

Routledge Studies of the Extractive Industries and Sustainable Development

CONTESTED CONSULTATIONS IN THE EXTRACTIVE INDUSTRIES

RIGHTS, PROCESSES, AND TENSIONS

Edited by

Paul A. Haslam, Nathan Andrews, Karin Buhmann,
Ibironke T. Odumosu-Ayanu and Mark C.J. Stoddart



Contested Consultations in the Extractive Industries

This volume examines how communities, companies, and governments contest and contribute to the evolution of norms, rules and decision-making procedures that govern stakeholder consultation in the extractive industries.

In recent years international organisations, governments and companies around the world have dramatically reformed the regime that governs consultations with community stakeholders about proposed extractive projects. However, the characteristics of this consultation regime are often contested, with diverse stakeholders seeking to defend their interests by drawing on different authoritative interpretations of the rules, norms and decision-making procedures that govern stakeholder consultation. Contestation over the meaning, governance and practice of stakeholder consultation is the central thread that ties this book together. Within this overarching concern, the volume takes a global and comparative perspective that examines the complexity of these intersecting and overlapping consultation requirements, with a particular focus on Indigenous Peoples, using cases from the Global North and Global South, including Argentina, Australia, Brazil, Canada, The Central African Republic, The Democratic Republic of Congo, Iceland, Ghana, Greenland, Guyana, Norway, and Peru. The book highlights the tensions associated with the application of this contested regime and identifies possible solutions from best practices around the world. From a theoretical perspective the book unpacks the maze of overlapping consultation requirements and practices that highlights the normative disagreements between key stakeholders and the overlapping rules and procedures that govern the implementation of consultation. A unique contribution of this collection is the commentary from practitioners, who reflect on the same issues addressed by the academic contributors, but based on their own vast practical experience.

This book will be of great interest to students and scholars researching public participation and stakeholder consultation in the extractive industries as well as natural resource governance and sustainable development more broadly.

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

earthscan
from Routledge

First published 2026
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

ISBN: 978-1-032-78563-9 (hbk)

ISBN: 978-1-032-78565-3 (pbk)

ISBN: 978-1-003-48850-7 (ebk)

DOI: 10.4324/9781003488507

Typeset in Times New Roman
by Taylor & Francis Books

Contents

<i>List of illustrations</i>	viii
<i>List of contributors</i>	x
<i>Preface and Acknowledgements</i>	xv
<i>Abbreviations</i>	xvii
Introduction	1
1 Contested stakeholder consultations in global comparative perspective	3
PAUL A. HASLAM, NATHAN ANDREWS, KARIN BUHMANN, IBIRONKE T. ODUMOSU-AYANU, MARK C.J. STODDART AND AXEL PUEUGUE	
PART I	
Understanding contestation	27
2 Consultation, Indigenous Peoples and the extractive industries	29
CIARAN O'FAIRCHEALLAIGH	
3 Sustainable mining for whom? Agential Constructivist perspectives on global mining sector consultation regimes in Africa	41
SURULOLA EKE, J. ANDREW GRANT AND MEGHAN HEMBRUFF	
4 Civil society and extractive company-community relations in Canada and Norway	58
MARK C.J. STODDART AND CHIAO-CHI CHEN	

PART II

The contested meanings of consultation 79

- 5 From consultation to consent: A potentially complex transition in the Indigenous rights context, and analogous implications for stakeholder consultation 81
DWIGHT NEWMAN
- 6 Agreements, consultation, and consent in extractive projects 92
IBIRONKE T. ODUMOSU-AYANU
- 7 Rights-based approach to consultation with Indigenous Peoples in natural resource extraction 108
FUNMILOLA AYOTUNDE
- 8 Indigenous governance, gender, and engagement with rights-holders: Lessons from Canada through environmental human rights 127
SHERRY PICTOU AND SARA L. SECK

PART III

Consult how? Processes for meaningful consultation 139

- 9 Meaningful engagement of affected people and communities: Exploring tensions between formal requirements and lived experiences of public participation in impact assessments 141
KARIN BUHMANN, SANNE VAMMEN LARSEN, MARK C.J. STODDART AND CHIAO-CHI CHEN
- 10 Public consultation in emergency situations: Lessons from decommissioning mine tailings dams in Minas Gerais, Brazil 158
RAFAELA S. MASSIGNAN, SOLANGE SILVA-SÁNCHEZ AND LUIS E. SÁNCHEZ
- 11 Stakeholder engagement and company-community relations in Ghana: Consultation practices, legal pluralism, and discontents 173
PHIL FAANU AND NATHAN ANDREWS
- 12 Impact assessment and responsible business guidance tools in the extractive sector: Implications for engagement in Canada 188
CHARLOTTE CONNOLLY, SARA L. SECK AND PENELOPE SIMONS

PART IV**Practitioner insights 205**

- 13 Meaningful stakeholder engagement and The Canadian Ombudsperson for Responsible Enterprise (CORE): Guided by principles 207
SHERI MEYERHOFFER
- 14 An early example of engagement and consultation in the industry: Setting the stage for improved social performance today 213
JEFFREY DAVIDSON
- 15 Social performance in rural communities 222
ANDRES RECALDE
- 16 Consultation as an exercise in democracy that produces a win-win understanding across the territory 226
LAURA RÓPOLO
- 17 Challenges to the protection of consultation in Latin America: The role of the Inter-American Court of Human Rights 229
SALVADOR HERENCIA-CARRASCO AND JORDI FEO VALERO
- 18 Globally recognised sustainability standard raising the bar for the mining sector worldwide 236
THE MINING ASSOCIATION OF CANADA
- 19 Between flaws, setbacks, and timid progress: Findings after 25 years of mining-related consultations 240
RODRIGUE TURGEON, VAL CROFT, JAMIE KNEEN AND CATHERINE COUMANS

PART V**Conclusion 249**

- 20 Beyond contested stakeholder consultations: A regime in flux 251
PAUL A. HASLAM, NATHAN ANDREWS, KARIN BUHMANN, IBIRONKE T. ODUMOSU-AYANU AND MARK C.J. STODDART

Index 267

Illustrations

Figures

3.1	The three rings of sustainability	44
3.2	China's control of overseas mine production as a % of total value of world mine production	50
4.1	Two-mode network of organisational actors (black square nodes) and case study regions (white triangular nodes)	67
4.2a	Two-mode network of organisational actors (black square nodes) and oil and gas company and government source documents (white square nodes), Canada case	69
4.2b	Two-mode network of organisational actors (black square nodes) and oil and gas company and government source documents (white square nodes), Norway case	70
4.3a	Three-mode network of organisational actors (black square nodes), discursive themes (grey circle nodes), and consultation frameworks (white octagon nodes), Canada case	72
4.3b	Three-mode network of organisational actors (black square nodes), discursive themes (grey circle nodes), and consultation frameworks (white octagon nodes), Norway case	73
11.1	The ecosystem of stakeholder consultation in Ghana's mining sector	176
20.1	Contested stakeholder consultations: Competing rules, norms and decision-making procedures	253

Tables

4.1	Summary of the textual data sources	64
4.2	Summary of nodes in Discourse Network Analysis	66

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Preface and Acknowledgements

The contestation that occurs around the meaning, governance and practice of stakeholder consultation is the central concern of this book. Within this overarching concern, we take a global and comparative perspective that examines the complexity of these intersecting and overlapping consultation requirements. From a theoretical perspective, we aim to unpack the maze of overlapping consultation requirements and practices by conceptualising it as a still emerging and complex regime that highlights the normative disagreements between key stakeholders and the overlapping rules and procedures that govern the implementation of consultation. From an empirical perspective, this book explores the diversity of stakeholder consultation practices using cases from the Global North and Global South. This allows us to highlight the tensions associated with the application of this contested regime, as well as to identify some possible solutions from best practices around the world.

This book, like so many, was a truly global and collaborative effort. It grew out of a hybrid workshop on Stakeholder Consultation Regimes in Comparative Perspective, held at the University of Ottawa, September 22–23, 2022. The workshop aimed to generate a multidisciplinary, North-South, academic-practitioner dialogue about how to understand the complexity of existing consultation processes. The ensuing dialogue led us to emphasise, in this book, the *contestation* that exists among key actors regarding fundamental regime characteristics – namely the rules, norms and decision-making procedures that govern stakeholder consultation.

We'd like to express our deep gratitude to all the participants who joined us for this workshop, either in person in Ottawa, or virtually, and who stimulated our thinking about stakeholder consultation practices. Participants in the workshop were Mohammed Adam, Giuseppe Amatulli, Nathan Andrews, Funmilola Ayotunde, Karin Buhmann, Dorothée Cambou, Ben Chalmers, Chiao-Chi Chen, Charlotte Connolly, Terrence Cowl, Jeffrey Davidson, Surulola Eke, J. Andrew Grant, Paul A. Haslam, Salvador Herencia-Carrasco, Uwafiokun Idemudia, Muaz Jalil, Rachael Lorna Johnstone, Christina Viskum Lytken Larsen, Rajiv Maher, Ginno Martinez, Sheri Meyerhoffer, Shona Nelson, Dwight Newman, Ibronke T. Odumosu-Ayanu, Ciaran O'Faircheallaigh, Sherry Pictou, Andres Recalde, Sara L. Seck, Penelope

Simons, Anna-Sofie Skjervedal, Mark C.J. Stoddart, Ragnheiður Elfa Þorsteinsdóttir, Rodrigue Turgeon, Sanne Vammen Larsen. Special thanks go to Axel Pueugue who assisted with the organisation and background research for the workshop, and Ginno Martinez Tuesta who served as rapporteur.

We would like to acknowledge the generous funding provided for the workshop by a Social Sciences and Humanities Research Council of Canada (SSHRC), Connections Grant (*Stakeholder consultation regimes in comparative perspective*, grant number 611-2021-0260, principal investigator, Paul A. Haslam), and the University of the Arctic Thematic Network on Arctic Sustainable Resources and Social Responsibility, itself supported by the Danish Agency for Science and Higher Education (principal investigator, Karin Buhmann).

Open access funding for this volume has also been supported by the following sources: SSHRC Insight Grant, *Institutions and the local resource curse*, grant number 435-2017-1510, principal investigator Paul A. Haslam; SSHRC Insight Grant, *Meaningful Stakeholder Engagement in Resource-Rich Communities*, grant number 435-2021-0683, principal investigator Nathan Andrews; SSHRC Insight Development Grant, *Beyond Social Norms and Customs: Researching Sustainable Formalization of Labour Relations in Agrarian Economies*, grant number 430-2023-00250, principal investigator Surulola Eke; Sherry Pictou and the Schulich School of Law; and Penelope Simons, Gordon F. Henderson Chair in Human Rights, University of Ottawa.

Abbreviations

2SLGBTQQIA	two-spirit, lesbian, gay, bisexual, trans, queer, questioning, intersex and asexual
ACHR	American Convention on Human Rights
AMV	Africa Mining Vision
ASM	artisanal and small-scale mining
BAPE	Bureau d'audiences publiques sur l'environnement [Office of Public Hearings on the Environment], Quebec
BCSC	British Columbia Supreme Court
BHP	Broken Hill Properties, company
BP	British Petroleum, company
CAR	Central African Republic
CBEMP	Community Based Environmental Monitoring Program
CCC	Community Consultative Committee
CCIA	Community-controlled Impact Assessment
CDE	State Defence Council, Chile
CEAA	Canadian Environmental Assessment Agency
CEO	chief executive officer
CMSI	Consolidated Mining Standard Initiative
COI	Community of Interest Panel
CORE	Canadian Office for Responsible Enterprise
CSMI	Climate Smart Mining Initiative, World Bank
CSO	civil society organisation
CSR	corporate social responsibility
DIA	Declaración de Impacto Ambiental [Declaration of Environmental Impact]
DIHR	Danish Institute for Human Rights
DNA	Discourse Network Analysis
DRC	Democratic Republic of the Congo
ECJ	Estrutura de Contenção a Jusante [Downstream Containment Structure]
EGPS	Extractives Global Programmatic Support, World Bank
EIA	Environmental Impact Assessment
ENGO	environmental non-governmental organisation

EPA	Environmental Protection Agency, Ghana
ESF	Environmental and Social Framework, World Bank
ESG	environmental, social, and governance
ESIA	environmental and/or and social impact assessment
EV	electric vehicles
FCR	Federal Courts Report
FEAM	Fundação Estadual do Meio Ambiente [State Environmental Foundation, Brazil]
FGD	focus group discussion
FPIC	free, prior and informed consultation / consent
FSM	Forest Smart Mining Initiative, World Bank
GAC	Global Affairs Canada
GBA+	Gender-Based Analysis Plus
GHG	greenhouse-gas emissions
GIA	gender impact assessment
GSR	Golden Star Resources Wassa, company
HIA	health impact assessment
HRBA	human rights-based approach
HRDD	Human rights due diligence
HRIA	human rights impact assessment
HRREC	Human Rights Clinic of the Human Rights Research and Education Centre, University of Ottawa
HRRM	Human Rights Responsibility Mechanism
IA	impact assessment
IAA	Impact Assessment Act, Canada
IAAC	Impact Assessment Agency of Canada
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
IAIA	International Association for Impact Assessment
IBA	Impact and Benefit Agreement
IBCA	Impact, Benefit and Co-Management Agreement
ICCPR	International Covenant on Civil and Political Rights
ICCs	Indigenous Cultural Communities
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
IFPIC	Indigenous free, prior and informed consent
IGF	Intergovernmental Forum
ILO	International Labour Office
ILO 169	International Labour Office of the Convention on the Rights of Tribal and Indigenous Peoples
IMF	International Monetary Fund
IPRA	Indigenous Peoples' Rights Act, Philippines
IPs	Indigenous Peoples

IR	International Relations
IRMA	Responsible Mining Assurance Standard for Responsible Mining
IWGIA	Indigenous Working Group for Indigenous Affairs
KPCS	Kimberley Process Certification Scheme
LCRs	local content regulations
LI	Legislative Instrument, Ghana
LNG	liquified natural gas
LSM	large-scale mining
MAC	Mining Association of Canada
MDF	Mineral Development Fund, Ghana
MINCA	Minera Las Cristinas C.A., company
MMIWG	National Inquiry into Missing and Murdered Indigenous Women and Girls, Canada
MPF	Mining Policy Framework, Intergovernmental Forum
MSE	meaningful stakeholder engagement
MWC	MiningWatch Canada
NAM	Newmont Ahafo Mines, company
NCP	National Contact Point, OECD
NDC	nationally determined contribution
NGO	non-governmental organisation
NRGI	Natural Resource Governance Institute
NWT	Northwest Territories, Canada
OECD	Organisation for Economic Cooperation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
OHCHR	Office of the High Commissioner for Human Rights
ONSC	Ontario Superior Court of Justice
PANEL	participation, accountability, non-discrimination and equality, empowerment, and legality
PDAC	Prospectors and Developers Association of Canada
PM	Perseus Mines, company
QC	Quebec, Canada
QCCA	Quebec Court of Appeal, Canada
QCCS	Quebec Superior Court
RBA	rights-based approach
RBC	Responsible Business Conduct
REE	rare earth elements
RSO	Revised Statutes of Ontario, Canada
SADC	Southern African Development Community
SBC	Statutes of British Columbia, Canada
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Supreme Court of Canada Reports
SEIA	social and environmental impact assessment

SEMMP	Socio-economic Management and Monitoring Plan
SSHRC	Social Sciences and Humanities Research Council, Canada
SIA	social impact assessment
SNA	Social Network Analysis
SOR	Statutory Orders and Regulations, Canada
SSM	semi-mechanised medium-scale mining
TCC	Tahltan Central Council
TCG	Tahltan Central Government
TNG	Tsilhqot'in National Government
TCC	Tahltan Tribal Council
TNC	transnational corporation
TRC	Truth and Reconciliation Commission, Canada
TRTFN	Taku River Tlingit First Nation
TSM	Toward Sustainable Mining standard
UNBLJ	University of New Brunswick Law Journal
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDRIPA	UNDRIP Act, Canada
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UNGA	United Nations General Assembly
VPSHRs	Voluntary Principles on Security and Human Rights
WWF	World Wildlife Fund
YKCA	Yukon Court of Appeal
YWCA	Young Women's Christian Association
ZAS	Zona de Autossalvamento [Self-Rescue Zone], Brazil



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Introduction



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1 Contested stakeholder consultations in global comparative perspective

Paul A. Haslam, Nathan Andrews, Karin Buhmann, Ibrionke T. Odumosu-Ayanu, Mark C.J. Stoddart and Axel Pueugue

Introduction

Public participation is seen as crucial to the effective management of the impacts and benefits from resource extraction (see Parkins & Mitchell, 2005; Parkins & Sinclair, 2014; Andrews & Essah, 2020; Haslam, 2021). As a result, international organisations, governments and companies around the world – often under pressure from project-affected communities and peoples as well as civil society and non-governmental organisations – have dramatically reformed the frameworks that govern consultations with community stakeholders about proposed extractive projects. Yet, consultations remain contested – including at the project level where local stakeholders may oppose site-specific development plans. In many cases, local/community stakeholders are also rightsholders and this position is often expressed in the demands made to developers and the state. Increasingly, it is evident that a multiplicity of actors is engaged in contestation over the principles, norms, rules and decision-making procedures that constitute what we call the *consultation regime*, and that this much more fundamental contestation is embodied in the myriad claims and practices of local people who are required or, in some cases, invited, to engage with the state or its agents of economic development. By focusing on the overlapping and potentially contradictory aspects of public consultation as an unfinished regime with consequences for the daily governance of resource projects, this volume provides a lens that explains how local conflict and contestation, which is in part the product of regime characteristics, also challenge and contribute to remaking the regime itself.

In global terms, stakeholder consultation is governed by a complex set of instruments: international, public and private, and it is clear that many of these instruments have undergone important changes in the last decade, especially since the release of the UN Guiding Principles on Business and Human Rights (UNGPs) (OHCHR, 2011). The motivations behind these reforms are diverse, encompassing norm entrepreneurship by international organisations, the management of social risk by companies, pressure from affected communities and peoples, social movements and international NGO networks, and efforts by governments to balance project facilitation with

DOI: 10.4324/9781003488507-2

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respect for public participation, changing jurisprudence, and norms on human rights, including the rights of Indigenous Peoples. This array of frameworks can influence consultation processes in complex ways that vary significantly between different countries – even when based on similar international and domestic principles. These consultation frameworks are contested from above (by policymakers, corporate executives, and academic observers) and from below by project-affected peoples and their allies, in wide-ranging and fundamental debates about the principles, norms, rules and decision-making procedures that govern consultations. A central issue in this contestation is whether project-affected people are viewed by proponents, or assert themselves, as stakeholders (having an interest in a project because it affects them) or as rights-holders (having rights that must be respected and accommodated). Yet, it remains unclear whether ongoing efforts to re-define and reform consultation processes have resulted in more consensual (or less conflictual) resource development, or even what makes for a successful consultation.

For example, different interpretations of what constitutes consultation and/or free, prior and informed consent can be found in ILO Convention No. 169; the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); International Finance Corporation's (IFC) Performance Standards; the (Canadian) Crown's duty to consult; legislative requirements on impact assessment that in many countries include obligations to ensure that affected groups are consulted; and company and industry association codes of conduct, such as the Mining Association of Canada's *Toward Sustainable Mining* standard (Buhmann, 2016; Andrews & Grant, 2020; Maher et al., 2021; Maher & Buhmann, 2019). From the protocols and domestic legislation that underpin the implementation of consultation globally (Minter et al., 2012; Owen & Kemp, 2014), to community development and impact benefit agreements in Ghana, Canada and elsewhere (Andrews, 2013; Andrews, 2019; Boakye et al., 2018; Haslam, 2018; Idemudia, 2007; Odumosu-Ayanu & Newman, 2021; O'Faircheallaigh, 2015; O'Faircheallaigh, 2018), legal demands and policy frameworks for stakeholder engagement manifest differently across jurisdictions.

The contestation that occurs around the meaning, governance and practice of stakeholder consultation is the central thread that ties this book together. Within this overarching concern, we take a global and comparative perspective that examines the complexity of these intersecting and overlapping consultation requirements. From a theoretical perspective, we aim to unpack the maze of overlapping requirements and practices by conceptualising it as a still-emerging and complex regime that highlights the normative disagreements between key stakeholders and the overlapping rules and procedures that govern the implementation of consultation. From an empirical perspective, this book explores the diversity of stakeholder consultation practices using cases from the Global North and Global South. This allows us to highlight the tensions associated with the application of this contested regime, as well as to identify some possible solutions from best practices around the world.

A regime for consultation

The principal theoretical contributions of this book are to frame the problem of stakeholder consultation from the perspective of regime theory, and to recognise the impact of contestation (especially from below) on the development of that regime.

We view regime theory as useful for three reasons: (1) it allows us to conceptualise the institutional and multi-scalar complexity that characterises authoritative claims about the nature and practice of consultation; (2) it highlights the contestation over fundamental principles, norms, rules and decision-making procedures that characterise stakeholder consultation; and (3) it underlines how practice gives concrete expression to these tensions. Moreover, the book is resolutely interdisciplinary, drawing on research from scholars of international business, law, anthropology, sociology and political science to inform this debate. Although we use the concept of a “consultation regime” as an organisational concept, we recognise that the contributors to the volume draw on diverse theoretical perspectives in their work.

Regimes are bundles of institutions that have consequences by mediating between powerful social forces and outcomes (see Ruggie, 2002). In the academic field of international relations (IR), with its focus on sovereign states in an anarchic international system, the study of regimes provided an explanation for how international institutions without coercive power could nonetheless bend the outcomes that would be expected from pure power politics, enhancing the influence of small and militarily weak states, while constraining the mighty. It is important to note that institutions are considered in a broad sense of the word – but are distinct from organisations, which is to say they do not have the capacity to act (Hasenclever et al., 1997, p. 11). Stephen Krasner’s “consensus definition” of international regime remains the most commonly cited:

Regimes can be defined as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.

(1982, p. 186)

The purpose of a regime is to provide governance for an issue area, and particularly to facilitate the conclusion of agreements between important actors by compensating for market failures such as imperfect information, transaction costs, and the need to sanction defectors (Keohane, 1982, p. 338). Regimes are of course created against the backdrop of power, interests and ideas that characterise the international system, and different schools of

thought disagree on the relative importance of these factors (Hasenclever et al., 1997, p. 38; Haggard & Simmons, 1987). Although Krasner emphasised that regimes are characterised by a convergence of expectations among actors, more recent work has recognised that many regimes that aim to govern particular issue areas are contested. In this regard, regimes can be complex and characterised by overlapping sets of distinct rules, diverse actors, and unclear lines of authority for settling disputes over interpretation. Scholars now recognise that such complexity drives both strategic behaviour by actors who choose to be bound by the rules most advantageous to them, and substantive conflict over meaning in the “joints” where different sets of rules meet, and which is only likely to be resolved in practice (Raustiala & Victor, 2004, pp. 279–280). In this regard, complexity and contestation is a fundamental attribute of many institutional regimes that may generate innovatory practices, but also makes stakeholder behaviour less predictable, and stable agreements more difficult to negotiate (Sewell Jr, 2001; Clemens & Cook, 1999, pp. 448, 459, 458; Haslam, 2010).

The consultation regime addressed in this book differs from international regimes in one fundamental aspect: since stakeholder consultation occurs within a sovereign state, authoritative decisions about the interaction of overlapping or contradictory principles, norms, rules and decision-making procedures can be taken according to the domestic rule of law. But other characteristics of international regimes remain directly relevant to consultation, and provide theoretical leverage over understanding key tensions. For example, the consultation regime provides governance for an issue area through articulating principles, norms, rules and decision-making criteria. Contestation about stakeholder consultation engages fundamental differences in interpretation about the principles and norms that are relevant, especially with regard to rights claims linked to emerging international human rights law that may not be widely accepted by governments or codified in national legislation. Consultation frameworks aim to mediate between actors (such as project proponents and other social actors like community stakeholders) with the purpose of facilitating agreement between them. Various processes or practices associated with the consultation regime have a functionalist logic to them which aims both to “reduce information and transaction costs” and reinforce the regime through the gains to cooperation (Haggard & Simmons, 1987, p. 506). There is also a “liberal bias” to the concept of regime that downplays divergent interests, power relations and the institutionalisation of inequality, which we also see in the idea of consultation (Haggard & Simmons, 1987, p. 508; Ruggie, 2002; Hopf, 2010).

Additionally, it is important to recognise at the outset that the oversight of consultation processes by the state, and its willingness to put a finger on the scales, conditions the practice of consultation and its outcomes. Some states, especially in the Global South, may design institutions that are born ineffective, intended to be insignificant or which function to achieve goals other than their stated purpose – thus reinforcing the structural power of the mighty over

the weak, and providing only a thin veneer of legitimization (Brinks et al., 2019). Indeed, some consultation frameworks have been identified by critical Latin American scholars as exactly this kind of institution. As Brinks, Levitsky and Murillo write: “by channeling conflict into these empty, powerless forums and demobilizing the communities, an ostensibly progressive institution can become a conservative one, making it easier to continue long-standing practices of simply extracting at will from indigenous territories” (2019, p. 15; also see Torres Wong, 2019; Rodrigues-Garavito, 2011). In such contexts, the consultation processes may be examples of “empty institutions” that are designed to give an impression of progress, without real capacity for change (Dimitrov, 2020).

In this sense, the application of the concept of consultation regime is also useful. It highlights the importance of contestation over power, interests and ideas. It broadens our view of consultation to embrace multiple visions, actors and sources of authority, including expectations based on traditional knowledge, voluntary practices by companies, legal requirements, and international human rights norms that have not yet attained the status of customary international law. Furthermore, it recognises that the complex interaction between sources of authority generates tensions that affect the practice of consultation and its effectiveness.

We define the consultation regime as follows:

The bundle of intersecting formal and informal arrangements, including human rights, regulatory requirements, and voluntary standards that specify processes for public participation through which project proponents and states engage with affected or interested populations with the aim of reaching a decision about the regulatory approval of an industrial project and its ongoing social licence.

The consultation regime is commonly embedded in environmental and social impact assessment law, but also encompass rights to consultation, especially for Indigenous Peoples, as well as voluntary practices by companies. Such processes typically define who is considered to be a stakeholder, create institutionalised mechanisms for stakeholders to express certain types of concerns about the project, and establish criteria for responding to stakeholder concerns and mediating between conflictual interests (Grant et al., 2014; Newman, 2014; Noble, 2020; Nygaard, 2016, Declaration on the Rights of Indigenous Peoples [UNDRIP], 2007). In this regard, the consultation regime remains the dominant institutional practice for aligning resource development projects with diverse community concerns over potential environmental damage, work and procurement opportunities, social and cultural dislocation, and respect for human rights. It is important to recognise that stakeholders contest and negotiate such definitions and practices imposed from above, while they are increasingly willing to articulate and defend their own vision of what public participation should look like from below. This growing evidence

of norm localisation augments the need to understand a consultation regime not only as received wisdom and practices from above but as processes to which communities impacted by industrial/extractive activities insist on contributing.

Structure of the book

The book is organised in four sections that highlight contestation about the meaning and practice of stakeholder consultation. The first part of the collection focuses on understanding different logics of contention; the second section highlights the contested meanings of consultation, particularly contestation over the rights claimed by project-affected people; the third section examines the processes for consultation and their impact on the meaningfulness of consultation for participants; and the fourth section draws out insights from practitioners who have managed consultation processes in the field.

Understanding complexity in the consultation regime

The first section of this collection examines different ways of understanding the complexity exhibited by the consultation regime. Taken together they highlight that there is considerable variation in implementation, there are multiple sources of authority upon which participants can call to legitimise their positions, and that highly localised sources of authority, norms, and expectations play an important role in shaping real-world practices of consultation. The multi-level complexity of the consultation regime facilitates contending interpretations – as authoritative reference points for each view abound (Schilling-Vacaflor & Eicher 2017, p. 1443).

In Chapter 2, Ciaran O’Faircheallaigh highlights the contested nature of consultation with Indigenous Peoples. He underlines that Indigenous conceptions of consultation are rooted both in Indigenous Law, based on the holistic connection between land, kinship, social relations, culture and spirituality, and demands for recognition as “holders of unique rights in lands and resources based on their status as Indigenous Peoples” (p.35), as do several other chapters in this volume. However, states and companies tend to incorporate into legislation and practice respectively, the less-demanding consultation principles of ILO Convention No. 169, rather than the consent-oriented principles of UNDRIP. Where states and companies fail to recognise the sources of traditional authority and rights claims, contestation over consultation processes is more likely. Additional fragmentation of the regime results from uneven implementation and respect for Indigenous rights, even when officially recognised by governments. Some agencies of the state, such as Ministries of Natural Resources may push resource development without much regard for meaningful consultation, while other agencies, including Indigenous Affairs or Ombudsman’s Offices may seek to protect and promote expanded definitions of Indigenous rights. O’Faircheallaigh also observes that

communities are not monolithic either, and intra-community contestation may occur over the value of recognising rights compared to the creation of economic opportunities. Overall, O’Faircheallaigh’s contribution highlights the fragmentation and variation that occurs in the consultation regime, and the central role of complex contestation over narrow and more inclusive definitions of Indigenous rights.

In Chapter 3, Surulola Eke, J. Andrew Grant, and Meghan Hembruff examine the Global Smart Mining Initiative (GSMI) as a regional governance mechanism for stakeholder consultation in Southern Africa. Although the purpose of the GSMI is to promote sustainable mining while minimising negative externalities, they show how the governance mechanism was captured by business interests. Mining companies influenced the design of GSMI to promote “favourable business conditions” (p.46), which were then reflected in consultation processes regulated by the framework. Since stakeholder engagement under the GSMI was ultimately operationalised by states, a local context characterised by weak implementing states and illiberal partner states such as China and Russia was reflected in consultation processes that created barriers to meaningful participation, including the failure to recognise Indigenous groups as rights-holders. Eke, Grant and Hembruff highlight regional initiatives as an independent source of stakeholder consultation governance norms, but also underlines how such norms can be undermined by company interests, and the unwillingness of implementing governments to threaten investment opportunities through meaningful consultation.

In Chapter 4, Mark C.J. Stoddart and Chiao-Chi Chen use social network mapping tools to examine how complex and networked relations between actors characterise stakeholder consultation regimes in Canada and Norway. Through a discourse network analysis of key documents from government, corporate and civil society sources, the authors give us a sense of how global frameworks for consultation are translated in different contexts, and reflected in distinct constellations of relationships between key actors. Stoddart and Chen are particularly interested in understanding how civil society organisations engage with the consultation regime in each place, and how they align with “alter” organisations, discursive themes and frameworks for consultation. The authors are able to identify key similarities and differences between the stakeholder consultation practices in Canada (Newfoundland and Labrador) and Norway, that seem to originate in the fundamental state-society orientations of these two countries, respectively a “liberal” and a “coordinated” market economy, and how those orientations are reflected in corporate culture. Thus, in Newfoundland and Labrador, a Canadian oil company focused its consultation practices almost exclusively on Indigenous groups as legal rights-holders, while in Norway, the Norwegian company, engaged with a much broader and more inclusive set of stakeholders including research groups, international environmental NGOs, unions and communities. But the same Norwegian company operating in Newfoundland and Labrador continued to engage with a wider set of the stakeholders than the Canadian

company operating there. Stoddart and Chen show that the stakeholder consultation regime, despite having a formal connection to common international instruments, shows considerable variation in local practice, driven in part by local state-society relationships in the host country, and in part by corporate cultures based on country of origin. Stoddart and Chen's work emphasises the social foundations of consultation regime variation, as well as the continuing utility of the political CSR/ varieties of capitalism literatures for understanding stakeholder consultation practices.

The contested meanings of consultation

The contributing authors in this section address the tension between viewing project-affected people and groups as stakeholders or rights-holders, as articulated in the relationship between Indigenous Peoples, proponents and the state. Since the emergence of public consultation on industrial and infrastructure projects in the 1960s, debate has raged over whether consultation should be viewed more narrowly as a process of engagement with stakeholders, or more broadly as an exercise in democratic citizenship tied to power over outcomes (Arnstein, 1969), and the respect of rights (Buhmann, 2018). For many governments, the increased prominence of public consultation originated with concerns over making better technical decisions for which local input was functional, rather than engaging with fundamental claims from deliberative democratic theory about citizen empowerment (Parkins & Mitchell, 2005, p. 531). Similarly, companies' openness to consultation has principally been about improving risk management – by reducing uncertainty about the behaviour of stakeholders (Fasterling, 2017, p. 229; Frederiksen, 2018). For governments and companies, public participation can be promoted but *should* fall short of consent understood as a right to veto (Parsons, Lacey, & Moffat, 2014, p. 84), while for affected peoples and their advocates, participation in a consultative process *should* mean consent, even when it does not in law and practice.

One of the most consequential tensions in consultation processes is whether participants are viewed as stakeholders whose interests *should* be accommodated, or as rights-holders whose rights *must* be respected. The term “stakeholders” originated with the management literature (Freeman et al., 2004) and is usually understood to refer to social groups with an important influence on operations and profitability, with whom the firm chooses to engage. However, Freeman's original definition refers to stakeholders as those who can affect, as well as those who can be affected by, an organisation's attainment of its objectives (Freeman, 1984). This dualistic stakeholder conception informs the use of the term in leading guidelines and frameworks, notably the UNGPs (Buhmann et al., 2024). The same duality can be observed in the currently emergent emphasis on affected stakeholders as key actors in consultations.

Traditionally, company managers distinguish between more (primary) and less important (secondary) stakeholders, investing the majority of effort and

resources in the former (Maignan & Ferrell, 2000; Friedman & Miles, 2006). The distinction between stakeholders and rights-holders is particularly evident when Indigenous rights are linked to consultation processes, as highlighted by several contributors to this collection. The right to be consulted for Indigenous Peoples derives from their close relationship to the land, and dependence on it for livelihoods, and the potential for resource projects to affect these relationships (Flemmer & Schilling-Vacaflor, 2016). As Flemmer and Schilling-Vacaflor note, consultation is not only “an end (meaningful participation) but also a means for protecting all types of indigenous rights that might be at stake...” (2016, p. 174). The right of Indigenous Peoples to give “free, prior and informed consent” (FPIC) to resource development derives from multiple sources of authority including international law, national law, customary practice, and corporate policy frameworks, which means “any single definition of FPIC will struggle under the weight of complexity” (Owen & Kemp, 2014, p. 94). Moreover, empirical evidence seems to suggest that the ability to leverage rights through consultation processes is likely to contribute to improved outcomes for affected people, especially with regard to benefits (Prno, 2013; Parlee, 2015; Odziemkowska & Dorobantu, 2021). In this regard, the linking of international human rights and emerging standards, such as FPIC for Indigenous Peoples, has contributed to contestation around content and meaning of rights claims.

However, there has also been a more general movement to acknowledge the position of some stakeholders as rights-holders. The UN Guiding Principles on Business and Human Rights (UNGPs) adopt the position that harms to stakeholders that are tied to the company are abuses of human rights. This approach has also been incorporated in varying degrees into a wide range on international and voluntary instruments including the revised OECD Guidelines (2023), industry codes such as the Mining Association of Canada’s *Towards Sustainable Mining* standard, and also into the domestic regulation of CSR practices (Buhmann, 2016). A central plank of the UNGPs “Protect, Respect, Remedy” framework is the promotion of human rights due diligence by companies (assessing the impact of their operations on the human rights of affected populations – stakeholders), so as to “identify and manage adverse impact” (Buhmann, 2018, p.397; also Buhmann, Jonsson, Fisker, 2019). As a practice and a concept, meaningful stakeholder engagement has emerged as a process that contributes to effective stakeholder engagement in order to identify and understand the views and concerns of potential or actual victims of business-related harms, including human rights abuses (Buhmann, 2018). Moreover, the UNGPs clearly link human rights due diligence to a focus on vulnerable and marginalised populations (OHCHR, 2011, p. 5; Buhmann et al., 2024). Thus, all rights-holders are stakeholders; but not all stakeholders are rights-holders. As noted by Connolly, Seck, and Simons, “not all stakeholders will have their human rights put at risk by an extractive project” (p.195).

In Chapter 5, Dwight Newman examines the implications of a potential transition in Canada from a consultation to a consent protocol for Indigenous communities in advance of the legal requirement to do so. He identifies important distinctions between the concepts of (the crown/ federal government's and provinces') "duty to consult", "consultation", "consultation oriented to obtaining consent", and "consent". While *consultation* is about identifying and mitigating the impact of governmental decisions on Indigenous rights within a context of uncertainty about those rights, *consent* is agreement about a course of action and requires much more certainty. Thus, Newman highlights that consultation is more appropriate to a context of legal uncertainty about rights, but consent ultimately requires much more clarity about "who the stakeholders are, what rights they have, and who legally speaks for them" (p.90).

Ibironke Odumosu-Ayanu, in Chapter 6, examines the implications of agreements between Indigenous Peoples and extractive companies and between Indigenous Peoples and the state for debates around consultation and consent. She assesses consultation and consent discourses through the lens of consent decision-making agreements between the Tahltan Nation (British Columbia, Canada) and the Government of British Columbia. This assessment is situated within the context of contested normative, legal, and rights-based frameworks for consultation and consent as well as agreements adopted between Indigenous Peoples/impacted communities and companies in jurisdictions around the world. Exercise of the agency and the self-determination rights of Indigenous Peoples are key to engagements that inform consultation norms and practices and centre consent. In her assessment, Odumosu-Ayanu views consent as "a process that begins with consultation", "expressed in communication of assent" and "dependent on ongoing relationship and trust" (pp.95–96). The chapter's analysis culminates in assessment of factors extrapolated from its examination of agreements that are being "adopted and adapted" to address "contestations around the scope of consultation and the meaning of consent" (p.96). Each of the factors represent springboards for broader conversations with resonance and application in multiple jurisdictions.

In Chapter 7, Funmilola Ayotunde, examines the right of Indigenous Peoples in Canada to participate in decision-making, as recognised by various international instruments, including UNDRIP, and Section 35 of the Canadian Constitution. She argues that Indigenous Peoples' involvement in natural resource management is the starting point for an inclusive and equitable partnership with other stakeholders, but that current participatory practices fall short of meeting a higher standard of meaningfulness found in Human Rights-Based Approaches (HRBA). The context for recognition of rights-based approaches is also complicated by the fragmentation of the Canadian consultation regime, where the federal government and the provinces have overlapping responsibilities and vary in their commitment to UNDRIP principles. Ayotunde suggests that the adoption of HRBA would be transformative because it would force governments to move beyond procedural aspects of consultation, to uphold specific rights.

In Chapter 8, Sherry Pictou and Sara L. Seck draw attention to the tendency of formal consultation processes to leave out grassroots leadership by Indigenous women. Drawing on the Canada-based example of the Wolastoqiyik and Mi'kmaq Grandmothers, Pictou and Seck show how limitation of consultation to the formal authorities (Chief and Council) excludes traditional knowledge-holders to the detriment of environmental protection. They note “ancestral governance systems and Indigenous laws” from which “the Grandmothers derive the authority to take up their responsibilities as land and water defenders” (p. 134). The chapter suggests that international law, particularly UNDRIP, UNGPs, and instruments that define environmental rights, such as the “right to a clean, healthy and sustainable environment” (p. 134), support the grassroots vision of the grandmothers as well as better inform state duties and business responsibilities to Indigenous Peoples and Indigenous women and girls.

Consult how? Process rules for meaningful consultation

The recent interest in “meaningful consultation” (Buhmann et al., 2024; Maher & Buhmann 2019, p. 232) has sought to reconcile the tension between the more circumscribed and transformational (Howard, 2018) understandings of what consultation means. Being “meaningful” is a qualifier that distinguishes the consultation process as more authentic than the “tokenism” highlighted by Arnstein (1969), and which falls within a set of related terms such as the ICMMs “effective consultation”, or Mercer-Mapstone’s “constructive dialogue” that implicitly highlight the failures of long-standing public participation practices (Mercer-Mapstone et al., 2018, p. 9). The innovation in this approach is to view the consultation process from the bottom regardless of who organises it, instead of being focused on proponent and state-centric perspectives.

For example, the definition embraced by the Arctic Council highlights the key components of meaningfulness; open dialogue, recognition of public concerns, and a genuine opportunity to influence decisions. It is an ongoing process that begins early in project design, and incorporates traditional knowledge (Prno et al., 2021, p.1008), as captured in the description below:

Meaningful engagement proposes a relationship between proponent, authorities and the public that is characterized by dialogue, respect and trust. It includes a genuine attempt to find out what are the truly significant issues for a community and its people, in order to create structures and solutions that give due consideration to those interests... To be meaningful, engagement needs to be adaptable to multiple forms and inclusive of culture-specific methods.

(Arctic Council, 2019, p.16)

In this view, particular changes to process rules may contribute to more meaningful consultation which is effective in building support for the proposed project and reducing the likelihood of social conflict with stakeholders.

Researchers and practitioners have highlighted a significant number of process characteristics including, institutionalisation of the process, pre-consultation facilitation, timing, selection of participants, scope of the consultation, methodologies for engagement, and integration of benefits.

- **Institutionalisation.** Observers have argued that consultation should be a normal institutionalised process (Ianniello et al., 2018, p.35); but avoid hierarchy and red tape (Ianniello et al., 2018, p.35). Insofar as many consultation processes have been effectively run by project proponents, this argument suggests that the state should take a greater role in the consultation process. However, some observers also highlight the problem with rigidly structured processes and point to a need to involve stakeholders in some aspects of process design. Flemmer and Schilling-Vacaflor (2016) argue that real participation implies a right to define and shape the space for consultation. At a minimum, process design needs to be context-sensitive to reflect local realities (Ianniello et al., 2018, p.34). Moreover, we also need to consider that the institutionalisation of consultation may encourage contention because it assumes that participation is a way-stop in a journey that ends in approving resource projects against the fundamental concerns of people about how they live, make their livelihoods, and enjoy recreation.
- **Pre-consultation facilitation.** Communities need to be prepared in advance to meaningfully participate in an institutionalised consultation process. It has been observed that communities with weak social organisations cannot take ownership of consultations that occur, and have difficulty in articulating their demands (Flemmer and Schilling-Vacaflor, 2016, p.177). When civil society is unorganised, proponents are more likely to be able to impose their vision of community relations or corporate responsibility (Amengual, 2018). In this regard a pre-consultation training and facilitation period is required that permits local organisations to build networks of support and collaborative relationships to support their role in the consultation process (Ianniello et al., 2018, p.35). Moreover, Ianniello et al. recommend the use of knowledgeable facilitators (Ianniello et al., 2018, p.35). Other observers have highlighted the difficulty that local communities have in understanding the meaning and implications of the legal and technical terms used by proponents. Such methods may involve avoiding the use of technical and legalistic language (Flemmer and Schilling-Vacaflor, 2016, p.179).
- **Timing.** It is now well established as best practice that consultation should begin early in the project development cycle and extend throughout it (Arctic Council, 2019; Andrews and Essah, 2020; Prno, Pickard, Kalyogana, 2021, p.1004). In general terms, long-term interaction is necessary to overcome an information deficit and asymmetry in power between the proponent and stakeholders (Ianniello et al., 2018, p.35). A rigid and rapid timeline for consultation can limit the possibility of achieving a “constructive dialogue”, in which there is a collaborative

development of mutual understanding (Mercer-Mapstone et al., 2018, p.9). In contrast, poor communication at the beginning can produce negative results for long-term expectations and relationship-building (Walsh et al., 2017, pp.168–169). For example, Prno et al.'s discussion of the successful Back River gold mine consultation underlines that it took five and half years (Prno et al., 2021, p.1002). And yet, it is also important to note that consultation can begin too early in the project lifestyle. For example, in Peru consultations with Indigenous communities begin before project parameters are defined, thus pushing the discussion away from better project design, towards distributive concerns (compensation, unsatisfied basic needs) (Flemmer and Schilling-Vacaflor, 2016, p.180). An important, but often overlooked, aspect of timing involves respect for the existing commitments of affected people, in order for them to be able to attend consultations (Larsen & Buhmann, 2024).

- **Selection of participants.** The selection of participants is one of the most important factors in the achievement of meaningful consultation. Iannello et al. (2018) points out that stakeholder representation is never neutral, but criteria for selection should be clear, as should its likely consequences for the effectiveness of the consultation. In this regard the selection of participants creates important legitimacy issues. How affected communities are conceptualised by governments and corporate proponents can have substantial repercussions on which voices are included and excluded, with potential animosity or protest as consequences of how these boundaries are drawn (Chen & Stoddart, 2024). Moreover, the goals of the consultation should affect the selection: innovative ideas require diversity; deadlock situations require participants with an interest in solving the issue; public support requires diversity and representativeness (Ibid., 9). In this regard, consultation processes need to guard against the exclusion of stakeholders, which can take the form of either *external exclusion*, when some individuals or groups are not represented in the process, or *internal exclusion*, when participation in the process does not confer substantive voice for some individuals or groups (Parkins & Mitchell, 2005, p.534). In general, academic and practitioner observers of consultation processes argue for favouring diversity in representation (Ianniello et al., 2018, p.35; Parkins and Sinclair, 2014, p.757; Head, 2007; Howard, 2018, p.188; Prno, Pickard, Kalyogana, 2021).
- **Scope of the consultation.** As previously noted in the discussion, the consultation regime is characterised by principled and normative disagreements about what it does and should mean in specific cases. Empirical evidence shows that participants in public consultations may have widely diverging expectations of its purpose and role in decision-making (Olsen & Hansen, 2014; also Walsh et al., 2017, pp.168–169). For this reason, the process must offer the opportunity for participants to clarify rules and mechanisms; and reach agreement on expected outcomes for the process (objectives) (Ianniello et al., 2018, pp.34–35).

- Methodologies for engagement.** Observers have also highlighted the importance of appropriate methodologies for engagement with stakeholders. An overarching concern has been with avoiding top-down engagement (Maher & Buhmann, 2019, p.232). Instead, engagement needs to give voice to participants' goals and agendas (Iannello et al., 2018, p.35), and use "culture-specific methods" (Arctic Council, 2019, p.16). Numerous researchers have highlighted the importance of using multiple and participatory methods in order to expand the "tool-box for stakeholder engagement... beyond the traditional mechanisms for public participation such as advisory committees, open houses, and public hearings" (Parkins & Sinclair, 2014, p.756). The use of multiple methods reduces the biases present in any one method (Ianniello et al., 2018, p.35; Andrews & Saaka, 2024). The focus on participatory methods aims at permitting "transformational, dialogic learning" between proponent and stakeholders that results in mutual understanding despite power asymmetries (Mercer-Mapstone et al., 2018, p. 9). In this perspective, consultation serves to bridge the boundaries between communities of practice (Wenger, 2000), and produce new ideas (Ianniello et al., 2018, p.35). Several researchers have highlighted the importance of involving stakeholders in the co-production of knowledge, which has enormous potential to strengthen relationships and trust between the parties (Ianniello et al., 2018, p.35; see also Parkins & Sinclair, 2014, p.757). For example, Prno et al. (2021) highlight the incorporation of inputs from traditional (Indigenous) knowledge about relationship between people and the environment, which lead to a successful plan to mitigate project impacts on Caribou populations.
- Integration of benefits.** Many observers emphasise the legitimacy that accrues to consultation processes that exhibit procedural fairness that confers a "reasonable voice" to stakeholders (Moffat & Zhang 2014, pp.62–63; Mercer-Mapstone et al., 2018, pp.350–351). However, other research has highlighted that consultation processes must also provide some kind of short-term gains to participants to keep them engaged and progressively build trust (Ianniello et al., 2018, p.35; Prno et al., 2021, pp.1009–1010).

The contributing authors consider and build on this literature by identifying important aspects of the consultation process that can contribute to more meaningful consultation and better consultation outcomes.

In Chapter 9, Buhmann, Vammen Larsen, Stoddart and Chen draw on fieldwork in the high north and Arctic region to examine the tensions between an ideal of meaningful consultation, articulated in international instruments such as the UNGPs and the OECD Guidelines, and company practices in Environmental and Social Impact Assessment (ESIA). Their analysis highlights how consultation, even when performed according to the letter of the law, may result in a compliance-driven focus that leaves community stakeholders feeling alienated. In this regard focusing on compliance with specific required steps without due consideration of the underlying objectives of the

consultation can create tensions among participants in the ESIA process that can undermine constructive outcomes. Moreover, the authors highlight that

a key part of the meaningfulness of involvement relates to the ability of affected stakeholders to proactively envision and steer their futures and preferred development pathways, rather than simply responding to external forces when a project or plan has already been decided.

(p.152)

Therefore, meaningfulness depends, to a significant extent, on a consultation processes responsiveness to localised demands and their social context. Buhmann, Vammen Larsen, Stoddart and Chen highlight key aspects of consultation processes that could be improved including early and adequate timing, better information and education of participants, and awareness of the situational context.

In Chapter 10, Massignan, Silva-Sánchez, and Sánchez examine the consultation of citizens in Brazil who were affected by tailings dam decommissioning. Although the national and regional legal framework for ESIA consultation in Brazil does provide for a right to information, public participation in decision-making, and access to judicial and administrative proceedings – the consent of stakeholders is not required. Decommissioning or “de-characterisation” processes with important environmental and social consequences, including significant displacement of people from their homes, were exempt from ESIA licencing requirements, because they often occurred in urgent situations characterised by declarations of emergency. As a result, short timelines predominated, public hearings were not conducted, companies took a top-down approach to communications, and Covid-19 restrictions further hampered the availability and adequacy of information. Overall, Massignan, Silva-Sánchez, and Sánchez find that the lack of substantive consultation and information associated with decommissioning processes contributed to significant psychological, social and emotional stress. Their argument provides further evidence for the importance of meaningful consultation of affected populations.

In Chapter 11, Faanu and Andrews examine the complex challenges for consultation in the mining sector in Ghana. The chapter considers the legal governance of stakeholder consultation, corporate best practices, and community responses. The authors highlight the importance of demands from communities for more meaningful consultation, in a complex context characterised by direct relationships between proponents and traditional authority figures and property holders, which frequently marginalises the voices of ordinary people in impacted communities. Moreover, the land tenure system, which exhibits dualism in customary and formal (legal) ownership has important consequences for defining the prominent rights-holders with whom mining companies must negotiate, as well as the distribution of benefits through the country’s Mineral Development Fund (MDF). The authors

report that voluntaristic commitments of companies are the main vehicle through which community members perceive benefits. More generally, Faanu and Andrews note a significant number of community concerns about environmental and property damage that remain unaddressed. In the Ghanaian case, weak governmental institutions intersect with limited consultation processes to undermine community support for mining activities as well as the sustainable futures of communities impacted by resource extraction.

In Chapter 12, Connolly, Seck, and Simons examine the potential of responsible business conduct (RBC) tools to improve existing impact assessment practice through the context-appropriate integration of human rights due diligence (HRDD). The authors showcase the rising influence of HRDD through the universalisation of the UNGPs, and its albeit limited adoption across both national contexts (Canada) and international instruments, arguing that a convergence around process-based norms of human rights due diligence should encompass the right to a “safe, clean, healthy, and sustainable environment” (p.189) recognised by the UN General Assembly in 2022. Connolly, Seck and Simons recognise the contestation that continues to occur regarding the incorporation of a broader set of human rights into HRDD process. However, they underline that the recognition of affected stakeholders as rights-holders (whose rights may be put at risk by an extractive project) offers a way to improve impact assessment processes since “early, ongoing and meaningful engagement with rights-holders is central to HRDD” (p.195). In this regard, HRDD tools have much greater potential to incorporate concerns over Indigenous, environmental and gender-based rights that have remained marginal to impact assessment processes focused on stakeholders impacted by projects.

Practitioner insights: Reflections on stakeholder consultation in practice

A unique contribution of this collection is that academic perspectives are complemented and challenged by practitioners. The collected edition concludes with a forum involving practitioners from diverse backgrounds, including company consultants, industry association professionals, human rights promoters and defenders, and civil society organisations. Practitioners have been asked to reflect on the same issues addressed by the academic contributors, but based on their own real-world experience.

Sheri Meyerhoffer, former Canadian Ombudsperson for Responsible Enterprise (CORE), presents a firsthand account of the work of CORE in Chapter 13. Canada’s federal government established CORE after decades of calls for government action regarding extraterritorial human rights abuses by Canadian mining companies operating abroad (Johnston & Bittle, 2023; Keenan, 2020). Meyerhoffer identifies the normative foundations of the CORE’s work as the UNGPs and the Council of Europe’s Venice Principles. She highlights the importance of inclusive and principled engagement with stakeholders, the development of a Human Rights Responsibility Mechanism,

and lessons learned about good practice. In terms of good practice, the Ombudsperson's office focused on fair and inclusive procedures, which included allocating sufficient time to a consultation process, making sure the purpose of the consultation is well understood by stakeholders, and responding to all comments received during the consultation.

Prior to the establishment of CORE, Canada's Extractive Sector Corporate Social Responsibility (CSR) Counsellor operated from 2010 to 2018 (Davidson, 2020) based on a mandate that relied *inter alia* on Canada's CSR Strategy that has itself been a subject of contestation (Canada CSR Strategy, 2014; Idemudia, Nadege Compaore & Kwakyewah, 2020). Jeffrey Davidson, who held the role of CSR counsellor between 2015 and 2018, in his contribution to this volume recounts an early consultation approach that was adopted in a mining operation in Venezuela in the 1990s. Davidson notes the "innovative, even pioneering, community focused long-term consultation and relationship building process" (p.215) that was adopted. Embedded in this process was attention to context, relationship building with local communities "with or without direct government involvement" (p.215), and legitimacy of the communities' concerns. Davidson calls the approach adopted "inclusive consultation" and observed that the company initially sought to adopt consultation as "a prelude to securing 'consent'" (p.216) from the communities but it extended beyond that to "becoming the basis for a broad-based community-company relationship building process that extended over the life of the... project" (p.216). The consultation approach adopted for this project has not, according to Davidson, been replicated elsewhere for several reasons including the contextual nature of the approach and its extension throughout the mine life cycle.

Andres Recalde shares insights from his work in Latin America with a focus on the importance of the distinction between the English and the Spanish meaning of consultation including dimensions of the interpretation that encompass consent-based decision-making. The chapter situates local communities as rights-holders, ultimately directing much of its discussion to Indigenous Peoples. Indigenous communities in Latin American countries where Recalde has worked expect to provide or withhold approval for mining projects as part of the consultation process. Hence, Recalde observes that consultation is "connected to governance" and linked to self-determination, "political process and political contestation over the issues and decisions at hand" (p.222). The chapter also highlights obstacles to "successful consultation" including the structure of local governments, challenges with land titling, and differences in perspectives expressed by different generations of community members. Recalde's chapter, in its conclusion, invites the reader to reflect on the differences between consultation processes in the Global North and Global South.

Laura Rópolo, an Argentine consultant and former government executive working with the mining industry, also highlights the social and political complexity in which stakeholder consultations are embedded. Drawing on her

knowledge of the case of Argentina, Rópolo notes that a consultation process implies learning-by-doing for companies, who suddenly find themselves forced to engage with “territorial social dynamics” (p.226) which they may not understand. Offering a sweeping view of the thirty years since the arrival of large-scale mining to the country, she emphasises the learning and improvements in consultation practice that have occurred. Rópolo sees stakeholder consultation as an exercise in democratic participation in which diverse social actors want to have their say, and seek benefits from the presence of “new neighbours” in their territories.

Salvador Herencia-Carrasco and Jordi Feo Valero draw on their work supporting cases brought by Indigenous Peoples before the Inter-American Human Rights System, to analyse the impact of the evolving case law on Indigenous People’s consultation rights. Herencia-Carrasco and Feo Valero have contributed numerous *amicus* briefs that aim to secure legal recognition of Indigenous rights regarding the protection of their land, territory, and culture. By examining the case law, they show that the Inter-American Court of Human Rights (IACtHR) has played a crucial role in recognising, protecting, and extending Indigenous rights. Herencia-Carrasco and Feo Valero assert that engagement of the courts is necessary to provide “teeth” to international law such as UNDRIP and ILO Convention 196 (p.230). They also show how procedural changes have created more space for Indigenous Peoples to speak for themselves in court proceedings, where they can now “challenge witnesses, present evidence, and relate testimonies based on their experiences” (p.231). Despite the importance of the IACtHR to the recognition of Indigenous rights, Herencia-Carrasco and Feo Valero also highlight some important challenges. In particular, they highlight that while the Court has broken new ground by defining the contexts in which FPIC is required, it has failed to clarify the responsibilities of a state in breach of those obligations. Herencia-Carrasco and Feo Valero provide a compelling case for “the potential of public interest litigation and the role of the courts in advancing Indigenous rights, including the right to consultation” (p.233).

The Mining Association of Canada (MAC), the country’s premier sectoral membership organisation also highlights the centrality of partnerships and relationship-building between mining companies and nearby communities. By engaging with communities, the industry aims to ensure that mining occurs responsibly and respectfully, while also developing economic opportunities. The centrepiece of MAC’s efforts is the Toward Sustainable Mining (TSM) standard, which is a “globally recognised sustainability program that supports mining companies in managing key environmental and social risks” (p.237). TSM is a set of tools and reporting requirements that are compulsory for MAC member companies, and which cover a diverse set of topics. It was established in 2004 and has been updated several times, most recently in 2019, when an Indigenous and Community Relationship Protocol was finalised. MAC’s contribution to this volume examines a number of case studies that exemplify the best practices of its membership. These practices include

community-based environmental monitoring, recycling and circular economy programmes, and the development of a collaborative framework with a First Nations community for ongoing environmental monitoring and management of a mining project from development to closure. MAC shows how the rules, norms and decision-making procedures associated with voluntary corporate codes of conduct also influence relationship-building between companies and communities.

In the final practitioner contribution to this collection, Rodrigue Turgeon, Val Croft, Jamie Kneen and Catherine Coumans who have led Mining Watch's work in several areas offer an outline of robust consultation practices focusing mostly on the "free entry mining system" in Canada. Following a critique of current consultation systems including the lack of political will for meaningful consultation and the top-down approaches being adopted, Turgeon, Croft, Kneen, and Coumans express the view that the goal must extend beyond consultation to "full and ongoing consent" (p.241) of affected communities and FPIC where Indigenous Peoples are involved. Given that this goal is not close to being achieved, relying on consultation practice in the field, practitioner experience, and examples of successes as well as challenges, they outline conditions including "structural change in the timing and scope of consultations" (p.243) that could improve consultation systems. They reserve a key place in these changes for the legal system arguing that "the best remedy is to legally challenge the validity of consultation processes" (p.243). Ultimately, the goal according to Turgeon, Croft, Kneen, and Coumans is to "ensure that governments move beyond haphazard consultation to truly respect the decisions and consent of affected communities and Indigenous Peoples" (p.244).

A final word

This edited collection seeks to understand the normative tensions that abound in stakeholder consultation, and which are reflected in contestations that underpin the negotiation and implementation of consultation rules, norms and decision-making procedures across scales – from the global to the local. The novelty of our approach is found in the application of regime theory to stakeholder consultation practices, as well as in the integration of largely distinct literatures on the critical socio-political study of the extractive industry and the analysis of stakeholder engagement from a business and human rights perspective. By approaching the topic in this way, and by bringing researchers and practitioners together to discuss stakeholder consultation from diverse disciplinary perspectives, we have sought to escape the siloed thinking that informs much of the existing scholarship. The comparative nature of the book, which examines cases from across what is commonly treated as a Global North-South divide, also underscores similarities and common drivers that can be visualised using our preferred language of "consultation regime". In this way, understanding stakeholder consultation through the lens of regime theory allows us to integrate diverse perspectives in service of understanding the contested evolution and future of consultation practices around the globe.

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Part I

Understanding contestation



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2 Consultation, Indigenous Peoples and the extractive industries

Ciaran O'Faircheallaigh

Introduction

For centuries the world's Indigenous Peoples (or “First Peoples”) have been excluded from state and corporate decisions that affect their territories, cultures and populations. As a result, every contemporary instance of consultation involving Indigenous Peoples is inherently political and open to contestation. Where consultations are tokenistic and fail to provide some control over decisions affecting them, Indigenous Peoples see them as further evidence of Indigenous marginalisation and are likely to condemn and oppose them. Where consultations offer the prospect of a share in power over decisions, they are likely to be welcomed as a sign that Indigenous marginalisation is becoming less complete, though for many Indigenous Peoples a degree of scepticism will remain as to whether the promise of shared decision making will materialise.

This chapter begins by expanding on the specific political, institutional and cultural context in which consultations involving Indigenous Peoples affected by extractive industries occur. It considers the sources of norms, rules and practices that shape, or purport to shape, consultation, including Indigenous law, international law and national legal regimes and policy practices. It then focuses on contestation surrounding consultation with Indigenous Peoples. It, argues that contestation has grown more intense both because of what I term “external” contests between Indigenous Peoples and state and corporate interests regarding the appropriate scope, purpose and outcomes of consultation; and internal tensions *within* Indigenous Peoples about the desirability of extractive industry and within the state and extractive industry regarding the extent to which consultation with Indigenous peoples should be permitted to affect their decisions regarding resource development. Specific issues regarding the “delivery” or form of consultation are then outlined. I argue that these are especially contentious in the Indigenous context because of specific cultural, geographical and economic factors affecting First Peoples. These factors are resulting in a trend for Indigenous Peoples to take control of consultation processes in extractive industry, illustrated by the increasing importance of Indigenous Impact Assessment as a mechanism for Indigenous consultation.

DOI: 10.4324/9781003488507-4

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The Concise Oxford Dictionary defines consultation as “Have deliberations with, seek information or advice from, take into consideration”. In this context, the “deliberations”, “seeking of advice” and “taking into consideration” occurs in relation to the identification, evaluation and possible exploitation of mineral resources on Indigenous territories, whether or not those territories are recognised as “Indigenous” in national legal regimes. This definition does not address the critical issue of the *purpose* of consultation, which can vary widely as has been recognised at least since Arnstein’s seminal 1969 article (Arnstein, 1969). At one end of the spectrum, consultation may involve state and industry conducting “deliberations” with Indigenous Peoples that are tokenistic and cynical and designed solely to give the impression that Indigenous interests are being considered, when there is no intention of doing so. At the other end of the spectrum, “deliberations” may involve seeking from Indigenous people their decision as to whether, and under what conditions, they may allow mineral exploitation on their territories. Indigenous Peoples, state agencies and corporations often have very different understandings of the purposes of consultation, and as a result contestation regarding how, by whom and to what end consultation should be undertaken is endemic.

The Indigenous context

Any discussion focused on Indigenous Peoples must begin by recognising their diversity. Indigenous people live in all regions of the world, according to the United Nations they occupy or use some 25 per cent of global land area, number 370–500 million, and represent the greater part of the world’s cultural diversity. They speak the major share of the world’s almost 7000 languages (United Nations Educational Scientific and Cultural Organisation [UNESCO], 2022). Indigenous Peoples also share values and key characteristics. They define their identity and their social relationships through their connections to *specific* areas of land and water; they have been dispossessed and marginalised by dominant societies, which are often colonial in origin; and in material terms they tend to be disadvantaged compared to majority populations. These shared characteristics create the basis for a complex and, at times, contradictory relationship with extractive industry. Mining represents a threat to their lands, waters, values and cultures, but at the same time offers access to economic opportunities that can help overcome material disadvantage and provide resources to support Indigenous livelihoods.

The historical political, cultural and institutional marginalisation of Indigenous Peoples provides a key part of the contemporary context for consultation. In the past, consultation was in most cases entirely absent. Whether during the gold rushes of the 19th century in settler states or the global expansion of the mining industry in the wake of World War 2, Indigenous Peoples were removed from their territories to make way for mining and their populations decimated in the process. Indigenous Peoples did not lack a capacity to survive or to exercise agency in the face of this onslaught, but any

influence they had on the course of events did not result from consultation by states or corporations. This situation reflected not only the prioritisation of extractive over Indigenous interests, but overarching institutional, policy and legal regimes based on racist assumptions about the inferiority of Indigenous Peoples and a belief that they would, and should, disappear as distinct populations or survive only as reserve armies of labour on the extreme margins of dominant society (O'Faircheallaigh, 2023, pp. 22–38, 59–76).

This history has profound implications for consultation in the contemporary period. In most cases Indigenous Peoples are a minority, often a small minority, within national political systems, and have little capacity to exercise electoral leverage in seeking to insist that they be included in decisions that affect them. Indigenous lands that have not been alienated are often located in remote and climatically extreme regions far from major urban centres where state and corporate decision making occurs. (These are also, of course, the regions where extractive industry is concentrated, given that orebodies close to major urban centres are largely exhausted.) Indigenous Peoples are often poor in material terms, lacking the financial resources needed to travel to centres of power, engage specialist staff and political lobbyists, and pay for exposure in the media.

Cultural context is also important. Many Indigenous Peoples speak their own languages rather than national languages that dominate policy discourses regarding extractive activity on Indigenous territories. In many cases Indigenous Peoples, and especially elders who are holders of cultural knowledge and political authority, have limited formal or “mainstream” education, and so may lack the capacity to engage with written material produced by state agencies and corporations, or to produce the documentation that these entities require from those with whom they “consult”. Indigenous cultural values and norms, for instance regarding gender and generational roles, may mean that generic, mainstream consultation techniques result in many Indigenous voices being silenced. I consider such cultural considerations in greater detail in discussing consultation procedures.

Sources of norms and rules on consultation

Indigenous law constitutes a key source of norms and rules on consultation. Indigenous law is rooted in the connection between land, kinship and social relations, and culture and spirituality relationships, a connection central to the identity and survival of Indigenous Peoples. Connection to ancestral land or “country” (defined here to include fresh and sea waters and air) is fundamental. Land is traditionally the source of physical survival and since time immemorial has sustained life and health. Many Indigenous communities still rely heavily on the land for production and income, and harvesting of the land's resources is often intimately associated with cultural and social activity and knowledge transmission. Land creates identity. A person is a member of a specific Indigenous group because they have an intimate connection, usually through blood ancestors but sometimes through their place of birth or by

adoption, with a particular *country*. Given that country and connections with it are of such fundamental importance, a basis precept of Indigenous law is that those Indigenous people *with a primary connection to country*, and only those people, must have the final say on matters that affect it. Consultation regarding extractive industry must therefore involve canvassing of proposals by state agencies or corporations with Indigenous Peoples who have the primary connection with the country concerned. In Indigenous law, *decisions* regarding such proposals are in the remit of these Indigenous Peoples, not of parties consulting with them (O'Faircheallaigh, 2023, pp. 64–66).

International law constitutes another source of norms and values on Indigenous consultation. An important development in this regard was the adoption by the International Labour Office of the Convention on the Rights of Tribal and Indigenous Peoples (ILO 169, 1989). This stated that Indigenous Peoples “shall have the right to ... exercise control, to the extent possible, over their own economic, social and cultural development” (Article 7). Consultation regarding proposed developments on Indigenous lands would not extend to a requirement for governments to seek Indigenous consent for them, except in the cases where their relocation was considered necessary. Relocation should only occur with the “free and informed consent” of Indigenous people (Article 16). While the impact of ILO 169 has been constrained by the small number of states that have ratified it and by the limiting of the need for Indigenous consent to cases of relocation, it is significant in indicating that state consultation with Indigenous Peoples should occur in the context of their right to shape their own development.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations General Assembly in 2007 after two decades of intensive efforts by a global alliance of Indigenous Peoples (Morgan, 2007), moved significantly beyond ILO 169 in affording a central position to the concept of Indigenous Free Prior and Informed Consent (FPIC). The principle of FPIC asserts that:

Indigenous people should have the right, free from duress and in possession of full information regarding proposed developments on their ancestral lands, to provide or withhold their consent to those developments prior to any authorization of development activity by state authorities or developers.

Of particular relevance in the context of extractive industry, Article 32 of UNDRIP states:

- “(1). Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- (2). States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project

affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

In adopting the principle of IFPIC, UNDRIP is aligned more closely with the core principles of Indigenous law discussed above. In terms of consultation, the obvious implication is that state consultation should involve the provision of information to Indigenous Peoples regarding any proposed state action that would permit extractive activity, and an acceptance by the state of Indigenous decisions in relation to such proposed action, including that it should not proceed in the face of Indigenous opposition.

An obvious limitation associated with UNDRIP is that as a “declaration” rather than treaty or convention, it is not binding in domestic law, and states that have adopted UNDRIP, as all major mineral-producing countries have now done, can continue to ignore the principle of IFPIC in their policies and practices. A further limitation is that UNDRIP applies to states and not to the corporations that play a key role in consulting with Indigenous Peoples regarding extractive activity. Yet this does not preclude First Peoples from using UNDRIP, and other international legal instruments, as a lever in their attempts to insist on controlling development on their territory (Manuel, 2017; O’Faircheallaigh, 2023, p. 40).

National law and policy constitute a third possible source of norms and rules in relation to Indigenous consultation. It is difficult to give a sense of the overall situation or of trends regarding national regimes as they vary so widely. For example, the Philippines has introduced comprehensive legislation that aims to recognise the rights of Indigenous Peoples, including in their interactions with extractive industry (for a detailed discussion see O’Faircheallaigh, 2023, pp. 220–223). The Indigenous Peoples’ Rights Act (IPRA) 1997 (IPRA) provides for the declaration of “ancestral domains”, which comprise “lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs [Indigenous Cultural Communities/ Indigenous Peoples]” (section (s) 3). The declaration of an Ancestral Domain confers on ICCs/IPs the “right to develop, control and use lands and territories traditionally occupied, owned, or used” and “to negotiate the terms and conditions for the exploration of natural resources in the areas ...” (s 7(b)).

These provisions suggest structured and substantial requirements for consultation with Indigenous Peoples based on their ultimate power to determine control what happens on their territories and their right to negotiate conditions for extractive activity if they determine it should proceed. However, as I have shown elsewhere (O’Faircheallaigh, 2023, pp. 225–235) the *practices* of Philippines authorities have often departed substantially from the approach required by IPRA. These practices have involved unabashed support for mining and scant regard for Indigenous rights. This is reflected in the use of the Philippines armed forces and paramilitary groups they train to suppress

Indigenous opposition to mining and to support mining company access to Indigenous land, and putting political pressure on the judiciary to reverse court rulings favourable to Indigenous Peoples. In this context, consultation with Indigenous Peoples has often been perfunctory, and indeed has been deployed as a weapon to support extractive industry, with Indigenous supporters of mining included and opponents excluded (O'Faircheallaigh, 2023, pp. 225–230).

In Australia, there is a requirement for extractive companies seeking the grant of exploration or mining permits to enter into negotiations with Aboriginal groups whose inherent rights to land or waters (“native title”) have been recognised in Australian law (the “Right to Negotiate”). However, it is difficult for groups in the more densely settled parts of Australia to achieve recognition of their native title and, where this is lacking, there may be a complete failure to consult with affected Aboriginal communities. Even where native title is recognised, the requirement for consultation falls on proponents rather than the state, and the legal standards governing consultation are weak, requiring only that proponents show they have met minimal administrative requirements for “good faith” negotiations. The degree to which they engage seriously with Indigenous interests can be highly variable. Further, a large proportion of applications for exploration permits are subject to what is called the “expedited procedure” where, if the activity involved is deemed to be “low impact” in environmental terms, the “Right to Negotiate” does not apply. Some state governments classify all applications for exploration permits as “low impact”, and unless Aboriginal native title holders undertake an expensive and uncertain legal process to challenge government decisions, there is no guarantee they will be consulted. In relation to applications for mining permits, native title holders do not have a legal capacity to reject extractive projects, and if negotiations do not end in agreement, proponents can apply to a government-appointed tribunal for permission to proceed with development. In this context the degree to which Aboriginal groups can use the Right to Negotiate to achieve meaningful and substantial consultation depends on their ability to supplement their legal rights by mobilising financial, organisational and political resources to bring pressure to bear on proponents and state agencies to recognise and accommodate Aboriginal interests. That ability varies greatly from group to group and region to region depending on historical and cultural factors and on the efficacy of Aboriginal leadership, as does therefore the content of negotiated agreements that emerge from consultations with industry (O'Faircheallaigh, 2016).

In some other countries, as diverse as Botswana and Sweden, the legal requirements for consultation with Indigenous Peoples are limited or non-existent, and where consultation does occur, the views and interests of Indigenous Peoples carry little weight in political decisions regarding extractive development (O'Faircheallaigh, 2023, pp. 259–280, 203–211).

Consultation and contestation

While legal provisions for Indigenous consultation vary considerably across the globe, the trend towards greater contestation regarding consultation processes and outcomes is universal. Such contestation is not new, with Indigenous Peoples always exercising their agency to try and insist on having their rights and interests recognised. But contestation has grown in geographical scope and in intensity with the removal of discriminatory laws against Indigenous Peoples, including limits on their formal political participation; their growing access to formal education and to social and conventional media; and increasing recognition of their rights in national and international law. These changes have led to growing demands by Indigenous Peoples that they be included in decisions about development on their lands and, critically, that they be recognised as holders of unique rights in lands and resources based on their status as Indigenous Peoples, and not treated as one of numerous “stakeholders” whose interests may be considered, but whose active and substantial participation in decision making is at the discretion of states and corporations.

Contestation reflects, of course, the reluctance of state and corporate actors to acknowledge the need for Indigenous consultation that is linked to a significant degree of Indigenous influence over extractive activity on Indigenous lands. State authorities have been reluctant to concede a degree of control to Indigenous Peoples over extractive activity that, rightly or wrongly, states believe are essential to their economic prosperity and that political leaders see as crucial for their electoral survival. As noted above this reluctance to cede control is evident in failures to adhere to domestic laws recognising Indigenous rights (for instance the Philippines), or in the design of laws recognising Indigenous rights in land in ways that limit the ability of Indigenous rights holders to regulate exploration and mining on their ancestral lands (for example Australia). It is also reflected in the actions of governments that have adopted UNDRIP but act in ways that are in flagrant breach of the principle of Indigenous FPIC, for instance in awarding exploration permits to extractive companies without any reference to affected Indigenous landowners.

Reluctance to admit Indigenous people into a significant role in decision making is also clear in the corporate world. Recognising the growing legal and political capacity of Indigenous Peoples, many of the world’s largest extractive companies publish “Indigenous Peoples policies” that assert the corporate willingness to consult with and accommodate the interests of Indigenous communities affected by their operations. But only a handful of corporations have publicly indicated that they will only proceed with projects with the approval of Indigenous landowners, and across the globe extractive projects continue to be developed against the stated and in many cases vociferous opposition of Indigenous Peoples (Indigenous Working Group for Indigenous Affairs [IWGIA], 2024; O’Faircheallaigh, 2023). In many cases, corporate policies lack specificity and few provide detailed information on how they incorporate Indigenous interests into their decision

making, or allocate resources to ensure that their engagement with Indigenous Peoples is effective.

Contestation regarding consultation is not simply an issue of opposition between Indigenous Peoples, on the one hand, and states and corporations on the other. All three actors experience *internal* tensions and a diversity of interests that render issues regarding consultation much more complex than suggested by a binary perspective based on an assumption that a monolithic Indigenous population is pushing for control over extractive activity, facing resistance from equally monolithic state and corporate interests resisting such demands.

The state is in fact far from a monolithic entity, but rather comprises multiple institutions with associated policies and practices, including in relation to attitudes to consultation and Indigenous participation more generally. At a broad level the political executive (president, prime minister, cabinet, heads of major agencies) may take quite different positions to environmental or Indigenous agencies or the judiciary. This results in “marriages of conveniences” or long-term alliances between elements of the state and Indigenous groups which result in the latter being incorporated into decision making and state action. For example, in Chile in 2018 Atacameños communities combined with Chile’s State Defence Council (CDE) to sue a BHP subsidiary, MEL, for the negative impacts of freshwater extraction for copper mining between 1997 and 2017. In a growing number of countries, including in the Global South, the judicial arm of the state is showing a growing willingness to insist that governments respect Indigenous legal rights and incorporate Indigenous interests into its decision making. For instance, under South Africa’s *Interim Protection of Informal Land Right Act 1996* “disposal” of communal customary rights in land, including Indigenous land, to allow for mining can only occur with the consent of a majority of community members. South Africa’s *Mineral and Petroleum Resources Development Act 2002* (s 10), on the other hand, only requires that the responsible government minister undertake “Consultation with interested and affected parties”, after which grant of a mining interest is at the discretion of the minister. In November 2018, South Africa’s High Court ruled that grant of mineral rights to an Australian mining company, opposed by Indigenous Xolobeni community, was invalid, on the basis that the Government did not first seek the community’s consent (*Beleni and others v Minister for Mineral Resources*, 2018). Thus, South African law includes two very different standards about what “consultation” consists of, and in this case the judiciary insisted on a higher standard than that the executive sought to apply.

Internal tensions also exist within Indigenous communities. It can be argued that what Burton (2014) terms the “Avatar narrative”, influential in some academic writing on Indigenous Peoples and extractive industry, denies these tensions and so ignored a range of complexities that can affect “consultation” with Indigenous communities. The “Avatar narrative” involves a binary formulation of the relationship between capital and Indigenous Peoples. The mining industry is presented as endlessly and hopelessly predatory

and destructive. Indigenous Peoples are bastions of resistance, prepared to give all in order to stop mining and protect their lands and cultures from the destruction that will inevitably result from mining. As numerous scholars whose work involves empirical observation of the relationship, this representation of the position of Indigenous Peoples is simplistic and often bears little relation to reality. Many (not all) Indigenous Peoples have an urgent need to gain access to economic opportunities and to basic services that non-Indigenous citizens take for granted, and mining is seen as a potential source of both. In some cases, they believe that in the absence of economic opportunity and access to education, health and housing services, their survival as Indigenous Peoples is in peril, because the young will leave in pursuit of these things. Revenues from mining may be seen as a way of lessening dependence on the state, and avoiding the social, cultural and political “strings” that accompanies state provision. On the other hand, mining creates the fear of cultural and environmental destruction and social dislocation.

The outcome is a complex mosaic of responses to mining and very different approaches to consultation and participation. Some Indigenous Peoples, especially those whose economic base has remained relatively intact, may oppose mining and may have no interest at all in being “consulted”. They will “participate” strongly, but with a view to stopping projects. Other Indigenous Peoples will want development but only on terms they consider acceptable, and will be keen to take up every opportunity to be consulted in efforts to achieve such terms.

Industry is also subject to contradictory pressures that create a dynamic environment for its engagement with Indigenous Peoples. Growing recognition of Indigenous rights in international law and domestic law, combined with the growing agency exercised by Indigenous people, create pressures on industry to go beyond tokenistic forms of consultation and to engage in active collaboration with Indigenous communities affected by its plans and operations. Failure to achieve such collaboration can result in major project delays due to litigation or direct action by Indigenous Peoples and, especially relevant for major international companies, can damage their reputation and create obstacles for them raising capital on international markets. On the other hand, consultation undertaken in a manner acceptable to Indigenous Peoples is time consuming, requires allocation of substantial human and financial resources, may itself cause project delays and cost over-runs, and its outcomes are unpredictable. Responding to Indigenous demands may reduce the freedom companies have to design and operate projects so as to maximise corporate returns. The result is considerable variability in corporate attitudes to consultations with Indigenous Peoples over time and between different projects and countries. For instance, Rio Tinto greatly reduced the resources it allocated to community engagement when mineral prices fell after the Global Financial Crisis in 2008. However, it was forced to substantially increase its efforts in community consultation and engagement with Aboriginal people in Western Australia’s Pilbara region after the company’s

destruction of the highly significant Juukan Gorge rock shelters in 2020 threatened to undermine its relations with local Aboriginal communities and the timely development of projects in the region (Rio Tinto, 2024).

Consultation procedures

The issue of how consultation occurs, of consultation procedures, is vitally important for Indigenous Peoples. For reasons mentioned earlier (limited material wealth; use of Indigenous, minority languages; cultural norms; limited formal education) conventional or “mainstream” consultations may be ineffective in an Indigenous context. For example, in many countries a primary form of consultation in relation to proposed extractive projects occurs through the environmental impact assessment (EIA) process. State authorities and/or proponents invite public comment on EIA documentation at key points in the EIA process (for instance on draft terms of reference at the start of the process; draft EIA reports prepared by proponents; approval conditions proposed by state regulators). EIA documentation is typically published in the dominant, non-Indigenous language; is highly technical and often runs to thousands of pages, and demands a high degree of Western “scientific” expertise to interpret; and may only be available in major urban centres far from where proposed projects are located and affected Indigenous Peoples live. As a result, consultation via EIA processes may entirely exclude affected Indigenous people.

Even where consultation by state agencies or proponents occurs in Indigenous communities, it may be inaccessible to Indigenous Peoples or to large parts of the affected population, or offer them limited opportunity to express their views. Consultations are still typically conducted in national languages, and based on written materials, often delivered via corporate-style power point presentations. Public meetings to which all community members are invited often constitute the core of consultation activity, but this vehicle is often entirely or largely ineffective in facilitating Indigenous participation. Some people (women engaged in child mining, people in formal employment) may not be able to attend. There may be a general reluctance among those who do attend to speak openly in a context they may find alien, or cultural norms may prevent specific groups from participating. For instance, men or women may be reluctant to raise issues that affect them in front of members of the opposite sex. Young people may feel that if they speak they may be seen as challenging the authority of senior people, especially where matters of land and culture are involved, which they inevitably are in discussing extractive projects. Mining may be highly contentious within Indigenous communities, and people may be reluctant to speak out for fear of increasing division or of being victimised by community members with opposing views (O’Faircheallaigh, 2024).

Reflecting the alienating and ineffective nature of many consultation processes conducted by state agencies and corporations, many Indigenous communities are developing their own consultation processes that reflect and

accommodate their material situation and cultural values. Given the diversity of Indigenous Peoples these processes include a wide range of approaches and consultation techniques (for examples see Faauia et al., 2017; Hoogeveen, 2016; Klinck et al., 2015). One approach involves the conduct of impact assessment processes, sometimes referred to as community-controlled impact assessment (CCIA) that are designed and conducted by Indigenous communities themselves and are designed to offer the best possible opportunities for effective consultation and participation (Gibson et al., 2018; O'Faircheallaigh & MacDonald, 2022). CCIAs allow information to be provided in a form and through channels that maximise its accessibility and utility for community members. The Aboriginal Social Impact Assessment for the proposed Browse Liquefied natural gas project in the Kimberley region of Western Australia's north-west coast provides an example. At the request of participants, information was provided primarily through meetings of each affected land-owning group, rather than the more standard approach of using meetings based on residential communities. Meetings were held at venues chosen by the groups themselves, often "in country" and away from major settlements. Minimum use was made of printed information materials, with colour maps of the LNG Precinct site and graphic illustrations and "virtual tours" of the proposed LNG plant being displayed on meeting room walls. Sufficient time was made available for discussion of the information provided, and requests for further information were noted and acted on after the meetings, where necessary involving follow-up meetings. The permission of education authorities was obtained to engage with high school students in their class rooms, an environment much more conducive to open discussion than large community meetings dominated by adults. Critical to the success of this approach was the fact that most of the team conducting the CCIA were local Aboriginal people who understood what was required for effective information provision, including a young man and a young woman who were adept at communicating information to children and teenagers (O'Faircheallaigh, 2024).

Future trends

None of the factors that have led to pressure for greater consultation with Indigenous Peoples affected by extractive projects seem likely to diminish in their impact in coming years. One can expect that pressure to grow, and for "consultation" to occur in way consistent with Indigenous values and preferences and to be defined more and more as involving a greater Indigenous say in whether projects proceed and, where they do, in their design and operation. The complex and often contradictory pressures bearing on key actors (Indigenous, state, industry) also seem likely to grow, leading to an increasingly complex picture in terms of what constitutes "consultation" and how it is conducted. Thus, while a general trend towards greater and more "meaningful" consultation with Indigenous Peoples will be evident, that trend is likely to be uneven over time and across space, depending on the ways in Indigenous agency is exercised and interacts with the interests of state and corporate actors.

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3 Sustainable mining for whom?

Agential Constructivist perspectives on global mining sector consultation regimes in Africa

Surulola Eke, J. Andrew Grant and Meghan Hembruff

Introduction

“Green technology” growth has transformed constituent global supply chains and increased the importance of access to minerals like graphite, lithium, and cobalt. The World Bank estimates that the production of these minerals could increase by 500 per cent by 2050 to meet growing demand (World Bank, 2022). A significant portion of their global supply emanates from African countries, which increases external interest in the continent. In the absence of effective governance, however, mining activities in Africa pose serious environmental threats and deepen commodity dependency. Moreover, the recent renewable energy transition necessitates new governance frameworks and transnational initiatives that seek to balance the social, environmental, and economic impacts of mining while potentially empowering resource-rich African states. Hence, new global and regional governance initiatives have been advanced to curb labour exploitation, environmental degradation, corruption, and other human security challenges in the mining sector.

The aforementioned interventions “birthed” the concept of sustainable mining, which is controversial as environmental and health hazards are associated with mineral extraction – even though the sector also enhances the economic wellbeing of local communities and nations (von der Goltz & Barnwal, 2019). The concept is deemed oxymoronic and an attempt to “rebrand” mining because exploitation cannot be sustainably designed (Tilton, 2009; Benson & Kirsch, 2010; Kirsch, 2010). Yet, the reality in the Global South – especially in Africa and among many Southern African Development Community (SADC) member states – is that the prohibition of mining would jeopardise economic growth and development (Arango-Aramburo et al, 2017). So, despite being oxymoronic, sustainable mining allows resource-dependent countries to continue the practical necessity of mining whilst simultaneously pursuing noble sustainability objectives. It is against this backdrop that stakeholder consultation frameworks (with date of establishment in parentheses), such as the Climate Smart Mining Initiative (CSMI) (2019), Kimberley Process Certification Scheme

DOI: 10.4324/9781003488507-5

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(KPCS) (2003), SADC Protocol on Mining (2006), Africa Mining Vision (AMV) (2009), Responsible Mining Assurance (IRMA) Standard for Responsible Mining (2011), Intergovernmental Forum (IGF) Mining Policy Framework (MPF) (2011; 2023), and United Nations Principles on Business and Human Rights (UNGPs) (OHCHR, 2011), were envisioned to improve sustainability in mining (and in business generally, in the case of the CSMI and UNGPs). As Grant et al. (2022, p. 4) reveal in their analyses of such global and regional governance initiatives, these efforts seek to promote norms such as local content as well as “transparency, accountability, participatory governance, CSR, auditing and other ‘best practices’” – yet still wrestle with producing tangible outcomes in terms of reducing “violence, instabilities, inequalities, and illicit practices faced by natural resource-rich nations in the Global South.” Inspired by such analyses, the question of whether frameworks like the CSMI actually inspire *sustainability* in mining is a compelling puzzle.

Therefore, using the CSMI as an evocative case study, we examine the extent to which stakeholder consultation frameworks advance sustainability in mining. Based on primary sources (CSMI provisions, production statistics, in-person interviews and participatory observations conducted by two of the authors across Africa in 2006, 2009, 2013, and 2022, as well as informal conversations and discussion remarks in 2023 and 2024 as part of governance initiative meetings) and secondary sources (reports, scholarly papers, and academic books), we then analyse the prospects of the CSMI as an intriguing global governance initiative proposed by the World Bank – which has exhibited the potential to ameliorate mining sector governance challenges. Although a welcome body of literature has started to emerge concerning this governance initiative, more scholarly assessments are needed. Hence, to that end, this chapter critically engages with the contents of the CSMI for the purpose of assessing its effectiveness in addressing governance challenges in Africa’s mining sector. Our analyses focus on two of the continent’s main mining regions: Central Africa and Southern Africa. While West Africa and East Africa encounter similar mining governance challenges, Central and Southern Africa are significantly more endowed with known reserves of so-called “green minerals”, whose demand is expected to continue rising for decades in concert with increasing demand for electric vehicles (EVs) and “green sources” of energy production and storage (Eke et al., 2024). Within these regions, the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), and South Africa are among the more notable mining sector participants given increased foreign interest in their respective mining sectors. As detailed in this chapter, we find that the CSMI fails to account for two interrelated barriers to the regional cooperation and international policymaking they aim to promote: (1) the lack of meaningful engagement from affected communities; and (2) the lack of incentives and capacity for adopting and implementing sustainable policy changes.

The rest of the chapter is organised in the following manner. First, we expand upon sustainability as a concept, Agential Constructivism as a theoretical approach, and provide a brief overview of the humanitarian and

environmental issues facing the mining sector in Africa over the past 20 years, suggesting that the transition to renewable energy places increasing pressure on already vulnerable communities. Next, we examine how the CSMI proposes to address these human security issues. Anchored in an agential constructivism approach, we find that the CSMI wrongly assumes that cooperation between the World Bank and African actors is possible or inevitable under current conditions. A neo-Gramscian approach demonstrates that the CSMI will be ineffective at incentivising the adoption of sustainable mining practices in the presence of expanding Chinese and Russian involvement in Africa and that the pervasiveness of these large forces creates systems of economic dependency that often result in exploitative trade agreements. Agential Constructivist approaches highlight the relevance of African agency and African countries' role as norm-builders in explaining how their relations with China or Russia reflect their evolving diplomatic or domestic interests. Taken together, our theoretical analyses demonstrate that the CSMI promotes sustainable mining – though falls short in its ability to spur genuine change on a meaningful scale. Consequently, we advocate for a more participatory and inclusive approach to African mining governance in order to meaningfully address enduring issues of environmental degradation, humanitarian violations, and economic dependency.

Conceptual and theoretical foundations: Agential Constructivism and sustainable resource governance

The sustainability concept emerged from the Brundtland Report on the effects of uncontrolled consumption (Kuhlman & Farrington, 2010). Over the past 40 years, the concept has been used and misused by governments and corporations to legitimise often unsustainable economic projects (Maude, 2014). In its undiluted form, sustainability has not only an economic dimension, but also environmental and societal aspects (King, 2008; Kirsch, 2010; Kuhlman & Farrington, 2010; Muqayi & Chimwara, 2019; Chirisa, 2019; Field, 2019).

Sustainability is future-oriented, and reconciles the resource exploitation needs of current and future generations (Potvin & Richards, 2015), while sustainable development is concerned with the resource exploitation needs of current populations (Maude, 2014). In Thiele's (2016) assessment, this focus should transcend the groups in close proximity to a project by also considering the impact on distant communities. In light of the various facets of sustainability, our concept of a sustainable resource governance initiative is one that alleviates poverty just as it contributes to profit accumulation (Field, 2019) – a measure that guarantees equitable distribution of the gains of resource exploitation (Thiele, 2016) and ensures that the environmental costs of resource exploitation are also equitably distributed (Muqayi & Chimwara, 2019). An Agential Constructivist perspective on governance suggests that this is a practical imperative since, regardless of the governance efforts of state institutions, disaffected local communities are able to discursively and practically influence how mining operations progress.

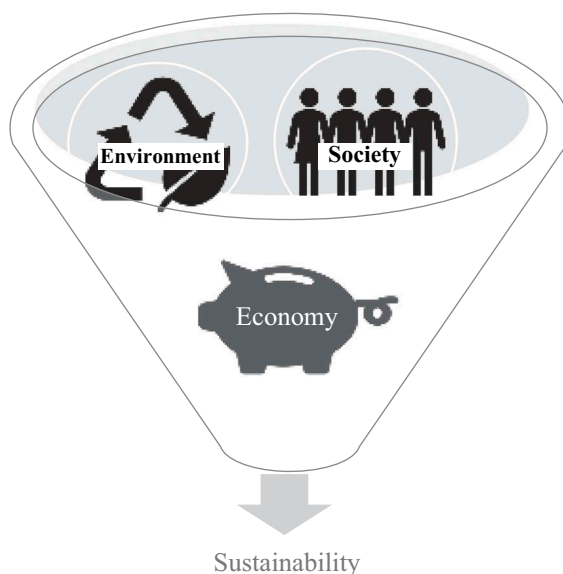


Figure 3.1 The three rings of sustainability

Source: the authors, 2025.

Therefore, mining sustainability requires the inclusion of all stakeholders, including various categories of commercial businesses, the relevant natural resources governance agencies of the state, and diverse local community groups. As affirmed through recently conducted fieldwork,¹ for instance, even informal mineral traders supporters/tributors,² are significant players in the mining sector of the DRC as they act as suppliers to large-scale mining (LSM) companies. Although their operations pale in comparison to those of LSMs and semi-mechanised medium-scale mining (SSM) – and these actors are drawn from neighbouring countries as well as non-African states³ – the pursuit of their unique goals and interests could jeopardise sustainable mining ambitions if excluded from broader consultative processes.

Combining the best of liberal institutionalism and neo-Gramscianism: Agential Constructivism

Liberal institutionalism is a theory of International Relations (IR) that holds that states cooperate with one another to achieve mutually beneficial outcomes partly within frameworks availed by international institutions like the IMF, UN, or World Bank. It holds that increased regulation and governance of the international community enhances stability and reduces conflict (Keohane, 1984). Consequently, liberal institutionalism ascribes norm-building to international organisations as a form of soft power that governs the activities of state and non-state actors (Donahue & Nye, 2000).

Structuralist theories of IR like neo-Gramscian perspectives, on the other hand, provide a useful critique of international institutions and reveal how these entities construct and manipulate the interactions of transnational actors. Yet, neo-Gramscian perspectives are also criticised for reducing political economic relations down to structural instances of “larger” actors exerting material power or social power over “smaller” actors and consequently ignoring the agency of smaller actors. In contrast, constructivist approaches help us understand how smaller actors, like states from the “Global South”, constitute norm-makers rather than merely norm-takers (Grant, 2018, p. 257). Although liberal institutionalism has revealed the importance of norms, constructivism holds norms to be extremely important indicators of state and non-state behaviour.

Contemporary constructivist approaches to IR also acknowledge the constant transformation of the global political economy and the limitations of static theories – like those that overemphasise the importance of hegemonic actors or “cores-peripheries” or “North-South” divides. Generally, constructivist approaches emphasise how ideational factors and norms shape the interests and identities of actors where neither agent nor structure is made ontologically primitive, but rather mutually constituting (Checkel, 1998, p. 326). Agential constructivism builds on traditional constructivist theory, emphasising how actors influence transnational norms and exercise agency in pursuing their interests (Grant, 2018, p. 261; Grant 2022; Eke et al., 2024). That is to say, individual actors exercise agency that is perhaps constrained, but not bound by their position in the political economic structure. Agential Constructivism is particularly useful for analysing global and regional governance initiatives – including stakeholder consultation regimes – and their projected effectiveness based on local incentives for compliance or non-compliance (Grant & Wilhelm, 2022; Eke et al., 2024).

The Climate Smart Mining Initiative

The Climate Smart Mining Initiative (CSMI) aims to mitigate environmental damage in mining sectors. Launched by the World Bank in May 2019, the CSMI invests billions to advance sustainable mining in the Global South more specifically. A part of the World Bank’s Extractives Global Programmatic Support (EGPS), the CSMI aids resource-rich Global South countries to sustainably develop their extractive industries (World Bank, 2023a). The EGPS generally advances transparency and accountability between governments and stakeholders by involving both industry and civil society in envisioning good governance.

The CSMI focuses on achieving environmental sustainability in the mining industry through investments in technology while also paying attention to social and economic elements of sustainability through improving the investment climate and facilitating institutional capacity throughout mineral supply chains. To that end, its four major areas of focus are climate mitigation,

climate resilience, circular economy, and creating market opportunities (World Bank, 2022). The CSMI is considered a shift away from local sustainable development towards top-down risk mitigation and the creation of favourable business opportunities for transnational firms (Phadke, 2019, p. 1374). This contrasts with the early 2000s, when global governance initiatives focused primarily on mitigating local environmental risks and international institutions mainly incentivised corporate social responsibility (CSR). These policies improved African mining governance as evidenced in the plethora of sustainability reports issued by mining companies post-2000 (Phadke, 2019, p. 1374). Critics argued that this approach lacked strong compliance mechanisms and effective community engagement frameworks for corporations that desired stricter operational guidelines (Dashwood, 2014, p. 565).

In this new era, “responsible mining” has transformed from mitigating local environmental harm towards a top-down set of investment strategies like the CSMI that pressure individual states to collaboratively mitigate climate change through their nationally determined contributions (NDCs) and to govern their respective mining sectors. Hence, the CSMI is a form of liberal institutionalism because it assumes that international organisations should facilitate cooperation and compliance among states and expects that “commonly held” sustainable mining goals will engender international cooperation on the matter. It also assumes that top-down governance coupled with proper incentives structure will engender policy uptake and translate into “hard law” at the national level. Since the CSMI also seeks to operationalise sustainable development norms, it is appropriate to analyse its current trajectory via an agential constructivist lens in order to examine its potential effectiveness in addressing governance gaps in Africa’s mining sectors. Consequently, in the next two sub-sections, the chapter assesses the prospects of the CSMI for meaningful community engagement, incentives, and capacity for adopting and implementing sustainable policy changes, which are infused by liberal norms and central to the proposed goals of the CSMI.

Meaningful engagement from affected communities or attention to local interests?

We investigate the CSMI to ascertain the objectives and beneficiaries of the new regulatory initiatives of international institutions. This is especially important given that transnational mining companies shaped the design of the fund (NGO Open Letter to World Bank, 2019). The World Bank, for instance, cites mining sector “heavyweights” Rio Tinto and Anglo American, as partners of the CSMI (World Bank, 2022). A neo-Gramscian critique of the CSMI suggests that this is a case of an international institution using its hegemonic power to impose a neoliberal capitalist economic world order that attends to global supply chains and corporate interests than reducing exploitation or local environmental damage. The hegemony of neoliberal discourse has also impacted the quality of meaningful engagement by prioritising

procedural efficiency over ongoing communication and information sharing with all stakeholders (Bond et al., 2020). This point is further evidenced by the CSMI's claim that resource extraction in Africa is a "necessary evil" to foment the "green energy revolution" (Phadke, 2019, p. 1375). This kind of discourse and the presence of mining executives at the World Bank's conference for Climate Smart Mining, suggests that mining firms are influencing sustainable mining regulations. While the initiative may aim to support the Global South in mining sector transformation, its goal of creating favourable business conditions and managing the global supply of energy transition minerals cannot be overlooked.

In fact, input from self-interested stakeholders, such as transnational corporations, are overly represented in the consultation process. For instance, the CSMI employs the World Bank's Environmental and Social Framework (ESF) for implementing global governance and the ESF relies primarily on environmental and social assessments performed by the borrower (World Bank, 2017). However, the overrepresentation of transnational corporations in designing the fund and prevailing business relations in resource-rich states gives transnational corporations a degree of authority in shaping those assessments. As such, the impact assessments upon which the CSMI intends to base its subsequent actions will tend to favour top-down approaches to stakeholder consultation. Top-down approaches are characterised by efforts to minimise harmful impacts through formal requirements such as monitoring systems or audits. This kind of enforcement promotes bare-minimum standards, enabling mining companies to narrativise compliance without meaningfully engaging actually or potentially affected stakeholders. The Environment and Social Framework Guidance Note 7 regarding Indigenous Peoples/Sub-Saharan African historically undeserved traditional local communities provides guidelines for borrowers to identify and fully consult Indigenous and local populations. Adverse impacts on Indigenous or local populations are to be avoided "where possible" or where avoidance is not possible, to "minimize, mitigate and/or compensate for such impacts" (World Bank, 2018). Mitigation in this case clearly relies on viable mechanisms for identifying affected communities and conducting impact assessments.

Ostensibly, the CSMI claims to be centred on the UN's Sustainable Development Goals (SDGs) and addressing underdevelopment, exploitation, and environmental degradation. It includes a Climate Smart Mining Approach, which integrates SDG priorities, including upholding Indigenous rights, an injection of wealth into local communities, and good governance of the mining sector in Africa through stakeholder engagement. Since engagement tends to be operationalised in the form of top-down formal consultation requirements, the question of who constitutes a "rights holder" or "affected stakeholder" is left to the discretion of the state. This portends oversights that undermine meaningful stakeholder engagement. Especially pressing is the vagueness surrounding *rights holders* since, according to the UN Global Compact, only those constitutionally recognised as Indigenous or tribal

peoples are defined as rights holders to free prior and informed consent (FPIC) (Lehr, 2014) – a key norm underpinning the United Nations Declaration on the Rights of Indigenous Peoples and its application to the governance of mineral resource sectors (Côté et al., 2025).⁴ In the DRC, for instance, the government and civil society generally accept the concept of “Indigenous Peoples” when referring to the Mbuti, Baka, and Batwa peoples – but the constitution and laws do not directly mention the rights of Indigenous Peoples.

Other barriers to meaningful stakeholder engagement include barriers to addressing concerns, grievances, and the right to protest. The ESF claims that all initiatives by the World Bank include provisions for addressing concerns and grievances (World Bank, 2017) and it acknowledges that effective stakeholder engagement is critical to sustainability. Yet, it also declares that “consultations are led by the borrowing governments” (World Bank, 2019). This suggests that, ultimately, the definition of, and consultation with, affected stakeholders or rights holders are state prerogative. As evidenced by the CSMI case, stakeholder consultation frameworks can promote human rights-based approaches that appropriately consult affected communities. However, global governance initiatives like the CSMI assume that states have the capability or incentives to adopt and enforce these measures. The CSMI also fails to acknowledge the barriers to meaningful local community participation. For example, a draft Forest Smart Mining Initiative (FSMI), a smaller initiative part of the CSMI, differentiates between five types of forestry sector stakeholders that participated in varying degrees in designing the initiative. The fifth category of stakeholders are defined as highly interested observers that wished to participate but faced political barriers to formal participation (Hruschka et al., 2021). This further suggests that stakeholders without barriers to participation like transnational corporations are the most influential in the consultation process – opposed to affected communities that lack the ability for formal participation. Moreover, a closer review of the key partners and underlying CSMI goals suggest that it lacks genuine participatory input from local communities. Without assessing the risks from the perspective of affected stakeholders, the CSMI simply promotes mining expansion without adequate safeguards for affected communities. Therefore, our analyses suggest that the CSMI is both handcuffed in appropriately addressing environmental concerns and social challenges in resource-rich African countries and in driving sustainability in mining operations.

The CSMI assumes that aid and assistance from international institutions are welcome in Africa. The World Bank assumes that African states will incorporate CSMI stipulated norms and regulations and require mining firms to ensure their operational implementation. Sustainability, then, becomes a process of ensuring due diligence in mining. This process could witness “soft law” becoming “hard law” if attendant legislation is promulgated by states. However, given the increasing interest in Africa’s resources by illiberal states like China and Russia, African governments are presented with alternative

investment opportunities that do not require CSMI compliance. For example, the Central African Republic (CAR) is home to anti-France sentiments. Stoked by Françafrique resentments, these trends have engendered increased CAR-Russia relations in recent years (Ozoukou & Lawler, 2022, p. 43). Several African countries have delinked from former colonial powers and their former Cold War patron, the United States, and engaged more closely with China or Russia – whose foreign policy strategies, incentives, and norms diverge from those of liberal international organisations. India, Israel, Saudi Arabia, and the United Arab Emirates have also sought to increase trade and diplomatic ties with African states to access natural resources and a growing consumer base. These trends can be accounted for by an Agential Constructivist framework because the latter places emphasis on the dynamics of African agency, which are elucidated below.

Increasing involvement of Chinese and Russian mining and the lack of incentives and capacity for participation in CSMI

Trade data on energy transition minerals indicate growing involvement of non-Western actors, notably China and Russia. In the last 20 years, Chinese firms have gained near exclusive access to the DRC's abundant reserves of copper (Walsh-Pickering, 2022) – as well as cobalt, which is a necessary component in the production of EVs. In 2007, as a part of the “Going Out Strategy”, China struck a “minerals-for-resource” deal with the DRC, investing \$US 9 billion in infrastructure in exchange for a joint-venture mining agreement (Amusan, 2019, p. 160). The deal gave Chinese corporations 68 per cent ownership in the copper and cobalt mines in the Katanga province. Out of the 19 mines that currently operate in the DRC, 15 are Chinese owned (Searcey et al., 2021). In 2016, for instance, the Chinese company, China Molybdenum, purchased 80 per cent stakes in the DRC's largest mine, the Tenke Fungurume Mine (Ericsson et al., 2020, p. 153). The mine was purchased from an American mining company for \$US 2.65 billion, supported by at least \$US 1.59 billion in loans from Chinese state-backed banks (Searcey et al., 2021).

Recent reports suggest that Russia has begun engaging in similar relationships as China with African countries, specifically the CAR. While some of this increased presence in the CAR comes from geopolitical interest, the operations of the Russian then quasi-private military contractor, Wagner Group (renamed Africa Corps in 2024 and now under the full auspices of Russia's Ministry of Defence), is the main actor overseeing the exports of mineral resources (Nkuna & Shai, 2021, p. 2). Arkhangelskaya & Shubin (2013) had argued that Russia's involvement in Africa since the beginning of the twenty-first century was driven by a desire to increase market share of the global minerals sector. Russia's “return” to Africa began in 2013 when France removed its troops from the CAR (Ozoukou & Lawler, 2022, p. 43). Since 2017, Russia has increased its access to natural resources in the CAR and other African countries such as Sudan, Niger, Mali, and Burkina Faso – among

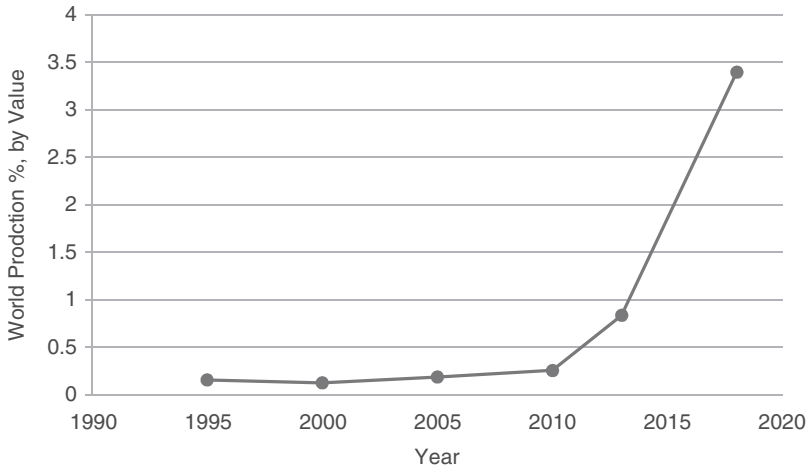


Figure 3.2 China's control of overseas mine production as a % of total value of world mine production

Source: Ericsson, M., Löf, O. & Löf, A. Chinese control over African and global mining—past, present and future. *Miner Econ* 33, p. 174 (2020).

others – in exchange for military training and weapons. Russia's Africa policy has therefore evolved since the early 2000s and is no longer considered resource-driven for economic gains from the minerals *per se* (Duursma & Masuhr, 2022). Rather, the benefits range from a way to access gold to prop up the value of the Ruble owing to Western sanctions on Russian financial transactions, to a means to bolster diplomatic influence on the global stage by adding African states as new allies. Similar to China, Russian foreign policy and investment in Africa is often without the prescriptions of veritable liberal governance regulations (Morin et al., 2021).

Despite increasing in scale, China's infrastructure deals in the DRC have not resulted in significant improvements in bolstering the domestic economy (Soyyigit & Nişancı, 2021). The World Bank's Human Development Index (HDI) indicates that the DRC has experienced marginal improvements to human development – but remains one of the least developed countries in the world (World Bank, 2023b). In 2021, the HDI for the DRC was estimated at 0.479, ranking it 164 out of 174 countries. Ironically, President Felix Tshisekedi has reinforced this assessment, noting that the DRC has not benefited from \$US 6.2 billion dollars in minerals-for-infrastructure contracts with China (Bartlett, 2023).

Further, Chinese corporations have been criticised for creating a business environment that fosters corruption, results in environmental pollution, undermines domestic business, and relies on exploitative labour practices (Soyyigit & Nişancı, 2021, pp. 187–188). Similarly, the operations of the Russian mining company, Lobaye Invests, in the CAR have caused land

degradation, deforestation, and water pollution in communities situated near Russian-linked mines (Morin et al., 2021). While structuralist theories such as neo-Gramscianism are useful in understanding the positionality of countries like the DRC or CAF in the global economic system, Agential Constructivism provides a welcome perspective for understanding how African states exercise agency in their respective relationships with China and Russia. Moreover, an Agential Constructivist analysis suggests that it is not merely a case of a larger actor using its material force on a smaller actor. Rather, countries like the DRC and CAR have adopted the language of liberal economic norms to willingly engage with China and Russia to attract foreign investment. This analysis suggests that the CSMI will be ineffective so long as African countries choose to invite investment from Chinese and Russian mining firms because the liberal political norms of CSR, safe working conditions, and environmental sustainability will be absent. While China and Russia have some nominal responsibility as state-members to uphold the regulations set out by the World Bank, Chinese and Russian firms, especially smaller mining corporations, do not feel compelled to promote the aforementioned liberal political norms. This is especially the case with Russian PMCs and Chinese small-scale and medium-scale mining operations. These mining sector actors often lack necessary permits and are responsible for a significant degree of environmental and health and safety issues. They have been accused of placing “profits over people”, lacking pertinent information, and having little incentives to follow any state-imposed regulations (Ericsson et al., 2020, p. 165). To effectively promote sustainability, the CSMI must ensure that, beyond mere formal requirements, states have the incentives and capabilities to effectively enforce new regulations based on liberal political norms.

More specialised aspects of the CSMI – like the initiative known as Forest Smart Mining (FSM) – emphasise the unique issues present in the ASM sector (in this case deforestation), and advocate for the regularisation of ASM activities so that they can access investment from responsible financial funds and consumer markets (Hruschka et al., 2021). While neither the CSMI nor the FSM directly promote the enforcement of local content or local procurement requirements, the FSM suggests that legalising ASM activities will empower civil society because the labour pools largely comprise local workers. However, close cooperation between states and transnational corporations effectively disincentivises ASM governance – even in places where ASM operations are formally legalised. Yet, owing to the lack of enforcement of local content regulations (LCRs) in the large-scale mining (LSM) sector,⁵ local economic development is confined to the ASM sector. The CSMI assumes that resource-rich African states will adopt policies to promote local economic development and regulate the operations of transnational corporations. These top-down approaches to governance are successful when expectations for sustainable practices become normative and non-compliant actors are disadvantaged amidst evolving standards. However, as long as there are incentives for non-compliance, such as maintaining a “business-friendly”

reputation or upholding prior business relations, the enforcement of LCRs cannot be guaranteed. Moreover, the CSMI lacks the potential to ensure sustainability in mining by leaving necessary policy prescriptions up to the states' discretion without recognising the barriers states face in adopting and implementing these policies.

An Agential Constructivist approach to analysing the CSMI questions the assumption that top-down norms and measures envisioned by liberal institutionalists will ensure cooperation. Taken together, a neo-Gramscian approach explains why the state may lack the capability to implement new policies and an Agential Constructivist approach explains why the state may lack the incentive to implement new policies. These are crucial points because capability and incentive are both vital for states to promote sustainability in mining. Moreover, local distrust and opposition to interventions by international institutions imperil global governance initiatives like the CSMI.

An Agential Constructivist approach also highlights potential alternative solutions for sustainable mining. Notably, efforts at the regional level may have greater success in harmonising laws and regulations and developing locally accepted standards by empowering African states to operationalise transnational norms that better reflect regional governance challenges and characteristics. At the same time, individual state and non-state actors that are included in these regional governance frameworks must be granted greater autonomy to address case-specific issues, such as the unique challenges associated with governing the ASM sector. Also, regional governance initiatives could be more effective than global governance initiatives in advancing sustainability by promoting local content and formalising artisanal mining across African mines. These initiatives will require meaningful engagement with civil society and affected communities – themes that also inform our recent analyses of the SADC Protocol on Mining (Eke et al., 2026).

Conclusions

Our analyses of the CSMI have generated insights on global and regional sustainability governance challenges in Africa's mineral sectors. Specifically, we expect that the CSMI will be ineffective at addressing environmental and humanitarian issues across the continent's mining sector due to its inability to recognise local opposition to Western intervention and increasing Chinese and Russian interest in the region. We also find that the CSMI can be critiqued in much the same way as other examples of liberal institutionalism because it assumes that top-down influence from international organisations will successfully ensure cooperation and compliance between state and non-state actors. By adopting an Agential Constructivist approach, we sought to avoid the drawbacks of liberal institutionalism, provide a more measured grounding for assessing the limitations of the CSMI, and offering solutions on how to promote governance cooperation to advance sustainable mining.

Top-down stakeholder consultation frameworks like the CSMI, ultimately fail to safeguard the interests of potentially or actually affected communities

and promote sustainability in mining. Our findings show that transferring responsibility onto borrowing governments to design stakeholder consultation frameworks that effectively identify local populations and assess potential risks will lead to superficial improvements in protecting the social, environmental, and economic sustainability of African communities. Top-down approaches also incorrectly assume that states and corporations necessarily take on sustainable development norms. We find that this is not the case in the African mining sector particularly where there are alternative options to form resource deals with states like China or Russia.

Our critique of the aforementioned tendencies aligns with Agential Constructivism's analysis of bottom-up governance dynamics, which challenge the top-down imposition of Western governance ideals on states by international organisations or the imposition of central state governance visions on local communities. This analytical perspective has two implications for sustainable mining governance in Africa. First, it reinforces our assessment of the significance of oft-ignored voices like those of informal mineral traders, who despite being lowly positioned in the hierarchy of mining stakeholders, can disrupt the implementation of sustainability initiatives if their exclusion from consultative processes causes their interests to be undermined. Second, and as alluded in the preceding paragraph, Agential Constructivism highlights the ability of states to selectively implement or completely ignore sustainability initiatives that they played little or no part in developing.

Although our analyses benefited from fieldwork in and around mining sites in Africa – as well as participatory observations in-country and at related global governance meetings that provide important contextual knowledge – we acknowledge a limitation of our study: that is, the lack of direct observation of CSMI implementation by major industry players. Therefore, we call for further research that provides direct observations of the CSMI in practice in order to provide generalisations based on analyses on the impact of stakeholder consultation frameworks on sustainability. Further research on comparable global governance initiatives and mining would also be well received by practitioners and scholars alike. For instance, in 2023, the IGF MPF completed the second iteration of its voluntary compliance mechanism aimed at mining firms. Although the danger of “compliance fatigue” may have a deleterious effect on the IGF's MPF as well as the CSMI – mining industry actors are already voicing concerns that the number of voluntary compliance mechanisms is becoming unwieldy and the time required for active participation and adherence is becoming onerous⁶ – advocates of the Consolidated Mining Standard Initiative (CMSI) are attempting to address these concerns. Established in 2024 and in the midst of final consultations in early 2025,⁷ the CMSI is a global extractive sector governance initiative that seeks “to harmonize multiple frameworks into a single standard, simplifying compliance, reducing reporting fatigue, and promoting broader industry adoption” (ICMM, 2024, p. 2). After a suitable interval, researchers should assess whether the CMSI is able to achieve these goals as well as the broader objective of improved sustainability.

Acknowledgements

Our chapter has benefited from the comments and suggestions provided by the anonymous referees and book editors. We thank Benjamin Ofosu-Atuahene and Olivia Howells for their helpful research assistance. The Social Sciences and Humanities Research Council (SSHRC) of Canada and the Sir Edward Peacock Research Fund in the Department of Political Studies at Queen's University provided welcome financial support for the research conducted as part of this broader project.

Notes

- 1 In-person interviews and participant observations conducted by one of the authors in Lualaba and Haut-Katanga provinces, Democratic Republic of Congo, 18–22 August 2022, which generated findings consistent with similar fieldwork conducted in other African countries over the past 20 years. This author also conducted participant observations in Toronto, Canada, during the Prospectors & Developers Association of Canada (PDAC) annual meetings in March 2023, in Washington, DC, USA during the Voluntary Principles on Security and Human Rights (VPSHRs) annual meetings in May 2024, and Geneva, Switzerland, during the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) annual meetings in November 2024, which shed light on a potential alternative to the CSMI.
- 2 Tributors provide financial support to one or more ASM participants in various ways. Tributors may control a mining plot and hire ASM participants on a daily or weekly basis. Alternatively, tributors may provide up-front financial support to ASM participants in exchange for a pre-set portion of the latter's "winnings" or mining production. Finally, tributors may extend informal – yet high-interest – loans to ASM participants.
- 3 Some mineral traders are non-African buyers who either formally or informally purchase SSM and ASM production on behalf of LSM firms. Some of these buyers are employed by LSM firms, while others are independent contractors.
- 4 The application of UNDRIP is relevant to natural resource sector governance in the Global South as well as the Global North. As regards the latter and the case of Canada, see for example Bousquet and Grant (2025) and Côté et al. (2026).
- 5 See for example Butler (2020).
- 6 The sentiments were shared with one of the authors as part of informal conversations as well as with attendees during plenary and panel discussions as part of the annual meetings of PDAC in March 2023 (Toronto, Canada), the VPSHRs in May 2024 (in Washington, DC, USA), and the IGF in November 2024 (in Geneva, Switzerland).
- 7 The CSMI conducted a "first round" of public consultations on its governance document in late-2024. A "second round" of public consultations is expected to begin in early 2025. See CSMI (2025).

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4 Civil society and extractive company-community relations in Canada and Norway

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Introduction

Stakeholder consultation regimes involve a complex web of interactions that include civil society groups, governmental representatives, businesses, and others. These interactions are multifaceted and also dynamic, shaped by the socio-political contexts within which they occur. Understanding these interactions is crucial for developing more meaningful and effective forms of stakeholder consultation. This is particularly the case in extractive sectors like offshore oil and gas development, where the social and environmental impacts on host communities can be far-reaching (Gotham, 2016; Oppong & Andrews, 2020).

In this chapter, we demonstrate the utility of Social Network Analysis (SNA) approaches to research on stakeholder consultation regimes and processes. We use Discourse Network Analysis (DNA), which applies the concepts and tools of SNA to document and textual data (Leifeld, 2017, 2020). Whereas much social science research focuses on individual people or organisations as the unit of analysis, SNA is primarily interested in the relationships and structured forms of interaction among people or organisations, which can be treated as collective actors. SNA data collection often looks at relationships of collaboration, flows of resources, communication and information sharing, and conflict relations (Crossley, 2011). The focus on analysing how these different forms of communication, collaboration, and conflict develop among social actors in different settings has proven extremely useful for understanding the social dynamics of policy processes, as well as in social movement studies. Here, we demonstrate the utility of these approaches for stakeholder consultation research.

Discourse Network Analysis – as an application of SNA – was initially developed for studies of policy debates but has become well-used for studies of mass media debate on environmental issues. In this chapter, we extend the DNA approach to look at stakeholder consultation around oil and gas development in Canada (particularly Atlantic Canada) and Norway. We look at networks of key actors, discursive themes, and frameworks for consultation as they are articulated across these two operating regions.

DOI: 10.4324/9781003488507-6

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The results from our DNA of reports, documents, and web content from government, corporations, and civil society groups offer valuable insights into the dynamics and discourses that shape stakeholder consultation with the oil and gas sector. Comparative DNA of stakeholder consultation regimes, such as the ones in Atlantic Canada and Norway, are useful because they allow us to identify key similarities and differences in the ways these regimes are structured. They enable us to understand how global frameworks for consultation are translated into the socio-political landscapes of different operating regions.

Furthermore, our DNA of these two oil and gas operating regions illuminates the different roles that civil society takes in consultation regimes. Civil society groups often serve as a bridge between communities and extractive companies, playing a crucial role in shaping the discourse around consultation in extractive and coastal development (Stoddart, Mattoni et al., 2020; Widener, 2021). Understanding the position and influence of these groups within the network provides valuable insights into the dynamics of company-community relations.

In short, DNA – building on the toolkit of SNA – offers a lens through which we can visualise and analyse the relationships between different actors within a network, the nature of their interactions, and the discourses that shape these interactions (Knoke & Yang, 2008; Leifeld, 2017; McLevey et al., 2023; Prell, 2012). By mapping out these networks, we can gain insights into the patterns of communication and power dynamics that constitute different consultation regimes.

Research questions

In this chapter, we answer the following research questions: Which civil society organisations are present in the Atlantic Canadian and Norwegian stakeholder consultation regimes around oil and gas development? We look at consultation processes involving Equinor (formerly Statoil) and Cenovus (formerly Husky) in Atlantic Canada and Equinor and Shell in Norway as key extractive sector companies and project proponents in the respective regions. Subsequently, within these networks, how do civil society actors align with a) alter organisations; b) discursive themes; and c) frameworks for stakeholder consultation? Finally, how do these discourse networks illuminate similarities and differences in consultation regimes – and the role of civil society actors – between Atlantic Canadian and Norwegian operating regions?

In this study, we focus on two specific regions: Newfoundland and Labrador (Canada) and Norway. These regions have been purposively selected because they share North Atlantic geographies and common histories of economic dependence on fisheries and oil and gas extraction (see Stoddart, Mattoni et al., 2020). At the same time, there are key differences between the regions. Norway is a country with a more consensus-oriented and corporatist political culture, while Newfoundland and Labrador is a sub-national provincial

jurisdiction within the pluralist and federalist political culture of Canada (Lijphart, 2012). Likewise, Norway is characterised by a coordinated market economy, with greater collaboration between governments, business actors, labour unions, and civil society organisations, while Canada is characterised by a liberal market economy where there is less collaboration across these sectors for planning and economic development (Hall & Soskice, 2001). Despite these differences, our comparative analysis allows us to identify unique and shared characteristics of stakeholder consultation regimes in these two regions, thereby enriching our understanding of company-community relations.

Theoretical framework

The concept of stakeholder consultation is an important part of the discourse of corporate social responsibility (CSR), particularly in the context of transnational corporations (TNCs). It involves companies actively seeking input from, communicating with, and being responsive to their stakeholders. CSR potentially helps companies understand and address the concerns and expectations of their stakeholders, make better decisions, and improve their social, economic, and environmental performance. Holzer (2010) further emphasises that this consultation is not merely about the corporation's interaction with its stakeholders, but also involves a process of "moralizing the corporation". This process is embodied in policies of stakeholder consultation and corporate accountability, often based on long-term politicised collaboration with a range of governmental and civil society actors (Holzer, 2010).

The moralisation of the corporation emerges from the interaction between corporations and their critics, including protest groups and advocacy networks. These critics, often organised in non-governmental organisations (NGOs), can use their position to make normative claims against corporations. The mobilisation strategies of activists rely on "framings" of corporate behaviour that highlight the moral responsibility of corporations. This moralising form of discourse is challenging for corporations to deny, and their global prominence makes them vulnerable to being cast as perpetrators of public harms (Holzer, 2010). In response to these challenges, corporations have adopted the discourse of CSR and have put effort into showing themselves as good corporate citizens. According to Holzer, this transformation of corporate self-presentation and self-management is a learning process that evolves in response to threats of public pressure and moral outrage.

The argument about "moralizing the corporation" as a quasi-public entity that should engage with a diversity of publics also has resonance with the key concept of "political CSR". In brief, political CSR is a form of corporate citizenship that seeks "deliberations, collective decisions and a concern for ... public goods" (Scherer et al., 2016, p. 274). Political CSR is an "umbrella concept" (Scherer et al., 2016, p. 275) that describes how CSR practices are actively used by corporations to help develop "solutions to public issues", engage in more deliberative and dialogical forms of stakeholder consultation,

and become more transparent and democratic in terms of corporate governance (Scherer et al., 2016, p. 276). The turn to political CSR parallels a broader shift from government – as the institutional centre of political debate and decision-making – to governance as a more diffuse process of deliberation and action involving the influence and input of a broader range of non-governmental actors from the private sphere and civil society (Maher et al., 2019).

While this shift means a more active role for corporations in the political sphere and in governance processes, it is important not to overstate the declining role of governmental actors, who continue to shape the rules that govern political CSR (Maher et al., 2019). An overly optimistic view of political CSR may likewise divert attention from tensions and open conflicts between corporate proponents and host communities (Maher et al., 2019).

Implicit in this model of political CSR are the assumptions that corporations are willing and able to use their power and influence in the service of positive social change; and that inclusive and dialogical stakeholder consultation is one of the ways to work towards that goal. There are varying explanations for why and how companies embrace agendas and practices that fall under the political CSR umbrella in terms of an emphasis on social change and problem-solving; deliberative and meaningful stakeholder consultation; and greater transparency and accountability.

Taking the oil and gas sector as an example, prior research analyses the various influences on whether and how companies orient towards environmental CSR practices. Rowlands (2000), for example, engages in a comparative case study of oil giants Exxon and BP. He argues that BP was among the first oil majors to break ranks with the sector and adopt a more proactive approach to climate change under the influence of organisational characteristics, such as a management structure that is more open and responsive to change. However, BP was also influenced by the broader context of public and political support for climate action in its UK headquarters region, especially by contrast with the more polarised climate-change politics in Exxon's US headquarters region (Rowlands, 2000).

A similar paired case study of ExxonMobil and Shell goes further in arguing that the more proactive environmental orientation of Shell has less to do with internal corporate culture, and more to do with the policy and public opinion signalling effects of the European political and social environment that it is headquartered within (Skodvin & Skjærseth, 2001). Similarly, prior work by Stoddart and colleagues uses fieldwork and interviews to compare oil sector orientations to climate change and energy futures in three different operating regions: Newfoundland and Labrador, Norway, and Scotland (Stoddart, McCurdy et al., 2020). Despite the presence of many of the same key transnational companies working across operating regions, these regions are defined by distinctive orientations to climate change and environmental responsibility. This includes an avoidance orientation, wherein climate change is not addressed at all, or is framed as an opportunity to expand oil and gas exploration, for example because of declining sea ice in the Arctic. This

orientation is more visible in the Newfoundland and Labrador operating region. Second, a persistence orientation emphasises strategies for keeping oil and gas exploration and extraction competitive alongside a future of decarbonisation and renewable energy development. This orientation is more visible in Scotland. Third, a transformation orientation goes further in asking how the oil and gas sector can pivot itself to become part of the emerging renewable energy landscape. This orientation is more visible in Norway. As such, this study also points to the significance of operating region – not solely headquarters region – as a key influence on whether and how companies engage in political CSR.

Elsewhere, proponents of the corporate culture view of why companies engage in political CSR make arguments that companies are more likely to adopt pro-sustainability CSR when: 1) they are more engaged with environmental scientists (Pulver, 2007); 2) they adopt a longer-term view of time in their planning (Slawinski & Bansal, 2012); 3) they realise their interests are no longer served by seeking to obstruct ongoing social change (Bach, 2019); and 4) when they are more willing to engage with civil society actors, including social movement critics and opponents (Bach, 2019; Slawinski & Bansal, 2012).

Drawing this literature together, we can see the development of political CSR orientations as a social process that is influenced by a mix of internal and external factors. Internally, it appears that companies that have a corporate culture that is more open to broad stakeholder consultation and social learning are more inclined to shift towards political CSR. Externally, it appears that the signalling of public opinion and the broader political environment are also influential for shifting companies towards political CSR.

In our analysis, we examine a mix of corporate actors from the oil and gas sector (Equinor, Cenovus, Shell) across two distinct operating regions: Atlantic Canada and Norway. Through our analysis of how civil society organisations are embedded in stakeholder consultation processes that are 1) across different operating regions, and 2) in connection with different key corporate actors, we gain further insight into the ways in which regimes of stakeholder consultation and civil society participation reflect the social-political landscape of specific operating regions, as well as the political CSR orientations of different transnational oil and gas companies. Our analysis makes use of DNA, which is a form of SNA. We turn to this next.

Methodology

An overview of SNA and DNA

Social Network Analysis is both a theoretical perspective and methodological toolkit, which is part of the larger umbrella perspective of relational sociology. As the name suggests, relational sociology argues that the primary focus of analysis should be on the interactions, ties, and networks between social actors. It begins from the assumption that the social world is not merely a

collection of individual actors but is made up of networks of connections and relationships. In this framework, actors may be individuals, organisations, or other types of identifiable collectives. Ties can be between actors (individuals and/or organisations). Ties can also be between actors through para-social entities like shared discursive themes about an issue. This focus on discursive themes is characteristic of Discourse Network Analysis (Leifeld, 2017). Ties between actors can also work through shared beliefs about an issue, or shared policy orientations, as in policy network and advocacy coalition approaches (for example, see Ylä-Anttila et al., 2018).

Social Network Analysis (and relatedly Discourse Network Analyses) offers tools to conduct relational analysis. SNA allows us to explore the properties of networks – interactions and ties – in which social actors are embedded (Crossley, 2011; Prell, 2012). SNA allows for the identification of inequalities in the network that result from structured patterns of centrality and marginality (or exclusion). SNA also allows us to identify where there may be opportunities for improved coordination of activities (collaboration, information sharing) by identifying which actors are most central (or well-connected) and which actors may play bridging or brokerage roles among discrete subgroups in a network.

In the context of stakeholder consultation regimes, relational sociology (as a larger theoretical orientation) and SNA (as a complementary methodical toolkit) can help us understand how global frameworks for consultation are translated into specific contexts. This approach has been well-applied to studies of stakeholder involvement in environmental issues, such as air pollution, and natural resource governance (e.g., Jones & White, 2022; Joshi & Swarnakar, 2023; Oubenal et al., 2017). As we further illustrate in our analysis, these approaches help us map out the unique stakeholder consultation regimes of different regions to identify key similarities and differences in the ways these regimes are structured. By mapping out these networks, we gain insights into the patterns of inclusion/exclusion, communication, influence, and power dynamics that play out in different consultation regimes.

A key concept in SNA is network centrality, which refers to how well-connected a node (for example, an individual or organisation) is to the other nodes in the network (Prell, 2012). The theoretical assumption is that high centrality can often be taken as a proxy for influence within a network. Network density is another important key analytical concept in SNA (Prell, 2012). This refers to how tightly knit and interconnected a network is, or conversely how diffuse and loosely connected a network is. High-density networks display frequent contact among nodes, which can lead to high levels of collaboration and information sharing among well-connected actors. By contrast, more diffuse networks may lack the same level of interchange, collaboration, or information flow among actors. A third relevant key concept is clustering, or examining how networks are constituted by subgroups of actors (Crossley, 2011). In highly clustered networks, the bridging ties that make connections across different subgroups can be especially important as brokers of connections information across these subgroups.

Discourse Network Analysis (DNA) applies these concepts and tools to documents and textual data by analysing links between social actors (individuals or organisations) and discursive themes, which are not traditionally within the scope of SNA. Originally, DNA developed to examine policy debate using policy documents to analyse affiliation, agreement, and disagreement relations between policy actors and discursive themes (Leifeld, 2020). This approach is useful for identifying key alignments and lines of conflict within policy networks, and for identifying subgroups of advocacy coalitions that cohere around similar policy orientations. Early applications of this approach focused on policy networks related to software patents in the European Union (Leifeld & Haunss, 2012), policy networks related to toxic chemical management (Leifeld & Schneider, 2012), and German policy networks related to old-age security and pensions (Leifeld, 2013). DNA has since been extended and widely used to examine how climate change and other environmental policy debates have played out in the mass media (for example, see Černý & Ocelík, 2020; Fisher et al., 2013; Kukkonen & Ylä-Anttila, 2020; Kukkonen et al., 2017; Stoddart et al., 2017; Swarnakar et al., 2022). More recent innovations of this approach examine climate communication networks in social media platforms like Twitter/X, Instagram, and China’s Weibo (Chen et al., 2021; Stoddart et al., 2025; Yang & Stoddart, 2021).

Data and methods

In this project, we use DNA to analyse a corpus of documents on extractive company-community relations and consultation related to oil and gas development in Atlantic Canada and Norway. We focus on oil and gas projects involving Equinor in both case study regions, Cenovus in Atlantic Canada (which recently absorbed Husky, a major operator in Atlantic Canada), and Shell in Norway. Table 4.1 provides a summary of the different textual data sources that made up the corpus used for our analysis.

First, we retrieved grey literature from the Government of Canada and Government of Norway websites using keywords related to public consultation and consultation, as well as Corporate Social Responsibility and social

Table 4.1 Summary of the textual data sources

<i>Document type</i>	<i>Canada case - # of sources</i>	<i>Norway case - # of sources</i>
Government documents	11 (published 2014–2021)	12 (published 2009–2021)
Corporate websites and linked reports	2 websites (Cenovus and Equinor) and 4 linked reports (retrieved April 2021).	2 websites (Equinor and Shell) and 9 linked reports (retrieved April 2021).
Impact assessment documents	10 (published 2017–2021)	35 (published 2011–2021)
Civil society web content	36 (retrieved December 2021–March 2022)	34 (retrieved February–March 2022)

licence to operate, with particular attention to the oil and gas sector. Second, we also retrieved data from corporate websites, including linked reports. This included material from Cenovus Canada (www.cenovus.com), Equinor (www.equinor.com), and Shell Norway (www.shell.no). Third, we retrieved Impact Assessment documentation related to projects involving Cenovus and Equinor (Canada) and Equinor and Shell (Norway). We focused on Impact Assessment documents because this is a widely used framework for structuring opportunities for stakeholder input and community consultation in extractive development in both case study regions.

Finally, we carried out netnography – or treating the internet as a field site – to unobtrusively observe and collect notes from various civil societies and other organisations that were referenced as intervenors or stakeholders/rights-holders in the governmental, impact assessment, and corporate website data (Hine, 2015). The netnography was carried out by the second author from December 2021 through March 2022. Note-taking on web content used a semi-structured protocol that focused our attention on content related to community consultation, corporate environmental and social responsibility, frameworks for consultation, and collaboration and conflict relations in the context of oil and gas development. For each of the identified organisations, we reviewed the publicly available organisation website, organisation X feed, Facebook page, YouTube, and Instagram feeds as available. For the Canada case, we examined web content produced by 36 organisations, including Indigenous groups, labour unions (including fisheries organisations), environmental groups, and recreational associations. For the Norway case, we examined web content produced by 34 organisations, including environmental and other NGOs, recreational associations, industrial associations (e.g., fisheries and energy-related organisations), labour unions, Indigenous organisations, and think-tanks.

We coded our document and textual data in NVIVO using a semi-structured coding scheme. We used the matrix function in NVIVO to generate quantified tables of coding co-occurrences among nodes. We used these matrices to generate our DNA using Visone software for network visualisation and analysis.

We can analyse social networks or discourse networks as one-mode networks, where all the nodes are of the same type, such as networks among individual people, or among discursive themes within policy documents. However, we can also analyse multimodal networks, where the connections are between two – or more – distinct types of data (Jasny, 2023; Knoke et al., 2021). For example, a two-mode network can be used to look at the connections between individual people (one mode of data) and the organisations to which they belong as employees or volunteers (a distinct second mode of data), or between organisations and discursive themes. The figures that structure our analysis include four distinct modes of data, represented by different nodes as summarised in Table 4.2.

Table 4.2 Summary of nodes in Discourse Network Analysis

<i>Mode of data</i>	<i>Node appearance</i>	<i>Figure #</i>
Case study regions (e.g., Canada and Norway)	White triangles	Figure 4.1
Organisational actors (e.g., business organisations, labour unions and industrial associations, municipalities, Indigenous groups, environmental and other civil society organisations)	Black squares <i>Note: white squares are used to designate key organisations in Figures 2a and 2b</i>	Figure 4.1, 4.2a, 4.2b, 4.3a, 4.3b
Discursive themes (e.g., distributive justice, procedural justice, ecological values, climate change).	Grey circles	Figures 4.3a and 4.3b
Consultation frameworks (e.g., Impact Assessment, Duty to Consult Indigenous Communities, Community Impacts and Benefits, Paris Agreement on climate change)	White octagons	Figures 4.3a and 4.3b

The four modes of data used in our analysis include 1) case study regions (Canada and Norway); 2) organisational actors from various sectors, including civil society organisations, as well as Equinor, Cenovus, and Shell as the oil and gas companies that we are particularly interested in; 3) discursive themes; and 4) the frameworks that structure the practices and processes of community consultation. These are combined in different ways through one-mode, two-mode, and three-mode network analyses. As such, our results work through a disaggregated or step-by-step form of multimodal network analysis (Jasny, 2023; Knoke et al., 2021). Approaching our textual data on civil society and extractive company-community relations through a multimodal network approach is useful because it visualises the multiple connections across operating regions, organisational actors, discursive themes, and frameworks for community consultation that can be harder to see when data are presented in either qualitative narrative form, or in two-dimensional tables.

Results

Civil society organisations in Canada and Norway

As Figure 4.1 illustrates, mapping civil society organisations and case study regions as a two-mode social network reveals several key patterns and insights into the structure and dynamics of stakeholder consultation across different contexts.

In Newfoundland and Labrador, a broad range of Indigenous groups are involved in the stakeholder consultation network and appear to be the most prevalent organisational actors in the consultation regime. However, there is a lesser focus on unions and community groups. This illustrates how community consultation, in the Canadian case, is often viewed as a matter of engaging with potentially impacted Indigenous communities as rights-holders (not only stakeholders), while non-Indigenous communities or organisational actors, may receive less consideration as potentially impacted stakeholders.

By contrast, the Norwegian case presents a more diffuse network with a broader range of organisational actors. There is a greater inclusion of various host communities, which may be an artifact of the geographical scale of the analysis that encapsulates multiple regions of the country. Additionally, Norway shows a higher presence of research organisations, cultural groups and unions compared to Newfoundland and Labrador. In comparison to Newfoundland and Labrador, this suggests that companies and governments in Norway are taking a broader and more inclusive view of who constitutes potentially impacted communities for the purposes of stakeholder consultation processes.

In both countries, environmental organisations are consistently included in consultation regimes. This indicates a recognition of the importance of environmental considerations in stakeholder consultation processes and suggests that these organisations are successfully making their way into CSR agendas and consultation processes. The World Wildlife Fund (WWF) is a relatively central actor in the network, which serves as a bridging tie across both study regions.

Civil society organisations, extractive companies and government

Figures 4.2a and 4.2b visualise the different organisational and community actors that are represented in corporate and government documents as stakeholders. In Newfoundland and Labrador, Canada, corporate source documents reference specific civil society organisations more frequently than we see in government documents (see Figure 4.2a).

Here again, we see significant visibility for a wide range of Indigenous communities. Environmental Non-Governmental Organisations (ENGOS) are also markedly present. Unions and community organisations appear less frequently, indicating a potential gap in stakeholder representation.

In Newfoundland and Labrador, there is a significant overlap of Indigenous organisations that are coded in the documents from both Equinor and Cenovus. This overlap suggests that multiple Indigenous groups are actively engaged or considered in the consultation processes related to the region's natural resource development across corporate proponents. However, we note that Equinor documents include a broader range of stakeholders in their consultation processes. ENGOS are more represented in Equinor's sources compared to those of Cenovus, suggesting a more diversified approach to stakeholder consultation by Equinor.

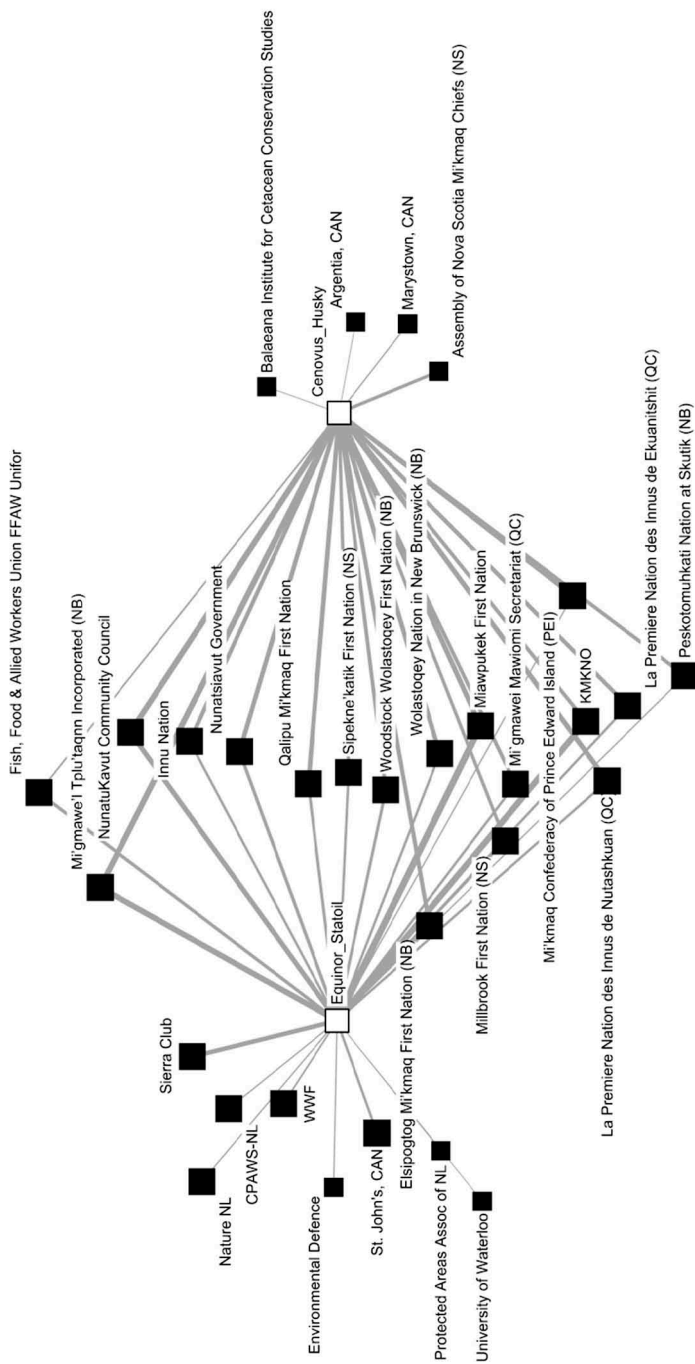


Figure 4.2a Two-mode network of organisational actors (black square nodes) and oil and gas company and government source documents (white square nodes), Canada case. Node size is adjusted to reflect degree centrality of organisational actors (%); tie thickness reflects frequency of coding co-occurrences across all textual data sources included in the analysis

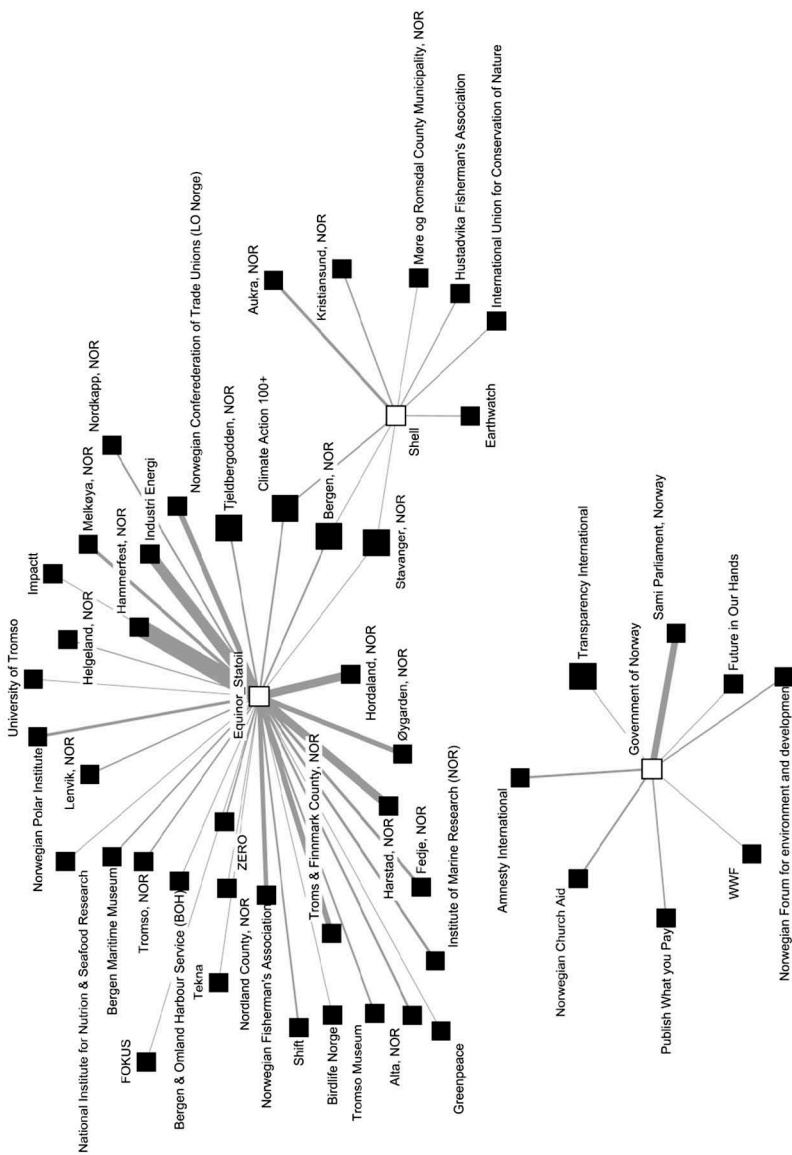


Figure 4.2b Two-mode network of organisational actors (black square nodes) and oil and gas company and government source documents (white square nodes), Norway case. Node size is adjusted to reflect degree centrality of organisational actors (%); tie thickness reflects frequency of coding co-occurrences across all textual data sources included in the analysis

Turning to the Norwegian case, communities (municipalities and counties) and NGOs are the most central organisations in this social network. This centrality indicates that these groups play a significant role in shaping the discourse and actions surrounding oil and gas development in the region (See Figure 4.2b). One of the main differences between cases is the much greater inclusion and connectivity of Indigenous organisations in the Atlantic Canada discourse network. The Sami Parliament is among the main Indigenous organisations in Norway and are present here. However, they are primarily linked to government source documents and are less central than NGOs or municipalities.¹

However, we also see that Equinor is more connected to a diverse range of stakeholders than Shell. This diversity includes ENGOs, historical and cultural organisations, communities, and unions, suggesting a more comprehensive approach to stakeholder consultation. That Equinor has a more diverse network in both operating case study regions suggests that they have a corporate culture that is oriented to a more inclusive model of political CSR across their various operating regions compared with either Cenovus or Shell.

Civil society, discourse, and consultation

Figures 4.3a and 4.3b are three-mode networks that visualise ties between civil society organisations, discursive themes, and consultation frameworks. This visualisation reveals distinct patterns that are indicative of the unique socio-political landscapes and priorities in each region.

In Newfoundland and Labrador, the network is clustered and diffuse (see Figure 4.3a). There are multiple groupings. First, ENGOs and unions are primarily linked with themes of distributional justice and fisheries impacts. They often critique the government and use “community impacts and benefits” as their main consultation framework.

Second, there is an ENGOs and Equinor grouping centred around the theme of climate change and is mainly influenced by the Paris Agreement as a guiding framework. Third, there is a grouping of Indigenous groups and government actors that focuses on the “duty to consult” obligation toward Indigenous communities. The primary themes here are impact assessment, procedural justice, and impacts on treaty rights.

By contrast, the Norwegian network is denser, with more interconnectivity between nodes (see Figure 4.3b). This figure shows that climate change is a particularly central theme that structures the network. This theme is particularly tied to the Paris Agreement, which serves as a central reference framework.

Another grouping is structured around global frameworks such as the UN Sustainable Development Goals (SDGs) and the OECD Guidelines for Multinational Enterprises. These frameworks connect with a variety of actors, including businesses, NGOs, governments, and international organisations, and cover discourses on climate change, human rights, and ecological values. Similar to the Canadian context, impact assessment and community impacts

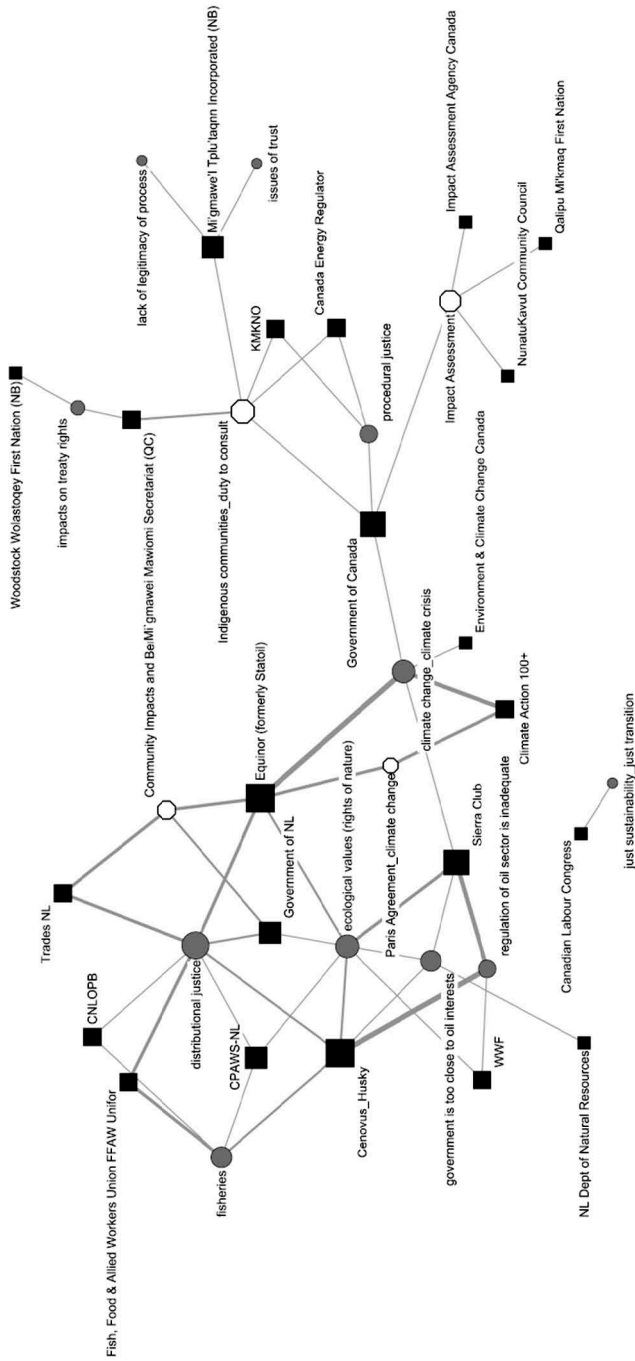


Figure 4.3a Three-mode network of organisational actors (black square nodes), discursive themes (grey circle nodes), and consultation frameworks (white octagon nodes), Canada case. Node size is adjusted to reflect degree centrality (%) within each mode of data; tie thickness is adjusted to reflect frequency of coding co-occurrences

and benefits are included. However, these are less central compared to these “global regime” frameworks. Finally, like the Canadian case, there is a grouping focused on distributional justice and fisheries impacts, which includes governmental actors among others.

Discussion and conclusion

The literature on political CSR points to the importance of engaging a broader, more inclusive range of stakeholders in deliberation and dialogue as extractive sector companies are increasingly expected to help ensure the social wellbeing and meaningful participation for host communities (Holzer, 2010; Hurst et al., 2019; Scherer et al., 2016). Corporate orientations towards political CSR can be a function of corporate culture (Bach, 2019; Pulver, 2007; Rowlands, 2000; Slawinski & Bansal, 2012), the broader social-political environments where companies are headquartered (Rowlands, 2000; Skodvin & Skjærseth, 2001), or the social-political environments of different operating regions (Stoddart, McCurdy et al., 2020).

As our DNA of civil society consultation in oil and gas development in Atlantic Canada and Norway illustrates, forms of extractive company-community relations are varied. Consultation regimes differ in terms of the breadth and inclusiveness of stakeholder consultation processes and practices. In other words, there are multiple consultation regimes that are constituted by different mixes of key stakeholders, discourses about extractive development and its impacts, and the frameworks that are used to structure consultation processes and practices.

Based on our analysis, we suggest that relational sociology (Crossley, 2011; Prell, 2012) and DNA (Leifeld, 2017, 2020) offer important theoretical perspectives and methodological tools for analysing the extractive sector consultation regimes of specific operating regions and social-political contexts. These network-based approaches provide insights into the patterns of inclusion/exclusion and influence that characterise different consultation regimes and help us identify key similarities and differences across consultation regimes.

In the case of Newfoundland and Labrador, Canada, the focus is predominantly on Indigenous communities, with lesser attention given to fisheries and distributional justice. The frameworks that predominantly guide consultation in this region are impact assessments, and community impacts and benefits.

On the other hand, Norway’s consultation regime is generally more inclusive, featuring a diverse range of stakeholders like communities, unions, and even research organisations. The discourse in Norway’s case leans more towards climate change and ecological considerations, with global frameworks such as the Paris Agreement, SDGs, and OECD guidelines appearing more prominently.

Among the oil and gas companies of interest, Equinor stands out for its more diverse and expansive networks of civil society consultation in both regions, as opposed to Cenovus and Shell. As such, our analysis suggests that

the nature of these consultation regimes is influenced by a blend of two intersecting factors: first, the corporate actor's orientation towards political CSR, and second, the regional characteristics of consultation regimes as shaped by the host community's political and regulatory landscape for oil and gas development.

This chapter has demonstrated the value of using SNA and DNA approaches as part of the research toolkit on consultation regimes in the extractive sectors. These conceptual and methodological tools offer a detailed lens through which to understand the intricate dynamics between various actors, discourses, and consultation frameworks that make up consultation regimes. They allow for a more comprehensive or multidimensional understanding of stakeholder consultation, particularly in sectors like offshore oil and gas development where the stakes are high.

Acknowledgements

Research for this chapter was funded by the Social Sciences and Humanities Research Council of Canada (SSHRC) for the project Meaningful stakeholder engagement in resource-rich communities: Comparative cases from the global south and high north (grant number 435-2021-0683; principal investigator Nathan Andrews).

Note

- 1 There are also important contextual differences in Indigenous/non-Indigenous social dynamics between the two case study regions. There are a greater number of Indigenous communities and organisations in Canada, and Indigenous people account for a larger share of the Canadian population in comparison with Norway. Issues of Indigenous rights and reconciliation arguably have also become more visible in political and public spheres in Canada in recent decades. This larger context likely helps explain the patterns of inclusion and representation among Indigenous communities we find in our analysis.

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Part II

The contested meanings of consultation



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5 From consultation to consent

A potentially complex transition in the Indigenous rights context, and analogous implications for stakeholder consultation

Dwight Newman

Part I: Introduction

Do aspects of what is needed to make a transition from Canada's approach to consultation with Indigenous Peoples toward full realisation of legal requirements of consent in Indigenous rights contexts offer any lessons for the contested concept of meaningful consultation? In even asking this question, there are already complexities. For the sake of clarity, I use the term "consent" to refer to the international norm of free, prior, and informed consent (FPIC) (and thus potentially for something different than what may be called "consent" within domestic jurisprudence) (cf. Patzer, 2019). And I use the term "meaningful consultation" to reflect what I consider a genuinely contested concept but one attempting to get at what kind of consultation achieves the purposes of consultation, which may require more than what is called "meaningful consultation" within Canada's duty to consult jurisprudence.

In this chapter, I will argue that there can be lessons drawn from this context. Notably, this is because a transition from consultation to consent in the Canadian context is more complex than it may first appear, and those complexities help to highlight aspects of the concept of meaningful consultation. However, to set out the shape of that intended argument, it is worth first setting out some basic background on the duty to consult doctrine in Canadian law and on the international FPIC norm.

Canada provides a particularly interesting context for this discussion, largely because of its extensively developed doctrine on Indigenous consultation. The duty to consult doctrine judicially developed in Canadian law based on an Indigenous rights clause in the post-1982 Canadian Constitution – in contrast to other countries where it was first legislated, sometimes based on international treaty commitments (cf. Allard, 2018) – has taken on a particular, modern form since a trilogy of cases in 2004/2005 (Newman, 2009; Newman, 2014). This doctrine requires proactive government consultation with Indigenous rights-bearing communities whose rights might be adversely affected by a contemplated government decision in advance of that decision, even where there remain legal uncertainties on the scope of the rights at issue (Newman, 2009; Newman, 2014). This doctrine has been very significant

within Canadian domestic law, with hundreds of thousands of government decisions each year giving rise to consultation obligations (Newman, 2017b). In a distinct, but related, development, the complexities and risks associated with this doctrine have supported tendencies by industry stakeholders to enter into negotiations of Impact Benefit Agreements (IBAs) or other forms of Indigenous-industry agreements (Newman & Graham, 2021), which have become almost uniquely prevalent in Canada due to the duty to consult doctrine – alongside Australia, where they have developed for different albeit slightly analogous reasons (cf. generally Odumosu-Ayanu & Newman, 2021). Thus, the duty to consult doctrine in Canada has been immensely significant not only in theoretical terms but in supporting practical results for Indigenous Peoples.

International law instruments and materials have had a longer-standing recognition of expectations of consultation with Indigenous Peoples but have moved significantly in the direction of norms of consent in certain circumstances. There have long been arguments that some form of consultation requirement is mandated by customary international law (e.g., Anaya, 2004), albeit with challenging complexities on what the exact shape of that consultation requirement would be. On a standard approach, customary international law exists where there is consistent state practice combined with *opinion juris* (a belief by states that the practice follows a legally binding norm). One court that seemed set to recognise a customary international law norm of consultation with affected Indigenous peoples ended up doing something different, perhaps in light of the complexities of finding sufficient consistency between states' practices. The 2012 decision of the Inter-American Court of Human Rights in the *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* surveyed state practice, seemingly heading toward the identification of a customary norm of consultation but then changed what it used that state practice for. It instead connected it to a different source of international law, general principles of international law (*Kichwa Indigenous People of Sarayaku v Ecuador*, 2012). Such a determination relies upon a different source of international law, with different consequences (cf. Biddulph & Newman, 2014) and the Court's decision to decide in that way almost appears to have a tendency to undermine arguments for a customary norm, thus generating complexity rather than clarity. However, international law norms of consent have been clearly articulated through the same period, notably in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by a resolution of the United Nations General Assembly in 2007 (Declaration on the Rights of Indigenous Peoples [UNDRIP], 2007).

What those consent norms mean is, more so than often realised, subject to significant complexities. Different articles within the UNDRIP have different forms, with some explicitly making FPIC mandatory in advance of certain state actions and others setting out a requirement on states to consult and cooperate with Indigenous Peoples "in order to obtain" FPIC (UNDRIP, 2007). The latter has certain ambiguities on to what degree it requires consent

to be obtained in every instance in which the word “consent” appears in the UNDRIP. Many with focused expertise on FPIC have tended to reframe the expectations of UNDRIP on FPIC into more of a process requirement, involving consultation with an aim of achieving consent, but with significant contextual flexibilities on to what degree it is actually mandatory to obtain consent (e.g., Barelli, 2018; c.f., Newman, 2020). That said, others have argued that a proper response to dominant state power may impose other requirements on such processes, including a substantive requirement like benefit-sharing (e.g., Anaya & Puig, 2017).

One concern I have raised about scholarly engagement with UNDRIP is that modes of interpretation appear to be highly variable and unpredictable, sometimes even within one edited book (Newman, 2019). I have previously argued for an approach to interpretation with analogies to treaty interpretation in international law, which can provide a general approach for interpreting most provisions of UNDRIP (Newman, 2020). However, even such an approach still leaves possible different readings of the UNDRIP’s FPIC-related clauses (Newman, 2020).

Andrew Erueti, another scholar who has shown serious, sustained attention to interpretation of the UNDRIP, has actually argued for a bifurcated reading of the UNDRIP, with different meanings to the instrument roughly in the Global North and the Global South, and with resulting consequences that FPIC expectations will be different in the Global North and the Global South (Erueti, 2022, p. 148, 160). Those latter consequences are perplexing in some respects, including in relation to the consequences that global mining companies headquartered in the Global North would seemingly have thinner FPIC-related obligations in the Global South than in the Global North according to Erueti’s argument that suggests FPIC was of greater concern in the Global North and then applies more strongly there. However, Erueti develops his arguments for such bifurcated readings from a rich engagement with the drafting history of the UNDRIP which he suggests shows strong grounding for such an approach.

Issues of how to interpret the UNDRIP remain, though, an unresolved area, and that has serious consequences for challenges in how to understand its FPIC requirements. How much the text is prioritised, and how much underlying purposes of FPIC are prioritised, leave some challenging questions. However, the idea that FPIC protects processes rather than definitively requiring FPIC to be obtained in every context does appear to be relatively widespread (e.g., Barelli, 2018; Patzer, 2019; Newman, 2020), even if not a definitive consensus.

Canada has adopted federal legislation under which the federal government is now committed by statute to harmonising federal law with the UNDRIP and to pursuing actions to achieve the objectives of the UNDRIP (*United Nations Declaration on the Rights of Indigenous Peoples Act* [UNDRIPA], 2021). The complex issues on UNDRIP interpretation thus also echo through Canadian statutory law. How Canadian courts might take account of the UNDRIP remains fundamentally unresolved and something to be seen in the

years ahead. As this chapter will argue, there could, in any event, be complex implications for Canada's duty to consult doctrine from developing international norms on FPIC.

While the UNDRIP articles on FPIC that embody elements of consulting in order to obtain consent may seem to suggest a close linkage between the concepts of consultation and consent – an idea potentially further circulated by scholarly accounts that reinterpret the UNDRIP's FPIC articles into processes largely shaped by consultation – that supposedly close linkage must be further interrogated.

Vis-à-vis the background set out in this Part I, I would argue that the shift from consultation to consent is more complex than it may first appear. FPIC is not just better consultation but is significantly different than consultation, and the transition from consultation to consent is thus not straightforward. In Part II, I will argue that the Canadian duty to consult and the obtaining of free, prior, and informed consent differ in their fundamental orientation. In Part III, I will argue that they fit within different policy structures on Indigenous issues. In Part IV, I will argue that they give rise to very different underlying needs on matters that need not be entirely defined for purposes of consultation but that must be clearly decided for purposes of consent, with such matters including the “size” of Indigenous rights-bearing communities or Peoples when there are potentially competing accounts of how to conceptualise Peoples as well as issues on representative structures of Indigenous Peoples. Because of these complexities, it will be possible to say some things back to the concept of meaningful consultation, and that is to where I will turn in the concluding Part V – although the conclusions in some ways will be about the need for ongoing scholarly attention to these contexts, of which this collection is an important part hopefully supporting future efforts as well.

Part II: Conceptual differences between consultation and consent

There are conceptual differences between consultation and consent, or differences in their fundamental orientation, that heighten the complexity of transition from the duty to consult to any FPIC-based standards. While the argument is developed in terms of the Canadian duty to consult doctrine, Canada has been an influential jurisdiction on consultation, and many of the claims will find parallels even in the context of different variations on domestic consultation approaches. There is simply a conceptual difference between consultation for other purposes and consultation oriented to obtaining consent or, indeed, the obtaining of consent.

The duty to consult arises in Canadian domestic law when there is a contemplated Crown decision, actual or constructive knowledge of an Aboriginal right(s) or treaty right(s), and the potential for an adverse impact on those rights from the contemplated Crown conduct, even where there is ongoing legal uncertainty about the scope of the right(s). This basic triggering test has been maintained consistently in the case law over the past two decades (viz., e.g.,

Newman, 2009; Newman, 2014; Newman, 2017b). The contents of the duty to consult vary based on the circumstances, based on the two factors of the strength of the rights claim and the potential degree of adverse impact on the right. And the expectation is always one of meaningful consultation (as a technical legal term within Canadian judicial decisions), which must incorporate the possibility of a modification of contemplated government conduct in response to what is learned in consultation so as to lessen adverse impacts upon Aboriginal and treaty rights (Newman, 2017b).

The concept of “consultation” within this duty to consult is specifically one of proactively offering rights-bearing Indigenous communities (as defined within Canadian law) an opportunity to identify potential rights impacts of government decisions in advance of governments making those decisions in order that governments can adjust their decisions to have fewer adverse impacts on rights. Nothing within this concept pertains to the general views of Indigenous communities – other than if there were a circumstance where an Aboriginal or treaty right included within its scope a right of a particular rights-bearing community to see its views implemented, as might exist within areas of unceded territories where there are outstanding claims to rights of self-government. By contrast, the concept of consent is entirely about whether another party agrees with a course of conduct. There is a fundamental conceptual distinction between engaging in order to obtain information about potential impacts on rights and engaging so as to seek agreement.

Depending on the location of consultation requirements within the spectrum that sees the contents of the duty to consult determined by the strength of rights claims and the potential degree of adverse impacts on rights, some might see consultation as coming close to the concept of consent in particular circumstances. At a practical level, a highly participatory process required in the context of the higher end of the spectrum may function such as to make consent become a practical requirement, and even uncertainty about what is required may make that a practical route forward – often the incentive for industry stakeholders to negotiate Indigenous-industry requirements (Newman & Graham, 2021). But at a principled level, a consultation process based on the duty to consult may have no specific orientation to whether there is or is not consent. Consultation and consent are conceptually distinct.

A recent Federal Court of Canada trial decision might be read by some as seeking to overcome these conceptual distinctions. In *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319, Madam Justice Blackhawk suggests that UNDRIP now needs to shape the interpretation of the Canadian duty to consult and that an FPIC standard may apply as the consultation standard in some circumstances, although she also ends up reading the FPIC standard as not actually requiring consent to be obtained but simply to mandate a process aimed at consent. She suggests that one implication would be to take account of requests and suggestions concerning the consultation process offered by the Indigenous rights holders involved. While the latter suggestion can sit easily enough within Canadian duty to consult case law

(and, indeed, would be a reasonable inference from a full application of the underlying concept of honour of the Crown), the former would mark a larger change. Justice Blackhawk calls it at one point an “added layer” (para 218). In some circumstances, it may be possible to have a process aimed at consent while simultaneously garnering information designed to understand impacts on Aboriginal and treaty rights so as to facilitate a decision without obtaining consent if necessary. But those are not always compatible within one process, and lawyers practising in related areas have noted how they may diverge (cf., e.g., Bergner, 2018). At this stage the final legal status of the reasoning in the *Kebaowek* trial decision remains uncertain, but it does not displace the point that there is a fundamental conceptual distinction between consultation and consent.

Part III: The roles of consultation and consent in differing policy frameworks

The underlying purpose of consultation and the underlying purpose of seeking consent may also be quite different. One distinctive feature of the duty to consult in Canada relates to its underlying rationales. While these rationales arguably extend more broadly (Newman, 2009; Newman, 2014), the official legal rationale is maintenance of honour of the Crown. That is obviously not a concept in many other legal regimes, notably those that do not have monarchies. So, it is something distinct in Canada, though I would nonetheless suggest that there are parallel differences in the underlying purposes of consultation and consent within analogous circumstances.

The Canadian duty to consult applies in contexts of ongoing uncertainty as to what the law is going to recognise in terms of Indigenous rights. It maintains the honour of the Crown by prescribing that contemplated Crown conduct must take account of the possibility of a later identification of an Aboriginal right or treaty right rather than just see the government bulldoze ahead – potentially literally but also possibly metaphorically – and deal with an identified rights infringement later.

By contrast, consent can apply only in the context where an Indigenous community, Nation, or people actually holds a right. As Mattias Åhrén has powerfully highlighted, consent is not a free-floating right but is something attached to the existence of another substantive right (Åhrén, 2022) – that is to say, a right set out somewhere else in the UNDRIP as an Indigenous right that applies in the particular circumstances in which a consent requirement is under contemplation. A requirement of consent depends upon there being another right rather than on the mere possibility of a right. While there can obviously also be consultation about an impending impact on an established right, the fact that consent applies only in the context of a right that exists differentiates it from the Canadian duty to consult doctrine, which establishes consultation requirements even in contexts in which a substantive right will not exist.

There is thus a further significant conceptual difference – and resulting implication for the scope of the two concepts – as between the Canadian duty to consult and the concept of consent. This conceptual difference gives rise to a reality that the two concepts respectively work better within different policy structures. Consultation (whether in the precise Canadian sense, or in some analogous senses) can work within policy contexts maintaining greater degrees of uncertainty, whereas consent works best within the context of more certainty as to claims that will be legally recognised. To make a consent-based regime work, there needs to be much more significant resolution of Indigenous rights claims within a domestic state. For various reasons, that is not where Canada has ended up. Courts have sometimes preferred to attempt to further negotiation rather than to decide matters. And negotiation that is shaped by the shadow of the law in the sense that parties reach results based on their underlying legal entitlements as their alternative to negotiating is more challenging when there is legal uncertainty and parties can have highly divergent perspectives on what their underlying legal entitlements – and thus, alternatives to negotiation – are. By contrast, Australia has seen much more resolution on Native title claims through mechanisms that it set up under statute. Canada might well not have had the same option, ironically because the constitutional entrenchment of Aboriginal and treaty rights would have subjected any such statute in Canada to endless constitutional challenges (Newman, 2009; Newman, 2014). In any case, a consent-based concept would in some sense be more readily applicable in a context like that of Australia than in one like that of Canada, precisely because a consent-based approach depends upon greater legal certainty than has been attained in Canada. A different policy framework's approach to legal certainty on Indigenous rights claims has effects on the degree to which consultation-based versus consent-based systems work well.

Part IV: Differing preconditions for consultation and consent

There is a sort of brief corollary to the point from the previous part. As stated, consultation can work with some legal uncertainties about which rights will be recognised, whereas consent depends upon more certainty. These forms of engagement with uncertainty, though, go farther than just concerning the rights claims themselves. They also encompass such matters as at what level of Indigenous collectivity a right is to be claimed and the representative structure that applies in relation to the Indigenous collectivity's rights claim.

Indeed, the Canadian duty to consult can function even with some imperfections relative to what might be theoretical approaches to who the rights-bearing communities are on certain rights. For example, in the context of the numbered treaties that were negotiated across much of the western part of the country from the 1870s and on through the next several decades, there is today often consultation with individual First Nations even though in some theoretical sense treaty rights would be held by the collectivity of First

Nations that signed a particular treaty together. Particular treaty areas do not all have governance structures, and in some cases the group of treaty signatories of a particular treaty encompasses First Nations that do not fit together well, so there are practical reasons for consultation to take place with individual First Nations. Because consultation is simply gathering information on potential impacts on treaty rights, gathering that information from a variety of different First Nations might be thought to do approximately the same thing as consulting with a (potentially non-existent) representative of the entire treaty territory. Of course, the Canadian duty to consult doctrine's focus on sole representatives has certain homogenising effects in so far as it assumes that the official representative will, for instance, adequately represent impacts on different minorities within the Indigenous rights-holding community. That may not be actually correct in relation to gender minorities, youth, or other minorities within the community, but the Canadian duty to consult doctrine eschews those concerns in favour of an emphasis on a representative, presumably in order to treat the rights-holding community as self-determining concerning what it has to say about its rights rather than as being subject to further interrogation. What might be the theoretically legally incorrect consultation of individual First Nations within a treaty territory might actually hear more diversity of voices than hearing from a sole representative of the treaty territory, and that just makes for better consultation on present aims. However, the correct representative of the rights-holder becomes immensely important with consent. If one were seeking consent, there would be a more challenging theoretical problem in the context of this scenario in so far as the rights-holder (the treaty territory collective, which may lack a representative) may be different than those it is actually possible to consult (the individual First Nations), even while there might sometimes even be disadvantages to engagement with that "correct" representative.

Similarly, in a context where a court recognises standing for an Indigenous community on a duty to consult matter other than the rights-bearing community, that is less problematic with consultation than it would be with consent. For example, in litigation that took place about impacts on marine mammals in Nunavut that the territory-wide treaty rights-bearing organisation chose not to pursue, the Supreme Court of Canada was open to permitting the hamlet of Clyde River to pursue that litigation (see discussion of case in Newman, 2017a). Again, if someone other than the overall Inuit Nation wished to identify potential impacts on rights under the modern Nunavut-wide treaty, this was potentially problematic but it was not so problematic as it would have been for someone other than the legal representative of the rights-holder to be involved in a determination of whether there was consent.

Where there are controversies on who that legal representative is, that of course gives rise to distinctive challenges. A practical approach in a duty to consult context may simply be to consult with all viable rival claimants (for example, with both hereditary and elected leadership, in contexts where there is an ongoing contestation as between these groups). By contrast, the

obtaining of consent is entirely dependent upon clarity as to the legal representative of a rights-bearing community. Again, there are serious complexities in any transition from the Canadian duty to consult to a consent-oriented system.

Part V: Conclusions and implications for meaningful consultation

Thus, I have set out several ways in which the Canadian duty to consult and the implementation of FPIC (or, potentially some other consent-based system), following arguments that Canada may be defining some different concept of consent (Patzner, 2019) in Canada are farther apart than first apparent. They are different concepts rather than simply being on one spectrum. They work best within different policy frameworks relative to one another. And they have differing degrees of dependence on legal clarity on various points that remain uncertain in some contexts in Canada.

One resulting conclusion is that the transition from consultation to consent is in many ways more complex than it is sometimes treated as being. There needs to be careful work on how to go about this transition well. There is important work coming out concerning FPIC and its implementation both from scholars and from United Nations processes (e.g., Doyle, 2015; Doyle, 2022; Expert Mechanism, 2018). But even some of this work may not be fully attentive to all of the challenges of the transition, and there needs to be ongoing scholarly, practitioner, and policy work to achieve these transitions well.

More broadly, in respect of some of the arguments in the present chapter, there obviously are some distinctive features to Canada's duty to consult. Even if with some analogical implications, the full force of the arguments presented here would not apply in precisely the same manner to other models of consultation. Notably, with respect to general stakeholder consultation that were oriented to views of stakeholders, many of the arguments would not apply in the same ways. That reality, though, does not mean that the analysis has no implications for such settings. Indeed, to the extent that some sorts of general stakeholder consultation do become about views of potentially affected communities, the achievement of the purposes of those forms of consultation – and thus of meaningful consultation – is actually subject to some of the same considerations that have applied within the argument to FPIC or consent-based processes. The latter relate to views of rights-bearing communities, and so do some forms of general stakeholder consultation.

The present argument thus helps to highlight that what is necessary for meaningful consultation depends profoundly on the particular type of consultation at issue and its underlying purposes. Meaningful consultation is consultation fulfilling purposes of a particular form of consultation (Newman, 2014), so to determine what ensures the meaningfulness of consultation, it is necessary to consider the purposes of a particular form of consultation.

Some forms of consultation, like Canada's duty to consult, may be geared to circumstances of various types of uncertainties. Obviously, these forms of consultation are more appropriate in contexts that have those types of

uncertainties, as they will tend to operate in ways further from consent notions to which other forms of consultation may be closer. But where there are uncertainties, these forms of consultation may be what are achievable and offer practical gains in terms of respect for stakeholders.

Other forms of consultation may be geared to giving voice to stakeholders where there are not uncertainties as in the former type. These forms of consultation can connect more directly to seeking to obtain consent, if that is the aim at issue. Whether it is or not, though, they may depend upon some of the preconditions that would exist for consent-based processes. To facilitate meaningful stakeholder consultation, it is necessary to identify with clarity who the stakeholders are, what rights they have, and who legally speaks for them. With these preconditions, there can be more meaningful consultation. Without them, those engaging in consultation may hear views, but there is no guarantee that the views heard correspond in any way to the purposes of consultation as being pursued.

Thinking about Canada's duty to consult and about FPIC has thus facilitated the identification of some different conditions and requirements for the achievement of meaningful consultation in the contexts of different kinds of consultation. One short chapter cannot set out a complete theory of meaningful stakeholder consultation. But this chapter has shown how it is possible to make contributions to that account by thinking about certain questions with perhaps complex analogies to the matters at issue.

There are other ways of continuing to think about meaningful stakeholder consultation, and it is important that ongoing work like that in the workshop underlying this collection continue in various vibrant forms. Stakeholder consultation has become immensely important in a range of contexts, but both the typology of forms of consultation and then questions of how to make each form of consultation meaningful relative to its purposes demand more scholarly attention than they have received thus far.

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6 Agreements, consultation, and consent in extractive projects

Ibironke T. Odumosu-Ayanu

Part I: Introduction

Extractive natural resource development is a site where states, extractive companies, and host communities navigate an uneven tripartite relationship of broad legal, social, political, economic, and constitutional significance (Odumosu-Ayanu, 2014). Undoubtedly, states and extractive companies have dominated the practice, and it is only in recent times that claims which host communities have advanced since the inception of modern extractive industries have begun to engender some engagement with communities in extractive industry governance. Agreements that involve communities, especially Indigenous Peoples, are central to this engagement. These agreements have garnered increased visibility and interest in both practice and scholarship (Odumosu-Ayanu & Newman, 2021). However, the implications of the agreements for the much-debated subjects of consultation and consent remain elusive.¹

Drawing examples largely from the Tahltan Nation and British Columbia (BC), Canada, this chapter analyses the position of agreements between Indigenous Peoples, state actors and/or extractive companies in the consultation and consent narratives. While these types of extractive industry-based agreements garnered sustained attention in the last two decades, agreements between Indigenous Peoples and actors such as states are not new (Odumosu-Ayanu, 2015). They have, however, not always yielded positive results for the Indigenous parties. From early agreements with chartered companies and states, which were often tools that dispossessed communities of their lands and resources, agreements have had significant consequences for Indigenous Peoples and must be approached as significant instruments. The chapter's analysis invites critical assessment of the practice of consultation and conceptions of consent through the lens of Indigenous Peoples' agreements in extractive resource development.

Consultation and consent are foundational to questions of Indigenous Peoples' rights and title in the context of extractive resource projects. Extractive resource development processes are generally designed to only require state and industry consent without due consideration of the title and rights of Indigenous Peoples. Indigenous Peoples have, however, exercised agency that

has translated to consultation regimes and contestations about consent. In many jurisdictions, including Canada, governments have the primary responsibility to consult host and impacted communities. In practice, extractive companies execute a large part of such consultation, in part, to secure a social licence to operate. Extractive companies' agreements with Indigenous Peoples, known generally as Impact Benefits Agreements (IBAs) in Canada, are often situated within this consultation framework.² The rights and title of Indigenous Peoples in Canada as well as the limitations of consultation make questions about shifts from consultation to consent germane. Legal and scholarly debates about Indigenous consent in Canada have tended to focus on implications of Aboriginal title and the Supreme Court of Canada's (SCC) decision in *Tsilhqot'in Nation v. British Columbia* (2014), or on free, prior, and informed consent (FPIC) under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and its application in Canada.

Following an introduction to the normative debates in Part II of this chapter, Part III discusses three projects – the Eskay Creek project, the Red Chris project, and the Galore Creek project – which feature agreements that set out consent decision-making processes. The projects are in the Tahltan Nation's territory and what is known as BC's golden triangle. They provide an example of reliance on agreements as a consent mechanism, with the agreements drawing from diverse normative sources discussed in Part III of this chapter.³ Part III also assesses agreements between the Tahltan Nation and extractive companies as elements in the consultation process. The chapter examines the location of robust agreements with industry and consent decision-making agreements in the consultation-consent discourse. It offers a scholarly account of the Tahltan Nation's agreements while assessing consultation and consent from the practice of, and negotiations between, the three primary actors in the extractive industries.

Part II: Consultation and consent

Consent and consultation are closely connected in extractive resource development. UNDRIP, in article 32(2), connects consultation with consent when it requires consultation “with Indigenous peoples... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources”. The SCC has developed a robust jurisprudence on the duty to consult, which largely defines the Crown's relationship with Indigenous Peoples in natural resource development (Newman, 2014). Its jurisprudence on Indigenous Peoples' consent to resource development projects, however, relies on a framework that excludes a majority of Indigenous Peoples given the Court's view on standards for establishing the requisite title and rights (Leydet, 2019, pp. 391–392).

Consent and its operationalisation in Indigenous Peoples' interactions in the extractive industry are complex. This is attributable to several factors.

First, the need for Indigenous Peoples' consent to extractive projects is often actively contested. Second, even where there is consensus around the necessity of Indigenous consent, the meaning of consent and the legal tradition – Indigenous and/or state – that grounds such consent is contested. Third, the exploitation that Indigenous Peoples have encountered generally and with natural resource development specifically, has an impact on consent. As Webber (2010, p. 5) notes, the “ability to give consent – in any situation – is severely bounded by the circumstances in which we find ourselves. How can one transcend the consequences of the past so that one can give free assent, undistorted by past inequities or simply by the sedimented positions and expectation of past relations?”

At common law, which is the state legal tradition in most of Canada, consent is foundational to contracts. Consent is generally presented as simple positive affirmation or otherwise, but scholars have argued that consent “varies by degrees” (Bell, 2010, p. 19). It is said to be “a manifestation of an intention to alienate rights” (Barnett, 1986, p. 304). For Barnett (1986, p. 319), by the “consent theory of legal obligation”, “agreements are legally binding because the parties bring to the transaction certain rights and they manifest their assent to the transfer of these rights”. Without necessarily subscribing to this mainstream contract view of consent, one could ask whether, by virtue of a specific agreement, Indigenous Peoples manifest assent to transfer certain rights in the natural resource context. What are these rights? What types of agreements are manifestations of consent to an extractive resource project? Do all agreements between Indigenous Peoples and extractive companies signify the former's consent to a project?

Agreements between Indigenous Peoples and extractive companies are one example of agreements that engender debates about consultation and consent to extractive resource development if the agreements, at a minimum, satisfy basic elements of consultation. These agreements are becoming widespread, and some Indigenous Nations require them before projects proceed. The agreements vary from those that focus on benefits, to others that incorporate more robust negotiation between the parties, and even to some by which an Indigenous Nation could signify consent to a project. The Tsilhqot'in National Government (TNG), for example, requires IBAs as grounds for granting Tsilhqot'in people's FPIC (TNG, 2023, p. 20). Generally, IBAs often demonstrate that there has been some engagement between Indigenous Peoples and extractive companies and these companies are seeking, *inter alia*, a social licence to operate or, in some cases, a social licence to continue to operate. The consent of the representatives of Indigenous communities to the IBA is often not lacking, although there may be challenges regarding the consent of most of the community.

However, signing an IBA does not always imply that there is consent for the project itself. It has been noted that:

[f]ar from being examples of free, prior and informed consent which includes the rights of communities to say ‘no’ to a development, Impact

Benefit Agreements involve community consent to accrue certain benefits from a development which they might fundamentally disagree with, and to try to mitigate impacts. They are one means for Indigenous Peoples to try to protect their land as best as possible given a development going ahead. (Weitzner, 2006, p. 30)

Even for those who view IBAs as attempts by extractive companies to seek the consent of Indigenous Peoples for projects, they conclude that these agreements present “a truncated version of consent that does not truly allow for the realization of the principle of FPIC” (Papillon & Rodon, 2017, p. 221). The timing of IBAs seldom present an opportunity for FPIC as many agreements are hardly ‘prior’ and are often not formed before issuance of project licences; and even where ‘prior’, they are usually not ‘informed’ (Odumosu-Ayanu, 2021 p. 22, Noble, 2021).

FPIC elements are interconnected. In this context, consent is “the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous Peoples or communities” (Food and Agriculture Organisation [FAO], 2016, p.16). Consent is free when it is given independently and voluntarily, it is prior when sought before project authorisations are issued and before the project commences, and informed when it flows from “accurate, timely and sufficient information provided in a culturally appropriate way” (FAO, 2016, p. 15).

Some Indigenous Nations in Canada that (may) host mining projects are developing mining policies that outline their positions on extractive resource development (cf., Odumosu-Ayanu, 2021, pp. 24–25). This exercise of self-determination relies, *inter alia*, on Indigenous law and seeks to protect the rights and interests of Indigenous Peoples. The policies also outline positions of Indigenous Nations on consultation and consent. In the Taku River Tlingit First Nation (TRTFN) Mining Policy (2019), for example, TRTFN laws, traditions, customs, and policies are germane to decision-making and to mining activities generally. The policy outlines rights including “the right to make decisions on how the land and resources are used” in the preamble. Section 4.1 of the policy indicates that mining activity may not occur unless FPIC has been granted in writing. The policy also includes prerequisites for consent including formation of “a Hà khustiyxh/Our Way Agreement” between the TRTFN and a proponent as well as an agreement with the Crown where that is applicable. By section 6.2 of the Mining Policy, signing the Our Way Agreement “will provide TRTFN Consent to the Proponent for the Mining Activity”. TRTFN signed an agreement with Canagold by which the latter “committed not to advance the proposed mine without having first obtained Taku River Tlingit consent” (TRTFN, 2023, p.1). Proponents must also comply with “guiding principles” outlined in the Policy to maintain the consent of the Nation during the life of the project.

Consent, then, is a process, a moment, and it is continuing. It is a process that begins with consultation, it is expressed in communication of assent, and

it is dependent on ongoing relationship and trust that propel it to endure for the life of a project. Nevertheless, consent retains within itself elements and possibilities of contestation (Iverson, 2010, p.189). It matters whether a community can contest a project that the state and industry are keen to develop. Hence, in addition to contestations around the scope of consultation and the meaning of consent, there could be contestation regarding a specific project. Agreements are now being adopted and adapted as mechanisms to address these contestations.

Part III: The Agreements

The Tahltan Central Government is clear to outside governments, industry and the world that working alongside the Tahltan Nation as true partners is a must. No exceptions. All projects within Tahltan Territory must first obtain the consent of Tahltan people otherwise they will not be supported or successful. These are our lands. Visitors must honour our title, rights, and cultural practices as we work together in the best interests of Tahltan people. That is the pathway to certainty for all. (Chad Norman Day, then President of the Tahltan Central Government)

(TCG, 2022)

This part of the chapter assesses the Tahltan Nation's agreements regarding three projects in Tahltan territory. It draws from public information that the Tahltan Central Government (TCG), the Government of BC, and the extractive companies offer about the projects. It focuses mostly on the agreements and the insights that they provide on the transition "from consultation to consent" (Coyle, 2016). BC provides an apt example of what purports to be a consent-based agreement framework, *inter alia*, because of its *Declaration on the Rights of Indigenous Peoples Act* (2019) and the title of many Indigenous nations in the province. The consent decision-making agreements discussed in this part are not yet widespread and the implementation and impacts of these agreements are not yet clear, but they represent possibilities around questions of consent beyond the duty to consult where an Indigenous Nation favours or is willing to consider extractive resource development.⁴

The Tahltan Nation is not necessarily emblematic of all Indigenous Nations in BC. As this discussion demonstrates, the Tahltan Nation is emphatic about its title, it operates a highly organised governmental framework, it has a history of natural resource development, and it maintains contemporary interest in natural resources and engaging closely with partners. Its natural resource-rich territory represents about 11 percent of BC or 95,933 square kilometres (British Columbia [BC], 2022). Mining is not new to the Tahltan Nation as Tahltan people have mined for millennia (Mackay, 2024, p. 111). The Tahltan Nation has been referred to as "a relatively powerful actor within the resource extraction sector, wielding far more power than most First Nations communities" (Sarson, 2023, p. 610). While the Tahltan Band and the Iskut Band govern the Tahltan on

Indian Act matters, the Nation is represented by the TCG, which is the “administrative governing body of the Tahltnan Nation” with respect to “inherent Aboriginal title and rights” and natural resources (TCG website).

The TCG is guided by the 1910 Declaration of the Tahltnan Tribe by which the Tahltnan Nation claims “sovereign right” over its territory. This claim is significant for the engagements of the Tahltnan with the BC Government. The Tahltnan are historically commercial people. The Tahltnan Resource Development Policy 1987 refers to the Tahltnans’ “elaborate trading economy” that existed before the Hudson Bay Company arrived in Tahltnan territory (Tahltnan Tribal Council [TTC], 1987). This included trade in natural resources. The Development Policy indicates that the Tahltnan people “are not inherently opposed to any specific type of business or resource development” in Tahltnan territory. However, such development must adhere to principles that the Tahltnan developed and a combination of “politics and business” to ensure that there is “substantial participation in business development”. The Tahltnan Tribal Council required that project developers and the Council form a “project participation agreement” that incorporates elements such as environmental protection, employment, education, training, and business development. However, beyond these elements, which have become typical in IBAs, as early as 1987, the Tahltnan Nation insisted on protecting their rights claim and “substantial equity participation by Tahltnans” in projects. The Tahltnan are not opposed to resource development and have developed policies to navigate the process.

This does not, however, present the complete story. The Tahltnan people are also known to oppose resource extraction that do not conform to their vision for their territory. One of the well-known oppositions, which spanned over a decade, was led by some Tahltnan matriarchs called “Klabona Keepers” to prevent resource development by Shell and Fortune Minerals to protect the Sacred Headwaters (Doody & Campos, 2022).⁵ The opposition revealed disputes within the Tahltnan Nation as the Tahltnan Central Council (TCC), which preceded the TCG, was negotiating with Fortune Minerals while Elders leading the blockades insisted on community participation in decision making and the Iskut Band quit the Council (McCreary, 2005). McCreary (2005) quotes Oscar Dennis, the spokesperson for the blockade at the time, as stating that: “We are not anti-development. We just want responsible sustainability...”. By the next year, the TCC had begun a process of ensuring unity among the Tahltnan (TCC, 2006). This opposition culminated almost 15 years later in the Klappan Plan signed by TCG and the BC Government by which areas that included the Sacred Headwaters were protected from industrial activity for at least 20 years (TCG & BC, 2019). In another example, the Tahltnan Nation opposed Doubleview Gold Corp’s “continued operations” in Tahltnan territory (TCG, 2021). TCG cited FPIC, UNDRIP, and BC’s *Declaration Act* noting that it expected that the BC Government would no longer grant permits to Doubleview in Tahltnan territory. The TCG noted that mining companies “are guests in Tahltnan Territory with provincial permit,

most of which were not granted with Tahltan support or consent". The Nation views Tahltan consent as necessary and sometimes negotiates consent processes through agreements. The balance of this part assesses projects in Tahltan territory with consent decision-making agreements. The TCG and the companies also formed IBA-type agreements, and these are analysed along with consent decision-making agreements between the TCG and the BC Government.

The Tahltan consent decision-making agreements are informed, *inter alia*, by section 7 of BC's *Environmental Assessment Act* (2018) and section 7 of the *Declaration Act*. By section 7 of the *Environmental Assessment Act*, a reviewable project cannot proceed without the consent of an Indigenous Nation on treaty lands where consent is required by the final agreement with the Indigenous Nation or if the area is covered by an agreement between the Government of BC and an Indigenous Nation which requires such consent. Section 7(1) of BC's *Declaration Act* indicates that the BC government and an Indigenous governing body may form an agreement regarding "the exercise of a statutory power of decision" and/or "the consent of the Indigenous governing body before the exercise of a statutory power of decision". These two provisions were integral to the agreements for the Eskay Creek project and the Red Chris project.

Eskay Creek Project

The Eskay Creek Project first began operating in 1994 as an underground mine. It was operated until 2008. The project is now being revitalised, this time, as an open pit mine that is owned by Skeena, which acquired Eskay Creek from Barrick Gold in 2020 (Skeena Gold+Silver, n.d.). The revitalisation project is at a pre-development stage and is undergoing environmental assessment. Skeena formed agreements with the TCG including a Communications Agreement which provides for "ongoing community engagement" and a Shared Opportunities Agreement that outlines business development opportunities (Skeena Resources Ltd., 2020, p. 11). In addition, Skeena's Exploration Agreement with the TCG addresses matters such as employment opportunities, funding support, and environmental and cultural protection. These three agreements are said to "support the ongoing development of the strong collaborative relationship between Skeena and Tahltan" (Skeena Resources Ltd., 2020, p. 11). In addition, TCG "agreed to invest" \$5million in Skeena in 2021 (Skeena Resources Ltd. & TCG, 2021). Project consent decision-making was, however, negotiated with the BC Government.

The *Declaration Act Consent Decision-Making Agreement for the Eskay Creek Project 2022 (Eskay Creek Consent Agreement)* between the Tahltan Nation and the BC Government addresses consent. It affirms Tahltan title and self-government rights in all Tahltan territory as well as the need for Skeena to obtain the consent of the TCG. The Agreement relies on UNDRIP and incorporates self-determination, self-government, and consultation with a

view to obtaining FPIC. Section 2.1 of the *Eskay Creek Consent Agreement* outlines the purposes of the agreement including to “set out a consent-based decision-making process” and “the area that requires TCG’s consent before the project can proceed”. By section 4.3, TCG consent is required before the project can proceed.

After the *Eskay Creek Consent Agreement* was signed, the TCG returned to consult the Tahltan people outlining a nine-step process toward a decision with the agreement being the first step and the decision being the ninth step (TCG, 2024). As Napoleon (2015) notes in the context of the Tshilqot’in Nation, Indigenous Peoples’ laws determine the constituent members who may make decisions regarding specific issues. TCG consultation is ongoing and by December 2024, the TCG was offering community open houses to discuss the project and the Tahltan Environmental Assessment process. The Eskay Creek Project presents an early opportunity to review the impacts of the BC Government’s adoption of agreements under the province’s *Declaration Act*.

Red Chris Project

The Red Chris project presents different timelines, considerations, and insights compared to the Eskay Creek project given that the project was already ongoing before agreements were signed. The mine is currently 70 per cent owned by Newmont which acquired Newcrest in 2023 (Newmont, 2023). An Impact, Benefit and Co-Management Agreement (IBCA) was formed in 2015 and updated in 2019 upon changes to the ownership percentage in the mine (Imperial Metals, 2020). Imperial Metals which holds 30 per cent in the Red Chris mine joint venture indicates that the IBCA “provides the basis for a life-of-mine partnership covering royalties, education, training, employment and contracting opportunities, capacity support and provisions for communication, and interaction on social and environmental matters” (Imperial Metals, 2020). While the IBCA may foster the relationship between the Tahltan Nation and the extractive companies, there is no indication that at the time of the Agreement, the Nation specifically consented to the project. What the agreement achieved according to the Nation was Tahltan “environmental oversight, substantial Tahltan employment at the mine, and revenue sharing” (TCC, 2015a, p. 6). The Tahltan Nation further demonstrated support when it invested in Imperial Metals which, at the time of the investment in 2015, owned the Red Chris Mine (TCG, 2015, p. 12).

It is, however, telling that Imperial Metals had already “completed substantial construction” of the mine at the beginning of the year before the IBCA was signed in April 2015 and was “expected to reach commercial operations” before 2015 ended (TCC, 2015b, p. 22). The Nation observed that at the time of signing, Red Chris was already “operating on a temporary permit” and it was important for the Nation “to have a voice in projects in [its] traditional territory” (TCC, 2015a, p. 6). It further noted that the agreement with the company “does not oblige Tahltan to publicly support the

mine” and neither does it affect the nation’s rights, title or other agreements (TCC, 2015a, p. 6). The IBCA was then a means for the Nation to participate in a project that would go forward.

Issues of consent were addressed much later with the BC Government in the *Declaration Act Consent Decision-Making Agreement for Red Chris Porphyry Copper-Gold Mine Project 2023 (Red Chris Consent Agreement)* between the TCG acting on behalf of the Tahltan Nation and the BC Government. The purpose of this Agreement as outlined in section 2.1 is to, *inter alia*, establish a “consent-based decision-making process that will be used for Assessment of Substantial Changes pursuant to subsection 7(1)(b) of the Declaration Act”. The agreement applies to proposed amendments of the environmental assessment certificate (s. 4.2) and the province would need to consider whether TCG has provided consent to a substantial change (s. 4.11). By the time this agreement was formed, the Red Chris Mine was already in production and the TCG had formed IBAs with the companies. Hence, it is directed to substantial changes. This differs from the *Eskay Creek Consent Agreement* which requires, within the parameters of the agreement, TCG consent for the project to proceed. Consent decisions of the TCG are subject to judicial review under the *Judicial Review Procedure Act* as acknowledged in part 12 of the *Red Chris Consent Agreement*.⁶

The *Red Chris Consent Agreement* outlined principles that inform the agreement in section 3.1, with the first principle being “recognition and implementation of Tahltan’s title and rights” and the second, “respect for and implementation of TCG decision-making”.⁷ The first principle intends:

To continue to advance reconciliation between Tahltan and the Province based on the recognition of Tahltan’s Title and Rights in Tahltan Territory and, as applicable, the implementation of the 1910 Declaration, the UN Declaration, the Declaration Act, the Draft Principles, the Calls to Action of the Truth and Reconciliation Commission, and the Supreme Court of Canada’s decision in *Tsilhqot’in Nation v. British Columbia*.

Each instrument referenced in this first principle is an important affirmation of the rights of the Tahltan Nation. By the 1910 Declaration, the Tahltan Nation asserted sovereignty over its territory and insisted that the BC government has no title to the territory. UNDRIP affirms the right of Indigenous Peoples to FPIC, and BC’s *Declaration Act* works towards implementation of UNDRIP. The *Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples* includes 10 principles. Principle 6 focuses on “meaningful engagement with Indigenous Peoples” that “aims to secure their” FPIC. The Province explains that this FPIC principle “builds on and goes beyond the legal duty to consult”. Even though, according to the SCC, Aboriginal title lands present the case for securing the consent of Indigenous Peoples, the FPIC standard in principle 6 is not limited to title lands and BC agrees to seek “opportunities to build processes and approaches

aimed at securing consent”. The Truth and Reconciliation Commission in Call to Action 92 calls for “meaningful consultation” as well as obtaining the FPIC of Indigenous Peoples in the context of economic development projects. In *Tsilhqot’in*, the SCC outlined its views on title and consent, noting, *inter alia*, that “[t]he right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders” (*Tsilhqot’in*, 76). The *Tsilhqot’in* decision, however, does not present a blanket consent standard for Aboriginal title lands as the SCC included caveats on the exercise of consent (cf., *Tsilhqot’in*, 76–77).

The second principle foregrounds respect for and implementation of the Tahltan’s self-determination rights and decision-making authority. It is foundational to meaningful navigation of consent decision-making and in line with the view that Indigenous Peoples’ consent to natural resource development cannot be separated from the right to self-determination articulated in article 3 of UNDRIP. Together, these principles affirm the basis for seeking the consent of the Tahltan Nation to natural resource development or continued development.

Galore Creek Project

The Galore Creek Copper-Gold-Silver project is owned by Newmont and Teck in Tahltan territory. In the course of consultation, NovaGold, which owned the project at the time, and the Tahltan Nation negotiated a Participation Agreement, which was announced in February 2006. The Participation Agreement established measures for engaging the Nation in environmental protection, as well as measures to ensure employment, training, and business for Tahltan people, and financial commitment by NovaGold (Government of Canada, 2007, p. 25). The TCC referred to the Participation Agreement as “a business agreement that allows Tahltans to benefit from the project” (TCC, 2006, p. 1). Highlights of the agreement do not use the language of consent but refer to “the support and involvement of the Tahltan Nation” in the Galore Creek project and support for “the Tahltan Nation’s principles of environmental stewardship, economic sustainability, and self-determination” (NovaGold & TCC, 2006). In November 2023, the BC government authorised negotiation of a *Declaration Act* consent agreement with the TCG that applies to project decisions made under the *Environmental Assessment Act* (BC, 2023). The negotiations are ongoing.

Part IV: Conclusion. Reflections on agreements as a mechanism for expressing consent

This chapter has presented an account of recent and ongoing Tahltan consent decision-making agreements as well as other agreements. The Tahltan Nation’s experience and the BC Government’s ongoing negotiations of consent agreements demonstrate that there is much to learn still about

consultation and consent. The agreement approach presented in this chapter is one example of an attempt to incorporate a consent framework in extractive resource decision-making and it is too early to identify definite implications. However, some reflections are in order. Informed by the discussion in this chapter, this concluding section presents four factors for consideration in consultation and consent debates in Canada and other jurisdictions. The factors – the mechanism, parties, purpose, and the bases for consultation and consent in extractive resource development – are germane to assessing the position of agreements in consultation and consent discourse and practice.

It is worth considering whether agreements are apt *mechanisms* for operationalising the consent of Indigenous Peoples, and if agreements are adopted, the type of agreement is also an essential consideration. As this chapter has described, agreements with Indigenous Peoples in Canada and Indigenous Peoples/impacted communities in jurisdictions across the world have emerged as mechanisms for negotiating relationships in extractive resource development. However, historical and contemporary implications of earlier agreements make critical assessment of resource (-related) agreements necessary. In most jurisdictions, these agreements are formed in contexts of state legislative/regulatory power and corporate financial power that may have disproportionate impacts on interactions with host and impacted communities. The power differential and disproportionate impacts also fuel contestation. Through contestation, shifts occur in relationships and engagements between states, extractive companies, and Indigenous Peoples and other communities. These shifts inform the variety of agreement approaches that are being adopted. In this regard, the Taku River Tlingit First Nation's approach discussed in Part II adopts an agreement framework for consent that is different from the Tahltan Nation's experience outlined in Part III. These varied approaches indicate that Indigenous Peoples are not monolithic but are self-determining peoples that either internally or in relationship with others, design, articulate, and implement consultation and consent frameworks that may differ from Nation to Nation. And, in the exercise of self-determination, other Indigenous Nations may choose to engage differently with other actors in extractive resource development or not to countenance extractive resource development at all.

The position and rights of the *parties* to the agreements are also key considerations, and these sometimes inform the *purpose* of agreements and vice versa. Host and impacted communities' participation in agreements in the extractive industries is no longer new. However, this participation is not universal, and it often merits scrutiny. Generally, the purpose and extent of decision-making authority that an agreement contemplates dictates the parties to the agreement. These agreements could range from largely philanthropy-based benefits initiatives to agreements that form part of a legal requirement of consultation, to custom-made consent agreements, but the consent decision-making agreements are not common. For example, the Tahltan Nation type of consent agreements are not yet widespread. In many parts of the world, including Ghana and Nigeria, extractive company

agreements with communities are aimed primarily at seeking a social licence to operate largely without legal responsibility to engage (Odumosu-Ayanu, 2020). Consent agreements such as those discussed in this chapter are on the other end of the range of agreements. In the case of the Tahltan Nation, the consent decision-making purpose of the agreements required engagement with the BC government. Even though some agreements between Indigenous Peoples and extractive companies may incorporate consent elements, the Tahltan Nation's experience demonstrates that state involvement is relevant for conversations around consent decision-making. State involvement is not surprising given that many jurisdictions confer constitutional and legislative authority to alienate and regulate natural resources on the state. Hence, the title and rights of communities are fiercely contested under the law to determine the extent of their consent rights (if any). While it is too early to definitively assess the implications of the Tahltan Nation's consent agreements with the Government of BC, assessment of the agreements and other similarly situated consent decision-making processes will include the extent of the state's legislative power and influence in dictating terms and parameters of engagement and agreement.

The *legal and normative bases* for agreements also present platforms for navigating consultation and consent debates. As this chapter has demonstrated, legal and normative bases for consultation and consent range from Indigenous law to state legislation, judicial decisions, and international instruments such as UNDRIP, which has become a primary source of normative grounding for FPIC. To assess agreements being signed, it is worth considering whether individual agreements reflect the principles that UNDRIP seek to capture, including FPIC. The consent decision-making agreements between the Tahltan Nation and the BC Government, while referencing the duty to consult,⁸ are situated within frameworks advanced by the Tahltan, BC, Canada, and internationally, including the Tahltan Nation's title and rights, the 1910 Declaration, BC legislation, UNDRIP, and the SCC's decision in *Tsilhqot'in*. The bases for agreements vary across and, sometimes within, jurisdictions. These legal and normative bases for agreements are important catalysts for robust considerations regarding consultation and consent or limitations to these considerations.

This chapter has demonstrated that agreements are being adopted as mechanisms for negotiating consent with Indigenous Peoples. These consent agreements are a form of what has been called "consent through negotiations" (Tully, 2010, p. 241). Consent negotiations and agreements are not without challenge as Indigenous Peoples are often required to have "mastery" of the "vernacular" of the other parties who are the dominant actors in this domain (Inayatullah & Blaney, 2004, p. 220). This, however, has not deterred some Indigenous Peoples such as the Tahltan Nation from these processes for as Tully (2010, p. 246–247) notes, while there is considerable hegemony at work in negotiations, inequalities should be criticised and changes demanded without resigning to the hegemonic conditions. For Tully (2010, p. 247) who

was writing about treaties, “[t]he aim of entering into negotiations is precisely to change unequal circumstances. ... Negotiation is the transformative way to provincialize and de-imperialize the relationship between indigenous and non-indigenous peoples”. The extent to which the negotiations and agreements that this chapter assesses contribute to de-imperialisation and anti-colonisation depend on specific agreements/agreement regimes, and it is yet to be fully determined.

Notes

- 1 Essays in the Odumosu-Ayanu & Newman (2021) collection considered Indigenous-industry agreements and FPIC.
- 2 IBAs have become almost mainstream. While many of these agreements are confidential, much is reported about them by the corporations or governments of the Indigenous nations. Many IBAs address similar issues including employment, training, education, and environmental matters.
- 3 While the existing consent decision-making agreements under the *Declaration Act* in BC are in Tahltan territory, others are being negotiated.
- 4 The implications of the *Declaration Act* and the justiciability of its provisions are still being debated. See Gitxaala 2023. This decision has been appealed to the BC Court of Appeal.
- 5 While questions regarding consultation and consent processes within the Tahltan Nation is necessary, it is beyond the scope of this chapter. See Roy 2019.
- 6 See also, section 12.4–14.6 of the *Eskay Creek Consent Agreement*.
- 7 The *Red Chris Consent Agreement* and *Eskay Creek Consent Agreement* adopt the same principles.
- 8 Section 15.7, *Red Chris Consent Agreement*; section 15.7, *Eskay Creek Consent Agreement*.

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7 Rights-based approach to consultation with Indigenous Peoples in natural resource extraction

Funmilola Ayotunde

Introduction

The last two decades witnessed a shift from Canada's state-industry-dominated resource governance. Historically, governments and natural resource companies controlled natural resource development and conducted operations with minimal or no involvement from host communities, which are key actors. Given that a significant proportion of untapped natural resources in Canada lie within Indigenous traditional territories (Canadian Northern Economic Development Agency, 2021),¹ these host communities are often Indigenous communities. A combination of international Indigenous rights norms and favourable court decisions transformed the dynamics of Indigenous Peoples' roles in resource development in Canada (Constitution Act, 1982).² Consultation with Indigenous communities in natural resource development has been shaped by Supreme Court of Canada decisions that clarify the implications of section 35 of the *Constitution Act* and case law developments on the duty to consult. At the international level, the widespread support for the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP" or "Declaration") (*Declaration on the Rights of Indigenous Peoples* [UNDRIP], 2007; United Nations General Assembly [UNGA], 2007)³ and ongoing debates around the meaning and implications of free, prior and informed consent (FPIC) provisions in the Declaration (Odumosu-Ayanu, 2021) have bolstered awareness of Indigenous Peoples' participatory rights.

Indigenous communities' involvement in resource extraction has improved in recent decades (Coates, 2021), but they have not fully realised their participatory rights. The key challenge is that a broad range of participatory rights and principles have not translated into meaningful practice and standard procedures for consultation. Case law and policy advancements have fostered greater recognition of Indigenous rights, but practical implementation remains inconsistent. Many Indigenous communities continue to face challenges in having their rights respected during resource development projects within their territories. Consultation is a component of participation but does not meet the required comprehensive engagement, deliberative democracy and joint decision-making implicit in rights-based approaches.

DOI: 10.4324/9781003488507-10

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This chapter examines a rights-based approach (RBA) to consultation with Indigenous communities in Canada and the opportunities for strengthening participatory rights in natural resource governance. Recognising Indigenous Peoples as rights-holders with distinct interests and legal rights has significant implications for involving Indigenous communities in resource governance. Also, understanding the full spectrum of Indigenous Peoples' rights to access information and participate in decision-making is essential for actualising Indigenous Peoples' rights and promoting equitable and sustainable development in the extractive sector. This chapter contributes to this understanding by exploring a rights-based conceptual framework for integrating Indigenous Peoples' rights into resource development policy and practices in Canada. The following section discusses how the duty to consult doctrine has shaped consultation practices. It highlights the limitations of the doctrine in the actualisation of Indigenous Peoples' participatory rights in resource development. The third section provides an overview of rights-based approaches. The fourth section distinguishes Indigenous Peoples from stakeholders in extractive projects and explores how the rights-based approach could be integrated into engagement with Indigenous Peoples in Canada as rights-holders. The fifth section presents the potential challenges of adopting a rights-based approach to consultation with recommendations for addressing them. The sixth section concludes the chapter.

Indigenous Peoples' participation under the duty to consult doctrine

Aboriginal law jurisprudence in Canada has significantly evolved around the interpretation and scope of section 35 of the *Constitution Act* (1982). Section 35 recognises and affirms “[t]he existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada” (Constitution Act, 1982). Without an explicit definition of the pre-existing rights referenced in section 35, the constitutional provision has generated considerable debate and judicial analyses. The Supreme Court laid the groundwork for interpreting section 35 in the *Sparrow* case, where consultation with the impacted Aboriginal Peoples was identified as one of the tests for assessing the government's justification for infringing on Aboriginal or treaty rights (*R. v Sparrow*, 1990). The Court later clarified that the “nature and scope of the duty of consultation” varies in different instances, but consultation must always be done in good faith (*Delgamuukw v British Columbia*, 1997, p. 168). Although consultation was one of the considerations in justifying government infringement on Aboriginal and treaty rights (*Sparrow*; *Delgamuukw*), the modern notion of duty to consult was defined by a trilogy of cases – *Haida Nation* (2004), *Taku River* (2004), and *Mikisew Cree First Nation* (2005).

In the *Haida Nation* case, Chief Justice McLachlin established the procedural frameworks for protecting Aboriginal and treaty rights as guaranteed in section 35. The *Haida Nation* challenged the substitution and transfer of a tree farm licence by the government of British Columbia without their consent and

despite their objections to tree harvesting within their traditional territory. The Supreme Court ruled that the Crown has a duty to consult and, if necessary, accommodate Indigenous Peoples when contemplating actions that might affect their asserted but unproven rights (*Haida Nation*, 2004). The theoretical basis for the duty to consult was traced to two concepts: the principle of the honour of the Crown (*Haida Nation*, 2004, pp. 16–25) and reconciliation as the underlying objective of section 35 (*Haida Nation*, 2004, p. 32; Newman, 2014).⁴

The *Haida Nation* case has been widely referenced, and the duty to consult doctrine has since become prevalent in Canada's section 35 case law. The Crown's obligation to consult is triggered when the government deliberates on actions that may adversely impact Aboriginal rights or title that the government had actual or constructive knowledge of (*Haida Nation*, 2004, p. 35). The content or extent of required consultation ranges from mere notice to involvement in decision-making, deep consultation with affected Indigenous Peoples and accommodating their interests in some instances (*Haida Nation*, 2004, pp. 43–45). The level of consultation is assessed on a case-by-case basis, depending on the strength of the asserted right and the probable degree of adverse impact on the right (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2019, p. 43).

The boundaries of the duty to consult have been extensively tested within the context of government actions relating to natural resource development. Both *Haida* (2004) and *Taku River* (2004) cases relate to natural resource exploration by corporate actors within Indigenous territories. Although the Crown holds the sole legal responsibility to consult meaningfully with Aboriginal Peoples (*Haida Nation*, 2004, p. 53), extractive companies often bear the consequences of the Crown's failure to meet the benchmarks of meaningful consultation. Hence, it is common practice for the Crown to delegate the procedural aspects of consultation to investors through environmental assessments (*Taku River*, 2004, p. 22).⁵ Companies are now more proactive in reaching out to Indigenous communities to build relationships and enter into industry-community agreements, including a clause confirming community support for the project. The duty to consult doctrine is a critical component of the legal framework governing the relationship between the Crown and Indigenous Peoples in Canada. It ensures that Indigenous rights are considered and respected in decisions that impact their lands and resources.

However, the practical implementation of the duty to consult doctrine remains complex as the Crown's responsibility to consult is assessed on a case-by-case basis (*Haida Nation*, 2004, p. 45).⁶ Having the court system as the primary recourse for disputes relating to section 35 rights and the scope of consultation places an inordinate burden on Indigenous communities. Inconsistent and sometimes narrow interpretations of section 35 can be discouraging for Indigenous litigants, as courts have sometimes permitted restrictions on Aboriginal rights (Borrows, 2017, p. 120). Expensive and rigorous litigation processes often place court-ordered protection and enforcement beyond some Indigenous communities' reach. Furthermore, the duty to consult

doctrine fails to capture the role of extractive companies as actors whose actions affect Indigenous Peoples' rights. By holding the Crown solely responsible for consulting with Indigenous communities, the doctrine creates a vacuum. It fails to clarify the responsibilities of third parties, such as business entities and private actors, to respect Indigenous rights and ensure that their projects do not hinder Indigenous communities from enjoying their rights. The doctrine, as explicated by the Courts, does not provide a comprehensive affirmation and protection of Indigenous Peoples' participatory rights. The Crown's responsibility to consult is triggered when their action may have an adverse impact on Indigenous Peoples' rights, but human rights standards promote Indigenous Peoples' active involvement in all matters that may affect the enjoyment of their rights, including the development of social and economic initiatives (UNDRIP, 2007, art. 18 and 23).

The right to participation is a core component of Indigenous Peoples' right to self-determination and is essential to the actualisation of their other rights (Poto, 2016).⁷ Participation is an ongoing process of communicating, consulting, and collaborating with Indigenous Peoples before making decisions that may impact them and throughout the lifespan of projects within their territories. Consultation is a component of participation, but it is not the ideal level of engagement the government or project proponents should have with Indigenous Peoples. Participation is not a one-way information-sharing process. Rather, it requires that, as rights-holders, Indigenous communities be provided with adequate and timely information to enable informed deliberation on a project. Indeed, the quality of participation is defined by access to accurate and timely information.

Overview of rights-based approaches

Rights-based approaches are conceptual frameworks for integrating human rights norms into policy and project planning, implementation, and evaluation (United Nations Development Programme, 2006). They place human rights at the core of decision-making and promote the recognition, preservation and actualisation of individual and collective rights at all phases of resource development projects (Olawuyi, 2015). The rights-based paradigm emerged in the early 2000s as the need to protect human rights became increasingly apparent after the Cold War (Sarmiento Barletti et al., 2023). The UN applied the human rights-based approach (HRBA) to reform initiatives in the mid-1990s (United Nations Population Fund, 2014). By the 2000s, several UN organisations, international non-governmental organisations and advocacy groups had adopted the rights-based trend. Without a coherent conception, diverse organisations adopted the catchphrase and inconsistently devised and applied what they believed was RBA. The approach gained momentum, particularly within the development assistance field, and has transcended other areas, including conservation, health, and environmental governance (World Health Organization, 2008). The UN Common Understanding (United Nations Sustainable Development

Group, 2003) has helped to streamline rights-based approaches as strategies to “further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments”. An RBA provides a holistic structure for synchronising procedural rights principles. It demands that projects be planned and executed around core principles: participation and access to information, accountability, non-discrimination and equality, empowerment and legality and access to justice (PANEL principles) (Frankovits, 2006; United Nations Education, Scientific and Cultural Organization, 2008).⁸

The UN Development Programme describes HRBA, with respect to development initiatives, as a strategy “which systematically applies the values, principles and standards contained in *international* and *national* human rights law to all aspects, both substantive and procedural of the development process” (United Nations Development Programme, 2006, p. 15). RBA developed within the international domain and around international law norms, but it has been adopted by state and non-state actors within regional and national regimes. For instance, the Organization of American States promoted an RBA for designing and executing climate change response (de Windt et al., 2016), the European Union applied the HRBA to development cooperation (Council of the European Union, 2014), and the African Commission adopted the HRBA to natural resources governance (Resolution on a Human Rights-Based Approach to Natural Resources Governance, 2012). Canada has joined the trend by adopting the HRBA to international development programmes (Global Affairs Canada, 2024).

Integrating an RBA into resource management and Indigenous community engagement in Canada is arguably straightforward as the state is a party to international instruments that protect rights reflected in the PANEL Principle. Canada has committed to promoting and protecting Indigenous Peoples’ rights to access information and participate in decisions that impact them through the ratification of treaties, incorporation of related customary international law into the Canadian legal regime, and enactment of domestic laws affirming participatory rights and Indigenous Peoples’ individual and collective rights. An RBA promotes human empowerment through rights awareness, access to remedies and institutional rights protection. Aside from centralising human rights in decision-making, an RBA provides a coherent structure for Indigenous Peoples to demand respect for their rights in resource governance.

Toward a rights-based approach to consultation with Indigenous Peoples

Terminologies for addressing different actors in resource development matters. Indigenous communities are often situated within the resource governance discourse as stakeholders with interests in or influence on projects (Poelzer et al., 2023).⁹ That perception must yield to the reality that Indigenous Peoples are distinct from stakeholder groups with interests in resource extraction; they are rights-holders whose rights, communal sustenance, and cultural survival are

impacted by extractive projects. Understanding the distinction between Indigenous Peoples as stakeholders and rights-holders is crucial for appropriately framing their stance in resource development. This distinction has significant implications for the nature of their engagement, the legal obligations of governments and corporations, and the overall approach to resource governance.

The characterisation of Indigenous groups as stakeholders in consultation regimes is inherently contradictory. The idea of stakeholder, as conceived in the business management field, denotes social groups that can influence business operations. In the context of resource extraction, stakeholders can include local communities, environmental organisations, labour unions and investors. Businesses choose to engage with these groups to avoid disruptions and protect their profit margin. Management engages with stakeholders voluntarily, defines those with legitimate stakes, and decides what concerns to address (Long, 2022). The market principles, business dominance and power imbalance underpinning the stakeholder model are unfitting for Indigenous community consultation regimes.

Consultation with Indigenous communities as rights-holders is propelled by legal, ethical, and strategic imperatives. There is a risk of equating Indigenous Peoples' interests with other groups' concerns when they are regarded as stakeholders. Moreover, there is a likelihood of muddling different groups' competing interests and having governments or project proponents prioritise other groups' interests, which could have minimal impact on a proposed project, over Indigenous communities' stake. Generally, some stakeholders' rights may be impacted by business operations. Nevertheless, the line between Indigenous communities and stakeholders must be well defined. Resource extraction places an enormous burden on Indigenous communities. Studies have shown the adverse impacts of resource development projects on Indigenous groups' health, culture and socioeconomic development (Aalhus, Oke & Fumerton, 2018; Manning et al., 2018).¹⁰ Extractive projects within Indigenous territories without their consent cause "irreparable harm to their livelihoods, cultures, languages and lives" (United Nations, 2022).

Indigenous Peoples' rights to access information and participate in decision-making processes concerning resource extraction are protected under international human rights law. The *International Covenant on Civil and Political Rights* (ICCPR) guarantees the right to freedom of expression, which includes the "freedom to seek, receive, and impart information" (International Covenant on Civil And Political Rights, 1966; OHCHR, 2011).¹¹ This right, often referred to as "freedom of information," is essential for transparency and accountability. The Special Rapporteur on Freedom of Opinion and Expression explained that this right extends to access to state-controlled information and imposes a positive obligation on governments to disclose information within their control (United Nations Special Rapporteur on Freedom of Opinion and Expression, 1998). Likewise, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) describes self-determination as the right for Peoples to "freely determine their political status and freely pursue their economic, social

and cultural development” (United Nations, 1976). The rights to enjoy and participate in cultural life are connected to the “principles of equality of treatment, freedom of expression, the right to receive and impart information, and the right to the full development of the human personality” (Office of the United Nations High Commissioner for Human Rights [OHCHR], 1996). Canada is a state party to the ICCPR and ICESCR, and the... provisions protecting the rights to participation and access to information are applicable to Indigenous Peoples in Canada (Government of Canada, 1976).

Timely access to information is a prerequisite for realising the right to participation (Rio Declaration on Environment and Development: Application and Implementation, 1997).¹² The interdependence of these rights has been affirmed in jurisprudence. In *Gauthier v Canada* (1999), the UN Human Rights Committee held that restricting access to information undermines the right to participate in public affairs. Similarly, in *Gitxaala Nation v Canada* (2016, pp. 309, 325), the Supreme Court of Canada found that the federal government failed to disclose crucial information to Indigenous communities during consultation processes, including assessments of their land claims and potential project impacts (*Gitxaala Nation v Canada*, 2016). The Court ruled that the government’s lack of transparency was “legally unacceptable” (*Gitxaala Nation v Canada*, 2016, p. 309), reinforcing that Indigenous nations must be provided with comprehensive and timely information to exercise their participatory rights effectively.

Indigenous Peoples have unique and inherent rights that are not merely interests to be balanced against other stakeholders’ interests. These rights are tied to their historical and cultural connection to their lands and resources. The UNDRIP (2007, art. 18, 27, 41) affirms Indigenous Peoples’ participatory rights and delineates how states should engage with them, particularly in decision-making that directly impacts their communities (UNDRIP, 2007). The Declaration extends the borders of Indigenous Peoples’ participatory rights through the affirmation of the right to free, prior and informed consent (FPIC) or states’ responsibility to consult with the aim of obtaining FPIC in specific instances, such as land and territory rights (UNDRIP, 2007, art. 32 (2); Newman, 2020; Doyle, 2015),¹³ relocation (UNDRIP, 2007, art. 10),¹⁴ and hazardous materials storage on Indigenous Peoples’ lands or territories (UNDRIP, 2007, art. 29).¹⁵

In resource extraction, Indigenous Peoples are rights-holders with specific legal rights, including the right to self-determination, freedom from discrimination, and the right to land and resources. Indigenous Peoples’ right to self-determination is affirmed in the UNDRIP (2007, art. 3). The right to self-determination interlinks with Indigenous Peoples’ right to participate in decisions that affect them, the right to free, prior and informed consent and the right to promote and protect their culture, environment and natural resources. It provides the foundation for Indigenous Peoples’ realisation of other rights because it creates the freedom to control and determine the future and assert other rights (United Nations General Assembly, 2013). Resource extraction

on Indigenous lands without Indigenous Peoples' involvement and at the expense of their traditional life and rights threatens their autonomy and ability to shape their future.

Equality and freedom from discrimination are also essential for actualising other rights, such as political, cultural, economic, civil and social rights (Ramcharan, 2015, p. 53). The UNDRIP (2007, art. 2) provides that Indigenous Peoples "have the right to be free from any kind of discrimination, in the exercise of their rights, in particular, that based on their [I]ndigenous origin or identity" (UNDRIP, 2007, art. 2). The right to equality and non-discrimination requires a two-pronged approach. First, protection and support for the conditions needed for Indigenous ways of life. Second, eradication of practices that side-line or marginalise Indigenous Peoples from others (OHCHR, 2013). The rights to equality and non-discrimination are the catalysts for acknowledging other Indigenous rights. The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, after his visit to Canada in 2013, reported that the challenges besetting Indigenous Peoples had worsened since his visit in 2004, and the conditions of Indigenous communities in Canada were overly critical (United Nations General Assembly, 2014). A decade after Anaya's visit, José Francisco Calí-Tzay, UN Special Rapporteur on the Rights of Indigenous Peoples, had a ten-day official visit to Canada in March 2023. At the end of the official visit, Calí-Tzay observed that Indigenous Peoples continue to experience severe barriers to fully realising their individual and collective rights. He noted that racial discrimination against Indigenous Peoples subsists and called on the Government of Canada to address the environmental challenges caused or worsened by extractive operations (OHCHR, 2023, p. 9).

Indigenous Peoples' rights to their lands, territories and resources have enormous impacts on their economic, social and cultural welfare (Wiessner, 2011). In the case of *Ominayak (Lubicon Lake Band) v Canada* (1990), the UN Human Rights Committee found that Canada breached its duty to protect the Lubicon Lake Band's way of life and culture, as affirmed by Article 27 of the ICCPR, when the federal government allowed the Government of Alberta to grant leases for a project within the Band's territory. The UNDRIP protects Indigenous Peoples' social, economic and cultural rights (UNDRIP, 2007, art. 3, 5). More so, the Declaration asserts that "Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". The Inter-American Court of Human Rights in the case *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001, p. 149) observed that:

The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.¹⁶

Generally, UN General Assembly resolutions are recommendations and legally non-binding. However, “they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles” (United Nations Permanent Forum on Indigenous Issues, 2012). The UNDRIP sets the expectations for states to protect Indigenous Peoples’ rights and eliminate discriminatory practices. Some UNDRIP provisions have arguably attained the status of customary international law (Wiessner, 2009). The Supreme Court clarified that, in the absence of a conflicting law, customary international law is part of Canadian domestic common law through the doctrine of adoption (*R. v Hape*, 2007, p. 35; *Nevsun Resources Ltd. v Araya*, 2020, pp. 89, 94). This implies that some provisions in the UNDRIP may be binding in Canada if a court concludes that they have attained the status of customary law. Aside from the provisions that may be considered customary international law, the substantive rights in the Declaration that reflect in international treaties applicable in Canada – such as the right to participation and access to information – can be enforced under binding international instruments.

The passing of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIP Act, 2021) solidifies the application of UNDRIP principles in Canada. The Act has two main objectives – to assert that UNDRIP applies in Canadian law and to develop a mechanism for implementing the Declaration (UNDRIP Act, 2021, s. 4). The Quebec Court of Appeal observed that the UNDRIP carries lesser weight than a binding international instrument. But, since the Declaration has been implemented as part of the federal legal framework, its principles could be applied to *interpret* Canadian law, including section 35 (Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis Children, Youth and Families, 2022: 506–513).¹⁷ Citing the UNDRIP Act’s *objective* “to affirm the Declaration as a universal international human rights instrument with application in Canadian law” (UNDRIP Act 2021: s. 4), the Supreme Court held that the Act incorporates the Declaration into Canada’s positive law (Reference re An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, 2024, 4).¹⁸ In a later case, the Court reiterated that the UNDRIP Act “has *affirmed* the Declaration as a universal international human rights instrument with application in Canadian law” (*Dickson v Vuntut Gwitchin First Nation*, 2024, p. 47). Unfortunately, the Supreme Court has yet to provide guidance on how to address the issues that will inevitably emanate from having the Declaration as part of the domestic legal regime. While the Declaration is considered a part of the federal legal framework, the legal weight to be assigned to different UNDRIP provisions, especially when they conflict with other laws, are questions the courts will grapple with in the near future.

As rights-holders, Indigenous Peoples have legally recognised rights that must be protected by governments and respected by businesses. The commodification of traditional lands and encroachment upon Indigenous territories is a gross

disregard for their rights. A rights-based consultation regime necessitates a shift from the notion of Indigenous communities as passive recipients of information to recognising them as rights-holders with collective interests that must be respected by corresponding duty-bearers – the Crown and extractive corporations. In *Tsleil-Waututh Nation* (2019, p. 564), the Federal Court explained that deep consultation goes beyond Crown representatives merely listening to Indigenous Peoples' concerns about a proposed project and reporting on consultation processes. The Crown must demonstrate a willingness to alter its project plans in light of the information received during the consultation process.

Although the state is primarily responsible for protecting Indigenous Peoples' rights to participation and access to information, the decisions and actions of extractive corporations have profound impacts on Indigenous communities and the enjoyment of their rights (Arnold, 2016).¹⁹ The *United Nations Guiding Principles on Business and Human Rights* (UNGPs) (OHCHR, 2011, principles 11, 22) confirm the responsibilities of corporations to respect human rights and remediate the adverse impacts of their actions through legitimate processes. The Guiding Principles spurred attention to human rights in business, thereby increasing pressure on corporations to conduct their activities responsibly and in a manner that mitigates social and environmental risks. The operational disruption and revenue loss caused by the Crown's failure to consult meaningfully may have motivated project proponents to consult Indigenous groups and seek support for extractive projects within their territories (Ugochukwu, 2020);²⁰ nonetheless, they also have legal rationales for consultation (Mining Act, 1990, s. 140(3)).²¹ For instance, during the planning phase, a project proponent must provide the Impact Assessment Agency with a preliminary description of a designated project (*Impact Assessment Act*, 2019, s. 10).²² The project description must include a list of Indigenous groups that may be potentially affected by the project and a report on the project proponent's engagement with them. The report must contain the concerns raised by the groups, the outcome of the meeting, and the plan to engage the groups in the future (Information and Management of Time Limits Regulations, 2019, para. 4). This implies that a project proponent's engagement with Indigenous groups is a required component of impact assessment. Furthermore, they are prohibited from providing false information about the impact of a project or carrying on operations in a manner that may impact the "health, social or economic conditions" of any Indigenous group (*Impact Assessment Act*, 2019, s. 143, 7(1)(d)). Any entity that breaches these restrictions is liable on summary conviction to fines (*Impact Assessment Act*, 2019, s. 144).

RBA seeks to alter the culture of consulting Indigenous communities to avoid project disruptions and protect state-investor interests. Aside from revenue loss and operational concerns, corporations stand the risk of judicial claims for failing to respect Indigenous rights. In *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* (2022), the British Columbia Superior Court confirmed that First Nations could make claims against a corporation for the

impacts of a project that breached Aboriginal rights. As rights-holders, Indigenous Peoples must have a broad knowledge of their rights and duty-bearers' corresponding responsibilities to hold corporations accountable. Governments must collaborate with Indigenous groups to improve their capacity to access information, access legal and technical advice on projects and participate in decision-making. As duty-bearers, the state and extractive corporations have the corresponding duty to ensure that resource extraction does not undermine Indigenous Peoples' rights.

Besides fulfilling legal requirements, there are numerous benefits to meaningfully consulting with Indigenous Peoples. When Indigenous communities are involved in project management, they contribute their knowledge and expertise and ensure that economic goals and market principles do not override other competing interests, such as environmental protection and sustainable use of natural resources, without compromising the ability of future generations to meet their needs. Incorporating Indigenous perspectives into impact assessments results in more comprehensive evaluations of potential project impacts and better mitigation strategies. Indigenous groups can effectively evaluate the actual consequences of a project and reach an informed conclusion if they have access to adequate and timely information. Projects that proceed with Indigenous communities' support are more likely to be socially acceptable and sustainable, reducing conflicts and fostering positive relationships. Companies with a social licence to operate are more likely to enjoy community support, reducing the risk of delays, protests, legal challenges and revenue depletion. Adopting an RBA to resource development will demonstrate the Crown's commitment to respecting and upholding Indigenous Peoples' rights. By proactively engaging in meaningful consultations and ensuring that extractive projects do not prevent Indigenous communities from enjoying their rights, governments and businesses can foster goodwill with these communities and promote stability in the extractive sector. These stronger relationships can enhance trust and contribute to the broader national goal of reconciliation and healing historical injustices against Indigenous Peoples.

Potential difficulties of adopting a rights-based approach to Indigenous consultation

Although an RBA to Indigenous engagements in resource development holds many promises, it presents surmountable challenges. These issues may delay the adoption of a rights-based framework in consultation practices, but they do not render the approach inoperable. First, Canada's complex and fragmented legal landscape poses significant structural difficulties. Canada's legal system is characterised by multiple layers of governance, including federal and provincial jurisdictions. Under the *Constitution Act* (1867: s. 91(24), 92A), the Parliament of Canada has exclusive powers to make laws relating to "Indians, and Lands reserved for the Indians," and provincial legislatures have exclusive authority to make laws relating to the exploration,

development and management of non-renewable natural resources within their provinces. All Aboriginal Peoples in Canada are within the federal legislative authority (*Daniels v Canada* (Indian Affairs and Northern Development), 2016, p. 46). However, provinces may react differently to federal laws impacting incidental matters within their jurisdiction, such as resource management (Fontaine, 2016; Declaration on the Rights of Indigenous Peoples Act, 2019).²³ Consultation practices may vary across jurisdictions due to the fragmented legal and institutional structures. For example, the level of Indigenous Peoples' involvement in resource projects in provinces that have adopted the UNDRIP and integrated its participatory rights principles will vary from others yet to acknowledge Indigenous Peoples' right to participation. This inconsistency can lead to confusion for the parties involved, making it difficult to achieve meaningful consultation. A consistent and clear set of standards across all jurisdictions would ensure that Indigenous rights are uniformly respected in resource development. This could involve creating a federal-provincial working group, in collaboration with Indigenous organisations, to establish a holistic policy framework that takes cognisance of the comprehensive Indigenous participatory rights principles.

Second, inadequate awareness may impede the integration of international Indigenous rights standards into consultation regimes. Indigenous Peoples' participatory rights are largely protected by international law instruments. Corporate executives, Indigenous representatives, and government officials may have limited knowledge of international Indigenous rights norms and find the domestic application of international law difficult to navigate. To facilitate compliance with international Indigenous rights norms in the extractive sector, it is important that domestic laws reflect international law standards. The government can demonstrate commitment to protecting Indigenous rights by developing legal and institutional frameworks to implement and monitor compliance with those norms.

Lastly, litigation through the mainstream court system is the primary avenue for Indigenous Peoples to assert their rights and seek redress (Constitution Act, 1982, s. 35; Department of Justice, 2018).²⁴ These adversarial legal processes can restrict Indigenous Peoples' access to remedies because they are expensive, complex, and time-consuming. Prolonged cases can delay the resolution of important issues and frustrate the implementation of necessary protections, perpetuating uncertainty and instability. Without access to timely and effective remedies, other Indigenous rights are precarious and subject to reckless disregard. Access to justice is a cardinal component of RBA and crucial for mainstreaming human rights norms into resource development in Canada. The UNDRIP provides that Indigenous Peoples have the right to access justice through timely and unbiased processes and "effective remedies for all infringements of their individual and collective rights" (UNDRIP, 2007, art. 40). Where there are conflicting views on the scope or applicability of Indigenous rights principles, a collaborative dispute-resolution approach that is culturally appropriate is arguably more appropriate. Alternative dispute resolution can

provide faster, less adversarial, and more culturally sensitive avenues for resolving disputes. Litigation processes present significant barriers to access to justice for Indigenous Peoples in Canada and should be the last resort in unavoidable instances when alternative approaches might have failed.

These challenges demonstrate that for an RBA to consultation with Indigenous Peoples to be implemented, existing resource development policies need to be revised to incorporate the principles of participation and access to information, accountability, non-discrimination and equality, empowerment and legality and access to justice (United Nations Sustainable Development Group, 2003). The extractive industry and government agencies must be well informed of the broad range of Indigenous rights and update their policies to ensure they align with human rights standards. A robust framework that centralises Indigenous Peoples' participatory rights is fundamental to protecting their other rights and well-being. The expectation for governments and project proponents to consult Indigenous Peoples goes beyond informing them of a potential development project and taking their concerns into consideration. Governments have a legal responsibility to create opportunities for Indigenous groups to participate in projects within their communities, and the onus is on businesses to respect communities' rights.

Conclusion

The integration of an RBA to consultation with Indigenous Peoples in Canada represents a transformative shift towards recognising and actualising their inherent rights. This approach promotes meaningful engagement with Indigenous communities as rights-holders, moving beyond superficial consultation to genuinely involve them in decision-making processes. It underscores the legal and strategic imperatives for moving beyond mere procedural consultation to ensuring substantive outcomes that respect and uphold the rights of Indigenous communities. An RBA recognises the interconnectedness of rights and adopts a holistic approach that considers the social, cultural, environmental, and economic dimensions of Indigenous groups. The courts have established the Crown's duty to consult and, in some instances, accommodate Indigenous Peoples. However, the duty to consult doctrine does not capture the role of project proponents as duty-bearers, practical implementation of the doctrine has been inconsistent, and does not facilitate full compliance with Indigenous Peoples' participatory rights. The Crown's duty to consult is limited to when their action may adversely impact Indigenous Peoples' rights, but human rights standards go further to require Indigenous Peoples' involvement in all matters that affect them.

A reimagination of actors' roles through a human rights lens is foundational to integrating human rights norms into consultation regimes in resource extraction. Rights-based frameworks seek to address the gaps in existing consultation practices by recognising Indigenous communities as active rights-holders whose rights must be respected by both the Crown and

extractive corporations. While the Crown bears the primary obligation to protect rights, an RBA implicates project proponents as duty bearers with corresponding responsibilities to ensure that their operations do not interfere with the actualisation of Indigenous communities' rights. This approach provides a practicable framework for addressing the power imbalances and top-down practices that tend to exclude Indigenous communities from participating in resource-related decision-making. This rights-based conceptual framework can foster more comprehensive engagement with Indigenous communities in resource development and promote coherent and comprehensive consultation policies and practices that align with international and domestic Indigenous rights norms.

Notes

- 1 Much of the country's mineral deposits, including gold, diamond, and uranium, are located on Indigenous lands and territories.
- 2 Reference to Indigenous Peoples in this chapter is to Indigenous Peoples of Canada except when stated otherwise. Although the term "Indigenous Peoples" is used generally, the term "Aboriginal" is used occasionally because of its application, and in relation, to the definition provided in the *Constitution Act*.
- 3 Despite the implications of UNDRIP for states, it received overwhelming support from most states.
- 4 The Court's reliance on a complex doctrine such as honour of the Crown without a fulsome elaboration opened its application and the origin of the duty to consult to varying interpretations from either the English case law or through the Aboriginal traditional perspectives.
- 5 The Court alluded to this practice in both *Haida* and *Taku River*, and held that environmental assessment process, if conducted properly, could fulfill the duty to consult.
- 6 The Supreme Court held that the scope of consultation in every instance "must be approached individually."
- 7 Self-determination is the foundational basis for Indigenous Peoples' participatory rights and the motivation for their independence and autonomy.
- 8 The *UN Common Understanding* provides an unexhaustive list of human rights principles that should guide HRBA – universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law. These principles have been widely adopted and recategorised into PANEL principles by UN agencies, international financial institutions and national government agencies with some variations.
- 9 For instance, an analysis of two mining projects in Northern Canada and engagements with Indigenous communities refer to the communities as stakeholders.
- 10 For a report on the impact of resource extraction on Indigenous women, see Susan Manning et al., (2018).
- 11 Article 19 of the *Universal Declaration of Human Rights*, also protects the right to "seek, receive and impart information". General Comment No. 34 provides a practical guide for protecting Article 19 rights and provides an authoritative context of the right to access information, among others.
- 12 Accessible and adequate information is a prerequisite for public awareness and encourages public participation in various issues.
- 13 Article 32(2) of UNDRIP. The implications of FPIC in resource management have been widely debated. Several scholars have explored the divergent interpretations

of the FPIC principles in the UNDRIP, and this chapter does not attempt to replicate this endeavour. For a detailed analysis of different interpretations of FPIC and the application of the principles of treaty interpretation to FPIC, see Newman, 2020 and Doyle, 2015.

- 14 Relocation of Indigenous Peoples is *subject* to their free, prior and informed consent and agreement on fair compensation, with the option to return where feasible.
- 15 States must consult with Indigenous Peoples in good faith and with the aim of obtaining their FPIC before approving any resource development projects on their lands or territories.
- 16 Indigenous Peoples' land rights have also been affirmed in other cases. *Kaliña and Lokono Peoples v Suriname* (2015); *Saramka People v Suriname* (2007); *Moiwana Village v Suriname* (2005).
- 17 Emphasis added.
- 18 This reasoning was followed in a later Supreme Court decision in *Dickson v Vuntut Gwitchin First Nation* (2024: art 47).
- 19 For compelling arguments on corporate human rights obligations, see Arnold (2016).
- 20 Businesses have legal and economic imperatives to involve Indigenous communities in extractive projects. Several corporations have realised the importance of engaging with Indigenous communities and have committed to improving their relationship with groups around their operation sites.
- 21 At the provincial level, an example of a legal requirement for business entities to consult with Indigenous groups is Ontario's *Mining Act*. The Ontario Minister of Mines must be satisfied that a project proponent conducted an "appropriate consultation" before the project proponent can commence an advanced exploration. S. 140(3) of *Mining Act* (1990).
- 22 Designated projects include constructing, operating, expanding, and abandoning mines, metal mills, and oil and gas pipelines. See a comprehensive list in the Schedule, *Physical Activities Regulations* (2019).
- 23 For instance, the Federal government articulated a commitment to implement the Declaration and followed up with the UNDRIP Act. Speaking at the Permanent Forum on Indigenous Issues, Minister of Indigenous and Northern Affairs, Carolyn Bennett, affirmed that Canada intends "nothing less than to adopt and *implement* the declaration in accordance with the Canadian Constitution" (Bennett, 2016, May 10). The British Columbia legislature also passed a law affirming the application of UNDRIP within their province. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c44. However, some provinces have not demonstrated intentions to integrate the UNDRIP into their provincial legal regime.
- 24 After section 35 was included in the *Constitution Act*, there were failed attempts to develop a common understanding and implementation process for the section during four constitutional conferences and two constitutional amendments. Due to the failure to reach a consensus on the scope of the section, litigation became the primary approach for interpreting section 35 and resolving conflicts emanating therefrom (Department of Justice, 2018).

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8 Indigenous governance, gender, and engagement with rights-holders

Lessons from Canada through environmental human rights

Sherry Pictou and Sara L. Seck

Introduction

Corporate and state driven engagement processes routinely leave out grassroots leadership by Indigenous women due to the imposition of colonial and patriarchal governance structures within which these processes are organised. These governance structures and engagement processes are at odds with implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), self-determination of Indigenous Peoples, and Indigenous laws. Indeed, while it is common to describe these initiatives as “stakeholder” engagement processes, this terminology is contested especially where those being “engaged” are Indigenous Peoples who are better understood as rights holders. The term “stakeholder” suggests that all participants are coming to the table as equals. On the other hand, Indigenous rights holders, especially when exercising the right to self-determination, may be better understood as not only having a right to be at the table, but a right to design the table itself in accordance with their own laws.

After introducing a brief history of colonialism, truth and reconciliation, and resurgence of Indigenous land and water practices in what is now known as Canada, this chapter will explore lessons for engagement with Indigenous Peoples emerging from Nova Scotia and New Brunswick case studies detailed in the 2021 report *Wolastoqiyik and Mi'kmaq Grandmothers - Land/Water Defenders Sharing and Learning Circle: Generating Knowledge for Action*. The chapter will then turn to international human rights law, first reflecting on the duties of states and responsibilities of businesses in engagement with Indigenous Peoples to take UNDRIP into account, before considering the potential and legitimacy of a human rights-based approach to engagement with Indigenous Peoples informed by both UNDRIP and the right to a clean, healthy and sustainable environment. The central aim of the chapter is to illuminate whether, and if so, how, environmental human rights approaches could better inform state duties and business responsibilities to respect the rights and responsibilities of Indigenous Peoples and especially women and girls, and gender diverse persons.

DOI: 10.4324/9781003488507-11

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Canada, colonialism, and the resurgence of Indigenous governance

Canada is a settler colonial state founded on the dispossession of Indigenous Peoples. From the 1700s to Confederation in 1867, historic treaties were entered into with some, not all, Indigenous Nations (Borrows & Coyle, 2017). Moreover, not all historic treaties include the surrender of territory or processes to surrender territory in the future. Early judicial decisions problematically justified Canada's claim to underlying title by relying on the doctrine of discovery even though it was not factually true nor did the British Crown or French before them treat what is now Canada as *terra nullius* (Borrows, 2010). Since the 1970s, modern treaties have been reached between Indigenous Nations and the government of Canada with 40 per cent of Canada's landmass now covered by twenty-nine comprehensive land claim or self-government agreements (Crown-Indigenous Relations and Northern Affairs Canada [CIRNA], 2016). These agreements reflect Canada's growing recognition of the inherent Aboriginal right to self-government and the need to build respectful partnerships with Indigenous Peoples in nation-to-nation relationships so as to move beyond this colonial history.

Section 35 of the Constitution Act, 1982 recognises and affirms "existing aboriginal and treaty rights" of Indian (First Nations), Inuit and Métis Peoples. Since 1982 numerous judicial decisions have interpreted the meaning of section 35 Aboriginal and treaty rights. However, the jurisprudence has struggled to account for Indigenous understandings and legal traditions due to the doctrine of reception which privileges colonial laws rather than approaching interpretation through a jurisdictional lens of nation-to-nation relationships (Borrows, 2010; Nichols, 2018). The Supreme Court of Canada (SCC) has interpreted section 35 to protect a spectrum of Aboriginal rights to fish, gather, and hunt, to site-specific rights, to Aboriginal title, although its approach has been critiqued for freezing Indigenous practices to the time of pre-European contact rather than the usual "living tree" approach to constitutional interpretation in Canada (Borrows, 2017). SCC jurisprudence has also imposed inherent limits on Aboriginal rights and title to protect future generations. While this could be read as paternalistic, an alternate ecological interpretation suggested by Borrows is that it supports the resurgence of Indigenous laws that limit land uses by measuring seven generations of impacts (Borrows, 2018).

There is no one source of pan-Indigenous law in Canada. Instead, legal traditions of each distinct Indigenous Nation are the sources of law and may reflect sacred or natural law as well as deliberative or customary laws. Indigenous laws are living social orders, not stuck in the past, and are increasingly recognised in Canadian judicial decisions, applied by Indigenous dispute resolution bodies, and integrated into colonial laws (Borrows, 2010). Nevertheless, resurgence of Indigenous laws must be understood in the context of Canada's colonial history and government-led or supported efforts to erase Indigenous languages, knowledges, and cultures through residential schools

that operated for over a century and have been described as perpetrating cultural genocide (Nagy, 2022).

The Truth and Reconciliation Commission's (TRC) Calls to Action provide a road map towards reconciliation between Indigenous and non-Indigenous Peoples through mutually respectful relationships. It specifically calls upon law schools and the legal profession to seek intercultural competency training that addresses the history and legacy of residential schools, Aboriginal and treaty rights, Indigenous law, and UNDRIP (TRC, 2015). Such intercultural competency training of the legal profession is essential to ensure all lawyers, whether representing governments, industry or Indigenous Peoples, are attuned to the manner in which the legacies of colonialism are embedded in existing laws and practices, including those relating to consultation and rights holder engagement. Another Call to Action supports the funding of Indigenous law institutes for the development and understanding of Indigenous laws in accordance with each unique culture (TRC, 2015). The revitalisation of Indigenous ecological laws informed by land and water-based practices, is an essential component of reconciliation. All governments are asked to adopt and implement UNDRIP as a reconciliation framework, as is the corporate sector especially when engaged in activities involving lands and resources of Indigenous Peoples (TRC, 2015).

While in 2007 Canada voted against UNDRIP, the federal government later dropped its objector status and committed to its implementation (Nagy, 2022). In June 2021, federal UNDRIP implementation legislation came into force with the explicit purpose of affirming the application of UNDRIP in Canadian law as a universal human rights instrument. A separate concern however is whether judicial interpretations of rights and justifications under section 35 accord with UNDRIP and especially with the principle of "free, prior and informed consent" (Nagy, 2022). Whether or not UNDRIP should be understood to be part of Canadian law as a reflection of customary international law is a subject of debate, although the answer should certainly be informed by Indigenous understandings of its weight, especially given the decades of international diplomacy by Indigenous leaders (Henderson, 2008; Centre for International Governance Innovation [CIGI], 2017).

In 2019, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) was released, a response to TRC Call to Action 41 (MMIWG, 2019; TRC, 2015). The report documents the horrific experiences of violence against Indigenous women, girls, two-spirit, and gender diverse (2SLGBTQQIA) persons in Canada. Notably, the MMIWG Calls to Justice makes specific recommendations for development and extractive industries to consider the security and safety of Indigenous women and gender diverse people at all stages from project planning to assessment and implementation as well as during management and monitoring. The recommendations also highlight the importance of ensuring equitable benefit from extraction and development projects, and point to impact assessments processes and the negotiation of impact-benefit agreements as

opportunities to ensure adequate attention is given to mitigate risks and impacts, with appropriate studies carried out and social infrastructure needs anticipated (MMIWG, 2019).

As Dr Sherry Pictou has argued, patriarchal practices introduced by the *Indian Act* have led to the disenfranchisement and gross underrepresentation of Indigenous women in governance including in decision-making over natural resources (Pictou, 2020). This is particularly concerning as resource extraction is also associated with much higher rates of violence against Indigenous women and girls. To overcome this history requires foregrounding Indigenous women and two spirit persons as active knowledge holders of land and water-based practices, and just as importantly as rights holders, while also necessarily drawing attention to the need to consult the broader Indigenous population rather than just the “official” leadership. According to Pictou, it is essential to adopt a human rights-based approach that recognises that “without Indigenous gender justice, there is no Indigenous self-determination” (Pictou, 2020, p. 386; Kuokkanen, 2019, p. 221).

Land and water defenders: Wolastoqiyik and Mi'kmaq Grandmothers

A 2021 report prepared by Dr Sherry Pictou in collaboration with Dr Janet Conway and Angela Day illustrates the challenges facing Indigenous women in Atlantic Canada who are excluded from decision-making that advances development projects while failing to attend to the protection of “land, water and all our relations (human and non-human)” as required under Indigenous laws (Pictou, 2021, p. 3). The report further describes how these “Grandmothers” or “Defenders” engaged in grassroots leadership to enact their treaty rights despite intimidation from corporate actors, governments and even members of their own communities. Many lessons emerged from their stories at a sharing-learning circle held in Nova Scotia in January 2020 with the aim of generating knowledge for future actions.

The stories

The Mi'kmaq (L'nu) People and the Wolastoqiyik People have practiced their “land-water based lifeways” for over 10,000 years in what are now known as the Atlantic provinces of Canada (Pictou, 2021, p. 1). Together with the Passamaquoddy, Abenaki and Penobscot People, they formed the Wabanaki Confederacy, with river systems playing a vital role in enabling trade as well as access to food including fisheries. From 1725 to 1779, the Confederacy negotiated a Covenant Chain of Peace and Friendship Treaties with the British Crown. While no land or waterways, including the oceans, were surrendered in these treaties, pre- and post-confederation governments of Canada routinely ignored the treaties, violating the Wabanaki treaty rights (Pictou, 2021, p. 1). Jurisprudence of the SCC has in recent years recognised Peace and Friendship treaty rights to hunt and fish for food, including the right to

fish for a moderate livelihood (Pictou, 2018). Negotiations on implementation of treaty rights continues, while outstanding claims to Aboriginal rights and title beyond the treaties are raised in courts, seeking to follow SCC precedents that recognise claims brought by Indigenous Peoples in other parts of Canada. At the same time, in keeping with the TRC Calls to Action, there is increasing clarity as to the content of Indigenous ecological laws in the region (M's-it No'kmaq et al., 2021).

As the case studies document, when agreements with industry are concluded with the Chief and Council in accordance with the Indian Act, these are used by governments to signal consent to project development. The assumption is that environmental concerns are being addressed by government mitigation and monitoring processes, yet the concerns expressed by the Grandmothers are not accounted for. An overarching concern is that Indigenous treaty rights and self-determination are being undermined with discriminatory and violent consequences for Indigenous women. However, embracing strategies that centre Indigenous laws, ceremony, and knowledge as well as treaty rights can powerfully support resurgence of Indigenous ways led by grassroots Indigenous women (Pictou, 2021, pp. 2–3).

The Wolastoqiyik Grandmothers case study concerns a proposal to develop an open pit mine in the Nashwaak River watershed that is a tributary for the Wolastoq River (Pictou, 2021, p. 4). The Grandmothers learned about the project as it was going through a harmonised provincial and federal environmental assessment process, rather than learning of it earlier as would have been the case had the government's constitutional fiduciary duty to consult and accommodate been met. Instead, they were told the duty been delegated by the provincial government to the Assembly of First Nations Chiefs in New Brunswick. When the final provincial environmental assessment report was released to the public, the Grandmothers and others opposed approval of the project due in part to inadequate consultation. Soon after, provincial approval was granted subject to forty conditions and pending federal approval. An impact benefit agreement was signed with one community, while all Wolastoqiyik chiefs signed a provincial agreement described as part of the duty to consult. However, many claimed that the province threatened to take away tax revenues if they failed to sign and stated that the agreement did not reflect comfort with the mine (Pictou, 2021, pp. 6–7). At this point the Grandmothers and others set up camp on their ancestral territory on the proposed mine site, including a long house and ceremony space. Though the Grandmothers received some support from men within their community, non-Indigenous allies, and mother earth (including beavers that brought trees down across the road) (Pictou, 2021, p. 8), they were also subject to intimidation tactics by non-Indigenous men who had been promised jobs and the RCMP (Pictou, 2021, p. 11). The federal government subsequently approved the mine subject to conditions, justifying 'in the circumstances' the significant cumulative adverse environmental effects that the mine would cause to the use of land and resources by Wolastoqiyik First Nations for traditional purposes (Pictou, 2021, p. 8). In 2019 the Metal and

Diamond Mining Effluent Regulations under the federal Fisheries Act were amended to add fish-bearing brooks of importance to the Grandmothers, clearing a major hurdle facing the proponent by allowing the disposal of mining waste into these waters (Pictou, 2021, p. 12).

The second case study involves opposition to a proposal by Alton Natural Gas Storage Limited Partnerships to engineer underground salt caverns for high-pressure storage of natural gas, with pipelines carrying water to and from the Shubenacadie river where salt brine would be discharged. The Mi'kmaq Grandmother water protectors learned of this development long after it had been approved and clearcutting of land and pipeline laying had begun. They were alarmed due to the contaminants in the brine and the high threat posed by salt cavern storage failures to local ground water (Pictou, 2021, p. 13). The project had early on received conditional approval from the Nova Scotia environment ministry, and the company and Mi'kmaq Chiefs were consulting in accordance with the Made in NS/Mi'kmaw Rights initiative negotiation process. This process was administered by the Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO), an organisation with a mandate to support the Assembly of Nova Scotia Chiefs in official consultation processes with the aim of seeking consensus among Mi'kmaq First Nations pursuing implementation of legally established Mi'kmaw rights (Pictou, 2021, p. 14). However, only the Chiefs were being consulted, not members of the Indigenous communities and even Council members were uninformed. Both Sipekne'katik First Nation and the Millbrook First Nation withdrew from the consultation process and public protests began with peaceful highway slow-downs (Pictou, 2021, p. 15). Eventually the Assembly of Nova Scotia Chiefs agreed to support community-based consultations and community referenda going beyond the Made in NS process (Pictou, 2021, p. 17). The work and issuance of new permits was briefly put on hold; however, soon the government was back to issuing permits without consent. The Grandmothers took action by undertaking water walks, building a strawbale house, setting up a Treaty Truck house and invoking treaty rights to engage in trade, and undertaking subsistence eel fishing (Pictou, 2021, pp. 19–20). Again, intimidation tactics were used including the hiring of Mi'kmaw men who were known warriors as company security, even as community and allies provided support. The Grandmothers successfully brought legal actions challenging the issuance of permits by the environment minister due to a lack of effective Indigenous consultation as owed under the treaties and due to Aboriginal title claims. Separately, federal fisheries laws were found to be violated. Yet Alton Gas was also granted injunctions and some Grandmother protectors were arrested and the straw bale house bulldozed down, even as they argued that they were “abiding by Mi'kmaq law on what is unceded Mi'kmaq land” (Pictou, 2021, p. 30). Ultimately, the Grandmothers played a leadership role in asserting title, challenging the legitimacy of the environmental assessment process, and demanding government engagement with community members, not just Chief and Councils (Pictou, 2021, pp. 4–30).

Lessons

The land and water defense stories in the Wolaskoqiyik and Mi'kmaw Grandmothers report reveal that those who are defending unceded ancestral lands and waterways are motivated by an “overarching concern... for the well-being of all their relations (human and non-human) that include ancestral and traditional lands, water, and forests as sources of food and lifeways” (Pictou, 2021, pp. 31):

As mothers, daughters, grandmothers, aunts, and sisters, in both cases they describe the necessity of protecting the health and vitality of land and water to ensure the well-being for future generations. This determination to defend and to protect ancestral homelands and waters is deeply rooted in the linguistic concept of M'sit No'kmaq (Mi'kmaw) and Psi-tenlonapemok (Wolastoqiyik) or “all-of-my-relations” (human and non-human). Here the stories give witness to how two worldviews, Indigenous and non-Indigenous, intersect and collide. However, it is the Indigenous worldview that is often neglected, excluded from, or distorted in the media and in other various forms of knowledge production practices such as Environmental Assessment reports. As one of the Wolastoqew Grandmothers/Defenders states: “**They take our words**” (politicians) as rights holders and distort or coopt them. There are exceptions, however, where allies offer support especially when they learn about potential environmental harms to where they too also live.

The Grandmothers report concludes with reflections on challenges and strategies. Among key challenges is the tendency for consultation and consent processes to exclude the broad spectrum of rights holders, a problem that is exacerbated by the negotiation of Impact and Benefit Agreements (IBAs) or Accommodation Agreements through confidential processes that exclude Indigenous rights holders, thereby dividing communities (Pictou, 2021, pp. 32–33). These agreements are then held up as evidence of Indigenous consent and used to criminalise the actions of land and water defenders, often women, who are asserting Indigenous title and treaty rights as legitimate rights holders (Pictou, 2021, pp. 33–34). Yet the agreements emerge in the context of “ongoing colonial patriarchal governance practices in both Indigenous and non-Indigenous societies” that overlap with the male-dominated resource extraction industries that weaponise law to criminalise Indigenous women dissenters (Pictou, 2021, p. 34). While the Grandmothers have to raise money to cover legal representation as they defend themselves for violating court injunctions, regulatory laws are passed to expedite these projects. Moreover, the ability of Grandmothers to leave their families so as to defend lands and waters comes with financial costs through loss of employment income, as well as emotional costs as families worry about their safety (Pictou, 2021, pp. 34–35).

The Grandmothers also identified successful strategies most notably the importance of telling “stories of perseverance and resilience rooted in teachings from Elders (Wise Council), their own knowledge systems about treaty rights and responsibilities – all grounded in ceremony with intergenerational relations to the very land/waters they are defending” (Pictou, 2021, p. 35). It is from these ancestral governance systems and Indigenous laws that the Grandmothers derive the authority to take up their responsibilities as land and water defenders (Pictou, 2021, p. 36).

State duties and business responsibilities: UNDRIP, gender and the right to a clean, healthy and sustainable environment

The challenges facing Indigenous land and water defenders as described above suggest much more is needed to support the resurgence of Indigenous ecological laws in the face of resource development pressures and colonial patriarchal governance systems. Resurgence of Indigenous ecological laws is called for not only as part of Truth and Reconciliation in Canada, but is also essential for guiding solutions to the contemporary local and global intertwined triple planetary crisis of climate change, biodiversity loss and pollution and waste (Seck, 2022, p. 80). The key question to be explored here is whether existing initiatives informed by international human rights law can provide the clarity necessary for Indigenous rights-respecting engagement processes that account for gender and ecological justice.

The 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) clarify the duties of states and the responsibilities of businesses under international human rights law. A key point is that it must unfortunately be presumed that states will at times if not often violate human rights, and businesses must not use compliance with rights-violating domestic laws and policies as an excuse for their independent failings to respect human rights. The normative expectation of the second pillar of the UNGPs is that all businesses adopt a human rights policy and implement it through human rights due diligence that identifies and assesses potential risks to human rights holders, prevents and mitigates these risks, tracks whether responses are effective over time, and communicates to account for how the actions taken address impacts. Businesses must also cooperate in the remediation of human rights harms that they have caused or to which they have contributed (Office of the High Commissioner for Human Rights [OHCHR], 2011, Principles 11–24). This expectation applies to all human rights, clearly capturing the rights of Indigenous Peoples. In the Canadian context this must include the rights articulated in the UNDRIP which, as noted above, the TRC Calls to Action ask businesses to adopt and implement as a reconciliation framework especially when engaging in activities that may impact Indigenous lands and resources.

Both state and business implementation of the UNGPs including with respect to the human rights of Indigenous Peoples would go some way to resolving the concerns of the Grandmothers. However, UNDRIP must not be

equated with a simplistic understanding of free, prior and informed consent, even as this is vital and recognised within several Articles of UNDRIP. Importantly, UNDRIP protects both the collective and individual rights of Indigenous Peoples. Article 22 draws explicit attention to the rights of women as well as children, persons with disabilities and Indigenous elders while Article 44 guarantees the rights equally irrespective of gender. UNDRIP recognises the rights of Indigenous Peoples to self-determination, and to maintain and strengthen Indigenous institutions including legal institutions. UNDRIP Article 18 recognises the right to participate in decision-making through representatives chosen in accordance with Indigenous procedures, and to develop and maintain Indigenous institutions for decision-making. Article 12 recognises the rights of Indigenous Peoples to develop and practice spiritual traditions and ceremonies, while Article 24 protects the right of Indigenous Peoples to traditional medicines including conservation of medicinal plants, minerals and animals. Importantly, Article 25 protects the right of Indigenous Peoples to “maintain and strengthen their distinctive spiritual relationships with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”. This Article clearly reflects and justifies the actions of land and water protectors like the Grandmothers. Article 29 supports Article 28 by recognising the rights of Indigenous Peoples to “the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”

Coast Salish Indigenous scholar Sarah Morales has explored the implications of UNDRIP implementation for the rights of Indigenous women in the context of extractive operations in detail. As Morales explains, among UNDRIP’s 46 Articles are those that offer specific protections to Indigenous women under pressure from extractive industry development. UNDRIP recognises rights to healthy and physical well-being, to property, to culture, to religion, to economic benefits, and to participate in decision-making. Each must be approached through a gender lens that makes space for Indigenous laws and knowledges (Morales, 2019). Guidance developed by the United Nations Working Group on Business and Human Rights that explores the application of the UNGPs through a gender lens provide a useful supplement. However, it is important that the gender lens be an intersectional one that problematises simplistic understandings of gender, embraces complex understanding of disadvantage and privilege, and problematises liberal empowerment, dominant power structures and the dominant view of the state as saviour (Handl, Seck & Simons, 2022).

The duties of states and the responsibilities of businesses in engagement do not stop at respect for the rights of Indigenous Peoples even through a gender lens. As evident from the stories told above, important work is also done by allies who may not be Indigenous but share concerns for the protection of lands and waters. As the UNGPs expect businesses to respect all human rights, attention must also be paid to the implications of the adoption in July

2022 by the UN General Assembly of resolution A/RES/76/300 recognising the right to a clean, healthy and sustainable environment with 161 votes in favour and none against. Resolution A/RES/76/300 recalls the UNGPs and the responsibility of business enterprises to respect human rights, while recognising that it is vital that human rights are exercised for environmental protection, including rights to “seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy”. The resolution further recognises that the consequences of environmental damage are felt more acutely by Indigenous Peoples, as well as women and girls, among others. It further recognises the importance of

gender-responsive action to address climate change and environmental degradation, the empowerment, leadership, decision-making and full, equal and meaningful participation of women and girls, and the role that women play as managers, leaders and defenders of natural resources and agents of change in safeguarding the environment.

While some might argue that this is a ‘new’ right, as noted in the resolution, the “vast majority of States have recognised some form of the right” already. It is therefore crucial that states and businesses seeking social licence to operate reflect on its implications for rights-respecting processes, including its relationship with environmental impact assessment (Seck et al., 2022). This includes attention to procedural environmental human rights, including rights of access to information, participation in decision-making, and access to justice in the event of harm, as well as the crucial role that environmental human rights defenders play in local and global environmental protection, and the need to ensure that they are able to act free from harassment, intimidation and violence (Seck et al., 2022, p. 30). Indeed, the UN Working Group on Business and Human Rights has developed guidance for businesses on how to support the work of human rights defenders, and the need to consult them as experts in human rights due diligence processes so as to ensure the voices of affected rights holders are heard (United Nations Working Group on Business and Human Rights [UNWGBHR], 2021).

Conclusions

This chapter has explored how rights holder engagement processes that exclude grassroots leadership by Indigenous women due to colonial and patriarchal governance structures lead to violations of their rights as environmental human rights defenders. However, the chapter has also demonstrated that guidance exists for businesses and states informed by international human rights law, notably the UNGPs, UNDRIP and the recent UNGA resolution recognising the right to a clean, healthy and sustainable environment. What is crucial is that engagement processes take seriously the need to fully adopt and implement a human rights-based approach, and to

take a holistic view of human rights responsibilities that include both collective and individual rights, account for gender and intersectionality, and embrace the importance and legitimacy of those who work to protect local and planetary health for present and future generations. The Wolastoqiyik and Mi'kmaq Grandmothers case studies provide insights into the experiences and priorities of land and water defenders who, while excluded from structures of power, are determined to carry out their responsibilities to all their relations – whether human or non-human. Implementation of UNDRIP, and respect for the self-determination of Indigenous Peoples including Indigenous ecological laws is a crucial step, but should not be reduced to a simplistic understanding of free, prior and informed consent with IBAs treated as consent absent community support including the support of land and water defenders. The legitimacy of non-Indigenous allies who also serve as environmental human rights defenders must also be recognised, respected and accounted for in human rights-informed engagement processes, something that is drawn into focus if attention is paid to the right to a clean, healthy and sustainable environment and the importance of enabling the exercise of procedural environmental rights by defenders.

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Part III

Consult how? Processes for meaningful consultation



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9 Meaningful engagement of affected people and communities

Exploring tensions between formal requirements and lived experiences of public participation in impact assessments

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Introduction¹

This chapter examines meaningful stakeholder engagement (MSE) as an ideal that is poised between, on the one hand, soft and hard law standards or requirements, whose objectives are to provide affected individuals and communities with a say and outcomes that are meaningful to them; and on the other, the actual experiences of processes and outcomes that are frequently far from those objectives. The deployment of the term “stakeholder” in this chapter is anchored in the conceptualisation provided by Ed Freeman (1984), a business ethicist who defined a stakeholder as “any group or individual who can affect or is affected by the achievement of the organisation’s objectives” (Freeman, 1984, p. 46). Although developed for a strategic management context, that definition gave the impetus for the evolution of stakeholder theory broadly, shaping much scholarship on stakeholder relations in business ethics and in the organisational literature at large (Friedman & Miles, 2006). Along with an organisation’s owners, customers, suppliers, employees and others close to the company, local communities are included in Freeman’s ethics-based understanding of stakeholders. Evan and Freeman (2001, p. 97) observe that the rights of such communities must be ensured, and that they have a claim to participate in decisions that substantially affect their welfare. This means that while not all rights-holders are stakeholders, some stakeholders are also rights-holders. Importantly, no disrespect of rights-holders is implied in this, nor any lower prioritisation of their rights, concerns or interests as compared with those of other stakeholders. The term “affected stakeholders” as used by the United Nations Guiding Principles on Business and Human Rights (UNGPs) (Office of the High Commissioner for Human Rights [OHCHR], 2011, p. 38), and the Organisation for Economic Cooperation and Development (OECD) (2011/2023) Guidelines for Multi-national Enterprises underscores this by drawing attention to the need and responsibility for business enterprises to take responsibility and be accountable for the risks and actual harmful impacts.

DOI: 10.4324/9781003488507-13

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The OECD Guidelines (2023, commentary 50) and supporting guidance texts explicitly underscore that meaningful stakeholder engagement is an important aspect of a risk-based due diligence process, in order to identify and deal appropriately with risk or harm to rights-holders. Indeed, the introduction of the stakeholder term in these contexts was made to ensure that the message and its importance is taken up directly by top managers (Buhmann, 2017), rather than being sidelined to and with corporate lawyers. Indeed, MSE is particularly important for affected stakeholders, that is, people that are or may be affected by projects or other activities led by (local) governments, companies, investors or others (Buhmann et al., 2024). A major objective of MSE is to create conditions for identifying and addressing risks or harm to such stakeholders from *their* perspective, undertaken also in a manner that is meaningful to them in regard to the process, the information and knowledge exchanged, and outcomes. Proactive and meaningful stakeholder engagement contributes to enabling an organisation involved with a project to identify whether stakeholders have the same or different perspectives on what constitutes an impact from their own view, and on how significant an impact may be (OHCHR, 2022).

It follows from both the UN Guiding Principles (OHCHR, 2011) and the OECD (2011) Guidelines that stakeholder engagement should be inclusive, context-sensitive and adapted to the needs and rights of vulnerable groups, taking due account of potential barriers to participation faced by affected stakeholders. In practice, much engagement between companies and/or authorities and affected people occurs in the context of industry or other development projects for which rules or practices on environmental and/or social impact assessment (ESIA) prescribe consultations with local communities. Multiple guidance instruments have been developed by private, public and hybrid organisations in order to help companies, investors, consultants and others from the outside involved in such consultations to undertake them in a way that is inclusive and experienced as meaningful by those consulted with. Yet, top-down approaches tend to dominate (e.g., Maher & Buhmann, 2019; Zoomers & Otsuki, 2017). This suggests a gap in regard to awareness of the conditions that frame the meaningful aspects of consultations and other forms of involvement for affected stakeholders, from a bottom-up perspective taking the point of departure in their situations. With this comes a need for awareness of the practice of MSE to connect the roles and involvement of affected stakeholders and those who undertake consultations or other engagement, to ensure that engagement with affected stakeholders not only takes place according to rules or formal guidelines, but does so in a manner that is meaningful to those potentially or actually affected, from the inception to closure not just of a project idea but for the entire engagement process, including the design of that process.

We explore this knowledge gap, with an emphasis on challenges and practices related to what makes stakeholder engagement meaningful for those affected. Based on fieldwork (individual and focus-group interviews) undertaken during

2018–2023 in Canada, Greenland and Iceland, we provide examples to underscore the need for engagement processes that take as their point of departure the context of potentially or actually affected people and asking: what are their prerequisites for participating in an engagement process so that it is meaningful to them in terms of their knowledge foundations for fully appreciating the impacts of development on their lives, livelihoods and material as well as immaterial values; their time and other resources; their traditions and practices; any internal issues within the group or groups involved, including historical ones; and for outcomes to be meaningful from the perspectives of those affected? What can and should the outside actors – project proponents like companies or investors, and national and local authorities do to meet those needs and concerns and contribute to making an engagement process truly meaningful from project idea inception to completion (or abandonment)?

Across the communities we interviewed, there was an impression that ESIA is often done as a compliance task, leading to formalised engagement rather than substantive interaction to fully involve affected communities, gather relevant concerns and local knowledge, and apply this in the decision-making process. There was also a common perception that those who conduct ESIA consultations do not spend enough time in the locations and with the communities affected to understand the local situation, but, rather, come in for a short time to conduct consultations as a short, formalised process that often lacks regard for the situational context. These experiences lead to a feeling among individuals and communities of the process as well outcomes lacking meaningfulness. To illustrate the experiences and challenges, we draw on a diverse range of examples from three sectors that relate to land use and access to land, all in the High North/Arctic, namely, the extractive and energy industries, and nature protection. The spotlight has long been on the extractives sector due to the significant social and environmental impacts on host communities and other local people caused by exploration and exploitation of minerals, oil and gas. With the surge in needs for transition minerals to build energy production with low greenhouse-gas emissions, MSE needs around the extractives sector are not likely to decrease but, rather, to become increasingly relevant for mining and transition-related minerals, such as copper, zinc, and rare earth elements (REE). The expansion of low-GHG energy, such as wind-energy farms or hydro-power facilities, also affects communities' use of and access to land, and may also put land under pressure in other ways. Perhaps because of the frequently remote locations of these energy projects in Northern areas, they are often in the proximity of (older) nature preservation projects, such as national parks or United Nations Educational, Scientific (United Nations Educational, Scientific and Cultural Organisation) and Cultural Organisation (UNESCO) world heritage sites. Accordingly, our examples span land-invasive as well as land-preserving activities.

Section 2 outlines key objectives and challenges of ESIA in the light of leading global standards on MSE. Section 3 sets out the method and introduces the case studies. Section 4 exemplifies challenges from local communities' perceptions of meaningfulness around timing and information, and section 5 concludes.

ESIA objectives and challenges

What makes engagement with affected people meaningful is highly contextual. This applies not only to the affected communities or individuals, but also to companies, who are often subject to governmental requirements, or to governmental authorities monitoring and enforcing those requirements, or organising consultations. Across the High North, governments have adopted quite detailed ESIA requirements that companies and responsible local government bodies must live up to (Nenasheva et al., 2015). Even in the absence of explicit governmental requirements on ESIA, authorities and companies are expected to observe the UNGPs (which apply to all companies, everywhere) and the OECD Guidelines (which apply to companies operating *in or out of* the OECD countries (including major extractives countries like Australia, Canada, and the United States or 10+ adhering states). These soft law instruments prescribe a process of outward-oriented risk-based due diligence as fundamental to companies' identification and responsible handling of their harmful impacts of society. Meaningful stakeholder engagement is set out as a key part of that process, for the same reasons as outlined above in this chapter (see further, Buhmann, 2023a). Because of their wide application, these soft-law requirements also apply to companies subject to governmental ESIA regulation, and can therefore be understood to complement those in regard to the way in which consultations and other required forms of engagement are done. This could look like a tension in itself; however, from the perspective of this chapter, the tension is rather the lack of awareness of the soft law instruments and the way in which they function in parallel to and ideally complement hard law instruments (e.g., Chimisso & Seck, 2020; Buhmann, 2018). Like the idea of MSE as set out on the UNGPs and OECD Guidelines, ESIA should also be meaningful to consulted people or it may not have success in uncovering potential harmful impacts, nor benefits, associated with a project.

Historically, government regulations enable public participation in ESIA to provide an informed basis for decision-making and to serve as a precursor for the provision by authorities of permits for a project to go ahead (e.g., Yang, 2019; O'Faircheallaigh, 2010). Through processes to consult or otherwise invite public participation, the views and concerns of affected communities and local knowledge are expected to enter the process. However, several studies question the quality and outputs of public participation, noting for example that participation often happens too late in the process to substantively inform the decision-making, and that involvement of the public is often tokenistic, as something required rather than seeking substantive input (Suskevics et al., 2023). Multiple studies across the High North and elsewhere indicate that communities often feel excluded rather than included in stakeholder engagement processes (e.g., Owen et al., 2023; Hansen & Johnstone, 2019; Maher, 2019). This suggests a tension between the objectives of ESIA, and the way ESIA requirements are implemented. Some tensions may be due to lack of alignment of expectations of people consulted, to whom it may not

be clear that public participation through ESIA is a right to have one's say, but not to have one's way (Larsen & Buhmann, 2024). Such lack of alignment suggests that it is not uncommon for those who carry out ESIA to fail to adequately explain what the process is and how it works. Related to this but with a different character, other tensions arise when the ESIA is compliance-driven rather than driven by a fundamental interest in uncovering the views and local knowledge of affected people. A compliance-oriented approach to undertaking ESIA and formally involving local people may compromise the overall objective of uncovering their views, concerns and knowledge, because it fails to even design and plan the process so that it becomes meaningful to consulted people, in terms of process, information as well as outcomes. Studies explicitly focusing on the community perspective have highlighted the need for impact assessments and other participation processes to *educate* local stakeholders about the project and promote social learning so that they can participate in debates and decisions concerning a company's activities (Demajorovic et al., 2019; Prno & Slocombe, 2012). Along similar lines, the United Nations Office of the High Commissioner for Human Rights (OHCHR, 2011, p. 38) makes a clear distinction between affected stakeholders and other stakeholders in regard to the need to tailor communication to the specific needs of the former: communication on impacts to potentially affected stakeholders should take account of the literacy, language and cultural communication barriers.

But companies involved in ESIA also need contextual knowledge in order to plan and execute an ESIA process with public participation that is meaningful to those affected. Owen and Kemp (2014) argue that companies need a strong awareness of sociological and socio-historical contexts in which projects take place due to the significance that land, natural resource use and/or ownership, and employment opportunities and issues often play for relations between a company and a local community relation.

It is well established in studies and guidelines for ESIA consultations that a pre-condition for consultation, participation or engagement to be "meaningful" is that it begins early, not just at the point when companies may become involved, but from the early stages when local authorities carry out planning for resource exploitation or other purposes (Kvam, 2019; Wilson, 2019). Governments have their own responsibilities for meaningful engagement with stakeholders affected by resource development projects and for public dialogue with wider society, as well as their role in shaping and implementing the legal framework and regulations (Buhmann, 2023b; Mestad, 2002). While governments in some places, e.g. the EU and other countries that apply EU law, including Iceland, require companies to undertake consultations, in Greenland the government is quite involved, also in a pre-consultation phase.

An essential element of risk-based due diligence, meaningful engagement should be an explicit or implicit element in many forms of interaction between companies or other project owners (such as institutional investors

who own shares in the company or project), authorities in charge of the area or providing and monitoring exploration or exploitation licences, and individuals and groups living in or close to the area affected by a potential or actual project. Meaningful engagement with affected people is beginning to become explicitly noted in international or other soft law guidance, such as the UN OHCHR (2011) Guiding Principles on Business and Human Rights (UNGPs) and the OECD (2011) Guidelines for Multinational Enterprises (chapter II.A.15) and explanatory guidance texts for the Guidelines. In other cases, it is more implicitly expected, often under the influence of the UNGPs and the OECD Guidelines (see further, Buhmann, 2023a). This may be the case for environmental and/or social impact assessment processes, as well as consultations, which are typically legally required dialogue or other form of communication between a company or government agency and affected stakeholders as part of an impact assessment. The OHCHR Guidance on the corporate responsibility to respect highlights the connection between the two-way aspect, the company's understanding of the situation of affected stakeholders, and trust: the Guidance advises companies to avoid delegating engagement with its potentially affected stakeholders entirely to external experts, because this will undermine the company's capacity to truly understand the perspectives of those it may have an impact on and to build trusting and productive relationships with them (OHCHR, 2012, p. 35).

Studies indicate that affected stakeholders not only seek greater participation in the management of risks and impacts, but also to build partnerships, collaborate on development plans, negotiate benefit-sharing agreements, and in some cases secure an equity share in the project (Wilson et al., 2016). Yet, there is often an inherent bias towards (proposed) projects being approved and implemented (Owen et al., 2023), rather than the alternative of not going ahead. Awareness or prior experience of such bias may lead to skepticism within communities about whether it is even worth participating if there is a perception that assessment processes might – at best – change the shape of *how* a project proceeds, while implicitly foreclosing the question of *whether* it proceeds. Such skepticism can be further fueled by previous experience related to the fact that, as elaborated elsewhere (Larsen & Buhmann, 2024), access to participation in decision-making through formal consultations is generally a right to express concerns or other views, but not a claim to having those concerns or views reflected in the decisions made. There is little space in the risk-management approach for situations when MSE generates insights and understanding with affected people leading them to challenge the project in their comments or even withhold consent. Rather, the predominant thinking is that projects should simply ensure that affected people get jobs or other income, or perhaps other benefits from a project, e.g., enhanced access to health care or rescue services (which companies may already provide to their own staff) or to vocational training or other education (in cooperation with the company, or funded by it). This type of thinking – that the economic aspects of a project justify its going ahead – is more common than one might

think. For example, it informs both the approach taken by the OECD Guidelines for Multinational Enterprises in its Employment/Industrial Relations chapters provision on labour, and at least to some extent the impact benefit agreement approach in the Raw Materials legislation of Greenland. According to the OECD Guidelines, companies should in their operations to the greatest extent practicable, employ local workers and provide training with a view to improving skill levels (OECD, 2011, V, 5). According to the Greenlandic Social Impact Assessment Guidelines that complement the Raw Materials legislation, the recruitment of Greenlandic labour, use of local processing and infrastructure, and engaging Greenlandic enterprises, local suppliers and industrial promotion initiatives are among issues of high priority for impact benefit agreements, along with long-term capacity building and knowledge transfer; vocational training, education and internships; and socio-cultural values and traditions (Naalakkersuisut, 2016, p. 20).

As we argue in this chapter, for a consultation process to be meaningful for those potentially or actually affected, it should be designed and exercised in such a way that the situation of those people is at the core from the outset. This means taking their perspective throughout the process, from the inception of the process to invite their views to the conclusion, including the decision made. The latter does not mean a right to have one's way, but at least that decision-makers explain and make it visible that views, concerns and knowledge shared in the ESIA process were in fact considered and not just received and filed, as a matter of compliance. It also means carefully considering what prior information, and if relevant, education, must be acquired by consulted people in order for them to understand and assess project impacts. In terms of timing, this is not just about what stage of the process participation takes place (Suskevics et al., 2023), but also taking into account time constraints caused by affected peoples' jobs and other income-generating activities or important cultural events when planning the process. Similarly, venue must be considered: in remote places, people may need to travel to a consultation or town-hall meeting, in Greenland or other places in the High North, often by boat. Even if this does not interfere with specific cultural events, it requires time, money for diesel or gas for a boat, and weather that permits travel on often rough waters in unpredictable weather.

Method and cases

The chapter builds on fieldwork undertaken in Greenland 2018, 2020 and 2022, looking at engagement related to a potential large mining project and a potential UNESCO World Heritage project; Iceland 2022, exploring engagement around a large hydro-power project; and Western and Atlantic Canada 2023, where we considered hydro-power, natural resource extraction and UNESCO World Heritage projects. The energy and extractive projects entail an element of environmental and social perturbation. UNESCO World Heritage projects, in principle, embody a less invasive and more conservational

element. Moreover, their nomination must conform to certain principles on local community involvement (UNESCO, 2024; *Convention concerning the protection of the world cultural and natural heritage* [UNESCO], 1972). In the research on which this chapter builds, we deployed this duality of sites in order to go beyond the conflicted experiences that local communities often associate with the invasive nature of energy and extractives projects. However, during the research it emerged that one of the UNESCO projects considered (the Gros Morne Park) originated as a rather conflicted project driven by the national park authorities. It was only turned into a UNESCO World Heritage project later, at which stage the UNESCO community engagement protocols were not activated because the park already existed. Our focus on diverse examples of resource extraction, renewable energy, and World Heritage preservation is consistent with a “maximum variation” approach to sampling in qualitative research (e.g., Hesse-Biber, 2017). This allows us to identify generalisable social processes and dynamics (e.g., Schwalbe et al., 2000) through comparisons of engagement processes related to substantially different modes of development. It allows for new insights that might not emerge from a study focused solely on any one of these issue areas.

Focused on community consultations around the proposed Kuannersuit mine, projected to produce concentrate of rare earth elements as well as a byproduct of uranium, interviews in *South Greenland* involved local communities, the proponent (an international company that was at the time named Greenland Minerals and Energy (GME)), Greenland’s Natural Resource Institute and the Ministry for Raw Materials in the capital of Nuuk. This is our key case; other cases add perspectives.

The Kuannersuit mountain in Southern Greenland is rich in REE, which are among the important transition minerals for the technical facilities to produce low-GHG or store energy in batteries. The deposit also holds an exceptionally high degree of radioactive materials, around 10 per cent (Hansen & Johnstone, 2019; Environmental Justice Atlas, 2019).

The world’s largest island with a population of only around 56,500 people (2022), Greenland is a self-governing part of the Kingdom of Denmark and holds exclusive authority for Greenland’s raw materials. The country’s Indigenous Inuit population is the majority (89.9 per cent of the total population). Greenland has established detailed ESIA requirements for large-scale raw materials exploitation (Naalakkersuisut, 2016; Mineral Resources Act, 2009), including since 2014 a pre-consultation requirement aiming at involving affected and other stakeholders early in the planning of the project, “so the stakeholders have a real opportunity to influence the process and make their voice heard” (Naalakkersuisut, 2016, p. 11).

The Kuannersuit mountain borders on the major local town Narsaq (population circa 1,350 (2020)) and a wider area with many sheep farms, the major Greenlandic agricultural activity and a key source of income for South Greenland. Moreover, the area borders on one of the country’s (currently three) UNESCO World Heritage sites, sporting Norse ruins, modern sheep

farming, and emergent fishing, hiking and kayaking tourism (Skrydstrup & Buhmann, 2021). As a consequence of a policy adopted by the Parliament of Greenland to no longer allow uranium exploitation, the Kuannersuit mine project has been paused since 2021. However, prior to that, a series of consultations had been undertaken by the proponent in cooperation with the raw materials authorities. Among sheep farmers and the tourism industry related to the UNESCO site there were deep concerns with the health impacts of potential uranium dust from the mine (Skrydstrup & Buhmann, 2021; Hansen & Johnstone, 2019).

Field work in *East Greenland* involved people in two communities in an area covered by a proposed UNESCO World Heritage site, projected to provide local employment around local culture and nature for the unique lifestyle of the fairly isolated east-Greenlandic population; and potential transition-relevant minerals mining in areas that serve as hunting grounds. Consultations had taken place on the former, not yet on the latter.

Fieldwork in Iceland 2021 included interviews with civil society and community organisations as well as advisory organisations, authorities and power companies in an area where the large Karahnjúkar hydro-power station and associated dam were constructed in the early 2007, and the Thingvellir UNESCO World Heritage Site.

In Canada, interviews were undertaken with community organisations in the Happy Valley-Goose Bay area close to the large Muskrat Falls hydro-power station (Labrador); and with community organisations and administrative agencies in small towns by the Gros Morne UNESCO World Heritage site (Newfoundland). Finally, it involved the council and lands management department of the Doig River First Nation, on whose lands numerous oil/gas and forestry activities are undertaken by outside companies (British Columbia).

The importance of a bottom-up perspective to make stakeholder engagement meaningful for those affected

Timing

Interviews with sheep-farmers in South Greenland indicated a pervasive frustration with the timing and consultations or town-hall meetings related to the Kuannersuit mine proposal. Up to 2018, most consultations and town-hall meetings took place in Narsaq. In South Greenland, outside of towns or settlements and between them, transport is mainly by boat, either the small boat (typically an engine-powered dingey) that a family may own, or the larger boats that provide transport between the settlements and Narsaq for a considerable fee (in 2022), a one person single ride between Narsaq and Qassiarsuk, a larger settlement that is home to some of the sheep farmers we met, was 500–700 DKK (around 100–120 CAD). Sheep farmers expressed annoyance with the placing of consultations in Narsaq rather than in or closer to their settlements, participation required travel to Narsaq, which is

not only costly, but due to the time involved for the journey also interfered with daily sheep-tending tasks on the days of the consultations. This meant that some community members needed to stay at home to tend to the sheep instead of attending the meetings in Narsaq. Sheep farmers felt that consultations could have been organised closer to their farms, many of which are located in settlements where several families could participate without travelling, or others could travel over shorter distances than required for going to Narsaq. Moreover, some meetings were planned during the lambing season. This made attendance even harder, as the lambs as well as the lambing ewes represent income, and sheep farmers need to stay on their land to assist ewes who might have a difficult delivery. The sheep farmers felt the timing disrespectful of their professions and the commitments they had to their livestock. On other occasions, consultations or town hall meetings took place at times that interfered with religious tradition (the Lutheran-Christian confirmation of youths), which conventionally involve gatherings of family and friends and therefore also travel across distances as well as hosting visitors. Sheep farmers were annoyed as well as surprised that the authorities involved did not pay attention to the date of the religious festivity, which are well-known across the country to take place during certain months.

Across these three issues of timing, sheep farmers we met with felt the company and authorities did not take their professional, family or cultural commitments into account when planning meetings. This indicates that timing of consultations is a manner that is respectful of the professional lives and family commitments of potentially or affected stakeholders is a significant aspect of what makes the involvement appear meaningful from the outset. While involvement in the ESIA process was clearly important to the sheep farmers, they had difficulty perceiving the investment of time and other resources (e.g., for transport) in process as meaningful if those who plan the meetings neglect showing consideration of the wider time-wise context, especially to avoid ESIA meetings interfering with other important activities.

Interestingly, the Covid-19 pandemic pushed a change in the authorities' form of engagement. Due to restrictions on the size of groups allowed for a meeting, in 2020 in the process of continued ESIA, the Greenlandic Ministry of Raw Materials undertook visits to settlements where they met with smaller groups than what had been done in prior consultations in Narsaq. The Ministry found that their meetings in the settlements provided richer information from the perspective of the local community than what they had obtained in the larger meetings in Narsaq; and reported communities welcoming the local visits as more meaningful and respectful.

Early and adequate timing

Fieldwork in East Greenland and Canada uniformly underscored that early engagement is another important feature of ensuring that engagement is meaningful. This, too, relates to respect for the needs of the involved communities. At Doig River First Nation, pre-consultation was seen to be a

significant step that offers opportunities for the community to understand a project idea early so that they have time to understand and assess impacts and prepare solid responses for the actual consultation. At Muskrat Falls and Gros Morne, community organisations underscored the importance of early engagement as important for the same reasons, and as a way for developers to signal a sincere interest in substantive engagement and responses. In East Greenland, early (pre-) engagement was seen as an indicator of respect for the community's needs for time and information. Moreover, respondents underscored the importance of decision-makers investing time in understanding the local context. This is further addressed as an aspect of information in the following.

Information

Top-down: Scientific information

In South Greenland, sheep farmers have expert knowledge on sheep biology, nutrition and breeding, grass/hay production, and many have solid knowledge and experience in economics and accounting related to sheep farming; but they are not experts in health impacts of uranium, nor in geology or meteorology that can contribute to uranium dust being spread. The complex interaction between several academic fields of expertise places demands on the company and/or government organising a consultation process.

As part of the consultation, the company proposing the rare earth elements mine at Kuannersuit invited scientists to explain how various aspects related to the expected spread and effects of the uranium dust. However, this scientific information did not have the intended calming effect. Rather, the technical character of the information provided from the individual scientific fields appears to have underscored the risks, perhaps precisely because the information was not connected across the fields. Extensive amounts of detailed information were provided, but that information also presupposed a high level of expertise in the specific fields. An accompanying educational step to enable the audience to connect the dots was missing. This corresponds to a missed opportunity to implement good-practice recommendations (e.g., Demajorovic et al., 2019; Prno & Slocombe, 2012) on promoting social learning to enable consulted communities to fully participate in debates and decisions concerning a company's activities. Making consultations meaningful to communities may also require making basic information on health, weather/dust flows and geology/mining processes available to local citizens in a pedagogical manner and at a level that responds to the existing knowledge of these stakeholder groups, well in advance of the consultation. Unless people who may be affected by an extractive activity are equipped to understand the impacts, from their perspective, a consultation will not be able to take proper account of impacts because the affected people will be unable to properly identify and voice impacts as they see them.

In Western Canada, the Doig River First Nation's lands management department in its engagement with outside industry insists on receiving technical information and often on relevant educational activities as part of impact benefit agreements, to enable the Nation's members to understand and respond to impacts taking a short- and long-term perspective.

Bottom-up: Situational context

In East Greenland, Iceland and Atlantic Canada, respondents underscored the significance of the bottom-up aspect of information: to be adequately informed, those undertaking consultations must invest in understanding the local context. This means spending time in the local community to meet with individuals where they are (e.g., in the community laundry in East Greenland; or the community fish store or the local clothing-and-equipment store in Canada). Respondents felt that ESIA is often done by proponents flying in, spending a day for a town-hall meeting, and leaving after having had formal consultations that favour those used to and comfortable with such settings. To be meaningful for the average local person, consultations should take place after efforts have been seen to be invested in getting to know the local context by being present where they community are, in their daily situations. Presence in advance of a consultation indicated interest and concern with the locality and its situation, and helps build trust.

Experience from South Greenland suggests that consultation meetings may be more meaningful to all involved when undertaken in a setting close to the location of those consulted in a capacity of being potentially or actually affected stakeholders. Such planning demonstrates a commitment on the part of authorities or the company to make the effort to meet affected people where they have their lives; to be the ones who travel; and to come to the place that may be affected and see for themselves what land, livestock, fields, and other socially significant places may be affected by a potential project.

Across the individuals and communities we met with in research feeding into this chapter, it was clear that a key part of the meaningfulness of involvement relates to the ability of affected stakeholders to proactively envision and steer their futures and preferred development pathways, rather than simply responding to external forces when a project or plan has already been decided. Along with this comes a need, expressed by several individuals, for an economic development paradigm not to have priority, almost by default, over other priorities set within the situational context, such as the preservation of lands, waters or lifestyles.

Top-down and bottom-up: Application

When done well, ESIA generates considerable substantive information. This is intended to be incorporated for the onward decision-making process. However, communities often feel this is not the case. In Iceland, the deployment of internet-based consultations provides accessible information on

project proposals; however, that system also generates an automated confirmation of receipt with no further information provided on whether or how the information provided online by a community member or organisation is processed, viewed and applied. In South Greenland, before the Kuannersuit mine-project was paused by political decision, there was a common perception with sheep-farmers that their concerns aired in the ESIA process was not applied by decision-makers.

Conclusion

The examples above underscore that to be meaningful for affected people, an ESIA process must be planned and executed with awareness of the contextual situation of those people. Simply paying attention to formal requirements will often result in a process that is not considered meaningful for involved communities or individuals who may be affected by the project or planning process giving rise to an ESIA. An initial investment of time and effort to understand the local professions, income-generation and customs not only helps build trust. It can also contribute to planning meetings at times and places that do not interfere with such income-generation or customs and are easily accessible in terms of time and location. As importantly, it may contribute to understanding prior knowledge needs for community members to become educated to understand and assess impacts from the perspective of their professions and local contexts. Without adequate prior knowledge to understand and assess impacts on the part of affected people, engagement opportunities risk not being fully meaningful to them.

Such procedural shifts can make participation more meaningful to those affected and generate participation by adequately informed community members. For participation to be meaningful also in the long-term, community members need to see that the concerns and knowledge they share are received and, ideally, applied and acted upon. Even if a project is not adjusted, the significance of the information should be acknowledged. Online communication can be easily accessible, but its automated character can enhance a perception of a top-down process that receives but does not act on information provided.

Moreover, early engagement is also valuable for creating opportunities for affected people to proactively envision and steer their own future development pathways related to a potential or proposed project.

As part of the process to make engagement meaningful by ensuring that affected stakeholders fully understand the implications of project or plan, potential impacts must be explained in ways that make it possible for affected people to relate them to their situations. Scientists may be called in to explain health or geological impacts, but scientific or technical issues may not resonate with communities in consultation meeting, unless an effort is done to make these issues meaningful. This may require communicative expertise, for example from an educator, to ask questions to all the disciplinary experts that

makes them explain the implications for a non-expert audience. Moreover, affected people may express concerns about the effects that impacts may have on their lives, lands, employment, health, housing, etc., but may not do so in the formal language of human, environmental, constitutional, administrative or other legally granted rights. Unless those conducting impact assessments or other engagement have relevant background knowledge to understand how the potential impacts may affect local people, regardless of whether they are expressed as rights or in other ways, they may not be able to help “translate” concerns voiced in general language into the specific rights that companies are required or expected to respect.

The formal requirements for companies and local governments to be able to document compliance with ESIA regulations and steps do not always travel easily with activities to ensure that the process is planned and implemented in such a way that it is meaningful to affected stakeholders in terms of timing and place; and that they are educated about the project and its implications in a wide sense (i.e., across the various impacts and dynamics that may accumulate), or promote social learning to build their options for meaningful participation in meetings, debates and decisions concerning a project. Common elements set out in guidance documents on ESIA include that engagement should be timely and ongoing, starting early and continue throughout the life of a project; and informed through ensuring information-sharing and transparency of process. Those elements assume a two-way process. Yet the terminology as well as processes arguably tend to be top-down, oriented around what organisations or authorities should do and how they should act, rather than oriented around the needs of affected people in order for the process to be experienced as meaningful and lead to outcomes that are meaningful to them. This orientation would include greater consideration for the types of information affected stakeholders need, as well as information processing capacities and how information can or should be communicated to align with the existing information processing capacities of affected people, taking their professional experience, educational and other training, and general context into account. The experiences of local communities across the locations we examined highlight a perception that ESIA generally remains planned and undertaken from a top-down perspective that fails to invest time and effort in obtaining a localised and contextual awareness of the community and the situations of individuals that may be affected by a potential project. This results in consultation meetings being planned at times and places that indicate lack of respect (and awareness) of the local context, and moreover may favour those who live or work close to the consultation location and are used to speaking in formalised settings.

For ESIA engagement to be meaningful for communities, those who plan and undertake it must invest time and resources in obtaining contextual awareness of a locality, its inhabitants, their professions and customs, and their needs and commitments. This can help frame the planning of time and location to be respectful of the affected stakeholders, and generate trust and a

sense of meaningfulness by participating. Crucially, such investment of time and contextual presence should also include efforts to assess knowledge needs for affected people to be able to meaningfully make use of engagement opportunities, and to respond to such needs, including through communicative steps and analysis of the needs and concerns expressed.

Note

- 1 The authors are grateful for the time and knowledge shared by multiple individuals in Canada, Greenland, Iceland, and Sápmi (Norway) during interviews, workshops and other forms of interaction. Field research for this chapter was funded by a grant under the Nordic Council of Ministers' Arctic Co-operation Programme for the project *Towards a socially just transition in the Arctic: Exploring, theorizing and disseminating best practice in meaningful stakeholder engagement for communities* (project number A21751; principal investigator Karin Buhmann).

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10 Public consultation in emergency situations

Lessons from decommissioning mine tailings dams in Minas Gerais, Brazil

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Introduction

The catastrophic failures of mine tailings dams in Mariana and Brumadinho, in 2015 and 2019, respectively, in the Brazilian state of Minas Gerais, with a death toll of almost 300 people, severely impacted livelihoods, ecosystems, water bodies, and caused displacement of people living in flood-prone areas. The disasters boosted regulatory changes in Brazil aiming at reducing the risks of such structures. In the aftermath of the Brumadinho disaster, both Federal and State governments moved to strengthen legislation: an ordinance of the National Mining Agency and a Minas Gerais law banned new tailings dams built under the upstream method,¹ and demanded operating dams be *de-characterised*, in other words, be decommissioned so as to no longer feature “characteristics” of a dam, such as runoff or rain water retention, and to be reintegrated into the landscape.

How environmental and social impacts and risks of tailings dams decommissioning are addressed and how citizens are involved and consulted in making decisions are relevant questions, both theoretically and in practical terms. Different from consultation processes that precede other planned interventions, such as a new mine or a major expansion, consultation in emergency situations faces the added challenge of short time frames because delayed decisions may exacerbate risks and the failure to act may result in human casualties. Nonetheless, the very declaration of emergency may be contested by affected populations and increase distrust in institutions.

The right to access information about the environment, including about *hazardous materials and activities* (emphasis added), to participate in decision-making processes and to access judicial and administrative proceedings, proclaimed by Principle 10 of the Rio Declaration (UNGA, 1992) is enshrined in international law (Banisar et al., 2012; van Bekhoven, 2016). Two major international treaties, the Aarhus Convention and the Escazú Agreement further detail the application of Principle 10 respectively in Europe, and in Latin America and the Caribbean (Sánchez et al., 2024). In Brazil, as in many other countries, the provision of information and public hearings are mandatory in Environmental Impact

Assessment (EIA) processes that discuss a proposed project, its impacts and proposed mitigation. Pertinent issues raised at public hearings must be considered in the project environmental review for licensing decision-making (Sánchez & Duarte, 2022).

In this chapter, consultation is understood as the process of disclosing information about a project and its impacts in a timely manner and by appropriate means to any interested citizen, thus providing mechanisms for listening to citizens' concerns, expectations and questions, and considering pertinent issues in decision-making. This is partially based on the definition of public consultation in Brazilian legislation and practice, where any citizen has the right to be heard (Dias, 2021). However, unlike the concept of Free Prior and Informed Consent (FPIC), rights-holders do not need to formally consent to enable licence approval. In practical terms, due to the short deadline of three years, de-characterisations were exempted from environmental licensing requirements. Consequently, public hearings were not conducted. The State did not establish a substitution process to adequately consult rights-holders and stakeholders. Instead, most companies responsible for the dams simply communicated with the public in a top-down manner, with few mechanisms for substantive interaction. Moreover, the COVID-19 pandemic also hampered in-person communication in Brazil between March 2020 and April 2022.

Therefore, by analysing the consultation conundrum associated with the de-characterisation of upstream dams, we highlight the challenges of consultation in emergency situations and in projects with short deadlines. We examine the legislation that mandated de-characterisation as well as later laws establishing the rights of the populations affected by dams. We also use information from recorded online interviews with seven companies responsible for the dams. Such interviews were part of a cumulative impact assessment of de-characterisation projects in Minas Gerais, implemented in 2020 and 2021 (Neri et al., 2021). In the remainder of this chapter, we describe the context of dam de-characterisation and our approach to studying the situation (second section); summarise recent legislation on dam safety and on the rights of affected people (third section); examine the social and-environmental impacts of de-characterisations works (fourth section); and discuss the issues related to consultation during emergency decommissioning processes (fifth section). Conclusions follow in the sixth section.

The need to decommission upstream tailings dams

The Minas Gerais Law 23291 passed on 25 February 2019, one month after the failure in Brumadinho. It required all upstream dams to be decommissioned by 25 February 2022. At the time that the law was first enacted, there were fifty-four upstream dams in the state, out of which eleven were classified as having a high risk of failure, which, according to the legislation, implied evacuation of the “self-rescue zone” (ZAS – *Zona de Autossalvamento* – from its acronym in Portuguese).

Decommissioning works require earth-moving, vegetation clearing, and transportation of massive quantities of sand and gravel through public roads,

among other activities. In addition to such on-site interventions (i.e., works in the tailings dam and surrounding areas), new rockfill or concrete backup dams (ECJs – *Estrutura de Contenção a Jusante*) were to be constructed downstream of the tailings dam in order to limit the area of possible damage in case of failure during decommissioning. In high-risk dams, works were undertaken by remotely operated vehicles, among several other worker safety measures.

Both the evacuation of the self-rescue zones and the construction of downstream dams caused the involuntary displacement of people. Until March 2021, at least 1,263 people were estimated to have been evacuated from ZAS, and 717 for ECJs construction (Neri et al., 2021). Although communities were expected to return to their homes after the de-characterisation and stabilisation of the remaining structures, displacement periods could reach several years, as some closures were delayed, and the completion of scheduled works was not expected before 2035.

Information about the environmental impacts caused by the de-characterisations, and about the consultation process led by the mining companies was extracted from a cumulative impact assessment of de-characterisation (Neri et al., 2021). This included the review of technical documents describing de-characterisation projects, site visits, and eight remote meetings with representatives of the seven companies responsible for the upstream dams. In each meeting, semi-structured interviews were conducted with the managers responsible for implementing the de-characterisation works. The script included questions about the actions to be undertaken at the dam sites and environs, such as opening access routes, establishing workers' living quarters, and building the downstream containment structures (ECJs). A set of questions focused on stakeholder engagement programmes and practices, including communication, complaints mechanisms, and resettlements plans.

The interviews revealed a lack of standards regarding engagement with stakeholders and rights-holders. A consultation process was not prepared or implemented. Some companies had a communications strategy and/or a community relations team. Although various interactions between companies and communities occurred, they were commonly characterised by predominance of one-way communications, with the mining companies delivering information, which the communities passively received. The companies reported having meetings with communities to inform them about emergency simulations with alarms, promoted visits to the affected communities, and undertook socio-economic surveys. Nonetheless, only one company developed a specific communication programme for the de-characterisations.

Legislation on dam safety: Progress on recognition of rights; backtracking on participation

The 2019 Law made provisions to enhance the safety of all kinds of dams. It also advanced in enlarging public participation by establishing requirements that are more stringent than those applied to other types of projects, including

the approval of new mines. The construction, operation, expansion and heightening of dams in the State of Minas Gerais requires prior environmental licensing, which, in turn, requires public hearings “to discuss the conceptual design of the dam, considering its various phases of implementation up to the final level” (Law 23291, 2019, p. 3). This provision aims at avoiding the practice of “project slicing”: dividing the larger project into smaller parts to mask environmental impacts. It is frequently used by companies and governments to facilitate and speed-up project approval (Enríquez-de-Salamanca, 2016). The legislation establishes that citizens who are affected either directly or indirectly, and who are residing in municipalities located in the area of the river basin where the project is located, will be invited to the consultation. Moreover, the Brazilian legislation innovates by requiring that space and time in the public hearings be reserved for women, with a view to discussing the specific impacts of the project on their lives.

The legislation also determines that the mandatory emergency action plan be disseminated “through public meetings held in places accessible to the populations located in the area downstream of the dam, who must be informed in a timely manner and encouraged to participate in the preventive actions provided for in said plan” (Law 23291, 2019, art. 7). Although the 2019 Law determines that all upstream dams should be decommissioned and established specific provisions for public participation in the environmental review of new projects, it is silent about public participation in de-characterisation. In this regard, the Law demands decommissioning, but does not detail the process by which de-characterisations should be conducted.

Federal legislation on dam safety was also updated after Brumadinho. A Senate enquiry commission (Project Law PL 550/2019) proposed amendments to the 2010 Federal law on dam safety that passed on 30 September 2020. The amended law also prohibits the construction of new upstream mine tailings dams, demands the de-characterisation of existing dams and requires dam owners to prepare emergency plans. The law establishes requirements for risk communication for operating dams. Yet, again, there is no requirement for a specific communication plan for de-characterisation works, let alone for any kind of consultation.

Consultation requirements are also absent in more recent state (Minas Gerais Law 23795/2021) and national (Federal Law 14755/2023) policies establishing the rights of people affected by dams. Both set requirements for participation in disaster recovery and impact mitigation plans. Although the concepts of “stakeholders” or “rights-holders” are not mentioned, the state policy defines people “affected by dams,” as “people harmed or potentially harmed by (...) socioeconomic impacts resulting from dam construction, operation (...) or decommissioning” (Law 23795, 2021, art. 2). The law establishes seven rights of affected people, including “participation in deliberative processes relative to policies, plans and programmes.” The law does not explicitly mention “projects.”

Moreover, the Federal policy establishes the “rights of populations affected by dams.” It includes a more extensive list of rights that includes provisions for damages resulting from “displacement or compulsory evacuation, in case of emergency” (Federal Law 14755/2023, art. 3). Therefore, people affected by de-characterisation works are referenced by both policies in terms of impact mitigation plans. For this and other matters related to dam safety, both laws make room for “independent technical assistants” to advise affected people in all matters related to dam safety. The assistants are chosen by the communities and paid by the dam owner.

Despite notable advancements in defining the rights of affected people, public participation in the decision-making process related to tailings dams had shown little progress. Stakeholders’ participation in project decision-making in Brazil is mostly limited to environmental impact assessments (Sánchez & Duarte, 2022). In those cases, the environmental studies must be disclosed and public hearings are mandatory, according to the federal and Minas Gerais laws. Similarly, recent Minas Gerais legislation clearly establishes the right of affected people to access environmental licensing studies; nonetheless, de-characterisation projects were exempted from these requirements.

The shortcomings of public participation in environmental licensing in Brazil have been discussed in the literature, and range from difficulties in accessing information and environmental studies, to the excessive use of technical language that hampers understanding by lay people (Harvie & Koutsamanis, 2024). Practitioners, in addition to scholars, are critical about public participation in EIAs (Duarte et al., 2017).

In a study of the EIA processes associated with the dam failures in Mariana and Brumadinho, de Paiva et al. (2024) argue that legislation does not guarantee meaningful engagement of rights-holders. Public hearings are principally vehicles for one-way information sharing, and are conducted only once – after the conclusion of the environmental impact study. Moreover, effective public participation is hampered by a lack of technical knowledge and financial resources. Another study in Minas Gerais concluded that public hearings mainly inform the public about decisions that have already been taken, disregarding public participation in the decision-making process (dos Santos et al., 2022). Similarly, in another Brazilian state, a study into the public hearings for a mining project revealed ineffective public participation (Bigolin Neto & Mallett, 2023).

With regards to dam decommissioning works, it is crucial that relevant information be communicated and transmitted in an accessible, transparent and continuously updated manner, which considers the diversity of interests of the various groups and individuals that may be affected. Information on dam decommissioning should encompass information regarding the possible consequences of the works, such as traffic accidents, as well as other related activities, such as the removal of native vegetation, which may also generate negative impacts.

Environmental and social impacts of decommissioning tailings dams: A focus on human displacement

Most dams that required de-characterisation are situated in the area known as the Iron Quadrangle, close to the State capital city, Belo Horizonte. The area hosts several mines, and features a dense population and continuous urban expansion. There are several human settlements downstream from these dams, and about 48,000 people are estimated to benefit from risk reduction as dams are de-characterised (Neri et al., 2021).

Although aiming to reduce risks, works to de-characterise tailings dams can also cause harmful environmental and social impacts, including cumulative impacts, especially when the de-characterisation of several dams located in a relatively small area occurs simultaneously. Neri et al. (2021) identified twenty-eight impacts, including the loss of native vegetation, and deterioration of air and water quality. In this chapter, we focus on displacement and related social and health impacts.

According to the International Principles for Social Impact Assessment, all issues associated with a planned intervention (such as a project) that affect or concern people, directly or indirectly, are social impacts. Thus,

a social impact is considered as something experienced or felt at any level, perceptual (cognitive) or corporeal (bodily, physical), at the level of an individual person, an economic unit (family/household), a social group (circle of friends), a workplace (a company or government agency) or by the community/society in general.

(Vanclay et al., 2015, p. 2)

Social impacts have a complex and multifactorial nature and rarely result from simple cause and effect relationships (Vanclay et al., 2015).

Regardless of the emergency situation of the dam, de-characterisation works caused increase in noise, air, and visual pollution. Public roads deteriorated due to increased truck traffic. In this regard, the impacts also lead to annoyances for the nearby population. Additionally, the execution of the tailings dam failure simulations, as required by law, also constitutes a source of stress with the potential to compromise mental health. In 2019 alone, the Civil Defence Coordination of Minas Gerais recorded approximately 26,000 participants in simulation exercises related to tailings dams (Godinho, n.d.).

The removal of population from self-rescue zones (ZAS) of tailings dams with high risk of failure were implemented by the mining companies backed by government or judicial authorisation, and the support of the Civil Defence forces. In most cases, this process was conducted hastily, and contributed to increasing concerns, fear, and protests among affected people. Involuntary removal or relocation can be a very traumatic experience, compromising the mental health of the affected population. In this regard, even legal authorised removals may negatively impact affected people.

The State of Minas Gerais, Office of the Public Prosecutor (MPMG)– which is a public office with a duty to protect the environment, cultural heritage and human rights – actively followed dam de-characterisation. Documents prepared by the Public Prosecutor, as well as reporting by the local and national press, attested to the occurrence of untimely and unplanned evictions. For example, in the community of São Sebastião das Águas Claras, Municipality of Nova Lima, approximately 200 people had to leave their homes at night after the emergency safety sirens had been activated, without any prior planning or warning (Ramos, 2019). In another community in the Barão de Cocais municipality, around 500 residents were displaced during the early hours of the morning, “in a situation that forced people to leave their homes in panic, carrying with them only the clothes on their backs [...]” (MPMG, 2019). Most such removals are months in duration, usually lasting until the dam is fully de-characterised.

The procedures adopted to carry out these removals, as well as the solutions offered to the displaced population, vary from case to case. Many families were initially housed in hotels and then transferred to rented houses either in their original municipality or in neighbouring towns. In some situations, the company offered private compensation packages to the displaced families. Although the companies offered alternative housing and some assistance to the affected population, observers highlighted the absence of a pre-defined plan for managing the involuntary displacement process and the corresponding relocation. This was also the case for removals considered “temporary” – where there was no expected return date for the people. “Temporary resettlement” can last several years, aggravating the stress levels of affected people. By mid-2021, a total of 1,263 persons had been displaced downstream of six dams, with the largest single displacement affecting 445 people (Neri et al., 2021).

One study of the population removed from their homes due to the collapse of the Fundão tailings dam in Mariana found an increase in the prevalence of stress-related psychiatric disorders, as compared to baseline data described in the literature (Neves et al., 2018). The study also found a prevalence of depression of 28.9 per cent in the group of affected individuals, a percentage five times higher than that described by the World Health Organization in the general population. The results also showed that depression was more than ten times more likely among children and adolescents who were victims of the disaster than the prevalence observed in the general population in this age group. Generalised anxiety disorder was diagnosed in 32 per cent of the target population of the study, post-traumatic stress disorder in 12 per cent, and the risk of suicide was identified in 16.4 per cent of those affected. Experimentation with alcohol and illicit drugs among this population also increased, as did the use of psychotropic medications. Most of the population studied (72.9 per cent) needed to urgently leave the place where they were and 69.3 per cent considered that there was a direct threat to their own life.

Although the discussion of the mental health impacts caused by tailing dams disasters and incidents is still limited, the specialised literature recognises that the loss of a sense of belonging and identity with the place and the rupture of community relationships significantly affects the mental well-being of individuals, increasing stress and psychological suffering (Hines-Martin, 2021). The literature also recognises that environmental changes due to mining activities, such as chronic noise, air and water pollution, as well as the risk of economic and personal damage, are associated with a higher risk of psychological problems. High rates of depression and substances abuse including such alcohol and illicit drugs are found in populations living in open-pit mining areas, particularly coal mining. Barnwell et al. (2020) and Canu et al. (2017) argue that the occurrence of mental disorders in these contexts provides evidence to confirm solastalgia, a form of emotional distress related to undesirable environmental changes in the place of residence or a place to which the individual has a sense of belonging (Albrecht et al., 2007).

Involuntary displacement, whether permanent or temporary, can result in the disruption of social networks and the rupture of ties with the community, as discussed by Neri et al. (2021). Displacement has implications for the way in which individuals recognise themselves as belonging to a particular social group, such as through friendship and neighbourhood ties, and sociocultural identity. Additionally, evacuation results in a loss of income and livelihoods.

There are many uncertainties surrounding a “temporary” or long-term removal situation, which can cause individual and collective stress. Uncertainty can encourage real estate speculation, foster rumours and suspicions about the fate of the evacuated areas, generate tension and conflicts, and can have important implications for the daily lives of displaced families, who may feel insecure in a situation in which there are no clear prospects (Neri et al., 2021). In addition, a “temporary removal” can create a bond of dependence with the companies that make emergency aid payments. The temporary nature of the displacement can also generate insecurity when returning home due to the fear that the risk that motivated the displacement may still exist.

In the cases studied (Neri et al., 2021), there were no specific communication plans for the works to decommission the dams. Such a plan should consider the diversity of the affected and interested public, the structures of local leadership, the level of education of the population, among other factors. Ensuring access to information involves using different methods and tools, such as sectoral meetings with affected communities, meetings with small groups that permit the expression of specific interests and concerns, meetings with community leaders, the press, electronic media or other local media – always using plain language.

Discussion

The top-down communication approach, aligned with the short deadline for decommissioning works and the absence of formal public hearings hindered public participation, especially of affected communities.

Not all cases of de-characterisation required emergency evacuation or short-term displacement of people from the self-rescue zones because the condition of most dams was evaluated as stable. Thus, de-characterisation could proceed while downstream communities maintained their regular activities. Yet, decommissioning works do impact the environment and communities. Moreover, the three-year legal deadline proved to be largely insufficient to complete most works. As the companies filed their projects with the state environmental agency, FEAM (*Fundação Estadual do Meio Ambiente*), it became clear works to stabilise several dams would take much longer. As the dams are very different in size (height and volume of tailings) and other characteristics, the time schedule for completion of works varies accordingly. For some dams, the proposed deadline is 2030.

The lack of community participation observed in de-characterisation projects echoes the approach of the government to dealing with the remediation of environmental impacts and the disruption of livelihoods arising from the tailings dam disasters in Mariana and Brumadinho (Milanez et al., 2021). In the Rio Doce river, affected by the Fundão dam failure in Mariana, several works hastily approved by the government failed to deliver the promised benefits or were challenged due to their own impacts and risks. One example, among several, is the dredging and stacking of tailings in the Candonga reservoir. This hydropower pond was so clogged with tailings from Fundão that energy generation was prevented. Seeking quick solutions, the government approved dredging without an environmental impact assessment or public consultation (Sánchez et al., 2018). This understudied and unassessed action was later proven to increase risks, and was legally challenged and abandoned (Maroun et al., 2021).

Emergency recovery activities usually involve multiple organizations and, given the short timelines, can be conducted with improper planning and without public participation. Consultation in the de-characterisation projects was mainly hampered by the environmental licence exemption for works, even for dams that were in stable condition, and which required long-term work schedules.

A likely reason for exempting de-characterisation of upstream dams from environmental licensing and public participation was to speed up the implementation of risk-reducing actions. Nonetheless, only a small fraction of the dams was assessed to be at high risk of failure. A possible two-tier approach, in which the impacts of decommissioning lower risk dams could have been normally assessed, would have allowed for some public consultation. The consequences of the environmental licensing exemption may be compared to simplified EIA processes that aim at reducing timelines and costs, via reduced procedures and the provision of limited information to stakeholders (Fonseca & Rodrigues, 2017). Enríquez-de-Salamanca (2021) analysed fifty-five simplified processes for different project types worldwide and concluded that 77 per cent reduced or eliminated public participation.

Howard (2018) emphasises that as environmental challenges become more complex and difficult, which is certainly the case with tailings dams, the

importance of public participation grows. However, the lack of legal requirements or legislative clarity on the purpose and form of community engagement, often results in irregular implementation of the participatory process. As a result, consultations end up influenced by subjective values regarding compliance with procedural requirements. The studies conducted by Howard (2018) suggest that community engagement needs to be improved and standardised, with closer integration between best practice standards and legal requirements.

Beyond legal requirements, several governance frameworks, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, are already being implemented by private sector actors, although there are still shortcomings (Maher & Buhmann, 2019). Adherence to such frameworks implies promoting meaningful stakeholder engagement independently of legal obligations. Several guidance documents have been available for years (e.g., International Finance Corporation [IFC], 2007; Kvam, 2017), essentially calling for bottom-up approaches, in which affected groups are actively involved in such initiatives.

The absence of legal requirements is no excuse for companies to not engage with rights-holders. The current literature on natural hazards and human-made emergencies indicates that sharing information can increase public engagement, and provides consistent evidence that communication approaches that treat the public as active participants in the response effort are most effective. These studies suggest that when the public perceives that information is being withheld, they are likely to experience anxiety and distress (Hinata, 2024).

Recent strengthening of legislation, most notably by the passing of Minas Gerais state (2021) and national (2023) legislation establishing the rights of people affected by dams, is noteworthy. However, de-characterisation of upstream dams in Minas Gerais is guided by the 2019 law, that does not require public participation or disclosure of information regarding de-characterisation works. This law requires the disclosure of emergency plans, and, for the environmental licensing process, public hearings and open-access to environmental studies – yet these conditions were not triggered due to the exemption of de-characterisation from licensing.

In order to mitigate those shortcomings of the law, the Office of the Public Prosecutor has collected and made publicly available the environmental studies and de-characterisation projects, since February 2024 (MPMG, 2024a). Moreover, in at least one case, a judge ruled that a mining company should compensate citizens for “insufficiency and inadequacy of information provided to the general public” (MPMG, 2024b). Indemnification of affected people was also agreed in an out-of-court settlement with one large mining company due to the evacuation of two self-rescue zones downstream of dams, and for “social, economic and environmental impacts” of de-characterisation works (MPMG, 2024c). Hence, these measures aim to repair the lack of consultation of rights-holders about social impacts.

Beyond de-characterisation, the recent legislation has been applied to planning resettlement of communities in the self-rescue zone of other dams, built under different construction methods (i.e., not upstream raising, but downstream, centreline or dams that are directly built to their final height). Those dams are required to be decommissioned only by closure. At the time of writing, one mining company, downstream communities, the Office of the Public Prosecutor and other parties reached an agreement to resettle about 400 families in the self-rescue zone of an iron ore tailings dam in the locality of Conceição do Mato Dentro (Conexão Mineral, 2024). The negotiation process required 120 meetings, setting up a 40-member resettlement committee and the support of independent advisors (MPMG, 2024d).

Conclusions

De-characterisation of upstream mine tailings dams became mandatory in Brazil after the disaster in Brumadinho. Due to short deadlines, environmental licensing was exempted and public hearings were not conducted. However, such hearings are the only opportunities guaranteed in the legislation for public participation prior to the approval of any project capable of causing environmental impacts. Therefore, rights-holders were not consulted and had little access to information about how they could be affected by decommissioning works. In the absence of mandatory consultation, companies did not engage with communities, and largely limited their actions to communication, even in the cases of dams where decommissioning works were scheduled to take several years.

To improve the consultation of rights-holders in de-characterisation projects, mining companies could have adopted well-known procedures for community engagement: to inform affected communities about the project; respond to requests for information and explanation; and to receive complaints or suggestions. Documents about the decommissioning projects, environmental studies and resettlement plans should be disclosed, in addition to making summaries available, written in plain-language. Rights-holders should have access to a complaints mechanism to facilitate communication with the companies. Guidance for companies were readily available, but were not used by the companies required to de-characterise their tailings dams.

Recent legislation recognised and legitimised the rights of people affected by all kinds of dams. Enforcement represents a challenge for all parties involved, but a recent agreement in one case – specifically a mine tailings dam – suggests that rights can be respected.

Consultation can and should be conducted even for projects with short deadlines and emergency actions. However, experience with decommissioning tailings dams in Minas Gerais suggests that companies will not act voluntarily to engage with and to consult rights-holders, preferring a top-down approach. Legislation and means for enforcement are strictly necessary to ensure proper consultation. These lessons are applicable to other projects with

short deadlines, simplified environmental licensing, or emergency action due to climate-related disasters. Public consultation should be enforced by the government to ensure that rights are respected. Future work could consider rights-holders' point of view about the roles of consultation in emergency situations.

Acknowledgements

This contribution is partly based on the Neri et al. (2021) report. All authors participated in that study, which was commissioned by the Office of Public Prosecutor of the State of Minas Gerais and supervised by the last author. We thank Dr. Andressa Lanchotti for commissioning the study on cumulative environmental and social impacts of de-characterisation or upstream tailings dams and Dr. Ana Claudia Neri for coordinating and managing that study.

Note

- 1 To progressively increase the capacity of a tailings dam, dykes are constructed above and behind (upstream to) the initial embankment. A dam can be raised with successive dykes built aligned to the dam axis (known as the centreline), downstream or upstream. The latter method is usually cheaper, but is the least safe, as previously deposited tailings do not provide a sufficiently stable foundations for the additional load.

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11 Stakeholder engagement and company-community relations in Ghana

Consultation practices, legal pluralism, and discontents

Phil Faanu and Nathan Andrews

Introduction

Ghana has long been recognised for its vast mineral resources, particularly gold, diamonds, bauxite, and lithium, which have been recently discovered. The mining sector has played a significant role in the country's economic development, contributing substantially to its gross domestic product and employment (Amponsah-Tawiah & Dartey-Baah, 2011; Ayee et al., 2011; Hilson & Hilson, 2017). Though the gold mining industry is cited as the backbone of Ghana's mineral sector (Usman Kaku et al., 2021), the industry is perceived negatively by host communities, with concerns about its limited public engagement, revenue contributions, employment generation, skills development, and localised economic benefits. Ayee et al. (2011) demonstrated how the Ghanaian public is skeptical about the positive contribution of mining to national development and further raised concerns about the growing negative implications of the sector. Notwithstanding the skepticism, research also shows that the mining sector in Ghana is not an isolated enclave, but it is deeply integrated into the country's economy through various backward economic linkages (Bloch & Owusu, 2012; Hilson et al., 2024; Hilson & Hilson, 2017).

However, the practicality and sustainability of the sector's backward linkages depend on the participation of local communities in stakeholder consultation to boost economic diversification. Evidence from recent data we have collected indicates that host communities are concerned with the scope and content of consultation in Ghana's mineral industry. Stakeholder consultation conventionally focuses on prominent personalities in mining communities (e.g., chiefs, queen mothers, landowners, local government authorities, and government regulatory bodies) without the involvement of "ordinary" community members whose daily lives intersect with the activities of extractive companies.

Yet, stakeholder consultation and meaningful engagement with those who may affect or be affected by a mining project are considered to be essential for ensuring project success (Freeman, 1984). For instance, stakeholder engagement in the extractive industry has become a crucial aspect of corporate social responsibility (CSR) initiatives to avoid any negative spillover, such as tension or

DOI: 10.4324/9781003488507-15

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contestation between mining companies and communities in developing countries (Ansu-Mensah et al., 2021; Mutti et al., 2012; Osei-Kojo & Andrews, 2016). Meaningful community consultation in the mineral sector is expected to drive broader economic development through agreed-upon resettlement packages, skills training for alternative livelihoods, technology transfer, and the creation of ancillary industries (Blesia, 2021). It is also regarded as a critical tool for ensuring the realisation of the UN sustainable development goals (see Eweje et al., 2021; Nonet et al., 2022). In Ghana, the need for effective engagement between companies and local communities has been a recurring theme in academic and policy discussions. This chapter examines the current state of stakeholder consultation and company-community relations in Ghana's mining sector, highlighting best practices, legal complexities, and the underlying discontents that continue to shape these complex interactions.

Arguments in the chapter are supported by the perspectives of host community members on stakeholder engagement in select mining communities in Ghana. A total of 46 interviews and four focus group discussions (FGDs) were conducted from July–December 2024 in the catchment communities of Golden Star Resources Wassa (GSR) in the Western Region and Perseus Mines (PM) in the Central Region. We also interviewed officials from relevant state regulatory agencies, institutions and mining companies. Given the length of this chapter, only a few summative insights are drawn from the primary data to capture a rather varied set of experiences and perspectives from various host mining communities.

The rest of the chapter proceeds with a brief discussion of the theoretical underpinnings of stakeholder consultation, followed by some insights into the practice of stakeholder consultation in Ghana's mining industry. This discussion leads us to examine the legal conundrums and community grievances involved in company-community relations. The conclusion provides reflections and suggestions for future scholarly and policy work.

Stakeholder consultation theoretical foundations

Stakeholder consultation as a framework is a critical component of effective decision-making, policy implementation, and business conduct. At the core of stakeholder consultation is the recognition that organisations, governments, and policymakers do not operate in a vacuum but rather are embedded within a complex network of individuals and entities with a vested interest in the outcomes of their actions (Andriof & Waddock, 2017; Buhmann et al., 2024). In his seminal work, Edward Freeman defined stakeholders as groups or individuals who affect or are affected by the activities of a business or organisation (Freeman & Reed, 1983; Freeman, 1984). Along the lines of this widely used definition, stakeholder theory emphasises the importance of identifying and engaging with all relevant stakeholders, including those who may not be directly affiliated with an organisation, its activities or policy (Jeffery, 2009). This expanded view of stakeholders goes beyond just

shareholders or direct clients and acknowledges the interconnectedness of modern society and the need to consider a wide range of perspectives and interests. Therefore, policy-making and business operations must recognise diverse perspectives and interests to ensure meaningful engagement.

Mercer-Mapstone et al. (2018) describe consultation as a two-way dialogue between a company and its stakeholders, both primary (people directly affected) and secondary (people indirectly associated) (see also Freeman et al., 2010). Effective consultation involves constructive, long-term negotiation with stakeholders, enabling companies to build their social licence to operate (Heffron et al., 2021). Besides the need to mobilise social licence, global governance frameworks mandate corporate activities to follow some best practices in engaging local communities in the conduct of their businesses. The UN Declaration on the Rights of Indigenous Peoples, UN Global Compact, and UN Guiding Principles on Business and Human Rights are examples of global norms that provide some standards of expected behaviour in business conduct for societies to flourish. The theoretical proposition of stakeholder consultation as normative, descriptive and instrumental principles provides a comprehensive framework for understanding how stakeholders can influence and be influenced by organisational and policy decisions (Phillips et al., 2019). The normative dimension posits that stakeholders have inherent moral worth and that their interests should be considered on ethical grounds. The instrumental dimension highlights the practical benefits of stakeholder engagement, such as improved decision-making, increased legitimacy, and enhanced organisational performance. The descriptive dimension examines how organisations and policymakers relate to their stakeholders.

Building on these theoretical foundations, the stakeholder perspective on multilevel governance, as discussed by Schmid and colleagues, emphasises the importance of considering stakeholders through consultation at multiple levels of mining decision-making from the local to the international (Schmid et al., 2015). This recognises the complex, interconnected nature of societal challenges and the need for coordinated, multi-stakeholder approaches. Also, through broad and meaningful consultation, a comprehensive assessment of stakeholder interests, power, and relationships is established to enable policy-makers and mining companies to strategically navigate the stakeholder landscape and develop more inclusive and effective solutions to mining spillovers (Whiteman & Mamen, 2002). Ultimately, the theoretical underpinnings of stakeholder consultation highlight the importance of adopting a holistic, inclusive, and ethical approach to decision-making and policy implementation (Jeffery, 2009). We rely specifically on Harrison et al.'s (2019) normative dimension to underscore the argument that community stakeholders in Ghana's mining industry should be regarded as having an inherent moral worth, which should require companies to listen to and engage with them in ways that can be regarded as meaningful by the local beneficiaries of such engagement processes. Our chapter contributes to recent scholarship that has

examined the complexities of company-community consultation in Ghana (Andrews & Essah, 2020; Ansu-Mensah et al., 2021; Dauda, 2024).

Ghana's mineral industry and the practice of stakeholder consultation

In Ghana's mineral industry, our experience and observation from the communities reveal a stark deviation from the theoretical ideals of stakeholder consultation. In practice, stakeholder consultation or engagement presents a different story, from the time/point investors engage with state authorities at the national level to the community level. Figure 11.1 seeks to capture the broader ecosystem of stakeholder consultation in the mining industry. The government of Ghana and companies alike recognise the economic significance of social licence in mining and have established some regulatory and legislative frameworks to ensure communities are engaged and informed of the mining operations in their localities. The Legislative

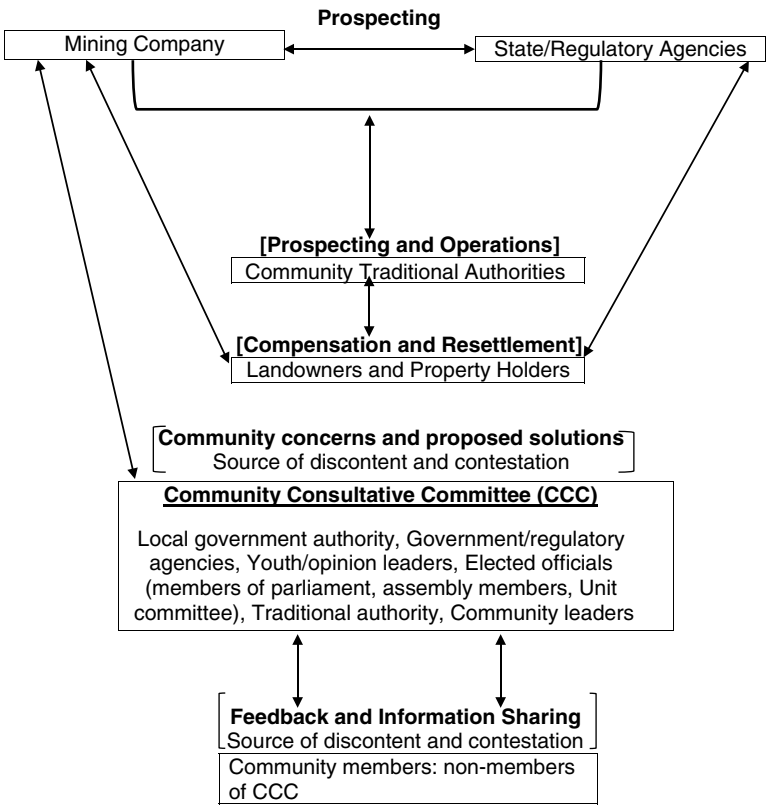


Figure 11.1 The ecosystem of stakeholder consultation in Ghana's mining sector
Source: Authors' configuration.

Instrument (LI) 2431 – Local Content and Local Participation – seeks to promote local involvement in the industry’s activities. Nonetheless, there is some consensus among civil society organisations (CSOs), local community members and even scholars that meaningful consultation is lacking in the industry’s activities as this LI has no explicit requirement for local stakeholder consultation.

Nonetheless, the 1992 Constitution, the Minerals and Mining Act 703, 2006 and amended versions, and the Minerals Commission Act 1993 (Act 450) make provisions for due diligence in stakeholder consultation, which are hardly adhered to by decision-makers. A study conducted by the Human Rights Clinic at the University of Texas (2010) demonstrates how community members in Tarkwa do not feel adequately consulted and that the government and companies are unwilling to engage in dialogue. It is interesting how these sentiments have not changed in about 15 years since this study was made public. Moffat et al. (2016) assert that even when community members are involved in the consultation process, it is characterised by mismatched expectations of stakeholders. Our study resonates with earlier research that found local communities felt marginalised in what they perceived to be a pre-determined consultation trajectory defined together by the state government and mining companies (Andrews, 2019, 2021; Cheney et al., 2001; Moffat et al., 2016). Community members insinuated that companies and communities had distinctly different worldviews and priorities with regard to stakeholder consultation.

As illustrated in Figure 11.1, consultation is usually done at the top level, with investors/companies meeting with the government and respective agencies to discuss their interests before prospecting and exploration. As noted above, existing mining laws in Ghana mandate local or grassroots consultation in mineral extraction but due to institutional and regulatory loopholes and expediency, consultation processes are often top-down – sometimes even remaining solely at the top level. Hira and Busumtwi-Sam (2018) posit that consultation is sometimes at the discretion of government officials and investors, which contravenes established laws. Even when consultation occurs at the local level, it appears emphasis is placed on traditional authority, land-owners and property holders within the jurisdiction whose lands are affected. The consultation with the customary authorities highlights their importance as those who tend to have more community-level landowner and property rights in the mineral industry, given that they are traditionally regarded as custodians of about 80 per cent of the land (see Adjei-Poku et al., 2023).

The pluralistic land tenure system within which consultation with host mining communities occurs in Ghana is a relevant context for the rest of the processes described in Figure 11.1. After all the established rituals of engagement and consultation are done without the participation of the ordinary people and affected farmers (usually leaseholders) on the land, a team of experts is constituted to conduct an environmental impact assessment. Also, a committee is formed to evaluate the land and properties on the affected land for resettlement and compensation as mandated by LI 2175 – Resettlement

and Compensation. It is important to note that compensation for the land is often paid to the landowners, not the leaseholder farmer. Leaseholder farmers with properties such as building structures and crops are valued and compensated for and resettled elsewhere, often without consultation on where they want to be relocated and the type of building or house they wish to live in. A female FGD participant in the Ayanfuri Newsite resettlement community said that

at our old place, the farmlands were near us, but here, they are far. We don't also have water. At our old place, there was a borehole that served us, but here, they mechanised a borehole, and the cost of the light bill is high for us...they promised us to help pay but relented.

(Fieldwork notes, October 2024)

This is just a brief example of the challenges residents in resettled communities face due to the lack of proper consultation.

Also, in the PM and GSR catchment communities, it was reported that during a high-level consultation, mining companies, traditional authorities and some key community opinion leaders signed a memorandum of understanding or benefit agreements without broader community consultation. It was only when GSR and PM started operations that they established a Community Consultative Committee (CCC) to continuously engage with ordinary community members as part of efforts to sustain their social licence to operate. The CCC meeting, which occurs every quarter of the year, is a source of discontent and contestation among members, always engineered by the inattentive nature of the mining companies to address some of the concerns raised by local people. For instance, the last meeting between the PM and community members on mining operations and the negative impacts on affected communities generated a heated argument between local people and the mining company because the company failed to address cracks on community buildings due to blasting from the mines (fieldwork notes, October 2024). From the meeting, we observed that PM has been unresponsive to this problem since it was reported in the first quarter meeting of 2021.

Consistent with Walsh et al. (2017), our study found that many mining projects have been developed without adequate consideration of the needs and concerns of the affected communities, leading to a range of negative social, environmental, and economic impacts. For example, although the law makes provisions for fair, adequate and prompt compensation payment, a lack of broader consultation hinders the process. The high-level engagement and consultation in the sector do not address these challenges and breed confrontation as the people directly impacted by the mining operations are excluded from key decision-making platforms. Barnieh and Ofori (2016) established that broader and inclusive stakeholder consultation prevents confrontation between mining firms and the community, and similarly, our interview with CSOs revealed a need for effective consultation with mining

communities before issuing licences to mining companies to overcome any form of confrontations and challenges. Such engagement, according to an officer of the Natural Resource Governance Institute (NRGI), will ensure fair compensation to members of host communities, maintain a social licence as well as reduce the number of social conflicts that usually occur in mining communities (interview, Accra, August 2024). This kind of consultation is best described as consultation for material benefits, and companies seem to be embracing this perspective as part of the so-called “enlightened self-interest” approach that underscores the business case for CSR (see Cragg, 2012; Han, 2023).

Legal pluralism and company-community relations in Ghana

Ghana’s mineral industry has long been a source of tension and conflict between mining companies and local communities (Hilson & Yakovleva, 2007; Okoh, 2014). This creates governance and management challenges even though there are laws and regulatory frameworks such as LI 2431, LI 2175, the Minerals Development Fund (MDF) Act 912, 2016, and the Mining and Minerals Amendment Act 900 (2015) that govern the industry. These laws and frameworks are expected to address tensions and related concerns and ensure sustainable mineral development and company-community relationships. Nonetheless, the industry still faces problems that undermine corporate-community relations and meaningful engagement. One of the main causes of these complex challenges is the legal pluralism that underpins Ghana’s land tenure system.

Land administration in Ghana is marked by a dualism between customary and statutory systems of tenure, contributing to the legal enigmas in the mining industry. Customary lands are under the stewardship of chiefs, family heads, and landlords, and about 80 per cent of lands are under customary ownership, with the remaining 20 per cent under state control through compulsory acquisition (Adjei-Poku et al., 2023; Anaafo et al., 2023). However, certain legislations – the 1992 Constitution, the Mining and Minerals Act, 2006, amended in 2010 and 2015 (Act 703) and the State Lands Act, 1962 (Act 123) – empower the government to acquire land in its entirety for the public interest. According to Act 703 and the Constitution of Ghana, the title or ownership of all minerals in their natural state is vested in the President of Ghana on behalf of the populace. As such, when an investor discovers any mineral deposit in any land within the country, the president has the legitimate right to ownership after due process of compensation to the customary landowner. Article 20(a) of the 1992 Constitution provides compulsory land acquisition for public interest subject to fair and adequate compensation. Typically, landowners lease land to farmers for farming and other agricultural purposes. But when the State acquires such lands for a public interest project, such as mining, compensation benefits go to the landowner except for the evaluated and valued crops and properties, which go to the farmer (if so owned). The complex network of regulatory frameworks and land tenure

systems creates room for misunderstanding, animosity, and a general discontentment around how land access and ownership is determined or enforced (see Andrews, 2016).

Legal pluralism has implications for transparency and accountability in terms of who gets access to mineral benefits and royalties and how these benefits are used for the betterment of affected communities – concerns that contribute to strained company-community relations. An interview with an assembly member of the Akyempim electoral area iterates how the youth accuse traditional authorities of colluding with mining companies and the government in the use of mineral benefits and royalties (interview, August 2024). For instance, the Minerals Development Fund (MDF) is meant to aid development in mining areas by providing the needed resources. Notwithstanding, this initiative has largely failed to ensure that mining communities benefit sufficiently from the revenues generated because of mismanagement and corrupt practices (Dashwood et al., 2022). The MDF Act 912, 2016 stipulates that 20 per cent of royalty received by the Ghana Revenue Authority on behalf of the state from holders of mine leases concerning the mining operations of the holders must be paid into this fund for mining community development. The Act further dictates that mining community development schemes should be designed and implemented in each mining community. Yet, our interviews reveal mismanagement of the MDF, which undermines the developmental benefits mining communities are expected to receive from resource extraction. As one respondent revealed,

most of the development we see in our community is from PM [the company] corporate social responsibility. I can't point to any development project in my community [funded] by the MDF since it was established. MDF authorities mismanage our money, and we don't benefit from it.

(Interview, Ayanfuri, October 2024)

This noted neglect of mining communities and the resultant reliance on corporate benevolence and monetary handouts has led to persistent development challenges with direct ramifications for the sustainable livelihoods of community members.

Similarly, LI 2175 outlines compensation and resettlement procedures before mine-site development and how to ensure the livelihood sustenance of the resettled communities. But, as alluded to above, our study revealed a plethora of post-resettlement problems. Opoku et al. (2024) uncovered some of these resettlement and compensation challenges in New Atuabo, Tarkwa-Banso new site, and New Mankessim, citing that individuals affected by mining-induced resettlement experienced a decline in psychosocial well-being. The applicability of LI 2175 and its requirements to the latter is a problem, exposing community members to livelihood challenges. As part of the resettlement requirements, the LI 2175 mandates the holder of the mine lease to

prepare a plan for the overall development of the resettlement area which shall include the measures, policies and strategies to guide the future development of the area; and prepare a strategic action plan which outlines specific projects and programs with action plans, guidelines and institutional arrangements for execution.

However, in practice, resettled communities are mostly provided with only building structures with limited basic amenities. This is partly because residents are not consulted on the architectural designs of the houses they would have to live in. Some families interviewed in Akosombo and Akyempim lamented how the mining company and some government officials just called them to meet up at a spot to select a building design from a sample to be built for them. One family head narrated:

I have a family of five members: my wife, two young girls and a son who had his own room and was preparing to get married and we were living in a three-bedroom house. But we were only provided with a two-bedroom house, posing a great challenge to my family. The architectural design did not consider my family size, conditions and preferences.

(Interview, September 2024)

Furthermore, the law governing compensation and resettlement provides for continuing support for these resettled communities through strategic programmes and plans but our fieldwork data revealed a peculiar picture of these communities, embroiled in inadequate sources of drinking water and no lands for farming since they lost their lands to mining and have no land rights at the new location (interviews, July–October 2024).

A core aspect of the complexities involved in company-community relations is the loopholes created because of the legal pluralism around land tenure as well as the ineffective implementation of requisite legislation (see Andrews, 2016). Such loopholes allow a certain level of permissiveness for mining companies to maintain control over processes and outcomes of stakeholder consultation, if it does occur at all.

Discontents and grievances: Evidence from communities

Ghana's mining industry has long been a subject of scrutiny, with communities in close proximity to mining operations voicing persistent concerns over the cracks on buildings created by blasting as well as noise pollution, dust, environmental damage and social impacts of these extractive activities (Aboagye, 2014; Amegbey et al., 2012). Awuah et al. (2024) recently found that vibration, frequency, and overpressure values from mine blasts in Ntotroso and Gyedu communities where Newmont Ahafo Mines (NAM) operates were above the EPA reference limits of < 88dB, 20 Hz and 2.0 mm/s. Yet, relevant stakeholders overlook the significant effects of blasting – loud noise

pollution – on animals in their natural habitat near the mining site (Usman Kaku et al., 2021). By law, in Ghana, there is a prescribed safe distance (buffer zone) of 500m from the blast zone to residential areas (Dumakor-Dupey et al., 2021). However, in practice, we observed that mining sites are located as close as 200 meters to residential buildings, exposing residents in these areas to life-threatening impacts and other health-related hazards emanating from these mining operations. In this section, we briefly highlight some of the grievances and discontents of community members vis-à-vis large-scale mining operations, which are fuelled by the lack of meaningful consultation.

First, there is an apparent neglect of the buffer zone of 500m for blasting and mining. We observed that in PM and GSR catchment communities, mining pits were about 200–300m away from residential structures. For instance, we observed an abandoned pit estimated to be 30–35 meters deep, located about 300 meters from the old chief palace and 200 meters from a church building. The pit has been left unreclaimed, and the Ayanfuri chief further revealed in an interview that PM plans to re-prospect it for further extraction (interview, October 2024). The chief decried how the PM failed to follow the law by exploring minerals close to his old palace, where some of his family members still live. There appears to be deliberate non-adherence to safety regulations because of weak monitoring structures from the Ghana Minerals Commission and the Environmental Protection Agency (EPA). The EPA director of the Dunkwa-on-Offin Municipality, where PM operates, expressed frustration over the agency's limited ability to enforce some regulatory policies and laws because of inadequate resources for monitoring and the effort of powerful hands from above at the national level – to undermine their work (interview, October 2024). The officer acknowledged that mining companies are aware of the 500m safety zone policy on blasting but do not adhere to it, creating unresolved disagreement between them and community members.

A second example of discontent arises from environmental and property damage. The residents of Ayanfuri, Abenabena, Kubekro, Accra Town and Akyempim face severe environmental pollution and damage caused by mining operations. The issue of cracked buildings due to mine blasting generated heated arguments during the 2024 third-quarter meeting of the Ayanfuri CCC, which coincided with our fieldwork visit. At the meeting, community members recounted the genesis of the issue when it was first reported to PM in 2021, but no lasting solution has been found except the regular patchwork on buildings. Our interaction with one of the mining officials at the meeting revealed that some of the cracks were engineering defects but not from the blasting. Yet, we observed that the situation has been exacerbated by the improper implementation of environmental impact assessment studies and ineffective mitigation measures employed by mining companies to address community concerns. At the end of the CCC meeting, the PM agreed to invest in a more sustainable methodology for blasting to reduce the impact on communities. However, given the history of not following such regulations, it is uncertain that such concerns would be resolved in a manner that satisfies community members.

Third, the distribution of benefits and compensation has also been a source of discontent and grievance among community members and between community members and mining companies. According to some study participants, benefits from mineral exploration for community development prioritise traditional authorities' (chiefs and elders) interests, who often use their discretion on how these benefits are further distributed (fieldwork notes, October 2024). It is important to note that some participants hesitated in responding to questions concerning benefits distribution for fear of being reported to the Chief or Queen mother, which reveals a strained relationship between community members and traditional authorities around the management of agreed-upon benefits to the community (interviews in Ayanfuri and Akyempim, September 2024). As such, the commonality among participants in GSR and PM catchment areas on benefits distribution is that it is characterised by elitism and favouritism, which leads to tension among community members on the one hand and between the mining company and local authorities on the other. Here, we see legal pluralism playing a role in muddying our understanding of the scope of responsibility that various authorities have regarding the adjudication of mining benefits.

Finally, in both PM and GSR catchment communities, the negotiation process for compensation packages lacked inclusive and broader consultation, resulting in inadequate compensation. Leaseholder farmers who were hard hit by resettlement and compensation processes were excluded from the consultation process that preceded resettlement. This category of stakeholders was brought into the chain of engagement at the final stages after decisions were made to inform them of the plan to resettle them. This consultation practice not only creates discontent among affected community members but contravenes best practices enshrined in global governance frameworks and companies' own rhetoric of "doing good" and creating shared value. But here too, we can attribute the laxity in following acceptable procedures to the permissive environment that allows companies to determine their own spheres of responsibility and accountability (see Andrews, 2019). The discontents and grievances raised in this section serve as a basis for strained company-community relations, which become multiplied when efforts aimed at listening to and addressing the concerns of affected communities are not undertaken in a meaningful manner.

Concluding reflections

In this chapter, we have evaluated the regimes and practices of consultation in Ghana's mining industry with an emphasis on the perspectives of community stakeholders who are typically expected to be beneficiaries of such endeavours. The discussion focused on national government legislation and how the lack of effective implementation of key policies permits companies to undertake processes that they themselves define and regulate. In other words, consultation occurs as part of companies' quest for social licence to operate, but

the approaches and outcomes are not often aligned with community expectations or priorities. While this consultation practice does not align with global principles around meaningful stakeholder engagement, certain contextual issues reveal more nuance. Within this context, where local custodians and elites are also maximising their benefits at the expense of the broader community, consultation fails to address the endemic issues that have sustained community discontent and grievance over time. As a result, the normative dimension of stakeholder engagement (i.e., valuing the inherent moral worth of stakeholders and their interests) is not upheld, although the instrumental dimension – which focuses on the practical benefits of stakeholder engagement, such as improved decision-making, increased legitimacy, and enhanced organisational performance – may still be what motivates companies to advance various CSR projects or even maintain their quarterly consultation meetings at the community level.

To improve the current state of consultation and community engagement, there is a need to strengthen the legal framework around compensation and land rights. As discussed in this chapter, these two areas have remained contentious in many mining communities due to the ambiguity surrounding how much is to be paid for the loss of land, whether any amount will be enough for communities relying on land for sustenance, who benefits from such payments, and the extent to which displaced farmers and other community members receive adequate alternative livelihood options, among other related concerns. Enhancing legislative mechanisms that can effectively govern these issues and provide redress for impacted community members will make a difference in resolving some of the current concerns and protecting the rights of host communities. This would also require a level of transparency and accountability that necessitates both companies and the government to take the monitoring and mitigation of social and environmental impacts seriously. For instance, this implies that impact assessments need to be undertaken in a manner that centres the perspectives and experiences of impacted communities, which would require an equal focus on the social alongside the environmental. Ultimately, making communities see or feel that their experiences and perspectives matter has some potential of enhancing company-community relations in general and improving consultation outcomes for the diverse range of stakeholders involved.

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12 Impact assessment and responsible business guidance tools in the extractive sector

Implications for engagement in Canada

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Introduction

Over the last few decades, international norms have emerged to guide responsible business conduct. The 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) represent a milestone in the development of such standards (OHCHR, 2011). The UNGPs draw upon existing sources of international human rights law to elaborate upon the duty of states to protect against the adverse impacts of business conduct through regulation and policy (Pillar I), the independent responsibility of business to respect human rights through the use of due diligence (Pillar II), and the provision of judicial and non-judicial remedies through state and non-state mechanisms (Pillar III). Since the adoption of the UNGPs in 2011, the understanding that business enterprises are duty bearers with a responsibility to respect human rights above and beyond compliance with domestic law has become widely accepted, with a corresponding proliferation of a wide range of “Responsible Business Conduct” (RBC) tools intended to assist businesses in fulfilling this responsibility.

Businesses are nevertheless still expected to comply with domestic impact assessment (IA) regimes before their extractive projects are authorised. Despite the theoretical and practical connections between domestic IA law and RBC tools, their interrelationship is understudied (Majekolagbe, Seck & Simons, 2021). IA and RBC tools both involve planning and decision-making processes used to assess the environmental, social, and economic effects of extractive projects. The primary difference is that IA is a legally mandated, state-driven exercise, whereas RBC due diligence, in most states, is a proponent (i.e., business)-driven exercise. This chapter asks whether environmental human rights-respecting RBC tools ought to be integrated into domestic IA law and practice as a means of producing more sustainable and equitable outcomes, enabling states and businesses to better fulfil their respective duties and responsibilities under international law in engagement processes.

DOI: 10.4324/9781003488507-16

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Part I surveys the international norms which ground state duties and business responsibilities to uphold environmental human rights. Part II explains the similarities and differences between RBC tools and domestic IA law, with a particular focus on the Canadian context. Canada provides an apt case study, as its IA regime underwent reforms in 2019 which broadened the consideration of impacts beyond ecological factors to include human rights-related considerations. Part III provides examples of how RBC tools can enhance Canadian IA law and practice in the areas of stakeholder engagement, gender and intersectionality, Indigenous rights, and sustainability, followed by an assessment of the risks and limitations of our suggested approach. We conclude with key recommendations for an environmental human rights-centric IA practice.

Part I: Environmental and human rights due diligence

The UNGPs re-frame the risks and impacts of business activities through a human rights lens. Domestic IA laws, including the Canadian IA regime, tend to focus on environmental, social, and economic effects, without explicit reference to human rights (United Nations Environment Programme [UNEP], 2018). As noted by the UNGPs,

[w]hile processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.

(OHCHR, 2011, p. 20)

Pillar II of the UNGPs more broadly establishes the expectation that businesses will undertake “Human Rights Due Diligence” (HRDD). HRDD is central to both the fulfilment of the state’s international human rights law obligation to protect human rights – pursuant to which states are legally obliged to take legislative, administrative and other measures to prevent private actors from violating human rights – and the independent responsibility of businesses to respect human rights. It includes four general components: (1) identifying and assessing actual or potential adverse human rights impacts that a business may cause, contribute to, or be directly linked to; (2) taking measures to prevent, mitigate or remedy adverse human rights impacts; (3) tracking the effectiveness of measures; and (4) communicating with rights-holders about how impacts are being addressed (OHCHR, 2022a).

In July 2022, the United Nations General Assembly (UNGA) recognised the right to a safe, clean, healthy, and sustainable environment, adding this fundamental human right to the “library” of internationally recognised rights (The human right to a clean, healthy and sustainable environment, 2022). The recognition of this right underscores the importance of governments and

businesses integrating environmental human rights considerations into their HRDD processes. While a positivist approach to legal analysis treats UNGA resolutions as non-binding sources of international law, the normative weight of such resolutions must be understood in light of the extent to which the content of the resolution reflects other binding sources of international law, state practice, and the views of non-state rights holders. At a minimum, existing state practice would establish this right as an emerging norm of customary international law (Seck, 2019, p. 169). The right involves both substantive and procedural components: substantively, the right guarantees access to clean air, a safe climate, clean water, healthy ecosystems and biodiversity, healthy food, and non-toxic places; procedurally, the right involves requirements for prior assessment, freedom of expression and association, public participation, access to information and science, and access to remedy (OHCHR, 2022b). Non-discrimination and attention to vulnerability cuts across both substance and procedure, so that the voices and needs of individuals and groups that are disproportionately and differentially affected by environmental harms are centred in decision-making (UNGA, 2018, p. 7). Together, these substantive, procedural and non-discrimination guarantees constitute an “environmental human rights approach” (Seck, 2023a).

The UNGA resolution recognising the right to a clean, healthy and sustainable environment explicitly recalls the UNGPs’ business responsibility to respect human rights, and also takes note of the 2018 UN Framework Principles on Human Rights and the Environment (“the Framework Principles”). The Framework Principles confirm that the state duty to protect human rights from harmful non-state actor conduct requires the prior assessment of environmental impacts of industrial projects, including their potential effects on the enjoyment of human rights (UNGA, 2018, p. 8). They also reiterate the UNGPs’ recommendation that businesses implement HRDD processes to fulfil their responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm (Knox, 2020, 22 & 35; UNGA, 2018, 22, & 35).

Despite these burgeoning international norms, Canada’s IA legislation, the *Impact Assessment Act* (IAA), 2019 does not explicitly reference human rights as factors to be considered when evaluating the impacts of a project (IAA, 2019). Yet as will be explored in the next part, an environmental human rights-based framing of the responsibilities of businesses and the duties of governments could help promote more sustainable and equitable outcomes including through better engagement and consultation practices that foreground rights holders.

Part II: The interrelationship between RBC and IA

At the most basic level, RBC tools and IA law are both about due diligence; that is, the process of identifying, preventing, mitigating and accounting for the adverse impacts of business activities (OHCHR, 2011, pp. 17–18). Although both IA and RBC guidance generally share the same goal of

addressing harm to people and the environment, the two are conceptually distinct. Domestic IA law provides rules and decision-making procedures in relation to assessing the *anticipated* risks and impacts of proposed business activities and seeks to evaluate whether these anticipated risks and impacts are within the public interest. RBC tools, on the other hand, contain norms intended to guide corporate decision-making processes throughout the project lifecycle in relation to their potential and *actual* impacts, and the prevention, mitigation and remedial measures designed to respond to these impacts. The following sections provide an overview of RBC tools and IA law within the Canadian context.

Responsible business conduct tools

RBC norms are encoded in diverse guidelines and standards which are designed to ensure businesses avoid and address adverse impacts caused or contributed to by their activities. Although often described as voluntary, RBC tools are better understood as legally relevant given their potential to contribute to defining social expectations of reasonable care in legal actions, including HRDD (*Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, 2021; *Choc v Hudbay Minerals Inc.*, 2013). There is often a perception within Canada that RBC tools are only relevant to companies when operating outside of Canada, with the implicit assumption being that Canada's domestic laws are sufficiently robust to safeguard against environmental and human rights abuses. However, this is clearly not the case given domestic extractive industry operations and their impacts on Indigenous Peoples, including gendered impacts (Seck & Simons, 2021; Pictou & Seck, 2025).

In 2021, Global Affairs Canada released a new five-year strategy entitled *Responsible Business Conduct Abroad; Canada's Strategy for the Future (RBC Abroad)* (Global Affairs Canada [GAC], 2021). *RBC Abroad* is focused on the activities of Canadian companies operating internationally, yet the opening message from the Minister clearly states: "Our government expects and encourages Canadian companies operating at home and abroad to meet high standards for responsible business conduct" (p. 1). In addition to the UNGPs, the Strategy references the OECD (Organisation for Economic Cooperation and Development) Guidelines for Multinational Enterprises, the importance of respect for Indigenous rights and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), as well as Canada's commitment to Gender-Based Analysis Plus (GBA+) (Women and Gender Equality Canada, 2022), and Global Affairs Canada's Voices at Risk Guidelines on Supporting Human Rights Defenders (GAC, 2019).

In 2023, the OECD Guidelines underwent a targeted update and were renamed the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD, 2023). Extensive changes were made to the environment chapter to clarify its application to diverse environmental challenges (p. 33), while the human rights chapter was updated to clearly address

challenges facing Indigenous Peoples, human rights defenders and other marginalised groups (p. 26). The human rights chapter explicitly clarifies that HRDD processes require identifying and addressing risks to rights-holders, rather than risks to the business (p. 27). The human rights chapter also makes explicit reference to the OECD's 2018 *Due Diligence Guidance on Responsible Business Conduct* which further highlights the relevance of different modes of IA, including environmental impact assessment (EIA), environmental and social impact assessment (ESIA), and human rights impact assessment (HRIA) to HRDD, and recommends that proponents use the information from EIA, ESIA or HRIA and other assessments conducted by the companies or third parties in their HRDD process (OECD, 2018, p. 26).

Canada is obligated to promote the OECD Guidelines to Canadian businesses and non-compliance by a business could lead to a Specific Instance complaint at the Canadian OECD National Contact Point (NCP), a state-based, non-judicial dispute resolution mechanism designed to handle complaints concerning corporations operating outside or within their respective jurisdictions (Robinson, 2014). Canada's NCP has confirmed that the OECD Guidelines apply domestically (GAC, 2017). Like the UNGPs, OECD Guidelines and their supplementary due diligence guidance (OECD, 2016; OECD, 2017; OECD, 2018; OECD, 2023) expect businesses to conduct HRDD, that is: to adopt a policy commitment to respect human rights; exercise due diligence to identify, prevent, mitigate, and monitor human rights impacts; and enable access to remedy for adverse human rights impacts caused or contributed to by business operations (OHCHR, 2011; GAC, 2022).

The OECD's risk-based due diligence approach aligns with the UNGPs by focusing the attention of businesses on their risks to people and planet: that is, "the likelihood of adverse impacts on people, the environment and society, that enterprises cause, contribute to or to which they are directly linked" (OECD, 2018, p. 15). As will be explored in Part III, good practices of other RBC tools, including subject-specific RBC tools addressing gender, Indigenous relations, and stakeholder engagement, can be used to enhance the requirements of the UNGPs and OECD and strengthen IA law. The following section will first provide a brief overview of the IAA, its key strengths and shortcomings.

Domestic impact assessment law

Canadian law is deeply disordering for Indigenous Peoples and extremely harmful to their social, political and legal orders. Canada's federal IAA regime is no exception – despite marked improvements – as it allows the governments to authorise industrial projects without their free, prior, and informed consent (Mainville & Pelletier, 2021). IA is a planning and decision-making process used to assess the environmental, economic, health, and social effects of proposed projects (Canadian Environmental Assessment Agency [CEAA], 2019, p. 4). It is a legally mandated, state-directed process

that must be undertaken before major projects can proceed, and represents a means to ensure that government decision-makers have sufficient information on the effects of a particular project before approving it (IAA, 2019, s. 2; Physical Activities Regulations, 2019; Impact Assessment Agency of Canada [IAAC], 2022a). For example, Canada's federal IA regime identifies information requirements and factors that must be considered during the IA process, and provides opportunities for public and Indigenous engagement. Once the requisite information is collected on potential impacts, the federal government must decide whether a project is in the public interest considering the project's contribution to sustainability, the risk of significant adverse effects and associated mitigation measures, the impacts on Indigenous Peoples, and the extent to which the project hinders Canada's environmental obligations (IAA, 2019, ss 63 a–e).

Currently, many domestic IA laws do not meet international human rights or environmental norms (UNEP, 2018). In fact, domestic law may actually permit rights infringements, underscoring the expectation expressed in the UNGPs and the OECD guidance that RBC may require compliance with human rights norms “over and above” or “beyond” domestic law (OHCHR, 2011, p. 13; OECD, 2023, p. 73). Yet, as noted above, Canada's current federal IA regime does not explicitly reference human rights (IAA, 2019). Despite this, the IAA goes beyond earlier versions by referencing the following factors to be considered when projects are being assessed: health, social and economic effects; sustainability and climate change; impacts on Indigenous groups, their rights, and cultures; community and Indigenous knowledge; comments received from the public; and the intersection of sex and gender with other identity factors (IAA, 2019, s 22(1)). These provisions provide opportunities for identifying, assessing, preventing, and addressing actual and potential human rights impacts.

In 2023, the Supreme Court of Canada ruled that aspects of the IAA's legislative scheme was unconstitutional due to its intrusion into areas of provincial jurisdiction (Reference re: Impact Assessment Act, 2023, 5–6; Seck, 2023b). The existing provisions related to public participation, gender and intersectionality, Indigenous rights, health, social and economic effects, and sustainability have remained in the amended version of the IAA but narrowed to clear areas of federal jurisdiction (IAAC, 2024). In Part III, below, we explain how RBC tools could inform the design of IA guidance (IAAC, 2022b) and regulations to ensure environmental human rights considerations are adequately integrated into IA practices in Canada.

Part III: Integrating RBC tools into IA law and practice

The integration of human rights considerations into the IA process is critical to ensuring adherence to the state duty to *protect* human rights, and the independent business responsibility to *respect* human rights under domestic and international law. Short of an amendment, one of the most viable options

for legally mandating the consideration of human rights impacts under the IAA is through the power of the Minister of Environment & Climate Change Canada to enact regulations to prescribe information that a proponent must provide in the planning phase (IAA, 2019, s.112.1). The fact that the federal government has clearly stated an expectation that Canadian mining and oil and gas companies adhere to RBC guidance that integrates HRDD (Canadian Ombudsperson for Responsible Enterprise, 2024) is one clear reason for incorporating RBC into IAA guidance and regulations. Further, a closer alignment could legally strengthen RBC processes as IA is mandated by law.

In this Part, we describe the federal IAA's provisions related to health, economic, and social effects, public participation, gender and intersectionality, Indigenous rights, and sustainability, and argue that these provisions provide opportunities for the incorporation of environmental human rights considerations under the IAA despite not being expressly provided for in legislation. We draw on the Impact Assessment Agency of Canada's (IAAC) Practitioner's Guide (IAAC, 2022b), to the *IAA* to demonstrate how specific RBC tools can help fill this critical gap and broaden IA law and practice, toward an integrated human rights-respecting framework.¹

Health, social and economic effects

As states are the primary duty bearers under international human rights law, attention to human rights impacts should be a requirement in any IA process even if not explicitly identified as such in the legislative scheme. In absence of express human rights provisions in the IAA, the new requirement to consider health, social and economic effects under section 21(1)(a) of the IAA provides an opportunity for a substantive assessment of potential human rights impacts. While social impact assessments (SIA) and health impact assessments (HIA) are considered distinct from HRDD, human rights are a core value of both SIA and HIA and their approaches seek to defend and uphold human rights (IAAC, 2015, p. iv). HIAs, are likely to be most effective in fulfilling HRDD's objectives, since they prioritise the participation and empowerment of rights-holders as opposed to stakeholders (Götzmann, 2019, p. 7). For example, whereas an SIA or HIA might not result in any discussion of freedom of expression, a HRIA could envision a community protest being suppressed by state forces (Ruggie, 2007, p. 7).

The Danish Institute for Human Rights (DIHR) HRIA Guidance and Toolbox provides a comprehensive instruction on the intersection between HRDD and HRIA (Götzmann et al., 2016). The toolbox spells out the strengths and weaknesses of integrated versus dedicated approaches to HRIA, and the key criteria of HRIA. It includes guidance and practical tools for conducting, commissioning, reviewing, or monitoring HRIAs of business projects. Oxfam Australia's "Community-Based Human Rights Impact Assessment: The Getting it Right Tool" also offers a community-based, participatory process and work plan to analyse the human rights impacts of

business activities, which focuses on “local communities as experts and human rights advocates” (Oxfam Australia, 2011, p. 2) This participatory approach could help mitigate against the danger of HRIA processes becoming co-opted by companies, used to silence local resistance and to delay necessary actions to address human rights harms (Maher, 2019, p. 63; Coumans, 2017, p. 272).

Public participation

A key component of HRDD is meaningful engagement and the recognition of rights-holders as a specific genre of stakeholder. As described in the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, all people have human rights and thus all stakeholders are “rights-holders”, however, not all stakeholders will have their human rights put at risk by an extractive project (OECD, 2017, p. 10; OECD, 2023, p. 27). The 2023 update of the OECD Guidelines clarifies that enterprises must pay particular attention to the rights of individuals and groups who are at particular risk of adverse human rights impacts, as well as those who are marginalised or otherwise particularly vulnerable (OECD, 2023, p. 26). The current IAA guidance fails to recognise rights-holders, and the distinction between the rights of rights-holders and the interests of stakeholders. Instead, IAAC’s Public Participation Guidance (Participation Guidance) simply prioritises the engagement of those who are “most likely to be impacted by the project” (IAAC, n.d., p. 2). Yet without clear criteria to guide this assessment, there is a risk that certain rights-holders will be marginalised and their participation limited in IA engagement activities.

Furthermore, in the case of IA processes, consultation is only triggered under domestic law where a proponent seeks to begin construction and usually does not occur prior to project site selection, or financing (Physical Activities Regulations, 2019).² In contrast, RBC tools make clear that HRDD and related public engagement and consultation activities should occur as early as possible, ideally at the very earliest stages of project planning and development (OECD, 2023, p. 20). Further, consultation is generally viewed as an ongoing, iterative process that extends well beyond domestic IA processes to include the construction, operation, and closure phases of an industrial project. This is a critical distinction, the IA process presumes that robust consultation and public participation are not required following project approval.

Early, ongoing and meaningful engagement with rights-holders is central to HRDD and to public participation in environmental decision-making. The substantive provisions on participation, particularly in the early planning phase of a project, are some of the key new provisions in the IAA (IAA, 2019, ss 11, 27, 33(e–f), 51(1)(c–d), 99). However, the Participation Guidance in IA is limited in its opportunities for both community-driven engagement and two-way dialogue, particularly beyond the initial planning phase (IAAC, n.d.). IAAC’s Template Public Participation Plan provides an easy entry point

for incorporating RBC tools; the plan must include a list of “preferred engagement tools identified by members of the public” (IAAC, n.d., p. 2). Civil society advocates could draw on RBC tools that highlight rights-holder engagement and explain how they can enhance the meaningfulness and openness of the public participation process.

Gender and intersectionality

The adverse and unequal impacts of extractive projects on the human rights of women, girls and persons of diverse genders is well-documented (e.g., Seck & Simons, 2019; Simons & Handl, 2019; Stienstra et al., 2016). Section 21(1) (s) of the IAA requires proponents and governments to consider the intersection of sex and gender with other identity factors, such as race, ethnicity, religion, age, and mental or physical ability. The Canadian government refers to this type of assessment as “Gender-Based Analysis Plus” (IAAC, 2021a). Applied to IA, GBA+ is a tool used to identify “who is impacted by a project and assess how people may experience impacts differently in order to improve project design” (IAAC, 2021a, p. 5). The methodological approach of GBA+ aligns with the Framework Principles’ cross-cutting right of non-discrimination, which promotes attention to vulnerability when assessing environmental human rights risks and harms.

RBC tools can help in the development and implementation of an environmental human rights-based approach to GBA+ scoping and baseline data collection, as well as associated prevention, mitigation, and compliance measures. Oxfam’s Gender Impact Assessment (GIA) Guide is one of the most comprehensive stand-alone tools for GIA in the extractive sector and is already cited in the Agency’s GBA Plus Guidance. GIA is referred to as a “vital component” of the due diligence process set out in the UNGPs (Hill et al., 2017). Likewise, the DIHR’s 2019 report on gender-responsive due diligence offers one of the most comprehensive resources on considering gender in HRDD (Götzmann et al., 2019). The report proposes a gender-responsive approach to HRDD focusing on community relations, land acquisition and resettlement, security, local content, grievance resolution and strategic social investments. Together, Oxfam’s GIA Guide and DIHR Report provide a useful framework for grounding GBA+ in an environmental human rights-based approach.

Indigenous rights

Indigenous Peoples hold inherent rights that are sourced or grounded in traditional laws and customs, and are recognised in international human rights law. Governments bear an obligation to uphold and protect these rights, while businesses possess an independent responsibility to respect Indigenous Peoples’ rights under the UNGPs and international RBC standards. This includes rights clarified in the UNDRIP (Declaration on the Rights of Indigenous Peoples [UNDRIP], 2007). Article 32(2) of UNDRIP pertaining to

consultation and the requirement for free, prior and informed consent is incorporated in IAAC's Guidance on the Assessment of the Potential Impacts to the Rights of Indigenous Peoples (IAAC, 2022c). The IAAC Template Indigenous Engagement and Partnership Plan provides an easy entry point for incorporating RBC Tools that integrate HRDD including respect for UNDRIP. The Plan must include a list of "preferred methods and tools for engagement identified by Indigenous communities" (IAAC, 2022d, p. 2). Indigenous communities and nations could draw on their own internal protocols, laws and traditions and/or national, regional, or international RBC tools on Indigenous engagement. Given the uniqueness of Indigenous communities, preference should be given to tools promoted by each community over more general instruments or pan-Indigenous tools, particularly with respect to obtaining communities' free, prior and informed consent.

Sustainability

When viewed through an environmental human rights lens, all members of the public can be properly considered rights-holders, in light of the wide-ranging impacts of extractive projects, including increased greenhouse gas emissions. However, the climate crisis cannot be understood or addressed in isolation from the crises of biodiversity loss and pollution and waste. Driven by unsustainable resource-intensive models of development, the three interconnected planetary crises cause severe harm to the biosphere and threaten a wide range of human rights, including Indigenous Peoples' rights (Pörtner et al., 2021).

The IAA now recognises a project's contribution to sustainability as one of the factors to be considered when assessing a project (IAA, 2019, s 22(h)). Sustainability is defined as the ability to protect the environment, contribute to the social and economic well-being of the people of Canada, and preserve their health in a manner that benefits present and future generations (s 2). The Minister's public interest determination must also take into account sustainability and the extent to which the effects of the project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change (ss 63(b)). Currently, the federal IAA guidance focuses disproportionately on climate change impacts to the exclusion of biodiversity and pollution issues (IAAC, 2021b). RBC tools which take a holistic view of environmental and social issues such as the revised environment chapter of the OECD Guidelines, read in conjunction with the human rights chapter, can improve approaches to other aspects of the triple planetary crisis, such as biodiversity loss, pollution and waste, which impact environmental human rights.

Limitations

HRDD is not a silver bullet for addressing the risks posed by extractive companies, and the perception of a possible bias in favour of industry is high

(Wanvik, 2016). RBC tools could be captured by companies and used in a manner that may in the end be harmful. For this reason, RBC tools should not be used without the prior consent of the affected people and should be designed in collaboration with affected rights-holders. They should be transparent and open (i.e., disclosed), entail external participation and verification, and involve independent monitoring and review (Harrison, 2013). These recommendations reflect the OECD Due Diligence Guidance, including the environment chapter of the OECD Guidelines which expect that objectives and performance targets are subject to regular monitoring and verification (OECD, 2023, pp. 33–34).

Further, to avoid the possibility of corporations cherry-picking tools to avoid more stringent requirements, or interpreting or applying tools in ways that may be averse to the interests of impacted communities, governments should establish minimum RBC standards which are drawn from common requirements related to HRDD. Common requirements contained in various RBC tools could then be incorporated into the existing *IAA* best practice guidance and future regulations. Integrating RBC tools into the *IAA* regime can help ensure minimum standards are met, as state authorities act as the regulator, empowered to oversee and monitor HRDD processes. For example, the federal *IA* agency could facilitate the involvement and participation of rights-holders and other stakeholders in the development of HRDD monitoring and compliance schemes. At the same time, space should be left open for Indigenous governance arrangements to substitute for any federal processes or exercises in jurisdiction, to ensure that approved projects respect and uphold Indigenous laws, customs, and norms.

Conclusion

This chapter has made the case for the integration of RBC tools into domestic *IA* regimes, to create more coherent and environmental human rights-respecting framework. Where domestic law falls short of international norms, RBC tools can be used to improve *IA* regimes and consequently the engagement practices of business and governments. Integrating environmental human rights into the *IA* context can help ensure the consideration of procedural and substantive rights that might otherwise be overlooked and may impose enforceable obligations on proponents as duty bearers.

We provided examples of how RBC tools may be effectively applied within the context of the Canadian *IA* regime to demonstrate the value of integration. Specifically, existing RBC tools can help operationalise the *IAA*'s provisions on social, economic and health impacts, public participation, Indigenous rights, gender and intersectionality, and sustainability while also filling in critical gaps. RBC standards, in this way, can broaden the traditionally narrower *IA* regime also contributing to the development of guidelines and/or regulations under a binding *IA* regime. It is now clear that Canadian extractive companies have RBC obligations within Canada. Canada's duty to *protect* requires

government agencies with domestic remit to take regulatory, administrative and other measures to prevent private actors from violating human rights. In partial fulfilment of this obligation, government agencies, at the very least, must actively promote and monitor the domestic implementation of RBC guidance.

RBC tools can be employed by governments, proponents, rights holders and other stakeholders to enact/develop human rights-respecting IA practice immediately, regardless of whether legislative reforms ensue or not. Practitioners and advocates should use them as a basis for dialogue with proponents and explain why it is “good business” to meet international standards where domestic law falls short. In time, regulators and courts will follow suit by drawing upon these RBC tools to inform legal duties and the standard of care owed by corporations.

Notes

- 1 While parts of the IAA were held unconstitutional by the Supreme Court of Canada in 2023, the act was subsequently modestly amended and our analysis is based on the amended version of the legislation.
- 2 Certain provincial laws require a measure of due diligence prior to the granting of an exploration licence, including consultation with Indigenous Peoples; see, for example, *Mining Act*, RSO 1990, c M 14 (Ontario).

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13 Meaningful stakeholder engagement and The Canadian Ombudsperson for Responsible Enterprise (CORE)

Guided by principles¹

*Sheri Meyerhoffer*²

First of its kind

In May 2019, I was proud to take on the challenge of serving as the Canadian Ombudsperson for Responsible Enterprise (CORE). The CORE is the first Canadian Ombud with a business and human rights mandate, and the only Ombud office mandated to hold Canadian garment, mining and oil/gas companies accountable for human rights abuses that have taken place outside of Canada as a result of their operations, including their supply chains. Significantly, the CORE's mandate also involves promoting the implementation of both the United Nations Guiding Principles on Business and Human Rights (UNGPs) (OHCHR, 2011), and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (OECD, 2023).

Given the CORE's unique mandate, we have attracted international interest in our journey, the lessons we are learning, and the good practice we are developing. As we developed the CORE's operational infrastructure, it became clear that meaningful stakeholder engagement is integral to our work – from design to service delivery; and fundamental to building and maintaining the relationships necessary to effectively deliver on our unique mandate. Engagement by itself is about decision-making, relationship development and capacity building. To be meaningful, stakeholder engagement should be strategic and customised to each identified group as each may be impacted differently. Ultimately, the process must be perceived as giving stakeholders a real opportunity to be heard and to feel that they have had a chance to influence the ultimate decisions. Whether the impact is positive or negative, their views should be considered in the design and implementation phases.

Meaningful Stakeholder Engagement also undergirds our capacity to leverage the power of mediation and dialogue. These involve “trust” principles as outlined in the international documents that guide the Ombud function around the world – taking deliberate action to ensure that all sides see our work and our approach as fair, impartial, transparent and accountable.

DOI: 10.4324/9781003488507-18

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The CORE's key stakeholders

The CORE's key stakeholders fall within three main groups: private, public and plural. Our public sector stakeholders comprise key Canadian federal government ministries. This includes Global Affairs Canada, Natural Resources Canada, Employment and Social Development Canada and Crown-Indigenous Relations and Northern Affairs Canada. It also includes trade-related government agencies like Export Development Canada and intergovernmental organisations such as the United Nations and the OECD.

The private sector is another key stakeholder group. It includes the main industry associations representing the garment, mining and oil and gas sectors and Canadian companies operating outside of Canada in these three sectors.

A third key stakeholder group for the CORE is the plural sector which includes civil society and academia. Civil society organisations typically have access to, and work closely with, impacted individuals, communities and workers. This includes but is not limited to Indigenous Peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. It is therefore important for the CORE to work with civil society to understand the needs of those impacted and to raise awareness about how they can use the CORE's complaints mechanism.

During early consultations with Canadian civil society organisations, we were advised against using the term 'stakeholder' when referring to potential or actual victims of human rights abuses. This advice was based upon the fact that those impacted are rights-holders and, given the potential for retaliation against them, should be engaged in a distinct manner. Rights-holders are individuals or entities with legal or moral entitlements to specific privileges or protections, such as land rights, and they typically have a vested interest in protecting and enforcing these rights. On the other hand, stakeholders encompass a broader range of parties with an interest or stake in a particular decision, action or effect; but they may not necessarily hold legal rights.

A principled approach

The CORE's work is guided by Article 31 of the UNGPs which outlines effectiveness criteria for non-judicial grievance mechanisms, and the Council of Europe's Venice Principles (Council of Europe, 2019), which is an internationally recognised set of standards that apply to the function of an Ombud's office.

- Firstly, in order to deliver *fair and impartial* engagement, the CORE takes a balanced approach. Our processes must be predictable, measurable and easy-to-understand, just, objective, equitable and rights-compatible to lead to outcomes aligned with internationally recognised human rights.

- Secondly, the CORE strives *for transparent and accountable* engagement through the publication of notifications, procedures and reports providing sufficient information to the public about the grievance mechanism's performance, and working with other government institutions to enhance accountability and changes to policy.
- Third, *accessibility* underpins the CORE's engagement. It requires the simple and efficient provision of the CORE's services to stakeholders, and particularly to impacted individuals and communities, via multiple formats and platforms that include relevant accommodation for those who may face particular barriers to access.

In line with the UNGPs and Venice Principles, the CORE's prioritisation of a business and human rights-based approach helps ensure ethical business conduct, corporate accountability, transparency, and sustainable development while fostering constructive engagement between businesses, stakeholders, and affected communities. This approach also reflects Canada's commitment to social justice and environmental stewardship in line with our reputation as a responsible global actor respecting human rights in business operations.

Overall, the CORE's approach is based on continuous learning and, at the operational level, provides a grievance mechanism based on engagement and dialogue in consultation with relevant stakeholder groups.

Putting principles into practice

The CORE's on-going work of identifying and consulting diverse stakeholders and adversely impacted groups continues to yield valuable insight and lessons, as demonstrated through several of the CORE's outputs and documents. In each case, valuable feedback received from stakeholder groups has shaped and strengthened the quality of the CORE's products – all of which lends to sustaining the critical trust between the CORE and various stakeholder groups. That is why, through this work, the CORE was able to garner valuable qualitative and quantitative insights. The data curated from this approach was also critical in the creation of key CORE office systems and processes. Significantly, it influenced the development, implementation, and refinement of one of the CORE's most significant operating instruments, the Human Rights Responsibility Mechanism (HRRM), which is the foundation of the CORE's complaint and dispute resolution process. It was created from the ground-up by our office including review for consistency with user design principles. Notably, it was designed to be accessible and easy to use. The HRRM is what allows the CORE to review a complaint submitted by – or on behalf of – an individual, organisation or community concerning possible human rights abuses resulting from a Canadian company's operations outside of Canada.

The CORE's commitment to protecting human rights has been paramount. Our complaints mechanism is predicated upon bringing parties together through a process and manner that leads to optimal resolution. This is best

when all parties feel safe and that their concerns are being heard. This is especially important for those adversely impacted who need to feel that they will not be exposed to harm. But it is noteworthy that companies also need to feel safe. This is why the CORE provides advice to Canadian companies regarding responsible business conduct (RBC), and we work with other government institutions to enhance accountability and recommend supporting policy.

The information and feedback obtained through public consultation also helped us better understand when Ombud-initiated reviews may be warranted. Reviews of this nature would be considered or launched in matters where there is sufficient information that human rights abuses may have occurred. Stakeholder engagement also reinforces our capacity to leverage the power of mediation and dialogue. These involve “trust” principles as outlined in the earlier cited international documents that guide the Ombud function around the world – taking deliberate action to ensure that all sides see our work and our approach as fair, impartial, transparent, and accountable.

Lessons learned

Since our inception, the CORE has reached out to stakeholders, and we have learned lessons along the way. We are not experts on consultation processes, but we’ve learned by doing. The following is a summary of some of our main lessons learned.

We have learned that consultation is an ongoing process – not one that ends once an official process has concluded. It is important to continue to engage and remain receptive to feedback. This involves meeting regularly with key stakeholders to exchange updates and seek their views on different issues. We have learned that maintaining strong relationships with stakeholders is fundamental to the CORE’s mandate. But that relationship can only be developed if there is trust – trust in stakeholders knowing that if they provide suggestions or raise a concern, that they will be listened to and heard.

In 2022, the CORE concluded a consultation process on a risk assessment process to use when planning visits to countries. Civil society stakeholders emphasised the importance of considering the potential risks to the safety of local actors related to meeting with the CORE, and the need for the CORE to assess these risks before engaging locally. As it did with many operations around the world, the COVID-19 pandemic drove us to be adaptable in how we engage. We adapted quickly from in-person consultation to hybrid and fully virtual. This versatility has allowed the CORE to improve accessibility, engaging many more people in our processes. But we also recognise that in some regions, people may face barriers to accessing technology.

Good practice

Our consultation efforts continuously provide knowledge, insight and lessons that allow us to constantly adapt, improve and hone our operations. The

following is a summary of the CORE's suggested good practice with regards to stakeholder engagement.

- *Make sure to properly allocate time for a consultation process.* This involves allocating enough time for consultations and avoiding holiday periods. It is also helpful to set a generous timeframe for responses – allowing stakeholders the ability to plan and respond in a timely manner.
- *Clearly outline the request.* In reaching out to stakeholders for input, it is important to clearly outline both the specific details of the request, as well as a timeline for response.
- *Highlight the “why”.* When consulting stakeholders, it is important to clarify the specific expertise for which the stakeholder is being contacted, and what value the document/product/conversation will add to the work. For example, in our listening tour, we made it clear to the people with whom we spoke that their viewpoints would help the CORE shape priorities and inform our approach.
- *Respond to feedback received during consultations.* In our various consultations, we received considerable feedback on our products. To the best extent possible, we attempt to respond to the comments received to indicate how feedback is being addressed and incorporated into our work.

And most of all, we cemented our commitment to a fair and balanced dispute resolution system where everyone – regardless of race, gender, ethnicity, language, age, disability, or any combination of characteristics – can participate, exercise their rights, and be heard. We have built a solid foundation and are building upon it by putting in place a range of tools to equip our office with the potential to create real systemic change, and bolster Canada's role and reputation as a leader in respecting human rights in business.

Conclusion

This note aims to convey an understanding of the importance of stakeholder engagement and applying good practice principles customised to specific groups. From the launch of the CORE to present day, stakeholder engagement continues to be key to the effective execution of the CORE's mandate. It involves better listening, accepting limitations, and integrating feedback received. It is a continuous consultation process rather than one or more isolated or stand-alone events.

The CORE'S human rights-based approach to stakeholder engagement is crucial for safeguarding rights, fostering inclusivity, and ensuring accountability. By respecting the dignity and voices of all stakeholders, particularly marginalised groups, the CORE promotes equity and transparency in decision-making processes. This not only strengthens trust, but also contributes to sustainable development. Moreover, it mitigates risks of human rights abuses, helps organisations comply with legal obligations, and upholds ethical standards.

Notes

- 1 This chapter is an abridged version of the chapter previously published as Meyerhoffer, S. (2024). Meaningful stakeholder engagement and The Canadian Ombudsperson for Responsible Enterprise (CORE): Guided by principles. In K. Buhmann, A. Fonseca, N. Andrews & G. Amatulli (Eds.), *The Routledge handbook on meaningful stakeholder engagement* (pp. 166–175). Routledge. Copyright © 2024 by Imprint. Reproduced by permission of Taylor & Francis Group.
- 2 Sheri Meyerhoffer's five-year term as Canadian Ombudsman for Responsible Enterprise ended on 1 May 2024. This essay was written during her tenure.

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14 An early example of engagement and consultation in the industry

Setting the stage for improved social performance today

Jeffrey Davidson

In the 1990s before companies, industry associations, governing authorities and international agencies had formalised “consultation” requirements or processes internally or externally for exploration or extractive activities, “different types of local consultation” were practiced, especially in developing countries¹ (Diamonte, 2012). Given ill-defined “duties to consult”, corporate or government obligations, tasks, frameworks or responsibilities, there were “no specific local consultation templates” to rely on. Whatever “consultation” modes took place ultimately reflected various “contextually-specific experiences”, and were carried out in a variety of ways. In Latin America, early consultation efforts often turned out to be consultative “in name only”. “Consultation” often meant simple information disclosure from the developer to stakeholders, but over time advanced to information sharing. In those instances where community participation was limited or discussion agendas and issues to be covered were set by the government or the company, the consultation process did not usually lead to positive outcomes for any of the parties. In fact, they were often seen as illegitimate by the local people, and even served to foster conflict or confrontation, even to this day.

A parallel “governance” challenge in Latin America, especially in Brazil, Peru, Colombia, Ecuador and Venezuela (as well as in other parts of the developing world), which complicated large-scale industrial mineral development, was the control, regularisation or even “banning” of informal artisanal and small-scale mining (ASM) (Kuramota, 2012). The exploitation of near surface gold and gemstone deposits became a significant economic survival strategy during times of extended economic downturn, especially given the lack of any effective social-economic welfare or support systems. “Given the complexity of the phenomenon,² assessments of the nature of the problem were frequently incomplete, as were the set of solutions to address it” (Kuramota, 2012, p. 1). While some of the key multilateral and bilateral development agencies (like many of the concerned national governments) were beginning to pay serious attention to the challenge of regularising ASM, their understandings of ASM and its problems were not “complete”, and their ability to identify and implement workable or effective solutions was limited (Kuramota, 2012).

DOI: 10.4324/9781003488507-19

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Despite these limitations, in the late 1980s, the Government of Venezuela decided to end what it regarded as problematic and chaotic unregulated mining activities in southern Bolívar state. It assumed ownership of and evacuated people out of most of these areas. In 1990/91 it auctioned off exploration and development rights, mainly to foreign-owned industrial mining companies. In so doing, ASM would become the problem of the foreign-owned private sector.

A Canadian company Placer Dome won the bid for the Las Cristinas concession, and formally took over the property with its government partner Corporación Venezolana de Guyana (CVG) in April 1992. By then, the Government had managed to clear the concession of over 4000 people. Nonetheless, approximately 500 displaced informal miners still lived within walking distance of Las Cristinas and soon resumed “illegal” mining activities on the property (Davidson, 1994).

Confrontation between the company exploration team and the local miners followed. In mid-1994, the joint venture operating company Minera Las Cristinas C.A. (MINCA) decided to commission a social-political risk assessment of the mine’s development potential given the presence of “illegal” miners on the property and the burgeoning issues and unresolved grievances of neighbouring Indigenous and mining communities. This assessment³ was carried out in Venezuela (July/August 1994), and involved discussions and meetings with government authorities, affected communities and specific interest groups. The study results were presented to the company in October and to the other key stakeholder groups and communities in December 1994.⁴

The field work, final reports, and consultant’s recommendations to the company and communities reflected an “enlightened self-interest” approach, noting that it would be in

the interest of both Placer Dome and the local communities to reduce tension and create stability in the area – both for themselves and with respect to their relations with each other. Building confidence and trust, finding common grounds for cooperative actions, and learning how to resolve differences in non-destructive ways are both skills and processes that do not blossom overnight; especially given the political, social and economic complexities of the situation, it would be more realistic to expect and work towards their evolution over time, encouraged and facilitated by constructive policies and appropriate actions.

(Davidson, 1994, p. v)

Placer Dome Venezuela’s management team agreed to work towards reducing the project’s immediate social and political risks by accommodating the livelihood needs of the displaced miners and communities. These initial actions ultimately evolved into the development of an ongoing “constructive co-habitation” relationship with the communities surrounding its Las Cristinas property. Early community consultations, initial risk reduction activities and

supporting management decisions established the foundation for what was to become an innovative, even pioneering, community-focused long-term consultation and relationship-building process, starting with the displaced miners and their communities and later involving all of the surrounding communities (Indigenous and mining).⁵ This process continued until Placer Dome sold its interest in the project and left the country in 2002.

A clearer understanding of the historical context and existing social, economic and political realities of the project area and region determined the way in which the consultation and relationship-building process evolved. Project management quickly:

- understood that a more stable, constructive relationship with the local communities was needed, if the project was to advance, and that *this relationship would have to be proactively created*, with or without direct government involvement;
- acknowledged the legitimacy of the displaced communities' livelihood concerns and accepted the miners' need and right to earn a living, even though they had no "legal" standing;
- implemented an initial policy of passive accommodation with the artisanal miners, allowing them to continue to work on the property as long as they did not intrude on active company exploration sites and followed certain basic safety rules.

Additional community consultations as well as field studies⁶ involving the community-based miners themselves led the miners and the company to decide jointly to advance to a formal cooperation agreement⁷ and project (the Los Rojas project) (Davidson, 1998). The project's goal was to create a legally constituted and secure working area for the miners within the Las Cristinas concession that would also serve to improve their livelihoods and working conditions. A joint working group was formed including company staff and representatives of the miners to plan and carry out the cooperation project.⁸ It met on a weekly basis to review progress and resolve problems.

This process involving direct consultation, decision-making and cooperation, was not forced; it occurred in a step-by-step way taking time to cohere and consolidate. It is important to note that central government agencies acted mainly as cordial or friendly observers (Wotruba & Davidson, 2003). As part of the project, the miners had to establish their own legal status by forming a not-for-profit civil association (Asociación Civil de Los Rojas [Civil Association of Los Rojas]), and then had to learn how to manage their operations and accounts in responsible and effective ways. Capacity building and on-the-job training⁹ in areas of mine safety, equipment operation, environmental control, administration, programme planning, conflict resolution, communication, etc. were critically important to assure the potential for success of the cooperation project. Joint learning and technical assistance activities involving both community and company people were equally important. For

example, an 8-day study trip to Bolivia in 1997 included representatives of the miners' association and company support staff. This helped both parties and the group as a whole see how organised miners' cooperatives and their processing activities were able to operate productively; and upon return to Venezuela, enabled them to work together for improving the Association's mining operation, and the set-up of their own processing plant.¹⁰

The company's approach to inclusive consultation (across communities and within communities, across genders and age groups); its focus on learning together, and joint decision-making on issues and plans affecting the miners and/or the communities directly, allowed for the planning, design and implementation of other significant community-company initiatives and partnership arrangements, such as the rehabilitation of local public health care facilities to be co-managed by the communities with the Bolivar state government (Davidson et al., 2000; Tull et al., 2017), prioritisation and implementation of local employment and business development support systems, and negotiation of learning-based community-company agreements for new infrastructure and community services development. Even when Placer Dome had to shut down its own large-scale development project due to the collapse of the international gold market in the late 1990s, the company and communities were still able to work together to mitigate the shut-down's adverse impacts on the local economy, on peoples' livelihoods, on community aspirations for the future, and deal with the emotional traumas that ensued.

In this conflictive situation, "consultation" was initially seen by the company as a prelude to securing "consent" from the local, affected communities for the large-scale exploitation project. However, it soon became clear that it would be more than that, becoming the basis for a broad-based community-company relationship building process that extended over the life of the company's Las Cristinas project and its presence in Venezuela. From the company perspective, it involved:

- recognition and respect of each other's needs and concerns;
- patience and a long-term commitment on the part of the company;
- a willingness to be innovative and take calculated risks instead of just accepting the status quo or taking the path of least resistance.

More importantly, the company was able to move beyond the industry's and government's "traditional" view of artisanal miners, Indigenous people, their communities and situations as "problems" and risks to be dealt with.¹¹ The project's *security* framework actually became a "*benign component of community affairs*" (Davy, et al., 1999, p. 30), with the site level operations and management teams *taking the local peoples' needs and concerns seriously. Community and stakeholder group participation in their own social-economic development were central to the company's own action plan for success.*

There was some discussion internationally as to whether the approach to consultation and relationship building developed at Las Cristinas could be

applied successfully to other places and situations. In the past 20 years, mining companies elsewhere have not tried or been able to duplicate this “model”. This has likely been due to a number of factors, such as *the “context specific” nature of the experience, the need for a consistent commitment to supporting the effort beyond the mine’s development stage throughout its operational and closure phases; a willingness to move beyond the mining sector or company’s traditional comfort zone as needed; and a company’s ability to develop a consistent culture within an operation that is sensitive and responsive to community concerns and needs.*

Looking back at the Las Cristinas experience, “consultation” and joint decision-making were only partly formalised; often carried out informally. Today the lack of a fully formalised consultative process, which would include comprehensive record-keeping of issues raised, planned and actual company responses; public disclosure reporting; local grievance mechanisms; and a coordinated approach to participatory consultation across company work (e.g. environmental as well as social, safety and security) would be seen as significant weaknesses in a project’s site-level social performance by industry associations as well as by international and domestic development agencies; civil society organisations, and even host and home governments.¹² Nonetheless, what occurred at Las Cristinas can be seen as an early effort to build a trust-based relationship that would allow for local stakeholder consultation and engagement to become “meaningful”.¹³

During the past two decades, company efforts to “moderate” local adverse impacts of exploration and mining operations and develop a significant level of “company-community trust” have often been based on “regulatory” or “offset” approaches, for example, through the use of compliance-based impact assessment processes or the design and implementation of local social and economic development programmes (Harvey & Bice, 2014). Bruce Harvey and Sara Bice in their professional practice paper of 2014 have argued that a more “viable approach centred on the trust-building” needed to achieve and maintain a project’s “social licence to operate” should be one of “collaborative moderation”. This would mean

working directly with project-affected stakeholders to achieve accommodation and agreement on issues that are of priority in the local context, as opposed to attempts to respond to an array of deemed universal issues set by regulators and exogenous agencies.

(Harvey & Bice, 2014, p. 328).

International and national voluntary standards and codes of conduct, including “stakeholder consultation” elements, have also emerged and evolved during the same period of time.¹⁴ More recently, four industry-wide associations, including the International Council on Mining and Metals (ICMM), the Mining Association of Canada (MAC), the World Gold Council (WGC) and Copper Mark, have worked to combine their own

“voluntary mining codes and standards into a unified standard” for use by the industry as a whole (Rolfe, 2025, p. 18).¹⁵ Most of the larger and medium-scale companies operating internationally have already recognised, signed off on and are even implementing many of the individual international standards,¹⁶ while also putting in place their own corporate-level policies, guidelines and standards relating to community engagement, consultation and agreement making and consent.¹⁷ These companies expect their site level projects and operations to respect and integrate them into their own practices, although they accept that their policies and standards may need to be adapted to reflect local cultural, political, economic and environmental realities and challenges. When adapted and applied at the project site level, such policies may only be able to work effectively when “there is a true understanding of what is actually taking place in the context and minds of local people” (Harvey & Bice, 2014, p. 330).

The area in which “consultation”, participation and co-management with local communities has advanced and become most significant during the last decade, is in environmental-social impact assessment, management and monitoring related to extractive projects/operations¹⁸ and company-community agreement making.¹⁹ Companies, host communities and governments have recognised the importance and value of “meaningful” consultation and engagement, especially relating to impact assessment and management along with benefit-sharing arrangements with affected communities.²⁰

It’s rare that we find a mining company that doesn’t understand what meaningful engagement means. ...But it’s common that we run into mining companies who struggle with making that happen.²¹

However, the “struggle” to make meaningful engagement and consultation happen may be a deeper problem, reflecting, as noted above, an inability on the part of foreign-owned companies working in cross-cultural environments to *recognise and respond effectively* to actual differences in cultural values and development expectations of host communities, whose own situations may also be complicated by their past experiences with extractive activities and with their own governments. I have seen this difficulty played out in a number of exploration, development and operating projects in Australia, Tanzania, Argentina, Guatemala, Honduras, Panama and Peru,²² where true engagement and consultation did not occur despite what the companies regarded as significant “social investment” and communication efforts. Nor were many of the companies able to understand or fully explain the reasons and conditions which gave rise to company-community antagonisms, confrontations and in some cases, even episodes of violent conflict.

Notes

- 1 This paragraph draws on ideas described by Gerardo Damonte (2012).
- 2 Such as mining rights, Indigenous land rights, environmental pollution, social and political conflict, corruption and criminalisation of control and mineral marketing.
- 3 This assessment was undertaken by a consultant specialising in artisanal mining, social impact, and economic issues based at a Canadian University.
- 4 These studies were presented by the consultant for review and discussion on a face-to-face basis with the different stakeholder groups and communities as an essential next step of the consultation and confidence-building process.
- 5 This approach to consultation and relationship building preceded Placer Dome's corporate effort to put together and formalise a company-wide Sustainable Development Policy publicly released in 1999. For a detailed description of this corporate policy-building effort, refer to chapter 5 in Dashwood (2012, pp. 136–176). The Las Cristinas experience also fed into and supported the industry's realisation that “managing political risk around mining projects was becoming a two-track process”, involving the procurement of legal approval of host governments to “build and operate” a mine and recognition of the need “to engage with local communities that were directly affected, as well as their institutional supporters around the world” (Cooney, 2017, p. 199).
- 6 This included a technical feasibility study, involving trenching and geo-sampling of the area chosen by the miners to become their legal mining area. These were activities in which the miners themselves participated.
- 7 The relationship with the displaced miners moved from “passive accommodation” to a “co-habitation” phase, based on the drafting and signing of a “Convenio de Cooperación [Cooperation Agreement]” between the Miners' Association and MINCA. This outlined the responsibilities and obligations of both parties.
- 8 The company's technical support group to the project was comprised of Venezuelans and local community people only.
- 9 Often organised and supported by the company.
- 10 This also included water management, environmental controls and the elimination of the use of mercury in the field, as well as the construction of a meeting house, kitchen, first aid station, latrines, and a plant nursery in the middle of the mining area.
- 11 A third-party review and overview of this “innovative” way of addressing potential conflict and building relationships can be found in Rosenfeld Sweeting and Clark (2000, pp. 54–55).
- 12 See for example, Mining Association of Canada (2015). International Finance Corporation (2014), Intergovernmental Working Group on the Mineral Industry (2014).
- 13 See the recent discussion on the key traits of meaningful stakeholder engagement by Karin Buhmann et al. (2024, pp. 10–11).
- 14 Such as the International Finance Corporation's Social and Environmental Performance Standards, UN Declaration on the Rights of Indigenous Peoples, UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises, the World Gold Council's Responsible Gold Mining Principles, the Mining Association of Canada's Towards Sustainable Mining (TSM) performance guidelines.
- 15 The first draft of the consolidated mining standard that was made available for public review in 2024 can be found in multiple languages at <https://miningstandardsinitiative.org/consultation/>.
- 16 It remains to be seen the extent to which the consolidated standard will be accepted and applied by individual companies once the standard is finalised and publicised.
- 17 See for example Rio Tinto's Communities and Social Performance Standard (2024), Kinross Gold's Management Approach to Stakeholder Engagement (2023).

- 18 Contributing to these advances were the updating and expansion of international and national codes of responsible business conduct, the carrying out of more comprehensive domestic regulatory and permit requirements, and increasingly, the formal recognition by national governments of Indigenous group and local community land use, livelihood and title rights.
- 19 Often called Impact and Benefit, or Good Neighbour Agreements.
- 20 The importance of engagement and consultation for governments and communities is outlined in Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development case study on consultation and engagement in ESIA (2023). See the recent essay by Karin Buhmann et al. (2024) conceptualising “meaningful stakeholder engagement” in practice and governance.
- 21 Dean Slocum of Acorn International quoted by Carly Leonida (2023) in an article on the progress made as well as the challenges remaining to make “engagement meaningful” at the site level.
- 22 Both as a company community relations coordinator at Energy Resources of Australia’s Ranger open pit uranium mine in the mid-2000s, as a Social Performance advisor with Rio Tinto, and later as the Government of Canada’s Extractive Sector Corporate Social Responsibility Counsellor visiting Canadian project sites in Argentina, Guatemala, Honduras, Panama and Tanzania.

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15 Social performance in rural communities

Andres Recalde

In the context of rural communities in Latin America, the word and meaning of “consultation” is interpreted by rights-holders and stakeholders to imply a different set of proponent obligations, and community rights. The Spanish translation – *consulta*- of the English term “consultation” is generally understood as conferring the right to approve (or not) certain acts or projects that affect the whole community. In that sense, in Spanish, the term has a dual meaning that embraces both the provision of “information” to, and the “approval” of a project by the community.

In English, consultation is often associated with a process in which a decision-maker seeks inputs from stakeholders that enhance the knowledge of the decision-maker about the issues under consideration. The output is thus expected to be a (technically) improved decision that takes account of stakeholder views. However, in Spanish, the same word, suggests that proponents are seeking permission or consent, not asking for an opinion. In this regard, consultation is linked to claims of self-determination, and should be considered an act of governance. Because it is connected to governance, consultation is also necessarily linked into a political process and political contestation over the issues and decisions at hand.

The potential for contestation between proponents and community stakeholders is exacerbated by competing understandings of the role and importance of national laws and the community’s customary regulations and traditions. Based on my experience working across Latin America and especially in highland Indigenous and peasant communities, I have frequently observed contradictions between these regulatory frameworks. The perspective from community stakeholders when engaged in a consultation process, is that they are providing their approval, or not, for a mining project to operate on their lands.

In Latin American countries, the duty to consult Indigenous Peoples has emerged as the most influential source of guidelines for consultation. This was the result of national governments formally adhering to the ILO Convention 169. Before that, there was little space for local stakeholders to express their opinions about a permit for an extractive industry project operating on their lands. Prior to the ratification of ILO 169, in some cases, local communities

DOI: 10.4324/9781003488507-20

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were not even informed of important extractive projects. That was commonly the case when a mining permit was approved on government-owned lands, but also when site access depended on roads that crossed community lands. Once national legislation enshrined ILO 169, other institutions of the state also began to be included in consultation processes. For example, agencies responsible for archaeological remains, impacts on the culture, languages and traditions of Indigenous groups became key players because of their role in evaluating the impact of new projects on communities. The engagement and diverse methodologies of various government agencies involved in consultation processes have made them very lengthy and complicated. Mining companies have tended to view these processes as deterrents that limit additional investment in mining exploration.

Given that consultation processes are now quite complex affairs that involve the participation of multiple government agencies, as well as the proponent and affected communities, I consider that the main hindrances to a successful consultation process are as follows.

- *Local governance structure.* Rural communities have to come to a formal and democratic decision regarding their position on a proposed project considered in a consultation process, which may be rendered more difficult or complex if community governance is operating with outdated bylaws. In particular, outdated bylaws may significantly restrict which community members are entitled to vote in a formal assembly. Since a formal assembly's decision must comply with a quorum requirement among registered members, a National Registry Agency (as in Peru), may not be able to certify the agreement if membership rolls have not been adequately updated as per local bylaws.
- *Lack of formal land titling.* A related problem that formal land ownership records are also either outdated, or never formally registered. The lack of formal registration of land may also trigger an internal struggle inside the community. Every family or clan recognises, by customary tradition, how land is distributed within the community, but these customary practices are rarely recorded in the official land tenure records. This constitutes a very serious limitation for a land lease agreement that must be signed between the company and formal landowners prior to the commencement of exploration activities.
- *Ideological orientations.* It is also quite common that the consultation process is affected by the ideological orientations of leaders, or because divisions in the community about the project may be mobilised by political actors. This is often the case when aspiring political candidates see an opportunity to show their leadership by influencing the consultation process in a way that they can leverage to gain access to elected positions within the community.
- *Intergenerational tensions.* Younger generations of local people have different expectations during a consultation process, which can be a

positive or negative aspect during the process. The distribution of benefits from the project could be unevenly distributed between the generations. For example, parents or grandparents are the land legal rights-holders, which confers greater influence in both deliberations and decisions related to the consultation process. Those rights could be transferred to children if bylaws were clear enough to allow for that. During consultation assemblies, younger people typically have no vote but they have the right to speak and express their opinions. This could contribute to a positive or negative attitude toward the result of the consultation process. Sometimes younger people from the host communities inherit their parents' stake in the land under lease to the mining company, and thus may be concerned about environmental impacts. But younger people may also benefit from employment opportunities, especially when companies give first preference to the family members of local stakeholders.

- Multilateral agencies are playing a more important role by conditioning their financial support to companies and governments on the adherence to ILO 169 consultation standards, including the objective of obtaining full prior and informed consultation (FPIC). This is good in principle; however, we must also recognise that it sometimes complicates coordination between the governance structures of the central government and rural communities.

Take for example this excerpt from a recent research article about FPIC:

In both the formal and more general utilization of FPIC, each word contributes meaning to the concept. *Free*, meaning that there must be no coercion, intimidation or manipulation by companies or governments, and that should a community say 'no' there must be no retaliation. *Prior*, meaning that consent should be sought and received before any activity on community land is commenced and that sufficient time is provided for adequate consideration by any affected communities. *Informed*, meaning that there is full disclosure by project developers of their plans in the language acceptable to the affected communities, and that each community has enough information to have a reasonable understanding of what those plans will likely mean for them, including of the social impacts they will experience. *Consent*, meaning that communities have a real choice, that they can say yes if there is a good flow of benefits and development opportunities to them, or they can say no if they are not satisfied with the deal, and that there is a workable mechanism for determining whether there is widespread consent in the community as a whole and not just a small elite group within the community.

(Vanclay & Esteves, 2011, pp. 6–7)

The statement above refers to a dichotomy in governance goals between the national government and Indigenous groups in a country. This dichotomy exposes local stakeholders to political pressures in the consultation process, particularly when clear and opportune information has not been provided by the party responsible for managing the consultation process. From my own experience this asymmetry in expectations and information endangers the consultation process – especially when the national government moves forward with a development agenda that it is not necessarily the same as that pursued by Indigenous groups. In other cases, the consultation process converges with the expectations of rural communities regarding job opportunities and economic dynamism that supports local services and businesses. This is more likely to occur if the consultation covers the exploitation phase of a new project. Conflict is more likely when the consultation covers a permit to initiate an open pit or underground mining operation in which the level of disturbance is significant.

The delivery of the consultation process matters. On the one hand national regulations delegate a specific government agency with leading and organising the consultation process – usually the Ministry of Mines or a Regional Government (broadly equivalent to a state or province in Peru). Nonetheless, the delivery process is prone to jurisdictional overlapping. This is most apparent at the local level, where it is not uncommon for rural communities to have two governance bodies: a customary group of elders; and the local municipality. Both groups represent the community, so overlapping authority can complicate the process.

An important way to improve outcomes of consultation process, is to improve local community governance structures. In this regard, a concentrated effort by central governments to update the governing bylaws of rural communities and to formalise land ownership is clearly necessary. This kind of effort was pursued in Mexico, where, over a 50-year period, a branch of the federal government was delegated the task of working with *ejidos* (the governance structure for collectively owned lands) to set up bylaws, update membership lists, and to register permanent possession (not ownership) of lands (urban sectors, commons, and individual parcels).

As stated in the beginning of this article, although the idea of consultation always implies an emphasis on valuing and respecting stakeholder opinions, there are some significant differences between the practice of consultation in the Global North and the Global South. In particular, the interpretation of communities – especially Indigenous communities – that they have the right to both be informed and to decide whether a project advances, is important in Latin America.

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16 Consultation as an exercise in democracy that produces a win-win understanding across the territory

Laura Rópolo

Argentina has approximately thirty years of experience with large-scale metal mining, and currently the country sees itself as a promising destination for foreign direct investment in basic metals, lithium and other minerals. According to official sources, there are 311 projects in an advanced stage of exploration.

In Argentina, a mining company must follow the legal process to obtain a Declaration of Environmental Impact (DIA [*Declaración de impacto ambiental*]), otherwise known as an environmental licence, before it passes from the exploration to the construction and production phases of a project. The process for obtaining a DIA is regulated by the provinces, and in each of the twenty-four provinces of Argentina, this requires stakeholder consultation and citizen participation (see Freytes et al., 2024, pp. 17–22).

In this way, “stakeholder consultations” are understood by companies located, or intending to locate to Argentina, as a requirement to be fulfilled on a checklist of necessary permissions. If a mining company has responsible policies and practices, it will surely value this space for citizen consultation – not only to tick a box, but also as an activity that adds value to both its sustainability policy and to its territorial competitiveness policy. Most citizens, whatever their position regarding the mining project, will also value stakeholder consultation as an opportunity to have their voices heard.

However, thirty years of experience demonstrate that these spaces for citizen participation are also places where social groups seek to demonstrate their power and influence in the territory and negotiate as stakeholders about how they can participate in the mining business and the revenue generated by mining. In this context, the process by which companies seek to obtain legal permits and a social licence to operate has also forced them into a process of practical learning, in which they need to understand the dynamics and interests of the territorial social actors who must grant them their social licence. They want employment, to be suppliers, and to participate in the economic life-cycle of the mine.

Today, stakeholder consultation is a social investment for Argentine society as a whole. Stakeholders in each mining project have identified it as a space that allows them to exercise their democratic rights and assert their economic, social, and cultural views before the “new neighbour” – the mining company

DOI: 10.4324/9781003488507-21

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established in their territory. While rights-holders benefit from private forums in which they can reach agreements with mining companies, they also value these public meetings, which allow them to make their interests visible, gain the support of other stakeholders, and improve their position in negotiations with the mining company.

In conclusion, I can affirm that the process in each province has improved over the years. While it is true that there are actors who oppose mining, others who support it, and others who remain neutral, all seek the opportunity to be heard in the consultations. This context presents challenges, threats, and opportunities for each social actor in each territory where a mine will be opened. Among stakeholders, there are hopes of “not being left out of the mining business,” as a mining employee, mining supplier, or beneficiary of the social investment made by the mining company. Everyone registers for the public consultation in order to be visible in that space and have a formal opportunity to begin negotiations with the mining company. Lessons have been learned across the country, both about what not to do and about good practices to consider in seeking continuous improvement of citizen participation and consultation mechanisms throughout the life-cycle and closure of the country’s mines. Personally, I believe there is still room for improvement in this space for citizen participation. This improvement in the exercise of democracy is the responsibility of all parties involved: governments, mining companies, and all interested actors can contribute to a process of endogenous territorial development.

The first public consultation processes, from 1990 to 2010, were perceived as a formal process for obtaining an DIA, and only a few stakeholders close to the project site were informed. People did not demand to be heard, as is the case today.

Progress has been made in including all stakeholders, although there is still room for improvement so that everyone who wants to participate can do so. Institutional quality can be improved. Some private organisations lack internal processes to ensure that their voice is effectively the voice of those they claim to represent.

The process of stakeholder consultation has evolved endogenously due to multiple causes. In particular, I emphasise that:

- Governments are improving their processes to be more transparent and inclusive.
- Companies are redefining their sustainability policies and investing in ESG (environmental, social, governance) benchmarks, within and beyond the mining sector.
- Increasingly, lenders (project financiers) and those responsible for granting legal permits are concerned not only with profitability, but also with what companies are doing to their environment in all of its dimensions: natural, economic, social, institutional, and political. This contributes to improving the governance and sustainability of mining projects.

- Stakeholders are gaining autonomy, by critically re-thinking the institutions and organisations that are representing them. There is an ongoing process of redefining and negotiating among themselves. They all want to be part of the mining business, or have mining contribute to resolving the structural problems in the territories surrounding the mine, which public policy has failed to address.

We win through the exercise of democracy; there are more voices, more issues, and more need for active listening as “neighbours” and for a real win-win understanding across the entire territory that contributes to economic development.

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17 Challenges to the protection of consultation in Latin America

The role of the Inter-American Court of Human Rights

Salvador Herencia-Carrasco and Jordi Feo Valero

Introduction

This book explores the challenges faced by Indigenous Peoples in enforcing their right to consultation across different jurisdictions. The adoption of *ILO Convention 169* as well as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and the *American Declaration on the Rights of Indigenous Peoples* has launched a series of laws, policies and case law in Latin America, and in other regions of the world, that have attempted to advance Indigenous rights, including rights to consultation.

Consultation serves as a fundamental right to ensure the effective recognition and participation of Indigenous and tribal Peoples in decisions that may impact their rights, particularly regarding the protection of their land, territory, environment and culture (Inter-American Court of Human Rights [IACtHR], 2015). This right is rooted in broader protections (*U'wa v Colombia*, 2024), including the rights to communal property (*Awas Tingni v Nicaragua*, 2001), cultural heritage (*Lhaka Honhat v Argentina*, 2020), and self-determination (Inter-American Commission on Human Rights [IACHR], 2021), which collectively reinforce the necessity of consultation (*Community Garifuna Triunfo de la Cruz and its members v. Honduras*, 2015) in safeguarding Indigenous communities' interests (*Kichwa Indigenous People of Sarayaku vs. Ecuador*, 2012).

Since 2016, we have been supporting cases brought by Indigenous Peoples before the Inter-American Court of Human Rights (IACtHR), as well as Supreme and Constitutional Courts across Latin America.¹ By filing amicus briefs and supporting Indigenous organisations and their legal teams, we have attempted to expand the understanding and scope of Indigenous rights, so that the courts can recognise them as truly being rights-holders. As authors, we would like to recount our experiences regarding the advances made, and limitations that Indigenous Peoples continue to face.

Consultation rights in Latin America: the role of courts and of the Inter-American Court of Human Rights

The first decision that the IACtHR published regarding the rights of Indigenous Peoples covered under ILO Convention 169 was the *Awá Tingni v Nicaragua* case, decided in 2001. In this landmark decision, the IACtHR expanded on the implications of article 21 of the *American Convention on Human Rights* (ACHR) to recognise the right to communal property of Indigenous Peoples. Since then, the Court has released more than fifty decisions focusing on the right to territory, the right to culture, the right to biological diversity, the right to a clean and safe environment, and, of course, the rights to consultation and consent.

It is important to highlight the seminal role that the Inter-American Human Rights System (IAHRS) has played in the recognition of Indigenous rights as well as the rights to consultation, territory, communal property, land titling (*Xucuru v Brazil*, 2017), among others. How Indigenous rights are understood and assessed would not be the same without the IAHRS, particularly the case law of the IACtHR. ILO Convention 169, the UNDRIP and the American Declaration on the Rights of Indigenous Peoples would not have had the same impact in Latin America without the development of judicially binding standards (Hennebel & Tigroudja, 2022), and the interpretation of the provisions of the ACHR made by the IACtHR.

Therefore, our first insight would be that Indigenous and consultation rights have a general framework established in international instruments, but their precision and “teeth” have been mostly developed by the courts. This is important for Indigenous Peoples, as it opens the possibility of recognising new Indigenous rights not included in ILO Convention 169 or UNDRIP, while also allowing the courts to expand the elements under which such rights must be fulfilled by states and other stakeholders.

The recognition and expansion of rights is important as the law should address challenges that were not foreseen at the time a legal instrument was adopted. However, this raises a question regarding how much participation Indigenous Peoples have in court proceedings that may decide on the nature and scope of rights that have a significant impact on their lives (Antkowiak, 2013). There is not much room for agency or ownership if Indigenous Peoples are relegated to be mere witnesses, dependant on the “good will” and legal strategies of other parties to the case.

Our second insight is that courts should be flexible enough to allow an active participation of Indigenous rights in its judicial proceedings. In many of the consultation cases that are brought to the courts, the lives and territory of Indigenous Peoples are at stake. Therefore, they should be allowed to present their case, regardless of the standing of the other parties to a case. Although not perfect, the IACtHR has recognised the importance of effective participation of victims, including Indigenous Peoples, in court proceedings. In 2009, the IACtHR amended its rules of procedure to allow victims to act

before the IACtHR in an autonomous and independent way (IACtHR, 2009). Before 2009, victims relied on interventions by the Inter-American Commission on Human Rights. This change contributed to the agency of Indigenous Peoples to “have their day in court”. As a result, they could challenge witnesses, present evidence and relate testimonies based on their experiences.

In the IACtHR, the 2012 case of *Sarayaku vs. Ecuador* was the first time the Court visited an Indigenous territory, to see and hear from the community the impact that a mining project would have on their lives, territory and religion (*Sarayaku v Ecuador*, 2012). Although this might not be possible in every single case, the notion of access to justice should include the necessary flexibility for Indigenous Peoples to have their say. As former President of the IACtHR, Judge Cançado Trindade, said, this procedural change has contributed to creating an “international law for humankind” (Cançado Trindade, 2020).

To conclude this section, we would like to highlight how challenging it is to safeguard consultation as a right that implies questioning state decisions that affect Indigenous lives and territories, and to avoid its transformation into a mere checklist that limits the agency of Indigenous Peoples (Rodriguez-Garavito, 2011). The recognition of Indigenous rights in the international sphere makes it (almost) impossible for states to legally deny protecting them. Since, these rights, including the right to consultation, cannot be denied, states sometimes seek to validate simple meetings and assemblies as consultations. UN bodies have stated that a meeting that merely provides information does not meet the requirements of Convention 169. Thus, they have emphasised the necessity of a genuine dialogue based on open communication, mutual respect, good faith, and a sincere intention to reach a common agreement.

Most of the cases brought before the IACtHR focus on the lack of consultation (*Saramaka v Suriname*, 2007) before an extractive project is approved by the state. However, soon, we expect that cases before the IACtHR will also include states attempting to validate “consultation practices” that do not meet international standards. This will force the courts to assess elements, in a concrete and less theoretical manner, such as: how long should a consultation last; what measures were adopted to assure the participation of minority groups in consultation processes; and were the measures adopted culturally appropriate.

Our final insight is that there is a need to strengthen collaboration between Indigenous Peoples, academia, human rights and environmental lawyers to ensure that consultation rights remain true to their object and purpose: the protection of the lives and territories of Indigenous Peoples, and respect for their decisions.

Challenges for the protection of Indigenous rights through public interest litigation

The main challenge for the protection of Indigenous Peoples is ensuring compliance with the decisions of the IACtHR, which are binding on, and obligatory for states. As this is a brief commentary, we emphasise that the

unwillingness of states to fulfill their international obligations is affecting all international law, including Indigenous Peoples' law. We recognise this is a problem that goes beyond the IAHRs, but it is important to recognise the current regressive context in which we find ourselves.

Based on our work with Indigenous Peoples before the IACtHR, we highlight two central problems resulting from these cases: first, a lack of recognition and application of free, prior and informed consent (FPIC) of Indigenous Peoples; and, second, a recent trend in IACtHR jurisprudence to evade addressing crucial issues for Indigenous rights.

The Court addressed the right to consent in the 2007 decision of *Saramaka vs. Surinam*. In this case, the IACtHR established the main requirements for a consultation process and the situations under which this consultation should require a consent. The Court determined that states were required to obtain the consent of Indigenous Peoples in cases "(...) regarding large-scale development or investment projects that would have a major impact (...) on their lives (*Saramaka v Suriname*, 2007, para. 134). Depending on the perspective of the Indigenous People, any extractive project on their territory could significantly affect their way of life.

And herein lies the challenge. As important as this statement is for the lives of Indigenous Peoples and the more than fifty decisions of the IACtHR regarding Indigenous rights, the Court has not clarified what responsibilities a state has when it breaches its duty to obtain the consent of Indigenous Peoples. To the best of our knowledge, we can only assume that the reasons are not strictly legal. The Court has decided on cases where a project would clearly have significant impacts on Indigenous ways of life, like for the Sarayaku or Garifuna – just to name a few, but the Court has prioritised its case law to define the requirements for a consultation process.

The second challenge we see is the tendency of the IACtHR to evade addressing certain critical issues for Indigenous Peoples. For reason of space, we would like to highlight the 2024 decision of *Tagaeri and Taromenane Indigenous Peoples v Ecuador* (2024). This was the first decision of the IACtHR focusing on the rights of Indigenous Peoples in Voluntary Isolation, therefore this was not a case on consultation, but of self-determination.

The Court was asked to determine the impact on Indigenous rights of a constitutional provision permitting the argument of "national necessity", to favour extractive or development projects in environmentally protected areas. This was an opportunity for the Court to assess the impact of project authorisations that lacked a human rights or environmental perspective on vulnerable groups. However, the Court remained silent on a topic that was important, not only for Indigenous Peoples, but also for its case law on business and human rights and the duties of the state to ensure responsible business conduct.

Conclusions

In almost nine years of work, we have advocated for a broader and more meaningful implementation of consultation processes in the protection of

Indigenous rights. This advocacy has covered areas such as legislative decision-making,² investment projects in Indigenous territories,³ the protection of isolated Indigenous groups,⁴ granting of mining concessions,⁵ land clearance declarations,⁶ the recognition of ancestral lands and colonial titles,⁷ and the application of the UN Guiding Principles on Business and Human Rights to Indigenous cases.

We have seen the potential of public interest litigation and the role of the courts in advancing Indigenous rights, including the right to consultation. However, we have also seen that, when legal issues regarding Indigenous rights directly implicate the development and economic policies of states, the IACtHR – as well as the national courts – tends to focus on the recognition of the rights without addressing the root of the problem: the impact that some economic policies, including those rooted in Constitutions, have on Indigenous Peoples. This demonstrates the need to strengthen the collaboration between Indigenous Peoples, academia and civil society organisations to pressure states to respect their international obligations regarding the protection of Indigenous rights, vulnerable groups and the environment.

Notes

- 1 See: Human Rights Clinic of the Human Rights Research and Education Centre (HRREC) of the University of Ottawa's website for more information on the projects related to Indigenous Peoples, Business and Human Rights in the Americas: <https://www.uottawa.ca/research-innovation/hrrec/teaching-training/business-and-human-rights-latin-america>
- 2 Amicus Curiae "Estándares Internacionales sobre el Derecho a la Consulta Previa, Libre e Informada en Materia Legislativa", TC Perú (2007). Brief for HRREC as Amicus Curiae Supporting Appellants Caso Antolin Huascar Flores y otros cinco mil ciudadanos, en la demanda de inconstitucionalidad contra diferentes disposiciones de la Ley N° 30.230 EXPEDIENTE N°00012–2015-PI, Tribunal Constitucional de Perú.
- 3 Amicus Curiae "Estándares internacionales y jurisprudencia comparada sobre demarcación de territorios indígenas y Derechos Económicos, Sociales, Culturales y Ambientales", Caso de las Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra), Corte IDH, 2019. Brief for HRREC as Amicus Curiae Supporting Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v, Argentina. Inter-American Court of Human Rights. (2020 IACTHR Series C, No. 400).
- 4 Amicus Curiae "Parâmetros do Direito Internacional dos Direitos Humanos sobre a Intangibilidade dos Territórios Habitados pelos Povos Indígenas Isolados e em Contato Inicial", 1º Vara Federal Cível da Seção Judiciária do Estado do Amazonas, 2020. Brief for HRREC as Amicus Curiae. Ação Civil Pública. Autos N° 1004249–82.2018.4.01.3200. 1º Vara Federal Cível da Seção Judiciária do Estado do Amazonas. Brasil.
- 5 Amicus Curiae "Estándares Internacionales sobre los Derechos de los Pueblos Indígenas" Expediente de Apelación de Sentencia 4785–2017 Of. 4 Referencia 1076–2016, Corte de Constitucionalidad de Guatemala, 2016. Brief for HRREC as Amicus Curiae. Supporting Appellants Expediente de Apelación de Sentencia 4785–2017 Of. 4 Referencia 1076–2016. Corte de Constitucionalidad de Guatemala.
- 6 Amicus Curiae "Estándares Comparados e Internacionales sobre el Derecho a la Consulta Previa, Libre e Informada", Caso San Miguel del Progreso- Amparo

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- 7 Amicus Curiae “Estándares Internacionales para la protección del territorio, ambiente y cultura de pueblos indígenas”, Caso Pueblos Indígenas U’wa y sus miembros vs. Colombia, Corte IDH, 2023. Brief for HRREC as Amicus Curiae case of the U’wa Indigenous People and its members vs. Colombia. Inter-American Court of Human Rights.

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Xucuru Indigenous People and its members v Brazil, Inter-American Court of Human Rights. (2017 IACTHR Series C, No. 346).

18 Globally recognised sustainability standard raising the bar for the mining sector worldwide

The Mining Association of Canada

Canada's mining industry has prioritised building and maintaining respectful, strong and trusting partnerships with communities impacted by, or with an interest in, mineral exploration and mining activities.

From exploration to mine closure, the mining sector engages with communities, most particularly Indigenous Peoples, who may be impacted by their projects to share information and to collaborate on issues related to environmental effects, monitoring and cultural protection. The industry also focuses on developing partnerships and initiatives that generate economic opportunities and wealth for surrounding communities.

The Mining Association of Canada (MAC) believes that the mining industry and Indigenous communities share a common interest in ensuring that mining activity takes place responsibly, in a manner that creates economic opportunity, is respectful of community interests, and ensures public safety. MAC members also recognise that they need to conduct their interactions with Indigenous Peoples in a manner that reflects the particular interests of the communities where they reside based on respectful relationships and collaborative decision-making.

MAC's Towards Sustainable Mining standard (TSM) is the tool MAC and its members use to measure their companies based on these values and to drive continuous improvement aimed at building more respectful and collaborative relationships. TSM is a globally recognised sustainability standard that supports mining companies in managing key environmental and social risks. Established in 2004, TSM was the first responsible mining standard in the world to require site-level assessments with external verification and is mandatory for all companies that are members of implementing associations.

TSM is backed by a suite of protocols against which mining companies measure and publicly report their performance. Protocol areas of focus range from Community and People – such as equitable, diverse and inclusive workplaces and crisis management and communications planning, to environment and climate change, which includes tailing management, biodiversity conservation management and water stewardship.

Assessments are conducted at the facility level where the mining activity takes place – the first sustainability standard in the world to do this in the mining

DOI: 10.4324/9781003488507-23

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sector. Publicly reported results provide local communities and others with an interest in a mine site's operations with a detailed look at the sustainability performance of mines and metallurgical facilities.

Overseen by an independent Community of Interest (COI) Panel, this multi-interest group helps mining companies and communities of interest foster dialogue, improve the industry's performance and continually improve the TSM program. Since its inception, the COI Panel has included designated representatives of Canada's First Nations, Inuit and Métis Peoples. TSM includes a dedicated protocol focused on relationships with Indigenous and other affected communities. Today, the third major update of this protocol, the TSM Indigenous and Community Relationships Protocol finalised in 2019, is implemented by all MAC members' operations.

The TSM Indigenous and Community Relationships Protocol lays out a clear set of criteria for companies to:

- Identify groups and individuals with an interest in decisions related to mining operations, for example, Indigenous Peoples, community members, employees.
- Support meaningful relationships with these groups and individuals, with a specific focus on Indigenous Peoples and communities, their rights and working with a view to obtaining their consent through implementation of effective co-developed decision-making processes.
- Work with communities to mitigate potential negative impacts and to optimise social benefits related to mining operations.
- Respond to feedback and concerns raised by communities.

Cameco Corporation, a Canadian uranium company, exemplifies the intent of the protocol's criteria with its participation in the Community Based Environmental Monitoring Programme (CBEMP), which is a component of the collaboration agreement signed between Cameco Corporation, Orano Canada Inc., four municipalities, and three First Nations in northern Saskatchewan. This programme highlights the positive effect cooperative monitoring and research can have in providing confidence in how mining operations are affecting those living in the local vicinity. This is just one of many initiatives that has resulted from a longstanding agreement with them. Through this type of partnership, Cameco offers training and employment to community members, who are responsible for leading interviews, mapping harvesting sites, taking samples of foods for analysis, and communicating this information to the broader community.

Another example is Rio Tinto's Diavik Mine, which has been recognised for its work to create economic opportunities out of materials that might otherwise be thrown away. This is the essence of what is known as the "circular economy", the idea that supports business practices that extract as much value as possible from resources by recycling, repairing, reusing, repurposing, or refurbishing products and materials – eliminating waste and

GHG (greenhouse gas) emissions. Rio Tinto's Diavik diamonds mine exemplifies circular economy best practices through partnership and local community engagement, both central tenets of TSM's Indigenous and Community Relationships and Climate Change protocols.

Several years ago, employees at Diavik recognised an opportunity to repurpose copper wire from predominantly completed underground mining levels. A core group of passionate employees took the initiative to propose to Diavik to salvage copper wire where possible and collect it in containers for transport off-site to donate to community groups. Diavik endorsed this idea and included this activity as part of scheduled work, so those who volunteered were paid for their time. This project worked to a small extent but grew substantially when, in 2019, Diane Haché, a retired employee, and her partner Michel Tremblay, a current employee, led the volunteer efforts to maximise the mine's recycling efforts, through stripping and shipping of the salvaged copper for sale, with all proceeds going towards Diavik's Community Contribution Program. Since the project's inception, the results have been significant, raising almost \$1.2 Million for local charities like the Stanton Territorial Hospital Foundation, YWCA (Young Women's Christian Association) Northwest Territories (NWT), HomeBase Yellowknife, Arctic Indigenous Wellness Foundation, and NWT On the Land Collaborative, and diverting over 500,000 pounds of copper cable from the landfill.

In Ontario, a joint venture between IAMGOLD Corporation Ltd. and Sumitomo Metal Mining Company situated within Treaty 9 Territory and the Traditional Territories of Mattagami First Nation and Flying Post First Nation, prioritised the use of a collaborative framework developed alongside its two First Nations partners to manage and monitor socio-economic effects of the Côté Gold mine throughout all phases of development, from construction to closure.

The innovative and collaborative spirit of the Côté Gold mine has had a significant positive benefit through the creation of the Socio-economic Management and Monitoring Plan (SEMMP) which was developed in partnership with Mattagami First Nation and Flying Post First Nation to establish which social and economic conditions should be managed and monitored during mine construction, operations and closure. Through this collaborative effort, the company and communities can jointly identify opportunities to manage changes and strengthen positive effects through the monitoring of numerous important indicators such as employment, training and business opportunities, community health, infrastructure, transportation and Indigenous land use and culture.

These success stories may be in part why, in recent years, there has been growing global interest and uptake of TSM and adoption of the program by mining associations around the globe.

Helping to build capacity within the global mining industry, TSM is freely shared with mining associations in other countries that are seeking tools to improve the environmental and social performance of their mining industries.

Exporting Canada's expertise in environmental and social stewardship is one important way that we can contribute to responsible mining practices around the world. As a constantly evolving standard, TSM is particularly attractive globally due to its focus on climate change, effective tailings management and good practice in respectful engagement and collaboration with Indigenous communities – three focal points in Canada's industry.

This made-in-Canada program is now being implemented in twelve countries on five continents, including Mongolia's mining association that joined as recently as 2024. Other countries' national mining associations currently implementing TSM include Mexico, Guatemala, Columbia, Panama, Brazil, Argentina, Botswana, Australia, Philippines, Norway and Finland.

TSM helps drive performance improvement where it counts – at the site level – and contributes to securing support for mining activities from the communities where it operates and from investors and manufacturers looking to invest in and purchase responsibly mined materials. For more information on the TSM initiative, visit tsminitiative.com or mining.ca.

19 Between flaws, setbacks, and timid progress

Findings after 25 years of mining-related consultations

Rodrigue Turgeon, Val Croft, Jamie Kneen and Catherine Coumans

MiningWatch Canada recently reached a 25-year milestone. We launched on 1 April 1999, at the end of a decade marked by an unprecedented global expansion of mining activity driven by economic globalisation. We set out to bring people together to share experiences and expertise, and to work in solidarity to build networks, coalitions and relationships to challenge the power of the mining industry and the policies that serve it. Over the past 25 years, we have worked with dozens of mining-affected communities around the world, intervened in over 200 mining conflicts around the globe, and written and supported the publication of over 100 in-depth reports (MiningWatch Canada [MWC], 2024a).

Over this time, we have seen communities across the world become increasingly aware of the dangers posed by the mining industry. Many are intervening at earlier stages in mine development to defend their rights and interests, with the goal of preventing harm in the first place (MWC, 2024a). While elaboration is outside the scope of this brief discussion, it is useful to consider MiningWatch's experience with developments in other countries. We note that communities globally are far better aware than they were 25 years ago of the long-term harm they may face from mining. There have been strong movements – for example in The Philippines and in Latin America – where mining-affected communities have decided to carry out their own consultations in accordance with their ancestral traditions or political procedures. In The Philippines, these processes have led to moratoriums on mining being declared in municipalities and provinces. In Latin America, people have organised *consultas* at the community and municipal level to demonstrate a clear lack of consent for mining (Coumans, 2011).

Despite this positive shift, there continue to be serious setbacks and obstacles. In the name of meeting the material needs of an energy transition – as currently envisioned by the mining industry, governments including Canada, and international institutions such as the World Bank – global mining production is expected to increase five- to ten-fold by 2050 (Izoard, 2024, pp. 26, 33; Vidal, 2018). In this context, the pressures exerted by the mining industry on local populations

DOI: 10.4324/9781003488507-24

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and ecosystems are bound to increase. At the same time, there continues to be an overwhelming lack of will from authorities across the world and in Canada to guarantee Indigenous Peoples' rights and the rights of civil society to participate in meaningful consultation processes around mining that are legal, dignified, effective, and predictable for all.

In Canada, "consultations" with affected stakeholders are often top-down processes led by a mining developer and/or a government body. Only Canadian federal and provincial/territorial governments carry the legal responsibility to consult and accommodate Indigenous Peoples, and only governments can legally enforce consultation requirements more broadly. Proponents may carry out so-called consultation exercises, but without legal authority in most cases. Nonetheless, provincial governments may attempt to "download" those responsibilities onto proponents (Northern Ontario Business, 2013). While there can be certain legal formalities depending on the jurisdiction, moments of consultation with affected communities typically take place only after companies have been granted the mineral rights over a piece of land. Consultations most often occur right before or during environmental assessment, and while negotiating impact benefit agreements.

While consultation with affected communities is certainly an important component to how mining happens in this country, we don't consider consultation to be the ultimate goal. Rather, we have pushed over these past 25 years for stronger mechanisms to ensure that no mining activity be authorised without the full and ongoing consent of those most affected by mining operations – and in the case of Indigenous communities, consent given in a free, prior, and informed manner as recognised by the United Nations Declaration on the Rights of Indigenous Peoples.

We are far from achieving that goal. No laws or practices currently exist in Canada that can meaningfully uphold rights around consent. However, there are certain conditions that can improve existing processes for consultation, with an eye towards making them more ethical and socially acceptable.

Given the vast nature of this subject, we frame our comments in the context of a *free entry* mining system currently in force in every jurisdiction in Canada with few exceptions, like in parts of the Yukon (Ross River Dena Council v Government of Yukon, 2012). *Free entry* is a

system of 'free access' that allows individuals to acquire mining claims virtually anywhere with a minimum of restrictions, regardless of who lives there or their relationship with the land, and with priority over any other use or occupation of the land.

(MWC, 2024a; Turgeon, 2023; Scottie, Bernauer & Hicks, 2022)

A number of key factors characterise the many processes for consultation on mining issues under this *free entry* system. For starters, there is a tendency to over-complicate in technical terms the presentation of mining projects to the point of making them incomprehensible to the general public for whom they

are intended. There are also significant discrepancies and a lack of coherence between the consultation processes required by various levels of governments across jurisdictions. Affected communities are left facing a maze of possibility for the type(s) and parameters of consultation that may or may not apply to a given project, made more difficult by a context in which communities can be facing large numbers of mining projects under assessment simultaneously in their territories with limited resources to respond.

The requirements for consultation vary greatly between jurisdictions. For instance, in Quebec, exploration companies must hold public information sessions and submit a report to the provincial government prior to applying for an authorisation for “impact-causing exploration work”. Following recent reforms to Quebec’s *Mining Act*, all new mining projects must undergo an environmental assessment, which can be followed by another opportunity for the public to be consulted and provide input. There may simultaneously be public consultations on land use planning and other mining regulations that have implications for a particular project. Depending on whether the project meets certain criteria, it may also undergo assessment at the federal level by the Impact Assessment Agency of Canada. In Ontario, private projects, including mines, are not required to undergo any kind of provincial impact assessment and the opportunities for public consultation are therefore much more limited.

Faced with these challenges, local communities have made clear their demands for these processes to be fair and equitable – and in the case of Indigenous Nations, that their Indigenous rights be respected and guaranteed.

Consultations must start earlier in the mining cycle, even before mining exploration titles are granted. Sufficient time must be given to communities to develop their understanding of the issues so that they can make informed decisions for their future.¹ Greater transparency is required, both from mine developers about their objectives and particularly about project-related environmental and social risks, and from governments about their political intentions (Roy-Grégoire, Orellana & Poisson, 2024). Consultations must be thorough and comprehensive; they cannot focus on only certain parts or stages of a project.² Consultations on mining projects must be carried out by independent agencies, at arms’ length from both from the industry and government.³ The government must uphold and implement the findings and recommendations by these independent agencies, so as to avoid decisions that are influenced mainly by economic considerations. The rules governing industry use of consulting firms specialised in community relations must be regulated. In fact, this business sector – which claims to be neutral, when in fact it is accountable only to its clients – adopts its own procedural practices which, in our view, too often transgress fundamental principles of ethics and respect for local populations.⁴

Furthermore, sufficient financial resources must be made available to local communities to enable them to reach out appropriately to their members for comments and also, in some cases, to retain the services of independent

mining experts capable of providing an informed and unbiased opinion on the true extent of the risks they face. Consultations must be conducted in the language of the populations concerned and in a procedure and environment that is appropriate and culturally aligned for Indigenous Peoples.⁵ Since any form of consultation implies the collection of notes, positions, proposals, concerns, and questions, the coordinating body for the consultation must ensure full and honest follow-up with the participants, clearly indicating how their input has been integrated into the analysis of the project and, where appropriate, providing answers to any questions raised. At the same time, confidentiality of sensitive personal and cultural information must be ensured, especially but not only for Indigenous Peoples. Finally, at the end of the consultation process, a financial audit must be published, especially when public funds are involved.

Consultation processes in the mining sector can be improved when people rally to demand it. A good example is the recent reform of Quebec's *Mining Act*, which adopted a measure that civil society had been calling for over 15 years: making all new mining projects subject to independent consultations by the Bureau d'audiences publiques sur l'environnement [Office of Public Hearings on the Environment] (BAPE).⁶

Communities can turn mining-related consultations to their advantage, despite their current procedural flaws. In her report, submitted in conjunction with the Coalition Québec Meilleure Mine's [Better Mine Quebec Coalition] brief to the BAPE hearings on the Horne 5 mining project in Rouyn-Noranda in September 2024, former BAPE commissioner and expert in land-use planning Julie Reid Forget proposed a tool for "planning the integration and costs of a major [mining] project" for municipalities affected by such projects (Reid Forget, 2024). The author asserts that this planning should take advantage of the information obtained during consultations about a mining project. Only when a proper framework for consultation is in place can information be timely used by local communities to formalise agreements with polluters, forcing the latter to compensate the community for the potential impacts of their mining project if authorised by provincial and federal authorities.

However, our greatest hope for structural change in the timing and scope of consultations on mining-related issues lies in the use of the legal system. Given that legal provisions in Canada's various jurisdictions give an advantage to mining companies and stifle the voices of citizens and Indigenous Peoples, and given the general lack of political interest in eliminating these injustices, we find that the best remedy is to legally challenge the validity of consultation processes in the face of the *free entry* mining system. In this respect, going to court to enforce the constitutional duty to consult and accommodate Indigenous Peoples on any project that might adversely affect their Aboriginal rights and title claims represents a fruitful step for those with the time, courage, and resources to take such legal action. In three jurisdictions, the courts have already ruled in favour of Nations who challenged the legality of *free entry* systems that offer consultations only *after* mining claims

have been issued. The Ross River Dena Nation was the first to win such a battle in the Yukon in 2012, followed by the Gitxaala and Ehattesaht Nations in British Columbia in 2023, and the Mitchikanibikok Inik First Nation before the Quebec Superior Court in 2024. A similar battle is being fought by several communities of the Anishinabe Nation before the Ontario Superior Court.⁷

Nevertheless, while British Columbia is subject to a court order to reform its *Mineral Tenure Act* to include Indigenous consultation as required by section 35 of the Canadian Constitution, and has also committed to reform the Act to align with the provincial *Declaration on the Rights of Indigenous Peoples Act*, other territories and provinces such as Yukon and Quebec have chosen to appeal such rulings to higher courts. Other Canadian jurisdictions are opting to maintain the status quo pending future litigation or a decision by the Supreme Court enforceable across the country (Turgeon & Wawanoloath, 2024). Quebec has even rejected any proposed amendments to its recent reforms to the *Mining Act* that would acknowledge the provincial Court's ruling (*Id.*, Assemblée nationale du Québec, 2024).

Beyond these pivotal legal developments, we firmly believe that the Canadian public is ready to move beyond current consultation practices towards the improvements outlined here. Mining-affected communities want project developers to uphold and respect their rights to consent, whether it's a "yes" – and if so, under what conditions – or a "no".⁸ So the question should be: how can we ensure that governments move beyond haphazard consultation to truly respect the decisions and consent of affected communities and Indigenous Peoples?

Notes

- 1 For example, Falco Resources Inc. filed a staggering 30,000 pages of documents to be analysed by civil society as part of the environmental impact assessment of the Horne 5 project in Rouyn-Noranda, Quebec. These documents were posted online in the middle of summer, many just days before the start of the public hearings, and some even after the procedure had begun. This situation was denounced by citizens and described as "tentacular" by the Commissioner during a public preparatory meeting held a week before the hearings began. See Bureau d'audiences publiques sur l'environnement (BAPE 2024, 13 August; MiningWatch 2024b, 27 August).
- 2 For instance, in 2022, the mining company IAMGOLD presented its new Fayolle open-pit gold mine project in Quebec's Abitibi-Témiscamingue region in such a way as to be considered separate from its operating Westwood mine just a few kilometres away. This approach, combined with the presentation of a project below the threshold to trigger a provincial environmental impact assessment, enabled the developer to avoid independent public consultations. The only consultation that took place was run by the company, presenting a series of hurdles for meaningful public participation. A formal request to the Quebec Minister of the Environment by six organisations and citizens affected by the project to use his discretionary power to require the project undergo independent public consultations was dismissed in the following vague terms: "the concerns expressed by the public are legitimate, but from our point of view, they do not justify it". See, MiningWatch Canada (2022a, 23 June).

- 3 Quebec's Bureau d'audiences publiques sur l'environnement (BAPE), in operation for over 40 years, is one of the best examples. The commissioners of this organisation, which is independent of the Ministry of the Environment, have the powers of the *Act respecting public inquiry commissions* to carry out their analyses, which give great importance not only to science, but also to the opinions expressed by people directly affected by the projects under review, including many mining projects.
- 4 To read the comments made on this subject by the Coalition Québec meilleure mine [in the context of the Ministère des Ressources naturelles et des Forêts' [Ministry of Natural Resources and Forestry] consultation on the mining framework, a mandate that was given to one of these outside government consulting firms, see Coalition Québec meilleure mine (2023, 18 May).
- 5 An example of good practice in this regard is the BAPE's decision to hold public hearings about the Horne 5 mining project in the community of Winneway on 3 October 2024 at the request of the council of the Long Point First Nation, instead of keeping hearings only in the city of Rouyn-Noranda. To our knowledge, this was a first for a mining project located on the unceded territory of the Anicinape First Nation. See, Bureau d'audiences publiques sur l'environnement (2024, 20 August).
- 6 Unfortunately, even after the review of the *Mining Act*, not all mining projects are subject to the BAPE public and independent hearings. Indeed, projects that increase their size or daily extraction capacity continue to be exempt when their proportion is less than 50 per cent. See *Loi modifiant la Loi sur les mines et d'autres dispositions* [Act modifying the Mining Law and other provisions].
- 7 The six First Nations are Apitipi Anicinapek Nation, Aroland First Nation, Attawapiskat First Nation, Fort Albany First Nation, Ginoogaming First Nation and Kitchenuhmaykoosib Inninuwug (McIntosh, 2024, 12 August).
- 8 According to an August 2022 Léger opinion poll, 78 per cent of people living in the province of Québec agree with "requiring the consent of local populations (municipalities and Indigenous Nations) before authorising any mining activity on their territory" (MiningWatch Canada, 2022b, 2 August).

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Part V

Conclusion



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20 Beyond contested stakeholder consultations

A regime in flux

Paul A. Haslam, Nathan Andrews, Karin Buhmann, Ibrionke T. Odumosu-Ayanu and Mark C.J. Stoddart

Introduction

This book analyses multiple facets of what we characterise as the contested consultation regime that governs, albeit imperfectly, the relationships between states, companies, communities and other affected stakeholders during the development of natural resource projects in both the Global South and Global North. The chapters demonstrate that the participants in stakeholder consultation processes often hold diverging views on the rules, norms and decision-making procedures that should lead to project approval. In this regard, we observe that there is contestation among the actors involved in stakeholder consultations over fundamental regime characteristics, both in theory and in practice. Some of the main reasons identified by the contributors to this book include: a lack of agreement over what constitutes “meaningful engagement”; diverse perspectives on how rights should be defined and considered relevant to consultation processes – implicating both Indigenous Peoples, and non-Indigenous rights-holders; and a problem of misaligned frameworks related to the profusion of standards and norms for stakeholder consultation. Underlying these three reasons is the emergent focus on vulnerable rather than powerful stakeholders (Buhmann et al., 2024), who are increasingly able to make their voices heard through protest, legal actions, and institutional strategies, and who have shifted academic and practitioner attention from top-down processes, to bottom-up perspectives based on the views of those most affected (through harmful impacts, or socio-economic benefits) by resource development projects.

Understanding stakeholder consultation as an emerging or unfinished regime

This section begins with an analysis of the normative basis for interactions among the stakeholders in the consultation regime while demonstrating that these norms and legal instruments are themselves results of, and sites of, contestation. As noted in the introductory chapter, regimes are understood as

DOI: 10.4324/9781003488507-26

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“sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations” (Krasner, 1982, p. 186). Our approach has been to treat the governance of stakeholder consultation as an emerging or unfinished regime, but one that is quite explicitly contested, and which has not yet generated a convergence of actor expectations (Haslam, 2010). We refer to a single “regime” when taking into account the global soft-law instruments and their connections to other instruments and actors. Figure 20.1 provides a diagrammatic ideal type of the contested consultation regime described in this book. It aims to link authoritative sources of rules, norms and decision-making procedures with the main actors involved in consultation processes. In this regard Figure 20.1 offers an explicit, although simplified and stylised understanding of how different ideas about consultation are incorporated into practices by distinct categories of actors. It underlines that (a) different actors have different reference points and expectations about rules, norms, and decision-making procedures; but also, that (b) there are homogenising influences within this contested regime.

The triangle at the centre of the diagram represents a specific practice of consultation, which results from the interaction of key local actors within a national legal context, namely agencies of the state, companies, communities and civil society organisations. The smaller white ovals are actors.¹ The shaded circles are formal and informal instruments that are sources of rules, norms and decision-making procedures. These instruments may be considered authoritative (Schilling-Vacaflor & Eicher, 2017, p. 1443), in the sense that they are created by institutions having legitimacy for (certain) stakeholders, shape these stakeholders’ understanding of what a consultation process *should* be, and are referenced by them in debates over regime characteristics. The instruments that have the most influence on consultation practices are shaded charcoal grey and belong to the domestic legal context where the rule of law and judicial review works to settle disagreements. Instruments that are considered binding international law and which are incorporated into domestic law (to varying degrees) are shaded a mid-grey. Instruments that have primarily a normative and non-binding character such as “declarations”, “guidelines”, and international corporate codes of conduct are placed in the outer ring (although some of these have been incorporated into domestic law in some countries).

Figure 20.1 shows that each actor involved in a practice of consultation has an understanding of how the process *should unfold*, but this understanding draws on different authoritative sources of rules, norms and decision-making procedures. Domestic sources may include highly localised understandings of decency, respect, and fairness (see chapter by Buhmann et al., this volume); Indigenous law (chapters by O’Faircheallaigh; Pictou & Seck; Odumosu-Ayanu; Connolly et al.; and Herencia-Carrasco & Feo Valero, this volume); national statutes and bylaws (chapters by Stoddart & Chen; Newman; Massignan, Silva-Sánchez, and Sánchez; and Faanu & Andrews, this volume); and national corporate codes of

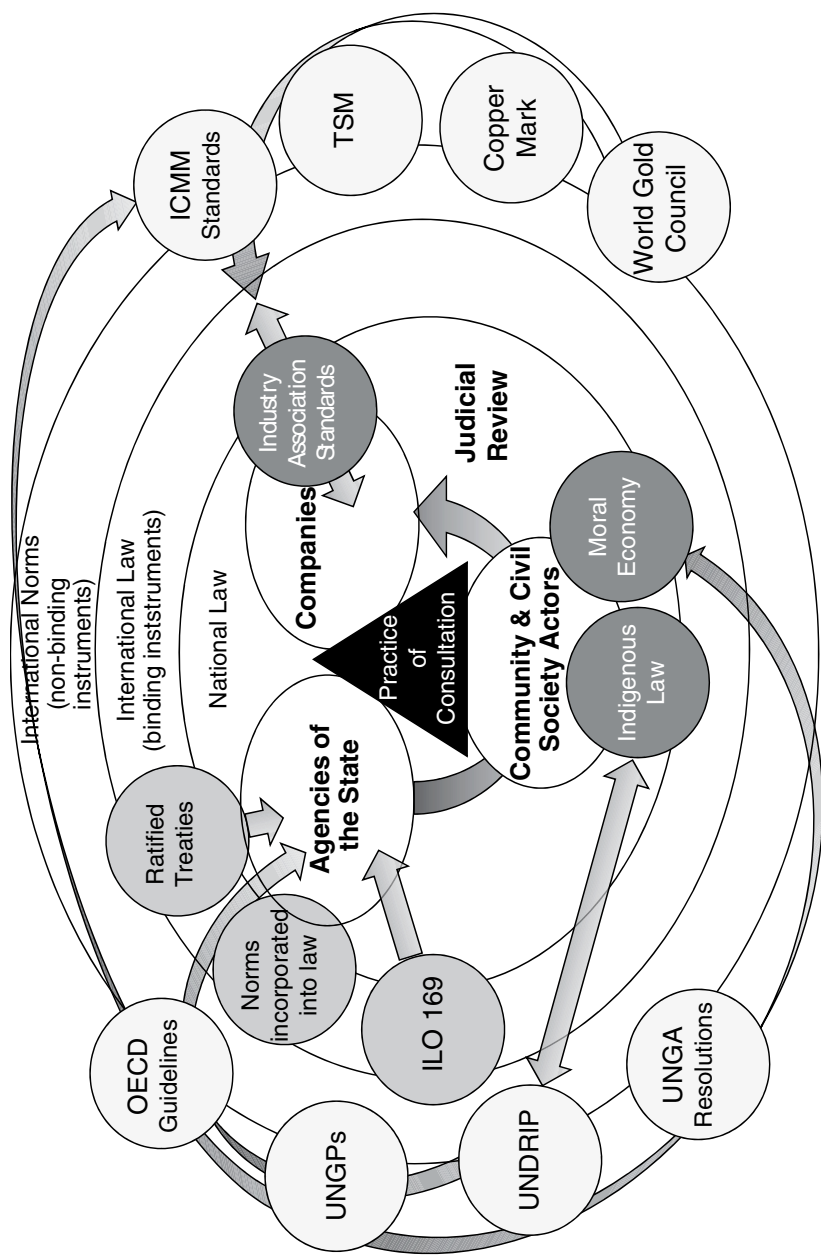


Figure 20.1 Contested stakeholder consultations: Competing rules, norms and decision-making procedures
Source: The authors.

conduct promoted by industry associations (chapters by Eke et al. & The Mining Association of Canada, this volume). International sources include binding instruments of international law, such as ratified treaties as well as normative (non-binding) instruments of international law such as, UN General Assembly resolutions, and other declarations, guiding principles and guidelines (chapters by Pictou & Seck; Ayotunde; Meyerhoffer; and Herencia-Carrasco & Feo Valero; and Turgeon, Croft, Kneen, and Coumans, this volume); and the standards promoted by industry associations with transnational corporate membership (chapters by Eke et al.; Davidson; Rópolo; Recalde; and The Mining Association of Canada, this volume). Although consultation practices are always defined in national law, the nature and scope of participant rights may not be clear, *prima facie*, at the same time that other instruments may offer alternative interpretations that some participants may find to be more legitimate.

The arrows in Figure 20.1 show the principal direction of influence for the diverse instruments discussed in the chapters of this book. We briefly highlight some of these relationships below: the bi-directional connection between Indigenous law and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007); the influence of the United Nations Guiding Principles on Business and Human Rights (UNGPs) on other international instruments and government policy; and the link between voluntary business standards, other instruments of soft law and company practices.

Free, prior and informed consent (FPIC)

Contestation over the definition, scope and application processes for *free, prior and informed consent* (FPIC) of Indigenous Peoples may be considered illustrative of these relationships, as discussed extensively in chapters by O’Faircheallaigh, Newman, Odumosu-Ayanu, Ayotunde, and Pictou and Seck (this volume). Figure 20.1 uses a bi-directional arrow to express the relationship between Indigenous law and UNDRIP. Pictou and Seck (this volume), describe Indigenous law as follows, the “legal traditions of each distinct Indigenous Nation are the sources of law and may reflect sacred or natural law as well as deliberative or customary laws” (p.128). O’Faircheallaigh affirms that Indigenous law is a key source of norms and rules for consultation, “rooted in the connection between land, kinship and social relations, and culture and spirituality relationships” (p.31). This perspective treats Indigenous law as *sui generis* vis-à-vis both domestic legal regimes and international law. Decades of activism in international organisations by independent Indigenous organisations such as the World Council of Indigenous Peoples, led to a process by which Indigenous representatives were involved in drafting what ultimately became UNDRIP, adopted by the UN Human Rights Council in 2006, and by the UN General Assembly on 13 September 2007 (Gagné, 2009). In this regard, the UNDRIP aligns with an Indigenous law perspective that views self-determination as a right of Indigenous Peoples, and asserts that states “shall

consult and cooperate in good faith... in order to obtain” FPIC (UNDRIP, 2007, Art. 19 and 32). At the same time, UNDRIP has influenced how some Indigenous communities understand and express their rights.

UNDRIP embodies a view of free, prior and informed consent that is considerably stronger than ILO Convention No. 169, which emphasises the right to consultation (Art. 6, 15, 16), but limits FPIC to cases of involuntary resettlement (Convention Concerning Indigenous and Tribal Peoples [C.169], 1989). ILO 169 has nonetheless supported a movement towards “prior consultation” practices (Zaremborg & Torres Wong, 2018). The Convention is binding on states that have acceded to it, whereas UNDRIP is a “declaration” (a largely normative instrument of “soft law”) with limited adoption by governments except those few (like Canada) that have opted to incorporate it into the national legal regime. The implications for FPIC have been debated (Anaya & Puig, 2017; Rombouts, 2017, pp. 193–196).

The United Nations Guiding Principles on Business and Human Rights

Figure 20.1 suggests that the rise in global influence of the United Nations Guiding Principles on Business and Human Rights (UNGPs), adopted by the UN Human Rights Council in 2011, facilitated the incorporation of a rights-centric view of consultation processes and business responsibilities to affected stakeholders. Although the implications and uptake of the UNGPs remain contested, there has been some convergence regarding responsibilities to protect and respect rights among the major international “soft law” instruments highlighted in the outer ring of Figure 20.1, including those promoted by industry associations. In Buhmann’s analysis of the 2011 revision of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, which are recommendations from OECD member states to companies operating in or out of those or other adhering states, she highlights efforts to align with the UNGPs, principally through the inclusion of a chapter on human rights which recommends the use of human rights due diligence (2018). The language of the chapter on human rights exhorts companies to respect human rights, but qualifies many company obligations with terms like “should” and “should avoid” and “seek” (OECD, 2023, p. 27).

It is also important to recognise that industry-led processes have not been immune from these influences. For example, members of the International Council on Mining and Metals (ICMM), an industry association that has been at the vanguard of efforts to promote sustainable development norms in mining (Dashwood, 2012), have committed to uphold the UNGPs, undertake human rights due diligence, including meaningful consultation, and respect Indigenous rights (ICMM, 2024, p.1). ICMM clarifies that obtaining FPIC is an obligation of states that should guide company human rights due diligence and relationship building – but also that companies should “obtain agreement with affected Indigenous Peoples demonstrating their consent to anticipated

impacts” (ICMM, 2024, p.6). For industry, *agreements* play a central role in demonstrating consent, although key documents recognise that projects may move ahead without such agreements demonstrating consent (ICMM, 2024, p.16). Since late 2024, the mining industry has been engaged in a process of harmonisation of the leading international mining standards (ICMM, TSM, Copper Mark and The World Gold Council) through what is called the Consolidated Mining Standard Initiative (CMSI). While the final content of the CMSI is unknown at the time of writing, the development of the industry standard has “multiple touchpoints” with the UNGPs and UNDRIP, according to Aidan Davy, CEO of ICMM (Davy, 2025). Nonetheless, academic and civil society voices continue to be sceptical of these efforts.

Contestation at the heart of the consultation regime

This volume treats stakeholder consultation practices and norms as an encompassing regime, and contestation about fundamental regime characteristics (i.e. ongoing negotiation of rules, norms and decision-making procedures) underscores why we consider this type of regime as unfinished or emerging. While no regime is entirely fixed or static, we believe that the unfinished quality of the stakeholder consultation regime allows stakeholders and rights-holders to challenge existing practices in ways that valorise their priorities and interests. This is one way the “liberal bias” associated with regime theory, which downplays divergent interests, power relations and the institutionalisation of inequality, is addressed within our conceptualisation of consultation regime. The unfinished character of the consultation regime also underpins the significant differences evident between country practices, as captured by Stoddart and Chen (in this volume).

This unfinished stakeholder consultation regime is further complicated by the interaction between actors and norms at different scales of analysis. For example, how do global norms work in national and sub-national settings that may be quite different from the generalised contexts that inform design “from above”? This complexity is informed by the norm diffusion paradox, the tangled webs involved in norm localisation, and the challenge of moving implementation from output effectiveness (which entails a general recognition of how issue-area governance can produce change in actors’ behaviour) to impact effectiveness (which focuses on how concrete and meaningful action is taken on the ground to bring the regime to life for expected beneficiaries or end-users) (see Andrews, 2019; Andrews & Oppong, 2023; Andrews & Alorse, 2025).

Since the consultation regime emerges and functions through the work of an assemblage of actors that operate at various levels, each possessing different power resources, certain interests are more likely to influence the material outcomes of this regime. For instance, the chapter by Eke, Grant, and Hembruff (this volume) highlights how the implementation of the Global Smart Mining Initiative, as a regional governance mechanism for stakeholder consultation in Southern Africa, was captured by business interests. Faanu and

Andrews (this volume) analyse how the legal pluralism underlying Ghana's land tenure system reinforces traditional authorities, resulting in male chiefs maintaining more control over processes of consultation than other stakeholders who are directly impacted by land dispossession. Pictou and Seck (this volume) underline how the consultation with the leaders of formally representative Indigenous institutions ended up marginalising the voices of traditional knowledge-keepers, Grandmothers. These three examples show that a nuanced understanding of scale is important to understanding how power, class, social status, and gender intersect in the consultation regime. Understanding scale is an important issue for future work on the complex intersectionality of the consultation regime.

"Beyond" contested consultations, it is noteworthy that despite being unfinished, emergent or contested, the regime can offer important outlets for diverse stakeholders to participate in the governance and management of resource extraction. For instance, if the regime can be understood as being truly grounded in principles of deliberative or participatory democracy, it may yet offer ways to enhance public participation from below (Rodela, 2012; Banerjee, 2022; Cumming et al., 2022; Mendonça & Asenbaum, 2025). We should also be willing to accept it when stakeholders do not see value in the established regime (no matter how deliberative or participatory), and decide to maintain a position of disinterest in or opposition to a project or process (see Bowles & Veltmeyer, 2022; Haslam and Ary Tanimoune 2016; Ary Tanimoune and Haslam 2024). Instead of regarding such opposition as sheer resistance or obstructionism, we should imagine these conflicts as opportunities for learning and doing better. This could produce forms of engagement that allow those whose "no" may never turn to a "yes" on a specific project proposal to appreciate the fairness of the process (Haslam 2021; Okada, 2024). Contestation may generate productive spaces of "conflictual cooperation" (Giugni & Passy, 1998) for moving forward towards better relations when the concerns of stakeholders/rights-holders are heard and taken seriously by proponents and decision-makers. If social learning happens from conflict, tension and controversy, then engagement processes can be improved so that they are experienced by participants as inclusive, transparent, and fair.

Between stakeholder interaction and the definition of meaningful consultation

Viewing stakeholder consultation as an emerging/ unfinished regime allows us to underscore the distinction between actors' interactions, and having the ability to participate in defining the regime. It is largely accepted that affected stakeholders (should) participate in consultation processes (*interaction*) prior to resource development even if the practice is marginal or non-existent in some contexts and some states. The core issue around meaningful consultation is no longer centred on the need for consultation, but rather around the ability to define what constitutes meaningful consultation (*definition*), and the

norms that inform this definition. As this volume has emphasised, three key actors – states, project proponents, and host and/or affected communities – interact within the consultation regime. However, these actors do not participate equally in defining this regime, and their interests often diverge significantly. The divergence of interests is not only related to project licencing outcomes, but also to more fundamental differences about what constitutes meaningful consultation and how and when it should occur. Contestation over the definition of stakeholder consultation coalesces around three major focal points – *identity*, *voice*, and *space*.

The *identity* of the key actors is germane to the emerging consultation regime. At the domestic level, the state is the most powerful actor, lawmaker, sub-surface resource title holder in many cases, and the principal governance decision-maker. Project proponents are constructed as financiers and developers that deploy their technical abilities in the resource development process and this often impacts interactions with and by these actors. Together with the state, project proponents bear the responsibility to consult while host communities generally occupy the position of actors who are consulted given potential impacts of resource development. Whereas there is a tendency to view some actors as duty bearers or as having responsibilities, while constructing others as rights-holders, these identities are not always binary but sometimes overlapping. At a fundamental level, the relationship and, sometimes, distinction between “stakeholders” and “rights-holders” also potentially situates each actor differently. This distinction between stakeholders and rights-holders is itself often contested. As Pictou and Seck note (this volume), through the right to self-determination, Indigenous Peoples should be considered rights-holders rather than stakeholders and “not only having a right to be at the table, but a right to design the table itself in accordance with their own laws” (p.127). The consultation regime is often first negotiated in the context of actors’ self-identification and how others define each actor. Identity is an early, if not, the first line of contestation in the unfinished work of the stakeholder consultation regime.

Voice flows from the identity of the key actors and determines who may contribute to the definition of the consultation regime. States have lawmaking authority by which they define the *scope* of the domestic application of the consultation regime, and they are also at the frontlines of shaping international and domestic parameters of participation in resource development. Corporate practices and mechanisms for engaging with host communities have also been legitimised in several forms including agreements, due diligence and several voluntary frameworks highlighted in Figure 20.1. While contestation remains even in the context of state *voice* and the ability of project proponents to shape the consultation regime, host communities’ *voice* is often keenly contested. Yet, host communities often insist on contributions from below sometimes in the form of Indigenous law and ways of knowing (O’Faircheallaigh; Seck & Pictou, this volume), or some other articulation of meaningful practices and perspectives from non-Indigenous Peoples (Buhmann et al., this volume).

Space, that is the normative, legal, and contested spaces in the consultation regime, engenders analysis around the scope of these regimes in what is an ongoing debate outlined in this volume, including chapters by O’Faircheallaigh, Newman, and Odumosu-Ayanu. What does meaningful consultation entail: is it consultation as a right, processes, expectations, or demands; or is it a consent-seeking process that involves negotiation of interests until the actors reach a point of consensus or agreement; or does it entail a process where a veto may apply? Various interpretations of the key instruments such as UNDRIP prevent articulation of one view on this subject (Anaya & Puig, 2017; Doyle, 2015). In Newman’s assessment (this volume) of the Canadian experience, for example, he presents conceptual differences between Canada’s duty to consult and FPIC and the challenges of transitioning from one to the other. As well, O’Faircheallaigh (this volume) describes the reluctance of both states and project proponents to permit consent by Indigenous stakeholders as a main cause of contestation. Essentially, the scope of meaningful consultation remains contested and cements the unfinished nature of stakeholder consultation.

Rights and the central role of contestation

This book suggests that contestation has been fundamental to the stakeholder consultation regime and central to the articulation and resolution of demands for recognition of rights. As noted above, there is often contestation as Indigenous Peoples exercise agency in consultation processes when relying on Indigenous law, UNDRIP, or rights claims in domestic legal forums. Other host communities and affected people also rely on the legal system to defend their rights in ways that reflect alternative views of consultation. Such contestation can be viewed as steps toward clarification of the unfinished consultation regime. It prompts reorganisation of state and project proponents’ relationships with host communities around rights claims and recognition that rights are central to a wide range of positive outcomes – even if framing consultation as a rights-based framework may not fully capture the gamut of consultation processes. It also prompts political, discursive and legal struggles over the types of rights at stake, their internal ranking (fundamental rights, such as constitutional and human rights, or other types of rights based in statutes), and conflicts between such rights or related claims. For example, a company might refer to a statutory right to explore resources and apply for a licence to exploit, whereas an affected community might try to counter through arguments on the primacy of their (constitutional or pre-existing statutory) rights to property, traditional land or professions, or to being involved in decision-making.

The use of a rights-lens raises questions about the treatment of host communities as affected stakeholders when there is less consensus – especially among states - regarding their rights claims. While the UNDRIP and certain consultation practices recognise Indigenous Peoples as rights-holders,

operationalisation of consultation as rights for non-Indigenous peoples is much less clear to the extent that participation and voice remain at the discretion of states and companies. Stoddart and Chen (this volume), show that stakeholder engagement by oil companies in the Canadian province of Newfoundland and Labrador tends to focus on Indigenous communities as rights-holders, but neglects civil society actors that might be considered stakeholders but not rights-holders. In Norway, as Stoddart and Chen note, a broader set of stakeholders are consulted by the companies, including affected communities, but also research organisations, cultural groups and unions – suggesting consultation patterns strongly influenced by state-civil society dynamics. In many parts of the Global South, consultation rules do not always view non-Indigenous peoples as peoples with the right to be consulted, engendering significant contestation in many cases (Odumosu-Ayanu, 2021). Even where all the key actors have an expectation of consultation, the practice is often problematic and reveals “competing legitimacy claims” (Gamu & Soendergaard, 2023). Recent academic work on company-community conflicts have started to conceptualise community resistance by “land defenders” (Le Billion & Lujala, 2020) to include Indigenous communities as well as other communities with strong ties to their territory (peasants) implying some equivalency in their relationship (and rights) to land (Prause & Le Billion, 2021 Hall et al., 2015), and thereby broadening the scope of rights-holders although the basis of their rights claims may be different.

The UNGPs situate meaningful consultation in the context of human rights due diligence noting at Principle 18 that the process of gauging human rights risks should “involve meaningful consultation with potentially affected groups and other relevant stakeholders”. It arguably adopts a human rights-based approach to engaging with affected communities by envisaging human rights impact assessments that incorporate “all internationally recognized human rights” (OHCHR, 2011). While the UNGPs principally adopt the language of “stakeholders”, with only a couple of references to “rights-holders”, the UNGPs have nonetheless played a key role in conceptualising the move from stakeholders to rights-holders (Connolly, Seck & Simons, this volume; Buhmann et al., 2024 Buhmann, 2023), even as it has been critiqued as adopting a human rights risk perspective that is incompatible with corporate social risk management (Fasterling, 2017). Hence, affected communities other than Indigenous communities are rights-holders in consultation contexts in which the UNGPs are relevant. However, the right to consultation for non-Indigenous communities does not necessarily extend to all rights-holders in the same way that UNDRIP contemplates for Indigenous Peoples. Even within the context of Indigenous Peoples as recognised rights-holders, application of FPIC domestically is uneven across jurisdictions as well as within jurisdictions, with Canada providing a prime example (Odumosu-Ayanu, this volume). In addition, while international frameworks such as the UNGPs and the OECD Guidelines may provide normative support for a rights-based consultation framework at an international level, they are not always adopted

in domestic processes. As a result, there are significant differences between community expectations and lived experiences (Buhmann et al., this volume). Uneven application of laws, principles, and norms within and across jurisdictions leads to differences in experience that require careful and nuanced assessment.

Problem of balancing misaligned frameworks

Evidence presented in the various chapters of this volume suggest that there currently exist too many frameworks that are not fully aligned and which operate with diverse levels of authority. The chapters also suggest that there is, as of yet, few results in terms of processes or practices that can widely be accepted as best examples to be replicated. Even the practitioner insights (this volume) provide mixed evidence around the harmonisation of existing consultation practices. Figure 20.1 displays some of the key frameworks that have been referenced in this volume so far; however, many others exist and often operate in tandem with these more established norms for stakeholder consultation. Based on the views presented in this volume, it may be argued that the past decade's normative boom in standards or frameworks related to stakeholder consultation is precisely part of the problem, as it often results in confusion or ambivalence around what the priorities for consultation should entail and which frameworks are more fundamental for that prioritisation.

The implication here is that contention can emerge from the misalignment between frameworks for engagement and their national/regional/local translation and implementation. A frequent problem is whether consultation processes are appropriately inclusive and reflect localised host community values and interests related to extractive development? Buhmann et al. (this volume) captures this misalignment by pointing to consultation processes that are performed in accordance with established law (regarding ESIA), but end up being so compliance-driven that they alienate community stakeholders. Such alienation implies that formal approval of a project is disconnected from the social context/reality where it is located.

Another aspect of the misalignment entails the contentious politics that sometimes results in projects obtaining approval even in the face of explicit community resistance. For instance, Pictou and Seck highlight how major industrial and mining projects on Indigenous land are approved by federal/provincial authorities, despite considerable community resistance. In both cases presented, Grandmothers from the Wolastoqiyik and Mi'kmaq nations resisted these decisions by framing traditional knowledge and activities as contentious actions, and invoking Indigenous law and their treaty rights in the courts. In a report on their resistance, the Grandmothers highlighted the tendency of consultation and consent processes to exclude some rights-holders. Massignan, Silva-Sánchez, and Sánchez (this volume) reinforce this point by showing how the Brazilian authorities used emergency contexts to justify sidelining consultation processes.

The centrality of “consent” runs through this volume, and it is most clearly demonstrated when consultation frameworks do not align with the demands of people who are impacted by projects. As evidenced in the literature, sometimes this lack of alignment is manifested through the actions of business and state interests to quicken stakeholder consultation through a “divide-and-conquer” approach entailing exclusionary participation and negotiation processes (see Schilling-Vacaflor & Eichler, 2017; Klein, Muñoz-Torres & Fernández-Izquierdo, 2023). Consent and its meaning within the principle of free, prior and informed consent remains contentious, since there is no agreement around how consent is sought, from whom, whether one can determine when consent is fully attained and how long it lasts (Newman, this volume; Southalan & Fardin, 2019; Mitchell et al., 2019). This conundrum is central to the contested nature of the stakeholder consultation regime because it reveals the binary choice between inclusive or exclusive consultations – with the former being a more grassroots-oriented approach and the latter maintaining a top-down character (see Andrews, 2013; Paredes, 2023). Evidence provided in this book should lead us to prefer the former especially if we want to imagine a future that goes beyond contestation in stakeholder consultation. But it is equally important to define certain key features that distinguish practices around FPIC from social licence to operate and corporate social responsibility (CSR) because, although they are related and often undertaken by companies, the implications for stakeholders and rights-holders vary depending on which of these concepts or frameworks is being used. For instance, the requirements surrounding the implementation of FPIC cannot be simplified as CSR because the latter views these as beyond-compliance corporate commitments and interventions that are purely voluntary.

Several chapters in this volume have highlighted that consultations are excessively oriented towards formal approval by government authorities, and often neglect to include community members such as those who have been historically marginalised due to procedural and socio-cultural factors. It is impossible to seek consent from every member of an affected community but there are tremendous opportunities for such processes to engage with stakeholders in a manner that would be deemed “good enough” by at least a clear majority. At the same time, there should also be flexibility built into the process for obtaining ongoing consent, which would allow people to change their minds, if they choose to, while encouraging project proponents to do subsequent check-ins with communities instead of seeing the attainment of consent or project approval as a one-time endeavour. This could go a long way in ensuring some balance between local needs/priorities and consultation frameworks.

Some provocations for the future of the contested stakeholder consultation regime

On the topic of balancing various frameworks, interests and priorities, an important recent conceptual contribution is the notion of “extractive bargains”, described by Bowles and Andrews (2023) as state justifications for a

continued reliance on resource extraction in terms of a “societal good”. Although these bargains are expected to involve a range of actors operating at the state and societal levels with the goal of balancing the national/state interest with the public good, it is uncertain whether an ethical case can be made for privileging a public good (such as “development”) over individual/community costs – especially when different from what affected communities want. For example, at the local level of Indigenous communities, leaders are caught between competing interests in resistance to resource extraction, projects of cultural and economic resurgence and political self-determination, and projects for Indigenous-settler reconciliation that are overshadowed by the political economy of neo-liberal capitalism and the legacies of colonialism. As Atleo and Boron (2023) argue, in this context of extractive bargains, both community resistance to or participation in extractive sectors (oil and gas, forestry, etc...) can become expressions of Indigenous self-determination. As this chapter has argued, the voice of Indigenous Peoples and other affected communities must be at the forefront of the definition of consultation regimes that affect them.

The rapid increase in the exploitation of natural resources that is required for a “green” transition to a lower carbon economy, economic development in the Global South, as well as for defence industries in an era of renewed geopolitical tensions, is likely to put pressure on the emerging stakeholder consultation regime (Barandiáran, 2019; Nem Singh, 2021). Some might argue that the intensification of mining activity may be a “necessary evil” on the route to sustainability. However, this would also raise major challenges with regards to stakeholder consultation with affected people, in so far as it would run counter to ideals on a just and fair transition (Cambou & Buhmann, 2025). In this context, it is possible that states would use discourses of urgency and economic nationalism to justify bypassing or foreclosing consultation processes (Bowles & Andrews, 2023; Massignan, Silva-Sánchez, and Sánchez this volume). Yet, there is evidence that the ideal of “meaningful” consultation is gradually becoming more accepted by actors involved in stakeholder consultation (see Buhmann et al., 2024).

These challenges and opportunities reflect both urgency and promise. There is an urgency to resolve contestation over the rules, norms and decision-making procedures that govern consultation processes. There is considerable promise in the possibility that such a resolution can be informed by the agency and self-determination of host communities, which contest stakeholder consultation practices that they do not consider to be adequate or meaningful. Within this dynamic of contestation, there may be a movement towards consolidation of the stakeholder regime.

Note

- 1 Community and civil society actors are located in the same oval. Principally, the Figure is referring to community-based civil society organisations (CSO), but it is important to note that some professional CSOs also demand recognition as stakeholders (see the chapter by Stoddart and Chen). Importantly, both community-based

and civil society actors tend to view soft-law instruments such as UN Declarations, Resolutions and Guiding Principles as authoritative. We have also chosen to include both Indigenous and non-Indigenous communities under the moniker of “Community”, but highlight the different local sources of authority for each, respectively Indigenous law, and Moral Economy.

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Index

- access to justice 112, 119–20, 136, 231
- accountability: collaboration with NGOs 60–61; global governance 45; governmental mechanisms 183–4, 209–11; human rights-based approach 112–3, 120; legal pluralism 180
- agential constructivism 43–5, 51, 53
- agreements, with Indigenous Peoples: legal basis 94–5, 103; alignment with FPIC 95, 102, 131, 243; Tahltan Nation 96–8; recognition of rights 100–1, 129; exclusion from 133; Greenland 147; relation to EIAs 241; industry perspective 237, 256
- alignment, of expectations 144–5, 262
- American Convention on Human Rights (ACHR) 230
- amicus curae brief 229
- ancestral domains 33
- Argentina 226–8, 229, 239
- artisanal and small-scale mining (ASM) 51–2, 213–4
- Assembly of First Nations Chiefs, New Brunswick 131
- Atlantic Canada 58–9, 62, 66–75, 130–3, 147–8
- Avatar narrative 36
- Awas Tingni v Nicaragua case 115, 229–30
- biodiversity conservation 236
- bottom-up approaches: academic perspectives 251; consultation practices 13, 142, 149, 152; on governance 53, 167
- BP (British Petroleum) 61
- bridging ties 63
- British Columbia, province of Canada: consultation 109, 117, 149; challenge to free entry system 244; industry-Indigenous agreements 92, 95–103
- Brumadinho tailings dam failure 158–9, 161–2, 168
- Brundtland Report 43
- buffer zone 182
- Cameco Corporation 237
- Canadian Office for Responsible Enterprise (CORE) 19, 194, 207–11
- Cenovus 59, 62, 64–8, 71, 74
- China, firms: contribution to economic development 50; corporate responsibility standards 51, 53; Going-Out Strategy 49
- China, foreign relations 49
- circular economy 237
- climate change: mitigation 46; corporate orientations 61, 66, 236, 238–9; in the media 64; policy networks 71, 74; rights-based approaches to 112, 193–4, 197; Indigenous approaches to 134, 136
- colonial governance 30, 127–9, 133–4, 233, 263
- compliance-oriented 16, 47, 53, 143–5, 154, 167, 188, 193, 196, 217, 263
- Constitutional rights, Indigenous Peoples 12, 81, 108–109; 118–119, 128, 177, 179, 244
- Consultation: compared to consent 8–10, 84–6, 93–6, 109–11, 229–32; contestation 3–4, 10–3, 35–7, 62, 240–4, 256; definitions 7, 30, 159, 257–9; early consultation 87–9, 145, 149–50; exclusions 34, 131–2, 165–8, 181–3; Indigenous perspectives 29, 96–104; in stakeholder theory 175; international standards of 4, 32,

- 47–9, 82–84, 111–8, 134–6, 148, 217–8, 236–9, 253–6; process rules 13–6, 38–9, 143, 149–53, 160–162, 210, 216, 227–8, 240–4; respectful timing 150, 154; role of civil society 59, 66–75, 208–11
- consultation regime 5–8, 252
- consultation failures: legal loopholes 177, 181, 223; political opportunism 223; illiberal states 51–2
- cooperative monitoring 237
- corporate culture 9–10, 61–2, 71, 74
- corporate social responsibility (CSR): engagement with stakeholders 60, 74, 173, 184; international standards 46, 252–254; political CSR 60–2; promotion of norms 42, 51, 68, 262
- Covid-19 17, 150, 159, 210
- CSMI (Climate Smart Mining Initiative) 9, 41–3, 45–52
- cultural genocide 129
- customary: authorities 177; decision-making of Indigenous people 95; international law 7, 82, 112, 116, 129, 190; law, 11, 223, 254; ownership of lands 17, 36, 179
- decommissioning, of tailings dams 17, 159–63, 166–8
- defenders of environmental and human rights 13, 18, 127, 130–6, 191–2, 260
- deforestation 51
- democracy 108, 227, 257
- dialogue: as mediation 207–10; compliance with requirements 146; failure of 177; human rights guidance on 195, 199, 231; inclusive 13–4, 74, 175, 237
- Diavik mine 237–238
- Discourse Network Analysis (DNA) 58, 62–6
- displacement, of people 17, 158, 160, 162–6
- Doig River First Nation 149–50, 152
- duty to consult, Canada 66, 71, 81–90, 93, 96, 100, 108–10, 120, 131, 222, 243, 259
- duty-bearers 117, 120–1, 188, 194, 198, 258
- empowerment: of citizens 10; within rights-based approaches 112, 120, 136, 194
- environmental human rights approach 189–90
- environmental pollution: as a human rights problem 197; by Chinese firms 50; by Russian firms 51; from works 163, 165, 181–2; Indigenous stewardship 134; in network analysis 63
- Equinor 59, 62, 64–6, 68–9, 71, 74
- equity, in projects 97, 146
- Eskay Creek project 98–9
- expedited procedure, Australia 34
- Exxon 61
- farming, sheep 148–51
- Flying Post First Nation 238
- free, prior and informed consent (FPIC): as an international norm 81, 224, 254–5; breaches by governments 35, 260; clauses in UNDRIP 82–3, 114; corporate attitudes towards 48; definitions 11, 21, 224; distinction between consultation and consent 85–90, 159; legal interpretations 20, 85–90, 93–5, 97, 99–101, 103, 108, 232; preconditions for 87, 90
- Framework Principles on Human Rights and the Environment 190, 196
- free entry mining system 21, 241, 243
- freedom of expression 113–4, 190, 194
- Galore Creek project 91, 101
- gender impact assessment 196
- gender justice 130
- Gitxaala Nation case 114
- Global Affairs Canada, Department of 191, 208
- green minerals 41–2, 47, 263
- Greenland 143, 145, 147–53
- grievance/ complaints mechanism 196, 208–9, 217
- Guiding Principles on Business and Human Rights (UNGPs) 11, 117, 134, 141–2, 146, 176, 175, 188, 207, 233, 254–5
- Haida Nation case 109–10,
- health impact assessments (HIAs) 149, 194, 198
- honour of the Crown, Canada 86, 110
- human rights due diligence 111–2, 134–6, 189–92, 194–8, 255, 260
- Husky 59, 64
- hydro-power dam 143, 147, 149

- IAMGOLD 238
 Impact Assessment Act, Canada 117, 190–3
 Impact and Benefit Agreements 4, 82, 95; 129; 133, 147, 153, 178, 241
 Indian Act, Canada 97, 130–1
 Indigenous Impact Assessment 29
 Indigenous law 8, 31–3, 95, 103, 128–129, 253, 259, 261
 Inter-American Commission on Human Rights (IACHR) 229
 Inter-American Court of Human Rights (IACtHR) 20, 229–33
 Inter-American Human Rights System (IAHRS) 230–2
 intergenerational tensions 223
 international customary law 116, 254
 international human rights law: access to information 113; Indigenous rights 11, 116, 127, 134, 196; domestic law fails to meet standard of 6–7, 193; Human Rights Due Diligence 189; UNGPs 134, 188
 international law, general principles 82
 internet-based consultation 152
 intersectional analysis 135, 193–4, 196–8, 237
 Inuit Peoples 88, 148, 237
 involuntary displacement 160, 163–5, 255

 Karahnjukar hydro-power station, Iceland 149
 Kuannersuit mine project, Greenland 149, 151, 153

 land defenders 260
 land tenure system 17, 179–81, 223, 257
 Las Cristinas, company 214–15
 liberal institutionalism 44–46, 52
 local content policies 42, 51–2

 Mattagami First Nation 238
 meaningful consultation: definition 13–7, 218; contestation of 81, 257–9; meaning in Canada 85, 101, 110; meaning in Ghana 177, 182; relation to FPIC 89–90; relation to UNGPs 255, 260, 263.
 mediation 207, 210
 Métis Peoples 116, 128, 237
 Mikisew Cree First Nation case 109
 Mi'kmaq Grandmothers 217, 130–4, 137
 Minas Gerais, Brazil 158–64
 Mining Act, Quebec 242–4

 Monitoring 219, 131, 146, 182, 184, 194, 198, 236–8
 moralizing, activist framing strategy 60
 moratorium 240
 M'sit No'kmaq (all-of-my-relations) 133
 Muskrat Falls hydro-power station, Canada 149, 151

 National Contact Point, OECD 192
 native title, Australia 34, 87
 neo-Gramscian 42–6, 51
 network density 63
 Newfoundland and Labrador, Canada 9, 59–62, 68–71, 74, 149, 260
 node centrality 63
 noise pollution 181
 Norway 9, 59–74, 160

 OECD Guidelines for Multinational Enterprises 11, 16, 71, 74, 142, 144–7, 167, 191–2, 195–8, 207, 253–5
 Office of the Public Prosecutor, Minas Gerais, Brazil 164, 167–9
 Ombudsman/ Ombudsperson 194, 207–11
 Ontario, province of Canada 238, 241–2, 244
 Oxfam, Australia 194–5

 partnerships: with communities 146, 236–8; with Indigenous Peoples 128, 132
 patriarchy, patriarchal governance 127, 130–4, 136
 Peru 213–4, 223–5, 230
 Placer Dome 214–6
 political CSR 60–2, 74–5
 Psi-te ntolonapemok (all-of-my-relations) 133

 Quebec, province of Canada 116, 242–5

 Responsible Business Conduct (RBC)
 tools 18, 188–199,
 reasonable care 191
 reconciliation 100–1, 110, 118, 127, 129, 134, 263
 recycling 237–8
 Red Chris project 93, 99–101
 regime, definition 3, 5–8, 251–4
 remedy, access to 21, 136, 189–90, 192
 resettlement 21, 160, 164, 168, 174, 176–181, 183–4, 196, 255
 residential schools, Canada 128–9

- rights: to access justice 116; to biological diversity 230; to a clean environment 13, 18, 114, 127, 133–7, 189–90, 230; to communal property 230; to consultation 11, 20, 114, 145–7, 159, 224, 230, 233, 255, 260; to consent 232; to culture 230; to freedom of expression 113; to information 17, 114–6, 158, 225; to negotiate 34; to non-discrimination 115; to participate in own development 32, 95, 111, 114, 135, 229; to protest 48; to self-determination 32, 101, 111, 127, 258; to shape consultation processes 14, 95, 114, 127; to self-government 128; to territory 33, 95, 114–5, 230; to work 215
- rights-holders 9–11, 17–9, 65, 68, 95, 109–18, 120, 127, 141–2, 159–62, 167–8, 194–8, 208, 222–4, 227, 230, 256–62
- Right to Negotiate, Australia 34
- Rio Tinto 37–8, 46, 117, 237–8
- Rouyn-Noranda, mining project 243
- Russia: foreign relations 43, 48–9, 51; mining firms 51, 53; paramilitary organisations 49
- Saramaka v Suriname case 231–2
- Section 35, Canadian Constitution 108–10, 116, 128–9, 244
- self-determination 98, 101–2, 111–4, 127, 130, 135, 137, 222, 229, 254, 258, 263
- sharing-learning circle 127, 130
- Shell 59, 61–5, 71, 97, 191
- site level assessments 216–8, 236, 239
- social learning 62, 145, 151, 154
- Social Network Analysis (SNA) 58, 62–3
- soft power 44
- Specific Instance, OECD National Contact Point 192
- Sumitomo Metal Mining Company 238
- supply chains 41, 45–6, 207
- sustainable mining 41–7, 236
- tailings dam: de-characterisation 159–68; failure 163, 166; management 160–2
- Taku River case 95, 102
- temporary resettlement 164–5
- The Philippines 33, 35, 240
- top-down approaches to consultation 151
- training: pre-consultation 14, 154; programs 97, 99, 101, 146–7, 237–8; to support reconciliation 129
- transition: consultation to consent 81, 84, 89, 96; minerals 47, 49, 143, 148, 240, 263
- transparency 42, 45, 61, 113–4, 180, 184, 209, 211, 242
- trusting relationships 146, 236
- UN Human Rights Committee 114–5
- UN Special Rapporteur on the Rights of Indigenous Peoples 113, 115
- UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples) 32–3, 82–4; 93–103; 114–6, 119, 127–9, 134–6, 196–7, 229–30, 253–6, 259–60
- UNDRIP Act, Canada 116
- UNESCO World Heritage Site 143, 147–9
- UNGPs (United Nations Guiding Principles on Business and Human Rights) 10–11, 13, 16, 18, 42, 117, 134–6, 141–6, 188–93, 196, 207–9, 253–6, 260
- Uranium mining 237
- Venezuela 19, 213–6
- Venice Principles, Council of Europe 208–9
- Wabanaki Confederacy 130
- water defenders 13, 127, 130, 133–4, 137
- Wolastoqiyik Grandmothers 128, 130–3, 137
- World Bank: energy transition 41, 240; Environmental and Social Framework 47–8; global governance 42–6
- World Wildlife Fund (WWF) 68
- Xucuru v Brazil case 230
- Yukon, territory of Canada 241, 244
- Tagaeri and Taromenane v Ecuador case 232
- Tahltan Nation 12, 92–3, 96–103