
Enacting a New Mining Act in Finland – How Were Sami Rights and Interests Taken into Account?

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Abstract

Due to the growing global need for minerals, mining industry has significantly expanded in the recent decades, especially in the North. In order to comply with the new needs, mining legislation in Finland has gone through important changes over the past years. One of the most fundamental changes in the legislation was to include the protection of Sami rights in the new Mining Act of 2011. The article aims to shed light on the development of the mining reform in Finland, to analyze how Sami rights were taken into consideration during the process, and to examine whether the current legislation provides effective enough protection for the Sami as an indigenous people. To obtain a valuable insight on the future prospects of mining in the Sami Homeland, semi-structured interviews were conducted with relevant parties involved from the mining industry.

In recent years, mining has become a significant issue of societal and media discussion in Finland. Multi-national companies are staking out vast areas for exploration, and have already established mining operations, which has caused much uproar in the neighboring areas.¹ Many complained before the enactment of the new Mining Act in

2011, that the previous version of 1965² was outdated and should be replaced as soon as possible.

During the time when the old 1965 Act was adopted, mining was a fundamentally different business in comparison to the present process. Mining was reserved only for Finnish natural and legal persons,³ and in practice mining was done by Finns: mainly by state companies (especially the Outokumpu company) and exploration by the Geological Survey of Finland. This situation changed dramatically with Finland becoming party to the European Economic Area Agreement as a European Free Trade Association (EFTA) member (and later becoming a Member State of the European Union in 1995). This had an overall effect that all natural and legal persons in this area became eligible to conduct mining processes in Finland. In turn, this had a rapid impact on mining, for instance in the notices of reservations, which rose dramatically from 225 in 1993, to 10,125 when the EEA Agreement entered into force. A similar phenomenon took place in regard to exploration permits, the annual number having been around 200 before the entry into force of the EEA, growing in 1993 to 1,096.⁴

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¹ The list of mining and exploration companies in Finland can be found at: http://new.gtk.fi/information-services/mining_explcomp.html (22. 04. 2014)

² Kaivoslaki 503/1965 (Entered into force 1 January 1966). Finnish and Swedish versions are available at: <http://www.finlex.fi/fi/laki/alkup/1965/19650503> (12.10.2008).

³ See Article 1 of the original version (*ibid.*), which was then later amended to include natural and legal persons in the whole European Economic Area Agreement region.

⁴ Valtiontalouden tarkastusviraston toiminnantarkastuskertomukset 154/2007, on file with the author.

It can convincingly be argued that the 1965 Mining Act operated in a dramatically different setting than the current one. The idea behind the 1965 Mining Act was that natural resources were used for the benefit of the Finnish nation, and therefore a task in which state companies had an important role to play. This can be compared to the present situation where the Finnish mineral deposits are explored by multi-national companies and the minerals form only a small part of the global supply.⁵ As such, the price is driven by changes in global demand. It is therefore evident that if the operating environment for mining processes has changed this dramatically, there is a need to replace the current Mining Act with a new one.

One particular concern which is studied in this article is that the 1965 Mining Act did not stipulate anything in its original form in regard to the Finnish Sami indigenous people.⁶ At the time when the Mining Act was enacted, the Sami did not enjoy any special legal status. This situation has changed dramatically over the years, especially since the 1990's. Since the Sami status as an indigenous people has been guaranteed in the Finnish constitution from the 1990's,⁷ and the Sami have gradually gained rights in interna-

tional law as an indigenous people, it is clear that there was also a need to include their legal status and rights within the new Mining Act. The crafting of a new Mining Act started in 1999, when the then Ministry of Trade and Industry (hereinafter "the MTI") established two committees to revise mining regulations, the outcomes of which were delivered in 2003.⁸ However, the work of these committees did not result in a Governmental Bill, thus a new Committee under a different composition was established in 2005 to make a proposal for a new Mining Act.

The focus of this article is to study the different versions leading to the reform of the Mining Act produced by the 1999 and 2005 Committees from the perspective of how they take into account Sami rights and interests. Given that the 2005 Committee produced a mid-report,⁹ a version for commentary by stakeholders in March 2008,¹⁰ and the final 232 page proposal that was released on 8 October 2008,¹¹ it will be interesting to examine what kind of differences exist among these versions from the Sami viewpoint. More importantly, we will examine the level of legal and actual protection currently enjoyed by the Sami regarding the impacts of mining, as well as the legal remedies available for them in regard to their Homeland.

In order to obtain a more extensive overview

⁵ Exploration and Mining in Finland's Protected Areas, the Sami Homeland and the Reindeer Herding Area – a Guide prepared by the Finnish Ministry of Trade and Industry, page 4, MTI Publications 30/2007. Available at https://www.tem.fi/files/18154/jul30teo_eng_20A4.pdf (22. 04. 2014)

⁶ The 1965 Mining Act was amended several times, although the only significant amendments were those of opening mining to natural and legal persons in the EEA area and adding references to nature and environmental protection.

⁷ Section 17 (3) of the Constitution states that: "The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture". Section 121 (3) provides: "In their native region, the Sami have linguistic and cultural self-government, as provided by an Act". See the current Finnish constitution 731/1999, at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>

⁸ See (only in Finnish): Esitys kaivoslain uudistamiseksi: Kaivoslain muutostarpeita selvittävä työryhmä Kauppa- ja teollisuusministeriön työryhmä- ja toimikuntaraportteja 2/2003; and Kaivosturvallisuussäädösten muutostarpeita selvittävän työryhmän raportti, Kauppa- ja teollisuusministeriön työryhmä- ja toimikuntaraportteja 3/2003.

⁹ See at http://www.tem.fi/files/18131/KAILA_valiraportti_1.2.2006final.pdf (12.10.2008).

¹⁰ The version is on file with the author.

¹¹ Ehdotus uudeksi kaivoslaiksi ja eräiden siihen liittyvien lakien muuttamisesta. Kaivoslain uudistamista valmistelleen työryhmän ehdotus Työ- ja elinkeinoministeriön julkaisuja, Konserni 26/2008, at http://www.tem.fi/files/20290/Ehdotus_uudeksi_kaivoslaiksi.pdf (12.10.2008).

and valuable insight on the future possibilities of mining in the Sami Homeland, we conducted semi-structured interviews with mining company employees, CEO's, environmental impact assessment consultants and representatives of the respective authorities in Finland, hence gathering information on first-hand experience from the relevant parties involved. Unfortunately, we were not able to secure interviews with the Sami parliament, which would have been important for our research results.¹² We were, however, able to find Sami parliament statements on the basis of which we could draw tentative conclusions as to the stance of the Parliament on issues of mining and their impacts on the Sami Homeland area.

The interviewees were asked general questions on the current and future possibilities of conducting mining operations on Sami lands; their experience (if any) on consulting with Sami people; and their opinion as to whether the new Mining Act provides strong enough protection for Sami rights.¹³

The level of the Sami rights protection under the new Mining Act is, furthermore, one of the core research areas of the Sustainable Mining, Local Communities and Environmental Regulation in Kolarctic Area (SUMILCERE) project.¹⁴ The authors hereto consider the present work as a significant contribution to this project.

¹² We made a sincere effort to interview the Sami parliament but obtained no responses, despite extensive efforts to secure these interviews.

¹³ Due to the insistence of our interviewees, we have respected their requests for full anonymity. Hence, in relaying the results of the interviews, we are unable to disclose even the respective name of the authority or mining company. In general, we therefore refer to what category the actor represents and when their interview took place.

¹⁴ Among other research questions, the project, funded by the Kolarctic ENPI CBC initiative of the European Union and being run within the period of 2013–2014, focuses on the rights of the Sami as an indigenous people in the course of mining activities. It aims at comparing the level of protection in the countries inhabited by Sami, *i. e.* Finland, Norway, Sweden and Russia.

1. How Has the Mining Reform Evolved?

The 1965 Mining Act was amended several times, although the only significant amendments were those of opening mining to natural and legal persons in the EEA area, and adding references to nature and environmental protection. Work to revise the current Mining Act commenced in 1999 when the MTI established two committees, one of which was tasked with drawing up a proposal for a new Mining Act (the other focused on mining safety issues). The MTI initiated the reform process and it was continued by the new Ministry of Employment and the Economy (MEE), which started its operations as of 1 January 2008.¹⁵ The membership and terms of reference of the committee were therefore determined by a ministry with a very favourable outlook on mining. As the National Audit Office (NAO) pointed out in its 2007 assessment, the MTI had over the years become a very pro-mining governmental ministry, a fact which did not serve the interests of having a thorough and broad discussion over how mining should be conducted in Finland.¹⁶ To have such a reform process commenced from this sort of institutional setting is not an ideal situation, if it is to take into account the societal interests and values related to mining.

The first committee that commenced its work in 1999 was composed of a fairly diverse group of participants representing varying interests and ministries. It included a university professor of environmental law, three members who represented mining interests (Union of Rock Industry, Finnish Association of Extractive Resources Industry, and the Outokumpu company), two

¹⁵ See, at http://www.tem.fi/en/ministry/history_of_the_ministry (26.1.2014).

¹⁶ See p. 9 of the Finnish version of the assessment, *supra* note 3. This can be obtained only in Finnish. Esitys kaivoslain uudistamiseksi: Kaivoslain muutostarpeita selvittävä työryhmä. Kauppa- ja teollisuusministeriön työryhmä- ja toimikuntaraportteja 2/2003. Edita Publishing 2003, 135 pages.

representatives of the environmental ministry, one member of the The Finnish Landowners' Organisation and two from MTI (plus the vice-chair). The Chair was from the Geological Survey of Finland and the Committee had a total of 10 members.¹⁷

The Committee was assigned to update the regulations that concerned prospecting and mining (safety issues were handled by another committee). In addition to this general task, the Committee was required to take a stance on certain specific questions: 1) to clarify the legal status of material (such as waste rock) that comes out of mining (whether it is waste or a side-product to be handled within the mining site), 2) the issues related to safely managing the post-closing phase of the mine, 3) the question of renting and using the mining right.¹⁸

The Committee itself saw it necessary to make a proposal for a new Mining Act that would replace the 1965 Mining Act. It also perceived that in addition to the special tasks on which it was assigned to take stance, it would address the issue of modernizing the procedures, hearing the views of interested parties and clarifying the conditions for decision-making. It was provided that the Mining Act would remain as an act of law which would deal with prospecting for, examining and exploiting the minerals, and which would protect the proponent's right to exclusively mine, also in land belonging to others.¹⁹ The Committee expressed explicitly that its primary approach to the revision of the Mining Act was based on the approach that could be characterized as a "right to livelihood".²⁰

The Committee did make a proposal for a new Mining Act in 2003, with altogether 117 Articles. Chapter 3 contains grounds as to why the Committee favors particular solutions, and Chapter 4 fleshes out the text of the proposed Mining Act.²¹ However, the Committee could not reach consensus on the whole proposal and thus its report includes five dissenting opinions – two from the Ministry of the Environment officials, and three from the members representing the mining industry.²² There were altogether 108 statements to the Committee proposal from stake-holders²³ – a proposal that did not lead to any further action.

In 2005, the MTI established a new Committee to continue work on this topic – a Committee that was composed solely of civil servants. The composition was also much more limited in number and consisted of two members from the MTI (plus the chair), one from the Ministry of Social Affairs and Health, one from the Ministry of the Environment and one from the Safety Technology Authority (STA, which was under the auspices of MTI). Hence there were only five members, and the lead was more clearly in the hands of the MTI, which due to organizational changes at the beginning of 2008 was included as part of a new super-ministry – the Ministry of the Employment and the Economy (MEE). In addition, the Committee had two permanent experts, one from STA and one from the Geological Survey of Finland (both of which are under the MEE). The secretary to the Committee was also from the MEE.²⁴

¹⁷ Ibid., preface. The Committee proposal is under the name of nine persons, because one member took a leave of absence from 17 January 2001.

¹⁸ Ibid., preface.

¹⁹ Ibid., p. 11.

²⁰ Ibid., p. 12.

²¹ Ibid., pp. 34–127.

²² Ibid., pp. 131–135.

²³ NAO Assessment Report, Finnish version, p. 34, footnote 29.

²⁴ See the 31 January 2006 mid-report (in Finnish only), p. 2, by the Committee at http://www.tem.fi/files/18131/KAILA_valiraportti_1.2.2006final.pdf (12.10.2008).

The terms of reference of the 2005 Committee were to revise the Mining Act on the basis of the two Committee reports issued in 2003. Hence, it was this new Committee that would also deal with mining safety issues, although it was decided to establish a special division for this purpose. According to its terms of reference,²⁵ the committee needed to pay attention to accommodating mining and other legislation, and take into account the Constitutional law principle that regulation needs to be precise and clearly defined.²⁶ The Committee's term of office was set out to expire on 29 December 2006, but was extended to 30 April 2008.²⁷

Although the 2005 Committee was to continue on the basis of the work done by its predecessor, it provides in its mid-report that it has not been able to do this because its predecessor had not taken into account the requirements for preparing legislation on the basis of the Finnish Constitution, which entered into force on 1 March 2000 (and for the first time merged all of the various Constitutional documents into a

single document).²⁸ In particular, the 2005 Committee argues that the previous Committee did not take into account the requirement to secure basic rights and liberties and also the Section 80 Constitutional requirement that legislation needs to be precise and clearly defined.²⁹

The 2005 Committee's approach is very different from its predecessor because it emphasizes the constitutionally guaranteed basic rights and liberties – not human rights³⁰ – as enshrined in Chapter 2 of the Finnish Constitution. In fact, the basic rights and liberties were already adopted in 1995 by amending the Constitution Act, and it is indeed relevant to ask why the 1999 Committee did not take into account the requirements of the Constitution when it made its proposal in 2003. It seems that the basic rights and liberties started to exert influence only gradually on law-making and law-application in Finland, especially from 2000 onwards.³¹ Hence, it may very well be that the 1999 Committee commenced its work with a traditional type of law-making, whereas by the time the 2005 Committee was assigned to its task, it was already common practice to include considerations relating to basic rights and liber-

²⁵ Ibid., pp. 5–7.

²⁶ Section 80 of the Finnish Constitution is as follows: "Issuance of Decrees and delegation of legislative powers. The President of the Republic, the Government and a Ministry may issue Decrees on the basis of authorisation given to them in this Constitution or in another Act. However, the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts. If there is no specific provision on who shall issue a Decree, it is issued by the Government. Moreover, other authorities may be authorised by an Act to lay down legal rules on given matters, if there is a special reason pertinent to the subject matter and if the material significance of the rules does not require that they be laid down by an Act or a Decree. The scope of such an authorisation shall be precisely circumscribed. General provisions on the publication and entry into force of Decrees and other legal norms are laid down by an Act". See the English version of the Finnish Constitution at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (12.10.2008).

²⁷ See at <http://www.tem.fi/index.phtml?s=2123> (12.10.2008).

²⁸ Section 131 provides that "This Constitution repeals the following constitutional Acts, as amended:

(1) The Constitution Act of Finland, of 17 July 1919; (2) The Parliament Act, of 13 January 1928; (3) The Act on the High Court of Impeachment, of 25 November 1922 (273/1922); and (4) The Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman, of 25 November 1922 (274/1922)".

²⁹ See the 31 January 2006 mid-report of the Committee (in Finnish only), page 16, paragraph 6.5.1. Available at http://www.tem.fi/files/18131/KAILA_valiraportti_1.2.2006final.pdf (22.04.2014).

³⁰ This is a little bit odd as Section 22: "Protection of basic rights and liberties" provides that "The public authorities shall guarantee the observance of basic rights and liberties and human rights".

³¹ Constitutional law professor Ilkka Saraviita's emeritus lecture in the University of Lapland, hall 2, 15.00–16.15, on 12 September 2008.

ties when an act of law was prepared. The 2005 Committee also holds that its predecessor did not take into account other legislation applicable to mining to a sufficient degree, and did not accord enough importance to legislative hierarchy. The Committee could also by-pass some of the issues that were dealt with by its predecessor because new legislation had been adopted after time at which the 1999 Committee had handed out its proposal in 2003.

The work of the 2005 Committee has taken a long time, with its original term of office having been extended from the end of 2006 to 30 April 2008. In March 2008, the MEE organized stakeholder consultations on the basis of the first draft of a Mining Act. This first draft will be used in this article as a version of comparison to the final Draft Mining Act that was handed down on 8 October 2008, and which was then developed firstly as a government bill in 2009 and finally as a new Mining Act which entered into force on 1 July 2011.

2. How Were Sami Rights Ensured During the Process?

In this part of the paper, the intention is to examine how the various versions of the new Mining Act produced by the Committees came to respect the rights of the Sami. There were various versions of the act produced by the Committees:

1. The 2006 Mid-report handed out by the 2005 Committee (Mid-report).
2. The March 2008 version of the Draft Mining Act was given to the stake-holders for them to comment to the Committee in private discussions with the MEE. This is referred to here as “the March version”.
3. The Draft Mining Act was handed down on 8 October 2008 by the MEE, and which was soon to be circulated for comment (hereinafter the “Draft Mining Act”).

4. Governmental Bill 273/2009.
5. The new Mining Act that revokes the old Mining Act, 621/2011.

Given that the most significant changes took place after the Sami parliament was able to offer its comments on the Draft Mining Act (March version), it is useful to compare the version that was given to stakeholders (dated 3.3.2008) and the final Mining Act of 2011, given that the 8 October 2008 draft had already been changed from the perspective of Sami rights.

The March version of the Mining Act was based on the idea that it was Sami reindeer herding (being a significant part of Sami culture and harshly affected by mining activities) that needed to be protected. This version was clearly influenced by the requirements of Article 27 of the Covenant on Civil and Political Rights,³² especially in the way that the article had been interpreted by its monitoring body, the Human Rights Committee. This is of course no surprise, given that the Covenant had been incorporated into the Finnish legal system at the level of an Act of Parliament,³³ so it is regularly applied by the domestic courts. The Human Rights Committee has often offered the following viewpoint, especially in paragraph 7 of its General Comment No. 23:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.

³² The text of the Covenant is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (28.2.2014).

³³ See the Decree (8/1976) by which the Covenant was incorporated at the level of an Act of Parliament in Finland, http://www.finlex.fi/fi/sopimukset/sopsteksti/1976/19760008/19760008_1

That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law [endnote omitted]. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.³⁴

The Human Rights Committee has made it clear in its case-practice, notably when giving its views on two cases that Sami had petitioned against Finland; that all states have clear procedural and substantive obligations towards indigenous traditional livelihoods and their continued vitality. First of all, indigenous peoples need to be consulted before any decisions are made that may infringe their traditional livelihoods. The Committee has also made it clear that: “[m]easures whose impact amounts to a denial of the right are incompatible with the obligations under article 27”³⁵. Hence, measures (e.g. of Finland to permit mining operations) that would threaten the viability of reindeer herding in a certain area would be prohibited. Yet, as previously outlined by the Committee in its views on case No. 511/1992: “measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27”.³⁶

³⁴ General Comment No. 23: The rights of minorities (Art. 27): 04/08/1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments), at <http://www.unhcr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument>

³⁵ *Jouni E. L ansman et al. v. Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996). Paragraph 10.3, at <http://www1.umn.edu/humanrts/undocs/html/VWS67158.htm> (27.1.2014).

³⁶ *L ansman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994)., <http://www1.umn.edu/humanrts/undocs/html/vws511.htm> (27.1.2014). See paragraph 9.4 “A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so

The March version is the first to contain the procedure of how to incorporate the rights and interests of Sami reindeer herding:

30 a § Clarifying the issues in the Sami homeland region and in the reindeer herding region.

If mining is to be performed – on the basis of exploration, exploitation...permit – in the Sami homeland region or in the reindeer herding area, the mining official is obligated to negotiate on the basis of what is prescribed in article 9 § of the Sami parliament act and article 53 § of the reindeer herding act, and the official must request a statement in the way prescribed in article 56 of the Act of Skolt Sami. It is the duty of the mining authority to investigate the damages to the Sami reindeer herding, and consider possible measures to prevent or mitigate such impacts. The authority should also take into account:

- 1) similar permits that are in force in the vicinity of this application from the perspective of Sami reindeer herding;
- 2) The size of the areas that are – from the viewpoint of the Sami reindeer herding rights – affected by the current application;
- 3) Other ways that the close-by uses of areas impact negatively the Sami reindeer herding.

To clarify the matter, the mining authority may organize a meeting to which the repre-

is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27”.

sentatives of the Sami parliament, the relevant reindeer districts, the applicant and the officers who are in charge of the administration of the land are invited.³⁷

Article 36 prescribes in what cases a mining permit cannot be given:

36 § Obstacles to the granting of permit in the Sami homeland region and in the reindeer herding area.

The prospecting permit, mining permit, gold panning permit shall not be given if the activity permitted could result in injuries and these damages cannot be substantially mitigated by permit conditions. The prohibited damages are:

1. That one permit or many permits combined, together with other land uses that influence reindeer herding would result in significant damage to Sami reindeer herding.
2. That it would cause significant damage to reindeer herding.³⁸

Hence, the March version is clearly in line with what the Covenant requires of Finland vis-à-vis protecting Sami traditional livelihood reindeer herding, since it requires consultations and also enables the mining authority to prohibit mining if it may threaten the viability of reindeer herding. Yet, it may seem strange that Sami reindeer herding and reindeer herding done by others are protected in a similar way, with the same criterion of significant damage. This is very much due to the way reindeer herding is organized in Finland, since unlike in Sweden and Norway, reindeer herding in Finland is not an exclusive Sami livelihood. On the other hand, even though the reindeer herding act does protect reindeer

herding in general terms of significant damage, the question arises as to whether Sami reindeer herding should in fact enjoy stronger measures of protection.

This and other issues were taken up by the Sami Parliament when they reacted to the March version as part of stakeholder consultations. It is evident that the Sami parliament was able to influence the content of the Draft Mining Act, since the October 2008 version was already significantly changed from the earlier March version, and it is this October 2008 version that survived to form the final new 2011 Mining Act, which reads in relevant parts as follows:

38 § – Clarifying the issues in the Sami homeland region and in the Skolt region

The permit authority must – together with the Sami parliament, the region's reindeer herding co-operatives ... – clarify the consequences from giving the prospecting permit, mining permit, and gold panning permit – to the rights the Sami hold as an indigenous people, who are entitled to uphold and develop their language and culture. The permit authority must also consider measures that could be taken to lessen or prevent these impacts.

The permit authority must take into account:

- 1) Similar permits that are in force in the vicinity of this application;
- 2) The areas that are – from the viewpoint of the rights Sami possess as an indigenous people – affected by the current application;
- 3) Other ways that the close-by areas are used that impact negatively to the rights Sami possess as an indigenous people

Moreover, all this is also relevant for mining permits that are to operate outside of the Sami homeland, but which have a significant

³⁷ This is laid down in p. 16 of the March version, supra note. Unofficial translation by Timo Koivurova.

³⁸ Ibid., p. 19. Unofficial translation by Timo Koivurova.

impact on the rights the Sami possess as an indigenous people.³⁹

The absolute prohibitions as regards to the Sami indigenous rights of mining are outlined in Article 50:

50 § Permit cannot be given at all in the following circumstances

The prospecting permit, mining permit, and gold panning permit shall not be given if:

- 1) one permit or many permits combined (cumulative impact) would clearly weaken the preconditions (together with other permits and other ways of using the area) for the practice of traditional livelihoods of Sami (in their homeland region) or would clearly weaken the preconditions to practice other Sami livelihoods or weaken the possibilities to uphold and develop Sami culture.
- 2) Would clearly weaken the living conditions of the Skolt Sami and the possibilities to practice livelihoods in the Skolt area.

All these permits can be given, if these problems can be mitigated or erased via permit conditions.⁴⁰

There are many positive improvements from the viewpoint of Sami protection from mining impacts provided in the new Mining Act, as compared to the old Mining Act and even to the March 2008 version. The March 2008 version was built very much on the Covenant on Civil and Political Rights and its Article 27, and focused on the protection of Sami reindeer, alongside reindeer herding in general from the impacts of min-

ing. It also focused on the Sami homeland area, and not on the impacts that may come from mining activities that take place outside of the homeland area but have impacts in the homeland area.

The most significant change is of course, that now Sami indigenous rights are protected, not only those of Sami reindeer herding. Even if Sami reindeer herding will still be the central focus of protection in the Mining Act, the Sami culture is now protected in broader terms, given that mining often causes various kinds of social, cultural and economic influences in the near-by areas, which may very well weaken the basis for overall Sami culture. The use of the term “Sami indigenous rights” is also important, given that Sami indigenous rights have progressed rapidly and will likely continue to do so in the future. In using a generic concept of “indigenous rights”, the Mining Act provides conceptual openness for change in light of the evolving law relating to indigenous peoples. Another interesting addition is the protection of Sami indigenous rights also from impacts arising from outside of the Sami homeland region. It is hence easy to conclude that the Sami parliament was able to influence the Committee in its work in drafting a new Mining Act. Now their rights are extremely well protected against any adverse impacts from mining, at least in regard to the law.

3. Does the New Mining Act Also Protect the Sami in Reality From the Impacts of Mining?

As examined above, it is clear that the new mining act is almost the exact opposite from the old 1965 Mining Act which did not even mention the Sami. Even if many other pieces of legislation (such as the Sami Parliament Act that requires negotiations with the Sami parliament) were applicable before the new mining act, it is clear that by including strong legal protection inside the new Mining Act, Sami legal protection against

³⁹ Kaivoslaksi (Mining Act) 10.6.2011/621, see at <http://www.finlex.fi/fi/laki/ajantasa/2011/20110621?search%5Btype%5D=pika&search%5Bpika%5D=kaivoslaksi> (27.1.2014). Unofficial translation by Timo Koivurova.

⁴⁰ Ibid.

adverse impacts of mining has become stronger. Moreover, the new Mining Act provides strong protection for the Sami not only in their Homeland, but also in relation to those mining projects that are close to the Homeland, but which may have adverse impact on the Homeland region itself.⁴¹

Currently, there are few exploration and exploitation permits that have been issued to operate in the Sami Homeland region, which constitutes the northernmost municipalities of Enontekiö, Inari, Utsjoki and part of the Sodankylä municipality. The Finnish Geological Survey has a reservation within an area of the Homeland, where it wanted to conduct basic geological scientific research. However, its permit application for bedrock sampling from the land owner (Metsähallitus⁴²) was rejected.⁴³ According to the official reasoning, the planned activities would have gone beyond “basic research”, and Metsähallitus did not want to be the entity that distinguished the border between basic research and the search for minerals. Furthermore, as the area in question was both a NATURA 2000 area and a Sami Homeland area, the landowner preferred to transfer the responsibility of issuing a permit to Tukes⁴⁴, the relevant authority in mining issues.⁴⁵ In its statement 2/D.a.5/2013, the

Sami Parliament has considered this an excellent decision.⁴⁶

The main bone of contention is currently between the Sami parliament and machinery gold panning – the proponents of which have made claims and applications to Tukes. As of yet there has been no decision. The Sami do not oppose traditional panning, without machine assistance, but four machinery gold panning permits issued by the mining authority have been challenged by the Sami parliament. The Administrative Court decided in favor of the Sami,⁴⁷ therefore Tukes and the gold panning applicants have proceeded to the Finnish Supreme Administrative Court (SAC) for a final decision.⁴⁸ Of much interest is how the SAC will decide these cases since the Finnish court system in general follows closely on how the Human Rights Committee gives content to the Covenant on Civil and Political Rights. Recently, and starting from the 2009 Poma Poma⁴⁹ case, the Human Rights Committee has made it clear that it is not enough for the state to organize consultations with indigenous peoples when it comes to protecting their traditional livelihoods. Indigenous peoples need also to give their prior and informed consent before the state can proceed with projects that are damaging to indigenous traditional livelihoods. It

⁴¹ The closest operating mines to the Sami Homeland are currently the Kevitsa, Pahtavaara, Kittilä, Hannukainen and Sokli mines, processing mostly nickel, gold, copper and phosphates. These mines are all located within a 100 km distance from the border of the Sami Homeland.

⁴² The ‘Forestry Board’, responsible for managing state-owned land in Finland, most of which is in Lapland.

⁴³ Mention must be made that Metsähallitus has given permits for bedrock mapping and geochemical sampling in the area, but not for drilling, which is another form of sampling bedrock.

⁴⁴ Case number MH 199/2013/06.06.02

⁴⁵ The case has not yet ended; the Finnish Geological Survey would turn to Tukes only if it was necessary to secure the rights to minerals. Instead, it tries to apply for permit from the Metsähallitus in this ongoing project.

⁴⁶ Statement number: 2/D.a.5/2013

⁴⁷ According to the Court, Tukes has failed in the process of co-operating with the Sami Parliament in establishing the impacts of the activity and in considering measures to decrease and prevent damage, required by Section 38 of the Mining Act.

⁴⁸ Cases dn:o 2369-2372/1/13 and 2465-2468/1/13

⁴⁹ Human Rights Committee, Ninety-fifth session, 16 March to 9 April 2009, *Ángela Poma Poma v. Peru*, views. 27 March 2009. Paragraph 7.6.: “...The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.”

will therefore be interesting to see whether the SAC will follow this stricter stance in these gold panning cases.

4. The Future – Will there be Large-scale Mining in the Sami Homeland?

Our semi-structured interviews confirmed the strength of protection of Sami rights. Although there are no mining sites currently located within the Sami Homeland, we asked the opinion of relevant actors who are involved in mining, about the current and future possibilities of mining on Sami lands. The reader is instructed to note that despite our efforts, we were unable to secure any Sami Parliament interviews. We have therefore used Sami Parliament statements to clarify the opinion of the Sami Parliament on these issues.

Interviewees agreed that for companies, it is a very important factor as to whether the site is located on an area of Sami Homeland. Besides the obvious fact that a company needs to earn the social license to operate and has to take into consideration the local people and culture, some have shared the opinion that the strong legal protection of the Sami can hinder companies who apply for permits in these areas.⁵⁰ As in most of these cases, a Sami appeal is highly expected, and as companies would rather not risk lengthy court proceedings, they tend to plan their activities in other areas which would impose fewer impediments.⁵¹

Due to the lack of big deposits, there are currently no mining sites in the Finnish Sami Homeland. The representatives of mining actors presume that in the case that a rich deposit could be found in the Homeland, companies would try to apply for permits, but would be concerned

about the outcome.⁵² The bigger the company, the more sensitive it is to indigenous rights issues. At the same time however, it most probably has well-established ways of negotiating with local communities.⁵³ Big international companies with experience in consulting with indigenous peoples in other countries, would be less worried than smaller companies or those that have tried unsuccessfully to establish sufficient ways of communication with indigenous peoples (for example, in Australia and South Africa).⁵⁴ On the other hand, junior companies might not even initiate the application process due to the strong legal protection of Sami and the probability of appeal. In the case of a smaller deposit being found, many companies would rather not try to apply for permits.⁵⁵

The majority of the interviewed persons see the core of the problem in the unclear regulation.⁵⁶ In their opinion, the wording of the Mining Act is in many areas too general, and therefore it is difficult to predict the potential future of a permit application. Companies aim at acting in full accordance to the rules, especially in sensitive mining-issues, and would rather not risk long and insecure procedures. If rules (both national and international) concerning mining activities were well-clarified, companies would feel more secure and would be less hesitant to plan their activities in Sami areas. Better defined criteria for appeal would also ensure more security for companies. From the Sami point of view, regulation on land issues and, more importantly,

⁵⁰ Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014.

⁵¹ Mining company representative, interviewed 14.2.2014.

⁵² Environmental consultant, interviewed 13.2.2014.

⁵³ Environmental consultant, interviewed 20.2.2014; Mining company representative, interviewed 14.2.2014.

⁵⁴ Environmental consultant, interviewed 20.2.2014.

⁵⁵ Mining company representative, interviewed 14.2.2014.

⁵⁶ Representative of a relevant authority, interviewed 12.2.2014; mining authority representative, interviewed 14.2.2014.

on compensation would have to be further clarified.⁵⁷

Besides the non-clarity of processes, many actors have expressed the opinion that the new Mining Act is “too new to work properly yet”.⁵⁸ One of the biggest changes in the new Act was the transfer of the mining authority from the Ministry of Employment and Economy to Tukes, and the new authority has not yet enough experience in dealing with mining issues. Therefore, the other authorities and parties in question are also in the process of learning the permit system.⁵⁹ This was also confirmed by the Sami Parliament in their statement on their view on the implementation of the Mining Act in the Sami Homeland.⁶⁰ They also felt there was a lack of explanation on what criteria Tukes uses to assess the effects on Sami culture.

Interestingly, the interviewed persons concur in seeing the role of the media as one of the biggest problems.⁶¹ Since different media organs usually picture mining as only a harmful activity, people tend to have a negative attitude towards mining in general. They further emphasized that this is especially true in the Arctic, where people are more sensitive about environmental issues, mostly due to climate change and the relatively strong protection of indigenous peoples. In order to gain people’s acceptance, one possible solution suggested by our interviewees was that they would also have to be provided with more knowledge on the advantages of such activities.

As it stands, this may result in the unfortunate situation where the Sami people themselves

might not have (according to our interviews) either enough information, or have false or incomplete information on the real effects of mining activities in their Homeland, which necessarily leads to misunderstandings between the Sami and mining companies.⁶² The interviewed representatives think that if the Sami were properly informed about the real effects of mining activities, they would probably be more willing to allow mining activities in their Homeland area. Besides understanding the obvious fact that mining does harm the environment, the Sami would probably need more knowledge on the precautionary measures taken by companies. Many of our interviewees emphasized the importance of honesty towards local inhabitants. Some even went so far as to state that companies are perhaps more hesitant to plan activities in Sami areas than they actually should be, provided that they communicate honestly with the local people.⁶³

Many responders supported this idea by saying that the fact that deposits may be located in the Sami Homeland does not, *per se*, hinder companies from a permit application if the company has enough experience in engaging in dialogue and negotiation with indigenous peoples.⁶⁴ Obviously however, this dialogue must be initiated at the earliest possible stage of the planning process, and communication with the local people must be transparent.⁶⁵

Although the interviewees all agreed that more advanced consultations would help in many cases, dialogue alone cannot solve the

⁵⁷ Mining company representative, interviewed 14.2.2014.

⁵⁸ Environmental consultant, interviewed 13.2.2014.

⁵⁹ Mining company representative, interviewed 14.2.2014.

⁶⁰ Number of Statement: 584/D.a.9/2013

⁶¹ Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014; Environmental consultant, interviewed 20.2.2014.

⁶² Representative of a relevant authority, interviewed 12.2.2014; Mining company representative, interviewed 11.2.2014; Mining company representative, interviewed 14.2.2014.

⁶³ Mining company representative, interviewed 14.2.2014.

⁶⁴ Environmental consultant, interviewed 20.2.2014; Mining company representative, interviewed 11.2.2014.

⁶⁵ Mining company representative, interviewed 11.2.2014.

whole problem.⁶⁶ Therefore, better co-operation between companies and the Sami Parliament would be much more beneficial for the future. Many actors have complained about the Sami Parliament not sending representatives to public hearings, although those are fora in which the viewpoints of different parties are discussed on a less formal basis. Because of the lack of “face-to-face” consultations with the Sami Parliament, there is no chance to present or discuss the opinion of each party and come up with a solution that would be beneficial for all.⁶⁷ This results in the situation where the Sami Parliament subsequently sends a formal (and in most cases rejective) opinion on a planned activity, even if this is not preceded by dialogue, which aims at finding consensus.⁶⁸ Furthermore, according to the interviews, Sami individuals are not always against mining, and some companies had experience where Sami persons even thanked them for initiating dialogues and giving them a better understanding of their activities.⁶⁹

Representatives of the mining companies all emphasized the importance and value of Sami culture and heritage, and confirmed that they understood “new” issues such as mining, may be seen as posing a threat. Moreover, they are all aware that the question of mining is only a further addition to the already sensitive situation concerning the insecurity of land and cultural issues. The fundamental differences between these interests thus aggravate the possibility of mea-

suring the impacts and benefits of mining on the Sami lands and impacts upon their culture.⁷⁰ It was acknowledged that decisions cannot always be made solely on the basis of scientific facts, when there are strong traditions, emotions and politics in the background.⁷¹

However, as it was further argued by the parties, there is a growing demand to maintain the wider societies’ present lifestyle, and minerals are required for this purpose. As the Lapland region has proven to be rich in deposits, the Sami Homeland area is probably not an exception. Therefore, a growing pressure to mine on indigenous lands can be expected in the future.⁷²

The situation in other Nordic countries with a Sami population is ambiguous. Based on the experience of our respondents, mining activities on Sami lands do exist in Sweden and Norway, indicating that it could be possible to conduct such activities on indigenous lands.⁷³ On the other hand, however, a harsh reaction by Swedish Sami might result in companies being reluctant to take steps in order to mine within the Homeland in Finland, for fear of similar reactions. However, the situation is obviously less serious in Finland, as long as no rich deposits are found.⁷⁴

Most actors from the mining sector agreed that despite the possible threat imposed by mining on their culture and heritage, the Sami would need to see and understand the benefits brought

⁶⁶ Environmental consultant, interviewed 13.2.2014; Environmental consultant, interviewed 20.2.2014.

⁶⁷ Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014.

⁶⁸ Some interviewees failed to see any solid and substantial reasoning of these formal opinions. For example, once the Sami Parliament argued that a company was at fault because it should have published their notification in the newspaper in the Sami language.

⁶⁹ Mining company representative, interviewed 14.2.2014.

⁷⁰ Mining company representative, interviewed 11.2.2014; Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014; Environmental consultant, interviewed 20.2.2014.

⁷¹ Environmental consultant, interviewed 13.2.2014.

⁷² Mining company representative, interviewed 14.2.2014; Environmental consultant, interviewed 20.2.2014.

⁷³ Environmental consultant, interviewed 20.2.2014.

⁷⁴ Mining company representative, interviewed 14.2.2014.

by the mining industry.⁷⁵ According to the interviews, cases such as the two mines in Sodankylä have clearly shown that although mining is a significant change for a municipality, such changes are not necessarily changes for the worse.⁷⁶ For instance, a mining industry would provide the possibility for young Sami to stay in their home area and not be forced to move to cities in order to secure their living.⁷⁷

Such activity could be achieved with more active co-operation between the Sami Parliament and the mining companies. According to many interviewees, it would be a significant, and probably the most important, step forward if more exploration activities were allowed in the Homeland region.⁷⁸ The lack of information on the bedrock and possible deposits currently poses one of the most problematic issues for companies.⁷⁹ By allowing more exploration, more data could be provided. Based on such knowledge it would be easier to decide whether it would be worth planning any kind of mining-related activities on Sami lands. Furthermore, the Sami would still have the right to appeal any motions in several other phases of the current system.⁸⁰

Better co-operation would also help to abolish the current misleading stereotypes, *i.e.* that mining companies are harmful actors in the Sami Homeland, and the associated reputation of Sami people in appealing against most types

of mining activities.⁸¹ Yet, given that the Sami Parliament is against machinery gold-panning, it can be inferred that at least at present, the Sami people would oppose any large-scale mining in their Homeland.⁸²

5. Concluding Remarks

The new mining Act was compiled in a fairly old-fashioned manner, in that there was practically no preceding societal discussion. On the other hand, this has also been a very Finnish way of preparing legislation, even in the case of such a societally important activity as mining. From the Sami viewpoint however, the legislation was prepared in such a way that enabled Finland's only indigenous people to inject their views and influence the preparation of the Mining Act. As discussed, the March 2008 Draft Mining Act version was significantly revised and improved from the viewpoint of Sami rights, and this was mainly due to the Sami parliament's active contribution in the stakeholder consultations.

It seems obvious that the legal protection that the Sami people now enjoy against mining and its adverse environmental and societal impacts is very strong, especially in their Homeland region and also elsewhere. It will be interesting to see what will happen with the applications to commence machine gold panning in the Sami Homeland region, given that the Supreme Administrative Court may well follow the Human Rights Committee's interpretation and decide that the consent of the Sami indigenous people is required.

⁷⁵ Environmental consultant, interviewed 13.2.2014; Mining company representative, interviewed 14.2.2014.

⁷⁶ Mining company representative, interviewed 14.2.2014.

⁷⁷ Environmental consultant, interviewed 13.2.2014.

⁷⁸ Mining company representative, interviewed 11.2.2014.

⁷⁹ Representative of a relevant authority, interviewed 12.2.2014; Environmental consultant, interviewed 13.2.2014.

⁸⁰ Mining company representative, interviewed 11.2.2014.

⁸¹ Environmental consultant, interviewed 13.2.2014; Environmental consultant, interviewed 20.2.2014.

⁸² Moreover, besides the Sami interests, there are other important factors impeding mining in the northernmost part of Finland. National parks, wilderness reserves, Natura 2000 areas, tourism and the rights of other local people also have to be carefully taken into account.

According to our interviews, there may be interest from companies, even in large-scale mining in the Sami Homeland region. Yet currently, it seems that the Sami parliament would oppose any such effort, and given their strong legal protection, it would thus seem difficult for any large-scale mining operation to be permitted to operate in their homeland area. Currently, it seems that Sami will accept only traditional gold-panning activities in their Homeland region. The Sami currently enjoy very strong legal and tangible protection from adverse mining impacts in Finland, even if their overall legal protection cannot yet be said to be adequate. Finland has promised to ratify the ILO 169 Convention⁸³ concerning the rights of indigenous peoples for a very long time, including promises by the present government.⁸⁴ Time will tell however, whether the overall legal protection of the Sami people will proceed in the same direction as the legal protection afforded to them against adverse mining impacts.

⁸³ The text of the Convention is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (28.2.2014).

⁸⁴ Programme of Prime Minister Jyrki Katainen's Government, 22 June 2011, p. 30. The programme is available at: <http://valtioneuvosto.fi/hallitus/hallitusohjelma/pdf/en334743.pdf> (28.2.2014).