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From issue: **Consulta Previa and Investment** (Spring 2014)

### ■ AQ FEATURE

# Two Views of Consulta Previa in Guatemala: A View from the Private Sector

BY [Cementos Progreso S.A.](#)

## **Lack of clarity of the regulations and lack of good faith by some community leaders have slowed important investments in Guatemala.**

[\*Read a view from Indigenous peoples here.\*](#)

Guatemala ratified International Labour Organization Convention 169 (ILO 169) on June 5, 1996, more than a year after Guatemala's Constitutional Court, the highest court in the country, ruled in Document 199-95 that the Convention did not contradict the Guatemalan Constitution.<sup>1</sup>

But the lack of clarity in ILO 169 and the absence of clear national guidelines for setting up a consulta previa process, despite the Court's decision, have left the door open for conflict and misinterpretation that has harmed, rather than helped, the people the Convention intended to serve. Nearly 10 years later, Guatemala still does not have a clear path for the development of regulations that can balance commercial and investment interests with the rights of Indigenous peoples.

Guatemala isn't alone. Latin American countries make up the largest group of signatories to the Convention: as we like to say, ILO 169 "speaks Spanish." Of the 185 ILO member states, only 22 have ratified the Convention—and 13 of those countries are Spanish-speaking Latin American states.<sup>2</sup> Yet most of them are still waiting for clear guidelines about how to proceed.

Article 6 of ILO 169 obligates states to consult with Indigenous communities on all the "legislative or administrative measures that might directly affect them." Many countries, lacking the capacity to exploit their nonrenewable natural resources, have granted concessions to private companies in exchange for tax revenue. That has provoked conflict.

But today, the right has expanded to other areas: decisions to approve laws, build schools and roads to distant communities or spray illicit crops.

### **The Complexity of Consultation in Guatemala**

Most of the movements that claim to represent and uphold the defense and rights of Indigenous peoples in Guatemala, including the defense and promotion of consulta previa, have common characteristics. They emerged from the conflict and the peace negotiations; they make intensive use of social networks and communications; and they are led by a few leaders who monopolize the causes of excluded, minority groups. In their name, they fight for land rights, for ancestral rights over natural resources, and against discrimination.



Cementing the deal? Guatemalan President Otto Pérez Molina pours the first shovel of cement for the contested factory in San Juan Sacatepéquez in July 2013. Photo: Johan Ordonez/AFP/Getty.

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Although these movements proclaim passive resistance, their methods and actions can turn violent and sometimes fatal. When members of the groups are prosecuted, they rely on special treatment and denounce what they call the criminalization of social protest. In reality, they are engaging in criminal acts such as attacking company employees and trespassing. As a result, they avoid conviction and remain outside the law.

The leaders of these movements are also active internationally. They frequently use forums like the Inter-American Human Rights system to denounce the lack of consultation on the projects—often bypassing the requirement that groups must have exhausted all domestic judicial recourse before receiving a hearing at the Inter-American Commission on Human Rights. As a result, the burden of proof is placed on the state and the private company holding title to the concession through a contract or license.

Quite frequently, even after no incriminating evidence is found against the accused entity following an investigation, no favorable pronouncement is released. But unfortunately, none of these decisions offers compensation for the damage suffered to the reputation of the state or the private investor.

**The Impact**

In Guatemala, in cases related to firms such as Cementos Progreso, the government has been put on the defensive even when all parties to the agreement have played by the rules. Many communities have undertaken what are erroneously named “community consultations” related to mining projects, but which are, in fact, plebiscites that manipulate information about a project to ensure its rejection.

The fact that such false consultations take place underlines the central problem of lack of clarity. The problem was recognized by former UN special rapporteur on the rights of Indigenous peoples, James Anaya, who said in a preliminary report on his June 2010 visit to Guatemala that, “The absence of a legislative and institutional framework for this subject has resulted in consultation processes that are, at

the very least, inadequate from the point of view of international standards recognizing the rights of Indigenous peoples.”<sup>3</sup>

Meanwhile, those whom the Convention was intended to benefit have only continued to suffer. In Guatemala, the economic condition of Indigenous peoples, who make up more than 50 percent of the population, has not improved since the government signed ILO 169 in 1996. Some 73 percent of Guatemala’s Indigenous communities live in poverty; 28 percent live in extreme poverty.<sup>4</sup> The foreign investment that could have brought jobs and raised standards of living has been sadly absent. Concerns about crime and violence, the lack of qualified labor and deficient infrastructure have been factors, along with the mounting uncertainty over property rights.

So why has a convention on Indigenous rights, created by an organization supposedly dedicated to creating dignified and decent jobs, impeded investment that would bring work and development to those most in need of it? Was this the original intention of this political instrument, or has it simply been used by multinational groups with ideological interests who are determined to block investments, promote institutional instability or nationalize industries?

When the international and Guatemalan advocates for ILO 169 can start answering these concerns, solutions will start to emerge.

Guatemala has large, unexploited mineral reserves that represent a great opportunity. Although most of the projects extracting non-renewable natural resources are developed on private property, the most recent examples of consultation—again, the misnamed “community consultations”—have been manipulated by diverse social groups from across the country that do not represent the people living near the projects.

Instead, the local communities have become tools of a broader anti-mining campaign. As a result, a mechanism that was intended to aid sustainable community development has become an obstacle to that very end.

## **Our Case**

Since 2006, Cementos Progreso, a company with 100 percent Guatemalan capital, has invested more than \$478 million (of \$800 million in total) to develop the San Gabriel project in the municipality of San Juan Sacatepéquez, one of the poorest areas of the country just 12 miles (20 km) from the capital.

Our aim was to generate industry, development and prosperity through five components: the construction of a cement plant with an investment of \$750 million; the development of education programs to benefit the children of the area; the establishment of reforestation programs with investments amounting to \$18 million; the establishment of alliances between the Secretaría de Planificación y Programación de la Presidencia (Ministry of Planning and Programming—SEGEPLAN), the municipality and the company to design and execute development plans for the project’s zone of influence, with an investment of \$250,000; and finally, the construction of a nine-mile (14.5 km) stretch of highway at a value of \$63 million that will form part of the regional ringroad, indirectly benefiting over 600,000 people in the northwest of the country—an historically abandoned area due to lack of infrastructure.

As a firm with one of the longest histories in Guatemala, having produced cement and superior aggregates for over 114 years, Cementos Progreso has provided work for more than 6,000 Guatemalans. Since 2007, the company has paid the state over \$500 million in taxes. In the past 10 years, our corporate foundation, the Carlos F. Novella Foundation, has provided technical and financial assistance to education programs benefiting more than 1,500 teachers, 650 schools, 260,000 children and youth, and approximately 1,300 adults.

We have attempted to engage local communities and comply with the letter and spirit of ILO 169, despite the lack of clear guidance on the issue. The company has participated in all the initiatives and efforts of the government to promote dialogue between the parties concerned.

Nevertheless, isolated but important instances of confrontation have occurred in San Juan due to information irresponsibly manipulated and disseminated by regional and national Indigenous, campesino and environmental organizations. A few small groups have even threatened the communities who support the project and the company. Their tactics have prevented an informed, balanced discussion of the project. And in some cases, they have blocked workers' access to the site, harassing employees and surrounding communities.

Notwithstanding this opposition, the Guatemalan government, through its 2010 Memoria de Labores (Annual Work Report) from the Ministry of Labor and Social Prevention to the ILO Committee of Experts on the Application of Conventions and Recommendations, approved the ongoing dialogue that Cementos Progreso was conducting.

The Guatemalan government's report to the Committee of Experts regarding the implementation of ILO 169 said that the consultations Cementos Progreso has conducted over the previous three years were in accordance with the spirit of Article 15, Number 2 of ILO 169.<sup>5</sup>

“Therefore,” the report concluded, “the commitment to carry out a process of consulta previa for the construction of the cement plant in San Juan Sacatepéquez has been complied with, although to date there still exists a diffuse social leadership, which does not represent the legitimate interests of local communities and is determined to obstruct the development of the project [...]”<sup>6</sup>

It should be mentioned that the national and municipal governments, the local communities and the company keep an open space for dialogue, in the spirit of consultation that is “without end.”

Given Guatemala's dire economic situation and the challenges to investment in the country, the government must promptly establish clear and definitive guidelines for consulta previa and enforce those norms.

Not all companies, Guatemalan or foreign, can make such enormous efforts to carry out projects as we have. In truth, if the government doesn't step up soon and define and enforce specific regulations to govern consulta previa, our economy will suffer.

Worse, opportunities for those who need them most will be delayed or lost.

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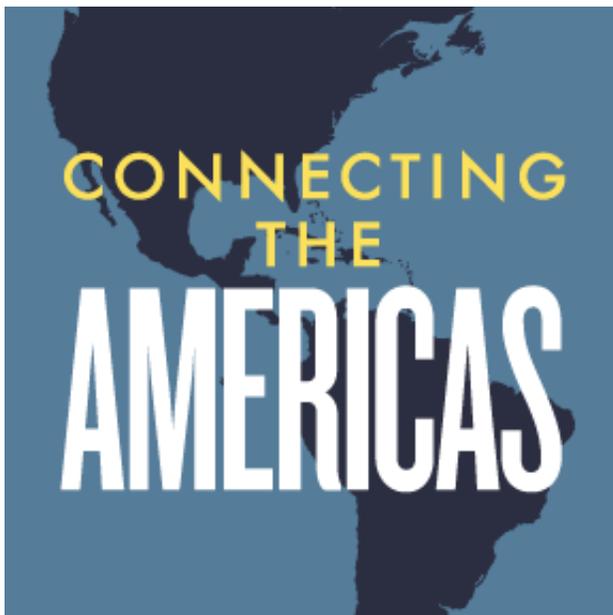
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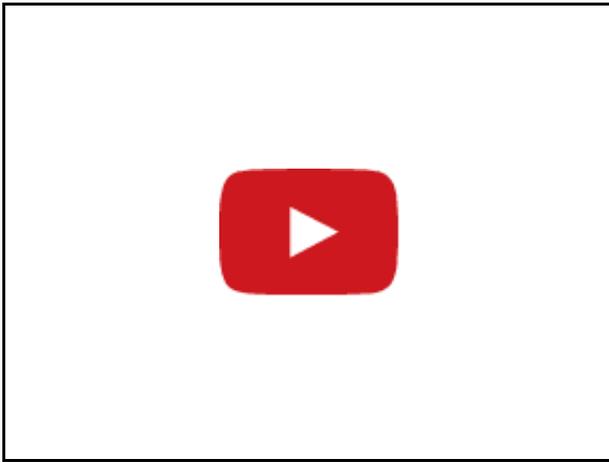
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