Seventeenth item on the agenda

**Report of the Director-General**

Fifth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)

**Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>3</td>
</tr>
<tr>
<td>II. Examination of the representation</td>
<td>4</td>
</tr>
<tr>
<td>A. The complainants' allegations</td>
<td>4</td>
</tr>
<tr>
<td>B. The Government's reply</td>
<td>8</td>
</tr>
<tr>
<td>III. The Committee's conclusions</td>
<td>10</td>
</tr>
<tr>
<td>IV. The Committee's recommendations</td>
<td>18</td>
</tr>
</tbody>
</table>
I. Introduction

1. In a communication received by the International Labour Office on 29 January 2021, Public Services International (PSI), the National Confederation of Public Servants of Ecuador (CONASEP) and the National Workers’ Federation of Provincial Governments of Ecuador (FENOGOPRE) made a representation under article 24 of the ILO Constitution alleging non-observance by the Government of Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), (“the Convention”). The Convention was ratified by Ecuador on 15 May 1998 and remains in force.

2. The provisions of the ILO Constitution relating to the submission of representations are as follows:

   Article 24
   Representations of non-observance of Conventions

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

   Article 25
   Publication of representation

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

3. Pursuant to article 1 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization, as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation, informed the Government of Ecuador and brought it before the Officers of the Governing Body.

4. At its 341st Session (March 2021), the Governing Body decided that the representation was receivable and set up a tripartite committee to examine it. This committee is composed of Ms Gloria Gaviria (Government member, Colombia), Ms Paola Egúsquiza Granda (Worker member, Peru) and Mr Guido Ricci (Employer member, Guatemala).

5. The Government submitted its observations concerning the representation in a communication received on 3 March 2022.

6. Regarding the possibility of opting for voluntary conciliation, the complainants informed the Office, in a communication received on 14 April 2023, of their decision to await the outcome of the examination by the ad hoc tripartite committee of the Governing Body before considering the possibility of opening discussions with the Government.

7. The complainants provided updated information on the issues raised in the representation in a communication received on 20 March 2023. The Government submitted its observations on the matter in a communication received on 26 May 2023.
8. The Committee met on 12 February 2024 to examine the representation and adopt the respective report.

II. Examination of the representation

A. The complainants’ allegations

9. The complainants allege the violation of Articles 2, 6, 7, 13, 14 and 15, in relation to Articles 8(2) and 30 of the Convention, for the reasons stated below.

1. Lack of consultation on two mining projects and related climate of violence

10. The complainants state that the Shuar Arutam People (PSHA) is located in the Amazon region, in the south-eastern province of Morona Santiago. It has a population of around 12,000 and is registered with the Council for the Development of the Nationalities and Peoples of Ecuador. Its traditional territory covers approximately 220,000 hectares, 90 per cent of which is natural vegetation or primary forest. It is organized into 47 centres, or communities, which are organized in six associations. The Governing Council is the main representative body of the PSHA, while the highest decision-making body is the General Assembly, in which representatives of the centres and associations take part.

11. The complainants state that, in August 2019, a total of 271 mining concessions were registered in the PSHA’s ancestral territory, covering approximately 56 per cent of the territory. According to the complainants, all of these concessions were granted without the PSHA having been informed or consulted beforehand, which has led to a deep mistrust towards the State. The complainants add that, in 2019, the PSHA requested a discussion with the Presidency of the Republic, the National Assembly and other government authorities on the large-scale mining projects located on their territories, but no entity responded to their request. Among these mining projects, the complainants refer in particular to the San Carlos-Panantza project and the Warintza project.

San Carlos-Panantza mining project

12. The complainants indicate that the San Carlos-Panantza project is located in the province of Morona Santiago and is focused on copper mining. The project covers an area of 41,760 hectares, includes 13 concessions granted to Explorcobres SA (Enterprise A) and affects 15,187.99 hectares of PSHA territory. The environmental licence for this project was granted by the Ministry of the Environment in Decision No. 194 of 17 March 2011.

13. The complainants state that, in 2012, the Office of the State Comptroller General issued report DIAPA-0027-2012 in which environmental aspects related to the San Carlos-Panantza project
were audited. In its report, the Office of the State Comptroller General found that the Ministry of Energy, Mines and Petroleum, the Ministry of Non-Renewable Natural Resources, the National Director of Mining and the Regional Director of Mining of Azuay had not adhered to the legal procedure to assess the potential impact of the project's concessions on water sources and springs. In this regard, the Office of the State Comptroller General recommended that the Ministry of Non-Renewable Natural Resources should coordinate with the Ministry of the Environment to conduct studies to identify the mining concessions that impact on water sources and springs with a view to taking measures to protect them. The Office of the State Comptroller General also found that the Ministry of the Environment had failed to comply with section 78 of the Mining Act by not verifying that the environmental management plan had been fully evaluated in detail in the environmental audit, which in turn had resulted in certain activities not being considered in the action plan or re-evaluated because they were not sufficiently clear. The Office of the State Comptroller General recommended that the Ministry of the Environment should suspend the licensing processes for the San Carlos-Pantanza project until the social conflicts had been resolved and should coordinate a documented process of negotiations and conflict mediation with other social actors that would lead to the creation of an intervention plan. The complainants indicate that, although section 92 of the Organic Law of the Office of the State Comptroller General provides that audit recommendations must be implemented immediately and on a mandatory basis, the recommendations had not been implemented.

14. The complainants also allege that, despite the recommendations of the Office of the State Comptroller General, in August 2016, amid a climate of social conflict, eight families of the Shuar Nankints community (located in the San Juan Bosco canton) were evicted by a contingent of 2,000 police and military personnel in order to make way for the mining company's works. In response to these actions, in November of the same year, a group of Shuar people reportedly occupied the mining camp in the Nankints area but were removed by the military. A month later, the PSHA decided to retake their territory, which led to further violence resulting in the death of one police officer, and injuries to seven other police officers and two Shuar people. This then led to the Government declaring a state of emergency throughout the entire province of Morona Santiago. The complainants indicate that, because of the declaration of a state of emergency and the military incursion, at least 35 Shuar families belonging to the communities of Nankints, San Pedro, Kutukus and Tsuntsuimi were forced to leave their territory. As a result, in July 2018 the Government approved the suspension of the period of validity of the mining concessions due to force majeure.

15. The complainants state that, through Official Letter No. MM-MM-2017-0082-OF of 3 February 2017, the Ministry of Mining submitted information to the State Attorney-General's Office regarding various aspects of the implementation of the San Carlos-Pantanza project. The official letter mentions that, in June 2010, the Ministry of the Environment coordinated an “environmental consultation” in which Enterprise A and some communities in the area affected by the project took part in assessing its potential impact. In this regard, the complainants allege that the Ministry of the Environment did not involve in this process either the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFINIAE) or the Confederation of Indigenous Nationalities of Ecuador (CONAIE), to which the PSHA belongs and is represented by, and that none of the PSHA centres or associations were included either. The outcomes of the only meeting held by the Ministry were included in an “environmental report” prepared by a consultancy firm, which states that the population was divided over the mining project, and the report therefore proposed further consultation processes, in coordination with local, sectional and provincial governments, so that it would be disseminated more widely.
16. Furthermore, the complainants state that, in 2019, the PSHA filed for a protection order against the State on the grounds that it had not held prior consultations with the PSHA on 13 mining concessions affecting their territories, and had not respected the PSHA’s territory and cultural identity. This application was rejected at both first and second instance because the damage caused by the lack of prior consultations had not been demonstrated.

17. In their communication of 20 March 2023, the complainants state that, on 14 September 2022, the Constitutional Court of Ecuador upheld an extraordinary protection order filed by the PSHA against the State Attorney-General’s Office and the Ministry of the Environment as a result of violation of the right to prior consultation with respect to the San Carlos-Panantza mining project. In its ruling, the Constitutional Court found that there are indigenous associations and centres of the PSHA within the geographic scope and affected area of the mining project, and considered that the PSHA’s right to prior consultation (recognized in article 57.7 of the Constitution of Ecuador) had been violated in relation to that project. In this regard, the Court ordered: (i) the annulment of Decision No. 194 of 17 March 2011 issued by the Ministry of the Environment granting the environmental licence to Enterprise A to undertake the project; (ii) the implementation, within a period of six months, of a consultation mechanism for the PSHA by the State ministries responsible for environmental and water issues, exploitation of non-renewable natural resources and the protection of human rights, and by decentralized autonomous governments at all levels; and (iii) the delegation of the monitoring of implementation of this process to the Office of the Ombudsperson. Subsequently, in an order for clarification and extension of its ruling, the Constitutional Court specified that the six-month period for holding prior consultations implies the time in which the State and the holders of this collective right must agree and implement the participation mechanism, without this precluding the possibility that the parties may, by mutual agreement and taking account of the specific circumstances of the consultation process, submit a reasoned request to the Court to extend this period.

18. The complainants maintain that, even though the ruling requires that prior consultations be held with the PSHA, there is no law governing the exercise of the right to consultation, nor does the ruling establish clear parameters regarding the documents that should be disseminated and submitted for consultation. They state that, as a result, there is serious concern that ad hoc practices will be deployed that will deepen the social conflicts that have become established in its territories through processes that do not respect the governance structures of the people or its internal decisions, or in which there is insufficient or outdated information.

19. The complainants also indicate that the San Carlos-Panantza project continues to be considered one of the country’s strategic projects.

Warintza mining project

20. The complainants indicate that the objective of the Warintza mining project is copper exploration. The project involves eight mining concessions covering a total of 26,777 hectares. The area affected by the project includes the Maikiuants, Warints and Yawi centres of the Nunkui association and the Tinkimints centre of the Sinip association, which belong to the PSHA. The project is currently at the initial exploration stage and is concentrated in the

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Curigen 9, Caya 21 and Caya 22 concessions, which were initially granted in 1999 to Lowell (Enterprise B) and together cover an area of 10,000 hectares.

21. The complainants indicate that the Warintza project has been at a standstill since 2001 because of disputes between the PSHA and Enterprise B and was suspended due to force majeure in 2006. They state that, in 2019, Solaris (Enterprise C), which had acquired the rights to the mining concession from Enterprise B, lifted the suspension and engaged in dialogue with some members of the Yawi and Warints communities to create a “strategic alliance” in order to reactivate the project, in the context of which benefits agreements were concluded. According to the complainants, the members involved in that alliance were not legitimate PSHA authorities, nor did they represent all the centres affected by the project. They indicate that for this reason, the Governing Council of the PSHA publicly rejected the agreements concluded between the leaders of the Yawi and Warints centres and Enterprise C that were not the result of a prior consultation process in accordance with the Convention.

22. The complainants further indicate that the Ministry of Energy and Non-Renewable Natural Resources claims to have carried out a “consultation mechanisms assessment” in respect of three of the eight mining concessions under the Warintza project with the Warints and Yawi communities (Caya 21, Caya 22 and Curigem 9) but not taking into account the Maikiuants and Tinkimints centres that are also located in the affected area.

23. Furthermore, in their communication of 20 March 2023, the complainants assert that the army has made violent incursions into PSHA territories in defence of the interests of Enterprise C. They specify that, in September 2021, tensions and violence escalated to a point that endangered the physical integrity of communities, particularly the Maikiuants community. Consequently, the PSHA established an “Indigenous Guard” for the purposes of monitoring the territory in view of encroachment by illegal loggers, and of assisting communities. In addition, the complainants allege that the president of the PSHA was subjected to threats and intimidation as a result of her public complaints in relation to the mining project. The incident was reported to the Provincial Prosecutor’s Office of Morona Santiago in Sucúa, which launched an investigation into intimidation but did not adopt any protective measures. In January 2023, the Prosecutor’s Office gave notice of its decision to close the complaint, arguing that more than a year had passed and no evidence had been found to establish that an offence had been committed. The complainants add that, in the context of the PSHA’s resistance to the mining activities in its territories, 44 activists have been convicted on the basis of complaints filed by the mining companies and/or the State on various grounds, including the alleged disruption of public services, damage to private property and intimidation.

2. Lack of participation of indigenous peoples in the development of national mining policy

24. The complainants allege that public policies in the mining sector have been developed without the involvement of the indigenous peoples and nationalities who live in the territories where mining resources are earmarked for exploitation. They note that the current National Plan for the Development of the Mining Sector 2020–30, which constitutes the road map for the development of the mining industry in Ecuador, is contrary to the provisions of the Convention in respect of the right of indigenous peoples to participate in matters which may affect them directly.

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5 Article 56 of the Constitution of Ecuador recognizes the existence of “indigenous communities, peoples and nationalities”.
3. Lack of protection and recognition of the territorial rights of the PSHA

25. The complainants state that the fact that the PSHA does not hold land titles to its ancestral territories has facilitated encroachments by third parties, militarization of the territories and the eviction of Shuar families.

4. Lack of protection measures for the PSHA during the COVID-19 pandemic

26. Lastly, the complainants allege that the Government did not attend to the specific needs of the PSHA during the COVID-19 pandemic. They indicate that during the lockdown period, the enterprise responsible for the Warintza project continued to operate without drawing attention to the health protocols to be followed.

B. The Government’s reply

27. In its reply, the Government provides information on the current status of the two mining projects referred to in the representation.

28. Regarding the San Carlos-Panantza mining project, the Government states that the project consists of the mining areas Curigem 2, Curigem 3, Curigem 8, Panantza, Panantza 2 and San Carlos, and was granted an environmental licence for the advanced exploration phase through Ministry of the Environment Decision No. 194 of 17 March 2011. The licence establishes that the public participation process was respected. In July 2016, the National Directorate of Environmental Control requested the concession-holder to update the environmental licence granted in 2011 to adapt it to the new mining surface area that had been reduced by two hectares. On 14 October 2020, the Environmental Quality Department of the Ministry of the Environment informed the mining concession-holder that the process of updating the environmental licence had been suspended until the social conflicts had been resolved, based on the recommendations of the Office of the State Comptroller General in its report DIAPA-0027-2012.

29. With regard to the Warintza mining project, the Government states that: (i) the project includes mining areas Caya 21, Caya 22 and Curigem 9, and received approval for the environmental register and environmental management plan for the initial exploration phase through a decision of the Ministry of the Environment dated 13 November 2015; (ii) a Ministry of the Environment decision dated 22 May 2019 approved the update of the environmental register for the initial exploration phase of the indicated mining areas, and established that they do not overlap with the National System of Protected Areas, Protective Forests and State Forest Lands; (iii) the company that holds the title to the mining concessions initiated the regularization process for the environmental impact studies on the advanced exploration phase of the mining concessions, and that, once approved, the public participation process in accordance with section 184 of the Organic Code on the Environment would be launched; (iv) in response to a request made by the PSHA, the Ministry of Energy and Non-Renewable Natural Resources ordered a pilot project to be implemented to identify the parties to the consultation and

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6 Section 184 of the Organic Code on the Environment – on public participation. The relevant environmental authority shall inform the population potentially directly affected about the possible implementation of projects, works or activities, as well as the possible expected socio-environmental impact and the relevance of actions to be taken. The purpose of public participation will be to gather the opinions and observations of the public in order to incorporate them into environmental studies, provided that they are technically and economically feasible. If the aforementioned consultation process results in a majority opposition by the respective population, the decision on whether or not to implement the project will be adopted by a duly reasoned decision of the relevant environmental authority...
apprise prior consultation mechanisms, the main objective of which was to devise a methodology to strengthen the organizational, participatory and decision-making processes among the peoples concerned; (v) in accordance with Official Letter No. MERNNNR-VM-2022-0053-OF of 23 February 2022 issued by the Ministry of Energy and Non-Renewable Natural Resources, one of the results achieved in this pilot project was the development and implementation of methodological guidance on identifying the parties to the consultation reflecting the historical continuity of the communities in the Warintza mining project area and their connection to the territories. In the aforementioned official letter, the Ministry of Energy and Non-Renewable Natural Resources recognizes that this socialization process does not amount to a process of prior consultation, but that its main objective was to disseminate the Ministry's management model and provide information on what was involved in prior consultation.

30. Furthermore, the Government indicates that the granting of mining concessions has been halted under Decision No. 001-DE-ARCOM-2018 of 24 January 2018 issued by the Agency for the Regulation and Monitoring of Energy and Non-Renewable Natural Resources. This decision establishes the temporary suspension of national mining land registration in artisanal and small-, medium- and large-scale mining operations.

31. In its communication of 25 May 2023, the Government indicates that the Ministry of Energy and Non-Renewable Natural Resources has worked with representatives of the extractive sector with a view to drafting a bill to regulate free and informed prior consultations concerning the non-renewable natural resources sector, which incorporates international human rights standards and transparency standards focused on complying with the Extractive Industries Transparency Initiative applicable to this type of process. This input was submitted to the National Assembly on 9 April 2021 for processing as a potential bill.

32. Regarding the measures to address the COVID-19 pandemic in the Shuar Arutam communities, the Government states that the Ministry of Public Health has drawn up regulations to provide priority and comprehensive attention to these communities, taking account of any gaps in access to health services. It provides detailed information on the measures adopted in this regard, including: the protocol for preventing and responding to COVID-19 among indigenous peoples and nationalities, which has intercultural relevance; operational guidelines for vaccination against COVID-19 among indigenous peoples and nationalities; and development of booklets and advertising material for the prevention of COVID-19 infection that are culturally tailored to the circumstances of the PSHA.

33. Lastly, in its communication of 26 May 2023, the Government reports that, to respond to the representation and ensure citizens have access to the information needed, it has tasked the Territorial and Environmental Monitoring Department with launching a conciliation mechanism. The Government specifies that this process will be a forum for dialogue, consultation and dissemination as a mechanism to generate civil society participation networks and ensure the inclusion of all voices and opinions in the areas of territorial development.
III. The Committee’s conclusions

34. The Committee’s conclusions are based on its examination of the allegations made by the complainants and the observations submitted by the Government in these proceedings.

35. The Committee notes that the main allegations of the complainants are: (i) the lack of consultation with the Shuar Arutam indigenous people concerning two large-scale mining projects (San Carlos-Pantanza and Warintza) in their traditional territories in Morona Santiago province, which led to the eviction of several communities amid a climate of violence; (ii) the lack of opportunities for PSHA involvement in the process of developing and adopting national mining policy; (iii) the lack of recognition and protection of the PSHA’s territorial rights; and (iv) the lack of measures to protect the integrity of PSHA members during the COVID-19 pandemic.

Prior consultation

General considerations

36. Before analysing the material facts of this representation, the Committee considers it appropriate to emphasize the importance of prior consultation as a cornerstone of the Convention and the basis for implementing all the rights enshrined therein. Furthermore, consultation is an essential tool of governance, social dialogue and legal certainty for indigenous peoples, the Government and other stakeholders. Consultation is enshrined in the following provisions of the Convention.

37. Article 6 of the Convention enshrines the right of indigenous peoples to be consulted as follows:

1. In applying the provisions of this Convention, governments shall:
   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

38. Furthermore, Article 15(2) of the Convention provides that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

7 With respect to prior consultation, the Committee also considers it appropriate to refer to the General Observation on the Convention adopted by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in 2018.
39. The Committee also notes that article 57.7 of the Constitution of Ecuador recognizes the collective right of indigenous peoples to “free and informed prior consultation, within a reasonable period of time, on the plans and programmes for the exploration, exploitation and marketing of non-renewable natural resources on their lands which could have an environmental or cultural impact on them”.

San Carlos-Panantza mining project
40. In relation to the San Carlos-Panantza mining project, the Committee notes that the complainants allege that:

(a) the project was designed for copper exploration in an area covering approximately 15,188 hectares of the PSHA’s ancestral territory. It was authorized in March 2011 through the issuance of the respective environmental licence without prior consultation with the PSHA;

(b) in 2012, the Office of the State Comptroller General audited the environmental aspects of the project and concluded that it had not complied with the procedure to assess the possible effects of the project on water sources and springs, or to prevent, mitigate and/or make good the environmental and social impacts of the project. The Office of the State Comptroller General recommended that the Ministry of Energy and Non-Renewable Natural Resources and the Ministry of the Environment should conduct studies to identify such impacts and to suspend the licensing process until the social conflicts had been resolved;

(c) the Ministry of the Environment implemented an “environmental consultation” in a simple information meeting involving Enterprise A and some communities in the area affected by the project, but without including other affected communities and associations or the PSHA Governing Council;

(d) amid a climate of social conflict generated by the implementation of the project, several PSHA communities living in the area affected by the project have been forcibly evicted;

(e) the PSHA filed a legal application for protection as a result of the violation of the right to consultation in the context of the project. This application was rejected at first and second instance and upheld by the Constitutional Court on 14 September 2022, which found that this right had been violated. In its ruling, the Court ordered the annulment of the decision granting the environmental licence for the project and ordered that a mechanism for prior consultation with the PSHA be implemented within a six-month period.

41. The Committee also notes the Government’s information that:

(a) the project was granted an environmental licence by the Ministry of the Environment in March 2011, in which it was established that it complied with the respective social participation process;

(b) as a result of the mining concession areas having been reduced by two hectares, a process to update the environmental licence was initiated in August 2016;

(c) in October 2020, the Ministry of the Environment informed Enterprise A that the process of updating the environmental licence had been suspended until the social conflicts had been resolved, based on the recommendations made by the Office of the State Comptroller General in 2012.
42. The Committee observes that, according to the information provided by the complainants, which has not been contested by the Government, the project in question is located on lands traditionally occupied by the PSHA. Studies must therefore be carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of the project (Article 7(3)). Moreover, given that the project concerns mineral resources located on the PSHA’s lands and therefore directly affects it, the PSHA must be consulted beforehand (Articles 6 and 15(2)). The Committee notes that these two elements were upheld by the Constitutional Court of Ecuador in its ruling of 14 September 2022, when it noted that “it can be concluded with reasonable certainty that there are indeed indigenous associations and centres of the Shuar people within the spatial limits of the mining project and the area affected” and therefore held that “in the specific case it was appropriate to hold prior consultation”. 8

43. Regarding the project impact studies, the Committee notes that the Government reports that a public participation process was carried out prior to the issuance of the environmental licence for the project. However, it notes that the Office of the State Comptroller General concluded in a 2012 report that the necessary procedures to assess all potential environmental impacts of the project prior to the issuance of the respective environmental licence had not been respected. It also notes a recent ruling of the Constitutional Court of Ecuador (No. 51-23-IN/23) of 9 November 2023, which established, generally, that environmental registrations and licences must be conditional on compliance with environmental consultation and/or compliance with free and informed prior consultation, as appropriate.

44. Concerning the mining project impact studies, the Committee sees fit to recall that Article 7(3) of the Convention provides that:

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

45. The Committee considers that, given the existence of territories of PSHA communities in the area affected by the mining project (as confirmed by the Constitutional Court), environmental, social and cultural impact studies of the project, carried out in cooperation with these communities, are necessary, as provided for in Article 7(3) of the Convention. The studies’ findings should provide the necessary information on which to base consultations with the indigenous peoples. The Committee observes that it cannot be concluded from the information provided by the Government that studies have been carried out to comprehensively assess the environmental, spiritual and cultural impact, or that the PSHA has cooperated to that end.

46. Moreover, given that the project involves the exploration of mineral resources, the Committee considers that, pursuant to Article 15(2) of the Convention, there is an obligation to consult the indigenous peoples under the terms of the Convention with respect to any decision authorizing programmes or activities for the exploration or exploitation of resources existing on their lands. The Committee notes that the complainants allege that the Ministry of the Environment allegedly held an “environmental consultation” in a simple information meeting and without involving the PSHA’s representative authorities. The Government has not provided any information in this regard.

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47. In this connection, the Committee wishes to underscore that, under Article 6(2) of the Convention, consultations must be undertaken in good faith and in a form appropriate to the circumstances. This implies full formal consultations, in which both the consulting body and the consulted peoples act in good faith and with the intention of genuine dialogue based on communication, mutual respect and a sincere desire to reach agreement. Consultations must also be informed and conducted in a manner adapted to the circumstances and through representative institutions of indigenous peoples. While the Convention does not impose a model of what a representative institution should be, it is important that it should be the result of a process carried out by the indigenous peoples themselves. An institution may therefore be representative at the national, regional or community level. Indigenous peoples must also be provided with all the necessary information in an accessible language with sufficient time to undertake their internal discussion and decision-making processes in advance. A simple information meeting does not comply with the requirements of the Convention concerning consultations.  

48. Taking into account the above criteria, the Committee considers that the “environmental consultation” indicated by the Government is not equivalent to a consultation process under Article 6 of the Convention, as it was not held through the PSHA’s representative institutions, nor was sufficient time granted to the communities to take an informed position on the impact of the project on their rights. In addition, the lack of a regulatory framework for prior consultation meant that a consultation process appropriate to the circumstances of the PSHA was not established, as corroborated by the Constitutional Court in its ruling of 14 September 2022.

49. Accordingly, the Committee requests the Government, if it intends to continue with the San Carlos-Panantza mining project, to take all measures necessary in advance to:

1. carry out studies to assess the social, spiritual, cultural and environmental impact, in cooperation with the PSHA;

2. carry out a prior consultation process with the indigenous communities regarding the project, designed with the involvement of the PSHA and taking into account the following criteria:

(a) the PSHA's representative institutions are involved;

(b) all relevant information is provided well in advance to the indigenous peoples concerned, including the findings of the social, spiritual, cultural and environmental impact studies in relation to the project, in a language accessible to the communities;

(c) sufficient time is allowed for the communities to carry out their internal decision-making processes;

(d) the necessary measures are taken to ensure that the agreements that may be reached between the Government and the indigenous communities within the consultation process are complied with, including with regard to the sharing of benefits.

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50. With respect to the allegations of acts of violence that reportedly occurred in connection with this project (and which reportedly resulted in the death of one police officer and injuries to seven other police officers and two Shuar individuals), the Committee notes that the Government has not provided information on measures taken in this regard. The Committee deeply deplores the seriousness of these allegations and underscores that no form of violence should be tolerated, irrespective of the perpetrator (law enforcement officers, indigenous peoples or third parties). The Committee stresses that, for a consultation process based on good faith, understanding and mutual respect to take place, the State must ensure a climate free from any violence that may affect indigenous peoples and their representatives, and must implement the guarantees necessary to ensure respect for their personal integrity, both physical and psychological. The Committee therefore requests the Government, with a view to ensuring a climate of peace and trust among the indigenous peoples, to take all necessary measures without delay to ensure that the relevant authorities investigate the allegations, determine who is responsible and impose appropriate penalties on the perpetrators. It also requests the Government to adopt measures to safeguard the physical and psychological integrity of members of the PSHA.

Warintza mining project

51. In relation to the Warintza mining project, the Committee notes that the complainants allege that:

(a) the objective of the Warintza project is copper exploration. The project covers a total of 26,777 hectares, divided into eight concessions, and the Maikiuants, Warints and Yawi centres of the Nunkui association and the Tinkimints centre of the Sinip association are located within the affected area. The project is at the initial exploration stage;

(b) the project has been at a standstill since 2001 due to disputes between the PSHA and the company that holds the title to the mining concession;

(c) in 2019, Enterprise C, which is the current concession-holder, launched dialogues with some members of the Yawi and Warints communities, with whom it created a “strategic alliance” in order to reactivate the project;

(d) the members of the communities involved in the “strategic alliance” are not legitimate authorities of the PSHA nor do they represent all of the centres affected by the project, hence the representative body of the PSHA rejected any agreement arising from the alliance;

(e) in 2019, the Ministry of Energy and Non-Renewable Natural Resources conducted an assessment of consultation mechanisms in respect of three concessions (Caya 21, Caya 22 and Curigem 9) but did not take into account the Maikiuants and Tinkimints centres that are also located in the affected area;

(f) since 2020, some members and representatives of the PSHA have been subjected to threats and violent incursions into their territories by military personnel defending the interests of Enterprise C;

(g) the president of the PSHA reported to the Provincial Prosecutor’s Office of Morona Santiago that she had been subjected to threats and intimidation as a result of her public complaints in relation to the mining project; however, no protective measures were taken. In January 2023, the Prosecutor’s Office gave notice of its decision to close the complaint as there was insufficient evidence to establish that an offence had been committed;
in the context of the PSHA’s resistance to mining activities in its territories, 44 activists have been convicted on the basis of complaints filed by the mining companies and/or the State for the alleged disruption of public services, damage to private property and intimidation.

52. The Committee also notes that the Government reports that:

(a) the environmental registration and management plan for the initial exploration phase of the project was approved in November 2015;

(b) in May 2019, the update of the environmental register for three mining concessions (Caya 21, Caya 22 and Curigem 9) was approved and it was established that they did not overlap with protected areas;

(c) the company that holds the title to the mining concessions initiated the process for regularizing the environmental impact studies, which, once approved, should lead to the launch of the public participation process in accordance with section 184 of the Organic Code on the Environment;

(d) in 2019, the Ministry of Energy and Non-Renewable Natural Resources conducted a pilot project to identify the parties to the consultation and appraise the project's consultation mechanisms. As part of this process, the historical continuity of the communities located in the project area and their connections to the lands were established. According to a February 2022 report of the Ministry of Energy and Non-Renewable Natural Resources, this process was not a consultation mechanism as its objective was to disseminate the environmental management model and provide information on what was involved in the consultation.

53. The Committee notes that the complainants' allegations and the Government's reply show that the copper exploitation project directly affects various communities and centres of the PSHA (Maikiuants, Warints and Yawi centres of the Nunkui association and the Tinkimints centre of the Sinip association) located in the area affected by the project. It notes that, as the Ministry of Energy and Non-Renewable Natural Resources established, the aforementioned communities have historical continuity and a territorial connection with the mining concession areas. Accordingly, the Committee considers that there is an obligation to consult these communities based on Articles 6(1)(a) and (2) and 15(2) of the Convention on any decision authorizing exploration or exploitation activities that affect lands traditionally occupied by the PSHA.

54. The Committee also notes, on the basis of the information provided by the Government, that the company that holds the mining concession has initiated the process to regularize the environmental impact studies for three of the eight mining concessions, which, once approved, will reportedly lead to the launch of a public participation process. As the Committee stated above, Article 7(3) of the Convention establishes that studies to assess the social, spiritual, cultural and environmental impact of development activities must be carried out in cooperation with the indigenous peoples concerned. The results of such studies must also be considered as vital information in the context of the consultation process with the communities affected by the project in question. The Committee thus considers that the regularization process for the environmental impact studies on the concessions belonging to the project must involve all Shuar communities located in the area affected by the aforementioned project, which includes the Maikiuants, Warints and Yawi centres of the Nunkui association and the Tinkimints centre of the Sinip association.
55. With regard to the allegations concerning the establishment of a “strategic alliance” between the company that holds the title to the concession and some members of the affected communities in order to reactivate the project, the Committee considers that while the Convention does not prohibit agreements and understandings that private sector companies might have with indigenous peoples in the context of a project to be undertaken in their territories, such understandings are not equivalent to a consultation process within the meaning of the Convention which, as mentioned previously, is the responsibility of the State and must be subject to the requirements of Article 6 of the Convention. Furthermore, the Committee wishes to recall that it is important that dialogue with indigenous peoples in the context of a consultation process is held in an inclusive and participatory manner with all affected communities in order to reinforce a climate of trust.

56. The Committee takes due note of the Government’s indication that a pilot project was conducted to identify the parties to the consultation and appraise the project’s prior consultation mechanisms, during which the historical continuity of the communities located in the area affected by the project and their connection to the territory were established. In addition, it notes that the Ministry of Energy and Non-Renewable Natural Resources recognizes that the process did not amount to a consultation mechanism as its objective was to disseminate the environmental management model and provide information on what was involved in the consultation.

57. The Committee trusts that the Government will continue to take all necessary measures to draw up without delay guidelines for a consultation process on the Warintza mining project that takes into account the inputs of the communities affected by the project, and that, once established, the consultation with the indigenous peoples is conducted taking into account the criteria set out in paragraph 49 of this report.

58. Lastly, the Committee observes that, according to the information provided by the complainants, the Prosecutor’s Office closed the complaint filed by the president of the PSHA concerning acts of intimidation against her, due to a lack of evidence. It also notes the allegations of intimidation and threats against representatives and members of the PSHA. In this respect, the Committee recalls the importance of taking measures to foster a climate of trust that is free from violence, in which indigenous peoples can participate in consultation processes and assert their rights.

Development of regulations for consultation

59. The Committee observes that the Government indicates in its reply that the Ministry of Energy and Non-Renewable Natural Resources worked with representatives of the extractive sector with a view to drafting a bill, the objective of which is to regulate free and informed prior consultations concerning the non-renewable natural resources sector. It notes that this input was submitted to the National Assembly on 9 April 2021 for processing as a possible bill.

60. The Committee duly notes, in turn, that in its ruling of 14 September 2022, the Constitutional Court ordered the State of Ecuador to implement, within a period of six months, the mechanism for free and informed prior consultation, a process on which the granting of administrative permits for the Panantza–San Carlos mining project depends. The Constitutional Court also specified that the consultation process must be implemented by the State ministries responsible for environmental and water issues, exploitation of non-renewable natural resources, and the protection of human rights, and by decentralized autonomous governments at all levels.
61. Taking into account the difficulties that arise in practice in carrying out consultation processes with indigenous peoples regarding administrative decisions relating to projects for the exploration or exploitation of natural resources in their territories, the Committee requests the Government – further to the ruling of the Constitutional Court – to strengthen efforts to ensure that a regulatory framework defining the scope of consultation in the mining sector and regulating the consultation process can be adopted without delay, and recalls the need to hold consultations with indigenous peoples on the content thereof. Pending the adoption of such a regulatory framework, the Committee recalls that it is important for the Government to take the necessary measures to establish mechanisms that will allow it to comply with the obligation under Article 15(2) of the Convention to conduct consultation processes with indigenous peoples in respect of any programmes for the exploration or exploitation of resources pertaining to their lands.

Involvement of the PSHA in the development of national mining policy

62. With respect to the complainants' allegations concerning the lack of involvement of the PSHA in the development of national mining policy, the Committee notes the lack of information from the Government in this regard. The Committee considers it important to recall that Article 7(1) of the Convention provides that:

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

63. Taking into account the fact that, as in the present case, mining exploration programmes are likely to affect indigenous peoples directly when they are to be implemented in territories traditionally occupied by those peoples, or to affect those territories, the Committee emphasizes the importance, in the context of discussing a national mining policy, of establishing mechanisms for the participation of indigenous peoples in the development of programmes and plans likely to affect them directly.

64. Furthermore, the Committee notes the information provided by the Government on the steps taken with a view to establishing a conciliation mechanism in the Ministry of Energy and Non-Renewable Natural Resources to follow up on this representation and serve as a forum for dialogue and discussion. The Committee trusts that this mechanism will be established and launched without delay and that, in that context, the conclusions and recommendations of the Committee will be taken into account.

Recognition and protection of lands traditionally occupied by the PSHA

65. The Committee notes that the Government has not provided information on the complainants' allegations concerning the lack of titling and lack of protection of territories traditionally occupied by the PSHA. The Committee recalls in this respect that Article 14 of the Convention establishes that:

Article 14

1. The rights of ownership and possession of the peoples 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 concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. …

66. The Committee emphasizes the importance of taking the necessary measures, with the participation of the PSHA, to continue determining and titling ownership of lands traditionally occupied by the PSHA and to protect their rights of ownership and possession effectively.

Measures to protect the health of indigenous peoples during the COVID-19 pandemic

67. In response to the complainants’ allegations concerning the failure to adopt specific measures to address the health needs of the PSHA, the Committee takes due note of the detailed information provided by the Government with respect to its prevention and care measures that were culturally adapted to indigenous peoples in tackling COVID-19.

68. The Committee recalls that the tripartite constituents of Ecuador may avail themselves of the technical assistance of the Office in connection with the conclusions set out above and also, more generally, with the application of the Convention.

IV. The Committee’s recommendations

69. In the light of the considerations on which the Committee’s conclusions set out in paragraphs 49, 50, 57, 58, 61, 63, 64, 66 and 68 above are based, the Committee recommends to the Governing Body that it:

(a) approve the present report and, in particular, the conclusions formulated by the Committee in paragraphs 49, 50, 57, 58, 61, 63, 64, 66 and 68;

(b) request the Government to provide the Committee of Experts on the Application of Conventions and Recommendations with information on the matters addressed in the report and in the Committee’s conclusions;

(c) publish the report and close this representation procedure.

Geneva, 12 February 2024

(Signed) Ms Gloria Gaviria
(Government member)

Mr Guido Ricci
(Employer member)

Ms Paola Egúsquiza Granda
(Worker member)