

General observation

The Committee has been examining detailed reports on Convention No. 169 since the Convention came into force in 1991. The Committee notes that to date 22 countries have ratified the Convention. It also notes that one of the issues that it has most often examined since the Convention has been adopted relates to the “obligation to consult”.

The Committee has taken note of the comments made in June 2010 during the 99th Session of the International Labour Conference (ILC) in the Committee on the Application of Standards concerning the comments made in respect of the application of Convention No. 169 by a number of member States and the Employer members and, in particular, the comments made on the meaning and scope of “consultation” as provided for by the Convention. The Committee considers that it is important, in view of the significance of this concept under the Convention for the indigenous and tribal peoples, for governments and the social partners to further clarify its understanding of the concept.

The Committee of Experts has, on a number of occasions, stated that, although its mandate does not require it to give definitive interpretation of ILO Conventions, in order to carry out its function of determining whether the requirements of Conventions are being respected, it has to consider and express its views on the legal scope and meaning of the provisions of Conventions, where appropriate.¹ In doing so, the Committee has always paid due regard to the textual meaning of the words in light of the Convention’s purpose and object as provided for by [Article 31 of the Vienna Convention on the Law of Treaties](#), giving equal consideration to the two authoritative texts of ILO Conventions, namely the English and French versions ([Article 33](#) of the Vienna Convention). In addition and in accordance with [Articles 5](#) and [32](#) of the Vienna Convention, the Committee takes into account the Organization’s practice of examining the [preparatory work](#) leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role the tripartite constituents play in standard setting.

In examining this question, the Committee has taken special note of the comments made by the Employer members of the Conference Committee on the Application of Standards that it had interpreted the right to consultation in such a way as to impose a more exacting requirement upon the government beyond that

¹ See ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, [para. 32](#); ILC, 73rd Session, 1987, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, [para. 21](#); ILC, 77th Session, 1990, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, [para. 7](#); ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, [paras 11 and 12](#).

envisaged by the Convention.² This comment was made in the context of the request made by the Committee of Experts in a case concerning the application by the Government of Peru of Convention No. 169 and which was discussed by the Conference Committee in June 2010.³

In light of the above, the Committee makes this general observation in order to clarify its understanding of the concept of “consultation” in the hope that this will result in an improved application of the Convention particularly as it concerns this right. This would be a follow-up to the general observation made by this Committee in 2008. It notes the statement made by the Employer spokesperson during the general discussion of the Conference Committee in June 2009 that “the general observations on social security and indigenous and tribal peoples did not raise any particular issues and were an illustration of the correct approach to making general observations that were useful and contributed to the implementation of the Conventions concerned”.⁴

As a general matter the Committee notes that, in view of the tripartite nature of the ILO, most of its Conventions make specific provision for consultation between governments and representatives of employers and workers or their organizations and of those concerned by the issues involved on the matters covered by the Conventions. Convention No. 169 is no exception. However, the provisions relating to “consultation” in Convention No. 169 specifically address consultation with indigenous and tribal peoples. The relevant provisions of the Convention are *Articles 6, 7, 15 and 17*.⁵ *Articles 27 and 28* also refer to consultation specifically regarding education.

² See ILC, 99th Session, 2010, *Provisional Record* No. 16, Part One, [para. 54](#); Part Two, [pp. 103–107](#).

³ *ibid.*, Part Two, [p. 106](#).

⁴ See ILC, 98th Session, 2009, *Provisional Record* No. 16, Part One, [para. 50](#).

⁵ *Article 6*

1. In applying the provisions of this Convention, governments shall:
 - (a) 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;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁵

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The presence of consultation in the abovementioned provisions signifies a comprehensive approach. These provisions on consultation were among the fundamental principles included in the revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), as a necessary requirement to eliminate the integrationist approach of that Convention. In order to properly understand the scope of this new principle inserted in Convention No. 169, the Committee

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining 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. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

undertook an exhaustive review of the preparatory work leading up to the inclusion of this principle and right in Convention No. 169.

The Committee notes that *Articles 6 and 15* were the subject of extensive debate and amendments during the two years of preparatory discussions leading to the adoption of Convention No. 169.

Concerning *Article 6*, the extensive preparatory work on this provision suggests that the tripartite constituents sought to recognize:

- (a) that indigenous and tribal peoples have a right to participate in the decision-making process in the countries in which they live for all issues covered by the revised Convention and which affect them directly;
- (b) that this right of participation should be an effective one, offering them an opportunity to be heard and to have an impact on the decisions taken;
- (c) that in order for this right to be effective it must be backed up by appropriate procedural mechanisms to be established at the national level in accordance with national conditions; and
- (d) that the implementation of this right should be adapted to the situation of the indigenous and tribal peoples concerned in order to grant them as much control as is possible in each case over their own economic, social and cultural development.⁶

The Committee notes the evolution of the text of *Article 6* during the course of the two discussions by the Conference and the wording in *Article 6(a)*. The text proposed by the Office prior to the first discussion stated that governments should “seek the consent of the peoples concerned ...”. This wording was amended by the Conference during the first discussion to read that governments should “consult fully the (peoples/population) concerned”. Based on comments received from constituents between the first and second discussions by the Conference, the Office deleted the word “fully”. In its place, the Office proposed an additional paragraph 2 to *Article 6* as follows:

1. In applying the provisions of this Convention, governments shall:
 - (a) 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;
 - (b) ...
 - (c) ...
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁷

⁶ See [ILC, 75th Session, 1988, Report VI\(1\), p. 30](#).

⁷ See [ILC, 76th Session, 1989, Report IV\(2B\), p. 10](#).

The Office explained that paragraph 2 sought to clarify the meaning and scope of paragraph 1(a). This was the final version of the text as adopted by the Conference during the second discussion. A number of amendments proposed during that discussion were not retained. Reference was made to the consensus reached that the term “consult” meant to consult in good faith.⁸ The Committee also noted the statement by a representative of the Office during the second discussion that in drafting the text of paragraph 2 it “had not intended to suggest that the consultations referred to would have to result in the obtaining of agreement or consent of those being consulted, but rather to express an objective for the consultations”.⁹

Article 15(2) states that “... governments shall establish and maintain procedures through which they shall consult these peoples, with a view to ascertaining 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”.

During the second stage of the preparatory work, the Office explained that, while the original proposal that had been contained in the proposed Conclusions concerning this provision had included the phrase “seek the consent”, which would have required that consent be obtained, it was clear from the first discussion that this phrase was not acceptable to a sufficiently large proportion of the membership and it could therefore not include it in the proposed text being submitted to the Conference for a second discussion. The Office had instead proposed alternative wording intended to convey that an attempt should be made in good faith to obtain the consent of the peoples concerned before undertaking exploration and exploitation activities in their territories, without indicating that they should have a veto over government decisions.¹⁰ The text of the Office had referred to *Article 6* of the proposed Convention, which used the words “seek to obtain the agreement of these peoples”. The final text adopted by the Conference was the result of a negotiated solution concerning a number of provisions.¹¹ As a result, the text of *Article 15(2)* was modified to read “they shall consult these peoples”.

⁸ See ILC, 76th Session, 1989, *Provisional Record* No. 25, [para. 68](#)

⁹ *ibid.*, [para. 74](#).

¹⁰ See ILC, 76th Session, 1989, Report IV(2A), [pp. 40–41](#).

¹¹ Most of these provisions were referred to a working group and the proposals were submitted to the Committee for adoption as a package. They were adopted by consensus.

It is only in *Article 16*, concerning removal, relocation and the right of return to their traditional lands, that a very precise formulation of consent exists.¹² *Article 16(2)* expressly provides for the “free and informed consent” of indigenous and tribal peoples where their relocation from lands they occupy is considered necessary as an exceptional measure.

Concerning *Article 17(2)* dealing with the transmission of land rights, the Office had modified its original proposal which would have required the consent of the peoples concerned. In the text prepared by it for the second discussion, it proposed instead the wording “[t]he peoples concerned shall be consulted ...”, which was adopted by the Conference unchanged.

Finally, the Committee notes that the Conference adopted a resolution, at the same time as the Convention, in which it specifically called upon governments to establish appropriate consultative machinery enabling indigenous and tribal peoples to express their views on all aspects of the Convention.¹³

The Committee of Experts in reviewing countries’ compliance with the Convention has remained true to the above understanding of the Convention. It has consistently indicated that “consultation and participation” constitute the cornerstone of Convention No. 169 on which all its provisions are based. Its general observation of 2008, published in 2009, reflected the above understanding of the relevant provisions of the Convention concerning the concept of consultation. The Committee stated:

With regard to consultation, the Committee notes two main challenges:
(i) ensuring that appropriate consultations are held prior to the adoption of all legislative and administrative measures which are likely to affect indigenous and

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Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

¹³ See resolution on ILO action concerning indigenous and tribal peoples, ILC, 76th Session, 1989, *Provisional Record* No. 25, pp. 32–33.

tribal peoples directly; and (ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted. The form and content of consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties. If these requirements are met, consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict. The Committee, therefore, considers it important that governments, with the participation of indigenous and tribal peoples, as a matter of priority, establish appropriate consultation mechanisms with the representative institutions of those peoples. Periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned, should be undertaken to continue to improve their effectiveness.

The Committee encourages governments to continue their efforts, with the participation of indigenous and tribal peoples, in the following areas, and to provide information in future reports on the measures taken in this regard:

- developing the measures and mechanisms envisaged in *Articles 2 and 33* of the Convention;
- establishing mechanisms for participation in the formulation of development plans;
- including the requirement of prior consultation in legislation regarding the exploration and exploitation of natural resources;
- engaging in systematic consultation on the legislative and administrative measures referred to in *Article 6* of the Convention; and
- establishing effective consultation mechanisms that take into account the vision of governments and indigenous and tribal peoples concerning the procedures to be followed.¹⁴

The Committee notes the positive statement made by the Employer members concerning its general observation of 2008 on the Convention and referred to above. It also notes that the above understanding of the relevant provisions of Convention No. 169 has also been endorsed by a number of tripartite committees examining representations against governments for failure to comply with the provisions of the Convention.¹⁵

In the case of Ecuador, the tripartite committee, in its report approved by the Governing Body in 2001, referred to the preparatory work of the Convention and

¹⁴ See ILC, 98th Session, 2009, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), [pp. 672–673](#).

¹⁵ Four tripartite committees established by the Governing Body under article 24 of the ILO Constitution to examine representations have examined this obligation in the context of Convention No. 169: the cases of [Colombia](#) and [Ecuador](#) in 2001, [Argentina](#) in 2008 and [Brazil](#) in 2009.

stated that it considered that the “concept of consulting the indigenous communities ... includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord”.¹⁶ It indicated that a simple information meeting cannot be considered as complying with the provisions of the Convention and that the consultation should occur beforehand, which implies that the communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies. Taking into account the preparatory work, the tripartite committee in that case concluded that, while *Article 6* did not require consensus to have been reached in the process of prior consultation, it does stipulate that the peoples involved should have the opportunity to participate freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly, as from the date on which the Convention comes into force in the country.¹⁷

In the representation filed against Colombia under the Convention, the tripartite committee, in its report approved by the Governing Body in 2001, considered that the concept of consultation under the Convention must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith and the sincere desire to reach consensus. The tripartite committee concluded that a meeting conducted merely for information purposes or meetings or consultations conducted after the granting of an environmental licence did not meet the requirements of *Articles 6 and 15(2)* of the Convention.¹⁸

In the case of the representation filed against Argentina, the tripartite committee, in its report approved by the Governing Body in 2008, pointed out that *Article 6* of the Convention does not stipulate that consent must be obtained in order for the consultation to be valid, but that it does require pursuit of the objective of achieving consent, which means setting in motion a process of dialogue and genuine exchange between the parties to be carried out in good faith.¹⁹

Finally, in the representation filed against Brazil, the tripartite committee, in its report approved by the Governing Body in 2009, gave an extensive explanation of the consultation process provided for under *Article 6* of the Convention.²⁰ The tripartite committee in that case recalled that consultation and participation are the cornerstone of the Convention and that such mechanisms are not merely a formal

¹⁶ See [GB.282/14/2, paras 36–39](#).

¹⁷ *ibid.*, [para. 36](#).

¹⁸ See [GB.282/14/3, para. 90](#).

¹⁹ See [GB.303/19/7, para. 81](#).

²⁰ See [GB.304/14/7, paras 42–44](#).

requirement, but are intended to enable indigenous peoples to participate effectively in their own development.²¹ It stated that consultation must take place in accordance with procedures that are appropriate to the circumstances, through indigenous peoples' representative institutions, in good faith and with the objective of achieving agreement or consent to the proposed measures. Concerning "appropriate procedures", the tripartite committee stated that there is no single model, which should take into account national circumstances, the circumstances of the indigenous peoples concerned and the nature of the measures which are the object of the consultation process.²² The tripartite committee also made it clear that *Article 6* must be understood within the broader context of consultation and participation, particularly within the framework of *Article 2(1)* and *Article 33*, which require the development, with the participation of the peoples concerned, of coordinated and systematic action to protect their rights and guarantee their integrity,²³ and to ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned.²⁴ The tripartite committee noted that "consultation, as envisaged in the Convention, extends beyond consultation on specific cases: it means that application of the provisions of the Convention must be systematic and coordinated, and undertaken with indigenous peoples ...".²⁵

Taking into account all the elements indicated above, the Committee wishes thus to restate its understanding of the concept of consultation as concerns: the subject matter of consultation or participation; who should be responsible for such consultation; and the characteristics of consultation.

Concerning the subject matter, the Committee considers that consultation of indigenous and tribal peoples is specifically required in respect of the following: legislative or administrative matters which may affect them directly (*Article 6(1)(a)*); undertaking or permitting any programmes for the exploration or exploitation of mineral or sub-surface resources pertaining to their lands (*Article 15(2)*); whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community (*Article 17(2)*); and specific matters related to education (*Articles 27(3) and 28(1)*).

Free and informed consent of indigenous and tribal peoples is required where relocation of these peoples from lands which they occupy is considered necessary as an exceptional measure (*Article 16(2)*).

²¹ [ibid., para. 44.](#)

²² [ibid., para. 42.](#)

²³ [Article 2\(1\).](#)

²⁴ [Article 33\(1\).](#)

²⁵ See [GB.304/14/7, para. 43.](#)

The participation of indigenous and tribal peoples is required in respect of the following: the development of coordinated and systematic action to protect the rights of indigenous and tribal peoples and to guarantee respect for their integrity (*Article 2(1)*); the adoption of policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work (*Article 5(c)*); decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them (*Article 6(1)(b)*); the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly (*Article 7(1)*); the improvement of the conditions of life and work and levels of health and education (*Article 7(2)*); the use, management and conservation of the natural resources pertaining to their lands (*Article 15(1)*); and ensuring that traditional activities are strengthened and promoted (*Article 23(1)*).

With respect to the authority responsible for consultation, *Articles 2 and 6* put that responsibility on governments. Governments are required under *Article 6* to “consult the peoples concerned, through appropriate procedures ...” and to “establish means by which these peoples can freely participate ...”.

Concerning the nature of consultation, from the review of the preparatory work concerning Convention No. 169 and from the review of the wording of the two authoritative texts of the Convention, the Committee concludes that it was the intention of the drafters of the Convention that the obligation to consult under the Convention was intended to mean that:

- (1) consultations must be formal, full and exercised in good faith;²⁶ there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;
- (2) appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
- (3) consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures;
- (4) consultations have to be undertaken with the *objective* of reaching agreement or consent to the proposed measures.

It is clear from the above that pro forma consultations or mere information would not meet the requirements of the Convention. At the same time, such consultations do not imply a right to veto,²⁷ nor is the *result* of such consultations necessarily the reaching of agreement or consent.²⁸

²⁶ See ILC, 76th Session, 1989, Report IV(2A), [pp. 19–21](#).

²⁷ See ILC, 76th Session, 1989, *Provisional Record* No. 25, [para. 74](#).

²⁸ [Ibid.](#)

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The Committee hopes that the above clarifications will assist governments to effectively implement the Convention and the indigenous and tribal peoples to be able to enjoy the protection and benefits of the Convention. It also hopes that it will strengthen the dialogue between governments, employers' and workers' organizations concerning the objectives and content of the Convention, with the active participation of organizations and institutions of indigenous and tribal peoples as called for by the resolution adopted by the Conference in 1989.

The Committee considers that its understanding of the meaning of consultation has remained faithful to both the letter and the spirit of the relevant provisions of Convention No. 169, the preparatory work leading to its adoption and the findings of the tripartite committees that the Governing Body has established to examine representations filed against certain member States concerning non-compliance with Convention No. 169.

In its functions, the Committee makes recommendations to promote the effective implementation of the Convention. Concerning the issue as to whether the Committee can make recommendations regarding the suspension of activities pending consultation, the Committee wishes to state that it is clearly not a court of law and as a result cannot issue injunctions or provisional measures. It notes that, in the cases in which it made a recommendation that has been interpreted as such, it had been communicating with the countries concerned for a number of years requesting them to take the necessary measures to consult the indigenous and tribal peoples concerned in accordance with the provisions of the Convention.

The Committee therefore concludes that the Convention requires that there should first be real in-depth consultations with the representative institutions of indigenous and tribal peoples and that sufficient efforts should be made, in so far as possible, to reach joint solutions, since this is the cornerstone of dialogue. It is also an important tool in achieving the goals of sustainable development.

ANNEX
(Texts linked to footnotes)

Footnote 1: ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 32:

32. The Committee's terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution. Nevertheless, in order to carry out its function of evaluating the implementation of Conventions, the Committee has to consider and express its views on the meaning of certain provisions of Conventions. [\(Back to Footnote 1\)](#)

ILC, 73rd Session, 1987, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 21:

21. The Committee has also pointed out that its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution; nevertheless, in order to carry out its function of evaluating the implementation of Conventions, the Committee has to consider and express its views on the meaning of certain provisions of Conventions. [\(Back to Footnote 1\)](#)

ILC, 77th Session, 1990, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 7:

7. The Committee has examined the views expressed in the Conference Committee on the Application of Standards, at its 76th Session (1989), by the Employer members and certain Government members as regards the interpretation of Conventions and the role of the International Court of Justice in this connection. The Committee has already had occasion¹ to point out that its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution of the ILO. Nevertheless, in order to carry out its function of determining whether the requirements of Conventions are being respected, the Committee has to consider and express its views on the content and meaning of the provisions of Conventions and to determine their legal scope, where appropriate. It therefore appears to the Committee that, in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally recognised. The situation is identical as regards the conclusions or recommendations of commissions of inquiry which, by virtue of article 32 of the Constitution, may be affirmed, varied or reversed by the International Court of Justice, and the parties can only duly contest the validity of such conclusions and recommendations by availing themselves of the provisions of article 29, paragraph 2, of the Constitution. The Committee considers that the acceptance of the above considerations is indispensable to maintenance of the principle of legality and, consequently for the certainty of law required for the proper functioning of the International Labour Organisation. [\(Back to Footnote 1\)](#)

ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, paras. 11 and 12:

11. In stating that in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally recognised, the Committee of Experts does not regard those views as decisions having the authority of res judicata. as the Committee is not a court of law. Furthermore, as it has already pointed out on more than one occasion, it has never regarded its views as binding decisions based on a definitive interpretation of the Conventions of which it examines the application by member States. However, it considers that the proper functioning of the standard-setting system of the International Labour Organisation requires that a State should not contest the views expressed by the Committee of Experts on the application of a provision of a Convention that it has ratified and at the same time refrain from making use of the established procedure for obtaining a definitive interpretation of the Convention in question. In such a situation, a doubt would remain as to the obligation to apply the provisions in question and every State would have a power conferred on it which is not conferred by international law. The result would be legal uncertainty as to the meaning and scope of the provisions concerned as long as the question is not settled by a decision of the International Court of Justice; GENERAL REPORT such a situation would be prejudicial to the certainty of law required for the proper functioning of the standard-setting system of the ILO.

12. The views of the Committee of Experts are generally accepted, amongst other reasons, because the Committee is composed of independent persons with direct experience of the different legal systems and because of its tradition of objectivity and impartiality and the careful attention it pays to the work of the other supervisory bodies of the ILO. The Committee of Experts is not the only body to deal with the problem of the application of Conventions and its evaluations do not prevail erga omnes. Its functions require it to determine whether the provisions of a given Convention are observed and hence to examine their content and meaning, and determine their legal scope. It is essential for the ILO system that the views that the Committee is called upon to express in carrying out its functions, in the conditions recalled above, should be considered as valid and generally recognised, subject to any decisions of the International Court of Justice which is the only body empowered to give definitive interpretations of Conventions. The Employer members of the Conference Committee themselves stated that as a general rule they observe the views of the Committee of Experts, though they reserve the right to depart from them. The Committee observes that this statement is not incompatible with the assertions in paragraph 7 of its 1990 report.

[\(Back to text\)](#)

Footnote 2: ILC, 99th Session, 2010, Provisional Record No. 16, Part One, para. 54:

54. With specific reference to the Indigenous and Tribal Peoples Convention, 1989 (No. 169), the Employer members referred to observations on certain countries made by the Committee of Experts, according to which certain governments were asked, pursuant to Article 15(2) of Convention No. 169, to suspend the implementation of existing projects, the exploitation or exploration of activities and implementation of infrastructure projects and the exploration and exploitation of natural resources. The Employer members pointed out that such requests did not have a basis in the Convention and had to be eliminated as soon as possible. The Committee of Experts was not a court of law and could not, in effect, request economic activity to stop.

[\(Back to Footnote 2\)](#)

ILC, 99th Session, 2010, Provisional Record No. 16, Part Two, pp. 103-107:

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The Employer members stated that the present case was one that exemplified how the ILO's supervisory machinery should ideally function, and also demonstrated the importance of having a diversity of cases before the Committee. They noted that in the information it provided, the

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Government had directly addressed virtually all of the points raised in the Committee of Experts' report, and the Committee's conclusions of last year. With regard to the Act on Prior Consultation, they noted the following: (1) the Act's definition of indigenous and tribal peoples was consistent with that contained in the Convention; (2) the Act laid down the right of prior consultations of indigenous and tribal peoples with respect to any legislative or administrative measure affecting them; (3) the consultations envisaged by the Act were to be held with a view to achieving consent on the measures proposed and, if agreement in this respect could not be reached, the Government was required to make a decision taking into consideration the rights of indigenous peoples; (4) the Act had to be interpreted in accordance with the provisions of Convention No. 169; (5) representative organizations of indigenous and tribal peoples had been consulted prior to the adoption of the Act on prior consultation; and (6) the drafting of the Act took into consideration several documents, including: the drafts presented by the Office of the Ombudsperson and parliamentarian groups (Bloque Popular, Nacionalista and Union por el Peru), the results of the Working Group No. 3 of the National Coordination Group for the Development of the Amazonian Peoples which was integrated by representatives of the Executive and indigenous Amazonian organizations, and the report on prior consultations prepared by the special commission established to study and recommend solutions for indigenous people's issues. Although it was for the Committee of Experts to evaluate the conformity of the provisions of the Act with the Convention, they underscored that it was nevertheless important to recognize the actions taken by the Government and commended it for them. The Government had amply demonstrated its commitment to respond to the conclusions of the ILO supervisory bodies.

They noted that a number of actors and organizations had commented favourably on the Act. Several organizations, including the Inter-Ethnic Association for the Development of the Peruvian Rainforest (AIDSESP), the Peasant Farmers' Confederation of Peru (CCP), National Agrarian Confederation (CCNA), the National Coordinating Committee for Communities Affected by Mining (CONACAMI) and the Confederation of Amazonian Nationalities of Peru (CONAP), all considered the Act on Prior Consultation an important achievement. The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples commended the law's adoption and considered that it could establish an important precedent as a best practice for other countries of the region and the world. With regard to the Committee of Experts' request that the exploration and exploitation of natural resources be suspended until the peoples affected and covered by the Convention were consulted, the Employer members maintained that the Convention did not provide for or envisage such injunctive authority. Stating that injunctions of this nature held potentially serious consequences for a nation's economic activity, in particular its ability to attract foreign direct investment, they stressed that this request of the Committee of Experts needed to be re-examined. The Experts needed to understand that the real issue was that economic activity resulted in taxes and revenues that supported the local communities. The conclusion of the Experts that economic activity should stop was not supported by the legislative history of the Convention and jeopardized foreign direct investment.

They recalled that Article 6 of the Convention was the principal clause concerning the right of consultation, and that the definition of the latter term had been extensively discussed in the deliberations preceding the Convention's adoption. From the records of these discussions, it was clear that consultation did not equate to, or require, the consent of the parties being consulted. The record of the second round of discussions preceding the Convention's adoption showed that the Employers' group believed the term "consultations" to signify "dialogue, at least", and the Office itself had stated that it did not consider the consultations referred to, to require the agreement or consent of those being consulted. In its observation, however, the Committee of Experts appeared to have interpreted the term so as to impose a more exacting requirement upon the Government beyond that envisaged by the Convention; the potential consequences of this interpretation would be discussed and examined by several of the Employer members in the course of the discussion.

The Worker members indicated that the discussion of this case formed part of the follow-up to the discussion held in 2009 and the serious incidents that had occurred in Bagua, leaving 33 dead. These incidents had been related to the adoption by the Government of decrees affecting the

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rights of indigenous and tribal peoples to lands and to natural resources. The decrees were not in conformity with the provisions of Convention No. 169, which called for consultation with the peoples concerned, through appropriate procedures, and in particular through their representative institutions, whenever consideration was being given to legislative or administrative measures which might affect them directly. Following his visit to the country, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples had also confirmed the seriousness of the situation. Following the incidents of 2009, a commission had been established to investigate the violence that had occurred in Bagua. Nevertheless, there remained the greatest confusion as to the functioning of the commission, and particularly with regard to its impartiality. Although a report had been published, it had not shed light on those directly responsible, nor had it been signed by the representatives of indigenous peoples.

In this context, the indigenous peoples had called for the adoption of legislation requiring the State to consult them. On 19 May 2010, the Parliament had approved a Bill on prior consultations, which appeared to contain an exhaustive list of the principles to be followed to achieve consultation within the meaning of the Convention and could therefore serve as a first step in the improvement of relations. However, neither the Committee of Experts nor the Conference Committee had yet examined the legislative text in question, despite the commitment given by the Government to provide information on the measures taken to bring the national legislation into conformity with the Convention. The Conference Committee was therefore not able to express an opinion on whether or not the Act on Prior Consultation of May 2010 was in conformity with the Convention, both in terms of its scope of application and in relation to the protection provided, consultation procedures and the concept of "land" covered by Article 13 et seq. of the Convention. The Act needed to be in conformity with the definition of indigenous peoples, but also with the fact that these peoples "owned" the lands with which they had a special relationship. The Government had also undertaken to prepare and adopt a plan of action, in consultation with indigenous organizations, as indicated in the conclusions of the Committee the previous year, which referred to the establishment of mechanisms for permanent dialogue between the Government and Amazonian indigenous peoples and a multisectoral commission which would constitute another dialogue mechanism. Nevertheless, one year later, no plan had been adopted and the ad hoc dialogue body had not had any tangible effects.

The action taken by the INDEPA also raised problems in view of its lack of knowledge of the problems and the lack of representation of indigenous peoples within it. In July 2009, the INDEPA, despite the fact that it had an essential role to play in the application of the law and the promotion of indigenous peoples, had engaged in acts of political interference in the operation of the Amazonian organization AIDSESEP with a view to obstructing its action. These allegations of partiality were damaging to the Institute and could only jeopardize the application of the law once it had been adopted. It also appeared that the AIDSESEP had not been consulted concerning the project to relocate Amazonian peoples, even though this project endangered the social, political and economic integrity of Amazonian peoples and communities. Moreover, issues of relocation were covered by Article 16 of the Convention. These flawed consultations concealed major economic interests. The Ministry of Energy and Mining was continuing to grant permits for the exploitation of hydrocarbons without any consultation and contrary to the Act on Prior Consultation. Over recent weeks, 25 new oil and gas exploitation zones had been granted, mainly in Amazonia.

In conclusion, the Worker members indicated that, even if the Act on Prior Consultation constituted progress, it was necessary to remain cautious and the Committee should not reduce the pressure exerted on the Government. In practice, the Act still has to be approved by the President. In addition, the Act did not take into account the recommendations of the Committee of Experts relating to the suspension of concessions in indigenous lands, did not deal with the repeal of the previous legislation, nor of compensation for acts that were contrary to the Convention. It was therefore important for the Act to be examined by the ILO before its signature by the President. Doubts remained concerning the Government's real political will to comply with prior consultation procedures, particularly since several agreements concluded between the executive

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authorities and the organizations of Amazonian indigenous peoples had, in practice, not been supported by the executive authorities in Congress. An effective framework for collaboration with the INDEPA was essential to give effect in practice to the obligations deriving from the Convention. For that purpose, the composition of the INDEPA would need to be reviewed to ensure that it effectively represented the interests of the peoples covered by the Convention. In that respect, the Government could benefit from ILO technical assistance.

A Worker member of Peru observed that the tragic events that had occurred at Bagua had been the result of the failure to give effect to the Convention, as reflected in the eight points emphasized by the Committee of Experts. A true and impartial investigation into everything that had occurred in Bagua had not been carried out. The body entrusted with the investigation had not been able to issue an objective report in view of the refusal by the Government's representatives to accept any responsibility on the part of the legislative and executive authorities. She added that the Government had not prepared any plan of action beforehand in consultation with the representative organizations of indigenous peoples. The discussions referred to by the Government in the context of the dialogue round tables did not amount to an adequate response. They consisted of incomplete dialogue which included the Amazonian people, but not the Andean peoples.

With regard to the INDEPA, she noted that the necessary steps had still not been taken for its reform so as to allow dialogue concerning long-term policies and plans of action with the participation of indigenous peoples. It was not composed of real representatives of indigenous peoples. Its bodies were bureaucratic and did not include consultative mechanisms, and its officials lacked knowledge of indigenous peoples. The INDEPA supported the establishment of a parallel board of directors organized to hinder the functioning of AIDSESEP; the lack of impartiality by the body would have serious consequences for the application of the law.

The Act on Prior Consultation adopted by Congress on 19 May 2010 was a positive step obtained as a result of internal and international pressure, but it still had not been officially approved. It was regrettable that so many years had elapsed without the adoption of the consultation machinery envisaged in the Convention. There were serious doubts concerning the real commitment to give effect to the provisions of the Convention respecting consultation. There also remained many serious situations of conflict relating to the significant increase in the exploitation of the natural resources in the lands occupied by Andean and native communities, in relation to which they had not been consulted. Some 72 per cent of the Amazonian territory had been granted under concession for the exploration and exploitation of hydrocarbons, but the current participation mechanisms did not amount to real consultation. Progress needed to be made in the implementation of the recent Act on Prior Consultation and in the application of all the stages of consultation. Nor had legislative measures been adopted to guarantee the participation of indigenous peoples in the benefits from mining, oil and gas and compensation for the damage caused by such activities. Nor had the question of the lack of formal land title been resolved. The Government had not adopted educational measures to eliminate prejudice against indigenous people and the lack of indigenous teachers was a matter of concern.

Another Worker member of Peru stressed the importance of freedom of expression and the guarantees that were afforded by the rule of law. He confirmed that the Government had continued to hold dialogues with apus (tribal chiefs), non-governmental organizations and peasant farmers. He highlighted the importance of the judiciary carrying out its work to investigate the deaths of indigenous peoples and police staff, and to investigate the disappearances. It was important that the legislative authority carry out its work regarding the official approval of the Act on Prior Consultation. He said it would be advisable to broaden training for peasant farmers and indigenous peoples on their rights and obligations in order for them to be able to decide on their future democratically and in a sovereign manner.

The Employer member of Peru provided detailed information on the national legislation relating to the right to consultation. He explained that, although it was the State that granted the concession for exploiting natural resources, the title to the concession did not confer ownership of the land on the enterprise or holder of the concession, nor did it authorize them to begin

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operating. Before any exploration or exploitation could start, the holder of the concession should reach an agreement with the owner of the land. In the case of a concession located on community land, the Constitution guaranteed that peasant and indigenous communities had the autonomous right to use the land as they saw fit, within the framework of the law. There were a number of national laws and regulations that protected the rights and customs of indigenous peoples as well as an official standard for the protection of the environment. He described the integrated system for assessing environmental impact, which had standardized and transparent criteria, and procedures to ensure that the proper participatory channels were used. Moreover, with the new Act on Prior Consultation, the country could definitely be said to have the highest standards for consulting indigenous peoples in accordance with the terms of the Convention. In the case of the mining and energy sector, the existing standards required that, before any such activities could be started, it be ascertained whether the interests of the indigenous peoples inhabiting the area directly concerned by a project might be affected, so that any concerns regarding any possible social, economic, environmental or cultural impact could be examined and taken into account. The speaker felt that the Committee of Experts' observations were inappropriate, given that the country's standards complied amply with the objectives of the Convention. He concluded by stating that indigenous communities enjoyed the economic benefits accruing from the exploitation of natural resources by virtue of a levy, i.e. the share of State income deriving from the economic exploitation of those resources that local and regional governments were entitled to, irrespective of any compensation that enterprises might pay the owners for the use of their land.

The Government member of the Bolivarian Republic of Venezuela, spoke on behalf of the Government members of the Committee, Member States of the Group of Latin America and the Caribbean States (GRULAC). He cited the progress that had been made in ensuring that the Convention was applied, which had led to the drafting of a Development Plan for the Amazonian Peoples in which they participated fully, and the approval by Congress of the Act on Prior Consultation establishing the requirement that the indigenous peoples be consulted in advance so as to obtain their agreement or consent to any national or regional development plans, programmes or projects affecting their rights. He hoped that the conclusions to be adopted would take into account the discussion that had been held, without overlooking the new information, data and arguments put forward by the Government. In conclusion, he reiterated his firm hope that the Committee of Experts would confine itself to the explicit mandate it had received from the Governing Body.

The Worker member of Paraguay expressed his solidarity and committed support for the indigenous peoples and peasants of Peru, and expressed serious concern about the problems in applying the Convention. He said that the General Confederation of Workers of Peru (CGTP) and federations of peasants and indigenous peoples had repeatedly denounced the increase in conflicts in indigenous and campesino areas, and that such conflicts were closely related to access to, and control of, natural resources. In addition, the Government persisted in applying systematically a vertical administrative framework to Amazonian and Andean territories, which did not provide any guarantees of environmental protection. He pointed out that 72 per cent of the Amazonian area was dedicated to exploiting hydrocarbons, which meant that it was strategically and politically important to have a mechanism for the active participation of indigenous peoples and peasants relating to such activities. He regretted the fact that current legislation only provided for administrative and information measures, which did not in any way fulfil the obligation of consultation set out in the Convention. Given the risk of a resurgence in social conflicts related to the exploitation of natural resources because of lack of prior consultation, he requested that such obligation of consultation be implemented in practice as soon as possible.

The Employer member of Mexico argued that the Committee of Experts had exceeded its mandate. He explained that he had been the Employer spokesperson during the discussions that led to the adoption of Convention No. 169 and that he knew well the spirit of the provisions. It was inaccurate that consultations had to achieve agreement and it was incorrect to interpret that it was possible to require a hold on or suspension of economic activities. Article 6 of the Convention did not have, and never had, a binding nature. The Committee of Experts should not be able to change the meaning of the provisions of Conventions. He concluded by declaring that he felt that

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the Government was adopting a legislative package appropriate for implementation of the Convention.

The Worker member of the Bolivarian Republic of Venezuela highlighted the importance of ancestral rights of indigenous peoples as native peoples. She recalled that 70 per cent of the country's population had its ancestral roots in indigenous communities. She requested that the Government acknowledge the right of Peruvian indigenous peoples to maintain their culture and traditions. She urged the Government to enact the Bill on the right to prior consultations, end indiscriminate over-exploitation of natural resources, put an end to the persecution of Andean and union leaders and guarantee the right of indigenous peoples to mandatory consultation on decisions in which they had a say.

The Employer member of Colombia stated that only five of the provisions of the Convention related to labour issues and that the other topics included were outside the ILO's competence. There were many regional and international instruments, as well as specialized organizations, to guarantee the protection of indigenous peoples. The ILO should limit itself to the field of labour. He expressed his concern that the Committee of Experts wished to introduce an injunctive measure to suspend economic activity that did not exist in the Convention. He also pointed out that there was no justification in the Convention for a need to reach agreement through consultations.

The Worker member of France responded to certain statements of the Employer members by recalling that Convention No. 169 was not the only Convention in which the ILO had addressed questions of civilization in close synergy with the United Nations. The Convention had been adopted by the Conference, and it was an international treaty that, once ratified by a member State, had to be implemented in its entirety. As regards the calling into question of the Committee of Experts' mandate and impartiality, it should be recalled that the interpretation of the text of a Convention was indispensable in order to clarify how its objective might be effectively attained. It should therefore be stressed that the Committee of Experts had not exceeded its prerogatives. The speaker emphasized that the word "consultation", as reflected in the text of the Convention, implied that consultations had to be undertaken in good faith, that is to say taking into account the views expressed. In the case under discussion, however, the Committee of Experts considered that the Government had not conformed to the objective of the Convention. He expressed the hope that the Act on Prior Consultation, referred to by the Government, would resolve the problem. However, the fact that three-quarters of the country had already been handed over for exploitation was a source of concern. The value of the territories went far beyond their market value. The discussion of this case revealed two conflicting ideologies: on the one hand, a capitalist approach, and on the other, a philosophy of sustainable development.

The Employer member of Ecuador expressed his concern at the interpretation of Article 6 of the Convention. The Convention did not authorize indigenous or tribal groups to set up parallel legislative bodies with the power to establish national standards or the right to veto legitimate measures taken by the national authorities when acting within their sphere of competence. He recalled the debate that had taken place when the Convention was being drafted, when the Workers' group presented an amendment to replace the term "consult" by "obtain the consent of" which was not accepted; that meant that the outcome of consultations was not binding. The spirit of the Convention was that the opinion of indigenous peoples should be sought when a government measure, or any matter stemming from the public authorities, might endanger the traditions and culture of their peoples. There was no way that this could be understood as opening up the possibility of their preventing or opposing categorically, irrespective of the will of the rest of society, a particular development model or projects going beyond the specific interests of those communities. The consultations should also serve to determine whether the groups wished to participate in, or stay out of, projects being undertaken in the proximity of their areas of interest and, should they decide to participate, what form that participation should take. That, however, did not imply that they were empowered to take decisions in the place of the duly authorized national bodies. He regretted that the Committee of Experts had gone beyond its mandate by requiring the suspension of projects relating to the exploration and exploitation of natural resources.

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The Employer member of Spain pointed out the progress made by the Government, including the Act on Prior Consultation. As for the discussion on the concept of consultations, he stressed the importance of respecting the rights of indigenous and tribal peoples to land, respect for the environment, the search for sustainable and harmonious development and the importance of corporate social responsibility, but he indicated that the concept of consultations could not engender the notion of a veto. He felt that it was inappropriate to consider that the consultations provided for in the Convention had a binding nature.

The Government representative welcomed the opinions and comments given on the progress that had been made. She said that the role of the INDEPA had changed because, at the request of leaders of indigenous peoples, it had been placed under the purview of the Presidency of the Council of Ministers as of February 2010. It was now a specialized technical body that carried out its functions in a multi-sectoral and cross-cutting manner at all levels of Government. She said that an apu (tribal chief) would be appointed to head the INDEPA; consultations were under way with indigenous groups to that end. She also said that the National Coordinating Group had prepared a National Plan for Amazonian Development, comprising ministries, regional governments and two representative organizations of Amazonian peoples: AIDSEP and CONAP. She described the measures being taken to fight discrimination and racism and the new resources being allocated to education in rural areas. She said that a source of constant concern was the fact that some of the benefits derived from extracting natural resources were granted to the peoples and communities where such activities were undertaken. Six types of concessionary payments had therefore been created for the various types of extraction activity. She said that, during 2009, US\$1.2 billion had been paid in concessionary payments. She concluded by reaffirming her commitment to continue ensuring a different future for members of Peru's indigenous communities.

The Employer members thanked the Government for the information it had provided during the discussion, noting that the Committee of Experts would need to assess the actions mentioned by the Government with respect to the Act on Prior Consultation and would indicate in its next report any possible flaws or shortfalls. While it typically took governments years or decades to act in response to observations, the Government of Peru had taken prompt action within a year and should be commended. They noted that no person or institution was infallible and that, based on the testimony and evidence presented, it would be prudent for the Committee of Experts to reconsider its conclusions with respect to the interpretation of certain provisions of the Convention that had been addressed by Employer members.

The Worker members considered that the Employer members had unjustly challenged Convention No. 169 and that their discourse on treaty interpretation could not hide the lack of any real arguments on the substance of the case. Yet this was a very serious case from which lessons could be drawn for the entire region. The recently adopted Act on Prior Consultation might be the first step towards the amelioration of relations which were currently characterized by violence. However, certain questions remained unanswered: the exact circumstances of the serious incidents in Bagua; the conformity of the Act with the Convention; the composition and impartial operation of the INDEPA; the repeal of previous laws; and the right to compensation for victims who had suffered from the application of earlier legislation. The Government had taken a first encouraging step and, in order to prove its good will, should accept a technical assistance mission of the Office at the earliest opportunity so that the Committee of Experts had all the necessary information it needed to be able to answer the questions raised.

The representative of the Secretary-General stated that she wished to provide some clarifications. The word "consultation" was probably found in every ILO instrument; it was the very backbone of international labour standards, since all Conventions and Recommendations included a provision on consulting with workers' and employers' organizations, or required consulting with "workers and employers" concerned or groups of persons concerned, such as persons with disabilities. However, this common, very important concept had to be construed within the overall context of the instrument in which it was placed. Consultation was an obligation irrespective of the language used, such as the expression "shall consult". Article 6 of Convention

No. 169 highlighted this term more than most provisions, and to interpret it correctly, one needed to look at the Article in its entirety, and not just part of it. Paragraph 2 of Article 6 set out that consultations carried out in application of the Convention had to be taken in good faith, and in a form appropriate to the circumstances, with the objective of achieving agreement or consent. This provision did not require that consultations had to reach agreement, but meant more than merely consulting and moving on. One had to consult in good faith and with the objective of achieving consent. Both the English and the French versions of the text were clear. They did not compel agreement or consensus. The same understanding was reflected in the Committee of Experts' observation which was being discussed in this case. She further stated that, as an ILO Convention, Convention No. 169 could not be disowned; it was a revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). The ILO was the first organization with a Convention on indigenous peoples and it was the only organization with a binding instrument on indigenous peoples. These elements of clarification were provided while recognizing that this remained a sensitive and controversial issue.

The Employer members thanked the Office for the clarifications but indicated that the word "consult" had a different meaning in English than in French, where it had a stronger connotation. Leaving this distinction aside, it was clear that failure to consult should not be taken to mean that one might stop economic development. To this end, when they questioned the Committee of Experts as to the true meaning of the Convention, they were referring to its injunctive aspects.

Conclusions

The Committee noted the statement by the Government representative and the discussion that followed. It noted that it had examined this case in 2009, and that the Committee of Experts, referring to the conclusions of this Committee, had called on the Government to take a range of measures of a legislative, institutional, awareness-raising and educational nature.

The Committee noted the Government's indication that the Congress of the Republic of Peru had adopted on 19 May 2010, an Act on the Right to Prior Consultation of Indigenous or Original Peoples as recognized in ILO Convention No. 169, containing, inter alia, provisions to identify the peoples concerned. The Government also provided information regarding Presidential Decree No. 022-2010 endowing the INDEPA with the status of a specialized technical body. The Government further provided information on the work of the four dialogue round tables established in June 2009 with the participation of Amazonian peoples, which, inter alia, covered investigations into the Bagua incidents, and the formulation of a development plan for the Amazon area. It also referred to access of indigenous peoples to education, measures to eliminate prejudices in respect of indigenous peoples as well as initiatives aimed at improving their conditions.

The Committee welcomed the Government's acknowledgment of the importance of consultation and the consequent adoption by the Congress of the Republic of the Act on Prior Consultation, and trusted that it would be promulgated rapidly by the President of the Republic. The Committee urged the Government to provide full information to the Committee of Experts on the promulgation and implementation of the Act to enable it to assess compliance with the provisions of the Convention. It urged the Government to ensure that the new Act on Prior Consultation was signed and implemented and to ensure, if needed, that transitional measures were adopted, in accordance with Articles 6, 7 and 15 of the Convention, as discussed in the Committee. The Committee also recalled the need for coordinated and systematic action to protect the rights of indigenous peoples, as provided for in Articles 2 and 33 of the Convention, which required state institutions that enjoyed the trust of indigenous peoples and in which their full participation was ensured. The Committee noted the information provided that the Act on Prior Consultation attributed a central role to the INDEPA as the technical body specialized in indigenous affairs and accordingly considered that the reform of this body, with the full participation of the representative organizations of indigenous peoples, was necessary to ensure its legitimacy and a genuine capacity for action and to secure the application of this important Act.

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The Committee noted the formulation of a development plan for the Amazon area which, however, would not cover indigenous peoples of the Andean region. It also noted that progress needed to be made in relation to the formulation and implementation of plans of action to address in a systematic manner the pending problems relating to the protection of the rights of the peoples covered by the Convention, as requested by the Conference Committee and the Committee of Experts. It emphasized the need to ensure that these plans of action were developed and implemented with the participation of the representative organizations of indigenous peoples, in accordance with Articles 2 and 6 of the Convention.

The Committee requested the Government to provide full information in a report to be submitted for examination at the forthcoming session of the Committee of Experts in reply to the matters raised by this Committee and the Committee of Experts, including detailed information on the promulgation and implementation of the new Act on Prior Consultation and related transitional measures, the implementation of the development plan for the Amazon region, as well as information on the effect of Ministerial Resolution No. 0017- 2007-ED setting admission criteria on bilingual teacher training. The Committee encouraged the Government to avail itself of the technical assistance of the Office to ensure that adequate progress on the implementation of the Convention was made.

The Worker members stated that in adopting these conclusions they had demonstrated great flexibility. They hoped that the Government would accept the technical assistance offered by the Office.

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Footnote 3: ILC, 99th Session, 2010, Provisional Record No. 16, Part Two, p.106:

The Employer members thanked the Government for the information it had provided during the discussion, noting that the Committee of Experts would need to assess the actions mentioned by the Government with respect to the Act on Prior Consultation and would indicate in its next report any possible flaws or shortfalls. While it typically took governments years or decades to act in response to observations, the Government of Peru had taken prompt action within a year and should be commended. They noted that no person or institution was infallible and that, based on the testimony and evidence presented, it would be prudent for the Committee of Experts to reconsider its conclusions with respect to the interpretation of certain provisions of the Convention that had been addressed by Employer members. [Back to text]

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Footnote 4: ILC, 98th Session, 2009, Provisional Record No. 16, Part One, para. 50:

50. With regard to the general observation on freedom of association, the Employer members stated that the Committee of Experts had focused on export processing zones (EPZs), which accounted for 0.5 per cent of all workers. The general observation appeared to set out a whole new set of reporting requirements on EPZs, as well as additional data on the informal economy. While agreeing with the need for greater attention to be paid to the implementation of ILO standards in the informal economy, they recalled that this problem was not unique to Convention No. 87 and that, as a reporting problem, it should be raised in the LILS Committee. Similarly, the general observation on light work under Convention No. 138 also appeared to create new reporting requirements without the approval of the Governing Body. They added that the general observation on the Termination of Employment Convention, 1982 (No. 158), did not contribute to a better understanding of what was required to give full effect to the Convention. In contrast, the general observations on social security and indigenous and tribal peoples did not raise any

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particular issues and were an illustration of the correct approach to making general observations that were useful and contributed to the implementation of the Conventions concerned.

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Footnote 8: ILC, 76th Session, 1989, Provisional Record No. 25, para. 68:

68. The Workers' members submitted an amendment to paragraph 1(a) to replace "consult" by "obtain the consent of". They felt that the draft text would require only contact rather than consent, and that this would enable government to undertake unilateral action. The Employers' members considered that the language in the draft text was in accordance with ILO use of the term "consult" which meant dialogue at least. The amendment would make the text too rigid and they did not support it. The Government member of Canada recalled that during the first discussion there had been consensus that the term "consult" meant to consult in good faith. He felt that expressing the objective of obtaining consent was unrealistic, especially in countries with many different indigenous and tribal groups. He opposed the amendment. Several other Government members also opposed the amendment. The Workers' members regretted the lack of support for the amendment from the other members of the Committee. The amendment was not adopted.

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Footnote 9: ILC, 76th Session, 1989, Provisional Record No. 25, para. 74:

74. A representative of the Secretary-General stated that in drafting the text, the Office had not intended to suggest that the consultations referred to would have to result in the obtaining of agreement or consent of those being consulted, but rather to express an objective for the consultations. The Government members of Peru and the United States felt that the explanation was helpful, and considered that no right of veto would be acceptable. The Employers' members, in the light of the explanation, proposed to subamend the Office text. The Workers' members pointed out that the Office text could not be subamended at this stage and repeated their call for a vote. The amendment was rejected by 750 votes in favour, 795 against, with 45 abstentions.

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Footnote 10: ILC, 76th Session, 1989, Report IV(2A), pp. 40-41:

Office commentary

The replies indicate a general consensus regarding the substance of paragraph 1, to the effect that these peoples should have rights over the natural resources pertaining to the areas they occupy, though reservations have been expressed by some respondents over elements of existing wording. The Government of India considered that it was unacceptable to extend the right of ownership to natural resources; however, as all other governments appear to accept that rights to lands include rights to surface resources at least, the provision has been maintained. Some respondents have proposed that the rights of these peoples over both surface and subsurface resources should be the same, but in view of the general acceptance of the approach whereby different rights apply to the different categories of resources, the differentiation has been retained. Others consider that the provision should refer to "rights" rather than "control", and this has been taken into account in the proposed text. Account has also been taken of the proposal by the Government of Colombia to include a reference to participation in the management and conservation of these resources.

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The term "traditional territories" has occasioned some reservations. The Office has therefore proposed the phrase "their lands and territories", intended to indicate that the areas to which the present Article applies are the same as those to which these peoples have rights under the preceding Article. As concerns the observation by the Government of Japan, this Article appears to be worded sufficiently flexibly that no such qualifying phrase is called for.

Paragraph 2 has elicited widely differing views regarding the use of the term "seek the consent" and the principles of consent and consultation. Some government and most workers' organisations, as well as the representative organisations of indigenous and tribal peoples, consider that this provision should require that consent be obtained in relation to mineral and other subsurface resources. Others appear to consider, in spite of the explanations given, that the phrase "seek the consent" used in the original proposal would in itself require that consent be obtained. It must be clear from the first discussion that this phrase is not acceptable to a sufficiently large proportion of the membership that it cannot be put forward again. The Office has, however, proposed alternative wording intended to convey that an attempt should be made in good faith to obtain the consent of the peoples concerned before undertaking activities of this kind in their territories, without indicating that they should have a veto power over government decisions.

The proposal to differentiate between the levels of agreement required before authorising exploration and exploitation has merit; but such a differentiation would be permitted on the national level by the existing text.

The proposed text does not reflect the suggestions that the term "fair compensation" be defined, as this appears to be a subject which would have to be approached in a different way in each country and in each situation, in accordance with the rules and procedures laid down at the national level. The proposals that references to water and energy resources should be made in paragraph 2 have not been retained, as these resources are of a different character from the mineral and other subsurface resources which this provision was designed to cover. It would appear that the concerns that these proposals reflect can be handled at the national level without explicit mention in the Convention - as in the case of Brazil, to which reference is made - and that the problems which might occur could be considered by the supervisory bodies under several provisions of the revised Convention. The proposed text reflects the suggestion that the peoples concerned should have the right to participate in the benefits of exploitation of the resources pertaining to their lands.

Thus amended, Article 14 appears as Article 15 in the new text.

Article 15

1. Subject to the following paragraphs of this Article, the (peoples/populations) concerned shall not be removed from their habitual territories.

2. Where the removal of the said (peoples/populations) is considered necessary as an exceptional measure, such removals shall take place only with their free and informed consent. Where their consent cannot be obtained, such removal shall take place only following appropriate procedures established by national laws and regulations, including public inquiries, which provide the opportunity for effective representation of the (peoples/populations) concerned.

3. In such exceptional cases of removal, these (peoples/populations) shall be provided with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist, and where the (peoples/populations) concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

4. Persons thus removed shall be fully compensated for any resulting loss or injury.

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Footnote 13: Resolution on ILO action concerning indigenous and tribal peoples, ILC, 76th Session, 1989, Provisional Record No. 25, Part One, pp. 32-33:

Resolution on ILO action concerning indigenous and tribal peoples

The General Conference of the International Labour Organisation,

Having adopted the Indigenous and Tribal Peoples Convention, 1989, and

Determined to improve the situation and status of these peoples in the light of the developments which have taken place since the adoption of the Indigenous and Tribal Populations Convention (No. 107) in 1957, and

Convinced of the vital contribution that indigenous and tribal peoples from the regions of the world make towards national societies, and reaffirming their sociocultural identity, and

Motivated by its firm desire to support the implementation and enhancement of the provisions of the revised Convention;

National action

1. Calls upon member States to consider ratifying the revised Convention at the earliest possible time ; to fulfil the obligations laid down in the Convention ; and to implement its provisions in the most effective manner.

2. Calls upon governments to co-operate in this respect with national and regional organisations and institutions of the peoples concerned.

3. Calls upon governments and employers' and workers' organisations to engage in a dialogue with the organisations and institutions of the peoples concerned about the most appropriate ways of securing the implementation of the Convention, and to establish appropriate consultative machinery enabling indigenous and tribal peoples to express their views on all aspects of the Convention.

4. Calls upon governments and employers' and workers' organisations to promote educational programmes, in collaboration with the organisations and institutions of the peoples concerned, in order to disseminate knowledge of the Convention in all sectors of national society including programmes consisting of, for example :

(a) materials on the content and objectives of the Convention ;

(b) information at regular intervals on the measures taken to implement the Convention ;

(c) seminars designed to promote a better understanding, the ratification, and the effective implementation of the standards laid down in the Convention.

International action

5. Urges the international organisations cited in the preamble of the Convention and others, within existing budgetary resources, to collaborate in developing activities to achieve the objectives of the Convention within their respective fields of competence, and urges the ILO to facilitate the co-ordination of such efforts.

ILO action

6. Urges the Governing Body of the International Labour Office to instruct the Director-General to take the following action, within existing budgetary resources, and to propose the allocation of further resources in future budgets for these purposes :

(a) promoting the ratification of the Convention and supervising its application ;

(b) assisting governments in developing effective measures for implementing the Convention with the full participation of the indigenous and tribal peoples ;

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(c) providing the organisations of the peoples concerned with information and training on the scope and content of this Convention and of other ILO Conventions that may be of direct concern to them, and possibilities for exchanging their experiences and knowledge ;

(d) strengthening the dialogue between governments and employers' and workers' organisations about the objectives and content of the Convention, with the active participation of organisations and institutions of the peoples concerned ;

(e) conducting a general survey, at an appropriate time, under article 19 of the ILO Constitution on the measures taken in member States for the implementation of the revised Convention ;

(f) producing, analysing and publishing relevant, comparable and up-to-date qualitative and quantitative information on the social and economic conditions of the peoples concerned ;

(g) developing technical co-operation programmes and projects that will directly benefit the peoples concerned, addressing the severe poverty and unemployment affecting them. These activities should include income and employment generation schemes, rural development, including vocational training, promotion of handicrafts and rural industries, public works programmes and appropriate technology. These programmes should be financed by the regular budget, subject to existing budgetary constraints, and by multi-bilateral and other sources.

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Footnote 14: ILC, 98th Session, 2009, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), pp. 672-673:

General observation: Indigenous and Tribal Peoples Convention, 1989 (No. 169)

On the eve of the 20th anniversary of the adoption of the Convention, the Committee notes that the establishment of appropriate and effective mechanisms for the consultation and participation of indigenous and tribal peoples regarding matters that concern them is the cornerstone of the Convention, yet remains one of the main challenges in fully implementing the Convention in a number of countries. Given the enormous challenges facing indigenous and tribal peoples today, including regularization of land titles, health and education, and the increased exploitation of natural resources, the involvement of the indigenous and tribal peoples in these and other areas which affect them directly, is an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue.

The Committee notes that the Convention refers to three interrelated processes: coordinated and systematic government action, participation and consultation. It notes that Articles 2 and 33 of the Convention, read together, provide that governments are under an obligation to develop, with the participation of indigenous and tribal peoples, coordinated and systematic action to protect the rights and to guarantee the integrity of these peoples. Agencies and other appropriate mechanisms are to be established to administer programmes, in cooperation with indigenous and tribal peoples, covering all stages from planning to evaluation of measures proposed in the Convention. The Committee recalls that pursuant to Article 7 of the Convention, indigenous and tribal peoples have the right to decide their own development priorities and to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. Article 6 sets out the Convention's requirements regarding consultation.

The Committee notes that in many countries genuine efforts have been made regarding consultation and participation with the aim of implementing the Convention. However, these efforts have not always met the expectations and aspirations of indigenous and tribal peoples, and also fell short of complying with the requirements of the Convention. In certain cases agencies have been established with responsibility for indigenous or tribal peoples' rights, however, with

little or no participation of these peoples, or with insufficient resources or influence. For example, the key decisions affecting indigenous or tribal peoples are in many cases made by ministries responsible for mining or finance, without any coordination with the agency responsible for indigenous or tribal peoples' rights. As a result, these peoples do not have a real voice in the policies likely to affect them. While the Convention does not impose a specific model of participation, it does require the existence or establishment of agencies or other appropriate mechanisms, with the means necessary for the proper fulfilment of their functions, and the effective participation of indigenous and tribal peoples. Such agencies or mechanisms are yet to be established in a number of countries that have ratified the Convention.

The Committee cannot over-emphasize the importance of ensuring the right of indigenous and tribal peoples to decide their development priorities through meaningful and effective consultation and participation of these peoples at all stages of the development process, and particularly when development models and priorities are discussed and decided. Disregard for such consultation and participation has serious repercussions for the implementation and success of specific development programmes and projects, as they are unlikely to reflect the aspirations and needs of indigenous and tribal peoples. Even where there is some degree of general participation at the national level, and ad hoc consultation on certain measures, this may not be sufficient to meet the Convention's requirements concerning participation in the formulation and implementation of development processes, for example, where the peoples concerned consider agriculture to be the priority, but are only consulted regarding mining exploitation after a development model for the region, giving priority to mining, has been developed.

With regard to consultation, the Committee notes two main challenges: (i) ensuring that appropriate consultations are held prior to the adoption of all legislative and administrative measures which are likely to affect indigenous and tribal peoples directly; and (ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted. The form and content of consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties. If these requirements are met, consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict. The Committee, therefore, considers it important that governments, with the participation of indigenous and tribal peoples, as a matter of priority, establish appropriate consultation mechanisms with the representative institutions of those peoples. Periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned, should be undertaken to continue to improve their effectiveness.

The Committee encourages governments to continue their efforts, with the participation of indigenous and tribal peoples, in the following areas, and to provide information in future reports on the measures taken in this regard:

- developing the measures and mechanisms envisaged in Articles 2 and 33 of the Convention;*
- establishing mechanisms for participation in the formulation of development plans*
- including the requirement of prior consultation in legislation regarding the exploration and exploitation of natural resources;*
- engaging in systematic consultation on the legislative and administrative measures referred to in Article 6 of the Convention; and*
- establishing effective consultation mechanisms that take into account the vision of governments and indigenous and tribal peoples concerning the procedures to be followed.*

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Footnote 26: ILC, 76th Session, 1989, Report IV (Part 2A), pp. 19-21:

Article 6

In applying the provisions of this Convention, governments shall:

(a) consult fully the (peoples/populations) 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;

(b) establish means by which these (peoples/populations) may freely participate at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which may affect them directly;

(c) make available to these (peoples/populations) opportunities and resources for the full development of their own institutions and initiatives.

Observations on Article 6

Brazil (CONTAG). In (a), the term "directly" is too restrictive since many actions which affect them indirectly nevertheless affect them seriously.

Canada. The word "consult" by itself presupposes an obligation to seek, in good faith and in an appropriate manner, the views, advice and assistance of the (peoples/populations) concerned. Replace (b) by: "ensure that the said (peoples/populations) are, to the same extent as the rest of the population of the State, able to participate in decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which may affect them directly". A requirement that any group freely participate in decision-making at all levels could affect the power of legislative bodies and the power and responsibility of governments to make decisions. In (c), delete "and resources", since it would not be realistic to impose an open-ended obligation for governments to provide resources, including financial resources, in all cases.

(IPWG). In (a), replace "consult fully" by "obtain the consent of; insert "constitutional" before "legislative". In (b), add at the beginning "in conjunction with and at the request of the peoples concerned"; after "decision-making" add "to the extent of their authority and jurisdiction". As concerns the Government's proposal on (c), the IPWG would agree if indigenous land and resource rights were not generating wealth for States against indigenous objections and without material benefit to their original owners.

Colombia. Revise (b) to read: "establish means to guarantee the representation of these peoples in elective institutions and in administrative and other bodies responsible for policies and programmes directed toward them".

Denmark (LO). In (a), after "consult fully" add "with a view to obtaining the consent of. The same amendment was proposed by Japan (SOHYO), Norway (Confederation of Trade Unions in Norway (LO)), Switzerland (Swiss Workers' Union (SGB)) and the United States (AFL-CIO).

Japan. See under Article 5. Furthermore, (b) should be revised to make it clear that this provision does not necessarily mean that special seats should be reserved for these (peoples/populations), but leaves the question of whether to take such measures to each country. (NIKKEIREN). See under Article 5.

Peru (General Confederation of Workers (CGTP)). (a) should provide that the role and legal personality of the representative institutions referred to should be recognised.

Switzerland (SGB). The proposal by Denmark (LO) would make it clear that governments should make serious efforts to reach agreement with indigenous peoples. It would not require agreement in every case, however.

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The concerns of the Governments of Canada and Japan regarding (b) appear to be well-founded and are taken into account. The formula proposed is intended to be flexible enough to allow, but not require, measures such as the allocation of special seats in legislatures or reserved posts in government employment. This should overcome the objections to a similar proposal not adopted during the first discussion.

The concern expressed over the term "resources" in (c), added during the first discussion, also appears to be well-founded. An alternative designed to overcome the objection is included.

The proposal to add "constitutional" in (a) has not been retained, as it has always been understood by the ILO's supervisory bodies to be covered by references to legislation. The proposals by Canada (IPWG) on (b) have not been retained as they would be contrary to the trend of the discussion.

The proposal to add "with a view to obtaining the consent of" in (a) was rejected during the first discussion. It nevertheless represents an attempt to clarify the meaning of the Convention's requirements. An additional paragraph has therefore been added, based on explanations given during the first discussion, in particular by the Government of Canada, as well as on proposals listed above, to clarify this term.

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Footnote 27 and 28: ILC, 76th Session, 1989, Provisional Record No. 25, para. 74:

74. A representative of the Secretary-General stated that in drafting the text, the Office had not intended to suggest that the consultations referred to would have to result in the obtaining of agreement or consent of those being consulted, but rather to express an objective for the consultations. The Government members of Peru and the United States felt that the explanation was helpful, and considered that no right of veto would be acceptable. The Employers' members, in the light of the explanation, proposed to subamend the Office text. The Workers' members pointed out that the Office text could not be subamended at this stage and repeated their call for a vote. The amendment was rejected by 750 votes in favour, 795 against, with 45 abstentions.

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