INTERNATIONAL LABOUR OFFICE

Governing Body
326th Session, Geneva, 10–24 March 2016

GB.326/INS/15/5

Institutional Section

INS

FIFTEENTH 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 the Government of Chile of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the First Inter-Enterprise Trade Union of Mapuche Bakers of Santiago

I. Introduction

1. In a communication received on 14 January 2014, the First Inter-Enterprise Trade Union of Mapuche Bakers of Santiago submitted a representation to the International Labour Office, in accordance with article 24 of the ILO Constitution, alleging non-observance by the Government of Chile of the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

2. Chile ratified the Indigenous and Tribal Peoples Convention, 1989 (No. 169), on 15 September 2008 and it is currently in force.

3. The provisions of the ILO Constitution concerning the submission of representations are:

> *Article 24*
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> *Representations of non-observance of Conventions*
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> 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.

4. In accordance with article 1 of the Standing Orders concerning the procedure for the examination of representations as revised by the Governing Body at its 291st Session (November 2004), the Director-General acknowledged receipt of the representation and informed the Government of Chile accordingly. At its 320th Session (March 2014), the Governing Body accepted the recommendation of its Officers, issued a decision on the receivability of the representation and appointed Mr Mariano Álvarez Wagner (Government member, Argentina) to the tripartite Committee set up to examine the representation. He was succeeded by Mr Francisco Figueiredo de Souza (Government member, Brazil) (323rd Session, March 2015). At the 321st Session (June 2014), the Governing Body appointed Mr Alberto Echavarría Saldarriaga (Employer member, Colombia) and Ms Eulogia Familia (Worker member, Dominican Republic) to the tripartite Committee.

5. The Government of Chile sent its observations in a communication dated 29 August 2014.

6. The tripartite Committee met on 6 November 2014 and invited the Government of Chile and the complainant organization to submit additional information in writing. This information was received in January 2015. The Committee also met on 6 June and 3 and 5 November 2015, to continue its examination of the representation, and again on 15 March 2016; it adopted its report on 21 March 2016.

II. Examination of the representation

Allegations made by the complainant organization

7. The First Inter-Enterprise Trade Union of Mapuche Bakers of Santiago (hereinafter "the trade union") states that the representation has the support of the member organizations of the National Coordinating Office for Indigenous Affairs that participated in the round table discussions with the Government of Chile (hereinafter "the Government"), the aim of which was to agree on regulations on indigenous peoples' right to consultation as enshrined in Convention No. 169.

Background

8. The trade union recalls that on 25 September 2009, ten days after Convention No. 169 entered into force, the Government published Supreme Decree No. 124 "regulating section 34 of Act No. 19253 on the consultation and participation of indigenous peoples". The trade union states that the Government issued Supreme Decree No. 124 without consulting or involving the indigenous peoples concerned and that the Ministry of Planning refused to repeal it as requested in 2011 by two indigenous leaders. [1] According to the trade union, the Supreme Decree's provisions restrict the scope of the rights established in

[1] See Ministry of Planning Decision No. 0289 of 6 March 2012.

Convention No. 169; this was the subject of complaints by indigenous and human rights organizations.

9. The trade union states that in March 2011, as a result of the constant criticism of Supreme Decree No. 124, the Government attempted to hold "wide-ranging consultations". Over a six-month period, it planned to hold consultations on: (a) a draft constitutional amendment on the recognition of indigenous peoples; (b) a new indigenous institutional framework; and (c) regulations on consultation in two areas: the implementing regulations for Articles 6 and 7 of Convention No. 169 and the consultation procedures for the Environmental Impact Assessment System (SEIA) Regulations.

10. The trade union states that the importance and complexity of the many issues to be discussed, the limited amount of time allocated and the failure to involve indigenous peoples in planning the consultations were weaknesses that have been pointed out on various occasions, including in the Chamber of Deputies and the Senate. [2] In light of these claims, the Government announced in September 2011 that changes in the original proposals would be made and that a new process, agreed with indigenous peoples, would be initiated.

Round table: Consultations on the drafting of Regulations on consultation with indigenous peoples (Supreme Decree No. 66 (2014))

11. The trade union states that, on 8 August 2012, at the ILO Office in Santiago de Chile, the Government publicly announced the submission of new draft regulations to replace the disputed Supreme Decree No. 124. The trade union acknowledges that the process initiated at the round table was very different from the previous unsuccessful process because the indigenous peoples' role was determined not by government bodies, but by their own representatives.

12. The trade union recalls that the attempt to reach an agreement with indigenous peoples on new regulations began on 30 November and 1 and 2 December 2012. A national meeting was held in Santiago de Chile with the Special Rapporteur on the rights of indigenous peoples (hereinafter "the Special Rapporteur") participating by videoconference. Subsequently, 150 consultation workshops were held throughout the country in order to discuss the scope of Convention No. 169 in Chile at the national level, conduct a wide-ranging discussion of the regulations on prior consultation and draw up draft regulations reflecting the views of indigenous organizations.

13. The trade union states that the round table was an official body, established in March 2013, in order to reach agreement with the indigenous peoples concerned on a prior consultation mechanism, to be established through regulations set out in a supreme decree. The trade union attaches the round table's working paper of 6 August 2013 entitled *Consulta Indígena: Nueva Normativa de Consulta de acuerdo a lo establecido en el Convenio núm. 169* [Consultation with indigenous peoples: New consultation regulations in accordance with Convention No. 169].

[2] In Memorandum No. 300 43.a-2011 of 16 June 2011, the Chamber of Deputies Committee on Human Rights, Nationality and Citizenship requested the executive branch to suspend the consultations with indigenous peoples led by the Ministry of Planning (MIDEPLAN) and, on 3 August 2011, the Senate adopted an agreement requesting the executive branch to repeal the "arbitrary" Supreme Decree No. 124 and instructing MIDEPLAN to suspend "the wide-ranging consultations with indigenous peoples on institutions".

14. The trade union also states that eight days of dialogue – a total of 23 meetings – took place between March and June 2013. Participating in the round table were 40 delegates from the nine indigenous peoples and ten ministerial representatives; an observer from the National Human Rights Institute (INDH) and an observer for the Office of the United Nations High Commissioner for Human Rights (OHCHR) were present at all the meetings. Audiovisual recordings of, and reports on, the meetings were produced and made available online.

15. The trade union states that, after long discussion, the participants at the round table reached various agreements with a view to improving the exercise of the right to prior consultation in Chile. On 15 November 2013, the President of the Republic signed Supreme Decree No. 66 approving the Regulations on the "procedures for consultation with indigenous peoples pursuant to Article 6, paragraphs 1(a) and 2, of the Convention". The Supreme Decree was published in the *Official Gazette* and entered into force on 4 March 2014.

16. The trade union states, with regard to several issues of concern to indigenous peoples on which no consensus was reached, that the final wording of Supreme Decree No. 66 limits the scope of the right to prior consultation and does not reflect the international human rights system.

17. While the trade union acknowledges that, under Article 16 of Convention No. 169, the Government is not required to obtain the consent of the indigenous peoples concerned unless they are relocated, it considers that, in the event of a disagreement between the State and the indigenous peoples concerned, the State must always honour and fulfil its international obligations. [3] It maintains that, at the round table, the Government demonstrated its unwillingness to implement the provisions of Convention No. 169.

The "measures that may affect directly" in the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014))

18. The trade union states that the Government proposed an interpretation of "measures that may affect directly" that is inconsistent with Article 6 of the Convention. It rejects the Government's position that not all decisions of State administrative bodies can be subject to prior consultation, even in the case of decisions that might have some impact on the rights and interests of indigenous peoples. Unlike the trade union, the Government would have disagreed, stating that only general measures with a real impact on those peoples require consultation.

19. According to the trade union, the Government maintained that consultation on all measures would bureaucratize the system and complicate the proper functioning of the public service, thus preventing the Government from playing its role and harming the indigenous peoples themselves. The trade union states that the Government introduced distinctions that restrict the holding of consultations by distinguishing, for example, between an administrative

[3] See the Special Rapporteur's statement: "As a starting point, it must be borne in mind that regardless of whether indigenous peoples consent or not, the State has an obligation under international law to respect and protect the rights of indigenous peoples in accordance with established international standards." J. Anaya: *El deber estatal de consulta a los pueblos indígenas dentro del derecho internacional* [The State's obligation to consult with indigenous peoples under international law], document presented at the seminar on prior consultation of indigenous peoples and the role of the Ombudsman in Latin America, event organized by the Ibero–American Federation of Ombudsmen (FIO), Lima, 25 Apr. 2013, p. 5.

measure (within the meaning of Article 6(1)(a) of Convention No. 169) and an administrative act (as defined in national legislation). [4]

20. With regard to the term "affect them directly", the trade union maintains that the Government proposed a definition that would not allow indigenous peoples to decide whether a measure might affect them directly and that, according to the Government, the directness of the effect must be proved using specific criteria. This is the opposite of the indigenous peoples' proposal that indigenous peoples should be free to state whether they would be affected directly.

21. The trade union disagrees with the Government's position that only indigenous peoples, not indigenous individuals, must be affected directly. It states that, according to the Government, Convention No. 169 establishes rights enjoyed not by individuals but by groups and thus protects only collective rights.

22. According to the trade union, Supreme Decree No. 66 (2014) combines the legal concepts of "direct effect" and "measures requiring consultation" in a single provision, section 7:

> *Measures that may affect indigenous peoples directly*. The State administrative bodies mentioned in section 4 of these Regulations shall consult the indigenous peoples whenever administrative or legislative measures that may affect them directly are being considered.
>
> Legislative measures that may affect indigenous peoples directly include preliminary drafts of legislation and amendments to the Constitution initiated by the President of the Republic, or any part thereof, that may have a direct, significant and specific impact on indigenous peoples as such by affecting the exercise of their traditions and ancestral customs; their religious, cultural or spiritual practices; or their relationship with their land.
>
> Administrative measures that may affect indigenous peoples directly include official documents issued by State administrative bodies that contain a declaration of intent which, owing to its informal nature, gives these bodies discretionary power to achieve indigenous peoples' agreement or consent to their adoption, provided that the measures in question would have a direct, significant and specific impact on indigenous peoples as such by affecting the exercise of their traditions and ancestral customs; their religious, cultural or spiritual practices; or their relationship with their land.
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> Measures issued during states of exception or emergencies, including earthquakes, tidal waves, floods and other natural disasters, shall not require consultation owing to their urgent nature.
>
> Purely procedural decisions and substantive or legal implementing measures shall be understood to be included in the consultations on the final decision for which they are the basis or which they are intended to implement.
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> …

[4] The term "administrative act" is defined in section 3 of Act No. 19880, published on 29 May 2003, establishing the basis for the administrative procedures that govern the decisions of State administrative bodies. The section reads:

> Written decisions adopted by the Administration are issued in the form of administrative acts.
>
> For the purposes of this Act, "administrative act" means a formal decision issued by a State administrative body and containing declarations of intent made in the exercise of official powers.
>
> Administrative acts take the form of supreme decrees and decisions.
>
> Supreme decrees are written orders issued by the President of the Republic or by a Minister "by order of the President of the Republic" on matters falling within the President's remit.
>
> Decisions are similar documents issued by administrative authorities with decision-making power.

23. The trade union states that for both administrative and legislative measures, the Government has added another requirement for the holding of free and informed consultations prior to the adoption of any measure that affects indigenous peoples directly: the measure must have a "direct, significant and specific impact". According to the trade union, this approach restricts a priori the number of measures deemed to have an effect since the obligation to consult does not apply to administrative and legislative measures which, while not related to indigenous peoples, may affect them in practice without necessarily having an impact on "their capacity as such" (in other words, their capacity as peoples).

24. The trade union states that this is clearly inconsistent with the international human rights system and the national legal system; the second paragraph of section 7 of Supreme Decree No. 66 (2014) establishes that consultations on measures that affect indigenous peoples will only be held if the measures have "a direct, significant and specific impact" on those peoples. The trade union considers that Convention No. 169 makes no such distinction and that, while it is understood that the type of consultation will depend on the way in which the impact of the measure is perceived by indigenous peoples in particular, the Convention does not suggest that the measures must concern only those peoples.

25. The trade union mentions, as an example, environmental qualification decisions (RCAs) authorizing investment projects that may not relate to indigenous policies as such. However, such investment projects could have an impact on indigenous peoples if they concern a hydroelectric project that would flood an indigenous people's burial grounds or a mining project that would displace these peoples. The trade union is of the opinion that to accept wording such as that proposed by the Government would be tantamount to renouncing the exercise of rights, and the indigenous leaders did not accept it during the dialogue with the Government.

26. The trade union mentions the view, expressed in a report of the Special Rapporteur, that consultation should not be restricted, since the effect is differentiated, where the decision relates to specific conditions or interests of a given indigenous people even where the decision has a broader impact, as in the case of new legislation on fishing. [5]

27. The trade union also attaches to its representation a legal study by Dejusticia, an applied research centre made up of Colombian university professors, which maintains that sections 7 and 8 of Supreme Decree No. 66 (2014) violate indigenous peoples' right to prior consultation, [6] as well as the mission report on the indigenous peoples' round table, prepared by the INDH.

28. The trade union maintains that by adding two extraneous criteria not stipulated in Article 6 of the Convention ("significant and specific" impact), the Government has introduced a restriction on consultation by means of a national regulation. The trade union considers that consultation is a right that is linked to the fundamental principles of international law. As

[5] See the comments made by the Special Rapporteur in a document issued on 29 November 2012, "Proposal by the Government concerning new regulations on consultation with and the participation of indigenous peoples in accordance with Articles 6 and 7 of Convention No. 169". The document containing the Special Rapporteur's comments is available online in Spanish at: http://unsr.jamesanaya.org/special-reports/comentarios-a-la-propuesta-del-normativa-de-consulta-chile.

[6] Available online at: http://www.dejusticia.org/#!/actividad/1904 .

the Inter-American Court of Human Rights has stated: "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law". [7]

Other disputed provisions of Supreme Decree No. 66 (2014) on the procedure for consultation with indigenous peoples

29. The trade union considers that certain provisions of Supreme Decree No. 66 (2014) represent a unilateral departure from the provisions agreed at the round table and compromise actions that are clearly the result of a dialogue in good faith.

30. Based on a comparative analysis of the provisions agreed at the round table and the sections of Supreme Decree No. 66 (2014), the trade union maintains that the Government made changes in order to exempt some of the Administration's bodies from the obligation to consult under the Regulations (section 4); delete the reference to "members of indigenous peoples" as enjoying the right to consultation (section 5); and replace the agreed statement that consultations must be held at the request of a national adviser from the National Indigenous Development Corporation (CONADI) by "with the agreement of the entire National Council of CONADI" (section 13).

31. The trade union notes with concern that the obligation to consult does not apply during emergencies. The fourth paragraph of section 7 of Supreme Decree No. 66 (2014) states: "Measures issued during states of exception or emergencies, including earthquakes, tidal waves, floods and other natural disasters, shall not require consultation owing to their urgent nature." The trade union is of the opinion that this provision is unlawful since domestic law (articles 39–41 of the Constitution) establishes the constitutional exemptions from the exercise of certain rights. The Constitution sets out the situations in which certain rights and guarantees may be affected by a state of exception, and none of its provisions mentions the exercise of prior, free and informed consultation. According to the trade union, the Government cannot declare a state of exception merely by issuing a decree.

Consultation with indigenous peoples concerning the Environmental Impact Assessment System Regulations (Supreme Decree No. 40 (2013))

32. The trade union maintains that the Government, contrary to its stated intention to consult with indigenous peoples, insisted on drawing up and adopting the SEIA Regulations – without taking into account the prior consultation required under Convention No. 169.

33. It states that, in October 2012, the Government submitted the Regulations to the Office of the Comptroller-General of the Republic (the body that reviews the legality of administrative decisions) in order to start the legal process that would culminate in their promulgation and publication in the Official Gazette. Subsequently, on 26 April 2013, several indigenous leaders who were members of the round table submitted observations to the Comptroller-General of the Republic, stating that sections 85 and 86 of Supreme Decree No. 40 (2013) were not in line with the provisions of Convention No. 169. That document is attached to this representation.

[7] Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku* v. *Ecuador*, judgment of 27 June 2012, para. 164.

34. The trade union states that Supreme Decree No. 40 (2013) was published in the Official Gazette on 12 August 2013 and entered into force on 24 December 2013, without the Office of the Comptroller-General having made any legal objection to its provisions.

35. According to the trade union, investment projects that fall within the scope of the Environmental Assessment System have established a parallel process of consultation with indigenous peoples that is not subject to the consultation requirements agreed at the round table.

36. The trade union refers to the statement made by the INDH, which pointed out that Supreme Decree No. 40 (2013) did not meet the international standards on the right to prior consultation. [8] First, the participatory process proposed by the Environmental Assessment Service (SEA) with a view to the adoption of implementing regulations for the Environmental Framework Act (Act No. 19300) had been rejected by the indigenous peoples, including the national advisers from the CONADI, who had voiced their disagreement with the consultation procedures followed by the SEA; and, second, the provisions concerning the rights of indigenous peoples did not include a clear consultation mechanism.

37. The trade union objects to the provisions of section 85 of Supreme Decree No. 40 (2013) that require the SEA to "design and develop good faith consultations that include mechanisms appropriate to the social and cultural characteristics of the peoples concerned and their representative institutions so that they may participate in an informed manner and have an opportunity to contribute to the environmental assessment process". It emphasizes that, according to the INDH, the Decree does not provide for "mechanisms that ensure intercultural dialogue and allow indigenous peoples to have an impact on the approval of investment projects on their lands and territories". [9]

38. According to the trade union, the Government representatives stated at the round table that the SEA regulations would establish a new social and cultural variable that took changes in the human environment into account during environmental assessments and would make sufficient provision for public participation so that indigenous communities could submit their observations.

39. The trade union maintains that the indigenous peoples' representatives did not agree to the provision on "measures authorizing projects and activities that fall within the scope of the Environment Assessment System" that was incorporated into section 8 of Supreme Decree No. 66 (2014), which was published and entered into force in March 2014.

[8] National Human Rights Institute (INDH): *The duty to hold prior consultations on the draft implementing regulations for the Environmental Impact Assessment System*, approved by the INDH on 13 May 2013 at its 152nd Special Session, available online in Spanish at: http://bibliotecadigital.indh.cl/bitstream/handle/123456789/529/minuta?sequence=1.

[9] ibid., p. 30. The trade union indicated in its submission to the Office of the Comptroller-General of the Republic that section 85(2) of Supreme Decree No. 40 of 2013 established that "only the indigenous peoples affected shall participate in the consultations ... , which shall be carried out with the objective of reaching agreement or consent" and that another sentence had been added: "However, failure to reach such agreement or obtain such consent shall not be taken to mean that the right to consultation was not exercised." The trade union is of the opinion that this sentence constitutes an unacceptable waiver of rights and jeopardizes the legitimate interests of indigenous peoples. It believes that the provision establishes that the outcome of the consultations is irrelevant but that the process itself is important. This contradicts the purpose of the right to prior consultation, the exercise of which requires that indigenous peoples be able to influence the outcome of decisions affecting them.

40. According to the trade union, the Government did not realize that disputes would arise with regard to section 8 of Supreme Decree No. 66 (2014):

> *Measures for the evaluation of projects and activities that fall within the scope of the Environmental Impact Assessment System.* Consultations on environmental permits for projects and activities that fall within the scope of the Environmental Impact Assessment System under section 10 of Act No. 19300 and require consultation with indigenous peoples pursuant to that Act and its implementing regulations shall be held in accordance with the rules governing the Environmental Impact Assessment System, within the time periods established therein, and with section 16 of this Decree on the stages of such consultation.
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> The environmental assessment of a project or activity that may have an environmental impact and that requires consultation with indigenous peoples in accordance with Act No. 19300 and its implementing regulations shall, in all cases, include any mitigation, compensation and reparation measures required in order to address the effects mentioned in section 11 of Act No. 19300.
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> With a view to the holding of consultations within the framework of the Environmental Impact Assessment System, the environmental authority may request technical assistance from the National Indigenous Development Corporation as provided in section 14 of this Decree.

41. The trade union maintains that one of indigenous peoples' main concerns is consultation on investment projects that fall within the scope of the SEA, owing primarily to the threat that mining, forestry and agricultural projects pose to their territories.

42. The trade union also states that section 8 of Supreme Decree No. 66 (2014) jeopardizes the proper implementation of Convention No. 169 by eliminating the duty to consult on environmental impact statements. In that regard, it stresses that under section 8 of Supreme Decree No. 66 (2014), consultations on projects that fall within the scope of the SEA pursuant to section 10 of the Environmental Framework Act (Act No. 19300) "and require consultation with indigenous peoples pursuant to that Act and its implementing regulations shall be held in accordance with the rules governing the Environmental Impact Assessment System". According to the trade union, this provision shows that the Act and its implementing regulations do not stipulate that projects submitted through an environmental impact statement require consultation.

43. The trade union also maintains that, according to section 85 of Supreme Decree No. 40 (2013), not all projects that require an environmental impact study require consultation, but only those whose effects are covered by sections 7, 8 and 10 of Supreme Decree No. 40 and which require an environmental impact assessment, but not an environmental impact statement. The trade union therefore believes that there is a contradiction that makes it possible not to hold consultations on projects that affect indigenous peoples and require an environmental impact statement or assessment since the term "direct affect" appears to be defined in the environmental rules, namely Supreme Decree No. 40 (2013).

44. The trade union states that Supreme Decree No. 40 (2013) mentions environmental impact statements only in the context of projects carried out on an indigenous people's land, in areas of indigenous-centred development or near groups of members of indigenous peoples in accordance with the second paragraph of section 86 of Supreme Decree No. 40 (2013). In such cases, the regional director or the executive director of the Service "shall hold meetings with those groups of people in the area in which the project or activity is to be carried out". "The Service shall produce a record of any meeting at which the opinions of such groups are sought." The trade union considers that, *stricto sensu*, this provision does not establish an obligation to hold consultations on an RCA approving an environmental impact statement.

45. The trade union maintains that there are no legal grounds for waiving the duty to consult on decisions approving an environmental impact statement since this is an administrative measure. It recalls that Chile's courts have ruled that an environmental qualification decision

is the tangible outcome of an environmental procedure [10] and thus constitutes the implementation of an administrative measure. Furthermore, the courts have ruled that public participation must meet the standard for prior consultation, [11] thereby recognizing the regulatory independence of Convention No. 169 from other sectoral legislation.

46. The trade union specifically refers to a published opinion of the Special Rapporteur [12] and is of the opinion that section 8 of Supreme Decree No. 66 (2014) does not establish the duty to consult on environmental impact statements, an issue covered by Supreme Decree No. 40 (2013); this suggests that Supreme Decree No. 66 (2014) could under no circumstances be applied under the Environmental Impact Assessment System.

Additional information

47. In its communication of January 2015, the trade union refers to President Michele Bachelet's draft programme document, which states that "failure to recognize the rights of indigenous peoples has led to a serious breakdown of these peoples' relationship with our society and with the State, which we all deeply regret". It cites the President's address of 21 May 2014: [13]

> We need a strong and determined State policy so that indigenous peoples are given forums and opportunities for participation in development and in the democratic community without losing the value that their diversity adds. This is why we are committed, in the first hundred days of our mandate …, to establishing a ministry for indigenous affairs and an indigenous peoples' council and developing an agenda for the development of indigenous peoples.
>
> But we want to do this properly. Our country has ratified Convention No. 169 and Decree No. 66 (2014) establishes procedures. We are not interested in ticking boxes and, now that we have submitted the draft law, we will soon begin to hold consultations in line with Convention No. 169 to ensure that all these draft laws reflect the views and perspectives of our indigenous peoples.

[10] The trade union mentions paragraph 5 of the decision of the Antofagasta Appeals Court in *Los Huasco altinos Agricultural Community* v. *Atacama Region Evaluation Committee III*, Case No. 618-2011 of 17 February 2012. The Court held that a "permit" is "the only tangible or concrete outcome of the various administrative measures". This ruling was upheld by the Supreme Court on further appeal.

[11] The trade union mentions five Supreme Court judgments: *Faumelisa Manquepillan* v. *Environmental Committee*, Case No. 60-62-2010 of Jan. 2011, para. 3; *Atacameños Peoples' Council Indigenous Association* v. *Antofagasta Regional Environmental Committee*, Case No. 258-2011 of 13 June 2011, para. 10; *Antu Lafquen de Huentetique Indigenous Community* v. *Los Lagos Regional Environmental Committee*, Case No. 10,090-2011 of 22 Mar. 2012, paras 10–11; and *Marcelo Condore Vilca, Alto Tarapacá Counsel on Land Issues et al.* v. *Director of the Tarapacá Region 1 Environmental Assessment Service*, Case No. 11,040-2011 of 30 Mar. 2012, para. 11.

[12] See the comments of the Special Rapporteur, published on 29 November 2012 in "Proposal of the Government of Chile for new regulations on consultation with indigenous peoples and participation in accordance with Articles 6 and 7 of Convention No. 169", paragraph 73 of which states: "the Special Rapporteur would like to recall that the applicable international standards establish a specific set of governmental obligations with regard to measures authorizing investment or development projects or concessions on or near indigenous land. This standard, which arises from the duty to protect the rights of indigenous peoples with regard to their land and resources, includes, at a minimum, the right to: (a) prior consultation and, in some cases, consent; (b) impact studies; and (c) a share in the profits", available online in Spanish at: http://unsr.jamesanaya.org/special-reports/comentarios-a-la-propuesta-del-normativa-de-consulta-chile.

[13] Available online in Spanish at: http://www.21demayo.gob.cl/pdf/2014_discurso-21-mayo.pdf, p. 40.

The indigenous peoples' development agenda will be drafted with the participation of those peoples to ensure that it meets their needs and is based on the diagnostics that we have carried out together.

48. The trade union states that, when the new authorities were placed under the Ministry of Social Development, the Ministry issued Decision No. 275, published in the *Official Gazette* of 24 June 2014, initiating the administrative process and opening consultations on the preliminary draft of the legislation establishing indigenous peoples' council or councils. At the same time, the Ministry of Social Development issued Decision No. 276 initiating the administrative process and opening consultations on the preliminary draft of the legislation establishing the Ministry of Indigenous Peoples. The trade union attached to its communication the documents distributed by the Ministry of Social Development, announcing and publicizing both consultations. [14]

49. The trade union states that in September 2014, the Ministry of Social Development prepared a schedule of activities showing the starting date, the locations and the communities participating in the first information meeting on both measures. Subsequently, at a public meeting, the regional secretaries of the Ministry of Social Development set out the main points of the measures on which consultations would be held, after which the measures were approved but without developing a good faith process that can be applied flexibly, taking into account the diversity and dialogue models of indigenous peoples.

50. The trade union maintains that Convention No. 169 requires States to consult indigenous peoples in a clear and specific manner and that the Ministry of Social Development deliberately misrepresented the purpose of the consultations, claiming that it was to "consider the opinion" of indigenous peoples and thus, by implication, lowering the standard of Article 6(2) of the Convention to that of mere dialogue. The trade union emphasizes that, according to the Convention, the aim of consultation is to achieve "agreement or consent to the proposed measures".

51. The trade union observes that the Government did not present the text of the measure on which consultations were being held, thus reducing the potential for impact on the proposed measure. The consultations were limited to conducting surveys and gathering information; there was no debate leading to policy dialogue or legal defence in support of the indigenous community's arguments.

52. The trade union states that the indigenous participants' signing of the attendance lists at the various meetings mentioned by the Government was interpreted as their approval of the agreements.

53. The trade union maintains that the failure to place indigenous peoples on an equal footing with representatives of the Government is inconsistent with the mandate and duty to consult, and prevents indigenous peoples from truly influencing the measures on which consultations are held. The trade union doubts the good faith of the Government as the final measure will not be the result of consensus and lively debate, but a reflection of the centrist position of the current Government authorities.

54. The trade union maintains that the subject of the consultations, the document concerning the establishment of a Ministry of Indigenous Peoples, is clearly detrimental to indigenous peoples since the power to set priorities remains in the hands of a minister in violation of

[14] Available online at: http://www.consultaindigenamds.gob.cl/doc/MEDIDALEGISLATIVADELCONSEJOOCONSEJOSDEPINDIGENAS.pdf and http://www.consultaindigenamds.gob.cl/doc/MEDIDALEGISLATIVADEMINISTERIODEPUEBLOSINDIGENAS.pdf.

Article 7 of the Convention. There was no in-depth debate on the content of the Government's proposal and no expressly identified preliminary draft of the legislation.

55. The trade union also objects to the subject of the consultations – the document concerning the establishment of an indigenous peoples' council or councils – because, in its view, it is not for the State to establish institutions representing indigenous peoples; they have the right and prerogative to determine their own organizational structures.

56. The trade union lists a series of legislative reforms that are before Congress, including education and taxation reforms, amendments to the Water Code, the Act establishing the Biodiversity and Protected Areas Service and the Industrial Property Act, which were not discussed during the consultations and do not provide for the participation of indigenous peoples.

The Government's observations

57. In its August 2014 communication, the Government states that the representation concerns Supreme Decree No. 66 (2014), published in the *Official Gazette* of 4 March 2014. It also mentions the SEIA Regulations, published in the *Official Gazette* of 12 August 2013. The Government maintains that: the definition of "administrative measure" in the regulations on the procedure for consultation with indigenous peoples (Supreme Decree No. 66 (2014)); the definition of "direct effect" established in those Regulations; and the rules regarding projects that fall within the scope of the Environmental Impact Assessment System, also contained in the Regulations, which are matters on which agreement between the indigenous peoples and the Government was not reached at the round table, should be addressed in turn.

58. The Government notes that the trade union does not object to the consultations held with a view to the establishment of new rules governing the consultation procedure, as required under Convention No. 169, but only to the outcome thereof, embodied essentially in two provisions of Supreme Decree No. 66 (2014) on the procedures for consultation with indigenous peoples. The Government acknowledges that the trade union also alleges a lack of consultation and objects to the wording of certain provisions of Supreme Decree No. 40 (2013) adopting the SEIA Regulations. The Government notes that the trade union further alleges that Article 6(1)(a) and (2) of the Convention have been violated.

The concept of "administrative measure" in the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014))

59. The Government states that the term "administrative measure" is defined in the third paragraph of section 7 of Supreme Decree No. 66 (2014) setting out the procedures for consultation with indigenous peoples:

> Administrative measures that may affect indigenous peoples directly include official documents issued by State administrative bodies that contain a declaration of intent, which, owing to its informal nature, gives those bodies discretionary power to achieve indigenous peoples' agreement or consent to their adoption …

60. The Government recalls its most recent proposal to the round table:

> Administrative measures requiring consultation shall be understood to mean official decisions that are final and general in scope, are issued by State administrative bodies and

> contain declarations of intent made in the exercise of the State's discretionary power in response to a specific public need … . [15]

61. The Government explains that the final wording of the third paragraph of section 7 of the Regulations on Consultation with Indigenous Peoples constituted a step forward that addressed one of the main objections made by the representatives of indigenous peoples. Originally, the definition of "administrative measure" included the words "its general scope" since the State initially considered that the Regulations should cover only measures with general effect, namely regulatory acts.

62. The Government explains that, like legislative measures, regulatory acts and regulations are "legislative instruments" that establish general, abstract legal provisions on a plurality – in other words, an unspecified number – of issues and people. Determining the degree to which indigenous peoples are likely to be affected directly is the most difficult in the case of these government instruments, as has been seen in a number of Latin American countries, such as Colombia, Ecuador and Peru. According to the Government, administrative measures with specific effects do not establish rules; they merely govern their implementation.

63. The Government makes a distinction between the aforementioned regulatory acts and the projects and activities that fall within the scope of the SEIA, which is governed by a special instrument: the SEIA Regulations, approved by Supreme Decree No. 40 (2013). The Government, referring to Article 34 of the Convention, states that its position with regard to consultation has been essentially to have one system for projects that fall within the scope of the SEIA and another for State administrative measures other than the RCAs and legislative measures taken by the President. The Government points out that these legislative measures fall outside the scope of the Regulations approved by Supreme Decree No. 66 (2014) since responsibility for their regulation lies with another State power.

64. The Government states that the trade union, in its representation, rejects two aspects of the definition of "administrative measure" contained in Supreme Decree No. 66 (2014): (a) the requirement that the measure be general; and (b) the exemption of decisions concerning projects that, because they require an environmental impact statement, fall within the scope of the SEIA.

65. The Government explains that the requirement that measures be "general" has been deleted from Supreme Decree No. 66 (2014) in order to take into account the position of the indigenous organizations that participated in the round table. It states that, as a result, consultation is required not only for measures that are general in scope, but also for those with a specific impact that may affect indigenous peoples directly.

66. Concerning the second objection, the exemption of decisions concerning projects that, because they require an environmental impact statement, fall within the scope of the SEIA, the Government maintains that it is not the definition contained in the third paragraph of section 7 of Supreme Decree No. 66 (2014) that produces the effect contested by the trade union, but rather the aforementioned special treatment required under section 8, which refers to the specific provisions of the Environmental Impact Assessment System, which will be examined in greater detail below (paras 86–103).

[15] The Government refers to pp. 147–148 of the final report on the consultations with indigenous peoples on the new Regulations on consultation in accordance with ILO Convention No. 169 of 29 October 2013, a copy of which is attached to its response.

The definition of "direct effect" in the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014))

67. The Government states that the second and third paragraphs of section 7 of Supreme Decree No. 66 (2014) establish the requirement that indigenous peoples must be affected and the types of measures on which consultations may be held. It explains that these provisions take into account the potential for a direct effect, including in the case of administrative and legislative measures initiated by the President of the Republic. Such measures may affect indigenous peoples directly where they "have a direct, significant and specific impact on indigenous peoples as such by affecting the exercise of their traditions and ancestral customs; their religious, cultural or spiritual practices; or their relationship with their land".

68. The Government considers this definition to be sufficiently broad as it mentions traditions; ancestral customs; religious, cultural or spiritual practices; or indigenous peoples' relationship with their land. In that connection, it recalls that its most recent proposal at the round table defined "effect" (for both legislative and administrative measures) [16] as: " … having a significant and exclusive impact on indigenous peoples as such by affecting the exercise of their traditions and ancestral customs, their religious, cultural or spiritual practices or their relationship with their land".

69. The Government states that in an effort to find common ground with the indigenous peoples' representatives at the round table during the drafting of the final text of Supreme Decree No. 66 (2014), the requirement that the impact be "exclusive" was removed and the term was replaced by "specific". According to the Government, this change allows for a broader application of the rule than the previous wording did since consultations may be held not only on measures that have an impact only on indigenous peoples (certain cases involving measures targeting those peoples), but also on those that have a general effect on the entire population but affect indigenous peoples differently because of their circumstances and rights. The Government adds that it is important to understand that the measure must have a special, characteristic or particular effect on indigenous peoples that it does not have on other Chileans.

70. The Government recalls that, according to the Diccionario de la Real Academia Española (Dictionary of the Spanish Royal Academy), the term "significant" means: "important because it represents or signifies something". The term was included in order to establish that consultations must be held on issues that are both relevant and important to indigenous peoples.

71. The Government adds that the phrase requiring that measures have a "direct impact" merely reiterates the reference in Article 6(1)(a) of the Convention to "measures which may affect them directly" ("them" being the indigenous peoples), thus ruling out indirect effects.

72. Furthermore, according to the Government, the statement that measures must have an impact on "indigenous peoples as such" also reaffirms Article 6(1)(a) of the Convention, which establishes that the Government must consult with the "*peoples concerned*, … through their representative institutions, whenever consideration is being given to … measures *which may affect them directly*" (emphasis added). This implies an obligation to the peoples affected by State action in light of their status as "peoples", a group or community as described in Article 1 of the Convention. In that regard, the Government emphasizes that the potential

[16] The Government again refers to pp. 147–148 of the final report on the consultations with indigenous peoples on the new Regulations on consultation in accordance with ILO Convention No. 169 of 29 October 2013.

for direct effect required by the Convention is related to the interests that constitute grounds for preserving and ensuring respect for ancestral traditions and customs, religious, cultural and spiritual practices or indigenous peoples' relationship with their land.

73. In response to the trade union's allegation that Supreme Decree No. 66 (2014) constitutes a rejection of the indigenous organizations' demand for the freedom to state whether they are affected directly, in which case consultation is required, the Government states that it elected to establish objective criteria that would provide all parties concerned with legal certainty regarding the consultation required by the Convention. The Government argues that the fact that an effect is initially determined by the State does not mean that indigenous peoples are deprived of their right to be consulted. The relevant State body has the constitutional and/or legal power to order measures; thus, it is only logical that it should assess the need for consultation by establishing whether indigenous peoples may be affected directly within the meaning of Supreme Decree No. 66 (2014).

74. The Government also states that, under section 13 of Supreme Decree No. 66 (2014), other parties may also request that consultations be held. In any case, it observes that, where the Administration has made an error of judgement, the party concerned may resort to judicial proceedings and appeals in an attempt to reverse and rectify the situation.

Other disputed provisions of Supreme Decree No. 66 (2014) on the procedure for consultation with indigenous peoples

Exemption of some State administrative bodies from the obligation to consult

75. The Government states that the proposal agreed by the round table reads:

> *Bodies to which these Regulations apply.* These Regulations shall apply to ministries, administrations, regional governments, governors' offices, the armed forces, law enforcement and public safety agencies, public administrative services and the Council for Transparency. In order to meet the obligation to consult, bodies granted autonomy under the Constitution may elect to be subject to the provisions of these Regulations. However, this shall not be understood as exempting them from the obligation to consult with indigenous peoples where required.
>
> All references to administrative bodies, the responsible body, the Administration, the State Administration or the State in these Regulations shall be understood to apply to the bodies and entities referred to in this section.

76. The Government also states that the term "Bodies to which these Regulations apply" is defined in section 4 of Supreme Decree No. 66 (2014) on consultation:

> *Bodies to which these Regulations apply.* These Regulations shall apply to ministries, administrations, regional governments, governors' offices and public administrative services.
>
> In order to meet the obligation to consult, bodies granted autonomy under the Constitution may elect to be subject to the provisions of these Regulations. However, this shall not be understood as exempting them from the obligation to consult with indigenous peoples where required by law.
>
> All references to administrative bodies, the responsible body, the Administration, the State Administration or the State in these Regulations shall be understood to apply to the bodies and entities mentioned in the first paragraph of this section.

77. The Government states that reference to the armed forces and the law enforcement and public safety agencies was deleted from section 4 of Supreme Decree No. 66 (2014) because, by their very nature, the administrative measures ordered by those bodies do not give them

the discretionary power to conclude agreements or obtain consent. The Government explains that the rules that generally govern these entities are issued by the Ministry of Defence and the Ministry of the Interior and Public Safety, the State Ministries under which the armed forces and the law enforcement and public safety agencies operate. In that regard, given that these Ministries are state administrative bodies governed by the provisions of Supreme Decree No. 66 (2014), it is reasonable to assume that, when considering the issuance of legislative or administrative measures that may affect indigenous peoples "directly" within the meaning of the law, they must hold consultations with indigenous peoples on those measures.

Deletion of the reference to "members of indigenous peoples" as enjoying the right to consultation

78. The Government states that the proposal agreed by the round table reads:

> *Persons who enjoy the right to consultation and representative institutions of the indigenous peoples concerned.* Prior consultations shall be held with indigenous peoples and directly affected members thereof, who may participate through their representative institutions and take the relevant decisions on a case-by-case basis.
>
> Once consultations have been announced under section 14 of these Regulations, each people shall be free to identify its representative institutions, such as the traditional organizations, communities and associations of indigenous peoples recognized under Act No. 19253.

79. The Government also notes that the reference to "individuals and representative institutions" was ultimately retained in section 6 of Supreme Decree No. 66 (2014) on consultation, which states:

> *Individuals and representative institutions.* Consultations with the relevant indigenous peoples shall be held through their national, regional or local representative institutions, depending on the extent of the effect of any measures which may affect indigenous peoples directly.
>
> Once a meeting has been announced under section 15 of these Regulations, each people shall freely determine its representative institutions, such as the traditional organizations, communities and associations of indigenous peoples recognized under Act No. 19253.

80. The Government emphasizes that the final text of section 6 of Supreme Decree No. 66 (2014) takes into account the provisions of Article 6(1)(a) of the Convention since it requires governments to not consult individuals, but the "peoples concerned through their representative institutions".

Elimination of the potential for a national adviser from CONADI to request the holding of consultations

81. The Government states that the draft text agreed at the round table reads:

> *Appropriateness of consultations.* Consultations shall be held on an ex officio basis whenever the responsible body is considering adopting a measure that may affect indigenous peoples directly.
>
> To that end, a report on the appropriateness of consultations may be requested from the Office of the Deputy Secretary for Social Services in the Ministry of Social Development.
>
> Furthermore, any natural or legal indigenous person concerned and/or representative institution may submit to the body responsible for the measure a reasoned request for the holding of consultations. A "reasoned request" shall be understood to mean one that, at a minimum, sets out the supporting facts and grounds.

> The National Council of CONADI, at the request of one or more of its elected indigenous members, may request that consultations on any matter be held as established in these Regulations.
>
> The responsible body shall accept or reject the request in a reasoned decision issued within 20 days.
>
> The responsible body shall issue a decision as to the appropriateness of holding consultations.

82. The Government states that section 13 of Supreme Decree No. 66 (2014) addresses the issue of the appropriateness of consultations:

> *Appropriateness of consultations.* Consultations shall be held on an ex officio basis whenever the responsible body is considering adopting a measure that may affect indigenous peoples directly within the meaning of section 7 of these Regulations. To that end, a report on the appropriateness of consultations may be requested from the Office of the Deputy Secretary for Social Services in the Ministry of Social Development, which shall respond within ten working days.
>
> Furthermore, any natural or legal indigenous person concerned or representative institution may submit to the body responsible for the measure a reasoned request for the holding of consultations. A "reasoned request" shall be understood to mean one that, at a minimum, sets out the supporting facts and grounds.
>
> The National Council of the National Indigenous Development Corporation may also request the body responsible for the measure to assess the appropriateness of consultations as established in these Regulations.
>
> The responsible body shall respond to the request in a reasoned decision pursuant to these Regulations within ten working days. Where the responsible body requests a report on the appropriateness of consultations from the Office of the Deputy Secretary for Social Services in the Ministry of Social Development, that time period shall be extended until the report has been issued within the time period established in paragraph 1 of this section, failing which a decision shall be issued in its absence.
>
> The decision as to the appropriateness of consultations shall be contained in a decision issued by the responsible body.
>
> All appeals against a decision not to hold consultations shall explain why they should be held and state clearly and specifically, pursuant to section 7 of these Regulations, how the alleged direct effect is produced.

83. The Government considers that the potential for a national adviser from the CONADI to request the holding of consultations is not limited to action taken by the National Council of CONADI as a collegiate body since a national adviser is perfectly entitled to make such a request under the second paragraph of section 13 of Supreme Decree No. 66 (2014).

States of exception or emergency

84. The Government states that consultations with indigenous peoples could not be required during the states of exception or emergency set out in Supreme Decree No. 66 (2014) because, in its view, prior consultations cannot be held in situations where decisions must be taken quickly and effectively, where the discretionary power to achieve indigenous peoples' agreement or consent is lacking and where it would be impossible to follow the steps set out in the Regulations on Consultation with Indigenous Peoples.

Projects subject to the Environmental Impact Assessment System (Supreme Decree No. 40 (2013)) under the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014))

85. The Government refers to the available documents on the consultation required under the Convention as it relates to the SEIA Regulations and recalls that a draft text of those Regulations was submitted to the Office of the Comptroller-General of the Republic despite the indigenous organizations' allegation that the participatory process carried out did not constitute "consultation" within the meaning of the Convention.

86. The Government also refers to the information and documents that were duly transmitted to the Office in annex to the reports on the application of the Convention that were submitted to the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) in 2012 and 2013.

87. The Government recalls that the SEA held extensive consultations with indigenous peoples on the provisions of the new Regulations, a process that was duly documented. [17] The Government observes that the complaints filed with the Office of the Comptroller-General of the Republic (the body that reviews the legality of administrative decisions) were rejected. Furthermore, in the proceedings brought before the high courts and the Constitutional Court by indigenous organizations and parliamentarians following the publication of Supreme Decree No. 40 (2013), all of the allegations regarding failure to hold consultations and violation of Convention No. 169 by provisions of the Regulations were rejected.

88. The Government states that, having received Chile's report on Supreme Decree No. 40 (2013), the Committee of Experts expressed no reservations about the new regulations or the absence of consultation, stating only that: "In a direct request, the Committee requests the Government to include information in its next report on other matters related to the self-identification of indigenous peoples, the consultation procedures which have been established in the regulations concerning the SEIA Regulations, natural resources and progress achieved in health and education. The Committee also requested information on pending issues relating to the regularization of land titles and benefit sharing". [18]

89. The Government recalls that a committee on the reformulation of consultations, established in October 2011 under the National Council of CONADI, authorized the SEA to continue to hold consultations. In May 2012, the Executive Director of the SEA attended a special meeting with the Advisory Committee on the SEA Regulations, which comprised nine indigenous advisers elected in March 2012 (one of whom was a member of the National Coordinating Office for Indigenous Affairs, which supports this representation). On that occasion, several advisers rejected points on which agreement had previously been reached and refused to participate in the review of the procedures for consultation with indigenous peoples. The draft text of the implementing regulations for the SEA was then sent to the Council of Ministers on Sustainability for consideration and adoption.

90. The Government states that in May 2013, when the INDH published a document entitled "The Obligation to Hold Prior Consultations on the Draft Regulations on the Environmental

[17] Ministry of the Environment and SEA, *Consultations with indigenous peoples on the SEIA Regulations, Procedural Guide to Public Participation and Support for Assessment of the Impact of Significant Changes on Indigenous Peoples*, available online in Spanish at: http://www.sea.gob.cl/archivos/contenidos/02_Informe_Final_Consulta_Indigena_RSEIA_SEA.pdf. Document transmitted in annex to the report of the Government of Chile, received on 31 October 2012.

[18] ILC: Observation of the Committee of Experts, adopted 2013, published 103rd Session (2014).

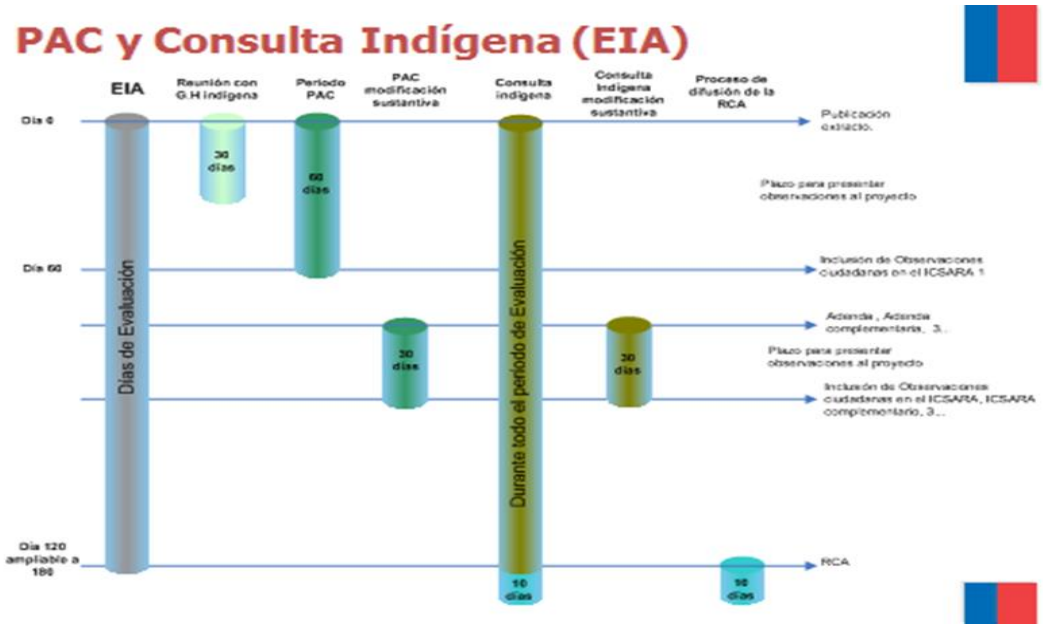
Impact Assessment System", [19] the SEA issued a public statement supporting the Institute's comments and argued that the SEIA Regulations were in line with the requirement that indigenous peoples be consulted under the Convention. [20]

91. The Government refers to the report on the application of the Convention submitted in September 2013[21] and emphasizes that section 85 of the SEIA Regulations (Supreme Decree No. 40 (2013)) provides, for the first time, for consultations on the environmental impact of investment projects that affect indigenous peoples directly.

92. The Government explains that the SEIA Regulations provide for consultation with indigenous peoples through a mechanism that is quite different from public participation. However, for official regulatory and technical reasons, Supreme Decree No. 40 (2013) includes Title V on "Community participation in the environmental impact assessment process". Section 4 of the Environmental Framework Act (Act No. 19300) establishes the State's duty to facilitate public participation and, in paragraph 2, the duty to implement international treaties on indigenous peoples.

93. The Government explains that consultations with indigenous peoples under the SEIA Regulations are held throughout the environmental impact assessment (EIA) process and are not subject to the 60-day limitation on the public participation mechanism (PAC). Moreover, consultation with indigenous peoples clearly differs from the public participation mechanism in both content and purpose. Consultation with indigenous peoples becomes an intercultural dialogue, the purpose of which is to obtain agreement on, or consent to, the environmental assessment of a given project that will result in the issuance of an RCA, which, in this case, is the administrative measure that may affect indigenous peoples directly.

94. The Government provides the following graph showing the differences between the PAC and consultation with indigenous peoples in the environment impact assessment (EIA):



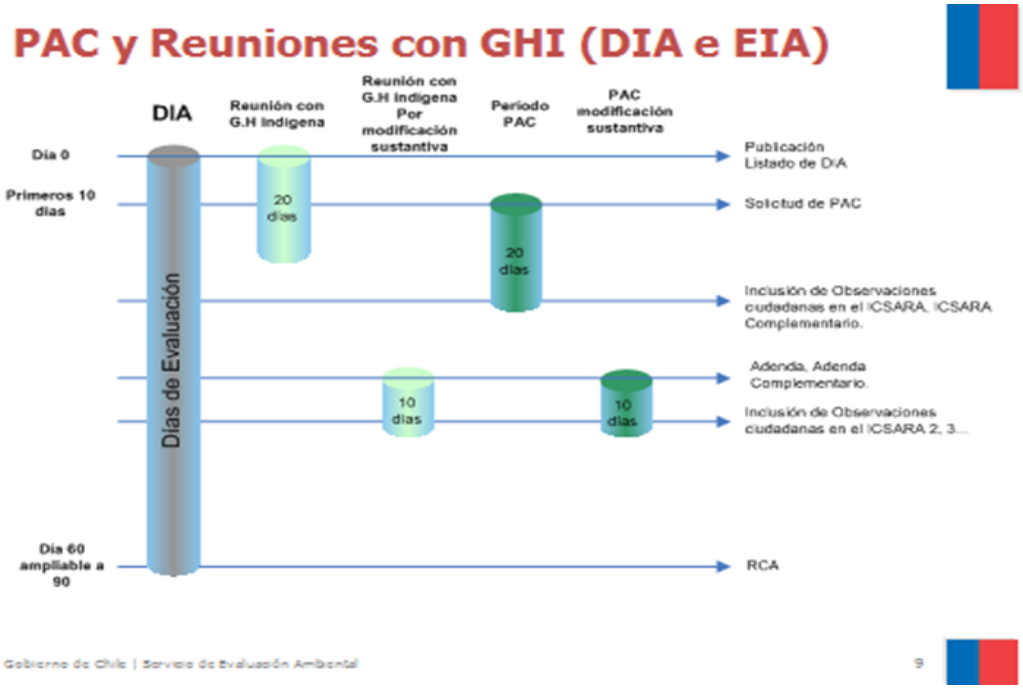
[19] See footnote 8 in paragraph 36 on the INDH document mentioned by the trade union.

[20] Available online at: http://www.sea.gob.cl/noticias/sea-afirma-que-el-reglamento-del-seia-cumple-con-la-consulta-indigena.

[21] Report of the Government of Chile, 2013, pp. 107–109.

95. The Government explains that, in the case of environmental impact statements [22] and environmental impact studies that do not recognize that a given project or activity has a significant impact on indigenous peoples despite being located on an indigenous people's land, in areas of indigenous-centred development or near indigenous peoples, section 86 [23] of Supreme Decree No. 40 (2013) provides for a special mechanism that enables indigenous peoples to express their opinions on the situation in question. If it becomes clear that their land would be affected, the project or activity will be subject to a further environmental impact study recognizing its impact on indigenous peoples; this will result in the holding of consultations throughout the environmental assessment process.

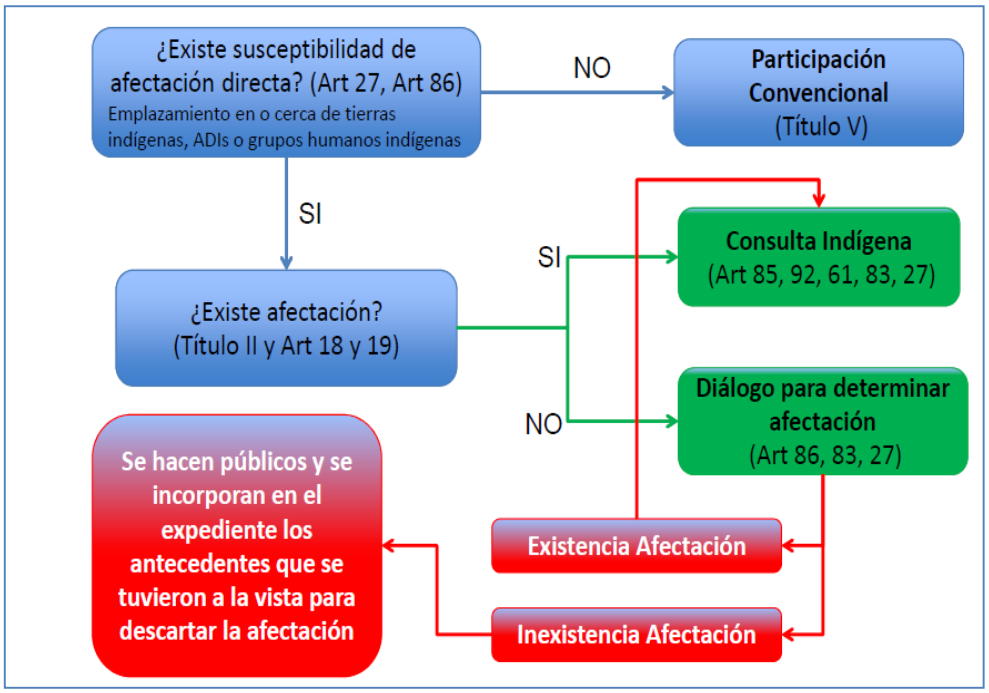
96. The Government provides the following graph showing the difference between the PAC meetings and the meetings with groups of members of indigenous peoples (GHI):



[22] Under section 2(f) of the Environmental Framework Act (Act No. 19300), an "environmental impact statement" is a document describing a future activity or project or changes in that activity or project. It is made submitted under oath by the relevant manager, and enables the competent body to assess whether the environmental impact of the activity or project constitutes a violation of the current environmental regulations.

[23] Section 86 of the SEIA Regulations – Meeting with groups of members of indigenous peoples. Without prejudice to the provisions of paragraph 2 of this Title, where a project or activity has been submitted for assessment through an environmental impact study showing that the effects, characteristics and circumstances mentioned in the preceding section will not result and are not present and where the project will be carried out on an indigenous people's land, in an area of indigenous-centred development or near groups of members of indigenous peoples, the regional director or the executive director of the Service shall hold meetings with the groups of members of indigenous peoples in the area in which the project or activity is to be carried out for a period not to exceed 30 days as from the project's approval with the aim of gathering and analysing their opinions and, where appropriate, determining whether section 36 of these Regulations applies. The Service shall keep minutes of every meeting held with a view to gathering the opinions of the aforementioned groups.

97. The Government also provides a chart showing the procedure for verifying the likelihood of, and potential for, direct effect on indigenous peoples as established in the SEIA Regulations (Supreme Decree No. 40 (2013)):



98. The Government maintains that the trade union has confused the consultation with indigenous peoples provided for by section 85 of the SEIA Regulations with meetings with groups of members of indigenous peoples held under section 86 of the Regulations, which obviously do not constitute consultation with indigenous peoples. The Government observes that neither of the two mechanisms (consultation with indigenous peoples under section 85 of the SEIA Regulations and meetings with groups of members of indigenous peoples under section 86 thereof) constitutes public participation, which is governed by sections 88–96 of the Regulations.

99. The Government states that a reading of section 85 of the SEIA Regulations (Supreme Decree No. 40 (2013)), clearly shows that its wording is almost identical to that of Article 6(1)(a) and (2) of the Convention: "design and develop good faith consultations that include mechanisms appropriate to the social and cultural characteristics of each people and their representative institutions so that they may participate in an informed manner …".

100. The Government maintains that the aforementioned provision is more wide-ranging; it represents an effort to comply with both the recommendations formulated by the Committee of Experts in its 2010 general observation and national case law. The Government emphasizes that section 85 of the SEIA Regulations adds "… and have an opportunity to contribute to the environmental assessment process".

101. The Government states that the rules relating to indigenous peoples contained in the SEIA Regulations do not concern only consultations; a complete system for analysing and identifying direct effects on indigenous peoples has been established. The Government refers to its 2013 report on the application of the Convention, in which it states: [24]

[24] Report of the Government of Chile, 2013, p. 106.

It should be borne in mind that the draft regulations submitted for consultation originally included five sections on indigenous peoples (sections 7, 8, 10, 83 and 84, of which the latter two have been retained as sections 85 and 86, respectively). As a result of the consultations (requests, comments and observations from indigenous peoples themselves) and the resulting changes in the Regulations, the scope of the provisions relating to indigenous peoples became broader and more precise regulations were required. The topic was ultimately covered by 15 sections, namely sections 5, 6, 7, 8, 9, 10, 18, 19, 27, 61, 83, 85, 86, 92 and 96, which address the following issues:

Sections that were reworded following consultation:

- Section 7, fourth and sixth paragraphs. Resettlement of communities or significant changes in the way of life and customs of groups of people.
- Section 8, third and eighth paragraphs. Location and environmental value of land. Potential for a direct effect on groups protected by special laws.
- Section 10, second paragraph, subparagraphs (b) and (c). Changes in the cultural heritage of indigenous peoples.
- Section 85. Consultation with indigenous peoples.
- Section 86. Meetings with groups of members of indigenous peoples.

Amendments to other sections which, in principle, did not previously cover indigenous issues but which, after consultations had been held and observations received, were amended in light of the requests made by indigenous peoples:

- Section 5, fifth paragraph – Public health risks.
- Section 6, seventh paragraph – Significant adverse effect on renewable natural resources.
- Section 9, fifth paragraph – Areas of natural beauty or value as a tourist attraction.
- Section 18, tenth paragraph, subparagraph (e) – Minimum content of studies.
- Section 19, sixth paragraph, subparagraph (b) – Minimum content of statements.
- Section 27 – Consideration of coverage based on potential to affect groups of members of indigenous peoples directly.
- Section 61, second paragraph – Notification of a decision regarding an environmental permit.
- Section 83, second paragraph – Duties of the Service.
- Section 92, third paragraph – Right to participate where a study has been modified.
- Section 96 – Right to participate where there are substantive amendments to a statement.

102. The Government states that none of the provisions of the Convention, other international instruments or the international case law of the Inter-American Human Rights System prohibits the regulation of consultations held during environmental assessments of projects or activities. It also considers that, even if a general consultation mechanism were to be established, it might not cover the specific characteristics of the assessment of social and cultural impact that an environmental assessment entails and that the relevant impacts and measures would not be addressed during general consultations and thus require special consultations.

Additional information

103. In its January 2015 communication, the Government acknowledges that the Ministry of Social Development and the Ministry of the Environment had received observations concerning consultation with indigenous peoples and, in particular, Supreme Decrees No. 40

(2013) and No. 66 (2014). It states that both Ministries intend to begin a review of the functioning of the two Supreme Decrees during the first quarter of 2015.

104. The Government also reports on the two administrative procedures for issuing invitations to the prior consultations organized by the Ministry of Social Development in order to examine proposals for the establishment of one or more indigenous peoples' councils and a Ministry of Indigenous Peoples. It states that, following these procedures, all of the indigenous communities and associations established pursuant to Act No. 19253, which contains the rules governing the protection, promotion and development of indigenous communities – in other words, representatives of the nine indigenous peoples (the Atacameño, Aymara, Colla, Diaguita, Kawashkar, Mapuche, Quechua, Rapa Nui and Yagán) – were invited to participate in the prior consultation process, as were the traditional and political organizations of the indigenous peoples.

105. The Government states that, during the consultations, special consideration was given to the standards established in Convention No. 169 with regard to the procedure for consultation with indigenous peoples.

106. The Government states that, in September 2014, the first planning meetings for the consultations were held in 58 locations with some 6,833 representatives of the aforementioned nine indigenous peoples invited to participate. The Government proposed a five-stage methodology for the consultations (planning, information, internal discussion, dialogue and systematization of the process). At each of the meetings held, agreement on the methodology for the consultations was reached with the representative institutions of indigenous peoples.

107. The Government emphasizes that the indigenous peoples' representatives participated actively and that the possibility of holding local dialogues is being considered.

108. The Government was considering holding a national round table with representatives of the indigenous peoples in January 2015 in order to reach agreement on the measure on which consultations were held. The measure was then to become a draft law, which would subsequently be referred to Congress through a communication issued by the executive branch with a view to its adoption.

109. The Government expressed the hope that the holding of consultations will allow for genuine dialogue with the indigenous peoples in an effort to restore trust between them and the State.

III. The Committee's conclusions

110. The Committee notes that the Regulations on Consultation with Indigenous Peoples, adopted through Supreme Decree No. 66 (2014), entered into force on 4 March 2014, repealing the regulations previously adopted through Supreme Decree No. 124 of 4 September 2009. The Committee recalls that Supreme Decree No. 124 of 2009 had been criticized by several trade unions and indigenous organizations and had given rise to comments by the Committee of Experts. [25]

[25] Having considered the Government's first report on the application of Convention No. 169, in a direct request adopted in 2010 and published in 2011, the Committee of Experts stated with regard to Articles 6 and 7 of the Convention and Supreme Decree No. 124 of 2009:

– Sections 16 and 21 of the Decree appear to leave the decision to the administrative bodies to determine whether it is appropriate to start a consultation or participation process.

Consultations on the drafting of Regulations on Consultation with Indigenous Peoples

111. The Committee recalls that the Convention must be implemented in its entirety [26] and considers that Articles 6 [27] and 7 [28] of the Convention are particularly important for the examination of the issues raised in the representation.

112. The Committee notes that the process initiated with a view to the drafting of Regulations on Consultation with Indigenous Peoples led to the organization of a round table in which

– Section 7 of the Decree appears to limit consultation exclusively to indigenous peoples' lands or areas of indigenous development … or refers to a significant majority of specified or specifiable indigenous communities, associations and organizations.

– Section 14 appears to limit consultations to the initial formulation of legislation.

– Section 15 of the Decree appears to lack clarity in providing for exceptions to consultations as regards emergency cases or the necessities for the proper operation of the respective bodies.

In an observation adopted in 2012 and published in 2013, the Committee of Experts noted the concerns expressed with regard to Supreme Decree No. 124 by the Single Central Organization of Workers (CUT), the National Confederation of Artisanal Fishers of Chile (CONAPACH) and a number of indigenous organizations. The Government, for its part, said that it intended to repeal Supreme Decree No. 124 and replace it by new text.

In an observation adopted in 2013 and published in 2014, the Committee of Experts noted that Supreme Decree No. 66 had been signed on 15 November 2013 and that Supreme Decree No. 124 would be abrogated once the new regulation entered into force. At its November–December 2013 meeting, the Committee did not examine the text of Supreme Decree No. 66, which had been published in March 2014.

[26] Articles 6 and 7 fall within Part I of the Convention ("General policy"). See also para. 68(b) of the report on Colombia adopted in November 2001 (GB.282/14/4).

[27] Article 6

1. In applying the provisions of this Convention, governments shall:

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

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

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

[28] Article 7

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

representatives of the indigenous organizations were invited to participate and did so. It also notes that the records of the consultations are contained in the final report on the consultations with indigenous peoples on the new Regulations on consultation in accordance with ILO Convention No. 169 of 29 October 2014. Further documents relating to the consultations are available online.

113. The Committee notes that in the general observations on Convention No. 169 published in 2009 and 2011, the Committee of Experts indicated that it considered it "important that governments, with the participation of indigenous and tribal peoples, as a matter of priority, establish appropriate consultation mechanisms with the representative institutions of those peoples", and that "periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned, should be undertaken to continue to improve their effectiveness".

114. The Committee notes that the representation focuses on several provisions that the Government adopted in promulgating Supreme Decree No. 66 (2014) and that the trade union does not deny that the Government did in fact hold consultations with a view to the drafting of national regulations on consultation with indigenous peoples. ***The Committee congratulates the Government and the other parties concerned on their efforts to adopt procedures regulating the consultation required by Article 6(1)(a) of the Convention.***

115. ***The Committee hopes that these regulatory developments will allow the peoples concerned to better exercise, in particular through their representative institutions, the right: (1) to set their own priorities for the development process insofar as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use; (2) to the extent possible, to control their own economic, social and cultural development; and (3) to participate in the formulation, implementation and evaluation of national and regional development plans and programmes that may affect them directly.***

The Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014))

116. The Committee observes that the Regulations on Consultation with Indigenous Peoples comprise three titles and 19 sections. The representation mentions the sections on which there was no agreement and those in which the text agreed at the round table was changed when the Regulations on Consultation with Indigenous Peoples were adopted by Supreme Decree No. 66 (2014). The sections that are the subject of this representation fall under Title I (General Provisions) of Supreme Decree No. 66. None of the provisions of Title II

formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

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

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

(Principles of Consultation) [29] are challenged in the representation. Title III (Consultation Procedures) includes section 13 (Situations requiring consultation), which is referred to in the representation; the remaining provisions of Title III [30] are not challenged.

117. The Committee notes that the sixth paragraph of Supreme Decree No. 66 (2014) refers to Article 34 of Convention No. 169, which states: "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."

118. The final paragraph of Supreme Decree No. 66 (2014) states: "The progress made shall not be limited to the issuance of these new Regulations on consultation and must be viewed as part of the Chilean Government's commitment to engaging in ongoing and continuous dialogue with the indigenous peoples that will allow for greater mutual understanding, growing trust and consensus on measures that may affect indigenous peoples directly."

Provisions of the Regulations on Consultation with Indigenous Peoples that are challenged in the representation

119. The Committee will begin by considering the following provisions of the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 60 (2014)), into which amendments not agreed at the round table have been introduced.

(i) Bodies to which these Regulations apply

120. Section 4 of the Regulations on Consultation with Indigenous Peoples states:

> *Bodies to which these regulations apply.* These Regulations shall apply to ministries, administrations, regional governments, governors' offices and public administrative services.
>
> In order to meet the obligation to consult, bodies granted autonomy under the Constitution may elect to be subject to the provisions of these Regulations. However, this shall not be understood as exempting them from the obligation to consult with indigenous peoples where required by law.
>
> All references to administrative bodies, the responsible body, the Administration, the State Administration or the State in these Regulations shall be understood to apply to the bodies and entities mentioned in the first paragraph of this section.

121. The trade union maintains that the Government exempted a number of administrative bodies from the obligation to consult.

122. The Government acknowledges that the armed forces and the law enforcement and public safety agencies are not mentioned in section 4 of the Regulations on Consultation with Indigenous Peoples because it was considered that, by their very nature, the administrative measures ordered by those bodies do not give them the discretionary power to conclude agreements or obtain consent. The Government is therefore of the view that the Ministry of Defence and the Ministry of the Interior and Public Safety are the state administrative bodies

[29] Section 9 (Good faith); section 10 (Proper procedures); and section 11 (Prior nature of the consultations).

[30] Section 12 (Body responsible for the consultation process); section 14 (National Indigenous Development Corporation); section 15 (Initiation of the process); section 16 (Consultation procedures); section 17 (Time limits); section 18 (Suspension of the consultation process); and section 19 (Record).

under which the armed forces and the law enforcement and public safety agencies, respectively, operate and that these Ministries should therefore be governed by the provisions of Supreme Decree No. 66 (2014) when ordering administrative measures that may affect indigenous peoples directly. The Committee finds this explanation reasonable.

(ii) Individuals and representative institutions

123. Section 6 of the Regulations on Consultation with Indigenous Peoples states:

> *Individuals and representative institutions.* Consultations with the relevant indigenous peoples shall be held through their national, regional or local representative institutions, depending on the extent of the effect of any measures which may affect indigenous peoples directly.
>
> Once a meeting has been announced under section 15 of these Regulations, each people shall freely determine its representative institutions, such as traditional organizations, communities or associations of indigenous peoples recognized under Act No. 19253.

124. The trade union observes that the reference to "members of indigenous peoples" as enjoying the right to consultation has been deleted from the first paragraph of section 6 of the Regulations on Consultation with Indigenous Peoples.

125. The Government emphasizes that the final text of section 6 of the Regulations on Consultation with Indigenous Peoples takes into account the provisions of Article 6(1)(a) of the Convention since it requires governments to consult not individuals, but the "peoples concerned through their representative institutions". The Committee will give its views on this matter at the end of the following chapter.

(iii) Appropriateness of consultations

126. Section 13 of the Regulations on Consultation with Indigenous Peoples states:

> *Appropriateness of consultations.* Consultations shall be held on an ex officio basis whenever the responsible body is considering adopting a measure that may affect indigenous peoples directly within the meaning of section 7 of these Regulations. To that end, a report on the appropriateness of consultations may be requested from the Office of the Deputy Secretary for Social Services in the Ministry of Social Development, which shall respond within ten working days.
>
> Furthermore, any natural or legal indigenous person concerned or representative institution may submit to the body responsible for the measure a reasoned request for the holding of consultations. A "reasoned request" shall be understood to mean one that, at a minimum, sets out the supporting facts and grounds.
>
> The National Council of the National Indigenous Development Corporation may also request the body responsible for the measure to assess the appropriateness of consultations as established in these Regulations.
>
> The responsible body shall respond to the request in a reasoned decision pursuant to these Regulations within ten working days. Where the responsible body requests a report on the appropriateness of consultations from the Office of the Deputy Secretary for Social Services in the Ministry of Social Development, that time period shall be extended until the report has been issued within the time period established in paragraph 1 of this section, failing which a decision shall be issued in its absence.
>
> The decision as to the appropriateness of consultations shall be contained in a decision issued by the responsible body.

All appeals against a decision not to hold consultations shall explain why they should be held and state clearly and specifically, pursuant to section 7 of these Regulations, how the alleged direct effect is produced.

127. The trade union observes that the final wording of section 13 of the Regulations on Consultation with Indigenous Peoples removed the potential for the National Council of CONADI to take action "at the request of one or more of its elected indigenous members". The agreement of the entire National Council of CONADI would therefore be needed in order to hold the consultations required by the Convention.

128. The Government states that the potential for a national adviser from CONADI to request the holding of consultations is not limited to action taken by the National Council of CONADI as a collegiate body, since a national adviser is perfectly entitled to make such a request under the second paragraph of section 13 of Supreme Decree No. 66 (2014). The Committee will give its views on this matter hereinafter.

129. The Committee observes that the three amendments mentioned in paragraphs 120, 123 and 126 above were made following the agreement reached at the round table and created distrust. However, it emphasizes that "consultation" implies the existence of a dialogue [31] between the indigenous communities concerned and the authorities responsible for the adoption of legislative and administrative measures that affect those communities directly. The consultations required by the Convention need not result in obtaining the agreement or consent of those consulted. [32] Convention No. 169 does not give indigenous peoples a right to veto; obtaining agreement or consensus is the purpose of engaging in the consultations, not an independent requirement. [33]

130. The Committee understands that, by issuing a legislative or administrative measure, a government may adopt an instrument on which consultations have been held, even if the instrument promulgated does not fully reflect agreement with the indigenous peoples concerned. However, it should be ensured that all current legislative and administrative measures are in accordance with the Convention.

[31] See the 76th Session of the International Labour Conference, 1989, *Provisional Record*, 25th sitting, para. 68: "The Worker members submitted an amendment to paragraph 1(a) to replace 'consult' by 'obtain the consent of'. They felt that the draft text would require only contact rather than consent, and that this would enable governments to undertake unilateral action. The Employer members considered that the language in the draft text was in accordance with ILO use of the term 'consult' which meant dialogue at least." Various Government members opposed the draft amendment, which was not adopted.

[32] ibid., para. 74. In the Committee's second discussion of Convention No. 169 (76th Session, June 1989), the Government members of Argentina and Bolivia submitted a proposed amendment to Article 6(2) of the Convention: "Replace the phrase 'achieving agreement or consent to the proposed measures' with 'ensuring the full and effective participation of the peoples concerned in decisions that affect them, in accordance with the legal system of each State'" (document C.C. 107/D.86). The amendment was supported by the Employer members and by the Government members of Canada, Brazil, Ecuador, India and Venezuela. The Worker members and the Government members of Australia, Denmark, the Soviet Union and the United States opposed the amendment. In that regard, "[a] representative of the Secretary-General stated that, when drafting the text, 'the Office had not intended to suggest that the consultations referred to would have to result in the obtaining of agreement or consent of those being consulted, but rather to express an objective for the consultations'". The amendment was rejected with 750 votes in favour, 795 against and 45 abstentions.

[33] ILO: *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents*, Geneva, 2013, p. 17.

131. The Committee notes that Article 6(1)(a) of the Convention states that consultations with indigenous peoples shall be carried out "through appropriate procedures and in particular through their representative institutions". [34] In that connection, it recalls that the right to consultation and the right to participation are not granted solely to indigenous peoples. Consultation is a fundamental principle that is enshrined in all other ILO Conventions, which provide for consultation between governments, employers' and workers' organizations and all other parties concerned by a given Convention. In this regard, Convention No. 169 is no exception but affirms the requirement for specific consultations with indigenous peoples. [35]

132. The Committee also notes that the second paragraph of section 13 of the Regulations on Consultation with Indigenous Peoples states: "any natural or legal person concerned or representative institution may submit to the body responsible for the measure a reasoned request for the holding of consultations. A 'reasoned request' shall be understood to mean one that, at a minimum, sets out the supporting facts and grounds."

133. ***The Committee requests the Government to include in its next report to the Committee of Experts updated information on the functioning of the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014)), taking into account the requirements of Articles 6 and 7 of the Convention.***

(iv) States of exception or emergency

134. The trade union observes that the fourth paragraph of section 7 of the Regulations on Consultation with Indigenous Peoples exempts emergency situations from the obligation to hold consultations: "Measures issued during states of exception or emergencies, including earthquakes, tidal waves, floods and other natural disasters, shall not require consultation owing to their urgent nature."

135. The trade union recalls that sections 39–41 of the Constitution establish the constitutional exemptions from the exercise of certain rights but make no mention of the exercise of prior, free and informed consultation. According to the trade union, a state of exception cannot be established through a supreme decree.

136. The Government states that consultations with indigenous peoples could not be required during the states of exception or emergency set out in Supreme Decree No. 66 (2014) because, in its view, prior consultations cannot be held in situations where decisions must

[34] These words were not included in the Conclusions proposed by the Office in preparation for the first discussion of the revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107); Report VI(2), 75th Session of the International Labour Conference, 1988, pp. 106–107 and, in particular, point 13 of the proposed Conclusions. During the first discussion of the Committee on Convention No. 107 in June 1988, the words "through appropriate procedures and in particular through their representative institutions" were added as a result of a proposal made by the Worker members with the support of the Employer members. Paragraph[s] 76 [and 80] of the record of that discussion state: "The second part of the Worker members' amendment sought to replace 'through appropriate procedures' by 'freely expressed through their own representative institutions'. The amendment was supported by the Employer members. The Government member of Canada felt that the text was too restrictive and did not allow for individual consultation and she introduced a subamendment to ease the restriction. The Worker members appreciated the intention and said they could support it if it was further subamended to emphasise the need for action where legislation was concerned. This text was adopted as subamended. The Employer members tabled an amendment to add the word 'directly', which was adopted." … "Point 13(a) as amended was adopted" (*Provisional Record*, 77th Session of the International Labour Conference, 1989, 32nd sitting, para. 76).

[35] 2013 *Handbook for ILO Tripartite Constituents*, p. 11.

be taken quickly and effectively, where the discretionary power to achieve indigenous peoples' agreement or consent is lacking and where it would be impossible to follow the steps set out in the Regulations on Consultation with Indigenous Peoples.

137. The Committee considers that while certain circumstances, such as natural disasters, may require the taking of urgent and emergency measures, consultation procedures should be re-established as soon as possible.

Measures that may affect indigenous peoples directly

138. Section 7 of the Regulations on Consultation with Indigenous Peoples states:

> *Measures that may affect indigenous peoples directly.* The State administrative bodies mentioned in section 4 of these Regulations shall consult the indigenous peoples whenever administrative or legislative measures that may affect them directly are being considered.
>
> Legislative measures that may affect indigenous peoples directly include preliminary drafts of legislation and amendments to the Constitution initiated by the President of the Republic, or any part thereof, that may have a direct, significant and specific impact on indigenous peoples as such by affecting the exercise of their traditions and ancestral customs; their religious, cultural or spiritual practices; or their relationship with their land.
>
> Administrative measures that may affect indigenous peoples directly include official documents issued by State administrative bodies that contain a declaration of intent which, owing to its informal nature, gives these bodies discretionary power to achieve indigenous peoples' agreement or consent to their adoption, provided that the measures in question would have a direct, significant and specific impact on indigenous peoples as such by affecting the exercise of their traditions and ancestral customs; their religious, cultural or spiritual practices; or their relationship with their land.
>
> Measures issued during states of exception or emergencies, including earthquakes, tidal waves, floods and other natural disasters, shall not require consultation owing to their urgent nature.
>
> Purely procedural decisions and substantive or legal implementing measures shall be understood to be included in the consultations on the final act or decision for which they are the basis or which they are intended to implement.
>
> …

139. The trade union maintains that the Government added additional provisions that limit the opportunities for consultation.

140. The trade union considers that Article 6 of the Convention entitles indigenous peoples to express themselves freely where measures affect them directly and that it establishes individual rights for each person and collective rights for groups of people. Under the second and third paragraphs of section 7 of the Regulations on Consultation with Indigenous Peoples, the obligation to consult does not apply to administrative and legislative measures which, while not related to indigenous peoples, may affect them in practice without necessarily having an impact on "their capacity as such" (in other words, their capacity as peoples).

141. The trade union considers that, in accordance with section 7 of the Regulations on Consultation with Indigenous Peoples, consultations on measures that affect indigenous peoples will only be held if the measures have "a direct, significant and specific impact" on those peoples. The trade union considers that Convention No. 169 makes no such distinction and that, while it is understood that the type of consultation will depend on the way in which the impact of the measure is perceived by indigenous peoples in particular, the Convention does not suggest that the measures must concern only those peoples.

142. The trade union maintains that, by adding two extraneous criteria not stipulated in Article 6 of the Convention ("significant and specific" impact), the Government has introduced a restriction on consultation by means of a national regulation.

143. The Government indicates that the third paragraph of section 7 of the Regulations on Consultation with Indigenous Peoples requires consultation not only for measures that are general in scope, but also for those with a specific impact that may affect indigenous peoples directly.

144. With regard to the term, "direct, significant and specific impact", the Government indicates that the adjective "specific" has replaced "exclusive" and was included in the latest proposal submitted to the round table with a view to a rapprochement with the indigenous peoples' representatives at the table. The Government understands that the expression "direct, significant and specific impact" allows for a broader application of the rule since consultations may be held not only on measures that have an impact only on indigenous peoples (certain cases involving measures targeting those peoples), but also on those that have a general effect on the entire population but affect indigenous peoples differently because of their circumstances and rights. The Government explains that the measure must have a special, characteristic or particular effect on indigenous peoples that it does not have on other Chileans.

145. The Government recalls that, according to the *Diccionario de la Real Academia Española*, the term "significant" means "important because it represents or signifies something". The term was included in order to establish that consultations must be held on issues that are both relevant and important to indigenous peoples.

146. The Government considers that the phrase requiring that measures have a "direct impact" merely reiterates the reference, in Article 6(1)(a) of the Convention, to "measures which may affect them directly" ("them" being the indigenous peoples), thus ruling out indirect effects.

147. Furthermore, according to the Government, the statement that measures must have an impact on "indigenous peoples as such" also reiterates Article 6(1)(a) of the Convention, which establishes that the Government must consult with the "peoples concerned, … through their representative institutions, whenever consideration is being given to … measures which may affect them directly". This implies meeting an obligation, taking into account their status as "peoples" as described in Article 1 of the Convention.

148. The Committee notes with interest that the reference, in section 7(c) of the Regulations on Consultation with Indigenous Peoples, to "legislative measures" that may affect indigenous peoples directly and are initiated by the President of the Republic was agreed by the parties concerned. However, it observes that there is still disagreement as to whether the scope of the "administrative measures" that are in fact covered by Supreme Decree No. 66, and specifically the Government's wording of the third paragraph of section 7, is consistent with Article 6 of the Convention. [36]

[36] The Indigenous and Tribal Populations Recommendation, 1957 (No. 104), establishes that: "Legislative or administrative measures should be adopted for the regulation of the conditions, de facto or de jure, in which the populations concerned use the land" (Part II (Land), para. 2, emphasis added). In the report that served as a basis for the first discussion at the 75th Session of the International Labour Conference in June 1988, the Office included a questionnaire, question 19 of which read: "Do you consider that Article 5 should be replaced by a provision which requires that governments should, whenever possible, undertake consultations with the peoples concerned, or with their representatives where they exist, whenever consideration is being given to legislative or

149. The Committee observes that Article 6(1)(a) of the Convention does not establish any exceptions with regard to the scope of "legislative and administrative measures". [37] However, it also observes that Article 7(1) thereof establishes the right of the peoples concerned 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. It also establishes their right to exercise control, to the extent possible, over their own economic, social and cultural development. Special projects for regions in which those peoples live must be carried out in a manner that promotes improvement in their living and working conditions and their health, and with their participation and cooperation.

150. The Committee considers that national legislation and practice may make a distinction between administrative decisions and measures, provided that this does not result in prevention or restriction of the holding of consultations, particularly through the representative institutions of the peoples concerned, whenever consideration is given to administrative measures that may affect indigenous peoples directly.

151. As regards the expression, "have a direct, significant and specific impact on indigenous peoples as such" in the second and third paragraphs of section 7 of the Regulations on Consultation with Indigenous Peoples, the Committee hopes that in practice, the adjectives "significant and specific" do not restrict the definition of "measures that may affect indigenous peoples directly". ***The Committee requests the Government to include in its next report to the Committee of Experts information to be used in examining whether implementation of the Regulations on Consultation with Indigenous Peoples (Supreme Decree No. 66 (2014)) has restricted the definition of legislative and administrative measures that may affect indigenous peoples directly.***

Measures for the evaluation of projects and activities that fall within the scope of the Environmental Impact Assessment System

152. Section 8 of the Regulations on Consultation with Indigenous Peoples states:

> *Measures for the evaluation of projects and activities that fall within the scope of the Environmental Impact Assessment System.* Consultations on environmental permits for projects and activities that fall within the scope of the Environmental Impact Assessment System under section 10 of Act No. 19300 and require consultation with indigenous peoples pursuant to that Act and its implementing regulations shall be held in accordance with the rules governing the Environmental Impact Assessment System, within the time periods established therein, and with section 16 of this Decree on the stages of such consultation.
>
> The environmental assessment of a project or activity that may have an environmental impact and that requires consultation with indigenous peoples in accordance with Act No. 19300 and its implementing regulations shall, in all cases, include any mitigation, compensation and reparation measures required in order to address the effects mentioned in section 11 of Act No. 19300.

administrative measures which may affect them?" (emphasis added) (75th Session of the International Labour Conference, 1988, Report VI(1), Partial revision of Convention [No. 107], p. 95).

[37] The 2013 *Handbook for ILO Tripartite Constituents* recalls, on page 12, that in its general observation of 2009, published in 2010, the Committee of Experts stated that one of the challenges of the Convention was "ensuring that appropriate consultations are held prior to the adoption of *all* legislative and administrative measures which are likely to affect indigenous and tribal peoples directly" (emphasis added).

> With a view to the holding of consultations within the framework of the Environmental Impact Assessment System, the environmental authority may request technical assistance from the National Indigenous Development Corporation as provided in section 14 of this Decree.

153. In its submission, the trade union notes that there was no consensus on section 8 of the Regulations on Consultation with Indigenous Peoples. It states that one of indigenous peoples' main concerns is consultation on investment projects that fall within the scope of the SEA, owing primarily to the threat that mining, forestry and agricultural projects pose to their traditional territories.

154. The trade union indicates that consultations on projects that fall within the scope of the SEA pursuant to section 10 of the Environmental Framework Act (Act No. 19300) "and require consultation with indigenous peoples pursuant to that Act and its implementing regulations shall be held in accordance with the rules governing the Environmental Impact Assessment System" pursuant to the first paragraph of section 8 of the Regulations on Consultation with Indigenous Peoples. The trade union maintains that projects that are submitted to the SEA for the purpose of obtaining an environmental impact statement (section 10 of Act No. 19300) are not subject to the prior consultation required under Convention No. 169 and that section 8 of the Regulations on Consultation with Indigenous Peoples exempts the RCAs provided for in section 10 of the Environmental Framework Act (Act No. 19300) from the prior consultation required under the Convention. [38]

155. The trade union mentions, as an example, the RCAs authorizing investment projects that may not concern indigenous policies even though, in its view, some investment projects, such as a hydroelectric project that would flood an indigenous people's burial grounds or a mining project that would displace an indigenous people, could have an impact on those peoples.

156. The Government indicates that none of the provisions of the Convention prohibits the regulation of consultations held during environmental assessments of projects or activities. It also considers that, even if a general consultation mechanism were to be established, it would not cover the specific characteristics of the assessment of social and cultural impact that an environmental assessment entails and that the relevant impacts and measures would not be addressed during general consultations and thus require special consultations.

157. The Government reiterates that its position has been essentially to have one system for projects that fall within the scope of the SEIA and another for State administrative measures other than environmental permits and legislative measures initiated by the President of the Republic.

158. The Government also explains that, in the case of environmental impact statements, defined in section 2(f) of the Environmental Framework Act (Act No. 19300), and environmental impact studies of projects and activities which do not recognize that a given project or activity has a significant impact on indigenous peoples but are located on an indigenous people's land, in areas of indigenous-centred development or near indigenous peoples, section 86 of Supreme Decree No. 40 (2012) (the SEIA Regulations) provides for a special mechanism. According to the Government, this mechanism enables indigenous peoples to express their opinions on the situation in question. If it becomes clear that their land would be affected, the project or activity will be subject to a further environmental impact study

[38] Section 10 of Act No. 19300 establishes the projects and activities which may have an environmental impact and which fall within the scope of the Environmental Impact Assessment System. The updated text is available on the website of Chile's Library of Congress at: http://www.leychile.cl/Navegar?idNorma=30667. See also paras 145–161 below.

recognizing the impact on indigenous peoples; this will result in the holding of consultations throughout the environmental assessment process.

159. In addition to Articles 6 and 7 of the Convention, the provisions of Articles 15 [39] and 16 [40] are important for the examination of this issue.

160. The Committee notes that, under section 2(f) of the Environmental Framework Act (Act No. 19300), an "environmental impact statement" is a document describing a future activity or project or changes in that activity or project. It is made under oath by the relevant manager and enables the competent body to assess whether the environmental impact of the activity or project constitutes a violation of the current environmental regulations. An "environmental impact study" is a document in which the activity or project manager describes in detail the characteristics of the future project or activity or the changes in that activity or project. The manager must provide the competent bodies with reasoned background information so that the environmental impact of the activity or project can be predicted, identified and interpreted and must describe the action or actions to be taken in order to prevent or minimize its significant adverse effects (Act No. 19300, section 2(i)).

161. The Committee notes that the first paragraph of section 8 of the Regulations on Consultation with Indigenous Peoples refers to environmental impact decisions, in other words, the decisions of competent bodies through which the authorities approve, amend or reject an environmental impact statement submitted by an activity or project manager. Moreover,

[39] Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

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

[40] Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

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

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

under this provision of the Regulations on Consultation with Indigenous Peoples, where a project or activity that may have an environmental impact requires consultation with indigenous peoples pursuant to the Environmental Framework Act (Act No. 19300), consultations shall be held in accordance with the provisions of, and the time periods established in, sections 85 and 86 of Supreme Decree No. 40 (2013), but following the consultation procedures established in section 16 of the Regulations on Consultation with Indigenous Peoples. The Committee notes that section 8 of Supreme Decree No. 66 establishes a specific mechanism for consultations on projects and activities that fall within the scope of the SEA.

162. The Committee notes that section 16 of the Regulations on Consultation with Indigenous Peoples and section 10, to which section 16 refers, were agreed and read:

> Section 16: Consultation procedure. Without prejudice to the provisions of section 10 of these Regulations, all appropriate consultation procedures shall comprise the following stages:
>
> (a) Planning of the consultation procedure. The purpose of this stage is to: (i) submit preliminary information on the measure on which consultations with indigenous peoples will be held; (ii) allow the indigenous peoples and the responsible body to designate the participants and their roles and functions; and (iii) allow the responsible body and the indigenous peoples to decide jointly on the methodology or the manner in which the process will be carried out; whether the record of the meetings will take the form of audiovisual recordings, minutes or some other medium; and whether observers, mediators and/or notaries should be present.
>
> The methodology shall take into consideration the procedure for allowing the participants in the consultations to speak, the way in which agreements will be ratified, locations, deadlines, the availability of resources to ensure an equal playing field, and announcement and logistics mechanisms in general.
>
> This stage shall involve at least three meetings: one for the preliminary submission of information on the measure on which consultations will be held; another to designate the participants and the methodology, for which the indigenous peoples shall have sufficient time to reach agreement internally; and a final one to agree on the methodology with the relevant body.
>
> The agreements reached at this stage shall be recorded in the minutes, which shall contain a detailed description of the methodology established and be signed by the parties designated for that purpose.
>
> In the event that there is no agreement on all or some of the aforementioned issues, the responsible body shall record this situation and the methodology to be applied with due respect for the principles of consultation.
>
> (b) Submission of information and announcement of the consultation process: The purpose of this stage is to submit any background information on the measure on which consultations with indigenous peoples will be held, including the reasons for the measure and its nature, scope and implications.
>
> The information shall be submitted in a timely manner using socially and culturally appropriate and effective methods and procedures in Spanish and, where necessary, the indigenous people's language in accordance with the specific characteristics of the indigenous people concerned.
>
> The information on the measure on which consultations will be held and on the process shall be updated continuously on the websites of the Ministry of Social Development, the National Indigenous Development Corporation (CONADI) and the responsible body.
>
> (c) Internal discussions among indigenous peoples: the purpose of this stage is to allow the indigenous people to analyse, study and establish its position through debate and internal consensus on the measure on which consultations will be held so that it will be able to speak and prepare for the dialogue stage.
>
> (d) Dialogue: the purpose of this stage is to facilitate agreement on the measure on which consultations will be held by exchanging opinions and comparing arguments. Within the

time limit established for this stage, meetings should be held as needed in order to meet the objective of the consultations.

During these meetings, the indigenous people's culture and decision-making methods shall be respected.

Agreements and disagreements at this stage, as well as follow-up and monitoring mechanisms and actions, shall be recorded.

(e) Processing, communication of results and conclusion of the consultation process: the purpose of this stage is to prepare a detailed account of the process followed, including an evaluation of the background, the various stages and a reasoned explanation of any objections, which shall be recorded in a final report.

Section 10: Appropriate procedure. The consultation procedure established in section 16 shall be applied flexibly.

To that end, it shall be adapted to the specific characteristics of the people or peoples consulted with due respect for their culture and world view as reflected in their customs, language, traditions and religious rituals and practices.

Furthermore, the responsible bodies mentioned in section 4 of these Regulations shall take into account the nature, content and complexity of the measure on which consultations will be held.

163. The Committee considers that, in consultation with indigenous peoples, different regulations may be established to govern the various situations in which consultations may be held, provided that these regulations are consistent with the provisions of the Convention.

164. The Committee observes that environmental impact decisions are taken by competent bodies and therefore constitute administrative measures that may affect indigenous peoples directly.

165. The Committee notes that section 8 of Supreme Decree No. 66 refers to section 16 thereof, which was agreed and establishes the stages of consultation. The Committee considers that these stages should also be followed during consultations on projects and activities that fall within the scope of the SEA.

166. The Committee recalls that in an observation adopted in 2012 and published in 2013, the Committee of Experts indicated that, in the event that an environmental impact study involved the prospection or exploitation of existing resources in indigenous peoples' lands and/or the resettlement of indigenous communities, compliance with all the provisions of Articles 15 and 16 of the Convention should also be ensured.

167. ***The Committee requests the Government to include in its report to the Committee of Experts information demonstrating that all of the requirements established in Articles 6, 7 and, where appropriate, 15 and 16 of the Convention have been met prior to the adoption of environmental impact statements authorizing a project or activity that might affect indigenous peoples directly.***

Implementing Regulations for the Environmental Impact Assessment System (Supreme Decree No. 40 (2013))

168. The trade union considers that the SEIA Regulations (Supreme Decree No. 40 (2013)) do not meet the requirements on prior consultation established in the Convention. It refers to a note issued by the INDH on 13 May 2013, in which the Institute indicates that Supreme Decree No. 40 "does not provide for mechanisms that ensure intercultural dialogue and allow peoples to have an impact on the approval of investment projects on their lands and territories".

169. The Government recalls that the SEA in the Ministry of the Environment duly recorded the consultations required by the Convention in a document entitled *Final report: Consultations with indigenous peoples on the SEIA Regulations, Procedural Guide to Public Participation and Support for Assessment of the Impact of Significant Changes on Indigenous Peoples*. In a public statement issued on 10 July 2013 in response to the concerns raised by the INDH, the SEA recalled that Act No. 19300 had been amended in January 2010 in order to take into account the entry into force of Convention No. 169 in Chile. The SEA also stated that the requirements with regard to prior consultation had been fully met.

170. In that regard, the Committee notes that the complaint focuses on sections 85 and 86 of the SEIA Regulations, adopted through Supreme Decree No. 40 (2013), and that they are to be applied in light of section 8 of the provisions of the subsequently adopted Regulations on Consultation with Indigenous Peoples, adopted through Supreme Decree No. 66 (2014).

171. The SEIA Regulations state:

> Section 85 – Consultation with indigenous peoples. Without prejudice to the provisions of section 83 of these Regulations [Obligations of the Service], where a project or activity gives rise to or would present any of the effects, characteristics or circumstances mentioned in sections 7, 8 and 10 of these Regulations in so far as one or more groups of members of indigenous peoples are affected directly, the Service shall, in accordance with section 4, paragraph 2, of the Act, [41] design and develop good faith consultations that include mechanisms appropriate to the social and cultural characteristics of each people and their representative institutions so that they may participate in an informed manner and have an opportunity to contribute to the environmental assessment process. The Service shall also establish mechanisms to enable these groups to participate in the evaluation of clarifications, corrections and/or additions that may be subject to an environmental impact study.
>
> Only the indigenous peoples affected shall participate in the consultations mentioned in the preceding paragraph, which shall be carried out with the objective of reaching agreement or consent. However, failure to reach such agreement or obtain such consent shall not be taken to mean that the right to consultation was not exercised. Where there is no proof that an individual has indigenous status in accordance with Act No. 19253, this status must be confirmed as provided in the current regulations.
>
> Section 86 – Meetings with groups of members of indigenous peoples. Without prejudice to the provisions of paragraph 2 of this Title [Public participation in environmental impact studies], where a project or activity has been submitted for assessment through an environmental impact study showing that the effects, characteristics and circumstances mentioned in the preceding section will not result and are not present and where the project will be carried out on an indigenous people's land, in an area of indigenous-centred development or near groups of members of indigenous peoples, the regional director or the executive director of the Service shall hold meetings with the groups of members of indigenous peoples in the area in which the project or activity is to be carried out for a period not to exceed 30 days as from the project's approval with the aim of gathering and analysing their opinions and, where appropriate, determining whether section 36 of these Regulations applies [if the study fails to provide information that is relevant or essential to its assessment and cannot be supplied through clarifications, corrections or additions, the Regional Director or the Executive Director, as appropriate, shall so state in a reasoned decision instructing that the background information be returned to the holder and terminating the procedure]. The Service shall keep minutes of every meeting held with a view to gathering the opinions of the aforementioned groups.

[41] Section 4(2) of the Environmental Framework Act (Act No. 19300) states: "The State bodies, in the exercise of their environmental mandates and in implementation of the environmental management instruments, shall ensure the proper preservation, development and strengthening of the identity, languages, institutions and social and cultural traditions of indigenous peoples, communities and individuals in accordance with the Act and the international agreements ratified by Chile and currently in force."

> Where a project or activity has been submitted for assessment through an environmental impact statement and is carried out on an indigenous people's land, in an area of indigenous-centred development or near groups of members of indigenous peoples, the regional director or the executive director of the Service shall hold meetings with those groups of people in the area where the project or activity is to be carried out for a period not to exceed 20 days with the aim of gathering and analysing their opinions and, where appropriate, determining whether section 48 of these Regulations applies [if the statement fails to provide information that is relevant or essential to its assessment and cannot be supplied through clarifications, corrections or additions, or if the project or activity requires an environment impact study, the Regional Director or the Executive Director, as appropriate, shall so state in a reasoned decision instructing that the background information be returned to the holder and terminating the procedure]. The Service shall keep minutes of every meeting held with a view to gathering the opinions of the aforementioned groups.
>
> The minutes of the meetings mentioned in the preceding paragraphs may be used as grounds for the reasoned decisions referred to in sections 36 [Early termination of the assessment procedure for environmental impact studies] and 48 [Early termination of the assessment procedure for environmental impact statements] of these Regulations or for a decision granting an environmental permit, as appropriate.

172. The trade union indicates that, although the second paragraph of section 85 states that "[o]nly the indigenous peoples affected shall participate in the consultations mentioned in the preceding paragraph, which shall be carried out with the objective of reaching agreement or consent", another sentence was added: "However, failure to reach such agreement or obtain such consent shall not be taken to mean that the right to consultation was not exercised." The trade union is of the opinion that this sentence constitutes an unacceptable waiver of rights and jeopardizes the legitimate interests of indigenous peoples. It believes that the provision establishes that the outcome of the consultations is irrelevant but that the process itself is important. This contradicts the purpose of the right to prior consultation, the exercise of which requires that indigenous peoples be able to influence the outcome of decisions affecting them.

173. The trade union states that, according to section 85 of the Regulations, not all projects that require an environmental impact study require consultation, but only those whose effects are covered by sections 7, 8 and 9 of the SEIA Regulations and which require an environmental impact assessment, but not an environmental impact statement.

174. The trade union indicates that, in the SEIA Regulations, environmental impact statements are mentioned only in the context of projects carried out on an indigenous people's land, in areas of indigenous-centred development or "near groups of indigenous people", as specifically stated in the second paragraph of section 86 of the Regulations. In such cases, the regional director or the executive director must hold "meetings with those groups of people in the area in which the project or activity is to be carried out". "The Service shall produce a record of any meeting at which the opinions of such groups are sought." The trade union considers that this provision does not establish an obligation to hold consultations on the RCAs aimed at obtaining approval of an environmental impact statement.

175. The trade union maintains that there are no legal grounds for waiving the duty to consult on decisions granting an RCA since this is an administrative measure.

176. The Government emphasizes that section 85 of the SEIA Regulations provides, for the first time, for consultations on the environmental impact of investment projects that affect indigenous peoples directly.

177. The Government explains that, for official regulatory and technical reasons, Supreme Decree No. 40 (2013) includes Title V on "Community participation in the environmental impact assessment process". The Regulations provide for consultation with indigenous peoples

through a mechanism that is quite different from public participation, the principle of which is established in section 4 of the Environmental Framework Act (Act No. 19300).

178. The Government indicates that the consultations with indigenous peoples established in the SEIA Regulations are held throughout the environmental impact assessment process and are not subject to the 60-day limitation on the public participation mechanism.

179. The Government maintains that consultation with indigenous peoples clearly differs from the public participation mechanism in both content and purpose. According to the Government, consultation with indigenous peoples becomes an intercultural dialogue, the purpose of which is to reach agreement on, or obtain consent to, the environmental assessment of a given project that will result in the issuance of an environmental permit, which, in this case, is an administrative measure that may affect indigenous peoples directly.

180. The Government explains that, in the case of environmental impact statements as defined in section 2(f) of the Environmental Framework Act [42] and the environmental impact studies of projects and activities which do not recognize that a given project or activity has a significant impact on indigenous peoples despite being located on an indigenous people's land, in an area of indigenous-centred development or near indigenous peoples, section 86 of the SEIA Regulations provides for a special mechanism. According to the Government, this mechanism enables indigenous peoples to express their opinions on the situation in question. If it becomes clear that their land would be affected, the project or activity will be subject to a further environmental impact study recognizing its impact on indigenous peoples; this will result in the holding of consultations throughout the environmental assessment process.

181. The Government claims that the trade union has confused the consultation with indigenous peoples provided for by section 85 of the SEIA Regulations with meetings with groups of members of indigenous peoples held under section 86 thereof. The Government observes that neither of the two mechanisms (consultation with indigenous peoples under section 85 and meetings with groups of members of indigenous peoples under section 86) constitutes public participation, which is governed by sections 88–96 of the Regulations.

182. The Government states that a reading of section 85 of the SEIA Regulations clearly shows that its wording is almost identical to that of Article 6(1)(a) and (2) of the Convention: "design and develop good faith consultations that include mechanisms appropriate to the social and cultural characteristics of each people and their representative institutions so that they may participate in an informed manner …".

183. The Government maintains that section 85 of the SEIA Regulations is more wide-ranging; it represents an effort to comply with both the recommendations formulated by the Committee of Experts in its 2010 general observation and national case law. The Government emphasizes that section 85 of the SEIA Regulations adds "… and have an opportunity to contribute to the environmental assessment process".

[42] Section 2(f) of the Environmental Framework Act provides the following definition: (f) Environmental impact statement: A document describing a future activity or project or changes in that activity or project. It is made under oath by the relevant manager and enables the competent body to assess whether the environmental impact of the activity or project constitutes a violation of the current environmental regulations.

184. The provisions of Articles 6, 7, 15, 16 and 34 [43] of the Convention are particularly important for the examination of this case.

185. The Committee notes that in the first paragraph of section 85, the SEIA Regulations requires the design of "good faith consultations" that include appropriate mechanisms that enable indigenous peoples, through their representative institutions, to "participate in an informed manner" and have "an opportunity to contribute" during the environmental assessment process.

186. The Committee observes that, according to the second paragraph of section 85, the process of prior consultation envisaged in the first paragraph of that section "shall be carried out with the objective of reaching agreement or consent" but that "failure to reach such agreement or obtain such consent shall not be taken to mean that the right to consultation was not exercised". The Committee notes that only the first sentence in the second paragraph of section 85 is a verbatim repetition of Article 6(2) of the Convention. Convention No. 169 does not give indigenous peoples a right to veto; obtaining agreement or consensus is the purpose of engaging in the consultations, not an independent requirement. [44]

187. The Committee notes that section 86 of the SEIA Regulations establishes that where projects requiring environmental impact statements under the Environmental Impact Assessment System, as well as some studies that do not appear to have a direct impact, are located on or near indigenous peoples' land, "meetings" must be held with the indigenous peoples concerned in order to seek their opinions, analyse them and, where appropriate, require a further environmental impact study.

188. Bearing in mind that "a simple information meeting, where indigenous peoples could be heard without having any possibility of influencing decision-making, cannot be considered as complying with the provisions of the Convention", the Committee understands that the laws and regulations provide that such projects require a further environmental impact study, which offers a procedural opportunity to hold appropriate consultations before a Government authority takes a decision approving or rejecting a given project or activity.

189. ***The Committee requests the Government to indicate in its report to the Committee of Experts the manner in which it is ensured that, for projects that may affect indigenous peoples directly and are approved under the Environmental Impact Assessment System, the requirements established in Articles 6, 7 and, where appropriate, 15 and 16 of the Convention have been met.***

190. ***If it is established that, in practice, there are disparities in the application and functioning of these regulatory standards, the Committee encourages the Government to hold the appropriate consultations with a view to supplementing the regulations where necessary.***

Consultations initiated under the Regulations on Consultation with Indigenous Peoples

191. In its communication of January 2015, the trade union refers to an address delivered by the President of the Republic on 21 May 2014, in which she expressed regret at the crisis of confidence felt by indigenous peoples in the country. The trade union also indicates that

[43] Article 34. The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

[44] 2013 *Handbook for ILO Tripartite Constituents,* p. 17.

the new Ministry of Social Development authorities have initiated two administrative procedures with a view to the holding of consultations on the establishment of an indigenous peoples' council or councils [45] and to consideration of the preliminary draft of the legislation establishing the Ministry of Indigenous Peoples. [46]

192. The trade union maintains that there was no in-depth debate on the content of the Government's proposal to establish a Ministry of Indigenous Peoples and that the proposal, which violates Article 7 of the Convention, is detrimental to indigenous peoples since the power to set priorities remains in the hands of a minister.

193. The trade union also objects to the document concerning the establishment of an indigenous peoples' council or councils because, in its view, it is not for the State to establish institutions representing indigenous peoples; they have the right and prerogative to determine their own organizational structures.

194. The trade union maintains that indigenous peoples' attendance at meetings convened by the Government should not be interpreted as approval of the agreements. It states that consultations were limited to conducting surveys; there was no debate leading to dialogue.

195. The trade union mentions other legislative reforms, including education and taxation reforms, amendments to the Water Code, the Act establishing the Biodiversity and Protected Areas Service and the Industrial Property Act, for which neither the consultation nor the participation of indigenous peoples was considered.

196. The Government provides information on the two administrative procedures relating to prior consultations organized by the Ministry of Social Development in order to examine proposals for the establishment of one or more indigenous peoples' councils and a Ministry of Indigenous Peoples.

197. The Government proposed a five-stage methodology for the consultations (planning, information, internal discussion, dialogue and systematization of the process). At each of the meetings held, agreement on the methodology for the consultations was reached with the representative institutions of the indigenous peoples.

198. The Government indicates that in January 2015, a national round table was held in order to reach agreement on the measure on which consultations had been held, which would become a draft law and subsequently be referred to Congress through a communication issued by the executive branch with a view to its adoption.

199. In its January 2015 communication, the Government also states that the Ministry of Social Development and the Ministry of the Environment consider it necessary to review the functioning of Supreme Decrees Nos 40 (2013) and 66 (2014) and states that the review will be conducted in 2015.

[45] Decision No. 275, published in the Official Gazette of 24 June 2014, initiating the administrative process and opening consultations on the preliminary draft of the legislation establishing indigenous peoples' council or councils.

[46] Decision No. 276, published in the Official Gazette of 24 June 2014, initiating the administrative process and opening consultations on the preliminary draft of the legislation establishing the Ministry of Indigenous Peoples.

200. The Government expressed the hope that the holding of consultations will allow for genuine dialogue with the indigenous peoples in an effort to restore trust between them and the State.

201. The Committee considers that "[i]t is imperative in all consultations to establish a climate of mutual trust, but all the more so with respect to indigenous peoples …". [47]

202. The Committee hopes that the first consultations carried out since the publication of the Regulations on Consultation with Indigenous Peoples will lead to a satisfactory outcome for the Government and the indigenous peoples. ***The Committee requests the Government to include in its report to the Committee of Experts information on the outcome of those consultations. The Committee invites the parties to continue their efforts to broaden dialogue and increase the participation and social inclusion of indigenous peoples through consultation.***

IV. The Committee's recommendations

203. ***In light of the foregoing conclusions concerning the issues raised in the representation, the Committee recommends that the Governing Body should:***

(a) approve this report;

(b) invite the Government to provide the Committee of Experts on the Application of Conventions and Recommendations with information on the issues addressed in this report and in the Committee's conclusions so that the Committee of Experts can examine that information at its 87th Session (November–December 2016);

(c) make this report publicly available and close this procedure.

Geneva, 21 March 2016 *(Signed)* Mr Francisco Figueiredo de Souza

Ms Eulogia Familia

Mr Alberto Echavarría Saldarriaga

Point for decision: Paragraph 203

[47] Mexico, report adopted in March 2004 (GB.289/17/3), para. 107.