

Norway

Indigenous and Tribal Peoples Convention, 1989 (No. 169) (ratification: 1990)

The Committee notes the Government's report due on 1 September 2008 which was, however, only received by the ILO on 15 December 2008, after the Committee's last session. The Committee recalls the communication received from the Norwegian Sami Parliament dated 28 August 2008, and notes the additional communication from the same body dated 29 April 2009. The Committee also notes the Government's reply dated 20 October 2009, to the Sami Parliament's comments of 29 April 2009. The Committee recalls that the Sami Parliament, according to the wishes expressed by the Government upon ratification, plays a direct role in the dialogue associated with supervision of the application of the Convention.

The Committee notes that the Government's report provides an update with regard to the application of various parts of the Convention, while the comments of the Sami Parliament focus on a number of specific aspects. The Committee will highlight certain positive developments and also address some specific questions in relation to which difficulties have arisen.

Follow-up to the Committee's previous comments. In its 2003 observation, the Committee examined information provided by the Government and the Sami Parliament regarding the preparation and submission to the National Parliament (*Storting*) of draft legislation to regulate legal relationships and administration of land and natural resources in the county of Finnmark (draft "Finnmark Act"). On that occasion the Committee urged the Government and the Sami Parliament to renew discussions on the disposition of land rights in the Finnmark, in the spirit of dialogue and consultation embodied in *Articles 6 and 7 of the Convention*. The Committee notes with *satisfaction* that following the Committee's comments, the *Storting's* Standing Committee on Justice held formal consultations with the Sami Parliament and the Finnmark County Council to discuss the draft legislation in question and received several rounds of written comments from these bodies. The final draft legislation prepared by the Standing Committee on Justice was unanimously endorsed by the Sami Parliament and a large majority of the Finnmark County Council and adopted by the *Storting* in June 2005 as the Act relating to the legal relations and management of land and natural resources in the county of Finnmark (the "Finnmark Act").

The Committee notes that with the entry into force of the Finnmark Act, state ownership of some 95 per cent of the land in Finnmark was transferred to a newly created body, the Finnmark Estate, which is managed by a board composed of six members (three members elected by the Finnmark County Council and three by the Sami Parliament). Section 5 of the Act acknowledges that through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark, and clarifies that the Act does not interfere with collective and individual rights acquired by the Sami and other people.

In order to establish the scope and content of the rights held by Sami and other people living in Finnmark “on the basis of prescription or immemorial usage or on some other basis”, the Act establishes a process for the investigation and recognition of existing rights to land, and, in this regard, provides for the establishment of a commission (“Finnmark Commission”) and a special court (the “Uncultivated Land Tribunal for Finnmark”). The Committee notes that the Finnmark Commission was appointed by Royal Decree of 14 March 2008, while the Uncultivated Land Tribunal for Finnmark had not yet been established at the time of reporting.

The Committee notes that under section 29 of the Finnmark Act, the Commission “shall investigate rights of use and ownership to the land” taken over by the Finnmark Estate “on the basis of current national law”. In this connection, the Committee also notes that section 3 clarifies that “the Act shall apply within the limits that follow from ILO Convention No. 169” and that it shall be applied “in compliance with the provisions of international law concerning indigenous peoples and minorities”. The Committee trusts that the steps necessary will be taken to ensure that the process of identifying and recognizing rights of use and ownership under the Finnmark Act will be consistent with *Article 14(1)*, and also *Article 8* of the Convention which requires due regard to customs and customary law of the indigenous peoples concerned in applying national laws and regulations. *The Committee requests the Government to provide information on further developments and progress made regarding the survey and recognition of existing rights in Finnmark county, including information on the work of the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark.*

The Committee further notes that the Finnmark Act provides that the Sami Parliament may issue guidelines for assessing the effect of changes in the use of uncultivated land on Sami culture, reindeer husbandry, use of uncultivated areas, commercial activity and social life (section 4). The guidelines are to be approved by the competent Ministry. The Act requires the state, county and municipal authorities to assess the significance of such changes in the use of uncultivated land, taking into account the guidelines of the Sami Parliament. *The Committee looks forward to receiving information on the implementation of the Finnmark Act as regards the management of the use of uncultivated land in Finnmark county and on how the rights and interests of the Sami have been taken into account in this process.*

Article 6. Consultation. Both the Government’s report and the Sami Parliament’s comments highlight that following the experience of putting in place the Finnmark Act, the need for an agreed framework for consultations became evident. The Committee notes with *interest* that agreement between the Government and the Sami Parliament on such a framework was reached with the establishment of the “Procedures for consultations between the state authorities and the Sami Parliament of 11 May 2005” (PCSSP). The PCSSP recognize the right of the Sami to be consulted on matters that affect them directly, set out the objective and scope of the consultation procedures in terms of subject matter and geographical area, as well as general principles and modalities regarding consultations. The Committee notes that the PCSSP are a framework agreement, which means that the state authorities and

the Sami Parliament can conclude special consultation agreements concerning specific matters, as may be necessary.

With regard to the implementation of the PCSSP, the Committee notes that the Government and the Sami Parliament, in some instances, express differing views on whether or not the agreed consultation procedure has been respected. These differences appear to be related principally to the issue of whether a consultation has been initiated early enough, to uncertainties as to whether a consultation process on a specific matter has actually commenced or concluded and to whether certain announcements made by state authorities during a consultation process amount to a lack of good faith. For instance, the Sami Parliament considers that the Government prematurely announced its position on how to deal with Sami rights in the new Mining Act in March 2008, before consultations had been concluded. *The Committee welcomes the PCSSP as a significant step towards ensuring that consultations, in accordance with the Convention, take place with regard to all matters affecting the Sami directly, and looks forward to receiving continuing information on its implementation and on any special agreements with regard to specific matters. Welcoming the apparently increasing number of consultation processes, the Committee encourages the Government and the Sami Parliament to consider ways and means to address and settle disagreements regarding the PCSSP's application, particularly with regard to the abovementioned differences, in a timely fashion. Noting that under the PCSSP, the state authorities are to inform the Sami Parliament "as early as possible" about the "commencement of relevant matters which directly affect the Sami", and emphasizing that consultations should be initiated as early as possible to ensure that indigenous peoples get a real opportunity to exert influence on the process and the final outcome, the Committee hopes that the Government will take the measures necessary to ensure that these requirements are applied fully and systematically.*

Articles 14 and 15. Rights to land in traditional Sami areas south of Finnmark county. The Committee notes that the Sami Rights Committee was reappointed on 1 June 2001 to report on issues relating to the Sami's right to, disposition and use of land and water in traditional Sami areas other than those covered by the Finnmark Act. The Government indicates that the main report of the Sami Rights Committee was presented in December 2006, and was circulated broadly for comments which were to be received by 15 February 2009. The Committee notes that the Sami Parliament expresses concerns that the process of identifying rights takes a long time and that interventions by governmental authorities in areas where rights have not been identified was "a constantly recurring problem". *The Committee welcomes the ongoing efforts with regard to the land rights of the Sami in their traditional areas south of Finnmark county. The Committee trusts that Articles 14 and 15 will be duly taken into account in this process and that consultation and participation in accordance with Articles 6 and 7 will take place. While acknowledging that the identification of rights under Article 14 is a process which may require considerable time, the Committee also considers that transitional measures should be adopted during the course of the process, where necessary, in order to protect the land rights of the indigenous peoples concerned, while awaiting the outcome of the process.*

The Mining Act. The Committee notes that the Mining Act was amended in 2005, in conjunction with the enactment of the Finnmark Act. The amendments, inter alia, provided that “significant emphasis” shall be placed on the due consideration of Sami interests in Finnmark when applications for licensed prospecting are being considered and that bodies representing Sami interests are to be heard with regard to such applications. The amendments also provide that in case of mines on the land owned by the Finnmark Estate, the King may determine a higher “landowner”s fee”. The Committee further notes that a new Mining Act was enacted on 19 June 2009, which will enter into force on 1 January 2010. The new Mining Act carries over the provisions concerning Sami interests in Finnmark, but fails to address these issues in other traditional Sami areas. The Sami Parliament describes the consultation process beginning in 2007 regarding a new Mining Act as difficult, and lacking real dialogue and good faith on the part of the Government. The Government states that the consultations had been conducted in accordance with the PCSSP; however, full agreement could not be reached and the consultation had therefore been concluded without full agreement being reached. The Committee notes the Government”s statement that the follow-up to the 2006 report of the Sami Rights Committee will establish the basis for legal amendments regarding Sami rights outside Finnmark, including possible amendments to the Mining Act.

The Committee notes that the issue of benefit sharing was one of the issues on which the Government and the Sami Parliament disagreed. The Government considered that a benefit-sharing mechanism, such as the one provided for under the Finnmark Act, where the funds emanating from a higher landowner”s fee is received and managed by the Finnmark Estate as the landowner, was “appropriate to fulfil the obligations under *Article 15(2)* of the Convention.” The Sami Parliament considered that benefit sharing should not be limited to the landowner; in other words, indigenous peoples who are not owners of the land concerned but have traditionally used it should also participate in the benefits of exploration and exploitation of resources pertaining to the lands.

The Committee observes that *Article 15(2)*, second sentence, reads as follows: “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.” As stated in the first sentence of *Article 15(2)* this applies in “cases where the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands”. The term “lands” in *Article 15(2)* is to be understood as defined in *Article 13(2)* as including “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”. On this basis, the Committee confirms that the Convention does not limit the participation in benefits and the receipt of compensation under *Article 15(2)* to indigenous peoples who are landowners under the national legislation. The Committee, however, considers that there is no single model for benefit sharing as envisaged under *Article 15(2)* and that appropriate systems have to be established on a case by case basis, taking into account the circumstance of the particular situation of the indigenous peoples concerned.

In the present case, the Committee notes that agreement between the Sami Parliament and the State had been reached on 95 per cent of previously state-held land to be owned by the Finnmark Estate in the management of which Sami representatives participate on an equal footing with other representatives. The Committee also notes that the Finnmark Estate receives the funds emanating from the landowner's fee and is competent to decide on how these funds are to be used. Based on the information before it, the Committee is not in a position to assess how this mechanism has functioned in practice with a view to allowing the Sami to participate in the benefits of mining activities in Finnmark. *The Committee asks the Government to send information in this regard. In any event, the Committee recommends that the functioning of the mechanisms intended to ensure that the Sami, as the indigenous people concerned, participate in the benefits of mining activities as envisaged in Article 15(2) be reviewed jointly by the State authorities and the bodies representing Sami interests, from time to time. More generally, the Committee considers it of importance that the national mining legislation is amended as soon as possible to ensure the effective application of Articles 14 and 15 in traditional Sami areas south of Finnmark county, and urges the Government and the Sami Parliament to renew discussions on this matter. It calls on the Government to ensure that until such legislation has been enacted, the Sami rights in the areas concerned are safeguarded by other appropriate means.*