



International
Labour
Organization

Procedures for consultations with indigenous peoples

Experiences from Norway



Gender,
Equality
and Diversity
Branch

Procedures for consultations with indigenous peoples

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Gender, Equality and Diversity Branch

International Labour Office - Geneva

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Preface

In November 2015, the Governing Body of the International Labour Office endorsed an ILO strategy for action concerning indigenous and tribal peoples (ILO, 2015). With regard to promoting better application of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), the strategy states the following:

Capacity building for ILO constituents and indigenous and tribal peoples' organizations for establishing and strengthening procedures for consultation and participation regarding key public policy areas will be a strategic focus of ILO action. This would include mapping and assessing existing practices and challenges regarding such mechanisms and promoting dialogue, involving ILO constituents and indigenous and tribal peoples, in order to seek solutions for overcoming related difficulties, in line with ILO standards (ILO, 2015).

In this context, the Office is seeking to document experiences regarding consultation and participation for consideration by interested governments, employers' and workers' organizations, as well as organizations of indigenous peoples.

The present study looks at Norway, which was the first country to ratify Convention No. 169 in 1990. The approach taken in Norway regarding consultations with indigenous peoples in accordance with Convention No. 169 comprises a series of interrelated steps and processes, including adopting constitutional and legislative provisions, defining procedures, and establishing institutions and mechanisms to ensure implementation of these provisions. It illustrates that the quality of the consultation process is a decisive factor in reaching consent.

The study does not contain a comprehensive assessment of all consultation processes in Norway since the adoption of the dedicated consultation procedures in 2005, but seeks to present the main features of the process and how it has functioned in practice using mainly the example of the consultation regarding the Minerals Act adopted in 2009. The practice of the consultation procedures between the Norwegian government authorities and the Sami Parliament (the "Sámediggi") has evolved since 2009 and continues to do so. This paper was prepared by the Office drawing on a study written for the ILO by Birgitte Feiring, with contributions from John Bernhard Henriksen.

For ease of reference, the paper reproduces relevant sections from the 2013 *ILO Handbook for ILO Tripartite constituents – Understanding the Indigenous and Tribal Peoples Convention No. 1989 (No. 169)*, which provide guidance on the Convention's provisions regarding consultation and participation. The most recent comments adopted by the ILO Committee on the Application of Conventions and Recommendations (CEACR) on the Convention's application by Norway are reproduced in the paper's annex.

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Consultation and participation in ILO Convention No. 169

Excerpt from the ILO Handbook for ILO Tripartite Constituents – Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169):¹

The rights to be consulted and to participate in decision-making constitute the cornerstone of Convention No. 169 and the basis for applying the broader set of rights enshrined in the Convention. This section will answer some of the key questions that are often raised by ILO constituents in relation to these intertwined rights of indigenous peoples.

WHY IS CONSULTATION AND PARTICIPATION THE CORNERSTONE OF THE CONVENTION?

Consultation and participation are fundamental principles of democratic governance and of inclusive development. The provisions on consultation and participation were introduced in Convention No. 169, in order to eliminate the integrationist approach of the earlier Convention No. 107. Consultation and participation are important objectives in themselves, but are also the means through which indigenous peoples can fully participate in the decisions that affect them. Consultation and participation are not rights exclusively ascribed to indigenous peoples. Consultation is a fundamental principle that is to be found in all other ILO Conventions, providing for consultation between governments, employers' and workers' organizations as well as those specifically concerned by a given Convention. In this regard, Convention No. 169 is no exception, but affirms the requirement for specific consultations with indigenous peoples.

Given the enormous challenges facing indigenous and tribal peoples today, including the regularization of land titles, health and education, and the increasing exploitation of natural resources, the involvement of the indigenous and tribal peoples in these and other areas which affect them directly, is an essential element in ensuring equity and guaranteeing social peace through inclusion and dialogue ... Consultation can be an instrument of genuine dialogue, social cohesion and be instrumental in the prevention and resolution of conflict.

CEACR, General Observation on Convention No. 169, 79th Session, 2008, published 2009.

WHAT DOES THE CONVENTION SAY ABOUT CONSULTATION?

The general requirement to consult with indigenous peoples is reflected in Article 6(1) of Convention No. 169. Consultation with indigenous peoples thus arises as a general obligation under the Convention, whenever legislative or administrative measures affect them directly. Such measures could, for example, concern the elaboration of national legislation regarding consultations or the construction of road infrastructure on the lands of a specific indigenous community. In addition, the Convention particularly emphasizes the need to consult under certain circumstances, including prior to exploration or exploitation of sub-surface resources and prior to relocation and land alienation.

¹ Footnotes omitted

Article 6(1) stipulates that governments should: “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”.

Further, Article 6(2) of the Convention specifies that “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”.

The Convention particularly emphasizes the need to consult in the following circumstances:

- Prior to exploration or exploitation of mineral and sub-surface resources (Article 15(2));
- Prior to relocation, which should take place only with the free and informed consent (Article 16);
- When considering alienation or transmission of indigenous peoples’ lands outside their own communities (Article 17);
- On the organization and operation of special vocational training programmes (Article 22);
- On literacy and educational programmes and measures (Articles 27 and 28)

The core area of application for the concepts of consultation and participation is in the context of relationships between indigenous peoples and States. The requirement for undertaking consultations with indigenous peoples is both broad and specific. In operational terms, this will often imply establishing institutionalized mechanisms for regular and broad consultation along with specific mechanisms to be applied, whenever a specific community is affected.

This is in line with the experience of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), which in its 2009 general observation noted two main challenges: (i) 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; and (ii) including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted.

Consultation under the Convention means:

1. Consultations must be formal, full and exercised in good faith; here must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;
2. Appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
3. Consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures;
4. Consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.

Pro forma consultations or mere information will not meet the requirements of the Convention. At the same time, such consultations do not imply a right to veto nor is the result of the consultations necessarily the reaching of agreement or consent.

See CEACR General Observation, 2010, published 2011.

One of the issues that the Committee of Experts on the Application of Conventions and Recommendation (CEACR) has most regularly examined since the Convention was adopted is the “obligation to consult”. Therefore, CEACR prepared a detailed general observation to further clarify the concept of consultation, which, inter alia, states:

The Committee cannot over-emphasize the importance of ensuring the right of indigenous and tribal peoples to decide their development priorities through meaningful and effective consultation and participation of these peoples at all stages of the development process, and particularly when development models and priorities are discussed and decided. Disregard for such consultation and participation has serious repercussions for the implementation and success of specific development programmes and projects, as they are unlikely to reflect the aspirations and needs of indigenous and tribal peoples.

CEACR, General Observations on Convention No. 169, 2009 and 2011.

WHY DOES CONSULTATION WITH INDIGENOUS PEOPLES REQUIRE SPECIAL ATTENTION?

Indigenous peoples have the same rights as all other citizens to participate in the general democratic life of the State and to vote in such processes. In addition, States have the obligation to specifically consult with and ensure the participation of indigenous peoples, whenever measures are being considered which may affect them directly. This does not mean that indigenous peoples have special rights but that given their situation, special measures for consultation and participation are required, to safeguard their rights within the framework of a democratic State. The collective nature of indigenous peoples’ rights and the need to safeguard their cultures and livelihoods are among the reasons why governments should adopt special measures for their consultation and participation in decision-making.

WHO HAS THE RESPONSIBILITY FOR UNDERTAKING CONSULTATIONS?

In the context of Convention No. 169, the obligation to ensure appropriate consultation clearly and expressly falls on governments and not on private persons or companies. In some cases, governments may delegate the operationalization of the consultation process to other entities. However, the responsibility to ensure that consultations are carried out in compliance with the provisions of the Convention rests with the government, even when it does not conduct the processes itself.

WHO SHOULD BE CONSULTED?

The Convention stipulates that indigenous peoples should be consulted through their representative institutions. What constitutes a representative institution should be determined taking into account the characteristics of the country, the specificities of the indigenous peoples and the subject and scope of the consultation. Given the circumstances, the appropriate institution may be representative at the national, regional or community level; it may be part of a national network or it may represent a single community. The important criterion is that representativeness should be determined through a process of the indigenous peoples themselves. This also implies, that an indigenous institution cannot claim representativity without being able to clearly identify its constituents and its accountability towards these constituents. In some cases, the alleged lack of representativeness of a given institution has been contested in court or brought to the attention of the ILO supervisory bodies.

In circumstances where representation is contested or there is a diversity of competing institutions, the identification of a single representative institution may not be possible. In

broad national consultations, there will be a need to take an inclusive approach, allowing for participation of the diversity of organizational expressions. In more specific consultations, the scope of consultations should be determined on the basis of the impact assessments stipulated in Article 7(3) of the Convention. Ensuring that the institutions concerned are representative may in some cases also imply going beyond traditional institutions. For instance, the Convention requires that its provisions should be applied equally to women and men, but in some cases indigenous women may not have a voice in traditional decision-making.

If the institutions consulted are not considered representative by the people they claim to represent, the consultation may have no legitimacy. “If an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention” (ILO Governing Body, 282nd session, 2001, GB.282/14/2).

Further, the Convention provides in Article 6(1)(c) that government shall “establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose”.

When it comes to determining what institutions are representative, the ILO supervisory bodies have stated that “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”

Governing Body, 289th session, 2004, document GB.282/17/3

WHAT ARE APPROPRIATE PROCEDURES?

The requirement that consultations should take place through appropriate procedures implies that consultations should take place in a climate of mutual trust. In general, Governments need to recognize representative organizations and both parties should endeavor to reach an agreement, conduct genuine and constructive negotiations, avoid unjustified delays, comply with the agreements which are concluded and implement them in good faith. Governments also need to ensure that indigenous peoples have all relevant information and that it can be fully understood by them. Sufficient time must be given to allow indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken, in a manner consistent with their cultural and social traditions. Thus, consultation often means establishing an intercultural dialogue. This means making a real effort to understand how indigenous peoples’ cultures and traditional decision-making processes function, and adapting the form and timing of consultation to these.

Procedures are thus considered appropriate if they create favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained. General public hearing processes would not normally be sufficient. The form and content of the consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so they may be able to affect the outcome and a consensus could be achieved, and be conducted in a manner that is acceptable to all parties. The Committee of Experts has emphasized that there should be a periodic evaluation of the operation of the consultation mechanisms, with the participation of indigenous peoples, with a view to continuing to improve their effectiveness.

IS THERE A REQUIREMENT TO REACH CONSENT?

As stipulated by Article 6(2), consultations must be undertaken in good faith and with the objective of obtaining agreement or consent. In this sense, Convention No. 169 does not provide indigenous peoples with a veto right, as obtaining the agreement or consent is the purpose of engaging in the consultation process, and is not an independent requirement. On the other hand, the ILO supervisory bodies have clearly stated 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 adequate implementation of the right to consultation thus implies a qualitative process of good faith negotiations and dialogue, through which agreement and consent can be achieved if possible. Here again, it is appropriate to underline the interconnection between broad and specific consultations. If indigenous peoples' rights, concerns and aspirations are reflected in legislation and broader policies, it will likely be easier to reach agreement and consent on specific measures or projects affecting their lands and territories. It must also be highlighted that even if the consultation process has been concluded without agreement or consent, the decision taken by the State must still respect the substantive rights recognized by the Convention, e.g. indigenous peoples' rights to land and to property. The more severe the potential consequences are for the concerned indigenous peoples, the greater is the importance of obtaining agreement or consent. If, for instance, the continued existence of an indigenous culture is at stake, the need for consent to proposed measures is more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences.

Convention No. 169 in its Article 16, paragraph 2 provides for "free and informed consent" of indigenous and tribal peoples where relocation of these peoples from lands which they occupy is considered necessary as an exceptional measure.

DOES CONSULTATION HELP TO PREVENT CONFLICT?

Effective consultation and participation are principles of good governance and are means to reconcile different interests and pursue objectives of inclusive democracy, stability and economic development. In contrast, the lack of effective consultation will often lead to further exclusion and, in the worst cases, conflicts and confrontations. Convention No. 169 has twice been ratified as an integral element of peace accords, to put an end to civil wars that were rooted in the exclusion of certain sectors of the population (Guatemala, 1996; Nepal, 2007). At the local level, consultation is the mechanism for establishing dialogue and facilitating agreements. Likewise, where the ILO supervisory bodies have analyzed specific situations of conflict, it has been clear that these conflicts emerged when the provisions on consultation and participation had not been adequately implemented.

WHAT ARE THE BARRIERS FOR CONDUCTING CONSULTATIONS?

A key obstacle to effective consultation is the situation of exclusion and mistrust, which often exists between indigenous peoples and States. As expressed by a Tripartite Committee of the Governing Body in the context of a particular country, "...the climate of confrontation, violence and lack of mutual trust stopped the consultations from being conducted more productively. It is imperative in all consultations to establish a climate of mutual trust, but all the more so with respect to indigenous peoples, given their lack of trust in state institutions and their feeling of marginalization, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome".

There are other reasons related to the failure to consult adequately, including the fact that widespread recognition of this right is fairly recent and both governments and indigenous peoples are in the process of developing appropriate institutions and modalities for consultations. As noted by the CEACR in its general observation, “[i]n certain cases, agencies have been established with responsibility for indigenous or tribal peoples’ rights, however, with little or no participation of these peoples, or with insufficient resources or influence. For example, the key decisions affecting indigenous or tribal peoples are in many cases made by ministries responsible for mining or finance, without any coordination with the agency responsible for indigenous or tribal peoples’ rights. As a result, these peoples do not have a real voice in the policies likely to affect them. While the Convention does not impose a specific model of participation, it does require the existence or establishment of agencies or other appropriate mechanisms, with the means necessary for the proper fulfillment of their functions, and the effective participation of indigenous and tribal peoples. Such agencies or mechanisms are yet to be established in a number of countries that have ratified the Convention” (CEACR 2008, published 2009).

WHAT DOES THE CONVENTION SAY ABOUT PARTICIPATION?

The concept of participation is closely linked to that of consultation. In a general manner, Convention No. 169 states in Article 6(1) that governments shall “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”.

The Convention thus recognizes that indigenous peoples often are in a disadvantaged position, which hinders their equal participation. This happens, for example, in the numerous cases where indigenous peoples, and in particular women, do not have recognized citizenship or identification documents, which would allow for their participation in elective processes. In other cases, electoral rules do not allow for minority representation, implying that indigenous peoples may be effectively excluded from participating in decision-making.

In addition, Article 7(1) of Convention No. 169 specifically stipulates that indigenous peoples shall “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”. Further, Article 33 of the Convention requires governments to establish agencies or other appropriate mechanisms to ensure “the planning, coordination, execution and evaluation, in cooperation with the peoples concerned, of the measures provided for in this Convention”.

Convention No. 169 contains numerous references to the concept of participation and also uses other terms such as the obligation to “cooperate” with indigenous peoples; the obligation not to take measures contrary to the “freely- expressed wishes” of indigenous peoples; and the obligation to seek “free and informed consent” of indigenous peoples where “relocation...is considered necessary as an exceptional measure”.

Members of indigenous peoples shall benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.

Enjoyment of the general right of citizenship, without any discrimination, shall not be prejudiced in any way by special measures established to safeguard the persons, institutions, property, labour, cultures and environment of indigenous peoples.

See articles 2(2) (a) and 4(3) of Convention No. 169.

**WHAT IS THE LINK BETWEEN CONSULTATION AND PARTICIPATION?**

The right to consultation of indigenous peoples is not limited to the right to react to externally initiated or imposed measures. The ILO supervisory bodies have underlined the interconnectedness of the concepts of consultation and participation. This implies that indigenous peoples should not only respond and be able to influence externally initiated proposals, but should actively participate and propose measures, programmes and activities that shape their development. Participation implies going further than mere consultation and should lead to concrete ownership of initiatives by indigenous peoples. In this sense, the intertwined concepts of consultation and participation are the mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development, as stipulated in Article 7(1) of the Convention.



1. Recognition of Sami rights in Norway

The Sami are an indigenous people, whose territory (Sápmi) is spread across four different States (Finland, Norway, the Russian Federation and Sweden) since the drawing of national boundaries in 1751 (Sámediggi, undated).

In Norway, the Sami population is estimated at some 50,000–65,000. As noted by the Sami expert John B. Henriksen:

These figures are estimates only as the national censuses do not include a specific component on ethnic identity thereby making it difficult to give accurate estimates. The Sami in Norway are spread over wide parts of the country so that many of the traditional Sami areas appear today as Sami enclaves. However, in the county of Finnmark the Sami constitute a significant part of the total population; in particular in municipalities in Inner Finnmark where they are in majority (Henriksen, 2008: 7).

The traditional Sami livelihood, based on reindeer herding, involves seasonal migration. Until 1965, Norwegian law only allowed Norwegian citizens to buy land, and preference was given to persons who used the Norwegian language (Sámediggi, 2011). As Henriksen explains: “Sami traditional ownership of lands and resources was regarded as irrelevant in legal terms, as their immemorial occupation and use of land and resources did not establish any right under the Norwegian system” (Henriksen, 2008: 7).

This, as noted by Roy and Henriksen, had the further consequence that:

In Norway, there is no clearly defined Sami Homeland area (...). This is largely due to historical factors, among others. The Sami in Norway are spread over wide parts of the country so that many of the traditional Sami areas appear today as Sami enclaves. The Sami in Norway have also been reluctant to attempt to define such a geographic area for fear that some Sami settlement areas would be excluded (Roy and Henriksen, 2010: 7).

In general, legislation and policy in Norway were aimed at the “Norwegianization” (*fornorsking*) of the Sami. This remained the case until 1956, when a committee was set up to propose measures to strengthen the Sami minority economically, socially and culturally (Roy and Henriksen, 2010: 7). Although the committee’s proposals were not followed, there was growing acceptance of the Sami as a minority in Norway in the 1960s and 1970s. In 1967, education in the Sami language was recognized as a right and, in 1973, the Nordic Sami Institute was opened as a research establishment (Roy and Henriksen, 2010: 7).

In 1978, the Norwegian Government decided to establish a hydropower plant in Alta, a key area for the grazing of Sami reindeer. The Sami population protested against the plant but, in 1981, the Sami protestors were removed by a force of 600 Norwegian police. The event caught international attention and triggered a shift in Norway’s policy, as the Government saw the need to accommodate Sami claims for rights.

In 1984, the Sami Rights Committee (Samerettsutvalget) presented its report, which provided for the adoption in 1987 of the Sami Act (*Lov om Sametinget og andre samiske rettsforhold* – “Sami Parliament and Other Sami Legal Matters Act”). The Act recognizes the Sami as an indigenous people and establishes that the Sami people are to have their own nationwide Sami Parliament (Sámediggi), elected by and among the Sami population (Sami Act, 1987, Article 1, paragraph 2).

The Sami Act was subsequently reflected in the Norwegian Constitution, which was amended in 1988 to stipulate that “[i]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life” (article 110a of the Norwegian Constitution).²

The Sámediggi was established in 1989. The rationale for the establishment of the Sámediggi was that the Sami constitute a minority in Norway and therefore will not be represented in ordinary democratic organs, which are based on majority democracy. In addition, as an indigenous people, the Sami have the right to control their own future by preserving and developing their language, culture and way of life (Sámediggi, undated).

The mandate of the Sámediggi is “any matter that in the view of the parliament particularly affects the Sami people”. In addition, the Sámediggi “may on its own initiative raise and pronounce an opinion on any matter coming within the scope of its business. It may also on its own initiative refer matters to public authorities and private institutions, etc.” (Sami Act, 1987, Article 2, paragraph 1).

The Sámediggi website goes on to explain that the business of the Sámediggi covers all types of questions regarding rights in all spheres of society. The Sami have various sets of rights: as individuals, as a distinct people and as an indigenous people. The Sami have customary rights to their traditional land and waters and rights to the resources pertaining to these areas, which constitute the collective material basis for their culture. These rights also concern matters such as language, education, health and the administration of their cultural heritage (Sámediggi, undated).

In 1990, Norway became the first country to ratify ILO Convention No. 169. Norway thereby committed itself to complying with a legally binding instrument of international law concerning the rights of indigenous peoples, with institutionalized supervisory bodies. Since then, the provisions of the Convention, along with the comments issued by the ILO supervisory bodies to Norway, have constituted major reference points in the process of elaborating legislation and procedures in Norway to uphold the rights of the Sami people.

Soon after ratification, divergent understandings of the Convention’s provisions regarding land rights emerged. As explained by Henriksen:

² In 2014 the Constitution was amended and, as a consequence of those amendments, article 100a became new article 108, with a slightly different wording, viz.: “The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life.” (See: <https://www.stortinget.no/globalassets/pdf/constitutionenglish.pdf>). As the references in this text are to the pre-2014 text, in the interests of consistency, the article will be cited throughout as “article 110a”.

The Government and the Sámediggi in Norway differed in their understanding of the substantive content of article 14 of the Convention [concerning land rights]. The Government interpreted its obligations under article 14 to be limited to ensuring a strongly protected usufruct right to lands and natural resources for the Sami, whereas the Sámediggi believed the State is obliged to recognize and protect Sami rights of ownership and possession, as well as usufruct rights. The difference between the positions of the Government and the Sámediggi as far as the land rights provisions were concerned established serious constraints for their cooperation and dialogue within the framework of the periodic reporting to the ILO (Henriksen, 2008: 5).

In April 2003, the Norwegian Government submitted a bill to the national parliament on the regulation of land rights in Finnmark (the Finnmark Act). As noted by Henriksen:

The proposal was strongly criticised by Sami institutions, legal experts and international entities for not meeting the international legal requirements for recognition and protection of Sami rights. This forced the National Parliament to enter into a direct dialogue with the Sámediggi regarding the contents of the Act (Henriksen, 2008: 9).

The guidance provided by ILO Committee of Experts on the Application of Conventions and Recommendations played a key role in helping the parties to appreciate the obligations under Convention No. 169. The Committee noted in its comments to Norway in 2003:

In light of the differing interpretations of what was occurring, the Committee cannot be sure whether the consultations at this time remained open to the Sámediggi being able to influence their outcome; it is apparent that there was a breakdown in confidence between the two sides, though sporadic consultations were still being held in a different form from previously (CEACR, 2003: 15).

The Committee of Experts also emphasized the importance of a process leading to a correct interpretation of the adequacy of the contents of a given proposal:

The process and the substance are inextricably intertwined in the requirements of the Convention, and in the present conflict. It appears to the Committee that if the Sámediggi, as the acknowledged representative of the Sami people of Norway, were to agree to the proposal, they could accept this solution as a resolution of the claims of land rights which have long been the subject of negotiation between the Sami and the Government. The adoption of the Finnmark Estate without such agreement amounts, however, to an expropriation of rights recognized in judicial decisions in Norway and under the Convention (CEACR, 2003: 19).

Over the course of 2004, the Government renewed its efforts to consult the Sámediggi and in June 2005, the “dialogue process concluded with the adoption of a radically revised and amended Finnmark Act by the National Parliament” (Henriksen, 2008: 9).

Given the controversies about consultation procedures in the process leading to the adaptation of the Finnmark Act, the Sámediggi and the Norwegian Government agreed that continued debate about the interpretation of the duty to consult was undesirable. Accordingly, in March 2004, it was agreed to establish a joint working group, comprising two representatives of the Sámediggi and three representatives of the Ministry of Local Government and Regional Development (Kommunal- og regionaldepartementet – KR D). The mandate of the working

group was to clarify the legal basis for the State's duty to consult the Sami and to elaborate a proposal for consultation procedures (Norway, 2006: 2–3). The working group was established at the administrative level, with the task of elaborating a report for discussion at the political level. The ensuing report is the joint work of the working group, but provides for separate comments provided by either the members appointed by the KRD or the Sámediggi, as necessary.

The working group issued its report in April 2005 (KRD/Sámediggi, 2005). The report clarified the legal basis for the Sami right to consultation and provided draft procedures for consultations between State authorities and the Sámediggi. The procedures were jointly signed by the Minister for Local Government and Regional Development and the President of the Sámediggi on 11 May 2005. Subsequently, the plenary of the Sámediggi gave its consent to the procedures on 1 June 2005. Following that, on 28 June 2005, a Royal Resolution affirmed that the consultation procedures would apply to the entirety of the State administration (Kongelig Resolusjon, 04/186, 28.06.2005).

On 23 June 2006, guidelines for State authorities' consultations with the Sámediggi and any other Sami interests were issued by the Ministry for Labour and Social Inclusion (Norway, 2006). The guidelines provide operational guidance to concerned authorities.

In its comments to Norway, the ILO Committee of Experts welcomed the consultation procedures:

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 (CEACR, 2009).



2. Contents of the consultation procedures

According to the 2005 consultation procedures, their objective is to:

- contribute to the implementation in practice of the State's obligations to consult indigenous peoples under international law
- seek to achieve agreement between State authorities and the Sámediggi whenever consideration is being given to legislative or administrative measures that may directly affect Sami interests
- facilitate the development of a partnership perspective between State authorities and the Sámediggi that contributes to the strengthening of Sami culture and society
- develop a common understanding of the situation and developmental needs of Sami society (Norway, 2005: 1).

The following sections will further describe and explore the rights and recognitions underpinning the consultation procedures, the key actors and scope of application of the duty to consult, together with the substantive and procedural requirements and the general procedures to be followed.

2.1. Underlying rights and recognition

2.1.1. Recognition of the State's duty to consult the Sami

The consultation procedures are based on article 110a of the Norwegian Constitution, and Norway's international human rights obligations, including ILO Convention No. 169 (Roy and Henriksen, 2010: 7; KRD/Sámediggi, 2005: 3).

In its report, the joint Sami-Government working group concluded that article 110a of the Constitution is both a directive for the State authorities and an element to be taken into account in questions relating to the interpretation of Sami rights. The provision has been understood to mean that the Sami themselves should preserve and develop their language, culture and way of life (KRD/Sámediggi, 2005: 20). In addition, the report states that article 110a of the Constitution also establishes a legal guarantee from the State that Norway's commitments to the Sami under international law will be respected and implemented (KRD/Sámediggi, 2005: 20).

Norway's most explicit commitment to indigenous peoples' rights is, of course, its ratification of ILO Convention No. 169, but the working group report also reviewed a number of other international standards which were seen as underpinning the State's duty to consult the Sami in Norway, such as the International Covenant on Civil and Political Rights (UN, 1966). The Covenant is incorporated in Norwegian legislation through the 1999 Human Rights Act.³

³ The Human Rights Committee, which is the ICCPR treaty body, stressed in relation to Article 27 the importance of enacting positive legal measures to protect the land resources and traditional activities of minorities, and also measures to ensure the effective participation of members of minority communities in decisions that affect them (see Human Rights Committee, 1994).

2.1.2. Recognition of the Sami as an indigenous people

The consultation procedures are premised on the recognition of the Sami as an indigenous people in the context of international law.

The 2006 guidelines for consultation make explicit reference to Article 1 (b) of the Convention,⁴ concluding that in Norway the Sami clearly comply with the criteria for being considered an indigenous people (Norway, 2006: 2).

In addition, the Convention indicates that self-identification as indigenous “shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply” (Article 1, paragraph 2). This criterion is also met in the case of the Sami.

2.1.3. Rationale

The consultation procedures clearly respond to obligations of the Norwegian State both under the Constitution and under international and domestic law. As described in section 1.2 above, however, on the process leading to the adoption of the procedures, it also became clear to both the Sámediggi and the Norwegian State authorities that a more systematic approach to consultations would avoid misunderstanding and help prevent conflicts. The 2006 guidelines specify that consultations between the Sámediggi and the authorities may mean that the decision-making processes are more time-consuming than usual. The conduct of satisfactory consultations will ensure, however, that the subsequent implementation of the measures concerned is both smoother and faster. Decisions based on questionable legitimacy, at either the local or the international level, may be difficult to implement. In addition, such lack of legitimacy may also create the need for further consultations, which increase the time and the costs related to the processes even more (Norway, 2006: 3).

2.1.4. Link to participation and self-governance

The link between the provisions of Convention No. 169 regarding consultation (primarily Article 6) and participation in the context of self-governance (primarily Article 7, paragraph 1) is discussed in the 2005 report of the working group, which, as translated from the original Norwegian, reads as follows:

Article 7, paragraph 1 [of Convention No. 169] contains several of the same formulations as Article 1 of the International Covenant on Civil and Political Rights, in accordance with which [all] peoples, pursuant to their right to self-determination, have the right to determine their political status and freely pursue their economic, social and cultural development. Article 7, paragraph 1 gives expression to the principle that indigenous peoples themselves, to the extent possible, should exercise control over their own development, and the application of this article thus differs from the duty to consult enshrined in Article 6. These provisions are closely interconnected, however, and must be interpreted in relation to one another.

(...)

⁴ Article 1 (b) of Convention No. 169 indicates that the Convention applies to “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”.

[Article 7 of ILO Convention No. 169] does not mean that indigenous peoples have the right of veto in respect of plans that concern the entire country. It does require, however, that real consultations be undertaken with representatives of the concerned indigenous people, which has the right to express its view and to influence the outcome.

The right [of all peoples] to determine their own priorities for the process of development does not mean that only these priorities should be considered, but this article [7.1] stipulates that the Sami “to the extent possible shall exercise control over their own economic, social and cultural development”. When this provision was adopted, it was assumed that the formulation “to the extent possible” should be interpreted with the flexibility provided for by Article 34 [of Convention No. 169] (KRD/Sámediggi, 2005: 11–12).

In its Article 2, paragraph 1, Convention No. 169 also expressly requires the Government to develop “coordinated and systematic action” to protect the rights of indigenous peoples, “with the participation of the peoples concerned” (ILO, 1989).

The Convention highlights the need for participation of the concerned indigenous peoples. The working group report consequently notes that it is clear from the preparatory work for Convention No. 169 that the provisions of Article 2, paragraph 1 are designed to establish the State’s responsibility to develop a collaborative relationship with indigenous peoples through which such peoples have the opportunity, in an active and systematic manner, to participate in the work of protecting their rights. This, the report concludes, cannot happen without effective consultations (KRD/Sámediggi, 2005: 13).

The 2006 consultation guidelines provide for a dual approach to consultation and participation, for example in the context of legislative proposals on which consultations should be held with the Sámediggi, but go on to stress the importance of ensuring that Sami representatives can participate in legislative committees on issues of great significance for the Sami. The guidelines point out that the participation of Sami representatives will not constitute consultations as such, but will mean that Sami interests are considered from the outset and will hence facilitate the consultations (Norway, 2006: 12).

The link between consultation and participation is also emphasized in the report of the UN Special Rapporteur on Indigenous Peoples, James Anaya, who notes as follows in his report about the Sami in the Nordic countries:

Along with effective means of consultation, an essential element of indigenous peoples’ self-determination is their ability to exercise autonomy or self-government over their internal and local affairs, as affirmed by the Declaration on the Rights of Indigenous Peoples (art. 4). A common concern communicated to the Special Rapporteur was the limited ability of the Sami parliaments to act independently and to make autonomous decisions over matters that concern Sami people due to the statutory parameters of their powers and functions. The Special Rapporteur understands that increasing the Sami parliaments’ autonomous decision-making power may require some significant legal and policy changes at the national level. However, the Nordic States, in consultation and agreement with Sami parliaments, should consider delimiting spheres of responsibility in which the Sami parliaments could have increased or sole independent decision-making authority, especially in matters of major importance to the Sami. This should be done along with strengthening recognition of the traditional decision-making authority of local Sami institutions, like the *siidas* (Anaya, 2011: 41).

2.2. Key actors and scope of application

2.2.1. Responsibility for undertaking consultations

Ensuring adequate consultations with indigenous peoples, in the context of Convention No. 169, is the express responsibility of the State.

In its 2005 report, the working group explains that ILO Convention No. 169, including its Article 6, basically concerns the duties of the Government. This should be understood to mean that the duty to consult applies not only to the Government and the ministries but also to directorates and other organs of State administration with delegated responsibilities. Within their respective areas of responsibility, municipalities and counties, also have the duty to contribute to meeting the obligations that Norway has assumed under international law, including the duty to consult the Sami. Although it has no obligation to do so, it might be appropriate in certain situations for the Storting – the Norwegian Parliament – also to conduct such consultations (KRD/Sámediggi, 2005: 9).

Accordingly, the consultation procedures stipulate that the procedures apply to the Government and its ministries, directorates and other subordinate State agencies or activities (Norway, 2005: 2).

In its Article 2, paragraph 1, Convention No. 169 emphasizes the need for governments to act in a coordinated and systematic manner. In the Norwegian context, this requirement is reflected and operationalized in the 2005 consultation procedures and the 2006 guidelines, which stipulate that it is the Ministry of Labour and Social Inclusion that bears overall responsibility for elaborating and coordinating the State's Sami policy⁵ (Norway, 2006).

Where specific consultations are concerned, the guidelines specify that the individual line ministries or enterprises concerned have the responsibility for consultations within their areas. These individual bodies are the best informed about their own areas, and this also tallies with the Government's principle of sector responsibility, which means that the individual sector authority has responsibility within its area for all groups of the population. The Ministry of Labour and Social Inclusion can assist the line ministries with advice on how the consultations should be undertaken and it has the right to participate in the consultation meetings upon request.

The guidelines further indicate that, given the need for the State to act in a coherent manner, it must be possible for ministries to engage in a preliminary discussion of issues before the Sámediggi is involved. They also point out that it will often be desirable for representatives of other relevant State authorities to participate in the consultation meetings (Norway, 2006: 11).

⁵ Since 2014 the Ministry of Local Government and Modernisation (Department of Sami and Minority Affairs) has been responsible for the consultation procedures and the coordination of the Government's policy towards the Sami. Previously these responsibilities lied with the following ministries:

- The Ministry of Government Administration, Reform and Church Affairs (2010 – 2013)
- The Ministry of Labour and Social Inclusion (2006-2009)
- The Ministry of Local Government and Regional Development (1998-2005)

The guidelines clarify that the procedures do not apply to municipalities. The Ministry of Labour and Social Inclusion will take the initiative to further explore how Sami interests can be adequately considered in the context of municipal proceedings. In cases where the State has delegated authority to the municipalities, the consultation procedures may apply to those municipalities. The procedures are also applicable to State businesses and State enterprises, to the extent that these exercise administrative authority pursuant to delegation from a higher-level State authority (Norway, 2006: 6).

The guidelines also provide guidance for cases where consultations are undertaken by subordinate instances that do not necessarily have the full decision-making power. They indicate as follows: in cases that are being prepared by lower-level authorities but where the decisions are to be taken by higher-level authorities, the assessment of whether the State has complied with its duty will have to take into consideration the consultations undertaken by the various authorities concerned. This means that, in cases where the lower-level authority and the Sámediggi have reached agreement and the decision is not subsequently changed by the higher-level authority, no further consultations by the higher-level authority are required. It is important that information conveying the particular viewpoint of the Sámediggi and the outcome of consultations should always accompany the case in further proceedings.

When a lower-level authority knows that the higher-level authority has views that differ from those of the Sámediggi, it should from the outset clarify the situation with that higher-level authority, or ensure that the consultations are undertaken directly with the higher-level authority (Norway, 2006: 13).

In addition, the guidelines draw attention to the need to establish regular consultations with individual State authorities. They stipulate that, in areas where consultations are often required (e.g. in the context of conservation plans and energy projects), it may be desirable for the concerned authority and the Sámediggi jointly to develop standard procedures. In such cases, the Ministry of Labour and Social Inclusion will be able to assist with the elaboration of these procedures (Norway, 2006: 13).

The 2006 guidelines also provide guidance for cases that are being referred by the ministries concerned to the Government. In these cases, the guidelines stipulate the need for the ministries to note that consultations have been conducted with the Sámediggi, and to indicate the viewpoints of the Sámediggi and the outcome of the consultations. The procedures do not imply a general requirement that the ministries must continue consultations after the issues have been referred to the Government, but the consultations should not be concluded as long as it is believed that it is possible to reach agreement on solutions (Norway, 2006: 12).

2.2.2. Consultations with representative institutions

As mentioned in section 1 above, the Sámediggi was established in 1989, as a key element in complying with the constitutional provision to “create conditions enabling the Sami people to preserve and develop its language, culture and way of life” (article 110a of the Norwegian Constitution).

In its 2005 report, the working group also fully acknowledges the importance of the Sámediggi as the representative Sami institution that will play a key role in consultative processes. The report notes that article 110a of the Constitution can hardly be implemented if the Sámediggi is not involved in processes of significance for Sami culture, language and way of

life. The report also stresses the need to emphasize the necessary significance and role of the Sámediggi as a representative, democratically elected organ for the Sami people when the foundation and procedures for consultations between State authorities and the Sami people are being drawn up (KRD/Sámediggi, 2005).

The report underlines the responsibilities of the Norwegian State vis-à-vis the Sámediggi, as well as the potential for the further strengthening of the Sámediggi, along with the associated challenges, through systematic and structured consultations. In that context, the report points out that the Sámediggi is established as an organ and accorded resources and responsibility by the Storting – the Norwegian Parliament. As such, it is dependent on the central authorities. At the same time, it is elected and given legitimacy by the Sami people through elections, predicated on the conviction that the Sami themselves must have decisive influence on their own development within all areas. This, the report notes, gives the Sámediggi a kind of intermediary position within the Norwegian system of government; a position that can be challenging for both the Norwegian Government, the Sámediggi itself and Sami society. Systematic and structured consultation procedures will be of considerable importance in order to develop and clarify the positioning of the Sámediggi, both within the political system and within society in general.

The report goes on to note that the establishment of consultative arrangements between the central authorities and the Sámediggi will be an important step in ensuring that the Sámediggi functions properly as an independent and comprehensive political organ. The consultative process will strengthen the legitimacy of the Sámediggi in Sami society – an essential precondition for efforts by the central authorities to facilitate the sound and desired development of Sami culture and society (KRD/Sámediggi, 2005: 5).

Accordingly, the consultation procedures and guidelines, from the outset, identify the Sámediggi as the key representative institution to be consulted. The central role of the Sámediggi in pursuing collaborative governance arrangements is reaffirmed in the 2006 consultation guidelines, which note that the consultative arrangements will also contribute to strengthening the legitimacy of the Sámediggi and will lead to a better understanding of the situation and the needs in Sami communities. The guidelines stress that such consultative arrangements will also lay the foundation for a partnership between the State authorities and the Sámediggi, which in turn will help to strengthen Sami culture (Norway, 2006: 3).

The guidelines further note that the consultative arrangements also confer responsibilities on the Sámediggi, emphasizing that these will be binding on the Sámediggi. For example, it is foreseen that the Sámediggi must give clear feedback within agreed deadlines on the proposals put forward by the State (Norway, 2006: 3).

The guidelines also acknowledge the need for the Sámediggi to undertake further consultations with Sami communities and organizations. They stipulate that, in cases prepared by lower level State authorities, it will usually be a precondition for successful consultations with the Sámediggi that the Sámediggi should be informed in advance about how the issue in question is viewed by communities and organizations. Hence, it is important that the Sámediggi is informed about the case as early as possible and it may not be advisable to initiate consultations before it is clarified how the case is viewed by the various Sami parties involved (Norway, 2006: 13).

Beyond the procedures for consultations with the Sámediggi, State authorities also have a duty to consult other Sami bodies, in particular in cases that directly affect Sami occupations such as, for example, reindeer husbandry (Norwegian government website, undated). The 2005 consultation procedures are agreed between the State and the Sámediggi and therefore only regulate the State's relationship with the Sámediggi. The duty to consult under Article 6 of ILO Convention No. 169 applies, however, to the "peoples concerned", in particular through their representative institutions. Hence, in individual cases, there may be a duty to consult others in addition to the Sámediggi. This applies in particular to cases which directly concern Sami occupations, such as reindeer husbandry (Norway, 2006: 3–4).

In such situations the Sámediggi is still involved in a coordinating role. The 2005 consultation procedures stipulate:

In matters where State authorities plan to consult local Sami communities and/or specific Sami entities or interests that may be directly affected by legislation or administrative measures, State authorities shall as early as possible notify which Sami entities or organizations it regards as affected by the matter, and discuss the coordination of such consultation processes with the Sámediggi (Norway, 2005: 9).

2.2.3. Matters that affect the Sami directly

In line with Article 6, paragraph 1 (a), of Convention No. 169, the 2005 consultation procedures stipulate that these apply "in matters that may affect Sami interests directly" (Norway, 2005: 2). The procedures further establish that "State authorities shall as early as possible inform the Sámediggi about the commencement of relevant matters that may directly affect the Sami, and identify those Sami interests and conditions that may be affected" (Norway, 2005: 6).

The 2006 consultation guidelines further explain that the requirement that a matter must affect Sami interests directly also implies that the matter in question must have a certain general relevance to Sami culture. Hence, there will not be a duty to consult in every case which has a direct effect on one or several Sami individuals, if the effect in question is not also related to Sami culture (Norway, 2006: 6).

Consequently, as stated in the 2005 consultation procedures, "[m]atters which are of a general nature, and are assumed to affect the society as a whole shall in principle not be subject to consultations" (Norway, 2005: 2).

The 2006 guidelines also specify that, in cases where it is not clear whether the Sami will be affected directly, it may be appropriate to depart from the Sámediggi's own assessment of what may or may not directly affect the Sami and whether or not it wishes to initiate consultations (Norway, 2006: 7).

According to the 2006 consultation guidelines, this principle does not mean that matters for consultation must exclusively concern the Sami, but they must be matters of particular interest to the Sami. There could, for example, be a duty to consult in certain matters relating to fishing, since fishing is and has always been an important occupation for the Sami – even though it is also an important occupation for many other Norwegians. In cases of a general nature, which can be assumed to influence the entire society, such as taxation, pensions, etc., the duty to consult will basically not apply (Norway, 2006: 6).

In addition, the 2006 guidelines foresee that there will be cases in which the State authorities are in doubt of whether there is a duty to consult. Initially, it will be natural to contact the Sámediggi or the Ministry of Labour and Social Inclusion (now the Ministry of Local Government and Modernisation) if there are such doubts. As more experience is gained with the consultation arrangement, a practice will be established regarding the types of cases which should entail consultations (Norway, 2006: 8–9).

2.2.4. Geographical and substantive scope of the duty to consult

In its 2005 report, the working group clearly establishes the relationship between Norway's duty to consult and the requirements under Convention No. 169, explaining that the duty to consult under Article 6, paragraph 1 of the Convention covers legislative and administrative measures.

It further explains as follows:

The substantive scope of consultations may include various issues, such as legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions (e.g. in governmental reports to the Norwegian Parliament, the Storting) (Norway, 2005: 2).

With regard to the geographical scope of the duty to consult, the 2005 procedures specify the following:

The obligation to consult the Sámediggi may include all material and immaterial forms of Sami culture, including music, theatre, literature, art, media, language, religion, cultural heritage, immaterial property rights and traditional knowledge, place names, health and social welfare, day care facilities for children, education, research, land ownership rights and rights to use lands, matters concerning land administration and competing land utilization, business development, reindeer husbandry, fisheries, agriculture, mineral exploration and extraction activities, wind power, hydroelectric power, sustainable development, preservation of cultural heritage, biodiversity and nature conservation.

In matters concerning the material basis for the Sami culture, including land administration, competing land utilization, and land rights, the obligation to consult the Sámediggi is applicable to traditional Sami areas (Norway, 2005: 2).

The procedures identify four entire counties and 21 municipalities distributed within three other counties as traditional Sami areas.

In turn, the 2006 guidelines further clarify that, in cases related to land dispositions, land interventions and land rights, the duty to consult will apply within traditional Sami areas. In other types of cases, for example, those concerning language and culture, the duty to consult will not be related to geography in the same way. It is difficult to determine precisely which the traditional Sami areas are. The Sami use and settlement area is vast, ranging from Hedmark in the south to Finnmark in the north. Consideration must also be given to Sami interests in areas with historical Sami settlements, where Sami culture today is weak and its visibility has been diminished by the policy of Norwegianization (Norway, 2006: 8).

Where individual administrative decisions are concerned, the 2006 guidelines specify that, in practical terms, the need to consult the Sámediggi concerning individual administrative

decisions will only arise in exceptional circumstances. In land-use cases [*arealsaker*], this may arise in the context of major interventions, such as the development of wind or water power plants, of the construction of roads or holiday houses. Consultations will not be necessary, however, about individual administrative decisions concerning such matters as logging licences, etc., made by the *rowiltnemndene*, or “predatory animal boards”. In cases other than those concerning land use, it can generally be assumed that there is no duty to consult. The threshold for consultations in individual administrative decisions may be lower in cases concerning reindeer husbandry (Norway, 2006: 8).

The duty to consult indigenous peoples in the context of the exploration and exploitation of natural resources is highlighted in particular in Article 15, paragraph 2, of ILO Convention No. 169. This is also emphasized in the 2006 consultation guidelines, which observe that, in many cases which may directly affect the Sami, there may be different interests that are in strong contrast with one another, relating for example to the exploitation of natural resources where huge economic interests are involved. It is nevertheless a requirement under the ILO Convention that consultations are undertaken (Norway, 2006: 7).

The 2006 working group report notes that there may also be a duty to consult when entering into international agreements and ratifying international instruments which may affect the Sami directly (Norway, 2006: 7).

2.3. The objective of achieving agreement or consent

ILO Convention No. 169 states that “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” (Article 6, paragraph 2).

In this regard, the 2005 consultation procedures establish that:

The consultations carried out with the Sámediggi, in application of the agreement on consultation procedures, shall be undertaken in good faith, with the objective of achieving agreement to the proposed measures (Norway, 2005: 6).

The 2006 guidelines reaffirm the need for consultations to be undertaken in good faith and with the objective of achieving agreement to the proposed measure. This means that consultations are more than just hearings and that the parties must endeavour, in sincerity and with fairness, to achieve agreement. It also means that there is a duty to undertake consultations and to seek agreement even if a State authority deems this unlikely. Under the guidelines it is not, however, a requirement that agreement or consent is always achieved. The extent of the consultations to be undertaken in specific cases in fulfilment of the duty to consult may vary. What is important, however, is that procedures are set in place that provide the Sámediggi with an opportunity to exert real influence on the process and the result. A simple information meeting will thus not normally meet the consultation requirement (Norway, 2006: 10).

The 2005 consultation procedures further note that:

When necessary, provisions shall be made for further consultations. Consultations shall not be discontinued as long as the Sámediggi and State authorities consider that it is possible to achieve an agreement (Norway, 2005: 6).

These procedures pursue a “partnership approach” with a focus on both process and outcome, which could eventually minimize disagreements while retaining the State’s final decision-making powers. Thus, they will increasingly facilitate a partnership approach between State authorities and the Sámediggi. It is still the State, however, that has the legal competence and responsibility for making the final decisions (Norway, 2006: 5).

The 2006 guidelines provide further orientation on the procedural requirements by stipulating that, in order to comply with the duty to consult, the parties must be informed of each other’s opinions and assessments. For its part, the State shall ensure that its interests and views are communicated and understood, and that it has understood the views of the Sámediggi. The Sámediggi has a corresponding responsibility to convey its views. Where the parties do not agree, it is further required that they assess which partial solutions can be adopted and changes made to the original proposal, in order to bring the parties closer together.

The guidelines further indicate that, if needed, more consultation meetings should be conducted and the cases should not be concluded as long as the Sami Council and the State assume that it will be possible to reach agreement. If the State and the Sámediggi do not succeed in reaching agreement, a clear justification of the parties’ diverging assessments and views must be given.

In this context, the guidelines emphasize the need for the State authorities and the Sámediggi to discuss their preliminary positions. This also means that consultations can be conducted before matters are finally cleared with other concerned State authorities (Norway, 2006: 11).

2.4. Procedural issues

Convention No. 169 underlines that consultations should take place *prior* to decision-making, for example when considering legislative or administrative measures (Article 6, paragraph 1 (a)); prior to the exploration and exploitation of sub-surface resources (Article 15, paragraph 2); when considering land alienation or transmission (Article 17); and prior to relocation (Article 16).

The 2005 working group establishes that the duty to consult applies to all stages of the proceedings of a given case (KRD/Sámediggi, 2005: 10). Consequently, the guidelines establish a regular dialogue mechanism for consultation, alongside procedures for specific consultations.

The 2005 consultation procedures provide the following general provisions for the consultation processes to be undertaken:

After the Sámediggi has been informed on relevant matters, it shall inform the relevant State authority as soon as possible whether further consultations are required.

The Sámediggi can also independently identify matters which in its view should be subject to consultations.

If State authorities and the Sámediggi agree that further consultations shall be held on a specific matter, they shall then seek to agree on a plan for such consultations, including the dates and venues for further contact (e.g. meetings, video-conferences, telephone

contact, exchange of written material), deadlines for responses, whether consultations at the political level are required and the type of political proceedings. Sufficient time shall be allocated to enable the parties to carry out genuine and effective consultations and political consideration of all relevant proposals. In case it is necessary for the Sámediggi to consider and debate the matter concerned in a plenary session, such debate and consideration must be conducted as early as possible in the process.

When necessary, provisions shall be made for further consultations. Consultations shall not be discontinued as long as the Sámediggi and State authorities consider that it is possible to achieve an agreement.

When a matter is submitted for consideration to the Government (Cabinet), the ministerial submission document shall clearly inform other governmental ministries about the concluded agreement with the Sámediggi and, if necessary, also to include information about matters where agreement has not been reached. In governmental propositions and reports to the national parliament, the Storting, on matters where the governmental position differs from that of the Sámediggi, the views and positions of the Sámediggi shall be reflected in the documents submitted (Norway, 2005: 6).

In the particular context of legislative proposals of immense significance for Sami interests, the consultation procedures establish that the plenary of the Sámediggi should be given the opportunity to discuss the matter. The guidelines further emphasize that the Sámediggi has the right to receive full information on all relevant aspects and that the plenary of the Sámediggi must be able to influence the process. This means that preliminary bills must be presented to the plenary. Normally, these would already have been cleared by the Government, since bills are made public through open discussion in plenary session. If the Sámediggi has comments on the substance of such bills, the bills will normally be returned to the Government for further discussion before they are presented again to the Norwegian Parliament (Norway, 2006: 12).

Given that the consultations procedures provide for inclusion of the Sámediggi's views into submission to the Government and the Storting, it is ensured that these views are made known to the public, including in cases where agreement has not been reached.

2.4.1. Flexibility and practicality

The 2006 consultation guidelines provide for some flexibility with regard to adherence to the guidelines, as long as this is mutually agreed to by the parties. Thus, they point out that the consultation procedures are intended as guidance, meaning that the State and the Sámediggi can jointly choose to deviate from them in areas covered by specific rules which, in the estimation of both the ministry concerned and the Sámediggi, safeguard the interests of indigenous peoples just as soundly as the consultation procedures. The guidelines also stress that the State cannot unilaterally choose to not follow the consultation procedures (Norway, 2006: 3).

The guidelines also provide for pragmatism and practical solutions, where possible, stressing the importance for the consultation procedures to be structured in a way that makes it possible for both the State authorities and the Sámediggi to implement them in practice. Cases which can be handled in a simple manner should be handled simply. For example, it should always be considered if it is possible to resolve an issue through telephone contact rather than through meetings (Norway, 2006: 11).

2.4.2. Regular dialogue and consultation

The consultation procedures provide for institutionalized and regular mechanisms for high-level dialogue and consultation between the State and the Sámediggi. To that end, they stipulate as follows:

Regular half-yearly meetings shall be held between the Minister responsible for Sami affairs and the President of the Sami Parliament. Other governmental ministers may attend these meetings when required. At these meetings, the situation and developmental needs of Sami society, issues of fundamental and principal importance, and ongoing processes, shall be discussed.

Regular half-yearly meetings shall also be held between the Sami Parliament and the Interministerial Coordination Committee for Sami Affairs. Among other things, information about relevant current Sami policy matters shall be provided at these meetings (Norway 2005: 5).

The ministry responsible for Sami affairs, as indicated in the 2006 guidelines, should send out written material to other concerned ministries well in advance of the biannual meetings. Ministries which have cases that they wish to raise at the meeting must inform the ministry well in advance.

The guidelines also suggest that it may also be appropriate to establish regular meetings between the Sámediggi and subnational State agencies and that these may be agreed upon at a later stage (Norway, 2006: 10).

2.4.3. Information disclosure, documentation and knowledge base

In its Article 6, paragraph 1 (a), Convention No. 169 stipulates that consultations should be undertaken “through appropriate procedures” (ILO, 1989). While such appropriate procedures are not defined in detail in the Convention, Norway’s consultation procedures includes elements such as information disclosure, documentation and the establishment of an appropriate knowledge base as essential components of consultation and decision-making processes. The consultation procedures set out provisions to that effect:

3. Information

State authorities shall fully inform the Sámediggi about all matters that may directly affect the Sami, as well as about all relevant concerns and queries at all stages of the process.

4. Public disclosure

Information exchanged between State authorities and the Sámediggi in connection with consultations may be exempted from public disclosure provided it is authorised by law. The principle of expanded public disclosure shall be practised. The final positions of the parties in individual matters shall be made public.

7. Minutes

Minutes shall be kept of all consultation meetings between State authorities and the Sámediggi. The minutes shall include a brief account of the subject matter, the views and positions of the parties, and the conclusions made at the meeting (Norway, 2005: 3, 4 and 7).

The 2006 guidelines provide further extensive guidance in this area. They specify that the State authority which will prepare legislation or measures must inform and facilitate dialogue with the Sámediggi as early as possible in the process. Early information is a precondition for the Sámediggi to participate and influence the processes and the final outcome. The respon-

sible State authority must, based on its knowledge about the issue, indicate which Sami interests could be affected in the given case. For its part, the Sámediggi has the responsibility to provide feedback on this as soon as possible, and also on whether or not the case raises other issues of significance for Sami interests.

According to the guidelines, good and effective consultations require great openness regarding the various aspects of the case. For that reason, relevant and full information must be provided. The authorities are responsible for providing the information in a way that ensures that the contents of the case are understood. In some cases this may mean that the information must be provided in the Sami language.

With regard to the requirement for complete information, the guidelines indicate that the Sámediggi must receive information about those aspects that are essential for its full understanding of the case and for it to form an opinion on a solid basis. Where legislative proposals of particular significance for Sami culture are concerned, it must be ensured that the Sámediggi has sight of the entire bill before taking a position on it (Norway, 2006: 8–9).

Further, in line with Article 7, paragraph 3, of Convention No. 169 regarding impact assessments,⁶ the guidelines establish that, in some cases, there will be a duty to assess the impact of plans and measures which may have a significant effect on the environment, natural resources or society, in accordance with Norwegian law.

It is recognized, however, that the public disclosure of preliminary exchanges may not always be conducive to agreement. The Public Disclosure Act (*Offentleglova*), which entered into force on 1 January 2009, established in its Article 19 that documents that are exchanged between State institutions and the Sámediggi and Sami organizations as part of consultations in accordance with ILO Convention No. 169 may be exempted from public disclosure (Norway, 2009, Article 19).

Justifying the need for such an exemption, the 2006 guidelines explain that the possibility of exempting documents from public disclosure is likely to be a prerequisite for exchanges of information about ideas and preliminary positions at an early stage in the processing of a case. It is, however, a requirement that the final positions of the parties shall be publicly disclosed (Norway, 2006: 9).

The guidelines also stipulate that minutes of the biannual meetings should be issued, unless both parties agree that this is not necessary. In addition, in cases where it is particularly important to document that agreement has been achieved, a record should also be made of telephone conversations (Norway, 2006: 13).

Lastly, the consultation procedures strongly underline the need to build up a solid knowledge base to inform the consultation and decision-making processes, in accordance with

⁶ Article 7(3) of Convention No. 169 establishes that the “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” (ILO, 1989).

the development needs and aspirations of the Sami people. In this context, the procedures stipulate as follows:

The Royal Ministry of Local Government and Regional Development and the Sami Parliament shall jointly appoint a specialized analysis group which, inter alia, shall submit an annual report concerning the situation and developmental trends of the Sami society on the basis of Sami statistics. The report shall be used as the basis for consultations on specific matters and for consultations concerning the developmental needs of the Sami society at one of the half-yearly meetings between the Minister responsible for Sami affairs and the President of the Sámediggi.

When State authorities or the Sámediggi consider there to be a need for background studies to strengthen the factual or formal basis for assessments and decisions, this shall be raised as early as possible, and both parties shall include questions concerning the terms of reference for such studies into the consultation process. The Central Government and the Sámediggi shall seek to reach an agreement on the terms of reference for such a study, and who shall carry out the study. The Central Government and the Sámediggi are obliged to assist in providing information and materials necessary for carrying out the study (Norway, 2005: 8).

The 2006 consultation guidelines further clarify that statistics provide an important knowledge base for an analysis of the situation and the development needs of society. In order to establish well-functioning consultations between the Government and the Sámediggi, it is essential that the parties are informed to the fullest extent possible about the situation and the development trends in Sami society, thus ensuring a shared understanding of the highest degree possible. In many respects, the knowledge base regarding Sami society is both deficient and not easily accessible (Norway, 2006: 14).

The main initiative undertaken to fill the knowledge gap in this area was the preparation of an annual Sami statistics report, which was first issued in 2006 (Norway, 2006: 14). The report "*Sámi logut muitalit*" ("Sami numbers speak") has been published annually ever since, and is prepared by the analytical group for Sami statistics, under the Nordic Sami Institute and the Sami University College. The reports provide annotated annual statistics. The 2013 edition focuses on language issues and on the presence of persistent organic pollutants in local food sources such as cod and reindeer. The report also provides recommendations on language and educational policies and on the need for further research into links between pollution and health risks (Sámi allaskuvla, 2013).



3. Implementation experiences

3.1. Type of issues addressed at biannual meetings

As mentioned in section 2.4.2 above, the consultation procedures provide for biannual meetings between representatives of the Sámediggi and the central State authority responsible for Sami affairs, together with other line ministries.

A perusal of the minutes of the biannual meetings (2005–12) shows that many of the issues presented or discussed are based on initiatives or studies initiated by either the Sámediggi or the State and are mostly related to broader governance and administrative decisions, rather than individual administrative decisions. The topics discussed include, for example, challenges related to the inclusion of the Sami culture and languages in municipal administration, church services, primary education and kindergartens; demographic and employment trends; budgetary allocations; administrative reforms; construction projects (e.g. of Sami museums); and the inclusion of certain municipalities under the Sami administrative area. The topics also include regional and international affairs such as the elaboration of a Nordic Sami Convention and preparations for the 2014 World Conference on Indigenous Peoples.

The biannual meeting held in June 2013 is illustrative of the range of topics presented for orientation or discussed at the meetings. In brief, the following topics were discussed:

- The Sámediggi commented on a proposed amendment to the Reindeer Husbandry Act. In a government white paper, the Ministry of Agriculture and Food suggested that harmonization of the management of reindeer husbandry with other management areas is good policy both for the Sami in general, and for Sami reindeer husbandry in particular. The Government considered that if policies on Sami reindeer husbandry were integrated in the general public policy, authorities would be more aware of their responsibilities towards the Sami population.
- The Sámediggi noted that this mainstreaming approach could be regarded as establishing a new objective for the Sami policy, which it regards as problematic, among other reasons because it was not discussed during the consultations held with the concerned ministry. The Ministry therefore could not be regarded as having acted in good faith. The matter was taken under advisement by the State authorities.
- The Sámediggi reported on the growing importance of culture-based employment in the Sami areas and its related action plan and projects to be initiated in 2014. Likewise, the Government presented its action plan on the same issue and the Sámediggi stated its view that it would have been good to ensure better coordination between the two action plans.
- The return of artefacts from the Norwegian national museum to Sami museums was addressed. It was decided that the discussions concerning adequate budget allocations to ensure the safe return of the artefacts would continue in the annual budget discussions between the State and the Sámediggi.

- The Sámediggi raised the issue of establishing an official qualification system for Sami interpreters. This will be assessed in the context of a general review of the interpretation services. The Government will come back with a proposal for the contents and objectives of such a review.
- The project *Sámi giellagáldu* (“Sami language source”) was discussed. The project aims, among things, to define terminology for five Sami languages. The Sámediggi raised concerns about the future funding of the project and it was decided to discuss this further at the next meeting between the presidents of the Nordic Sami parliaments and the Sami ministers of Finland, Norway and Sweden.
- The possibility of Norway recommending a Sami cultural heritage site for inclusion in the list of world heritage sites was discussed.
- Based on a report regarding the inclusion of Sami viewpoints at the municipality level, it had previously been decided to look into the costs related to administering bilingual (Sami–Norwegian) municipalities. At a previous meeting, the Ministry of Government Administration, Reform and Church Affairs (Fornyings-, administrasjons- og kirkedepartementet – FAD) was tasked with looking into available data, but after initial research, the ministry concluded that available State and municipal data and statistics (the so-called “KOSTRA figures”) do not provide relevant data, among other things because of the Norwegian policy of not disaggregating data by ethnicity. The parties agreed to ask their respective administrations further to discuss the challenges of making the additional costs of bilingual municipalities visible, and to present a proposal for follow-up at the next meeting, with the involvement of political representatives (Minutes, 28.06.2013).

In the 2006 guidelines, it is specified that the consultation procedures do not apply to cases concerning the state budget. This does not mean that the parties cannot discuss matters related to budgetary issues in the biannual meetings (Norway, 2006:7).

In his 2011 report, the UN Special Rapporteur on the Rights of Indigenous Peoples noted as follows:

Representatives of the Norwegian Sami Parliament, or Sámediggi, have stated that their decision-making has at times been constrained by earmarks established by the central Government in the allocation of financial resources. The Government of Norway, however, takes a different perspective, stating that new projects and initiatives for funding have often come from the Sámediggi itself and that it has been granted considerable freedom in re-prioritizing the use of funds. Also, the Sámediggi has noted with concern that the consultation procedure (...) does not cover budget-setting (Anaya, 2011: 43).

As already mentioned, international affairs are also discussed at the biannual meetings. For example, at the meeting in December 2009, the Sámediggi raised the question of the relationship between the UN Declaration on the Rights of Indigenous Peoples and the continuing negotiations under the UN Framework Convention on Climate Change. The Sámediggi pointed out that it expects the Declaration to constitute the basis for international and national processes concerning climate change, adaptation and mitigation, which affect indigenous peoples directly. The Sámediggi noted that, although there had been a good dialogue with the Ministry of the Environment in the context of the 2009 meeting of the Conference of the

Parties to the UN Framework Convention on Climate Change, it also felt that there was a lack of clarity about the implications of the UN Declaration. It was decided to raise the issue at a meeting between the Sámediggi and the Ministry of Foreign Affairs (Minutes, 15.12.2009).

3.2. Experiences and lessons learned

Another important feature of the biannual meetings is that they include a continuous process of assessment and valuation of experiences and lessons learned in reference to the consultation procedures.

The first such assessment of experiences took place at the biannual meeting in June 2006, based on the first 13 months of application of the consultation procedures. The Sámediggi presented the following views on the initial experiences:

- There had been several good consultation processes and more ministries had understood that the Sámediggi must be consulted with a view to reaching agreement.
- The Ministry of Labour and Social Inclusion had been present at many of the meetings, which was regarded as positive and constructive for the dialogue between the parties.
- It was regarded as understandable and necessary that the ministries needed an inception phase to explore how best to incorporate consultations in their work procedures. From the outset, however, they should be fully prepared with regard to the content of the consultation procedures. Much time had been spent discussing the requirements under the consultation procedures as such, rather than discussing the actual matters for consultation.
- Several ministries had argued that the procedures entailed additional work for them; the same argument had been used to justify non-compliance with the procedures. The parties were already aware of this consideration when agreeing on the consultation procedures and they must therefore bear the consequences.
- There had been cases in which the State authorities, after reaching agreement with the Sámediggi, had made changes to the decisions afterwards. It is important that persons holding consultations with the Sámediggi have the necessary institutional anchorage and decision-making power.
- There had been some examples of violations of the consultation procedures during the initial year, and the Sámediggi expressed its hope that this practice would be corrected (Minutes, 30.06.2006).

The Ministry for Labour and Inclusion responded on behalf of the State authorities that:

- The Ministry would follow up with those line ministries where the Sámediggi saw a need for a better collaboration with regards to the consultations.
- It was important that all parties involved knew when consultations were required and when not. Consultations took time and, therefore, mistakes could occur.
- It was to be welcomed that the President of the Sami Council had clearly stated that consultations would not always lead to agreement.

- The consultation processes had improved the possibility of the Ministry for Labour and Inclusion gaining an overview of the various Sami affairs addressed in other ministries and contributing to the discussion and resolution of those cases (Minutes, 30.06.2006).

The parties further agreed to conduct an evaluation of the consultation procedures in 2007.

At the June 2007 meeting, the President of the Sámediggi emphasized that it would attempt to follow the consultation procedures as faithfully as possible, both with regard to responding quickly on issues, and making its positions clear both orally and in writing, and would contribute with information on cases and be flexible with regard to when and how cases were treated at the political level (Minutes, 04.06.2007).

The President also highlighted the positive experience of consultation in the context of the Planning and Construction Act (*Plan- og bygningsloven*). He stated that, in this case, the Sámediggi had access to all information from the beginning, the agreed arrangements for consultations were followed, the Ministry had a mandate to consider various solutions and the Sámediggi had access to the comprehensive final document, which was in line with the proposed bill, with the result that the plenary of the Sámediggi could satisfactorily consider the proposal (Minutes, 04.06.2007).

The Sámediggi expressed its hope that these positive experiences could constitute a model to be followed, while a number of negative experiences were also cited. In these other cases, it noted as follows:

- The administrative and political leadership of the ministries did not have adequate scope for undertaking real consultations where different solutions could be explored.
- The Sámediggi was being given inadequate information and background material in the consultation process and this, in turn, was creating grounds for mistrust and the perception that it might be necessary to consider worst case scenarios.
- Many important cases were being relegated into parallel processes or deferred.

The Ministry of Labour and Social Inclusion reported that there would now be an internal evaluation of the procedures for consultation within the ministries (Minutes, 04.06.2007).

In 2009, at the biannual meeting in December, parties discussed the structure of the meetings and related routines. The Ministry and the Sámediggi agreed that the biannual meetings should be better prepared through written submissions in which both parties presented the cases that they wanted to discuss. That, they believed, should facilitate tangible outcomes of the consultations (Minutes, 15.12.2009).

At the June 2010 meeting, parties again discussed the experiences gained in implementing the consultation procedures. The minutes record that the parties regarded the agreement on consultations as an important tool in the interaction between the Sámediggi and the Government. They saw the agreement as an aid to achieving a good dialogue. It was also underlined, however, that consultation was not everything and the agreement could not replace all meetings. There was general agreement that the parties should be better at calling one another by phone beyond the consultations (Minutes, 14.06.2010).

In the same meeting, the parties also agreed that a good process was often of decisive importance for a good result. When it was clear that consultations should take place, it was important to reach agreement swiftly on how those should be undertaken. They also agreed that there was a high degree of flexibility in how things could be done. Almost all cases, and all consultations, were different. What was of fundamental importance, however, was that consultations were undertaken with full information and openness between the parties and that the process was documented (Minutes, 14.06.2010).

Further stressing the importance of a good process, the parties noted that consultations often occurred at irregular intervals. A period with many consultation meetings could be followed by a longer period during which there was no new information. This often happened because, in parallel with the consultations, internal processes of negotiation or clarification were under way within the Government or within the Council of the Sámediggi. The parties agreed that they should inform one another about such processes and must make it clear that such breaks in their consultations did not mean that they had closed views or positions which had not been discussed and consulted in depth (Minutes, 14.06.2010).

The practice in the context of specific localized consultations was also discussed. The parties agreed that, in cases which in a specific and direct way affected Sami local communities and interests, the State might also have a duty to consult those communities and interests. The State had to coordinate such consultations with the consultations undertaken with the Sámediggi. The previous practice had been for the Sámediggi and the local interested Sami parties not to participate in the same consultation meeting (Minutes, 14.06.2010).

Lastly, the parties discussed the experiences gathered in efforts to reach agreement. They agreed that consultations undertaken to achieve agreement were to a large extent about finding opportunities which gave the best possible mutual benefits. They noted that it was not a requirement under the consultation procedures that they should reach agreement, but that every possible effort must be made before abandoning agreement. The alternative to agreement was a poorer result, with prospects of insecurity and lack of legitimacy in the follow-up.

The experiences showed that, by far, most consultations achieved agreement. Until that point, disagreement had been the exception. The parties had failed, for example, to reach agreement on a new mineral act (Minutes, 14.06.2010).

A number of issues regarding consultations between the Sámediggi and the Norwegian government remain under discussions. An independent Sami Rights Committee delivered a report on a number of matters, including a new law on administrative procedures and consultations in December 2007. The proposal is currently under consideration (Norwegian Government, 2014).

3.3. Norwegian Minerals Act and the Sami Minerals Guide

As noted in the previous section, the parties did not reach agreement on the Norwegian Minerals Act, which was adopted by the Norwegian Parliament in June 2009.

Among other considerations, the Act stipulates that it shall ensure that the foundation of Sami culture, commercial activity and social life is safeguarded (Norway, 2009a, section 2). In the context of search for minerals, the Act establishes the following:

In the case of a search in Finnmark, the searching party shall in addition give written notice to the Sameting (the Sami Parliament), Finnmarkseiendommen (the Finnmark Estate) where it is landowner, and the relevant area board and district board for reindeer management (Norway, 2009a, section 10).

Similar provisions for notification are included in section 13 of the Act, in the context of exploration of minerals owned by the State.

Section 17 of the Act refers to applications for mineral exploration in Finnmark. It stipulates as follows:

An exploring party shall take reasonable steps to obtain information about directly affected Sami interests in the area that is to be explored.

A special permit may be refused if granting the application would be contrary to Sami interests. In the assessment, special consideration shall be given to the interests of Sami culture, reindeer management, commercial activity, and social life. If the application is granted, conditions may be imposed to safeguard these interests.

When processing the application, the Directorate of Mining shall give the landowner, the Sameting (the Sami Parliament), the municipality, and the relevant area board and district board for reindeer management an opportunity to comment.

If the Sameting or the landowner opposes the granting of an application, the Ministry shall decide the application.

If the Ministry grants an application (...), an appeal to the King by the Sameting or the landowner shall have a suspensive effect (Norway, 2009a, section 17).

The UN Special Rapporteur on Indigenous Peoples observed in his 2011 report:

The Norway Mineral Act of 2009 requires that Sami cultural life be safeguarded under the act and also requires, in Finnmark County, that the Sami Parliament and the landowner have the opportunity to comment during the process of authorizing a permit. Nevertheless, the Norwegian Sami Parliament has expressed concern that the act does not provide an adequate level of consultation with the Sami Parliament on applications for permits within Finnmark County, or any consultation for applications affecting traditional lands outside that county (Anaya, 2011: 57).

As the parties did not reach agreement on the Minerals Act through consultations, the Sámediggi, in response, elaborated a draft guide for the exploration and development of mineral resources (*Sametingets mineralveileder*). The draft mineral guide was sent out in 2009 for parliamentary hearings and eventually adopted by the Sámediggi in 2010 (Sámediggi, 2010a)

The Norwegian Minerals Act and also the Sami Mineral Guide were discussed at several of the biannual consultation meetings.

At the meeting in August 2009, the President of the Sámediggi announced that the Sámediggi had accepted that the Norwegian Parliament (the Storting) had adopted the Minerals Act. He

declared that the Sámediggi wished to take a positive stance vis-à-vis the possibility of mineral activities and had therefore submitted a draft proposal for parliamentary hearings about how the Sámediggi should position itself with regard to such activities (Minutes, 11.08.2009).

The Sámediggi further underlined that the draft mineral guide was not a draft regulation or draft law but an attempt to overcome a situation in which the Sámediggi had to say no to all mineral activities. It recalled that the Sámediggi had twice said no to the Minerals Act and the activities regulated by that act. It was that political reality that the proposed guide took into account and sought to handle in a constructive manner. It pointed out that the Sámediggi had contacts with the mineral business and mineral companies and its experience demonstrated that, if the Sámediggi said no to a given activity, the company concerned would stop its activity (Minutes, 11.08.2009).

In his response, the Minister said that the Government would provide a coordinated response on the draft, underlining that the Sámediggi had neither the authority nor the competence to impose fees, or to impose a duty on companies to negotiate or adopt regulations, as might have been perceived. In addition, the Minister underlined that the Minerals Act included a number of points on which the Government and the Sámediggi did agree (Minutes, 11.08.2009).

The draft mineral guide of the Sámediggi was also discussed at the subsequent biannual meeting in December 2009. At that meeting, the Ministry of Business and Trade (Nærings- og handelsdepartementet) pointed out that the Sámediggi's Mineral Guide would not be legally binding (Minutes, 15.12.2009). The Ministry suggested that, instead, it might make sense for the Sámediggi to have internal rules on how to position itself with regard to mineral businesses (Minutes, 15.12.2009). Among other issues, the Sámediggi highlighted the need for a predictable policy vis-à-vis mineral companies (Minutes, 15.12.2009).

At the biannual meeting in June 2010, the Sámediggi reported that it had now adopted the Mineral Guide (Sámediggi, 2010a), as it could not give its consent to the Minerals Act, given concerns over protection of natural resources, participation in decision-making processes and benefit-sharing mechanisms (Minutes, 14.06.2010). The Sámediggi noted that its option was to object strongly to any mineral operations or to develop procedures for the Sámediggi to undertake a separate assessment of each individual mineral project that operators wished to undertake (Minutes, 14.06.2010).

The Mineral Guide defines as its purpose the need to ensure that concern for Sami culture, economic activities and social life is valued and addressed in the context of plans for use of mineral resources. The Guide determines the expectations which the Sámediggi has of companies and the form of its collaboration with companies that wish to reach agreement with the Sámediggi regarding search and exploration operations and plans for exploitation licenses related to mineral resources. (Sámediggi, 2010a: 3).

In brief, as recorded in the minutes of the June 2010 biannual meeting, the Guide clarifies the role of the Sámediggi in the context of exploration, exploitation and operation in the traditional Sami area. The Guide is aimed at ensuring transparency and predictability. The intention of the Mineral Guide is that the Sami, through the Sámediggi, are able to negotiate about exploratory activities and operations to ensure that the Sami share in the benefits of such business. In addition, the Sámediggi emphasized that it has as its aim the achievement

of business activities related to mineral resources in the traditional Sami areas that benefit and directly strengthen and develop Sami culture and communities. Such business must be exercised in coexistence with – and not in replacement of – traditional Sami livelihoods (Minutes, 14.06.2010).

3.4. Qualitative assessments of the consultation procedures

A number of analysts, including from the Sámediggi itself, have published qualitative assessments of the implementation of the 2005 consultation procedures. In a 2010 written presentation to the UN Special Rapporteur on the Rights of Indigenous Peoples, the Sámediggi writes that:

Since the confirmation of the consultation agreement by Royal Decree in July 2005, the Saami Parliament has consulted with the state authorities on many matters.

The Saami Parliament's position has been strengthened on a general basis by the fact that various ministries have become more aware of the need to include the Saami Parliament in important processes (...).

Unfortunately, the [positive] consultations regarding the new Planning and Building Act and Nature Diversity Act do not consistently represent the general experience. There have been several cases in which the state authorities have not respected the consultation agreement and the underlying international-law obligations (...).

The Saami Parliament has faced challenges connected to the fact that, in a number of situations, there has been very little or no scope for real consultation with the state, as the government has in reality already made the decisions. The Saami Parliament understands that it can be difficult to reach agreement within government on large and complex matters, but nevertheless takes the view that this cannot justify a failure to conduct real consultation (Sámediggi, 2010b: 2–3).

In response to the criticism voiced at the 2011 biannual meeting that certain ministries failed to fully embrace the consultation procedures, the Minister responded that, in general, there was reason to be satisfied that the consultations with various ministries were now on a good track. He pointed out that the arrangement was still a relatively new arrangement and that time was needed for it to settle into place (Minutes, 13.12.2011).

The ILO supervisory bodies have also analysed the implementation of the consultation procedures. Thus, in 2009, the Committee of Experts on the Application of Conventions and Recommendations noted as follows:

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 (CEACR, 2009).

In his 2011 report, the UN Special Rapporteur on the Rights of Indigenous Peoples analysed the consultation procedures as follows:

The Special Rapporteur considers this agreement to represent good practice with respect to implementation of the duty of States to consult with indigenous peoples, which provides an important example for the other Nordic countries as well as for countries in other regions of the world (Anaya, 2011: 17).

At the same time, the Special Rapporteur raises a few concerns:

Certainly, to some extent, the Sami parliaments' participation in decision-making affecting the Sami people is facilitated by the establishment of clear consultation procedures. (...) Norway has signed a consultation agreement with the Norwegian Sami Parliament. However, the Sami Parliament has stated that while "the procedures for consultations gave Sámediggi a better influence on the Government's policies in Sámi issues [,] experiences with the consultation agreement [have been] mixed. There [are] still challenges regarding traditional Sámi ways of living and industrial developments." Also, representatives of the Norwegian Sami Parliament expressed concern that the Government has at times entered into consultations having already decided on outcomes. However, the Special Rapporteur observes that, if correctly applied, the consultation procedure provides an important tool for the advancement of Sami rights and the improvement of relations between the Sami people and the Norwegian State (Anaya, 2011: 39).



4. Concluding remarks

In general, the parties directly concerned, namely the Norwegian State and the Sámediggi, seem to have benefited from the adoption and implementation of the consultation procedures. This positive view is confirmed by the ILO supervisory bodies. The following aspects may be identified as among the key elements contributing to the success of the process.

First: the duty to consult is embedded in a coherent human rights and governance framework that recognizes substantive rights of indigenous peoples.

- The consultation procedures are framed within the context of Norway's obligations under international law, in particular Norway's ratification of ILO Convention No. 169. Hence, Norway has submitted itself to a legally binding instrument with institutionalized supervisory mechanisms, which have been instrumental in guiding domestic legislation and processes. Norway has thereby developed a unique model of consultation, adapted to the specific characteristics of the Norwegian State and Sami society in Norway.
- The consultation procedures are solidly embedded in the constitutional and legislative framework of the State, which respects the substantial rights of indigenous peoples, including rights to land. This delineates and frames the implementation of the duty to consult indigenous peoples, and ensures a high degree of policy and legislative coherence.
- The consultation procedures are anchored in the institutional framework of the State, providing mechanisms for coordinated and systematic action by the State authorities in their relations with the Sami.
- The consultation procedures provide for a broad and integrated governance approach to participation and consultation. This involves, among other measures, the establishment and strengthening of a representative self-governance institution of the Sami; institutionalized mechanisms for regular dialogue between the State and the Sami; and research institutions and studies to inform the continuous dialogue between the State and the Sami. These elements mediate power relations between indigenous peoples and the State and could to some extent be regarded as preconditions for meaningful consultations. The linking of consultation and participation enhances the possibility that proposed measures are aligned with Sami priorities for development at an early stage and thus facilitates the possibility of reaching agreement or consent.
- The State provides resources to ensure the functioning of the Sámediggi as the overall representative and self-governance institution of the Sami. Recurrent discussions about budget allocations underline the importance of this support in ensuring real opportunities for adequate implementation of the rights to consultation, participation and self-governance.

Second: the duty to consult is perceived as a continuous dialogue process that builds the capacities, and strengthens mutual trust between the parties

- Consultation is perceived as a continuous process through the establishment of arrangements for regular and institutionalized dialogue. Specific consultations are embedded within the framework of continuous dialogue and of systematic and coordinated action. This approach gradually builds the trust and the capacities of the parties in the process, facilitates the possibility of reaching agreement and, eventually, saves time and resources.
- The role of the Sámediggi as the key representative institution for consultations has strengthened its legitimacy and capacity. Likewise, the consultation processes have enhanced the State authorities' understanding of the concerns and priorities of the Sami, and also enhanced the State's ability to act in a systematic and coordinated manner in upholding the rights of the Sami.
- The consultation procedures focus on a qualitative process of dialogue, which fosters collaborative rather than confrontational relations and, in the end, greatly facilitates the possibility of reaching agreement or consent among the parties.

Other elements that have proved to be fundamental for the success of the consultations are:

- Initial agreement on the specific consultation process, including stages, scope, time frame, etc.
- Institutional anchorage and decision-making power of the participating representatives, to ensure that they have the flexibility to consider various options.
- Full information and openness between the parties and documentation of the process and outcome.
- High degree of flexibility in the process, allowing time for the parties' internal consultations.
- Development of a solid and accumulative knowledge base.

Norway's experience seems to confirm that the quality of the consultation process is of decisive significance for the possibility of reaching consent: the parties have been able to reach consent in the vast majority of cases. Even in cases where agreement was not reached, for example regarding the Minerals Act, the parties have made their diverse positions clear. Specifically, the Sami Parliament issued its own Mineral Guide and, although the Sami Parliament does not have legislative powers, the Guide informs private companies about the expectations of the Sami Parliament and has served as the basis for dialogue and negotiation with such companies. This shows a pragmatic approach to handling disagreement, which seems to have promoted predictability, legitimacy and dialogue in situations that could otherwise have been conflictual.



References

- Anaya, 2009 “Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people”, Human Rights Council, United Nations (A/HRC/12/34), 15 July 2009. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/12/34
- Anaya, 2011 “Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya”, Addendum: “The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland”, Human Rights Council, United Nations (A/HRC/18/35/Add.2), 6 June 2011. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/18/35/Add.2
- CEACR, 2003 Committee of Experts on the Application of Conventions and Recommendations, ILO: “Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 — Norway (Ratification: 1990)”, adopted 2003, ILO, 2004. Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2225961
- CEACR, 2009 Committee of Experts on the Application of Conventions and Recommendations, ILO: “Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 — Norway (Ratification: 1990)”, adopted 2009, ILO, 2010. Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2306517
- Henriksen, 2008 Henriksen, John B. “The Finnmark Act (Norway), a case study”, Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169, Case Study 3. Programme to Promote ILO Convention No. 169, ILO, 2008. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_118116.pdf
- Human Rights Committee, 1994 Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27) (CCPR/C/21/Rev.1/Add.5). Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111>
- ILO, 1989 Indigenous and Tribal Peoples Convention, 1989 (No. 169). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO
- ILO, 2009 *Indigenous and Tribal Peoples’ Rights in Practice – a Guide to ILO Convention No. 169*, Programme to Promote ILO Convention No. 169 (PRO169), ILO International Labour Standards Department, 2009. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf

- ILO, 2013 *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents*, Programme to Promote ILO Convention No. 169 (PRO169), ILO International Labour Standards Department, 2013. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf
- ILO, 2015 *Indigenous peoples' rights for inclusive and sustainable development*, Governing Body 325th Session, Geneva, October 2015. GB.325/POL/2
- Kongelig Resolusjon, 2005 Kongelig Resolusjon, 04/186, 28.06.2005. *Prosedyrer for konsultasjonsrett med Sametinget*
- KRD/Sámediggi, 2005 "Rapport fra arbeidsgruppe: Prosedyrer for konsultasjoner mellom Statlige Myndigheter og Sametinget, avlevert til Kommunal- og regionalministeren og Sametingspresidenten 20. april 2005". Available at: http://www.regjeringen.no/Upload/AID/temadokumenter/sami/sami_konsultasjoner_Rapport.pdf
- Minutes, 30.06.2006 Minutes of biannual meeting on 30 June 2006. Available at: http://www.regjeringen.no/Upload/AID/temadokumenter/sami/sami_konsultasjoner_mote_30.06.06.pdf
- Minutes, 04.06.2007 Minutes of biannual meeting on 4 June 2007. Available at: http://www.regjeringen.no/Upload/AID/temadokumenter/sami/Sami_konsultasjoner_protokoll_040607.pdf
- Minutes, 11.08.2009 Minutes of biannual meeting on 11 August 2009. Available at: http://www.regjeringen.no/upload/AID/temadokumenter/sami/Sami_konsultasjoner_protokoll_100809.pdf
- Minutes, 15.12.2009 Minutes of biannual meeting on 15 December 2009. Available at: http://www.regjeringen.no/upload/FAD/Vedlegg/SAMI/Konsultasjon_sametinget_151209.pdf
- Minutes, 14.06.2010 Minutes of biannual meeting on 14 June 2010. Available at: http://www.regjeringen.no/upload/FAD/Vedlegg/SAMI/Referat_halvarlig_politisk_mote_140610_karasjok.pdf
- Minutes, 14.12.2010 Minutes of biannual meeting on 14 December 2010. Available at: http://www.regjeringen.no/upload/FAD/Vedlegg/SAMI/Referat_halvarlig_politisk_mote_141210.pdf
- Minutes, 13.12.2011 Minutes of biannual meeting on 13 December 2011. Available at: http://www.regjeringen.no/upload/FAD/Vedlegg/SAMI/Ref_pol_mote_Sametinget_131211.pdf
- Minutes, 28.06.2013 Minutes of biannual meeting on 28 June 2013. Available at: http://www.regjeringen.no/upload/FAD/Vedlegg/SAMI/Ref_politisk_mote_Sametinget_240613.pdf
- Norway, 2005 "Procedures for consultations between State authorities and the Sami Parliament". Available at: <http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA.html?id=450743>

- Norway, 2006 “Veileder for Statlige Myndigheters konsultasjoner med Sametinget og Eventuelle Øvrige Samiske Interesser”, Arbeids- og inkluderingsdepartementet, 23. juni 2006. Available at: https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_-veileder_for_konsultasjoner.pdf
- Norway, 2009 Lov om rett til innsyn i dokument i offentlig verksemd (offentleglova), in force from 1 January 2009. Available at: <http://www.lovdatabank.no/dokument/NL/lov/2006-05-19-16>
- Norway, 2009a Act of 19 June 2009 No. 101 relating to the acquisition and extraction of mineral resources (the Minerals Act). Available at: http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf
- Norway, 1814 Norwegian Constitution, in pre-2014 version. English translation available at: <https://www.stortinget.no/en/Grunnlovsjubileet/In-English/The-Constitution---Complete-text/>
- Norwegian Government, undated Norwegian Government website. Available at: <http://www.regjeringen.no/nb/dep/fad/tema/samepolitikk/midtspalte/konsultasjonsplikt-i-samiske-saker.html?id=86931>
- Norwegian Government, 06.08.2014 Norwegian Government website. Available at <https://www.regjeringen.no/no/tema/urfolk-og-minoriteter/samepolitikk/midtspalte/oppfolging-av-utredningen-fra-samerettsu/id742650/>
- Roy and Henriksen, 2010 Roy, Raja Devasish, and Henriksen, John, *Relevant Constitutional Provisions in Other Countries and Safeguards on Indigenous Peoples' Rights in Other Laws*, Addendum, Programme to Promote ILO Convention No. 169, ILO International Labour Standards Department, 2010. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123851.pdf
- Sámediggi, undated Website of the Sami Parliament, *Historikk*. Available at: <http://sametinget.no/nor/Om-Sametinget/Bakgrunn/Historikk>
- Sámediggi, 2010a *Sametingets mineralveileder – Mineralveileder for undersøkelser og drift på mineralressurser*. Available at: [http://www.sametinget.no/content/download/561/4968/version/1/file/Sametingets+mineralveileder+\(2010\).pdf](http://www.sametinget.no/content/download/561/4968/version/1/file/Sametingets+mineralveileder+(2010).pdf)
- Sámediggi, 2010b The Saami People’s Right to Self-determination, Conference with the UN Special Rapporteur Professor James Anaya in Rovaniemi 2010-04-14. Available at: <https://www.sametinget.se/13407>
- Sámediggi, 2011 Website of the Sami Parliament, *Historien bak Finnmarksloven*. Available at: <https://www.sametinget.no/Land-og-ressursrettigheter/Landrettigheter/Finnmarksloven/Historien-bak-finnmarksloven>
- UN, 1966 International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, United Nations resolution 2200 (XXI) of 16 December 1966, annex. Available at: [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2200\(XXI\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2200(XXI))



Annex

Comments adopted by the ILO Committee of Experts on the Application on Conventions and Recommendations in 2014 with regard to the application of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) by Norway

Observation

The Committee notes the Government's report received in September 2013 and the communication by the Norwegian Sami Parliament received in January 2014. 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 the supervision of the application of the Convention.

Articles 6 and 7 of the Convention. Consultation and participation. The Government recalls that the right of indigenous peoples to participate in decision-making processes was formalized in May 2005 with the establishment of the Procedures for consultations between the state authorities and the Sami Parliament (PCSSP). As a result of this agreement, approximately 30–40 formalized consultations take place every year. The Government indicates that consultations must be conducted in good faith on the part of both parties, and with the objective of achieving an agreement. In its communication, the Sami Parliament indicates that the PCSSP has strengthened interaction and cooperation on items that may have a direct impact on the Sami. Amendments to some legislative texts or regulations have been introduced following agreement or partial agreement between the parties. The Sami Parliament further indicates that in cases in which agreement is not achieved, the consultative procedure has been characterized by a lack of disclosure and late involvement of the Sami Parliament. In these cases, the authorities have adopted a decision or taken a position publicly before the consultations began or while they were in progress. The Sami Parliament adds that there are sometimes major differences in the manner in which *Article 6* of the Convention is interpreted and complied with in practice by the various government ministries. The Sami Parliament calls for clearer internal routines on the part of the Government in this area. The Sami Parliament indicates that there is no mechanism that helps clarify whether the consultation obligations have been satisfied by the Norwegian Parliament (*Storting*) in specific cases. Moreover, it adds that the PCSSP does not cover financial incentives or budgetary measures. It is of the Sami Parliament's opinion that financial parameters and initiatives are of crucial importance and have a direct impact on the Sami community. The Sami Parliament does not consider meetings to be consultations in compliance with *Articles 6* and *7* of the Convention where the Sami are only given an opportunity to make verbal interventions to the Minister of Finance about the budgetary needs of Sami society, but where no insight is gained into the Norwegian Government's assessments, ranking of priorities and decisions. The Committee previously noted 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 emphasized 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. In its reply to the communication of the Sami Parliament,

the Government indicates that the consultation mechanism ensures that decision-makers are well acquainted with the views of the Sami Parliament and, in accordance with *Article 6*, seek to achieve agreement to the proposed measures. It adds that some challenges remain regarding the practical implementation of the consultation procedures. The Government will consider, in dialogue with the Sami Parliament, how these can be resolved. ***The Committee requests the Government to continue to pursue its efforts to address the challenges identified and to provide information enabling it to examine the manner in which the procedures established ensure the effective consultation and participation of the indigenous peoples concerned in decisions which may affect them directly, giving full effect to the requirements of the Convention.***

Follow-up to the Committee's previous comments. Amendments to the Finnmark Act. In reply to the 2009 observation, the Government indicates that section 29 of the Finnmark Act of 2005 was amended in 2012. The amendment came into force on 1 January 2013 and led to the expansion of the mandate of the Finnmark Commission to include the investigation of individual or collective rights to fishing spots upon request from a person with a legal interest in clarification of such rights. The expansion of the Commission's mandate led to a parallel expansion of the mandate of the Uncultivated Land Tribunal for Finnmark. The Finnmark Commission issued its first report in March 2012 (the Stjernøya and Seiland field) and its second report in February 2013 (the Nesseby field). The Committee notes that a common feature of the rights recognized by the Commission for the local population and reindeer herders in the two fields is that they are based on long-term utilization. Thus, the rights are protected against expropriation and similar procedures, and also involve certain restrictions on the Finnmark Estate's landowner rights. In March 2013, the Administrative Regulations regarding the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark were amended by Royal Decree to align the procedures for appointment of members of the Tribunal with those applying to appointment of judges to the ordinary national courts. The Sami Parliament was consulted before the new procedures for appointment of members of the Tribunal were finally decided upon and the consultations led to an agreement. The Sami Parliament indicates that the Finnmark Estate Board has not adopted any decisions regarding changes in the use of uncultivated land, although the authorities have already given permission to several major land encroachment cases in Finnmark County. ***The Committee trusts that the necessary steps 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 therefore requests the Government to provide information on progress made regarding the survey and recognition of existing rights of indigenous peoples in Finnmark County, including information on the work of the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark. Please also include 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.***

Direct request

Article 7 of the Convention. Development activities. The Government indicates in its report that the Ministry of Petroleum and Energy and its subordinate agency the Norwegian Water Resources and Energy Directorate (NVE) handle matters requiring consultations with the

Sami Parliament on a regular basis. Consultations are normally related to the licensing process of hydropower plants, wind power plants or power lines conflicting with Sami interests/ areas, but can also be relevant for new petroleum projects. In its communication, the Sami Parliament refers to the Goliath field in the Barents Sea, where production was scheduled for 2013 and the operational phase was programmed to last 15 years. It adds that, during the consultations in 2009, it was agreed that the operator has performed a comprehensive environmental impact assessment for Goliath. It was agreed that it was important that initiatives to boost local spin-off effects and expertise must also benefit the Sami. It was also agreed that the emergency contingency system to combat oil pollution on Goliath must maintain a very high standard. Agreement was not reached however between the Sami Parliament and the Ministry of Petroleum about an indigenous fund in connection with the Goliath field, or about whether the Sami have any special rights to petroleum resources in the Barents Sea. ***The Committee requests the Government to continue providing information on the cooperation between the Ministry of Petroleum and Energy, and its subordinate agency the NVE, and the Sami Parliament concerning oil and gas, water and energy projects.***

Articles 14 and 15. Rights to land in traditional Sami areas south of Finnmark County. The Government indicates that it is currently working on the follow-up of the report of the Sami Rights Committee. One of the proposals of the Sami Rights Committee is a new statute on administrative procedures and consultations. In its communication, the Sami Parliament indicates that 2012 marked the commencement of consultations on consultation as well as administrative procedures legislation. It adds that the Government has not given the Sami Parliament any basis for consultations on the identification legislation and governance and administrative legislation. The Sami Parliament is concerned about the lack of legislative advancement in these efforts, and about whether this indicates little willingness to safeguard Sami rights to land and resources outside of Finnmark County. ***The Committee trusts that Articles 14 and 15 of the Convention will be duly taken into account in this process and that consultation and participation will take place in accordance with Articles 6 and 7. The Committee also requests the Government to provide further information on the measures to protect the land rights in traditional Sami areas south of Finnmark County.***

Article 15(2). Mining legislation. The Government indicates that the Minerals Act was adopted in the spring of 2009 and entered into force on 1 January 2010. The Minerals Act establishes special rules to ensure the basis for Sami interests in Finnmark, including a duty to give notice before prospecting and exploration begin. Secondly, the Mineral Act contains special procedures pertaining to the processing of applications for permits for mineral activities in Finnmark. The Government indicates that a party that is extracting a deposit of minerals owned by the State shall pay the landowner an annual fee of 0.5 per cent of the sales value of the extracted minerals. In the case of land owned by the Finnmark Estate, an increased landowner fee of 0.25 per cent shall be paid in addition to the ordinary landowner fee. The Committee notes that the Government presented its Strategy for the Minerals Industry in March 2013. The Ministry of Trade and Industry carried out two consultations meetings with the Sami Parliament, which gave its approval of the chapter in the strategy about mineral activities in areas where there are Sami interests. One of the measures in the Strategy for the Minerals Industry is that the Government will consider whether the Minerals Act should be amended with the inclusion of specific rules to protect Sami interests in connection with mineral operations outside of Finnmark. The Ministry of Trade and Industry initiated consultations on the matter with the Sami Parliament and the Sami Reindeer Herders' Association

of Norway in the spring of 2013. In its communication, the Sami Parliament indicates that a decisive factor for its approval of the aforementioned Strategy was that the Ministry of Trade and Industry is to take the initiative for consultations on amendments to the Minerals Act to safeguard Sami interests and rights throughout the Sami territory, and to help maximize the efficiency of the process to achieve such legislative change. In its reply to the communication of the Sami Parliament, the Government indicates that the Strategy for the Minerals Industry was presented by the previous Government and is of a non-binding nature. The Government adds that it will consider whether the Minerals Act should be amended with the inclusion of specific rules to protect Sami interests in connection with mineral operations outside of Finnmark. If the Government considers amending these provisions, the Sami Parliament will be invited to consultations, according to the established consultation procedures. ***The Committee requests the Government to provide further information on the manner in which it ensures that the Sami participate in the benefits of mining activities.***

Articles 7 and 15(1). Reindeer husbandry. The Committee notes that Act No. 40 relating to reindeer husbandry of 15 June 2007 was amended in June 2013. The Government reports that the amendment came into force on 1 January 2014 and implies discontinuing the system of area boards, and transfer of the responsibilities of the area boards to the county governors. In its communication, the Sami Parliament indicates that the winding up of regional administrative boards and the transfer of regional reindeer husbandry administration to the county governor was carried out without good faith consultations. The consultations were characterized by the Ministry of Agriculture and Food having taken a public and highly concrete position on the amendments before the consultations commenced. Consultations were concluded without the Ministry making any amendments to what had been decided in April 2011, date at which the Ministry announced on its website that the Reindeer Husbandry Act was to be amended. The Committee notes that the Sami Parliament is deeply concerned by the fact that the Government is not ensuring the implementation of the consultation obligations when decisions are taken in this area which is of such great importance to the Sami. In its reply to the communication of the Sami Parliament, the Government indicates that in 2011 a decision was made concerning a proposal of possible changes in the public administration of reindeer husbandry. The formal consultation process started a year later and the Sami Parliament and the Ministry of Agriculture and Food had several meetings during a period of one year. It was not possible to reach an agreement on the matter. The Government then made a final decision and the proposed changes to the Reindeer Husbandry Act were sent to Parliament. The Committee notes that the Ministry of Agriculture and Food invited the Sami Parliament to take part in the development of a framework for Sami and reindeer husbandry participation in the new regional administration. ***The Committee requests the Government to continue to provide information on the measures taken to ensure that the rights of the Sami to the natural resources pertaining to their lands are specifically safeguarded. Please also provide an evaluation of the impact of the changes eventually introduced in the public administration of reindeer husbandry.***

Fishing rights of the Sami. The Government indicates that the Marine Resources Act includes a provision on the importance of emphasizing Sami culture considerations in regulations pertaining to fishing and in the management of fishing. Furthermore, the Participation Act has been amended in 2012 to include a provision stating that the law is to be applied in accordance with the principles of public international law on indigenous peoples and minorities. Another measure includes the establishment of a local fjord fishing advisory board that

will have an important advisory role in the management of the fish resources in the northern fjords. The board will consist of three members from the Sami Parliament and three members from each of the three northern counties. The Government indicates that in December 2013 the Sami Parliament and the Ministry of Fisheries and Coastal Affairs agreed on a mandate for the local fjord fishing advisory board, and the board was formally constituted in March 2014. The mandate states that the board shall strengthen the management of the fjord fisheries, having particular attention to Sami usage and the importance of this usage for local Sami communities. Moreover, the Committee notes that the Sami Parliament is represented in the delegation that is negotiating with Finland on a new agreement on fishing for salmon in the Tana river. The primary aim of the negotiations is to reduce fishing to a sustainable level. It is intended that the new fishing regulations will be in place with effect from the 2015 fishing season. ***The Committee requests the Government to provide information on the measures taken to ensure that the fishing rights of the Sami are specifically safeguarded (Article 15(1)). It also invites the Government to provide information on the measures taken, with the participation of the Sami and whenever appropriate, to ensure that traditional fishing activities are strengthened and promoted (Article 23).***

Article 28(3). Sami languages and education. The Government indicates that in 2009 it presented an Action Plan for Sami Languages, developed in consultation with the Sami Parliament. The principle focus of the plan is to create the right conditions to increase the number of people actively using the Sami languages. In its communication, the Sami Parliament indicated that the Action Plan contains a number of good initiatives and has been a useful tool in the work to strengthen and develop Sami languages. However, the Sami Parliament recognizes a need for a more comprehensive language policy that covers society as a whole. The Committee notes that in September 2014 the Government appointed a committee to investigate schemes, rules and measures relating to the Sami languages. Consultations between the Government and the Sami Parliament resulted in an agreement on the terms of reference for the committee. ***The Committee invites the Government to continue to provide updated information on the measures taken to preserve and promote the development and practice of the Sami languages.***

Article 32. Contacts and cooperation across borders. The Government indicates that the Nordic countries together with the three Nordic Sami Parliaments have started negotiations on the Nordic Sami Convention. The Norwegian delegation was appointed in March 2011 and the aim is to conclude the negotiations in 2016. The Norwegian Sami Parliament indicates that Norway's restrictive approach to the negotiations in terms of both form and content impedes the progress of the negotiations. In its reply, the Government indicates that, following the parliamentary elections in 2013, consultations were held with the Sami Parliament on a new mandate and an agreement on the mandate was achieved in May 2014. ***The Committee requests the Government to provide updated information on the measures taken to facilitate contacts and cooperation between the Sami across borders, including activities in the economic, social, cultural and environmental fields. In this regard, please provide updated information on the progress of the negotiations on the Nordic Sami Convention.***

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