



Governing Body

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Institutional Section

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TWELFTH ITEM ON THE AGENDA

Report of the Director-General

Fifth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP)

Introduction

1. By a communication of 5 October 2009, the General Confederation of Workers of Peru (CGTP), referring to article 24 of the Constitution of the International Labour Organisation, made a representation to the International Labour Office alleging that the Government of Peru has failed to secure the effective observance of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).
2. The Indigenous and Tribal Peoples Convention, 1989 (No. 169) was ratified by Peru on 2 February 1994 and is in force for that country.
3. The provisions of the Constitution of the International Labour Organisation concerning the submission of representations are as follows:

Article 24

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

4. The representations procedure is governed by the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its 291st Session (November 2004). In accordance with articles 1 and 2, paragraph 1, of the above Standing Orders, the Director-General acknowledged receipt of the communication, informed the Government of Peru thereof and brought the matter before the Officers of the Governing Body.
5. At its 307th Session (March 2010), the Governing Body, on the recommendation of its Officers, decided that the representation made by the CGTP was receivable and appointed the members of a committee for its examination, namely, Mr Darío Celaya Alvarez (Government member, Argentina), Mr Alberto Echavarría Saldarriaga (Employer member, Colombia) and Mr Gerardo Martínez (Worker member, Argentina). At its 312th Session, the Governing Body appointed Mr Rafael Souza Campos de Moraes Leme (Government member, Brazil) as a replacement for Mr Celaya Alvarez.
6. In a communication of 14 April 2010, the Office invited the Government to send its observations concerning the representation. In a communication of 15 June 2010, the Government sent its observations.
7. The Committee held a meeting on 21 March 2012 and adopted the present report.

Examination of the representation

Allegations made by the complainant organization

8. In its communication of 5 October 2009, the General Confederation of Workers of Peru (CGTP) alleges that in 2007, the Ministry of Energy and Mines of Peru produced 15 proposals, for consideration by the private sector, for the construction of dams for hydroelectric power plants. Three plants were to be built in the *Selva Central* (central jungle region): one at the mouth of the river Tsomaveni (a tributary of the river Ene), one in the Pakitzapango canyon and one at the confluence of the Ene and Perené rivers. The proposed system of dams would be the country's largest. The output of the Pakitzapango dam would be three times that of Peru's largest existing electric power plant. According to the complainant, the purpose of the dams is to sell electric power to Brazil, and is related to the Initiative for Integration of Regional Infrastructure in South America (IIRSA), which originated with an agreement between 12 South American presidents to interconnect the highway, energy and telecommunication networks of the 12 countries of the region. What is more, the hydroelectric project involves the construction of an electric transmission line 400 kilometres long cutting through Peru's *Selva Central* in a straight line to Brazil, affecting the Ucayali and Madre de Dios Amazon rainforest.
9. The complainant organization states that on 3 December 2008, by Ministerial Resolution No. 546-2008-MEM/DM, the Ministry of Energy and Mines awarded a temporary concession to Pakitzapango Energía SAC (a company with Brazilian capital, according to the complainant), to conduct, within 20 months, a feasibility study for the construction of a future Pakitzapango hydroelectric power plant.

10. The complainant reports that in the river Ene valley there are 17 Ashaninka communities living in 33 settlements or annexes. Under Peruvian law, the communities hold title to their lands. They are ancestral lands on which the Ashaninka have developed their own way of life in close harmony with the forests and rivers of the basin, satisfying their everyday needs and living as they have for generations. For the Ashaninka of the *Selva Central*, the Pakitzapango canyon is of great cultural and spiritual significance as the place in which all the peoples of the Amazon originated.
11. The complainant organization states that the concession granted covers 99,987.424 hectares on lands belonging to ten Ashaninka communities in the river Tambo, Pangoa and Mazamari districts, and also affects the other Ashaninka communities and thousands of settlers of Andean origin who have lived on the banks of the Ene for decades.
12. The complainant organization submits that although its purpose is to assess the feasibility of building the dam, the temporary concession makes no provision for any study to assess the social impact the dam would have. The construction of the hydroelectric plant involves a loss of territory for the indigenous communities with spiritual and cultural implications for the Ashaninka. The ecological impacts are equally serious: the lands upstream would be flooded, depriving those downstream of water. The climate changes generated imply loss of soil fertility and the destruction of ecosystems.
13. According to the complainant organization, notwithstanding the extent of the dam's impact, the Government did not consult the representative organization, the Central Ashaninka del Río Ene (CARE). That organization sent a letter of protest to the Ministry of Energy and Mines, which issued Report No. 47-2009-DGE-DCE. The report found that: (1) construction of the hydroelectric plant will depend on the studies conducted by the company Pakitzapango Energía SAC, which holds the concession; (2) the concession does not harm the rights of the indigenous peoples as it involves only studies, not works; and (3) if the feasibility study is positive, the company will have to apply for a final concession, the grant of which is contingent on an environmental impact study and the organization of workshops and public hearings to explain the project to anyone that might be affected (the complainant encloses a copy of the report).
14. In the complainant's view, if the actual construction of the hydroelectric power plant depends on the results of the studies conducted, the people that would be directly affected by the plant should have been consulted before and during the process whereby the concession for the feasibility studies was granted, since this phase has a bearing on the future decision as to whether or not the plant will be built. However, there have been no consultations, either during the application process or since the concession was granted. The complainant organization finds that "the process is thus lacking in good faith, since any consultation and participation regarding the final concession would have as a basis a feasibility study conducted without consultation and with no assessment of social effects, yet in the knowledge that there would be an impact"; indeed, the project includes a water reservoir which will mean flooding a vast stretch of land inhabited by the Ashaninka. According to the complainant organization, the feasibility study serves only to establish the technical requirements for the construction of the hydroelectric dam without envisaging the possibility that the project may not be viable.
15. The complainant organization submits that there was likewise a lack of good faith on the part of the regional government of Junín, which called a meeting to set up an Executive Committee to Support Construction of the Pongo de Pakitzapango Hydroelectric Plant, without inviting the people who would be directly affected or their representative organization, CARE.

16. The complainant organization states that, although the Peruvian Government views the building of a hydroelectric dam in the river Ene valley as development and so seeks to declare it to be of national interest, for the Ashaninka people the plant would be “a serious threat to their lives” and would generate “poverty and extermination”. Although the hydroelectric project affects the Ashaninka communities directly, they are prevented from exercising their right to decide whether or not the project is a priority for their lives since there was no consultation or participation. Furthermore, although the concession was granted temporarily for the purpose of a feasibility study, by failing to provide for an assessment of the social impact of the construction project it overlooks the conflicts that would arise from building a dam in the midst of the indigenous communities. Nor has there been any analysis of the cultural and spiritual implications for the Ashaninka communities or of the project’s impact on the environment. Besides, the land occupied by the Ashaninka is home to some of the greatest biodiversity in Peru, yet the Government is promoting it as an investment zone for a mega project and is granting concessions for engineering studies.
17. The complainant organization submits that the zone intended for the construction of the plant is of cultural and spiritual significance both for the river Ene Ashaninka peoples and for other indigenous communities, “Pakitzapango” being the mythical birthplace of Peru’s Amazonian civilizations. Furthermore, the affected communities are legal owners of the land, a fact that the Government of Peru overlooked in awarding a private company a temporary concession over an area located on land where the communities live without consulting them. The complainant also mentions that the communities are under threat of displacement because a reservoir will follow the building of the dam. It alleges that the Peruvian Government is encouraging execution of the project by issuing the requirement for prior consent from the communities affected established in Article 16(2) of the Convention.

Observations of the Government

18. In its communication of 15 June 2010, the Government refers to the information supplied by the Ministry of Energy and Mines (MEM) and the Legal Advice Office of the Ministry of Labour and Employment Promotion.
19. According to the information supplied by the Government, a distinction must be drawn between temporary and final concessions. Temporary concessions are granted for the purpose of conducting project feasibility studies. They are subject to a time limit of two years and may be extended for a further year in the event of force majeure or unforeseen circumstances. A temporary concession carries no entitlement to use of the land and requires that, in conducting the study, technical and safety standards are to be observed and the environment and cultural heritage to be preserved.
20. According to the Government, the grant of concessions in the electricity sector requires the sanction of an environmental impact study to be conducted with the consultation and participation of the citizens in the area directly and indirectly affected by the project. There is a regulation on citizens’ participation pertaining to energy-related activities (Ministerial Resolution No. 535-2004-MEM/DM), which applies to the procedures for environmental impact assessment. Its objectives are the involvement of natural and legal persons in the development of electricity-related activities and the organization of activities to inform and engage in dialogue with the people concerned by the projects.
21. The Government also states that Supreme Decree No. 002-2009-MINAM issues regulations on transparency, access to public information on environment and the participation of citizens in environmental matters. They facilitate citizens’ access to information and regulate the mechanisms and processes for the participation and consultation of citizens regarding environmental issues. In addition, the Guidelines for citizens’ participation in electricity-related activities (Ministerial Resolution No. 223-2010-MEM/DM), adopted in May 2010, apply while

the environmental studies are being produced and during the follow up and supervision of the environmental aspects of projects. The Guidelines provide for the following mechanisms for citizen participation: face-to-face events, participatory workshops and public hearings.

22. According to the Government, in the Pakitzapango case, the Directorate-General of Electricity issued Ministerial Resolution No. 546-2008-MEM/DM, published on 3 December 2008, granting a temporary concession of 20 months to Pakitzapango Energía SAC (a firm with Brazilian capital) to conduct feasibility studies relating to the generation of electric power at a future Pakitzapango hydroelectric plant in the districts of Mazamari, Río Tambo and Pangoa, Satipo province, department of Junín.
23. According to the Government, in the area covered by the studies, there are indigenous peoples, mostly the Ashaninka communities of the Ene and Tambo river basins who are members of the Central Ashaninka del Río Tambo (CART), CARE and the Federación Ashaninka del Río Ene (FARE). According to the Ministry of Energy and Mines, the company has run into difficulties with the indigenous communities, particularly those affiliated to CARE, as they consider that the project affects them directly and that they were not consulted either before or during the process to grant the temporary concession. To obtain authorization from the communities, the company held a meeting with CART in March 2009 to explain the objectives of the feasibility study. In September 2009, the matter of the temporary concession was addressed in the National Group for the Development of the Amazonian Peoples, in which the Ministry of Energy and Mines and CARE participate. On 27 November 2009, a meeting was organized in coordination with CART in the district of Tambo to provide information on the scope of the temporary concession. On 27 January 2010, a meeting was held with CARE, but the latter's opposition to the project put a stop to dialogue.
24. The Government also indicates that the Ministry of Energy and Mines asserted that the Pakitzapango temporary concession has no direct impact on the indigenous peoples in the area, since it aims only to carry out studies to determine whether or not the project is technically, economically and environmentally feasible.
25. In a communication of 7 March 2011, the Government states that by Directorate Resolution No. 040-2010-EM/DGE the Directorate-General of Electricity found fault with the application for renewal of the temporary concession, and its finding was upheld by Vice-Ministerial Resolutions Nos 107-2010-MEM/VME and 002-2011/MEM/VME which dismiss the appeals filed by the company, so the administrative remedies have thus been exhausted.

The Committee's conclusions

26. The Committee notes the complainant organization's allegations and the Government's observations thereon.
27. The Committee considers that the issues raised in the representation relate to the application of Article 7(3) of the Convention, which reads as follows:

Article 7

...

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.

- 28.** The Committee observes that this case concerns the grant, on 3 December 2008, of a temporary concession for 20 months to the company Pakitzapango Energía SAC by the Ministry of Energy and Mines (Ministerial Resolution No. 546-2008-MEM/DM). The concession was granted for the purpose of conducting feasibility studies relating to the generation of electricity with a view to the construction of a future Pakitzapango hydroelectric plant in the districts of Mazamari, Río Tambo and Pangoa, Satipo province, department of Junín.
- 29.** The Committee notes that according to the allegations of the CGTP, the concession, which pertains to lands of great cultural and spiritual significance for the Ashaninka of the Ene river basin and for other communities, was granted without any consultation in good faith of the Ashaninka communities living on the land, without heed to their priorities and in disregard of their titles of ownership of the lands concerned. More specifically, the Committee notes the complainant's submission that: (1) the concession concerns almost 100,000 hectares located on the lands of ten of the 17 river Ene Ashaninka communities and likewise affects the other Ashaninka communities and the Andean settlers living in the region; (2) although the concession was granted temporarily, for the purpose of conducting feasibility studies for the construction of a hydroelectric plant that would affect the Ashaninka communities directly (since it involves the construction of a dam and the subsequent flooding of lands with the possible displacement of the peoples), the Government failed to consult them either before or during the procedure to grant the concession; (3) the lack of consultation and participation during the process to grant the concession deprived the indigenous communities of the possibility of deciding whether or not the project is a priority for them; (4) the studies allowed under the concession concern the technical aspects of the project but not its social impact on the indigenous communities; and (5) the communities concerned hold titles of ownership of their lands.
- 30.** The Committee notes that in its observations the Government explains the difference between final and temporary concessions, pointing out that under temporary concessions such as the one granted to Pakitzapango Energía SAC, permits are not granted for the use of land but only for the conduct of studies. Only for the grant of the final concession is there a requirement for an environmental impact study that includes a mechanism for citizen consultation and participation. The Committee notes that according to the Government, the temporary concession awarded in this case did not harm the rights of the indigenous peoples since its aim was to carry out only studies, not works (Report No. 47-2009-DEGE-DCE issued by the Ministry of Energy and Mines and sent by the complainant organization).
- 31.** The Committee also notes that the Government: (1) refers to the adoption of regulations on transparency, access to public information on the environment and citizens' participation in environmental matters (Supreme Decree No. 002-2009-MINAM of 17 January 2009) and to the Guidelines on citizens' participation in electricity-related activities (Ministerial Resolution No. 223-2010-MEM/DM of May 2010) which provide for mechanisms such as face-to-face events, participatory workshops and public hearings; (2) states that the company held meetings with the representative organizations of the Ashaninka communities for the purpose of providing information on the objective of the concession (in March 2009 and on 27 November 2009 meetings were held with CART and on 27 January 2010 a meeting was held with CARE but the latter's opposition to the project put a stop to the dialogue); and (3) states that by Directorate Resolution No. 040-2010-EM/DGE, the Directorate-General of Electricity found the application for renewal of the temporary concession to be flawed and that its finding was upheld by Vice-Ministerial Resolutions Nos 107-2010-MEM/VME and 002-2011-MEM/VME dismissing the appeals filed by the company, so the administrative remedies have been exhausted.

32. The Committee welcomes the promulgation on 6 September 2011 by the President of Peru of the “Act concerning the right of indigenous and original peoples to prior consultation established by ILO Convention No. 169”, section 1 of which reads as follows: “Section 1. Object of the Act. The present Act sets forth the content, principles and procedures pertaining to the right of indigenous and original peoples to prior consultation on legislative or administrative measures that affect them directly. It shall be interpreted in conformity with the obligations established in Convention No. 169 of the International Labour Organization (ILO), ratified by the Peruvian State by means of Legislative Resolution 26253”.
33. The Committee observes that the legislative measures referred to by the Government were adopted after the concession was granted and it is unclear from the information supplied whether these measures were applied to the specific case of this concession. The Committee also observes that the meetings which the company held with the representative organizations of the Ashaninka communities sought to provide the communities with information about the project.
34. The Committee observes the Government’s acknowledgement that in the specific case of the possible construction of the Pakitzapango hydroelectric plant, it had been planned to conduct technical, economic and environmental feasibility studies. The Committee regrets that these studies were not carried out with the cooperation of the indigenous peoples concerned, as provided for by Article 7(3) of Convention No. 169. The Committee expresses the hope that the recent legislative progress made in the country will enable the indigenous peoples to be involved as soon as possible in the decision-making processes concerning legislative or administrative measures that are liable to affect them directly.
35. The Committee deems that the present proceedings should be declared closed.

The Committee’s recommendations

36. *The Committee recommends to the Governing Body in the light of the conclusions set out in paragraphs 26–35:*
- (a) *approve this report;*
- (b) *request the Government to ensure that technical, economic and environmental feasibility studies are conducted with the cooperation of the indigenous peoples concerned, in accordance with Article 7(3) of Convention No. 169. The Committee expresses the hope that the legislative progress made in the country will enable the indigenous peoples to be involved as soon as possible in the decision-making processes concerning legislative or administrative measures that are liable to affect them directly;*
- (c) *publish this report and declare the present proceedings closed.*

(Signed) Mr Souza Campos de Moraes Leme

Mr Echavarría Saldarriaga

Mr Martínez

Point for decision: Paragraph 36