consultation – lending strength to community complaints that, so far, Pan American Silver has refused to acknowledge. The joint statement further alludes to heightened tension and threats against leaders in the region,<sup>3</sup> stating that the consultation must be “carried out without pressure or conditions imposed by any of the parties.”<sup>4</sup>

## *II. Constitutional crisis leaves communities without an impartial backstop*

Judicial independence and impartiality in Guatemala have been on the decline since the UN-backed International Commission against Impunity (CICIG by its initials in Spanish) was slowly dismantled and, in 2019, expelled from the country.<sup>5</sup> Over the last year, however, there has been a dramatic increase in attempts to undermine the impartiality of the Supreme Court of Justice and the Constitutional Court by a powerful group of economic and political actors that include businesspeople, as well as members of congress and public officials.



This group is widely known as the “Pact of the Corrupt” (*Pacto de Corruptos*). The Pact of the Corrupt has already infiltrated the Supreme Court and is accused of influence peddling in order to determine its composition in the future.<sup>6</sup> The Pact is also accused of being the orchestrators behind various Supreme Court rulings that seek to encourage open disrespect for key rulings of the Constitutional Court, attempting to unseat specific members of the court, and most recently, rushing the election of new Constitutional Court judges. This situation has serious implications both for judicial independence in Guatemala, as well as for the consultation with the Xinka, given the Supreme Court's role as the main arbiter in the process.

Photo: A protestor holds a sign calling for the resignation of President Giammettei's administration. Protestors have been tear gassed and have faced arbitrary arrest. Credit: CPR-Urbana

In September 2019, the Constitutional Court suspended and ordered a re-do of the nominating process to elect new Supreme Court judges due to violations of due process, including the failure to conduct performance reviews or evaluations of candidates. The Supreme Court refused to abide by the Constitutional Court order, thrusting the nomination process into a state of limbo. More than a year later,<sup>7</sup> new Supreme Court judges have yet to be elected and the selection process remains stalled. Described by the Washington Office on Latin America (WOLA) as “one of the biggest scandals of interference in the justice system by illicit groups,”<sup>8</sup> the makeup of the Supreme Court will undoubtedly impact the legitimacy of the consultation with the Xinka and the future of the Escobal mine.

*The future makeup of the Supreme Court will undoubtedly impact the legitimacy of the consultation with the Xinka and the future of the Escobal mine.*

The Pact of the Corrupt has also intensified its attacks on the Constitutional Court by way of Congress. Like the Supreme Court, Congress ignored the Constitutional Court ruling to suspend the nomination of new judges and approved a widely-criticized action to strip certain Constitutional Court judges of their legal immunity.<sup>9</sup> Additionally, the trade association that represents the economic elite and extractive industries -- which is believed to be acting in the interests of the Pact of the Corrupt -- has issued statements in which they question the authority of certain Constitutional Court judges and rulings, in order to weaken confidence in the Court's decisions.<sup>10</sup>

On November 10, 2020, the Supreme Court elected Roberto Molina Barrento to fill one of the two vacant seats on the Constitutional Court. The process, not unlike that to elect new Supreme Court judges, was rushed and marked by procedural anomalies that violate nomination and selection standards, including the failure to conduct interviews or consider widespread civil society concerns. Guatemalan and international organizations filed multiple legal appeals requesting that the process be redone.<sup>11</sup> Roberto Molina Barrento ran for vice president in 2019 with the VALOR party and whose clear political affiliation should have disqualified him outright. Barrento already served as a Constitutional Court judge, and in 2013, was one of three judges to vote in favor of illegally overturning the conviction of former General Efraín Ríos Montt for genocide and crimes against humanity.<sup>12</sup>

It is likely that the Constitutional Court's 2018 decision to uphold the suspension of the Escobal mine and order a consultation with the Xinka contributed to this intensification of attacks. Two additional Constitutional Court rulings in June 2020 built on the jurisprudence set by the Escobal decision. These decisions upheld the suspension of two other transnational mining projects for lack of prior consultation with affected Indigenous populations: the Fenix nickel mine owned by the Swiss Solway Group,<sup>13</sup> and the Tambor gold mine owned by Nevada-based Kappes, Cassiday & Associates.<sup>14</sup> The two decisions require MEM to carry out consultation processes within 18 and 12 months, respectively. The Solway Group has so far refused to suspend its project.<sup>15</sup>

This process of co-optation of the courts helps explain why, for nearly two years, the Supreme Court failed to issue resolutions on any of the many appeals filed by the Xinka Parliament over lack of due process and Xinka exclusion from the first stage of the consultation process. Finally, in August 2020, the Supreme Court issued a blanket rejection of all the legal challenges presented by the Xinka Parliament relating to the failure of the government and company to comply with key aspects of the Constitutional Court order, signaling the court's intention to clear the way for the process to proceed despite procedural errors and violations of due process dating back to 2018.<sup>16</sup> However, none of the administrative and civil complaints that the Xinka filed with the Supreme Court in late 2019 against MEM and the Ministry of the Environment & Natural Resources (MARN) for breach of duties have been resolved.<sup>17</sup> Over a year ago, in September 2019, Guatemala's Human Rights Ombudsman (PDH), also named in the Constitutional Court order to oversee the consultation, identified illegalities in the first stage of the process that, if not resolved, could "impact the execution of the entire consultation process." The PDH confirmed that MARN violated due process when it defined the area of influence without the participation of the Xinka people and recommended a revision of the process to date.<sup>18</sup> MEM and MARN have not yet responded and, perhaps in retaliation for this and other issues on which the PDH has been outspoken, the Guatemalan government slashed the offices' budget in November.<sup>19</sup>

Co-optation of the judicial system by Guatemala's economic and political elite has serious implications for the consultation process over the Escobal mine. The Supreme Court of Justice is supposed to guarantee respect for Indigenous rights and due process throughout the consultation. The Pact of the Corrupt's influence over the court undermines confidence that it can act as a fair arbiter. If corrupt and powerful interests continue to interfere in the judiciary and Congress, communities will be left without any independent backstop at all. The undermining of the PDH further raises concern about institutional support for Xinka rights within the Guatemalan government.



Photo: A press conference is held in the municipality of Mataquescuintla to commemorate the 8th anniversary of the municipal consultation in which 98% of voters rejected mining. Credit: Xinka Parliament

### *III. New government in crisis as mining industry favoritism persists*

Even before President Alejandro Giammattei's administration was inaugurated on January 14, 2020, there were signs that the mining sector would be privileged over the wellbeing of affected communities. During his election campaign, Giammattei promised to restore confidence in the mining industry within his first 90 days in office.<sup>20</sup> Due to major disruptions from COVID-19, Giammattei has not yet had the chance to fully make good on his promise. But cause for concern remains. Within his first nine months, Giammattei declared seven states of emergency as part of his tough-on-crime policies, including in several municipalities with long-standing conflicts over mineral extraction.<sup>21</sup> His willingness to use violence against the population was also demonstrated in November when the government responded to peaceful protests over the passing of a controversial budget with tear gas and indiscriminate arrests.<sup>22</sup> Mass protests and calls for the president's resignation continue at the time of publication.<sup>23</sup>



The political appointment of a mining executive close to Pan American Silver raises further concerns over a conflict of interest. In February 2020, the former general manager of the Escobal mine, Juan José Cabrera Alonso, was appointed as Special Secretary to the Vice President. From January 2013 to May 2019, Cabrera was general director and legal representative of the Guatemalan subsidiary that operates the Escobal project, Minera San Rafael (now called Pan American Silver Guatemala, S.A.).<sup>24</sup> Cabrera takes credit<sup>25</sup> for having obtained the Escobal operating license in 2013 -- a process marked by irregularities and the current subject of investor lawsuits against Tahoe Resources (now Pan American Silver) in the U.S.<sup>26</sup> The license was granted amidst violence and a barrage of unfounded legal attacks against local residents who were organizing municipal and community-level referendums. In the weeks and months following the license approval, armed security guards scaled up repression against peaceful protests.

One armed attack left seven men injured, leading to a high-profile civil lawsuit in Canada.<sup>27</sup> Martial law was later declared in several municipalities around the mine, during which time the homes of community leaders were raided and several were jailed for months. This struck fear in the population and local organizing went quiet long enough for the Escobal mine to get up and running in early January 2014.<sup>28</sup>

The government's stated commitment to the mining industry, Cabrera's presence in government, as well as the continued appointment of public officials from past administrations who have demonstrated industry favoritism,<sup>29</sup> undermine confidence that the Xinka consultation will be administered fairly and with full respect for their rights. The current political crisis, and the government's violent response to protestors, has severely damaged public trust in the government and triggered widespread protests calling for Giammattei's resignation. If the executive government is forced to resign, the implications for the consultation process -- including agreements reached between the Xinka and MEM in October -- remain unclear.

Photo: The Army patrols the streets with machine guns in 2013 when Martial Law was declared in areas surrounding the Escobal mine. Credit: CPR-Urbana

*The current political crisis and the government's violent response to protestors has severely damaged public trust in the government.*





#### *IV. Heightened threats to defenders*

The security situation for members of the Xinka Parliament and human rights defenders in Jalapa, Jutiapa and Santa Rosa who oppose the Escobal mine worsened throughout 2020, during which time supporters of the mine ramped up attempts to sow community division through defamation and the spreading of disinformation about the consultation.<sup>30</sup> Unfounded criminal accusations are also on the rise against Xinka leaders, as part of efforts to weaken cohesion among Xinka communities. Groups and individuals associated with the mining company, including former employees, have used threats and violence—thus far unsuccessfully—in an attempt to seize control over the peaceful resistance encampment in the municipality of Casillas and influence the consultation.

Social media, especially Facebook, has become the most common means to defame and spread misinformation against local leaders. Posts often accuse community members of receiving money in exchange for their opposition to the mine, a tactic that seeks to pull people apart and undermine trust in leadership.<sup>31</sup>

Individuals believed to be acting in coordination with the company have personally defamed and threatened members of the Peaceful Resistance and Xinka leaders, reinforcing online tactics. A small group of people led by a former Escobal mine security guard is spearheading these attacks. In September 2020, this group, which describes itself as the “Re-Organized Peaceful Resistance of Casillas,” met with Pan American Silver and MEM. The Xinka Parliament issued a statement to clarify that it did not participate in the meeting and called on the population to be wary of those who may be working with the mining company to derail the process and create instability.<sup>32</sup> In November, this group set up its own encampment very near the Casillas resistance camp, presumably as another way to provoke division and stoke tensions. At the time of publication, participation at this new camp was low and it is unclear if the effort will continue.

Photo: Xinka Lawyer Quelvin Jiménez speaks about the consultation. Credit: Xinka Parliament

Xinka communities have also experienced violent power grabs aimed at reshaping community-level leadership and influencing the consultation. Most notably, in June 2020, in violation of a presidential order prohibiting public meetings during the pandemic, municipal representatives from Mataquescuintla, accompanied by military personnel, attempted to hold an extraordinary election in the community of San Supo. Community members believe that the purpose of the election was to stack the Community Development Council with individuals who support the mine.

More recently, eight Xinka men from Santa María Xalapán, Jalapa are facing criminal accusations of land invasion that, while not directly related, are thought to be retribution for their active participation in the Casillas resistance camp.<sup>33</sup> In addition, despite precautionary measures from the Inter-American Commission on Human Rights,<sup>34</sup> threats, surveillance and acts of intimidation by unknown actors have persisted against the legal counsel for the Xinka Parliament, Quelvin Jiménez.

The constant specter of violence and intimidation also undermines the consultation process. The violent power grabs and emergence of a parallel group aimed at undermining Xinka leadership and sowing community division create an environment of insecurity. Impacted community members lack the security and liberty needed to carry out a process of free, prior, and informed consent with respect for the Constitutional Court decision and internationally-recognized Indigenous rights.

*Impacted community members lack the security and liberty needed to carry out a process of free, prior, and informed consent.*

Photo: Marta Muñoz, a community activist, speaks from behind a mask due to COVID-19 about the impacts of mining. Credit: Xinka Parliament





## *V. COVID-19 and company interference*

In response to the public health threat from COVID-19 and the strict travel restrictions and curfews imposed in Guatemala, the Xinka Parliament and the Peaceful Resistance in Santa Rosa, Jalapa and Jutiapa temporarily dismantled their encampment in Casillas. The second resistance camp in the neighboring municipality of Mataquescuintla remained in place throughout with additional health and safety measures.<sup>35</sup> In response to community concerns that the company would take advantage of the pandemic and the temporary removal of the Casillas encampment to advance the Escobal project, dozens of organizations and individuals wrote to the company demanding it stop all activities, including outreach to communities.

Less than a month later, the Xinka Parliament issued a statement denouncing the company for taking advantage of the pandemic in violation of the court order. Particularly troubling were accusations that the company was collecting people's signatures and identification numbers in exchange for food supplies, reminiscent of company tactics used to fabricate support for the project before it went into operation in 2014.<sup>36</sup> The company responded that only essential maintenance work continues at the mine, failing to address concerns over community relations.<sup>37</sup>

Pan American Silver's actions during the pandemic are consistent with patterns identified across the mining industry, in which companies have sought to take advantage of the crisis to improve their image and advance their interests.<sup>38</sup> In October 2020, as part of the agreements reached with MEM over the consultation, Guatemalan authorities committed to inform Pan American Silver that the Xinka consider the company's ongoing community relations activities to be acts of bad faith that threaten the integrity of the consultation process.<sup>39</sup>

In August, communities decided to return to the resistance encampment in Casillas, despite ongoing public health risks, due to the persistent attempts to divide the Peaceful Resistance and defame local leaders. Health and safety protocols have been established for the encampment in compliance with ongoing public health restrictions in the municipality. Communities already facing mining-related health threats are now also faced with increased health risks from possible COVID-19 infections. Pan American Silver's ongoing community outreach, in contravention of the court-ordered suspension of all mining activities, only aggravates these risks.

## Conclusion

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In October, the Xinka Parliament reached an important agreement with MEM. The 59 elected Xinka representatives were formally recognized for participation in the consultation process, and MEM agreed to inform Pan American Silver that its community relations activities are an act of bad faith. Despite this important advancement, multiple overlapping crises pose serious threats to the Xinka people, the Peaceful Resistance of Santa Rosa, Jalapa and Jutiapa, and the consultation.

Corporate capture of government authorities, defunding of human rights bodies, and co-optation of the Guatemalan institutions, including the Supreme Court and Congress, effectively leaves the Xinka people without an impartial and independent arbiter in the consultation process. In addition, Pan American Silver has continued its community relations despite the COVID-19 pandemic, including meetings with a parallel organization that has past ties to the Escobal mine, which is provoking tensions in the area. At the same time, members of the Xinka Parliament and the Peaceful Resistance face ongoing defamation and threats of criminalization and violence.

The Xinka people and the larger resistance movement have overcome incredible obstacles since the arrival of transnational mining companies to their territory nearly a decade ago, despite struggling within a system that has refused to recognize their very existence and has undermined their rights. The multiple crises facing the rule of law and democracy in Guatemala have significant implications for the consultation process, including how it will proceed and whether it will be considered legitimate. Even in the absence of an independent and impartial judicial system, the Xinka people will make their own judgment about the process. If it is undermined by company interference, corrupt courts, or biased public officials, the consultation will fail. The challenges are significant, and deepening, but the Xinka have demonstrated that they have the organizing capacity and political strength to continue asserting their rights despite such odds.

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