Appendix V

Interpretation of Convention No. 169

While the formal interpretation of ILO Conventions is reserved to the International Court of Justice, from time to time Governments ask the Office for a written indication of how it believes a Convention should be applied. These are informally designated as interpretations, and are published as a ‘Memorandum of the International Labour Office’ and circulated to the ILO’s constituents.

There has been one such interpretation of Convention No. 169, requested by Switzerland on the instrument’s coverage, and published in 2001. The text follows:

ILC: Interpretation of a decision concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 – Switzerland. Published: 2001

Memorandum by the International Labour Office

1. In a letter dated 20 December 2000, the Director of the Federal Department of Economic Affairs (SECO) sought the Office’s official and formal opinion on the scope of certain provisions of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), with a view to clarifying a number of questions that had arisen in examining options for ratification of the Convention.

2. Subject to the customary reservation that the Constitution of the International Labour Organization confers no special competence upon the ILO to interpret the Conventions, the Office must limit itself to providing governments that so request with information enabling them to assess the appropriate scope of any given provision of a Convention, while taking into account any relevant elements that may have emerged from the ILO’s preparatory work and the comments of its supervisory bodies. It is primarily up to the governments concerned to judge whether or not their national law and practice are or can be compatible with the standards laid down in the international labour Convention in question, subject – in the event of the latter’s ratification – to the procedures established by the International Labour Organization for the review of reports relating to the application of ratified Conventions at international level.

3. The first two questions raised by the Federal Department concern the field of application of the Convention:

– Question 1: Could travellers, such as those of Jenish, Roma or Gypsy origin, be covered by Convention No. 169 (knowing that there has been only scant discussion of
the matter, but considering the conditions laid down in Article 1 (paragraphs 1(a) and 2 in particular)?

Question 2: Could there be any legal justification for preventing travellers from being covered by Convention No. 169?

4. The Convention’s field of application is defined in Article 1, which distinguishes tribal peoples from peoples regarded as indigenous, with the reservation under paragraph 3 that the term ‘peoples’ ‘shall not be construed as having any implications as regards the rights which may attach to the term under international law’.

5. Paragraphs 1 and 2 of Article 1 read as follows:
   1. This Convention applies to:
      (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
      (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
   2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

6. In the case at issue, the criteria relating to indigenous peoples, as specified in paragraph 1(b) of the said Article, are not relevant; indeed, the questions that arise pertain to travellers in a State that has neither been conquered nor colonized, and whose boundaries have not been modified.

7. The criteria relating to tribal peoples covered by paragraph 1(a) are the social, cultural and economic conditions that distinguish such peoples from other sections of the national community, on the one hand, and the specific customs or traditions or the special legislation that wholly or partially regulate their status, on the other. Moreover, paragraph 2 of the said Article introduces ‘a fundamental criterion for determining the groups to which the provisions of this Convention apply’, namely that of self-identification – in this particular instance that of self-identification as a tribal group. Self-identification as tribal is the prerogative of the members of the community in question, who regard themselves as a ‘people’, whereas determining the groups to which the provisions of the Convention apply should fall within the purview of the ratifying member States.

8. The question as to whether such a people in particular (i.e. travellers) meets the criteria set out in Article 1 of Convention No. 169, and is hence covered by its