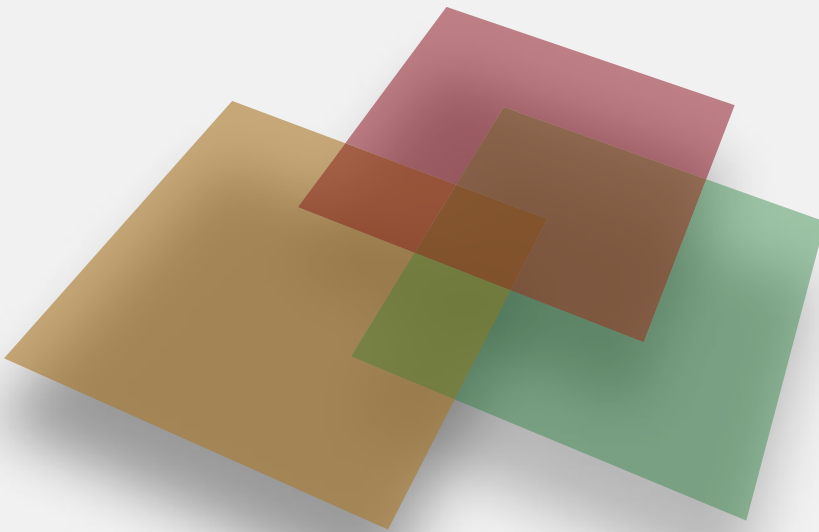




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Labour
Office
Geneva

Handbook for ILO Tripartite Constituents

Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)



**Programme to Promote
ILO Convention
No. 169 (PRO 169)**

International Labour
Standards Department



**Understanding the Indigenous and Tribal
Peoples Convention, 1989 (No. 169)**

HANDBOOK

For ILO Tripartite Constituents

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HANDBOOK
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LIST OF ABBREVIATIONS

ACT/EMP	Bureau for Employers' Activities
ACTRAV	Bureau for Workers' Activities
CApp	Conference Committee on the Application of Standards
CEACR	Committee of Experts on the Application of Conventions and Recommendations
ILC	International Labour Conference
ILO	International Labour Organization
PRO 169	Programme to Promote ILO Convention No. 169
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples

ACKNOWLEDGEMENTS

This handbook is written by Birgitte Feiring, former Chief Technical Adviser of the ILO's Programme to Promote ILO Convention No. 169 (PRO 169) under the direction of the Director of the International Labour Standards Department, Ms. Cleopatra Doumbia-Henry. It draws on the wealth of comments and analysis of the Convention, provided by the ILO supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Further, it is inspired by a series of previous ILO publications on indigenous and tribal peoples and by recent studies undertaken by Mr. Lee Swepston and Mr. Victor Toledo. Finally, the text has been enriched and improved by the comments provided by staff of the International Labour Standards Department, the Programme to Promote ILO Convention No. 169 and representatives of the Bureau for Workers' and Employers' Activities (ACT/EMP and ACTRAV) within the ILO.

FOREWORD

This handbook aims to answer some of the essential questions of ILO constituents regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). It has been elaborated in close cooperation with the Bureau for Employers' Activities (ACT/EMP) and the Bureau for Workers' Activities (ACTRAV), with the aim of providing the ILO constituents with a practical tool to better understand the relevance, scope and implications of the Convention and to foster joint efforts for its implementation.

Convention No. 169 is a unique Convention. Adopted by the International Labour Conference (ILC) at its 76th Session in 1989, in cooperation with the UN-system, it represents a consensus reached by ILO tripartite constituents. Indigenous and tribal peoples are among the vulnerable groups of concern to the ILO as it pursues its mission to promote social justice, internationally recognized human and labour rights and Decent Work. Convention No. 169 concerns the situation of more than 5,000 indigenous and tribal peoples, constituting a population of more than 370 million, living in more than 70 countries in all regions of the world. These peoples possess diverse languages, cultures, livelihood practices and knowledge systems. However, in most countries, they face discrimination and exploitative labour conditions, which are interconnected with their generalized marginalization and poverty situation. The ILO's concern for indigenous peoples dates back to the 1920s and originated in the quest to overcome the discriminatory working conditions they live under. In recognition of the complexities and specificities of indigenous peoples' situations, Convention No. 169 takes a holistic approach covering a wide range of issues that affect the lives and well-being of these peoples. Convention No. 169 has become a global reference point with impact on governance and development policies that spans far beyond the countries that have ratified it. Further, it is an instrument for governments to foster a favourable environment for the creation of sustainable enterprises.

The elaboration of this handbook is timely, as Convention No. 169 in recent years has been ratified by more States, including in Africa and Asia, and its implementation has become a focus of review and discussion by the ILO supervisory bodies and the ILO constituents. The 2008 ILO Declaration on Social Justice for a Fair Globalization further acknowledges that “in a world of growing interdependence and complexity ...the fundamental values of freedom, human dignity, social justice, security and non-discrimination are essential for sustainable economic and social development and efficiency”. Indigenous and tribal peoples’ rights and concerns have gained unprecedented momentum, intersecting with the global debate concerning human rights, governance, poverty reduction and economic development, social economy, climate change, sustainable development and environmental protection. Progressive implementation of the Convention is generating knowledge and experience that can inform and inspire further efforts. In particular, the intertwined rights to consultation and participation in decision-making have raised particular interest regarding the scope, implications and operationalization of the Convention.

This Handbook seeks to answer some of the fundamental questions regarding Convention No. 169 and, in particular, questions about the purpose, scope and operationalization of the right to consultation. Indigenous peoples, like any other group, cannot directly invoke the Convention before the ILO supervisory bodies but use the ILO tripartite constituents in articulating their issues and concerns. Up to now, they have always used the trade unions in their own countries or internationally or have been affiliated to them or in certain countries established specific trade unions of indigenous peoples. The Handbook seeks in particular to respond to the concerns of the ILO tripartite constituents for an easy to use guide that will assist them in supporting the implementation of the rights of indigenous peoples under the Convention, understanding their own roles in giving effect to the Convention and assisting enterprises in being able to work the Convention in pursuing their investment opportunities and projects.

It is my hope that this Handbook can help strengthen the dialogue between ILO constituents and indigenous and tribal peoples for the progressive ratification and application of ILO Convention No. 169.

Cleopatra Doumbia-Henry
Director
International Labour Standards
Department (NORMES)

SECTION 1

Introduction to ILO Convention No. 169

WHAT IS ILO CONVENTION NO. 169?

ILO Convention No. 169 on indigenous and tribal peoples is an international treaty, adopted by the International Labour Conference of the ILO in 1989. The Convention represents a consensus reached by ILO tripartite constituents on the rights of indigenous and tribal peoples within the nation-States where they live and the responsibilities of governments to protect these rights. It is based on respect for the cultures and ways of life of indigenous peoples and recognizes their right to land and natural resources and to define their own priorities for development. The Convention aims at overcoming discriminatory practices affecting these peoples and enabling them to participate in decision-making that affects their lives. Therefore, the fundamental principles of consultation and participation constitute the cornerstone of the Convention. Further, the Convention covers a wide range of issues pertaining to indigenous peoples, including regarding employment and vocational training, education, health and social security, customary law, traditional institutions, languages, religious beliefs and cross-border cooperation.

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.

ILO Convention No. 169, article 7(1)

WHO ARE INDIGENOUS AND TRIBAL PEOPLES?

“Indigenous and tribal peoples” is a common denominator for more than 370 million people, found in more than 70 countries worldwide. They constitute approximately 5% of the world population but 15% of the world’s poor. Indigenous and tribal peoples are found in all regions of the world, from the Arctic to the tropical forests. There is no universal definition of indigenous and tribal peoples, but ILO Convention No. 169 provides a set of subjective and objective criteria, which are jointly applied to identify who these peoples are in a given country.

Given the diversity of the peoples it aims at protecting, the Convention uses the inclusive terminology of “indigenous” and tribal peoples and ascribes the same set of rights to both groups.¹ In Latin America, for example, the term “tribal” has been applied to certain afro-descendant communities.

	Subjective criteria	Objective criteria
Indigenous peoples	Self-identification as belonging to an indigenous people.	Descent from populations, who inhabited the country or geographical region at the time of conquest, colonisation or establishment of present state boundaries. They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.
Tribal peoples	Self-identification as belonging to a tribal people.	Their social, cultural and economic conditions distinguish them from other sections of the national community. Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

¹ For practical reasons, this booklet uses the term “indigenous peoples”, which is also the most commonly accepted term and the one used in other international instruments.

Indigenous and tribal peoples are often known by national terms such as adivasis, mountain dwellers, hill tribes, hunter-gatherers, and many countries have developed specific registers of these peoples. In some cases, where there has been a lack of clarity about the application of the subjective and objective criteria, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has analysed the circumstances and provided comments to the country concerned.

DO INDIGENOUS AND TRIBAL PEOPLES HAVE “SPECIAL” RIGHTS?

The histories of indigenous peoples have been marked by discrimination, marginalization, ethnocide or even genocide and, unfortunately, violations of their fundamental rights still occur. Hence, Convention No. 169 reaffirms that indigenous and tribal peoples are entitled to the same human rights and fundamental freedoms as all other human beings. At the same time, this also implies that indigenous customs cannot be justified, if these are in violation of universal human rights. This is, for example, important in cases where indigenous women, with reference to customs or traditions, are deprived of fundamental rights, such as access to education or property.

Indigenous peoples’ rights are not “special” rights, but are articulations of universal human rights, as they apply to indigenous peoples. This means contextualizing rights to the situation of indigenous peoples and taking the collective aspects of these rights into account. For example, indigenous children have the same right to education as all other children, but their distinct languages, histories, knowledge, values and aspirations should be reflected in education programmes and services. The Convention thus provides for special measures to ensure effective equality between indigenous peoples and all other sectors of a given society. However, the requirement for special measures does not mean that the Convention requires that indigenous peoples be given special privileges vis-à-vis the rest of the population.

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms, without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

ILO Convention No. 169, article 3(1)

WHY IS THE ILO CONCERNED WITH INDIGENOUS PEOPLES?

The situation of indigenous peoples has been a key concern for the ILO since its creation. Discrimination and exploitation of indigenous and tribal workers directly inspired the adoption of labour standards, such as the ILO Forced Labour Convention, 1930 (No. 29). During the 1950s, it became increasingly clear that the labour conditions of these peoples were consequences of deep-rooted injustices and prejudices and intrinsically linked to broader issues of identity, language, culture, customs and land. Therefore, in 1957 and on behalf of the UN-system, the ILO adopted the Indigenous and Tribal Populations Convention (No. 107). Convention No. 107 was the first international treaty dealing with the rights of indigenous peoples. The Convention is still in force for 17 countries, where it is used as an instrument to guarantee certain minimum rights. It is, however, closed to new ratifications since the entry into force of Convention No. 169.

Convention No. 107 had an inherent assimilationist orientation, which was typical of its time. It was based on the underlying assumption that the only possible future for indigenous peoples was integration into the larger society and that others should make decisions on their development. In 1986, an expert committee convened by the ILO Governing Body concluded that “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world.” Consequently, the ILO undertook a revision of Convention No. 107 and finally adopted ILO Convention No. 169 on indigenous and tribal peoples in 1989.

“...the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards”.

Preamble, ILO Convention No. 169

ARE INDIGENOUS PEOPLES' LABOUR CONDITIONS STILL A CONCERN?

All available statistics and research indicate that indigenous peoples still suffer from the worst forms of labour exploitation and are disproportionately represented among the victims of discrimination, child labour and forced labour. Indigenous peoples face barriers and disadvantages in the labour market as they have limited

access to education and vocational training and their traditional knowledge and skills are not necessarily valued or in demand. Their generalized marginalization and poverty situation makes them vulnerable to exploitative practices such as bonded labour, trafficking, hazardous work and the worst forms of child labour. Often, indigenous peoples also face discrimination against their traditional livelihood as such. This is, for example, the case when practices of shifting cultivation, pastoralism or hunting and gathering are restricted or their rights to land and resources are not recognized. Moreover, indigenous peoples are often not aware of their rights and have weak connections to workers' organizations. Convention No. 169 comprises a full section on indigenous peoples' right to employment, vocational training and protection of their labour rights. Further, the ILO and its constituents are increasingly addressing the situation of indigenous peoples through the fundamental labour Conventions concerning non-discrimination, freedom from forced labour and child labour and freedom of association and the right to collective bargaining.

WHAT IS THE LEGAL STATUS OF THE CONVENTION?

Convention No. 169 is an international treaty that becomes legally-binding upon States through ratification. To date, it has been ratified by 22 member States of the ILO, located in Latin America, Asia, Africa and Europe and covering an estimated population of more than 50 million indigenous peoples. Beyond the ratifying countries, Convention No. 169 is an international reference point, which is cited and used by UN bodies, regional human rights bodies and national courts. It has inspired numerous development and safeguard policies and national legislative frameworks. The decision to ratify Convention No. 169, like any other international labour Convention, is a sovereign and voluntary decision of a State. It is often preceded by a long process of dialogue between the government, indigenous peoples, workers' organizations and employers' organizations, as well as other sectors of society. Ratifying States have an obligation to implement the Convention in good faith in both law and practice and to ensure that indigenous peoples are consulted and can participate in the process. This implies that States must review and adjust legislation, policies and programmes to the provisions of the Convention and ensure that it reaches the foreseen results in practice, including closing of socio-economic gaps between indigenous and non-indigenous sectors of society. In some of the ratifying countries, the Convention has the force of law upon ratification and can be invoked before domestic courts, which, in turn, can directly rely on its provisions. However, even in those countries where treaties are directly applicable, specific legislative provisions will normally be needed to ensure the effective application of the Convention.

Governments have responsibility to:

- Develop coordinated and systematic action to protect the rights of indigenous peoples and guarantee respect for their integrity.
- Establish agencies or other appropriate mechanisms to administer programmes for indigenous peoples, with the necessary means to fulfill the functions assigned.
- Ensure that planning, coordination, execution and evaluation of programmes is undertaken in cooperation with indigenous peoples.
- Propose legislative and other measures and supervise their implementation.

See ILO Convention No. 169, articles 2(1), 33 (1,2)

WHO HAS THE RESPONSIBILITY FOR IMPLEMENTING THE CONVENTION?

Ratification of Convention No. 169 is an important step in reversing exclusion and discrimination and to ensure that indigenous peoples' rights are respected and socio-economic gaps are closed. The responsibility for implementing the Convention lies with the governments of the ratifying countries. Considering the broad scope of the Convention, it emphasizes that government action must be coordinated and systematic. In most cases, this will imply establishing mechanisms for coordination among several government institutions and branches, as indigenous issues cut across sectors and geographical regions. In some countries, the Ministry of Labour is the focal point for implementation, while in others it can be another Ministry or a distinct government institution with responsibility for indigenous peoples. Coordination is also necessary with Ministries covering other areas such as finance, health, education and social security. Throughout the Convention, it is emphasized that implementation measures should be planned, coordinated, executed and evaluated in cooperation with indigenous peoples. In order to operationalize this, the Government must establish mechanisms for consultation and participation. The implementation process will be unique for each country as it has to be tailored to the specific social, cultural, geographical, economic and historical circumstances. Therefore, the Convention provides for flexibility by stipulating that the nature and scope of implementation measures should be determined in accordance with the conditions characteristic of each country.

- Ratification is an international act whereby a State establishes its consent to be bound by a treaty.
- Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
- A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

See Vienna Convention on the Law of Treaties, 1969.

HOW IS THE IMPLEMENTATION OF THE CONVENTION SUPERVISED?

Ratifying States commit themselves to submit regular reports on the implementation of Convention No. 169 to the ILO, at least every five years². These reports are to be shared with workers' and employers' organizations at the national level. The ILO also encourages States in preparing the reports, to consult indigenous and tribal peoples in the country, through their traditional institutions. In addition under the ILO Constitution, workers' and employers' organizations can submit information and comments on the application of the Convention, or lodge complaints ("representations"), in order to bring progress, challenges or violations to the attention of the ILO supervisory bodies. Reports are reviewed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which, in turn, issues comments to the concerned States in order to further guide the implementation process. The observations of the Committee of Experts are then brought before the tripartite Conference Committee on the Application of Standards, which chooses a limited number of such observations to discuss in the tripartite forum and issues conclusions to the States concerned. Representations can be filed by employers' or workers' organizations under Article 24 of the ILO Constitution, for alleged violation of the Convention. These are then addressed by a tripartite committee set up by the Governing Body, which issues conclusions and recommendations. The supervision of Convention No. 169 is a very dynamic process and a large amount of information, comments and conclusions have been submitted regarding the application of the Convention. Most of the cases that have been brought to the attention of the supervisory bodies concern the alleged failure to consult with indigenous peoples regarding measures or projects that affect their land.

² This is not specific to C. 169. The reporting obligation is based on articles 19 and 22 of the ILO Constitution and applies to all ILO Conventions ratified by member States of the Organization.

ILO supervisory processes are unique in their focus on continuous dialogue with governments and the possibility of offering ILO technical assistance to resolve the problems encountered. All supervisory comments contribute to a deeper understanding of the implications of Convention No. 169 in specific contexts and are publicly available at www.ilo.org/normlex

WHAT IS THE ROLE OF WORKERS AND EMPLOYERS' ORGANISATIONS?

The ILO is based on the principle of tripartism, which includes dialogue and cooperation between governments, employers, and workers in the formulation, adoption and supervision of labour standards. As with all other ILO Conventions, workers and employers play a crucial role in the promotion and application of Convention No. 169. In most cases, the ratification follows a process of awareness-raising, capacity-building, analysis and dialogue between the government, indigenous peoples and workers' and employers' organisations. Following ratification, governments are required to submit copies of their reports on application of the Convention to the most representative employers' and workers' organizations. These organizations may comment on the governments' reports and they may also send comments and information on the application of the Convention directly to the ILO. In many cases, workers' organisations have submitted comments or representations (see above) to the ILO supervisory bodies on behalf of indigenous peoples' organizations.

ILO Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) and the related Recommendation No. 152 emphasize the importance at the national level of regular tripartite consultations to ensure that ILO standards are formulated, applied and supervised with the participation of employers and workers organizations. This leads to greater cooperation among the social partners, ensures stronger awareness and participation in matters relating to international labour standards and eventually leads to better governance. Such consultations may also include consultations on the preparation and implementation of legislative or other measures to give effect to ratified Conventions, e.g. Convention No. 169.

In some countries, workers and employers have formed alliances with indigenous peoples to address issues such as the existence of forced labour among indigenous workers or to support economic development and establishment of enterprises by indigenous employers.

DO INDIGENOUS PEOPLES HAVE ACCESS TO ILO PROCEDURES AND ASSISTANCE?

Indigenous peoples' organisations are not among the ILO's tripartite constituents, comprising governments, employers' and workers' organizations. However, indigenous persons or their organizations are encouraged to become members of workers' and employers' organizations. In some cases, indigenous peoples have formed specific workers' and employers' organizations or specific chapters within broader organizations. In other cases, workers' and employers' organizations have formed alliances with indigenous organizations, e.g. to address situations of forced labour. Access to the supervisory mechanisms under ratified Conventions, including Convention No. 169, is regulated by the ILO Constitution and restricted to its tripartite constituents. While this has been criticized by indigenous peoples, it has not been an obstacle in practice, as indigenous peoples have formed alliances, particularly with trade unions, to present information, comments and representations.

The ILO has a comprehensive technical assistance programme to raise awareness as well as to promote the effective application of the Convention. The Programme to Promote ILO Convention No. 169 (PRO 169) is a unique global programme that provides support to ILO tripartite constituents and to indigenous and tribal peoples in more than twenty-five countries across Asia, Latin America and Africa.

WHAT IS THE CONTRIBUTION OF ILO CONVENTION NO. 169 TO NATIONAL DEVELOPMENT?

In most countries, indigenous peoples have significantly higher poverty rates than other sectors of society, along with pronounced health and education disadvantages. This can, to a large extent, be related to structural discrimination, also reflected in low public investments on indigenous lands, e.g. in terms of infrastructure and communication. Moreover, the contribution of indigenous peoples to national economy and development often remains invisible as their production systems may be largely subsistence-oriented and they often work within the informal sectors as unskilled labourer or domestic workers. There is a growing recognition of the economic potential of overcoming discrimination against indigenous peoples, as well as the economic and development potential of indigenous cultures, knowledge and production systems and natural resources. Indigenous peoples' rights to consultation, participation and benefit-sharing need to be respected in the development process in order to avoid exploitative relationships and conflicts.

Convention No. 169 is an instrument for good governance and a tool for conflict resolution and reconciliation of diverse interests. If indigenous peoples' rights and aspirations for the development process are respected, they can become full partners in the development process, thereby also considerably increasing their contribution to national economies.

OTHER INTERNATIONAL INSTRUMENTS RELEVANT TO INDIGENOUS PEOPLES

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly in 2007, after more than 20 years of negotiations between indigenous peoples and States. UNDRIP is thus the most recent and fullest expression of indigenous peoples' aspirations. As a Declaration, the UNDRIP does not have the binding force of a treaty. However, it was adopted by the UN General Assembly and should be taken into account by all UN member States in good faith. The UNDRIP does not establish any new rights but instead reflects an articulation of existing rights to the context of indigenous peoples.

The provisions of UNDRIP and Convention No. 169 complement each other. However, UNDRIP addresses additional subjects that were not included in Convention No. 169, such as the militarization of indigenous lands and the protection of traditional knowledge. UNDRIP expressly affirms indigenous peoples' right to self-determination, while Convention No. 169 does not include such a provision. Convention No. 169 explicitly provides for rights to participation, consultation and self-management for indigenous peoples.

SECTION 2

Consultation and participation

The rights to be consulted and to participate in decision-making constitute the cornerstone of Convention No. 169 and the basis for applying the broader set of rights enshrined in the Convention. This section will answer some of the key questions that are often raised by ILO constituents in relation to these intertwined rights of indigenous peoples.

WHY IS CONSULTATION AND PARTICIPATION THE CORNERSTONE OF THE CONVENTION?

Consultation and participation are fundamental principles of democratic governance and of inclusive development. The provisions on consultation and participation were introduced in Convention No. 169, in order to eliminate the integrationist approach of the earlier Convention No. 107. Consultation and participation are important objectives in themselves, but are also the means through which indigenous peoples can fully participate in the decisions that affect them. Consultation and participation are not rights exclusively ascribed to indigenous peoples. Consultation is a fundamental principle that is to be found in all other ILO Conventions, providing for consultation between governments, employers' and workers' organizations as well as those specifically concerned by a given Convention. In this regard, Convention No. 169 is no exception, but affirms the requirement for specific consultations with indigenous peoples.

Given the enormous challenges facing indigenous and tribal peoples today, including the regularization of land titles, health and education, and the increasing 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 ... Consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict.

CEACR, General Observation on Convention No. 169, 79th Session, 2008, published 2009.

WHAT DOES THE CONVENTION SAY ABOUT CONSULTATION?

The general requirement to consult with indigenous peoples is reflected in Article 6(1) of Convention No. 169. Consultation with indigenous peoples thus arises as a general obligation under the Convention, whenever legislative or administrative measures affect them directly. Such measures could, for example, concern the elaboration of national legislation regarding consultations or the construction of road infrastructure on the lands of a specific indigenous community. In addition, the Convention particularly emphasizes the need to consult under certain circumstances, including prior to exploration or exploitation of sub-surface resources and prior to relocation and land alienation.

Article 6(1) stipulates that governments should: *“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”*.

Further, Article 6(2) of the Convention specifies that *“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”*.

The Convention particularly emphasizes the need to consult in the following circumstances:

- Prior to exploration or exploitation of mineral and sub-surface resources (Article 15(2));
- Prior to relocation, which should take place only with the free and informed consent (Article 16);
- When considering alienation or transmission of indigenous peoples' lands outside their own communities (Article 17);
- On the organization and operation of special vocational training programmes (Article 22);
- On literacy and educational programmes and measures (Articles 27 and 28).

The core area of application for the concepts of consultation and participation is in the context of relationships between indigenous peoples and States. The requirement for undertaking consultations with indigenous peoples is both broad and specific. In operational terms, this will often imply establishing institutionalized mechanisms for regular and broad consultation along with specific mechanisms to be applied, whenever a specific community is affected.

This is in line with the experience of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which in its 2009 general observation noted 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.

Consultation under the Convention means:

1. Consultations must be formal, full and exercised in good faith; here 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.

Pro forma consultations or mere information will not meet the requirements of the Convention. At the same time, such consultations do not imply a right to veto nor is the result of the consultations necessarily the reaching of agreement or consent.

See CEACR General Observation, 2010, published 2011.

One of the issues that the Committee of Experts on the Application of Conventions and Recommendation (CEACR) has most regularly examined since the Convention was adopted is the "obligation to consult". Therefore, CEACR prepared a detailed general observation to further clarify the concept of consultation, which, inter alia, states:

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.

CEACR, General Observations on Convention No. 169, 2009 and 2011.

WHY DOES CONSULTATION WITH INDIGENOUS PEOPLES REQUIRE SPECIAL ATTENTION?

Indigenous peoples have the same rights as all other citizens to participate in the general democratic life of the State and to vote in such processes. In addition, States have the obligation to specifically consult with and ensure the participation of indigenous peoples, whenever measures are being considered which may affect them directly. This does not mean that indigenous peoples have special rights but that given their situation, special measures for consultation and participation are required, to safeguard their rights within the framework of a democratic State. The collective nature of indigenous peoples' rights and the need to safeguard their cultures and livelihoods are among the reasons why governments should adopt special measures for their consultation and participation in decision-making.

WHO HAS THE RESPONSIBILITY FOR UNDERTAKING CONSULTATIONS?

In the context of Convention No. 169, the obligation to ensure appropriate consultation clearly and expressly falls on governments and not on private persons or companies. In some cases, governments may delegate the operationalization of the consultation process to other entities. However, the responsibility to ensure that consultations are carried out in compliance with the provisions of the Convention rests with the government, even when it does not conduct the processes itself.

WHO SHOULD BE CONSULTED?

The Convention stipulates that indigenous peoples should be consulted through their representative institutions. What constitutes a representative institution should be determined taking into account the characteristics of the country, the specificities of the indigenous peoples and the subject and scope of the consultation. Given the circumstances, the appropriate institution may be representative at the national, regional or community level; it may be part of a national network or it may represent a single community. The important criterion is that representativeness should be determined through a process of the indigenous peoples themselves. This also implies, that an indigenous institution cannot claim representativity without being able to clearly identify its constituents and its accountability towards these constituents. In some cases, the alleged lack of representativeness of a given institution has been contested in court or brought to the attention of the ILO supervisory bodies.

In circumstances where representation is contested or there is a diversity of competing institutions, the identification of a single representative institution may not be possible. In broad national consultations, there will be a need to take an inclusive approach, allowing for participation of the diversity of organizational expressions. In more specific consultations, the scope of consultations should be determined on the basis of the impact assessments stipulated in Article 7(3) of the Convention. Ensuring that the institutions concerned are representative may in some cases also imply going beyond traditional institutions. For instance, the Convention requires that its provisions should be applied equally to women and men, but in some cases indigenous women may not have a voice in traditional decision-making.

If the institutions consulted are not considered representative by the people they claim to represent, the consultation may have no legitimacy. “If an appropriate consultation process is not developed with the indigenous and tribal

institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention” (ILO Governing Body, 282nd session, 2001, GB.282/14/2).

Further, the Convention provides in Article 6(1)(c) that government shall “establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose”.

When it comes to determining what institutions are representative, the ILO supervisory bodies have stated that “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”

Governing Body, 289th session, 2004, document GB.282/17/3

WHAT ARE APPROPRIATE PROCEDURES?

The requirement that consultations should take place through appropriate procedures implies that consultations should take place in a climate of mutual trust. In general, Governments need to recognize representative organizations and both parties should endeavor to reach an agreement, conduct genuine and constructive negotiations, avoid unjustified delays, comply with the agreements which are concluded and implement them in good faith. Governments also need to ensure that indigenous peoples have all relevant information and that it can be fully understood by them. Sufficient time must be given to allow indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken, in a manner consistent with their cultural and social traditions. Thus, consultation often means establishing an intercultural dialogue. This means making a real effort to understand how indigenous peoples’ cultures and traditional decision-making processes function, and adapting the form and timing of consultation to these.

Procedures are thus considered appropriate if they create favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained. General public hearing processes would not normally be sufficient. The form and content of the 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 they may be able to affect the outcome and a consensus could be achieved, and be conducted in a manner that is acceptable to all parties. The Committee of Experts has emphasized that there should be a periodic evaluation of the operation of the consultation mechanisms, with the participation of indigenous peoples, with a view to continuing to improve their effectiveness.

IS THERE A REQUIREMENT TO REACH CONSENT?

As stipulated by Article 6(2), consultations must be undertaken in good faith and with the objective of obtaining agreement or consent. In this sense, Convention No. 169 does not provide indigenous peoples with a veto right, as obtaining the agreement or consent is the purpose of engaging in the consultation process, and is not an independent requirement. On the other hand, the ILO supervisory bodies have clearly stated that a simple information meeting, where indigenous peoples could be heard without having any possibility of influencing decision-making, cannot be considered as complying with the provisions of the Convention. The adequate implementation of the right to consultation thus implies a qualitative process of good faith negotiations and dialogue, through which agreement and consent can be achieved if possible. Here again, it is appropriate to underline the interconnection between broad and specific consultations. If indigenous peoples' rights, concerns and aspirations are reflected in legislation and broader policies, it will likely be easier to reach agreement and consent on specific measures or projects affecting their lands and territories. It must also be highlighted that even if the consultation process has been concluded without agreement or consent, the decision taken by the State must still respect the substantive rights recognized by the Convention, e.g. indigenous peoples' rights to land and to property. The more severe the potential consequences are for the concerned indigenous peoples, the greater is the importance of obtaining agreement or consent. If, for instance, the continued existence of an indigenous culture is at stake, the need for consent to proposed measures is more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences.

Convention No. 169 in its Article 16, paragraph 2 provides for "free and informed consent" of indigenous and tribal peoples where relocation of these peoples from lands which they occupy is considered necessary as an exceptional measure.³

DOES CONSULTATION HELP TO PREVENT CONFLICT?

Effective consultation and participation are principles of good governance and are means to reconcile different interests and pursue objectives of inclusive democracy, stability and economic development. In contrast, the lack of effective consultation will often lead to further exclusion and, in the worst cases, conflicts

³ See more on relocation at page 21.

and confrontations. Convention No. 169 has twice been ratified as an integral element of peace accords, to put an end to civil wars that were rooted in the exclusion of certain sectors of the population (Guatemala, 1996; Nepal, 2007). At the local level, consultation is the mechanism for establishing dialogue and facilitating agreements. Likewise, where the ILO supervisory bodies have analyzed specific situations of conflict, it has been clear that these conflicts emerged when the provisions on consultation and participation had not been adequately implemented.

WHAT ARE THE BARRIERS FOR CONDUCTING CONSULTATIONS?

A key obstacle to effective consultation is the situation of exclusion and mistrust, which often exists between indigenous peoples and States. As expressed by a Tripartite Committee of the Governing Body in the context of a particular country, "...the climate of confrontation, violence and lack of mutual trust stopped the consultations from being conducted more productively. It is imperative in all consultations to establish a climate of mutual trust, but all the more so with respect to indigenous peoples, given their lack of trust in state institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome"⁴.

There are other reasons related to the failure to consult adequately, including the fact that widespread recognition of this right is fairly recent and both governments and indigenous peoples are in the process of developing appropriate institutions and modalities for consultations. As noted by the CEACR in its general observation, "[i]n 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 fulfillment 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" (CEACR 2008, published 2009).

⁴ Governing Body, 289th session, march 2004. Representation made under article 24 of the ILO Constitution, Mexico, GB 289/17/3.

WHAT DOES THE CONVENTION SAY ABOUT PARTICIPATION?

The concept of participation is closely linked to that of consultation. In a general manner, Convention No. 169 states in Article 6(1) that governments shall “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”.

The Convention thus recognizes that indigenous peoples often are in a disadvantaged position, which hinders their equal participation. This happens, for example, in the numerous cases where indigenous peoples, and in particular women, do not have recognized citizenship or identification documents, which would allow for their participation in elective processes. In other cases, electoral rules do not allow for minority representation, implying that indigenous peoples may be effectively excluded from participating in decision-making.

In addition, Article 7(1) of Convention No. 169 specifically stipulates that indigenous peoples shall “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”. Further, Article 33 of the Convention requires governments to establish agencies or other appropriate mechanisms to ensure “the planning, coordination, execution and evaluation, in cooperation with the peoples concerned, of the measures provided for in this Convention”.

Convention No. 169 contains numerous references to the concept of participation and also uses other terms such as the obligation to “cooperate” with indigenous peoples; the obligation not to take measures contrary to the “freely-expressed wishes” of indigenous peoples; and the obligation to seek “free and informed consent” of indigenous peoples where “relocation...is considered necessary as an exceptional measure”.

Members of indigenous peoples shall benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.

Enjoyment of the general right of citizenship, without any discrimination, shall not be prejudiced in any way by special measures established to safeguard the persons, institutions, property, labour, cultures and environment of indigenous peoples.

See articles 2(2) (a) and 4(3) of Convention No. 169.

WHAT IS THE LINK BETWEEN CONSULTATION AND PARTICIPATION?

The right to consultation of indigenous peoples is not limited to the right to react to externally initiated or imposed measures. The ILO supervisory bodies have underlined the interconnectedness of the concepts of consultation and participation. This implies that indigenous peoples should not only respond and be able to influence externally initiated proposals, but should actively participate and propose measures, programmes and activities that shape their development. Participation implies going further than mere consultation and should lead to concrete ownership of initiatives by indigenous peoples. In this sense, the intertwined concepts of consultation and participation are the mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development, as stipulated in Article 7(1) of the Convention.

SECTION 3

Lands and natural resources

Convention No. 169 is based on the recognition of the cultural and spiritual values that indigenous peoples attach to their land. Their rights to land and natural resources requires special attention, as these are fundamental to securing the broader set of rights related to self-management and the right to determine their own priorities for development.

WHAT IS THE SCOPE OF INDIGENOUS PEOPLES' LAND RIGHTS?

The Convention recognizes indigenous peoples' rights to the land and resources they traditionally occupy and use in a broad sense. It gives importance to the concept of territories, covering the total environment of the areas they occupy. The recognition of land rights is based on the traditional occupation, meaning the land where indigenous peoples have lived over time and want to pass on to future generations. It is thus the traditional occupation and use which is the basis for establishing indigenous peoples' land rights, and not the eventual official recognition or registration of that ownership. These land rights comprise both individual and collective aspects. Further, governments are required to establish procedures to identify indigenous peoples' lands and protect their rights of ownership and possession, including through demarcation and titling, and to establish mechanisms to resolve land claims.

Traditional occupation confers "a right to the land, whether or not such a right was recognized [by the State]".

CEACR, 73rd Session, 2002, observation, Peru, para 7

The Convention includes a series of safeguards to prevent the displacement of indigenous peoples from their land. It establishes as a general principle that

indigenous peoples shall not be removed from their lands. Where this is unavoidable, it should be only as an exceptional measure. Such exceptional relocation should only take place with their free and informed consent. Where consent cannot be obtained, relocation shall take place only by following appropriate procedures, which provide the opportunity for effective representation of the peoples concerned. Further, they have the right to return to their traditional lands as soon as possible. In cases where this is not possible, indigenous peoples should be provided with compensation and lands of an equal quality and legal status.

DO INDIGENOUS PEOPLES HAVE A RIGHT TO NATURAL RESOURCES?

Most indigenous peoples are highly dependent upon land and natural resources and have developed sophisticated livelihood practices to sustain their economy and the environment. Convention No. 169, as a general principle, stipulates that indigenous peoples have the right “to the natural resources pertaining to their lands”, including the right “to participate in the use, management and conservation of these resources”. The exception to the general principle occurs in cases where the State retains the ownership over mineral, sub-surface or other resources. In such situations, the Convention establishes a series of safeguards to ensure that indigenous peoples are adequately consulted and that they participate in the benefits and receive fair compensation for any damage incurred. The provisions on natural resources (Article 15 of the Convention) are to be applied in conjunction with the general provisions on consultation and participation (Articles 6 and 7), which are described in detail in the previous section. The Convention highlights the need to ascertain whether and to what extent indigenous peoples’ interests will be prejudiced, prior to any exploration and exploitation of natural resources on their lands. It is specifically emphasized (Article 7(3)) that impact studies should be undertaken in cooperation with indigenous peoples to assess the social, spiritual, cultural and environmental impact of planned activities and that the results of these studies shall be considered as

The rights of indigenous peoples to the natural resources pertaining to their lands shall be specially safeguarded. Where the State retains ownership of mineral or sub-surface resources, governments shall establish procedures to consult these peoples and ascertain if their interests are prejudiced. They shall participate in the benefits and receive fair compensation.

See ILO Convention No. 169, Article 15(1) and (2)

fundamental criteria for the implementation of the activities. Further, it is important to note that the provisions regarding impact assessment and consultation apply not only to the actual exploitation of resources but also to the exploration phase. This implies that indigenous peoples must be informed, consulted and participate from the very outset of a planned intervention, including before concessions or licenses are granted to operators.

Inadequate implementation of the provisions regarding consultation, participation and impact assessment in the context of natural resource exploration and exploitation are quite common and are the subject of the most frequent complaints brought to the attention of the ILO's supervisory bodies. Often, conflicts occur between indigenous peoples and private sector actors, who have obtained concessions or licenses from the State. In this context, it is important to underline that the responsibility for ensuring the correct application of the right to consultation and participation lies with the State. Failure to comply with this responsibility will pose a risk to the investments of the private sector, as indigenous peoples may rightfully invoke their rights under the Convention.

In 2010, the Committee of Experts on the Application of Conventions and Recommendations (CEACR), in its observations on Convention No. 169, asked the government of Peru to "suspend the exploration and exploitation of natural resources which are affecting the peoples covered by the Convention until such time as the participation and consultation of the peoples concerned is ensured through their representative institutions in a climate of full respect and trust, in accordance with Articles 6, 7 and 15 of the Convention"(Report of the CEACR, 2010, p. 784). The CEACR, in the same year, made similar requests to suspend activities to the governments of Colombia (p. 762) and Guatemala (p. 768). The employers objected to this interpretation and "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." (Report of the CApp 2010, Part 1, para. 54). The Committee of Experts addressed this issue in a general observation published in 2011. In that context it clarified that "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". (Report of the CEACR, 2011, p. 788).

SECTION 4

Implications for private sector

WHAT ARE THE IMPLICATIONS OF CONVENTION NO. 169 FOR THE PRIVATE SECTOR?

Although the responsibility for implementation of Convention No. 169 lies with the State, the Convention has clear legal implications for private sector actors operating in ratifying countries. The Convention is legally binding upon the States that have ratified and concrete steps need to be taken by them to ensure that their obligations under the Convention are effectively implemented at the national level. However, in many countries there are still considerable challenges in terms of applying the Convention in law and practice, particularly with regard to the right to consultation. This implies that private sector actors risk being caught between the standards of a legally-binding instrument, which can be enforced through the national legal system and which is monitored through international supervisory mechanisms, and the practice of a given State, which has not taken the necessary measures to effectively implement the Convention. A lack of a proper domestication of Convention No. 169 in countries that have ratified it has led to conflict in many cases between companies and indigenous peoples and put the investments of private sector operators at risk. Private sector actors have a direct interest in acting in accordance with the principles of the Convention, for issues of legal security, legitimacy, partnerships and sustainability. Multinational enterprises need to use the principles of Convention No. 169 in good faith as well as the general principles of the ILO Tripartite Declaration of principles concerning multinational enterprises and social policy, which call for enterprises to, inter alia, respect international standards concerning human and labour rights, and honour commitments in conformity with national law and accepted international obligations.

The explanatory note of the International Finance Corporation of the World Bank (IFC) on Convention No. 169⁵, provides specific guidance for companies regarding the Convention. Generally, it notes that companies face a “reputational imperative arising from the perceived duties of companies to be seen to act in a way that is compliant or consistent with international law”. In addition, it notes the following factors, which should be considered when operating in countries that have ratified the Convention:

- Companies must comply with national law. In some ratifying countries, Convention No. 169 is directly applicable in the legal systems;
- Non-compliance by governments will affect companies and may even lead to jeopardizing licenses and concessions;
- There are circumstances where companies’ actions could influence or compromise the State’s implementation of its obligations under C169: “... private sector companies should not act in a manner that would interfere with the State’s discharge of its obligations under its international agreements”.

DO COMPANIES HAVE A GENERAL DUTY TO RESPECT INDIGENOUS PEOPLES’ RIGHTS?

The UN Secretary-General’s Special Representative for Business and Human Rights, Professor John Ruggie, has over the last years developed what is known as the UN Framework for business and human rights, which has been endorsed by the UN Human Rights Council. The UN Framework rests on three pillars: 1) the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; 2) the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others, and; 3) greater access by victims to effective remedy, judicial and non-judicial (A/HRC/14/27).

Although international law generally does not directly impose obligations on companies, “the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility” (ibid). The UN Framework for Business and Human Rights outlines the following elements of the “responsibility to respect”:

⁵ IFC, 2007: ILO Convention No. 169 and the Private Sector

- It means avoiding the infringement of the rights of others and addressing adverse impacts that may occur.
- The responsibility exists independently of States' human rights duties. It applies to all companies in all situations.
- The responsibility is determined by the impact caused.
- Three sets of factors need to be considered: the country context, the impact of the company's activities and abuse connected to activities.
- The corporate response to managing the risks of infringing the rights of others is to exercise human rights due diligence, which comprises four basic components:
 1. a statement of policy articulating the company's commitment to respect human rights;
 2. periodic assessment of actual and potential human rights impacts of company activities and relationships;
 3. integrating these commitments and assessments into internal control and oversight systems; and
 4. tracking and reporting performance.

This due diligence approach is in line with the guidance of the IFC information note on "ILO Convention No. 169 and the private sector", which states that: "In order to minimize risk, companies would be advised to satisfy themselves that the government has fulfilled its responsibilities". Specifically, companies should look into whether:

- The process used for identifying indigenous and tribal peoples' lands is consistent with the requirements of Convention No. 169.
- Legal or other procedures for resolving indigenous peoples' land claims and disputes are acceptable and have been subject to consultation.
- The title to land has derived originally from indigenous peoples and whether this title was obtained properly, in accordance with the law, and without taking advantage of lack of understanding of laws in order to secure possession.

- The relevant government authorities have recognized the indigenous peoples' rights to natural resources.
- Appropriate consultation has taken place prior to the granting of exploration and exploitation licenses.
- Mechanisms are in place to enable the communities concerned to participate in the benefits of the project and to compensate them fairly.

ANNEX A

INFORMATION RESOURCES

GENERAL INFORMATION:

The ILO's website on indigenous and tribal peoples contains a wealth of information materials and resources, including information about ILO technical assistance related to Convention No. 169: www.ilo.org/indigenous

The Programme to Promote ILO Convention No. 169 (PRO 169) has a particular training website, which comprises all necessary materials, including texts, publications, presentations and videos, for a course on indigenous and tribal peoples' rights and development:

www.pro169.org

GUIDANCE ON CONVENTION NO. 169:

The following publications provide specific and detailed information about Convention No. 169:

1. ILO. General Observation, Indigenous and Tribal Peoples, ILO Committee of Experts on the Application of Conventions and Recommendations 81st Session, 2010. International Labour Conference, 100th session, 2011. Report III (1A).
2. ILO. General Observation, Indigenous and Tribal Peoples, ILO Committee of Experts on the Application of Conventions and Recommendations 79th session, 2008. International Labour Conference, 98th session, 2009. Report III (1A).

3. ILO. Application of ILO Convention No. 169 by domestic and international courts in Latin America, ILO, Programme to Promote ILO Convention No. 169 (PRO 169), (Geneva, 2009).
4. ILO. Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169, ILO, Programme to Promote ILO Convention No. 169, (Geneva, 2009).
5. ILO. ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual. Project to Promote ILO Policy on Indigenous and Tribal Peoples, 2000.
6. IFC Guidance Note No. 7 on Indigenous Peoples, International Finance Corporation, 2007.

MATERIAL ON INDIGENOUS PEOPLES' LABOUR CONDITIONS:

1. ILO. Eliminating Discrimination against Indigenous and tribal Peoples in Employment and Occupation: A Guide to ILO Convention No. 111, (Geneva, 2007).
2. ILO. Guidelines for Combating Child Labour among Indigenous and Tribal Peoples, ILO, IPEC & PRO 169. (Geneva, 2006).
3. E. Bedoya; A. Bedoya. Trabajo Forzoso en la Extracción de la Madera en la Amazonía Peruana. (ILO, Lima, 2005).
4. Trends, Thomas, V. (Ed.). Traditional Occupations of Indigenous and Tribal Peoples: Emerging, Project to Promote ILO Policy on Indigenous and Tribal Peoples, (PRO 169). (Geneva, 2000).

ANNEX B

CONVENTION No. 169

Convention concerning Indigenous and Tribal Peoples in Independent Countries

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957; adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

PART I. GENERAL POLICY

Article 1

1. This Convention applies to:
 - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
 - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
 - (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
 - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
 - (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
- (b) the integrity of the values, practices and institutions of these peoples shall be respected;
- (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

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.

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 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II. LAND

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

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 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.

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.

Article 18

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
 - (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
 - (b) equal remuneration for work of equal value;
 - (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
 - (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
 - (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
 - (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;

- (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
 - (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.
4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V. SOCIAL SECURITY AND HEALTH

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PART VI. EDUCATION AND MEANS OF COMMUNICATION

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.
2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.
3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

PART VII. CONTACTS AND CO-OPERATION ACROSS BORDERS

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII. ADMINISTRATION

Article 33

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.
2. These programmes shall include:
 - (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
 - b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

PART IX. GENERAL PROVISIONS

Article 34

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X. FINAL PROVISIONS

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the

International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

For more information

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