



FOURTEENTH ITEM ON THE AGENDA

Report of the Director-General**Seventh Supplementary Report:
Report of the Committee set up to examine
the representation alleging non-observance
by Brazil of the Indigenous and Tribal
Peoples Convention, 1989 (No. 169), made
under article 24 of the ILO Constitution by
the Union of Engineers of the Federal
District (SENGE/DF)***Contents*

	<i>Page</i>
List of abbreviations.....	iii
I. Introduction.....	1
II. Examination of the representation	2
A. Allegations	2
B. The Government's observations.....	3
III. Conclusions.....	6
Prior consultation on the drafting of the Act	6
Consultation process provided for under Article 6 of the Convention	8
Broader context of consultation and participation	8
Application of the Act and the impact of the exploration and exploitation of natural resources.....	9
Consultation as part of the process of identifying which lands would be excluded from the Annual Plan of Forest Concessions	11
Studies.....	12
Safeguarding land rights	12
Special measures.....	13
IV. Recommendations.....	13

List of abbreviations

CAPOIB	Coordinating Council of Indigenous Peoples and Organizations of Brazil
CIR	Indigenous Council of Roraima
CIVAJA	Indigenous Council of Valle de Javari
COIAB	Coordinating Body of Indigenous Organizations of the Brazilian Amazon
CONAFLOR	Coordination Committee of the National Forest Programme
CONAMA	National Environmental Council
FNDF	National Forest Development Fund
FUNAI	National Indian Foundation
IAB	Brazilian Lawyers' Institute
IBAMA	Brazilian Institute for the Environment and Renewable Natural Resources
ISA	Socio-Environmental Institute
PAOF	Annual Plan of Forest Concessions
PLC/62-2005	Bill No. 62 of 2005 concerning the administration of forests
PPTAL	Integrated Project for the Protection of the Indigenous Peoples and Lands of Legal Amazonia
SENGE/DF	Union of Engineers of the Federal District
SFB	Brazilian Forestry Service
SISNAMA	National Environmental System

I. Introduction

1. In a communication dated 18 October 2005, the Union of Engineers of the Federal District (SENGE/DF) made a representation to the International Labour Office under article 24 of the Constitution of the International Labour Organization alleging non-observance by the Government of Brazil of certain provisions of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).
2. The Indigenous and Tribal Peoples Convention, 1989 (No. 169), was ratified by Brazil on 25 July 2002 and is in force in that country.
3. The following provisions of the ILO Constitution relate to the representations procedure:

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).
5. 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 Brazil thereof and brought the matter before the Officers of the Governing Body.
6. At its 295th Session (March 2006), the Governing Body, on the recommendation of its Officers, decided that the representation made by the SENGE/DF was receivable and appointed the members of a committee for its examination, namely, Mr Darío Celaya Alvarez (Government member, Argentina), Mr Guido Doménico Ricci Muadi (Employer member, Guatemala) and Mr Gerardo Martínez (Worker member, Argentina). At its 303rd Session (November 2008), the Governing Body appointed Mr Jorge De Regil (Employer member) to replace Mr Guido Ricci who no longer was a member of the Governing Body since June 2008.
7. In a communication dated 28 April 2006, the Office invited the Government to send its observations concerning the representation. In a communication of 15 June 2006, the Government sent its observations. On 12 July 2006, the SENGE/DF sent an additional communication. The Government sent its observations concerning this communication in letters of 11 September and 11 October 2006.
8. The Committee held a meeting on 17 March 2009 and adopted the present report.

II. Examination of the representation

A. Allegations

Indigenous peoples likely to be affected

9. In its communication of 18 October 2005, the SENGE/DF refers to the drafting procedure and basic provisions of Bill No. 62 of 2005 concerning the administration of public forests (PLC/62-2005), introduced by the President of the Republic. The SENGE/DF alleges that indigenous peoples were not consulted on the impact which the adoption of PLC/62-2005 would have on the administration of public forests, which could be leased to private entities (concession holders) for long periods. The complainant points out that the Brazilian people have never before been confronted with legislation entailing such serious potential consequences without prior in-depth public debate. The SENGE/DF considers that prior discussions for drafting the Bill were not only ineffective but also biased.
10. The SENGE/DF has provided two maps showing respectively: (1) the legal status of indigenous lands; and (2) areas where national forests and indigenous lands overlap. The first map is entitled: “Ministry of Justice, National Indian Foundation: (PPTAL) Integrated Project for the Protection of the Indigenous Peoples and Lands of Legal Amazonia: The legal status of indigenous lands governed by the PPTAL”. On the left-hand side, the following information is given: Status of indigenous lands (198 in total), and the following categories of land status are listed: (i) To be identified (35); (ii) Identification in progress (45); (iii) Identified (17); (iv) Delimited (0); (v) Demarcation in progress (12); (vi) Demarcated (7); (vii) Officially approved (25); and (viii) Registered (57). The map also indicates indigenous lands not covered by the PPTAL, and the references contain the names of the 198 indigenous areas included in the eight categories mentioned above.
11. The second map is entitled “Overlapping of National Forests on Indigenous Lands”. This map indicates (in green) the boundaries of public forests according to the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA), and (in red and blue) indigenous lands according to the National Indian Foundation (FUNAI).¹ According to this map, indigenous lands and public forests overlap in some regions.
12. The complainant organization also provides a letter dated 10 October 2005 concerning the Bill and signed by leaders of the Regional Conference of Indigenous Peoples of Matto Grosso, as well as a legal opinion on the Bill prepared by the Brazilian Lawyers’ Institute (IAB) and dated 4 March 2005.
13. The letter from the Regional Conference of Indigenous Peoples of Matto Grosso requests the Senate to suspend immediately procedures to adopt the Bill concerning the administration of public forests, so that it can be discussed with all the ethnic groups in Brazil likely to be affected by it. The Regional Conference of Indigenous Peoples of Matto Grosso states that it is not categorically opposed to the Bill, affirms that the Convention provides for consultations with indigenous peoples, and asks why they were not consulted, stating that “we wish to know if this Bill will be good or bad for us”. The letter acknowledges that the Bill aims to approve concessions for forest exploitation on

¹ According to section 1 of Annex I of Decree No. 4,645 of 25 March 2003, the FUNAI is a public foundation, established under Act No. 5,371 of 5 December 1967, which is linked to the Ministry of Justice. Its duties include the guardianship of indigenous peoples and establishing guidelines for and ensuring compliance with policies for indigenous peoples. It is overseen by a president and three directors appointed by the President of the Republic on the advice of the Minister for Justice.

indigenous land and indicates that the indigenous leaders who signed it wish to know what safeguards will be implemented to protect their lands once logging companies open up roads and access routes to areas in and around their lands. They ask if the IBAMA and the FUNAI will be able to supervise the logging companies; which routes will be used to transport timber; and whether rivers running through indigenous lands will be used. They also ask if persons not belonging to indigenous populations will enter indigenous land when the companies are working in the vicinity. They want to know what will happen in cases where public forests are located within indigenous lands, as is the case in the Yanomami (State of Roraima) and Alto Río Negro regions, and whether the Government will prohibit exploitation in these areas.

14. As for the substance of the representation, the complainant organization points out that indigenous peoples are at risk from the impact of timber exploitation without proper safeguards. According to the complainant, the Bill in question establishes “mortgages” on forest land and that, in particular, the manner in which the Bill was drawn up violates Articles 4, 6 and 7 of the Convention. The SENGE/DF indicates that the purpose of making this representation is to enable a technical discussion to be held with the competent professional sectors in order to improve the legislation.
15. The legal opinion of the IAB, provided by the complainant, states that the existing law respected the rights of the traditional inhabitants of areas located within public forests. It recognizes existing occupancy permits and, if necessary, provides for the removal of occupants in order to preserve specific ecosystems, with the advance payment of full compensation as set out in section 42 of Act No. 9985/2000. The opinion points out that the proposed new Bill, by contrast, completely disregards all the occupancy rights established between the executive branch and individuals over the centuries, and adds that it is an attempt to undermine the entire existing land occupancy system.
16. The legal opinion also points out that the environmental protection system in place before the Bill was drafted resulted in the creation of the National Environmental System (SISNAMA), established by Act No. 6938/81, including a consultative and deliberative body, the National Environmental Council (CONAMA). Civil society and indigenous communities are widely represented on this Council, whereas under the new legislation it would be controlled by five people appointed by the executive branch.
17. In a communication dated 12 July 2006, the SENGE/DF indicated that, immediately after presenting the representation, it collaborated with the National Congress to reverse procedures for the adoption of the Bill. It was successful in its efforts in the Senate in the sense that provisions were added to the Bill to protect the interests of all citizens and, with regard to the Convention, of the indigenous peoples who inhabit the areas affected by PLC/62. However, the SENGE/DF states that this important legislative achievement came to nothing when the President of the Republic vetoed the provisions in question through his Message No. 124 of March 2006, a copy of which was submitted with the communication.

B. The Government's observations

18. In its observations dated 15 June 2006, the Government points out that the Bill under discussion was approved by the President of the Republic, becoming Act No. 11284 of 2 March 2006 concerning the administration of public forests. This Act governs, among other things, the public forest concession system for sustainable exploitation, as well as the creation of the Brazilian Forestry Service (SFB), the National Forest Development Fund (FNDF) and the National Register of Public Forests. The Government also provided a copy

of the Act and of Decree No. 5795 of 5 June 2006, which contains provisions concerning the composition and functioning of a consultative committee provided for in the Act.

19. The Government states that the Act aims to protect and encourage enterprises whose activities are legal and sustainable and to reduce the black market in endangered wood. Furthermore, by establishing the requirement to identify and register public forest land, the Act will also effectively combat illegal occupations and take-overs of land, the latter being regarded as one of the main causes of conflicts in the Amazon. More than 60 per cent of the forests in the region are located on public land. The new Act is the fruit of negotiations which were also held with the timber industry.
20. The Government indicates that indigenous lands are excluded from the application of the Act by the provisions of section 11(IV). It indicates that, according to the Act, a plan must be drawn up to identify forests that can be leased in exchange for payment. For the purposes of drawing up this plan, section 11(IV) of the Act specifically provides for “the exclusion of indigenous lands, areas occupied by local communities, and areas of interest, in order to establish conservation areas enjoying comprehensive protection”. According to the Government, the exclusion of indigenous lands from areas that can be leased through forest concessions ensures that indigenous peoples will not be directly affected by the legislation in question.
21. The Government states that the process of drafting the Bill concerning the administration of public forests started in November 2003. A working group with 90 participants, representing the federal Government, state governments, non-governmental organizations (NGOs), social movements, the private sector and educational and research institutions, met four times for two-day periods in order to shape the Bill. In 2004, an international seminar on public forest management with 250 participants was held in Belem, with presentations made by specialists from various countries that use concession systems. Four versions of the Bill were drafted; these underwent over 20 revisions and were the subject of an extensive consultation process involving more than 1,200 representatives of different institutions. Some 20 consultative sectoral meetings were held with NGOs, social movements, the private sector and state governments.
22. In its subsequent communication, the Government stated that the following entities participated in these consultations: (1) the Socio-Environmental Institute (ISA), which is directly involved in indigenous matters and, according to its statute, aims to “promote, conduct and disseminate research and studies, produce documentation and develop projects for the protection of the environment, cultural heritage and human rights of peoples, especially indigenous peoples and traditional populations”; and (2) the Amazonian Labour Network, which includes representatives of indigenous peoples.
23. The Government pointed out that, furthermore, the Bill was examined on three occasions by the Coordination Committee of the National Forest Programme (CONAFLOR) and that indigenous communities are directly represented on CONAFLOR by the Coordinating Body of Indigenous Organizations of the Brazilian Amazon (COIAB), and, indirectly, through participation in a forum involving the following participants: the Coordinating Council of Indigenous Peoples and Organizations of Brazil (CAPOIB); the Indigenous Council of Roraima (CIR); the Indigenous Council of Valle de Javari (CIVAJA); and the COIAB. The Bill was discussed intensively within the Government, and that included consultations with the Ministry of Justice, which is linked to the FUNAI.
24. With regard to the manner in which the Act as adopted will provide for the administration of public forests, the Government points out that the IBAMA will be responsible for the authorization, oversight and monitoring of forestry operations conducted in federal areas. The new Act provides for the creation of the Brazilian Forestry Service (SFB), which will

have the following basic functions: (i) administering the concessions system; (ii) promoting sustainable forest development in Brazil; and (iii) administering the National Forest Development Fund (FNDF).

25. According to the Government, the Bill envisages three ways of managing public forests, as follows: (i) through the establishment of conservation areas to allow sustainable forest production (for example, national forests); (ii) by determining areas for use by communities as forest settlements, exploitation reserves, *quilombo* areas, and sustainable development projects; and (iii) through forest concessions awarded in exchange for payment and through a competitive bidding process that takes environmental and social criteria into account.
26. The Government points out that contracts will be awarded for up to 40 years for the exploitation of forest products and 20 years for environmental services, and that the overall concession system will be assessed after the first five years and audited independently every three years.
27. The Government emphasizes on the other hand that the Act concerning the administration of public forests does not contain any self-executing provisions, that is, it does not relate to specific projects requiring immediate implementation. Implementation of the Act will require compliance with a set of procedures. The Government states that the procedures provided for in the Act include the requirement to hold public consultations at the regional level, during which the views will be heard of any indigenous communities whose lands are located close to the forest concession areas, always bearing in mind that these areas will never be adjacent.
28. With regard to forest concession procedures, the Government indicates that it will be necessary to draw up a plan identifying forests that could be leased in exchange for payment. For the purposes of drawing up this plan, section 11(IV) of the Act specifically provides for “the exclusion of indigenous lands, areas occupied by local communities, and areas of interest, in order to establish conservation areas enjoying comprehensive protection.” Section 6 also provides that “Before granting forest concessions, and for purposes of adjudication, the competent bodies shall identify any public forests which are occupied or used by local communities.”
29. According to sections 51 and 52 of the Act concerning the administration of public forests, the Commission for Public Forest Management will be established within the Ministry of the Environment. This Commission will have a consultative role and, in particular, will: (i) assess, evaluate and propose instructions for the management of public forests; (ii) adopt a position on the Annual Plan of Forest Concessions (PAOF); and (iii) act as the consultative body of the SFB. According to section 52, the Commission will include representatives of the public authorities, employers, workers, the scientific community, social movements and NGOs. Decree No. 5795 of 5 June 2006 stipulates that the Commission will comprise 22 representatives of various sectors, one of whom must be a COIAB representative, and that the Commission will meet twice a year.
30. The Government points out that the preservation of public areas around indigenous land, including forests, even when the latter are leased through forest concessions, will ensure that the impact on the culture of the indigenous peoples who live there will be smaller than that of other forms of economic exploitation. That impact would be much greater if nothing were done to protect the vegetation around indigenous lands, as that would result in other forms of land use, including agriculture and livestock breeding. The Government adds that the protection of the areas around the indigenous lands will be consolidated by the conservation of public forests. It will be possible to use the revenue generated by the concessions system to promote sustainable development in indigenous communities.

31. The Government indicates that, according to the procedures for obtaining a concession, it will be necessary to obtain an environmental permit. The procedures also include the requirement to conduct a study on the environmental impact of proposed activities if they entail infrastructure work and if it is considered that there is a potential environmental risk. The Government points out that state environmental bodies, as well as the SENGE/DF, will be able to oversee forest exploitation in areas within their jurisdiction.
32. According to the Government, some 20 per cent of the revenue generated will be used to finance the system itself. The remaining 80 per cent will be allocated as follows: 30 per cent for the states in which the forests are located; 30 per cent for the municipalities; and 40 per cent for the FNDF. The Government points out that, pursuant to section 41.9 of the Act, the Fund's resources could also be used for indigenous communities.
33. The Government states that the executive branch vetoed four points of the text before it was adopted. The first vetoed paragraph provided that concessions for areas over 2,500 hectares would require the approval of the National Congress. The second vetoed point had provided for the establishment of a management committee for the SFB and the FNDF which would include representatives of eight ministries. The third point to be deleted was a restrictive provision preventing amendments to the budget allocation of revenues generated by the concessions and which would be earmarked for the IBAMA. The last aspect of the original text to be deleted had provided that the appointment of SFB directors would be subject to approval by the Senate.
34. In summary, the Government states that, with regard to Article 4 of the Convention, the Act is specifically aimed at safeguarding the rights of all Brazilians. With regard to Article 6, the Government reaffirms that indigenous peoples were consulted in the manner described in the above paragraphs. It reiterates that the exclusion of indigenous lands from areas that can be leased through forest concessions ensures that indigenous peoples will not be affected by the Act. With regard to Article 7 of the Convention, the Government also reaffirms that the Act concerning the administration of public forests does not contain self-executing provisions, in other words, it does not relate to specific tasks requiring immediate implementation, and that implementation of the Act must be done in accordance with a set of procedures. The procedures provided for in the law include the requirement to hold public consultations at the regional level, during which the opinions will be heard of the indigenous communities whose lands may be close to the forest concession areas, always bearing in mind that the indigenous lands will never be actually adjacent. The Government also points out that it will be possible to use the revenue generated by the concession system to promote the sustainable development of indigenous communities.

III. Conclusions

The Committee's conclusions

35. The Committee takes note of the information and annexes submitted by the complainant organization and of the Government's response and annexes, which include a copy of the Act in question.

Prior consultation on the drafting of the Act

36. The Committee notes that the complainant organization alleges that, during the drafting of Act No. 11284 of 2 March 2006 concerning the administration of public forests, there was no prior consultation with the indigenous peoples likely to be affected by it, in particular

regarding the impact of the Act on the peoples in question in view of the fact that timber exploration and exploitation would take place on, or in the vicinity of, their lands.

37. The Committee notes that the Regional Conference of Indigenous Peoples of Matto Grosso alleges that it was not consulted on the impact of timber exploration and exploitation on lands occupied by indigenous peoples, or in areas close to their lands.
38. The Committee notes that, according to the Government, three consultative meetings were held with the CONAFLO, on which the COIAB is represented, as well as other indirect forms of consultation. Furthermore, the Government states that the Bill was the subject of in-depth discussions at the government level, including consultation with the Ministry of Justice, which is linked to the FUNAI.
39. The applicable provisions in this case are Articles 2, 4, 6, 7, 13, 14, 15(2) and 33 of Convention No. 169.
40. The Committee will first consider whether Act No. 11284 of 2 March 2006 concerning the administration of public forests is a legislative measure that is likely to affect indigenous peoples directly, with a view to ascertaining whether it should have been subject to the consultation process provided for by Article 6 of the Convention.

According to Article 6 of the Convention:

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;*** [Emphasis added.]

...

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.

41. The Committee notes that, according to the maps provided by the complainant organization, which are of official origin (Ministry of Justice/FUNAI and IBAMA), there is an overlap between national forests and lands of varying legal status which are occupied by indigenous peoples. The Committee notes that the Government did not question the validity of these maps or offer any observations on them. Furthermore, it notes that, according to the Government, the Act will not affect indigenous lands, but it also notes that the Act does not identify the unaffected indigenous lands. It further notes that these lands will be identified at a later date. Although the Committee will examine this issue in greater detail with regard to the practical application and impact of the Act, it points out that the need to identify the lands that will be excluded shows that the Act is likely to have a direct effect on the peoples concerned. It further notes that, according to the Government, the indigenous peoples were consulted in some form at three meetings, which indicates that the Government does not question the relevance of the consultation process. In the light of the foregoing considerations, the Committee concludes that the Act concerning the administration of public forests, as *a legislative measure which may directly affect the people concerned*, comes within the meaning of Article 6 of the Convention and that it should have been subject to the consultation process provided for by that Article.

Consultation process provided for under Article 6 of the Convention

42. The second question that will be examined by the Committee is whether the consultations that were undertaken were in accordance with the provisions of Article 6 of the Convention. The Committee draws the Government's attention to the fact that the consultation process provided for by Article 6 of the Convention includes specific requirements. Not just any consultation process will be in compliance with the Convention. In keeping with paragraph 2 of Article 6, consultation must take place in accordance with procedures that are *appropriate to the circumstances*, through the indigenous peoples' *representative institutions*, in *good faith* and with the objective of *achieving agreement or consent to the proposed measures*. "Appropriate procedures" are those that create the conditions necessary to reach an agreement or consent concerning the proposed measures. This means that the expression "appropriate procedures" must be understood in relation to the aims of the consultation. There is no single model of appropriate procedures, which should take into account national circumstances, the circumstances of the indigenous peoples concerned and the nature of the measures which are the object of the consultation process. As regards the consultation process itself, it should take into account the opinions of the various peoples involved in order to facilitate an exchange of information and ensure that the procedure used is considered appropriate by all parties. The Committee emphasizes this point because the validity of the consultative processes provided for by the Convention, as a mechanism to prevent and resolve conflicts, depends on the creation of fruitful mechanisms for dialogue. The consultation laid down in the Convention is therefore not merely a formal requirement but a genuine instrument for participation. The Committee notes that, according to the Government, three meetings were held with CONAFLO, on which the COIAB is represented, but it also notes that the Government does not indicate the criteria applied with regard to the "representative institutions" mentioned in Article 6 of the Convention. Nor has the Government provided any information regarding the allegations that the Regional Conference of Indigenous Peoples of Matto Grosso was not consulted. With reference to the other procedural requirements (appropriate procedures, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent), the Committee notes that the Government has not provided sufficient information on the way in which it has met these requirements. The Committee also notes that no records or any other type of document relating to the procedures used and the topics discussed have been submitted by the Government, in particular relating to the different points of view regarding the impact on indigenous communities of exploration and exploitation of forestry resources. In the light of the above information, it would appear that, while there was some consultation with the indigenous peoples concerned, it was not enough to meet the requirements of the Convention. The Committee furthermore expresses its concern with regard to the long-term impact that this legislation may have on the indigenous peoples of the Amazon, in view of the fact that the Act provides for timber concessions to be awarded over a period of 40 years. Consequently, the Committee concludes that the consultations were not undertaken in conformity with the consultation process provided by Article 6 of the Convention.

Broader context of consultation and participation

43. The Committee would like to make it clear that Article 6 must be understood within the broader context of consultation and participation. According to Article 2(1), "*Governments shall have the responsibility for developing, **with the participation of the peoples concerned**, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity*" and, according to Article 33(1) and (2), "*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 ... These programmes shall include: (a) the planning, coordination, execution and evaluation, in cooperation 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 cooperation with the peoples concerned” [emphasis added.]. In sum, Articles 2 and 33 of the Convention provide for coordinated and systematic action by governments, with the **participation** of the peoples concerned, to protect the rights of these peoples and to guarantee respect for their integrity, and for such **participation**, from the conception to the evaluation stage, of the measures provided for in the Convention. In this context, the ILO’s supervisory bodies have repeatedly stated that “Consultation, as envisaged in the Convention, extends beyond consultation on specific cases: it means that application of the provisions of the Convention must be systematic and coordinated and undertaken in cooperation with the indigenous peoples as part of a gradual process in which suitable bodies and machinery are established for the purpose.”²

44. Furthermore, the Committee emphasizes that the Convention does not provide for a specific solution to questions related to the exploration and exploitation of natural resources on land occupied or otherwise used by indigenous peoples. However, the Convention does require the existence of effective consultation and participation machinery, in order to ensure that indigenous peoples participate in their own development. It recalls that consultation and participation are the cornerstone of the Convention and that such mechanisms are not merely a formal requirement but are intended to enable indigenous peoples to participate effectively in their own development. The appropriate use of these mechanisms also contributes to preventing and resolving conflicts of interest, creating inclusive development projects, and thus increasing social cohesion with respect for diversity. The Committee will go on to examine other aspects of consultation and participation.

Application of the Act and the impact of the exploration and exploitation of natural resources

45. Thirdly, the Committee will examine the question of the application of the Act, its impact and the consultation and participation envisaged by the Convention in this particular case, in other words with regard to the exploration and exploitation of natural resources. In this case, the Convention not only provides for consultation at the stage of drafting the relevant legislation, but also sets out specific consultation and participation mechanisms, in Article 15(2) read in conjunction with Article 13(2) and Article 7. According to Article 15(2) of the Convention:

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. [Emphasis added.]

The “lands” to which Article 15(2) refers are defined in Article 13(2), which stipulates that: “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*” [emphasis added].

² *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III, Part (1A), International Labour Conference, 96th Session, Geneva, 2007, p. 554.

46. The Committee notes that the concerns raised relate to the *impact* of logging on indigenous peoples: the safeguarding of indigenous lands when logging companies open up roads and access routes to areas near or on their lands; transit routes for timber; the use of rivers; and the question of access by outsiders to indigenous land where companies have been granted concessions *in the vicinity* of those lands. Furthermore, there has been uncertainty in cases where public forests are located on (within) indigenous land, as is the case of the Yanomami (State of Roraima) and Alto Rio Negro regions.
47. The Committee welcomes the Government's statements to the effect that indigenous lands are excluded from potential logging concession zones and that this ensures that indigenous peoples are not directly affected by the legislation in question. In this context, it notes that, according to section 11 of Act No. 11284, "*With regard to forestry concessions, the Annual Plan of Forest Concessions (PAOF) shall take into account: ... (IV) the exclusion of indigenous lands, areas occupied by local communities and areas of interest, in order to establish conservation areas enjoying comprehensive protection.*"
48. The Committee also notes the Government's statements to the effect that the Act concerning the administration of public forests does not *contain self-executing provisions*, that is to say, it does not specify tasks requiring immediate implementation. The Committee notes that the implementation of the Act will require compliance with a series of procedures. It draws the Government's attention to the fact that the procedures provided for in the Act include the requirement to hold public consultations at the regional level, during which the views will be heard of indigenous communities whose lands may be close to forestry concession areas, always bearing in mind that these zones shall never be adjacent. The Committee also notes that Decree No. 5795 of 5 June 2006 created a new consultative committee on matters pertaining to the administration of public forests, which will represent various sectors and comprise 22 members, one of whom will be a COIAB representative.
49. The Committee duly notes that the information contained in the two paragraphs above represents an important opportunity, if the measures provided for by the Convention are applied, to implement the consultation and participation machinery required by the Convention with regard to the exploration and exploitation of natural resources, namely in Article 15(2) concerning consultation and natural resources and in Article 7 concerning the participation of the indigenous peoples in plans and programmes for national and regional development which may affect them directly.
50. The Committee draws the Government's attention to the fact that, under Article 15(2) of the Convention, it must consult the indigenous peoples concerned regarding state-owned resources located on the lands defined in Article 13(2) of the Convention, "*before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands*" – that is to say, before licences are granted – "*with a view to ascertaining whether and to what degree their interests would be prejudiced*". Furthermore, the peoples concerned must, wherever possible, be able to participate in the benefits of such activities and receive fair compensation for any loss or damage they may sustain as a result of such activities. The Committee therefore considers that the Government should adopt additional regulatory and practical measures to ensure that the consultation provided for in Article 15(2) takes place, including the procedural requirements stipulated in Article 6, before licences are granted for the timber exploration and exploitation provided for in the Act concerning the administration of public forests.

Consultation as part of the process of identifying which lands would be excluded from the Annual Plan of Forest Concessions

51. Having indicated that, under the terms of Article 13(2), the provisions of Article 15(2) of the Convention apply to the total environment of the areas which the peoples concerned occupy or otherwise use, the Committee notes that the Act concerning the administration of public forests does not define the term “indigenous lands” for the purpose of excluding them.
52. The Committee has also noted that, according to a map provided by the SENGE/DF, there is an overlap between the lands covered by the proposed Act and certain indigenous lands, and that the Regional Conference of Indigenous Peoples of Matto Grosso cites as examples the cases of the Yanomami and the Alto Rio Negro. The Committee noted that the other map provided by the SENGE/DF includes indigenous lands at different stages of the registration process, and classifies these lands in the following manner: (i) to be identified; (ii) identification in progress; (iii) identified; (iv) delimited; (v) demarcation in progress; (vi) demarcated; (vii) officially approved; and (viii) registered.
53. The question therefore arises concerning: (1) the manner in which the indigenous lands to be excluded from timber exploration and exploitation are to be determined; and (2) the procedure that will be used to determine the impact of exploration and exploitation activities on the eight land categories referred to above, in cases where an overlap is shown on the maps and on lands in the vicinity of the indigenous peoples’ territories.
54. In order to resolve these problems, Article 7 of the Convention must be applied in addition to the other Articles referred to. Under the terms of 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* [emphasis added].
 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, 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 cooperation 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. [Emphasis added.]
 4. Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.
55. In the light of the provisions of Article 7(1) of the Convention, the Committee considers that, for timber exploration and exploitation to comply with the Convention, indigenous peoples should be involved in the formulation, implementation and evaluation of plans and programmes likely to affect them directly. In particular, with regard to the application of section 11(IV) of Chapter IV (forestry concessions) of the Act concerning the administration of public forests, indigenous peoples should, under the terms of this section, participate in determining the indigenous lands to be excluded from logging activities.

56. As regards the lands referred to in paragraph 53 above (namely, lands in one of the eight categories mentioned in paragraph 52, lands where there are *overlaps*, and land *in the vicinity* of timber concession zones), in so far as they are lands “which the peoples concerned occupy or otherwise use” within the terms of Article 13(2) of the Convention, they must be subject to consultation as laid down in Article 15(2) in the manner indicated by the Committee in paragraph 42 of this Report.

Studies

57. Likewise, under the terms of Article 7(3) of the Convention, studies must be carried out, *in cooperation with the peoples concerned*, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The same Article stipulates that “*the results of these studies shall be considered as fundamental criteria for the implementation of these activities*”. Finally, the environmental impact assessment studies laid down in the Act are not sufficient to ensure compliance with this Article of the Convention; they must include the “*social, spiritual and cultural*” impact and be carried out in cooperation with the peoples concerned.
58. By way of a conclusion on the impact of logging activities on the indigenous peoples of the Amazon likely to be affected by timber concessions, the Committee notes that, while the Act concerning the administration of public forests does not regulate these aspects to the extent stipulated by the Convention, it does contain provisions which do not contradict the Convention, although supplementary provisions are required. The Committee refers to Chapter IV of the Act, on forestry concessions, which, in order to comply with the Convention, must include consultation and participation in the manner laid down in Articles 7 and 15(2) of the Convention. While the Committee notes that the inclusion of a representative of the COIAB on the consultative committee, as laid down in Decree No. 5795 of 5 June 2006, creates an opportunity for consultation, it reiterates that not all consultation and participation complies with the consultation and participation requirements laid down in the Convention. The Committee refers in particular to paragraph 42 of this Report. Furthermore, the consultation and participation provided for in Articles 6, 7 and 15(2) of the Convention include partners, objectives and methods that require more than the inclusion of an indigenous representative on a general committee. Likewise, the indigenous peoples concerned should participate in determining the lands to be excluded from timber exploration. As regards compensation and the indigenous peoples’ share in any benefits, the Committee, while noting that, according to section 41.9 of the Act concerning the administration of public forests, specific resources “may benefit the indigenous peoples”, considers that provision must be made for fair compensation and for participation by the peoples concerned in the benefits to which Article 15(2) of the Convention refers.

Safeguarding land rights

59. With regard to the opinion of the IAB submitted by the complainant, as to whether the new Act provides less protection for indigenous peoples in terms of their land rights than the current system, the Committee notes that, according to the Government, the new Act would help to strengthen protection. The Committee hopes that, when implementing the Act concerning the administration of public forests, the Government will bear in mind the obligation, laid down in Article 14 of the Convention, to recognize the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy, and to guarantee effective protection of those rights of ownership and protection.

Special measures

60. With regard to Article 4 of the Convention, application of which is sought by the complainant organization, the Committee notes the Government's statements to the effect that the purpose of the Act is to safeguard the rights of all Brazilians. It requests the Government, when developing mechanisms to implement the Act, to bear in mind that, under the terms of Article 13 of the Convention, governments are required to 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. It trusts that the Government will take the necessary special measures aimed at safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned, as required under the terms of Article 4 of the Convention.
61. The Committee reminds the Government that it may ask for technical assistance from the Office, if it is considered necessary.

IV. Recommendations

The Committee's recommendations

62. *The Committee recommends to the Governing Body that it approve this Report and, in the light of the conclusions contained in paragraphs 35–61, that it:*
- (a) request the Government to adopt the measures needed to complement the consultation process concerning the impact of timber concessions envisaged in the Act concerning the administration of public forests on the indigenous people likely to be affected, taking into account the terms of Article 6 of the Convention and the Committee's conclusions set out in paragraphs 42–44 of this Report;*
 - (b) request the Government to adopt in particular the relevant regulatory and practical measures to implement the consultation process laid down in Article 15(2) of the Convention, including the procedural requirements stipulated in Article 6, before licences are granted for the timber exploration and/or exploitation envisaged in the Act concerning the administration of public forests;*
 - (c) request the Government to ensure that the consultation process required under Article 15 of the Convention is implemented in relation to the lands referred to in paragraph 52 of this Report, whatever their legal status may be, provided that they comply with the criteria of Article 13(2) of the Convention (lands which the peoples concerned occupy or otherwise use);*
 - (d) invite the Government, under the terms of Article 7(1) of the Convention, to guarantee the participation of the indigenous peoples in the formulation, implementation and evaluation of plans and programmes related to the logging activities referred to, including the determination of the land to be excluded under the terms of section 11(IV) of the Act concerning the administration of public forests;*

- (e) request the Government, in accordance with Article 7(3) of the Convention, to ensure that studies are carried out, in cooperation with the peoples concerned, with a view to assessing the social, spiritual and environmental impact on the peoples concerning of the logging activities envisaged in the Act;*
- (f) request the Government to ensure that the indigenous peoples affected by logging activities participate, whenever possible, in the benefits of such activities and receive fair compensation for any loss or damage they may sustain as a result of such activities;*
- (g) request the Government to ensure that logging activities do not affect the rights of ownership and possession laid down in Article 14 of the Convention;*
- (h) request the Government to adopt special measures to safeguard the persons, institutions, property, labour, cultures and environment of the peoples affected by logging activities;*
- (i) recommend that the Government request ILO technical assistance and cooperation, if it considers it appropriate, in order to implement, in cooperation with the social partners, the recommendations set out in the present report, and to promote dialogue among the parties;*
- (j) entrust the Committee of Experts on the Application of Conventions and Recommendations with following up the questions raised in this report with respect to the application of the Indigenous and Tribal Peoples Convention, 1989 (No. 169); and*
- (k) make this report publicly available and close the procedure initiated by the representation of the complainant alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).*

Geneva, 17 March 2009.

(Signed) D. Celaya Alvarez
Chairperson

J. De Regil

G. Martinez

Point for decision: Paragraph 62.