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Report IV (2 A)

Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)

Fourth item on the agenda

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INTRODUCTION

The first discussion of the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), took place at the 75th Session (1988) of the International Labour Conference. Following that discussion, and in accordance with article 39 of the Standing Orders of the Conference, the International Labour Office prepared and communicated to the governments of member States a report [1] containing a proposed Convention based on the Conclusions adopted by the Conference at its 75th Session.

Governments were invited to send any amendments or comments they might wish to make so as to reach the Office by 30 November 1988 at the latest, or to inform it, by the same date, whether they considered that the proposed text constituted a satisfactory basis for discussion by the Conference at its 76th Session (1989).

At the time the present report was prepared, the Office had received replies from the following 60 member States: Argentina, Australia, Austria, Barbados, Belize, Bolivia, Botswana, Brazil, Burundi, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Cyprus, Czechoslovakia, Denmark, Dominica, Ecuador, Egypt, Ethiopia, Fiji, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Ghana, Honduras, India, Ireland, Japan, Kenya, Luxembourg, Mali, Malta, Mexico, Mozambique, Netherlands, Norway, Panama, Peru, Poland, Romania, Rwanda, San Marino, Saudi Arabia, Somalia, Suriname, Swaziland, Sweden, Switzerland, Thailand, Trinidad and Tobago, USSR, United Arab Emirates, United Kingdom, United States, Zambia.

In accordance with article 39, paragraph 6, of the Standing Orders of the Conference, as amended at its 73rd Session (1987), governments were requested to consult the most representative organisations of employers and workers before finalising their replies and to indicate which organisations they had consulted.

The governments of 26 member States (Australia, Brazil, Canada, Czechoslovakia, Denmark, Egypt, Finland, Gabon, India, Ireland, Japan, Kenya, Malta, Mexico, Netherlands, Norway, Peru, Romania, Rwanda, Somalia, Sweden, Switzerland, Trinidad and Tobago, United Arab Emirates, United States, Zambia) stated that their replies had been drawn up after consultation with such organisations. In the case of 11 countries (Australia, Brazil, Denmark, Gabon, India, Japan, Mexico, Norway, Peru, Switzerland, United States) the replies of employers' or workers' organisations were appended to those of their governments or were communicated directly to the Office.

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[1] ILO: *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report IV (1), International Labour Conference, 76th Session, 1989.

Following a recommendation made by the Committee appointed by the Conference at its 75th Session to consider the revision of Convention No. 107, governments were urged to consult organisations representing indigenous and tribal peoples in their countries, if any. The governments of six countries (Australia, Canada, Finland, Norway, Sweden, United States) indicated in their replies that they had done so. In cases in which the views of such organisations have been communicated directly to the Office, account has been taken of them in preparing the report.

In order to ensure that the text of the proposed Convention, in English and French, is in the hands of governments within the time-limit laid down in article 39, paragraph 7, of the Standing Orders of the Conference, this text has been published in a separate volume which has already been sent to governments (Report IV (2 B)). The present volume (Report IV (2 A)), which has been drawn up on the basis of replies from governments and from employers' and workers' organisations (as well as from indigenous and tribal organisations in some cases), contains the essential points of their observations. It is divided into two sections: the first comprises observations of a general nature made by governments, while the second contains the more specific observations on the proposed Convention, with the Office commentaries on these observations.

REPLIES RECEIVED AND COMMENTARIES

The substance of the replies received with regard to the proposed Convention concerning indigenous and tribal (peoples/populations) in independent countries are given below. The replies are followed, where appropriate, by brief Office commentaries.

The governments of the following 39 countries stated that they had no observations to put forward for the moment or that they considerd the proposed text to constitute a satisfactory basis for discussion at the 76th Session of the Conference: Austria, Barbados, Belize, Burundi, Cameroon, Central African Republic, China, Cyprus, Czechoslovakia, Dominica, Ethiopia, Fiji, France, German Democratic Republic, Federal Republic of Germany, Ghana, Honduras, Ireland, Kenya, Luxembourg, Mali, Malta, Mozambique, Netherlands, Poland, Romania, Rwanda, San Marino, Saudi Arabia, Somalia, Suriname, Swaziland, Switzerland, Thailand, Trinidad and Tobago, USSR, United Arab Emirates, United Kingdom, Zambia. The governments of six countries (Barbados, China, Czechoslovakia, German Democratic Republic, Poland, San Marino) stated that no such populations were to be found in their countries.

General observations

Brazil

The proposed revised text no longer refers to integrationist models, and constitutes an advance for indigenous rights.

Canada

(Indigenous Peoples' Working Group (IPWG)). The Conference has a duty to act in the best interests of indigenous peoples, who are merely observers within the revision process. The central purpose of the revision should be to eliminate discriminatory, repressive, prejudicial and paternalistic provisions; to reflect current and evolving international law; and to contribute to the recognition and protection of indigenous rights and freedoms.

Ecuador

The proposed text presents difficulties which appear insuperable. The proposals concerning the use of the term "peoples" and rights to subsoil resources might lead to interpretations of the concept of self-determination which could be damaging to the constitutional principle of sovereignty.

FINLAND

There is a general consensus concerning the revision of the Convention. Attention should be paid to the work being carried out by the United Nations on this theme.

GABON

(Employers' Confederation of Gabon). If some citizens are more disadvantaged than others it is normal that a greater effort should be made for their benefit. However, violations of human rights and questions relating to land rights are not within the ILO's competence.

JAPAN

It is appropriate to discuss the revision of the Convention in view of the development of international opinion. However, as national systems and the situation of these populations differ from country to country, the Convention should be flexible enough to implement the measures concerned in a balanced manner for all nationals. The opinions of other international organisations should be considered. Vague expressions such as "full participation" and "rights" should be clarified.

(General Council of Trade Unions of Japan (SOHYO)). SOHYO disagrees with the Government's statement concerning treatment equal to that of other sectors of the national population, since the purpose of the revision is to discuss the fundamental principle of autonomy and self-identification of these peoples, and to adopt a universally applicable Convention.

MEXICO

(Confederation of Industrial Chambers (CONCAMIN)). No special status or arrangements should be established for members of the indigenous (peoples/populations). The aim of raising their living standards should be considered as being covered by the principle of equality for all citizens.

SWEDEN

The proposed text reflects the position that the previous assimilationist orientation should be abolished, and that indigenous and tribal populations should have the right to be consulted and to exert influence in matters concerning them. This will improve their prospects of preserving and developing their linguistic and cultural identities and their traditional economic activities. It is important that the Convention be framed in terms acceptable to them. A flexibility clause should be included allowing a ratifying State to exclude certain provisions of the Convention as dictated by national conditions.

Observations on the proposed Convention concerning indigenous and tribal (peoples/populations) in independent countries [1]

Terminology

Consent, consultation, co-operation and participation

Several questions of terminology have arisen in preparing this report. (The use of "peoples" or "populations" is dealt with under Article 1.) Rather than discuss them each time they arise, it appears sensible to deal with them only once.

During the first discussion an important conceptual decision was taken to recognise explicitly in a number of provisions that indigenous and tribal peoples should have an active role in decision-making and in planning and administering programmes affecting them. As this developed through the discussion, the formulas used were not always consistent. Several respondents have expressed concern that this inconsistency might lead to unintended differences of interpretation. One difference was that the conclusions adopted during the first discussion sometimes require consultation, and sometimes *full* consultation, with similar problems for other expressions. In addition, the terms "participation", "consultation", "co-operation" and "collaboration" are all used. The text now proposed does not include the word "full", and there is no intention thereby of lessening the degree of consultation, etc., required. In addition, the term "collaboration", where it appeared, has been changed to "co-operation".

As concerns consent, at the first discussion the Office had offered the formula "seek the consent" in two instances with the aim of indicating that governments should make a serious attempt to obtain the agreement of indigenous and tribal peoples in specified fields. This wording did not mean, as some participants stated, that the groups concerned would have a veto power; however, even this flexible language did not prove acceptable.

At the same time, several of the non-governmental organisations representing indigenous and tribal peoples have argued that it is inconsistent to speak of respect for their cultures, institutions and ways of life, while reserving the right for governments to take actions to which they are opposed.

The argument that acceptance of the concept of attempting to obtain agreement would justify the creation of "a State within a State" has been invoked, as has the idea that its use would create special rights for these sectors of the national community, provoking backlash against them and constituting unacceptable reverse discrimination. The Office considers that these concerns are not justified by a requirement to attempt to obtain the agreement of the groups affected by governmental action, when it is clear that governments would retain the residual power to take the action they deem necessary if agreement cannot be reached after a sincere effort is made.

An alternative formulation has been proposed in Article 6, with a view to securing agreement at the second discussion. It should be emphasised again, as in the past, that the Convention will contain minimum standards only, and that

[1] The observations are preceded by the relevant texts as given in the proposed Convention set out in Report IV (1).

it has been deliberately framed not to impede the development of other – and possibly higher – standards in other forums and in particular at the national level.

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/populations) in all regions of the world, have made it appropriate to adopt new international standards on the subject, and

Recognising the aspirations of these (peoples/populations) to control over their own institutions, ways of life and economic development, within the framework of the States in which they live, and

Noting that in many parts of the world these (peoples/populations) have been unable to enjoy their fundamental human rights to the same degree as the rest of the populations of the States within which they live, and

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

Noting that the following standards 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 standards, 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 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/Populations) Convention (Revised), 1989:

Observations on the Preamble

Bolivia. The Government welcomes the reference to the Inter-American Indian Institute which has rightly been included in view of the important work undertaken.

Canada (IPWG). The Preamble should state that the principles contained in the other international rights instruments referred to apply also to these peoples; at present it gives the impression that a separate standard is being recognised concerning their rights and freedoms. It should be stated that the justification

for the revision was to remove outdated attitudes and approaches destructive to indigenous peoples and societies. A paragraph recognising that all indigenous peoples have the right to self-determination should be included as well as a paragraph acknowledging that their economic, social, cultural and land and resource rights should be protected from state encroachment by the exercise of the right to self-determination.

In the fourth paragraph, the words "on the subject" should be replaced by:

... consistent with existing and developing international law including the collective rights and freedoms of indigenous peoples,

The fifth paragraph should be redrafted to read:

Recognising the aspirations and rights of indigenous peoples to jurisdiction over their own destiny and institutions, to exist as distinct societies and peoples, to maintain and develop their identity, languages, religions and philosophies of life, to determine their cultural, social, economic, spiritual and material development without the adverse imposition of foreign life styles.

The denial of human rights for indigenous peoples is not limited to some parts of the world, as implied in the sixth paragraph. This should read:

Noting that these peoples have been unable to enjoy their fundamental collective and individual human rights in a manner consistent with their own laws, values, customs and perspectives.

Paragraph seven should be revised to replace "vital" by "distinct" and to replace "traditions" by "peoples". The following should be added to this paragraph:

(and) to the promotion and observance of human rights and freedoms, the maintenance of international peace and the pursuit of friendly relations and co-operation between States and indigenous peoples.

Norway. In the eighth paragraph, the references should be limited to the relevant United Nations organisations and agencies.

Panama. The Preamble should serve to clarify some points on which it has been difficult to reach agreement, such as the adoption of the word "peoples" in connection with aspects of national sovereignty.

Office commentary

The Governments of Bolivia and Norway take opposite positions on whether to mention the Inter-American Indian Institute, while other respondents do not refer to it. The reference has been maintained. As concerns the proposal by the Government of Panama, the clarification of such concepts might be better left to the Office reports and to the operative parts of the text as well as to the Conference discussions.

The detailed proposals by the Indigenous Peoples' Working Group of Canada merit careful consideration, and account has been taken of them in the fourth, fifth, sixth and seventh paragraphs. However, in so far as these proposals – in particular in the fifth paragraph – would introduce the recognition of rights not recognised or not dealt with in the operative parts of the instrument, it would not seem appropriate to reflect them. As concerns the statement that the Preamble should provide that the other international instruments mentioned should apply also to indigenous and tribal peoples, the Office does not agree with the interpretation given by the IPWG; and in any case it is not for the ILO to determine the scope of these instruments adopted by the United Nations.

PART I. GENERAL POLICY

Article 1

1. This Convention applies to:

(a) tribal (peoples/populations) 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/populations) 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 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 indigenous and tribal (peoples/populations) mentioned above are referred to hereinafter as "the (peoples/populations) concerned".

Observations on the use of "peoples" or "populations"

Australia. The term "peoples" would be acceptable only if there was no implication, in either the operative or preambular parts of the Convention, that those "peoples" have a right to "self-determination". Proposed Articles 6 *(b)* and 7, paragraph 1, cause particular concern in this regard. These concerns will be overcome, however, if a form of wording precluding the notion of self-determination in relation to "peoples" – along the lines of the Canadian proposal – is included.

(Australian Council of Trade Unions (ACTU)). The use of the term "peoples" is a matter of fundamental importance to the National Coalition of Aboriginal Organisations which regards the use of the term "populations" as degrading and offensive. The term "peoples" should be used without qualification.

Bolivia. The Government prefers the term "populations", but some formulas could be explored to permit the use of "peoples". There should be a specific clarification that "peoples" has no connotations relating to the political self-determination of peoples, as understood in contemporary international law and United Nations practice. The introduction of the term "peoples" without this clarification would be outside the ILO's mandate.

Brazil. Use "populations" rather than "peoples".

(National Confederation of Agricultural Workers (CONTAG)). The term "nation" should be used instead of "peoples" or "populations". Nation and State are distinct concepts. Many independent States constitutionally recognise their multinational character. The concept of "nation" is linked to that of autonomy, which involves the exercise of self-determination while excluding the possibility of constituting a separate State. Moreover, it is perfectly correct to qualify the term "nation" by the adjectives "tribal" or "indigenous".

Canada. Different nations including Canada employ the term "peoples" domestically with reference to their indigenous populations, but the meaning of the term in international law is unclear. Its use in this text may imply rights that

go beyond the scope of the revised Convention, such as the right to self-determination, which has been described by the United Nations as the right of peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development". Thus, self-determination under international law can imply the absolute right to determine political, economic and social cultural programmes and structures without *any involvement whatsoever* from States. Consequently, any use of the term "peoples" would be unacceptable without a qualifying clause which would indicate clearly that the right to self-determination is not implied or conferred by its use.

An appropriate qualifying clause would be: "The use of the term 'peoples' in this Convention does not imply the right to self-determination as that term is understood in international law." The Government would give serious consideration to other formulations which would meet its concerns.

Concern with the use of the term "peoples" is related to the issue of self-determination *as that concept is understood in international law.* This position is not meant to prejudice the attainment of greater levels of autonomy for indigenous populations at the national level.

(IPWG). Given the importance of identifying the peoples to which provisions of the Convention apply, definitions of indigenous and tribal peoples should not be based exclusively on the nature of the relationship with the national community. Their identity as distinct peoples is not dependent upon definitions according to the criteria acceptable to the national community. Definitions that respect their right to self-identification should be used.

Indigenous and tribal peoples are distinct societies that must be referred to in a precise and acceptable manner. Continued use of the term "populations" would unfairly deny them their true status and identity as indigenous peoples. Unless indigenous peoples are rightfully described as "peoples" the revised Convention will lack credibility with the very peoples it is intended to benefit.

The IPWG strongly opposes the position of the Canadian Government. The subamendment proposed by the Government of Norway would use the term "peoples" provided it did "not address the question of national self-determination as this term is understood in international law". However, any qualification that removes the consideration of the right to self-determination would negate or at least cast grave doubts on the existence of that human right in relation to indigenous and tribal peoples. Such an amendment would have drastic consequences on the work of the United Nations and in other forums where the environment for the recognition and protection of indigenous rights and freedoms is not guided by fears and apprehensions that have no foundation in reality.

Chile. The term "populations" should be used as it is more authentic. "Peoples" has implications linked with self-determination and separation from the State.

Colombia. The term "peoples" should be used. It refers in particular to the sense of identity of these peoples.

Denmark (Danish Federation of Trade Unions (LO)). The term "peoples" should be used.

Ecuador. The use of "peoples" can lead to interpretations and distortions regarding self-determination which are in conflict with sovereign and constitutional principles.

Finland. The term "peoples" should be used, and it should be defined in such a way as to be acceptable as widely as possible and not to have any effects outside the Convention.

Gabon. The term "peoples" is more appropriate in the context of the Convention as the reference is to a social and cultural community which is distinct in its identity. Likewise, the term "peoples" would go with that of "territory" referring to the space in which they live.

India. The Government has strong reservations regarding the use of the term "peoples" since it can be taken as equivalent to "nation", and may imply the right of self-determination as understood in international law. The word "peoples" may have different meanings in different countries and there are numerous examples of diverse peoples being part of a nation. The Government of India is not in favour of applying the term "peoples" to any particular religious, tribal, linguistic, ethnic or other groups. Even if a clarification is adopted, it would be difficult to avoid an association with the principle of self-determination. Moreover, the use of "peoples" would prove an obstacle to ratification.

(Bharatiya Mazdoor Sangh (Indian Factory Workers' Union) (BMS)). Replacement of "populations" by "peoples" is unnecessary and unwarranted. The objectives of revision are to ensure that the culture and traditions of these populations are accorded proper respect and that they are adequately consulted on matters affecting them. However, the suggested wording is not essential for this purpose. The term "peoples" could be misused and misinterpreted to justify secession in the name of self-determination, which would be detrimental to national integrity and security. The proposal that "peoples" should be used, if an acceptable formula could be found to ensure that it did not imply rights beyond the scope of the revised Convention, in particular with regard to self-determination in the sense of separation from the State, offers no satisfactory solution.

Mexico. The term "peoples", when referring to self-determination and autonomy, does not necessarily imply separation from the State, but on the contrary consolidates the State.

Norway. The expression "peoples" should be used. If there is a need for a definition, the following is proposed: "The term 'peoples' as used in this Convention does not imply rights beyond the scope of the Convention."

Peru. The term "peoples" should be adopted in so far as it refers to the right of indigenous peoples to maintain an ethnic identity separate from that of other members of society as well as the right to maintain their territorial base with full sovereignty.

Switzerland (Swiss Workers' Union (SGB)). The use of "peoples" is an essential part of changing the overall orientation of the Convention. No qualification or explanation is necessary or appropriate. The terminology used

in an ILO Convention has no legal effect on the meaning of other international instruments. Furthermore, the United Nations itself is moving in the direction of the term "peoples", as reflected in resolution 1988/18 of 1 September 1988 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which changed the title of the relevant item on its agenda to "Discrimination against indigenous peoples".

United States. United States law already uses the term "peoples". However, because international law accords to peoples the right of self-determination, the proposed use of this term in the revised Convention raises some concern. Adoption of the term "peoples" could be used to argue for an interpretation of international law to include an absolute right of indigenous groups not only to self-determination in the political sense of separation from the State but also to absolute independence in determining economic, social and cultural programmes and structures, which would also be unacceptable to many States. The unqualified use of "peoples" may thus prevent wide ratification of a revised Convention. The argument about terminology should not overshadow the substance of the revised Convention.

To help ensure widespread ratification the Government therefore supports retention of the term "populations". However, "peoples" could be accepted provided that it is appropriately qualified so as to make clear that its use in this Convention does not grant or imply rights that go beyond the scope of this Convention, such as the right to self-determination as that concept is understood in international law.

Two acceptable formulations are "the use of the term 'peoples' does not imply any rights except those set forth in this Convention. In particular it does not imply the right to self-determination as that term is understood in international law"; or "the use of the term 'peoples' does not imply the right to self-determination as that term is understood in international law".

(American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)). The term "peoples" should be used without reservation or qualification. But, in order to obtain the consent of governments and others concerned, the following text, based on the compromise text considered by the Committee, should be included in Article 1: "The use and interpretation of the term 'peoples' in this Convention shall not affect it in other international instruments or proceedings."

Office commentary

The majority of replies favour the use of "peoples", as was also the case in Report VI (2) before the first discussion. However, in the first discussion and in the replies received, serious reservations have been expressed concerning the implications of using this term, at least if used without an appropriate qualifying clause. While a few of the respondents are opposed to the use of "peoples" under any circumstances, most have indicated that they could accept it if the meaning of the term could be suitably qualified; various formulations were put forward for a qualifying clause, both during the first discussion and in the replies received. Essentially, these proposals fall into two categories. The first provides that the use of the term "peoples" should not imply or provide for any rights

additional to those provided for in the revised Convention. The second provides more specifically that the use of the term should not imply the right to self-determination, some going on to mention specifically the right to secession.

The reasons for favouring the use of "peoples" are detailed by Canada (IPWG), and have been discussed in earlier reports. They consist essentially in the idea that its use is necessary to reinforce the recognition of the right of these groups to their identity and as an essential aspect of the change of orientation toward increased respect for their cultures and ways of life.

As concerns the implications in international law of the use of the term, it may be noted in particular that Article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, provides that "All peoples have the right of self-determination". However, the meaning of "peoples" is evolving in international law, in particular as it relates to the right of self-determination; and the meaning of "self-determination" is likewise an evolving concept, as to both its content and beneficiaries. There has been no decision by the deliberative bodies of the United Nations as to whether and to what degree the right of self-determination attaches to indigenous and tribal peoples, nor in what circumstances. It is clearly outside the ILO's mandate to assign meaning to these terms until these questions have been decided in more appropriate spheres of the United Nations system – where indeed such deliberations are taking place.

Equally important, the ILO must be careful not to adopt language which would in any way limit those other deliberations. It would be contrary to the intention and spirit of the present revision process to adopt terminology which would embody a lower standard than that already recognised, or which would go against recent trends.

The trend toward the use of "peoples" is apparent in other parts of the United Nations system, though no uniform common language has been established. A recent example is its increasing use in United Nations documentation and deliberative bodies (e.g. the resolution mentioned by Switzerland (SGB)). UNESCO and World Bank documentation use the term – albeit inconsistently – as does the Inter-American Indian Institute.

While due weight has been given to the arguments against using it, the term "peoples" has been used in the proposed text. This reflects the position expressed in a majority of replies that the term can be used on condition that a suitable qualifying clause is adopted, the effect of which would be to ensure that the term did not imply rights beyond the scope of the revised Convention. In proposing the qualifying phrase no specific reference has been made to self-determination because this might present an obstacle to further evolution of the concept with regard to these peoples. It would, in particular, involve the ILO in assigning a meaning to a term which all concerned agree should not be determined by the ILO. The Office considers that the concerns voiced can be covered by providing unambiguously that the use of the term "peoples" does not imply any other rights than those provided for in the revised Convention, and that it does not affect the meaning of other international instruments.

The proposal to use "nations" has not been retained.

Observations on other aspects of Article 1

Argentina. The Government makes an observation concerning the wording of the Spanish version of the text.

Canada (IPWG). Replace paragraph 1 *(b)*, up to the word "colonisation", by:

(b) peoples in independent countries who regard themselves as indigenous on account of their descent from the peoples who inhabited the country, or a geographical region to which the country belongs, at the time of contact . . .

Colombia. Delete paragraph 1 *(b)*. In paragraph 1 *(a)* replace "tribal peoples in independent countries" by: "indigenous peoples in independent countries who are descended from the peoples who from time immemorial have occupied the territories of the country".

Japan. The scope of the Convention is becoming ambiguous with the introduction of the notion of self-identification as a fundamental criterion. The scope should be more clearly and restrictively defined.

Norway. In paragraph 1 *(b)*, after "colonisation", add "or establishment of state boundaries".

Sweden. It would be unfortunate if differences between this Article and the definition to be adopted by the United Nations resulted in inconsistent coverage. The subjective identification referred to in paragraph 2 might be taken to be the sole criterion to be applied. It would be inadvisable for objective criteria, as contained in paragraph 1, not to be also applicable.

Office commentary

The proposal made by the Government of Norway concerning paragraph 1 *(b)* has been retained; it also covers the use of "contact" suggested by Canada (IPWG).

Self-identification would not appear to be the sole criterion applied to coverage by the Convention, as suggested by the Government of Sweden. As concerns the observation by the Government of Japan, the question of whether to attempt to adopt a detailed definition was considered at the earlier stages of discussion and it was decided not to do so in view of the flexible nature of this instrument, the difficulties of adopting such a definition, and the fact that few problems in this respect have arisen in supervising the application of a similar provision in Convention No. 107.

The proposal by the Government of Colombia would remove any reference to tribal peoples, thereby narrowing the scope of the Convention and preventing its application to several countries which have ratified Convention No. 107. A proposal to this effect in the first discussion was not accepted.

Article 2

1. Governments shall have the responsibility for developing, with the full participation of the (peoples/populations) concerned, co-ordinated and systematic action to guarantee respect for the integrity of these (peoples/populations) and their rights.

2. Such action shall include measures for:

(a) enabling members of these (peoples/populations) to 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/populations) with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the (peoples/populations) concerned to raise their standard of living to that enjoyed by other members of the national community, in a manner compatible with the aspirations and ways of life of these (peoples/populations).

Observations on Article 2

Argentina. In paragraph 2 *(c)*, delete "members of the" since these words contradict the communal rights approach of the rest of the text. This point could be supplemented by a provision promoting self-management.

Brazil (Workers' Central Organisation (CUT)). In paragraph 1, add "and with the free consent" after "participation". It would be contradictory for a provision concerning protection of the integrity of these peoples and respect for their rights not to include such a reference.

(CONTAG). In paragraph 2 *(c)*, making the standard of living of "other members of the national community" the point of reference is ethnocentric, as it is the peoples concerned who should determine the standard of living which they desire.

Canada. Amend paragraph 1 to read: "Governments shall have the responsibility for developing, with the participation of the (peoples/populations) concerned, co-ordinated and systematic action for the protection of the rights of these (peoples/populations)." The phrase "for the protection of the rights of these (peoples/populations)" is more realistic in terms of benefits to them than a vague objective of guaranteeing "respect" for their integrity and rights.

(IPWG). The words "full participation of" in paragraph 1 should be replaced by "consent and in collaboration with". There should be a strong obligation on States to ensure that their actions and measures are not unilaterally developed against the wishes and interests of indigenous peoples, particularly as regards rights and freedoms. There should be no fear of "veto" whenever indigenous peoples seek respect for their integrity, as consent is a basic principle of democracy.

Colombia. In 2 *(b)* (first line), insert "their unity", before "social". In 2 *(c)*, replace "assisting" by "supporting".

India. While governments must guarantee respect for the integrity of tribal populations and their rights in the field of cultural identity, religious beliefs, social customs, etc., it is essential to bring them into the mainstream of national life. Any attempt to preserve a "noble savage" concept is retrogressive, and can leave them at the risk of manipulation and exploitation even by their own members who have had exposure to foreign influences. Democratic choices by free individuals must alone determine choices for economic and social/societal development, education and equality of opportunity. The words "for the

protection of the populations concerned" as originally proposed should be retained.

Japan. In view of the diversity of national legislation and administrative and judicial systems, and in the situations of indigenous and tribal (peoples/populations), the words "in a manner and to an extent depending on the situation of the country and of the (peoples/populations) concerned" should be added at the beginning of paragraph 1.

United States. Governments should have a major role in systematic action, and this responsibility should be shared with those concerned. It should be made clear that the term "government" means the federal government.

Office commentary

The suggestion by the Government of Argentina to delete "members of the" would contradict a decision by the Conference in the first discussion, where these words were added with reference to the recognition of communal rights in paragraph 2 *(c)*.

The proposal of the Government of India would also contradict language adopted by the Conference, which decided to remove the original reference to protection on the grounds that it was patronising. In this respect, the Office considers that the Government has made an important point, and that a requirement to protect vulnerable population groups is in no way patronising. On the other hand, the approach taken in the remainder of this Article would appear to be consistent with the Government's concern, if it is understood that all measures adopted under the revised Convention would be based on the assumption that respect for the integrity, rights, customs and other aspects of the ways of life of these peoples is in no way contradictory to their playing an active and constructive role in the life of the nation. A balance between protective action and measures to allow and encourage participation must therefore be sought. The proposal by the Government of Colombia on 2 *(b)* appears already to be implied in the existing wording. On 2 *(c)*, the existing wording appears more suited to the sense of the provision.

The proposal by the Government of Japan would remove any obligatory force whatsoever. Sufficient flexibility is provided for in Article 33 (Article 34 in the new text) to take account of the diversity of national situations.

The point made by Brazil (CONTAG) appears to be covered by the final phrase of the sentence. The reference is to levels of living standards rather than to identical standards.

The point raised by the Government of the United States was clarified during the first discussion (see paragraph 47 of the Committee's report).

In view of the above considerations, the proposal by the Government of Canada on paragraph 1 would meet most of the points raised. It would, however, omit the very important addition introduced at the first discussion of respect for the identity of these peoples, which would not appear to be a "vague objective" if understood to mean respect for their ability to retain their own identity consistent with the principles developed more fully in paragraph 2. This reference has therefore been retained.

Article 3

1. Indigenous and tribal (peoples/populations) shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the (peoples/populations) concerned, including the rights contained in this Convention.

Observations on Article 3

Brazil (CUT). The rights of these peoples existed before the establishment of any national or international legislation. In paragraph 2, replace "contained" by "recognised".

Canada. Add to paragraph 1: "The provisions of this Convention shall be applied without discrimination to male and female members of these (peoples/populations)." The reference to equal treatment in Article 20, paragraph 3 *(d)*, applies only to recruitment and conditions of employment and leaves open the possibility of discrimination under other equally important provisions.

Colombia. Add to paragraph 1: "In developing these rights and freedoms, governments shall recognise these peoples' own forms of organisation and representation for the effects of this Convention."

Japan. Since these (peoples/populations) enjoy human rights and fundamental freedoms as citizens, as well as being subject on an equal footing with other citizens to the power of States to impose penalties and to pursue the public interest, the words "except in cases prescribed by law for all citizens", as in Article 10, should be added at the beginning of each paragraph.

Norway. Same proposal as Canada.

United States. Paragraph 2 should be amended to make it clear that the prohibition on the use of force or coercion does not preclude legitimate police action by governments.

Office commentary

The proposal made by the Governments of Canada and Norway (which is supported also by the Nordic Sami Council) was also presented during the first discussion, but not adopted following the argument that international Conventions always apply equally to men and to women and that it would be superfluous. The protection against sexual harassment in Article 20 is of a different character from a general prohibition of sexual discrimination. The proposal has not therefore been reflected in the proposed text as it would appear to add nothing substantive.

The proposal by the Government of Japan would also appear to be inherent in the wording of this Article, as would that of the Government of the United States which was already clarified during the first discussion. The point made by Brazil (CUT) is noted.

The sense of the proposal by the Government of Colombia would appear already to be covered by Articles 2, paragraph 2 *(b)*, 4, paragraph 1, 5 and 6, paragraph 1 *(c)*.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the institutions, persons, property, labour and environment of the (peoples/populations) concerned.

2. Such special measures of protection shall not be contrary to the wishes of the (peoples/populations) concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection.

Observations on Article 4

Brazil (National Confederation of Industry (CNI)). This Article should be drafted to avoid the possibility of more favourable treatment being given to these communities than to other workers.

Canada (IPWG). Replace "special" by "particular" to avoid derogatory connotations. In paragraph 1, replace "as appropriate" by "as warranted".

Amend paragraph 2 to read:

2. Such particular measures of protection shall not be contrary to the wishes of the peoples concerned as freely expressed through their own institutions and shall be initiated and implemented in collaboration with them.

Amend paragraph 3 to read:

3. Particular measures of protection shall not prejudice in any way the enjoyment of other rights generally available without discrimination in national laws.

Add the following new paragraph:

4. Governments shall not take measures that prejudice in any way the collective rights of the peoples concerned.

Colombia. In paragraph 1, reverse the order of "institutions" and "persons", and add "territory" after "labour".

Office commentary

The proposal by Brazil (CNI) would be contrary to the spirit of the Convention, which is to provide for special measures for this especially disadvantaged group. This is in accordance with long-standing ILO principles, according to which special measures in favour of disadvantaged groups cannot be held to be discriminatory against other elements of the population.

The proposal by Canada (IPWG) to replace "special" by "particular" would introduce its own ambiguities, and the derogatory connotations of "special" are not evident. The proposal to amend the term "as appropriate" would weaken the obligation, which would then apply to cases of necessity only, and would eliminate the important concept of suitability.

The proposal by the Government of Colombia on word order has been retained. As concerns "territories", the suggestion would duplicate the requirements of Part II.

The proposal by Canada (IPWG) concerning paragraph 2 might limit the scope of this provision by making all such measures subject to being initiated and implemented by the communities concerned. The more general and more flexible formula in the original is retained, as more detailed provisions concerning consultation and co-operation are found elsewhere.

The proposal to revise paragraph 3 does not appear to introduce any substantive change.

Article 5

In applying the provisions of this Convention:

(a) due account shall be taken of the cultural and religious values and practices of these (peoples/populations), and 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/populations) shall be respected;

(c) policies aimed at mitigating any difficulties experienced by these (peoples/populations) in adjusting to new conditions of life and work shall be adopted, with the full participation and co-operation of the (peoples/populations) affected.

Observations on Article 5

Canada. The expression "any difficulties" in *(c)* is too broad, and "any" should be deleted.

(IPWG). Amend *(a)* to read:

(a) the cultural and religious values and practices of the peoples concerned shall be recognised, respected, promoted and protected, and due account shall be taken of the nature of the problems which face them as distinct societies and individuals;

In *(b)*, add "promoted and protected" after "respected".

Amend *(c)* to read:

(c) policies shall be adopted and implemented with the consent and collaboration of the peoples concerned aimed at mitigating and correcting difficulties and problems associated with adjustments to new conditions of life and work.

In order to take account of the dignity and particular problems of indigenous women and children, add a new paragraph:

(d) all appropriate measures shall be taken in good faith to ensure that the rights of the indigenous women and children of the peoples concerned derived from international, national and indigenous laws be respected, promoted and protected.

Colombia. In *(a)*, move the reference to groups and individuals to follow "due account shall be taken"; add "social" before "cultural". In *(c)*, replace "by these peoples . . . work" by "in their relations with, and in living together with, other sectors of national society".

Japan. At the beginning of each provision, add "In a manner and to an extent depending on the situation of the country and of the (peoples/populations) concerned", because when prompt action is required consultation might delay action. In addition, there would be unjustifiable discrimination against other citizens.

(Japan Federation of Employers' Associations (NIKKEIREN)). Giving too much priority to the protection of these (peoples/populations) and to the enhancement of their social status may discriminate against other citizens. The instrument should provide for equal rights.

United States. In *(b)*, eliminate the reference to "integrity". The Government supports the intent, but believes that this term is ambiguous and may weaken the provision. In *(c)*, delete "any" before "difficulties".

Office commentary

The proposal by Canada (IPWG) concerning *(a)* has been retained, in a slightly modified version. The more general term "groups" is used in the proposed text, since "distinct societies" raises questions best dealt with in other Articles. The proposal by the Government of Colombia would alter the meaning of *(a)*, and has not been retained, but the proposal to add "social" has been.

In *(b)*, the use of the term "integrity" received general support when proposed at the first discussion, and would appear to signify that the values, practices and institutions of these peoples should be seen as having an organic wholeness which would suffer from attempts to introduce changes. The term has thus been retained subject to further discussion.

As concerns *(c)*, the proposal to delete "any" has been retained. The proposal by the Government of Colombia would change this provision from applying to a transitional period to one dealing with permanent policy. As the latter is dealt with elsewhere, the proposal has not been retained. The concerns expressed by the Government of Japan and by the NIKKEIREN would seem here to go against the intention of the instrument, which is to provide for special measures in cases in which they are particularly necessary.

The proposal to add a new paragraph for the protection of women and children has not been retained, as the thrust of the instrument is toward the protection and promotion of indigenous and tribal peoples as a group rather than of categories of these peoples.

Article 6

In applying the provisions of this Convention, governments shall:

(a) consult fully the (peoples/populations) concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

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

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

Observations on Article 6

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

Canada. The word "consult" by itself presupposes an obligation to seek, in good faith and in an appropriate manner, the views, advice and assistance of the (peoples/populations) concerned. Replace *(b)* by: "ensure that the said

(peoples/populations) are, to the same extent as the rest of the population of the State, able to participate in decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which may affect them directly". A requirement that any group freely participate in decision-making at *all* levels could affect the power of legislative bodies and the power and responsibility of governments to make decisions. In *(c)*, delete "and resources", since it would not be realistic to impose an open-ended obligation for governments to provide resources, including financial resources, in all cases.

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

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

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

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

(NIKKEIREN). See under Article 5.

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

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

Office commentary

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

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

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

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

Article 7

1. The improvement of the conditions of life and work and level of education of the (peoples/populations) concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas inhabited by them. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

2. The (peoples/populations) concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, territories, institutions and spiritual well-being and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall be involved in the formulation and implementation of plans and programmes for national and regional development which may affect them directly.

3. Governments shall ensure that studies are carried out, in collaboration with the (peoples/populations) concerned, to assess the social, spiritual, cultural and environmental impact of planned development activities on them.

Observations on Article 7

Argentina. In paragraph 2, add "evaluation" after "implementation".

Brazil (CNI). Delete paragraph 2. It represents to some extent the right of these communities to self-determination, or at least to the creation of a State within a sovereign State.

(CONTAG). See under Article 6 concerning paragraph 2.

Canada. In paragraph 2, replace "territories" by "lands" for the reasons given under Part II. In paragraph 3, add "whenever appropriate" after "shall"; the present wording would require studies to be carried out for every instance of planned development.

(IPWG). Indigenous peoples are subject to unilateral decision-making by governments working with business for massive development projects that drastically affect indigenous peoples and the environmental integrity of their lands, resources and territories. In paragraph 1, after "areas" in both sentences, add "regions and territories used and occupied". In paragraph 2, add "lands, resources and" before "territories"; after "control" add "and jurisdiction"; and delete "to the extent possible". Add a new paragraph: "In collaboration with the peoples concerned, governments shall protect and preserve the environmental integrity of the territories of these peoples, including the biosphere, air, waters, sea areas and sea ice."

Chile. Paragraph 2. Participation should be through official channels to which all citizens have access.

Colombia. In paragraph 1, add "health". In paragraph 2, replace "to exercise control, to the extent possible, over" by "to attain through self-management". In paragraph 3, replace "ensure that studies are carried out" by "carry out studies".

India. Paragraph 2 is not acceptable, as governments cannot surrender the right to decide priorities and to make decisions on economic development affecting the entire population. Amend as follows: "Governments shall have the ultimate decision-making power for establishing priorities for the process of development. They should, however, take into account the priorities which the populations concerned may express, through democratic and representative forums in this regard, in so far as it affects . . . directly."

Japan. See under Article 5.

(NIKKEIREN). See under Article 5.

Norway. Add a new introductory paragraph: "In collaboration with the (peoples/populations) concerned, the government shall protect and preserve the environmental integrity of the territories of these (peoples/populations)." In paragraph 2, add after the first sentence: "In exercising such control the (peoples/populations) concerned shall be responsible for the ecologically sound management of the natural resources and the environment."

(LO and Norwegian Sami Organisations (NSR)). To the new introductory paragraph proposed by the Government, add: "including the biosphere, air, inland and coastal waters and sea ice".

United States. In paragraph 3, add "Whenever appropriate". The present text would require studies in every instance and might defeat the opportunity for development which the tribe concerned might wish to pursue.

(Inuit Circumpolar Conference (ICC)). Add a new paragraph concerning environmental protection (same as Canada (IPWG) above), either here or under Part II.

Office commentary

The proposals for an additional provision on protection of environmental integrity would fit well in this Article on development activities. The listing of aspects of the environment has not been included. This would appear also to meet the concern expressed by Brazil (CONTAG).

The observations by the Governments of India and Japan and by Brazil (CNI) appear to be based on a reading of paragraph 2 which does not correspond to the Office's understanding of that text. The first sentence would establish the principle of the right to decide on their priorities, but the words "to the extent possible" qualify the right to exercise control over the development process and would not remove a government's power to decide. The proposal to delete "to the extent possible" has not been retained for this reason. In the same connection, the proposal by the Government of Norway appears to be based on the supposition that development activities would always be administered by these peoples in their areas, and thus has not been retained. The suggestion by the Government of Argentina has been included.

The proposal to add "whenever appropriate" in paragraph 3 has been retained. It would not be desirable to make the requirement of this paragraph absolute, for the reasons expressed.

The proposal by the Government of Chile would not be inconsistent with the wording of this Article if official channels are adequate to the needs of consultation. As in many other regards, however, the situation of these peoples often makes it impossible for them to have access to these official channels in practice, in which case appropriate additional consultative measures would be required. Similarly, the proposal by the Government of India would unduly restrict the kinds of consultation which would be carried out and limit the flexibility of this Article.

The proposals by Canada (IPWG) for additional wording in paragraphs 1 and 2 have not been retained, since the more general terms already used would not appear to benefit from narrower definition. The proposal by the Government of Colombia on paragraph 1 would remove an inconsistency in the original.

The proposal by the Government of Canada to replace "territories" by "lands" in paragraph 2 has not been retained, independently of any decisions which may be made concerning Part II. The term "territories" is appropriate here as being more flexible and somewhat wider, without requiring in this particular context that decisions be made as to its exact meaning.

The proposal by the Government of Colombia on paragraph 2 would reduce flexibility and impose a positive obligation on these communities which they may not be able to assume. Its proposal on paragraph 3 would also reduce flexibility without adding any positive protection.

Article 8

1. In the application of national laws and regulations to the (peoples/populations) concerned, due regard shall be had to their customary laws.

2. These (peoples/populations) 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 or with internationally recognised human rights.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these (peoples/populations) from exercising the rights granted to all citizens and from assuming the corresponding duties.

Observations on Article 8

Argentina. In paragraph 2, add "cultures" before "customs".

Australia. In paragraph 3, replace "members" by "a member" and replace "all citizens" by "other members of the population". This makes it clear that the reference is to rights which an individual has as a member of the wider population, and reproduces the language used in Article 2, paragraph 2 *(a)*.

(ACTU). Paragraph 1 should provide that customary laws be "recognised and respected"; "due regard" may provide little force in practice. In para-

graph 2, delete the reference to the national legal system because this question is dealt with in Article 9. The same proposal in respect of paragraph 2 is made by Brazil (CUT), Denmark (LO), Japan (SOHYO) and Switzerland (SGB). Add the following new paragraph:

Appropriate procedures shall be established, in agreement with the peoples concerned, which will provide for effective negotiation to resolve serious cases of conflict between customary law and national law.

Brazil (CNI). This matter is beyond the ILO's competence.

(CONTAG). Paragraph 2 should not refer to concepts foreign to these peoples. Replace "where these are not" by "using persuasive and educational measures when these customs and institutions are".

Canada. In paragraph 1, replace "customary laws" by "customs". In many States, customary laws have no force under the national legal system. The term "customs" is broader; it would ensure that all means of internal regulation practised by these populations are covered and would be more consistent with Articles 8, paragraph 2, 9, paragraph 2, and 16, paragraph 1.

(IPWG). Articles 8 and 9 are contrary to the general duty in Article 2 to respect the identity, customs and traditions and institutions of these peoples. The requirement of compatibility with national law is a licence for cultural genocide and allows assimilationist policies. International law should be developed from the perspective of indigenous peoples as well as that of States. Amend to read:

1. In any application of national law to the peoples concerned, their customs, traditions and laws shall be recognised, respected and protected.

2. Mechanisms and procedures shall be established, with the consent and in collaboration with the peoples concerned, to resolve any case of conflict between indigenous and national law, with due regard to internationally recognised human rights.

3. The application of this Convention shall not prevent members of these peoples from exercising, according to their wishes, the rights granted to all citizens and from assuming the corresponding duties, without prejudice to the rights and freedoms of the peoples to whom such members belong.

Chile. Indigenous populations should abide by the national legal system.

Colombia. In paragraph 2, delete "shall", and replace "where" by "shall ensure that". Add a paragraph:

4. Governments shall carry out studies on customary law in order to adapt national legislation to the indigenous reality.

Gabon. In paragraph 2, delete the reference to the national legal system, since this could be interpreted to the detriment of the peoples concerned and might well rob them of a part of their identity, which would be contrary to the spirit of the instrument.

Japan. See the proposal made under Article 5. The manner in which customs and customary law are treated is up to each legal system, and all citizens should be treated alike. The words "in a manner and to an extent depending on the situation of the country concerned and on an equal footing with other citizens" should be added.

(NIKKEIREN). The guarantee of equality before the law will prevent discrimination.

Norway (LO and NSR). In paragraph 1, replace the last phrase by "their customary laws shall be recognised and respected".

Switzerland (SGB). The Convention should not place unnecessary limitations on the nature of the institutions indigenous peoples adopt for themselves. The only truly universal rights are those adopted by international bodies.

United States. In paragraph 1, insert "customs or" before "customary laws" for greater consistency and flexibility. With respect to paragraph 2, it would be useful for conflicts between customary and national law to be resolved.

(AFL-CIO). In paragraph 2, delete the reference to the national legal system, since it is incompatible with the principles of autonomy reflected elsewhere in the Convention.

(ICC). In paragraph 1, respect instead of due regard should be the standard. The reference in paragraph 2 to the national legal system would allow assimilationist policies. In paragraph 3, no effort is made to balance the exercise of rights by individuals with the collective rights of the peoples concerned.

Office commentary

Some respondents, and some participants in the first discussion, feel that to include an obligation to take account of customary law would be damaging to national legal systems. The States which include such an obligation do not find it damaging, however, and some degree of respect for these peoples' own methods of self-regulation is essential to respect for the fundamental obligation under the Convention of respect for their own culture. Nor has any problem arisen in supervising the application of a similar provision under Convention No. 107. This being said, the degree of respect to be paid is difficult to define. Clearly the principle of equality before the law does not in itself respond to the need expressed here. It is equally inappropriate to include the principle of primacy of customary law. The present wording of paragraph 1 is thus retained, with the addition of a reference to customs in accordance with proposals made. The flexible wording is intended to allow the gradual incorporation of the concept into national law without damaging the established legal system.

The Office does not consider that the reference to the national legal system devalues the principle of paragraph 1, because of the reference to fundamental rights and to internationally recognised human rights. This wording was in any case inserted during the first discussion.

The suggestion by the Government of Japan for added flexibility would not appear necessary because of the considerable flexibility already provided.

A provision on the resolving of conflicts, taking account of the points raised in the first discussion, has been included.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the use of methods customarily practised by the (peoples/populations) concerned for dealing with crimes or offences committed by their members shall be respected.

2. The customs of these (peoples/populations) in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Observations on Article 9

Brazil (CNI). This matter is beyond the ILO's competence.

(CONTAG). See under Article 8. Replace paragraph 1 by:

1. The methods which the nations concerned use for dealing with crimes committed by their members within those nations should be respected, and persuasive and educational measures should be applied when these methods are incompatible with fundamental rights defined by the national legal system or with internationally recognised human rights.

Canada. Paragraph 2 should be made compatible with paragraph 1 by adding "To the extent compatible with the national legal system and internationally recognised human rights".

(IPWG). See comments under Article 8. Revise as follows:

1. The use of methods traditionally and customarily practised by the peoples concerned for dealing with disputes, crimes or offences and other internal matters involving members of these peoples shall be recognised, respected and maintained, including the imposition of penalties which are compatible with internationally recognised human rights.

2. The customs, traditions and laws of the peoples concerned shall be applied by the authorities and courts dealing with such cases.

3. These peoples should have the right to retain their own customs, traditions, laws and institutions and the application of national laws and regulations shall not abrogate or derogate from any aboriginal treaty or other rights and freedoms that pertain to the peoples concerned.

Chile. The principle of equality before the law would be violated if special legislation were adopted.

Colombia. Amend paragraph 1 as follows: "The methods ... shall be respected, while ensuring that they are compatible with internationally recognised human rights."

Japan. See under Article 5.

(NIKKEIREN). See under Article 8. Taking the circumstances of each country into account, the methods customarily practised by the (peoples/populations) concerned for dealing with crimes or offences should be reformed.

(SOHYO). Delete the reference to the national legal system.

United States (ICC). See under Article 8. Amend the text of Article 9 to read as follows:

1. The use of methods customarily practised by the peoples concerned for dealing with disputes and other internal matters involving members of these peoples shall be respected, including the imposition of penalties which are compatible with internationally recognised human rights.

2. Where the use of such methods is not feasible, the customs of these peoples shall be respected by the authorities and courts dealing with such cases.

Office commentary

The suggestion by the Government of Canada appears already to be covered by the flexible language of paragraph 2, and the suggestions by the Government of Colombia, Canada (IPWG) and the United States (ICC) for paragraphs 2 and 3 are covered by the previous Article. The observations of the Governments of Chile and Japan and of Japan (NIKKEIREN) and (SOHYO) are covered under Article 8. The proposal by Brazil (CONTAG) is noted but is too restrictive as a method of dealing with this question.

Article 10

The exaction from the members of the (peoples/populations) 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.

Observations on Article 10

Brazil (CONTAG). Add: "In those cases prescribed by law for all citizens, discrimination against members of the nations concerned shall be avoided."

Canada. In order to make this Article more compatible with the legal systems of States which may not cover specific penalties and offences on the subject, amend to read: "Except in cases prescribed by law for all citizens, the exaction from the members of the (peoples/populations) concerned of compulsory personal services in any form, whether paid or unpaid, shall not be permitted."

(IPWG). Delete "except in cases prescribed by law for all citizens".

Office comentary

The comment of Brazil (CONTAG) is covered by the general prohibition on discrimination against these peoples. The proposal by Canada (IPWG) has not been retained, as it would confer upon indigenous and tribal citizens of a country immunities which are not enjoyed by other citizens. A similar proposal was withdrawn during the first discussion.

The proposal by the Government of Canada would replace the present wording by what appears to be a weaker provision. This provision in Convention No. 107 has not caused any difficulties of application. No changes are proposed.

The order of Articles 10 and 11 has been reversed.

Article 11

1. In imposing penalties laid down by general law on members of these (peoples/populations) 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.

Observations on Article 11

Australia (ACTU). Reintroduce an amendment not adopted at the first discussion, so that the Article would read: "In imposing penalties laid down by general law on members of these peoples, account shall be taken of the danger of disruption of community life. In this connection, preference shall be given to the preferred cultural options of the peoples concerned rather than confinement in prison."

Brazil (CNI). This matter is beyond the ILO's competence.
(CONTAG). This Article could be combined with Article 9, paragraph 2.

Canada (IPWG). Amend paragraph 1 to read: "In imposing penalties laid down by general law on members of these peoples, their cultural rights, customs, traditions and practices shall be respected and maintained and full account shall be taken of their economic and social characteristics and conditions."

Chile. See under Article 9.

Finland. Revise paragraph 2 to read: "Preference shall, to the extent compatible with the national legal system, be given to methods of punishment other than confinement in prison."

Office commentary

By the nature of the problem it deals with, this Article must remain flexible. It would appear that most of the proposals made would reduce the flexibility of the present wording, except that of the Government of Finland which appears to be implied already by the present wording.

The proposal by Brazil (CONTAG) has been noted, but Article 9 deals with the question of respect for internal methods of dealing with offences, while this Article deals with sentencing practices.

The order of Articles 10 and 11 has been reversed.

Article 12

The (peoples/populations) concerned shall be safeguarded against the abuse of their fundamental rights and shall be able to take legal proceedings for the effective protection of these rights. Members of these (peoples/populations) shall have the right to use their own languages in any legal proceedings.

Observations on Article 12

Argentina. Delete "fundamental", since the violation of any rights is damaging to these (peoples/populations).

Australia. Many groups of people of diverse backgrounds are unable to use their own languages in courts. The right to use their own languages should be confined to members of these (peoples/populations) who have difficulty using the language of the court. This provision would go beyond Article 27 of the International Covenant on Civil and Political Rights.

Brazil (CNI). This matter is beyond the ILO's competence.

Canada. Amend the second sentence to read: "Members of these (peoples/populations) shall also be able to make themselves understood in any legal proceedings, where necessary through interpretation facilities." The present wording may imply obligations on governments which far exceed the objective of being able to follow court proceedings, which the Government supports.

(IPWG). Add the following:

Governments shall ensure that the representative institutions of the peoples concerned enjoy collective legal personality and have the right to initiate legal proceedings under the national legal system.

Governments shall take measures to protect in the national legal system the right of the peoples concerned to:

(a) manifest, teach, practise and observe their own religious traditions, beliefs and ceremonies;

(b) maintain and use their own languages, including for administrative, judicial and other relevant pruposes; and

(c) maintain, establish and develop their own judicial and legal systems within their territories.

Chile. Delete the second sentence.

Norway. After "shall" add "as far as practicable".

Sweden. Entitlement to an interpreter should be conditional on the person not having a command of the language of the court.

Office commentary

The second sentence was added during the first discussion. The Office agrees that an absolute requirement in this regard would go well beyond most national law and would present barriers to ratification and implementation. An alternative proposal has therefore been made.

The first paragraph proposed by Canada (IPWG) has been dealt with elsewhere. The second paragraph would not fit within this Article, and would add requirements in fields already covered elsewhere.

The proposal by the Government of Argentina has been retained.

In addition, a certain number of proposals have been received, under different Parts of the proposed Convention, suggesting that a provision concerning the legal personality of these peoples should be included in order that they may defend their rights. This has been taken account of in the first sentence.

PART II. LAND

General observations on Part II

Australia. The Government is prepared to accept the compromise position regarding the use of "lands" and "territories". The use of "territories" does not seem to be appropriate in Australia for areas over which indigenous people may retain a traditional association but at this time do not hold any form of legal title.

(ACTU). Limiting the rights under the Convention to those lands which were traditionally occupied or used does not address the frequent case of groups which were recently relocated or centralised. Since many indigenous peoples have lost lands in the recent past, some provision must be made for resolving claims for the return of land. Also, consistent with the policy reorientation of the Convention, the revision should provide more detailed guidance for co-development of natural resources by indigenous peoples and States. A proposal for restructuring Part II of the revised Convention is submitted (see below under separate Articles).

Bolivia. The question of using "lands" or "territories" is sensitive and difficult. Although the use of both terms in Convention No. 107 does not appear to have caused major problems, this is largely because an extensive interpretation had not been given to the term "lands", while it is now intended to include the rights of use and ownership of natural surface and subsurface resources. This kind of interpretation raises thorny and insoluble problems for countries such as Bolivia, whose traditional policy and constitutional practice are founded on the principle that the State possesses sovereign rights over natural water and mineral resources. This concept is not so rigorous with regard to renewable natural resources, including those of flora and fauna. Any text concerning the rights to and use of natural resources must be in line with national legal standards. The interpretation given in Report IV(1) of the question of "consent" is adequate. It would be very difficult to accept that any provision on land use, which includes the use and exploitation of non-renewable natural resources, should require the prior consent of the indigenous populations connected with a territorial area of the State.

Brazil. The term "land" should be used instead of "territory". With regard to the problem of ownership, possession and/or use, all of these forms are included in Brazilian legislation and there is no objection to their use.

(CNI). The organisation does not agree with the use of the term "territories", nor with the recognition of ownership rights, nor with the need to obtain "consent" as provided for in Articles 14, paragraph 2, and 15, paragraph 2.

Canada. In order to ensure consistency and avoid misinterpretation, the term "lands" should be used throughout the sections dealing with land. The term "territories" as used in Articles 7, paragraph 2, and 14, paragraphs 1 and 2, involves the "establishment (or protection) of legal rights" as does the Convention as a whole. Article 15, paragraph 1, refers to "habitual territories", a term which is not used elsewhere in the Convention and whose meaning is unclear.

Add the following new Article: "In applying the provisions of this Part, governments should have due regard to the close relationship between indigenous land and culture, in particular the collective aspects of indigenous rights to land."

(IPWG). This Part should establish guide-lines and obligations on States involving the development and exploitation of natural resources of all kinds and should provide measures for the settlement of land, resource and territorial rights including disputes settlement mechanisms designed to promote and achieve fair and just recognition and protection of indigenous lands, resources and territories. Unless international standards are developed that are consistent with the historical and spiritual connection between indigenous culture and land, other provisions in this Convention having to do with state measures and indigenous consent will have little if any effect on the survival of indigenous peoples as distinct societies.

The profound significance of lands and resources to indigenous peoples, the collective nature of indigenous territorial rights and the land tenure systems and rights of transmission of indigenous peoples should be fully recognised and respected. The key elements of title, ownership and control should be included in the land and resource provisions in favour of indigenous peoples. In no case should indigenous peoples be deprived of their own means of subsistence, livelihood and material wealth. Measures directly affecting indigenous land, resources and territories should only be taken by States with the free and informed consent of and in collaboration with the indigenous peoples concerned and in ways acceptable to them. Both surface and subsurface rights of indigenous people should be recognised. Effective mechanisms and procedures should be established to resolve claims and disputes involving lands and resources, and disputes arising under any treaty, law or agreement, as well as for the restoration of lands. The significance of treaties and treaty-making in dealing with such fundamental matters as lands and resources should be recognised and treaty rights respected, honoured and implemented.

Colombia. Use the term "territories". Its use in this Convention refers to the social, cultural and ecological space occupied by the peoples concerned.

Finland. The approach proposed in the report concerning the use of the terms "lands" and "territories" is a satisfactory compromise. The proposal made in the first discussion, stressing the close relationship between land and culture for indigenous peoples as well as the collective nature of their land rights, should be taken into consideration.

Mexico. With regard to the terms "land" and "territories", article 27 of the Mexican Constitution and the Agrarian Reform Act proclaim the right of indigenous peoples and communities to have restored to them both the lands and waters of which they have been dispossessed, or to be provided with sufficient lands and waters for their subsistence. The concept of "territory" applies to the geographical and physical space inhabited by the peoples and communities of a group with similar ethnic characteristics such as language, traditional forms of organisation, religious feasts and ceremonies, and other customs. There are cases where such territories are in two countries, such as that of the Papagos whose territory is in both Mexico and the United States, without

affecting the sovereignty of these countries. Regarding the term "seek the consent", reference should be made to obtaining the approval of the representative body of the community, provided that the work undertaken or the resources exploited are for the direct benefit of the community which owns these resources.

Norway. Add a new introductory Article (same as that proposed by the Government of Canada).

Peru (CGTP). There should be a provision in which States accept the principle of promoting the grouping of indigenous (peoples/populations) wherever possible.

Switzerland (Swiss Federation of Christian Trade Unions (CSC)). The term "land" does not include waters or sea ice; the term "territory" is more relevant to the situation of populations who may well live on both sides of a national frontier. Without undermining their national sovereignty, the States concerned should be invited to conclude agreements providing facilities for freedom of movement in such cases.

(SGB). This Part will need to be substantially restructured before it can be agreeable both to indigenous peoples and to governments. It should provide that, where it is not possible to recognise indigenous peoples' complete ownership or control of a particular territory or resource they should be given the greatest possible rights to its use. Indigenous people should be able to exercise complete control over those areas they occupy or use exclusively, and should have the right to continue to use resources in areas now occupied by others. The revised Convention must deal clearly and fairly with cases in which these peoples were forced off their land in the recent past. In such cases, they should be able to obtain secure rights to the places they now occupy. In addition, they should be able to obtain compensation for the loss of their land. The revised Convention should not only prohibit any involuntary removal of these peoples, except in the case of a life-threatening emergency, but it should promote co-development. Even in a case where agreement cannot be reached for the exploitation of natural resources in their territory, the government should be required to seek means of sharing the management, and the benefits, of the development project with the indigenous people concerned.

Office commentary

In their general observations, a number of respondents have considered the use in the Convention of the terms "lands" and "territories".

Noting the wide divergence in views, the Office has retained both terms according to the context, as is the case in Convention No. 107. Some of the rights provided for in this Part do relate specifically to the land itself, as is the case with the ownership and transmission of land rights. Other provisions relate to matters such as waters and other natural resources, or to the question of removal of these peoples from the areas they occupy. In certain provisions, moreover, the terms "lands and territories" are used together.

The Government of Australia stated that the term "territories" does not seem to be appropriate for areas with which indigenous peoples may retain a

traditional association, but to which they do not hold any form of legal title. However, the term "territory" would not appear to carry the implication of legal title, but only of a geographical area subject to a particular jurisdiction.

Certain respondents, in particular from non-governmental and workers' organisations, have proposed a significant restructuring of this Part of the Convention. At this late stage of the revision process the Office considers that a major restructuring, which would necessarily involve the replacement of several Articles and the inclusion of other new ones, would be inadvisable. However, the substantive proposals submitted have been taken into account to a large degree.

Several respondents have made similar proposals for the inclusion of a new Article at the beginning of this Part. As this proposal also received considerable support during the first discussion, such a provision (Article 13 in the new text) has been included, providing a useful introductory basis for considering the complex issue of land rights in the subsequent Articles of this Part. Furthermore, this may help to establish the principle that, because of the special relationship between their lands and cultures, in certain matters the peoples concerned should indeed be accorded treatment different from that accorded to other sectors of the national population. A small number of respondents have expressed concern that such distinct or preferential treatment might constitute discrimination against other sectors of society, but this has been discussed in other contexts in the present report.

Article 13

1. The rights of ownership and possession of the (peoples/populations) concerned over the lands which they traditionally occupy shall be recognised.

2. Governments shall take steps as necessary to identify the lands which the (peoples/populations) concerned traditionally use and occupy, and to guarantee effective protection of their rights of ownership and possession.

Observations on Article 13

Australia (ACTU). Revise the text to read:

Article 13

1. The rights of the people concerned to the lands and resources of their traditional territories shall be recognised and effectively protected, as provided in this Part. These rights shall include the continued use and enjoyment of all natural resources, including flora and fauna, inland and coastal waters, and sea ice.

2. In applying the provisions of this Part, governments shall have due regard to the close relationship between land and the cultures of the peoples concerned. Wherever possible and in accordance with the wishes of these peoples, the rights recognised shall be collective and inalienable.

3. Measures taken to implement this Part shall not prejudice any rights to land or resources which the peoples concerned may already enjoy under national legislation, or under treaties or other agreements formerly made with them.

4. As used in this Part, "traditional territories" refers to the geographic areas which the peoples concerned have long occupied or used, and continue to occupy or use, or to those areas to which they have been removed in historical times.

Article 14

1. Governments shall take steps to identify, in co-operation with the peoples concerned, and where necessary to demarcate, the lands and territories of the peoples concerned and to guarantee the effective protection of their rights.

2. The peoples concerned shall be accorded exclusive rights of ownership, possession and control to the largest practicable portion of their traditional territories.

3. The peoples concerned shall be accorded the greatest practicable rights of non-exclusive possession and use to those portions of their traditional territories which have been occupied or are used by other persons. The nature and legal form of the rights recognised shall be determined in co-operation with the peoples concerned. On no account may the peoples concerned be deprived of their forms of subsistence.

4. Conflicting rights or claims to any portions of the traditional territories of the peoples concerned shall be resolved equitably in accordance with criteria and procedures established in co-operation with the peoples concerned.

Canada. Replace paragraph 1 by: "The rights of possession, use or ownership of the (peoples/populations) concerned over the lands which they traditionally occupy shall be (i) recognised; or (ii) equitably addressed through procedures established in accordance with Article 19."

Article 13, paragraph 1, should be linked to Article 19 for the following reasons: there are two aspects underlying these Articles. The first is to *(a)* establish legally recognised rights to occupy lands and *(b)* to achieve recognition of traditional links between indigenous populations and the lands in question. However, the term "traditionally occupy" remains ambiguous. It does not take into account, for instance, situations where indigenous populations have relinquished rights over traditional lands, for example through treaties or other agreements, or of situations where there are overlapping claims over the same lands, or parts thereof, between either different indigenous groups or between indigenous and non-indigenous groups. Hence the need for the establishment of a fair process to address equitably unresolved claims. Recognition of rights and a process for dealing with cases of dispute must of logical necessity be addressed simultaneously in Article 13, paragraph 1. The reference to possession, *use or* ownership would reflect the different conditions among member States and thus would increase the chance of wide ratification.

Paragraph 2 should be revised. The identification of lands provided for in Article 13, paragraph 2, should be included in Article 19 (see below). With respect to the protection of rights, paragraph 2 should read "The rights referred to in paragraph 1 shall be effectively protected in the national legal system."

(IPWG). Revise the Article to read:

1. The title and rights of ownership, possession and control of the peoples concerned over the lands, resources and territories which they traditionally have occupied or otherwise used shall be recognised.

2. For greater certainty, the land, resources and territories referred to in paragraph 1 include those currently used and occupied by the peoples concerned.

3. Governments shall take steps, with the consent and collaboration of the peoples concerned, to demarcate the lands and territories of these peoples, and to guarantee effective protection of their title and rights of ownership, possession and control.

4. If so requested by the peoples concerned, governments shall enter into negotiations to conclude treaties with those peoples in relation to the recognition and protection of their lands, resources and territories.

5. In applying the provisions of this Convention, governments shall recognise and respect the historical, traditional and unique relationship between indigenous land and culture, in particular the collective rights of indigenous and tribal peoples in land.

Chile. Paragraph 2 should advocate promoting family ownership, as provided in Chilean legislation.

Denmark (LO). (Same observations as Australia (ACTU)).

India. The concept of "possession" is not acceptable. In view of the wide divergence of views, Article 11 of Convention No. 107 should be retained as it is.

Japan. Considering that the recognition of the rights of ownership and possession over lands as well as the way of protecting such rights are regulated by the civil law of each country, and that they should be established taking into consideration the actual status of the rights of private individuals including the (peoples/populations) concerned, the words "in a manner and to an extent depending on the situation of the country and of the (peoples/populations) concerned" should be added at the beginning of each paragraph.

(SOHYO). The autonomy of the peoples concerned cannot generally be said to be fully guaranteed, without any recognition and safeguarding of their right of ownership and possession of land. However, the observations of the Japanese Government on Part II are incompatible with the standpoint of respecting the autonomy of the indigenous, but seem to be based on the principle of assimilation.

Norway. As concerns paragraph 1, same observations as Canada. In paragraph 2, add "and territories" after "lands". A definition of the meaning of "territories" may be needed.

(NSR). Revise paragraph 1 to read: "The rights of ownership, possession or preferential use of the peoples concerned over the lands which they traditionally occupy shall be recognised and protected." In paragraph 2, add "or of preferential use" after "possession".

Sweden. Nomadic tribes who require extensive areas of land for their cattle herding are unlikely to be covered by the Article as worded here. A provision should be added concerning rights of users. The report makes it clear that there was a certain degree of unanimity during the first year's discussions in this connection.

Switzerland (CSC). Ownership should be respected, whether private or communal.

United States. It should be made clear that the phrase "the lands which they traditionally occupy" does not mean all the lands that the tribes have historically occupied. The Government could support either the Canadian proposal on paragraph 1 or the following wording: "The rights of ownership and possession of the (peoples/populations) concerned over the lands which have been reserved for their use or which they currently occupy and for which they have a tradition of use and possession shall be recognised."

(AFL-CIO). What is often referred to as "land rights" does not necessarily take into account lands traditionally used but not owned; non-land resources such as flora, fauna, subsurface deposits and sea ice; water rights, fishing rights, etc. The traditional concept of land rights should be expanded to a territorial

concept that does not necessarily rely for definition upon lines drawn on maps.

Office commentary

As concerns the use of the terms "ownership", "possession" and "use", the Governments of Canada and Norway have made identical proposals based on a proposal submitted during the first discussion. In view of other observations received, the Office considers that to assimilate the term "use" to ownership and possession would weaken the revised Convention by comparison with Convention No. 107, which recognises the right to ownership; it has therefore dealt with this question separately. The Government of India considers that the concept of possession is unacceptable, and proposes its deletion. This wording would, however, correspond to cases in which the rights which indigenous or tribal peoples have acquired through occupation should be recognised, but it is not appropriate to recognise them through ownership. Several respondents, and the Meeting of Experts convened on this question in 1986, have put forward effective arguments in favour of including the concept, and representatives of indigenous and tribal peoples themselves have indicated that they often attach more importance to possession than to ownership.

The concern expressed by the Government of the United States over the meaning of "traditionally occupy" has already been addressed in earlier reports. The Office considers that this term would not grant rights to any territory ever occupied; but in any case it would be subject to land-claims mechanisms referred to below.

Different views have been expressed concerning users' rights, and such concerns were raised earlier also by the Food and Agriculture Organisation of the United Nations with special reference to nomadic peoples. Recommendation No. 104, which supplements Convention No. 107, contains provisions dealing with land-use rights for nomads and shifting cultivators. An additional paragraph has therefore been inserted to distinguish between the right of use and the rights of ownership and possession. The term "preferential use" has not been retained, as the concept would in this context be contrary to the objective sought.

Some respondents have suggested that the present Article should refer to Article 19 concerning the resolving of land claims. The Office has proposed to incorporate that Article in the present one (Article 14 in the new text) in recognition of the close links between the identification of the relevant lands and the resolving of claims. It appeared appropriate to retain the existing wording for maximum flexibility.

The more far-reaching proposals by Australia (ACTU) and Canada (IPWG) have been taken into account in preparing the proposed text. If accepted in their entirety, however, they would go considerably beyond what it appears other participants in the discussion would accept. Care has been taken not to prejudice, by the proposed language, the possibility of these proposals being incorporated in other international texts or in national arrangements.

The proposal by the Government of Chile to promote "family ownership" has not been retained, as it advocates giving priority to a single model of land rights in preference to the many others which exist.

Article 14

1. Special measures shall be taken to safeguard the control of the (peoples/populations) concerned over natural resources pertaining to their traditional territories, including flora and fauna, waters and sea ice, and other surface resources.

2. Governments shall seek the consent of the (peoples/populations) concerned, through appropriate mechanisms, before undertaking or permitting any programmes for the exploration or exploitation of mineral and other subsoil resources pertaining to their traditional territories. Fair compensation shall be provided for any such activities undertaken within the territories of the said (peoples/populations).

Observations on Article 14

Australia. The phrase "seek the consent" in paragraph 2 could be perceived as a veto power. It should be replaced by "consult fully with", which would be consistent with Article 6 *(a)*.

The words "fair compensation" are undefined and open-ended. They should be related to damage and disturbance to land, improvements on the land and loss of amenity. Decisions on the distribution of benefits from exploitation of state-owned resources to particular groups in the community should rest with the State.

(ACTU). The Article should read as follows:

1. Governments shall seek to obtain the informed consent of the peoples concerned before undertaking or permitting any exploration for mineral or other subsoil resources within their territories.

2. Where the consent of the peoples concerned cannot be obtained, such exploration shall only take place following appropriate public procedures in which the peoples concerned are effectively represented.

3. Governments shall obtain the informed consent of the peoples concerned before undertaking or permitting any exploitation of mineral and other resources (including waters) within their territories. The peoples concerned shall have control over any process of mineral extraction and the right to share equitably in the proceeds from any extraction to which they have given consent.

Brazil (CONTAG). If it is not possible to recognise that the wishes of the nations concerned should prevail regarding the exploitation of mineral resources in their lands, then at least conditions should be established under which such exploitation may be permitted. Moreover, apart from mineral wealth, it is important to regulate the exploration of water and energy resources on indigenous lands.

(CUT). This Article should also refer to water and energy resources. If it is impossible to provide more effective guarantees for the protection of the lands of these (peoples/populations), the aim should be to extend to energy resources the guarantees which have already been stipulated for subsoil resources. This extension is consistent with the new Brazilian Constitution which treats both resources alike, even requiring congressional authorisation on a case-by-case basis.

Canada. Paragraph 1 should be amended to read as follows: "Special measures shall be taken to safeguard the rights of the (peoples/populations) concerned over the natural surface resources pertaining to the lands which they occupy, including flora and fauna, waters and sea ice."

The term "traditional territories" should be replaced by "lands which they occupy" (i.e. lands over which they have recognised rights along the lines of the amendment proposed by the Government to Article 13, paragraph 1) because "traditional territories" is ambiguous and imprecise and may encompass situations where indigenous populations have relinquished rights over traditional lands, for example through treaties or other agreements.

The term "control" should be replaced by "rights" because it would be impossible for most member States to provide for control in all cases over all national surface resources pertaining to the lands in question. In Canada most indigenous populations have the use and benefit of the fauna and flora on lands which they legally occupy. However, general control over other natural resources depends on the provisions of specific treaties, negotiated settlements and legislation.

In paragraph 2, the term "traditional territories" should be replaced by "lands which they occupy" for the same reasons. The amended provision should also clarify what is meant by "fair compensation".

Regarding the words "seek the consent", it would be unrealistic to require consent with respect to exploration or exploitation of all subsurface resources due to the possible existence of third-party rights or extraordinary national interests.

(IPWG). Revise to read as follows:

1. Special measures shall be taken to safeguard the rights and control of the peoples concerned over natural resources pertaining to their traditional territories, including flora and fauna, waters, sea areas and sea ice, subsoil and any other resources. Measures shall also be taken to safeguard the means of traditional activities, subsistence economies and other development of these peoples.

2. Governments shall obtain the informed consent of the peoples concerned, freely expressed through their own institutions, before undertaking or permitting any programmes for development, including the exploration or exploitation of mineral and other subsoil resources pertaining to their traditional territories. Full compensation, based on negotiated agreements with the representatives of the peoples concerned, shall be provided for any such activities undertaken within the territories of the said peoples.

Chile. The requirement for consent in this context is contrary to the principle of non-discrimination.

Colombia. In paragraph 1, replace "safeguard the control of the (peoples/populations) concerned over" by "guarantee the direct participation of the peoples concerned in the control and management of". In paragraph 2, replace "seek" by "obtain".

Denmark (LO). The Article should read as follows:

1. Governments shall seek the informed consent of the peoples concerned before undertaking or permitting any exploration or exploitation of mineral or other subsoil resources within their territories, or acquiring any part of the surface as a matter of public necessity.

2. Where the consent of the peoples concerned cannot be obtained, such activities shall take place only following a determination, through appropriate public procedures in which these peoples are effectively represented, that the proposed activities are necessary and that reasonable alternatives do not exist.

3. Priority shall be guaranteed to the peoples concerned with regard to the operation and benefits of any mineral or other subsoil exploitation within their territories.

4. Governments shall ensure that measures are taken to mitigate the social, cultural, economic and environmental impacts of any such activities on the peoples concerned, and provide compensation for any resulting damage, loss or injury. This shall include the provision of lands of equivalent character and value, as may be agreed with the peoples concerned.

India. As concerns paragraph 1, the Government does not accept such a wide definition of the right of ownership over land as to extend control over natural resources. This should be deleted. The word "territories" in this Article and in Article 15, paragraph 1, has political overtones and should be replaced by a word such as "areas".

In paragraph 2, the words "to the extent possible" should be inserted between the words "seek" and "the".

Japan. See the proposal made under Article 5. Governments should manage natural resources from the viewpoint of the public welfare.

Mexico. An additional clause should be added to paragraph 2 providing that the (peoples/populations) concerned should be the direct beneficiaries of such exploration or exploitation. Fair compensation should be provided for any activity of this kind carried out on their territories.

Norway. In paragraph 1, "control" should be replaced by "rights". The words "their traditional territories" should be replaced by "the lands which they occupy". Revise paragraph 2 to read:

Governments should, in good faith, seek the consent of the peoples concerned, through appropriate mechanisms, before undertaking or permitting any programmes for exploitation of mineral and other subsoil resources pertaining to the lands which they occupy. Fair compensation according to national law should, without any adverse discrimination, be provided for any such activity undertaken within the territories of the said peoples. Damages caused by such activities should always be fully compensated.

(NSR). Revise paragraph 1 to read: "Special measures should be taken to safeguard the control of the peoples concerned over the renewable resources pertaining to the lands which they occupy, including flora and fauna, inland and coastal waters, and sea ice."

Sweden. Reference is made to the draft amendments concerning land use, consulting procedures and compensation claims which were put forward during the first discussion.

Switzerland (CSC). In paragraph 1, after the word "surface" add "and subsurface". In paragraph 2, delete "or permitting".

Add a paragraph 3 requiring the consent of those concerned when it is a matter of private, as opposed to government, initiative. In this case the government should ensure that fair compensation is agreed. The discovery of natural wealth should not in all cases be a reason to remove these peoples from their territories nor to cause grave damage to their environment.

United States. The Government agrees with the thrust of paragraph 1, but has reservations regarding the use of "control". The phrase "pertaining to their traditional territories" should also be clarified. Therefore the Government supports Australia's position (see above). Alternatively, the Government would propose substituting the following text for paragraph 1:

Special measures shall be taken to safeguard the (rights/control) of the (peoples/populations) concerned over natural resources pertaining to the lands for which their ownership is recognised or which has been reserved for their use or which they currently occupy and have a tradition of use and possession, including flora and fauna, waters and sea ice, and other surface resources.

The substitution of the word "rights" for the word "control" may permit wider ratification of this Convention since some States may be unable to provide for control in all instances. The replacement of "traditional territories" by "the lands which they occupy" or the alternative proposal by the United States Government would eliminate the same problem that was raised by the use of "traditionally" in Article 13.

Regarding paragraph 2, the Government agrees with the concepts of consent and fair compensation. The term "traditional territories" should be clarified by substituting the wording suggested above.

Office commentary

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

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

Paragraph 2 has elicited widely differing views regarding the use of the term "seek the consent" and the principles of consent and consultation. Some government and most workers' organisations, as well as the representative organisations of indigenous and tribal peoples, consider that this provision should require that consent be obtained in relation to mineral and other subsurface resources. Others appear to consider, in spite of the explanations given, that the phrase "seek the consent" used in the original proposal would in itself require that consent be obtained. It must be clear from the first discussion that this phrase is not acceptable to a sufficiently large proportion of the membership that it cannot be put forward again. The Office has, however,

proposed alternative wording intended to convey that an attempt should be made in good faith to obtain the consent of the peoples concerned before undertaking activities of this kind in their territories, without indicating that they should have a veto power over government decisions.

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

The proposed text does not reflect the suggestions that the term "fair compensation" be defined, as this appears to be a subject which would have to be approached in a different way in each country and in each situation, in accordance with the rules and procedures laid down at the national level.

The proposals that references to water and energy resources should be made in paragraph 2 have not been retained, as these resources are of a different character from the mineral and other subsurface resources which this provision was designed to cover. It would appear that the concerns that these proposals reflect can be handled at the national level without explicit mention in the Convention – as in the case of Brazil, to which reference is made – and that the problems which might occur could be considered by the supervisory bodies under several provisions of the revised Convention.

The proposed text reflects the suggestion that the peoples concerned should have the right to participate in the benefits of exploitation of the resources pertaining to their lands.

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

Article 15

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

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

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

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

Observations on Article 15

Australia (ACTU). Revise to read as follows:

1. The peoples concerned should not be removed involuntarily from their territories or other lands.

2. Where the temporary relocation of these peoples is necessary as an exceptional measure in situations of a health emergency or natural disaster, it should take place only

with their informed consent. In these circumstances, their territories and other lands should be restored to them as soon as they wish, and they should be assisted in recovering their way of life.

3. If, in these exceptional circumstances, restoring their territories and other lands to them is impossible, they should be provided with lands of quality, quantity and legal status which is agreed to be at least equal to that of the territories and lands previously occupied or otherwise used by them, suitable for their present needs and future development.

Brazil (CONTAG). In paragraph 2, an objective criterion for authorising their removal regardless of consent should be used. Replace "Where their consent cannot be obtained" by "Where the nation concerned cannot express its will".

Revise paragraph 4 to read: "Whenever such removals are temporary, the immediate return of the transferred nations to their own lands shall be guaranteed as soon as the reason that determined the removals no longer exists."

It is important to consider the possibility of temporary transfer, providing for the right of return.

(CUT). Add at the end of paragraph 2: "When the circumstances which led to the removals have ceased to exist, the immediate return of these (peoples/populations) should be guaranteed." Delete the words "Where their consent cannot be obtained". Appropriate procedures are needed for the removal of these populations only in exceptional cases, such as natural disasters, epidemics, etc., and the possibility of immediate return must be guaranteed when these dangers no longer exist. For the same reason, add at the beginning of paragraph 3 the words "When return proves impossible" and delete the final sentence. The impossibility of return would have to be proved. The alternative of compensation in money should not appear in the text. Since this is always possible, specific mention of it would present it as an option on the same footing as the previous ones.

Canada. In paragraph 1, the term "their habitual territories" should be replaced by "the lands which they occupy" for reasons already explained.

In paragraph 2, add "where applicable" before "public inquiries" to take account of the fact that public inquiries may not be necessary in all cases.

The first sentence in paragraph 3 should be amended by adding "whenever possible" after the word "shall", and the word "size" after the word "quality". The second sentence in paragaph 3 should be amended to read as follows: "In cases where it is not possible to provide these (peoples/populations) with such lands or where the (peoples/populations) concerned prefer to have compensation in money or in some other form, they shall be so compensated under appropriate guarantees."

The addition of the words "whenever possible" in the first sentence would reflect the fact that it may not always be possible to provide replacement land or to ensure that the land provided is of equal quality, size and legal status. The amendment to the second sentence would cover the situation where the provision of replacement land is not possible, or where those concerned prefer compensation in some other form. The phrase "where chances of alternative employment exist" should be deleted because its meaning is unclear and seems

to make the determination of compensation contingent on there being employment opportunities at the new location. There is no reference in this Article or elsewhere in the Convention to situations where the grounds for removal no longer exist, so that the land could be restored. An example would be removal in times of war and the situation once the war had ended.

(IPWG). Revise to read as follows:

1. The peoples concerned shall not be relocated involuntarily from their territories or lands.

2. Where the relocation of these people is necessary as an exceptional measure in emergency situations, it shall take place only with their informed consent, freely expressed through their own institutions and with their full co-operation. In these circumstances, their territories and lands shall be restored to them as soon as conditions permit, and they shall be assisted in recovering and maintaining their way of life.

3. If, in these exceptional circumstances, restoring their lands and territories to them is agreed to be impossible, these people shall be provided with lands of quality, quantity and legal status which are agreed to be at least equal to that of the territories and lands previously occupied or otherwise used by them, suitable for their present needs and future development.

Denmark (LO). Same as Australia (ACTU).

India. As it may not always be possible to undertake removals "only with their free and informed consent", the words "as far as possible" should be inserted in paragraph 2 after "place"; the word "only" after "place" should be deleted. As it may not always be possible to hold public inquiries, add "if considered necessary" after "inquiries".

Japan. As the meaning of the term "public inquiries" in paragraph 2 is not clear, and it is assumed that procedures which guarantee the (peoples/populations) concerned the opportunity to express their will are sufficient when their consent for removal cannot be obtained, the expression "including public inquiries, which provide the opportunity for effective representation of the (peoples/populations) concerned" should be replaced by "which guarantee the (peoples/populations) concerned an opportunity to express their will."

Because providing the (peoples/populations) concerned with alternative lands does not always satisfy them for compensation, and there could also be some cases where providing them with "lands of the same quality and legal status" is impossible, the words "as far as possible" should be added at the end of the first sentence of paragraph 3.

In paragraph 4, compensation for removal should be judged on a case-by-case basis. As it is not appropriate to regard every loss as an object of compensation, and the fundamental idea of compensation should be equally valid for all citizens, the word "any" should be deleted, and the words "on an equal footing with other citizens" should be added.

Mexico. In paragraph 3, after "future development" add "so that they may preserve their ethnic integrity in accordance with their culture".

Add a new phrase at the end of paragraph 4 providing that the compensation should cover all the costs of removal and resettlement, including services.

Norway. In paragraph 2, add "wherever possible" after "such removals shall". In the first line of paragraph 3, add after "shall" the words "whenever possible". Add after "quality" the word "size".

Add the following provision:

Where the expropriation of the lands of the said peoples is considered necessary as an exceptional measure, such expropriation should, whenever possible, take place only with their free and informed consent. Where their consent cannot be obtained, such expropriations should take place only following appropriate procedures established by national laws and regulations, including public inquiries, which provide the opportunity for effective representation of the peoples concerned.

(NSR). Revise to read as follows:

1. The removal or relocation of the peoples concerned shall take place only with their informed consent, except, and as an exceptional measure, in a situation involving a disaster or other emergency which threatens their lives.

2. In such exceptional cases, these peoples shall have their lands and territories restored to them as soon as they wish and conditions permit, and they shall be provided with means to recover their own way of life.

3. If the restoration of their lands or territories is impossible, they should be provided, to the extent possible, with lands of at least equal value and legal status, suitable to provide for their present needs and future development.

United States. Revise paragraph 1 to read as follows: "Subject to the following paragraphs of this Article, the (peoples/populations) concerned shall not be removed from lands they occupy." The term "habitual territories" is not used elsewhere in the proposed Convention and its meaning is unclear.

The term "effective representation" in paragraph 2 needs clarification.

In the first line of paragraph 3, add "whenever possible" after "shall". In considering how to describe the land and its adequacy as compensation it may be beneficial to use a standard of "comparable value". To assist in defining comparable value the Government recommends that the phrase "quality and legal status" be amended to read "quality, size and legal status". The term "legal status" needs clarification.

Office commentary

In order to respond to the concern expressed by the Governments of Canada and the United States in relation to the term "habitual territories", and to provide consistency between the various provisions of this Part, the term has been replaced by the term "lands and territories".

Some respondents consider that paragraph 2 should specify more clearly those exceptional circumstances under which the peoples concerned may be removed or that it should limit the possibility to emergency situations. This proposal would prove both unduly limiting if other imperative reasons should exist, and unduly permissive by giving explicit authorisation to removal in specified circumstances (an argument often invoked in criticising Article 12 of Convention No. 107).

Various concerns have been expressed concerning public inquiries (paragraph 2). The concern expressed by the Government of India appears to be covered by the existing wording. The Office has nevertheless included the words "where appropriate" as indeed such public inquiries may not prove necessary or

possible in all cases. The Government of the United States considers that the use of the term "effective representation" needs clarification. The term "effective representation" is taken from the conclusions of the 1986 Meeting of Experts, and implies that the procedures should ensure full involvement in the decision-making process for the peoples concerned. Further detail would limit the flexibility of this paragraph and risk excluding valid consultative procedures in some countries. No change is suggested.

A number of respondents consider that this Article should provide explicitly that removals should be temporary wherever possible, and that the peoples concerned should have the right to return to their lands or territories once the grounds for such removal have ceased to exist. A new paragraph to this effect is inserted. It would not appear necessary to provide more explicitly for a differentiation between expropriation and temporary removal.

Several respondents consider that paragraph 3 should include a specific reference to the size as well as to the quality and legal status of replacement lands; but there are also proposals to include the qualifying phrase "wherever possible", as it may not always prove possible to meet these conditions. The Government of the United States considers furthermore that the term "legal status" requires clarification. Proposals of this nature were considered at length during the 1986 Meeting of Experts. In its conclusions, this meeting in fact proposed the terms "at least equal extent, quality and legal status", though reservations were expressed by the employer experts on this point. However, the Office subsequently dropped the reference to size, quantity or extent, precisely because it might prove logistically impossible to provide alternative lands of identical dimensions. When an identical suggestion was made at the time of drafting Convention No. 107 in 1956, the prevailing view was that the inclusion of the words "wherever possible" would weaken the protection afforded by the proposed text. This view would seem to be equally valid today. On this point the Office has therefore retained the substance of the text as previously drafted. The term "legal status" implies that the peoples concerned should have rights over their new lands which are at least equal to the rights they enjoyed over the lands from which they may be removed.

The proposal of the Government of Mexico on paragraph 3 has not been taken up, as the principle would seem to be implicit in the existing provision.

The Government of Canada has proposed the deletion of the words "In cases where chances of alternative employment exist", on the grounds that this might link the issue of compensation to the availability of alternative employment opportunities. Brazil (CUT) has proposed, conversely, that any reference to compensation apart from land should be deleted from the text. The Office has retained the Canadian proposal, but feels it would be unwise to remove any reference to alternative forms of compensation.

As concerns the proposals by the Government of Japan for paragraph 4, the Office considers that the principle of full compensation for any resulting loss or injury is indeed appropriate, and has not taken up these proposals. The Office considers that the responsibility covered by the proposal by the Government of Mexico is implicit in the concept of full compensation.

Thus amended, Article 15 appears as Article 16 of the new text.

Article 16

1. Procedures for the transmission of rights of ownership, possession and use of land which are established by the customs of the (peoples/populations) concerned shall be respected, within the framework of national laws and regulations.

2. The consent of the (peoples/populations) concerned shall be sought when considering the adoption of national laws or regulations concerning the capacity of the said (peoples/populations) to alienate their land or otherwise transmit rights of ownership, possession and use of their land.

3. Persons who are not members of these (peoples/populations) shall be prevented from taking advantage of the customs referred to in paragraph 1 of this Article or of lack of understanding of the laws on the part of the members of these (peoples/populations) to secure the ownership, possession or use of land belonging to them.

Observations on Article 16

Australia (ACTU). Revise this Article to read:

Standards and procedures for the distribution and transmission of individual rights to land and resources which have been established by the peoples concerned shall be recognised and respected within their own territories and communities.

Brazil (CONTAG). The Confederation proposes deleting the words "within the framework of national laws and regulations" in paragraph 1.

(CUT). The words "within the framework of national laws and regulations" in paragraph 1 should be deleted and the word "internal" should be included before the word "transmission". Internal transmission of rights of ownership, possession and use of land should not be limited by national laws and regulations.

Canada. Paragraph 1 should be amended by changing "possession and use" to "possession or use", to make it clear that rights of possession or use may arise separately from rights of ownership.

Paragraph 2 should be amended by replacing "the consent of the (peoples/populations) concerned shall be sought" by "the (peoples/populations) concerned shall be consulted" and "possession and use" by "possession or use". A requirement to "seek the consent" could affect the supremacy of legislative bodies. Moreover it may not be possible for governments to seek the consent of every group who may be affected by the legislative measures.

(IPWG). Revise the Article as follows:

1. Procedures for land tenure and the transmission of rights of ownership, possession and use of land which are established by the laws and customs of the peoples concerned shall be recognised and respected.

2. The territories and other lands of the peoples concerned shall be effectively protected from alienation by national laws.

3. Persons who are not members of the peoples concerned shall be prevented from securing any rights or benefits pertaining to the territories or lands or resources of these peoples, through fraud, deceit or by taking advantage of any lack of awareness or understanding of national law.

Chile. The words "the consent . . . shall be sought" in paragraph 2 should be amended since this implies a power of veto and would limit the decision-making power of the State.

Denmark (LO). Same as Australia (ACTU).

India. The word "possession" in all of the paragraphs of this Article should be deleted.

Japan. For paragraph 2, see the proposal made under Article 5.
Paragraph 3 should be made clearer as to the aims of regulation.

Norway. In the first line of paragraph 1, replace "and" by "or".
(NSR). In paragraph 1, add "preferential" before "use".

United States. The phrase "possession and use" in paragraph 1 should be amended to read "possession or use". Such an amendment would make clear that rights of possession or use may arise separately from rights of ownership and the amended language would be more flexible.
Revise paragraph 2 to read:

The (peoples/populations) concerned should be consulted when considering the adoption of national laws or regulations concerning the capacity of the said (peoples/populations) to alienate their land or otherwise transmit rights of ownership, possession or use of their land.

Office commentary

The proposals that this Article be revised simply to recognise the procedures established by these people for the transmission of land rights are not likely to be accepted by the Conference. However, if the applicability of paragraph 1 were limited to transmission of such rights among members these peoples – that is, to internal distribution of such rights among themselves – as has been suggested, this might be acceptable. It would also eliminate the need for the phrase "within the framework of national laws and regulations". The reservations expressed on the use of the terms "ownership", "possession" and "use" are taken into account by making reference simply to the land rights of these peoples.

Paragraph 2 therefore should refer to the transmission of land rights beyond these communities. Objections have again been raised to the inclusion of a requirement that consent be sought, and several respondents have proposed that these lands simply be made inalienable. The latter view was strongly expressed at the 1986 Meeting of Experts, and indigenous and tribal representatives have repeatedly stated that they share this view. Convention No. 107 makes no direct reference to inalienability, but the accompanying Recommendation (No. 104) contains two provisions recommending restrictions on indirect leasing or mortgaging of the lands of these communities. Moreover, legislation along these lines has been adopted in several countries in recent years. Yet problems remain. First, in spite of a certain movement in this direction, no clear trend can be discerned in national legislation. In addition, there may well be cases in which the peoples concerned wish – or may decide in the future – to alienate part or all of their lands outside the community. To adopt provisions simply prohibiting alienation would restrict the options of these communities to an unacceptable degree. It would also go contrary to every other provision of the proposals for revising this instrument by putting restrictions on the capacity of these peoples to take action which they might wish to take after full and mature consideration. In view of this clear conflict of objectives, the Office has adapted its original proposal to take account of the discussions.

Paragraph 3 has been slightly amended in view of the comments made and of the changes to paragraph 1.

Thus amended, Article 16 appears as as Article 17 of the new text.

Article 17

Unauthorised intrusion upon, or use of, the lands of the (peoples/populations) concerned shall be considered an offence. Adequate penalties for such offences and appropriate recourse procedures shall be established by law.

Observations on Article 17

Australia (ACTU). Revise to read:

Unauthorised intrusion upon, or use of, the lands or resources of the peoples concerned shall be punishable by national law, and these peoples shall have the right to initiate legal proceedings against intruders on their own behalf, as well as the right to the prosecution of such cases by the government.

Brazil (CUT). Delete the word "unauthorised", which could imply that intrusion does not constitute an offence when it is authorised.

Canada. Revise to read:

Adequate penalties or other recourse procedure shall be established by law to deal with unauthorised intrusion upon, or use of, the lands of the (peoples/populations) concerned.

This would meet the intent of the Article while more flexibly applying to different national legal systems which may not provide for specific criminal offences.

(IPWG). Revise to read:

1. Unauthorised intrusion upon, or use of, the lands or resources of the peoples concerned shall be considered as an offence, and substantial penalties for such offences and other effective recourse procedures, which may be initiated by these peoples, shall be established by law.

2. Other persons shall be effectively prevented from occupying or using the lands and resources of the peoples concerned except with the informed consent of these people, and in conformity with their own customs or laws as well as national laws adopted for this purpose.

3. The peoples concerned shall have the right to initiate legal proceedings against intruders on their own behalf and the right to the prosecution of such cases by the government.

Denmark (LO). Same as Australia (ACTU).

Japan. The words "to the same extent as in the cases of lands of other citizens" should be added at the end of the first sentence.

Norway. After "intrusion" add "according to national law and practice".

Office commentary

The adjective "unauthorised" applies to the term "use" as well as to the term "intrusion", and has therefore been retained.

Some worker respondents propose an additional clause, to the effect that the peoples concerned shall have the right to initiate legal proceedings on their own behalf. This important right appears to be covered already by the third paragraph of Article 8.

The Government of Japan proposes a qualifying clause, according the peoples concerned rights no greater than those accorded to other citizens in the event of intrusion. The Office considers that special protection is warranted, in view of the very serious abuses affecting indigenous and tribal peoples in particular. The concern expressed by the Government of Canada has been taken into account, while retaining the overall substance of the Article. An obligation on governments to prevent unauthorised intrusions – such as incursions by settlers or prospectors – has been added to clarify the intention of this provison.

Thus amended, Article 17 appears as Article 18 in the new text.

Article 18

National agrarian programmes shall secure to the (peoples/populations) concerned treatment equivalent to that accorded to other sections of the national community with regard to:

(a) the provision of more land for these (peoples/populations) 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/populations) already possess.

Observations on Article 18

Australia (ACTU). Revise to read:

In any national agrarian programmes, priority shall be given as far as possible to:

(a) the provision of more land for these peoples when they have not the area necessary for providing them with an adequate standard of living, or for any possible increase in their number;

(b) the provision of the means for these peoples to improve their standard of living through a process of development which is in accordance with their own values and aspirations;

(c) the consolidation of the traditional territories of these peoples, especially where this will aid in the protection of the living resources upon which they may depend.

Canada. The Government agrees on the understanding that the intent is for the (peoples/populations) concerned to receive equivalent treatment to that accorded to other sections of the national community.

(IPWG). Revise *(a)* and *(b)* to read:

(a) the provision of more land for these peoples when they have not the area necessary for providing the essential right of an adequate standard of living enjoyed by other members of the national community and in a manner comparable with the aspirations and ways of life of these peoples;

(b) the provision of the means required to promote the development of their lands in accordance with their own priorities and values;

Add a new paragraph providing:

Agrarian reform laws shall not be implemented in a manner which vests title to the lands of these peoples in any person who is not a member of the peoples concerned as determined by them.

Colombia. In *(b)*, add after the word "required" the words "and ecologically suitable". At the end of this paragraph, add the words "in accordance with their needs and aspirations".

Denmark (LO). Same as Australia (ACTU).

United States. The Government agrees to the proposed text and notes that, pursuant to Article 34 thereof, the phrase "treatment equivalent" should not be interpreted to diminish existing treaty or legislative rights.

Office commentary

The understandings expressed by the Governments of Canada and the United States both appear to be correct. The intent of this Article was to provide for non-discriminatory rather than preferential treatment, and to allow indigenous and tribal peoples to benefit from general programmes of agrarian reform. Provision is, however, made for the special needs of these peoples to be taken into account.

Australia (ACTU) and Canada (IPWG) have proposed amendments intended to consolidate the land rights of these peoples and to mandate that development should take place in accordance with their own aspirations. Both these concerns appear to be covered elsewhere in the revised text, and there appears to be no pressing need to duplicate these provisons.

Following minor drafting changes, Article 18 appears as Article 19 in the new text.

Article 19

Adequate procedures shall be established within the national legal system to resolve land claims by the (peoples/populations) concerned, including claims arising under treaties.

Observations on Article 19

Australia (ACTU). Revise to read:

Adequate procedures shall be established within the national legal system for the identification of the lands and resources of the peoples concerned, and for the resolution of claims, including claims arising under treaties or other agreements formerly made with these peoples.

Canada. Given the suggested amendment to Article 13, paragraph 1, the reference to procedures for identification of lands now in Article 13, paragraph 2, would be more appropriately placed in Article 19. Revise to read:

Adequate procedures shall be established within the national legal system for the identification of the lands which the (peoples/populations) concerned traditionally use and occupy and for the resolution of land claims by the (peoples/populations) concerned, including claims arising under treaties.

(IPWG). Revise to read:

1. Effective procedures shall be established within the national legal system in collaboration with the peoples concerned to resolve claims and disputes involving lands and resources, including claims arising under treaties and for restoration of lands.

2. Laws, treaties and other agreements shall be interpreted and implemented in accordance with their original spirit and intent.

3. In cases where a treaty-making process is requested by the peoples concerned, the procedure in paragraph 1 shall not in any way restrict or otherwise undermine the process requested.

Denmark (LO). Same as Australia (ACTU).

Japan. The protection of the (peoples/populations) concerned is considered to be sufficient when it is equal to that afforded to other citizens. Therefore the words "to the same extent as in the case of other citizens" should be added.

Norway. Replace "to resolve" by "for the identification of the lands which the (peoples/populations) concerned traditionally use and occupy and for the resolution of".

Switzerland (SGB). The revised Convention should make a clear distinction in Article 19 between procedures which are established to implement Article 13, paragraph 2 (identification of land owned or used by indigenous peoples), and procedures which should also be established to settle claims for compensation for those lands which are no longer occupied or used by indigenous peoples.

Office commentary

The text of this Article has been incorporated in Article 14.

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 20

1. Governments shall, within the framework of national laws and regulations, and in full co-operation with the (peoples/populations) concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these (peoples/populations), to the extent 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/populations) 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/populations) 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;

(b) that workers belonging to these (peoples/populations) 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/populations) are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

(d) that workers belonging to these (peoples/populations) enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment;

(e) that workers belonging to these (peoples/populations), including seasonal and migrant workers employed in agriculture or in other activities, are fully informed of their rights under labour legislation and of the means of redress available to them.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the (peoples/populations) concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Observations on Article 20

Brazil (CONTAG). In paragraph 1, replace "within the framework of national laws and regulations" by "under their national laws and regulations".

Canada (IPWG). Amend paragraph 1 to read as follows:

Governments shall, with the consent of and in collaboration with the peoples concerned, adopt particular measures to develop and ensure recruitment opportunities and to guarantee effective protection with regard to access, training, recruitment and conditions of employment for indigenous workers including, if warranted, enacting or amending laws to extend those opportunities and that protection to the peoples concerned.

In paragraph 4, replace "Particular attention shall be paid to the establishment of" by "Governments shall, in collaboration with the peoples concerned, establish".

Chile. Paragraph 1. Special measures to ensure effective protection in respect of the recruitment of workers belonging to indigenous peoples may not entail any discrimination vis-à-vis the rest of the country's workers.

Egypt. At the end of paragraph 4, add the following sentence:

There shall be no discrimination between workers belonging to the peoples concerned and other workers in respect of the number of hours of work in the same activity and the minimum age for admission to employment.

Mexico. Add a new subparagraph to paragraph 3, as follows:

(f) that migrant workers belonging to the (peoples/populations) concerned are protected – as regards both their person and their property – during the transfer to workplaces and their return home.

Panama. Paragraph 4. Inspection services can also make a contribution in each country to the activities involved in supervising compliance with the Convention.

United States. In paragraph 3, subparagraphs *(a)* and *(e)*, delete the references to "migrant workers". Other ILO Conventions set forth the rights of migrant workers and a convention on migrant workers' rights is under discussion within the United Nations.

Office commentary

As concerns paragraph 1, it is clear from the preparatory documentation for the adoption of Convention No. 107 in 1957 that the expression "within the framework of national laws and regulations" was intended to indicate that these population groups were to be covered by the general labour legislation in addition to any specific measures which might be adopted. Seen in this light, the proposal by Brazil (CONTAG) has not been retained. The proposal by Canada (IPWG) would add an obligation to develop and ensure employment opportunities. This obligation would correspond, in large measure, to the requirements of other ILO Conventions (in particular the Employment Policy Convention, 1964 (No. 122). The concern expressed by the Government of Chile would not be in accordance with the general thrust of the revised Convention.

As regards the proposal by the Government of the United States, it should be recalled that this question arose out of observations on the specific problems facing indigenous and tribal workers. The proposal by the Government of Mexico has not been taken into account to avoid giving undue emphasis to this particular aspect of employment. The Office has proposed some minor editorial changes to paragraph 3.

The proposal by the Government of Egypt is already covered in paragraphs 2 and 3 and, in more general terms, by other ILO instruments. The proposal by Canada (IPWG), in respect of paragraph 4, is largely similar to the amendments put forward during the first discussion which were not accepted because of the obligation they placed on governments. The proposal by the Government of Panama would give the labour inspection services functions outside their sphere of competence.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21

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

Observations on Article 21

Canada. In the English text add "and professional" after the word "vocational" so as not to limit unduly the type of training in question.

(IPWG). The title of Part IV, which fails to reflect the principle that indigenous peoples have the right to establish their own priorities, should be changed to read "Training, traditional economies and economic development".

United States (ICC). The right of indigenous peoples to exercise control over their own economic, social and cultural development is recognised in Article 7, paragraph 2. Unfortunately this principle of indigenous control is not elaborated with any consistency in the specific provisions dealing with vocational training, health and education.

Office commentary

The amendment proposed by the Government of Canada would not alter the meaning of the text. The terminology used corresponds to that in other ILO Conventions on the subject, in particular the Human Resources Development Convention, 1975 (No. 142). It is clear from the discussions during the Conference and the texts which came out of it that the concerns expressed by Canada (IPWG) and the United States (ICC) were heeded and are reflected in the texts proposed for the Articles making up these Parts of the Convention. The new title proposed by the IPWG for Part IV has not been retained since it includes matters that are not dealt with in this Part.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the (peoples/populations) 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/populations) concerned, governments shall, with the full participation of these (peoples/populations), ensure the provision of special training programmes and facilities.

3. Any special training facilities shall be based on the economic environment, social and cultural conditions and practical needs of the (peoples/populations) concerned. Any studies made in this connection shall be carried out in co-operation with these (peoples/populations), who shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Observations on Article 22

Canada. In paragraph 2, delete the word "full" for the reasons outlined in the observations on Article 2. Paragraph 3 should be reworded as follows as from the second sentence:

Any studies made in this connection shall be carried out in co-operation with these (peoples/populations), who shall be consulted in the organisation and operation of such special training programmes. Where feasible, these (peoples/populations) shall progressively assume responsibility for the organisation and operation of these special training programmes, if they so decide.

The present wording would amount to an inflexible requirement that might be impossible for most member States to comply with.

(IPWG). In paragraph 2, add the words "and collaboration with" after "full participation". In paragraph 3, replace the word "practical" by "actual" and the phrase "who shall progressively assume responsibility" by "who have the right to take responsibility". In addition, the following new paragraph should be added:

4. The planning and operation of training programmes and facilities shall be under the responsibility and control of those peoples, if they so determine.

Chile. At the end of paragraph 3, add "in agreement with the competent authority".

Japan. See the proposal made under Article 5.

United States. In paragraph 2, the word "full" should be deleted so as not to limit training opportunities (see the observations on Article 2) and the word "facilities" should be changed to "programmes" since the alternative to existing programmes would be special programmes (facilities may be a part of special programmes). In paragraph 3, likewise, replace "facilities" by "programmes".

Office commentary

As regards the proposals by the Governments of Chile and Japan, it will be recalled that Article 33 (Article 34 in the new text) provides for the desired flexibility. In paragraph 2, the proposals of the Governments of Canada and the United States to delete the word "full" have been accepted. The proposal by the Government of the United States to delete "and facilities" has not been accepted, however, since the term is considered to be a useful reference to practical means of implementation; in paragraph 3, the replacement of "facilities" by "programmes" has been accepted.

The proposal of Canada (IPWG) on paragraph 2 adds nothing to the content of this provision.

For paragraph 3, the suggestions of the Government of Canada and of the IPWG are similar. If the proposed text follows the Government's suggestions, it is because the Office considers that the present text would entail the premature imposition of responsibilities on communities which may not be able to discharge them immediately. The word "practical" seems to convey much the same meaning as "actual". The new paragraph proposed by the IPWG would repeat the content of the last part of paragraph 3.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the (peoples/populations) concerned, such as hunting, fishing, trapping and gathering, shall be recognised, strengthened and promoted as important factors in their economic development. The integrity of these traditional activities shall be protected.

2. Upon the request of the (peoples/populations) concerned, appropriate technical and financial assistance shall be provided, taking into account traditional technologies and the cultural characteristics of these (peoples/populations), as well as the importance of sustainable and equitable development.

Observations on Article 23

Brazil (CONTAG). Observation concerning the Spanish version of the text.

Canada. Paragraph 1 should be amended to read as follows:

Handicrafts, rural and community-based industries, and subsistence economies and traditional activities of the (peoples/populations) concerned, such as hunting, fishing, trapping and gathering, shall be recognised and, as appropriate, be protected, strengthened, and promoted as important factors in their economic development.

The words "as appropriate" would make allowance for other factors which may be relevant to the economic development of the (peoples/populations) concerned. There is, moreover, a need to clarify what is meant by "subsistence economies". Another factor to be considered is the responsibility of governments to balance a variety of legitimate interests. Deletion of the last sentence of paragraph 1 is proposed for these reasons and also because the term "integrity" is ambiguous when translated into a legal obligation.

Paragraph 2 should be amended to read as follows:

When appropriate, technical or financial assistance shall be provided for the development of the above-mentioned skills, occupations and activities upon the request of the (peoples/populations) concerned, or on the government's own initiative. Such assistance shall take into account traditional technologies and the cultural characteristics of these (peoples/populations), as well as the importance of sustainable and equitable development.

As presently worded, paragraph 2 requires governments automatically to provide both technical and financial assistance when requested to do so.

(IPWG). Paragraph 1 should begin as follows: "Rural and community-based industries and traditional economies including handicrafts, subsistence economies and other traditional activities . . .".

In addition, a new paragraph 3 is proposed, as follows:

3. Consistent with the right to development, upon the request of the peoples concerned, technical training and financial assistance shall be provided to address the economic and developmental needs of the peoples concerned consistent with their aspirations, rights and freedoms.

Chile. In paragraph 2, after the words "shall be provided," insert "in line with that granted to other sectors of the population".

Colombia. Reword the first sentence of paragraph 1 to read: "The right of peoples to strengthen and promote handicrafts, ... shall be recognised as important factors in their development."

Japan. See the proposal made under Article 5.

Mexico. Observation concerning the Spanish version of paragraph 1.

Norway. The Article should not be understood to imply an automatic right to technical and economic assistance.

United States. Paragraph 2 should begin: "Wherever possible". While technical assistance should be provided upon the request of the people concerned, allowances must be made for situations in which this is impossible (e.g. for financial reasons).

Office commentary

During the first discussion the references to subsistence economies and to hunting, fishing and trapping were added to the proposals of the Office for paragraph 1. The suggestions by the Government of Canada and by the IPWG demonstrate that that discussion left inadequate time for full account to be taken of the implications of these additions. The Office has thus prepared an alternative text for this paragraph. This also meets the proposal of the Government of Canada to delete the final sentence of paragraph 1, which is

replaced by another one. The reference to handicrafts at the beginning of paragraph 1 has not been deleted, as suggested by Canada (IPWG), since this was accepted during the first discussion and appears to be consistent with other activities referred to here. The proposal by the Government of Colombia has not been retained either as it would transfer the obligation from governments to the communities concerned.

The substance of the proposals by the Governments of Canada, Norway and the United States with regard to paragraph 2 was the subject of discussion during the Conference. It seems to have been made clear that the provision of technical and financial assistance to achieve the aims set forth in this paragraph was of the greatest importance. Nevertheless, to make the provision more flexible, the inclusion of the words "wherever possible" has been accepted.

As regards the proposal of the Government of Chile, it is recalled that in this provision, as throughout the Convention, it is understood that activities on behalf of indigenous peoples are carried out within the context of the general policy of each country.

See the Office commentary on Article 8 in respect of the observation by the Government of Japan.

PART V. SOCIAL SECURITY AND HEALTH

Article 24

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

Observations on Article 24

Canada. Yes, subject to confirmation from the ILO that the provision does not require extending specific benefits to indigenous populations in situations where the latter would not otherwise qualify for such benefits because the overall protection they do receive from various sources is equivalent to that enjoyed by non-indigenous persons.

Colombia. After "extended" insert "and adapted".

Office commentary

With reference to the observation by the Government of Canada, it seems clear that the protection proposed for indigenous peoples is intended to be granted within the limits laid down under the general social security scheme of each country. As was clear from the first discussion, what is important is for the coverage of the country's social security scheme – where one exists – to be extended without discrimination to indigenous peoples.

The proposal by the Government of Colombia, while appropriate, is so general as to add little to the content of the present text.

Article 25

1. Governments shall ensure that adequate health services are made available to the (peoples/populations) concerned, or shall provide them with resources to allow them to design and deliver 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/populations) 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, to the extent possible, allow for the training and employment of local community health workers, and focus on primary health care while maintaining strong links to 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, with the full participation of the (peoples/populations) concerned.

Observations on Article 25

Brazil (CONTAG). In paragraph 1, replace "or shall provide" by "in order to provide".

Canada. In paragraph 3, add the words "and of health care professionals" after "local community health workers". Paragraph 4 should be worded as in point 56 of the original ILO text, i.e.: "The development of such services shall be co-ordinated with general measures of social, economic and cultural development." As worded at present, the reference to "full participation" may give a veto power to one segment of the national population (i.e. indigenous populations) over co-ordination of the provision of health services for indigenous populations and any other social, economic and cultural measures which apply to the population of the country as a whole.

(IPWG). In paragraph 1, replace "or" by "and". In paragraph 2, replace "to the extent possible" by "to the maximum extent possible". In paragraph 3, replace "to the extent possible" by "as a preferential hiring practice" and "allow for" by "ensure". After "health workers" insert "and other professional health care providers". In paragraph 4, after "full participation", add "and under the control and jurisdiction".

Chile. In paragraph 2, after "planned and administered", insert "in accordance with government health plans".

Colombia. In paragraph 1, replace "responsibility" by "initiative". In paragraph 4, replace "social, economic and cultural" by "social, economic, cultural and ecological".

Japan. At the beginning of paragraphs 1 and 4, insert: "In a manner and to an extent depending on the situation of the country and of the (peoples/populations) concerned".

Office commentary

The proposal by Brazil (CONTAG) on paragraph 1 has not been retained. The proposal by Canada (IPWG) would be contrary to the sense of the present

wording as it was drafted during the first discussion. The suggestion by the Government of Colombia to replace "responsibility" by "initiative" would limit the scope of the text since "responsibility" includes "initiative". As regards the proposal by the Government of Japan concerning paragraphs 1 and 4, see the Office commentary on Article 8.

For paragraph 2, the proposal of Canada (IPWG) would shift responsibility for organising health services to the community and this would be inconsistent with the wording of other articles in the text. The proposal of the Government of Chile is covered in paragraph 4.

The proposals of the Government of Canada and of the IPWG to insert "and of health care professionals" or "and other professional health care providers" in paragraph 3 have not been taken up since this would add a general requirement with no relation to the purpose of this provision, which supplements the requirement in the preceding paragraph. The suggestion of the IPWG to replace "to the extent possible" in paragraph 3 by "as a preferential hiring practice" has been deemed appropriate and the paragraph has been reworded accordingly. On the other hand, the replacement of "allow for" by "ensure" has not been accepted since this would deprive the text of the flexibility desired by a large number of governments.

As regards paragraph 4, the Government of Canada raises the question of the meaning of the reference to participation of the peoples concerned. It will be recalled that this was added during the first discussion, along with similar phrases in a number of other provisions. In this instance, however, it does not appear appropriate and the last part of paragraph 4 has consequently been deleted. The terms "provision" and "measures" have, however, been retained as being more applicable to long-term policy implementation. The proposal of the IPWG to insert the phrase "and under the control and jurisdiction" does not seem appropriate to this paragraph; in any case paragraph 1 covers the same ground. The proposal of the Government of Colombia has no clear link to the subject of this paragraph and has not been retained.

PART VI. EDUCATION AND MEANS OF COMMUNICATION

Article 26

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

Observations on Article 26

Canada (IPWG). At the end of the sentence, add "consistent with their rights under treaties and national and international laws".

United States. It should be understood that the term "equal footing" will not affect the special treatment afforded United States Indians by treaty or legislation.

Office commentary

These concerns are duly covered by the general provision in Article 34 (Article 35 in the new text).

Article 27

1. Education programmes and services for the (peoples/populations) concerned shall be developed and implemented in collaboration 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/populations) 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/populations).

3. In addition, governments shall recognise the right of these (peoples/populations) to establish their own educational institutions and facilities. Appropriate resources shall be provided for this purpose.

Observations on Article 27

Australia. Paragraph 3 is acceptable provided it is subject to the sorts of qualification contained in the International Covenant on Economic, Social and Cultural Rights.

(ACTU). In paragraph 1, replace "collaboration" by "co-operation".

Canada. The Article should be amended to read as follows:

1. The development and implementation of education programmes and services for the (peoples/populations) concerned shall be done in collaboration with them. The programmes and services shall address the special needs of these (peoples/populations) and take into account their histories, knowledge and technologies, value systems and their further social, economic and cultural aspirations.

2. The competent authority shall take measures to facilitate the training of members of these (peoples/populations) and their involvement in the formulation and implementation of education programmes. As appropriate, such measures should aim at the progressive transfer of responsibility for the conduct of these programmes to these (peoples/populations).

3. In addition, governments shall recognise the right of these (peoples/populations) to establish their own educational institutions and facilities provided that the standard of education is not lower than the general standard established by the competent authority. Where appropriate, governments shall assist the (peoples/populations) concerned in giving effect to that right.

It would not be realistic to impose an open-ended obligation on governments to provide resources, including financial resources, for any educational institution an indigenous group may choose to establish.

(IPWG). In paragraph 2, after "education programmes", complete the sentence as follows: "with a view to the transfer of responsibility, control and jurisdiction for education services to these peoples, if they so desire in accordance with their inherent rights".

Chile. Education plans cannot consider particular sectors of the population in isolation. They should be included in the country's general education plans.

Japan. See the proposal made under Article 5.

Mexico. The following new paragraph is proposed:

4. Governments shall implement, with the participation of those concerned, programmes to promote sporting and recreational activities respecting the tradition and culture of the (peoples/populations) concerned.

United States (ICC). Paragraph 2 refers only to "education programmes" and not to "education services" in general. There is no mention of the term "control".

Office commentary

The proposal by the Government of Canada for paragraph 1 does not appear to add anything essential to the present text. The suggestion by Australia (ACTU) has been taken into consideration. As regards the proposal of the Government of Japan concerning paragraphs 1, 2 and 3, see the Office commentary on Article 8. A similar amendment proposed by this Government was rejected during the first discussion.

As regards paragraph 2 and the proposal by the Government of Canada to replace "ensure" by "facilitate", it will be recalled that a similar amendment proposed by this Government was rejected. The idea contained in the term "as appropriate" may be considered to be implicit in the present text. However, for the reasons already expressed in connection with the ability of communities to assume responsibilities, this proposal has been retained. The meaning of the word "control", which both the United States (ICC) and Canada (IPWG) propose to include, is already implied in the present text. Likewise, the words "implementation of education programmes" incorporate the notion of "education services". The proposal by the IPWG to include the word "jurisdiction" does not appear appropriate since it might imply the existence of a special jurisdiction for indigenous peoples within the national system.

The proposal by the Government of Canada concerning the first sentence of paragraph 3 and reflected in the observations by the Governments of Australia and Chile, appears to be valid in so far as it relates to the obligation in Article 29. The wording of this first sentence has consequently been amended in line with the proposal by the Government of Canada. The amendment proposed by this Government for the second sentence is similar to another one that was submitted during the first discussion but was rejected.

The new paragraph proposed by the Government of Mexico deals with an aspect that is outside the scope of this Part of the Convention.

Article 28

1. Children belonging to the (peoples/populations) concerned shall 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, as decided by these (peoples/populations).

2. Adequate measures shall be taken to ensure that these (peoples/populations) have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Effective measures shall be taken to preserve and promote the development and practice of the indigenous languages of the (peoples/populations) concerned.

Observations on Article 28

Australia. Paragraph 1 represents an extension of the right to education established in the International Covenant on Economic, Social and Cultural Rights. The objective of the principle gives rise to no difficulties but there may be situations where tuition in indigenous languages is not possible. The paragraph should be amended to reflect this.

Brazil (CONTAG). In paragraph 2, delete the words "in the national language or".

Canada. Paragraph 1 should be amended to read as follows:

Children belonging to the (peoples/populations) concerned shall be taught to read and write in their own indigenous language or, where this is not practicable, in the language most commonly used by the group to which they belong.

It would be difficult for many governments to satisfy a requirement that indigenous language instruction must be automatically provided on the basis exclusively of a request from the indigenous group concerned regardless of the number of indigenous languages that may exist and of the fact that not all of these have a standardised grammar.

Paragraph 3 should be amended by replacing "effective" by "appropriate". The former term in a legal text such as an ILO Convention would create an obligation for governments which may be difficult to comply with since such effectiveness can depend on factors which are not under the control of governments.

(IPWG). In paragraph 1, replace "group" by "peoples".

Japan. See the proposal made under Article 5.

Office commentary

For paragraph 1, the Governments of Australia, Canada and Japan share the concern that the obligation laid down might be too strict to allow for implementation in all cases. The Government of Canada also expresses concern about the meaning to be attributed to "as decided by these (peoples/populations)". The present text was adopted late in the first discussion, when there was insufficient time to explore the practical implications of the wording. Without wishing to weaken the provision, the Office has proposed alternative wording designed to take these concerns into account. The proposal of Canada (IPWG) to replace "group" by "peoples" has not been accepted since "group" is considered to have a more neutral connotation. As regards the proposal by the Government of Japan, see the Office commentary on Article 8.

The proposal by Brazil (CONTAG) in respect of paragraph 2 has not been retained. In some countries the national language is the same as the official language while in others they are different.

The amendment proposed by the Government of Canada for paragraph 3 has not been retained since the word "effective" was adopted at the first

discussion to replace "appropriate". Nevertheless the arguments put forward by the Government of Canada are valid and the Office has decided not to have any adjective preceding the word "measures".

Article 29

The imparting of general knowledge and skills that will help children belonging to the (peoples/populations) 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/populations).

Observations on Article 29

No observations have been received on this Article.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the (peoples/populations) 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/populations).

Observations on Article 30

Brazil (CONTAG). In paragraph 1, replace "deriving from" by "recognised in". In paragraph 2, delete "If necessary".

Colombia. In paragraph 2, delete "If necessary".

Office commentary

As regards the proposal by Brazil (CONTAG) on paragraph 1, the Convention under discussion not only recognises but also defines rights. Consequently, the words "deriving from" must be maintained.

The Government member of Colombia, during the Conference, submitted a similar amendment to paragraph 2 but it was rejected. In any case the expression "if necessary" confers the desired flexibility on the text and also meets the concern expressed by Brazil (CONTAG).

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/populations) concerned, with the object of eliminating prejudices that they may harbour in respect of these (peoples/populations). 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/populations).

Observations on Article 31

Brazil (CONTAG). After the word "portrayal" add "and explanation".

Office commentary

The proposal of Brazil (CONTAG) appears to be already covered by the present text.

Proposed new Article on migration across borders

During the first discussion, the Government representative of Colombia submitted an amendment proposing a new Article to deal with indigenous and tribal peoples living in frontier areas. The Committee decided to defer this question to the second discussion in order to allow further study.

The Government of Colombia has made a further proposal:

When the territories of indigenous peoples are divided by the borders of two or more countries, the governments concerned shall, on the basis of the provisions of this Convention, safeguard the cultural, social, economic and territorial integrity of these peoples within the framework of the laws and regulations of each country.

Several other proposals were received, from Australia (ACTU), Denmark (LO), Finland, Norway (NSR), Switzerland (SGB) and the United States (Four Directions Council (FDC)), which closely resembled each other and may be summarised as follows:

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

Other respondents (Denmark, Peru (CGTP), the United States (AFL-CIO)) gave more general support to the proposal.

Office commentary

A new Article based on the wording proposed by several respondents is included in the proposed text (Part VII, Article 32). It is deliberately left quite flexible, in order to allow governments to take measures which are appropriate to their national circumstances and to the situation of the groups concerned. Such a provision would also allow normal border controls in exercise of police power, while encouraging flexibility for such matters as the free circulation of ceremonial and cultural objects.

PART VII. ADMINISTRATION

Article 32

1. The governmental authority responsible for the matters covered in this Convention shall create or develop agencies or other appropriate mechanisms to administer the programmes affecting the (peoples/populations) concerned, and provide them with the means necessary for the proper fulfilment of the functions assigned to them.

2. These programmes shall include:

(a) planning, co-ordination, execution and evaluation, in co-operation with the (peoples/populations) concerned, of the measures provided for in this Convention;

(b) proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken in full co-operation with the (peoples/populations) concerned.

Observations on Article 32

Canada. Paragraph 1 should be amended to read as follows:

The governmental authority responsible for the matters covered in this Convention shall create, develop or otherwise ensure that there are agencies or other appropriate mechanisms to administer the programmes affecting the (peoples/populations) concerned. Governments shall provide such agencies or mechanisms with means, where not otherwise available, to fulfil the functions assigned to them.

The words "or otherwise ensure" would take account of the fact that bodies may already have been created to administer relevant programmes. The words "where not otherwise available" would recognise that there may be circumstances where the necessary means may be provided by non-governmental sources.

In paragraph 2 *(b)*, it is proposed the word "full" be deleted for the reasons outlined in the Government's observations on Articles 2 and 5.

(IPWG). The present text is not adequate and the following amended text is proposed:

1. The governmental authority responsible for the matters covered in this Convention shall, in collaboration with the peoples concerned, create or develop agencies or other appropriate mechanisms to administer the programmes involved, and provide them with the financial and other means necessary for the proper fulfilment of the duties assigned to them and to implement the other obligations of this Convention.

2. The carrying out of these programmes and other obligations shall include planning, co-ordination, execution and evaluation, in collaboration with the peoples concerned, of the measures provided for in this Convention.

3. Implementation of this Convention shall also entail legislative and other measures, devised in collaboration with the peoples concerned, to guarantee the full recognition and respect for the rights of these peoples in this Convention and the carrying out of the programmes and the other obligations referred to above. Monitoring and supervisory procedures, based on explicit criteria, shall be developed in collaboration with the peoples concerned.

Chile. The Government objects to paragraph 1 on the grounds that the creation of agencies, mechanisms and programmes depends on the characteristics and economic circumstances of each country.

Japan. See the proposal made under Article 5.

Peru (CGTP). States should undertake to adopt policies to promote environmental protection, ecological balance and self-sustained development of

indigenous peoples. Provision should be made for penalties in cases of infringement of the recognised rights of indigenous peoples, such offences being considered more serious when committed by public employees.

United States. In paragraph 1, replace "create or develop" by "work to ensure that there are". This will allow existing agencies or other appropriate mechanisms to be utilised. New ones would be created or developed only when necessary.

(ICC). It is proposed to reword this Article entirely in line with the text proposed by Canada (IPWG).

Office commentary

For paragraph 1, account has been taken of the proposals by the Governments of the United States and of Canada as regards the first sentence of the text. The change proposed by the latter Government for the second sentence, however, has not been accepted since it entails an obligation that would fall solely on governments. Nevertheless, the Office has amended its text to take account of the possibility, as suggested by the Government of Canada, of the necessary means being provided by non-governmental sources. The concern expressed by the Governments of Chile and of Japan is already covered by the present wording, which embodies the required flexibility.

To meet the proposal made by the Government of Canada for paragraph 2, the word "full" has been deleted in subparagraph *(b)*.

The proposal by Canada (IPWG) and United States (ICC) to redraft this Article completely would lengthen the text but add little substance. This is why similar amendments were not accepted during the first discussion.

Peru (CGTP) proposes the establishment of penalties and the adoption of policies to protect the environment. The latter point is reflected in other provisions of the Convention. The former one expresses a valid concern but it would not appear necessary to enter into this level of detail.

PART VIII. GENERAL PROVISIONS

Article 33

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.

Observations on Article 33

Brazil (CONTAG). At the end of the Article, add the words "without prejudice to recognised rights".

Canada (IPWG). After the word "country" the text should continue: "the intent of this Convention, and the wishes of the peoples concerned".

In addition, Part VIII of the Convention should include a new paragraph worded as follows:

Nothing in this Convention shall be interpreted as implying for any government, group or person any right to engage in any activity or to perform any act aimed at the undermining or destruction of any of the rights or obligations recognised in this Convention.

Sweden. This Article should be reworded so as to make it clear which provisions a ratifying State would be free to exclude from its implementation of the Convention.

United States (ICC). The same proposal as Canada (IPWG), that is to say amendment of the end of the Article and addition of a new interpretative clause. Despite what is stated in the report of the Committee on Convention No. 107, the new criteria suggested are necessary in Article 33 for the sake of clarity. As regards the new interpretative clause, the new Convention should not prescribe less protection than that afforded by other international instruments. Paragraph 8 of article 19 of the ILO Constitution does not fully cover the concerns included in the proposed amendment.

Office commentary

The meaning of the proposal by Brazil (CONTAG) is already covered by the present text and by Article 34 (Article 35 in the new text). The addition of a new ending to the Article, together with a new paragraph, proposed by Canada (IPWG) and United States (ICC) were previously suggested, during the first discussion at the Conference, by the Workers' members who eventually withdrew their amendments. The Office does not consider additional provisions necessary since the principle in question is already inherent in the text.

As regards the proposal by the Government of Sweden, it would seem difficult for a Convention on fundamental human rights to provide for certain provisions to be excluded from implementation. In addition, it has already been stated that the new Convention is capable of progressive implementation. Consequently, the particular kind of flexibility suggested does not appear necessary.

Article 34

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

Observations on Article 34

Brazil (CONTAG). Replace "national laws, awards, custom or agreements" by "the laws, awards, custom or agreements of each country".

Canada. After the word "Recommendations", the Article should end "and other international instruments, or under national laws, awards, custom, treaties or agreements."

The placing of the word "treaties" before "or agreements" rather than before "or international instruments" is designed to recognise the fact that treaties between States are already covered under "international instruments" whereas

treaties between national governments and indigenous (peoples/populations) are more properly grouped with "national laws, awards, custom or agreements".

(IPWG). After "agreements" add "or aboriginal title and rights".

Office commentary

As regards the proposal by Brazil (CONTAG) to replace the word "national", it will be recalled that this is the word commonly used in other ILO Conventions. The suggestion by Canada to move the word "treaties" has been accepted but it has been decided to insert it before "national laws, awards, custom or agreements" because it would not appear right for the ILO to prejudice the results of studies currently under way in the United Nations on the nature of treaties between States and indigenous peoples. The proposal by Canada (IPWG) merits consideration but, as it relates exclusively to land rights, it is covered by the provisions of Part II of the Convention.

PART IX. FINAL PROVISIONS

Article 35

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

Observations on Article 35

No observations have been received on this Article.