

# ILO Convention 169 and the Private Sector

## *Questions and Answers for IFC Clients*

Understanding the rights and perspectives of indigenous and tribal peoples affected by projects is an important but sometimes complex issue for IFC clients, particularly in relation to extractive or infrastructure projects. Private sector companies need to be aware of the various legal, reputational, and business risks they may run when implementing projects with potential impacts on indigenous and tribal peoples and, at the same time, of the opportunities of forming partnerships with these peoples and delivering development benefits to them.

Indigenous peoples' groups and other stakeholders often raise responsibilities of IFC clients in relation to ILO Convention 169 on Indigenous and Tribal Peoples. ILO Convention 169 is directed at governments, not the private sector, so its relevance to IFC clients is usually indirect (though there may be instances when companies are held directly responsible for its implementation). However, the Convention is used as a reference point by indigenous and tribal peoples themselves and by other civil society stakeholders in projects.

If an IFC client is implementing a project where government's actions mean that the project does not meet the requirements of the Convention, it can find itself accused of "breaching" the principles of the Convention or of violating rights protected under the Convention. This has occurred in relation to several IFC-financed projects in Latin America, and such complaints have sometimes contributed to troubled community relations and project delays.

The implementation of the Convention in the context of private sector projects (directly by governments or indirectly by private companies) will support a more open and inclusive approach to private investment. In this way, the private sector also benefits from government ratification and adherence to the Convention. Compliance with the Convention will not only protect indigenous and tribal peoples' rights, but will promote the interests of private business by laying the groundwork for a positive and socially responsible investment environment.

This note seeks to address the main questions about the Convention's content, its legal scope, the risks non-compliance might pose for the private sector, and practical approaches that can be adopted to respond to the requirements of the Convention.

In adopting a Question and Answer framework, this note provides practical assistance for IFC and its clients, and for other stakeholders, in the context of projects that impact or potentially impact upon indigenous peoples. It is intended to assist all parties in better understanding how Convention 169 relates to projects.

This note should be read in conjunction with IFC's Performance Standard 7 on Indigenous Peoples, which contains direct requirements for IFC clients when projects impact such peoples. The Performance Standard also has an associated Guidance Note. As many of the principles within Convention 169 have been encapsulated within IFC policies, understanding the Convention will also assist with understanding how best to implement the Performance Standards.

## What are the key obligations under Convention 169?

ILO Convention 169 on Indigenous and Tribal Peoples is one of the key instruments in the body of international law relating to indigenous peoples. Adopted in 1989, the Convention has been ratified by only 18 countries (as of January 2007) of which 13 are in Latin America (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Honduras, Guatemala, Mexico, Paraguay, Peru, and Venezuela). The other countries that have ratified the Convention to date are Denmark, Fiji, Norway, the Netherlands, and Spain.

The key relevant provisions in the Convention require that:

- Governments develop coordinated and systematic action to protect the rights of indigenous and tribal peoples.
- Governments consult these peoples through appropriate procedures and representative institutions when applying the Convention's provisions, and ensure their participation in the process of development.
- Governments ensure that indigenous and tribal peoples have the right to decide their own priorities for the process of development.
- Governments respect indigenous and tribal peoples' special relationship with lands, which includes territories both occupied and used.
- The rights of ownership and possession over lands traditionally occupied are recognized and governments take steps to identify these peoples' lands, and to establish procedures to resolve land claims.
- The rights to natural resources on lands and territories are safeguarded, including the right to participate in the use, management and conservation of resources.
- Where the State retains ownership of mineral and sub-surface resources, indigenous and tribal peoples should be consulted prior to programs of exploration or exploitation of resources and wherever possible participate in the benefits of exploitation and receive compensation for damage resulting from exploitation.
- Indigenous and tribal peoples should not be removed from lands except where necessary as an exceptional measure and with their free and informed consent. If consent cannot be obtained, relocation should only occur in compliance with due legal process.
- Whenever possible, indigenous and tribal peoples should have the right to return to traditional lands, or to receive compensation if return is not possible.

## ILO Convention 169: Key Questions

### *What groups are covered by the Convention?*

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The Convention applies to (a) "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs and traditions or by special laws and regulations"; and (b) "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country...at the time of the conquest or colonization or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their won social, economic, cultural and political institutions." Self-identification is regarded as a "fundamental criterion for determining the groups to which the provisions of this Convention apply" (Art. 1).

There is no international definition of which groups are "indigenous," and this has to be decided at the national level. Convention 169 covers both indigenous and tribal peoples, meaning those who live in a way that sets them apart from the national community, whether or not they are descended from "first inhabitants." For instance, in several Central American countries, garifunas (or maroons, or other terms) are descendants of escaped African slaves, and thus are not indigenous in the literal sense, but they are tribal and are covered by the Convention.

There is another ILO Convention on the same subject, the Indigenous and Tribal Populations Convention (No. 107) of 1957. While less demanding than the later C169, it does contain relevant obligations for countries that have not yet ratified C169. It is applicable to a number of countries in Asia and Africa.

### *Who has legal obligations under Convention 169?*

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The purpose of ILO Conventions is generally to mandate State action in the context of the national legal system in relation to the rights and obligations contained in the instrument. As with other ILO

Conventions, Convention 169 is aimed at governments and is binding only on the States that have ratified it.

Like most international conventions, its application to States is clear in the language used in Convention 169. Indeed, there are no Articles establishing obligations for bodies other than governments.

For example, Article 2 states that “Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”

The ILO's structure of implementation for Conventions also emphasizes the role of the State. ILO constituent parties may raise complaints about alleged breaches of a Convention, but these relate to the adequacy or otherwise of State action in implementation. Comments by non-State parties (i.e., trade unions and employers' organizations) on its application are dealt with by the ILO Committee of Experts (its main supervisory body). This Committee comments on implementation and makes requests and recommendations to governments. If these comments are sufficiently serious, they may be referred to the annual ILO Conference for public discussion, or to special complaints mechanisms.

The terms of such comments by the ILO Committee of Experts also make clear that it sees the scope of legal compliance with Convention 169 as limited to the State. For example, it has noted that:

“...the obligation to ensure that consultations are held in a manner consistent with the requirements established in the Convention is an obligation to be discharged by governments, not by private individuals or companies.” (See CEACR Observation on Bolivia 2005 / 76th Session.)

While private companies do not have any direct obligations under the Convention, it has clear implications for their activities and operations. There may well be legal obligations arising from national legislation implementing the Convention. And in some countries, ratified Conventions are incorporated directly into national law and may be used by the courts to determine responsibilities, which they could theoretically decide to apply to actors other than governments.

## *Do private companies have any obligations under Convention 169?*

Companies face a reputational imperative arising from the perceived duties of companies to be seen to act in a way that is compliant or consistent with international law. Direct legal obligations on private companies, however, can only come from national law.

Where national legislation sets out clear obligations on private actors in relation to indigenous peoples, then it is important that companies comply with these obligations. There may be such legislation in countries that have not ratified the Convention, although it is only those that have ratified that are required to put such legislation in place.

The failure of a government either to fulfill its obligation to implement the Convention, or to comply with its responsibilities under national legislation, can have consequences for a private sector project. For example, if a State fails to comply with obligations on prior consultation on a project, a private company may find that the licenses that have been granted are subject to legal challenge (this is considered in more detail below).

There may also be circumstances where private sector companies' actions could influence or compromise the State's implementation of its obligations under international agreements, such as Convention 169. For example, a private sector extractive project can potentially generate very large revenues, some of which will be paid over to the State in the form of concession, license or royalty fees, and taxes. A state regulatory agency, in anticipation of such revenue, may expedite the project approval process by not following its own consultation requirements under Convention 169, or write into laws state commitments which may conflict with its ability to comply with Convention 169. If the project is being implemented in a country with weak governance, or in a state of conflict, the risks of the private sector's influence over the government may be greater. While this is an area of human rights debate that is still evolving, a consensus is emerging that private sector companies should not act in a manner that would interfere with the State's discharge of its obligations under its international agreements.

## *How do States implement Convention 169?*

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If a country has ratified Convention 169, then it is obliged to ensure that there are rules or procedures in place to implement the obligations in the Convention. This may be by way of constitutional provisions, specific implementing legislation, administrative regulations, or the inclusion of obligations within other procedures, such as those for the granting of environmental and exploration licenses.

In some countries, including many of the Latin American countries that have ratified the Convention, the provisions of international treaties and Conventions that have been adopted by the State are considered directly effective in national law without the passage of separate national implementing legislation. Even if international standards are not directly applicable in this way under the Constitution, States are still required to take measures, including legislation, to implement them nationally.

Where there are specific or general provisions in national law, then any private sector company will be obliged to comply with the law that is applicable to that company under the national system. But it is important to understand that they are complying with the national law, and not the Convention directly, in so doing.

## *Can States transfer obligations under Convention 169 to the private sector?*

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While the State may—and should—place obligations on a private company to act within defined boundaries, the State cannot rid itself of obligations derived from the ratification of the Convention. So, for example, the fact that granting a concession to drill oil is transferring some of the State's rights to carry out subsoil exploration to a private company does not mean that the State's obligations to implement Convention 169 are automatically transferred to the private company.

The same point can be made in relation to consultation. In the case, for example, of private mining and oil and gas projects, or forestry or other resource exploitation, governments can fulfill some of the obligations under the Convention by requiring private companies to carry out specific actions. In Colombia, for example, Decree 1320 of 1998 regulates the *consulta previa* (prior

consultation) in cases where indigenous and Afro-Colombian communities are within the area of influence of a project, and requires that the party responsible for the project conduct the consultations and present evidence of the same to the government prior to the granting of environmental licenses.

Governments can ensure that indigenous and tribal peoples benefit from extractive industries (a requirement of Article 15 of the Convention) by requiring companies to deliver such benefits in the form of royalty payments, employment generation, provision of services, etc. These requirements can be created through general legislation or can be obligations established as part of the granting of concession or licenses. Similarly, governments ensure that indigenous peoples receive fair compensation for any damages that they may sustain as a result of the extraction of mineral resources by requiring private companies to provide such compensation. In all these cases, governments meet their obligations through actions implemented by private companies.

Governments are ultimately responsible for ensuring that indigenous and tribal peoples affected by private sector projects benefit from them and are properly consulted and compensated; but they don't need to do everything directly. The reliance on actions of private sector companies to achieve compliance with some of the requirements of Convention 169 is inevitable, particularly in countries with large indigenous populations, such as Guatemala or Bolivia.

## *Can a private company violate rights protected under the Convention?*

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Even if a private company does not have direct obligations under the Convention, it can, of course, violate rights under the Convention that have been incorporated into national law, by failing to comply with administrative requirements, such as environmental licenses and permits for the exploration and exploitation of natural resources, which create obligations for private sector companies. Any such violation could only be tested under national law and administrative rules and, strictly speaking, if proven, would be a breach of the law or the conditions of permits or licenses, rather than a direct breach of the Convention. However, impacted parties and stakeholders may still view certain private sector activities as in violation of the Convention if they

are perceived to be inconsistent with its principles, especially where the State is perceived to be deficient in enforcing its obligations under the Convention.

In cases where the government meets obligations under the Convention by requiring a private company to do certain things, the private company becomes the agent of the government and, as such, can violate rights protected under the Convention. This would occur, for example, if a private company has the obligation to compensate indigenous peoples for damages and fails to do so.

### ***Do private companies face the risk of being considered accomplices of human rights violations committed by governments?***

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There is ongoing debate about the degree to which a private company can be complicit in human rights or international law abuses, where the State is the primary guarantor of these rights. These debates occur in the field of customary international law and with respect to claims such as those under the Alien Torts Claims Act of the United States of America, which allows claims to be filed in the US for a company's acts performed outside the US, when a company has some US presence. However, these claims to date have been restricted to serious "criminal" human rights abuses, such as murder, forced labor and the like, rather than the sorts of issues arising under most of the provisions of Convention 169.

The general position of the relationship between human rights and transnational corporations and other business enterprises has been summarized in the Interim Report of the UN Secretary-General's Special Representative on the issue, John Ruggie:

*"All existing instruments specifically aimed at holding corporations to international human rights standards... are of a voluntary nature. Relevant instruments that do have international legal force, including some ILO labor standards, the Convention on the Elimination of All Forms of Discrimination Against Women, and the OECD and UN anti-bribery Conventions, impose obligations on states, not companies, including the obligation that states prevent private actors from violating human rights.*

*Under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the*

*most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and some crimes against humanity."*

*[Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97 (2006)]*

From this statement, IFC clients might conclude that unless the company is involved in "heinous" human rights violations, legal complicity is unlikely to be an issue. However, the international legal interpretation of these issues is still developing, and civil society groups may view other acts as complicity, which can have serious reputational impacts.

### ***Do companies holding mining or oil and gas concessions face business risks in cases where governments do not comply with obligations under Convention 169 related to the granting of such concessions?***

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There are three relevant issues. First, Convention 169 places responsibility for addressing land rights issues with governments. There must be a process for recognizing land claims and for resolving them. The issues and complaints that tend to arise under the Convention thus largely relate to the adequacy of the national legal system for safeguarding land rights.

Second, Convention 169 states that indigenous peoples' rights in relation to natural resources should be safeguarded, but it does not grant them exclusive rights over such resources. It is a government's obligation to ensure that rights are safeguarded and to establish processes that determine the degree to which rights will be enforced.

Third, where the State retains ownership of sub-surface or other resources, the Convention recognizes that the State has the ultimate right to dispose of such resources. But it also requires that indigenous and tribal peoples should have a say in how resources are exploited. It is a responsibility of government to consult indigenous peoples prior to any project going ahead, and to ensure that the peoples concerned can participate in the benefits of exploitation of natural resources and also receive fair compensation for any damage they may sustain as a result of these activities.

These obligations—to address land rights, safeguard rights to natural resources, consult with indigenous peoples about exploitation of resources, compensate them fairly, and ensure that they participate in the benefits of these activities—lie very definitely with the State. However, the State meets at least some of these obligations through actions of the private sector that are required by law or are conditions of environmental permits and licenses to explore or exploit natural resources.

In cases where there has been a failure on the part of the State to carry out its obligations directly (or through the private company that benefits from a land rights transfer or concession) there is a risk that a company could find its license or concession in jeopardy.

### ***What can companies do to mitigate such risks relating to resource exploitation concessions?***

In order to minimize risk, companies would be advised to satisfy themselves that the government has fulfilled its responsibilities. Specifically, companies should look into whether:

- the process used for identifying indigenous and tribal peoples' lands is consistent with the requirements of Convention 169
- legal or other procedures for resolving indigenous peoples' land claims and disputes are acceptable and have been subject to consultation
- if title to land has derived originally from indigenous peoples, this title was obtained properly, in accordance with the law, and without taking advantage of lack of understanding of laws in order to secure possession
- the relevant government authorities have recognized the indigenous peoples' rights to natural resources
- appropriate consultation takes place prior to the granting of exploration and exploitation licenses
- mechanisms are in place to enable the communities concerned to participate in the benefits of the project and to compensate them fairly.

This due diligence should form part of a social and environmental assessment. If there appear to be problems over these issues, the company should evaluate the role it can play in facilitating the recognition of rights or promoting consultation (see below for more details). It

will be important that any such activities are conducted in an appropriate and fair manner and that both government and the affected communities understand and accept the company's role.

### ***Does Convention 169 give indigenous communities the right to veto projects that affect them?***

Consultation with indigenous communities about their priorities is fundamental to Convention 169. The ILO Committee of Experts has said that “consultation is the key to all other provisions of the Convention” (See CEACR Observation on Guatemala 2005/76th Session).

However, the Committee of Experts has also made it clear on a number of occasions that this does not mean that indigenous peoples' communities have a right to veto projects that affect them.

The Convention is clear about what is required in the process of consultation. Article 6.2 states that the consultations should be carried out “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.” This lack of veto within the Convention is reinforced by the provisions on land rights and relocation in Article 16, which allows for compulsory relocation in certain exceptional circumstances.

While there is no right of veto, the obligations under the Convention are to implement meaningful consultations with the objective of trying to reach agreement based on consensus. In cases where the State retains the ownership of mineral or sub-surface resources, the purpose of the consultation is to establish “whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands” (Article 15). Therefore, the Convention does not necessarily call for referendums (called *consultas populares* in the Latin American context) on projects, but more broadly for an effort to determine adverse impacts of a project, using whatever measures may be best, and to design appropriate mitigation measures.

### ***Do private companies face any risks if they act in a manner that is inconsistent with the principles of Convention 169? If so, what can they do to mitigate such risks?***

Regardless of any strict legal issues that may arise from the application of the Convention or national law, private companies may face substantial reputational risks in cases where their actions are alleged to be in “breach” of the provisions of Convention 169 or any other standards based on internationally recognized rights.

A project that is tainted with allegations from indigenous peoples that their rights are being violated and that international law is being breached will be difficult to take forward, regardless of whether or not there are actual breaches or legal violations. While a private company might feel the need to clarify that the law does not apply to it, a more fruitful approach may be to try to act in a way that is consistent with the principles of the Convention on issues such as consultation, land rights, and protection of indigenous peoples' cultures. Where opposition to a project exists, the company can try to understand the basis of such opposition, attempt to mitigate risks to indigenous groups as much as possible, and demonstrate to them that their concerns have been or will be addressed.

### ***Do private companies have a role to play in the legal recognition of land rights of indigenous peoples?***

As noted above, ILO Convention 169 places responsibility for addressing land rights issues with governments. Thus, the issues and complaints that tend to be presented to the ILO in relation to the Convention largely relate to the adequacy of the national legal system for safeguarding land rights. However, private sector companies are affected where there are deficiencies in the national land registration and titling systems or in cases where the rights to particular areas have never been defined. The company operating within this environment must deal with ambiguity. In terms of business risks, this can mean that the company's legal title or operating position is uncertain, resulting in delay to the project. It can also result in community opposition or legal challenges to the company's operations, which could render the project unviable.

It is therefore important that, as part of their social and environmental assessment, private sector companies understand the obligations placed on national governments under Convention 169, the national legal structure in place, and the adequacy of its application in practice to lands where companies plan to operate or are operating. Companies should satisfy themselves that their legal title to land, or right to exploit lands, is secure—in other words, that there are no outstanding legal claims or unresolved land rights issues or, at the least, that they are aware of unresolved issues and have made allowances for such risks.

While this can be a very delicate matter, it is nonetheless important that a private sector company assure itself that the host government has fulfilled, or is fulfilling, its responsibilities adequately in terms of *identifying* indigenous or tribal lands and *recognizing* the land rights of these peoples. While land rights can only be granted by government entities, private companies can try to facilitate the legal recognition of indigenous and tribal peoples' rights to land, as well as efforts to demarcate areas over which these peoples have rights to land or claims to such rights. Such actions could include:

- drawing the attention of governments to issues that need addressing
- working with government and affected communities to seek resolution to outstanding disputes and land claims
- facilitating the recognition of indigenous peoples' land claims if they so request (for example, by supporting efforts of indigenous communities to obtain formal legal rights to land through financial, legal or technical assistance)
- encouraging government-led consultations on land rights or facilitating government participation in company-led consultations on this subject.

While encouraging effective implementation of Convention 169 will be in a private sector company's own interests, it is important that any such activities are seen to be in support of compliance with Convention 169 and in cooperation with government and indigenous peoples.

### *What does Convention 169 say about the relocation of indigenous peoples, and how might this affect a private company?*

Displacement of communities can often occur during projects, and has been the subject of complaints to the ILO Committee of Experts. Convention 169 views the relocation of indigenous peoples as an exceptional measure. If relocation is unavoidable, the Convention requires “free and informed consent.”

According to the Convention, if consent cannot be obtained, relocation shall only take place in line with proper national procedures that allow for indigenous peoples' effective representation. The Convention also provides that affected peoples should have the right of return to the lands from which they have been removed. If this is not possible, they should be provided with land of a quality at least equal to their previous lands. Arrangements made to allow for the right of return or the provision of alternative lands should therefore form part of the private sector company's due diligence and community engagement program.

In cases where the relocation of indigenous peoples associated with a private sector project is carried out improperly by the government, the private company will face the risks of legal challenge to the project and community opposition. Therefore, as with other aspects of land rights, the company should look into whether the government has carried out its responsibilities appropriately. In order to try to achieve consistency with Convention 169, company actions should include:

- verifying that there was no alternative project design that could have avoided relocation
- if consent was obtained, determining that it was free and informed
- if consent was not obtained, determining that the legal processes used allowed for effective representation of the communities concerned.

Review of documentation and discussions with government officials and representatives of communities may be necessary. If there are doubts over these issues, the company faces the reputational risk of being associated with non-compliance with the Convention.

### *Does Convention 169 require private sector companies to provide compensation and deliver benefits?*

Convention 169 states that, wherever possible, indigenous peoples should participate in the benefits of projects. While this can relate to direct financial benefit, it usually relates to collateral and development benefits such as employment opportunities, healthcare, education or employment.

The issue of compensation is also likely to arise in relation to impacts on land use and resources, and other issues such as relocation. Convention 169 provides for fair compensation for any losses and damages.

The responsibility for ensuring financial participation, development benefits or compensation will vary according to the nature of the project, but is primarily the responsibility of the State. In extractive industry projects, for example, the State normally fulfills this obligation by placing financial and other requirements on the project sponsor. These requirements can be specified in national legislation or in permits or licenses granted to the project sponsor. All compensation measures and programs to benefit indigenous peoples should be designed taking into account the concerns expressed by indigenous peoples during the consultation process.

As with other issues, it will be in the private sector company's interests to check whether the State is seen by the affected communities to have fulfilled its responsibilities fully and fairly. As part of due diligence, the company should satisfy itself that the government has consulted directly, or has supervised and participated in the consultation processes facilitated by the company, in a way that is consistent with the Convention, and that such consultation has involved all affected communities. It is appropriate for private sector companies to facilitate such tri-partite consultations as long as the role of the private company is accepted by all parties and the consultations involve full and culturally appropriate disclosure of project information. The company should also ensure that the compensation process is fair and transparent and that programs designed to benefit indigenous peoples are consistent with the needs and concerns expressed during the consultation process.



### *Are there particular responsibilities for private companies in relation to non-discrimination?*

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Convention 169 emphasizes that governments must prevent discrimination against members of indigenous communities in relation to employment issues and that governments should take “special measures” to ensure protection against discrimination. There are no clauses directed at private sector companies; however, as with other issues, there are reputational and business risks for IFC clients if their employment practices discriminate against indigenous peoples, whether or not such discrimination is sanctioned by law and enforced by government authorities. As part of the social and environmental assessment, private companies should satisfy themselves that the law is consistent with the requirements of the Convention and that special measures are in place to ensure the effective protection of indigenous and tribal peoples with regard to recruitment and conditions of employment. If this is the case, they should follow the law strictly. If national law is not consistent with the requirements of the Convention, the private company should draw the government's attention to any perceived shortcomings and adopt its own non-discriminatory policies.

The IFC also has its own requirements on non-discrimination contained within Performance Standard 2 on Labor and Working Conditions. IFC clients must ensure that they are fulfilling the requirements of PS2.

### *Are there requirements of Convention 169 that are also requirements of Performance Standard 7? If companies comply with PS7, can they ignore Convention 169?*

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There is a fundamental difference between Convention 169 and IFC's Performance Standard 7, in that the former is directed at governments, whereas the latter contains obligations placed directly on clients by a lender. Nevertheless, there is considerable overlap between the two in terms of issues covered and approaches required. Indeed, many of the principles of Convention 169 have been incorporated in and underpin the requirements of PS7. These include:

- coverage of the term “indigenous and tribal peoples”
- the importance of consultation
- the recognition of the rights of ownership and possession over customary lands
- the lack of a veto over projects.

In some cases, there are parallel requirements under Performance Standard 7 expected of private sector clients. For example, Article 6 of the Convention requires governments to consult indigenous and tribal peoples, and PS7 clause 9 also requires “free, prior and informed consultation.”

However, while there are clear overlaps between the two instruments, it is important to understand that client compliance with PS7 is no substitute for State implementation of Convention 169. As detailed above, if a State that has ratified Convention 169 has failed to implement it effectively, there may be risks for a client irrespective of how well it complies with PS7.

Where States have not yet ratified Convention 169 and there is no obligation on them to implement its provisions, there may still be relevant legislation and processes. In such cases, clients should undertake the same due diligence activities set out above in relation to the effectiveness of government action and should, of course, comply with PS7 if seeking financing from IFC.

### *How do private companies benefit from the implementation of Convention ILO 169?*

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The implementation of the Convention not only protects the rights of indigenous and tribal peoples it also benefits private companies implementing projects that affect them. For example:

- Culturally appropriate consultations with indigenous and tribal peoples are critical for establishing constructive relations with them and for addressing their concerns effectively.
- Decision-making processes that take into account the views of affected indigenous communities improve project design and facilitate its operation over time.
- The clear definition and protection of the rights of indigenous peoples to land and natural resources facilitates the planning and implementation of private sector projects and reduces the risk of conflicts over lands and resources.
- The participation of indigenous and tribal peoples in the benefits generated by private sector projects generates support for the project among these peoples, enhances the reputation of the companies that implement them, and lowers operational risks.
- Companies that implement projects in a manner consistent with the Convention's principles will enhance their public image, which will have a positive impact on their business.

## The Case of the Marlin Project in Guatemala

The Marlin mine in Guatemala, developed by Glamis Gold Ltd. with IFC support, illustrates how allegations of Government non-compliance with the requirements of Convention 169 can jeopardize private sector projects.

The Marlin gold mine is located in two municipalities. About 87 percent of the property, including the ore bodies and processing facilities, is in the Municipality of San Miguel, which is over 95 percent indigenous (Mam). The remaining 13 percent of the property, occupied by the mine's administrative facilities, is in Sipacapa, which is over 77 percent indigenous (Sipakapense).

Glamis Gold acquired the Marlin mine in 2002, when it was in the early stages of development. The previous owner had already obtained the exploration license and purchased some of the land needed for the project. The initial consultation process by Glamis focused on the communities to be directly impacted by the project. The company formed the Marlin Project Community Relations Group, made up of local indigenous residents of both San Miguel and Sipacapa, in order to understand the cultural context for consultation and to facilitate company communications in a linguistically and culturally appropriate manner.

The Community Relations Group implemented an extensive community engagement program with the support of a public consultation specialist. The Group conducted hundreds of consultations with participants in villages in the municipalities of San Miguel and Sipacapa and arranged a large number of visits to the mine site for local officials, teachers, families, and other groups and individuals. The company also developed and circulated illustrated pamphlets describing the mine and the mining process and arranged visits for some local officials and community leaders to an operating mine in Honduras.

When the company applied for the exploitation license, it enjoyed good relations with the villages immediately adjacent to the mine site and directly affected by the project. The municipal authorities of San Miguel and Sipacapa issued written statements supporting the project.

The Government granted the exploitation license in 2003 in accordance with applicable laws and regulations, including those on public disclosure of project information. The Ministry of Environment and Natural Resources (MARN) reviewed the EIA of the Marlin project, including the documentation on the consultations carried out by the company, and approved it after the completion of the public comment period.

### Problems Surface Regarding ILO Convention 169

Everything seemed to indicate that the mine was going to be developed without controversy, especially considering that it enjoyed the support of the directly impacted communities. However, soon after the Marlin project received its exploitation license, two local partners of an international NGO that opposed gold mining mounted a campaign against the Marlin project. The NGOs claimed that the mining concession and the exploration and exploitation licenses were not valid because the Government had granted them without consulting with the indigenous peoples impacted by the project, as mandated by Convention 169 of the ILO, which was ratified by Guatemala in 1996. The NGOs

demanded the Government to stop the Marlin project, asked the IFC to withdraw its financial support, and filed a complaint with the ILO through a labor union.

The NGOs did not dispute the fact that the company had carried out consultations, but contended that the Government did not meet its obligation to consult. They interpreted the Convention in its most literal sense and considered that both the company's consultations, as well as the review of such consultations by the Government, as part of the EIA approval process, were irrelevant for assessing compliance with ILO Convention 169. The NGOs argued that consultations carried out exclusively by the company, without the presence of the Government, did not guarantee the transmittal of objective information about the adverse impacts of projects to local communities.

The allegations of the NGOs, combined with concerns about the potential adverse environmental impacts of the mine, helped create a strong movement against the Marlin project and mining in general, which was supported by influential members of the Catholic Church and various organizations concerned about indigenous peoples and human rights. The movement did not succeed in stopping project construction, but created serious challenges for Glamis and the Government at the local and national levels. In addition, opposition to mining limited the company's ability to carry out exploration activities in Sipacapa.

### Lessons Learned

The Marlin project offers important lessons to private sector companies planning to implement projects affecting indigenous peoples in countries that have ratified Convention 169:

- Companies need to carefully document consultations with indigenous peoples, including government participation in such consultations, during all phases of natural resource exploration and exploitation.
- Companies planning to acquire projects that affect indigenous peoples need to review, as part of their due diligence, the adequacy of the previous consultations, particularly those carried out by the government prior to the granting of concessions and licenses.
- In addition to keeping a record of the subjects of the consultation meetings and the persons who attended, as Glamis did, companies should also document the information delivered during the meetings, the concerns expressed, and the responses and commitments made by the company and the Government. Companies that have this kind of information will be in a good position to defend themselves against accusations that indigenous communities were not provided with full and objective information about the adverse impacts of the project.
- In countries like Guatemala, where the Government has not issued specific regulations on consultations with indigenous peoples to ensure compliance with Convention 169, private companies need to play a proactive role in the design and implementation of a consultation process with government participation and endorsement. Companies should invite appropriate government agencies and other third parties to join the key consultation meetings with the local communities. The presence of the government representatives add credibility to the process and facilitate the delivery of information on certain subjects, such as the licensing processes and the legal obligations of private companies.

## Acknowledgements

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This Note was prepared by a team comprising Jose Zevallos and Debra Sequeira (IFC staff) and Steve Gibbons and Stuart Bell of Ergon Associates. Special thanks are due to Lee Swepston and his team at the ILO Secretariat in Geneva who provided valuable input at various stages of the drafting process. The team would also like to thank the following IFC staff for reviewing and commenting on the draft: Rachel Kyte, Richard Caines, Motoko Aizawa, Jorge Villegas, and Michael Swetye, as well as George Blankenship (Blankenship Consulting) and Eduardo Rubio (General Manager of Quellaveco). Design and layout were done by Vanessa Manuel and dissemination by Barbara Zhang.