CAN FREE, PRIOR AND INFORMED CONSENT SUPPORT RECONCILIATION BETWEEN INDIGENOUS PEOPLES AND THE STATE IN MULTICULTURAL SOCIETIES?

Annabel Beales

Doctor of Philosophy in Law

CITY, UNIVERSITY OF LONDON

The City Law School

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Abstract

The United Nations Declaration on the Rights of Indigenous Peoples has been hailed as a 'framework for reconciliation' on which states and indigenous peoples can build harmonious relationships. However, during the negotiations of UNDRIP's text, some argued that its impact would be constrained by the adoption of a cultural rights framework over an unambiguous recognition of the right to self-determination.

This thesis investigates the implementation of a key provision of UNDRIP: the requirement on states to consult with indigenous peoples in order to obtain their consent before approving measures or policies that would impact on indigenous rights, asking whether weak interpretations of indigenous self-determination under a multicultural model of rights are constraining the reconciliatory potential of prior consultation. It provides a theoretical analysis of prior consultation, drawing from indigenous critiques of human rights based multiculturalism and western theories of dispute resolution, and applying a decolonial theoretical framework. The theoretical analysis is grounded in case studies that illustrate how prior consultation is being implemented in Peru and Canada.

This thesis concludes that two different conceptualisations of FPIC have emerged: the 'general rule' approach, which is based on the right to self-determination and generally favoured by indigenous peoples; and the 'multiculturalist approach', which views FPIC as a facet of multicultural democracy. This latter approach is generally favoured by states, whose practice in this regard will shape the future development of FPIC as an international legal norm. However, this 'multiculturalist approach' is unlikely to lead to reconciliation because it constrains indigenous self-determination within a colonial imbalance of epistemic, political and economic power that overwhelmingly benefits the state.

In contrast, this thesis puts forward a dispute resolution approach which reimagines prior consultation as a duty to forge consensus. Such an approach, based on mutual respect and collaboration between peoples, may be more likely to contribute to reconciliation because it sidesteps commonly-held concerns that indigenous consent will be wielded as a unilateral right of veto, and recognises indigenous self-determination more fully. Viewing prior consultation through the lens of dispute resolution also suggests that mediation may offer a range of tools to counterbalance structural disadvantages that indigenous peoples face within the prior consultation process and encourage a more genuine intercultural dialogue.

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List of Abbreviations

ADR	Alternative Dispute Resolution
AIDESEP	Asociación Interétnica de Desarrollo de la Selva Peruana
BATNA	Best Alternative to a Negotiated Agreement
BCEAO	British Columbia Environmental Assessment Office
CCP	Confederación Campesina del Perú
CEA Act	Canadian Environmental Assessment Act
CEA Agency	Canadian Environmental Assessment Agency
CERD	The Committee on the Elimination of Racial Discrimination
CONAP	Confederación de Nacionalidades Amazónicas del Perú
EIA	Environmental Impact Assessment
EMRIP	The Expert Mechanism on the Rights of Indigenous Peoples
FPIC	Free, Prior and Informed Consent
IA Act	Impact Assessment Act (Canada)
IACtHR	Inter-American Court of Human Rights
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labor Organization
ILO C107	International Labor Organization Convention 107 – Indigenous and Tribal Populations
ILO C169	International Labor Organization Convention 169 – Indigenous and Tribal Peoples
LD	Legislative Decree
mEIA	Modified Environmental Impact Assessment
MINEM	Ministry of Energy and Mines (Peru)
MINCU	Ministry of Culture (Peru)
MVRB	Mackenzie Valley Review Board
MVRMA	Mackenzie Valley Resources Management Act (Canada)
MVLWBs	Mackenzie Valley Land and Water Boards

NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PSNR	Permanent Sovereignty over Natural Resources
SENACE	National Environmental Certification Service for Sustainable Investments (Peru)
SSN	Stk'emlupsemc te Secwepemc Nation
UNCHR	United Nations Commission on Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples (also may be referred to as 'the Declaration')
UNGA	United Nations General Assembly
UNHCR	United Nations Human Rights Committee
TWAIL	Third World Approaches to International Law
WATNA	Worst Alternative to a Negotiated Agreement
WGDD	Working Group on the Draft Declaration
WGIP	Working Group on Indigenous Populations
ZOPA	Zone of Potential Agreement

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Chapter 1: Introduction

1.1 Introduction to the United Nations Declaration on the Rights of Indigenous Peoples

There are an estimated 350-500 million indigenous people globally,[1] making up around 5-6% of the world's total population.[2] Indigenous peoples are culturally diverse, speaking around 4000 of the world's almost 6700 languages.[3] Despite strong efforts on behalf of indigenous peoples to maintain their cultures and ways of life, they routinely suffer from marginalisation, poverty and human rights violations.[4] For centuries indigenous peoples have been defending their own physical and cultural survival from violence, discrimination, forced assimilation and dispossession of their lands. Living across all regions of the world, indigenous people own, occupy or use around a quarter of global land, and safeguard up to 80% of the worlds' biodiversity.[5] Furthermore, indigenous territories are often rich in natural resources, making indigenous peoples particularly vulnerable to the impacts of extractivist development models that stand in direct contrast to most indigenous development paradigms.[6]

In the face of this physical and cultural violence, indigenous peoples have consistently asserted their right to exist as independent societies, free to determine their own futures and priorities for development. As Chapter 3 will relate, it is only relatively recently that indigenous peoples have been able to leverage international law to support them in this struggle. For centuries after colonisation began, the work of European international legal theorists justified and enabled appropriation of indigenous land and resources, and the oppression of

[1] United Nations Educational, Scientific and Cultural Organization, 'Indigenous Peoples' (*UNESCO*, 7 September 2017) <https://en.unesco.org/indigenous-peoples> accessed 6 June 2020.
[2] Umberto Cattaneo Rishabh Kumar Dhir, 'Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future' (2020) Report <http://www.ilo.org/global/publications/books/WCMS_735607/lang--en/index.htm> accessed 27 July 2020.
[3] United Nations Permanent Forum on Indigenous Issues, 'Indigenous Languages Backgrounder' (United Nations Department of Public Information 2018) <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Languages.pdf> accessed 25 August 2020.
[4] Dwane Mamo (ed), *The Indigenous World 2020* (34th Edition, Indigenous Work Group for Indigenous Affairs 2020) <https://www.iwgia.org/en/resources/indigenous-world> accessed 25 August 2020., 21.
[5] 'Indigenous Peoples' (*World Bank*) <https://www.worldbank.org/en/topic/indigenouspeoples> accessed 13 February 2021.
[6] Jerry Mander and Victoria Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (New Expanded Edition, University of California Press 2007).; Cathal Doyle and Andrew Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement* (Tebtebba, PIPLinks and Middlesex University 2014).; UNHRC Expert Mechanism on the Rights of Indigenous Peoples Fifth Session 9-13 July 2012 'Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on the extractive industries' (30 April 2012) UN Doc A/HRC/EMRIP/2012/2.

indigenous peoples by European powers.[7] In the 1920s, the attempts of indigenous peoples to assert their independent and self-governing status fell on deaf ears at the League of Nations, who considered that conflict between indigenous peoples and state governments were an internal matter and not of international concern.[8] Later, during the post-war decolonization period, states considered that indigenous peoples would benefit from the independence of former colonial territories, and would eventually become assimilated into the general population of new states.[9] However, indigenous peoples were insistent on maintaining their own distinct ways of life, and - faced with continued human rights violations and discrimination - cooperated with one another to finally make their voices heard.

The global movement of indigenous peoples gained traction in the 1970s, and expertly utilised the United Nations system to shape international legal protections for indigenous people.[10] In 1971, the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Martínez Cobo as Special Rapporteur to undertake a Study on the Problem of Discrimination Against Indigenous Populations. His landmark report (published between 1981-84) investigated the condition of indigenous peoples across the world and set forth recommendations for protection of indigenous people's human rights following extensive input from indigenous advocates. In 1982, the UN Economic and Social Council established the Working Group on Indigenous Populations (WGIP).[11] This committee of experts provided a focus for the indigenous movement to collaborate and promote their agenda, and resulted in the early drafts of UNDRIP.

In 1985, the General Assembly established the UN Voluntary Fund for Indigenous Peoples, to provide financial assistance to enable indigenous representatives to participate in WGIP.[12] In 1995, the Commission on Human Rights established an open-ended Working Group on the Draft Declaration (WGDD), which was composed of states' representatives, non-state actors,

[7] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007).
[8] 'Indigenous Peoples and the United Nations Human Rights System Fact Sheet' (Office of the United Nations High Commissioner for Human Rights 2013) No. 9, Rev.2 <https://www.refworld.org/docid/5289d7ac4.html> accessed 19 February 2021.; Grace Li Xiu Woo, 'Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations' 2003 Law, Social Justice & Global Development Journal <https://warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/woo/> accessed 27 July 2020. See Chapter 3.
[9] Claire Charters and Rodolfo Stavenhagen, 'The UN Declaration on the Rights of Indigenous Peoples: How It Came to Be and What It Heralds.' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009).
[10] Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009).
[11] Study of the problem of discrimination against indigenous populations ECOSOC Res 1982/34 (7 May 1982)
[12] United Nations Voluntary Fund for Indigenous Populations, UNGA Res 40/131 (13 December 1985).

academics and indigenous people themselves.[13] This group met annually until 2006, when the draft UNDRIP was adopted by the Human Rights Council and submitted to the General Assembly.[14] Following some tense behind-the-scenes negotiation, the enormous efforts of indigenous grassroots activists and high-level representatives culminated in the adoption of UNDRIP by the UN General Assembly on 13th September 2007.[15]

The adoption of UNDRIP represents a remarkable achievement: it protects a wide range of economic, cultural, social and political rights of indigenous peoples, as individuals and - crucially - as collective groups. Although the text inevitably contains compromise and limitations, the text of UNDRIP 'breaks new ground' in international law.[16] Through UNDRIP the international community of states recognised indigenous peoples' rights to self-determination and autonomous self-government; such recognition is the first time that the right to self-determination has been recognised explicitly in relation to a sub-national group.[17] UNDRIP's focus on collective rights is also extremely significant. As Xanthaki has commented, 'The Declaration also put an end to discussions about the recognition - or non-recognition - of collective rights for sub-national groups in current international law.'[18]

Whilst the text is based on compromise and does not fulfil all the ambitions of many within the indigenous movement, it was welcomed as a basis for future discussion and action.[19] It was

[13] Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994, UNHCR Res 1995/32 (3 March 1995) (adopted without a vote). ; Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214, ECOSOC Res 1995/32 (25 July 1995).

[14] Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994', UNHRC Res 1/2 (29 June 2006).

[15] The United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) (adopted by 143 votes to 4; 11 abstentions). Australia, Canada, New Zealand and the United States of America voted against adoption, and the 11 abstentions were by Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine. All States that voted against UNDRIP have now indicated their support.

[16] Mauro Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' (2011) 13 International Community Law Review 413., 434.

[17] Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 International and Comparative Law Quarterly 957.; Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments Feature: Reflections on a Decade of International Law' (2009) 10 Melbourne Journal of International Law 27.

[18] Xanthaki (n 17)., 30.

[19] Ban Ki-moon, 'Statement Attributable to the Spokesperson for the Secretary-General on the Adoption of the Declaration on the Rights of Indigenous Peoples' <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Statement-SG-IDWIP-2007.pdf> accessed 29 January 2021.; Victoria Tauli-Corpuz, 'Message of Victoria Tauli-Corpuz, Chairperson of the UN Permanent Forum on Indigenous Issues, on the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples' <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Statement-Press-Release-IDWIP-2007.pdf> accessed 29 January 2021.; Adelpho Regino Montes and Gustavo Torres Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009).

hailed by the United Nations as 'a triumph for justice and human dignity' that establishes 'a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples'.[20] Importantly for this thesis, it was expressly intended to promote greater harmony between indigenous peoples and states, after centuries of colonisation and oppressive and discriminatory policies towards indigenous peoples.[21]

Despite its 'soft law' status, Barelli has argued that the UNDRIP has significant implications for states both in its own right and through the progressive interpretation of international treaties such as ICCPR, ICESCR, ILO C107 and ILO C169.[22] In the years since its adoption, the UNDRIP has played a significant role in providing a normative baseline for countries, intergovernmental organisations, corporations and non-governmental organisations in their approach to indigenous peoples,[23] including as the basis for initiatives that seek to bring about reconciliation between indigenous peoples and the state.[24] However, over 13 years later many tensions remain, and there is still a gulf between indigenous rights in theory and their implementation and enjoyment in practice.[25]

1.2 The focus of this thesis: free, prior and informed consent and the mining sector

[20] 'Declaration on the Rights of Indigenous Peoples' (*United Nations Human Rights Office of the High Commissioner*) <https://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> accessed 13 February 2021.

[21] For example, two paragraphs of the Preamble of UNDRIP state: 'Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests', and 'Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.' UNDRIP, UNGA Res 61/295 (13 September 2007).

[22] Barelli, 'Role of Soft Law in the International Legal System' (n 17).

[23] Felipe Gómez Isa, 'The UNDRIP: An Increasingly Robust Legal Parameter' (2019) 23 The International Journal of Human Rights 7.

[24] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Twelfth Session 15-19 July 2019 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples' (2 September 2019) UN Doc A/HRC/EMRIP/2019/3/Rev.1.

[25] Examples of the implementation gap are discussed in Reports by the UN Special Rapporteur on the Rights of Indigenous Peoples, e.g. UNGA 'Rights of indigenous peoples, including their economic, social and cultural rights in the post-2015 development framework' (6 August 2014) UN Doc A/69/267; UNHRC 'Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz' (11 August 2014) UN Doc A/HRC/27/52; UNHRC 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. Addendum: The Status of Indigenous Peoples' Rights in Panama' (3 July 2014) UN Doc A/HRC/27/52/Add.1; UNHRC 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya Addendum: The Situation of Indigenous Peoples' Rights in Peru with Regard to the Extractive Industries (3 July 2014) UN Doc A/HRC/27/52/Add.3.
For a critical examination of the position of indigenous peoples in Canada, the United States, Australia and New Zealand, see Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009). For a discussion of various indigenous rights strategies and the failure of legal and political victories to necessarily translate into practice, see Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010). Morgan gives a socio-legal account of the impact of the indigenous rights movement on international discourse on indigenous rights, whilst cautioning that the legal framework is insufficient to produce change - see Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate 2011).

This thesis focuses on one aspect of UNDRIP: the principle that States have a duty to effectively consult indigenous peoples in order to obtain their free, prior and informed consent (FPIC) before making decisions, policies or actions which would affect their rights.[26] In particular, it focuses on Article 32 of UNDRIP, which is most relevant to states' duties in the context of mining projects.

The principle of 'prior consent' had previously been included in both the International Labor Organization conventions on indigenous populations, in relation to relocation of indigenous communities from their lands.[27] ILO C169, which sought to overturn the assimilationist nature of ILO C107, also included a requirement for states to consult with indigenous populations on legislative or administrative measures that would directly affect their rights, 'with the objective of achieving agreement or consent to the proposed measures.'[28] The UNDRIP expanded on the provisions of ILO C169, specifically referring to FPIC in the context of projects on their lands and placing the requirement in the context of indigenous peoples' 'right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'. Furthermore, the UNDRIP, as a General Assembly resolution, was significant because 144 countries had voted for it. Previously, ILO C169 had only been ratified by 22 countries, and so its geographical reach and significance for international standard-setting was much more limited.[29]

Article 32 is particularly relevant in relation to extraction projects on indigenous territories. The ever-pressing demand for natural resources often results in devastating impacts on indigenous communities – causing displacement, jeopardising health and means of subsistence, destroying areas rich in biodiversity and with spiritual significance for indigenous communities, undermining indigenous governance institutions, and violation of cultural and property rights, Additionally, extractive projects are tied to an increase in sexual violence against indigenous women by workers, and frequently result in conflict between indigenous

[26] UNDRIP, UNGA Res 61/295 (13 September 2007) Arts 10, 19, 29 and 32. The Declaration contains two instances in which FPIC must be obtained by states: Article 10 prohibits relocation of indigenous peoples without their free, prior and informed consent, and Article 29 prevents storage of hazardous waste on indigenous lands without their FPIC. Article 19 requires states to 'consult in order to obtain' FPIC before adopting or implementing administrative or legislative measures that would affect them. Articles 11 require redress for indigenous peoples if their cultural, intellectual, religious and spiritual property is taken without their FPIC, and Article 28 provides redress if traditional lands, territories and resources have been confiscated, taken, occupied, used or damaged without FPIC.

[27] International Labor Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959) (C107 – Indigenous and Tribal Populations Convention) Art 12; International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) (C169 – Indigenous and Tribal Peoples Convention) Art 16.

[28] C169 – Indigenous and Tribal Peoples Convention Art 6.

[29] Barelli, 'Role of Soft Law in the International Legal System' (n 17).

communities, mining companies, and the state, leading to violence and criminalisation of land defenders.[30] Mining impacts a significant proportion of indigenous territory worldwide; for example a 2020 study concluded that mining now impacts 20% of indigenous land in the Amazon.[31] Consequently, mining activity is a prominent source of conflict: out of 651 mining-related environmental conflicts registered on the EJOLT Atlas, 316 involved indigenous communities.[32] However, there are signs that the mining sector is coming to accept FPIC as a means to secure social license to operate and reduce community conflicts which have costly implications for project planning and execution.[33]

Since UNDRIP's adoption, the international recognition and implementation of FPIC consultation has gathered pace, and it is emerging as an international legal norm.[34] However, States have shown reluctance to fully respect FPIC, instead emphasising the need to consult with indigenous communities without requiring their consent to actually be obtained. Thus, the Inter-American Court on Human Rights has pronounced that the obligation to *consult* (and not to *obtain consent*) constitutes a general principle of international law,[35] and Szablowski has opined that 'in global policy circles relating to extractives, it seems that FPIC is everywhere discussed, but it is not much of an exaggeration to say that it is practiced virtually nowhere.'[36] Much of the literature on FPIC now focuses on how to operationalise it in practice; many analyses of specific FPIC consultation processes have been carried out which highlight the challenges of implementation. These include delineating the obligations on states, challenging unsupportive legal frameworks; defining who should be consulted and how consent is judged; the need for education, partnerships and skills-building for indigenous peoples, particularly

[30] UNHRC 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractive industries operating within or near indigenous territories (11 July 2011) UN Doc A/HRC/18/35, paras. 30-55; UNHRC Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractives industries and indigenous peoples (1 July 2013) A/HRC/24/41; Doyle and Whitmore (n 6).

[31] Patricia Quijano Vallejos and others, 'Undermining Rights: Indigenous Lands and Mining in the Amazon' <https://www.wri.org/publication/undermining-rights> accessed 24 January 2021.

[32] EJOLT, 'EJAtlas | Mapping Environmental Justice' (*Environmental Justice Atlas*) <https://ejatlas.org/> accessed 24 January 2021.

[33] See for example, International Council on Mining and Metals, 'Indigenous Peoples and Mining: Position Statement' (ICMM 2013) May.; ICMM, *Indigenous Peoples and Mining: Good Practice Guide* (2nd edn, ICMM 2015) <https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9520.pdf> accessed 19 November 2020.

[34] Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, Taylor & Francis Group 2015).

[35] *Case of the Saramaka People v Suriname* Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 172 (28 November 207); *Case of the Saramaka People v Suriname* Judgment of August 12, 2008 (Interpretation of the Judgement on Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No 185 (12 August 2008).

[36] David Szablowski, 'Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice' (2010) 30 Canadian Journal of Development Studies / Revue canadienne d'études du développement 111.

around their knowledge of indigenous rights; and the need for companies and states to cede control of the process and decision-making to indigenous peoples themselves.[37]

1.3 Key issues

This thesis seeks to develop on this growing literature by investigating whether key debates or assumptions that were evident during the negotiation of the UNDRIP may now be influencing the implementation of FPIC in practice, in ways that constrain its potential to bring about one of the fundamental aims of the indigenous movement: indigenous self-determination. As will be discussed in Chapter 3, indigenous self-determination is a prerequisite to meaningful reconciliation between indigenous societies and the state. Thus, forms of FPIC that constrain indigenous self-determination may not succeed in resolving conflict and bringing about the new, harmonious relationships envisaged by UNDRIP's authors.

This section briefly highlights three of the significant issues that are relevant to this thesis.

1.3.1 Human rights or self-determination as the basis for indigenous rights

During the UNDRIP's negotiation, there was a debate within the indigenous movement and academic circles as to whether indigenous negotiators should place indigenous rights within the paradigm of established human rights (and in particular, the right to culture), or whether they should emphasise their fundamental claim to self-determination as autonomous and self-governing peoples – a claim which was viewed by states as a threat to their political unity and territorial integrity.[38] The distinction was important, because the adoption of a human rights

[37] See, for example, Indigenous Peoples, 'Making FPIC – Free , Prior and Informed Consent – Work : Challenges and Prospects for Indigenous Peoples FPIC Working Papers , Forest Peoples Programme June 2007'.; Nina Kantcheva, 'Designing the Consultation Process to Develop Guidelines for Implementing FPIC and Providing Recourse' (UN-REDD Programme 2011).; Shalanda Baker, 'Why the IFC's Free, Prior and Informed Consent Policy Does Not Matter (yet) to Indigenous Communities Affected by Development Projects' (2012) 30 Wisconsin Int'l L J 668.; Ana Maria Esteves, Daniel Franks and Frank Vanclay, 'Social Impact Assessment: The State of the Art' (2012) 30 Impact Assessment and Project Appraisal 34.; Cathal Doyle and Jill Cariño, 'Making Free Prior & Informed Consent a Reality and the Extractive Sector' (2013) <[www.piplinks.org/makingfpicareality]> accessed 15 January 2017.; Philippe Hanna and Frank Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013) 31 Impact Assessment and Project Appraisal 146.; Sango Mahanty and Constance L McDermott, 'How Does "Free, Prior and Informed Consent" (FPIC) Impact Social Equity? Lessons from Mining and Forestry and Their Implications for REDD+' (2013) 35 Land Use Policy 406.; Stuart R Butzier and Sarah M Stevenson, 'Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent' (2014) 32 Journal of Energy & Natural Resources Law 297.;
[38] Engle (n 25).; Andrew Erueti, 'The Politics of International Indigenous Rights' (2017) 67 University of Toronto Law Journal 569.; Dwight Newman, 'Interpreting Fpic in Undrip' (2020) 27 International Journal on Minority and Group Rights 233.

framework implied an acknowledgement of the incorporation of indigenous peoples under the authority of the state.[39]

Indigenous rights were already treated within the UN in the context of human rights, non-discrimination and the right of minorities to participate in the life of the state whilst maintaining their own cultures and traditions.[40] Amongst prominent indigenous rights advocates, Professor James Anaya, who in 2008 became the UN Special Rapporteur on the Rights of Indigenous Peoples, recognised the potential for human rights to provide a firm legal basis for indigenous peoples' rights to cultural identity, land, autonomy and participation in state decision-making, including .[41] On the other hand, Engle has argued that the movement's strategic adoption of the more acceptable cultural rights framework during the 1990s detracted from the crucial issues which originally motivated the movement, such as structural discrimination and a lack of autonomy, and she warned that this decision may constrain future attempts to achieve indigenous self-determination in practice.[42] Ultimately, as will be discussed in Chapter 3, UNDRIP is considered to have provided a right to internal self-determination to indigenous peoples, exercised within the context of the nation state.[43]

Similarly, the way that FPIC is conceptualised will shape the way in which it is implemented. Doyle has examined the different bases for FPIC, noting that it can be understood as a means through which indigenous peoples can exercise a general right to self-determination; as a safeguard of other more specific rights such as the right to culture, to practice traditional means of subsistence or to collectively own property; and as a means of ensuring effective and non-discriminatory participation in state decision-making.[44] According to Doyle, an understanding of FPIC that is rooted in the right to self-determination has potential to transform the balance of power between indigenous peoples and states. Perhaps unsurprisingly, states

[39] Erueti (n 38).; Duane Champagne, 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights' (2013) 28 Wicazo Sa Review 9.
[40] For example, CERD, General Recommendation XXIII: Indigenous Peoples (18 August 1997) UN Doc CERD/C/51/misc 13/Rev 4.; for an overview of how cultural rights standards applied to indigenous peoples prior to UNDRIP's adoption, see Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2010)., 196-204.
[41] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004).;
S James Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' (2004) 21 Arizona Journal of International and Comparative Law 13.;
S James Anaya, Claire Charters and Rodolfo Stavenhagen, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009).;
[42] Engle (n 25).; Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141.
[43] Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' (n 16).
[44] Doyle (n 34)., 129-159.

are reluctant to do so, and Doyle comments that the extent of FPIC's success will depend on indigenous peoples themselves continuing to assert their rights at every level of society.[45]

1.3.2 The influence of multiculturalism on the implementation of FPIC

The idea of multiculturalism has been influential in the development of the minority rights regime of the late Twentieth Century, as a means of managing a rise in intra-state conflicts between different ethnocultural groups. Principles of human rights, democracy, equality, non-discrimination and good governance have been relied on by powerful states and the international non-governmental organisations as the basis for developing peaceful and prosperous societies. A key principle is that of effective participation – that all individuals and groups within a society have a voice in the policy decisions and legislative measures that affect them.

Such principles are referenced in Article 46 of the UNDRIP, which permits restrictions of the rights in UNDRIP only insofar as they are 'determined by law and in accordance with international human rights obligations',[46] and in a manner that is 'non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.' Additionally, UNDRIP must be interpreted 'in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.'[47] Furthermore, as shall be explored further in Chapter 5, the structure of the UNDRIP which draws on both individual and collective rights protection within the context of a culturally non-homogenous but superordinate state bears a strong resemblance to the model of human rights based multiculturalism proposed by Will Kymlicka. This model was an attempt to provide a liberal rationalisation of the emerging minority and human rights regime in the late twentieth century.[48]

Indigenous rights, and FPIC in particular, have been conceptually and positively linked to the practice of multiculturalism by proponents of indigenous rights, UN bodies, states, and judicial bodies.[49] The Inter-American Court of Human Rights, which has taken a lead in developing case law on the application of FPIC, has stated that 'Respect for the right to consultation of

[45] ibid.
[46] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 46.2.
[47] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 46.3.
[48] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995).
[49] Xanthaki (n 40). 252-256; Paul Patton, 'Philosophical Justifications of Indigenous Rights' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge).

indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity...which must be assured, in particular, in a pluralistic, multicultural and democratic society.'[50] To Anaya, the model of indigenous rights that was developed through ILO C169 and the then draft declaration 'advances a multicultural model of political ordering and incorporation of indigenous peoples into the fabric of the state' in a manner that generally accords with Kymlicka's model.[51] Additionally Stavenhagen has said that the challenge of UNDRIP is now 'to renew the usefulness of a people's right to self-determination in the era of democratic multiculturalism',[52] as well as the UN Permanent Forum on Indigenous Issues' statement that 'Many of the rights in the Declaration will require new approaches to global issues, such as development, decentralization and multicultural democracy.'[53]

However, there are those who view the conflation of indigenous rights and multiculturalism to be problematic. Champage has argued that

> *The UNDRIP plan reduces indigenous rights and values to an invitation to participate in a more fully inclusive multicultural nation-state…. Unfortunately, multicultural nation-states, just like their mono-cultural predecessors, will be institutionally incapable of addressing the values, interests, and social organization of indigenous peoples.*[54]

In relation to FPIC specifically, Rodríguez-Garavito views the development of the international legal principle of free, prior and informed consultation as only one part of an international 'process comprised of the global juridification of difference—a process that I have termed ethnicity.gov—which reflects the dominant type of multiculturalism and governance that dominates in the era of neoliberal globalization'.[55] Indeed, Rodriguez-Garavito deems FPIC to represent an entirely new approach, saying 'FPIC's rise and impact in regulations and disputes about indigenous rights have been so profound that instead of merely constituting a legal

[50] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* Judgement of June 27, 2012 (Merits and Reparations) Inter-American Court of Human Rights Series C No 245 (27 June 2012), para 159. See also *Case of the Case of the Community Garifuna Triunfo de la Cruz and its members* v Honduras Judgement of October 8 2015 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 305 (8 October 2015) paras 158, 261.
[51] Anaya, 'International Human Rights and Indigenous Peoples' (n 41)., 15.
[52] Rodolfo Stavenhagen, 'Making the Declaration Work' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009)., 364.

[53] UN Permanent Forum on Indigenous Issues, 'Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples' <https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> accessed 29 January 2021., 2.
[54] Champagne (n 39).
[55] César Rodríguez-Garavito, 'Ethnicity.Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Indiana Journal of Global Legal Studies 263., 304.

figure, it entails a new approach to ethnic rights and multiculturalism, with its own language and rules'.[56] In his view, this approach to FPIC will further reinforce imbalances of power that continue the legacy of colonialism that has caused such suffering to indigenous peoples, and has the effect of depoliticising and neutralising dissent. FPIC, he argues, represents only 'a last recourse—a last inconvenience in the way of death—to which indigenous peoples cling in the face of all odds … in their struggle against collective annihilation.'[57]

1.3.3 The role of FPIC in reducing conflict

There is a general assumption within the development and human rights community that consultation processes will result in the better inclusion of minorities in state decision-making, leading to the protection of minority rights and the reduction of conflict.[58] However, recent research is highlighting obstacles that are currently standing in the way of such an outcome. For example, Schilling-Vacaflor and Flemmer have drawn attention to restrictive interpretations of FPIC in domestic law which contrast with the more comprehensive and inclusive processes demanded by indigenous peoples. Furthermore, they highlight three preconditions necessary if participatory processes are to lead to conflict transformation: 'state institutions capable of justly balancing the diverse interests at stake; measures that reduce power asymmetries within consultations; and joint decision-making processes with binding agreements'.[59]

Several authors have argued that FPIC processes are unlikely to lead to reconciliation if they are designed without mechanisms to link the social demands of indigenous communities to wider institutional reform which resolves and provides remedies for the underlying causes of conflict. Otherwise, consultation processes could simply reproduce social conflict as the issues raised during FPIC consultations fall into an 'institutional vacuum',[60] resulting in

[56] ibid., 268.
[57] ibid., 305.
[58] E.g. See UNPFII, Sixth Session, 14-25 May 2007 'Report on the sixth session (14-25 May 2007)' UN Doc E/2007/43, E/C.19/2007/12., para 21 which states: 'Through free, prior and informed consent, future conflicts can be avoided and the full participation of indigenous peoples in consultation mechanisms, environmental impact assessments and sociocultural impact assessments can be ensured.'
This view is also being embraced by the private sector, which increasingly views consultation processes as a means to reduce the costs of opposition to projects through the achievement of a social licence to operate. Lisa J Laplante and Suzanne A Spears, 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector' (2008) 11 Yale Human Rights & Development Law Journal 69. Juliette Syn, 'The Social License: Empowering Communities and a Better Way Forward' (2014) 28 Social Epistemology 318.; Ana Maria Esteves, Daniel Franks and Frank Vanclay, 'Social Impact Assessment: The State of the Art' (2012) 30 Impact Assessment and Project Appraisal 34.
[59] Almut Schilling-Vacaflor and Riccarda Flemmer, 'Conflict Transformation through Prior Consultation? Lessons from Peru' (2015) 47 Journal of Latin American Studies 811.
[60] Roger Merino, 'Re-Politicizing Participation or Reframing Environmental Governance? Beyond Indigenous' Prior Consultation and Citizen Participation' (2018) 111 World Development 75., 82.

disillusionment and disengagement on the part of indigenous communities. Guzman-Gallegos has argued that this requires the state to take on a new role as mediator between different sociocultural groups and to foster a political culture of negotiation rather than acting as a 'facilitator for the agendas of elites'.[61] Such recommendations were also reflected in Oxfam's report, which also highlighted the need, separate from robust FPIC procedures, for states to implement fora for dialogue and consensus-building with indigenous peoples on urgent problems, and to develop comprehensive reparations plans for past violations of rights to be included in the FPIC process.[62] Furthermore, Stetson explicitly links the process of institutional reform with a project of decolonisation, arguing that in order to reduce conflict over natural resources, the state must recognise that its structures and institutions are developed according to a Eurocentric logic which has exploited indigenous people and lands for economic gain. Henceforth, Stetson argues that states should include indigenous peoples in the planning and implementation of sustainable development projects in ways which includes indigenous notions of development and modernity.[63]

Recently, authors have begun to analyse FPIC consultation as a form of deliberative democracy.[64] Ilizarbe has noted that the indigenous movement fundamentally challenges the very nature of citizenship and who is deemed a member of the political community, requiring a 'transformation of the state and democracy from within'.[65] Sanborn and Paredes have observed that FPIC in Peru is an attempt to institutionalise intercultural dialogue - and that whilst in the short term this may lead to increased conflict, there may be potential for longer-term success. However, they caution that a barrier to this progress is the inability of the 'state, political elites and other sectors of society, to recognise the indigenous peoples as citizens with full rights, and, at the same time, to recognise them as different from most'.[66] Furthermore, Sanborn and Parades note that FPIC processes operate across important differences in language, culture and relationship to the land, and comment that 'protecting the collective rights of minorities is not easy for a multicultural society.'[67] Implementation of FPIC is therefore

[61] Maria A Guzman-Gallegos, 'Conflicting Dilemmas: Economic Growth, Natural Resources and Indigenous Populations in South America' (NOREF Norwegian Peacebuilding Resource Centre 2014).
[62] Due Process of Law Foundation, 'Right to Free, Prior and Informed Consultation and Consent in Latin America' (Due Process of Law Foundation and Oxfam 2015) <http://dplf.org/sites/default/files/executive_summary_consultation_2015_web_02-17-2016_c.pdf> accessed 29 January 2021.
[63] George Stetson, 'Oil Politics and Indigenous Resistance in the Peruvian Amazon: The Rhetoric of Modernity Against the Reality of Coloniality' (2012) 21 Journal of Environment & Development 76.
[64] Alejandro Santamaría Ortiz, 'La consulta previa desde la perspectiva de la negociación deliberativa' [2016] Revista Derecho del Estado 227.; Nicolas Pirsoul, 'The Deliberative Deficit of Prior Consultation Mechanisms' (2019) 54 Australian Journal of Political Science 255.; Carmen Ilizarbe, 'Intercultural Disagreement: Implementing the Right to Prior Consultation in Peru' (2019) 46 Latin American Perspectives 143.;
[65] Ilizarbe (n 64)., 146.
[66] Cynthia A Sanborn and Alvaro Paredes, 'Consulta Previa: PERÚ' (2014) Spring., 21.
[67] ibid., 21.

a complex task, and it is perhaps unsurprising that there is dissatisfaction amongst indigenous people across the world as to how it is being operationalised.[68]

Pirsoul suggests that a key factor in the current limitations of FPIC is a 'deliberative deficit' in the consultation process, in which the 'deliberative ideal of exchange of ideas between equals is reduced to a game of persuasion'.[69] Both Pirsoul and Ilizarbe highlight the 'democratic deficit' that exists within these mechanisms, highlighting the disadvantaged position of indigenous people due to their lack of access to information, the treatment of indigenous representatives as 'subordinate actors' within the dialogue, and the problem of ensuring that indigenous elites do not dominate at the expense of the democratic participation of communities, merging their varied individual interests into a collective whole. Additionally, they draw attention to an imbalance of epistemic power, in which indigenous people's worldviews are deemed to be less legitimate and rational – and therefore less persuasive – that those of state officials and other non-indigenous actors. This imbalance is further compounded by their inferior political and socioeconomic status, as well as by lack of recognition for indigenous legal systems.[70] These analyses reveal the complex imbalances of power that are at play during the FPIC process. They also suggest that, if FPIC is to be effective as a tool for reducing conflict, there is a pressing need to design consultation mechanisms with a view to overcoming the considerable disadvantages that indigenous communities face.

1.4 Objective and Contribution

The aim of this thesis is to analyse whether (and how) a multiculturalist framing of FPIC is constraining its potential as a tool for indigenous self-determination, which is understood by this thesis to be an essential foundation for reconciliation between indigenous peoples and the state. As set out above, much of the literature is focused on the practical challenges that FPIC poses, whereas in contrast, this thesis seeks to contribute to a relatively small body of work that investigates the relationship between FPIC, multiculturalism and the reduction of conflict between indigenous peoples and the state.[71] In taking a critical stance, this thesis

[68] Due Process of Law Foundation (n 62).; UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62, paras 60 and 61.
[69] Pirsoul (n 64)., 266.
[70] Ilizarbe (n 64).; Pirsoul (n 64).
[71] For example, Lorenza B Fontana and Jean Grugel, 'The Politics of Indigenous Participation Through "Free Prior Informed Consent": Reflections from the Bolivian Case' (2016) 77 World Development 249.; Hans Morten Haugen, 'Participation and Decision-Making in Non-Dominant Communities. A Perspective from Civic Republicanism' (2016) 23 International Journal on Minority and Group Rights 306. Schilling-Vacaflor and Flemmer (n 59).; Ilizarbe (n 64).; Lisbet Christoffersen, 'Contextualizing Consent: Spaces for Repression, Resistance, and Accommodation in Bolivia's TIPNIS Consultation' (2020) 15 Latin American and Caribbean Ethnic Studies 105.;

does not seek to denigrate the significant achievements of the global indigenous movement in negotiating the UNDRIP's adoption, but to respond to Engle's call to 'shore up its fragile architecture' by critically examining UNDRIP, as 'an important site for the ongoing struggle over the meaning of human rights, the dominance of human rights as the basis of justice, and the extent to which it might be mined or abandoned for alternative, transformative strategies.'[72]

In response to this challenge, Chapters 3 and 4 of thesis theoretically analyse what it considers to be the issue central to the conflict between indigenous peoples and states: that of indigenous self-determination and its conflictual relationship with state sovereignty, territorial integrity and political unity. These chapters examined the extent to which the human rights paradigm, as understood through Kymlicka's influential model of human rights based multiculturalism, can sufficiently reconcile these two apparently opposing claims, or whether alternative strategies are necessary. Chapter 5 builds on this theoretical analysis, applying it to the ambiguous text of Article 32 of UNDRIP to understand how an underlying presumption in favour of the human rights based multiculturalism, particularly amongst states, has influenced both the text of Article 32 and its subsequent interpretation.

In addition to the theoretical question posed by Engle, this thesis also contributes to answering a question posed by Doyle towards the end of his monograph on FPIC. Doyle pointed to the need for

> *greater consideration of the role which recognising the right to give or withhold consent can play in altering the rights-constraining power dynamics between indigenous peoples and external actors… as well as what conditions are necessary for a good faith intercultural dialogue between the industry, States and indigenous peoples to occur.*[73]

Doyle's use of the word 'intercultural', as opposed to 'multicultural' is prescient, because it speaks to the difference between an equal exchange between cultures rather than a hierarchical ordering of the states and indigenous peoples. Chapters 6 and 7 of this thesis examine the practice of FPIC in Peru and Canada respectively, to evaluate multiculturalist approaches to implementation of FPIC and to understand whether the theoretical assumptions underlying the normative framework of FPIC, discussed in Chapters 3 to 5, are now affecting

[72] Engle (n 42).
[73] Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge Research in Human Rights Law (London: Routledge, Taylor & Francis Group, 2015). P282

its implementation.[74] This analysis provides insights into the impact of political, epistemic and economic power imbalances on the quality of FPIC consultation procedures as well as their substantive outcomes.

Chapter 8 attempts to propose a pragmatic solution to the power imbalances that are inherent in a multiculturalist approach to FPIC, whilst also providing insights into the reasons why states must recognise the 'right to say no' if FPIC consultation outcomes are to be fair and long-lasting. In doing so, it seeks to make a practical contribution to improving the future practice of FPIC in the context of a multicultural state. To this end, it draws from mediation and negotiation theory, and makes a contribution to a nascent body of work applying these theories to facilitate an improved relationship between indigenous peoples and the state.[75]

1.5 Definitions

1.5.1 Indigenous peoples

There is no universally agreed definition of indigenous peoples.[76] UNDRIP does not offer a definition, in recognition of the importance of self-identification and to reflect the breadth and variety of indigenous cultures: strict interpretations of a definition may prevent some indigenous peoples from relying on rights which ought to protect them, particularly where the political context is not conducive.[77] The Inter-American Court of Human Rights has also taken

[74] See Section 1.6.2 below for an explanation of why these two countries were chosen as the case studies in this research project.

[75] Michael Coyle, 'Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand' (2011) 24 New Zealand Universities Law Review 596.; Michael Coyle, 'Negotiating Indigenous Peoples' Exit from Colonialism: The Case for an Integrative Approach Discourse and Negotiations across the Indigenous/Non-Indigenous Divide' (2014) 27 Canadian Journal of Law and Jurisprudence 283.; Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (1st edition, Routledge 2015).; Michael Coyle, 'Shifting the Focus: Viewing Indigenous Consent Not as a Snapshot But As a Feature Film' (2020) 27 International Journal on Minority and Group Rights 357.

[76] Various definitions of indigenous peoples have been put forward, for example in UNCHR (Sub-Commission) 'Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on Criteria which Might be Applied when Considering the Concept of Indigenous Peoples' (21 June 1995) UN Doc E/CN.4/Sub.2/AC.4/1995/3; UNCHR (Sub-Commission) Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of "Indigenous People"' (10 June 1996), UN Doc. E/CN.4/Sub.2/AC.4/1996/2; B Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 The American Journal of International Law 414.; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002)., 33-60; Jeff Corntassel, 'Who Is Indigenous? "Peoplehood" and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9 Nationalism and Ethnic Politics 75.

[77] Benedict Kingsbury has argued for a purposive approach and proposes essential and indicative criteria for determining who is indigenous to allow for the variation between peoples. Kingsbury's model proposes self-identification as a distinct ethnic group; experience of or vulnerability to disruption or exploitation; long connection with the region; and the wish to retain a distinct identity as essential factors. Other factors that strongly suggest indigeneity include non-dominance in national or regional society; close cultural connection with land; historical continuity in the region; linguistic, socio-economic or cultural distinctivenes from the non-indigenous population; being regarded as indigenous by the non-indigenous population and government administration. Developing a flexible definition is important in the context of some states such as China claiming that indigeneity is inextricably

a flexible approach, when it held that the Saramaka tribe could be deemed 'indigenous' under international law. The Saramaka, as descendants of African slaves brought to Suriname by Europeans in the 17th Century, were not indigenous to the territory. However, the Court decided that they should be categorised as indigenous on the basis of their similar characteristics to indigenous tribes, considering such factors as distinct social structure, economy and their spiritual relationship with their territory. In fact, the special spiritual, cultural and economic relationship to land is held to be a key factor in determining the indigenous nature of a group.[78]

Perhaps the most often-cited definition - and the one that shall be used in this thesis - is that of Martinez Cobo, in his 'Study of the Problem of Discrimination against Indigenous Populations'. This defines indigenous peoples as those:

> which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[79]

1.5.2 The distinction between FPIC and consultation

Throughout this thesis there are references to FPIC and also to 'consultation', 'FPIC consultation' or 'prior consultation'. As will be further discussed in Chapter 5, there are many views as to the obligations that Article 32.2 of the UNDRIP place on states, and whether it constitutes a right of veto for indigenous communities.[80] In this thesis, 'consultation' or 'prior consultation' refers to the broad process by which states engage with indigenous communities

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linked to European colonialism, and that therefore international law on indigenous peoples is applicable solely in states which underwent European colonialism. States such as India argue that giving preferential rights to specific peoples on the basis of prior occupancy of land may exacerbate existing conflict; in Africa, there is a hesitation to recognise only some communities as indigenous for similar reasons. See Kingsbury (n 76). However, this thesis focuses on Peru and Canada, both of which recognise the existence of indigenous peoples within their territorial borders – although there are still disagreements over who is classed as indigenous, even in these contexts.

[78] *Case of the Saramaka People v Suriname* (n 35), paras 78 – 84.

[79] UNCHR 'Study of the Problem of Discrimination Against Indigenous Populations Final Report (last part) submitted by the Special Rapporteur Mr José Martínez Cobo' (30 September 1983) UN Doc. E/CN.4/Sub.2/1983/21/Add.8, para 379.

[80] Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 European Journal of International Law 165.; Doyle (n 34).; Mauro Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016).

before taking a decision that may impact on their rights, to understand their concerns and hear their suggestions. The purpose of consultation may vary – for example, it may be intended that the state must weigh and consider the views of indigenous communities in its decision, or to use this information to take action to mitigate impacts. It may also be undertaken with the objective of reaching agreement, or even in rare cases in order to actually obtain consent before any action is taken.

'FPIC' in this thesis describes the decision of an indigenous community to consent to a proposed measure, *prior* to the measure being approved by the state. FPIC requires that the community has been *informed*, by having access to adequate information about the measure on which to base a decision. FPIC also requires that the community is *free* to make a decision, without coercion of any kind.[81] In practice, authors have noted the practical challenges of meeting these criteria in the context of language and cultural barriers, financial pressures, violence and threats of criminality, and project timeframes which limit the ability of indigenous communities to engage according to their traditional decision-making processes.[82] In reality, authors have also noted that there are very few instances in which there is a clear obligation on the state in domestic legislation to actually obtain consent.[83] Therefore this thesis defines an 'FPIC process' or 'FPIC consultation' as one in which the state consults indigenous peoples with the objective of obtaining their consent, but may or may not require consent to be achieved for the measure to be approved.

1.5.3 Self-determination

The question of what the right to self-determination entails in the context of indigenous peoples is explored in depth in Chapter 3. As will be seen, the right to self-determination was recognised in Article 1 of both the ICCPR and ICECSR, and at first was understood to confer a right on the population of a state or former colonial territory to 'determine its own political status and to freely pursue their economic, social and cultural development.' In the late Twentieth Century, the concept of 'internal self-determination' developed to refer to the right

[81] UNPFII Fourth Session 16-27 May 2005 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005)' (17 February 2005) UN Doc.E/C.19/2005/3, para 45; UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62.

[82] Doyle and Cariño (n 37).; Szablowski (n 36).; Marilyn Machado and others, 'Weaving Hope in Ancestral Black Territories in Colombia: The Reach and Limitations of Free, Prior, and Informed Consultation and Consent' (2017) 38 Third World Quarterly 1075.

[83] Notable exceptions to this are the Philippines and in Australia's Northern Territories. Both these jurisdictions have legislated to require FPIC to be obtained prior to the approval of extractive projects on indigenous territory. However, even these examples are imperfect, and in the main states are preferring legal frameworks that require consultation, but not a requirement for FPIC to be obtained. See Doyle (n 34). 194-201.

of a sub-national people to pursue these objectives within the structures of a democratic state. In the context of this thesis, the 'right to self-determination' is used to express this idea as it has been elaborated for indigenous peoples, particularly by Anaya who has described that it has both remedial and substantive aspects.[84] However, this thesis argues that the right to self-determination should not be solely understood through a human rights frame, but should also emphasise its politically charged nature as well as the possibility of its expression in ways other than state-centric democratic processes.

1.5.4 Reconciliation

Reconciliation is also explored further in Chapter 3. Drawing from both indigenous writing and the field of Peace and Conflict Studies, this thesis views 'reconciliation' (sometimes referred to as 'deep reconciliation') as a political process centred on dialogue, in which parties that were in a state of conflict work together to transform unjust systems and structures so that they can live harmoniously alongside one another in mutually beneficial relationship of respect. This 'deep reconciliation' contrasts with 'coexistence', which refers to a more superficial state in which there may be an absence of overt conflict, but in which the underlying root cause of the conflict remains unaddressed.

1.6 Methodology

1.6.1 The Challenge of Researching Indigenous Issues

Linda Tuhiwai-Smith, a Māori academic specialising in indigenous education and research methodologies, writes 'we [indigenous peoples] are the most researched people in the World.'[85] Her book, *Decolonising Methodologies*, forcefully demonstrates how European scientific research on indigenous peoples is inextricably linked with imperialism, privileging European knowledge as 'truth' and positioning indigenous peoples as the object of research – the 'other' to be examined and judged through European eyes and for their own purposes. In this sense, indigenous research shares a similarity with critical theory, which seeks to bring a benefit to the research participants, rather than simply aiming to acquire knowledge for its own sake.[86] Tuhiwai-Smith writes passionately about the detrimental impact of this research on indigenous peoples – the appropriation of their knowledge and cultural heritage and the

[84] Anaya, Charters and Stavenhagen (n 41).
[85] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd edn, Zed Books 2013)., 7.
[86] Shawn Wilson, *Research Is Ceremony: Indigenous Research Methods* (Fernwood Publishing Co Ltd 2008)., 37.

degradation of their self-worth and ways of life. She argues for indigenous research to be carried out by indigenous peoples, according to their own knowledge systems.

This thesis acknowledges that there is a danger of contributing to the colonial legacy of appropriation of indigenous knowledge systems. Additionally, it recognises that it is not for non-indigenous researchers to speak on behalf of indigenous peoples. Therefore this thesis does not make indigenous peoples its research subject, but instead turns attention onto Eurocentric Modernity/Coloniality, and the ways that it expresses itself in the context of FPIC. It attempts to engage with the work of indigenous authors in a way that *listens to* and '*speaks with*'[87] their voices as much as possible, whilst maintaining an awareness of pervasive Eurocentric logic both within the mind of the researcher and within much of the literature on UNDRIP. On the other hand, there is also a risk 'romanticising' indigenous knowledge and presenting it as homogenous body of knowledge when in fact, there are many different indigenous perspectives. To reflect this, efforts have been made to represent different indigenous viewpoints in the discussion on self-determination, multiculturalism, FPIC and mediation.

1.6.2 The Methodology of this Thesis

This thesis consists of critical theoretical analysis of the influence of ideas about multiculturalism on both the conceptualisation of FPIC and its implementation. The research has been conducted through a critical, decolonial theoretical framework that is discussed in Chapter 2. It draws from work of decolonial authors such as Walter Mignolo,[88] Arturo

[87] Catherine Walsh, '"Other" Knowledges, "Other" Critiques: Reflections on the Politics and Practices of Philosophy and Decoloniality in the "Other" America' (2012) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World.

[88] Walter D Mignolo, *The Idea of Latin America* (1st edn, Wiley-Blackwell 2005).; Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press 2012).; Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press 2012).; Walter D Mignolo and Arturo Escobar (eds), *Globalization and the Decolonial Option* (Reprint edition, Routledge 2013).

Escobar,[89] Enrique Dussel,[90] Anibal Quijano,[91] Ramon Grosfoguel[92] and Catherine Walsh.[93] These authors seek to develop postcolonial debates, which they argue are largely anchored in the Eurocentric philosophy of Marx and Foucault, to include analysis based on Latin American and indigenous philosophy, and expand concepts such as Chakrabarty's notion of provincializing Europe[94] by advocating techniques such as border thinking, borrowing from the writing of Gloria Anzaldua.[95] This approach fits well with the theme of indigenous rights, given the relevance of colonial history to the current situation of inequality and discrimination that indigenous peoples face, the global/local ('translocal' or 'glocal') nature of indigenous movement,[96] and the claims of indigenous people themselves that decolonisation is crucial for reconciliation to occur.[97]

Decolonial writers (as well as those from other methodological approaches) have argued against the requirement for - or even the possibility of - strict objectivity on the part of the researcher, particularly on questions of social justice.[98] The decolonial approach is strongly in this vein, arguing that researcher/activists ought not remain neutral on issues that perpetuate legacies of colonialism and cause harm to 'subaltern' groups.[99] Santos has outlined a project

[89] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (With a New preface by the author edition, Princeton University Press 2011). Mignolo and Escobar (n 88).
[90] Enrique Dussel, *Twenty Theses on Politics* (Duke University Press 2009).; Enrique Dussel, *Philosophy of Liberation* (Aquilina Martinez ed, Wipf & Stock Publishers 2003).
[91] Anibal Quijano, 'Paradoxes of Modernity in Latin America' (1989) 3 International Journal of Politics, Culture, and Society 147.; Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 Nepantla: Views from South 533.
[92] Ramón Grosfoguel, 'Race and Ethnicity or Racialized Ethnicities? Identities within Global Coloniality' (2004) 4 Ethnicities 315.; Ramón Grosfoguel, 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' (2011) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World.; Ramón Grosfoguel, 'Decolonizing Western Uni-Versalisms: Decolonial Pluri-Versalism from Aimé Césaire to the Zapatistas' (2012) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World.
[93] Catherine Walsh, 'Shifting the Geopolitics of Critical Knowledge' (2007) 21 Cultural Studies 224.; Walsh (n 87).
[94] Ajay Skaria, 'The Project of Provincialising Europe: Reading Dipesh Chakrabarty' (2009) 44 Economic and Political Weekly 52.
[95] Gloria Anzaldua, Norma Cantu and Aida Hurtado, *Borderlands / La Frontera: The New Mestiza* (4 edition, Aunt Lute Books 2012).
[96] Boaventura de Sousa Santos, *Toward a New Legal Common Sense : Law, Globalization, and Emancipation* (2nd ed., Cambridge University Press] 2002).; Ruth Trinidad Galván, 'Chicana/Latin American Feminist Epistemologies of the Global South (Within and Outside the North): Decolonizing El Conocimiento and Creating Global Alliances' (2014) 6 Journal of Latino-Latin American Studies (JOLLAS) 135.
[97] Taiaiake Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (1st edn, David Bunnett Books 1999).; Mander and Tauli-Corpuz (n 6).; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University Of Minnesota Press 2014).
[98] Marc Mason, 'On Objectivity and Staying "Native"' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (1st edn, Routledge 2019) <https://www.taylorfrancis.com/books/e/9780429952814> accessed 4 November 2020.; Ranjan Datta, 'Decolonizing Both Researcher and Research and Its Effectiveness in Indigenous Research' (2018) 14 Research Ethics 1.; Flavia Monceri, 'Beyond Universality: Rethinking Transculturality and the Transcultural Self' (2019) 14 Journal of Multicultural Discourses 78.
[99] Walter D Mignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26 Theory, Culture & Society 159.

of 'the sociology of emergence',[100] in which academics take seriously the efforts of subaltern groups to use law for emancipatory ends, rather than dismissing their efforts as being overly idealistic or too insignificant to bring about lasting change. The role of the scholar is to join the dots between different counter-hegemonic actions, so that each does not appear as an isolated exception, but as part of a global effort to de-centre existing hegemonic practices. Put another way, the goal is to shed light on the 'plural forms of resistance and embryonic legal alternatives arising from the bottom the world over.'[101] At the same time, hegemonic forms of law should be critiqued and deconstructed, to erode their assumed legitimacy. Thus, the aim of scholars who take this approach is intensely practical: to build on nascent alternatives in the hope that, in time, emancipatory laws and practices can be developed to replace those which currently dominate.[102] In this vein, this thesis views FPIC as an emancipatory project led by and for indigenous peoples, and seeks to understand the extent to which Eurocentric worldviews are now constraining its emancipatory effect.

The use of indigenous political philosophy as a foundation for critiquing human rights based multiculturalism and the UNDRIP is in keeping with the decolonial methodology to think from the 'periphery', to critically analyse Eurocentric legal and philosophical frameworks through the values and perspectives of the oppressed group, and to 'decentre' assumptions and systems that whilst claiming to be universal, are in fact just one way of viewing the world. As a western researcher, this endeavour is inevitably limited by the researcher's ability to think beyond their own culture and epistemic perspective, and the line between appropriation and appreciation is ever-present.[103] This thesis represents an endeavour to self-reflectively 'decolonise the mind' and to 'unlearn' familiar liberal ideals of the Global North by placing them in an intercultural dialogue with the critiques of the Global South.[104] The purpose is to help create space for 'alternative' 'emancipatory' conceptualisations and practices of FPIC to emerge, that are rooted in indigenous epistemologies.

In order to undertake theoretical analysis in a decolonial fashion, this thesis deliberately draws from the work of indigenous authors and some non-indigenous authors who are supportive of,

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[100] Boaventura de Sousa Santos (ed), *Another Knowledge Is Possible; beyond Northern Epistemologies* (Verso 2008).
[101] Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005)., 12.
[102] ibid.,18.
[103] The author is extremely thankful to indigenous thinkers and activists whose writings have challenged and enriched her thinking during this research, and acknowledges that the vast majority of these works were written predominantly for an indigenous audience.
[104] Santos, *Another Knowledge Is Possible; beyond Northern Epistemologies* (n 100).; Santos, *Toward a New Legal Common Sense* (n 96).; Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Paradigm 2014).

and familiar with, the objectives of indigenous activists. Like all groups, indigenous viewpoints are diverse, and the sources used represent a range of views about the potential of multiculturalism and the UNDRIP to protect indigenous rights. In addition, the analysis of UNDRIP's content draws from primary sources, particularly the various revisions of the UNDRIP draft and official statements made by country representatives at the UN, in addition to commentary by indigenous and non-indigenous people involved in the drafting process and legal analysis by human rights scholars.

The theoretical analysis is grounded by its use of two desk-based case studies that investigate whether underlying multiculturalist assumptions are impacting the implementation of FPIC in Peru and Canada. Whilst the usefulness of case studies is contested,[105] case studies can provide a deeper understanding of complex interactions between the law and its subjects,[106] producing a more holistic and nuanced understanding of situations and events, and the different viewpoints of various actors and observers within them.[107]

The reasons for the choice of Canada and Peru are as follows: First, both countries have indicated their support for UNDRIP, with Peru taking a lead in advocating the adoption of UNDRIP at UNGA, and Canada indicating its qualified support in 2010, and its full support in 2016. Both countries are multicultural democracies with a history of European colonisation and relatively advanced legal frameworks on indigenous peoples' rights. Extractive development, and mining in particular, is a significant part of both countries' economies. Both countries have a difficult history of conflict between indigenous peoples and the state, whilst at the same time being states that consider UNDRIP (and FPIC) to be a key foundation for resetting their relationship with indigenous peoples and protecting indigenous peoples' rights. However, the two countries have taken different approaches to implementing FPIC: in the case of Peru the framework is legislative. On the other hand, as a common law country, Canada's legal framework relies on the development of case law based on the historic relationship between indigenous peoples and the Crown. Whilst this thesis is not intended to provide a comparative analysis of these two approaches, it enables an exploration of whether similar issues related to multiculturalism are evident in both cases.

[105] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 Utrecht Law Review 95. Making the case for case studies in Empirical legal research.
[106] Kathleen M Eisenhardt and Melissa E Graebner, 'Theory Building From Cases: Opportunities And Challenges' (2007) 50 Academy of Management Journal 25.
[107] Jane Lewis and Carol McNaughton Nicholls, 'Design Issues' in Jane Ritchie and others (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (2nd edn, SAGE Publications Ltd).

The illustrative examples of specific consultations were chosen in order to provide insight into consultations that could be considered as best case scenarios for FPIC in the two countries, because this research is concerned with assessing the reconciliatory potential of the multiculturalist approach to FPIC at its most effective. In Peru, the legal framework is such that there is little variation in the procedures involved in individual prior consultations. Illustrative examples of consultations were therefore chosen due to their illustrating in some way, a landmark development in the practice of FPIC. In Canada, where the regulatory environment enables more variation, illustrative examples were chosen that highlighted novel institutional mechanisms which increased indigenous community's control of the process, in order to provide insight into whether FPIC is promoting indigenous self-determination.

The case studies use a variety of primary sources, such as legislation and government decrees, official indigenous and non-indigenous government records, official records of consultation plans and agreements, social media accounts and websites of indigenous communities, NGO blogs and reports, and reports by observers who were present at the consultation in question. These are complemented by secondary sources such as media articles and academic writings. These were selected to include a variety of perspectives from the main actors concerned - particularly of state government and indigenous communities involved. Texts in Spanish were translated by the author, with assistance from Spanish speakers who have lived in Peru particularly to clarify cultural meaning where this was unclear. One of the disadvantages of case studies is a lack of generalisability to other situations. Rather than focus solely on one case study, it was decided to investigate three examples of FPIC consultation in two countries. The intention was not to make direct comparisons, but to deepen understanding of the complexities that can arise during consultation, and to gain an indication of whether the theoretical limitations of multiculturalist understandings of FPIC identified earlier on in the thesis are observable in practice. It was not practically feasible to undertake field research for six different illustrative examples, but the breadth of information readily available online nevertheless made it possible to gain a relatively in-depth understanding of the cases from a distance. Furthermore, in the analysis of the case studies, reference has been made to other research on FPIC in the countries which corroborates the observations made.

Following the case studies, Chapter 8 utilises three mediation models to explore whether mediation could provide a means of tempering the influence of the multiculturalist approach to FPIC on the FPIC process - in particular, to try to mitigate imbalances of power. This research intends to reflect on the limitations of non-indigenous strategies for dialogue that may be

employed in the context of FPIC.[108] In doing so, this thesis recognises that by and large such approaches are based in non-indigenous knowledges, and may not be considered appropriate for use by specific indigenous communities. The rights-based and interests-based models were chosen because 'rights' and 'interests' are often considered to be integral to the FPIC process as a basis for discussions. The narrative model of mediation is not as widely known. However, it permits an alternative analysis of how power operates within dialogue processes, and specifically deals with the impact of epistemic injustice as well as the potential for finding agreements that are rooted in relationship and epistemic diversity.

1.7 Chapter Outline

This thesis is structured as follows:

Chapter 2 provides greater detail on the theoretical framework that underpins this thesis, and its methodological implications. It explores the relationship between the decolonial approach, which is a specifically Latin American critique of the colonial legacy,[109] and similar approaches such as postcolonial studies and Third World Approaches to International Law (TWAIL). Although there are many similarities, the decolonial approach offers greater emphasis on the importance of the early colonial period in Latin America to the creation of the modern world system and its engagement with indigenous and other marginalised epistemologies within Latin America.

Chapter 3 introduces the premise that indigenous peoples and the state exist in a condition of intractable conflict, whose root cause is the inability to reconcile indigenous claims for self-determination with the sovereignty, political unity and territorial integrity of the state. It also introduces UNDRIP as a 'framework for reconciliation' and examines Eurocentric and indigenous ideas on what is required for reconciliation to occur. By tracing the status of indigenous peoples in international law over the centuries, it shows how the source of the conflict between indigenous peoples and states has been entrenched in the international normative framework. Finally, drawing from human rights scholars and indigenous political

[108] Additionally, the researcher considers that it would be inappropriate for a non-indigenous author to base such an analysis in indigenous models of negotiation or dispute resolution with which she is not intimately familiar and without the involvement and consent of the indigenous communities in question.
[109] Different authors refer to 'decolonial' approaches and the 'Modernity/Coloniality' school to indicate a specific body of work based on the writing of Anibal Quijano and Walter Mignolo, which analyses the colonial legacy from a Latin American perspective. In this thesis, I will mainly refer to the 'decolonial approach'.

philosophy, it examines how the recognition of the right to self-determination in Article 3 of UNDRIP may be constrained by interpreting it solely through the lens of human rights. It argues that if the right to self-determination it is to enable a process of reconciliation, it will need to be interpreted in a way that engages with indigenous ideas and retains its power to challenge the political and economic *status quo*.

Chapter 4 develops on the limitations of human rights approaches in the quest for reconciliation, by examining whether Kymlicka's influential model of human rights based multiculturalism provides a sufficient framework for restoring the relationship between indigenous peoples and the state. In line with the decolonial approach outlined in Chapter 2, it critiques Kymlicka's theory drawing from the work of indigenous activists and political philosophers, most of whom have engaged with multiculturalism as it arises in the Canadian context. It identifies three key ways in which human rights based multiculturalism falls short of enabling self-determination of indigenous peoples: it fails to adequately engage with indigenous worldviews, and thus overlooks the central importance of indigenous self-determination; it reinforces colonial hierarchies of power that privilege the state as the ultimate legal authority; and it provides a definition of citizenship that focuses on rights, rather than relationship and responsibility for each other and the natural world.

Chapter 5 applies the analysis in Chapters 3 and 4 to Article 32 of UNDRIP, in relation to FPIC. It argues that there are two very different interpretations of FPIC emerging. Indigenous rights advocates have defended a 'general rule' approach that affirms the fundamental place of indigenous self-determination, and requires consent to be obtained in the vast majority of extractive projects. On the other hand, states have developed a 'multiculturalist' interpretation of FPIC as a measure that safeguards rights of indigenous peoples in the context of a democratic, multicultural but unified state. This multiculturalist interpretation considers that obtaining FPIC is an objective, but not a requirement. Utilising the analysis of the previous chapter on human rights based multiculturalism as well as the work of decolonial authors, Chapter 5 cautions that far from being a tool for reconciliation, there is potential for FPIC to create a new layer of conflict between states and indigenous peoples.

Following this, Chapters 6 and 7 present two case studies on the implementation of FPIC in Peru (in Chapter 6) and Canada (in Chapter 7). These two chapters take the same format, first analysing the development of the legal framework on FPIC in each country and then presenting three illustrative examples of FPIC consultation processes, before analysing whether the theoretical constraints of multiculturalist approach to FPIC that were identified in Chapters 4 and 5 are coming to fruition.

Chapter 8 is the final substantive chapter of this thesis. It draws from the case studies, as well as wider literature on the practice of FPIC, to consider whether the use of mediation might overcome some of the limitations of the multiculturalist approach to FPIC noted in the previous Chapters. Drawing from theory on rights-based mediation, interests-based mediation and narrative mediation, it provides three different means of analysing power dynamics within a prior consultation process, and analyses how mediation techniques could help to expose and shift power imbalances to cultivate a more equal intercultural dialogue between indigenous peoples and states. It also draws attention to the limitations of western mediation models in this context, and highlights the importance of designing mediation processes in partnership with indigenous communities to give them equal control over the process.

Finally, Chapter 9 provides the main conclusions and limitations of this thesis and suggests some avenues for further research.

Chapter 2: Theoretical Framework

2.1 Introduction

This chapter outlines the theoretical framework that underpins this thesis, and its methodological implications. Section 2 introduces the body of literature comprising 'postcolonial studies', explaining its important exposure of the continued legacy of colonialism on the present-day world system, particularly in relation to the colonisation of the Middle East, South Asia and Africa. This critique has been applied to international law by those who employ Third World Approaches to International Law (TWAIL), which has contributed to the study of indigenous peoples' rights in international law. Section 3 suggests how the 'decolonial' or Modernity/Coloniality school[1] - a specifically Latin American critique of the colonial legacy – could add to TWAIL's analysis of international law, and to the study of indigenous peoples' rights and FPIC in particular. The decolonial approach contains similar themes to postcolonial literature, particularly in terms of the dualism inherent in colonial culture and the need to identify that European culture and systems are not universal. However, decoloniality differs from postcolonial analyses in its emphasis on the importance of the early colonial period in Latin America to the creation of the modern world system and its engagement with indigenous and other marginalised epistemologies within Latin America. Finally, Section 4 considers some methodological implications of the choice of decolonial literature as a theoretical framework.

2.2 Postcolonial approaches to indigenous peoples' rights in international law

2.2.1 Postcolonialism

Postcolonialism is a diverse movement which came to prominence in the Western academy during the 1980s, drawing from the intellectual legacy of non-Europeans who were struggling against colonisation after the Second World War.[2] This legacy includes influential intellectual-activists such as Martinican Psychiatrist Frantz Fanon (who later lived in Algeria during the

[1] Different authors refer to 'decolonial' approaches and the 'Modernity/Coloniality' school to indicate a specific body of work based on the writing of Anibal Quijano and Walter Mignolo, which analyses the colonial legacy from a Latin American perspective. This thesis will mainly refer to the 'decolonial approach'.
[2] Eve Darian-Smith, 'Postcolonial Theories of Law' in Max Travers and Reza Banakar (eds), *An Introduction to Law and Social Theory* (2nd edn, Hart 2012).

war of independence against the French),[3] Trinidadian socialist historian C.L.R. James,[4] Martinican poet and politician Aimé Césaire[5] and Afro-American sociologist and historian W.E.B. DuBois.[6] Between them, they vehemently challenged colonialism in the Caribbean and Africa and racial oppression in the United States of America. Their writing also celebrated the power of oppressed peoples to resist such regimes. Postcolonial studies as an academic genre has been greatly influenced by the writing of three literary theorists:[7] Palestinian-American Edward Said,[8] Indian Homi Bhabha[9] and Gayatri Spivak, also from India.[10]

Said's work critiqued the field of Oriental Studies, interrogating the production of knowledge from the point of view of a constructed divide between the Occident (the Western World of Western Europe and the United States of America) and the Orient (the Middle and Far East). Said argued that Oriental Studies was founded on the distinction between the Orient as 'other', and the notion that Modernity was created by the West. Therefore, history had become the story of the Wests' actions upon the passive 'other'. Said draws from a variety of Western texts across many disciplines to demonstrate a discourse of 'Orientalism', which emerged at the end of the eighteenth century, constructed in the atmosphere of the Enlightenment. Knowledge was regarded as universal and categorised into disciplines whose conventions dictated how knowledge was recognised and classified. Despite the appearance of objectivity, Said demonstrated that scientific and other disciplines represented the Orient as being almost always negative, drawing from stereotypes with little evidential foundation. This underlying schema, being particularly insidious due to its propagation in government and mass media, acted to legitimise and perpetuate the domination of the Orient by the West.[11] Said also explored the origins of imperialism in the Western psyche, arguing that Western culture has both reflected and reinforced imperialism in history and up to the present day. Said argued

[3] Frantz Fanon, *The Wretched of the Earth* (Constance Farrington tr, New Ed, Penguin Classics 2001).; Frantz Fanon, *Black Skin, White Masks* (New edition edition, Pluto Press 2008).
[4] CLR James and James Walvin, *The Black Jacobins: Toussaint L'ouverture and the San Domingo Revolution* (New Ed edition, Penguin 2001).
[5] Aime Cesaire and Robin DG Kelley, *Discourse on Colonialism* (New Ed edition, Monthly Review Press 2000). Aime Cesaire, *A Tempest: Based on Shakespeare's the Tempest,* (Wheeler Professor of Performance and Director of the Otto B Schoepfle Vocal Arts Center Richard Miller tr, 1 edition, Theatre Communications Group Inc,US 2002).Aimé Césaire, James Arnold and Clayton Eshleman, *The Original 1939 Notebook of a Return to the Native Land* (Bilingual edition edition, Wesleyan University Press 2013).
[6] WEB Du Bois, *The Souls of Black Folk* (New edition edition, Dover Publications Inc 2000).
[7] Robert JC Young, *Colonial Desire: Hybridity in Theory, Culture and Race* (Routledge 1994)., 163; Peter Childs, *An Introduction to Post-Colonial Theory* (Longman 1997)., viii; Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 Adelaide Law Review 315.
[8] Edward W Said, *Culture And Imperialism* (New Ed edition, Vintage 1994). Edward W Said, *Orientalism* ([New 2003 ed], Penguin 2003).
[9] Homi K Bhabha, *The Location of Culture* (2 edition, Routledge 2004).
[10] Gayatri Spivak, *The Spivak Reader: Selected Works of Gayati Chakravorty Spivak* (Donna Landry and Gerald MacLean eds, Routledge 1996). Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press 1999).
[11] Said, *Orientalism* (n 8).

that essentialist narratives about race and nationalism must be overcome in favour of a new recognition of intertwined histories and identities.[12]

Said's influence is extremely significant. Childs and Williams comment that without Said, 'Colonial Discourse Analysis and Postcolonial Theory might not have cohered or constituted themselves as an area of theoretical enquiry in the way that they did.'[13] As a result of Said's theoretical influence, a key strategy of postcolonial literature is to expose and challenge the dualisms embedded in the European worldview which sustain neo-colonialist policies. Postcolonialism also seeks to challenge limiting and negative interpretations of the Third World, exposing dominating forms of power, and understanding how power can be enabled to resist Eurocentric hegemony.[14]

Bhaba's contribution focuses on the reconstruction of the concept of Modernity as a purely European construct. He points to the hybridity of the postcolonial condition. Bhabha argues that Fanon's division of "Black Skins, White Masks" is in fact not clear cut: the process of colonisation results in hybridisation of colonised and coloniser culture, through cultural interchanges at the local level. The identities of the colonised and the colonisers are challenged and transformed by the process of colonisation. This reality belies the ideological notion of culture as separate or pure. The examination of these interactions between coloniser and colonised allows contradictions in the colonial narrative to emerge, which can be used to undermine its power.

For example, the brutality of colonialism undermines the narrative of its 'civilising mission'. [15] Chakrabarty goes beyond Bhabha's examination of hybridised identity to focus on the interplay between different knowledge systems. Chakrabarty advocates the 'provincialisation' of European knowledge and cultural narratives, recognising that they are not universally applicable. He argues that European knowledge and narratives of history need to be 'provincialised' with the recognition that they are inherently European, rather than global or universal. In addition, he posits that knowledge systems are not distinct entities, but can also be hybridised through interaction. Therefore, an examination of interplay between European and non-European knowledge systems is essential in order to discover alternatives to the dominant paradigm. In *Provincialising Europe* he writes 'European thought is at once both indispensable and inadequate in helping us to think through the experiences of political

[12] Said, *Culture And Imperialism* (n 8).
[13] Childs (n 7).
[14] Dianne Otto, 'Postcolonialism and Law?' (2000) 15 Third World Legal Studies.
[15] Bhabha (n 9).

modernity in non-Western nations, and provincializing Europe becomes the task of exploring how this thought … may be renewed from and for the margins.'[16]

The concept of the 'subaltern' has been introduced to postcolonial literature through the work of Spivak and the Subaltern Studies Group which includes the work of Chatterjee and Guja.[17] Subaltern Studies focusses not simply on the duality between colonised and coloniser, but also examines the hierarchies that are part of the colonised and colonising cultures. The narratives of colonisation and resistance are written by those with the power to speak, but this does not represent the totality of the colonised group. Subaltern Studies seeks to reveal the actions of those who may be ignored by intellectual postcolonial writing: for example, the grassroots peasant movements, or women whose voices are silenced by societal customs, laws, or lack of education. In concluding that the subaltern cannot speak for themselves, due to the overlapping hierarchies being imposed (for example, colonialism as well as patriarchy within the colonial and colonised community), Spivak argues that Subaltern Studies ought to draw attention to their exclusion from historical narrative, whilst resisting the temptation to speak on their behalf.[18]

Spivak also recognises the pitfalls of essentialism (i.e. the danger of treating a specific group as homogenous and possessing the same characteristics and interests). She introduced the concept of 'strategic essentialism', to describe the use of group identity as a basis for a political struggle, whilst simultaneously rejecting the notion of homogeneity within the group.[19] Subaltern Studies therefore presents a challenge to postcolonial writers to avoid the trap of romanticising the subaltern or ignoring the diversity within the groups they seek to empower.

Postcolonial literature has therefore drawn attention to the ongoing legacies of colonialism, and vehemently opposes the view that colonial policies ended with the decolonisation of colonial territories after World War Two. It has exposed the dualist notion of the West versus the Orient, revealing how imperialist tendencies are embedded and supported by European or North American culture. It also has drawn attention to the need for examination of how knowledge systems are recognised and placed in hierarchies of legitimacy, and of the need to challenge dominant narratives which claim universal relevance. Privileging the narratives of

[16] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (New edition with a New preface by the author edition, Princeton University Press 2007)., 16.
[17] Childs (n 7).
[18] Gayatri Spivak, 'Can the Subaltern Speak?' in Patrick Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (Harvester Wheatsheaf 1994).
[19] Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (Routledge 1998).

the oppressed can challenge the assumptions of the colonial narrative and reveal the agency of non-European peoples to resist colonialism and imperialism.

2.2.2 TWAIL: Applying postcolonial thought to international law

The above section reviewed the main themes of both postcolonial literature. This section explores how postcolonial approaches have been applied to International Law. It examines the role of law in establishing and perpetuating colonial hierarchies of inequality, for example through its underlying 'civilising mission' in the role of international institutions in the internal economic and social affairs of developing countries,[20] the positioning of the State as the ultimate unit of social organisation to the detriment of other means, and the underlying assumptions of state sovereignty and formal equality separated from recognition of political realities.[21]

The TWAIL movement arose in the late 1990s, from a series of meetings at Harvard Law School, which aimed to critique existing third world scholarship on international law, the universal claims of public international law and international economic law, and the relative weight given to international legal scholars from the 'first' and 'third' worlds.[22] TWAIL now is a diverse network of critical legal scholars who seek to examine how international law relates to questions of colonial history, identity, power and difference, as well as considering avenues for egalitarian changes to international law itself.[23] TWAIL scholarship re-tells the history of international law, bringing the colonial encounter between Europeans and non-Europeans to the centre of its historical narrative. It rejects the view that colonialism ended with the decolonisation period after World War Two, and seeks recognition within international law of colonialism's continuing legacy. [24] It also aims to discover new forms of resistance to the generation of international law through the predominant knowledge and voices of the "Global North", whether through the use of law by grassroots movements[25] or through the voices of

[20] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 Third World Quarterly 739.
[21] John D Haskell, 'TRAIL-Ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 Canadian Journal of Law and Jurisprudence 383.
[22] The initial conference was held in 1997, organised by a group of graduate students including Celestine Nyamu, Balakrishnan Rajagopal, Hani Sayed, Vasuki Nesiah, Elchi Nowrojee, Bhupinder Chimni and James Thuo Gathii, supported by Professor David Kennedy (Faculty Director of Harvard Law School) Anthony Angie (a Harvard Law School Graduate) and Makau Wa Mutua (former Director of the Human Rights Program at Harvard).
[23] James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade, Law and Development 26.
[24] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007).
[25] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003).

third world judges on International Tribunals.[26] In doing so, TWAIL engages in a project of transforming international law, so that it represents the voices of all the world's peoples.[27]

There is a fine line to tread between recognising the use of international law to further the colonial legacy of Western imperialism, and affirming the proposition that international law as a framework which was devised solely by Europeans and exported to the periphery. Anghie demonstrates the impact of the colonial encounter on the development of International Law, which he views as originating in the need to mediate difference between European states and their colonies or non-European trading partners. Thus international law cannot be viewed as a purely European phenomenon, but one which has been exploited by European colonial states to support their political and economic aspirations.[28] Anghie's analysis continues the writing of third world scholars such as Weeramantry, who has examined the influence of Islamic legal systems on the development of legal doctrine in Europe in the 1400s.[29]

In addition to affirming the contribution of non-European legal systems to early international law, TWAIL remains sceptical of many third world governments whose policies adopt oppressive legal frameworks and structures. TWAIL thus does not give support indiscriminately to any third world legal regime. TWAIL calls for 'dialogic manoeuvres across cultures to establish, where necessary, the content of universally acceptable norms', accepting the positive from both Eurocentric and other legal frameworks.[30] As will be discussed in Section 2.3, it is particularly in this area that decolonial writing on transmodernity may be a useful addition to TWAIL's theoretical approach.

Critics of TWAIL have argued that it is doomed to failure by its own conflicting logic: how can TWAIL scholars utilise a system which is inherently colonial for emancipatory purposes? Fiddler has questioned whether the task of integrating third world voices into the construction of international law is possible, given the existence of an international system which is 'structurally and substantively more inhospitable to its message than the system faced by developing-country international lawyers in the period of decolonization.'[31] Alvarez has also

[26] James Thuo Gathii, 'Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)' (2002) 15 Leiden Journal of International Law 581.
[27] Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31.
[28] Anghie (n 24).
[29] CG Weeramantry and Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan Ltd 1988).
[30] Mutua and Anghie (n 27).
[31] David P Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2 Chinese Journal of International Law 29.

questioned whether the deliberately diverse voices of TWAIL scholars have a clear enough message to enable change, and queries whether in fact they advocate disengagement with the international legal system entirely.[32] Gathii suggests that this nihilistic point of view could derive from the fact that TWAIL is sometimes perceived as critique for its own sake. However, he argues, TWAIL scholarship undertakes critique to 'build on and transform the egalitarian aspects of international law" rather than to merely 'deride'.'[33]

Indeed, the possibility of transforming international law is in fact a debate within TWAIL itself. Anthony Anghie states that 'some scholars have eloquently argued that the Third World should dispense with international law altogether. But this not a feasible option, simply because that would leave open the field of international law to the imperial processes.'[34] In other words, if TWAIL scholars accept that their mission is impossible, they admit defeat. Anthony Anghie argues further:

> *The point is not to condemn the ideals of [international law] as being inherently imperial constructs, but rather to question how it is that these ideals have become used as a means of furthering imperialism and why it is that international law and institutions seem so often to fail to make these ideals a reality… and in doing so, empower us to make, rather than simply replicate, history*.[35]

However, in its attempts to reform international law, TWAIL stands accused of presenting solutions which are not radically different from Eurocentric reforms to international law. Haskell takes the work of leading TWAIL scholar, Chimni, and argues that current proposals for reform, even of scholars considered to be radical, are not noticeably different from reforms proposed by more conventional critics of International Law:

> *In focusing on the 'timing' and 'extent' of trade liberalization, and calling for international institutional regulators to curb the excesses of financial speculation and promote abstract principles, such as 'accountability' and 'transparency', he not only seems indistinguishable from Eurocentric reform proposals, but perhaps more importantly, does not interact with the possibility that there is something more intrinsic to the ideas*

[32] Jose E Alvarez, 'My Summer Vacation (Part III): Revisiting TWAIL in Paris' (*Opinio Juris*) <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/> accessed 8 May 2014.
[33] Gathii (n 23)., 43.
[34] Anghie (n 20)., 752.
[35] Anghie (n 24)., 320.

> *and practices of the international economic regime itself that constructs the inequalities he sets out to confront*.[36]

A number of strategies have been presented in response to the challenge of transforming International Law. Haskell advises TWAIL scholars to find more radical solutions through challenging the goals and assumptions of the international legal system, rather than focussing solely on implementation. He proposes that TWAIL scholars engage more deeply in Structuralist and Marxist critique, undertaking 'structural jurisprudence' which reveals the binary nature of international law's vocabulary and analyses how capitalist production operates through the international legal system.[37]

Another approach to the challenges of reform has been to conduct ethnographic research, linking local experience of international law to global law and institutions. Darian-Smith argues that TWAIL, through deeper analysis of intersectionality between different forms of discrimination and ethnographic research, can make an important contribution to the scholarship of international law, which remains

> *stuck in a modernist worldview that ... prioritises a state's legal interrelations with other states and fails to pay sufficient attention to the ever-expanding field of NGOs, volunteer organisations, religious and ethnic regional affiliations, and the mass movement of peoples in search of greater human security*.[38]

Eslava and Pahuja have also proposed an ethnographic approach, which explores the implementation of, and resistance to, international law within specific locations. These could be through regulatory implementation, and specific policy and practice at a State, regional or local level. This, they argue, would build a more nuanced understanding of how international law operates in a diverse manner dependent on local context, and could draw attention to and create links between many small acts of resistance.[39] Similarly, Rajagopal has used an interdisciplinary approach to examine the emergence of transnational social movements, connecting individual sites of resistance and assessing implications of the emerging global movement for the international legal system, in particular human rights law and its institutions.[40]

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[36] Haskell (n 21)., 405.
[37] ibid.
[38] Darian-Smith (n 2)., 263.
[39] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 195.
[40] Rajagopal (n 25).

Thus TWAIL has helped to raise the voice of the third world in international law, and it reveals the links between the current international legal system and institutions, and their colonial origins. It further reveals the Eurocentric nature of international law, whilst undermining the assumption that it has evolved purely from European thought. It calls for international legal scholars and practitioners, as well as grassroots activists, to create transnational coalitions which build on the egalitarian elements within international law whilst challenging the structures and use of international law for the furtherance of American/Western European ends. This includes critically examining the practice of third world governments who may be complicit in this project, and examining the manifestations of International Law in local contexts. However, critics argue that TWAIL has set itself an impossible task, and that it does not offer new solutions. The next section explores how TWAIL has contributed to the literature on indigenous peoples' rights.

2.2.3 Postcolonial analyses of indigenous peoples' rights

The vast majority of authors on indigenous peoples' rights recognise the injustices wreaked on indigenous peoples through European colonialism. The preamble to UNDRIP itself recalls these injustices, and authors argue that indigenous peoples' specific grievances demand a Declaration which is specific to indigenous peoples, as distinct from other minorities. It is therefore not surprising that many authors on indigenous rights engage with postcolonial authors and approaches in their work. For example, Gordon asserts that TWAIL is a useful framework for analysing the impact of international law on indigenous peoples' rights, such as the International Labor Organization Treaty 169. He states that

> *since the Third World and indigenous peoples share the characteristic of having been subjected to domination at the hands of a Eurocentric international legal system, the tools with which TWAIL has armed itself can be transferred to the realm of indigenous peoples in an attempt to explain the indigenous situation within the international legal system as well as identifying how the current system has failed and continues to fail these peoples*.[41]

Another example of postcolonial approach to indigenous rights scholarship is *Indigenous Rights in the Age of the UN Declaration.*[42] This interdisciplinary work, drawing from legal,

[41] Seth Gordon, 'Indigenous Rights in Modern International Law from a Critical Third World Perspective' (2006) 31 American Indian Law Review 401.
[42] Elvira Pulitano, *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press 2012)., 6.

anthropological, literary and indigenous perspectives, asks whether UNDRIP is an effective tool for indigenous self-determination. The contributors argue that indigenous perspectives and stories must be taken into account in order to undo the Eurocentric origins of international law. UNDRIP is viewed as a point of departure from the trajectory of international law, towards a 'humanized' law, and points to the existence of 'different types of laws in the world'.[43] Indigenous interpretations of terms such as statehood, understood as an autonomous and transculturated political structure rather than a separate State, can transform Eurocentric understandings of international law. It also highlights the reluctance of States and the UN to fully embrace and implement UNDRIP. Throughout the work, there is an emphasis on the need to resolve the conflict of values and meaning between indigenous and non-indigenous worldviews and legal approaches.

Postcolonial writers also advocate the study of resistance movements and their effects, in relation to the indigenous movement. *Transforming Law and Institution* [44] is a socio-legal work exploring how the global indigenous movement operated within the UN system to bring about changes in discourse and international law relating to indigenous peoples rights, as well as the impact that that interaction had on the movement itself. Morgan cites many examples of how law and practice of international, regional and national regimes, as well as international organisations such as the UN and the World Bank, have been impacted by the indigenous rights movement, but cautions that law is insufficient to bring about lasting change. Social, economic, political and cultural factors are responsible for a widening 'implementation gap' between norms and reality on the ground. Influences such as the interests of States and transnational companies, discriminatory attitudes and structural racism, and an 'administrative culture unaccustomed to multiculturalism',[45] lack of political will or mechanisms, bureaucracy and corruption are amongst the barriers to implementation. It requires the cooperation of the UN, States, indigenous peoples, and civil society to overcome these challenges.

Discussion of indigenous peoples rights may directly speak to the fundamental uncertainty of the TWAIL movement discussed above, that international law may never be used for emancipatory purposes. Alexandra Xanthaki refers to the engagement of indigenous peoples in UN mechanisms, and notes: 'Anghie questions whether the postcolonial world can "deploy for its own purposes the law which had enabled its suppression in the first place". This is

[43] Ibid., 6.
[44] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate 2011).
[45] ibid., 159.

exactly what indigenous peoples are trying to do.'[46] Whilst Xanthaki is sceptical of the possibility that international law could ever escape imperialist tendencies, she is optimistic about the impact of the indigenous rights movement, arguing that their claims for self-determination, cultural rights and property rights are generally consistent with existing international law principles but are contributing to a dynamic shift of meaning. She considers that the indigenous debate has reopened discussions that international law had previously considered closed, such as human rights standards and their assumed meanings and use, whilst the engagement of indigenous peoples in UN institutions has strengthened the possibility of global cooperation. For this reason, the study of indigenous rights from a postcolonial perspective may benefit not only indigenous rights movement, but also postcolonial scholarship itself.

2.3 The potential of the 'decolonial' approach

As described above, TWAIL has made important contributions to the international legal debate which will shape the analysis in this thesis. TWAIL's questioning of whether international law can be used to challenge its own imperial tendencies is particularly relevant for a thesis which explores indigenous peoples' use of international law to regain control over their lives and territories after centuries of colonisation. Nevertheless, TWAIL has relied extensively upon postcolonial literature, but has not engaged significantly with an alternative viewpoint on colonialism put forward by decolonial thinkers from the Latin American Modernity/Coloniality school. This refers to a group of authors who root their analysis of present-day struggles for social justice in the experience of the colonisation of the Americas, which also offers valuable insights for this present research project, particularly given its focus on the implementation of FPIC in Peru and Canada.[47]

In the context of a thesis on indigenous peoples' rights, which is focused on countries in the Americas, it is important that the theoretical framework employed reflects both indigenous worldviews and the historical timeframe of colonisation in the countries in question. Decolonial writers date their lineage back to indigenous resistance of early colonisation, and have incorporated indigenous perspectives into their research.[48]

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[46] Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2010)., 2. Citing Anghie (n 24)., 8.
[47] Exceptions include Matthew Stone, Illan Rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press 2012).
[48] Catherine Walsh, 'Afro and Indigenous Life-Visions in/and Politics. (De)colonial Perspectives in Bolivia and Ecuador' (2011) 18 Bolivian Studies Journal/Revista de Estudios Bolivianos 49.

2.3.1 Building on TWAIL scholarship through the decolonial approach

Decolonial authors have also engaged with matters of law, including the struggle of indigenous peoples at both the local and global levels. The most notable example is Portuguese Sociologist and Legal scholar Boaventura de Sousa Santos, who cites both decolonial and postcolonial writers. His book (jointly with César A. Rodríguez-Garavito), *Law and Globalization from Below*,[49] considers the role of law in the global justice movement, using a socio-legal, bottom-up approach. In the introductory explanation of his theoretical position, Santos cites decolonial authors, particularly Mignolo, Quijano and Dussel, in his proposal of 'subaltern cosmopolitan legality' defined a set of conditions which are essential if the law is to be used for emancipatory ends.[50]

In *Toward a New Legal Common Sense*, Santos argues that modern law has become ineffectual in current challenges of social regulation and emancipation, but that there is an emerging movement of subaltern cosmopolitan legality which respects difference as well as equality, and results in bottom-up changes and use of the law for emancipatory goals. Santos also develops the possibility of an intercultural reconstruction of human rights in *Another Knowledge is Possible*,[51] advocating a cross-cultural dialogue which results in a *mestizo* understanding of rights, rather than one that has evolved primarily out of capitalist/colonialist framework. Legal approaches based on Latin American decolonial philosophy have also been advocated by Leung[52] Guardiola-Riveira[53] and by Barretto in relation to human rights,[54] and by

[49] Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).
[50] Boaventura de Sousa Santos lists eight proposals for subaltern cosmopolitan legality (SCL): (1) it is possible to use state law and individual rights for political struggle, but there are alternatives (2) Law should be used as a tool in political struggle, as part of a wider political mobilisation which may include illegal and non-legal acts (3) legal pluralism must be analysed and not assumed to be counter-hegemonic, as it may contribute to inequality of power relations (4) political objectives can be used to prioritise local, national or international legal action and to target links between global and local legalities (5) SCL is concerned with systemic change and social justice, not just individual justice (6) SCL views power relations as not being restricted to the State but including the market, and the community, and aims to empower the 'subaltern market' and 'subaltern community' (7) SCL uses the law's aspirational qualities to argue for radical social transformation, whilst also arguing for more effective implementation of existing law. (8) SCL may also adopt 'demo-liberal' strategies which confirm the hegemony of the State, particularly where the objective is to achieve basic rights which will permit greater political mobilisation. Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed., Cambridge University Press] 2002).
[51] Boaventura de Sousa Santos (ed), *Another Knowledge Is Possible; beyond Northern Epistemologies* (Verso 2008).
[52] Gilbert Leung, 'Towards a Radical Cosmopolitanism' in Matthew Stone, Illan Rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law, Politics and the Political* (Routledge 2012).
[53] Oscar Guardiola-Rivera, 'Law, Globalisation, and Second Coming' (2013) 11 Human Architecture: Journal of the Sociology of Self-Knowledge 33.
[54] José-Manuel Barreto, 'Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto' (2012) 3 Transnational Legal Theory 1.

Meyer in relation to international peace-making.[55] Therefore this thesis will contribute towards a relatively new body of literature which seeks to apply decolonial Latin American writing to the problem of overcoming Eurocentric hegemony in International Law.

Latin American Philosophy could assist in questioning the underlying assumptions and aims of the Law. Using the work of Dussel, as well as Simon Bolivar and other Latin American writers, Oscar Guardiola-Rivera, proposes a new approach which he terms 'redemptive critical theory'.[56] This critique argues that Latin American philosophy revolves around the creation of hope: alternative ways of configuring the world which draw from the principle of reciprocity (between people, current and future generations, or between people and planet) rather than concentrating on the production and distribution of financial capital, and with the faculty of judgement or reason. Guardiola-Rivera argues that Latin American philosophy highlights the need of capitalism to produce an 'other', and its tendency to evoke narratives of scarcity and competition, rather than plenty and reciprocity. Redemptive critical theory would therefore ask how hope can be rediscovered, reasserting Amerindian and Afro-descendent Latin-American ways of thinking which view time and space as priceless gifts of nature rather than commodities and emphasising reciprocity over capital exchange. The route-map and methodology for redemptive critical theory is not clear, however it is an example of the radically different approach which could be taken as a result of engagement in Latin American philosophy.[57]

Decolonial approaches may help to include the voices of Latin American and indigenous peoples in critiques of international law. As Caroline Walsh and Arturo Escobar[58] have pointed out, there is a rich tradition of black and indigenous thought which has been ignored by postcolonial critique but which can contribute to creating alternatives to Modernity. Decolonial thought draws from such knowledges. Additionally, as discussed above, the main postcolonial authors – Spivak, Bhaba, Said and others – centre their analysis on the impact of British and French colonialism in the Middle East, Africa or Asia in the nineteenth and twentieth centuries, paying relatively little attention to the wealth of writing on colonisation from a Latin American

[55] Jörg Meyer, 'The Concealed Violence of Modern Peace(-Making)' (2008) 36 Millennium - Journal of International Studies 555.
[56] Oscar Guardiola-Rivera, 'Notes on a Novella for the Future' in Matthew Stone, Illan Rua Wall and Costas Douzinas (eds), *New critical legal thinking: law and the political* (Birkbeck Law Press 2012).
[57] Oscar Guardiola-Rivera, *What If Latin America Ruled the World?: How the South Will Take the North into the 22nd Century* (Bloomsbury Paperbacks 2011).
[58] Catherine Walsh, 'Shifting the Geopolitics of Critical Knowledge' (2007) 21 Cultural Studies 224. Arturo Escobar, 'Worlds and Knowledges Otherwise' (2007) 21 Cultural Studies 179.; Catherine Walsh, '"Other" Knowledges, "Other" Critiques: Reflections on the Politics and Practices of Philosophy and Decoloniality in the "Other" America' (2012) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World.

perspective.[59] For example, Gathii states that 'the colonial legacy of the nineteenth and twentieth centuries places a substantial constraint on the former colonies, to the benefit of former colonial powers.'[60] Whilst decolonial scholars do not contest the truth of this statement, they argue that this historically limited view of colonialism obscures the impact of the previous three centuries of colonialism in the Americas. Latin America has its own experience and interpretation of colonialism which ought not to be omitted from holistic discussion of the global impact of colonialism.[61] As Salvatore argues, 'To start the criticism of Eurocentrism with Conrad and Kipling, or even with the cultural activities of the East India Company, seems to miss the origin of modernity by two or three centuries.'[62]

Furthermore, through its emphasis on 'border thinking'[63] and 'epistemic delinking'[64](discussed later in this chapter), decolonial approaches might open up new and more radical proposals than those provided by TWAIL through its analyses which rely on Eurocentric theoretical frameworks, such as Marxism for example. The Modernity/Coloniality school argue that the postcolonial literature is often theoretically based in the writings of European academics, such as Marx, Foucault, Horkheimer and others, and so postcolonial critique is

> *largely anchored in Euro-American and continental perspectives, in 'new' readings of post-structuralism and post-modernism, and in a continued discarding or lack of attention to critical knowledge production of people of color, particularly intellectuals not from the 'academy' but associated with social movements and with a 'collective' rather than individual thinking.*[65]

Similarly, Ramon Grosfoguel argues that this 'discarding' of other knowledges limits the South Asian Subaltern Studies Group, which 'by using a Western epistemology and privileging Gramsci and Foucault, constrained and limited the radicalism of their critique to Eurocentrism.'[66] Grosfoguel calls for the decolonisation not only of Subaltern Studies but also

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[59] Fernando Coronil, 'Elephants in the Americas? Latin American Postcolonial Studies and Global Decolonization' in Mabel Morana, Enrique Dussel and Carlos Jauregui (eds), *Coloniality at Large: Latin America and the Postcolonial Debate* (Duke University Press 2008).; Ricardo D Salvatore, 'The Postcolonial in Latin America and the Concept of Coloniality: A Historian's Point of View' (2010) 8 A Contracorriente 332.
[60] Gathii (n 23)., 38.
[61] Morana, *Coloniality at Large*.
[62] Salvatore (n 59)., 336.
[63] Walter D Mignolo, 'Geopolitics of Sensing and Knowing: On (de)Coloniality, Border Thinking, and Epistemic Disobedience.' (2013) 1 Confero 129.
[64] Walter D Mignolo, 'Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of de-Coloniality' (2007) 21 Cultural Studies 449.
[65] Walsh, '"Other" Knowledges, "Other" Critiques' (n 58).
[66] Ramón Grosfoguel, 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' (2011) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World.

Postcolonial Studies. Whilst Haskell[67] calls for radicalisation of TWAIL through greater engagement with Marxism and Structuralism (as discussed above), the decolonial approach seeks alternative paradigms which critique not just the relations between different parts within the prevailing system, but the very goals and assumptions that led to the system itself, from the perspective of those who are marginalised and oppressed. This is what Mignolo means by 'changing not only the content, but the terms of the conversation'.[68] Supporters of decolonial thinking argue that epistemic delinking is essential to creating alternative models which challenge the fundamental assumptions of Modernity (i.e. are not based on economic growth and the accumulation of capital), bringing about transformation rather than limited reform of the existing system.[69] This approach may be one response to the argument that TWAIL has failed to propose radical alternatives.

2.3.2 Decolonial analyses of indigenous peoples' rights

The previous section showed how decolonial thought may add to existing postcolonial analysis of international law. The considerable literature on indigenous peoples rights has not often drawn from decolonial literature of the Modernity/Coloniality school,[70] but this has begun to change. This section presents some of the decolonial analysis of indigenous peoples' rights that is most relevant to the focus of this thesis.

One example is Helga Maria Lell's article examining multiculturalism in Latin America, and the implications for national citizenship rights.[71] Lell argues that prevalent understandings of law such as *Kelsen's Pure Theory of Law*[72] assume a homogenous society in which each individual is equal under the law. In Latin America (and indeed elsewhere) this is not the case, and Lell argues that Kymlicka's understanding of the State as being 'pluri-national' is more applicable due to its engagement with diverse cultures and immigrant communities, as

[67] Haskell (n 21).
[68] Mignolo, 'Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of de-Coloniality' (n 64).
[69] E.g. See Guardiola-Rivera, 'Notes on a Novella for the Future' (n 56)., discussing Latin American philosophy's potential for redemptive critical theory, and the "culture of life" versus the "culture of death" in Walsh, 'Afro and Indigenous Life-Visions in/and Politics. (De)colonial Perspectives in Bolivia and Ecuador' (n 48). See also Walter D Mignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26 Theory, Culture & Society 159.
[70] In 2015 the author conducted a literature search of the HeinOnline database. It provided over 1100 references for articles containing 'postcolonial/post-colonial' and 'indigenous rights', but only 14 for 'decolonial' and 'indigenous rights'.
[71] Helga Maria Lell, 'Concept of Citizenship: Multicultural Challenges and Latin American Constitutional Democracy, The' (2014) 2 Birkbeck Law Review 87.
[72] Hans Kelsen, 'Pure Theory of Law, The - Its Method and Fundamental Concepts' (1934) 50 Law Quarterly Review 474.

described in *Multicultural Citizenship.*[73] Drawing from de Sousa Santos' work, and citing Anibal Quijano, Lell demonstrates through the Mexican case of *Joel Cruz Chavez y Otros*[74] that although indigenous peoples are considered citizens, in practice they are excluded from participating in the citizenship right to vote. Lell concludes that legal systems must emphasise harmonisation between cultures, moving beyond tolerance to 'the coexistence and dynamic dialogue between cultures that recognize each other's incompleteness'. She endorses Kymlicka's theory, which is socio-political in nature, arguing that it should be inculcated into the law through consideration of cultural and linguistic values. Chapter 4 of this thesis explores this proposition further, drawing on indigenous political philosophy of indigenous authors in Canada.

In addition to critiquing Kymlicka's model of human rights based multiculturalism, the main focus of this thesis is on the operationalisation of Article 32 of UNDRIP, which relates to FPIC consultation in the context of extractive development on indigenous territories. A body of work on prior consultation and FPIC is also developing from authors who take a critical, decolonial stance, mainly in the context of ethnographic study of consultations in Latin America. These scholars have highlighted that although prior consultations are theorised as providing neutral spaces for dialogue between equals, they are in practice top-down processes, controlled by the state.[75] As a result, they draw attention to the impact of significant power asymmetries which reinforce the power of the state and constrain indigenous peoples' claims to self-determination within weak bureaucratic administrative procedures.[76] According to these authors, FPIC is principally used as a mechanism to legitimise extractivist development policies and neutralise indigenous dissent, at the expense of more meaningful collaborative reform of institutions and economic development policies.[77] Consequently, several authors

[73] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995).
[74] *The State v Chavez and others* (Trial to Protect the Political and Electoral Rights of Citizens) SUP-JDC-1 1/2007 Mexican Electoral Tribunal of the Federal Judiciary.
[75] Esben Leifsen, Luis Sánchez-Vázquez and Maleny Gabriela Reyes, 'Claiming Prior Consultation, Monitoring Environmental Impact: Counterwork by the Use of Formal Instruments of Participatory Governance in Ecuador's Emerging Mining Sector' (2017) 38 Third World Quarterly 1092. Jessie Shaw, 'Indigenous Veto Power in Bolivia' (2017) 29 Peace Review 231.; Marilyn Machado and others, 'Weaving Hope in Ancestral Black Territories in Colombia: The Reach and Limitations of Free, Prior, and Informed Consultation and Consent' (2017) 38 Third World Quarterly 1075.; Gisela Zaremberg and Marcela Torres Wong, 'Participation on the Edge: Prior Consultation and Extractivism in Latin America' (2018) 10 Journal of Politics in Latin America 29.
[76] David Szablowski, 'Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice' (2010) 30 Canadian Journal of Development Studies / Revue canadienne d'études du développement 111.; Roger Merino, 'Re-Politicizing Participation or Reframing Environmental Governance? Beyond Indigenous' Prior Consultation and Citizen Participation' (2018) 111 World Development 75.; Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' (2018) 31 Leiden Journal of International Law 773.
[77] César Rodríguez-Garavito, 'Ethnicity.Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Indiana Journal of Global Legal Studies 263.; Rachel Sieder, '"Emancipation" or "Regulation"? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala' (2011) 40 Economy and Society 239.; María del Carmen Suescun Pozas, Nicole Marie Lindsay and María Isabel du Monceau, 'Corporate Social Responsibility and Extractives Industries in Latin America and the Caribbean:

have questioned whether FPIC can lead to reductions in conflict, in the absence of institutional reform to improve participatory governance and the resolution of underlying historical grievances.[78]

On the other hand, this same research has also highlighted the ways in which indigenous communities are utilising national and international law to mobilise resistance to unwanted extractive development, providing hope that international legal norms on FPIC may be effective at least to some extent as a strategy for contesting the oppression of indigenous peoples. They provide examples of indigenous communities leveraging even weak legal frameworks on FPIC to protect their rights[79] and to politicise FPIC[80] through court actions and through alliances with local, regional and national NGOs, as well as community referenda,[81] as well as by devising their own protocols for FPIC[82] and contesting flawed consultation processes being imposed by states.[83] This type of research is identifying the conditions that support successful bottom-up indigenous action, for example in identifying that indigenous communities which benefit from experience, support and strong political institutions are more likely to be successful in mitigating project impacts, and negotiating binding agreements to ensure that they have some share in the benefits.[84] They also highlight the range of possible outcomes of resistance, for example in increasing social investment programs, precipitating the withdrawal of extraction companies, or introducing of new regulatory frameworks which, at least in part, reflect indigenous ambitions for FPIC.[85] Walter and Urkidi have commented 'Perhaps, the key success of consultations has been the political learning processes that these have triggered – connecting social actors, scales, places, discourses and strategies – which

Perspectives from the Ground' (2015) 2 The Extractive Industries and Society 93.; Leah Temper, 'Blocking Pipelines, Unsettling Environmental Justice: From Rights of Nature to Responsibility to Territory' (2019) 24 Local Environment 94.

[78] George Stetson, 'Oil Politics and Indigenous Resistance in the Peruvian Amazon: The Rhetoric of Modernity Against the Reality of Coloniality' (2012) 21 Journal of Environment & Development 76. Almut Schilling-Vacaflor and Riccarda Flemmer, 'Conflict Transformation through Prior Consultation? Lessons from Peru' (2015) 47 Journal of Latin American Studies 811.; Merino, 'Re-Politicizing Participation or Reframing Environmental Governance?' (n 76).

[79] Machado and others (n 75).

[80] Leifsen, Sánchez-Vázquez and Reyes (n 75).

[81] Brant McGee, 'Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development, The' (2009) 27 Berkeley Journal of International Law 570.; John-Andrew McNeish, 'Full Article: Extracting Justice? Colombia's Commitment to Mining and Energy as a Foundation for Peace' (2017) 21 The International Journal of Human Rights 500.

[82] Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, Taylor & Francis Group 2015)., 270-272.

[83] Viviane Weitzner, '"Nosotros Somos Estado": Contested Legalities in Decision-Making about Extractives Affecting Ancestral Territories in Colombia' (2017) 38 Third World Quarterly 1198.

[84] Machado and others (n 75).; Almut Schilling-Vacaflor and Riccarda Flemmer, 'Mobilising Free, Prior and Informed Consent (Fpic) from Below: A Typology of Indigenous Peoples' Agency' (2020) 27 International Journal on Minority and Group Rights 291.

[85] Almut Schilling-Vacaflor, 'Prior Consultations in Plurinational Bolivia: Democracy, Rights and Real Life Experiences' (2013) 8 Latin American and Caribbean Ethnic Studies 202.; Schilling-Vacaflor and Flemmer (n 84).;

have allowed to reclaim and put in practice participation rights and to envision alternative forms of development.'[86]

The exploration of FPIC from a decolonial perspective is therefore not only providing insights into the ways that the international legal framework is being implemented in ways that support the continuation of colonial legacies; it is also shedding light on how indigenous peoples are utilising international law in defence of their own rights and priorities for development. This thesis builds on this emerging decolonial perspective on FPIC.

2.4 Methodological implications

Having argued for the adoption of a decolonial approach which builds on the TWAIL critique, this chapter now focuses on the methodological implications of this theoretical framework.

2.4.1 Epistemic de-linking and border thinking

As discussed above, proponents of decolonial approaches argue for analyses rooted in epistemologies which originate outside of Eurocentrism, in order to provide novel and radical solutions to the problems of Modernity. It is therefore essential that a decolonial project engages with these 'discarded' knowledges in order to bring new insights to debates which have previously be couched in terms of Eurocentric theoretical frameworks. Decoloniality advocates a practice of 'epistemic delinking', based on the work of Egyptian sociologist Amin and Anibal Quijano's concept of 'desprendimiento', or 'unlearning'. In brief, it is necessary to 'delink' from European ways of thinking (for example relying solely on theoretical frameworks which have arisen from the Eurocentric academy) and think through the lived experience of being colonised and the epistemologies of colonised peoples.[87] Because of the variety of experience and knowledge systems which exist, decoloniality does not advocate replacing hegemonic Eurocentrism with a decolonial hegemony: instead, it aims towards a collective project of many epistemologies in dialogue. As a consequence, this thesis will engage with writing and viewpoints of various indigenous authors during the analysis, particularly those of indigenous feminists (discussed below).

[86] Mariana Walter and Leire Urkidi, 'Community Mining Consultations in Latin America (2002–2012): The Contested Emergence of a Hybrid Institution for Participation' (2017) 84 Geoforum 265.
[87] Mignolo, 'Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of de-Coloniality' (n 64).

In conducting decolonial research, Mignolo advocates 'border thinking'.[88] He concludes that it is not possible to 'sympathetically' understand another 'cosmo-vision' (knowledge system) from one's own, so the researcher must recognise the limits of one's own ability to understand. However, through 'border thinking' – that is, the meeting of people and ideas from different places in time and space – new experiences and understandings of colonialism can be reached. Linda Martín Alcoff describes the purpose of 'border thinking' as follows:

> *the point is not simply to reveal multiplicity, but to reveal the lines of tension and conflict, or the points of contradiction, between colonizing and colonized spaces. Thus, he [Mignolo] explained, "colonial semiosis required a pluritopic hermeneutics since in the conflict, in the cracks and fissure where the conflict originates, a description of one side of the epistemological divide won't do*.[89]

Therefore, 'border thinking' is theorising from the conflict between Eurocentric and other knowledge systems. The border is a complex and diverse place, a site of profound tension which at first may appear divided and contradictory. However, following Anzaldúa, Mignolo suggests that such confrontational places can give rise to coherent, hybrid understandings and identities, and alternative possibilities for action.

2.4.2 Critical approaches as a purposeful endeavour

Authors who engage in such critical legal research do not view their discipline as having a specific methodology, but see it as a heterogeneous field with different approaches[90] which may include looking at difference along many axes – such as race, class, gender, sex, ethnicity, economics or trade.[91] The absence of a specific methodology has been viewed as an advantage: for example, Panu Minkinnen argues that strict methodological doctrine acts to produce legal conformity, rather than allowing new possibilities to emerge.[92] The uniting principle in postcolonial legal studies is that the researchers have a shared concern with how law can be used to bring about social justice, by exposing and challenging the imperialist and Eurocentric/Anglo-American nature of modern international law. The 2007 TWAIL conference launched a vision statement which recognised the diversity of the movment but also its shared goals:

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[88] Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton University Press 2012).
[89] Linda Martín Alcoff, 'Mignolo's Epistemology of Coloniality' (2007) 7 CR: The New Centennial Review 79., 89.
[90] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Taylor and Francis 2013)., 120.
[91] Gathii (n 23).
[92] Watkins and Burton (n 90).

> *Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: first, we need to contest international law's privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world; and second, we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples.*[93]

The explicit purpose of postcolonial research therefore positions the researcher not as an impartial observer who strives for neutrality (as in conventional European research paradigms), but as a political actor.

Decolonial 'methodology' also suggests that the illusion of neutrality in European research is flawed.[94] Mignolo argues that researchers in the European model construct a fallacious, imagined 'zero-point' from which to conduct research. This 'zero-point' assumes that it represents a universally agreed philosophy of research based on European science and reason. In fact, Mignolo argues, such a zero-point is not universal, but inherently located in Europe. Mignolo advocates that researchers reject the ideal of neutrality and be ever-mindful of the geographical, historical and social relations between researcher and researched:

> *The question is: who, when, why is constructing knowledges? Why did eurocentred epistemology conceal its own geo-historical and bio-graphical locations and succeed in creating the idea of universal knowledge as if the knowing subjects were also*

[93] Vision Statement of the 2007 TWAIL Conference held at Albany Law School, New York, cited by Gathii (n 23). David Kennedy, 'TWAIL Conference: Keynote Address - Albany, New York - April 2007, The' (2007) 9 International Community Law Review 333.

[94] There are many who would agree with this proposition, including critical scholars from diverse schools (Marxism, Feminist Theory, Queer Theory, Critical Race Theory to name a few) who all approach their work with the specific objective of revealing inequality, rather than the neutral aim to reveal an objective truth. In the Social Sciences, the impossibility of a neutral researcher is also recognised. However, in Social Sciences, the researcher strives to be as neutral as possible, employing various techniques and methodologies to control for observer bias. For example, the Encyclopaedia of Evaluation considers bias to be 'a **negative** condition that inhibits evaluators or evaluations from finding true, pure, and genuine knowledge. *Bias* is considered synonymous with ***subjective, unfair, partial*, and *prejudiced*** and is defined as **errors based on beliefs or emotions that are wrong or irrelevant** and that may adversely affect people and programs' Additionally, the impact of the researcher on the subject is intended to be minimised. This is in stark contrast to critical approaches, including the decolonial approach, in which the researcher takes a political stance on the issue at hand. Additionally, decolonial authors stress the need for analysis to be carried out from the researcher's locus of enunciation, rather than attempting to remove or ignore the effects of their locus on the research ('Bias', in Sandra Mathison, *Encyclopedia of Evaluation* (SAGE Publications, Inc 2005) <http://knowledge.sagepub.com/view/evaluation/n50.xml> accessed 7 April 2015., emphasis added.)

> *universal? This illusion is pervasive today in the social sciences, humanities, the natural sciences and the professional schools. Epistemic disobedience means to delink from the illusion of the zero point epistemology*.[95]

It is therefore vital to consider the researcher's own 'locus of enunciation'. In this case, the researcher is a non-indigenous, white woman who has been brought up and educated mainly in the United Kingdom (also spending three years in Nepal as a child, where her father worked on World Bank-funded development projects). As such, this research is carried out from the position of one who is conditioned by Eurocentric perspectives and academic traditions. The researcher is therefore not positioned on a 'border', from which decolonial research is often carried out. Despite this, in conducting this research it is recognised that the historical legacy of Eurocentric colonialism, both material and epistemic, has caused unspeakable harm, both in the 'third world' in the global South and also to immigrants, women, and other marginalised groups in the global North. This is not to say there is no merit at all in the European way of life – as discussed above, Enrique Dussel points out that the goal of Transmodernity is not to disdain all aspects of Modernity, but to collectively identify the positive elements, as well as those from other cultures.[96]

Grosfoguel distinguishes the 'epistemic location' from the 'social location', arguing that just because a person originates from the South, does not mean that he has adopted Southern epistemology.[97] For example, Dussel points to the role of local elites in administering and supporting colonial systems.[98] In the same way, this research is an attempt to adopt a decolonial way of thinking, whilst recognising the limitations of the researcher's own epistemological location. Caution must be taken to avoid the pitfalls of Eurocentrism – i.e. speaking *on behalf of* other peoples; viewing Modernity as something constructed solely by Europeans, rather than acknowledging the contribution of regions and events outside of Europe; failing to recognise the asymmetrical positions of cultures in dialogue; and failing to engage with and support non-Western understanding of the world. There is also a challenge to discuss the perspectives of 'outsiders' without appropriating them as one's own, and of recognising that there is a limit to how much a person nearer the centre of the colonial order can contribute in the struggle for epistemic justice. The researcher's locus of enunciation also

[95] Mignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (n 69)., 160.
[96] Enrique D Dussel, 'Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation' (2012) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World <http://escholarship.org/uc/item/6591j76r> accessed 19 February 2015.
[97] Grosfoguel (n 66).
[98] Dussel (n 96). This analysis is relevant to the activism of indigenous peoples at the international and national level, as the social and economic position of indigenous leaders may change due to their involvement in the United Nations system, or through training in the law, for example.

imposes limits on their ability to understand other perspectives – for example, Gordon Christie is 'a cautious agnostic' about the potential for non-indigenous scholars to participate in the development of Indigenous Legal Theory. His view is that whilst there is doubt over whether a non-indigenous author could understand 'what the world looks like, through the eyes (or rather the mind) of an Indigenous person', the possibility is 'left open' and a 'contestable point'.[99]

There are examples of other white, Euro/American authors who engage in decolonial writing, as well as in other disciplines such as critical white studies. Catherine Walsh, an American now living and teaching in Ecuador, has taken the approach of relocating her 'locus':

> *Although I work in the university, I seldom identify as an academic. I identify rather as a militant intellectual, an intellectual activist or activist intellectual, and always as a pedagogue. … Ecuador is now not only my home—I identify as an immigrant from the North to the South—but also my place of enunciation, thought, and praxis. It is here in the South, and most particularly through collaborative work with Afro-descendant and indigenous social movements and communities at their request, that I began more profoundly to comprehend the colonial and the decolonial*.[100]

Boaventura de Sousa Santos, himself a Portuguese academic, has chosen a different route: to advocate from within the Eurocentric institutions and disciplines, calling for European academies to 'recognize that the understanding of the world by far exceeds the Western understanding of the world. Is the university prepared to refound the idea of universalism on a new, intercultural basis?'[101] This seems to be a more accessible position than attempting to alter one's locus entirely, and one which is valuable. Walter Mignolo comments that

> *Whether you are born and raised in London or Beijing, and whether you have been put in those places or move around the world, you cannot escape from 'experiencing' the world order you received when you were born and educated … You can try to assimilate to a dominant culture or to emulate ideas that emerged from bodies embodied in local histories (like Germany or France) and languages in which –*

[99] Gordon Christie, 'Indigenous Legal Theory: Some Initial Considerations' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009).
[100] Catherine Walsh, 'Pedagogical Notes from the Decolonial Cracks' (2014) 11 e-misférica.
[101] Boaventura de Sousa Santos, 'The University at a Crossroads' (2012) 10 Human Architecture: Journal of the Sociology of Self-Knowledge 7.

> *unfortunately – your skin and brain were formed. Or you can accept – with pride – what you are, to embody the place you occupy in the colonial matrix of power*.[102]

In this sense, although a person's locus of enunciation cannot change, one can accept their location and attempt to contribute to intercultural discussion from that perspective. Thus this thesis attempts to engage with indigenous perspectives on human rights based multiculturalism and on FPIC in a decolonial manner. Perhaps this is the work that is required '*casa adentro*' for those of us who are located in a Eurocentric perspective: to relearn and critique our own knowledge and its place in relation to other knowledges. This self-reflexive practice would then allow us to contribute in the work '*casa afuera'*, which is 'to help build a different vision and practice of humanity, life, and living'.[103]

This approach seems to be one that decolonial authors would support.[104] Ramón Grosfoguel describes Boaventura de Sousa Santos as

> *the leading scholar of the Coimbra School of thought in Portugal that has replaced Paris as the centre of critical theory in Europe today… Santos himself is a perfect example of how being European does not automatically translate into being Eurocentric. Following the spirit of other European decolonial thinkers from de las Casas to Sartre, Santos is one of the most important decolonial thinkers today. Santos embodies a real possibility that gives us hope for the future of humanity: the possibility of decolonization for European man*.[105]

Therefore, in undertaking this research, the researcher is also endeavouring to speak from her own locus of enunciation, whilst endeavouring to decolonise Eurocentric ways of thinking.

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[102] Madina V Tlostanova, *Learning to Unlearn: Decolonial Reflections from Eurasia and the Americas* (Ohio State University Press 2012)., 193.
[103] Walsh, 'Afro and Indigenous Life-Visions in/and Politics. (De)colonial Perspectives in Bolivia and Ecuador' (n 48).
[104] In a related field, the call for the involvement of white people in critique of white supremacy has been made in critical white studies, for example by Derrick Bell and bell hooks, Richard Delgado and Tim Wise. Critical White Studies evolved from Critical Race Theory in the United States of America, and seeks to examine the socio-cultural construction of 'whiteness' and white identity, as well as the systemic privileging of whiteness. It is thought to derive from the D.E.B. Dubois' essay, 'The Souls of White Folk', which charted the rise of white supremacy in ideology as well as political and social institutions, and revealed the flaws in white claims of supremacy over other races. White authors have engaged reflexively with critical white studies, examining such areas as defensive psychological mechanisms in which white people can view themselves as 'friends' of black people, whilst remaining complicit in systemic injustice which privileges whiteness and characterises black people through negative stereotyping. Richard Delgado and Jean Stefancic (eds), *Critical White Studies: Looking behind the Mirror* (Temple University Press 1997).; Tim Wise, *White Like Me: Reflections on Race from a Privileged Son* (Revised, Shoemaker & Hoard, Div of Avalon Publishing Group Inc 2011).
[105] Ramón Grosfoguel, 'Preface' (2006) 29 Review (Fernand Braudel Center) 141., 141.

2.4.3 The materiality of international law

As discussed above, TWAIL scholars have advocated an approach which situates international law in the 'material' sphere, examining how it manifests itself at the local level, rather than viewing international law as an abstract normative framework which sits 'above' day-to-day experience. Eslava and Pahuja have argued for a turn towards legal ethnography, charting how international law is embodied in local contexts, such as

> *administrative procedures, social spheres or simply innocuous technical or commercial things… international regulatory work done today by biometric scanners at international frontiers in the fight against terrorism and the control of illegal migration, the extensive implementation of ID cards and water-meters for the functioning, rationalisation and measurement of development projects, or the targeted use of mobile phone technology for the integration of small farmers into the global trading system.*[106]

The authors argue that through this mapping of international law on a material scale, it is possible to view the diverse ways in which 'universal' international law is enacted, and the scale and variety of existence to its intervention in domestic affairs.

Decoloniality contributes towards this 'materialisation' of the study of international law, through its focus on the colonial experiences and epistemologies of subjugated peoples. In their introduction to *Law and Globalization from Below,* Boaventura de Sousa Santos and César A. Rodríguez-Garavito extol the importance of a 'bottom-up' approach to international law and globalisation which centres on grassroots resistance. Importantly, they described the dialogue which led to their book as being based on the writing of the decolonial school: Dussel, Mignolo and Quijano. Consequently there is excellent precedent for engaging with decolonial writers in order to carry out postcolonial legal critique. The work of de Sousa Santos suggests that it will be important to engage with grassroots narratives which critique the mainstream position on UNDRIP and FPIC processes, which positions UNDRIP as a victory and FPIC as a safeguard of indigenous peoples' rights.

In view of the above, decolonial research requires the non-indigenous researcher to be ever mindful of their own locus of enunciation, whilst engaging with the ideas and epistemologies of indigenous peoples and those at grassroots level who have an alternative perspective on

[106] Eslava and Pahuja (n 39).

the everyday practice of indigenous peoples' rights and FPIC in particular. It also requires consideration of the tension between epistemic delinking and conducting PhD research within the framework of a formalised university setting. As such, this project is as much about decolonisation of international legal research as it is about an analysis of indigenous peoples' rights.

2.5 Conclusion

This chapter has shown that postcolonial approaches to International Law, such as TWAIL, provide a rich and appropriate theoretical framework from which to address the issue of indigenous peoples' rights. However, critics of TWAIL suggest that thus far, its proposed solutions to the problems of Modernity do not go far enough towards a radical reimagining of the international legal system. Decolonial approaches based on the literature of the Modernity/Coloniality School are specifically rooted in a longer view of colonialism that dates back to the colonisation of the Americas. This chapter has suggested that they can add to postcolonial critiques by challenging both the underlying goals and assumptions of International Law, rather than simply challenging its practice and implementation.

Both postcolonial and decolonial approaches have been used to analyse indigenous peoples rights, revealing the need to engage with indigenous worldviews and legal approaches to develop new understandings of legal concepts. They have also highlighted the success of the global indigenous movement to use international law as a strategic tool to achieve their objectives. However, recent decolonial analyses of FPIC have suggested that weak, top-down implementation of FPIC may not have the emancipatory effects that indigenous people had hoped, and highlights the role of bottom-up indigenous resistance movements is continuing to contest how FPIC should be carried out in practice. This thesis will build on these critiques to analyse how dominant assumptions that are rooted in Eurocentric liberal thought may be undermining the potential of FPIC to contribute to indigenous self-determination, and ultimately reconciliation between states and indigenous peoples.

In taking a decolonial approach, certain methods are required. It is necessary, in particular, to engage with epistemologies and critiques from the periphery or exteriority of Eurocentric Modernity. This means taking seriously the opinions and critiques of indigenous grassroots movements, as well as their world views. Accordingly, the research carried out for this thesis, recognises the importance of engaging with indigenous critiques of multiculturalism and UNDRIP. Furthermore, this research, is informed by the need to recognise the epistemic

location and bias of the researcher, whilst also shunning the notion of a neutral researcher and engaging in a purposeful project of decolonising western research.

Chapter 3: The Limitations of UNDRIP as Framework for Reconciliation

3.1 Introduction

UNDRIP has been recognised as a reconciliatory instrument, that seeks to promote harmonious relationships between indigenous peoples and the state. This chapter examines whether UNDRIP's content supports this claim, focusing in particular on the question of the right to self-determination.

Section 2 provides an explanation of an important premise that underlies this thesis: that indigenous peoples and states are locked in an intractable conflict. Section 3 then examines claims that UNDRIP is a framework for reconciliation and examines key ideas about reconciliation from a Eurocentric and indigenous perspective, drawing from Peace and Conflict studies and the writings on indigenous political philosophy which have developed in Canada, which both emphasise the need for structural change to remove harmful colonial legacies. Section 4 explains the key role of indigenous self-determination in achieving reconciliation.

International law has been identified as a tool that has been used by European powers to further colonial agendas. Section 5 of this chapter provides an explanation of how developments in international law since the earliest days of colonisation of the Americas until the establishment of the minority rights regime in the late Twentieth Century reveal the heart of the conflict between indigenous peoples and the state: the question of how indigenous self-determination can coexist with states' assertions of sovereignty, territorial integrity and political unity. Section 6 then analyses how states and indigenous representatives tried to resolve this question during the negotiations of UNDRIP's text, arguing that they settled on the paradigm of human rights. Whilst this decision eased the agreement of states to recognise indigenous self-determination, it had important limitations that have constrained the understanding of what indigenous self-determination can mean.

The final section of this chapter addresses two key ways in which the human rights approach to self-determination is lacking – that of rebalancing political and economic power. It concludes that whilst UNDRIP is a significant step forward in improving the situation of indigenous peoples, the limited interpretation of the right to self-determination is problematic for its long-term success as a framework for reconciliation.

3.2 Indigenous peoples and the state are locked in an intractable conflict

This thesis starts from the viewpoint that indigenous peoples and the state are entrenched in a long-term, intractable conflict that commenced with the first colonisation of the Americas, and that is ongoing today. The term 'intractable conflict'[1] is a term used in the field of peace and conflict studies, first used to describe the conflicts that emerged after the end of the Second World War that involved socio-ethnic groups, rather than states, as the primary combatants. Such conflicts entail a destructive[2] relationship between two distinct social groups, characterised by hostile interactions[3] over a long period, even passing between generations.[4] Such conflicts go through cycles of violence punctuated by intense crises (or 'episodes') and periods of relative calm,[5] but have no discernible end-point.[6] There are usually factors which make the conflict groups interdependent or inextricably linked, be this for reasons of geography, financial interests or other factors.[7] Intractable conflicts are also likely to involve third parties as supporters, observers, accomplices or peace-making facilitators, such as NGOs, businesses, militias, States or activist movements.[8]

The root causes of intractable conflicts are often based 'in [a] history of colonialism, ethnocentrism, racism, sexism or human rights abuses'.[9] These abuses can lead to imbalances of power being formalised in the institutions and traditions of society[10] denying their basic human needs for security, identity, respect, safety and control,[11] and causing the

[1] Also described as 'protracted social conflict', or 'deep-rooted conflict'. Oliver Ramsbotham, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (3rd ed, Polity 2011). 5 See also Edward E Azar, Paul Jureidini and Ronald McLaurin, 'Protracted Social Conflict; Theory and Practice in the Middle East' (1978) 8 Journal of Palestine Studies 41.; John Wear Burton, *Resolving Deep-Rooted Conflict: A Handbook* (University Press of America 1987).; Edward A Azar, *The Management of Protracted Conflict* (Dartmouth Publishing Co Ltd 1990).; John Burton, *Conflict: Human Needs Theory* (Palgrave Macmillan 1993).; Louis Kriesberg, 'Intractable Conflict', *The handbook of interethnic coexistence* (Continuum 1998).; Peter T Coleman, 'Characteristics of Protracted, Intractable Conflict: Toward the Development of a Metaframework-I.' (2003) 9 Peace and Conflict: Journal of Peace Psychology 1.; Louis Kriesberg, 'Nature, Dynamics and Phases of Intractability' in Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds), *Grasping the Nettle: Analyzing Cases of Intractable Conflict* (US Institute of Peace Press 2005).; Heidi Burgess and Guy M Burgess, *What Are Intractable Conflicts?* (2003) <http://www.beyondintractability.org/essay/meaning-intractability> accessed 5 June 2014.;

[2] John Burton, *Conflict: Resolution and Provention* (Palgrave Macmillan 1990).: *Resolution and Provention.* 2.

[3] John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (United States Institute of Peace Press 1997).

[4] Daniel Bar-Tal, 'From Intractable Conflict through Conflict Resolution to Reconciliation: Psychological Analysis' (2000) 21 Political Psychology 351. 354

[5] Morton Deutsch, Peter T Coleman and Eric C Marcus, *The Handbook of Conflict Resolution: Theory and Practice* (John Wiley & Sons 2011).; Kriesberg, 'Intractable Conflict' (n 1).

[6] Azar, Jureidini and McLaurin (n 1). 50

[7] Morton Deutsch, *Distributive Justice: A Social-Psychological Perspective* (Yale University Press 1985). 263

[8] Coleman (n 1); Chester A Crocker, Fen Osler Hampson and Pamela R Aall, *Herding Cats: Multiparty Mediation in a Complex World* (US Institute of Peace Press 1999).

[9] Coleman (n 1).

[10] Johan Galtung and Tord Höivik, 'Structural and Direct Violence: A Note on Operationalization' (1971) 8 Journal of Peace Research 73.; Edward E Azar, 'Peace amidst Development: A Conceptual Agenda for Conflict and Peace Research' (1979) 6 International Interactions 123.

[11] Burton, *Conflict* (n 1).

conflict to become entrenched in relationships, cultures and societal structures.[12] Although it may be possible to settle particular episodes of conflict, new conflict episodes will occur unless there is structural change. Thus, intractable conflicts are not static but 'processes'[13] or 'systems in flux', in which the actors, issues and intensity of conflict can change over time.[14]

The relationship between indigenous peoples and the state has much in common with this definition of intractable conflict. Their conflict is multidimensional in nature, related to control of land and resources, but also including issues of identity, culture, power and status. Policies of colonialism and extractivist development, as well as Eurocentric hierarchies of forms of knowledge, race and gender, have dominated the interactions between these societies since first contact,[15] with devastating impacts over generations. Furthermore, their physical location within state boundaries and their spiritual connection to their lands means that indigenous peoples and states remain interdependent and inextricably linked. Whilst the specific details of the conflict may evolve over time, the underlying question of how indigenous and non-indigenous societies are to peacefully co-exist remains. As the next section outlines, UNDRIP is viewed as a means to bring about a more harmonious relationship.

3.3 UNDRIP as an 'instrument of reconciliation'

3.3.1 UNDRIP's reconciliatory ambitions

The Preamble of UNDRIP recognises the historic and colonial injustices that indigenous peoples have suffered,[16] and sets out that:

> *the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.*

[12] Deutsch, Coleman and Marcus (n 5). 537; Lucas Mazur, 'The Social Psychology of Intractable Conflicts' (2014) 20 Culture & Psychology 276. 277; Bar-Tal (n 4).
[13] Azar, Jureidini and McLaurin (n 1). 50.
[14] Coleman (n 1). 28. For an influential systems approach, see also Lederach (n 3).
[15] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007).; Jerry Mander and Victoria Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (New Expanded Edition, University of California Press 2007).
[16] UNDRIP's preamble states: 'Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests'. UNDRIP, UNGA Res 61/295 (13 September 2007).

This view has been frequently reinforced through statements by UN officials, states and indigenous representatives. According to UN Secretary-General Ban Ki-Moon:

> *The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.*[17]

James Anaya, the former UN Special Rapporteur on the Rights of Indigenous Peoples, seemed to share this view, asserting that UNDRIP has contributed to international law's shift from being an oppressive instrument of colonialism to a framework which supports indigenous struggles for self-determination,[18] and commenting that 'the Declaration is a point of common understanding to address indigenous peoples concerns and develop measures of reconciliation'.[19] The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has also referred to UNDRIP as a 'vehicle for reconciliation'.[20] In addition to this, several states referred to the potential of UNDRIP to bring about reconciliation and greater harmony in their statements at the adoption of UNDRIP in the 66th General Assembly.[21] Taking the example of Canada, The Truth and Reconciliation Commission has called on all levels of Canadian Government to 'to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation' between the Canadian Government and Aboriginal Peoples, and the recent Bill C-15[22] states that 'the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for reconciliation, healing and peace'. Indigenous people have also viewed UNDRIP in this manner: Sheryl Lightfoot, an

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[17] United Nations Secretary-General 'Protect, promote endangered languages, Secretary-General urges in message for International Day of World's Indigenous People' (23 July 2008); <www.un.org/News/Press/docs/2008/sgsm11715.doc.htm> accessed 20 February 2015.

[18] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004).

[19] S James Anaya, 'USA / Indigenous Peoples: "New Measures Needed for Reconciliation and to Address Historical Wrongs" – JAMES ANAYA' <https://unsr.jamesanaya.org/?p=739> accessed 15 February 2021.

[20] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Twelfth Session 15-19 July 2019 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation' (2 September 2019) UN Doc A/HRC/EMRIP/2019/3/Rev.1, para 7.

[21] See UNGA, Sixty-first Session 107th Plenary Meeting Thursday 13 September 2007, 10 am New York official records (13 September 2007) UN Doc A/61/PV.107 see Statement of the representative of Peru, Mr Chavez, introducing the draft resolution (at 10), statement of Leichtenstein (at 23), statement of Brazil (at 26); Suriname (at 27). See also the statements of Canada (at 12), United States of America (at 15) and New Zealand (15), who considered at the time of its adoption that the Declaration had failed to achieve its purpose of providing a basis for harmonious relations between indigenous peoples and states. Also UNGA, Sixty-first Session 108th Plenary Meeting Thursday 13 September 2007, 3pm New York official records (13 September 2007) UN Doc A/61/PV.108, Statement of Guatamala (at 8).

[22] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* Second Session, Forty-third Parliament, 2020.

Anishinaabe indigenous academic and activist, has described UNDRIP as 'an indispensable part of the national project of reconciliation',[23] and The Assembly of First Nations has said, 'when the Declaration is undermined, reconciliation is also under threat.'[24]
Reconciliation is a complex concept with many definitions. The next two sections will consider how reconciliation is defined, in both Eurocentric and indigenous writing on the subject.

3.3.2 Eurocentric perspectives on reconciliation

Within the field of peace and conflict studies, reconciliation is often viewed as an ongoing process to heal conflict, rather than an end-point at which no conflict remains. John Paul Lederach, a leading proponent of 'conflict transformation', defines reconciliation is as a 'dynamic, adaptive process aimed at building and healing' during which a redefinition of relationships occurs.[25] Intractable conflict is a part of the relationship between the disputants that may never be entirely resolved, so procedural solutions are required to transform the conflict from a destructive to constructive one reducing violence and increasing justice in both personal relations and societal institutions.[26] This relational approach emphasises creation of dialogue mechanisms to allow the disputants to navigate the conflict through political means without resorting to violence, and over time to foster 'right relationships' based on the four principles of truth, justice, mercy and peace.[27]

In addition to dialogue, reconciliation requires changes at the personal, relational, structural and cultural levels.[28] However, this does not necessarily occur simultaneously, and a degree of reconciliation on a political level may be achievable even if it is still unthinkable at an interpersonal level. [29][30] Taking a cautious view of what is achievable, Kriesberg provides a definition of reconciliation as 'coexistence': 'the processes by which parties that have experienced an oppressive relationship or a destructive conflict with each other move to attain or restore a relationship that they believe to be *minimally acceptable*'.[31] However, Bloomberg

[23] Sheryl Lightfoot, 'The Road to Reconciliation Starts with the UN Declaration on the Rights of Indigenous Peoples' (*The Conversation*) <http://theconversation.com/the-road-to-reconciliation-starts-with-the-un-declaration-on-the-rights-of-indigenous-peoples-122305> accessed 15 February 2021.
[24] 'Implementing the United Nations Declaration on the Rights of Indigenous Peoples' (Assembly of First Nations 2017) <https://www.afn.ca/wp-content/uploads/2018/02/17-11-27-Implementing-the-UN-Declaration-EN.pdf> accessed 15 February 2021., 2.
[25] John Paul Lederach, 'Civil Society and Reconciliation' in Chester A Crocker (ed), *Turbulent Peace: The Challenges of Managing International Conflict* (United States Institute of Peace Press 2001)., 842.
[26] David Bloomfield, 'On Good Terms: Clarifying Reconciliation' (Berghof Research Center for Constructive Conflict Management 2006) Report No 14.
[27] Lederach (n 3).,24-31.
[28] ibid., 23-27.
[29] Kriesberg, 'Intractable Conflict' (n 1).
[30] Chapman 2002
[31] Louis Kriesberg, 'Changing Forms of Coexistence' in Mohammed Abu-Nimer (ed), *Reconciliation, Justice and Coexistence: Theory and Practice* (Lexington Books 2001).

cautions that such coexistence may be unsustainable in the long-term; rather, 'positive coexistence'[32] or 'political reconciliation'[33] requires that there is also trust, equality, respect, acceptance of differences, mutual interests and a sense of partnership between the two sides. Bloomberg argues that creating democratic institutions through which issues can be jointly negotiated can help build confidence and trust, and help to develop these relational ties. This kind of political reconciliation, he notes, tends to be carried out in a top-down manner, as it involves structural change. Furthermore, a more holistic reconciliation - which includes the interpersonal and cultural levels, carried out at the grassroots and from the bottom-up - may come later still, once a positive working relationship between the two conflicting groups has enabled interpersonal relationships to develop across the divide.[34]

Furthermore, dialogue mechanisms to resolve specific episodes of conflict must be accompanied by deeper institutional change, to tackle underlying inequalities and injustices that replicate conflict. Failing this, there will be only a 'negative peace', in which overt violence ceases but underlying 'structural violence' – harm caused by unjust institutions and societal structures and cultural norms – continues. In order to achieve 'positive peace', social systems must serve the whole population, without discrimination.[35] John Burton, a major influence on the development of peace and conflict studies, has argued that the tendency of states to view their populations as a unified society, and to rely on coercive power or the narrative of 'shared values' was doomed to fail in the context of post-colonial, multicultural societies.[36] In Burton's view, conflict arises from the denial of three key needs by inflexible, inequitable and power-based structures of society: psychological *security* – to have structure, predictability, stability, and freedom from fear and anxiety; *identity* – a sense of self in relation to the outside world; and to *recognition* - the experience of having one's identity recognised and respected by others.[37] Burton advocated for 'provention', meaning the development of societal conditions and institutions that build cooperative relationships between different groups and in which policy decisions are taken through participatory problem-solving with the aim of fulfilling these three human needs. In this approach, reconciliation is said to require a positive recognition of

[32] Bloomfield (n 26)., 14.
[33] Erin McCandless, 'The Case of Land in Zimbabwe: Causes of Conflict, Foundation for Sustained Peace' in Mohammed Abu-Nimer (ed), *Reconciliation, Justice and Coexistence: Theory and Practice* (Lexington Books 2001).
[34] Bloomfield (n 26)., 27-28.
[35] Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167.
[36] John Wear Burton, *Deviance, Terrorism & War: The Process of Solving Unsolved Social and Political Problems* (Martin Robertson 1979).
[37] Burton, *Conflict* (n 2).; John Wear Burton, *Violence Explained: The Sources of Conflict, Violence and Crime and Their Prevention* (Manchester University Press 1997).; See also Kevin Avruch and Christopher Mitchell, *Conflict Resolution and Human Need: Linking Theory and Practice* (Routledge 2013).

different identities and value systems, as well as deep shifts in power relations at both a personal and intergroup level.[38]

3.3.3 Indigenous perspectives on reconciliation

Eurocentric perspectives on reconciliation are by their nature limited and incomplete, and so this section will explore some indigenous perspectives on reconciliation. As Borrows and Tully have noted, these are very diverse,[39] so this section touches on some of the key themes, many of which overlap with those discussed in the previous section.

Indigenous people identify that the root of the conflict with the state lies in histories of colonisation and dispossession from lands, resources, and traditional ways of life. Consequently, the work of reconciliation is the reversal of these policies as they are enacted in the present day.[40] A key starting point is the recognition of indigenous peoples as peoples. EMRIP has drawn attention to the many possible forms of recognition that exist, from weak symbolic recognition such as apology for harm to stronger forms such as reparations, treaties, legal recognition of *sui generis* rights for indigenous peoples, or political recognition of indigenous governments.[41] Coulthard, who (as discussed in Chapter 4) is sceptical of the impact of recognition, identifies that reconciliation also requires indigenous people to 're-establish a positive "relationship to self"' through a resurgence of indigenous culture and practices, instead of relying on external validation and acceptance.[42]

The establishment of new social and political relationships is seen as critical to deconstructing colonial legacies[43] and to take action towards restitution of indigenous peoples' 'political freedom, personal liberty, cultural identity, or human rights'[44]. According to Borrows and Tully, this involves rejecting the 'power over' model of relationship that has derived from 'oppressive

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[38] Burton, *Conflict* (n 2).

[39] John Borrows and James Tully, 'Introduction' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018)., 4. It is noted that some indigenous people consider that reconciliation is tantamount to assimilation and should be resisted in favour of indigenous resurgence. For example, see Andrea Landry, 'This Reconciliation Is for the Colonizer' (*The Wrong Kind of Green*, 13 June 2017) <http://www.wrongkindofgreen.org/2017/12/01/this-reconciliation-is-for-the-colonizer/> accessed 24 November 2020.

[40] 'Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, 6-8 December 2000' (Tebtebba Foundation 2000).

[41] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Twelfth Session 15-19 July 2019 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation' (2 September 2019) UN Doc A/HRC/EMRIP/2019/3/Rev.1, paras 15-34, 47-48.

[42] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University Of Minnesota Press 2014)., 108.

[43] ibid.; Dale R Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (University of Toronto Press 2006).

[44] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (W W Norton & Company 2000). , 318.

state and imperial ideas, practice and frameworks'[45] and 'engaging in dialogue and negotiation as equals … [giving rise to] partnerships based on mutual consent.'[46] Furthermore reconciliation is viewed as a participatory process, which must include indigenous people and perspectives at all stages, and be undertaken in ways that reflect indigenous cultural and spiritual traditions, if outcomes are to be considered legitimate.[47] Finally, reconciliation is described by indigenous authors in terms of restoring balance between people, community and the earth, based on principles such as responsibility, interconnectedness, and reciprocity.[48] Thus reconciliation between indigenous peoples and the state cannot be divorced from the question of reforming economic models that are destructive, rather than sustainable,[49] as well as to valuing indigenous knowledge and ways of living, rather than viewing them as inferior to 'modern' approaches.[50]

3.4 The key role of self-determination in achieving reconciliation

For indigenous authors, then, reconciliation requires a fundamental shift in power relations between indigenous peoples and the states, from systems of power that are rooted in colonial history, to new systems of power which emphasise participation, consent, and balance. For many indigenous people, the route to achieving this reconfiguration of power is through the recognition of indigenous self-determination.[51] Claire Charters has expressed how self-determination relates to 'distributions of power and appropriate power-holders, and includes within it the right of peoples to choose how to express their own political aspirations, *on the basis of equality*, and to determine their collective destiny *without outside interference*.'[52]

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[45] Borrows and Tully (n 39)., 8.
[46] ibid., 21.
[47] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Twelfth Session 15-19 July 2019 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation' (2 September 2019) UN Doc A/HRC/EMRIP/2019/3/Rev.1, paras 72, 79.
[48] Carlo Osi, 'Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation' (2008) 10 Cardozo Journal of Conflict Resolution 163.; Jeff Corntassel and Chaw-win-is T'lakwadzi, 'Indigenous Storytelling, Truth-Telling, and Community Approaches to Reconciliation' (2009) 35 English Studies in Canada 137.; John Borrows, 'Earth-Bound: Indigenous Resurgence and Environmental Reconciliation' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018).
[49] Borrows (n 48). James Tully, 'Reconciliation Here on Earth' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018).
[50] Gina Starblanket and Heidi Kiiwetinepinesiik Stark, 'Towards a Relational Paradigm - Four Points for Consideration: Knowledge, Gender, Land, and Modernity' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018).
[51] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Twelfth Session 15-19 July 2019 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation' (2 September 2019) UN Doc A/HRC/EMRIP/2019/3/Rev.1 para 79.
[52] Claire Charters, 'A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making' (2010) 17 International Journal on Minority and Group Rights 215. (emphasis added).

Anaya has clearly articulated the close relationship between indigenous self-determination and reconciliation, and how this is rooted in transformation of power relations:

> *Properly understood, self-determination is an animating force for efforts toward reconciliation—or, perhaps more accurately, conciliation—with peoples that have suffered oppression at the hands of others. Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suffocation. It does not do so to condone vengefulness or spite for past evils, or to foster divisiveness but rather to build a social and political order based on relations of mutual understanding and respect. That is what the right of self-determination of indigenous peoples, and all other peoples, is about*.[53]

Viewed in this way, the right to self-determination calls for states to take action to rectify the systemic structures and assumptions that perpetuate unjust power relations in their relationship with indigenous peoples.[54] It must not be merely symbolic, but must be evidenced in material ways - for example through the return of enough indigenous lands to enable indigenous people to live in a self-sufficient manner, and in the adherence by the state to historical treaties with indigenous peoples. Gunn argues that as a route to reconciliation, self-determination must be defined holistically, to also include indigenous peoples' right to determine their economic, social and cultural development.[55] Alfred argues that 'without massive restitution, including land, financial transfer and other forms of assistance to compensate for past harms and continuing injustices committed against our peoples, reconciliation would permanently enshrine colonial injustices and is itself a further injustice'.[56] Without this kind of practical action, Alfred warns that reconciliation will be limited to a 'pacifying discourse' which assuages settler guilt and obstructs the need for meaningful change.[57] This assertion is supported by examinations of state-led Truth and Reconciliation Commissions in Canada, Australia, Peru, and Guatemala which 'differentiated the goal of reconciliation from an indigenous self-determination agenda.'[58] The study found that this

[53] S James Anaya, Claire Charters and Rodolfo Stavenhagen, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009)., 196.
[54] Benedict Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in Pekka Aikio and Martin Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Abo Akademy University 2000).
[55] Brenda L Gunn, 'Moving beyond Rhetoric: Working toward Reconciliation through Self-Determination' (2015) 38 Dalhousie Law Journal 237.
[56] Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (University of Toronto Press 2005)., 152.
[57] Alfred, restitution is the real pathway to justice for indigenous peoples 182-184
[58] Jeff Corntassel and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9 Human Rights Review 465., 465.

strategy failed to improve the relationship, because it did not hold states accountable for historical violations of rights.

However, indigenous claims over land, financial and other forms of compensation, and political power present a challenge to the legitimacy of states' political authority and to their control over economically valuable land and natural resources. As the next section shows, international law has played a key role in neutralising indigenous claims to land and resources, and legitimising the claims of the state.

3.5 The role of international law in perpetuating the root cause of the conflict

This section demonstrates how, since colonisation of the Americas, developments in international law have failed to recognise indigenous peoples' right to self-determination in order to support colonial policies of European nations, and in so doing have entrenched the tension at the heart of the conflict between indigenous peoples and states: how indigenous peoples' assertion of self-determination can coexist with the concepts of state sovereignty, political unity and territorial integrity in international law.[59]

3.5.1 Indigenous peoples in International Law during the colonial period

In the early days of Spanish colonisation of the Americas, Naturalist theorists such as Francisco de Vitoria argued against the brutal feudalistic system of *Encomienda* that was imposed, recognising indigenous peoples as sovereign nations with the right to enter into treaties with other nations by virtue of their essential humanity and rationality.[60] However, Vítoria justified colonisation on the basis of 'just war' theory, in which indigenous societies were deemed to be failing to adhere to international obligations imposed under Natural Law to allow foreigners to travel to their lands, trade and proselytize, or in order to impose benevolent government in the best interests of 'backwards' indigenous societies.[61] In 1648 the Treaty of Westphalia led to the rise of the state as the sole subject of international law, and under the emerging Law of Nations, indigenous peoples had to meet higher definitions of

[59] For a fuller explanation of the treatment of indigenous peoples in international law, see Anaya, *Indigenous Peoples in International Law* (n 18).; Anghie (n 15).; Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, Taylor & Francis Group 2015)., 13-68.

[60] The *Encomienda* system permitted the Spanish Crown to grant indigenous land to colonisers and for the colonisers to demand labour and tributes (in the form of gold, animals, crops and other goods) from indigenous people. See Timothy J Yeager, 'Encomienda or Slavery? The Spanish Crown's Choice of Labor Organization in Sixteenth-Century Spanish America' (1995) 55 The Journal of Economic History 842.

[61] Anaya, *Indigenous Peoples in International Law* (n 18). 15-26.

Statehood to be considered as subjects, based on Eurocentric criteria, in order to be considered as free and independent nations with a right to control their territories.[62]

In the late nineteenth and early twentieth centuries, Positivist writers renounced Natural Law and looked to the consent of States as its legitimate source. The principle of State recognition, set out specific criteria for Statehood, including recognition by the 'Family of Nations' and the requirement that the society in question be 'civilised'. Indigenous peoples by their nature were deemed unable to meet these criteria and, in any event, recognition of the sovereignty of indigenous peoples in colonised territories would have been against the interests of those who now controlled access to the elite club of recognised sovereign states. Indigenous lands were deemed *terra nullius (*meaning, 'land belonging to no-one'). On this basis, the recognised states could claim sovereignty over indigenous territories on the basis of effective occupation. Former treaties with indigenous peoples were deemed outside the scope of international law, creating only 'moral obligations' which could lawfully be set aside.[63] Instead, the doctrines of Trusteeship, and the Mandate system of the League of Nations established the practice of 'advanced nations' governing territories that were 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'.[64] Indigenous territories were thus incorporated into larger administrative territories without recognition of their autonomy, and on the basis of their assumed backwardness. [65]

In 1923, Haudenosaunee Chief Deskaheh of the Six Nations of the Iroquois[66] travelled to the newly-formed League of Nations in Geneva, Switzerland, to seek membership of the League

[62] ibid. James Anaya (no 10) 22. Largely, this resulted in a distinction by European theorists between indigenous peoples with institutions and cultures which were more akin to European ideas of civilisation (such as the Incas or Aztecs), and who settled in specific areas and cultivated land, rather than hunter-gathering across vast territories, for example in Vattel's Law of Nations.

[63] ibid. 26-31.

[64] League of Nations, Covenant of the League of Nations (1919), Article 22.

[65] Anaya, *Indigenous Peoples in International Law* (n 18). 31-14. Trusteeship, buoyed up by 'scientific racism', aimed to 'civilise' indigenous people out of their 'backwards' way of life. In tandem with numerous initiatives led by specific governments, particularly Britain, the United States and Canada, as well as the Church, International Law developed to reflect the Trusteeship doctrine, for example in the text of the General Act of the Conference of Berlin which addressed the purpose of colonization in Africa, which was stated as 'instructing the natives and bringing home to them the blessings of civilization'.

[66] The Haudenosaunee Confederacy is a union of the Mohawks, Oneidas, Onondagas, Cayugas, and Senecas and Tuscarora peoples, whose traditional territories lie in the regions of Lake Ontario, the River Hudson and Lake Champlain in what is now the border territories of Toronto, Canada and the State of New York, United States of America. After the American War of Independence, Confederacy families that had been allies of the British moved to the Grand River, in the Province of Canada. The British Crown granted the Confederacy a large tract of land known as the Grand River Tract to the east of Lake Ontario in the Haldimand Proclamation of 1784. After much of the land was lost to settlers, in 1842 a smaller parcel of land protected as the Six Nations Indian Reserve Number 40 in 1842. See 'Six Nations of the Grand River' (*Ontario.ca*, 5 June 2013) <https://www.ontario.ca/page/six-nations-grand-river> accessed 15 August 2020.; 'The League of Nations' (*Haudenosaunee Confederacy*) <https://www.haudenosauneeconfederacy.com/the-league-of-nations/> accessed 11 August 2020.; 'Haudenosaunee' (*Native-land.ca*, 3 March 2019) <https://native-land.ca/maps/territories/haudenosaunee/> accessed 15 August 2020.; 'Deskaheh' (*The Canadian Encyclopaedia*, 28 August 2015) <https://www.thecanadianencyclopedia.ca/en/article/levi-general> accessed 27 July 2020.

and to establish international recognition of the Six Nations' status as 'organised and self-governing peoples', with 'independent rights of home-rule',[67] in the hope that it would put a stop to the Dominion of Canada's increasing interference in the Six Nations' internal affairs.[68] However, Chief Deskaheh did not find a warm reception; the League of Nations refused even to grant him an audience, viewing the dispute as a domestic matter not of international concern.[69] The following year, in 1924, a Māori representative, Pita Moko, attempted to present a petition to the League of Nations on behalf of Māori spiritual leader Tahupōtiki Wiremu Rātana, calling for the return of lands confiscated by the British Crown and for the Crown to honour the Treaty of Waitangi. He, too, was denied. [70]

3.5.2. Indigenous peoples were sidelined during Decolonisation

This paternalistic and erasing approach continued after the Second World War, when indigenous peoples' rights were largely overlooked in the post-war process of decolonisation, which sought to establish self-government for colonial territories according to existing boundaries.[71] [72] The United Nations Charter, which stated that the purpose of the United

[67] Deskaheh, 'The Redman's Appeal for Justice' (16 August 1923) <http://cendoc.docip.org/collect/deskaheh/index/assoc/HASH0102/5e23c4be.dir/R612-11-28075-30626-8.pdf> accessed 25 August 2020., para 20(1). See paras 3, 6 and 16. The letter argued that Great Britain, France, the Netherlands, the United States of America and the Dominion of Canada - all members of the League of Nations - had already recognised the international status of the Six Nations by entering into treaties with them. On this basis, Chief Deskaheh asserted that the Iroquois were 'justly entitled to the same recognition by all other peoples.' (para 3).

[68] ibid., paras 1 and 2. The urgency of Chief Deskaheh's mission was a result of unwelcome interference within Haudenosaunee territories by the Dominion of Canada, preventing the ability of the Six Nations' Hereditary Council from governing their peoples freely in the way that they saw fit. The Dominion of Canada had imposed their own laws relating to property and the penal system on the Six Nations, had "misappropriate and wasted" funds that were held in trust, and were maintaining an armed force within Six Nations territory, all without the Six Nations' consent (paras 10-15). This, Chief Deskaheh asserted, was contrary to treaty arrangements by which the Dutch and later the English had recognised the Six Nations as independent nations and allies (para 6), as well as contravening promises made by the British Crown to protect the Six Nations from 'encroachments' (para 4).

[69] 'Indigenous Peoples and the United Nations Human Rights System Fact Sheet' (Office of the United Nations High Commissioner for Human Rights 2013) No. 9, Rev.2 <https://www.refworld.org/docid/5289d7ac4.html> accessed 19 February 2021.; Grace Li Xiu Woo, 'Canada's Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations' 2003 Law, Social Justice & Global Development Journal <https://warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/woo/> accessed 27 July 2020.

[70] New Zealand Ministry for Culture and Heritage Te Manatu Taonga, 'Ratana, Tahupotiki Wiremu' <https://teara.govt.nz/en/biographies/3r4/ratana-tahupotiki-wiremu> accessed 27 July 2020.

[71] A system of trusteeship was established under the United Nations Charter Chapter XI to assist them to develop their own free political institutions in accordance with the political aspirations of the peoples. (Ch XI Art 73). In 1960, UNGA further supported the norm of granting independent statehood for colonies within their existing boundaries. The 1975 the Final Act of the Conference on Security and Cooperation (Helsinki Declaration) applied self-determination not only to colonised territories but also to populations of existing state boundaries. Charter of the United Nations, (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter); Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) (adopted by 89 votes to none; 9 abstentions).; Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki (1 August 1975).

[72] The right of peoples and nations to self-determination, UNGA Res 637 (VII) A-C (16 Dec 1952). For a discussion of indigenous peoples and self-determination in international law during the post-war decolonisation period, see Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2010).,131-135.; Doyle (n 59). 68-70;

Nations was, inter alia, 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'[73] was generally interpreted to apply to entire peoples that were living in Non-Self Governing territories in the process of decolonisation.[74] In 1960, the two international human rights Covenants recognised that 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development,'[75] although 'peoples' remained undefined.

At the time, the Belgians put forward a proposal that compared the situation of indigenous peoples within existing state boundaries with that of Non-Self-Governing Territories, and that would have conferred on them a similar right to self-determination. However, instead States adopted the 'Blue Water' thesis, which emphasised the territorial integrity of existing states and territories, and treated indigenous peoples as part of the larger colonised populations.[76] This approach mirrored that of the recent ILO C107 - Indigenous and Tribal Populations Convention;[77] this paternalistic treaty aimed to improve the living and working conditions of indigenous people through an approach which assumed the inevitable demise of indigenous ways of life and the eventual assimilation of indigenous people into national society.

3.5.3 The status of indigenous peoples in the era of minority rights

The right of self-determination was not intended to apply to sub-state minorities and instead the rights of people of ethnic, religious or linguistic minorities to enjoy their own culture, and to practice their own religion and language in community with others was protected by Article 27 of the ICCPR.[78] Soon after, the International Convention on the Elimination of All Forms of Racial Discrimination sought to protect minorities from racial discrimination.[79] In the 1980s and 1990s there emerged greater recognition of the different needs of sub-state social groups, and the ways in which these minorities were often discriminated against and marginalised from systems of democratic government. There was recognition that these minorities would want

[73] UN Charter (n 71) Art 1(2).
[74] Declaration on the Granting of Independence to Colonial Countries and Peoples (n 71).
[75] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 1; and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3 (ICESCR), Art 1.
[76] Xanthaki (n 72). 133.
[77] International Labor Organization Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959) (ILO C107).
[78] Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002)., 126; Mauro Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' (2011) 13 International Community Law Review 413.
[79] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination (adopted by 21 December 1963, entered into force 4 January 1969).

to preserve their own cultural identities, distinct from their national identity, whilst also having an equal opportunity to be involved in the life of the state.[80] Controversial International instruments such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[81] and the Council of Europe's Framework Convention for the Protection of National Minorities[82] followed, alongside initiatives to protect the rights of indigenous peoples, including ILO Convention 169 – Indigenous and Tribal Peoples and the Draft Declaration on the Rights of Indigenous Peoples which was first presented in 1993.[83]

During this period, states continued to be reluctant to acknowledge indigenous peoples as 'peoples' – preferring to refer to them as 'populations'.[84] Whilst the ILO C169 – Indigenous and Tribal Peoples did use the term 'peoples', it also included a clear proviso that 'The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.'[85] The reason for this concern was that in an environment of rising socio-ethnic conflict, including conflict in Europe, states were wary of the potential for secessionist movements being a destablilising force.[86] Consequently, the Vienna Declaration and Programme of Action 1993 affirmed the principle of equal rights and self-determination of all peoples, but also specifically restricted actions that would harm the territorial integrity or political unity of states conducting themselves in accordance with these principles.[87]

The right to self-determination for populations who were not under colonialism or foreign occupation became integrally linked with the concept of human rights and democratic governance.[88] The concept of 'internal self-determination' developed, such that sub-national groups could 'have the right to freely pursue their 'political, economic, social and cultural

[80] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA 2009).
[81] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 Dec 1992) (adopted by consensus) (Declaration on Minorities).
[82] Framework Convention for the Protection of National Minorities (adopted on 10 November 1994, entered into force on 1 February 1998) 660 UNTS 195 (Framework Convention on Minorities).
[83] See Chapter 3 for a discussion of the UNDRIP's development and adoption.
[84] E.g. see UNCHR (Sub-Commission) 'Study of the Problem of Discrimination Against Indigenous Populations Final Report (last part) submitted by the Special Rapporteur Mr José Martínez Cobo' (30 September 1983) UN Doc. E/CN.4/Sub.2/1983/21/Add.8; and the establishment of the Working Group on Indigenous Populations by the UN Economic and Social Council in 1982. Study of the problem of discrimination against indigenous populations, ECOSOC Res 1982/34 (7 May 1982).
[85] International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) (ILO C169 – Indigenous and Tribal Peoples), Art 1.3 (emphasis in original).
[86] The 1990s was marked by a number of violent intra-state conflicts involving ethnocultural groups. The collapse of the USSR in 1991 presented a significant threat to stability in Europe, and the 1990s saw the emergence of intra-state conflicts, for example in Bosnia (1992-1995); Somalia (1992-3) and the 1994 Rwandan Genocide. See Ramsbotham (n 1).
[87] World Conference on Human Rights, Vienna Declaration and Programme of Action (12 July 1993) A/CONF.157/23.
[88] Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press 2005).

development within the framework of an existing State.'[89] International frameworks such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[90] and the Framework Convention for the Protection of National Minorities[91] emphasised the importance of political rights and the opportunity for minorities to participate in the life of the state on an equal basis, whilst maintaining their own cultures, languages and traditions. Such an approach recognised that national populations were not homogenous units, and contributed to the development of the concept of 'internal self-determination', in which the self-determination of sub-national groups was achieved through participation in democratic governance, in a way that did not undermine existing state political unity and territorial integrity.[92]

This approach to minority rights stands in contrast to the notion of 'external self-determination', which permitted populations under colonisation or foreign occupation to form a new independent state.[93] Scholars debated the potential for remedial secession, in which a minority group could secede from a state as a last resort in extreme cases of persistent and ongoing rights violations by the state and the absence of representation in state government. Anaya has suggested that such a right could apply to indigenous peoples in some circumstances.[94] However, as Barelli has observed, 'there is no evidence of support for this under international law'.[95] Furthermore, Xanthaki has argued that remedial secession depends on the subjective recognition of by states that rights violations are sufficient to merit it, and in practice this recognition is unlikely to be forthcoming for political reasons.[96]

During this period, the status of indigenous peoples in international law was ambiguous. Many scholars agreed that due to their particular history and distinctiveness, indigenous peoples were not a typical example of a subnational minority so the existing minority rights framework was insufficient to respond to their particular situation.[97] On the other hand, there was no clear-

[89] E.g. Reference re Secession of Quebec, [1998] 2 SCR 217, para 126; CERD, General Recommendation XXI(48), The right to self-determination (8 March 1996) UN Doc CERD/48/Misc.7/Rev.3, paras 4 and 6. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995).
[90] Declaration on Minorities (n 81).
[91] Framework Convention on Minorities (n 82).
[92] CERD, General Recommendation XXI(48), The right to self-determination (8 March 1996) UN Doc CERD/48/Misc.7/Rev.3; Barelli (n 78).
[93] For example, the Declaration on Principles of International Law concerning Friendly Relations recognised the duty of states to respect the equality and right to self-determination of peoples, and to 'bring a speedy end to colonialism'. Furthermore, it recognised that 'peoples under colonial or racist regimes or other forms of alien domination' was a violation of the principle of self-determination and of human rights. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 26/25 (XXV) (24 October 1970) (adopted without a vote).
[94] Anaya, *Indigenous Peoples in International Law* (n 18)., 83-84,
[95] Barelli (n 78)., 415.
[96] Xanthaki (n 72).,144-146.
[97] Trifunovska, 'One Theme in Two Variations - Self Determination for Minorities And Indigenous Peoples' (1997) 5 International Journal on Minority and Group Rights 175.

cut right to external self-determination, and whilst most indigenous peoples did not specifically seek independent statehood, states remained extremely wary that recognising the right to self-determination for indigenous peoples could be used both by some indigenous peoples and other sub-national minorities as a basis for secessionist claims.[98] Consequently, the discussions during the negotiation of UNDRIP attempted to establish the meaning of what the equal right to self-determination of all peoples means for indigenous peoples.

3.6 The Right to Self-determination in UNDRIP: A 'Fragile Architecture'?

It has been said that UNDRIP 'may represent one of the most significant stages in the development of the right to self-determination since decolonisation.'[99] In 2007, UNDRIP recognised, for the first time, that indigenous societies are 'peoples' with a right to self-determination. For indigenous representatives, achieving recognition of the right to self-determination on an equal basis with other peoples was a central objective in its negotiation,[100] and indigenous delegates at the WGIP asserted that 'the right of self-determination was the pillar on which all the other provisions of the draft declaration rested and the concept on which its integrity depended.'[101] However, due to states' concerns regarding the potential for encouraging secessionist movements, the inclusion of the right to self-determination in UNDRIP was extremely controversial, and a significant cause of delay in reaching its adoption.

This section argues that the wording agreed on self-determination in UNDRIP has not resolved the fundamental tension between indigenous self-determination and state sovereignty, political unity and territorial integrity.

3.6.1 The triumph of human rights over self-determination

Karen Engle's analysis of the negotiations of the draft UNDRIP demonstrates how the pragmatic and gradual adoption by the indigenous movement of the human rights paradigm undermined the essence of their claim for self-determination. She argues that the transnational indigenous movement of the 1970s and 1980s was 'relatively united' in demanding that the

[98] Barelli (n 78).
[99] Helen Quane, 'New Directions for Self-Determination and Participatory Rights?' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011).
[100] Barelli (n 78).,417; Anaya, Charters and Stavenhagen (n 53).
[101] UNCHR (Sub-Commission) Report of the Working Group on indigenous Populations on its eleventh session (23 August 1993) UN Doc E/CN.4/Sub.2/1993/29, para 57.

indigenous peoples' right to self-determination - including the right to secession - should be enshrined in UNDRIP.[102] She writes that indigenous advocates were also

> *wary of using international human rights mechanisms as a forum to advance their cause, due what they saw as the assimilationist tendencies of human rights, which allowed for neither strong forms of self-determination nor collective cultural rights.... human rights was often seen as inseparable from the civilizing mission of colonial days or the globalizing or liberalizing mission of neocolonialism*.[103]

Consequently, in its early days the indigenous movement tended to 'eschew human rights'[104] and frame its demands in terms of 'decolonization and self-determination'[105]. However, Engle relates that their stance weakened as the indigenous movement began to accept the right to culture as a basis for indigenous rights protections, rather than solely focusing on the right to self-determination.[106] The indigenous movement found the international human rights bodies to be receptive to the protection of indigenous cultural rights, for example in the Human Rights Commission and CERD, the International Labor Organization, and the Inter-American Commission on Human Rights, and the IACtHR. At the same time, states and international human rights bodies resisted indigenous peoples' claims to equal self-determination under Article 1 of the ICCPR and ICESCR.[107] In the end, the approach of advocating for cultural rights protections was less threatening to states, and consequently gained more traction. As Engle states, 'the Declaration seals the deal: external forms of self-determination are off the table for indigenous peoples, and human rights will largely provide the model for economic and political justice for indigenous peoples.'[108]

Engle's position can be better understood through the evolution of Article 3 and related Articles during the drafting process. Indigenous representatives' original concept of self-determination, as expressed in the WGIP's 1993 draft, stated that:

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[102] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141., 148.
[103] ibid., 151.
[104] Kelly Roy and Gudmundur Alfredsson, 'Indigenous Rights: The Literature Explosion' (1987) 13 Transnational Perspectives 19., 21.
[105] ibid., 21; Douglas Sanders, 'The Re-Emergence of Indigenous Questions in International Law' (1983) 1983 Canadian Human Rights Yearbook 3., 25.
[106] This was partly down to the expansion of human rights into a wide range of discourse in the post-Cold War era; as Engle puts it, human rights became the '*lingua franca* of both states and social movements' to the extent that 'there are few legal and discursive spaces wholly outside the human rights framework'. Engle (n 102).,158.
[107] ibid., 152-160.
[108] ibid., 147. Engle argues that the danger is not in the lack of external self-determination *per se*, as this was not a main concern of the global indigenous movement by the end of the drafting process, and in any event the rules of international law will apply in limited circumstances to permit secession of indigenous peoples, as with other sub-state groups.

> *Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government*.[109]

Throughout the negotiations, this expansive view of self-determination was diluted until it reframed in the terms of established international law. States' preoccupation with secession, although it was not a priority issue for indigenous peoples,[110] became an entrenched distraction that prevented a more imaginative dialogue on how to radically reimagine the relationship between indigenous peoples and states.[111]

Article 3 of the final text states:

> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

And Article 4 states:

> *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

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[109] UNCHR (Sub-Commission) 'Draft declaration on the rights of indigenous peoples Revised working paper submitted by the Chairperson-Rapporteur, Ms. Erica-Irene Daes, pursuant to Sub-Commission resolution 1992/33 and Commission on Human Rights resolution 1993/31' (8 June 1993) UN Doc E/CN.4/Sub.2/1993/26, Art 3.

[110] States' need for overall control of legal, territorial and political matters was evident from the observations registered during the eleventh session of the WGIP. Canada expressed the need for establishing harmonious negotiation processes between states and indigenous governments but expressed the view that indigenous peoples should not have the ability to unilaterally determine their status within the existing state, and enact laws without reference to the application of state law, a perspective echoed by New Zealand. At this stage, Australia and Chile supported a change in the draft to specifically confirm the territorial integrity of states, placing indigenous self-determination firmly within the bounds of the state. See UNHCR (Sub-Commission), Report of the Working Group on Indigenous Populations on its eleventh session' (23 August 1993) UN Doc E/CN.4/Sub.2/1993/29, paras 50, 52 and 53; UNCHR (Sub-Commission) 'Report on the Working Group on Indigenous Populations on its eleventh session Addendum Comments by the Government of Canada' (27 August 1993) UN Doc E/CN.4/Sub.2/1993/29/Add.1.

[111] For example, in 1993 Erica-Irene Daes, Founding Chairperson & Special Rapporteur, WCIP provided an explanatory note to states framing Article 3 in terms of 'internal self-determination'. See UNCHR (Sub-Commission), 'Explanatory note concerning the draft declaration on the rights of indigenous peoples' (19 July 1993) UN Doc E/CN.4/Sub.2/1993/26/Add.1. Engle notes that this approach was not universally agreed by indigenous delegates at the time and that the note and the proposed alternative wording was not included in the WCIP draft.

Charmaine White Face, Zumila Wobaga, who was involved in a hunger strike during negotiations at the WGDD, has called Article 4 'very limiting and dangerous to the self-determination of Indigenous Nations'.[112] In her view, the reference to 'matters relating to their internal and local affairs' in this Article, without defining what these matters are, gives states the opportunity to define this narrowly, thus limiting its scope. Article 31 of the 1994 draft declaration adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, on which Article 4 is based, not only provided a wide-ranging list of matters over which the clause applied, but also made clear that indigenous autonomy represented 'a specific form' of exercising the right to self-determination.[113] These words are omitted in the final text, creating ambiguity as to whether autonomy is intended to be the sole means of expressing indigenous self-determination. [114]

The right to self-determination was finally agreed by states subject to the inclusion of Article 46.1, following intensive negotiations in the run up to the 61st General Assembly. Article 46.1 reads:

> *Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States*.[115]

A further amendment was made in the final negotiations to remove a statement from the preamble which asserted 'indigenous peoples have the right freely to determine their relationships with states, in a spirit of coexistence, mutual benefit and full respect.' Together, these changes arguably undermine the original intention of the indigenous drafters to reframe

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[112] Charmaine White Face, Zumila Wobaga, *An Analysis of the Declaration on the Rights of Indigenous Peoples* (Living Justice Press 2013)., commentary on Article 4.

[113] Article 31 of the draft declaration adopted by the Sub-Commission stated:

> *Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.*

See Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56.

[114] Barelli (n 78). Barelli has also noted that the reordering of the text so that Article 4 on autonomy reads together with Article 3 on self-determination could imply that the right to self-determination is intended to be limited to autonomy. However, he also makes a case against this interpretation.

[115] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 46(1).

their relationship with states as one of negotiation between equals, and instead position them firmly as sub-state minorities within the existing state-centric framework of international human rights. This is reinforced by Articles 46.2 and 46.3, which require UNDRIP to be interpreted in accordance with principles of democracy, respect for human rights, equality and non-discrimination. Engle argues that self-determination became roughly equated with the right to autonomy, and was granted on the condition that indigenous peoples do not challenge the political unity and territorial integrity of the state and fall in line with existing international legal norms.[116] White Face has gone further, arguing that the prioritisation of states' territorial integrity and political unity undermines indigenous treaty rights and the norm of democratic government is a violation of indigenous peoples' right to choose how they self-govern. She sums up Article 46 as 'very offensive to all indigenous Peoples of the world who have suffered the longest from the lack of Human Rights.'[117]

3.6.2 The 'dual aspect'[118] of the UNDRIP right to self-determination and its limitations

The success of the UNDRIP is not in gaining recognition of the right to external self-determination for indigenous peoples.[119] However, according to Anaya, interpreting independent statehood as the ultimate expression of self-determination is to be limited by 'a narrow state-centred vision of humanity and the world, that is, a vision of the world that considers the modern state—that institution of Western theoretical origin—as the most important and fundamental unit of human organization.'[120] For Anaya, UNDRIP reflects a new development in political theory that is based on indigenous ideals, which goes beyond the state/individual dichotomy to reflect the complexity of human identity, political orders and social allegiances. Self-determination, in this context, is for indigenous peoples 'to be full and equal participants at all levels in the construction and functioning of the governing institutions under which they live'[121] and to 'control their own destinies under conditions of equality.'[122]

Anaya reflects this view when he describes self-determination in terms of its 'substantive' and 'remedial' aspects. 'Substantive' self-determination is both *constitutive* and *ongoing*. First, governing orders must be constituted in such a way that they represent the will of the people

[116] Engle (n 102)., 161.
[117] White Face, Zumila Wobaga (n 112)., commentary on Article 46.
[118] Anaya, Charters and Stavenhagen (n 53)., 193.
[119] Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge 2016)., 21-27. However, as Barelli has argued, it does not detract from any right they may have elsewhere in international law, and in any case the majority of indigenous peoples do not aspire to form new states, but to redefine their relationship with the state within which they now live
[120] Anaya, Charters and Stavenhagen (n 53).,186.
[121] ibid.,188.
[122] ibid.,190.

they serve, for example being formed and altered through processes which are participatory and based on consent. At the same time, the ongoing aspect requires that these governing orders permit people and collectives to have meaningful control and choice over their affairs, on a day-to-day basis.[123] In Anaya's view, UNDRIP arises from the continued violation of this principle of substantive determination, in relation to indigenous peoples. He argues that UNDRIP engages the 'remedial aspect' of self-determination, providing 'a self-determination remedial regime'[124] which details specific rights to restore indigenous peoples' substantive self-determination on a basis of equality with all other peoples in a manner that is adapted to their particular histories and circumstances. In this way, he likens it to the process of post-war decolonisation – a specific response to a violation, that is appropriate to the individual circumstances and need.[125]

The model of self-determination in UNDRIP is two-pronged: it seeks to protect indigenous peoples' autonomy over their internal affairs whilst also enabling them to participate effectively in the decision-making processes of the state.[126] This dual model is summed up in Article 5 of UNDRIP, which states:

> *Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*

In relation to autonomy, many of UNDRIP's provisions flesh out the ways in which indigenous peoples can maintain their own political, legal, economic, social and cultural institutions. An important element of this is the provisions on the right of indigenous peoples to own, use, develop and control their lands, territories and resources, which are an essential for indigenous peoples to maintain their traditional ways of life.[127] UNDRIP also protects indigenous peoples' right to control their knowledge, intellectual property and cultural heritage,[128] and their educational systems.[129] However, commentators such as White Face highlight how the text of UNDRIP demonstrate states' resistance to a high degree of indigenous autonomy. This can be seen in the discussion on Article 4 above, as well as in

[123] Anaya, *Indigenous Peoples in International Law* (n 18)., 97-129.
[124] Anaya, Charters and Stavenhagen (n 53)., 190.
[125] Anaya, *Indigenous Peoples in International Law* (n 18)., 196.
[126] Anaya, Charters and Stavenhagen (n 53). 193.
[127] UNCHR (Sub-Commission) 'Study on the protection of the cultural and intellectual property of indigenous peoples by Erica-Irene Daes' (28 July 1993) UN Doc. E/CN.4/Sub.2/1993/28, para 24; *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua,* Judgment of 31 August 2001 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (31 August 2001), para 149; 'The Hague Conference (2010) Rights of Indigenous Peoples Interim Report' (International Law Association 2010).
[128] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 31.
[129] Ibid., Art 14.

Article 23 which protects the right of indigenous peoples to determine and develop priorities and strategies for exercising their development. White Face argues that the original text of Article 23 protected indigenous peoples' 'right to determine and develop all' health, housing, economic and social programmes that relate to them, whereas the final text includes an amendment which ensures only a right to be 'actively involved' in developing them. She argues that this neuters the provision, by allowing the state to take decisions on matters of indigenous responsibility, in accordance with to the state's own values and norms. Furthermore, she argues that 'the deletion of the word all in the GA version underscored the agenda of States to maintain control over Indigenous Peoples in key areas of everyday life and to restrict our self-determining authority.'[130]

Similar critiques have also shown how self-determination is constrained in UNDRIP's participatory rights regime. The importance of participation in decision-making to the operation of self-determination has been frequently affirmed.[131] UNDRIP includes a raft of participatory rights, that go far further than those protected in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. These include the right of indigenous peoples to participate in decisions that would affect their rights through their representative institutions;[132] to participate in the establishment of processes to recognise and adjudicate their rights to land, territories and resources; and in state-led measures to combat prejudice or child exploitation.[133] Additionally, states must obtain FPIC before relocating indigenous peoples or storing hazardous waste on their lands, and must 'consult in order to obtain' FPIC before adopting administrative and legislative measures that would affect them,[134] and before approving projects on indigenous territories.[135]

Scheinin and Åhren have noted the particular importance of FPIC to the realisation of indigenous self-determination, noting that it goes beyond mere participation to include the power to make decisions. Consequently, they argue, FPIC 'requires transfer of jurisdiction from state to political bodies to indigenous peoples' representative institutions'.[136] This understanding of participatory rights in UNDRIP would certainly greatly transform the place of

[130] White Face, Zumila Wobaga (n 112)., commentary on Article 23.
[131] For example, UNHRC Expert Mechanism on the Rights of Indigenous Peoples Third session 12-16 July 2010, 'Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, Report of the Expert Mechanism on the Rights of Indigenous Peoples' (17 May 2010), UN Doc A/HRC/EMRIP/2010/2, para 5.
[132] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 18
[133] Ibid., Arts 27, 30, 15 and 17
[134] Ibid., Art 19
[135] Ibid., Art 32. See Chapter 5 for a more in-depth discussion of Article 32.
[136] Martin Scheinin and Mattias Åhrén, 'Relationship to Human Rights, and Related International Instruments' in Jesse Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018)., 67.

indigenous peoples *vis à vis* the state. However, as is explored in depth in Chapter 5, due to states' concerns the wording in Article 32 relating to FPIC was compromised, so that consent must be genuinely sought, but is not required for the state to proceed with measures that indigenous peoples do not support. The same was also true of Article 19, which at first states to obtain consent from indigenous peoples before adopting administrative and legislative measures that affect indigenous peoples, and to ensure that indigenous peoples could participate fully in these decisions 'through procedures determined by them'.[137] In contrast, the final text requires consultation through indigenous peoples' representative institutions, which leaves the question of who designs the consultation process ambiguous (or impliedly, in the hands of the state). As will be discussed in Chapters 6, 7 and 8, the design of consultation mechanisms can have considerable impacts on the ability of indigenous peoples to exercise self-determination.

Thus, in relation to the two main modes of self-determination – autonomy and participation – UNDRIP's text fell short of guaranteeing the freedoms that indigenous representatives had originally claimed.

3.7 Moving beyond the 'dual aspect' approach

In the years since UNDRIP's adoption, indigenous people and their supporters have sought to interpret its provisions as widely as possible within a state-centric framework of human rights.[138] This section examines further the potential of UNDRIP's recognition of right to self-determination (understood in the 'dual aspect' model described above) to fundamentally transform political and economic power relations between indigenous peoples and the state, in ways that are supportive of indigenous author's understandings of what is necessary for reconciliation to occur.

3.7.1 A new understanding of political power

[137] Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56., Art 20.

[138] For example, S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009).; Dorothée Cambou, 'The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective' (2019) 23 The International Journal of Human Rights 34.

This section examines the difference between Eurocentric and indigenous conceptualisations of power, and evaluates the extent to which UNDRIP is able to transform power relations between indigenous peoples and the state.

As Engle and others have noted,[139] there were differing views within the indigenous movement as to the suitability of the human rights framework for pursuing self-determination (and thus a new power dynamic between indigenous peoples and the state). Decolonial authors such as Santos have also commented on the limitations of human rights in emancipating oppressed groups. Santos notes that human rights have developed out of a capitalist/colonialist framework, and are rooted in western ideas, and liberal human rights institutions. [140] Consequently, human rights – and international law more generally -encapsulates a top-down notion of power, in which states have been viewed as the primary subjects of international law and its main actors.[141]

Additionally, there is concern that a human rights framing of self-determination does not challenge states to re-examine their power relationship with indigenous peoples. For example, Xanthaki has addressed how adoption of a human rights frame may lead to self-determination being conceived as an 'umbrella right',[142] such that it becomes indistinguishable from the right, protected in Article 1 of the International Covenants on Human Rights, of a people 'to pursue their social, economic and cultural development'. As a result, she argues that approaches which conflate the right to self-determination with a broad spectrum of other rights run the risk of losing its core essence: political power.[143] Such a neutered understanding of self-determination could be used by states to gloss over politically sensitive claims for self-determination and characterise them in social or economic terms which pose less of a threat to the *status quo*.[144] Such an apparently innocuous definition of self-determination reinforces unequal relations of power, rather than prompting states to address them.

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[139] Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press 2010).; Andrew Erueti, 'The Politics of International Indigenous Rights' (2017) 67 University of Toronto Law Journal 569.; Dwight Newman, 'Interpreting Fpic in Undrip' (2020) 27 International Journal on Minority and Group Rights 233.

[140] Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).; Boaventura de Sousa Santos (ed), *Another Knowledge Is Possible; beyond Northern Epistemologies* (Verso 2008).

[141] Solomon Salako, 'The Individual in International Law: "Object" versus 'Subject' (2019) 8 International Law Research 132.

[142] Xanthaki (n 72)., 153 citing Gudmundur Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law' in Nazila Ghanea and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Brill Nijhoff 2004) <https://brill.com/view/title/11165> accessed 17 February 2021.

[143] Xanthaki (n 72). 157-159. See also Charters (n 52).

[144] To combat this possibility, Xanthaki argues that conceiving of self-determination as a principle of international law (in addition to its status as a more narrowly-defined right) means that it becomes a 'standard to be observed in the name of justice and fairness' alongside other principles such as equality, respect for life, territorial integrity and state sovereignty. Such principles can be 'applied flexibly and inclusively' to fill gaps in the legal framework. Such

Indeed, the unequal relations between states and indigenous peoples was evident in the decision to strategically adopt a human rights framework to enunciate indigenous claims during UNDRIP's drafting period. In order to make progress towards agreement, indigenous representatives had to negotiate their rights with reference to previously established norms of international law, convincing states that indigenous demands were consistent with an established legal framework that, until that point, had made a habit of excluding indigenous peoples.[145] As Peters argues, 'in terms of norm dynamics, the existing framework of norms was so strongly institutionalized that the new norms of rights for indigenous peoples could only be acceptable to the critical mass of states when they were made to fit into existing international law'. The requirement to negotiate from within the terms of international law came at a cost to the cohesion of the indigenous movement, which at times became severely fractured as indigenous representatives struggled to make progress whilst remaining true to their indigenous values and identities.[146] Peters also notes how the final text denies indigenous peoples agency, commenting that throughout UNDRIP, indigenous peoples are conceived not as agents in their own right but as passive subjects of the state[147] - a positioning which is consistent with the view that states are the main subjects of international law, but which is far from transformative in terms of power relations, and could even be seen to be disempowering from an indigenous perspective.

This recourse to established norms of international law precluded a wider discussion on the nature of power and how it relates to the relationship between states and indigenous peoples. Indigenous conceptualisations of power often differ dramatically from those of Eurocentric philosophy. Alfred describes 'western' idea of power as 'adversarial' and 'coercive'.[148] This chimes with analyses of power by some non-indigenous authors, such as Foucault's writing on sovereign power and the disciplinary state. Building on Foucault, Santos has defined power as an 'unequal exchange',[149] reinforced by three forms of domination: capitalism, patriarchy

an approach by-passes the counter-productive focus on secession and enables the emergence of a broad range of institutional arrangements that support indigenous peoples to experience political autonomy and gain control of their futures. Xanthaki (n 72)., 155.

[145] See Chapter 1.

[146] Andrea Carmen, 'International Treaty Council Report from the Battle Field - the Struggle for the Declaration' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009).

[147] Frederike Peters, 'Subaltern Voices in International Law. Role and Contribution of Indigenous Representatives in the Creation of the United Nations Declaration of the Rights of Indigenous Peoples' (Master thesis International Relations (MA), Universiteit Leiden 2017) <https://studenttheses.universiteitleiden.nl/handle/1887/52445> accessed 17 February 2021.

[148] Taiaiake Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (1st edn, David Bunnett Books 1999)., 59.

[149] Boaventura de Sousa Santos, *Toward a New Legal Common Sense : Law, Globalization, and Emancipation* (2nd ed., Cambridge University Press] 2002)., 451. See 420-495 for Santos' discussion of the six forms of power.

and colonialism. These forms of power both influence and are sustained in the way that society is constructed in the household; workplace; markets; in the community through the creation of the 'other'; in political spaces and institutions; and in the 'worldplace', in which economic value moves from peripheral places in the global south to the 'core' in the global north. Santos argues that these unequal exchanges are reinforced by six 'legal orders', that govern the actions of individuals within each of these six spheres of life. In common with Alfred, Santos considers that law takes effect through an argumentative discourse, and the 'threat of force'.[150]

In relation to the key principle of state sovereignty in political theory, Wheatley has noted that the positivist law of nations considers a capacity for coercive force to be integral to the definition of a sovereign state: 'Sovereign political communities were distinguished from non-sovereign political communities by the existence of institutions of government and coercive systems for the enforcement of law norms.'[151] Furthermore, Wheatley suggests that the influential Eurocentric understandings of sovereign power that were put forward by key theorists such as Hobbes, Locke and Vattel were conceptualised in direct opposition to indigenous traditional livelihoods and governance systems.[152] To these theorists, indigenous land tenure systems and governance practices represented a 'dystopian "state of nature"' in which land was left unused and indigenous people were thought to live in a backwards and uncivilised manner.[153] Sovereign authority was understood to be exercised in relation to discrete populations settled on defined parcels of land, and systems of government, laws and the coercive means to enforce them were considered to be necessary for people living within these 'civilised' societies to achieve 'the good life' - as defined by economic development, private property and agricultural productivity in accordance with European-style land use systems.[154]

[150] ibid. Santos defines 'law' broadly, as 'a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force' (at 457).
[151] Steven Wheatley, 'Conceptualizing the Authority of the Sovereign State over Indigenous Peoples' (2014) 27 Leiden Journal of International Law 371., 381.
[152] ibid.
[153] ibid.
[154] Echoes of such arguments can still be witnessed in relation to indigenous-state conflict today: for example, in Chapter 6 it is seen in the characterisation of indigenous peoples as 'dogs in the manger' who refuse to put their land to good use; in the case of the Xákmok Kásek Indigenous Community v Paraguay, the Agrarian Statute of Paraguay limited the expropriation of indigenous land to those instances in which the land is not 'rationally productive' (at 265)- i.e. in use for commercial, agricultural purposes. The Court found that this was in breach of the indigenous community's right to property, commenting that he Court comment that failing to recognise a variety of cultural conceptions of property ownership 'would make the protection granted by Article 21 of the Convention meaningless for millions of individuals'. *Xákmok Kásek Indigenous Community v Paraguay* Judgement of August 24 2010 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 214 (24 August 2010), paras 87, 149.

In contrast, indigenous political philosophy tends to interpret power in a bottom-up or horizontal fashion, rather than as a force that operates from the top down.[155] Alfred explains that in indigenous cultures, 'access to power is gained through balancing the diverse aspects of our being, harmonization with the natural forces that exist outside us, respect for the integrity of others and the diverse forms of power, and knowledge of ritual.'[156] Central to the indigenous understanding of power is the human relationship with nature: 'In indigenous philosophies, power flows from respect for nature and the natural order. In the dominant western philosophy, power derives from coercion and artifice – in effect, alienation from nature.'[157] Whilst indigenous societies are not immune to operating under exploitative forms of power, Alfred's concept of power as balance and harmony offers an alternative vision of how power could operate between the state and indigenous peoples.

Many indigenous authors have expressed that they do not want a degree of power delegated from a state who asserts its power over them; instead they are seeking a relationship in which power is expressed as a horizontal relationship of mutual respect. Alfred has advocated for a nation-to-nation approach, which he views as a 'traditional objective. In contrast, attempting 'to achieve partial recognition of a right of self-government within the legal and structural confines of the state' he considers to be an assimilationist goal.'[158] Vine Deloria has argued that the approach of self-government and delegated autonomy is inadequate, because it does not accommodate spiritual needs and originates 'in the minds of non-Indians who have reduced the traditional ways to dust, or believe they have, and now wish to give, as a gift, a limited measure of local control and responsibility'.[159]

This chapter argues that UNDRIP represents exactly this arrangement – the delegation by states of limited control and responsibility to indigenous peoples. In contrast, the Iroquoian *Guswentha*, or Two-Row Wampum, is one model for the relationship between indigenous peoples and states that has been cited by indigenous authors as an example of how power

[155] In a discussion with Atsenhaienton, a Kanien'kehaka whose people was one of the founding members of the Iroquois Confederacy, Alfred examines the concept of sovereignty in European and indigenous culture. Atsenhaienton views sovereignty as a European construct, that relates to the Crown's (or state's) authority over its land and people. In contrast, in indigenous systems 'the people are sovereign' (at 109). Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (n 148). 108-113. In the Iroquois Confederacy, Turner relates that the Chiefs of the Grand Council would not negotiate decisions with their counterparts without first gaining the approval of their communities. This speaks to contrasting understandings of who are the ultimate bearers of power within indigenous and non-indigenous societies. Turner (n 43). 49.

[156] Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (n 148)., 52.

[157] ibid., 60.

[158] ibid., 99

[159] Vine Deloria Jr and Clifford M Lytle, *The Nations within: The Past and Future of American Indian Sovereignty* (Reissue edition, University of Texas Press 1998)., 15, cited in Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (n 148)., 54.

relations between states and indigenous peoples should operate. The Two-Row Wampum has been described by Grand Chief Michael Mitchell of Akwesasne as follows:

> *When the Haudenosee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Teh or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect.*
>
> *These two rows symbolize two paths or vessels, traveling down the same rivers together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel. The principles of the Two Row Wampum became the basis for all treaties and agreements that were made with the Europeans and later the Americans*.[160]

Turner gives insight into the principles on which the Iroquois Federacy was based, including the value of recognising 'the moral autonomy of the other'[161]. Thus the two boats symbolise a model of the 'coexistence of power' based on commonly-held principle that the two peoples are interdependent, sharing the same 'river of time'[162] whilst remaining '*distinct political entities*' and '*independent nations*'[163] in whose affairs the other must not interfere. This same spirit is summed up by Ladner when she says 'Both indigenous nations and the settler state will need to come to terms with what it means to have multiple nations occupying the same space. We will need to find a way to live together in a mutually respectful, mutually agreeable and mutually beneficial way on indigenous lands.'[164]

Along similar lines, political theorists such as James Tully and Richard Stacey have advocated for alternative models of relationship outside the human rights paradigm that could better accommodate indigenous understandings of power. For example, 'intercultural constitutionalism', based on shared principles of mutual recognition as independent nations,

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[160] Michael Mitchell, 'An Unbroken Assertion of Sovereignty' in Boyce Richardson and Assembly of First Nations (eds), *Drum beat: anger and renewal in Indian country* (Summerhill Press 1989)., 109-110 cited in Turner (n 43)., 48.
[161] Turner (n 43)., 53.
[162] Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (n 148)., 52.
[163] ibid., 54 (emphasis in original).
[164] Kiera Ladner, 'Learning from the Earth, Learnining from Each Other: Ethnoecology, Responsibility and Reciprocity' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press 2018)., 261.

consent and the continuity of their respective distinct political and cultural identities;[165] or through developing the model of Canadian federalism as the basis for indigenous self-government.[166] These approaches differ from a human rights approach that is evident in UNDRIP because they emphasise the separateness of indigenous peoples, and their existence as nations who have the right to decide which of their powers and responsibilities they will grant to outside entities, such as the state. In contrast, as discussed above in section 2.4.1, in the human rights approach the state decides which of its own powers and responsibilities it will delegate to indigenous peoples. In a nation-to-nation approach there is a negotiation between equals; in the human rights approach, there is a limited degree of control given down as a 'gift'.[167] This is a crucial difference.

Several of UNDRIP's provisions reflect the unwillingness of states to countenance a 'nation-to-nation' or 'citizens plural' approach. The draft declaration originally contained a provision enabling indigenous peoples to collectively determine their own citizenship in addition to being citizens of the state.[168] However, by the end of the WGDD, this provision had been removed and replaced with the 'right to determine own identity or membership'[169] – which fails to distinguish indigenous citizenship from membership of any other group or organisation.[170] Throughout negotiations, states also watered down provisions on recognising treaties, agreements and constructive arrangements between indigenous peoples and states in a way that reinforced states' dominance over indigenous peoples and undermined indigenous efforts to put their relationship with states on a nation-to-nation footing.[171] Furthermore, states

[165] For example, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995).

[166] Richard Stacey, 'The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism' (2018) 46 Federal Law Review 669.

[167] Jr and Lytle (n 159).; Richard Day, 'Who Is This We That Gives the Gift? Native American Political Theory and The Western Tradition' (2001) 2 Critical Horizons 173.Vine Deloria, and also Richard Day.

[168] See Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56., Art *32,* which states:

> *Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.*

[169] UNCHR 'Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session' (22 March 2006) UN Doc E/CN.4/2006/79, Art 32; UNDRIP, UNGA Res 61/295 (13 September 2007), Art 33.

[170] White Face, Zumila Wobaga (n 112)., commentary on Article 33. White Face calls Article 33 'one of the most dangerous Articles in this Declaration'.

[171] The draft of the Declaration produced by Daes at the end of the WGIP called for states to recognise that 'treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,' (13th preambular paragraph) and such agreements should be recognised, observed and enforced by states 'according to their original spirit and intent' (Art 36). Furthermore, any disputes should be settled by 'competent international bodies.' (Art 36). Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56.

removed provisions in the WCIP draft that called for the full recognition of indigenous legal systems.[172] All these amendments work against the potential for UNDRIP to significantly challenge existing power relations, and constrain the scope of indigenous self-determination.

Champagne has criticised UNDRIP on these terms. In his view, far from being a foundation for a new relationship between indigenous peoples and the state - UNDRIP is a sophisticated form of integration, designed to be consistent with states' established method of dealing with minority groups or ethnic minorities. As such, it leaves the primacy of state governments unchallenged and indigenous peoples at the mercy of state discretion, particularly when it comes to important issues of land ownership and control of resources.[173] In his view, UNDRIP emphasises 'democratic multiculturalism' over an alternative model of 'citizens plural', which 'recognizes the extralegal character of indigenous peoples' participation in the nation-state'. The 'citizens plural' approach, he argues, would have better reflected the wish of indigenous peoples to join in national government and culture as well as maintaining their separate government and culture as indigenous peoples. However, as Starblanket and Stark have acknowledged, 'Too often, conventional Western knowledge is willing to turn to the relational only insofar as this attention to relationships doesn't threaten the stability of the state'.[174]

Indigenous models of power and the relationship between indigenous peoples and the state suggest that the treatment of indigenous peoples as a special kind of minority within the state may be a flawed approach, that limits the definition of the right to self-determination to the content of Articles 4 and 5 of UNDRIP, precluding other possibilities for its expression. Chapter 4 of this thesis further explores the limits of the human rights framework for reconciliation, through a critical examination of Kymlicka's model of minority rights, human rights based multiculturalism, from the perspective of indigenous political philosophy. The next section of this chapter highlights a second important way in which human rights-based perspectives on the right to self-determination may be lacking.

The final text of the Declaration falls short of this unambiguous recognition, stating that these agreements are matters of international concern 'in some cases' (at Article 37.1). Although the Declaration is careful not to imply that it diminishes or eliminates indigenous rights that have been established through treaties, agreements and constructive arrangements (Art 37.2) and considers that these 'and the relationship they represent, are the basis for a strengthened partnership' (14th preambular paragraph) there is no provision for disputes to be referred to international bodies - suggesting that states prefer to handle such disputes as internal matters, consistent with the original approach of the League of Nations (discussed in Chapter 3). UNDRIP, UNGA Res 61/295 (13 September 2007).

[172] Ref compare WGIP with Dec.

[173] Duane Champagne, 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights' (2013) 28 Wicazo Sa Review 9., 20.

[174] Starblanket and Stark (n 50)., 180.

3.7.2 *A new understanding of economic power*

In addition to concerns over the ability of the human rights paradigm to transform political power relations, there is a significant danger that the question of economic power glossed over in the human rights approach to self-determination. Section 2.2.3 noted that for indigenous writers, reconciliation encompasses addressing economic models that create imbalance between people and the earth. Mander and Tauli-Corpuz have argued that indigenous peoples and states are locked in 'paradigm wars'; a conflict of worldviews which impacts on each sides' understanding of land, property, and humanity's place within the natural world, and gives rise to radically different visions of what 'development' look like.[175] The ideological nature of the claims of the global indigenous movement, and its opposition to the neoliberal model of development, is a point which is also made by decolonial scholars such as de Santos, Rodriquez-Garavito and Arenas.[176] Santos argues that the indigenous movement's 'reading of our time is paradigmatic in nature, its logic is anti-capitalist, its politics is based on self-determination and autonomy, its ideology is emancipation from hegemonic 'development models''.[177]

Consequently, a related conceptualisation of self-determination as 'resurgence' focuses less on indigenous peoples' political relationship to state structures and more on reviving their traditional relationship with the land. This approach advocates the revival of all areas of indigenous life in a way that draws from traditional wisdom as it relates to the present. An important aspect of this ideal is the revival of indigenous land management practices, and creating independent means of sustainable self-sufficient economies based on indigenous values such as reciprocity.[178] Indeed, Corntassel has also warned that state-centric rights-based approaches may change the nature of indigenous institutions, resulting in indigenous peoples 'mimicking state functions rather than honoring their own sustainable, spiritual

[175] Mander and Tauli-Corpuz (n 15).

[176] For example, Rodriquez-Garavito and Arenas comment that the global indigenous movement 'is explicitly rooted in a reaction against the expansion of the frontiers of predatory forms of global capitalism into new territories (e.g. the Amazon) and economic activities (e.g. the commercial exploitation of traditional knowledge and biodiversity). This expansion, in turn, is linked to the pressures to step up the exploitation of natural resources associated with the increasing consumption of the North and economic dependence of the South.' César Rodríguez-Garavito and Luis Carlos Arenas, 'Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U'wa People in Colombia' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005)., 242.

[177] Santos (n 149)., 239.

[178] Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (n 148)., 118-119.; Jeff Corntassel, 'Re-Envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination' (2012) 1 Decolonization: Indigeneity, Education & Society 86.; Borrows and Tully (n 39).

relationships with their homelands'.[179] In his view, 'the pursuit of self-determination should be reconceived as a responsibility based movement centered on a sustainable self-determination process, not as a narrowly constructed, state-driven rights discourse.' [180] However, in practice this can be a significant challenge because, as Alfred notes, 'the structure of mainstream society is such that people who adhere to traditional values are not likely to have access to the resources and cooperation needed to achieve self-sufficiency.'[181]

To realise indigenous self-determination defined in this way requires that indigenous peoples wield only political power but also economic power. This would require systemic changes to economic models and the way that resources are distributed.[182] For example, in the context of resource extraction activities, a view of self-determination that connects the economic with the political would not only require consent, but might also require that resource extraction activities are carried out *at the request* of indigenous communities, in way that reflects indigenous values. Furthermore, it would require indigenous communities to be recognised as resource owners and project partners with substantial control over the project, rather than viewing them as beneficiaries or stakeholders who are to be consulted.[183]

Whilst these 'resurgence' approaches to indigenous self-determination do not focus on secession, they are nevertheless often perceived as a threat to the authority of the state and its control over land and resources.[184] Thus many of its proponents emphasise unilateral action rather than negotiation with the state, whilst pointing to the way that indigenous people are vilified and even criminalised for participating in cultural practices on traditional land which is often considered private property or publicly-owned parks. In one example, Corntassel and Bryce describe the work of Lekwungen communities in what is known as British Columbia in Canada, to revive their traditional kwetlal food system. Frequently encountering opposition from non-indigenous citizens, Bryce initiated projects that involved the non-indigenous community, to educate them about the history of the land and their responsibilities towards its food system. This is one example of how indigenous 'communities must assert sustainable self-determination rather than negotiate for it.'[185]

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[179] Jeff Corntassel and Cheryl Bryce, 'Practicing Sustainable Self-Determination: Indigenous Approaches to Cultural Restoration and Revitalization' (2012) 18 The Brown Journal of World Affairs 151., 153.
[180] ibid.,160. See also Gerald Taiaiake Alfred, 'Colonialism and State Dependency' (2009) 5 International Journal of Indigenous Health 42.; Corntassel (n 178).
[181] Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (n 148)., 118.
[182] Coulthard (n 42)., 108-9.
[183] ibid., 108-9.
[184] Corntassel and Bryce (n 179).
[185] Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 Alternatives: Global, Local, Political 105.

Article 3 of UNDRIP states that by virtue of the right to self-determination, indigenous peoples can 'freely pursue their economic, social and cultural development',[186] and further protects their right to maintain their own economic systems and institutions, to be secure in their subsistence, and engage in traditional and other economic activities.[187] However, as discussed in Chapter 5, states retain their permanent sovereignty over natural resources, including sub-soil resources, which significantly alters the economic balance of power in their favour. As discussed above in relation to Article 4, indigenous peoples have the right to 'autonomy' in their local affairs, but specific reference to autonomy over 'economic activities, land and resources management' was removed during negotiations. Furthermore, as discussed in Chapters 4 and 5, according to a human rights approach based on multiculturalism, the state retains sole authority to take decisions relating to development projects on indigenous lands, weighing up indigenous rights and interests against the rights and interests of the population of the state as a whole. This framework ensures that indigenous peoples do not have full control over their own lands and resources, and enforces the prevailing economic power disparity between states and indigenous peoples.

3.8 Conclusion

This chapter has argued that since the earliest colonisation of the Americas, indigenous peoples and the states have been locked into an intractable conflict, between indigenous peoples' self-determination on the one hand, and states' sovereignty, political unity and territorial integrity on the other. Developments in international law over this period have entrenched this conflict and failed to recognise indigenous peoples' right to self-determination. UNDRIP was an attempt to redress this long-standing injustice, and to finally resolve an issue that stands at the heart of the ongoing conflict.

The discussion on reconciliation in Section 2.2 suggests that addressing the root of conflict is key to reconciliation, and that deep systemic change is necessary to transform unjust power relations in social structures, cultural norms, and political institutions. As a single instrument, UNDRIP is obviously limited in its capacity to achieve this. It did succeed in opening up a debate on how international law should treat indigenous peoples more equally, and provides a framework that, if implemented, would surely improve the situation of indigenous peoples.

[186] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 3.
[187] Ibid., Arts 5 and 20.

In fact, UNDRIP is remarkable for its explicit recognition of the right to self-determination of a non-state people – a recognition that, indigenous people argue, is key to reconciliation.

However, this chapter has argued that UNDRIP has not succeeded in resolving the root cause of the conflict, because it has reinterpreted indigenous claims for self-determination through a lens of human rights. States' preoccupation with the external/internal self-determination dichotomy has resulted in a framework, based on human rights, that views indigenous peoples similarly to sub-national minorities and equates the right to self-determination with the right to democratic governance and participation alongside limited rights to autonomy.

Human rights are of course a basic entitlement and are of particular importance in view of the violations of rights that indigenous peoples continue to suffer. Furthermore, the strategy of adopting the language of human rights enabled indigenous peoples to secure recognition of the right to self-determination, which may not have been possible otherwise. However, the heavy reliance on a human rights framing has precluded a more expansive examination of alternative models of relationship. Consequently, rather than providing a model of equal relations that is truly transformative, UNDRIP's 'dual aspect' model of self-determination remains aligned with a colonial model of hierarchical power between the state and indigenous peoples and does not sufficiently challenge the way that political and economic power is still distributed between them. As a result, in the terms of peace and conflict studies, UNDRIP may be able to support 'coexistence' and reduce the prevalence of outright conflict, it is unlikely to support deeper forms of reconciliation, and positive peace.

This conclusion is perhaps not surprising, given that UNDRIP is stated to constitute 'minimum standards for the survival, dignity and well-being' of indigenous peoples.[188] Consequently there is an implied expectation that states should go further than its provisions to fully address the conflict with indigenous peoples. The danger of continuing to prioritise human rights as the dominant lens through which to view UNDRIP is that it will fail to deliver the transformative results that indigenous peoples are seeking, and subsequently lead to disillusionment. As Scheinin and Åhrén have forcefully observed, over a decade after UNDRIP was adopted, states have largely conflated self-determination with consultation, and 'are currently doing next to nothing to realize one of the greatest promises of the Declaration'. [189] This chapter has highlighted some of the alternative ways in which political reconciliation between indigenous peoples and states could be designed, outside of the model of human rights. The next chapter

[188] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 43.
[189] Scheinin and Åhrén (n 136)., 74.

continues the examination of the dangers of treating indigenous peoples as minorities within a state, by critically evaluating Kymlicka's model of human rights-based multiculturalism from indigenous perspectives.

Chapter 4: A Critical Analysis of Human Rights Based Multiculturalism as a Basis for Reconciliation

4.1 Introduction

This chapter analyses Kymlicka's model of human rights based multiculturalism as a model for reconciliation between indigenous peoples and the state. This model has been chosen because it specifically addresses how liberal political theory could be developed to accommodate the claims of indigenous peoples to self-government and recognition of their collective rights: something that, at the time UNDRIP was being adopted, was a fiercely contested idea. Kymlicka's monograph, *Multicultural Citizenship* was originally published in 1995, shortly after the formation of the WGDD. It sought to provide a coherent liberal rationale for the developing international framework of minority rights, including the draft declaration.[1] Drawing from key liberal principles such as individual autonomy, Kymlicka sought to explain how recognition of collective or 'group-differentiated' rights was logically consistent with - and essential for – ensuring the rights and freedom of the individual.

Kymlicka's work was highly influential on Eurocentric understandings of minority rights (including those of indigenous peoples) in academic political philosophy, as well as the practice of states and international organisations.[2] Anaya has commented that the model of indigenous rights developed through the UNDRIP was generally consistent with Kymlicka's

[1] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995).

[2] Kymlicka's model of multiculturalism has been noted by various authors as being influential in the development of liberal understandings of multiculturalism and how states can navigate cultural difference. For example, Brock writes that Kymlicka's account of how cultural claims should be mediated is 'probably the most developed and dominant one around'. Similarly, Newman has commented that Kymlicka 'created an entire school of thought in liberal multiculturalism and its variants'. Jewkes and Grégoire describe Kymlicka as 'one of the most influential political philosophers of our time.' Kymlicka himself observes, 'Having defended this ideal of liberal multiculturalism in my own work - particularly my 1995 book *Multicultural Citizenship: A Liberal Theory of Minority Rights* - I have been struck by the way it has come to inform the work of many international organizations'. See Gillian Brock, 'Can Kymlicka Help Us Mediate Cultural Claims?' (2005) 12 International Journal on Minority and Group Rights 269., 269; Dwight G Newman, 'You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights' (2007) 52 McGill Law Journal 725. 743; Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, USA 2009)., 7.; Will Kymlicka, Michael Jewkes and Jean-François Grégoire, 'Models of Citizenship, Inclusion and Empowerment: National Minorities, Immigrants and Animals? An Interview with Will Kymlicka (WK)' (2016) 44 Political Theory 394.

model,[3] and Kymlicka himself has noted that the adoption of UNDRIP is evidence of states' continued support for multicultural citizenship.[4] As was discussed in Chapter 3, the collective right to self-determination in UNDRIP is interpreted through the lens of human rights and expressed through the 'dual aspects' of participation in state decision-making on the one hand, and autonomy in local affairs on the other. In a similar way, human rights based multiculturalism entails protection of individual and collective rights, and proposes both limited self-government for indigenous peoples as well as enhanced rights of participation in state decision-making. Consequently, this thesis considers Kymlicka's model of human rights based multiculturalism to be a useful model for exploration of the assumptions and philosophical *lacunae* that underpin the 'dual aspect' model of internal self-determination[5] advanced by UNDRIP.

In keeping with decolonial practice discussed in Chapter 2, this chapter will critique human rights based multiculturalism from the perspective of the marginalised group - in this case, indigenous peoples. It therefore draws from critiques by indigenous critics of liberal multicultural models, and their analysis brings some altogether different insights from those offered by liberal commentators, and opens up alternatives. In particular, it draws heavily from the work of indigenous authors in the Canadian context, who have engaged directly with questions of reconciliation and liberal multiculturalism. Whilst this chapter concentrates on the limitations of Kymlicka's theory, it is important to point out that its support of indigenous self-government is recognised by some indigenous writers as an important step forward. For example, Turner comments that Kymlicka's work is 'arguably … the most generous accommodation of Aboriginal rights in contemporary liberalism',[6] and Holder and Corntassel consider it - at least in part - to be 'a promising avenue of development.'[7] Of course, it must also be noted that indigenous perspectives are diverse, and should not be represented as homogenous. The critics cited in this chapter hold varying degrees of optimism or pessimism as to the potential of liberal multiculturalism to further the rights claims of indigenous peoples.

[3] S James Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' (2004) 21 Arizona Journal of International and Comparative Law 13., 15.
[4] Will Kymlicka, 'The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies' (2018) 68 International Social Science Journal 133.,139.
[5] See Chapter 3, Section 3.6.2.
[6] Dale R Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (University of Toronto Press 2006). 59.
[7] Cindy L Holder and Jeff J Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 Human Rights Quarterly 126. 150.

Section 2 of this chapter introduces human rights based multiculturalism: its origins, its main characteristics, and critiques that have been levied at it from within the liberal tradition. Section 3 highlights the need for models of multiculturalism that centre epistemic justice, and are developed in dialogue between cultures. On the contrary, human rights based multiculturalism draws only from Eurocentric liberal theories, which make universalist claims and do not adequately engage with indigenous historical narratives. Section 4 unpacks the significant consequences of the epistemic limitations of human rights based multiculturalism on its suitability for addressing the political balance of power between indigenous peoples and the state. By assuming the role of states as the main unit of social organisation, human rights based multiculturalism misrepresents the core claim of indigenous peoples to self-determination. Furthermore, drawing from the 'dual aspect' model of self-determination discussed in Chapter 3, it shows how human rights based multiculturalism constrains both the self-government/autonomy aspect, as well as their ability to participate effectively in decision-making. Finally, Section 5 of this chapter examines the limitations of human rights based multiculturalism to challenge economic power imbalances, and provides some insight into how indigenous political philosophy moves beyond human rights based multiculturalism to transform indigenous-state relations based on a concept of 'citizenship with the land'.

4.2 Human Rights Based Multiculturalism

This section will set out the main principles of human rights based multiculturalism as expressed by Kymlicka in *Multicultural Citizenship*.

4.2.1 Kymlicka's purpose in developing a model of human rights based multiculturalism

Kymlicka observed that International Organisations such as the United Nations and the World Bank adopted liberal multiculturalist policies during the late 1980s and 1990s despite a lack of firm evidence that it plays an effective role in the reduction of ethnic conflict. This commitment to liberal multiculturalism, he argued, was evidenced in best practice guidance, legal norms (which sought to impose liberal multiculturalism to overcome the reluctance of some States to adopt best practice), and interventions in specific conflicts.[8] However, although South America adopted a form of multicultural constitutionalism[9] following the end of the dictatorship period,

[8] Kymlicka, *Multicultural Odysseys* (n 2). 247-293. Kymlicka was a significant contributor and the peer reviewer for the *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (United Nations Development Program 2004)., which champions multiculturalism as a crucial component of successful development.
[9] Helga Maria Lell, 'Concept of Citizenship: Multicultural Challenges and Latin American Constitutional Democracy, The' (2014) 2 Birkbeck Law Review 87.

Kymlicka notes that Latin America's adoption of multiculturalism was the exception. He notes that it was not enthusiastically embraced by African or Asian states, due to several factors that include distrust of universalist European ideals and international organisations more generally.[10]

Furthermore, Kymlicka argued the minority rights instruments adopted in the 1990s were 'adopted hastily' and 'quite vague', seemingly 'motivated more by the need to appease belligerent minorities than by any clear sense of what justice requires. Both the underlying justification for these rights, and their limits, remain[ed] unclear.'[11] He raised concerns that human rights, although essential, are insufficient by themselves to secure the rights of minority groups within a State because they do not address key practical questions which arise in a State with minority communities. For example, the individual human rights framework does not address issues such as which languages should be recognised in State institutions and schools, whether indigenous lands should be under State or indigenous control, or the extent to which minorities should be expected to integrate into the wider national society. If such policy decisions are made through a democratic government, it is likely that minority concerns will be side-lined or subsumed by the interests of the national majority because decision-making will usually be dominated by the views of the majority. Kymlicka argued that this would lead to injustice and the exacerbation of ethnocultural conflict.[12]

In view of this belief, Kymlicka intended his work to show how the liberal tradition was a diverse field that was capable of recognising the importance of culture and community, and to overcome the resistance to minority rights (and collective rights in particular) that was prevalent at the time, a resistance that, in his view, 'was more a function of Cold War ideological battles than of careful philosophical analysis.'[13] In doing so, he hoped to explain the normative logic of 'relatively successful, peaceful, democratic multinational federations in the West,', to help post-colonial and post-communist countries manage the political claims of sub-national groups and prevent conflict.[14] Whilst the following critique of Kymlicka's model focuses on its limitations, it is important to acknowledge the extent of his contribution in demonstrating that collective rights are not incompatible with the liberal tradition.

[10] Kymlicka, *Multicultural Odysseys* (n 2). 248-252.
[11] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press) <https://0-oxford-universitypressscholarship-com.wam.city.ac.uk/view/10.1093/0198290918.001.0001/acprof-9780198290919> accessed 14 November 2020. 5-6.
[12] ibid. 4-5.
[13] Kymlicka, Jewkes and Grégoire (n 2)., 397.
[14] ibid., 402.

4.2.2 An overview of human rights based multiculturalism

Kymlicka's model of 'human rights based multiculturalism' distinguishes two different types of minority within a State, and three kinds of 'differentiated citizenship rights' which different types of minority may claim. 'National minorities' are defined as groups which are linguistically and culturally different from the majority State culture and (crucially to Kymlicka's framework) which possess their own societal institutions encompassing both private and political life. These, he suggested, tend to occur within 'multination States' in which previously autonomous and territorially concentrated cultures find themselves being incorporated into a larger State. Indigenous peoples would normally fall into this category. On the other hand, there are 'ethnic groups' which are immigrant groups with cultures distinct from the national majority, but which do not have their own established institutions.[15]

Kymlicka argues that these two types of minority are likely to claim different 'group-differentiated rights' to protect their cultures. Thus national minorities, such as indigenous peoples, tend to seek self-government rights in which State power is delegated to the national minority. Ethnic groups, on the other hand, seek 'polyethnic rights' which enable them to preserve their cultural practices in the context of the wider State apparatus. This may include financial support or legal protection. Finally, both ethnic groups and national minorities may require special representation rights, which are guaranteed seats for minority groups within the institutions of the State.[16]

The rationale for this model is explicitly rooted in Eurocentric liberal ideals, intended to demonstrate 'how minority rights are limited by principles of individual liberty, democracy, and social justice.'[17] Consequently, Kymlicka's model seeks to balance the interests of individuals within a minority group with the rights of the group itself to exist and practice its own culture. Kymlicka argues that 'internal restrictions' - in which individual autonomy is curtailed by minority groups - can generally not be tolerated in liberal societies, with limited exceptions in the case of national minorities. On the other hand, 'external protections' for minorities may be permitted to limit the impact of State policy and action on their cultures and ways of life, and put different groups within a state on a 'more equal footing'.[18]

Kymlicka justifies the addition of group-differentiated rights to the existing framework of

[15] ibid.10-33
[16] ibid. 131-151.
[17] ibid. 6.
[18] ibid. 36. See also ibid. 34-48 for Kymlicka's discussion of internal restrictions and external protections.

individual rights on the basis of equality with historical circumstances and the benefit of cultural diversity to wider society also providing justification in some instances. In relation to equality, he argues that the policy of 'benign neglect', which assumes that individual rights are all that is necessary to protect ethnocultural minorities, ignores the structural disadvantage that these minorities face. For example, the State makes decisions about the official languages of institutions which will put linguistic minorities at a disadvantage. Group-differentiated rights are essential to redress these imbalances.[19]

In developing the equality justification, Kymlicka leans on the work of liberal philosophers Rawls, Dworkin and Stuart Mill, to propose a liberal notion of freedom: the freedom of each individual to choose their own idea of what 'a good life' entails, along with the freedom to revise their beliefs and change their plan of life accordingly. Such a 'good life' cannot be imposed by external forces but must be consistent with the individual's own evolving internal belief system. According to Kymlicka, this gives rise to two pre-conditions for leading the 'good life': the 'resources and liberties needed to lead their lives in accordance with their beliefs about value, without fear of discrimination or punishment' and the freedom to question those beliefs, 'to examine them in the light of whatever information, examples, and arguments our culture can provide.'[20] Thus liberal societies value individual privacy, education, as well as freedom of expression and association in order to support these preconditions for the good life.[21]

Kymlicka places great emphasis on the role of an individuals' own culture as a necessary condition for the fulfilment of the 'good life'. Culture, according to Kymlicka, provides the cultural narratives which individuals use to discover different options for the good life, and assess their value and meaning. Therefore, culture is a necessary resource for ensuring individual freedom in the liberal tradition. Furthermore, any culture will not do - it is access to *one's own* culture which is required for individual freedom. Kymlicka argues that people have bonds with their culture that are too strong to reasonably expect them to give up. Reasons for this may be that, as Rawls suggests, culture provides the language with which we understand ourselves. In general people do not choose to make dramatic breaks with their own culture in preference for another, so it is not reasonable to require them to do so. Kymlicka also suggests that our culture has important influences on our sense of identity and self-esteem, and that denigration of our cultural group by others can result in the dignity and self-respect of its members being threatened.[22] In light of the above, Kymlicka argues that

[19] ibid. pp 108-115.
[20] ibid. p81
[21] ibid. 75-106.
[22] ibid. 82-91.

> *The freedom which liberals demand for individuals is not primarily the freedom to go beyond one's language and history, but rather the freedom to move around within one's societal culture, to distance oneself from particular cultural roles, to choose which features of a culture are most worth developing, and which are without value.*[23]

Having established that all individuals require membership of a societal culture as a primary good on which individual freedom depends, Kymlicka's justifies the creation of minority rights based on the liberal egalitarian theories of Rawls and Dworkin, that inequalities which are unchosen, and occur arbitrarily, should be addressed.[24] Thus the structural disadvantages that minorities face within national society should be mitigated by a framework of group-differentiated rights, intended to overcome these disadvantages and ensure continued access to their culture as a resource for individual freedom.

In addition to this equality argument, Kymlicka proposes that there is sometimes an historical justification for group-differentiated rights, particularly where national minorities have been subsumed into a larger State against their will. There may have been treaties (for example between indigenous peoples and colonisers) which the State has not honoured, or the land may have been taken by force. In this situation, there is an historical grievance which may be redressed in part through group-differentiated rights. However, this historical argument works together with the equality argument. Finally, Kymlicka makes the case that group-differentiated rights are justified if one recognises the benefit to wider society of diversity (in terms of creating more diverse options and therefore greater freedom). However, he noted there are those who do not recognise these advantages and so cultural arguments, based on self-interest rather than rights *per se*, are not persuasive on their own.[25]

4.2.3 Critiques of human rights based multiculturalism from a liberal perspective

Kymlicka has been criticised on numerous grounds from within the liberal tradition. Chandran Kukathas has criticised Kymlicka's assertion that access to one's own culture will automatically provide options from which to choose, because illiberal cultures may reduce a person's options by requiring strict adherence to cultural norms. Thus Kukathas argues that Kymlicka's

[23] ibid. 90-91.
[24] ibid. 109. Kymlicka writes 'They are clearly justified, I believe, within a liberal egalitarian theory, such as Rawls's and Dworkin's, which emphasizes the importance of rectifying unchosen inequalities. Indeed inequalities in cultural membership are just the sort which Rawls says we should be concerned about, since their effects are "profound and pervasive and present from birth"'. (citing John Rawls, *A Theory of Justice* (Harvard University Press 1971). and Ronald Dworkin, 'What Is Equality? Part 2: Equality of Resources' (1981) 10 Philosophy & Public Affairs 283.)
[25] ibid. 107-130.

justification for providing group-specific rights in order to support liberal freedom fails on this basis.[26] Brian Barry refutes Kymlicka's assertion that the survival of cultures is a legitimate end which ought to be supported by States[27] and cautions that bestowing 'national minorities' with self-government rights and special representation in national legislature conflates cultural distinction with nationhood and unfairly creates two unequal classes of citizen.[28] Iris Marion Young argues that the categories of 'national minority' and 'ethnic groups' are too rigidly defined, and that in overlooking bicultural identities, Kymlicka excludes groups such as African-Americans. Thus the model ought to be softened to provide a continuum of ways of being and interacting with the majority, beyond the two options of integration or segregation.[29] Waldron argues for 'cosmopolitanism', stating that individuals are influenced by elements of many cultures and sometimes even move between them - undermining Kymlicka's assertion of one's own cultures as a primary need. Waldron writes that to insist that individuals live solely within the culture of their birth is in fact illiberal, because it limits rather than expands their choices.[30] Bhikhu Parekh also disputes Kymlicka's argument that immigrants, by choosing to relocate, have voluntarily given up the right to their culture – lack of access to their own culture is a 'chosen inequality'. Parekh counters that if, as Kymlicka argues, culture is a primary good, then it is hard to see how individuals can be expected to waive their right to such a fundamental need.[31]

A comprehensive discussion of liberal debates on Multicultural Citizenship is beyond the scope of this thesis.[32] Far more relevant, is the question of whether it presents a model that indigenous peoples can support, as a roadmap for re-setting their relationship with the state.

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[26] Chandran Kukathas, 'Are There Any Cultural Rights?' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press 1995).

[27] Instead, Barry argues that the survival of cultures, when divorced from the interests of individuals, has no value in and of itself. Such an approach would result in reifying and preserving cultures rather than permitting their evolution and demise, should they cease to serve a useful purpose for their members.

[28] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity 2001) cited in Kymlicka, *Multicultural Citizenship* (n 1)..See also 'Barry and the Dangers of Liberalism' in Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd ed, Palgrave Macmillan 2006).
Reconsidered ed. Paul Kelly (Cambridge: Polity Press, 2002). 137.

[29] Iris Marion Young, 'A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy' (1997) 4 Constellations 48.

[30] Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' (1991) 25 University of Michigan Journal of Law Reform 751. In response, Kymlicka argues that Waldron's examples of moving between cultures are in fact simply examples of how many cultural influences can form part of a single diverse societal culture like that of the United States. Additionally, the fact that some rare people do choose to move between cultures does not undermine the proposition that people are reasonably entitled to access their own culture. See Kymlicka, *Multicultural Citizenship* (n 4). p86.

[31] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd ed, Palgrave Macmillan 2006)., 100.

[32] For an overview of liberal multiculturalism and some of its common critiques, see Kukathas (n 26).; Dominic McGoldrick, 'Multiculturalism and Its Discontents' (2005) 5 Human Rights Law Review 27.; Kymlicka, 'The Rise and Fall of Multiculturalism?' (n 4).; Sarah Song, 'Multiculturalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/fall2020/entries/multiculturalism/> accessed 14 November 2020.

4.3 Epistemic justice

4.3.1 Rejecting universalism and recognising the locus of enunciation of liberal theories

Whilst the above commentators' critiques stem from an examination of the correctness or coherence of Kymlicka's rationale, when human rights based multiculturalism is analysed through the lens of decolonial thought discussed in Chapter 2, a far more significant problem is its universalist tendencies and its very nature as a *liberal* model rooted in Eurocentric ideals. Parekh has noted that whilst liberalism reinforces important values, such as 'as human dignity, autonomy, liberty, critical thought and equality',[33] liberal political philosophy does not have the monopoly on their definition. Furthermore, liberalism tends to underplay other important values, such as 'human solidarity, equal life chances, selflessness, self-effacing humility, contentment and a measure of scepticism about the pleasures and achievements of human life.'[34] Parekh demonstrates how a liberal model is incompatible with other worldviews, and asserts normative standards which require justification and which ultimately weaken the model's applicability and moral standing.[35] In fact, for Parekh, although Kymlicka's work is valuable because it 'explores and deepens the theoretical resources of liberalism and has a persuasive power over liberals',[36] *any* one-sided view of multiculturalism will be self-evidently incomplete, and as a result it is unlikely to be a model with persuasive power across diverse cultures:[37]

> *Since every political doctrine has a limited grasp of the immense complexity of human existence and the problems involved in holding societies together and creating sensitive, sane and self-critical individuals, none of them including liberalism can be the sole basis of the good society… Moreover, since multicultural societies represent an interplay of different cultures, they cannot be theorized or managed from within any one of them. They require a multicultural perspective.*[38]

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[33] ibid., 338-339.
[34] ibid., 338-339.
[35] ibid., 105-6.
[36] Parekh (n 31)., 12.
[37] ibid.,107.
[38] ibid., 339. For example, Parekh argues that Kymlicka's focus on autonomy means that his theory is not as tolerant of some cultures which value, for example, well-being above autonomy of its members: some cultures have ends which are more acceptable than others in Kymlicka's model. Kymlicka's liberal assertion that a 'good life' must be lived from within requires that the self is separated from others, 'and that in turn rests on a wider theory of individuation and the concomitant view of moral agency. Many cultures do not draw such a distinction' (at 339). Parekh even points out that individualism is to a great extent based in Protestantism and is not representative even of a large part of Western cultural heritage, let alone other cultural traditions (at 104).

Similarly, Day has criticised Kymlicka, as well as other liberal theorists of multiculturalism, for failing to engage with the work of indigenous political theorists,[39] whilst arguing that Kymlicka writes his theory from the supposedly neutral point of view of the system of states itself. Consequently, human rights based multiculturalism is concerned with preserving the stability of the state in the face of minority nationalism, and requires all identities to accept the state model as the only currently available option. Thus liberal theorists offer a universalist approach in which they grant, from their privileged position, rights to others based on a limited understanding of those others' needs. According to Day, liberal theorists must ask themselves

> *How is it that 'we' – whoever 'we' are – can be so sure of what 'they' – whoever 'they' are – really want? And how is it that 'we' came to be in a position of granting or denying recognition to 'them' in the first place? Who is this 'we' who gives the gift of liberal multiculturalism?*[40]

Consequently, Day suggests that unless liberal theorists can recognise the deficiencies of their limited locus of enunciation, the resulting multicultural paradigm 'may, in its current form, serve primarily to assuage the anxieties of semi-peripheral capitalist nation-states rather than to advance the goals of indigenous peoples'.[41] This is a view echoed in Glen Sean Coulthard's book, *Red Skin White Masks,*[42] which examines the liberal conceptualisation of indigenous rights and finds it lacking on several points. Coulthard argues that it is doubtful whether a model purely justified by liberal principles, without a similar foundation in indigenous principles, can ever adequately provide a framework to mediate the relationship between indigenous peoples and the State.

The one-sided nature of human rights based multiculturalism is a weakness which Kymlicka himself acknowledges, as he reminds us that the primary goal of *Multicultural Citizenship* is to

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[39] Richard Day, 'Who Is This We That Gives the Gift? Native American Political Theory and The Western Tradition' (2001) 2 Critical Horizons 173., 177. Indigenous political theorists include, for example, Taiaiake Alfred (for example, Taiaiake Alfred, *Peace, Power, Righteousness - An Indigenous Manifesto* (1st edn, David Bunnett Books 1999).) Vine Deloria (for an overview of his influential life and work, see Holly Boomer, 'Writing Red: A Tribute to Vine Deloria Jr (1933-2005)' (2006) 26 Great Plains Quarterly 113.; Tink Tinker, 'Walking in the Shadow of Greatness: Vine Deloria Jr. in Retrospect' (2006) 21 Wicazo Sa Review 167.), Lee Maracle (for example, Lee Maracle, *I Am Woman: A Native Perspective on Sociology and Feminism* (Press Gang Publishers, an imprint of Raincoast Books 1996). Lee Maracle, *My Conversations with Canadians* (Book*hug Press 2017)., Georges E Sioui (for example, Georges Sioui, *Eatenonha: Native Roots of Modern Democracy* (McGill-Queen's University Press 2019)., Patricia Monture-Angus (for example Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Fernwood Publishing Co Ltd 1995).

[40] Day (n 39).

[41] Richard JF Day, *Gramsci Is Dead: Anarchist Currents in the Newest Social Movements* (Pluto Press; Between the Lines 2005).

[42] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University Of Minnesota Press 2014).

clarify the liberal rationale, as a first step towards inter-cultural dialogue.[43] Furthermore, in 2014 Kymlicka expressed a new-found scepticism about the universal applicability of human rights based multiculturalism, particularly in Africa, the Middle East or Asia due to their different circumstances, and recognises the need for 'historical contextualism', and attending more closely to the specific local circumstances rather than taking a universalist approach.[44] As the following sections will show, indigenous authors' analyses reveal the shortcomings of human rights based multiculturalism in the context of the relationship between indigenous peoples and the state, and call for an approach that takes greater account of their particular history of conflict.

4.3.2 The importance of historical contextualism

One important reason for liberal theorists of multiculturalism to engage with indigenous perspectives, is to ensure that the models of multiculturalism put forward are based on an understanding of history and the present-day context that is as complete and as nuanced as possible. Indeed, Dale Turner notes that it is a 'frustrating problem' for indigenous peoples that their own interpretations of history are not viewed as being valid from a Western perspective.[45] An example of this lack of engagement in *Multicultural Citizenship* is found in Kymlicka's justification of why individuals must have access to their *own* cultures as a necessary resource for individual freedom:

> *Of course, people do genuinely move between cultures. But this is rarer, and more difficult. In some cases, where the differences in social organization and technological development are vast, successful integration may be almost impossible for some members of the minority. (This seems to be true of the initial period of contact between European cultures and indigenous peoples in some parts of the world).*[46]

Although Kymlicka acknowledges the injustices that many indigenous peoples have suffered elsewhere in his book, this statement conflicts sharply with the narratives of indigenous peoples regarding their experience of early colonisation by Europeans. Indigenous nations often had no desire to integrate, and suffered extreme violence and exploitation at the hands of European invaders.[47] Kymlicka's words could be interpreted as suggesting that indigenous

[43] Kymlicka, *Multicultural Citizenship* (n 4)., pp 170-171.
[44] Kymlicka, Jewkes and Grégoire (n 2)., 395.
[45] Turner (n 6)., 67.
[46] Kymlicka, *Multicultural Citizenship* (n 1)., 85.
[47] The two opposing narratives regarding early colonisation of the Americas can, for example, be seen in the contentious debate over replacing 'Colombus Day' with 'Indigenous Peoples' Day' in the United States of America

peoples did not integrate due to their own relative 'backwardness' compared with European colonisers, and it obscures a colonial history of violence and injustice. Referring to indigenous nations as 'the minority' during the initial period of contact also misrepresents the fact that European colonisers came to complex, established indigenous societies as outsiders, not as the 'majority' culture.

Kymlicka's lack of engagement with indigenous viewpoints also results in the demotion of historic injustice to a secondary issue, and privileges distributive justice above compensatory justice as a rationale for group-specific rights. According to Turner, Kymlicka's equality argument does concede that indigenous peoples were 'initial legitimate entities that formed the multinational state of Canada'[48] which subsequently ceded powers and were 'incorporated' into the new State, in situations that were sometimes unjust. However, the injustice that occurred at the time of 'incorporation' is not considered by Kymlicka to be a relevant factor to his equality argument which forms the primary rationale for group-specific rights; instead, the ultimate justification is the importance of equality of the national minorities in the State of Canada as it exists today. Although Kymlicka does also present a rationale based on historical justice, this is a secondary, supporting argument in which claims for specific rights based on historical wrongs are entertained only to the extent that they are necessary to protect cultural existence, and only to the extent that they do not disrupt a balance of equity with other national minorities.[49]

Whilst welcoming Kymlicka's theory as a step forward in defending aboriginal self-government, Turner argues that by excluding indigenous philosophy and voices from liberal theorising on rights, Kymlicka has relegated historical concerns to the periphery. In his words:

> *The relevant issue for Aboriginal peoples is not whether we ought to rectify past injustices in order to balance the scales of a liberal distributive justice system, but rather how governments can come to recognize the legitimacy of Aboriginal forms of*

and other countries in the region. On the one hand, Columbus Day is viewed as a source of national pride in celebrating the pioneering spirit of Christopher Columbus who 'discovered' the New World and brought European civilisation to the Americas. On the other hand, proponents of Indigenous Peoples' Day recognise it as a celebration of indigenous resistance to genocide and the attempted eradication of their civilisations by barbaric invaders. See Sam Hitchmough, '"It's Not Your Country Any More". Contested National Narratives and the Columbus Day Parade Protests in Denver' (2013) 32 European Journal of American Culture 263.; 'Columbus Day Being Replaced With "Indigenous Peoples Day"' (2015) 31 New American 6.; Jorge Baracutei Estevez, '"Columbus Day Is the Celebration of Genocide"' *Down to Earth* (13 August 2018) <http://global.factiva.com/redir/default.aspx?P=sa&an=HTDWTE0020180831ee8d0005l&cat=a&ep=ASE> accessed 4 October 2020.

[48] Kymlicka, *Multicultural Citizenship* (n 1)., 10-13. Kymlicka recognises that this incorporation could be forcible or by consent.

[49] Turner (n 6)., 63-66.

sovereignty in order to renew the political relationship on more just foundations.[50]

Consequently, Turner argues that Kymlicka's model overlooks the key claim of indigenous peoples - their self-determination as independent nations - and so proposes only a weak form of Aboriginal sovereignty which is curtailed to the extent it impinges on that of the state. The next section explores in more detail how human rights based multiculturalism may act to reinforce, rather than overcome, imbalances of political power that have their roots in colonial history.

4.4 Political Power

4.4.1 The problematic assumption of state authority over indigenous peoples

As noted by Day,[51] human rights based multiculturalism is proposed from the point of view of states. It takes as its starting point the nation state as the main unit of social organisation in the world. This is not due to any ideological preference on Kymlicka's part,[52] but due to a more pragmatic assessment that the world today is organised into states, and is likely to remain so. Kymlicka argues that indigenous peoples – whether voluntarily or not – have now been 'incorporated' into the state, and so the question is now how to ensure equality for indigenous peoples in their present context.[53] Turner argues that in taking this approach, Kymlicka 'sidesteps the issue of Aboriginal incorporation'.[54]

The underlying assumption of the legitimacy (or at least, the inevitability) of state authority over indigenous peoples poses a significant problem for many indigenous writers, who do not concede the overarching sovereignty of the State over indigenous peoples.[55] As discussed in Chapter 3, many indigenous authors call for the recognition of their status as equal peoples in a horizontal relationship of power *vis-à-vis* the state. However, Kymlicka's human rights based multiculturalism subsumes indigenous peoples as one of many minorities under the nation state. Macklem explains the problem with this approach:

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[50] ibid., 69.
[51] See Section 4.2.1.
[52] Kymlicka, Jewkes and Grégoire (n 2).; See also comments in Sue Donaldson and Will Kymlicka, 'Reply: Animal Citizenship, Liberal Theory and the Historical Moment | Dialogue: Canadian Philosophical Review / Revue Canadienne de Philosophie | Cambridge Core' (2013) 52 Canadian Philosophical Review 769.
[53] Kymlicka, *Multicultural Citizenship* (n 1)., 10-13.
[54] Turner (n 6)., 65.
[55] Alfred (n 39).; Duane Champagne, 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights' (2013) 28 Wicazo Sa Review 9.; Coulthard (n 42).

> *Kymlicka's characterization of the problem indelibly marks his conclusion. By viewing the moral or political issue implicated by indigenous difference as one that requires justification of unequal distribution of political rights and responsibilities within a particular nation-state, Kymlicka includes indigenous people in the very political structure from which they seek a measure of autonomy.*[56]

The theoretical incorporation of indigenous peoples under the authority of the state has implications for the extent of indigenous self-determination. In a human-rights based model of multiculturalism, the state has a responsibility to balance the rights and interests of its citizens, and wields considerable power to determine these decisions in the way that it sees fit. However, indigenous writers have observed that such an approach requires indigenous peoples to submit to colonial law and institutions that they may not recognise as having legitimate authority over them.[57] On the other hand, a treaty-based relationship of equals would require such decisions to be made through mutual consent.[58] According to Corntassel, approaches based on recognising individual rights are insufficient to restore this dynamic, because 'Indigeneity is legitimized and negotiated only as a set of state-derived individual rights aggregated into a community social context - a very different concept than that of collective rights pre-existing and independent of the state.'[59]

Two decades after the release of *Multicultural Citizenship*, Kymlicka himself recognised the need to re-articulate human rights based multiculturalism in a way that engages more directly with post-colonial theory, in order to overcome the tendency towards imperialism that is embedded in liberal thought. He commented:

> *In my mind, I have always operated on the premise that a multicultural liberalism must be a postcolonial liberalism: liberalism needs to renounce imperial fantasies at the same time as it renounces fantasies of homogenous and unitary nationhood. … [Multicultural Citizenship] can contribute to a post-colonial project, but that would need to be disentangled and expressed in a way that I didn't do.*[60]

[56] Patrick Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993) 45 Stanford Law Review 1311., 1354.
[57] Coulthard (n 42).
[58] Brenda L Gunn, 'Moving beyond Rhetoric: Working toward Reconciliation through Self-Determination' (2015) 38 Dalhousie Law Journal 237.
[59] Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 Alternatives: Global, Local, Political 105. 115.
[60] Kymlicka, Jewkes and Grégoire (n 2)., 397.

However, as the next two sub-sections show, this omission has important potential impacts on the ability of indigenous peoples to exercise fully their right to self-determination.

4.4.2 A decolonial critique of the 'politics of recognition'

As discussed in Chapter 3, western scholars of peace and reconciliation studies have pointed to external recognition and respect for one's identity as a key human need, and as an important step in the reconciliation process. Kymlicka's model does indeed recognise the distinctiveness and value of indigenous identity, as well as the importance of the recognition of one's culture for individual self-esteem. This is a key justification for human rights based multiculturalism's purpose of ensuring that people can continue to identify with their culture on an equal and non-discriminatory basis. However, Coulthard has offered a different view of the importance of recognition. He argues that the crucial factor for self-esteem is not the recognition of one's culture by others, but an individual's ability to live out one's cultural identity and to feel pride and respect for one's own culture. More recently, Kymlicka himself has indicated his new understanding that the importance of external recognition of identity to minority groups can fluctuate over time, and that the more pressing factor in creating resilient multicultural societies is whether or not different groups can 'act effectively upon their national identity'.[61]

Coulthard argues that liberal models which are based on the state delegating limited powers of self-government to indigenous peoples have the potential to undermine indigenous communities' self-identity and limit the range of options by which the state permits them to put self-determination in practice. In the context of indigenous peoples' struggles, Coulthard[62] follows Day[63] in defining 'politics of recognition' as the many attempts to reconcile indigenous claims of nationhood with settler-state sovereignty, through models of liberal pluralism which recognise indigenous peoples by attempting to create new legal and political relations with the State.[64] As such, Coulthard and Day define recognition-based models according to their underlying liberal logic, as well as according to their proposed solutions. Kymlicka's theory fits Coulthard's definition in the sense that it advocates a new relationship with the State, based

[61] ibid., 400.
[62] Glen Sean Coulthard is a member of the Dene Nation and assistant professor in the First Nations Studies Program and the Department of Political Science at the University of British Columbia. His monograph, Red Skin, White Masks, is an in-depth critique of the paradigm of recognition from a Fanonian and Marxist perspectives in dialogue with indigenous political theory, arguing that it is an ineffective framework for achieving decolonisation of indigenous peoples.
[63] Day (n 39).
[64] Coulthard argues that the paradigm of 'the politics of recognition' has become prevalent in international indigenous rights struggles, with common traits being the delegation of power, capital and land to indigenous communities via land claim settlements, economic development programs, and self-government agreements. Additionally he notes that the politics of recognition are also being applied in other claims for rights by groups including women, ethnic and religious minorities, and LGBTQIA communities.

on liberalism, which includes delegation of self-government rights (including land) by the State to indigenous peoples.

Coulthard shows a flaw in the logic that liberal theorist of multiculturalism Charles Taylor[65] uses to justify self-government rights for indigenous peoples. Taylor draws from Hegels' master/slave dialectic to suggest that 'recognition' by the State or mainstream society is needed for indigenous peoples to realise self-determination. Taylor argues that identity provides a background from which individuals can make their own life choices. Our identity, in turn, is constituted dialogically in the context of our cultural community. In order to maintain a positive self-identity and self-esteem, individuals require the positive recognition of their self-identity by other people in their community. Furthermore, this recognition must be mutual to take effect. Drawing on the work of Frantz Fanon,[66] Taylor argues that failure to gain this recognition is injurious to the sense of self and harms the individual, through the internalisation of a negative self-image by the colonised people.[67] On this basis, Taylor argues that recognition is a 'vital human need', and so it is essential to ensure the survival of strong cultural communities within which and between which this recognition can occur. Without these communities, individuals will not have the resources they need to determine their own destiny.

However, Coulthard points out that Fanon drew a distinction between Hegel's hypothetical scenario and the reality of colonialism, which Taylor overlooks. Fanon argued that unlike

[65] Taylor is a key theorist of the recognition paradigm. Like Kymlicka, Taylor seeks to provide a liberal justification of group-specific rights. Taylor emphasises the importance of identity, arguing that as identity provides a background from which individuals can make their own life choices. Our identity, in turn, is constituted dialogically in the context of our cultural community. Ensuring the survival of strong cultural communities is therefore essential to providing the resources individuals need to determine their own destiny. Although they propose similar solutions, Kymlicka and Taylor's justifications of group-differentiated rights differ in their focus on the role of culture in promoting individual freedom. Taylor's analysis focusses on the psychological aspects of cultural communities in providing recognition to promote positive self-identity and self-esteem. In contrast, Kymlicka's analysis draws mainly on the role of culture in providing the options for individual beliefs and definitions of 'the good life'. Nevertheless, as part of his defence of culture as essential to personal autonomy and the liberal tradition, Kymlicka cites Taylor (1992a) to acknowledge the negative impact on individual self-esteem and dignity if the individual's culture is not respected. (Kymlicka, *Multicultural Citizenship* (n 1)., 89). For a key exposition of Taylor's work, see Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1992).

[66] Frantz Fanon, *The Wretched of the Earth* (Constance Farrington tr, New Ed, Penguin Classics 2001). Fanon's extended Hegel's master/slave dialectic to argue that colonial relations are perpetuated not only by physical force but also by the internalisation of a negative self-image on the part of the colonised. Settler societies did not recognise colonised peoples as equals but as inferior, even sub-human beings, and colonised people's self-image was destroyed through repeated misrecognition of their humanity by the colonisers. This has dire and lasting consequences for the mental health and physical wellbeing of colonised communities. Over time, these negative self-images as well as the structural features of colonialism begin to be normalised, contributing to the long-term stability of the colonial system.

[67] Taylor writes: 'our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or a group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.…Due recognition is not just a courtesy we owe people. It is a vital human need.' Taylor (n 65)., 25-26; emphasis in original.

Hegel's slave, colonised societies don't have to struggle for independence, limited forms of which are negotiated or granted by the State.[68] According to Fanon, struggle is essential for the removal of the subjective (psychological) elements of colonisation – the negative self-image which colonised peoples adopt as a result of their experiences of colonisation and the derogatory narratives of the setter regarding colonial peoples. Additionally, without a struggle which results in a break from colonial structures, Coulthard argues that the resulting 'solution' will be based on the values of the coloniser. These external values are then adopted by the colonised as their own, and limit the type of freedom they are able to claim. For Fanon, this falls short of true self-determination because the colonised do not set the terms by which they are recognised. For example, Coulthard cites an example in which attempts to gain independence through capitalist projects has led to an indigenous bourgeoisie more interested in profit than indigenous values.[69]

This throws doubt on the usefulness of recognition-based models for reconciliation in the indigenous context. Fanon did not consider the colonial situation to provide any such mutual recognition, and Coulthard argues that the settler state does not desire or need mutual recognition from the colonised, instead seeking 'land, labor and resources'.[70] Consequently, Coulthard points out that in the case of States and marginalised groups, there is likely to either be explicit non-recognition of equal status, or a recognition whose terms do not challenge the prevailing power imbalance between the State and the marginalised group. Coulthard urges caution against liberal multiculturalism, saying:

> *instead of ushering in an era of peaceful coexistence grounded on the ideal of reciprocity or mutual recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend.*[71]

Despite a transition from State policies of assimilation to ones of recognition and accommodation, 'the State has remained colonial to its foundation.'[72]

[68] Fanon has controversially accepted a role for violence in counter-colonial struggles. Fanon (n 66)., 27-84; see also Lewis R Gordon, Sonia Dayan-Herzbrun and Drucilla Cornell, *What Fanon Said: A Philosophical Introduction to His Life and Thought* (Illustrated edition, Fordham University Press 2015)., 114-123.
[69] Coulthard (n 42)., 42.
[70] ibid.,13.
[71] ibid., 3.
[72] ibid., 6.

A similar critique could be applied to Kymlicka's model. Due to its exclusion of indigenous theoretical perspectives, Kymlicka's liberal theory of minority rights is, by definition, a theory which is based on the values of the coloniser, and which entails the granting of rights by the State and participation of minority groups in State decision-making apparatus (according to the rules of such institutions, which are likely to be established by the State). This does not represent 'struggle' as Fanon would have it, and the terms of any negotiation are likely to be dominated by the needs and values of the State, rather than those of indigenous peoples. According to Coulthard, the failure to include indigenous values in liberal theories such as Kymlicka's has significant negative and assimilative effects on the self-identity of indigenous peoples and limits the possible options which can be imagined or entertained in a system dominated by liberal values.[73] The next section will examine further how this may take effect in the context of indigenous peoples right to self-determination, through the dual aspects of autonomy and effective participation, that were discussed in Chapter 3.

4.4.3 Constraints on the 'dual aspects' of self-determination: self-government and effective participation

Kymlicka advocates for indigenous land rights and self-government as forms of 'external protection' to help in 'alleviating the vulnerability of minority cultures to majority decisions' and to 'ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority.'[74] In the context of indigenous peoples, collective ownership of land is crucial to support the holistic health of the community and its members.[75] However, Nadasdy argues that strategies being used in the name of indigenous self-government and rights to land, such as Canada's land claim and self-government agreements, reinforce the colonial notion of 'territorially organized polities' and are mechanisms that perpetuate colonial practices and 'extend the territorializing process that is currently transforming indigenous societies across the north [of Canada] and rendering many of their core beliefs, practices and values nonsensical.'[76] Analysing Kymlicka's later work, *Zoopolis*, Nadasdy contests Kymlicka's assertion of a 'basic fact that human society is organized into distinct, territorially bounded, self-governing communities'.[77] On the contrary, Nadasdy notes that 'there are, in fact, many forms of non-territorial organization … this is not to say that

[73] ibid.
[74] A fact that Kymlicka himself points out. Kymlicka, *Multicultural Citizenship* (n 1)., 109.
[75] UNHRC Forty-fifth Session 14 September – 2 October 2020 'Right to Land under the United Nation Declaration on the Rights of Indigenous Peoples: a human rights focus Study of the Expert Mechanism on the Rights of Indigenous Peoples (15 July 2020) UN Doc A/HRC/45/38.
[76] Paul Nadasdy, 'First Nations, Citizenship and Animals, or Why Northern Indigenous People Might Not Want to Live in Zoopolis' (2016) 49 Canadian Journal of Political Science/Revue canadienne de science politique 1., 11.
[77] Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2013).

territorial strategies are never used in such societies, but only that territoriality is not their organizing principle, as it is in the territorial state'. Nadasdy argues that liberal theories take for granted the universalist nature of the territorial state, and in so doing, ignore the real-life existence of alternative modes social organisation.[78] Worse than that, by operationalising self-government and autonomy in a way that reinforces the liberal assumption of societies organised into political and territorial units, liberal multiculturalism erodes and is 'doing violence'[79] to traditional indigenous ways of life rather than seeking alternative models that might better reflect indigenous values.

Another potential constraint on self-government that arises from human rights based multiculturalism is Kymlicka's proposal of 'internal restrictions'[80] which contemplate state interference in indigenous affairs should it consider that the individual rights of members of an indigenous people were being unduly restricted. Kymlicka acknowledges this is a difficult balance to strike, and that liberalism must give considerable thought to when it is appropriate to use coercive and non-coercive means to protect the individual rights and personal autonomy of individual minority group members.[81] In practice, this could lead to considerable interference in indigenous affairs, and to the perception of collective rights as less important than individual ones.

On the other hand, human rights based multiculturalism may act to restrict the range of possibilities for indigenous self-determination to only those that are deemed to fall within the scope of 'authentic' indigenous culture. Because the objective of Kymlicka's model is to ensure the right to culture, and not self-determination, if an indigenous group were to decide to pursue a strategy for development that is not viewed as authentic to their indigenous culture (from the point of view of the non-indigenous majority), then it may prejudice legal protection of their group-specific rights. This has been observed by Povinelli in Australia, who argues that liberal multiculturalism places demands on indigenous peoples to redefine their identities and traditions in a way that is comprehensible to those with liberal perspectives.[82] A similar phenomenon was evident in the Canadian *Van der Peet* case, in which Canada's Supreme Court held that fishing for commercial purposes was not a traditional aboriginal practice and

[78] Nadasdy refers, for example, to indigenous peoples in northern Canada.
[79] Nadasdy (n 76).
[80] Kymlicka, *Multicultural Citizenship* (n 1)., 37. See also Chandran Kukathas, 'Survey Article: Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship' (1997) 5 Journal of Political Philosophy 406.
[81] Kymlicka, *Multicultural Citizenship* (n 4)., 173-192.
[82] Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Illustrated edition, Duke University Press Books 2002).

was therefore not protected as an aboriginal right under Canadian law.[83]

The second aspect of self-determination, described in Chapter 3, is the requirement for indigenous peoples to be able to effectively participate in decision-making that affects their rights. Kymlicka also advocates special representation rights that would require states to consult or even gain the consent of a self-governing national minority before taking decisions that would constrain their self-government rights, and permanent representation of national minorities on the bodies that take such decisions.[84] Furthermore, he recognises the possibility for national minorities to veto - or withhold consent to - specific policies that would infringe their rights, such as the approval of extractive projects on indigenous territories.[85] In theory, these proposals should afford indigenous people a degree of control over their futures and enable them to determine their own priorities for development.

However, indigenous authors have highlighted the limitations of human rights based multiculturalism in enabling a meaningful dialogue of equals in the context of state-indigenous consultation mechanisms. Indigenous writers have shown how liberal models of multiculturalism require indigenous peoples to enunciate their claims for justice in liberal terms - as opposed to referencing indigenous laws and principles. Turner has called this limitation 'Kymlicka's Constraint',[86] pointing out that this leads to an 'asymmetry' in which 'indigenous peoples must use the normative language of the dominant culture to ultimately defend world views that are embedded in completely different normative frameworks. The dominant culture does not face this hurdle.'[87]

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[83] R v Van der Peet, [1996] 2 SCR 507. See Chapter 7, 211-212, and Russel Lawrence Barsh and James Youngblood Henderson, 'The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand' (1997) 42 McGill Law Journal.

[84] Kymlicka, *Multicultural Citizenship* (n 4)., 32-33. Kymlicka writes:

> *However, the issue of special representation rights for groups is complicated, because special representation is sometimes defended, not on grounds of oppression, but as a corollary of self-government. A minority's right to self-government would be severely weakened if some external body could unilaterally revise or revoke its powers, without consulting the minority or securing its consent. Hence it would seem to be a corollary of self-government that the national minority be guaranteed representation on any body which can interpret or modify its powers of self-government (e.g. the Supreme Court). Since the claims of self-government are seen as inherent and permanent, so too are the guarantees of representation which flow from it (unlike guarantees grounded on oppression)*.

[85] Kymlicka, *Multicultural Citizenship* (n 1). 109,110,126. Where it can help protect a minority from unjust policies/decisions that favour the majority. Specific examples include decisions on language and culture.

[86] Turner (n 6)., 58. Turner cites Will Kymlicka, *Liberalism, Community and Culture* (Claredon 1989). in which he admits that indigenous people will need to bear the burden of justifying their claims for self-determination and other rights in accordance with liberal logic. At 73, Turner writes: 'The kinds of explanations that are embedded in Aboriginal philosophies are not viewed as legitimate 'claims of reason' in contemporary legal and political discourses. … As long as Kymlicka's constraint requires indigenous peoples to explain themselves within the discourses of the dominant culture, there will be a need for specially educated indigenous people to generate the required explanations. It must be remembered that the need to explain ourselves to the dominant culture arises primarily for political reasons and only secondarily from a desire to attain some kind of rich cross-cultural understanding of indigenous philosophies'.

[87] Turner (n 6)., 81.

As a result of this privileging of liberal discourse, Coulthard, Turner and Alfred have all noted that the legal and political institutions within which recognition claims are conducted are not neutral sites but are instead charged with colonial relations of power.[88] These operate to reinforce the values of the State and exclude alternative world views from the discursive sites which shape the content of their rights.[89] Alfred argues that interaction with these institutions can alter the perceptions of indigenous claimants, who come to understand their rights more in terms of the State's legal definition pertaining to such rights, rather than through their own cultures and traditions.[90] Turner remains optimistic that indigenous 'word warriors' can work to overturn the imbalance of power through dialogic engagement in both indigenous and Eurocentric legal and political discourse.[91] However, many other indigenous thought leaders remain skeptical, warning of the 'illusion of inclusion'[92] and calling instead for 'local, indigenous-centered, responsibility-based movements'[93] that rejuvenate indigenous institutions and resist the continued colonisation of indigenous lands and ways of life.

An example of the practical result of the imbalances of power in participation mechanisms is given by Kaplan-Myrth, in an examination of a program to improve public health in indigenous communities. She draws the distinction between 'practical reconciliation', in which the state and indigenous peoples work in partnership to meet specific public health goals in a way that affirms underlying liberal values, and 'impractical reconciliation', in which there is 'an opportunity to reinterpret Australia's colonial history and to recognise Aboriginal people's rights as Indigenous Australians.'[94] Kaplan-Myrth reported that non-indigenous public health policy makers supported liberal ideas of 'community empowerment' as a means to achieve a public health objective. On the other hand, for the aboriginal activists, recognition of their self-determination was a primary concern in devising healthcare provision for aboriginal peoples in Australia. Aboriginal representatives called for a rebalance of power in the structures of collaboration and partnership in aboriginal healthcare programmes, ensuring that institutional structures build aboriginal capacity to design and implement healthcare provision suitable for their specific needs in partnership with the state. Aboriginal participants called for these partnerships to be built on consent: as one commentator from the National Aboriginal

[88] Alfred (n 39).; Turner (n 6).; Coulthard (n 42).
[89] Turner (n 6).
[90] Alfred (n 39).
[91] Turner (n 6)., 69.
[92] Alfred (n 39).; Corntassel (n 59). 109.; Coulthard (n 42).; Andrea Landry, 'This Reconciliation Is for the Colonizer' (*The Wrong Kind of Green*, 13 June 2017) <http://www.wrongkindofgreen.org/2017/12/01/this-reconciliation-is-for-the-colonizer/> accessed 24 November 2020.
[93] Corntassel (n 59)., 122.
[94] Nili Kaplan-Myrth, 'Sorry Mates: Reconciliation and Self-Determination in Australian Aboriginal Health' (2005) 6 Human Rights Review 69.

Community-Controlled Health Organization put it: ‘the day we say "No" to something and it doesn't happen, we'll begin to believe that there's a partnership in place.’[95]

The perspectives of indigenous critics indicate that Kymlicka’s theory does not go far enough to address epistemic injustice and maintains colonial hierarchies of political power. In turn, this constrains the range of options that are available for indigenous self-determination to be put into practice through state-led mechanisms for self-government and effective participation. The next section explores how human rights based multiculturalism is also limited in its capacity to transform imbalances of economic power, a limitation which also constrains indigenous peoples’ ability to ‘act out of their own identity’ in a way that is consistent with indigenous values.

4.5 Economic power

4.5.1 The need for a more holistic approach

As discussed above, Kymlicka advocates for indigenous land rights and territorial autonomy as a form of ‘external protection’ to help in ‘alleviating the vulnerability of minority cultures to majority decisions’ and to ‘ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority.’[96] In the context of indigenous peoples, collective ownership of land is crucial to support the holistic health of the community and its members.[97] In addition, Kymlicka advocates special representation rights that would require states to consult or even gain the consent of a self-governing national minority before taking decisions that would constrain their self-government rights, and permanent representation of national minorities on the bodies that take such decisions.[98] In this respect, Kymlicka recognises the possibility for national minorities to veto specific policies that would

[95] ibid. 80.
[96] A fact that Kymlicka himself points out. Kymlicka, *Multicultural Citizenship* (n 1)., 109.
[97] UNHRC Forty-fifth Session 14 September – 2 October 2020 ‘Right to Land under the United Nation Declaration on the Rights of Indigenous Peoples: a human rights focus Study of the Expert Mechanism on the Rights of Indigenous Peoples (15 July 2020) UN Doc A/HRC/45/38. See Chapter 3 and 5 for discussion of this issue.
[98] Kymlicka, *Multicultural Citizenship* (n 4)., 32-33. Kymlicka writes:

> *However, the issue of special representation rights for groups is complicated, because special representation is sometimes defended, not on grounds of oppression, but as a corollary of self-government. A minority's right to self-government would be severely weakened if some external body could unilaterally revise or revoke its powers, without consulting the minority or securing its consent. Hence it would seem to be a corollary of self-government that the national minority be guaranteed representation on any body which can interpret or modify its powers of self-government (e.g. the Supreme Court). Since the claims of self-government are seen as inherent and permanent, so too are the guarantees of representation which flow from it (unlike guarantees grounded on oppression)*.

infringe their rights, such as the approval of extractive projects on indigenous territories.[99] In theory, these proposals should afford indigenous people a degree of control over their livelihoods and subsistence, and enable them to determine their own priorities for development.

However, scholars of multiculturalism - including Kymlicka himself - have observed that the ideas of equality between groups and freedom within groups, as espoused by the minority rights regime, have not led to economic equality for indigenous peoples,[100] and Kymlicka has observed that in practice, different forms of multiculturalism cut across issues of identity, economic resources and political inclusion.[101] Nancy Fraser has identified that strategies which focus on recognition of identity and cultural membership are often seen as distinct and even polarised from claims for redistribution of resources. Thus in the context of western societies, 'class politics' becomes oppositional to 'identity politics' and the economic sphere becomes detached from the cultural.[102] Bhikhu Parekh has argued that cultural recognition and equality is impossible in multicultural societies without a simultaneous transformation of economic and political power.[103]

Indigenous authors have also called for a more holistic approach to indigenous rights, and for greater emphasis on transforming existing modes of capitalist economics that drive the need for states to continue to extract resources from indigenous territories. Holder and Corntassel argue that Kymlicka's characterisation of culture as primarily a psychological need ignores the very real material benefits of cultural membership for indigenous people and sets up a false dichotomy between the psychological and cultural aspects of indigenous rights on the one hand, and more tangible economic and political concerns on the other. Consequently, in separating cultural/psychological and material concerns, liberal theories of multiculturalism are 'not merely 'partial' in their representation; they are misleading' because they fundamentally

[99] Kymlicka, *Multicultural Citizenship* (n 1). 109,110,126. Where it can help protect a minority from unjust policies/decisions that favour the majority. Specific examples include decisions on language and culture.
[100] ibid., 148.
[101] Kymlicka, *Multicultural Odysseys* (n 2).
[102] Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age, I/212, July–August 1995' 1 New Left Review 68.
[103] Parekh (n 31). 343. Parekh writes: 'Misrecognition, therefore, can only be countered by both undertaking a rigorous critique of the dominant culture and radically restructuring the prevailing inequalities of economic and political power. Since the dominant group welcomes neither the radical critique nor the corresponding political praxis, the struggle for recognition involves cultural and political contestation and sometimes even violence, as Hegel (1960) highlighted in his analysis of the dialectic of recognition and which Taylor's (1994) sanitized version of it ignores. As we have seen, the politics of culture is integrally tied up with the politics of power because culture is itself institutionalized power and deeply imbricated with other systems of power. Cultural self-esteem cannot be developed and sustained in a vacuum and requires appropriate changes in all the major areas of life. No multicultural society can be stable and vibrant unless it ensures that its constituent communities received both just recognition and a just share of economic and political power. It requires a robust form of social economic and political democracy to underpin its commitment to multiculturalism.'

misrepresent the central claims of the indigenous movement.[104] As a result, Holder and Corntassel warn that these misleading frameworks pose a risk to the indigenous movement's ultimate success.

4.5.2 The need for economic as well as cultural diversity

Richard Day has also argued that the false distinction between cultural and economic matters has influenced the limited models of self-government that have been tried, so that they are incapable of reducing the conflict between the state and indigenous peoples. He argues that liberal multiculturalism is willing to permit cultural diversity and the 'possibility of multiple national identifications' but it is less willing to countenance political and economic diversity, always assuming that 'any subaltern group that is granted 'national' status will thereby acquire subordinate articulation with a capitalist state.'[105] Day cites examples from Canada, the USA and Australia in which the existing state has retained a 'trump card' allowing it to control the parameters of indigenous autonomy to protect state economic interests (such as access to minerals and other sub-soil resources). [106] In order for multiculturalism to work, Day calls for a wider acceptance of the diverse economic models that exist:

> *It will become increasingly necessary for state peoples to accept diversity not only at the level of cultural symbols, but at all levels of social, political and economic organisation. This means that future intercultural discussions will have to leave behind state-based liberal-capitalist federalism, and focus on the development of more*

[104] Holder and Corntassel (n 7)., 139. As has been noted earlier in this chapter, Kymlicka bases his main argument for group-differentiated rights on the importance of one's own culture for the enjoyment of individual freedom. However, Holder and Cornassel note that it is often the oppressors who insist on defining a group and treating them in a particular manner – and that the need for specific group protections stems from this external categorisation rather than the ethical implications of the self-identification of group members. This is not acknowledged in Kymlicka's analysis. A rationale based on the psychological value of groups also employs a universalist explanation of the value of culture, resulting in false assumptions. For example, such theories assume that all group members share the same interest in the continuance of the group, and that the conditions necessary for group continuance and the features of group membership are consistent across all groups. Therefore such theories do not take into account the complex differences between the experiences of the various groups in society. These assumptions may also risk the success of the indigenous rights movement, for example if the majority group uses the emphasis on the psychological attachment to groups to justify the erosion of minority rights, in the interests of state-building or creating a strong national identity. Additionally, indigenous political demands are more likely to be evaluated with reference to universal needs which we all share, rather than on the specific history of injustices suffered. By removing the focus from tangible inequalities and oppression, the liberal insistence on the psychological importance of group membership 'thus erodes the intuitive moral difference between claims of the powerful and claims of the powerless' (at 137). Finally, in theories such as Kymlicka's, collectivities are conceived as monolithic, homogenous, and clearly defined whereas in practice, this is far from the case. The understanding of cultures as being homogenous 'introduces an element of naturalism to the discussion of group politics, with a corresponding limitation on the degree of moral and political responsibility which we expect people to take for the shape of the society they build.' (at 138).

[105] Day (n 39)., 182. Day argues that Kymlicka's liberal multiculturalism assumes that all groups are willing to accept 'a model of multinational federalism that preserves the current allocation of territories to identities, bureaucratic apparatuses, and regimes of capital accumulation.'

[106] ibid.

> *heteronomous systems. A difficult choice faces liberal multiculturalism: in order to become what it says it wants to be, it will have to sacrifice much of what it has always been.*[107]

Kymlicka's model does not go far enough to address the inequality that is generated through the systemic privileging of one economic development strategy over another. By its own liberal logic, if the primary justification of group-specific rights is to rectify 'unchosen inequality', then one could argue that economic systems which systematically endanger a specific culture or way of life should be subject to restrictions or should require such minority groups to have special representation rights in economic decision-making at a national or international level. Kymlicka acknowledges the need to balance conflicting rights when it comes to the attempts of groups to restrict the rights of individual members, and recognises the need to balance the cultural rights of national minorities with the rights of the cultural majority. However, it is extremely doubtful that Kymlicka intended that the special representation rights that he proposed would extend to a discussion of how the materialistic entitlement of some societies might be limited, should their own vision of the 'good life' consistently undermine the ability of other societies to live in a way which is consistent with their own worldviews.

This suggestion is supported by Kymlicka's comment that self-government might coincide with reduced representation of national minorities on some federal bodies – an arrangement that would actually lessen indigenous peoples' ability to influence the economic development policies of the state once they had obtained rights to self-government.[108] Far from being partners in the country's economic trajectory, human rights based multiculturalism affords indigenous peoples group-specific rights in order to mitigate the negative consequences of an economic policy over which they have no control at all. On the basis of this analysis, it is far from clear that Kymlicka's 'external protections', including self-government rights and special representation rights, will be sufficient to protect indigenous cultures from the imperative of states' continued economic development,[109] which often stands in direct contrast to indigenous peoples' own views on how to live in relation to the land. The next section examines how an enlarged definition of citizenship could provide a way to open up dialogue on the economic power imbalance that remains unchallenged by human rights based multiculturalism.

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[107] ibid.,195.

[108] Kymlicka, *Multicultural Citizenship* (n 11). Kymlicka writes: 'To over-simplify, then, self-government for a national minority seems to entail guaranteed representation on *intergovernmental* bodies, which negotiate, interpret, and modify the division of powers, but reduced representation on *federal* bodies which legislate in areas of purely federal jurisdiction from which they are exempted.' (at 202).

[109] Kymlicka himself acknowledged states' reluctance to grant land rights to national minorities, given their concerns about political stability and access to resources. Kymlicka, *Multicultural Citizenship* (n 1)., 123.

4.5.3 From 'multicultural citizenship' to 'citizenship with the land'

Indigenous peoples' relationship with their land and resources is difficult for those of a western mindset to conceive. For indigenous communities, there is a spiritual and ancestral connection with territory that is central to their culture and way of life, far exceeding purely economic interests.[110] In the indigenous worldview, people and communities are seen as being deeply interconnected and even related to the natural world around them. This sense of relationship to the land brings with it a duty of responsibility, to the environment as well as past and future generations. This quote from John Borrows gives an insight into this way of viewing the world, and the impact of European colonisation on indigenous peoples' ability to live in accordance with their own 'good life' ideals:

> *My grandfather was born in 1901 on the western shores of Georgian Bay, at the Cape Croker Indian reservation. Generations before him were born on the same soil. Our births, lives, and deaths on this site have brought us into citizenship with the land. We participate in its renewal, have responsibility for its continuation, and grieve for its losses. As citizens with this land, we also feel the presence of our ancestors, and strive with them to have the relationships of our polity respected. Our loyalties, allegiance, and affection is related to the land. The water, wind, sun, and stars are part of this federation. The fish, birds, plants, and animals also share this union. Our teachings and stories form the constitution of this relationship, and direct and nourish the obligations this citizenship requires. The Chippewas of the Nawash have struggled to sustain this citizenship in the face of the diversity and pluralism that has become part of the land. This has not been an easy task. Our codes have been disinterred, disregarded, and repressed. What is required to re-inscribe these laws, and once again invoke a citizenship with the land?*[111]

The concept of 'citizenship with the land' reveals important differences between many indigenous understandings of what 'citizenship' should entail, and that proposed by human rights based multiculturalism. Multicultural citizenship, surprisingly, does not go into great detail on the definition of citizenship; Kymlicka notes that the liberal tradition frequently fails to distinguish between equality of persons and equality of citizens. Throughout, Multicultural Citizenship suggests that the duty of a liberal society towards those whom it regards as its

[110] Janeth Warden-Fernandez, 'Indigenous Communities and Mineral Development' (International Institute for Environment and Development 2001) 59.
[111] John Borrows, '"Landed" Citizenship: Narratives of Aboriginal Political Participation', *Citizenship in Diverse Societies* (Oxford University Press 2000).

people is to protect the rights of all individuals equally and to protect minority cultures in order to provide individuals with an appropriate 'context of choice' from which to exercise their personal freedom. Furthermore, liberal political philosophy implicitly assumes that citizenship is reserved for humans only, and the natural world, including plants, animals and minerals, is treated as a resource or property for disposal as citizens deem fit in the pursuit of a 'good life'.[112]

In contrast, indigenous perspectives on 'citizenship' leads to a different conceptualisation of what it means to be a citizen, bringing a sense of shared responsibility for the welfare of a natural environment on which both indigenous and non-indigenous communities are reliant. Nadasdy, referring to the worldview of Dene indigenous people in the Yukon, comments that:

> *First Nations peoples have long regarded themselves as the least powerful of all the various kinds of persons inhabiting the landscape. Although they recognize the mutual interdependence of humans and animals, they view the relationship as unequal. After all, human people depend for their very survival on the goodwill of their animal benefactors'.*[113]

This contrasts dramatically with the Eurocentric tendency to view humans as the most powerful of the species, dominant over nature. Due to this marked difference in worldview, and its impacts on the ability of indigenous peoples to live their own version of the 'good life', models of multiculturalism are needed that include a holistic view of inequality which includes tangible and systemic dimensions - and a key element of this, for many indigenous people, is a critique of global capitalism itself.[114] Coulthard has highlighted the failure of liberal multicultural theories to tackle inequality's 'generative structures, in this case a capitalist economy constituted by racial and gender hierarchies and the colonial state' and comments that 'an approach that is explicitly oriented around dialogue and listening ought to be more sensitive to the claims and challenges emanating from these dissenting Indigenous voices.'[115] However, human rights based multiculturalism does not attend to these wider systemic

[112] Will Kymlicka and Sue Donaldson, 'Locating Animals in Political Philosophy' (2016) 11 Philosophy Compass 692.
[113] Nadasdy (n 76)., 7
[114] Coulthard cites Mohawk political scientist Taiaiake Alfred as one of many indigenous voices who have explicitly challenged capitalist values as being a driving force of coloniality in all its forms. For example, Alfred (n 39). See also Jerry Mander and Victoria Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (New Expanded Edition, University of California Press 2007). The Manila Declaration also raises the devastating impact of globalisation on indigenous lands and peoples, and commends indigenous peoples to 'strategize concrete ways to appropriately respond to the forces and processes of globalization'. 'Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, 6-8 December 2000' (Tebtebba Foundation 2000)., Art 3.1.
[115] Coulthard (n 42)., 36.

questions, instead assuming that indigenous culture will to a significant degree remain confined to the domain of indigenous society and territories, and overall state policy be subject to adjustment in places where it directly affects minority rights, rather than needing to be radically redefined.

Contrary to this assumption, some indigenous scholars such as John Borrows do aspire to influence wider state affairs at a systemic level, advocating not only for indigenous control of their own communities, but also for indigenous people to have significant influence in the wider decision-making of state institutions and society. Through greater involvement of indigenous people in all aspects of government, Borrows advocates for 'aboriginal control of Canadian affairs' to influence the state's relationship with the land. Rather than being assimilated into the conventional approach of the state, Borrows writes that as a strategy, aboriginal control of Canadian affairs entails significant political control for aboriginal peoples, and the potential to 'change contemporary notions of Canadian citizenship'.[116] In his view,

> *Citizenship under Aboriginal influence may generate a greater attentiveness to land uses and cultural practices that are preferred by many Aboriginal peoples. Canadian notions of citizenship might not only develop to include greater scope for people's involvement in sustenance activities, but these ideas of citizenship might also further reduce the tolerance for land uses which extirpate these pursuits.*[117]

This level of participation and control of state affairs by what Kymlicka would term a 'national minority', is far beyond the realms of what is contemplated in *Multicultural Citizenship*. Instead, it constitutes a reframing of citizenship not as a list of entitlements and conflicts of rights to be navigated, but as conferring a solemn responsibility to the natural world and to sustainable development in the land on which an individual resides.[118]

Although it may appear far-fetched, this emphasis on a shared responsibility to the land opens the door to new approaches to reconciliation which build on indigenous legal systems and worldviews to bestow rights directly on the environment, moving the focus away from Eurocentric conceptions of 'ownership' to indigenous principles of responsibility, duty and relationship. For example, Nyquist has proposed that viewing the land as a 'common good', which both indigenous peoples and the state must protect, provides a basis (alongside

[116] Borrows (n 111).
[117] ibid., 332
[118] See also Gordon Christie, 'Law, Theory and Indigenous Peoples' (2003) 2 Indigenous Law Journal 67., 110-111.

indigenous self-determination) for building partnerships between indigenous peoples and the state.[119] An even more transformative approach is demonstrated in the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 of New Zealand, which bestowed the Whanganui River with legal personality, and recognises a Māori worldview which sees the River as a living, indivisible being, and Te Pou Tupua as a human representative of the River as a living ancestor. Subsequently, management of the river is a mutual responsibility between the Maori and the Crown. Although it has been argued that the Act could go further towards recognising indigenous worldviews and self-determination, it is an attempt to base settlements on indigenous legal traditions and epistemology, and to bring about reconciliation through the reconceptualisation of our mutual relationship with the land.[120]

In his book, *Merging Fires*, Rick Wallace describes a reconciliation process between the Grand Council of Treaty No 3[121] and the City of Kenora in Western Ontario, Canada,[122] which sits within Treaty No 3 territory.[123] In this process, an area of land was designated to be jointly managed by both governments. Summing up the Kenora reconciliation project, Rick Wallace writes:

> *Underlying this process is a radical re-harmonization - environmentally, spiritually, politically and economically - occurring in a local space that confronts the impacts of globalization on its resource-based economy. Environmentally, it is based on a recognition that resources need to be locally controlled and sustainably used for the benefit of the region. Spiritually, it is a re-casting of the land as spirit, as itself animated and alive, of having a will and as a partner in a relationship of respect and reciprocity. Politically, it is an evolving process between communities at the grassroots/local level to reclaim governance and development*.[124]

[119] Steven Nyquist, 'Self-Determination and Reconciliation: A Cooperative Model for Negotiating Treaty Rights in Minnesota' (1991) 9 Law & Inequality: A Journal of Theory and Practice 533.This approach also has the benefit of potentially prohibiting state interventions which are detrimental to the land and indigenous ways of life. This by no means suggests that there will not be conflict between the state and indigenous peoples even if projects are for environmental protection - projects aimed at conservation, e.g. national parks or carbon storage, are also the subject of conflict between IPs and the state. Furthermore, such an approach may not be agreed by all, as it may be seen to undermine indigenous sovereignty and self-determination.
[120] Jacinta Ruru, 'Listening to Papatūānuku: A Call to Reform Water Law' (2018) 48 Journal of the Royal Society of New Zealand 215.; Dennis Dennis-McCarthy, 'Incorporating Indigenous Worldviews on the Environment into Non-Indigenous Legal Systems: Has the Te Awa Tupua Act Led to Reconciliation and Self-Determination?' (2019) 27 Māori Law Review.
[121] Representing 25,000 Anishinaabe people living in 55,000 square miles of territory in north-western Ontario and Manitoba. Rick Wallace, *Merging Fires: Grassroots Peacebuilding Between Indigenous and Non-Indigenous Peoples* (Fernwood Publishing 2013)., 137.
[122] A city of around 17,000, 85% of whom are Euro-Canadian and 15% Anishinaabe. ibid., 137.
[123] ibid., 137-165.
[124] ibid., 161.

His words provide an insight into the extent of the transformation in the institutions and mindset of liberal multicultural states that will be necessary if they wish to fully reconcile with indigenous peoples.

Unfortunately, the ability of liberal multiculturalism to rise to this challenge is questioned by Duane Champagne, who warns that although the impacts of the global market system will lead to indigenous people wanting to engage more fully in 'national and international markets and political systems',[125] they want to do so 'informed by their own histories, cultures, and interests.'[126] However, due to the liberal separation of politics and culture, 'Multicultural states will want indigenous peoples to remove themselves from the holistic relations among culture, politics, community, and economy that often prevail in indigenous nations.'[127] Consequently, Champagne concludes that 'multicultural nation-states, just like their mono-cultural predecessors, will be institutionally incapable of addressing the values, interests, and social organization of indigenous peoples.'[128]

4.6 Conclusion

Kymlicka's model of human rights based multiculturalism sought to bring clarity and a sense of underlying cohesion to the way that influential liberal states and international organisations have managed the demands of minorities within the context of the nation state. But can it successfully provide a basis for reconciliation? Some indigenous authors, such as Turner, Holder and Corntassel, suggest that it is possible to enlarge Kymlicka's theory to embrace indigenous ideas about sovereignty, the interlinkages between cultural and economic rights, and the multiple ways in which individuals relate to their communities and lands. On the other hand, those such as Day, Coulthard and Champagne cast doubt on whether liberal theories will ever be able to overcome colonial structures of power. However, both groups agree that on its own, the human rights based model of multiculturalism is not sufficient to fully meet indigenous rights claims.

This chapter has suggested that human rights based culturalism, whilst being a significant advancement in the liberal understanding of how the state might relate to indigenous peoples, is ultimately limited as a model for reconciliation. By its nature, it is a one-sided model that does not engage deeply with indigenous historical narratives and political philosophy, and

[125] Champagne (n 55)., 18.
[126] ibid., 18.
[127] ibid., 19.
[128] ibid., 19.

consequently it conceptualises indigenous peoples as a sub-national group under the authority of the state, fundamentally missing the claim of self-determination at the heart of indigenous struggles. The result is that this model is one that will uphold the right of indigenous peoples to their distinct culture provided that it does not significantly challenge the existing power hierarchy or economic interests of the state. Furthermore, it requires that indigenous peoples submit to liberal limitations on the recognition of their collective rights and negotiate their position with reference to the liberal terminology, and does not go far enough to tackle the root causes of material inequalities that are inextricably linked with enjoyment of indigenous peoples' cultural rights.

An underlying assumption of human rights based multiculturalism is that provided indigenous peoples are afforded autonomy within their own society, they will have less cause to seek special influences over other areas of state decision-making. However, as discussed in the last section of this chapter, some indigenous people do seek to influence state decision-making at a broad level, for example in relation to sustainable economic policies or how citizenship is defined. Given the controversies surrounding liberal multiculturalism, it is likely that the mere suggestion of a national minority holding sway over national economic policy would result in a significant backlash unless a shared understanding of history and a sense of partnership is also developed between indigenous and non-indigenous people. However, indigenous perspectives have much to offer in deepening the liberal concept of what it means to be a citizen in society. They highlight the importance of the land on which the citizenry live, as a living and dynamic player in its own right, as opposed to a resource to be divided and exploited. An indigenous conceptualisation of citizenship contributes greater emphasis on the responsibilities of citizens to protect the natural environment for the benefit of all those living in a multicultural state - whether now, or in the future. Greater engagement with this principle could open up possibilities for new legal approaches and avenues for reconciliation, based on the recognition of mutual dependence on the land and the shared duty to protect it.

These critiques of human rights based multiculturalism bear great similarity to the critiques of UNDRIP in the previous chapter, arguing that neither goes far enough to resolve the root of the intractable conflict, and requiring new ways of thinking that transform both political and economic power structures. The analysis of human rights based multiculturalism has also highlighted the importance of rebalancing the imbalance of epistemic power, as discussed in Chapter 2, arguing that it is essential for both the legitimacy of multicultural models as well as supporting the identity and self-esteem of indigenous peoples and their ability to negotiate on an equal basis in dialogues with the state.

Despite its shortcomings, human rights based multiculturalism remains a prevalent and influential strategy adopted by liberal states and institutions. The next chapter details how the limitations of human rights based multiculturalism are evident in the negotiation and interpretation of Article 32 of UNDRIP, which pertains to an important special representation right of indigenous peoples that arises in relation to state development projects on their lands.

Chapter 5: The multiculturalist model of FPIC and its implications for reconciliation

5.1 Introduction

This thesis focuses on the principle of free prior and informed consent (FPIC) in the context of mining projects on indigenous territories, with a view to assessing the potential of FPIC as a tool of reconciliation between indigenous peoples and states. As was discussed in Chapter 3, indigenous self-determination and revitalisation of indigenous relationships to land are crucial for reconciliation to occur. However, extractive projects have significant harmful impacts on indigenous land and resources, and are a frequent cause of conflict between indigenous peoples and states who both claim rights over the land.

This chapter examines the negotiation of the text of Article 32 and its subsequent interpretation, to provide insights into its potential as a tool of reconciliation between indigenous peoples and states in the context of extractive projects. Given the frequency of conflict over extractives activity, Article 32 is arguably one of UNDRIP's most important provisions, because it requires states to consult with indigenous peoples in order to obtain their FPIC before approving projects that would affect indigenous lands, territories or resources. Due to the fact that FPIC is operationalised through a consultation process, it potentially provides a mechanism for the kinds of constructive, cooperative dialogue proposed by Peace and Conflict scholars (discussed in Chapter 3) to build positive relationships, and therefore may contribute to reconciliation.

On the other hand, there is also potential for flawed FPIC consultations to exacerbate existing conflict. Article 32 was extremely controversial during the drafting process of UNDRIP, because states were concerned that a duty to obtain indigenous consent could enable indigenous peoples to veto projects that were key to the economic development of the nation, and bestow greater rights on indigenous people compared with other citizens. Due to these concerns, the wording originally proposed by indigenous representatives was watered down, so that as it stands, there is considerable variation in opinion as to its meaning, and its implications for state practice. The inability of indigenous representatives to achieve unambiguous wording on consent in UNDRIP's final text is symptomatic of FPIC's location at

the intersection between state sovereignty and indigenous self-determination. As such, Article 32 encapsulates the root of the intractable conflict between indigenous peoples and states that was discussed in Chapter 3.

The first section of this chapter will provide an overview of the main provisions of UNDRIP that relate to land rights, examining the extent to which the state was willing to give up its control of resources on indigenous territories. Then in Section 2, the text of Article 32 is analysed to demonstrate how the text changed over the drafting period, and the reasons for states' concerns. Section 3 explains two very different emerging interpretations of FPIC – one based on the right to self-determination, and the other drawing from a multiculturalist approach that emphasises democratic participation and equality which, it is argued, is likely to dominate implementation of FPIC in practice. Section 4 analyses this multiculturalist approach drawing on the work of decolonial authors and the critiques of human rights based multiculturalism developed in Chapter 4, concluding that far from improving relations between the state and indigenous peoples, FPIC has potential to become a site for additional conflict.

5.2 The struggle for control of territory and resources

Traditional lands and territories, and the natural resources found within them, play a vital role in indigenous spiritual, cultural and economic life, and their very survival as distinct peoples. Consequently, indigenous rights to land are a necessity for the enjoyment of indigenous self-determination.[1] Furthermore, indigenous self-determination also requires that indigenous peoples may use and freely dispose of their natural wealth and resources as they see fit.[2] However, states are also extremely concerned with the maintenance of territorial unity and the ability to use natural resources in the national interest. Consequently, the negotiation of UNDRIP required extensive discussion on how indigenous peoples and states would navigate their overlapping claims to indigenous lands, territories and resources. The discussions reveal how states asserted their overall control of land, rather than seeking to reframe the relationship in the way envisaged by indigenous critics of liberal multiculturalism in the previous Chapter.

[1] UNCHR (Sub-Commission) 'Study on the protection of the cultural and intellectual property of indigenous peoples by Erica-Irene Daes' (28 July 1993) UN Doc. E/CN.4/Sub.2/1993/28, para 24; *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua,* Judgment of 31 August 2001 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (31 August 2001), para 149; 'The Hague Conference (2010) Rights of Indigenous Peoples Interim Report' (International Law Association 2010).

[2] Dorothée Cambou, 'The UNDRIP and the Legal Significance of the Right of Indigenous Peoples to Self-Determination: A Human Rights Approach with a Multidimensional Perspective' (2019) 23 The International Journal of Human Rights 34.

Traditionally, the rights to control land and natural resources has been interpreted under international law as an aspect of the principles of territorial integrity of states and of permanent sovereignty over natural resources (PSNR).[3] Huff suggests the issue of natural resource ownership was at the heart of state opposition to the recognition of self-determination in UNDRIP, as opposed to concerns regarding territorial integrity. He asserts that the objections of States concerning the risk of political disunity and secession were exaggerated to mask deeper concern that indigenous self-determination 'could lead to a loss of control over the valuable natural resources which remain on indigenous traditional lands.'[4] The former Special Rapporteur on the Rights of Indigenous Peoples, Erica-Irene Daes, conducted a 'Study on indigenous peoples' permanent sovereignty over natural resources' during the drafting of UNDRIP, to look into this controversial area of tension between indigenous peoples and States.

Daes' study consulted governments, NGOs and indigenous representatives and sought to find a middle ground. Daes underlined the importance of natural resources to indigenous self-determination, saying: '*the right of permanent self-determination over natural resources was recognized because it was understood early on that without it, the right of self-determination would be meaningless.*'[5] Her report argued for an interpretation of indigenous ownership of natural resources in which the PSNR principle applies to indigenous peoples, to a limited degree; Daes explains: PSNR for indigenous peoples 'does not mean the supreme authority of an independent State', and 'use of the term in relation to indigenous peoples does not place them on the same level as States or place them in conflict with State sovereignty'.[6] Instead, indigenous peoples are permitted 'governmental control and authority over the resources in the exercise of self-determination'[7] and States have a corresponding duty to ensure this collective right is respected.[8]

Relying on this argument, indigenous representatives succeeded in securing extensive protections of indigenous land rights. Article 26 of UNDRIP protects indigenous peoples' rights to the lands, territories and resources which they have traditionally owned or otherwise used or acquired, and protects their right to own, use, develop and control the lands, territories and

[3] Ricardo Pereira and Orla Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 Melbourne Journal of International Law 451.
[4] Andrew Huff, 'Indigenous Land Rights and the New Self-Determination Papers Presented: 2004 ILSA Fall Conference, Oct. 21-23, 2004 - University of Colorado School of Law: Panel: Indigenous Rights, Local Resources and International Law' (2005) 16 Colorado Journal of International Environmental Law and Policy 295.
[5] UNCHR (Sub-Commission) Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur Erica-Irene A. Daes (13 July 2004) E/CN.4/Sub.2/2004/30.
[6] Ibid., para 18.
[7] Ibid., para 18.
[8] Ibid, para 40.

resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired, including through legal recognition and protection of indigenous lands, territories and resources. However, this the rights to ownership, possession, development and control are only protected in relation to lands that indigenous peoples currently inhabit. Rights to lands that have been lost to them are protected in vague terms, and there is considerable difficulty for indigenous peoples in proving their historical connection with lands that have been lost.[9]

To manage disputes over land, under Article 27 States are required to set up 'a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources'.[10] Where this land has been 'confiscated, taken, occupied, used or damaged without their free, prior and informed consent', Article 28 of UNDRIP provides for redress by restitution or, when this is not possible, just, fair and equitable compensation in the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Furthermore, UNDRIP recognises indigenous peoples' 'right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.'[11] Article 29 provides for the right of indigenous peoples to 'the conservation and protection of the environment and the productive capacity of their lands or territories and resources', as well as imposing a requirement for states to give assistance in this regard.[12] The recognition that indigenous models of subsistence and development are distinct from those of states and need protection is significant. However, this recognition was limited by states' refusal to explicitly recognise both the cultural and material impact of indigenous peoples' relationship with the land. The negotiations of the WGDD led to a deletion to part of Article 25 of the WGIP's 1994 draft text, with the result that in the final text Article 25 acknowledges indigenous peoples' distinctive spiritual relationship with lands, but not their material relationship.[13]

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[9] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments Feature: Reflections on a Decade of International Law' (2009) 10 Melbourne Journal of International Law 27.; Charmaine White Face, Zumila Wobaga, *An Analysis of the Declaration on the Rights of Indigenous Peoples* (Living Justice Press 2013)., commentary on Article 26.

[10] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 27.

[11] Ibid., Art 20.1. See also Art 20.2 which provides for just and fair redress for indigenous peoples deprived of their means of subsistence and development.

[12] Ibid., Art 29. Article 29 also prevents storage of hazardous waste on indigenous land without their FPIC.

[13] Ibid., Art 25. In the 1994 version approved by the UNCHR, Article 25 read as follows:

In addition, UNDRIP's recognition of indigenous peoples' rights to lands, territories and resources does so in a manner that reinforces the overriding authority of state legal systems in controlling the process of recognising, protecting and adjudicating indigenous land claims. The WGIP had included wording in Article 26 affirming indigenous peoples' 'right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources'.[14] Instead, the draft that was submitted by the WGDD to the HRC included more vague provisions calling for 'due respect to the customs, traditions and land tenure systems'[15] in the way that states recognise and protect indigenous land, and 'due recognition of indigenous laws'[16] in adjudication procedures that relate to this duty. Consequently, state legal systems remain the highest authority and may determine what the duty to give 'due regard' to indigenous legal systems should entail. This reluctance to entirely embrace indigenous legal systems is also evident in the watering down of the final Article 34 of UNDRIP, in which states recognised indigenous legal systems and customs 'where they exist'.[17] The addition of these three words places on indigenous peoples the

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> *Indigenous peoples have the right to maintain and strengthen their distinctive spiritual* ***and material*** *relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.* (Emphasis added.)

Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56.

[14] Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56., Art 26 stated:

> *Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used.* ***This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions*** *for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.* (Emphasis added).

[15] UNCHR 'Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session' (22 March 2006) UN Doc E/CN.4/2006/79.

> *States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be* ***conducted with due respect to the customs, traditions and land tenure systems*** *of the indigenous peoples concerned.* (Emphasis added).

[16] Ibid., Art 26.

> *States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process,* ***giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems****, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.* (Emphasis added).

[17] UNDRIP, UNGA Res 61/295 (13 September 2007)., Art 34.

> *Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and****, in the cases where they exist, juridical systems or customs,*** *in accordance with international human rights standards.* (Emphasis added).

burden of demonstrating the very existence of their juridical systems, in order to have them recognised as such and taken into account by the dominant legal system of the state.

Thus, whilst representing a significant step forwards, the provisions of rights to lands, territories and resources again demonstrate the incorporation of indigenous peoples into the framework of the state, rather than a reimagining of the relationship premised on mutual recognition as equals. Despite providing what many described as progressive protection for indigenous rights over their land and natural resources,[18] UNDRIP does so within a framework which reinforces the territorial integrity, PSNR and legal authority of states. Schrijver notes that none of its provisions 'vests indigenous peoples *expressis verbis* with permanent sovereignty over their natural wealth and resources or entails exclusive rights for indigenous peoples over the natural resources within their territories.'[19] As a result, UNDRIP continues the historical conflict in which states and indigenous peoples both lay claim to the land and natural resources within traditional indigenous territories.

5.3 FPIC in UNDRIP: An Ambiguous Solution to the Sovereignty/Self-Determination Conflict

5.3.1 The compromise in Article 32

Mindful of this continuing issue,[20] the concept of free, prior and informed consent (FPIC) was included in the Draft Declaration by the WGIP, as a key strategy for resolving the overlapping claims to land and natural resources discussed in the previous section. As Doyle comments, 'The consent requirement provides the middle ground in which the apparently irreconcilable claims of indigenous peoples to an inherent right to permanent sovereignty over natural resources can be reconciled with states' claims to sovereignty over these same resources.'[21]

[18] Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 Wisconsin International Law Journal 51.; Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, Taylor & Francis Group 2015).; Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge 2016).

[19] Nicolaas Schrijver, 'Self-Determination of Peoples and Sovereignty over Natural Wealth and Resources' in United Nations (ed), *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations 2013)., 99.

[20] In 2003, Stavenhagen noted the significant negative impacts that large-scale projects were having on indigenous rights, and noted that 'the right to free, informed and prior consent by indigenous peoples continues to be of crucial concern, inasmuch as too many major decisions concerning large-scale development projects in indigenous territories do not comply with this stipulation [of consultation and participation in decision-making], clearly set out in paragraph 6 of ILO C169.' (at para 13). UNCHR 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen' (21 January 2003) UN Doc E/CN.4/2003/90, paras 6-29.

[21] Doyle (n 18)., 147.

UNDRIP is not the first international instrument to introduce the requirement for states to consult indigenous peoples, or indeed to gain their consent, but it does arguably represent the most extensive expression of these principles to date. ILO C107 and ILO C169 established consultation as a means of negotiating conflicts between state objectives and indigenous people's human rights, requiring that states do not remove indigenous peoples from their land without their consent.[22] ILO C169 in particular established the importance of indigenous peoples participating in decision-making on issues that affect their rights.[23]

Indigenous representatives in the WGIP and WGDD succeeded in extending the principle of consent beyond its limited application in the ILO Conventions so that it applies all projects which affect indigenous lands, territories and resources;[24] to situations in which cultural, intellectual, religious and spiritual property (including intellectual property rights, designs, artefacts, arts and literature) is taken without free, prior and informed consent being given;[25] and in the case of storage of hazardous waste on indigenous lands.[26] Furthermore, UNDRIP requires states to consult in order to obtain the free, prior and informed consent of indigenous peoples before introducing legal or administrative measures which would affect indigenous peoples' lives.[27]

However, this chapter focuses on Article 32.2 of UNDRIP, which is most pertinent to the topic of this thesis. Despite the apparent success of indigenous peoples in including free, prior and informed consent in UNDRIP, the final text of Article 32.2 does, however, represent a compromise which indigenous representatives were compelled to accept, in the interests of UNDRIP being adopted at all.[28] The original wording proposed by the WGIP, and adopted in 1994 by the Sub-Commission, unequivocally read:

> *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources,* ***including the right to require that States obtain their free and informed consent*** *prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other*

[22] See Chapter 1, Section 1.2.
[23] SJ Rombouts, 'The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes' (2017) 53 Stanford Journal of International Law 169.
[24] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 32.
[25] Ibid., Art 11(2).
[26] Ibid., Art 29.
[27] Ibid., 19.
[28] Luis Enrique Chavez, 'The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2010).

resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[29]

However, in its final version Article 32 states:

32.1 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.

32.2 ***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.*

32.3 States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The impact of the changes to Article 32.2 are two-fold: first, they transform FPIC from a right that indigenous peoples can require (and therefore, by implication, may have some control over how it is obtained), to a duty of the state to consult (suggesting that the state will control the process). Secondly, and crucially, states are not explicitly required to obtain consent according to the final text, which requires them to 'consult in order to obtain consent'. As will be explored later in Section 5.3, this more ambiguous wording has led to differing views on what is actually required in practice.

5.3.2 States' objections to Article 32

The comments of states at UNDRIP's adoption give insights into the reasons why the text of Article 32 had to be watered down. Unsurprisingly, the four States which voted against UNDRIP at the General Assembly were vocal in their opposition to FPIC. Their concerns included the 'unworkable' breadth of FPIC which conferred rights on a national sub-group to

[29] Annex to UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1994/45 (26 August 1994) in UNCHR (Sub-Commission) 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session Geneva 1-26 August 1994' (28 October 1994) UN Doc E/CN.4/1995/2 E/CN.4/Sub.2/1994/56, Art 30 (emphasis added).

'veto legitimate decisions of a democratic and representative government'[30]; the potential for FPIC to constitute a veto which is 'fundamentally incompatible with the Canada's parliamentary system' and provisions regarding land which 'are overly broad and unclear and are susceptible of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possible putting into question matters that have already been settled by Treaty.'[31] New Zealand objected to the provisions on land rights in Articles 26 and 28 on the basis that 'the entire country is potentially caught within the scope of the article', which fails to take into account the competing land rights of other citizens and implying that 'indigenous peoples have rights that others do not have'.[32] New Zealand further objected to Articles 19 and 32(2) stating that they imply 'that indigenous peoples have a veto over a democratic legislature and natural resource management' and give rise to 'different classes of citizenship'.[33] The United States of America denounced the text as 'confusing' and stated that it 'risks endless conflicting interpretations and debate about its application', pointing to the many detailed interpretive statements that were being offered by states who voted in support of its adoption.[34]

Concerns were also raised by states who abstained and even amongst those who supported UNDRIP. This included South American states such as Suriname, which qualified their support for FPIC such that it 'should not be understood as an encroachment upon the rights and duties of the State to pursue society's interests by developing its natural resources and achieving sustainable development and improving the lives of the population as a whole'.[35] Colombia, abstaining from the vote, noted that as a signatory to the ILO C169, it had led the implementation of prior consultation processes, conducting 71 consultations with indigenous peoples between 2003 and 2007. Despite supporting the need for effective participation mechanisms, Colombia viewed the FPIC provisions in Articles 19 and 32 as 'a possible veto on the exploitation of natural resources in indigenous territories in the absence of an agreement. That could interfere with processes benefiting the general interest.'[36] They also raised concerns about the recognition of indigenous ownership of lands and resources, stating

[30] UNGA Sixty-first Session 107th Plenary Meeting Thursday 13 September 2007, 10 am New York official records (13 September 2007) UN Doc A/61/PV.107, ('UN Doc A/61/PV.107') 10. See statement of Australia.
[31] Ibid., 12. Statement of Canada.
[32] Ibid, 14. Statement of New Zealand.
[33] Ibid., 14. Statement of New Zealand.
[34] Ibid., 15. Statement of the United States of America. See also 'USUN Press Release No 204(07): Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples' <https://www.ulapland.fi/loader.aspx?id=3f948c7b-2781-4c8c-bbbd-d137d6963617> accessed 20 February 2021.
[35] Ibid., 27. Statement of Suriname.
[36] Ibid., 18. Statement of Colombia.

> *It is important to stress that many States, including Colombia, constitutionally stipulate that the subsoil and non-renewable natural resources are the property of the State in order to protect and guarantee their public use for the benefit of the entire nation. Therefore, accepting provisions [which acknowledge indigenous ownership of land and resources] would run counter to the internal legal order, which is based on the national interest*.[37]

The familiar questions of national sovereignty and the place of indigenous peoples within the broader national community were key to states' resistance to FPIC, and as will be seen in Chapters 6 and 7, are having impacts on how FPIC is operationalised. Two main themes emerge in States' response to FPIC during the elaboration and adoption of UNDRIP: first, national governments must retain the ability to govern their whole territories in the interests of the national community in its entirety, and that UNDRIP's provisions on FPIC are practically unworkable and constrain this right; second, they object on the basis that FPIC may create different classes of citizenship or unequal and preferential treatment for indigenous peoples who form one part of a national community with varied and potentially conflicting interests. Consequently, FPIC remained a major stumbling block to UNDRIP's progress throughout the WGDD and its adoption at the General Assembly.[38]

States' objections to the originally drafting of Article 32 speak directly to the ongoing conflict between indigenous peoples' self-determination and states' sovereignty, territorial integrity and political unity. As will be argued later in this chapter, these unresolved issues are also shaping the way that different actors are interpreting Article 32, with significant implications for the future of FPIC as a tool of reconciliation.

5.4 Two emerging interpretations of FPIC

5.4.1 Areas of consensus and complexity

Before examining the main points of divergence, it is noteworthy that since UNDRIP's adoption, some areas of consensus have emerged on how free, prior and informed

[37] Ibid., 18. Statement of Colombia.
[38] Albert Barume, 'Responding to the Concerns of the African States' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009).; Adelpho Regino Montes and Gustavo Torres Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009).

consultation is to be operationalised (as opposed to FPIC). There seems to be general agreement that the consultation should be undertaken in good faith, occur prior to any decision or action being taken, and in a way that ensures indigenous peoples are properly informed about the proposed project and its potential impacts, including sharing information, undertaking risk assessments, ensuring adequate technical and financial support for indigenous peoples to participate, and ensuring necessary translation or discussions in a language that indigenous peoples can understand. Furthermore, in seeking consent the state should not use coercion, whether through aggression, criminalisation, or financial means. The process of consultation should be culturally appropriate and respect indigenous institutions and decision-making processes, and should give indigenous peoples a chance to participate effectively and have a meaningful impact on decisions made by the state.[39]

However, the ambiguity of the final wording of Article 32 has left significant uncertainty as to how the need to obtain consent should be interpreted, and a wide range of definitions of FPIC is emerging that would have considerably different implications for its implementation.[40] At a basic level, FPIC is simultaneously described as a right, a duty, a general principle, a normative standard, a process and/or a mechanistic safeguard that derives from recognised substantive rights, for example to land, resources, culture or self-determination.[41] There is also considerable variation of opinion in the appropriate methodologies that should be used when interpreting an instrument of soft law that is, at the same time as being a General Assembly Resolution, also a very detailed document that was subject to decades of negotiation by states.[42] For example, while Barelli argues for a constructive reading of UNDRIP that is compatible with its 'spirit and normative framework',[43] Newman argues that due to its distinctive nature, the rules of the Vienna Convention on the Law of Treaties should apply, taking first the most obvious meaning of the text, then looking to context, the intent (or 'object' of the parties, and only then to purpose in order to clarify any ambiguities.[44] Newman argues

[39] UNPFII Fourth Session 16-27 May 2005 'Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005)' (17 February 2005) UN Doc.E/C.19/2005/3; *Case of the Saramaka People v Suriname* Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 172 (28 November 2007) paras 133.; Doyle (n 18). 268-275; UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62.
[40] Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 The International Journal of Human Rights 1.; Dwight Newman, 'Interpreting Fpic in Undrip' (2020) 27 International Journal on Minority and Group Rights 233.
[41] *Case of the Saramaka People v Suriname*, (n 39); UNHRC Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractives industries and indigenous peoples (1 July 2013) A/HRC/24/41, paras 27-30; Doyle (n 18).
[42] Newman (n 40).
[43] Barelli (n 18)., 38.
[44] Newman (n 40)., 244.

that the methodology chosen to interpret UNDRIP has significant consequences for the way that it is understood.

As shall be seen in the following sections, the choice to take a purposive methodology is likely to result in a more expansive reading of Article 32 than would a purely textual analysis.[45] Consequently, there is considerable divergence in interpretations of Article 32 between those who clearly align themselves with the goals of the indigenous movement and human rights, and states who take a more literal and thus restrictive view. The rest of this section argues that out of the ambiguity of Article 32, two opposing views of FPIC are emerging.[46]

5.4.2 The 'Sliding Scale' Approach: A Grey Area

An interpretation with increasing momentum in legal analysis of UNDRIP appears to be that of the 'sliding scale' approach to FPIC, in which it is argued that the duty on states to obtain consent will be triggered where the proposed project will have severe impacts on the rights of indigenous peoples. This view draws from the significant case of *Saramaka v Suriname* in the Inter-American Court of Human Rights (IACtHR). In the case, the Court held that in addition to states' obligation to consult,

> *major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory*

[45] ibid.

[46] The emergence of two independent interpretations of FPIC is consistent with Erueti's analysis of the Declaration as a whole, in which he argues that there are 'two narratives' held within its provisions. According to Erueti, whilst indigenous activists, predominantly from the CANZUS countries of the global north, emphasised the need for decolonisation and self-determination during the negotiations of the Declaration's text, indigenous representatives from the global south were more focused on the need to secure promotions for their basic human rights. This view is also consistent with the voting pattern of states and their comments on FPIC during the 61st General Assembly. The CANZUS states interpreted Article 32 as a veto, and voted against the Declaration, whereas the majority of states including those in South America initially interpreted FPIC in the light of multiculturalism, the duty to consult, and its contribution to democratic governance (although, as will be further discussed in Chapter 7, Canada has since interpreted UNDRIP, and FPIC, in line with its existing constitution, which is arguably closer to a multicultural model than a nation to nation one.) Given these two different narratives throughout the Declaration, Erueti argues for a 'mixed-model' interpretative approach, which allows different interpretations of the Declaration to reflect the specific needs of indigenous peoples in different contexts On the basis of the above analysis, a mixed-model interpretation of FPIC could potentially see the trigger for consent falling in different places along the spectrum, depending on whether the decolonization or human rights narrative is adopted in different countries. However, despite the different emphases of indigenous representatives during the negotiation process, since UNDRIP's adoption indigenous peoples from outside CANZUS states – and particularly in Latin America – are also claiming strong forms of FPIC that rely on a self-determination basis. See Andrew Erueti, 'The Politics of International Indigenous Rights' (2017) 67 University of Toronto Law Journal 569. See also Alexandra Xanthaki, 'Indigenous Autonomy in the Americas' in Tove H Malloy and Francesco Palermo (eds), *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford University Press 2015).

must be understood to additionally require the free, prior, and informed consent of the Saramaka, in accordance with their traditions and customs.[47]

This judgment was followed in the *Endorois* case before the African Commission on Human and Peoples Rights, who also upheld the need for consent to be obtained where the project would have a major impact.[48]

Legal commentators such as Pentassuglia argue that the evolutionary interpretation of FPIC by the IACtHR broadly interprets international standards and domestic norms in order to practically resolve ambiguities contained within them. As such, the decision 'informs a procedural and contextual management of competing claims in ways which strike a balance between the group's perspective and wider interests'.[49] In the same vein, Barelli argues that Article 32 imposes 'stringent duties' on states to meaningfully consult with the aim of reaching agreement, and guarantees effective protection of fundamental human rights.[50] In his view, the *Saramaka* decision forms part of a 'new and dynamic understanding of FPIC' which fills the legal gap left by Article 32 of the UNDRIP by distinguishing between small-scale and large-scale developments by using a sliding scale approach to participatory rights such as that articulated by Pentassuglia.[51] Barelli also points out that the *Saramaka* decision develops on the 'flexible approach' to FPIC advocated by the Human Rights Committee, and has garnered support from the Special Rapporteur.[52] However, Barelli also highlights future difficulties with this 'sliding scale' approach, for example in how 'large-scale projects' are defined, and questions whether this definition of FPIC adequately considers the cumulative impact of many small-scale projects affecting an indigenous territory over time.[53] As the next two sections show, the *Saramaka* judgement - like Article 32 – the sliding scale approach is capable of being interpreted in two very different ways, with the potential to cause conflict on the ground.

[47] *Case of the Saramaka People v Suriname*, (n 39), para 134. See also *Case of the Saramaka People v Suriname* Judgment of August 12, 2008 (Interpretation of the Judgement on Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No 185 (12 August 2008).
[48] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* African Commission on Human and People's Rights 276/2003 (4 February 2010), paras 226 and 291.
[49] Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 European Journal of International Law 165., 176.
[50] Barelli (n 18)., 37-39.
[51] G. Pentassuglia, Minority Groups and Judicial Discourse in International Law: A Comparative Perspective (Leiden: Martinus Nijhoff Publishers, 2009), 113.
[52] UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya' (15 July 2009) UN Doc A/HRC/12/34, para 47.
[53] Barelli (n 40).See also Marcos A Orellana, 'Saramaka People v. Suriname' (2008) 102 American Journal of International Law 841.

5.4.3 The 'General Rule' Approach

The most transformative interpretations of Article 32 are offered by authors who are staunch supporters of indigenous peoples, including former Special Rapporteur on the Rights of Indigenous Peoples Professor James Anaya, and Cathal Doyle in his monograph *Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free prior and informed consent*. Their strong interpretations of FPIC emphasise the right to self-determination as a basis for FPIC,[54] and hold that as 'a general rule … extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent'.[55] Such an interpretation would represent a significant challenge to existing power structures, and confer on indigenous peoples real control over their lands and their future development. In defence of this position, Doyle cites pronouncements of the three treaty bodies which are most engaged with indigenous rights - CERD, CESCR and HRC, as well as the Inter-American Commission on Human Rights and the African Commission on Human and Peoples Rights.[56] In general, indigenous people tend to support this strict interpretation of FPIC as a 'quasi-veto right',[57] in line with the views of Anaya and his fellow former Special Rapporteurs, Rudolpho Stavenhagen and Victoria Tauli-Corpuz.[58] Similarly, some NGOs who defend indigenous peoples' rights also characterise FPIC in absolute terms,[59] describing it as 'including the right to say no'.[60]

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[54] UNHRC 'Report of the Special Rapporteur on indigenous peoples, James Anaya' (6 July 2012) UN Doc A/HRC/21/47, paras 47-53; UNHRC 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractives industries and indigenous peoples' (1 July 2013) A/HRC/24/41, para 28; Doyle (n 18).,101-159; UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62, paras 3-5.

[55] UNHRC 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractives industries and indigenous peoples' (1 July 2013) A/HRC/24/41, 27.

[56] Doyle (n 18)., 131. For example, CERD, General Recommendation XXIII: Indigenous Peoples (18 August 1997) UN Doc CERD/C/51/misc 13/Rev 4.; *Angela Poma v Peru* Communication No 1457/2006 (27 March 2009) UN Doc CCPR/C/95/D/1457/2006, para 7.6; *Endorois Welfare Council v Kenya* (n 48), para 291.

[57] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne Journal of International Law 439., 465.

[58] UNCHR 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen' (21 January 2003) UN Doc E/CN.4/2003/90; Victoria Tauli-Corpuz, 'The Concept of Indigenous Peoples' Self-Determined Development or Development with Identity and Culture: Challenges and Trajectories' (Tebtebba Foundation 2008) UN Doc CLT/CPD/CPO/2008/IPS/02.

[59] E.g. Survival International, 'Decolonize Conservation' <https://www.survivalinternational.org/conservation> accessed 20 February 2021. According to Survival International's interpretation of FPIC, 'According to international law, the Free, Prior, and Informed Consent (FPIC) of local communities is required before any projects can take place on their land'.

[60] Shona Hawkes, *Consent Is Everybody's Business: Why Banks Need to Act on Free, Prior and Informed Consent* (Oxfam GB for Oxfam International 2019)., 11.

The Expert Mechanism on the Rights of Indigenous Peoples conducted a Study on FPIC which supported Anaya's 'general rule' approach to Article 32 in relation to the extractives sector.[61] However, EMRIP's study has been critiqued by Newman, who highlights the complexities of interpreting UNDRIP and advocates for the principles of treaty interpretation to be applied.[62] He notes that there has been little cohesive effort to agree on how UNDRIP should be interpreted, with the result that divergent interpretations are emerging. In particular, he notes a tendency amongst jurists and rights advocates to interpret each clause individually, rather than including adequate substantive discussion of how interpretation may be affected in light of other articles such as Article 46, which provides limitations clauses and principles for UNDRIP's interpretation. In relation to the EMRIP study on FPIC, Newman suggests that it does not take a rigorous enough approach to this question: 'after making some controversial unexplained decisions about interpretive methodology, [the study] goes on to mention Article 46.1 quickly but to rapidly assert requirements within it that are not self-evidently present in what was agreed in UNDRIP.'[63] Additionally, there is also acknowledgement within the report itself that the legal situation is not clear cut. EMRIP's report itself states that:

> *A State or stakeholder that decides to proceed after consent is withheld by indigenous peoples moves into* ***a legal grey area*** *and exposes itself to judicial review and other types of recourse mechanisms, potentially including international, regional and national tribunals, and by indigenous peoples' own institutions.*[64]

One of the 'grey areas' surrounding FPIC is how to determine the threshold for consent to be required. The Saramaka judgement, discussed above, is a leading example of a regional human rights court attempting to define this 'legal grey area'. Doyle argues that the IACtHR's interpretation of the *Saramaka* judgement can be read to support the 'general rule' approach. He argues that its wording 'indicates that extensive impacts are synonymous with large-scale development or investment projects, and consequently such activities always trigger the FPIC requirement.'[65] Additionally, he argues that the IACtHR has IACtHR's reference to the right to

[61] UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62, para 32.
[62] Newman (n 40). Newman advocates for the rules of treaty interpretation to be applied to the Declaration. The Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31 requires that treaty terms should be interpreted according to the ordinary meaning of the terms 'in their context and in the light of its object and purpose', including any subsequent practice. Under Article 32, preparatory work and context can be used to confirm the meaning of a treaty text that remains ambiguous if interpreted in accordance with Article 31.
[63] ibid., 235-236.
[64] UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62, para 28 (emphasis added).
[65] Doyle (n 18)., 151, with reference to *Case of the Saramaka v Suriname* (n 39) para 17.

self-determination in relation to FPIC 'suggests that the notion of a major impact ... extends beyond threats to cultural or physical survival to include limitations on their development choices.'[66] However, this view is disputed by Pasqualucci, who views the Saramaka judgement to limit FPIC requirement to only those projects with profound impacts on a large part of the territory, which threaten cultural or physical survival of the indigenous people concerned.[67]

A second debate concerns when it is permissible for the state to proceed with a project in the event that the indigenous peoples concerned withhold their consent. Proponents of the 'general rule' approach argue that states should only proceed without consent if proposed projects will definitely not have substantial impacts on indigenous rights (said by Anaya to be 'mostly a theoretical possibility given the invasive nature of extractive activities'),[68] or in rare cases where it is permitted in accordance with states' international human rights obligations, according to the limitations set out in Article 46.2 of UNDRIP which reads:

> *In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society*.

The question, then, is under what circumstances can indigenous rights be lawfully restricted? Both the IACtHR and the African Commission have held that indigenous property rights must

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[66] ibid., 150, with reference to *Case of the Saramaka v Suriname* (n 39), para 93. Additionally, at para 135, the Court referenced the statement of Special Rapporteur Rudolfo Stavenhagen:

> *The issue of extractive resource development and human rights involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination. Sustainable development is essential for the survival and future of indigenous peoples, whose right to development means the right to determine their own pace of change, consistent with their own vision of development, including their right to say no. Free, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector.*

UNCHR 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolpho Stavenhagen' (21 January 2003) UN Doc E/CN.4/2003/90, para 66. The Court's reference to this statement seems to support Doyle's view that the right to determine development priorities is a key basis for FPIC.

[67] Pasqualucci (n 18).

[68] UNHRC Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Extractives industries and indigenous peoples (1 July 2013) A/HRC/24/41, para 31.

be balanced against the rights of other third parties, including private for-profit concession holders.[69] The IACtHR has set out tests that must be met before indigenous property rights may be restricted. The restriction must be (a) established by law (b) necessary (c) proportional and (d) with the aim of achieving a legitimate aim in a democratic society, including the private property rights of third parties.[70] Furthermore, the restriction must not prejudice the survival of the group and its members, and must be subject to three safeguards, effective participation, reasonable benefit sharing, and prior environmental and social impact assessment.[71] Xanthaki notes that these criteria still provide a considerable degree of protection for indigenous peoples' rights and a higher threshold for infringement of indigenous rights than those of the general population.[72] Additionally, Doyle notes that if FPIC is also derived from other rights – such as the right to culture or the right to life – the 'public interest' restriction does not apply and the threshold for consent to be obtained is lowered considerably. Consequently, the threshold would fall at different points along the sliding scale of impact depending on which right was at risk of violation.[73]

However, the question of what is considered to be a 'legitimate aim in a democratic society' - and therefore a legitimate reason to restrict indigenous peoples' right to property – appears to be answered broadly by the IACtHR and African Commission. [74] For example, the *Case of the Kaliña and Lokono Peoples v Suriname,*[75] the IACtHR states that the assessment of whether it is appropriate to limit indigenous property rights must be made on a 'case by case basis', bearing in mind 'public utility and social interest',[76] and that there is no general rule that indigenous property rights will prevail over those of private individuals.[77] Furthermore, the task of deciding when an infringement is justified is considered by the IACtHR to belong 'exclusively to the state', because 'the IACtHR is not a domestic court of law that decides disputes between

[69] *Case of the Saramaka v Suriname* (n 39), paras 211-215; The African Commission has also decided) that indigenous property rights can be restricted by the 'interests of public need or in the general interest of the community', according to Article 14 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).
[70] *Case of the Saramaka People v Suriname* Judgment of August 12, 2008 (Interpretation of the Judgement on Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No 185 (12 August 2008), paras 34 and 35. See also *The Case of the Yakye Axa Indigenous Community v. Paraguay,* Judgement of June 17, 2005 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 125 (17 June 2005).
[71] *Case of the Saramaka v Suriname* (n 39), paras 127-128.
[72] Alexandra Xanthaki, 'Rights of Indigenous Peoples under the Light of Energy Exploitation Focus: International Energy Law' (2013) 56 German Yearbook of International Law 315.
See *The Case of the Sawhoyamaxa Indigenous Community v Paraguay* Judgement of March 29, 2005 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 146, para 144-147 (29 March 2005).
[73] Doyle (n 18)., 130.
[74] *Case of the Yakye Axa Indigenous Community v. Paraguay* (n 70), paras 144-145.
[75] *The Case of the Kaliña and Lokono Peoples v Suriname* Judgement of November 25, 2015 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 309 (25 November 2015).
[76] Ibid., para 155.
[77] Ibid., para 158.

private individuals.'[78] This provides a great degree of scope for the State to determine when indigenous lands and resources may be commandeered in the interests of the public good, and these decisions will, of course, be made with reference to the state's own laws and development priorities rather than those of indigenous peoples. Indeed, the case law of the IACtHR confirms that, subject to the above safeguards such as consultation, projects for environmental protection,[79] petrochemical and mineral extraction,[80] hydroelectric dams,[81] logging[82] and cattle ranching[83] may be viewed as 'legitimate aims' for infringing indigenous property rights.

Consequently, the IACtHR's approach in *Saramaka* and other cases arguably still permits far more exceptions to the 'general rule' than are permitted under Article 46.2 of UNDRIP, and there is potential for disagreement and confusion as to where the threshold for consent will fall according to how rights violations are categorised. Furthermore, it will be up to states (or the Court) to decide what constitutes an acceptable restriction on indigenous peoples' rights, which – as highlighted in the previous chapter – is problematic from the point of view of indigenous peoples who may come to a different conclusion as to what is acceptable, and who may dispute that the state has legitimate authority to make such a decision on their behalf.

Thus the question of when FPIC is required is indeed a 'grey area'. To avoid this uncertainty, Doyle argues that the self-determination basis for FPIC 'mandates the indigenous definition of the concept and control over its implementation.'[84] This view proposes that the responsibility for defining the trigger point for FPIC should rest with indigenous peoples themselves, rather than being defined by state legislators or the conventional court process. However, the amendments to Article 32 which frame FPIC as a state duty rather than a right of indigenous peoples seem to work against such an interpretation of the text. In any case, it is extremely unlikely that states would agree to such an approach and Doyle himself has noted that states and industry are reluctant to fully respect the self-determination basis for FPIC.[85]

[78] Ibid., para 156.
[79] Ibid., para 171.
[80] *Case of the Saramaka v Suriname* (n 39); *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* Judgement of June 27, 2012 (Merits and Reparations) Inter-American Court of Human Rights Series C No 245 (27 June 2012).
[81] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (n 80); *The Case of the Kuna of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama*, Judgement of October 14, 2014 (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 284 (14 October 2014).
[82] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 1); *Case of the Saramaka v Suriname* (n 39).
[83] *Case of the Yakye Axa Indigenous Community v. Paraguay* (n 70).
[84] Doyle (n 18)., 130.
[85] ibid.

The next section articulates the approach to FPIC that states do seem willing to adopt: an interpretation of FPIC in the context of human rights based multiculturalism and the operation of democratic governance. This presents a radically different view from that espoused by proponents of the 'general rule'.

5.4.4 The Multiculturalist Approach to FPIC

This section argues that states – who are the primary makers of international law – did not interpret Article 32.2 as conferring a 'general rule' presumption that indigenous consent would always be required in the context of extractive projects. On the contrary, both the ordinary meaning of the text and states' subsequent behaviour support a far more restrictive interpretation of FPIC under UNDRIP.

Whilst the proponents of the 'general rule' approach to FPIC emphasise the right to self-determination as the basis for FPIC, states have preferred to highlight its role in ensuring that indigenous people are able to participate fully and effectively in decision-making within multicultural democratic but unified societies, ensuring all citizens are treated equally, and preventing discrimination.[86] These arguments echo the liberal multicultural rationale for group-differentiated rights discussed in Chapter 4. Furthermore, as was discussed in Chapter 3, states were extremely reluctant to recognise indigenous peoples' right to self-determination in case it posed a threat to states' political sovereignty and territorial integrity and emphasised that the right to self-determination enshrined in UNDRIP was consistent with existing principles of international law and applies only to the right of indigenous peoples to exercise internal self-determination in the context of politically unified states.[87] This approach reflects the approach of human rights-based multiculturalism in framing indigenous peoples as minorities within the context of the overarching state.

Although UNDRIP was negotiated at length with indigenous representatives, UNGA Declarations are, ultimately, adopted by states who are the primary makers of international law,[88] and therefore states' express explanations of vote at the time of its adoption should be

[86] See A/61/PV.107 (n 31), particularly the Statements of Colombia, Chile, United Kingdom, Mexico, Liechtenstein, Sweden, Thailand, Brazil, Guyana, Suriname,; UNGA, Sixty-first Session 108th Plenary Meeting Thursday 13 September 2007, 3pm New York official records (13 September 2007) UN Doc A/61/PV.108 ('A/61/PV.108') See Statements of Myanmar, Namibia, Nepal, Indonesia, Philippines, Nigeria (abstained), Guatamala.

[87] A/61/PV.107 (n 31) see Statements of Argentina, Chile, United Kingdom, Norway, Jordan, Leichtenstein, Sweden, Thailand, Brazil, Guyana; A/61/PV.108 (n 86) see Statements of Iran, India, Namibia, Nepal, Pakistan, Turkey, Philippines, Nigeria (abstained), Egypt, Guatamala, France.

[88] Arnold N Pronto, 'Some Thoughts on the Making of International Law' (2008) 19 European Journal of International Law 601.

taken into account when interpreting any ambiguity that exists in the text.[89] The multiculturalist understanding of UNDRIP espoused by states who voted in support of UNDRIP is consistent with a narrower interpretation of FPIC, as only a duty to consult with the aim of reaching agreement. It is telling that even states who supported UNDRIP's adoption did not explicitly endorse FPIC as a right of veto, preferring to interpret it as a right to consultation consistent with an underlying adherence to human rights based multiculturalism and principles of democracy. For example, the representative of Sweden welcomed the adoption of UNDRIP, whilst stating that:

> *the Swedish Government firmly believes that the promotion of the human rights of indigenous individuals contributes to the maintenance and development of multicultural, pluralistic and tolerant societies, as well as to the creation of stable and peaceful democracies built upon effective participation by all groups in society .... article 32.2 shall be interpreted as a guarantee that indigenous peoples must be consulted, not as giving them a right of veto*. [90]

Furthermore, states who supported UNDRIP placed made further clarifications which narrow the interpretation of FPIC. For example, states confirmed that UNDRIP would be interpreted in a way that is consistent with existing domestic and international law[91] and noted its non-binding and aspirational nature.[92] Importantly, several states took the opportunity to reinforce their overriding control over sub-soil and other natural resources for use in the public interest,[93] and to interpret article 26 (on indigenous peoples' right to traditional lands, territories and resources) in a way that is consistent with property rights established in domestic law, including those of third parties.[94] For example, Suriname cited its Constitution in its explanation of vote, which sets out that

> *Natural riches and resources are property of the nation and shall be used to promote economic, social and cultural development. The nation shall have the inalienable right*

[89] Newman (n 40).
[90] A/61/PV.107 (n 31), 24. See also the statements by Norway, Finland, Suriname; A/61/PV.108 (n 86) see statements of Namibia and Guatemala which interpret the provisions in the Declaration in the light of existing duties to consult and/or the need for effective participation in decision-making.
[91] A/61/PV.107 (n 31) statements of Japan, Mexico, Sweden, Thailand, Guyana; A/61/PV.108 (n 86) statements of Iran, Namibia, Paraguay, Philippines, France.
[92] A/61/PV.107 (n 31) statements of United Kingdom, Guyana, Suriname; A/61/PV.108 (n 86) statements of Nepal, Indonesia, Turkey.
[93] A/61/PV.107 (n 31) statements of Colombia (abstained), Japan, Suriname; A/61/PV.108 (n 86) Philippines, Nigeria (abstained), Egypt.
[94] A/61/PV.107 (n 31) statements of Japan, Mexico; A/61/PV.108 (n 86) statement of Paraguay.

to take complete possession of the natural resources in order to apply them to the needs of the economic, social and cultural development of Suriname.[95]

Taken together, there is little in the explanations of vote to suggest that States intended Article 32.2 to confer a duty to obtain consent as a 'general rule', even in the context of extractive projects. On the contrary, there is much to suggest that they were intent on maintaining effective state control over land and natural resources, and to have the ultimate decision-making power over how to balance indigenous rights against the economic and development needs of all citizens.

This view is supported by those who take a more textual (rather than purposive) approach to interpreting UNDRIP. For example, Engle has commented that whilst indigenous peoples called for the right to FPIC, which is 'stronger than the right to consultation', they did not achieve this in the final text of UNDRIP. Stressing the words 'consult in order to obtain consent' in Article 32(2), and comparing it with the 1993 version of the draft declaration [which] recognized the right of indigenous peoples to require that states acquire their consent', Engle concludes that 'what was achieved was less than what was called for', and that 'consent is only the goal in UNDRIP'.[96] Furthermore, Xanthaki has commented that 'it is noteworthy that the text does not recognise explicitly a *right* to free, prior and informed consent',[97] and Newman has concluded that whilst there is no definitive definition of FPIC, the final text of Article 32 as well as the travaux préparatoires 'marks a move towards a textually more limited FPIC obligation than often thought in indigenous rights circles.'[98]

Indeed, Article 32 stands in contrast to Articles 10 (on relocation) and Article 29 (on storage of hazardous materials) which both make the need to obtain consent explicit. Luiz Chavez, the Chairperson of the WGDD, has confirmed his understanding of the meaning of Article 19 of UNDRIP, which uses the same formulation of 'consult in order to obtain consent'. Reflecting on the debates in the working group, he recalls:

Put simply, it was a question of establishing whether the declaration could recognise a right of veto in relation to state action or not. My assessment was that the WGDD could not accept this, neither for practical reasons nor reasons of principle. In practical terms, the state could not renounce either its powers or its responsibility when taking

[95] A.61/PV.107 (n 31), 27.
[96] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141.
[97] Xanthaki, 'Rights of Indigenous Peoples under the Light of Energy Exploitation Focus' (n 72)., 322.
[98] Newman (n 40)., 240.

decisions on issues of public order. And, in principle, the declaration could not recognise indigenous peoples preferential or greater rights than those granted to other members of society, as would be the case with a right of veto. The Chairman's proposals therefore established only an obligation regarding the means (consultation and cooperation in good faith with a view to obtaining consent) but not, in any way, an obligation regarding the result, which would mean having to obtain that consent.[99]

On the basis of this analysis, it seems that the 'general rule' approach was not the intention of states during the negotiation process or at its adoption. However, even if Article 32.2 is considered to be ambiguous in its ordinary meaning (which is not entirely self-evident), the subsequent practice of states does not support the assertion that consent must be obtained before approving projects on indigenous territories, at least for the moment.[100] The duty to consult (stopping short of obtaining consent) has been recognised as a 'general principle of international law', [101] whereas the duty to obtain FPIC has not. Furthermore, whereas many states require indigenous peoples to be consulted, only a tiny minority have implemented a requirement to obtain consent in national legal frameworks.[102]

The multiculturalist approach to FPIC is also apparent in the judgements of the IACtHR. The criteria imposed by the Court on permissible restrictions of rights (discussed above) echo the arguments put forward by Kymlicka, discussed in the previous chapter. Additionally, again echoing Kymlicka, the Court has explicitly recognised the public interest in maintaining diverse cultural identities within modern democratic societies,[103] and in a Joint Separate Opinion, Judges Antônio Augusto Cançado Trindade, Máximo Pacheco Gómez, and Alirio Abreu Burelli stated that cultural diversity is essential for realising human rights at national and

[99] Chavez (n 28)., 103-104.
[100] Notable exceptions to this are the Philippines and in Australia's Northern Territories. Both these jurisdictions have legislated to require FPIC to be obtained prior to the approval of extractive projects on indigenous territory. However, even these examples are imperfect, and in the main states are preferring legal frameworks that require consultation, but not a requirement for FPIC to be obtained. See Doyle (n 18). 194-201.
[101] James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 Arizona Journal of International and Comparative Law 7. At 7, Anaya states that the existence of a duty to consult was generally accepted by states in their contributions to the negotiation of the draft declaration, and that 'This widespread acceptance of the norm of consultation demonstrates that it has become part of customary international law.'; In the *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (n 80), the Court stated (at para 164) that 'the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law.'
[102] David Szablowski, 'Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice' (2010) 30 Canadian Journal of Development Studies / Revue canadienne d'études du développement 111. Doyle (n 18). 194-201.
[103] *Case of the Yakye Axa Indigenous Community v. Paraguay* (n 70) para 148; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Interpretation of the Judgement of Merits, Reparations and Costs Inter-American Court of Human Rights Series C No 142 (6 February 2006), particularly the Concurring Opinion of Judge A A Cançado Trindade, para 10.

international levels and that law must be interpreted accordingly.[104] What is more, the duty to consult has been directly linked to the practice of multiculturalism by the IACtHR. The Judgement in the case of the *Sarayaku People v Ecuador* states: 'Respect for the right to consultation of indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity...which must be assured, in particular, in a pluralistic, multicultural and democratic society.'[105]

What is more, in the case of the *Kaliña and Lokono Peoples v Suriname,* the Court has now controversially linked consultation directly to the right to participate in government under Article 23 of the American Convention, and in doing so has further positioned consultation as a facet of multicultural democracy.[106] The *Kaliña* case also provided an opportunity for the Court to support a more transformative interpretation of the relationship between indigenous peoples, the state and land, such as the principle of joint responsibility for land espoused by Borrows[107] and others, which was discussed in the previous chapter. The Court heard that Suriname had designated a part of the Kaliña and Lokono peoples' land as a nature reserve without adequate consultation. The Inter-American Commission requested that the Court require the state to either remove the 'nature reserve' status or to place the reserve under co-management with the Kaliña and Lokono peoples. The Court declined to do so, instead requiring the state to ensure that the existence of the reserves did not infringe the indigenous peoples rights without meeting the requirements of legality, necessity and proportionality, and the achievement of a legitimate purpose.[108] In doing so, the Court conformed to its multiculturalist approach, giving the state ultimate control of indigenous territories to the exclusion of more transformative alternatives that perhaps could realise indigenous self-determination more fully. As discussed in the previous section, such an approach places limits on indigenous peoples' ability to be

[104] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 1). See in particular the Joint Separate Opinion of Judges Antônio Augusto Cançado Trindade, Máximo Pacheco Gómez, and Alirio Abreu Burelli, para 14.

[105] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (n 80), para 159. See also *Case of the Case of the Community Garifuna Triunfo de la Cruz and its members* v *Honduras* Judgement of October 8, 2015 (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 305 (8 October 2015) paras 158, 261.; In *Case of the Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24 2010 (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 214 (24 August 2010), para 148, the Inter-American Commission argued that the Court must apply an indigenous understanding of how property is used when determining indigenous land rights. Failing this, 'would render the definition of Paraguay as a multicultural and multi-ethnic State illusory, eliminating the rights of thousands of individuals who inhabit Paraguay and enrich the country with their diversity'.

[106] *Case of the Kaliña and Lokono Peoples v Suriname* (n 75). In a contested judgement, the IACtHR used its *iuria novit* powers to decide that, in failing to adequately consult the Kaliña and Lokono Peoples on the continued existence of nature reserves and a mining site, Suriname had violated their right to participate in government under Article 23 of the American Convention on Human Rights. In the earlier *Case of the People of Sarayaku v Ecuador* (n 80), the Commission asked the Court to decide whether the State, in failing to consult, was in breach of Article 23 of the American Convention (right to participation), but the Court declined on the basis that the matter was dealt with adequately under Article 21.

[107] John Borrows, '"Landed" Citizenship: Narratives of Aboriginal Political Participation', *Citizenship in Diverse Societies* (Oxford University Press 2000).

[108] *Case of the Kaliña and Lokono Peoples v Suriname* (n 75), paras 274 and 286.

entirely self-determining. Furthermore, it sets indigenous rights firmly within the bounds of an overriding multicultural nation state.

Within this multiculturalist paradigm, the IACtHR has referred to FPIC as a safeguard of indigenous peoples' physical and cultural survival.[109] However, viewing FPIC as a safeguard in this manner could be criticised as a blunt instrument, which does not impose any meaningful additional duty on states beyond their existing duty to respect and protect human rights. Doyle notes that indigenous consent must always be consistent with the enjoyment of human rights, and must not be used by states to justify human rights violations.[110] If FPIC is only required at the higher end of the spectrum where impacts may threaten the physical or cultural survival of an indigenous people, it could be argued that the human rights obligations of states demand that they should not proceed with the project in any event. Thus the key determinant of the state's actions in such a situation would not be the absence of FPIC, but the fact that an unlawful human rights violation would occur if the state continues its proposed course of action. On this basis, it is questionable whether a principle of FPIC defined in such a way adds anything beyond a repetition of states' existing duties to protect and respect human rights.

5.5 Analysing the Multiculturalist Approach to FPIC

5.5.1 Decolonial analyses of the multiculturalist approach to FPIC

At first glance, multiculturalism and human rights seem to offer a great opportunity for the adoption of strong forms of FPIC. Proponents of the 'general rule' approach to FPIC have recognised the potential for multiculturalism and human rights to support stronger definitions of FPIC. For example, CERD's General Recommendation XXIII places a strong interpretation of FPIC within the framework of non-discrimination and the right of minorities to participate in the life of the state whilst maintaining their own cultures and traditions.[111] Anaya also has recognised the potential for multiculturalism and human rights to provide a firm legal basis for indigenous peoples' rights to cultural identity, land, autonomy and participation in decision-making, and has been a leading proponent of indigenous advocates adopting the human rights framework.[112] In his view, indigenous groups utilised the framework available to them and imbued it with indigenous ideals, providing 'hope of political ordering that simultaneously

[109] *Case of the Saramaka People v Suriname*, (n 39), paras 90, 129-13.
[110] Doyle (n 18)., 256.
[111] CERD, General Recommendation XXIII: Indigenous Peoples (18 August 1997) UN Doc CERD/C/51/misc 13/Rev 4., para 3.
[112] S James Anaya, 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State' (2004) 21 Arizona Journal of International and Comparative Law 13.; S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009).;

embraces unity and diversity on the basis of equality'.[113] To Anaya, the multicultural model of indigenous rights that was developed throughout the late 20th and early 21st century presents a challenge to the 'previously dominant Western conceptions of the culturally homogenous and legally monolithic state.'[114] Stavenhagen states 'The challenge now is to renew the usefulness of a people's right to self-determination in the era of democratic multiculturalism',[115] and Morgan cites 'an administrative culture unaccustomed to multiculturalism' as one barrier to implementation of UNDRIP.[116] The UN Permanent Forum on Indigenous Issues has commented, 'Many of the rights in the Declaration will require new approaches to global issues, such as development, decentralization and multicultural democracy.'[117]

These comments tend to position multiculturalism as part of the solution to successfully implementing UNDRIP. However, as the comment by UNFPII shows, these optimistic assessments require a reinvention of multiculturalism in a way that better reflects indigenous worldviews. As the analysis in the previous chapter demonstrated, liberal theorists of multiculturalism have not tended to engage deeply with indigenous political philosophies.

Furthermore, authors who take a decolonial approach to analysing FPIC have contested the assumption that multiculturalism and an emphasis on FPIC as democratic participation will result in the better inclusion of minorities in state decision-making, better protection of minority rights and the reduction of conflict.[118] Instead they argue that prior consultations not neutral spaces for dialogue between equals, but rather are top-down processes, controlled by the state.[119] As a result, they suggest that FPIC processes are significantly influenced by power asymmetries which reinforce the power of the state and constrain indigenous peoples' claims

[113] Anaya, 'International Human Rights and Indigenous Peoples' (n 112)., 61.
[114] ibid., 61.
[115] Rodolfo Stavenhagen, 'Making the Declaration Work' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA 2009)., 364.
[116] Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate 2011). ,159.
[117] UN Permanent Forum on Indigenous Issues, 'Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples' <https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> accessed 29 January 2021.
[118] Lisa J Laplante and Suzanne A Spears, 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector' (2008) 11 Yale Human Rights & Development Law Journal 69. Juliette Syn, 'The Social License: Empowering Communities and a Better Way Forward' (2014) 28 Social Epistemology 318.; Ana Maria Esteves, Daniel Franks and Frank Vanclay, 'Social Impact Assessment: The State of the Art' (2012) 30 Impact Assessment and Project Appraisal 34.; Syn.
[119] Esben Leifsen, Luis Sánchez-Vázquez and Maleny Gabriela Reyes, 'Claiming Prior Consultation, Monitoring Environmental Impact: Counterwork by the Use of Formal Instruments of Participatory Governance in Ecuador's Emerging Mining Sector' (2017) 38 Third World Quarterly 1092.; Marilyn Machado and others, 'Weaving Hope in Ancestral Black Territories in Colombia: The Reach and Limitations of Free, Prior, and Informed Consultation and Consent' (2017) 38 Third World Quarterly 1075.; Jessie Shaw, 'Indigenous Veto Power in Bolivia' (2017) 29 Peace Review 231.; Gisela Zaremberg and Marcela Torres Wong, 'Participation on the Edge: Prior Consultation and Extractivism in Latin America' (2018) 10 Journal of Politics in Latin America 29.

to self-determination within weak bureaucratic administrative procedures.[120] According to these authors, FPIC is principally used as a mechanism to legitimise extractivist development policies and neutralise indigenous dissent, at the expense of transformational and collaborative reform of institutions and economic development policies.[121] Consequently, several authors have questioned whether FPIC can lead to reductions in conflict, in the absence of institutional reform and the resolution of underlying grievances.[122]

One leading proponent of this view is Rodríguez-Garavito, who is deeply pessimistic about how states are adopting the duty to consult and FPIC within a framework of multiculturalism. He views the development of the international legal principle of FPIC as only one part of an international

> *process comprised of the global juridification of difference—a process that I have termed ethnicity.gov—which reflects the dominant type of multiculturalism and governance that dominates in the era of neoliberal globalization … FPIC's rise and impact in regulations and disputes about indigenous rights have been so profound that instead of merely constituting a legal figure, it entails a new approach to ethnic rights and multiculturalism, with its own language and rules*.

Far from this being a positive development from the perspective of indigenous peoples, Rodriquez-Garavito cautions that the approach of states to FPIC will hamper its success. Based on his observations of FPIC consultation processes in Colombia, Rodriguez-Garavito identifies five common flaws which he considers derive from the interpretation of FPIC through the multicultural governance paradigm: (a) consultation processes become focused on agreeing procedure, rather than resolving substantive issues (b) the process is dominated by miscommunication, due to 'a discursive clash, in which claims and different kinds of

[120] Szablowski (n 102).; Roger Merino, 'Re-Politicizing Participation or Reframing Environmental Governance? Beyond Indigenous' Prior Consultation and Citizen Participation' (2018) 111 World Development 75.; Roger Merino, 'The Cynical State: Forging Extractivism, Neoliberalism and Development in Governmental Spaces' (2020) 41 Third World Quarterly 58.

[121] César Rodríguez-Garavito, 'Ethnicity.Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Indiana Journal of Global Legal Studies 263.; Rachel Sieder, '"Emancipation" or "Regulation"? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala' (2011) 40 Economy and Society 239.; María del Carmen Suescun Pozas, Nicole Marie Lindsay and María Isabel du Monceau, 'Corporate Social Responsibility and Extractives Industries in Latin America and the Caribbean: Perspectives from the Ground' (2015) 2 The Extractive Industries and Society 93. Leah Temper, 'Blocking Pipelines, Unsettling Environmental Justice: From Rights of Nature to Responsibility to Territory' (2019) 24 Local Environment 94.

[122] George Stetson, 'Oil Politics and Indigenous Resistance in the Peruvian Amazon: The Rhetoric of Modernity Against the Reality of Coloniality' (2012) 21 Journal of Environment & Development 76. Maria A Guzman-Gallegos, 'Conflicting Dilemmas: Economic Growth, Natural Resources and Indigenous Populations in South America' (NOREF Norwegian Peacebuilding Resource Centre 2014).; Almut Schilling-Vacaflor and Riccarda Flemmer, 'Conflict Transformation through Prior Consultation? Lessons from Peru' (2015) 47 Journal of Latin American Studies 811.; Merino, 'Re-Politicizing Participation or Reframing Environmental Governance?' (n 120).

knowledge, based on radically distinct epistemological roots, get crossed.'[123] (c) differences of opinion develop on what are proper subjects for discussion, and what the appropriate normative framework should be; (d) power asymmetries are reproduced in the agreements reached, further legitimising existing hierarchies of power; (c) opportunities arise for indigenous peoples to mobilise support and to use procedural and legal tactics in order to delay or stop projects from proceeding. and generating processes of mobilisation.[124]

All of these effects call into question the capacity of FPIC processes to build harmonious relations and reduce conflict. Rodriguez-Garavito himself characterises FPIC as 'a last recourse—a last inconvenience in the way of death—to which indigenous peoples cling in the face of all odds, as the Colombian Embera communities continue to do in their struggle against collective annihilation.'[125] This characterisation of FPIC presents a picture of FPIC that is miles away from the aspirational spirit of UNDRIP to bring about indigenous self-determination and a harmonious relationship with the state.

5.5.2 Applying indigenous critiques of human rights based multiculturalism

This section analyses the text of Article 32 with reference to the critiques of Kymlicka's human rights based multiculturalism that were explored in Chapter 4, from the perspective of achieving epistemic justice, transforming colonial imbalances of political power, as well as challenging the imbalance of economic power. As discussed in Chapter 4, transformation of power imbalances is closely tied to the understanding of what citizenship is, and how indigenous peoples and states relate to the land.

The content of UNDRIP is largely consistent with Kymlicka's framework of human-rights based multiculturalism, containing group-differentiated rights that enable indigenous peoples to live in accordance with their own customs and traditions, in the context of a wider nation state. It provides indigenous people with the three categories of rights that Kymlicka identified: self-government rights, including collective rights to land, autonomy and the right to maintain their own institutions; special representation rights, ensuring indigenous peoples have a voice in the legal and administrative matters that may affect their rights; and polyethnic rights, enabling them to participate in the life of the state free from discrimination.[126] The 'dual aspect' approach

[123] Rodríguez-Garavito (n 121)., 295.
[124] ibid.
[125] ibid., 305.
[126] These polyethnic rights fall outside of the scope of this chapter and so are not discussed in detail here. However, they include Articles 2 and 9 which confirm that indigenous peoples and individuals have the right to be free from discrimination; Article 5 confirming indigenous peoples' 'right to participate fully, if they so choose, in the political, economic, social and cultural life of the State'; Article 13 protecting the right to indigenous languages and to

to the right to self-determination described in Chapter 3 centres on two of Kymlicka's group-differentiated rights – self-government (or 'autonomy') and special representation ('participation'). Article 32 provides a particular type of special representation right for national minorities that Kymlicka himself supported in some cases.[127]

In justifying the group-differentiated rights contained in its text UNDRIP draws from both the liberal discourse of individual human rights, as well as collective rights, which are advocated both by indigenous peoples and Kymlicka. The discomfort expressed by states in relation to many of its provisions – and particularly Articles 3 and 32 - is testament to the ability of indigenous representatives to push the boundaries of liberal multiculturalism. However, in doing so they uncovered its limits - an immovable commitment to the ultimate power of the state, and the inability - or unwillingness - of states to imagine alternatives for a more equal relationship with indigenous peoples.

It could be said that during negotiations, indigenous representatives were acting in a manner consistent with Dale Turner's 'word warriors', seeking to reconcile indigenous values with the principles and terminology of international law.[128] However the debates the WGIP, WGDD and UNGA suggest that Coulthard[129] was right to worry about the dangers of engaging in asymmetric processes of dialogue that require indigenous peoples to articulate their claims in liberal - rather than indigenous - terms. As Chapter 3 demonstrated, a dialogue based on established principles of international law led to the narrowing of options for indigenous self-determination, and reinforced the dominant political power structures and normative frameworks. In matters relating to self-determination, PSNR and FPIC, indigenous representatives were forced to argue in the existing logic of international law, with the result that the final text was watered down in such a way as to remove the most transformative elements of the original draft. The text of Article 32 seems to place control of the process in the hands of the state, providing cause for concern that FPIC consultations will themselves

'understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means'; Article 15 requiring states to ensure that education and public information upholds the dignity of indigenous cultures and traditions and promotes tolerance and non-discrimination; and Article 16, which requires that indigenous people have access to non-indigenous media and to take appropriate and effective measures to ensure that public and private media reflect indigenous cultural diversity. UNDRIP, UNGA Res 61/295 (13 September 2007).

[127] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995)., 109,110, 126.

[128] This approach is evident in Erica-Irena Daes' explanations of the concept of 'internal self-determination' and indigenous PSNR which were relied on to achieve the recognition of indigenous self-determination and rights to land, territories and resources. UNCHR (Sub-Commission) Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur Erica-Irene A. Daes (13 July 2004) E/CN.4/Sub.2/2004/30.

[129] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University Of Minnesota Press 2014). See Chapter 3 for discussion.

become state-centric processes in which indigenous peoples must argue using the logic of the state, rather than their own worldviews, and hence be at a disadvantage.

The analysis in Chapters 3 and 4 also highlighted the need to transform the balance of economic power if reconciliation is to be achieved. Indigenous representatives ensured that UNDRIP does not only focus on civil and political rights and the right to culture, but also protects indigenous peoples' material wellbeing by upholding indigenous peoples' right to develop their own economic systems and their own priorities for development,[130] as well as the right to the improvement of their economic and social conditions.[131] In this regard, it could be argued that UNDRIP succeeds where Kymlicka's model fails, in combining cultural recognition with elements of material redistribution[132] to tackle both cultural and economic inequality. However, as detailed above, UNDRIP's provisions on land rights do not recognise indigenous peoples' material relationship to land, their legal systems nor their traditional institutions for land management, and the discussion on PSNR assumed that states would control resources that were not part of traditional indigenous use – meaning that subsoil resources are generally considered to be owned by states, and not indigenous peoples. This only reinforces the existing imbalance of economic power.

Thus Article 32 operates within the context of a right to self-determination that supports the human rights multiculturalist approach and constrains both indigenous political and economic power and incorporates indigenous peoples under the authority of the state. This is significant for FPIC because it provides the state or the courts with ultimate authority to decide when consent is required, applying their own legal frameworks and worldviews to the decision-making process. Furthermore, the state retains ultimate control over indigenous land and natural resources for the benefit of the nation as a whole. This makes it unlikely that FPIC will prompt states to fundamentally reconsider their relationship to indigenous peoples or the environment in the way that authors such as Borrows have advocated.

Indeed it is clear from both the negotiations at the WGDD and General Assembly, and the resulting compromises in the text, that states were not open to considering new models of

[130] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 23.

[131] Ibid., Art 21.1 states:

> *Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.*

[132] Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age, I/212, July–August 1995' 1 New Left Review 68.

citizenship or partnering to jointly steward land. Instead, as discussed in section 5.1 above, they remained preoccupied with the imperative to be able to take unilateral decisions about how national resources should be deployed in the national interest. Consistent with Kymlicka's model, Article 32 may provide indigenous peoples with an opportunity to influence specific projects that may affect their rights, but a multiculturalist interpretation reinforces the power of the state to take decisions unilaterally, according to its own logic and on the basis of weighing the different interests within the state. Furthermore, all but the most extreme interpretation of the 'general rule' approach does not help indigenous peoples where states' wider development priorities systematically and repeatedly impinge on the ability of indigenous peoples to live in accordance with their own customs and traditions. This might occur, for example, through a succession of small projects whose cumulative impacts have a significant impact.

During negotiations, states insisted on framing their relationship with indigenous peoples by incorporating them into the democratic multicultural state,[133] rather than recognising their 'extra-legal character'. Even the countries which do recognise treaty-based relationships with indigenous peoples to some extent, such as New Zealand and Canada, proved unable to consider the approach of 'citizens plural' during the negotiations. In the discussions on FPIC, several states objected on the basis that FPIC would lead to 'different classes of citizenship'.[134] New Zealand's comment, which dismissed Article 26 because it could apply to the entire territory,[135] is particularly telling - it seems to suggest that states to some extent recognise the potentially unjust and contested means by which they hold power, but consider it too risky to engage in discussions which could prove transformative to the relationship between indigenous peoples and the state.

Analysing UNDRIP from the perspective of indigenous critiques of multiculturalism suggests caution in adopting a multiculturalist approach of FPIC as a tool for reconciliation. It suggests that indigenous worldviews and legal systems may be given less weight than established principles of international law, or domestic legal frameworks, and puts doubt on the potential of FPIC to provide epistemic justice. Additionally, it reveals that this conceptualisation of FPIC is rooted in a form of self-determination which constrains the ways in which indigenous peoples can interpret their relationship with the state. It is therefore questionable whether FPIC can help to solve the sovereignty/self-determination conflict which persists as the root cause of antagonism between indigenous peoples and the state. Finally, UNDRIP does not enable indigenous peoples to have full control over their natural resources, nor does it enable them

[133] UNDRIP, UNGA Res 61/295 (13 September 2007)., Art 46(2).
[134] UN Doc. A/61/PV.107 (n 31), 14. Statement of New Zealand.
[135] Ibid.,14.

to challenge the wider developmental strategy of the state that results in the frequent need for projects on indigenous territories

5.6 Conclusion

The analysis above shows that two very different interpretations of FPIC are emerging in the context of the extractives sector: a 'general rule' approach which emphasises indigenous self-determination and considers that consent must be obtained for the vast majority of extraction projects; and a 'multiculturalist approach' which emphasises the need for the state to take unilateral decisions in the interests of equality and non-discrimination within the context of a multicultural, democratic state. Whilst indigenous peoples and their supporters prefer the former view, states have adopted the latter.

The ambiguity in Article 32.2 and the wide range of subsequent interpretations poses a problem for its implementation. There appears to be a significant possibility that contrasting interpretations of FPIC will lead to a conflict over how individual FPIC processes should be managed, over their specific objectives, and what the implications of a lack of consent should be on the continuation of proposed projects. States are the primary makers of international law, and will also exercise the vast majority of control over whether, and how, UNDRIP will be implemented in practice. Therefore, it seems reasonable to assume that FPIC will generally be implemented by states within a human rights multiculturalist framework as opposed to one that emphasises indigenous self-determination. However, such an implementation may not satisfy indigenous peoples who emphasise the self-determination element of FPIC and expect to have their decisions respected. Rather than reducing conflict, states' and indigenous peoples' different expectations of FPIC could lead to an additional layer of conflict in the already tense context of projects being proposed on indigenous lands. Furthermore, rather than positioning indigenous peoples and states as partners in stewarding the land, current approaches to the interpretation of FPIC place states and indigenous peoples as opponents who both claim the right to 'veto' the other sides' development objectives.

Chapter 3 argued that in choosing to utilise international legal principles to further their claim for self-determination, the indigenous delegates were unable to significantly alter dominant power structures and normative frameworks in which indigenous peoples are positioned as minority groups within a superordinate nation state. In the discussions on free, prior and informed consent and the related issues of rights to land and natural resources examined in this chapter, states doubled down on a human rights multiculturalist approach to ensure that they retained the upper hand, rather than contemplating alternative ways of relating with

indigenous peoples that might challenge the *status quo*. From this analysis, it appears that warnings about the limitations of multiculturalism and the human rights paradigm seem to be well-grounded.

The next two chapters focus on the implementation of FPIC in Peru and Canada, examining whether FPIC is being implemented in a manner that reinforces the multicultural paradigm and limits the options for indigenous self-determination, or whether indigenous peoples are able to utilise even the weak provision on FPIC to further their claims to self-determination. This chapter has raised important questions in this regard. For example, will such consultations embrace or undermine indigenous epistemologies, institutions and legal systems? In evaluating the impacts of projects in indigenous territory, whose views will be authoritative? When determining whether an infringement of indigenous rights to land is legal, necessary, proportionate, and for a legitimate purpose, whose legal principles will prevail? If states can infringe indigenous rights in order to pursue the national interest, how is that interest decided - on what grounds, by and for whom, and in accordance with whose values? The answers to these questions in practice will determine whether FPIC could become a blunt tool which repeats historic injustices, or a catalyst to reimagine a more harmonious relationship between indigenous peoples and states.

Chapter 6: The Implementation of FPIC in Peru

6.1 Introduction

This thesis has so far argued that reconciliation depends on states' recognition of indigenous self-determination, and that indigenous critiques argue that the liberal model of human rights-based multiculturalism – which informs UNDRIP - fails to enable indigenous self-determination in its fullest form, instead limiting it to a narrow definition. In the same way, the dominant interpretation of free, prior and informed consent as enshrined in UNDRIP is consistent with human rights based multiculturalism and a narrow understanding of the right to self-determination. This stands in contrast to many indigenous people's expectations of how free prior and informed consent should be put into practice as an expression of indigenous self-determination in its fullest form. The analysis thus far conducted in the thesis seems, therefore, to suggest that, instead of acting as a tool for reconciliation, FPIC may well result in an additional layer of conflict between indigenous peoples and states. To further test this hypothesis, the next two chapters will focus on two case-studies with a view to revealing how this potential conflict surrounding FPIC could unfold/materialise, particularly in relation to the questions of how consultations should be conducted, what their purpose is, and what should happen in the absence of indigenous consent.

The next two Chapters of this thesis will examine whether FPIC is being conceived differently by states and indigenous peoples in practice, and what the implications are for its potential to bring about reconciliation. They will do so by considering two countries - Peru (in this chapter) and Canada (in the next) which have taken an approach to FPIC that is similar in many ways to the multiculturalist approach to Article 32 UNDRIP that was described in the previous chapter. Chapters 6 and 7 are not intended to provide a comparative analysis, but to provide an assessment of the way that FPIC is being implemented in practice, in two countries which can be said to subscribe to human rights based multiculturalism. The purpose of this assessment is to identify whether the critiques of the multiculturalist approach, developed in chapters 3 to 5, are evident in the practice of FPIC and thus constraining its potential as a tool for reconciliation on the ground.

These two countries have been chosen for the following reasons: first, both countries have indicated their support for UNDRIP. Whilst Peru was a vocal supporter from the beginning, proposing the draft declaration for adoption at UNGA, Canada's support evolved gradually up

to 2016 when it indicated its unqualified support. Secondly, both countries are multicultural democracies with a history of European colonisation and relatively advanced legal frameworks on indigenous peoples' rights. Thirdly, both countries have histories in which indigenous people have suffered from severe violations of their rights, resulting in a relationship of conflict with the state. Finally, in both cases, UNDRIP – including FPIC – is viewed as a means of reducing conflict and promoting reconciliation.

The first section of this chapter will set out the background to the development of Peru's Prior Consultation Law, and provide an overview of its main provisions, arguing that it replicates the multiculturalist interpretation of FPIC that was discussed in Chapter 5. The second section reviews three illustrative examples of prior consultation processes in relation to three mining projects with original communities in the Andes. These examples have been carried out through desk-based research of state and indigenous government reports and statements, commentary by non-governmental organisations, and contemporary newspaper and social media reports. The final section will analyse the reconciliatory potential of FPIC in Peru, with reference to the critique of the multiculturalist approach to FPIC developed in the previous chapter: the lack of epistemic justice during the process; its inability to challenge established hierarchies of power and create more equal relations between the state and indigenous peoples; and the need to transform the balance of economic power if reconciliation is to be achieved.

6.2 Peru's Law on Prior Consultation

6.2.1. Background

Peru's Law on Prior Consultation is celebrated as an example to other countries,[1] and Peru has been at the forefront of international legal developments on indigenous rights ratifying ILO C169 on 02 Feb 1994;[2] playing a key role in negotiating the draft Declaration with the African Union; and introducing the draft Declaration for adoption at UNGA. Peru has a sizable indigenous population, with 55 recognised indigenous and original peoples - 4 in the Andes

[1] Riccarda Flemmer, 'Prior Consultation as a Door Opener: Frontier Negotiations, Grassroots Contestation, and New Recognition Politics in Peru' in Claire Wright and Alexandra Tomaselli (eds), *The Prior Consultation of Indigenous Peoples in Latin America : Inside the Implementation Gap* (1st edn, Routledge 2019).

[2] 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (*International Labor Organization*) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314> accessed 16 December 2020.

and 51 in the Amazon.[3] In Peru's 2017 census, 22.3% of those over 12 years of age self-identified as Quechua, and 3.6% as part of an indigenous or original people, with 16.4% of the population speaking Quechua, Aymara or another indigenous language as their mother tongue. Furthermore 60.2% self-identified as mestizo[4] - a mixture of indigenous and European heritage.

Peru has been described as a weak state that has not been able to successfully navigate multicultural integration or equally guarantee political participation for all its citizens.[5] Historically, indigenous people in Peru have suffered from poverty, discrimination, and denial of basic rights.[6] Policies of 'mestizaje' were used as a demographic tool to remove their 'backwards' cultures, so that Andean and coastal communities became more integrated with the wider population and became known as 'peasants', with only the more isolated Amazonian populations being thought of as truly 'native'.[7] In 1993, following a military-backed 'self-coup' in 1990, President Fujimori introduced a new Constitution[8] which recognised the ethnic and cultural plurality of Peru's population. It secured important rights for indigenous people, individually and as collectives, including the right to ethnic and cultural identity;[9] the right to interpreters when communicating with the state and the recognition of indigenous languages as official languages in their regions of use;[10] the recognition of indigenous and peasant communities as legal persons, with inalienable rights over land, and the right to economic, administrative and jurisdictional autonomy, within the bounds of Peruvian Law.[11] However, Acuna has argued that the Constitution fell short of a decolonial approach, in that it did not recognise indigenous communities as nations, did not grant full self-determination, and retained for the state the rights over sub-soil natural resources.[12] Nor was the approach of the Constitution fully inter-cultural: Ilzarbe comments that whilst it made an attempt to

[3] 'Lista de Pueblos Indígenas u Originarios' (*BDPI*) <https://bdpi.cultura.gob.pe/pueblos-indigenas> accessed 17 October 2020.
[4] 'Peru: Perfil Sociodemografico: Informe National Censuss Nacionales 2017: XII de Poblacion, VII de Vivienda y III de Comunidades Indigenas' (Insituto Nacional de Estatistica e Informatica 2018) <https://www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitales/Est/Lib1539/libro.pdf> accessed 16 December 2020.
[5] Juan Pablo Sarmiento Barletti and Lexy Seedhouse, 'The Truth and Reconciliation Commission and the Law of Prior Consultation: Obstacles and Opportunities for Democratization and Political Participation in Peru' (2019) 46 Latin American Perspectives 111.
[6] Cynthia A Sanborn and Alvaro Paredes, 'Getting It Right? Challenges to Prior Consultation in Peru' (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, The University of Queensland, Australia 2015) Occasional Paper <https://www.csrm.uq.edu.au/media/docs/1141/occassional-p-series-sanborn-paredes-peru.pdf> accessed 16 December 2020.
[7] Jacob Fried, 'The Indian and "Mestizaje" in Peru' (1961) 20 Human Organization 23.
[8] Constitución Política del Perú de 1993.
[9] ibid., Art 2.19.
[10] ibid., Arts 2.19 and 48.
[11] ibid., Arts 89 and 149.
[12] Roger Merino Acuna, 'Coloniality and Indigenous Territorial Rights in the Peruvian Amazon: A Critique of the Prior Consultation Law' (University of Bath, Centre for Development Studies (CDS) 2015) Working Paper 38.

accommodate cultural difference, it did not require the design, evaluation and implementation of public policy in partnership with indigenous representatives, or redesign the institutions of state to balance unfair economic, social and political structures.[13]

Despite these reforms and its vocal support for indigenous rights on the international stage, Peru did not implement prior consultations for policies, legislative proposals or projects which affected indigenous people following its ratification of ILO C169.[14] Such consultations as did occur were primarily conducted privately by companies, generally in a superficial manner. Consequently, the indigenous communities conducted anti-extraction protests and referenda to voice their lack of consent to development on their territories.[15] In 2009, President Garcia attempted to implement Peru's Free Trade Agreement with the USA through a series of legislative decrees which provided access to the Amazon for oil and gas extraction and logging, without consulting indigenous peoples.[16] Indigenous activists joined forces with environmentalists and labour groups in protest,[17] and indigenous peoples were portrayed as 'dogs in the manger', who refused to make use of Peru's natural wealth or allow others to benefit from it.[18]

In April 2009, the indigenous organisation AIDESEP[19] declared a national strike to protest the decrees, and the government declared a national emergency. Negotiations between indigenous representatives and the Public Ombudsman's office ultimately failed when on 4th June 2009 the ruling ADRP party blocked a vote on Legislative Decree 1090, preventing its repeal.[20] On 5 June 2009, violence erupted when the army and police attempted to clear thousands of indigenous and mestizo protestors blocking the 'Devil's Curve' highway near

[13] Carmen Ilizarbe, 'Intercultural Disagreement: Implementing the Right to Prior Consultation in Peru' (2019) 46 Latin American Perspectives 143. Ilizarbe argues that interculturality would require, in addition, initiatives to change social discourse which is discriminatory and exclusionary.
[14] Sanborn and Paredes (n 6).
[15] Almut Schilling-Vacaflor and Riccarda Flemmer, 'Conflict Transformation through Prior Consultation? Lessons from Peru' (2015) 47 Journal of Latin American Studies 811.
[16] ibid. This action was in contravention of indigenous rights enshrined in the Constitution and ILO C169 and in some cases, in defiance of Congress who had previously vetoed similar legislation.
[17] Amelia Alva-Arévalo, 'A Critical Evaluation of the Domestic Standards of the Right to Prior Consultation under the UNDRIP: Lessons from the Peruvian Case' (2019) 23 The International Journal of Human Rights 234.
[18] These slogans simplified and politicised the complex questions about development in Peru, and blamed the socioeconomic challenges of Peru on those wishing to preserve the Amazon and traditional ways of life, pitting '400,000 natives' against '28 million Peruvians'. Thus opposition to extractivist economic development was equated with being against the national interest. Barletti and Seedhouse (n 5). See also Peter Bille Larsen, '"The Dog in the Manger": Neoliberal Slogans at War in the Peruvian Amazon' in Nicolette Makovicky, Anne-Christine Tremon and Zandonai Sheyla S (eds), *Slogans: Subjection, Subversion, and the Politics of Neoliberalism* (Routledge 2019).
[19] 'AIDESEP' <http://www.aidesep.org.pe/> accessed 16 December 2020.
[20] Neil Hughes, 'Indigenous Protest in Peru: The "Orchard Dog" Bites Back' (2010) 9 Social Movement Studies 85. See also George Stetson, 'Oil Politics and Indigenous Resistance in the Peruvian Amazon: The Rhetoric of Modernity Against the Reality of Coloniality' (2012) 21 Journal of Environment & Development 76. for a description of the content of the legislative decrees, and how it is based in a modernity/coloniality logic which undermines indigenous epistemological claims to land, and supports political and economic control of indigenous territory by the state.

Bagua, 600 miles north of Lima. Hundreds being injured and at least 33 died - including 23 police, 11 of whom were executed, and 5 indigenous protesters although unofficial reports suggest the indigenous death toll was far higher.[21]

In the immediate aftermath, the Baguazo massacre was blamed on indigenous extremists and foreign anti-Peruvian influences.[22] However, due to international condemnation and national solidarity protests between workers, peasants, indigenous people and students, President Garcia suspended the highly unpopular decree LD1090[23] and reopened negotiations.[24] The UN Special Rapporteur on the Rights of Indigenous Peoples visited Peru and offered to help mediate the conflict and the Prime Minister resigned over the government's handling of the matter.[25] On 18th June 2009, Congress repealed two of the most contentious legislative decrees - LD1064 and LD1015[26] - and admitted that failure to consult was a key cause of the conflict.[27] The blockades ended, but indigenous organisations continued to call for the recognition of indigenous territorial rights. In view of the ongoing tension, the Public Ombudsman proposed national legislation be devised to implement the right to prior consultation.

6.2.2 Two divergent interpretations of FPIC in the negotiations of the Law on Prior Consultation

The proposed text of the draft Law on Prior Consultation stated that it was intended as a normative framework to fulfil the right to consultation, as enshrined in ILO C169 as well as

[21] Hughes (n 20). It should be noted that unofficial reports suggest more than fifty indigenous protestors were killed, and that police disposed of bodies to conceal the killings.
[22] ibid.; Schilling-Vacaflor and Flemmer (n 15).
[23] Decreto Legislativo No 1090 que aprueba la Ley Forestal y de Fauna Silvestre 2008.
[24] According to Ilizarbe (n 13)., the development of the law on prior consultation was part of a wider call on behalf of environmental, human rights and indigenous movements towards participatory democracy, resulting in an effort to counter growing social conflict with dialogic mechanisms - for example procesos de concertación (deliberation and consensual decision processes), mesas de desarrollo (development roundtables), and presupuestos participativos (participatory budgets).
[25] 'Yehude Simon, Peru's Prime Minister, Will Resign' (*the Guardian*, 17 June 2009) <http://www.theguardian.com/world/2009/jun/17/yehude-simon-peru-resign> accessed 9 January 2021.
[26] Decreto Legislativo No 1015 que unifica los procedimientos de las comunidades campesinas y nativas de la sierra y selva con las de la costa, para mejorar su producción y competitividad agropecuaria 2008.; Decreto Legislativo No 1064 que aprueba el régimen jurídico para el aprovechamiento de las tierras de uso agrario 2008. Indigenous organisations decried these Decrees due to their limiting effect on indigenous peoples' collective land rights and right to consultation. For example, LD 1015 facilitated the transfer of indigenous land to private ownership by requiring a simple majority of community members to vote in favour, instead of a 2/3 majority as previously required. LD 1064 removed rights to consultation and consent in the case of land use for projects concerning mining or oil and gas. See Hughes (n 20).
[27] Hughes (n 20). The UN Special Rapporteur later highlighted the failure of the state to consult as a key factor in the escalation of violence. See S James Anaya, 'Observaciones Sobre La Situación de Los Pueblos Indígenas de La Amazonia y Los Sucesos Del 5 de Junio y Días Posteriores En Las Provincias de Bagua y Utcubamba, Perú' (2009) UN Doc. A/HRC/12/34/Add.8.

UNDRIP. The draft Law on Prior Consultation was discussed in a dialogue table with indigenous organisations,[28] in which government representatives sought to narrow the scope and application of prior consultation, whilst indigenous representatives fought to emphasise the standards of UNDRIP to ensure that the Law was widely applicable and included a requirement to obtain consent where measures directly affected indigenous territories.[29]

Although it made clear that free, prior and informed consent was not intended to constitute a right of veto, the draft did require that consent be obtained in specific circumstances: in the case of relocation of indigenous peoples, for storage or dumping of toxic waste, and administrative, legislative or project measures that would have 'an impact on their lands, territories or other resources, particularly in relation with the development, the use or the exploitation of natural resources'. The government refused to countenance a duty to obtain FPIC in the latter case, highlighting the non-binding nature of UNDRIP and stating that it could not endorse in a binding manner a guideline or policy that did not fall within the scope of Peru's own internal legal framework.[30] The indigenous representatives affirmed the proposed text, saying 'it should be taken into account that [it] … refers to the serious impact on lands, territories and other resources, based on what is stated in paragraphs 135 and 137 of the IACHR judgment Saramaka people vs. Suriname'.[31] Thus whilst indigenous representatives considered that the state should respect their right to say no in the case of major development projects, the state viewed FPIC as only an objective in the consultation process. This mirrors the division between indigenous and state interpretations of FPIC at the United Nations, discussed in the previous chapter.

6.2.3 The triumph of the 'multiculturalist' approach

The final draft of UNDRIP, consisting of 43 articles, was submitted to Congress on 9 April 2010. Following intense debate, it passed as an abbreviated version of 20 articles on 19 May that year. The issues which the dialogue table had been unable to agree on were either

[28] The GNCDPA Grupo Nacional de Coordinación para el Desarrollo de los Pueblos Amazónicos (National Coordination Group for the Development of Amazonian Peoples, GNCDPA), established 11 June 2009 to facilitate dialogue. The GNCDPA was presided over by the Minister of Agriculture and was comprised of government officials from other ministries, members of regional governments and representatives of Amazonian communities. It oversaw four dialogue tables: to investigate the Baguan Massacre (Mesa 1), to improve the contested decrees and reform the forestry legislation (Mesa 2), to draft a law on prior consultation (Mesa 3), and to negotiate a development plan for the Amazon region (Mesa 4). See Schilling-Vacaflor and Flemmer (n 15).
[29] 'Documento Final de La Mesa 3 "Sobre El Derecho de Consulta"' (Grupo Nacional de Coordinacion para el Desarrollo de los Pueblos Amazonicos) <http://www.servindi.org/pdf/Mesa_Dialogo_3.pdf> accessed 16 January 2021.
[30] ibid. See in particular commentary on draft articles 1.2, 2b) and 19.2
[31] ibid. See indigenous response on draft article 19.2, translation author's own.

removed from the draft, left vague, or resolved in the governments' favour.[32] In its final form, the Law references only ILO C169, and states:

> *The purpose of the consultation is to reach an agreement or consent between the State and indigenous or original peoples regarding legislative or administrative measures that directly affect them, through an intercultural dialogue that ensures their inclusion in the State's decision-making processes and the adoption of measures that respect their collective rights*.[33]

Furthermore, it does not require consent to be obtained in any situation, and in the event that consent is not forthcoming, the state is permitted to proceed but must 'adopt all measures that are necessary to guarantee the collective rights of the indigenous or original peoples and the rights to life, integrity and full development.'[34] In this respect, the Law on Prior Consultation interprets FPIC in line with a multiculturalist approach, as discussed in the previous chapter. Whilst the state maintains control over decision-making, it must operate this responsibility in a way that includes indigenous peoples in the decision-making process and protects their rights.

Despite its shortcomings, indigenous organisations supported the law, as the best possible outcome under the circumstances. However, President Garcia vetoed the law, insisting that it should uphold the 'national interest' as the overriding criterion for government decisions, raising concerns about the chilling effect it would have on foreign investment, and arguing that only Amazonian indigenous communities with formal title to land should have consultation rights, to the exclusion of Andean and coastal peasant communities.[35] Protests in October and December 2010 followed; and the draft law was left in limbo as the country turned to focus on its elections.[36]

In September 2011, one of the first acts of the newly-elected President Humala was to sign the Law on Prior Consultation (which had been unanimously passed by Congress) at a public

[32] Schilling-Vacaflor and Flemmer (n 15).; see also Acuna (n 12). for more critique of the Law on Prior Consultation.
[33] Ley No 29785 - Ley del Derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) 2011.
[34] ibid. Art 15, translation author's own.
[35] Oficio N° 142–2010-DP/SCM Observaciones a la autógrafa de la 'Ley del derecho a la consulta previa a los pueblos indigenas u originarios reconocido en el Convenio Num. 169 de la Organización Internacional del Trabajo' 2010. Presidente de la República del Perú, Oficio N° 142–2010-DP/SCM. Observaciones a la autógrafa de la 'Ley del derecho a la consulta previa a los pueblos indigenas u originarios reconocido en el Convenio Num. 169 de la Organización Internacional del Trabajo'. Delgado-Pugley, Deborah, 'Contesting the Limits of Consultation in the Amazon Region: On Indigenous Peoples' Demands for Free Prior and Unformed Consent in Bolivia and Peru' (2013) 43 Revue Generale de Droit 151.
[36] Schilling-Vacaflor and Flemmer (n 15).

ceremony attended by indigenous representatives near the site of the Bagua Massacre. Humala promised to take a different approach to indigenous matters than that of his predecessor, in order to build a 'great republic that respects all its nationalities.' He asserted the law was a new step in cultural relations, recognising the 'sovereign will' of indigenous peoples, and the need for joint problem-solving on the development question, in order to remove conflict and establish peace through dialogue, for the benefit of all the population and nature. He also argued that the Law on Prior Consultation would in fact increase foreign investment due to a reduction in social conflict around extractive activities.[37] These words reflected many of the concerns of those who adhere to the 'general rule' approach, reflecting recognition of self-determination, and the need for a relationship of equals. However, this sentiment was not reflected in the content of the Law nor its Regulatory Decree.

There followed a six-month meta-consultation on a Regulatory Decree presented by the Viceministry of Interculturality, and headed by a multi-sectoral commission. Initially indigenous organisations hoped that the Regulatory Decree would compensate for the flaws in the Law, but in fact it served to further limit participatory rights in keeping with the multiculturalist approach to FPIC described in the previous chapter. The six indigenous organisations involved in the meta-consultation initially formed a 'Unity Pact', setting out 'Minimum Non-Negotiable Principles for the realisation of the right to participation, prior consultation and free, prior and informed consent'[38] as a baseline for the discussions. These Minimum Principles drew from UNDRIP, ILO C169, the *Saramaka* case of the IACtHR as well as a report by the Inter-American Commission on Human Rights, and set out a vision of FPIC that is consistent with the 'general rule' approach.

The Unity Pact emphasised the need for the state to obtain consent in many situations, including in cases where the proposed measure presents a risk to the subsistence of indigenous peoples and their physical or cultural integrity, including megaprojects that could affect indigenous peoples' means of subsistence, any decision which could affect, modify, reduce or extinguish property rights, military activities, storage of hazardous waste, or relocation. It made clear its view that states should not approve a measure in cases where indigenous consent was not granted. Not only that, but it also outlined several situations in which the state must not approve measures because they would be certain to affect the life, integrity or subsistence conditions of indigenous peoples, including damage to historical-

[37] Ilizarbe (n 13).
[38] Pacto de Unidad, 'Principios Mínimos Para La Aplicación de Los Derechos de Participación, Consulta Previa y Consentimiento Libre, Previo e Informado'. The organisations making up the pact were SIDESEP, CNS, CONACAMI and ONAMIAP, Confederation of Amazon Nationalities of Peru (Conap) and the Peasant Confederation of Peru (CCP).

cultural heritage, their means of subsistence, and their vision of respecting their habitat. In this latter case, the Unity Pact asserted that concessions for extractive activities in natural environments such as rivers, glaciers, wetlands, forests, or for measures which would impact biodiversity or result in loss of indigenous land, territory or resources.[39] Mirroring the views of those who propose the 'general rule' that consent will always be required for extractive projects, this extensive list effectively requires consent for all extractive projects, and precludes the possibility that consent would be granted for the vast majority.

In the event, the meta-consultation gravely damaged trust between indigenous peoples and the state, and was criticised for being rushed, with inadequate time to digest information and consult, and for not being properly representative of indigenous peoples.[40] The inability to gain concessions from the state also caused a rift between indigenous organisations themselves. At the end of the first phase, four of the six national organisations withdrew from the process until such time as the Law on Prior Consultation was changed to meet the standards set by the Unity Pact.[41] The indigenous organizations' demand for a revision of the Law was refused, and the Vice Minister for Interculturality, Iván Lanegra Quispe, accused the organisations who had left the process of bad faith.[42] The second phase of the consultation took place between the two remaining organizations, Confederation of Amazon Nationalities of Peru (CONAP) and the Peasant Confederation of Peru (CCP) and the representatives of 18 state vice-ministries: a numerical imbalance which has been said to have dramatically limited the negotiating power of the indigenous groups. Flemmer and Schilling-Vacaflor analysed this dialogue concluding that indigenous representatives sought significant amendments, whilst government officials were intent on following the process. Furthermore, the discussion consisted of technical legal argument, rather than incorporating indigenous 'communication repertoires, knowledge forms, values and logics'.[43] The way that the meta-consultation was conducted, and the inability of the two sides to reach consensus, significantly undermined the legitimacy of the legal framework on consultation.

[39] Ilizarbe (n 13).
[40] Various national organisations - e.g. AIDESEP, CONAP - compete to represent their base communities, and due to historical differences in legal treatment between Andean and Amazonian indigenous communities, the two groups are divided.
[41] The organisations that withdrew were SIDESEP, CNS, CONACAMI and ONAMIAP. See Schilling-Vacaflor and Flemmer (n 15).
[42] httpJ/servindi.org/actualidad/60278>. In an open letter to the indigenous organizations who withdrew, Lanegra expressed incredulity and an inability to see a rationale for such behaviour. He argued that the Law on prior consultation was a joint achievement of non-indigenous and indigenous peoples to forge consensus, consistent with ILO C169, and urged them not to 'turn their backs on so many Peruvian men and women, indigenous or not, who were loyally committed to its approval.' Thus indigenous representatives who withdrew from the process were positioned discursively as irrational and betraying their fellow compatriots.
[43] Schilling-Vacaflor and Flemmer (n 15).

The manner in which the decree was finalised reinforced mistrust, further undermining the legitimacy of the legal framework, entrenching the multiculturalist framing of FPIC in Peru and reducing the potential for future intercultural dialogue. The multi-sectoral commission ended with 28 items still in dispute.[44] CONAP and the CCP accused the state of acting in bad faith, and requested that the Presidency of the Council of Ministers set aside the disputed text which was being proposed for the regulations by the multi-sectoral commission.[45] However, the President and his Council of Ministers approved the Regulatory Decree, unilaterally imposing its own view on 24 of the 28 disputed issues, and even reversing several of the binding agreements which were reached in the meta-consultation. They also added 13 new provisions without discussion, some of which violated the Unity Pact's minimal principles.[46]

The resulting Regulatory Decree was published on 3 April 2012,[47] and it recognised the need to obtain consent in only two circumstances: for relocation, in accordance with Article 16 of ILO C169, and in the case of storage or disposal of hazardous waste.[48] Otherwise, whilst the objective of consultation was to reach agreement or consent, 'failure to reach this goal does not imply infringement of the right to consultation'. Thus whilst the Unity Pact interpreted FPIC in the manner of the 'general rule' approach, the resulting legal framework endorsed by the state falls firmly within the multiculturalist approach that does not recognise the need to obtain consent in the vast majority of cases. This seems to confirm the suggestion that the divergent interpretations of FPIC that were observable in relation to Article 32 of UNDRIP are also influencing the debate on how it should be implemented in practice, and that the multiculturalist approach as endorsed by states at the United Nations is the model of FPIC that is being implemented at the domestic level.

6.2.4 The content of the Law on Prior Consultation and its Regulatory Decree

The Law and its accompanying Regulatory Decree set out a prescriptive process for prior consultation, which must be completed in a maximum of 120 days.[49] In stage 1, the entity promoting the measure must identify the proposal that will be consulted upon, and evaluate whether it might directly affect indigenous peoples' rights. In stage 2, the promoting entity -

[44] Ilizarbe (n 13).
[45] httpJ/servindi.org/actualidad/60278>.
[46] Delgado-Pugley, Deborah (n 35).; Schilling-Vacaflor and Flemmer (n 15).; Barletti and Seedhouse (n 5).
[47] Decreto Supremo No 001-2012-MC Reglamento de le Ley No 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) 2012.
[48] Reglamento de le Ley No 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) 2012. Art 7.
[49] ibid., Art 24.

with input from the Viceministry of Interculturality which maintains the database of recognised indigenous groups in Peru - identifies the indigenous people that will be consulted in relation to the proposed measure. In addition, it is also possible for indigenous communities to request that they are included in a prior consultation, which is decided by the promoting entity or the Viceministry of Interculturality on appeal.[50] The Consultation Plan is then prepared in agreement with the indigenous people, setting out who will take part; roles and responsibilities, and the methodology for the process including languages to be used, and the time and location of meetings. In stage 3, the 'publicity stage', the promoting entity provides information to the communities about the measure to be consulted, and a copy of the consultation plan. In stage 4, the 'information stage', a meeting is held in which the promoting entity presents detailed information about the measure, and in discussion with the community determines which indigenous rights would be affected. The promoting entity is required to provide technical assistance to the indigenous people in order for them to understand the implications of the proposed measure, and the Viceministry of Interculturality is also on hand to advise and support both sides on the process. In stage 5, the 'internal evaluation', the indigenous communities consider their response to the measure, and provide a record of their evaluation to the promoting entity. At this stage, if the community agrees to the measure, they proceed to Stage 7 - 'decision'. If the community is not in agreement, the consultation proceeds to Stage 6 - 'dialogue' - in which the promoting entity and indigenous people discuss any proposals the indigenous people have about the measure, with the aim of reaching agreement. At the final decision stage, the promoting entity will determine how to proceed on the basis of the results of the consultation.[51] The process is overseen by a facilitator, and aided by translators, all of whom must be trained and registered by the Viceministry of Interculturality.

According to the resulting Law on Prior Consultation and its Regulatory Decree, the framework is intended to protect the right of indigenous peoples to be consulted before any administrative or legislative measure which directly affects their collective rights, cultural identity, quality of life and development. Its aim is for indigenous people and the state to reach agreement on the respective measures through intercultural dialogue, including indigenous people in decision-making processes with the assistance of registered facilitators and interpreters trained in consultation issues.[52] It is based on underlying principles of (i) *Opportunity* for consultation prior to the implementation of the measure to be adopted; (ii) *Interculturality,* which requires that consultation processes recognise, respect and adapt to differences

[50] ibid. Art 9.
[51] Ministerio de Cultura, 'Derecho a La Consulta Previa: Guia Metodologica Para La Facilitacion de Procesos de Consulta Previa' (Ministerio de Cultura 2015). 13.
[52] Barletti and Seedhouse (n 5).;

between cultures, and contribute to the recognition and value of each one of them; (iii) *Good faith*, in which the state analyses and assesses the position of indigenous peoples in a climate of trust, collaboration and mutual respect, and both the state and indigenous institutions have a duty to act in good faith, being prohibited from 'political proselytizing and undemocratic behaviour'; (iv) *Flexibility* - carried out through procedures which are appropriate to the nature of the proposed measures and the situation of the indigenous people involved; (v) *Reasonable timeframes* to give indigenous people enough time to understand and consider the measure; (vi) *Freedom from coercion or conditions* to enable consent to be given freely; and (vii) *Complete and timely information* provided by the state at the outset of the consultation, to ensure that consent is informed.[53] The Viceministry of Interculturality has set out a Guide for facilitators including specific forms that are to be completed in the meetings.[54]

6.3 Critiques of the Law on Prior Consultation and its Regulatory Decree

Indigenous groups involved in the meta-consultation vehemently criticised both the Law and the regulatory decree, for its failure to embrace an expansive approach to consultation, instead opting for a narrow process in which the state retains decision-making power.[55] For example, the legislative framework includes a restrictive interpretation of the indigenous groups who are entitled to be consulted,[56] limits the applicability of consultation to those measures which 'directly' and 'negatively' affect indigenous people who live in close proximity to the site of proposed projects. This excludes communities who may be gravely affected by indirect or remote impacts, for example as a result of impacts on rivers.[57] The Regulation further narrows the scope of consultation by exempting certain projects from consultation altogether, such as those for constructing and maintaining public infrastructure for health, education and general public services,[58] and the Law is not retrospective, and so does not cover measures which have been approved prior to its promulgation, or the expansion of blocks which had been

[53] Ley No 29785. Art 4.
[54] Ministerio de Cultura (n 51).
[55] Schilling-Vacaflor and Flemmer (n 15). Ilizarbe (n 13).
[56] In a departure from the standards of definition set out in ILO C169, the Law defines indigenous and native people with reference to linguistic, cultural and ethnic criteria that mark out the qualifying groups as pre-colonial cultures, for example their descent from original peoples, their cultural and institutional separation from the rest of the population, and their lifestyles, spiritual and historical links to traditional lands, in addition to subjective self-identification. Ley No 29785., Art 7. In the Andean context, this definition is potentially exclusive of peasant communities that have integrated to a greater degree than the definition imagines. There was uncertainty as to whether or not the legislation would apply to Andean and coastal peasant communities, or only to Amazonian indigenous peoples, particularly in view of the fact that both Humala and Garcia publicly denied that these former communities were indigenous. See Deborah Poole, 'Mestizaje as Ethical Disposition: Indigenous Rights in the Neoliberal State' (2016) 11 Latin American and Caribbean Ethnic Studies 287. The powerful extractives lobby also denied that Andean communities should be recognised as indigenous. Sanborn and Paredes (n 6).
[57] Acuna (n 12).
[58] Reglamento de le Ley No 29785. Art 15; Acuna (n 12).

granted prior to September 2011.[59] During the negotiations with the state, activists argued that consultation should apply to all projects initiated since 1995 when Convention 169 entered into force.[60]

Furthermore, in keeping with the multiculturalist approach to FPIC, the state retains control of the process and outcome of the consultations, such that the existing power imbalance between indigenous peoples and the state is maintained. The proposal of the Ombudsman, supported by indigenous representatives, to have a dialogue to agree on the form that the consultation should take was rejected by the executive who instead opted for the prescriptive 120-day process. Merino argues that the characteristics of the seven-stage process are evidence that 'the entire process is designed to inform and convince people of a decision that has already been made'.[61] As discussed above, despite the Law's commitment to the objective of agreement between the state and indigenous communities, its provisions generally fall short of a commitment to obtain consent before the measures proceed. Instead, in common with the multiculturalist approach to FPIC, where no agreement is reached, the state is empowered to make the final decision unilaterally in a way which guarantees indigenous rights and balances the diverse interests of the national population as a whole.[62] Additionally, the manner in which the regulatory decree was altered after the meta-consultation process had ended has undermined trust in the state to give due regard to indigenous rights when balancing them against the national interest.[63] In contrast, the principles agreed in the indigenous organisations' Unity Pact set out a vision of consultation in which indigenous communities had significant power over the process and the outcome, including situations in which the securing of consent should be obligatory, and others in which consultations should not go ahead if the planned measure would have significant detrimental impacts on indigenous rights.[64]

Additionally, Sanborn-Parades has observed that the process set out for consultations lacks independent oversight which could counteract the power imbalance that is integral to the process. The responsibility for overseeing any given consultation rests with the Ministry proposing the measure - for example, the Ministry for Energy and Mines in the case of mining projects or hydroelectric dams. These Ministries tend to be strong institutions, that are

[59] Acuna (n 12).
[60] ibid.
[61] Roger Merino, 'Re-Politicizing Participation or Reframing Environmental Governance? Beyond Indigenous' Prior Consultation and Citizen Participation' (2018) 111 World Development 75. 79.
[62] Barletti and Seedhouse (n 5).
[63] ibid.
[64] Schilling-Vacaflor and Flemmer (n 15).

politically powerful and well-funded. In contrast, the Vice-Ministry for Intercultural Affairs - which Sanborn Parades describes as a relatively weak state institution - is given a support role, tasked with maintaining the database of indigenous peoples and their representatives, registering the results of consultations, and providing lists of official facilitators and translators. The Unity Pact argued, in vain, for the establishment of a new Ministry for Indigenous and Native Peoples, with a stronger institutional role in government, that could oversee consultations and provide a counterbalance to the powerful Ministries which seek to bring measures that impact on indigenous peoples.[65] Such a proposal would have helped to rebalance the power asymmetries which are inherent in the consultation process.

Throughout, there is evidence that indigenous epistemology is not respected on a par with the states' approach – in keeping with critiques of the multiculturalist approach to FPIC. Indigenous critics of the Law also highlight the way in which it includes the creation of a database of indigenous communities who are eligible for consultation,[66] maintaining the categorisation of people as 'indigenous' or 'mestizo', in a way that perpetuates the historical practice of categorising indigenous people based on ethnicity. Poole questions the validity of the 'shared illusion that it is not only possible, but desirable to create a universal metric for gauging the purity of identities that are inherently fluid and political', and notes the approach of the Vice-Ministry to privilege so-called reliable (government generated) data on indigenous communities, over the 'untrustworthy disciplines' of anthropology and history which give testament to the richness of Andean culture.[67] It could also be said that this approach privileges information from Eurocentric methods of data collection over the testimonies and oral histories of the indigenous peoples themselves.

Furthermore, details of the legal framework suggest a lack of regard for indigenous institutions and a focus on process over meaningful engagement. Merino argues that the Regulation requires consultation with state-recognised indigenous representatives rather than emphasising consultation with indigenous assemblies and other decision-making institutions. This failure to respect indigenous custom potentially leaves the door open for corrupt practices, and for indigenous institutions to be undermined causing conflict within indigenous societies. In support of this suggestion, she highlights the words of the Vice-Minister of Territorial Governance, who stated 'Prior consultation is a means and not an end in itself. Its aim is to inform the population about changes and impacts'.[68] Indeed, the legislative framework

[65] Sanborn and Paredes (n 6).
[66] UNDRIP, UNGA Res 61/295 (13 September 2007), Art 19.
[67] Poole (n 56). 298.
[68] Merino (n 61). 79.

does not require consultation before concessions are granted - only prior to exploration and exploitation. At the point that a concession has been awarded, it is likely that there is considerable financial and political pressure to continue projects, and only minimal opportunity for indigenous communities to shape the planned project.[69] In this arrangement, the possibility for an intercultural discussion on development objectives and priorities, including serious consideration of indigenous worldviews and alternatives for development, becomes highly unlikely.

The background to the introduction of the Law on Prior Consultation shows both cause for optimism and pessimism as to its reconciliatory potential. On the one hand, legislation on prior consultation in Peru was introduced in the aftermath of the Baguazo violence by President Humala, intended as a means of improving relations between the state and indigenous peoples, and in recognition of the need to respect their 'sovereign will' in the context of a multinational state. On the other hand, the rhetoric around the adoption of the Law on Prior Consultation and its Regulation, and the meta-consultation with indigenous representatives, gives insight into a competing view that prior consultation is a threat to the national interest and the continuation of extractivist development on behalf of the population as a whole. Consequently, the scope of prior consultation was narrowed, and the state has maintained control of the process and outcome - setting out a prescriptive methodology and relatively short timetable through which prior consultations must occur, and excluding the need for consent to be obtained in the vast majority of cases. The experience of participating in the meta consultation was damaging to indigenous organisations' unity and damaged trust between indigenous peoples and the state. The dialogue was said to operate in technical, legal terms and did not engage with indigenous logic and worldviews.

Ultimately, where there was disagreement, the state unilaterally adopted its own preferred resolution that was consistent with the multiculturalist approach whilst the indigenous representatives considered that the new law fell beneath their interpretation of international standards set out in ILO C169 and in Article 32 of UNDRIP, which in their view requires consent to be obtained as a 'general rule' in the case of extractive projects on indigenous territories. This leaves a large question mark over whether a Law on Prior Consultation that itself lacks indigenous support and ownership, is sufficient to broker reconciliation. To examine

[69] Servindi, 'Perú: Observaciones a Ley de Consulta Pueden Plantear Un Quiebre En El Estado de Derecho | Coordinadora Nacional de Derechos Humanos – Perú' (*Coordinadora Nacional de Derechos Humanos*, 23 June 2010) <http://derechoshumanos.pe/2010/06/peru-observaciones-a-ley-de-consulta-pueden-plantear-un-quiebre-en-el-estado-de-derecho/> accessed 16 January 2021.

this question further, the next section of this chapter provides three illustrative examples to explore the practice of prior consultation in Peru's mining sector.

6.4 Illustrative Examples

Since the 1980s, Peru has pursued a policy of economic growth based on extractivism, privatisation and neoliberal economic principles.[70] In order to reconstruct Peru's economy and society in the wake of its internal conflict[71], successive Presidents have championed extraction of natural resources - in particular metal ores, minerals and hydrocarbons - as the foundation for restoring peace, tackling poverty, increasing social investment and making progress as a modern state. The impact of these policies on indigenous peoples have been significant - 21% of Peru's land is concessioned for mining;[72] over half of indigenous titled communities overlap with extraction concessions.[73] However, such investments have not resulted in significant improvements to living conditions for people living close to extractive projects, and have increased social unrest.[74]

Mining is the largest extractive sector in Peru,[75] representing 9.4% of national GDP and 60% of the total value of national exports in 2018.[76] Requests for mining permits cover 14.3% of Peru's territory,[77] and the sector has received considerable overseas investment.[78] However, the success of the mining sector comes at a cost: the expression 'Peru is a mining country' is

[70] Roger Merino, 'The Cynical State: Forging Extractivism, Neoliberalism and Development in Governmental Spaces' (2020) 41 Third World Quarterly 58.
[71] In particular, the Shining Path Maoist movement and the Marxist-Leninist Túpac Amaru Revolutionary Movement.
[72] 'Indigenous Peoples in Peru' (*IWGIA - International Work Group for Indigenous Affairs*) <https://www.iwgia.org/en/peru> accessed 9 January 2021.
[73] Barletti and Seedhouse (n 5).; 'Indigenous Peoples in Peru' (n 72).
[74] Peru's public Ombudsman reported that conflicts associated with the extractive industries increased from 37 per month in 2007 to 139 in 2017. Merino (n 61).
[75] Flemmer (n 1).
[76] Globally, Peru is the second largest producer of copper and one of the main producers of gold, silver, lead and zinc. 25° Observatorio de Conflictos Mineros en el Perú and Perú, 'Reporte Segundo Semestre 2019' (Observatorio de Conflictos Mineros en el Perú 2019).; 'Minem prevé el inicio de construcción de seis proyectos mineros durante el 2020' <https://www.gob.pe/institucion/minem/noticias/52261-minem-preve-el-inicio-de-construccion-de-seis-proyectos-mineros-durante-el-2020> accessed 9 January 2021.
[77] 'MEM destaca nuevo escenario de la minería peruana y las oportunidades para desarrollar proyectos de exploración' (*Gob.pe*, 4 March 2019) <https://www.gob.pe/institucion/minem/noticias/26191-mem-destaca-nuevo-escenario-de-la-mineria-peruana-y-las-oportunidades-para-desarrollar-proyectos-de-exploracion> accessed 9 January 2021.
[78] 25° Observatorio de Conflictos Mineros en el Perú and Perú (n 76).; 'MEM destaca nuevo escenario de la minería peruana y las oportunidades para desarrollar proyectos de exploración' (n 77). 'The Minister of Energy and Mines, Francisco Ísmodes Mezzano, highlighted today at PDAC 2019, the largest mining exploration event in the world, that this year the construction of six new projects is expected with a global investment of US $3,441 million, and that between 2020 and 2021 another 9 initiatives would be executed with a global investment that exceeds US $11.8 billion.' (Translation author's own).

often used to justify the harmful impacts of mining on indigenous rights,[79] and Peru has been described as 'one of the leading producing countries of mining conflicts worldwide.'[80] According to the report of the 25th Observatory on Mining Conflicts in Peru, the state's response to these conflicts has been reactive, and hampered by weak institutions, an inability to work in a multi-sectoral manner, and weak presence in remote areas where mining often occurs. Furthermore, it reports that the weakening of environmental regulations, and the placement of key parts of the environmental impact assessment in the hands of private companies, has undermined the perception of the state as a neutral actor whose concern is to protect the economic, social and cultural rights of the population as well as environmental protections.[81]

In recognition of the threat of conflict to its social cohesion and international reputation, the Peruvian Government launched a multi-stakeholder process to bring government, industry and civil society to discuss the future direction of the mining sector.[82] This resulted in the publication of the report 'Vision of Mining in Peru by 2030' in February 2019, presenting the intention that mining should operate within a framework of good governance and including the participation of 'all sectors and levels of government, the private sector, organized society and communities; ensuring intersectoral, multilevel and multi-actor coordination …. to prevent, manage and transform conflicts into opportunities for development and social peace.' The report highlighted respect for prior consultation, in accordance with existing law, as a mechanism for improving participation and inclusion, and ensuring the wellbeing of the population. In June 2019, the President announced the formation of a new commission to review Peru's 30-year-old General Mining Law, 'to fit our reality, providing a clear legal framework to investors giving peace of mind and development for all'.[83]

These recent developments obscure the initial reticence with which the mining sector viewed the Law on Prior Consultation. Despite the Law on Prior Consultation coming into effect in 2012, the first mining consultations did not commence until September 2015. This was due to the hostile reception of consultation within the sector, and the refusal of the Ministry of Energy and Mines and the National Society for Mining, Petrol and Energy to implement the

[79] Armando Guevara Gil and Carla Linares, 'Mineralizing the Right to Prior Consultation: From Recognition to Disregard of Indigenous and Peasant Rights in Peru' (2019) 20 Global Jurist.
[80] 25° Observatorio de Conflictos Mineros en el Perú and Perú (n 76).
[81] Merino (n 61).; 25° Observatorio de Conflictos Mineros en el Perú and Perú (n 76).
[82] 'Peruvian Government Unveils Its 2030 Mining Vision for the Country' (*International Mining*, 22 February 2019) <https://im-mining.com/2019/02/22/peruvian-government-unveils-2030-mining-vision-country/> accessed 9 January 2021.; 'Mining Vision of Peru to 2030' (*PCCC - Peruvian Canadian Chamber of Commerce*, 5 April 2019) <https://perucanadacc.ca/es/node/61> accessed 9 January 2021.
[83] 25° Observatorio de Conflictos Mineros en el Perú and Perú (n 76). 4. The commission was established 15 October 2019, in compliance with Supreme Resolution No. 190-2019-PCM.

consultation procedures, in particular due to objections at the inclusion of Andean peasant communities in the list of indigenous groups to be consulted. Meanwhile, new mining projects continued to be authorised.[84] As of October 2020, 21 prior consultations have been completed in the mining sector,[85] with four currently in process.[86]

The illustrative examples that follow demonstrate how prior consultation is evolving within the mining sector. All three take place in Andean Quechua communities. Initially, as demonstrated by the Aurora and La Merced cases, the state controlled the process and there was little opportunity for indigenous communities to meaningfully influence the design and implementation of the project. The Aurora project was chosen because it was the first project on which prior consultation had been applied in the mining sector. The La Merced project was the first time that a prior consultation had proceeded to the dialogue stage with one of the communities concerned, but as will be seen, this did not significantly influence the impact of the consultation on the project. Both these projects were subject to a report by the Public Ombudsman, providing a valuable critical analysis of the process in relation to its ability to guarantee indigenous peoples' collective rights, by a first-hand observer of the process. By contrast, the case of the Tintaya Antapaccay Extension - Coroccohuayco integration brings the analysis up-to-date, showing how indigenous communities are leveraging domestic and international law to reassert their own interpretation of FPIC in line with the 'general rule' approach. In this case, indigenous people challenged the state's control of the process and forced a development in the law by demanding that prior consultation happens in relation to the Environmental Impact Assessment (EIA), to enable the consultation to have a meaningful impact on the scope of the project, and that their decision to grant or withhold consent be respected. As such, the Coroccohuayco case study suggests that the struggle between the 'multiculturalist' and 'general rule' approach to FPIC is continuing in the context of individual FPIC consultations.

6.4.1 Project Aurora

The first prior consultation in Peru's mining sector took place in relation to the Aurora de Minera mining exploration project, with the representatives of the Quechuan campesina community of Parobamba in Tanatile district, in the province of Calca, Cusco region. The process was

[84] Flemmer (n 1).
[85] 'Procesos Terminados' (*Ministerio de Energía y Minas*) <http://minem.gob.pe/descripcion.php?idSector=3&idTitular=8732> accessed 9 January 2021.
[86] 'En Proceso' (*Ministerio de Energía y Minas*) <http://minem.gob.pe/descripcion.php?idSector=3&idTitular=8757> accessed 9 January 2021.; see also 'Consulta Previa' (*Ministerio de Cultura*) <http://consultaprevia.cultura.gob.pe> accessed 9 January 2021.

overseen and evaluated by the Public Ombudsman (Defensor del Pueblo) which is a public body with a constitutional mandate to (inter alia) protect the rights of indigenous peoples.[87]
A preparatory meeting was held on 4th September 2015 to prepare a consultation plan.[88] The promoting entity was declared to be MINEM and the measure to be consulted was the authorisation by MINEM of the start of exploration activities for Project Aurora, by the company Minera Focus SAC[89] - thus the consultation took place after the Environmental Impact Assessment and scope of the project had been approved.[90] The Consultation Plan identified that this measure may have impacts on the community's rights to land and territories, to choose their own priorities for development, and to conserve their customs and institutions.[91] It set out the timetable in which all stages of the consultation would take place over a two-month period from September to October 2015.[92] The participants were to be the community members and representatives of MINEM, with other actors being the facilitators who would organise and oversee the process; interpreters; technical advisors; the Vice Ministry Of Inter-Culturality, who were to offer advice, technical assistance and capacity-building support to both the MINEM and the indigenous community during the process; and the Public Ombudsman, to supervise public entities in the carrying out of their functions and to ensure that fundamental rights were respected.[93]

In the information phase, information bulletins were provided in Spanish through the radio and project information was disseminated on MINEM's website. Following this, MINEM held an information workshop on 4th October 2015.[94] According to the Ombudsman's report, this

[87] Constitución Política del Perú, Art 162. The Ombudsman's report on the Aurora project states that the Ombudsman's role in this context is to supervise public bodies' conduct of prior consultation, acting as a critical observer, providing recommendations and urging corrective measures as necessary to guarantee the right to prior consultation. It can make recommendations verbally during the consultation itself, as well as after the event in writing. See 'Evaluación de La Etapa Informativa Del Proceso de Consulta Previa al Proyecto de Exploración Minera Aurora' (Defensoria del Pueblo 2016) Informe No 001-2016-DP/AMASPPI-PPI <https://www.defensoria.gob.pe/wp-content/uploads/2018/05/Informe-N-001-A-2016-DP-AMASPPI-PPI-Aurora.pdf>.
[88] 'Plan de Consulta Proyecto de Exploración Minera Aurora' (Ministerio de Energía y Minas 2015) <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/1_%20Exploracion%20Aurora%20-%20Minera%20Focus%20SAC/1%20-%20Etapa%20de%20Publicidad/3%20-%20Plan%20de%20Consulta.pdf> accessed 10 January 2021.
[89] Ministerio de Energía y Minas, 'Resumen de Proyecto Exploracion Aurora' <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/1_%20Exploracion%20Aurora%20-%20Minera%20Focus%20SAC/1%20-%20Etapa%20de%20Publicidad/4%20-%20Proyecto%20de%20Medida%20Administrativa.pdf> accessed 17 January 2021.
[90] ibid. See also Cooperacción, '¿Primera Consulta Previa En Minería? - CooperAcción' (*CooperAcción*, 10 September 2015) <http://cooperaccion.org.pe/primera-consulta-previa-en-mineria/> accessed 10 January 2021.
[91] 'Plan de Consulta Proyecto de Exploración Minera Aurora' (n 88). Annex 3.
[92] ibid. Annex 4.
[93] ibid. para 5.
[94] 'Proyecto de Exploracion Minera "Aurora": Informe Final de Consulta Previa' (Ministerio de Energía y Minas 2015) Expediente No 2437480 <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/1_%20Exploracion%20Aurora%20-%20Minera%20Focus%20SAC/4%20-%20Decision/2%20-%20Informe%20Final%20del%20Proceso%20de%20Consulta%20Previa.pdf> accessed 10 January 2021. para 4

meeting was planned to coincide with the communal assembly which took part on the first Sunday of every month, and there was a good turn-out including women and older people.[95] At the community's request MINEM had agreed to include older school children, in accordance with the community's customs, and an interpreter was provided to translate into Quechua.[96] The Ombudsman reported that in the first part of the workshop, MINEM gave an explanation of mining exploration, the concept of an administrative measure for the purposes of consultation, the collective rights of indigenous or native communities, and how exploration could affect them. Following this, the participants formed small groups of around 20, to answer the questions 'What are the advantages and disadvantages of mining? What are the development priorities of the Parobamba community? And what collective rights of the community can be affected?'. At the end, a plenary was held which was intended to provide an opportunity for each group to ask questions, raise concerns, and receive a response.

On the basis of its participation in the information stage meeting, the Ombudsman criticised the consultation on many grounds, which indicated the process failed to provide adequate information to the community and did not live up to the requirements of providing a good faith, intercultural dialogue. It commented that there was a lack of technical support for the indigenous community, and reported that information about the project was not presented in a clear and graphical way,[97] nor were the precise locations of project activities mapped to help the community evaluate the implications of the project on their rights and way of life.[98] The Ombudsman noted that the lack of technical support was particularly evident in the small group discussion stage, when it also became apparent that those who were mainly Quechua-speaking did not understand the information they had heard. This failure especially marginalised women and the elderly, preventing them from participating in the discussion.[99]

The Ombudsman also criticised the quality of the dialogue. On a basic level, the language used was technical rather than straightforward and easily comprehensible.[100] It also noted that the official translator (who was accredited by MINCU) was frustrated in his duties, as MINEM officials prevented him from translating questions from the Quechuan-speaking attendees in

and 'Acta Del Taller Informativo Comunidad Campesina de Parobamba: Proyecto de Exploración Minera Aurora' (Comunidad Campesina de Parobamba 2015) <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/1_%20Exploracion%20Aurora%20-%20Minera%20Focus%20SAC/2%20_%20Etapa%20Informativa/1%20-%20Taller%20Informativo.pdf> accessed 10 January 2021.

[95] 'Evaluación de La Etapa Informativa Del Proceso de Consulta Previa al Proyecto de Exploración Minera Aurora' (n 87). 2.

[96] ibid., 3.

[97] ibid., para 3.1.

[98] ibid., para 3.5.

[99] ibid. para 3.3.

[100] ibid. para 3.2.

the final plenary session, so that their concerns were not heard. The Ombudsman commented in this regard, 'this bad practice is a sign of lack of interest of the MINEM to understand the concerns of the indigenous population in relation to mining activity and a demonstration of lack of empathy of this entity towards this population.'[101] The report also highlighted that even when questions were asked, they did not always get a response - for example, in relation to the location of access routes and exploration activities,[102] and that there was no feedback process to evaluate the community's understanding of the information provided.[103] The Ombudsman drew attention to a lack of impartiality on the part of the facilitator, who was criticised for speaking in a biased way which stressed the benefits to the community whilst downplaying the impacts of the proposed exploration activities in contravention on MINCU guidelines.[104] Similarly, in its presentation about the project, MINEM were said to have downplayed the possible impacts as 'small' and 'not significant'.[105] The Ombudsman's report also criticises MINEM officials for not enabling the four MINCU officials in attendance to fulfil their duties to support the consultation so that a meaningful intercultural dialogue could be achieved.[106]

The consultation process resulted in the community providing its consent to the exploration at the information stage.[107] Whilst this appears to be encouraging, it could be argued that the agreement of the community under such circumstances does not in fact, constitute FPIC. As discussed above, there were concerns that the information was incomplete, not fully translated, not supported by technical assistance for the community and was provided in a biased manner that was intended to diminish negative impacts and emphasise positive benefits. Thus the consent cannot be said to be fully informed. Furthermore, the consultation was carried out at a late stage, after the EIA had already been approved. It is therefore not given prior to significant decisions being made that would materially affect the impacts of the project. By presenting projects almost as a *fait accompli*, the state vastly reduced the community's viable alternatives to granting consent, which also calls into question how free the decision really was. Furthermore, the outcome agreement of the prior consultation did not demonstrate that the dialogue had any meaningful impact on the project. Rather, the content of the agreement was generic, restating existing legal obligations of the government and the mining company rather than including community-specific agreements to mitigate harm to their

[101] ibid. para 3.8.
[102] ibid. para 3.6.
[103] ibid. para 3.9.
[104] ibid. para 3.7.
[105] Statement by lawyer Maritza León of the General Directorate of Mining Environmental Affairs at the public meeting, see ibid. para 3.4.
[106] ibid. 3.10.
[107] 'Proyecto de Exploracion Minera "Aurora": Informe Final de Consulta Previa' (n 94). para 6.2a

way of life or providing the community with benefits or compensation.[108] Consequently, the criticisms of those who suggest that Peru's implementation of FPIC amounts to a 'rubber stamping exercise',[109] seem to have resonance in this case.

6.4.2 La Merced

The second case study concerns exploration activities at the La Merced mining project, which the state considered would impact the Quechua campesina communities of Quilla Ayllu and Llactun-Aija in the district of Huacllan, in the Aija province of Ancash. This was the first prior consultation in the mining sector to proceed to the dialogue stage. It shows that whilst MINEM had responded to a few of the critiques in the Ombudsman's report on the Project Aurora consultation, the consultation process still remained deeply flawed.

According to the consultation plan, the measure to be consulted was the authorisation by MINEM of the commencement of mining exploration activities of the 'La Merced -Phase 1' project by the company Minera Barrick Misquichilca S.A.[110] The Ombudsman's report criticised this decision, stating that the start of exploration activities is not the ideal measure to be consulted, because at that stage of a mining project the EIA and the various authorisations required have already been completed. As a result, it is effectively impossible for the consultation to modify aspects of the project that impact on collective rights. Consequently, in the Ombudsman's view, it is proper for the prior consultation to take place during the EIA process.[111]

The project was considered to potentially affect the rights of the Quechuan communities to their land and territory, to choose their own priorities for development, and to conserve their

[108] ibid. para 6.2b. It noted that the community agreed for the Ministry of Energy and Mines to authorise the exploration activities on condition that a) the activities should respect the environment and the community's collective rights; b) the company fulfills its commitments in the environmental impact study, as well as undefined 'social' commitments; c) the state complies with its duty to supervise and control the activities of the mining company; d) the community will be continuously informed about the exploration activities.

[109] Cathal Doyle, 'Indigenous Peoples' Experiences of Resistance, Participation and Autonomy: Consultation and Free, Prior and Informed Consent in Peru' in Claire Wright and Alexandra Tomaselli (eds), *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap* (Routledge 2019). 69.

[110] 'Proyecto de Media Administrativa (La Merced)' (Ministerio de Energía y Minas) Resolución Directoral <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/4%20-%20Exploracion%20La%20Merced%20-%20M_%20Barrick%20Misquichilca%20S_A_/1%20-%20CC%20de%20Quilla%20Ayllu/2%20-%20Etapa%20de%20Publicidad/3%20-%20Proyecto%20de%20Medida%20Administrativa.pdf> accessed 10 January 2021.

[111] 'Sobre El Proceso de Consulta Previa Del Proyecto de Exploración Minera La Merced' (Defensoria del Pueblo 2016) Informe No 003-2016-DP/AMASPPI-PPI <https://www.defensoria.gob.pe/wp-content/uploads/2018/05/Informe-N-003-2016-DP-AMASPPI-PPI-La-Merced.pdf> accessed 10 January 2021. para 1.

customs and institutions.[112] The consultation was to take place between MINEM, on the one hand, and the communities of Quilla Ayllu and Llactun-Aija, on the other. Other parties involved were the facilitator, interpreters and technical advisors, as well as the Viceministry of Interculturality in an advisory capacity.[113] The publicity stage was to take place on 11 May 2016, with posters, a municipal radio announcement, and publication of information on MINEM's website, and the information and internal evaluation were to take place on the same day - 11th June for the Quilla Ayllu community, and 12th June for Llactun-Aija. The dialogue stage was programmed to take place on 14 June 2016.

In evaluating the information stage, the Public Ombudsman noted improvements in the simplicity of the language used and audiovisual support material used to convey information. However, many of the flaws of the Project Aurora consultation were repeated. The information was only partly translated into Quechua. This strategy was apparently approved by male members of the community, but had the result of again marginalising those who did not have proficient Spanish, who were mainly women. Additionally, the consultation did not include a mapping exercise to compare the location of mining activities with the community's own use of the land. MINEM did not implement the Ombudsman's recommendation to use evaluation tools to assess whether the information provided had been understood by the community. Again, the lack of neutrality displayed by the facilitator was cited as a cause for concern.[114]

The Ombudsman also noted that the internal evaluation stage took place on the same day as the information stage, which did not give the community adequate time to reflect on the information they had received, highlighting that Article 13 of the Law of Prior Consultation and Article 19 of the Regulations permits up to 30 days between the two stages. Consequently, it recommended that future consultations should allow adequate time for reflection and deliberation. The Ombudsman also noted that the minutes of the internal evaluation meeting bore a striking resemblance to the other consultations that had been completed previously, suggesting that a formulaic approach was being taken which did not allow for specific concerns of different communities to be addressed.[115]

[112] 'Plan de Consulta Proyecto de Exploración Minero La Merced' (Ministerio de Energía y Minas 2016) <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/4%20-%20Exploracion%20La%20Merced%20-%20M_%20Barrick%20Misquichilca%20S_A_/1%20-%20CC%20de%20Quilla%20Ayllu/2%20-%20Etapa%20de%20Publicidad/2%20-%20Plan%20de%20Consulta.pdf> accessed 10 January 2021. Annex 2.
[113] ibid. s4 and s5.
[114] 'Sobre El Proceso de Consulta Previa Del Proyecto de Exploración Minera La Merced' (n 111). s3.
[115] ibid. s4.

The Ombudsman observed that the information meeting on 12th June 2016 was attended both by non-indigenous people who raised concerns that were not related to the collective rights of indigenous people, and by representatives of the concession company, Minera Barrick Misquichilca S.A., who filmed the informative workshop and took pictures of the minutes of the internal evaluation assembly. This involvement contradicted Article 30 of the Law on Prior Consultation and Article 12 of the Regulations, which allow the participation of third parties only to provide information at the request of the state or the indigenous community concerned.[116] The Quilla Ayllu expressed their agreement following the internal evaluation stage,[117] but the Llactun-Aija community continued to the dialogue stage. However, the Ombudsman highlighted that the various concerns raised by the Llactun-Aija community, for example relating to community health and education, should have been grounds for including them in the dialogue as well.[118]

In any event, the Ombudsman's report casts doubt on the usefulness of the dialogue with the Llactun-Aija community, because the resulting accords were preoccupied with enforcing the legal duties of the state and the mining company, rather than mitigating impacts, safeguarding collective rights to natural resources, and enabling compensation or community benefits.[119] Similar to the Aurora case, the resulting agreements with both communities reiterated the legal obligations of MINEM in relation to the project rather than addressing the specific context of the Le Merced project and enabling the community to address their own priorities for development. In addition, both communities required that the mining company comply with a labour agreement already signed with the communities, and must conduct guided visits of the mine site as well as training in environmental monitoring for the community, to allow them to monitor the project.[120] Following the dialogue stage, the community of Llactun-Aija additionally stipulated that MINEM is required to provide a copy of the environmental impact assessment to the community; and to transfer complaints to the Agency of Environmental Assessment and Control (as well as to the Ministry of Culture and the Public Ombudsman, both of which are existing obligations on the state).[121] Thus the dialogue stage did not result in agreements which

[116] ibid. s3.
[117] 'Informe Final de Consulta Previa Sobre El Proyecto de Exploración LA MERCED' (Ministerio de Energía y Minas 2016) Informe No 562-2016-MEM-DGAAM-PCP-EXPLOR-LA-MERCED-DNAM-DGAM <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/4%20-%20Exploracion%20La%20Merced%20-%20M_%20Barrick%20Misquichilca%20S_A_/1%20-%20CC%20de%20Quilla%20Ayllu/4%20-%20Evaluacion%20Interna/2%20-%20Informe%20Final%20de%20CP.pdf> accessed 10 January 2021. s6.2.
[118] Reglamento de le Ley No 29785., Art 19.2. This last rule states that when the representatives of the indigenous people consulted submit modifications, contributions or proposals, the dialogue stage should be initiated
[119] 'Sobre El Proceso de Consulta Previa Del Proyecto de Exploración Minera La Merced' (n 111). s5.
[120] 'Informe Final de Consulta Previa Sobre El Proyecto de Exploración LA MERCED' (n 117). s6.2b.
[121] Ana Leyva, 'CONSÚLTAME DE VERDAD: APROXIMACIÓN A UN BALANCE SOBRE CONSULTA PREVIA EN EL PERÚ EN LOS SECTORES MINERO E HIDROCARBURÍFERO' (Oxfam America Inc and CooperAcción

altered the project in any meaningful way, to mitigate its impacts on the community or respond to requests that were made during the dialogue for education, health and other social support.[122]

The La Merced consultation has marked similarities with Project Aurora, again calling into question whether indigenous peoples are adequately informed about proposed projects in the course of consultations. Once again, the consultation took place at a late stage, when there was very little scope for negotiating changes to mitigate the impact on indigenous rights and interests. Although the state took on board some of the Ombudsman's previous suggestions, the absence of a mapping exercise or the use of tools to evaluate what the community had gleaned from the information presented calls into question the extent of the state's commitment to a meaningful dialogue.

6.4.3 Tintaya - Antapaccay Extension - Coroccohuayco Integration

The final Peruvian case study concerns the extension of the Tintaya - Antapaccay copper mine in Espinar province, Cusco. Unlike the other illustrative examples, which were in relation to new mines, the communities concerned were experienced in the impacts of mining on their lands. Another key difference is that in the case of Coroccohuayco, the prior consultation process has been instigated as a result of community activism. This case demonstrates how some indigenous communities are rejecting the formulaic approach described in the Aurora and La Merced consultations. Instead, the communities in Espinar are utilising domestic and international norms to demand that prior consultation gives them a meaningful role in the design of mining projects on their land.

The Tintaya mine opened in 1985, and a further mine site at Antapaccay was opened in 2012, utilising the same infrastructure. The proposed US $590 million investment involves the construction of a new open pit mine, as well as underground mining in communities that have not been impacted by mining in the past, and would require the purchase of community lands, resulting in the loss of community facilities and infrastructure.[123] The history of mining at Tintaya has been dominated by poor relations with local communities, with disputes arising

2018) <https://oi-files-cng-prod.s3.amazonaws.com/peru.oxfam.org/s3fs-public/file_attachments/17072%20Consultame%20la%20verdad%20web.pdf> accessed 10 January 2021.

[122] 'Sobre El Proceso de Consulta Previa Del Proyecto de Exploración Minera La Merced' (n 111). s5.

[123] EJOLT, 'Glencore in Tintaya Copper Mine in Espinar, Perú | EJAtlas' (*Environmental Justice Atlas*) <https://ejatlas.org/conflict/tintaya-espinar-peru> accessed 16 October 2020. These unresolved conflicts have been the subject of legal action against the mining companies in respect of injury by police security forces, damage to human health and the environment, and communities have also submitted complaints to the UN Special Rapporteur for the human right to safe drinking water and sanitation and the UN Working Group on human rights and transnational corporations. At times, violent and deadly force has been used by the police to subdue protest.

on compensation for land, development opportunities, the unresolved issue of toxic heavy metal contamination in humans, animals and the water system. Protests have been met with violence at the hands of police security forces, resulting in the deaths of three protesters in 2012.[124]

In 2018, the current owner of the Tintaya-Antapaccay mine, Glencore, applied to extend mining operations to a new site at Coroccohuayco. MINEM treated this application as a modification to the EIA for the Antipaccay mine, which had been agreed in 2010, and therefore exempt from prior consultation because it was not a new project. The 13 local communities and the Public Ombudsman disagreed with this approach, and called for a right to prior consultation in relation to the modification of the EIA (mEIA).[125] In September 2018, local communities formally requested that the National Environmental Certification Service for Sustainable Investments (SENACE)[126] undertake a prior consultation on the mEIA. SENACE responded that they were not legally required to undertake a prior consultation as part of the impact assessment process, and that MINEM bore the duty to consult prior to authorisation of the mining activities. SENACE's decision was referred to the Vice-Ministry of Interculturality of the Ministry of Culture, who refused to consider the issue because the community had submitted their appeal after the 15-day statutory time frame.[127] The mEIA went ahead, without any consultation on the baseline data - one of the most contentious issues, given the previous contamination of the site. According to NGO the Peru Support Group, the process of undertaking the mEIA was characterised by poor communication. Workshops held by Glencore on 17 and 18 October 2017 were not well attended by the communities, despite their fears that the project may require indigenous communities to relocate.[128]

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[124] In 2011, a law suit was filed against Xtrata in relation to the contamination, which Xtrata claimed was due to the natural 'mineralisation' of the area. Xtrata contracted with Peru's police force to provide security at the mines, and in 2012 protests were violently suppressed, resulting in the deaths of 3 protestors and a further case being filed in London against Xtrata. The case was eventually thrown out as the court decided that it was time-barred under Peruvian law. *Vilca & Ors v Xstrata Ltd & Anor [2018] EWHC 27 (QB)*. See also 'UK Mining Firm in Court over Claims It Mistreated Environmental Activists' (*the Guardian*, 31 October 2017) <http://www.theguardian.com/business/2017/oct/31/uk-mining-firm-in-court-over-claims-it-mistreated-environmental-activists> accessed 11 January 2021.; 'Vilca & Ors v Xstrata Limited and Compania Minera Antapaccay SA' (*Blackstone Chambers*) <https://www.blackstonechambers.com/news/vilca-ors-v-xstrata-limited-and-compania-minera-antapaccay-sa/> accessed 11 January 2021.

[125] Peru Support Group, 'Espinar: The Opportunity for Serious Community Consultation?' (*Peru Support Group*, 30 November 2019) <https://perusupportgroup.org.uk/2019/11/espinar-the-opportunity-for-serious-community-consultation/> accessed 11 January 2021.

[126] 'Servicio Nacional de Certificación Ambiental para las Inversiones Sostenibles - Senace' <https://www.gob.pe/senace> accessed 11 January 2021. Senace is the government body responsible for evaluation of environmental impacts of complex investment projects.

[127] Resolución Viceministerial Nro 011-2019-VMI-MC 2019.

[128] Oct 21 and 2017 | Mining, 'Mining: Unconvincing Efforts at Consultation in Espinar' (*Peru Support Group*, 21 October 2017) <https://perusupportgroup.org.uk/2017/10/mining-unconvincing-efforts-at-consultation-in-espinar/> accessed 11 January 2021.

The dispute over the mEIA took place in a changing political context. In March 2018, President Vizcarro was sworn into office on a pledge to restore public confidence in political institutions in the wake of corruption scandals involving former presidents.[129] Under Vizcarro, there is a new emphasis on government officials taking the time to visit communities,[130] and of 'dialogue to find shared solutions for the development of citizens' of Peru,[131] and a new government policy that "where there is wealth in the subsoil, there must be well-being on the surface". In addition to setting aside considerable sums for remediating environmental liabilities,[132] in September 2019 the Minister for Energy and Mines announced a review of mining regulations to provide a 'comprehensive regulatory framework… to strengthen the competitiveness and sustainability of the sector.'[133] On 29 April 2019, senior government ministers, including the Minister for Energy and Mines, Francisco Ísmodes Mezzano, met with community leaders and agreed to a process to identify the indigenous communities who were impacted by the mine, with a view to their consultation.[134] In addition, four dialogue tables were established, to address community concerns regarding infrastructure, health and those affected by toxic metals, changes to the Framework Agreement and impacts of the mining corridor.[135]

On 24 July 2019, the peasant communities Huano Huano, Pacopata and Ruiri Coroccohuayo submitted a complaint to the Ombudsman, regarding the actions of the Compania Minera Antapaccay S.A. (owned by Glencore plc)[136] and SENACE in relation to the mEIA. The Ombudsman's report of 15 August 2019 unequivocally concludes that SENACE, as a government body, is bound by the Law on Prior Consultation to carry out prior consultations

[129] 'Peru in Turmoil after President Vizcarra Dissolves Congress' *BBC News* (1 October 2019) <https://www.bbc.com/news/world-latin-america-49888117> accessed 11 January 2021.
[130] Ministerio de Energía y Minas, 'Ministro Ísmodes se reunió con comunidades de Espinar para abordar temas de consulta previa' (*Gob.pe*, 28 June 2019) <https://www.gob.pe/institucion/minem/noticias/45193-ministro-ismodes-se-reunio-con-comunidades-de-espinar-para-abordar-temas-de-consulta-previa> accessed 11 January 2021.; 'Ejecutivo Dialogó Con 13 Comunidades de Espinar Sobre Mecanismo de Consulta Previa' (*Agencia Peruana de Noticias Andina*, 27 August 2019) <https://andina.pe/agencia/noticia-ejecutivo-dialogo-13-comunidades-espinar-sobre-mecanismo-consulta-previa-764845.aspx> accessed 11 January 2021.
[131] 'Ejecutivo Dialogó Con 13 Comunidades de Espinar Sobre Mecanismo de Consulta Previa' (n 130). See also Ministerio de Energía y Minas, 'Ministros de Energía y Minas y de Cultura visitaron comunidades originarias de Espinar' (*Gob.pe*, 9 September 2019) <https://www.gob.pe/institucion/minem/noticias/50656-ministros-de-energia-y-minas-y-de-cultura-visitaron-comunidades-originarias-de-espinar> accessed 11 January 2021.
[132] Statements by Minister of MEM in meeting with communities on 29 April 2019 Ministerio de Energía y Minas, 'MEM acuerda empezar labor de avanzada de identificación de pueblos indígenas para proyecto Coroccohuayco' (*Gob.pe*, 29 April 2019) <https://www.gob.pe/institucion/minem/noticias/27948-mem-acuerda-empezar-labor-de-avanzada-de-identificacion-de-pueblos-indigenas-para-proyecto-coroccohuayco> accessed 11 January 2021.
[133] Ministerio de Energía y Minas, 'Minem: Inversión en minería alcanzó los US$ 3,011 millones entre enero y julio' (*Gob.pe*, 4 September 2019) <https://www.gob.pe/institucion/minem/noticias/50483-minem-inversion-en-mineria-alcanzo-los-us-3-011-millones-entre-enero-y-julio> accessed 11 January 2021.
[134]
[135] 'Espinar: comunidades retoman el diálogo con el Estado sobre la consulta previa' (*Observatorio de Conflictos Mineros en el Perú*, 29 April 2019) <http://conflictosmineros.org.pe/2019/04/29/espinar-comunidades-retoman-el-dialogo-con-el-estado-sobre-la-consulta-previa/> accessed 20 November 2020.
[136] 'Major Mines & Projects | Antapaccay Mine' <https://miningdataonline.com/property/139/Antapaccay-Mine.aspx> accessed 11 January 2021.

on any administrative measure which directly impacts on indigenous peoples' rights, and further pronounces that in order for consultation to be effective, it must occur at the time of the EIA, when the impacts on the community can be understood and appropriate mitigation measures agreed.[137] The Ombudsman recommended that SENACE, the Ministry of the Environment, MINEM and the Viceministry of Interculturality all take steps to ensure that prior consultation is carried out prior to the approval of the EIA, and further recommended that no further activity be taken in relation to the Coroccohuayco project, until SENACE had determined whether the approval of the mEIA would impact on the legal rights of indigenous peoples so that a prior consultation could be carried out if that was the case.[138]

Following the publication of the Ombudsman's report, negotiations took place between senior government ministers and community leaders to secure a consultation process.[139] The indigenous communities demanded that the prior consultation process comply with international standards set out in ILO C169 and Article 32.2 of UNDRIP.[140] However, mining activities on site continued and agreements with the communities were breached.[141]

The communities instigated an indefinite strike on 12 November 2019 to disrupt Glencore's activities, and a week later a meeting was held comprised of the prime minister, Vicente Zeballos, and a number of vice-ministers, the Cuzco regional governor, local mayors and representatives of the 13 communities, resulting in agreement to hold a prior consultation.[142] However, hopes for a meaningful consultation on the mEIA were dashed when SENACE

[137] 'El Derecho a La Consulta Previa y La Modificatoria Del Estudio de Impacto Ambiental Del Proyecto Minero Antapaccay - Expansión Tintaya - Integración Coroccohuayco' (Defensoria del Pueblo 2019) Informe No 001-2019-DP-AMASPPI-PPI. The Ombudsman asserted that SENACE's position, that the appropriate time for consultation was at the point of authorisation of the project, in accordance with MINEM's regulations, contravened the principle of 'prior' consent because the approval of an EIA itself would impact on the legal position of indigenous peoples, and because the authorisation of exploration or exploitation would preclude indigenous peoples from effectively influencing the design of the mining project and relevant measures to prevent, mitigate or control social and environmental impacts. Consequently, it found that SENACE's position failed to respect indigenous peoples' right to prior consultation.

[138] ibid.

[139] On 27 August 2019 community leaders met with senior government ministers and vice ministers to request that any consultation take place in accordance with the norms of ILO C169, and agreed that MINEM and SENACE would monitor the mining activities and verify compliance with environmental regulations. Follow-up visits were made by the Ministers of Energy and Mines, and the Vice-Minister of Interculturality, as well as representatives of other government departments, throughout September to better understand the concerns of community members. 'Espinar: comunidades retoman el diálogo con el Estado sobre la consulta previa' (n 135).

[140] Asamblea Multicomunal por la Consulta Previa en Espinar, 'NUESTROS DERECHOS ANTE TODO. SIN LUCHAS NO HABRA VICTORIAS' (*Facebook*, 30 January 2020) <https://www.facebook.com/permalink.php?story_fbid=791165354729095&id=588097581702541> accessed 11 January 2021.

[141] Fourteen human rights NGOs issued a public letter on 26 November arguing for the need to seize this opportunity and take forward a meaningful consultation. 'Espinar: tras medidas de fuerza de comunidades primer ministro Zeballos acepta diálogo' (*Observatorio de Conflictos Mineros en el Perú*, 14 November 2019) <http://conflictosmineros.org.pe/2019/11/14/espinar-ministro-zeballos-acepta-dialogo-tras-paro-en-el-corredor-minero/> accessed 11 January 2021.

[142] Peru Support Group (n 125).

approved the mEIA on 17 December 2019, just two days before the first preparatory meeting on a prior consultation process for the project was due to be held.[143] As a result of SENACE's approval of the mEIA, there was no immediate administrative measure to consult, so a new Ministerial Resolution modified the Unique Text of Administrative Procedures of MINEM to enable prior consultation to take place in a wide window of opportunity between the 'admission to process of the EIA' up to the authorisation of activities.[144] As a result of this Resolution, prior consultation is now required for the granting or modification of concessions, the authorisation of the start of exploration or exploitation activities, and for the granting or modification of the mining transport concession. Only one prior consultation has to take place per project, rather than there being a requirement for separate prior consultations on the granting of the concession and for commencement of activities in relation to a single project.

On 19th December 2019, the first preparatory meeting for a prior consultation on the Coroccohuayco project took place between MINEM leadership and the local communities.[145] According to the Multicommunal Assembly for the Prior Consultation in Espinar, talks were suspended in January because MINEM officials refused to include community proposals in the plan.[146] However, dialogue resumed and the prior consultation plan was agreed on 14th February 2020,[147] despite protests from five other communities who demanded to be included in the consultation, but who were not considered by the state to be directly affected by the project.[148] Significantly, the consultation plan provides for a four week interval between the

[143] Cooperacción, '¿Estamos Ante Un Acto de Mala Fe Del Gobierno En El Caso Coroccohuayco? - CooperAcción' (CooperAcción, 23 December 2019) <http://cooperaccion.org.pe/estamos-ante-un-acto-de-mala-fe-del-gobierno-en-el-caso-coroccohuayco/> accessed 16 December 2020.

[144] Resolución Ministerial No 403-2019-MINEM/DM 2019.

[145] The meeting held on Thursday 19 December was attended by the provincial mayor of Espinar, Lolo Arenas; representatives of the 13 original communities of Huano, Pacopata, Huini Coroccohuayco, Alto Huancané, Huancané Bajo, Tintaya Marquiri, Alto Huarca, Cala, Huarca, Huisa Ccollana, Huisa, Anta Ccollana and Suero Cama, as well as officials of the Presidency of the Council of Ministers and the Ministry of Culture. Ministerio de Energía y Minas, 'Minem avanza en la implementación de la Consulta Previa del proyecto Integración Coroccohuayco' (*Gob.pe*, 20 December 2019) <https://www.gob.pe/institucion/minem/noticias/71244-minem-avanza-en-la-implementacion-de-la-consulta-previa-del-proyecto-integracion-coroccohuayco> accessed 11 January 2021.

[146] Asamblea Multicomunal por la Consulta Previa en Espinar, 'COMUNIDADES ORIGINARIAS DE ESPINAR RETOMAN DIALOGO CON EL ESTADO PARA IMPLEMENTACION DE CONSULTA PREVIA' (*Facebook*, 12 February 2020) <https://www.facebook.com/permalink.php?story_fbid=800278540484443&id=588097581702541> accessed 11 January 2021.

[147] The communities concerned are Tintaya Marquiri, Huano, Alto Huancané, Huancané Bajo, Alto Huarca, Cala, Suero y Cama, Huarca, Huisa Ccollana, Huisa and Anta Ccollana. Jean Pierre Fernandez, 'Integración Coroccohuayco: Minem entregó plan de consulta previa a comunidades de Espinar' (*Revista Energiminas*, 14 February 2020) <https://energiminas.com/integracion-coroccohuayco-minem-entrego-plan-de-consulta-previa-a-comunidades-de-espinar/> accessed 11 January 2021.

[148] 'Espinar: crece tensión por aprobación de proyecto Coroccohuayco' (*Observatorio de Conflictos Mineros en el Perú*, 21 January 2020) <http://conflictosmineros.org.pe/2020/01/21/espinar-crece-tension-por-aprobacion-de-proyecto-coroccohuayco/> accessed 12 January 2021.; 'Distritos de Espinar en paro frente a proyecto Coroccohuayco' (*Observatorio de Conflictos Mineros en el Perú*, 3 February 2020) <http://conflictosmineros.org.pe/2020/02/03/distritos-de-espinar-en-paro-frente-a-proyecto-coroccohuayco/> accessed 12 January 2021.; 'Espinar: se inicia mesa de diálogo luego del paro por el proyecto Coroccohuayco'

information and internal evaluation stages; and incorporates a six-page document of proposals from the community. This document recognises that prior consultation is carried out in defence of rights of indigenous peoples that are recognised in ILO C169 and UNDRIP, and should be carried out in accordance with these standards in addition to the domestic legal framework. Article 32.2. of UNDRIP was specifically cited in the indigenous communities' proposals.[149] The Multicommunal Assembly announced on the day that the Consultation Plan was agreed that the consultation process 'will be a space for the defence of our rights, through which agreements must be reached and the consent of the communities obtained', reflecting a reading of FPIC as requiring consent, in line with the 'general rule' interpretation of UNDRIP Article 32.2. However, the Consultation Plan itself supports a multiculturalist reading of FPIC, leaving the final decision to the promoting state entity and requiring only an evaluation of indigenous points of view, suggestions and recommendations, and of the impact of the project on their rights.[150] Consistent with the Law on Prior Consultation and the multiculturalist approach, the state views FPIC as the objective of the consultation, that guarantees participation but does not require consent in order to proceed.[151]

Unfortunately, in March 2020 the COVID-19 pandemic forced the consultation process to be suspended after the first two communities had conducted their information stage meetings.[152] Disagreements over whether to use money from the mining Framework Agreement to support the Espinar communities' health needs during the pandemic led to strike action from 15th July to 7 August 2020 accompanied by forcible responses in which protestors were reportedly shot by police.[153] On 8th August Minister of Energy and Mines visited Espinar and negotiated a

(*Observatorio de Conflictos Mineros en el Perú*, 4 February 2020) <http://conflictosmineros.org.pe/2020/02/04/espinar-se-inicia-mesa-de-dialogo-luego-del-paro-por-el-proyecto-coroccohuayco/> accessed 12 January 2021.

[149] Ministerio de Energía y Minas, 'Plan de Consulta Proyecto Minero "Antapaccay Expansión Tintaya - Integracion Coroccohuayco"' (Ministerio de Energía y Minas 2020) <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/En%20Proceso/4%20Coroccohuayco/Plan%20de%20Consulta.pdf> accessed 18 January 2020. See Annex 1 Propuestas de las comunidades originarias para ser incorporadas al plan de consulta previa del proyecto antapaccay - expansión Tintaya - integracion coroccohuayco, particularly s1 and 2. In support of their demands, the communities' proposals highlight ILO C169 articles 6.1a, 6.2,15.2 & 7.2 and the Declaration, particularly articles 32.2 and 32.3, 7.3, 20.1, and 23.

[150] ibid. s9.7.

[151] ibid. s5.

[152] Although the Minister of Economy suggested that consultations could be carried out virtually, this suggestion was roundly opposed by indigenous groups - stating that most communities do not have internet access and priority should be given to responding to urgent health, social and economic needs of the communities during the pandemic, ojopublico, 'Hay 13 Proyectos Extractivos En Territorios Indígenas Pendientes de Consulta Previa' (*Ojo Público*, 11 July 2020) <https://ojo-publico.com/1953/hay-13-proyectos-extractivos-pendientes-de-consulta-previa> accessed 16 October 2020.; Red Muqui, 'La virtualización por encima de la interculturalidad en la consulta previa en proyecto minero de Espinar' (*Red Muqui*, 9 July 2020) <https://muqui.org/noticias/la-virtualizacion-por-encima-de-la-interculturalidad-en-la-consulta-previa-en-proyecto-minero-de-espinar/> accessed 16 October 2020.

[153] 'Cusco: heridos por conflicto en Espinar esperan investigaciones sobre actos de represión' (*Observatorio de Conflictos Mineros en el Perú*, 1 August 2020) <http://conflictosmineros.org.pe/2020/08/01/cusco-heridos-por-conflicto-en-espinar-esperan-investigaciones-sobre-actos-de-represion/> accessed 12 January 2021.

short term agreement that Glencore would provide vouchers for food, medicine, protective equipment, education and other urgent needs, with further discussions taking place in September 2020.[154] However, throughout the pandemic mining activities continued at the site, in the face of protests by the communities and with the presence of police security forces.[155]

Between November 9 and 26 2020, information stage meetings took place in each of the communities. The records of these meetings indicate a similar form in each one: they consisted of an explanation of the stages of consultation by a representative of the Ministry of Culture; a presentation by a 'specialist' from the Direción General de Minería on the measure to be consulted; followed by questions and answers. Afterwards, the Direción General de Asuntos Ambientales Mineros provided an explanation of the legal aspects of environmental management for mining projects. Finally, specialists from the Oficina General de Gestion Social about the possible impacts on collective rights. A Quechuan interpreter was in attendance from the Ministry of Culture. The record from some of the communities[156] indicates that the state delegations left behind a DVD with explanations of the project, as well as two maps, and a manual of prior consultation and associated laws. At the end of the meeting, the MINEM facilitator read out a meeting record, which was signed by attendees. The form of these meeting records uses standardised wording which is adapted for each community. Whilst it is perhaps to be expected that in an information meeting, the state representatives would dominate the agenda, it is noteworthy that the state representatives were the only ones recorded to have spoken at the meeting, and are able, over seven hours, to describe the process of the consultation, the collective rights in question, and the project with reference to the state's interpretation of prior consultation and the laws of Peru.[157]

[154] Aug 8, 2020 | Human Rights and Mining, 'New Mines Minister Achieves Breakthrough in Espinar' (*Peru Support Group*, 8 August 2020) <https://perusupportgroup.org.uk/2020/08/new-mines-minister-achieves-breakthrough-in-espinar/> accessed 16 October 2020. 'A LA OPINIÓN PÚBLICA DE LA PROVINCIA DE ESPINAR' <https://www.gob.pe/institucion/minem/noticias/302461-a-la-opinion-publica-de-la-provincia-de-espinar> accessed 16 October 2020.; Ralph Zapata, 'Conflicto en Espinar: comunidades retoman las negociaciones por las demandas no resueltas' (*Ojo Público*, 2 September 2020) <https://ojo-publico.com/2047/espinar-retoma-las-negociaciones-por-las-demandas-no-resueltas> accessed 16 October 2020.

[155] Asamblea Multicomunal por la Consulta Previa en Espinar, 'ANTE EL INCUMPLIMIENTO DE LOS COMPROMISOS ASUMIDOS POR EL ESTADO, ANUNCIAMOS EL INICIO DE LAS MOVILIZACIONES COMUNALES PARA GESTAR UN LEVANTAMIENTO DE LAS COMUNIDADES EN DEFENSA DE NUESTROS DERECHOS' (*Facebook*, 7 October 2020) <https://www.facebook.com/permalink.php?story_fbid=979219422590353&id=588097581702541> accessed 12 January 2021.

[156] (including the Tintaya Marquiri and the Huano community)

[157] See 'En Proceso' (*Ministerio de Energía y Minas*) <http://minem.gob.pe/descripcion.php?idSector=3&idTitular=8757> accessed 9 January 2021. Taller Informativos

The dialogue stage of the consultation was due to take place between 7 and 19 December 2020,[158] but consultation is now proceeding virtually in view of the ongoing coronavirus crisis.[159] In the meantime, the communities continue to protest for their rights, including respect for recognition of their rights to land and water, recognition and repair of damage done to their environment by previous extractive activities (including representation on a commission to assess the extent of this damage),[160] the creation of a communal canon to allow greater investment by regional and local government in their communities, and for a share of the benefits of extractive activities in their territories.[161]

6.5 Analysis

The implementation of FPIC in Peru is consistent with a multiculturalist approach to FPIC that states supported during the adoption of UNDRIP. Rather than requiring consent to be obtained before the approval of projects on indigenous territory, consent is positioned as the objective of consultation, but is not required for a project to go ahead. However, the state's view of FPIC stands in contrast to that of at least some of the indigenous peoples in Peru, who have interpreted Article 32.2 of UNDRIP in accordance with the 'general rule' approach that was discussed in Chapter 5. This was evident in the development of the Law on Prior Consultation, the meta-consultation on the Regulatory Decree, as well as in the statements of the Multicommunal Assembly in the Coroccohuayco illustrative example. Given these divergent views on what FPIC should look like, and the fact that the state unilaterally imposed its own interpretation of FPIC in passing both the Law and its Regulatory Decree without the consent of indigenous organisations, it is perhaps not surprising that the implementation of FPIC in Peru has been criticised by indigenous people and their allies as merely a box-ticking exercise to confirm decisions that the state has already made.[162]

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[158] Ministerio de Energía y Minas, 'Plan de Consulta Proyecto Minero "Antapaccay Expansión Tintaya - Integracion Coroccohuayco"' (Ministerio de Energía y Minas 2020) <http://minem.gob.pe/minem/archivos/file/Consulta%20previa%20-%20mineria/En%20Proceso/4%20Coroccohuayco/Plan%20de%20Consulta.pdf> accessed 18 January 2020.
[159] 'Avanzan las coordinaciones para continuar la consulta previa en Espinar, Cusco' <https://www.gob.pe/en/institucion/minem/noticias/340772-avanzan-las-coordinaciones-para-continuar-la-consulta-previa-en-espinar-cusco> accessed 7 February 2021.
[160] 'Minem: consulta previa en Espinar por el proyecto minero Antapaccay Expansión Tintaya-Integración Coroccohuayco continuará de forma virtual' (*Revista ProActivo*, 3 February 2021) <https://proactivo.com.pe/minem-consulta-previa-espinar-proyecto-minero-antapaccay-expansion-tintaya-integracion-coroccohuayco-sera-virtual/> accessed 7 February 2021.
[161] 'Asamblea Multicomunal Por La Consulta Previa En Espinar - Posts | Facebook' <https://www.facebook.com/permalink.php?story_fbid=1062064274305867&id=588097581702541> accessed 7 February 2021. Post dated Jan 27.
[162] Acuna (n 12). Alva-Arévalo (n 17).; Doyle (n 109).

This chapter has included two illustrative examples which concluded in the indigenous communities concerned expressing their agreement to the proposed project. However, as discussed above, the formulaic and shallow approach to FPIC in these examples gives weight to the concerns raised in Chapter 4 that a multiculturalist approach would not result in the kind of dialogue that eventually leads to meaningful reconciliation, because it lacks epistemic justice, fails to challenge hierarchies of power, and does not provoke a reconsideration of dominant development paradigms. Furthermore, the rigid process, short timescale and restatements of existing obligations in the outcome agreements raise concerns that FPIC in Peru is precisely the kind of 'weak bureaucratic procedure' that authors such as Rodriguez-Garavito and Merino[163] have warned about – a venue for the state to recognise indigenous rights whilst at the same time maintaining the *status quo*.

From the perspective of epistemic justice, these consultations were structured and organised into the prescriptive framework established by the state. The indigenous communities were informed of their rights by the Vice-ministry of Interculturality, who framed them exclusively in relation to the law of the state, as opposed to providing space for indigenous legal frameworks or understandings of rights. Dialogue mainly took place in Spanish as opposed to Quechua, and translation was not adequate for all members of the community to engage. Similarly, highly technical information was presented without adequate support or evaluation of comprehension, questions went unanswered, possible risks were played down by state officials and facilitators, and there were no mapping exercises to enable the indigenous people to adequately determine what the impact on their way of life might be. The extremely short timeframe for consultation also limited the potential for the communities to deliberate at length. In Chapter 4, it was noted that the multiculturalist model would require indigenous people to engage with discussion on the terms, logic and timeframe established by the state. In these illustrative examples, that certainly appears to have been the result. This observation was also made in relation to the discussion during the meta-consultation, in which indigenous worldviews were side-lined.

The critique of the multicultural model in Chapter 4 also predicted that will be insufficient to challenge existing hierarchies of power. As has been noted, the legal framework falls short of requiring consent to be obtained, which limits the potential of FPIC to fully realise indigenous self-determination. Furthermore, in undertaking the consultations after the EIA had been approved, the state retains full control over the scope of the project and severely limits the

[163] César Rodríguez-Garavito, 'Ethnicity.Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Indiana Journal of Global Legal Studies 263.; Merino (n 61).

opportunity of indigenous people to make meaningful changes to project design as a result of the prior consultation process. As was seen in the two cases in which consent was obtained, the outcome documents largely reiterated existing legal obligations, and were very similar to one another. This lends credence to the idea that consultations are viewed by the state as an administrative process, rather than requiring a meaningful negotiation. This falls far short of the 'general rule' interpretation of FPIC that was discussed in Chapter 5 as a means through which self-determination is exercised. Additionally, the power imbalance between indigenous people and the state is also encapsulated in the relative influence of state ministries involved in the process. Compared with the decision-making roles of MINEM and SENACE, the Viceministry of Interculturality has emerged in these illustrative examples as a relatively weak institution, which is consistent with Sanborn Parades' view.[164] Its representatives were prevented from being effective in the Aurora consultation, and its trained facilitators repeatedly displayed bias in performing their duties. Thus the ministries responsible for developing projects in the national interest wield greater authority in the process than the vice-ministry tasked with protecting the rights of a cultural minority. This is consistent with the multiculturalist approach that considers the protection of cultural rights as an objective that can be limited by considerations of 'national interest'.

Additionally, the practice of prior consultation in Peru has not fundamentally reshaped the imbalance of economic power. FPIC in Peru has been implemented in the context of a firm commitment to extractivist development and state ownership of subsoil resources on indigenous lands. The narratives employed by President Garcia in relation to indigenous peoples' opposition to the implementation of the FTA with the USA portrayed indigenous people as backwards communities who would not use their land to its potential, or permit others to do so, and both President Garcia and the mining sector expressed concern that prior consultation would stymie foreign investments in extractive industries. Even the arguments of President Humala in favour of prior consultation included that it may in fact encourage foreign investments as a result of its ability to reduce social conflict around extractive development projects. Thus indigenous peoples have been positioned as barriers in the way of economic development, rather than as allies in creating a prosperous future for all. In keeping with the multiculturalist approach to FPIC, Peru's 'Vision of Mining in Peru by 2030' recognises the importance of good governance, and prior consultation of indigenous peoples as part of wider democratic participation in the state's extractivist development policies, with a view to ensuring that development benefits all the country's citizens. However, there is no evidence in the

[164] Sanborn and Paredes (n 6). Sanborn Paredes

illustrative examples of a willingness by the state to consider more transformative strategies such as co-management of the land.

The Coroccohuayco example gives insight into the longer-term potential of FPIC to provide a site of contestation and further conflict in Peru, as is suggested in Chapter 5. In this case, the community had experienced severe negative impacts of previous development, and had a developed understanding of FPIC that conforms with the 'general rule' interpretation of Article 32.2 of UNDRIP. Consequently, they pushed back against the shallow, multiculturalist implementation of FPIC by the state, demanding that consultation allows them a real chance to affect the scope and design of the project, and asserting that consent must not only be sought, but also obtained. Whilst the communities at Espinar did achieve a Ministerial Resolution that modified the Unique Text of Administrative Procedures of MINEM so that prior consultation could take place in a wide window of opportunity between the 'admission to process of the EIA' up to the authorisation of activities,[165] in the event the mEIA was approved just before the consultation was due to commence. This adds weight to the argument that the state controls the process, reinforcing existing power hierarchies to the detriment of indigenous self-determination.

The NGO CooperAccion have called these developments 'an act of bad faith on the part of the state, because the revision to the norms still allows prior consultation to take place after the EIA has been approved. CooperAccion suggest that the Ministerial Resolution has even worsened the position of indigenous peoples; in the case of Coroccohuayco, the prior consultation is now proceeding without a clear scope after the EIA approval, but before the mining company have cleared other regulatory approvals which are necessary for the project to commence. CooperAccion have warned that indigenous peoples 'are facing legal tricks and *ad hoc* norms to favour the execution of specific mining projects, such as Coroccohuayco, ignoring, without good reason, the demand of the communities to be consulted in ways that really guarantee their collective rights.' Furthermore, the NGO warns that the prior consultation could become 'a mere formality that generates new frustrations and risks the important rights that are at stake.'[166] Certainly, the differing interpretations of FPIC by the state and indigenous peoples seem to be translating into vastly different expectations of how the process should unfold, at least in some cases. This, paired with the lack of epistemic justice, state-controlled

[165] Resolución Ministerial No 403-2019-MINEM/DM.
[166] Cooperacción, '¿Estamos Ante Un Acto de Mala Fe Del Gobierno En El Caso Coroccohuayco? - CooperAcción' (*CooperAcción*, 23 December 2019) <http://cooperaccion.org.pe/estamos-ante-un-acto-de-mala-fe-del-gobierno-en-el-caso-coroccohuayco/> accessed 16 December 2020.

process, and limited options for self-determination would support the notion that multiculturalist interpretations of FPIC may be insufficient to promote reconciliation.

6.6 Conclusion

The analysis of the development of Peru's legal framework on prior consultation, and the three illustrative examples presented in this chapter cast doubt on the potential of the multiculturalist interpretation of Article 32.2 of UNDRIP to significantly contribute to reconciliation between indigenous peoples and the state. The three critiques of human rights based multiculturalism, that were discussed in the previous chapter in relation to Article 32.2 of UNDRIP, equally apply to the practice of FPIC in Peru. The mechanism for consultation prescribed in Peru's legal framework is narrow in scope and shallow in its ability to meaningfully engage with indigenous concerns. Consequently, it reinforces existing power structures and epistemic injustices, and at present does not enable indigenous communities to significantly shape the measures being proposed. Instead of providing a space in which two partners can forge consensus, prior consultation appears to be viewed by the state as an administrative process to legitimise pre-approved projects. On the other hand, it would appear that - in the mining sector at least - indigenous communities have progressed from viewing consultation as a limited opportunity to try to hold states to account for delivering on their existing legal duties, to an approach in which they are seeking to regain some control over the process - both in terms of when FPIC consultations occur, and how they are carried out. Nevertheless, the prescriptive legal framework continues to provide only a limited form of consultation which is unlikely to support meaningful self-determination, or build trust and reconciliation in the long-term.

Chapter 7: The Implementation of FPIC in Canada

7.1 Introduction

Chapter 6 provided an insight into the narrow and shallow implementation of FPIC in Peru - a country that has adopted a multiculturalist approach to FPIC, consistent with states' interpretation of Article 32 of UNDRIP. This chapter investigates the current practice of FPIC in Canada. Canada was one of the four countries which voted against the adoption of UNDRIP, in a large part due to the fear that FPIC could be interpreted as a right to veto important national development projects.[1] Furthermore, Canada is not a party to ILO C169.

Canada's domestic legal framework recognises a duty to consult that is based in case law which includes a theoretical recognition of a nation-to-nation relationship between the state and indigenous peoples. However, as shall be discussed, the Courts' interpretation of a duty to consult in the Canadian context treats indigenous peoples not as distinct sovereign peoples but as a special minority within a multicultural state, consistent with Kymlicka's model of multiculturalism and the multiculturalist interpretation of Article 32 of UNDRIP described in Chapter 5.[2] Whilst the term 'indigenous' will continue to be used in this chapter, the term 'aboriginal' also appears in relation to specific rights and title, due to the term being used to describe the First Nations, Inuit and Métis peoples in the Canada Act 1982 that forms part of the Canadian Constitution.[3]

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[1] Canada. (2007). Statement by Ambassador McNee to the General Assembly on the Declaration on the Rights of Indigenous Peoples. Retrieved from https://www.canada.ca/en/news/archive/2007/09/statement-ambassador-menee-general-assembly-declaration-rights-Indigenous-peoples.html.; Martin Papillon and Thierry Rodon, 'From Consultation to Consent : The Politics of Indigenous Participatory Rights in Canada' (*The Prior Consultation of Indigenous Peoples in Latin America*, 16 August 2019). 272.

[2] It should be noted that Canada's approach to FPIC in relation to Article 19 of the Declaration concerning legislative and administrative measures is far less amenable. In 2018 the Supreme Court decided, without taking into account the provisions of UNDRIP, that the Canadian parliament does not have a duty to consult indigenous peoples as part of the law-making process. However, detailed discussion of this issue falls outside the scope of this thesis. *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765. See also Sasha Boutilier, 'Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples' (2017) 7 Western Journal of Legal Studies <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5688> accessed 19 November 2020.; Pam Palmater, 'The Supreme Court Has Just Gutted the Crown's Duty to Consult First Nations' (*Maclean's*, 11 October 2018) <https://www.macleans.ca/opinion/the-supreme-court-has-just-gutted-the-crowns-duty-to-consult-first-nations/> accessed 19 November 2020.;

[3] The Constitution Act, 1982, s35, being Schedule B to the Canada Act 1982 (UK), 1982, c11. (53)
S35(2) states 'In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

This chapter takes a similar form to the last: in the first section, it analyses the legal basis for prior consultation of indigenous peoples in Canada. The second section provides three illustrative examples that give insight into some of the more collaborative approaches that consultation is being implemented in the Canadian context. The illustrative examples have been conducted through desk-based research of state and indigenous government documentation, commentary by non-governmental organisations, contemporary newspaper reports and journal articles. The final section will analyse the reconciliatory potential of FPIC in Canada, again with reference to its contribution to indigenous self-determination; the achievement of epistemic justice during the process; the ability of consultation to create more equal relations between the state and indigenous peoples; and how it may reframe the relationship of the state and indigenous peoples with respect to the land.

7.2 Canada's Duty to Consult

7.2.1 Background

Over 1.4 million people in Canada - or less than 5% of the population - identify as indigenous (or aboriginal). Around half are 'registered' or 'status' Indians (First Nations), 30% Métis (of mixed indigenous and European ancestry), 15% unregistered First Nations, and 4% Inuit.[4] Canada is viewed as a country that is world-leading in its support for human rights,[5] but despite this, the aboriginal population of Canada faces human rights violations of 'crisis proportions',[6] and lags far behind the rest of the population in measures of health care, housing, education, welfare, and social services. Furthermore, the relationship between indigenous peoples and the state is strained; even whilst considerable attention is given to the need for reconciliation,[7] indigenous peoples are frequently positioned as obstacles to economic progress.[8]

Canada is a Federal State with its origins in the colonisation of indigenous territory by the British and French Empires from the 16th Century.[9] The early occupation and colonisation of

[4] UNHRC Twenty-seventh session, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum The situation of indigenous peoples in Canada (4 July 2014) UN Doc A/HRC/27/52/Add.2.
[5] John McNee, 'Statement by Ambassador McNee to the General Assembly on the Declaration on the Rights of Indigenous Peoples, 13 September 2013'.
[6] UNHRC Twenty-seventh session, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum The situation of indigenous peoples in Canada (4 July 2014) UN Doc A/HRC/27/52/Add.2., para 14.; Papillon and Rodon, 'From Consultation to Consent' (n 1).
[7] UNHRC Twenty-seventh session, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum The situation of indigenous peoples in Canada (4 Ju;y 2014) UN Doc A/HRC/27/52/Add.2
[8] Terry Mitchell, 'Realizing Indigenous Rights in the Context of Extractive Imperialism': (2019) 12 International Journal of Critical Indigenous Studies 46.
[9] Ralph R Krueger, 'Canada | History, Geography, & Culture' (*Encyclopedia Britannica*, 17 November 2020) <https://www.britannica.com/place/Canada> accessed 19 November 2020.

Canada was devastating for the well-being of indigenous peoples.[10] After 1701, the Crown entered into treaties with some of the First Nations, to define their relationship with the indigenous peoples on a nation-to-nation basis. The Royal Proclamation of 1763 acknowledged the prior ownership of land of indigenous peoples in North America, and required the Crown to enter treaties and gain consent before occupation of indigenous land.[11] The treaties that were formalised - often following violent conflict or under coercion - generally legitimised the British Crown's sovereignty over the land by surrendering Aboriginal title in return for the creation of reserves and providing guarantees of indigenous peoples' rights to hunting and fishing, for example.[12]

Over time, this treaty model was replaced by a model of *de facto* sovereignty as the control of the Crown over the territories increased.[13] In the 19th Century, the British North America Act integrated the Provinces of Canada, New Brunswick and Nova Scotia into a federal Dominion under the British Crown, whilst giving the federal Parliament legislative authority over 'Indians, and Land reserved for the Indians.'[14] The Indian Act 1876 consolidated previous colonial laws which aimed to assimilate First Nations people and eradicate their culture.[15] This Act, although amended (most recently in 1985) to address some of its most unacceptable provisions, still regulates non-self-governing Indian territories and, in the words of Alexander, was 'designed to break apart pre-existing First Nations governance and replace it with a fiduciary relationship with the Crown'.[16]

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[10] ibid. Particularly in the first 200 years of colonisation, territorial encroachment and foreign disease significantly reduced the populations of First Nations and Inuit communities.

[11] Beverley McLachlin, 'Aboriginal Peoples and Reconciliation' (2003) 9 Canterbury Law Review 240.

[12] John Borrows, 'Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism' (2017) 98 Canadian Historical Review 114.

[13] Papillon and Rodon, 'From Consultation to Consent' (n 1).

[14] The Constitution Act 1867 30 & 31 Victoria c 3 (UK)., s 91(24).

[15] Under the Indian Act, First Nations people were considered wards of the state, as opposed to citizens. They were confined to indigenous reserves, unable to own property or vote, unless they renounced their status as Indians. The law (and subsequent amendments) gave the government powers over the identification of peoples as 'Indian', as well as over the governance structure of First Nations, and their education. The Act replaced traditional indigenous governance structures with elected band councils. Furthermore, it made illegal many key practices of First Nations culture, and permitted officials to determine rights and benefits based on judgements of 'good moral character'. Meanwhile, aboriginals suffered from inadequate access to healthcare, education, water, sanitation and employment opportunities. The practice of Indian Residential Schools forcibly removed indigenous children from their families in order to 'kill the Indian within the child' and forcibly assimilate them into European ways. The physical and mental abuse of indigenous children and their families perpetrated by this system - as well as through the 'sixties scoop' in which indigenous children were fostered or adopted by non-indigenous families - continued until its abolition in 1996, and its harmful legacy continues for those who were affected. William B Henderson and Zach Parrott, 'Indian Act' (*The Canadian Encyclopedia*, 23 October 2018) <https://www.thecanadianencyclopedia.ca/en/article/indian-act> accessed 20 November 2020.; Rosemary Nagy and Robinder Kaur Sehdev, 'Introduction: Residential Schools and Decolonization' (2012) 27 Canadian Journal of Law & Society / La Revue Canadienne Droit et Société 67.

[16] Doug Beazley, 'Decolonizing the Indian Act' (*National Magazine*, 18 December 2017) <http://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2017/decolonizing-the-indian-act> accessed 20 January 2021.

The legitimacy of Canada's sovereignty over indigenous territory and peoples remains a contested matter.[17] Much of Canada's territory remains unceded, as the Inuits, and First Nations on French-colonised territories, did not enter into treaties with Europeans,[18] and the Peace and Friendship treaties they entered into did not cede land.[19] Consequently, much of the land that is now British Columbia, Newfoundland, Nunavut, Quebec and Yukon was never the subject of a treaty.[20] Furthermore, there remain around 70 pre-1975 treaties that are recognised by the Crown, governing the relationship between 364 First Nations representing over 600,000 people, and Canada.[21] Whether or not these treaties were honoured, indigenous peoples in Canada have not yielded their claim to autonomy as nations.

The way in which the state has sought to manage this contested sovereignty is to recognise the existence of indigenous peoples whilst incorporating them into the legal framework of the state. In 1973, in the seminal *Calder* case, the Supreme Court recognised the existence of aboriginal peoples with their own social and political structures before the formation of Canada, and ruled that the laws and interests of aboriginal peoples - which predated the Crown's sovereignty - formed part of the common law, and could only be extinguished by a specific Act by the Crown.[22] Following the seminal decision in *Calder,* Canada developed the Comprehensive Land Claims Policy, by which the Crown entered into modern treaty agreements with indigenous groups.[23] Modern treaties are intended to form a basis for reconciliation, by creating 'new relationships within the Canadian federation while balancing the interests of Indigenous peoples with those of broader society'.[24] In 1982, the Constitution was amended to include the permanent protection of existing Aboriginal and Treaty rights which had not yet been extinguished under s35 (but without specifying their substance).[25] In addition, in 1995 the Canadian Government set out its Inherent Right policy, to govern

[17] John Borrows, 'Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia' (1999) 37 Osgoode Hall Law Journal 537.
[18] Britannica
[19] 'Fact Sheet on Peace and Friendship Treaties in the Maritimes and Gaspé' (*Government of Canada*, 15 September 2010) <https://www.rcaanc-cirnac.gc.ca/eng/1100100028599/1539609517566> accessed 20 January 2021. The Peace and Friendship Treaties were signed in the period 1726 to 1779, between the British and the Mi'kmaq, Maliseet and Passamaquoddy First Nations. They have been described as 'founding documents for the development of Canada'.
[20] Frank Iacobucci and others, 'Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples' (Torys LLP 2016).
[21] Papillon and Rodon, 'From Consultation to Consent' (n 1).
[22] *R v Calder*, [1996] 1 SCR 660.
[23] Since 1975, 25 additional modern treaties (also called comprehensive land claim agreements) have been signed, to delineate the relationship between 97 Indigenous communities (representing about 89,000 Indigenous individuals) and the provincial or territorial and federal governments. These agreements cover about 40% of Canada's land mass, covering such topics as land ownership, financial settlements and resource benefits sharing, consultation rights, and self-government. Canada, 'Implementation of Modern Treaties and Self-Government Agreements. July 2016-March 2018 Provisional Annual Report.' (2019) report <https://www.rcaanc-cirnac.gc.ca/eng/1573225148041/1573225175098#chp2> accessed 26 February 2021.
[24] ibid.
[25] Iacobucci and others (n 20).; Papillon and Rodon, 'From Consultation to Consent' (n 1).

negotiations to implement the right to self-government, as an inherent right under s35 of the Constitution.[26] Self-government agreements, whether standalone or in conjunction with a modern treaty, are intended to establish new intergovernmental relationships between indigenous governments and the Government of Canada, setting out governance structures, and responsibilities for programs and service provisions. They adopt a 'concurrent law model', where federal and provincial law applies alongside indigenous law.[27]

In recent years, Canada has explicitly recognised the need for reconciliation, and the role of UNDRIP in achieving it. In particular, the Royal Commission on Aboriginal Peoples, which was active between 1991-1996, revealed the scale of abuse of indigenous people that occurred within the residential school system.[28] In 2005, the Government announced its intention to provide compensation to every survivor, and to form a Truth and Reconciliation Commission to record testimonies and educate Canadians on what had occurred. Its final report of 2015 included 94 Calls to Action to promote reconciliation between the Canadian State with indigenous peoples, including the recommendation that Canada 'fully adopt and implement' UNDRIP.[29] However, Stanton has argued that the Courts have not applied the RCAP's vision of reconciliation as a 'mutual process to be engaged in by indigenous and non-indigenous peoples alike' differs significantly from the conceptualisation of reconciliation within the Canadian legal framework, in which indigenous sovereignty is 'reconciled' with that of the state through a colonial style of incorporation.[30]

7.2.2 The triumph of the multiculturalist approach

Due to the unique treaty-based relationship between the Crown and indigenous peoples in Canada, Papillon and Rodon argue that 'Indigenous peoples face a unique legal environment in Canada that shapes how FPIC is interpreted and, ultimately, translated in governance practices.'[31] However, as will be explained in more detail in the next section, the case law on the duty to consult positions indigenous peoples firmly within the legal framework of the state, as subjects rather than as sovereign peoples, and mirrors the multiculturalist approach to FPIC

[26] 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government' (*Government of Canada*, 3 November 2008) <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136> accessed 26 February 2021.
[27] Canada, 'Implementation of Modern Treaties and Self-Government Agreements. July 2016-March 2018 Provisional Annual Report.' (n 23).
[28] Nagy and Sehdev (n 15).
[29] 'Truth and Reconciliation Commission of Canada: Calls to Action' (Truth and Reconciliation Commission of Canada 2015)., Calls to Action 43 and 44.
[30] Kim Stanton, 'Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission' (2017) 26 Journal of Law and Social Policy 21.
[31] Martin Papillon and Thierry Rodon, 'Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada' (2017) 62 Environmental Impact Assessment Review 216., 218.

that states adopted in relation to Article 32 of UNDRIP. Coyle has observed that the duty to consult in Canada is not derived from the 'foundational principle' of consent which would recognise 'the inherent equality of indigenous peoples and their right to determine their own economic, political and cultural destinies in partnership with the state.[32] Instead, the duty is based on the need to balance indigenous rights with 'magical assertions of Crown sovereignty'[33] - a sovereignty that the Courts have so far failed to challenge.[34] Hamilton and Nicholls have commented that the entire legal framework rests on a 'thick' definition of Crown sovereignty which falsely presumes that the Crown has sovereignty, legislative power and title to indigenous lands and positions indigenous peoples as 'subjects' and 'cultural minorities *within* Canada'.[35] Under this model, the 'duty to consult' rests on the Courts' view, set out in *Tsilhqot'in Nation v British Columbia*,[36] that s35 rights should be adjudicated in a manner consistent with the states' fiduciary duty and the reasonable limitations of individual rights set out in the Canadian Charter of Rights and Freedoms.[37]

Authors such as Borrows and Hamilton and Nicholls have argued that to adequately respect the self-determination of indigenous peoples and a nation-to-nation relationship, the legal framework should apply an interjurisdictional analysis of s35 rights.[38] This, it is argued, could give rise to a more meaningful 'duty to negotiate', following the principles set out in the *Quebec Secession Reference.*[39] This approach, which would more fully recognise aboriginal peoples as nations with a right to consent and to have their decision respected, is more reminiscent of

[32] Michael Coyle, 'Shifting the Focus: Viewing Indigenous Consent Not as a Snapshot But As a Feature Film' (2020) 27 International Journal on Minority and Group Rights 357., 360.
[33] Borrows, 'Sovereignty's Alchemy' (n 17)., 596. In Borrow's view, the duty to consult as elaborated in the *Delgamuukw* decision permits a unilateral extinguishment of aboriginal rights, which if not corrected, could entitle aboriginal peoples to a secession claim due to violations by the state of their right to self-determination. See also Gordon Christie, 'A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation' (2005) 23 Windsor Yearbook of Access to Justice 17.
[34] Michael Coyle, 'From Consultation to Consent: Squaring the Circle?' (2016) 67 University of New Brunswick Law Journal 235. 244.
[35] Robert Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56 Alberta Law Review 729. 738.
[36] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256, paras 138-152.
[37] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 ('Canadian Charter'). The Canadian Charter relates to individual rights and minority language education rights. s1 states 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'
[38] John Borrows, 'The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia' (2015) 48 U.B.C. Law Review 701.; Hamilton and Nichols (n 35).;. See also the work of Richard Stacey, who argues that s35 must be brought together with federalism to fully recognise indigenous self-government and self-determination. Richard Stacey, 'The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism' (2018) 46 Federal Law Review 669.; Richard Stacey, 'Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?' (2018) 68 University of Toronto Law Journal 405.
[39] Hamilton and Nichols (n 35).

the ‘general rule’ approach advocated by indigenous peoples and their allies in relation to Article 32 of UNDRIP.[40]

However, Canada’s approach to FPIC has also shifted over time away from a ‘general rule’ interpretation of FPIC to embrace the multicultural approach. At the time of UNDRIP’s adoption, Canada interpreted UNDRIP’s provisions on FPIC as a veto right more in line with the ‘general rule’ approach, and said that it was be ‘incompatible with Canada’s parliamentary system’.[41] Likewise, when in 2010 Canada indicated its qualified support for UNDRIP, it emphasised UNDRIP’s status as a ‘non-legally binding aspirational document’ and noted again that FPIC, when used as a veto, was incompatible with Canada’s domestic legal framework and constitution.[42] However, as pressure mounted to fully adopt UNDRIP, Canada has moved to interpret FPIC in a manner consistent with the multicultural approach. Announcing Canada’s full support for UNDRIP at UNPFII in 2016, the Minister of Indigenous Affairs, Carolyn Bennett, stated that the implementation of UNDRIP would be ‘breathing life into s35’ and noted that ‘[Canada’s] constitutional obligations serve to fulfil all of the principles of the declaration, including free, prior and informed consent.’[43] The following year, the Government’s Principles Respecting the Government of Canada’s Relationship With Indigenous Peoples interpreted FPIC to merely require consultation ‘aimed at securing consent’, rather than as a full right of veto.[44]

Canada’s change of tone paved the way for an attempt to implement UNDRIP in federal law.[45] In 2016, concerns regarding FPIC were a ‘major roadblock’ to an attempt to implement

[40] Discussed further in Chapter 5.
[41] UNGA, Sixty-first Session 107th Plenary Meeting Thursday 13 September 2007, 10 am New York official records (13 September 2007) UN Doc A/61/PV.107, 13.
[42] Government of Canada; Aboriginal Affairs and Northern Development Canada, ‘Archived - Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, November 12 2010’ (29 June 2011) <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 26 February 2021. 1309374239861/1309374546142.
[43] ‘Fully Adopting UNDRIP: Minister Bennett’s Speech at the United Nations’ (*Northern Public Affairs*, 11 May 2016) <http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/> accessed 26 February 2021. The Minister of Indigenous Affairs of the new Liberal government confirmed Canada’s full support for UNDRIP at the UNPFII, stating that Canada intended to adopt and implement the Declaration in accordance with the Canadian Constitution and in doing so would be ‘breathing life into s35 and recognizing it as a full box of rights for Indigenous Peoples in Canada.’ Furthermore, Minister Bennett noted that ‘Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including free, prior and informed consent.’
[44] Department of Justice Government of Canada, ‘Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples’ (14 July 2017) <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html> accessed 26 February 2021.; ‘Building Common Ground: A New Vision for Impact Assessment in Canada’ (Canadian Environmental Assessment Agency 2017) program results.
[45] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, First Session, Forty-second Parliament, 2016. This private member’s bill was sponsored by Romeo Saganash, MP from the Cree Nation of Eeyou Istchee, was placed before the House of

UNDRIP in the Senate, and in the wider public debate.[46] However, in December 2020, a new Bill C-15 was introduced to place a legal obligation on the Government of Canada to 'take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples, and must prepare and implement an action plan to achieve the objectives of the Declaration'.[47] In doing so, the Government has stated that the established duty to consult would not change, but that UNDRIP would 'inform how the Government approaches the implementation of its legal duties going forward'.[48] However, Bill C-15 has not been subject to consultation with indigenous peoples, and many indigenous people in Canada have reacted with concern, arguing that the Bill undermines the self-determination basis of UNDRIP and instead use 'only the weaker colonial language of control and management'.[49]

The next section sets out the main content of FPIC in Canada, known as 'the duty to consult'. As will be seen, the 'duty to consult' is largely consistent with the multiculturalist approach to FPIC discussed in Chapter 5.

7.2.3 The content of the duty to consult

In the absence of legislation, the legal framework governing the duty to consult in Canada is established through a 'well developed' body of case law on indigenous peoples' rights which has been praised by the UN Special Rapporteur on the Rights of Indigenous Peoples.[50] Canada's legal framework views the duty to consult as arising from the recognition, in s35 of the Canada Act 1982, of 'existing aboriginal and treaty rights'[51] and the principle of the 'honour of the Crown'. This principle requires the Crown to act honourably in its dealings with aboriginal peoples, to fulfil the purpose of s35 which is 'the reconciliation of the pre-existence of

Commons, with the aim of establishing a collaborative process to implement UNDRIP. The House voted in favour in May 2018 at its third reading, but the Bill was delayed by the Senate so it failed to become law.

[46] Papillon and Rodon, 'Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada' (n 31).; Martin Papillon and Thierry Rodon, 'Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach' (Institute for Research on Public Policy 2017) IRPP Insight 16.

[47] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, Second Session*, Forty-third Parliament, 2020.

[48] 'Backgrounder: Bill C-15 - United Nations Declaration on the Rights of Indigenous Peoples Act' (*Government of Canada*, 26 January 2021) <https://www.justice.gc.ca/eng/declaration/about-apropos.html> accessed 21 February 2021.

[49] Russ Diabo, 'Indigenous Peoples Should Reject Canada's UNDRIP Bill C-15: It's Not All That Meets the Eye' (2020) 31 Indigenous Policy Journal <http://www.indigenouspolicy.org/index.php/ipj/article/view/723> accessed 26 February 2021.

[50] UNHRC, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya' (4 July 2014) UN Doc A/HRC/27/52/Add.2, para 6.

[51] The Constitution Act, 1982, s35, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

aboriginal societies with the sovereignty of the Crown'.[5253] The remainder of this section introduces the current legal requirements in relation to the state's duty to consult, and argues that despite the formal recognition by Canada of the pre-existence of aboriginal societies and the *sui generis* nature of their rights,[54] the duty to consult rests on a framing of indigenous peoples not as sovereign peoples, but as national minorities within a nation state in a manner that is consistent with a multiculturalist reading of Article 32 of UNDRIP.

In 1990, the landmark case of R v Sparrow[55] considered the conditions on which an aboriginal right to fish could be justifiably infringed by the Crown. It stated that the aboriginal rights protected by s35 of the Constitution Act 1982 are not absolute, but may be limited by the Crown subject to certain tests being met. First, it must be in pursuit of a valid legislative objective, which must be specific rather than a general statement of 'the public interest'. Second, the 'honour of the Crown' must be observed, and the state's fiduciary duty to aboriginal peoples must be 'the first consideration in determining whether the legislation or action in question can be justified.'[56] Within the analysis of whether an infringement is justified, the Court set out a non-exhaustive list of questions to be considered, including whether the infringement was kept to a necessary minimum; whether compensation is provided; and whether consultation has taken place. These requirements were confirmed in the later cases of *R v Badger*,[57] in relation to treaty rights, and in *Delamuukw v British Colombia*[58] in relation to aboriginal title.

The principles of *R v Sparrow* were affirmed in the *Van der Peet* case, which also considered that the nature of the relationship of the Crown to aboriginal peoples 'is a fiduciary one and a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples'. However, the same case provided a relatively restrictive interpretation of s35 rights, as an activity that is 'an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.' In determining whether such a right exists, 'The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional

[52] *R v Van der Peet*, [1996] 2 SCR 507, para 31. See also *R v Badger*, [1996] 1 SCR 771, at para. 41; *R v Marshall*, [1999] 3 SCR 456; *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511, 2004 SCC 73, paras 16 and 17; D*elgamuukw v British Columbia*, [1997] 3 SCR 1010, para 186.
[53] *R v Van der Peet* (n 52) para 31; *Delgamuukw v British Columbia* (n 52), para 186; *Haida Nation v British Columbia* (n 52), paras 17, 20 and 25.
[54] See *R v Van der Peet* (n 52)*; Delgamuukw v British Columbia* (n 54).
[55] *R v Sparrow*, [1990] 1 SCR 1075. See also *R v Badger* (n 52); *Delgamuukw v British Columbia* (n 54).
[56] *R v Sparrow* (n 55).
[57] *R v Badger* (n 52), para 97.
[58] *Delgamuukw v British Colombia* (n 52), para 168.

structure.'[59] However, this approach has been criticised by Barsh and Henderson for its paternalistic approach in which the Supreme Court has assumed the power to make judgements on what is central and integral to aboriginal culture. Furthermore, they argue that the decision effectively extinguishes rights by applying a higher standard in defining aboriginal rights, and in requiring that they are consistent with Canada's legal framework.[60]

The important case of *Haida Nation v British Colombia (Minister of Forests)*[61] contemplated whether the duty to consult also applied where aboriginal rights that were asserted, but not yet proven. The Court decided that, provided that there was a *prima facie* claim that aboriginal rights would be impacted by a measure proposed by a provincial or federal government, the duty to consult applied. As such, the duty to consult arises ' when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it', and acts as a safeguard to prevent the Crown 'cavalierly run[ning] roughshod' over asserted rights before they are finally determined, in contravention of the reconciliatory purpose of s35.[62] The positioning of consultation as procedural - as opposed to a substantive - right was confirmed in the case of *Mikisew Cree First Nation v Canada (First Minister of Canadian Heritage)*[63] which dealt with treaty rights, and in relation to modern treaties in the case of *Beckman v Little Salmon/Carmacks First Nation.*[64] Furthermore, the case of *Ktunaxa Nation*[65] stated that the duty to consult constitutes a 'right to a process, not a particular outcome'.

The *Haida Nation* case was also instrumental in setting out some indicators of how the duty to consult must be fulfilled. There is a requirement for the consultation to be carried out with procedural fairness.[66] This may include providing funding to indigenous groups to enable their participation, and provision to accept oral evidence in accordance with indigenous traditions.[67] Furthermore, there is an obligation of good faith on the Crown and the indigenous party. Hamilton and Nicholls have argued that the expression of this good faith requirement on

[59] *R v Van der Peet* (n 52). See also David W Elliot, 'Fifty Dollars of Fish: A Comment on R. v. Van Der Peet Case Comments and Notes' (1996) 35 Alberta Law Review 759.
[60] Russel Lawrence Barsh and James Youngblood Henderson, 'The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand' (1997) 42 McGill Law Journal.
[61] *Haida Nation v British Columbia* (n 52).
[62] ibid.
[63] *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765.
[64] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.
[65] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386, para 83.
[66] *Haida Nation v British Columbia* (n 52), para 41; *Beckman v Little Salmon/Carmacks First Nation* (n 64), para 46.
[67] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069, para 47; See also *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, [2017] 1 SCR 1099.

indigenous people - that they 'outline their claims with clarity'[68] and do not take 'unreasonable positions to thwart the Crown from making decisions'[69] - requires that they express themselves in the language of rights and in a way that is consistent with their ascribed status as Crown subjects. Consequently, 'they must fit themselves into the Constitutional Order that they are in fact contesting.'[70]

The duty to consult in Canada bears a strong resemblance to the multiculturalist approach to FPIC discussed in Chapter 5, in which consent is generally not required but may on exception be necessary at the very highest end of the impact spectrum. The extent of the consultation required rests on an assessment of the strength of claim to the aboriginal right in question, as well as the potential severity of the infringement on that right, should the project proceed. Thus if the direct impact of the project is minor and the rights claim is weak, the Crown's duty to consult may be discharged by giving notice and information, and to discuss any issues raised.[71] On the other hand, if there is a strong claim to title or similar right over land, and the potential impacts of the project are severe, the duty to consult may require extensive engagement and the participation of the communities in decision-making processes concerning the project, and written explanations of the outcome and the engagement of third parties to resolve disputes in difficult cases.[72] The process should be carried out as a 'meaningful, two-way dialogue' at every stage of the project process[73] with the intention of understanding and taking into account indigenous peoples' concerns.[74] At this more stringent

[68] *Haida Nation v British Columbia* (n 52), para 36.
[69] Ibid, para 42. 'At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.'
[70] Hamilton and Nichols (n 35). 739.
[71] In *Beckman v Little Salmon/Carmacks First Nation* (n 64), a treaty was in place, which surrendered title to the land to the Crown. The court held that the duty to consult was at the lower end of the spectrum, considering that the grant of a parcel of surrendered land for agriculture would have a minimal impact on aboriginal and treaty rights; subsequently there was no duty to accommodate. In this case, the First Nation was informed of the proposal, objected by letter, and did not attend a consultation meeting that was held. The court found that this process was sufficient to discharge the duty to consult.
[72] *Haida Nation v British Columbia* (n 52), para 44. See also *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* (n 67), para 52.
[73] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3, paras 36, 756, 564-574.
[74] *Delgamuukw v British Columbia* (n 52), para 168; *Mikisew Cree First Nation v Canada* (n 2), para 51. Two high-profile cases have also underlined this point. In *Gitxaala Nation v Canada*, 2016 FCA 187 (CanLII), [2016] 4 FCR 418, which was brought in relation to the Northern Gateway Project, the court held that Canada had failed to 'engage, dialogue and consult' with the concerns raised by First Nations following the completion of the environmental assessment by a joint review panel, and prior to authorisation of the project by the Governor in Council. The court noted that to discharge a duty to consult, the state must demonstrate its intention to correct errors or omissions, provide meaningful feedback to concerns raised, and a 'real and sustained effort to pursue meaningful two-way dialogue'. In this case, the post-assessment consultation was hurried, with no apparent intention to include additional project conditions if necessary (see paras 329 – 341). In *Tsleil-Waututh Nation v Canada* (n 73) regarding the 'Trans Mountain Pipeline, the Federal Court of Appeal held, that the consultation process had failed at the same stage, stating that the Crown demonstrated a lack of willingness to engage with indigenous critique of the Joint Review Board's environmental assessment, and consider additional accommodations. The exercise was simply to record indigenous comments and relay them to the Governor in Council, before the project was approved. In both these cases, the Court quashed the certificate authorising the

end of the spectrum, the duty to consult may also require the state to make accommodation, which has been defined by the Court as the requirement to seek 'compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation.' Accommodation could include steps to mitigate impacts or avoid irreversible harm until such time as the rights claim can be resolved.[75] As discussed below, if a claim for title to land and resources is ongoing, there is an implied duty for the Crown to consult and accommodate at the higher end of the spectrum, in the spirit of reconciliation, and even in the most serious cases, to actually obtain consent.[76]

Case law has also set out some limitations to the scope of the duty to consult. First, consultations are not intended to deal with 'past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position'.[77] The focus of the consultation must be the proposed measure's impact on the enjoyment of aboriginal rights, as opposed to wider concerns about environmental impacts,[78] or on the previous adverse impacts of the project in question.[79] However, when assessing the potential impact on these rights, existing limitations on rights and cumulative impacts can be included.[80] Furthermore the purpose of consultation is not to forge agreement, and there is (with a very limited exception discussed below) no requirement to obtain consent.[8182] Instead, the purpose is for each side to understand one another's concerns, and to 'substantially address' them.[83]

Case law has also addressed the circumstances in which the state may proceed with a project in the event that the indigenous people in question withhold consent. In this respect, too, Canada conforms to the multiculturalist approach described in Chapter 5, permitting the state to infringe indigenous title for reasons that include general public interest, as opposed to

project, and required the state to redo the consultation on the environmental assessment report. This demonstrates the importance of the underlying approach taken by Ministers and officials in ensuring that legal frameworks are translated into meaningful dialogues with indigenous peoples.

[75] *Haida Nation v British Columbia* (n 52), paras 46-48; In the *Taku River Tlingit First Nation v British Columbia* [2004] 3 SCR 550, the government was required to consult the Taku River Tlingit First Nation**,** who had a strong *prima facie* claim to land, at the higher end of the consultation and accommodation spectrum. This was done through inclusion of the First Nation as part of the Project Committee, and their full participation in the environmental review process. The views of the First Nation were heard by the decision makers, and project approval conditions were designed to address the project's impacts in the long and short term.

[76] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* [2010] SCC 43; *Haida Nation v British Columbia* (n 52), para 24; *Delgamuukw v British Columbia* (n 52), para 168.

[77] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (n76).

[78] *Clyde River (Hamlet) v Petroleum Geo-Services* Inc (n 67), paras 45 and 51.

[79] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (n 76), para 53.

[80] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* (n 67), para 42.

[81] *Haida Nation v British Columbia* (n 52), paras 36, 46-48; *Taku River Tlingit First Nation v British Columbia* (n 75). In the latter case, the Court held that 'The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.' (para 22).

[82] *Haida Nation v British Columbia* (n 52), para 36.

[83] *Delgamuukw v British Columbia* (n 52), para 169; *Tsilhqot'in Nation v British Columbia* (n 36), para 76.

strictly limiting infringement to rare exceptions that are necessary in order to uphold human rights. The *Tsilhqot'in Nation v British Colombia* case held that where the Crown proposes to infringe of a proven right of aboriginal title to land - which 'confers the right to use and control the land and to reap the benefits flowing from it' - it may only do so with consent, or if the proposed infringement is 'justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group'.[84] In determining the scope of the public interest, the Court referred to *Delgamuukw*, in which it was decided that:

> *the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title*.[85]

Such a statement is not consistent with the views of those who advocate the 'general rule' approach to FPIC, but instead places emphasis on the state's freedom to pursue economic development strategies without obstruction. In a similar manner to the criteria set for infringement of the right to property by the IACtHR in the *Saramaka v Suriname* case,[86] in order to justify an infringement of aboriginal title Canada must demonstrate that it is necessary to achieve the objective ('rational connection'); that there must be 'minimal impairment' of the right; and that the adverse effects on Aboriginal interest must not outweigh the benefits of proceeding ('proportionality of impact'). The state must also show that it has met its duty to consult and accommodate before proceeding, with the Court noting that 'Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the

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[84] *Tsilhqot'in Nation v British Columbia* (n 36)., paras 76-77. The judgement makes clear that this consideration of the objective purpose of the infringement is only relevant in cases where title is proven.

> '*Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s35 of the Constitution Act, 1982. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group*.' (para 80).

[85] *Delgamuukw v British Columbia* (n 52), para 165; *Tsilhqot'in Nation v British Columbia* (n 36), para 83.

[86] *Case of the Saramaka People v Suriname* Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 172 (28 November 2007); *Case of the Saramaka People v Suriname* Judgment of August 12, 2008 (Interpretation of the Judgement on Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No 185 (12 August 2008)., discussed in Chapter 5.

consent of the interested Aboriginal group.'[87] Additionally, if a new aboriginal title is established, there may be a need to reassess projects or legislation that were previously undertaken without consent, if their continuance would 'unjustifiably infringe' Aboriginal title.[88] In practice, Hamilton and Nicholls argue that this recognition of consent is almost irrelevant, due to the difficulties in satisfying the high burden of proof to demonstrate aboriginal title, and the cost of doing so.[89] Coyle reported in 2020 that the *Tsilqot'in* decision remained the sole example of the application of the indigenous consent standard, representing just 0.002% of Canada's territory.[90]

7.3 Critiques of the duty to consult

Critics have argued that the duty to consult is not intended to facilitate the sharing of authority and decision-making, but to legitimise state decisions through an information-sharing process which allows indigenous peoples only minimal influence on the outcome.[91] This is, in part, due to its implementation the environmental impact assessment process. The Canadian Environmental Assessment Act[92] (CEA Act) has been criticised as being unsuitable for prior consultation processes, designed for general public consultation rather than for private, bilateral engagement with indigenous peoples.[93] In 2019, the CEA Act was replaced with the Impact Assessment Act (IA Act),[94] which explicitly references Canada's commitment to implementing UNDRIP in its preamble. Whilst some critics argued that the IA Act would kill off development projects due to its more extensive requirements to consult indigenous peoples, others argued that it did not go far enough, drawing heavily on the flawed processes of its predecessor, the CEA Act, and falling short of the recommendations made by an Expert Panel during its drafting as well as IA best practice.[95]

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[87] *Tsilhqot'in Nation v British Columbia* (n 36), para 97. *Delgamuukw v British Columbia* (n 52) established that Aboriginal title - an exclusive right to land - is an existing Aboriginal right protected by s35 of the Constitution. To demonstrate title to land, indigenous peoples must demonstrate sufficient evidence of continuous and exclusive occupation of the territory from before the time of European colonisation, and the integral link between the land and their culture. Furthermore, traditional lands cannot be used in a manner that is incompatible with their traditional ways of life; if they wish to use their lands in a way that is not permitted, they must surrender to land to the Crown and convert them into non-title lands. See *Tsilhqot'in Nation v British Columbia* (n 36), para 2.

[88] *Tsilhqot'in Nation v British Columbia* (n 36), para 92

[89] Hamilton and Nichols (n 35).

[90] Coyle (n 34)., 246.

[91] Papillon and Rodon, 'From Consultation to Consent' (n 1)., 268.

[92] Canadian Environmental Assessment Act, SC 2012, c19, s52.

[93] For a critique on how the CEA Act restricts indigenous peoples rights, see Denis Kirchhoff, Holly L Gardner and Leonard JS Tsuji, 'The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples' (2013) 4 International Indigenous Policy Journal 1.

[94] Impact Assessment Act SC 2019 C 28 s1.

[95] Meinhard Doelle and A John Sinclair, 'The New Federal Impact Assessment Act in Canada: Delivering on Reform Expectations?' (2018) Working Paper <https://papers.ssrn.com/abstract=3290255> accessed 23 November 2020. The Act establishes the Impact Assessment Agency as a single coordinating body for impact assessments which meet criteria for federal impact assessment, with power to delegate to any provincial or indigenous governing body. The Act commits to the implementation of UNDRIP in its preamble and makes clear its intention to promote

Critics of FPIC consultations in Canada argue that they are not generally conducive to deep inter-cultural conversations, as they are formal procedures, rooted in western science, in which indigenous knowledge is not equally valued.[96] Furthermore, there is no obligation for regulatory bodies to agree to demands or suggestions made within the consultation process, so the opportunity for indigenous peoples to influence the design of the process and the decisions made is limited.[97] Natan Obed, the President of Inuit Tapiriit Kanatami,[98] has commented that 'our experience has shown us that consultations tend to have predetermined outcomes, are rarely collaborative in nature, and by their very orientation situate final decision-making power with non-Indigenous governments. This is not self-determination.'[99] Such flaws in the ESIA process increase the 'potential for conflict, increase the capacity burden on under-resourced indigenous groups and [minimise] Indigenous concerns and jurisdiction.'[100]

The UN Special Rapporteur on the Rights of indigenous Peoples also noted the frustrations of indigenous leaders with government-led processes for consultation, stating that flawed consultation processes are 'contributing to an atmosphere of contentiousness and mistrust that is conducive neither to beneficial economic development nor social peace.'[101] Commentators have also argued that in Canada, as in Peru, consultation has been

cooperation with indigenous peoples and indigenous governing jurisdictions, ensuring that indigenous knowledge is taken into account, and that there is respect for indigenous peoples throughout the process. For example, there is Ministerial discretion to require a federal impact assessment where projects fall below the threshold, including in cases where there may be adverse effects to Indigenous peoples, including Indigenous women. In a new 'planning phase', indigenous groups as well as the public and governing bodies with any jurisdiction over the project must be consulted. If the Agency decides an impact assessment is required, it sets out the scope of the assessment which must now consider, in addition to environmental impacts, such considerations as the need for the project; alternatives to the project; traditional knowledge of Indigenous peoples and community knowledge; impacts on Indigenous rights and communities; and the project's impact on sustainability and climate commitments. Following the impact assessment, the Minister must take a decision (or refer to the Minister in Council) as to whether the project is in the public interest, considering the extent of the adverse impacts, mitigation measures, impacts on indigenous communities and their s35 rights, and the impact on sustainability and climate commitments. It also establishes an Indigenous Advisory Committee. The authors comment that the IA Act's success in promoting indigenous involvement will depend greatly on whether Ministerial discretion is exercised in the spirit of the Act and the UNDRIP.

[96] Carly A Dokis, *Where the Rivers Meet: Pipelines, Participatory Resource Management, and Aboriginal-State Relations in the Northwest Territories* (Reprint edition, UBC Press 2016).; Aniekan Udofia, Bram Noble and Greg Poelzer, 'Meaningful and Efficient? Enduring Challenges to Aboriginal Participation in Environmental Assessment' (2017) 65 Environmental Impact Assessment Review 164.

[97] Papillon and Rodon, 'Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada' (n 31).

[98] Inuit Tapiriit Kanatami is the national organization championing the rights and interests of the 65,000 Inuit in Canada. 'National Representational Organization for Inuit in Canada' (*Inuit Tapiriit Kanatami*) <https://www.itk.ca/> accessed 21 February 2021.

[99] Natan Obed, 'Free, Prior & Informed Consent and the Future of Inuit Self-Determination – Northern Public Affairs' (*Northern Public Affairs*, 2015) <http://www.northernpublicaffairs.ca/index/volume-4-issue-2/free-prior-informed-consent-and-the-future-of-inuit-self-determination/> accessed 21 February 2021.

[100] 'Building Common Ground: A New Vision for Impact Assessment in Canada' (n 44)., 27.

[101] UNHRC Twenty-seventh session, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum The situation of indigenous peoples in Canada (4 Ju;y 2014) UN Doc A/HRC/27/52/Add.2, para 71.

appropriated by government and private companies to limit the decision-making power of indigenous peoples, through the operation of restrictive legal norms and processes controlled by the non-indigenous party, and which constrain the transformational potential of FPIC. Consent gained in such circumstances tends to reflect a cost-benefit/compensation logic which does not constitute truly free consent, or reflect the cultural practices and or development priorities of indigenous peoples.[102] Furthermore, Young argues that the Court's conceptualisation of the duty to consult as a procedural rather than a substantive right may simply result in the 'illusion of efficacious federalism' in which failed consultation processes can be endlessly repeated to legitimate unilateral state decision-making, and draw attention away for the resolution of broader socio-economic concerns.[103]

As is evident from the above, although the duty to consult is viewed by the state as an essential part of reconciliation with aboriginal peoples, its critics are less optimistic about its reconciliatory impact. In keeping with the indigenous critique of human rights based multiculturalism, critics of the Canadian duty to consult argue that it privileges Euro-Canadian law and ways of viewing the world, and does not challenge existing hierarchies of power. For example, Christie has concluded that 'contemporary jurisprudence is essentially colonial in nature', and that the Supreme Court has 'privilege[d] non-Aboriginal visions of land and land use', denying aboriginal sovereignty and 'constructing a national identity ..that has as its core a central vision of Canada as a colonial state'.[104] Similarly, John Borrows has argued that the *Delgamuukw* case undermines aboriginal land rights and places Canadian law and values as the immutable standard in relation to which aboriginal claims must be judged.[105] The assumption of Crown sovereignty, the supremacy of state law, the lack of a general duty to obtain consent and the conceptualisation of s35 rights as 'not absolute' and subject to reasonable limitations all confer onto the Crown the significantly greater bargaining power in consultation processes,[106] and Coyle observes that consultation processes are not usually jointly designed, which may further disadvantage indigenous groups whilst undermining the legitimacy of the process itself, increasing the risk of disputes.[107]

Consequently, indigenous peoples in Canada are mobilising to create their own FPIC standards, through strategies of confrontation which challenge existing mechanisms through

[102] Papillon and Rodon, 'From Consultation to Consent' (n 1).
[103] Stephen M Young, 'The Deification of Process in Canada's Duty to Consult: Tsleil-Waututh Nation v Canada (Attorney General)' (2019) 52 U.B.C. Law Review 1065., 1104.
[104] Christie (n 33).
[105] Borrows, 'Sovereignty's Alchemy' (n 17).
[106] Hamilton and Nichols (n 35).
[107] Coyle (n 34).

both legal action and civil disobedience; collaboration to maximise the usefulness of existing mechanisms in achieving their rights and objectives, and the reappropriation of FPIC through parallel indigenous decision making processes.[108] The next section of this chapter examines three illustrative examples, which demonstrate that even in its most progressive form, a multiculturalist approach to FPIC falls prey to the pitfalls of human rights based multiculturalism that were highlighted in Chapter 4.

7.4 Illustrative Examples

The absence of a uniform legislative framework for consultation in Canada means there is significant variation between the depth and scope of provincial policies and guidelines on consultation.[109] Consequently, it is not possible for selected cases to provide a representative view of prior consultation in Canada. Whilst there are notable high-profile examples of sub-standard prior consultations that have not resolved conflict over extractive projects,[110] the purpose of this thesis is to explore avenues for reconciliation, and therefore illustrative examples were sought that provide a best case scenario for the multiculturalist approach to FPIC. All three illustrative examples demonstrate ways in which indigenous groups are utilising the existing top-down legal framework to assert their traditional knowledge and rights through consultation processes, again focusing on the mining sector. Canada's mining sector is a 'mainstay' of the economy, with a total mineral production of $47.0 billion in 2018. However, this industry has a significant negative impact on indigenous territories: since 2009, approximately 309 agreements between exploration and mining companies and Indigenous communities and governments have been signed,[111] but in general terms extractive activities have failed to provide significant improvements in indigenous well-being, whilst at the same time having serious negative socioeconomic, environmental, cultural costs, including political conflict.[112]

7.4.1 Ajax Mine

[108] Papillon and Rodon, 'From Consultation to Consent' (n 1).
[109] Iacobucci and others (n 20).
[110] See footnote 76 for two notable examples of consultations that have been shown to be inadequate and which are the subject of conflict: *Gitxaala Nation v Canada* (n 76) and *Taku River Tlingit First Nation v British Columbia* (n 76).
[111] Natural Resources Canada, 'Minerals and the Economy' (25 January 2018) <https://www.nrcan.gc.ca/science-data/science-research/earth-sciences/earth-sciences-resources/earth-sciences-federal-programs/minerals-and-economy/20529> accessed 23 November 2020.
[112] Anna J Willow, 'Indigenous ExtrACTIVISM in Boreal Canada: Colonial Legacies, Contemporary Struggles and Sovereign Futures' (2016) 5 Humanities 55.

The Ajax Project - co-owned by Poland-based KGHM International and Abacus Mining and Exploration Corporation, based in Vancouver - was a proposed $1.5 billion open-pit gold and copper mine two kilometres from the outskirts of the city of Kamloops in British Columbia[113], on traditional Stk'emlupsemc te Secwepemc Nation (SSN) territory.[114] If built, it would have destroyed 1,700 hectares of rare grasslands and waters, which include Jacko Lake and the Pípsell Cultural and Heritage Area, with immense cultural significance to the Secwepemc people. The project was subject to a joint environmental review between the Canadian Environment Assessment Agency (CEA Agency) and the British Columbia Environmental Assessment Office (BCEAO).[115] Despite the significance of the development and its potential impacts on human health and the environment, in 2011 the CEA Agency determined that it should be subject to a Comprehensive Study Process, rather than the more comprehensive Independent Review, and began consultations with the SSN. The SNN requested that an Independent Review Panel be established in view of the significant impact of the project. Independent Reviews are the most extensive and independent form of environmental assessment under the CEA Act, undertaken on projects that may have significant adverse effects that are of public concern. They are initiated at the discretion of the Minister of the Environment if it is considered that it is in the public interest to do so. They require the project to be assessed by an independent panel of experts, may take up to 24 months for a decision to be made by the Minister of the Environment.[116] Under a Comprehensive Study, the government agency responsible for the project is tasked with undertaking the assessment, and a decision must be made by the Minister within a year of the assessment commencing.[117] However, this request for an Independent Review was denied.[118]

In 2015, in response to the proposed mine, the SSN filed an Aboriginal title claim to the Supreme Court of British Columbia for the Pípsell area.[119] The British Columbia Environmental

[113] 'BC Government Rejects Ajax Mine' (*MINING.COM*, 15 December 2017) <https://www.mining.com/bc-government-rejects-ajax-mine/> accessed 25 November 2020.
[114] Ashcroft Indian Band, Lower Nicola Indian Band, and Whispering Pines/Clinton Indian Band also asserted their traditional interest in the land. 'Province Denies Environmental Permit for Ajax Open-Pit Mine near Kamloops |' (*Georgia Straight*, 14 December 2014) <https://www.straight.com/news/1008231/province-denies-environmental-permit-ajax-open-pit-mine-near-kamloops> accessed 25 November 2020.
[115] 'Ajax Mine Project: Joint Federal Comprehensive Study / Provincial Assessment Report' (Canadian Environmental Assessment Agency and British Columbia Environmental Assessment Office 2017) <https://iaac-aeic.gc.ca/050/evaluations/document/120717> accessed 25 November 2020.
[116] Canadian Environmental Assessment Agency Government of Canada, 'Canadian Environmental Assessment Agency - Review Panels' (1 January 2007) <https://iaac-aeic.gc.ca/010/type5index-eng.cfm> accessed 8 December 2020. See CEA Act articles 38 – 48.
[117] Canadian Environmental Assessment Agency Government of Canada, 'Canadian Environmental Assessment Agency - Comprehensive Studies' (1 January 2007) <https://iaac-aeic.gc.ca/010/type3index-eng.cfm> accessed 8 December 2020. See CEA Act Article 27.
[118] 'Summary Assessment Report (Ajax): With Respect to the Application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate Pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43' (British Columbia Environmental Assessment Office 2017). 18.
[119] This title claim is not yet resolved. See *Ignace v British Columbia (Attorney General),* 2019 BCSC 10.

Assessment Office (BCEAO) recognised their 'strong *prima facie* claim', updated their assessment in the light of the Tsilhqot'in decision,[120] and committed to engage with SSN at the 'deep' end of the spectrum, following the approach of the court in the *Haida* case.[121] An Ajax government-to-government discussion table was established by the Provincial government. Described by the BCEAO as an 'expanded consultation approach',[122] the consultation included the collaborative development of a Government-to-Government Framework Agreement, covering the EA, permits, negotiating of the accommodations to be made, and links to broader initiatives for reconciliation. They also developed an EA Collaboration Plan which addressed how the SSN and the BCEAO would collaborate on information sharing, issues management and dispute resolution. This collaborative approach led to changes in the standard EA process, including two additional assessments of impact on Aboriginal economies and the current use of lands and resources for traditional purposes, as well as the provision of information relating to the project's potential impacts on SSN governance.[123]

Despite the collaborative approach, SSN considered that there remained inadequacies in the way the EA was being conducted, and commenced their own assessment of the project combining western scientific analysis with their own laws, traditions, customs and knowledge, involving over 80 technical experts and knowledge keepers, and over 300 submissions. The process established a 46-person panel of elected Chiefs, Counsellors, elders, youth, and family representatives. The panel was to review information and make recommendations to the SSN Joint Council on how to proceed, considering issues that fell within the government's EA process, and outside of it (for example, the economic opportunities of the mine for the SSN community). Funding from the BCEAO and the CEA Agency enabled SNN to participate in the EIA process, and funding from the project proponent KGHM Ajax Mining Inc was also provided to SSN for participating in the EA and undertaking the separate SSN Assessment Process.[124] Speaking about the need to establish this parallel assessment, Councillor Ed Jensen

[120] *Tsilhqot'in Nation v British Columbia* (n36).
[121] 'Summary Assessment Report (Ajax): With Respect to the Application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate Pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43' (n 118). 17-20.
[122] ibid. 5.
[123] The Ajax Mine Government to Government Framework Agreement, including the EA Collaboration Plan, were implemented in practice in early 2016 and formally signed by SSN Joint Chiefs and the Province in September 2016. 'Ajax Mine Project Government to Government Framework Agreement' <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/eao-mous-and-agreements/eao-government-to-government-framework-for-ajax-mine.pdf> accessed 21 February 2021.
[124] 'Summary Assessment Report (Ajax): With Respect to the Application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate Pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43' (n 118). 5.

commented: ‘we are challenging BC’s current ‘consultation’ assessment model with one based on our full informed consent.’[125]

In February 2017, the Province proposed an accommodation agreement, committing to work with SSN to address the social and cultural impacts of the mine; contribute $2 million to build SSN’s capacity to engage in a sociocultural working group with the Province; an Economic Community Development Agreement which included a transfer of Crown lands with a value of up to $8 million and resource revenue sharing of 37.5% of the Minerals Tax Act revenues collected by the Province on Ajax; a pilot collaborative stewardship initiative with $100,000 in funding for the first year for the Thompson River watershed; and to explore collaboration for the management and conservation of sensitive areas. In addition, the mining company proposed their own mine benefit agreement, including compensation and a commitment to provide employment for community members.[126]

The SSN’s review determined that the mine posed serious threats to air and water quality, as well as irretrievable harm to the Pipsell Cultural Heritage Area, and critiqued the financial viability of the project. Considering the short-term economic benefits did not outweigh the long-term impact on their cultural heritage, in March 2017 SSN announced that it was withholding its free, prior and informed consent for the project, in a statement:

> *“The Ajax Mine Project in its proposed location at Pípsell is in opposition to the SSN land use objective for this profoundly sacred, culturally important, and historically significant cultural keystone site.*
>
> *Our decision to preserve and sustain Pípsell and Jacko Lake is for the long-term benefit of all Canadians, ensuring the future enjoyment of this special place serves to further reconciliation, so that we may all be great and good.”*[127]

[125] Statement by Councillor Ed Jensen, ‘Stk’emlupsemc Te Secwepemc Nation Implement Its Own Assessment Process for the Proposed Ajax Project. Kamloops, BC, September 10 2015.’ <https://tkemlups.ca/files/2015/10/2015-Spring-Lexeyem.pdf>.
[126] ‘Ajax Mine Project: Joint Federal Comprehensive Study / Provincial Assessment Report’ (n 115).
[127] ‘Protect Jacko Lake and the Pípsell Cultural Area from Mining – Take Action Now!’ (*Mining Watch Canada*, 1 December 2017) <https://miningwatch.ca/blog/2017/12/1/protect-jacko-lake-and-p-psell-cultural-area-mining-take-action-now> accessed 26 February 2021.

The SSN's review and public statement triggered the public support of more than 30 organizations across BC and Canada, including the City of Kamloops, who passed several motions to formally oppose the project.[128]

The SSN's Assessment Report and their Decision Package were provided to the BCEAO and the CEAA, and considered in the Joint Assessment Report. The collaborative approach to consultation taken for the Ajax project, according to the BCEAO, 'resulted in a unique and flexible EA process and activities that included timeline changes, additional rounds of comments and responses resulting directly from the SSN Assessment Process, over 50 meetings with SSN, provincial participation in SSN Assessment Process events, and a commitment by the EAO to include and consider the results of the SSN Assessment Process in the assessment report prepared by the EAO and Agency.'[129]

In August 2017, both CEAA and BCEAO determined that the proposed project would irreversibly and significantly damage the SSN's cultural heritage, and their ability to use their lands and resources.[130] However, they also determined that, with appropriate mitigation, the project would not have significant environmental impacts: two opposing conclusions that were 'simply irreconcilable for the Secwépemc Nation.' Furthermore, the SSN criticised the process and the model used for the environmental assessment, saying that 'CEAA and BCEAO admit that uncertainties are high and confidence levels are low for multiple predicted impacts of the mine project, including for water quality, water users, air quality, health risks, and habitat losses.'[131] Although the environmental assessment included a First Nations consultation plan, SSN leaders criticised the approval process for its emphasis on western science and failing to take into account SSN traditions and culture.[132] As Federal and Provincial Ministers were considering their final decision, the SSN called on their supporters to lobby their political representatives to deny approval for the mine; work with the SSN to protect the Pipsell Cultural Heritage Area for the benefit of all Canadians, and to call for reform to 'flawed and inadequate

[128] '31 Groups Join Local First Nations in Opposing Ajax Mine' (*Kamloops This Week*) <http://www.kamloopsthisweek.com/news/31-groups-join-local-first-nations-in-opposing-ajax-mine-1.23218090> accessed 26 February 2021.
[129] 'Summary Assessment Report (Ajax): With Respect to the Application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate Pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43' (n 118). 6.
[130] 'Ajax Mine Project: Joint Federal Comprehensive Study / Provincial Assessment Report' (n 115).; 'Summary Assessment Report (Ajax): With Respect to the Application by KGHM Ajax Mining Inc. for an Environmental Assessment Certificate Pursuant to the Environmental Assessment Act, S.B.C. 2002, c.43' (n 118).
[131] 'Protect Pipsell' (*Protect Pípsell*) <http://protectpipsell.ca/> accessed 26 November 2020.
[132] Maryse Zeidler, 'First Nation-Led Environmental Review Panel Rejects Ajax Mine in Kamloops, B.C.' (*CBC News*, 5 March 2017) <https://www.cbc.ca/news/canada/british-columbia/first-nation-led-environmental-review-panel-rejects-ajax-mine-in-kamloops-b-c-1.4010569> accessed 26 November 2020.

federal and provincial environmental assessment laws and processes, in accord with the UN Declaration on the Rights of Indigenous Peoples.'[133]

In December 2017, British Columbia Environment and Climate Change Strategy Minister George Heyman and Energy, Mines and Petroleum Resources Minister Michelle Mungall declined to issue the environmental assessment certificate to the project company, KGHM Ajax Mining Inc. The statement on behalf of BCEAO cited the conclusion that the 'adverse effects of the Ajax project outweighed the potential benefits' and that there would have been 'significant adverse effects to Indigenous heritage and to the current use of lands and resources for traditional purposes.' [134] However, it was the state's own assessment of the potential impact on indigenous cultural heritage, and not the absence of consent, that was the decisive factor in declining to issue the certificate.

The Federal Authorities also issued a negative decision on the project proceeding in 2018, stating that 'taking into consideration the Comprehensive Study Report, comments from Indigenous groups and the public, and the implementation of appropriate mitigation measures, the authorities are of the opinion that the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances.'[135] Similar to the provincial government's decision, the Ministers took into consideration the comments of indigenous groups in making their decision, but did not base their decision on the absence of their consent. The mining consortium did not appeal the decision, but in September 2019 Abacus Mining & Exploration Corporation, who own a 20% interest in the project, released a statement to its shareholders indicating that they advance the project, including considering strategies for a resubmission of an environmental application.[136] In September 2020, KGHM reportedly appointed a new superintendent to work towards submitting a new application for the project, with a priority on engaging with First Nations, the community and the government to that end.[137] The SSN remains firmly opposed to the project.[138]

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[133] 'Protect Pipsell' (n 131).
[134] 'Ministers' Reasons for Decision, Ajax Mine Project Proposed by KGHM Ajax Mining Inc.' (British Columbia 2017).
[135] 'Ajax' (*KGHM Corporate Website*, 29 October 2014) <https://kghm.com/en/our-business/projects-under-development/ajax> accessed 27 November 2020. Impact Assessment Agency of Canada, 'Decision' (27 June 2018) <https://www.ceaa-acee.gc.ca/050/evaluations/document/123178?culture=en-CA> accessed 27 November 2020.
[136] 'Abacus Mining: Update on Ajax Project' (*Junior Mining Network*, 23 September 2019) <https://www.juniorminingnetwork.com/junior-miner-news/press-releases/1316-tsx-venture/ame/67410-update-on-ajax-project.html> accessed 27 November 2020.
[137] 'KGHM Hires New Superintendent as Bid to Revive Ajax Mine Ramps Up' (*Kamloops This Week*, 2 September 2020) <https://www.kamloopsthisweek.com/news/kghm-hires-new-superintendent-as-bid-to-revive-ajax-mine-ramps-up-1.24196668> accessed 23 October 2020.
[138] 'Will Ajax Mine Application Be Resubmitted?' (*Kamloops This Week*, 24 September 2019) <https://www.kamloopsthisweek.com/news/will-ajax-mine-application-be-resubmitted-1.23955973> accessed 27 November 2020.; Tk'emlups te Secwepemc Kukpi7 Rosanne Casimir stated

On the face of it, the Ajax mine case appears to be a great success for indigenous groups. However, the SSN considered that despite their own extensive and ground-breaking review process,[139] their recommendations and findings did not lead to substantive changes in the either the provincial or federal EA reports, which did not adequately accommodate their interests. Leaders of the SSN also expressed their dismay at the consultation process which, in their view:

> *does not support reconciliation between Indigenous People and Canadians or the Canadian Government. The process functions to draw lines and assess significance when it does not respect the unique and intimate relationship and responsibility that Indigenous People have with their territories. It does not assess and measure impacts from a place of respecting the sovereignty, laws, knowledge and history of Indigenous people. Much must be changed within this process before it can effectively and consistently support reconciliation.*[140]

The Ajax Mine project is an example of a project that falls at the high end of the impact spectrum. Despite this, and the clear absence of indigenous consent to the project, the provincial and federal governments conformed with a multiculturalist approach and did not consider FPIC to be a deciding factor in their decision to decline approval for the project. On the other hand, the SNN understood the process as a means to assert their nationhood and self-determination. In an interview shortly after the SSN's announcement that it was withholding consent for the project Chief Ron Ignace commented:

> *The days of colonial authoritarianism are over. It's time for Canada to recognize that we are nations, as nations we have rights to our land, and if we are approached honourably, we can sit down and come to a fair and just conclusion. … We're mad as hell and we're not going to take it anymore. What we are doing is upholding our law,*

> *It's frustrating that they think they could change our minds. I know that in every single conversation that we've had it's always been 'No.' It's not going to be changed. This is something that was community-driven, through the membership throughout, and we've worked with many entities to preserve said lands. So it's not only our voices but the collective voices that stood up and stood firm on that.*

[139] Elizabeth McSheffrey, 'Indigenous Law Banishes a Giant B.C. Mine' (*National Observer*, 21 April 2017) <https://www.nationalobserver.com/2017/04/21/news/indigenous-law-banishes-giant-bc-mine> accessed 26 November 2020.

[140] Fred Seymour and Ron Ignace, '#Me7ePipsellTa7aAjax (Yes Pípsell, No Ajax)- Respecting the SSN's Pípsell Decision' <https://miningwatch.ca/sites/default/files/20171023ssntobc-can-letterre-ssnpipselldecisionministerseadecisionforajaxproject.pdf> accessed 21 February 2021., 7.

maintaining and asserting our ownership and jurisdiction on our lands. That's our responsibility.[141]

As yet, the title claim filed in 2015 is unresolved, and it is likely that further applications will be made for mining on the site. In this context, the SSN's struggle to protect the Pípsell area is likely to continue, and FPIC will continue to provide a focal point for the conflict between indigenous self-determination and the decision-making power of the state.

7.4.2 The Ring of Fire

The Ring of Fire, in the wetlands of James Bay Lowlands in Ontario's Far North, is marked as 'one of the most promising mineral development opportunities in Ontario in over a century',[142] with potential for long-term production of chromite, nickel, copper, platinum, zinc, gold and kimberlite, valued at up to $60 billion.[143] Noront Resources Limited is the largest claim holder, holding about 85% of the base metals holdings.[144] It intends to first develop the Eagles Nest nickel mine, as well as chromite mines, and a new ferrochrome processing plant.[145] The James Bay area falls within Treaty No 9, a treaty signed between First Nations and the Crown in 1905-6, which ceded land to the Crown in return for the establishment of reserves.[146] The James Bay area also falls under the Far North Act,[147] which sets out a mechanism for joint land use planning to support the environmental, social and economic objectives of indigenous peoples of Ontario through conservation of environmental and cultural heritage, as well as sustainable economic development. The introduction of this Act was opposed by indigenous groups in the region, as it granted final decision-making power to the Government and was introduced without consultation and considered to be a continuation of colonial policies.[148]

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[141] McSheffrey (n 139).

[142] 'Ring of Fire' (*Ministry of Energy, Northern Development and Mines*, 15 May 2012) <https://www.mndm.gov.on.ca/en/ring-fire> accessed 27 November 2020.

[143] So far, more than $278 million has been spent on exploration and there are about 13,300 active mining claim units, in relation to 2,127 square kilometres of land. The area is 300km from the nearest paved road, so the Ontario government has pledged $1 billion to build new roads and other infrastructure to provide access to the region. Kenneth P Green, 'BLOG: Ring of Fire Breakthrough Can't Come Soon Enough' (*Fraser Institute*, 20 September 2019) <https://www.fraserinstitute.org/blogs/ring-of-fire-breakthrough-cant-come-soon-enough> accessed 27 November 2020.

[144] David Godkin, 'Making Inroads on the Ring of Fire?' (*Canadian Mining Journal*, 1 February 2019) <https://www.canadianminingjournal.com/features/making-inroads-on-the-ring-of-fire/> accessed 27 November 2020.

[145] 'Ring of Fire' (n 142). Jessica Gamble, 'What's at Stake in Ontario's Ring of Fire | Canadian Geographic' (*Canadian Geographic*, 24 August 2017) <https://www.canadiangeographic.ca/article/whats-stake-ontarios-ring-fire> accessed 27 November 2020.

[146] John F Leslie, 'Treaty 9 | The Canadian Encyclopedia' (*The Canadian Encyclopedia*, 16 June 2016) <https://www.thecanadianencyclopedia.ca/en/article/treaty-9> accessed 27 November 2020.

[147] Far North Act, 2010, SO 2010 C 18.

[148] 'The Far North Land Use Planning Initiative' (*Ontario.ca*) <https://www.ontario.ca/page/far-north-land-use-planning-initiative> accessed 27 November 2020. Joint planning is carried out through community-based planning for local land use, a wider strategy for land use in the Far North, and the use of both science and indigenous

Matawa First Nations Management is the tribal council that represents nine indigenous communities in the region, including Marten Falls First Nation, an Anishinaabe community on whose territory the Eagles Nest mine is planned, and Webequie First Nation,[149] an Ojibway community of around 850 people, whose land falls closest to the main area for development. Both these First Nations have established land rights through the establishment of reserves under the Indian Act. In addition, other Cree and Ojibwa bands also inhabit the area.[150] To date, there has been little industrial development in the area, with the exception of some small-scale mining and forestry activities, and the communities still rely on the land for food, shelter and medicines. According to Gamble, unemployment rates in the communities are around 90%, and communities lack potable drinking water, have low levels of education, and high rates of addiction to prescription opioids.[151]

As exploration commenced, the Webequie First Nation and Marten Falls First Nation conducted blockades of air strips, lifting them only on condition that they were properly consulted on the construction of exploration camps and the future development of the area.[152] In 2011, the CEAA decided that a Comprehensive Study Environmental Assessment should be undertaken, as opposed to a Joint Review Panel Environmental Assessment which the Matawa First Nations had called for since May of that year, to give them 'a voice in the assessment'.[153] In response, the Matawa Chiefs publicly withdrew their consent for the development, noting that 'First Nations are not stakeholders in these matters. These are our homelands since time immemorial.'[154]

In July 2013, the Matawa nations requested to enter into a Regional Framework Process, which was signed on 26 March 2014, to conduct community-based negotiations between the

knowledge to support planning. See Holly L Gardner and others, 'The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?' (*International Indigenous Policy Journal*, 1 November 2012) <https://doaj.org> accessed 21 February 2021.; Dayna Scott and John Cutfeet, 'After the Far North Act: Indigenous Jurisdiction in Ontario's Far North' (Yellowhead Institute, 9 July 2019) <https://yellowheadinstitute.org/2019/07/09/after-the-far-north-act/> accessed 27 November 2020.;

[149] 'Webequie First Nation - Webequie First Nation' <http://www.webequie.ca/article/welcome-1.asp> accessed 27 November 2020.

[150] Gamble (n 145).

[151] ibid.

[152] James Murray, 'NetNewsLedger - Marten Falls First Nation Starts Blockade on Ring of Fire' (*NetNewsLedger*, 27 January 2011) <http://www.netnewsledger.com/2011/01/27/marten-falls-first-nation-starts-blockade-on-ring-of-fire/> accessed 27 November 2020.

[153] 'Removing Our Support, Government Is Not Listening' (*Matawa First Nations*, 21 October 2011) <http://archive.md/ylRys> accessed 27 November 2020.

[154] See comments of Chief Peter Moonias of Neskantaga First Nation, 'Matawa Chiefs Fear the Consequences of Canada's Choice to Use Comprehensive Study Environmental Assessment Process in the Ring of Fire' (*Matawa First Nations*, 13 October 2011) <http://archive.md/ylRys> accessed 27 November 2020.

Government of Ontario and the Matawa First Nations Tribal Council on the future of mining developments, environmental protection, and community participation and benefits.[155] The talks were kept confidential, but were described by Neskantaga and Eabametoong communities who took part as 'productive exploratory talks'[156], and the nine Matawa First Nations described a 'positive relationship' with the province's lead negotiator, Justice Frank Iacobucci.[157] Nevertheless, in 2018 the government shifted its approach from a consensus-building approach with all nine communities, to working with only the 'mining-ready' communities, with a focus on building the new access roads.[158] In November 2018, the Regional Framework process was suspended by the newly-elected Ford Government. 2019 the approach was set aside entirely, in favour of negotiating separately with each of the communities.[159] The sidelining of indigenous groups who were reticent about development was a subject of contention, with the Chiefs of the Neskantaga and Eabemetoong communities in particular warning they would pursue legal claims should they not achieve a negotiated agreement on the future development of the area.[160]

Meanwhile, in May 2018, the Webequie First Nation,[161] and Marten Falls First Nation[162] - both of which had already formed terms of reference for community land use planning with the

[155] 'Ontario and Matawa Member First Nations Celebrate Historic Framework for Negotiations on the Ring of Fire' (*Matawa*, 24 April 2014) <http://www.matawa.on.ca/ontario-and-matawa-member-first-nations-celebrate-historic-framework-for-negotiations-on-the-ring-of-fire/> accessed 27 November 2020.

[156] 'Lack of Consultation on Ring of Fire Development Frustrates First Nation Communities' (*Northern Ontario Business*, 9 November 2018) <https://www.northernontariobusiness.com/industry-news/mining/lack-of-consultation-on-ring-of-fire-development-frustrates-first-nation-communities-1117466> accessed 27 November 2020.

[157] 'MATAWA FIRST NATIONS MANAGEMENT STATEMENT ON REMOVAL OF REGIONAL FRAMEWORK AGREEMENT LEAD-NEGOTIATOR FOR ONTARIO UNDER NEW PROGRESSIVE CONSERVATIVE GOVERNMENT' (*Matawa*, 5 September 2018) <http://www.matawa.on.ca/matawa-first-nations-management-statement-on-removal-of-regional-framework-agreement-lead-negotiator-for-ontario-under-new-progressive-conservative-government/> accessed 27 November 2020.

[158] 'Province Starts over on Ring of Fire Consultation Process' (*Sudbury.com*, 28 August 2019) <https://www.sudbury.com/local-news/province-starts-over-on-ring-of-fire-consultation-process-1662256> accessed 27 November 2020.

[159] 'Lack of Consultation on Ring of Fire Development Frustrates First Nation Communities' (n 156). Earlier that year, it was reported that Ford removed Justice Frank Iacobucci from his position as lead negotiator of the Framework, during a 'purge' of officials appointed during the previous Wynne government's tenure. Other accounts suggest that Iacobucci resigned shortly after Ford's election. Ian Ross, 'What's the Plan for the Ring of Fire?' (*BayToday.ca*, 8 September 2018) <https://www.baytoday.ca/local-news/whats-the-plan-for-the-ring-of-fire-1039255> accessed 12 January 2021. 'Ontario to Pursue Ring of Fire Bilateral Talks with First Nations' (2019) 92 Daily Commercial News 1.

[160] 'Lack of Consultation on Ring of Fire Development Frustrates First Nation Communities' (n 156). This was not a hollow threat - in July 2018, Eabemetoong was victorious in the Division Court of Ontario's Superior Court of Justice, which cancelled a mining permit due to lack of consultation. 'Court Cancels Mining Permit after Ontario Failed to Adequately Consult First Nation Community - The Globe and Mail' <https://www.theglobeandmail.com/politics/article-court-cancels-mining-permit-after-ontario-failed-to-adequately-consult/> accessed 12 January 2021.

[161] 'Webequie Supply Road Project' (*Ontario.ca*, 8 May 2018) <https://www.ontario.ca/page/webequie-supply-road-project?_ga=2.31741950.1952233397.1579433171-115629062.1579433171> accessed 12 January 2021.

[162] 'Marten Falls Community Access Road Project' (*Ontario.ca*, 8 May 2018) <https://www.ontario.ca/page/marten-falls-community-access-road-project> accessed 12 January 2021.

Province of Ontario under the Far North Act[163] - agreed to initiate planning for new all-weather roads, which would improve access to their communities, but which did not go far enough to connect to the proposed mine sites.[164] They had entered a voluntary agreements with the Province of Ontario to undertake an Individual Environmental Assessment,[165] and a Federal Impact Assessment is also being undertaken.[166] Whilst complying with Provincial and Federal laws and guidelines, the assessments were to be community-led, so that the First Nations, supported by technical experts, would lead the development of the access road. As part of the process, the government has delegated elements of its procedural responsibility to consult other indigenous groups impacted by the project as part of the environmental assessment process. In addition, as part of the approvals process, Provincial and Federal authorities will also consult these groups in order and take a view whether the consultations have been adequate to discharge their duty to consult under s35 of the Constitution.[167] Nevertheless, the ownership of the project by an indigenous community provides an unusual dynamic, in which consultation is as much an inter-indigenous community process, as it is a process of negotiation between different indigenous communities and the state.

Indigenous ownership of the project also allows the project to proceed in accordance with values set by the community themselves. The Marten Falls First Nation Community[168] have set their own guiding principles for the project, to honour their traditional land and teachings, and these have been incorporated into the Terms of Reference for the Provincial Environmental Impact Assessment, which itself was the subject of consultation with 22 indigenous communities, both at the draft stage and following submission to Ontario's Ministry of Environment, Conservation and Parks.[169]

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[163] 'Land Use Planning Process in the Far North' (*Ontario.ca*, 30 May 2014) <https://www.ontario.ca/page/land-use-planning-process-far-north> accessed 12 January 2021.

[164] 'Preparing Environmental Assessments' (*Ontario.ca*, 10 February 2014) <https://www.ontario.ca/page/preparing-environmental-assessments> accessed 12 January 2021.

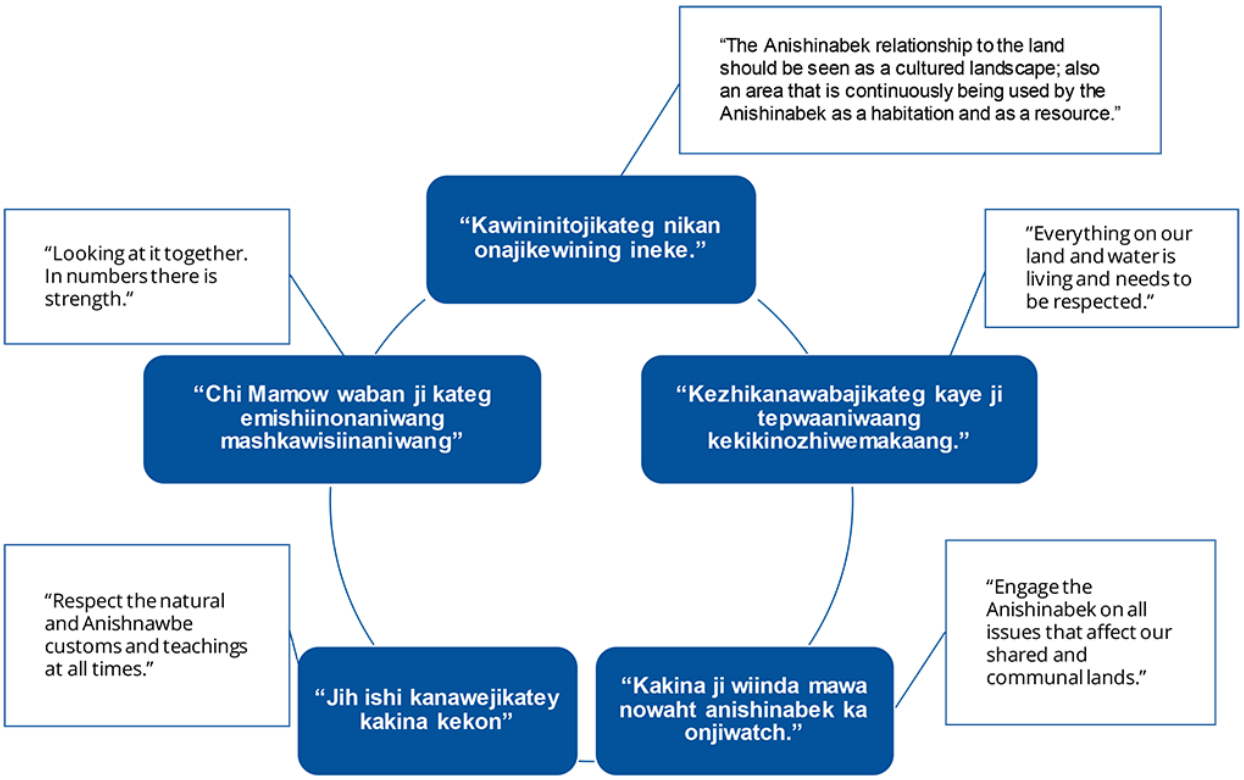
[165] 'Environmental Assessment: Designating Regulations and Voluntary Agreements' (*Ontario.ca*, 24 January 2014) <https://www.ontario.ca/page/environmental-assessment-designating-regulations-and-voluntary-agreements> accessed 21 February 2021.

[166] Impact Assessment Agency of Canada, 'Notice of Commencement of an Impact Assessment' (24 February 2020) <https://iaac-aeic.gc.ca/050/evaluations/document/133939> accessed 21 February 2021.

[167] 'Indigenous Engagement and Partnership Plan for the Marten Falls Community Access Road Project Impact Assessment' (Impact Assessment Agency of Canada 2020).

[168] Impact Assessment Agency of Canada, 'Marten Falls Community Access Road Project' (8 August 2019) <https://ceaa-acee.gc.ca/050/evaluations/proj/80184?culture=en-CA> accessed 12 January 2021.

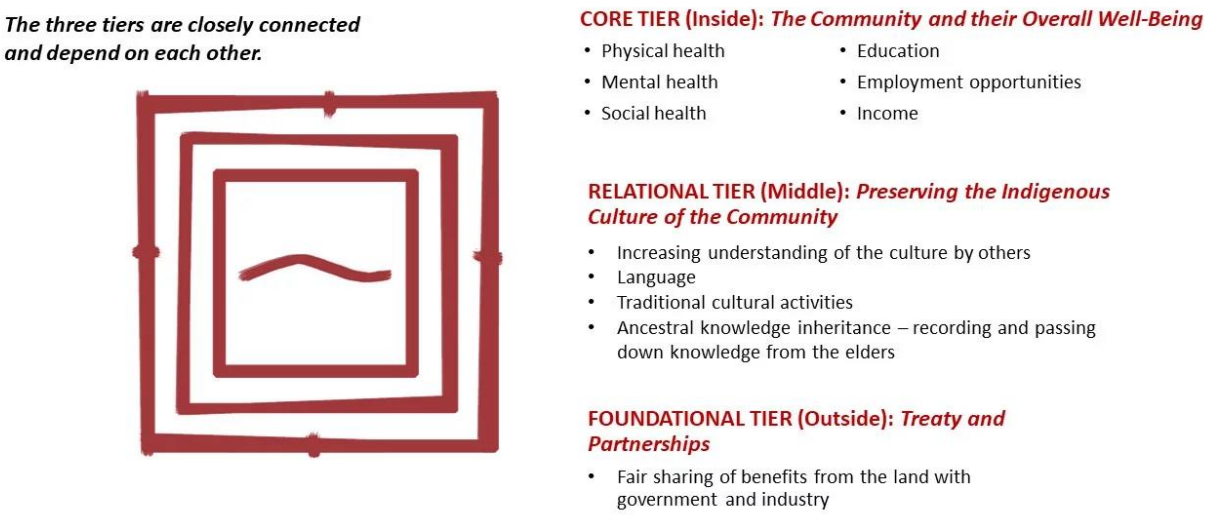
[169] 'Terms of Reference – Marten Falls First Nation' (*Martin Falls First Nation Community Access Road*) <http://www.martenfallsaccessroad.ca/tor/> accessed 12 January 2021.



© 2019 Marten Falls First Nation Community Access Road[170]

Similarly, the Webequie Supply Road impact assessment is also proposed and managed by the Webequie First Nation itself. The Webequie are also basing their approach on community values and traditional knowledge as well as modern protocols. Their approach is summed up in their three-tier model, designed to reflect 'what makes a community work well... how its members see the world, and how they can best benefit from roads, resource development and ownership of their land.'[171]

[170] 'Guiding Principles – Marten Falls First Nation' (*Marten Falls First Nation Community Access Road*) <http://www.martenfallsaccessroad.ca/guiding-principles/> accessed 12 January 2021.
[171] 'Community Approach – The Webequie Supply Road Project' (*Webequie Supply Road*) <https://www.supplyroad.ca/community-approach/> accessed 12 January 2021.



© Webequie Supply Road[172]

Both First Nations have set up dedicated websites to update the communities on progress and provide information - including explanatory videos, newsletters and reports.[173] Whilst there has been considerable interest and engagement from the communities,[174] there has also been concern from some Chiefs that the continuation of the consultation despite restrictions due to COVID-19 and proposals to use online communication, do not permit indigenous customs to be followed and reduces the capacity of indigenous communities to engage adequately with the process,[175] and according to Chief Dorothy Towedo, delays in funding from the Province of Ontario have also prevented Aroland First Nation from participating meaningfully in the EA process.[176]

[172] 'The Webequie Supply Road Project' (*Webequie Supply Road*) <https://www.supplyroad.ca/> accessed 12 January 2021.; Impact Assessment Agency of Canada, 'Webequie Supply Road Project' (22 July 2019) <https://iaac-aeic.gc.ca/050/evaluations/proj/80183?culture=en-CA> accessed 12 January 2021.
[173] 'The Webequie Supply Road Project' (n 172).; 'Marten Falls First Nation – Community Access Road' <http://www.martenfallsaccessroad.ca/> accessed 12 January 2021.
[174] See 'Proposed Terms of Reference Marten Falls Community Access Road - Environmental Assessment, Appendix B: Indigenous Communities' (AECOM Canada Ltd 2020) <http://www.martenfallsaccessroad.ca/wp-content/uploads/2020/09/FULL_RPT_2020-09-09_Proposed-ToR_60593122_WEB-1.pdf> accessed 21 February 2021.;,
[175] ibid., see Letter from Chief Dorothy Towedo, Aroland First Nation dated 24 June 2010; Letter from Chief Richard Allen Constance First Nation dated 22 July 2020; Meeting Summary of Conference Call 17 June 2020, Chief Achneepineskum Opening Remarks.
[176] ibid., Letter from Chief Dorothy Towedo to Mr Saddique, dated July 27 2020.

These concerns mirror a recent study of indigenous communities' understanding and experiences of the Matawa First Nations in the Ring of Fire.[177] It highlighted the need for sufficient independent financing and capacity building to allow them to freely consent, the excessive burden of consultations on indigenous communities, and the high volume of complex technical information that was not translated into indigenous languages or even plain English. Furthermore, the study reported that community members had experienced intimidation, coercion and inducement to consent to mining projects in the area, and that the timescales for consultation often did not permit indigenous communities to build consensus in line with their traditional decision-making practices. Consequently, indigenous communities' experiences of consultation in the Ring of Fire did not live up to their expectations of what FPIC under UNDRIP should entail; and they were calling for an equal, relational approach to dialogue with the state that adequately reflects indigenous relationship to the land. The unequal relationship was reflected in the relative demands placed on under-resourced indigenous people and the government during the consultation process:

> *Matawa members recounted how they were required to develop various capacities to understand the perspectives of provincial and territorial governments and industry proponents. On the other hand, these members pointed out that governments and industry were not building their own capacity to understand Indigenous laws, protocols, and languages, and meanings attributed to relationships, nor were these proponents building their capacity to apply the principles of free, prior and informed consent.*[178]

It remains to be seen how the piecemeal strategy the government (in separating the construction of access roads from the later approval of mine sites) will develop, particularly in the context of a recent rolling-back of environmental protections in the Province that was received with dismay by the Matawa Chiefs.[179] Indigenous groups are calling for an approach which 'entails genuine joint decision-making in which final authority is shared.'[180] On the other hand, Ontario Premier Doug Ford committed in his election campaign that the full access road to Ring of Fire would be built, 'If I have to hop on that bulldozer myself… The difference

[177] Terry Mitchell and others, 'Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)' (2019) 10 International Indigenous Policy Journal.
[178] ibid.
[179] 'MATAWA CHIEFS COUNCIL REJECTS THE ONTARIO GOVERNMENT BILL 197 CROWN TACTICS TO "TAKE UP THE LAND" AND ACCESS THE RESOURCES AND WEALTH OF THE NORTH' (*Matawa First Nations*, 28 August 2020) <http://www.matawa.on.ca/matawa-chiefs-council-rejects-the-ontario-government-bill-197-crown-tactics-to-take-up-the-land-and-access-the-resources-and-wealth-of-the-north/> accessed 12 January 2021.
[180] Dayna Scott and John Cutfeet, 'After the Far North Act: Indigenous Jurisdiction in Ontario's Far North' (*Yellowhead Institute*, 9 July 2019) <https://yellowheadinstitute.org/2019/07/09/after-the-far-north-act/> accessed 12 January 2021.

between us and the Liberals [is] we don't talk. We're doers.'[181] Such sentiments suggest that there remain significant differences between the expectations of the Matawa First Nations and government regarding the nature and purpose of FPIC consultation.

7.4.3 Mackenzie Valley Resource Management Act

The Mackenzie Valley Resource Management Act[182] is an example of co-management and joint decision-making between First Nations councils and the territorial government of the Northwest Territories. The Northwest Territories is one of two Canadian jurisdictions in which aboriginal population outnumbers non-indigenous citizens, making up just over 50% of the population.[183] Oil was first discovered in the region in 1920, leading to the conclusion of Treaty No 11 to enable the Canadian government to secure the land. Subsequently, the area was also mined for Uranium and gold, and a gas pipeline built. A large oil discovery in 1968 led to proposals for a gas pipeline from the Arctic to Alberta, following the Mackenzie River. [184]

At the time, the Dene were asserting their rights over territory which they argued did not form part of Treaty No 11 and remained unceded. The pipeline project was put on hold while several land claims were negotiated. In order to negotiate their claims, the Dene Nation and the Métis Association of the NWT formed the Dene/Métis Negotiations Secretariat, with key negotiating demands being the co-management of the land use planning, impact assessment, land and water management, management of heritage and wildlife.[185] The ensuing land claims agreements ultimately led to two distinct indigenous jurisdictions over land in the region, the Inuvialuit Settlement Region to the North, and the Mackenzie River region.[186]

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[181] CBC News, 'Progressive Conservatives Outline Plan for Northern Ontario | CBC News' (*CBC*) <https://www.cbc.ca/news/canada/sudbury/doug-ford-northern-ontario-1.4579311> accessed 12 January 2021.
[182] Mackenzie Valley Resource Management Act 1998, SC 1998, c 25. ('MVRMA').
[183] 'Land Rights' (*Shift*) <https://shiftproject.org/resource/the-human-rights-opportunity-in-collaboration-with-wbcsd/land-rights/> accessed 21 February 2021.
[184] The Mackenzie River is a huge river system running through Canada's Northwest Territories to the Arctic sea, on land that is traditional to the Dene, Inuvialuit, Gwich'in,Sahtu and Dehcho peoples. 'Mackenzie River' (*The Canadian Encyclopedia*) <https://www.thecanadianencyclopedia.ca/en/article/mackenzie-river> accessed 21 February 2021.
[185] 'Mackenzie Valley Resource Management Act 2016 Workshop Summary Report' (Dillon Consulting 2016) <https://www.lands.gov.nt.ca/sites/lands/files/resources/2016_mvrma_workshop_summary_report_-_jun_7_16.pdf> accessed 21 February 2020., 6. The land claim agreement with the Inuvialuit (signed in 1984), Dene and Métis. As a result, the Dene/Métis Agreement-in-Principle was concluded in 1989, and following this the Gwich'in Comprehensive Land Claim Agreement (1992) and the Sahtu Dene and Metis Comprehensive Agreement (1993). The Tlicho Land Claims and Self-government Agreement was completed in 2003. Each of these agreements include rights over surface and subsurface resources in parts of the territory. Areas which are not subject to these land claims agreements fall under Treaties 8 and 11, protected by the Constitution.
[186] ibid.

The concluded land claim agreements with the Dene/Métis, the Gwich'in and the Sahtu First Nations formed the basis for the Mackenzie Valley Resources Management Act 1998 (MVRMA).[187] In keeping with the principles of the land claim agreements, the MVRMA places all land and water management, licensing, planning and environmental assessment (including that of settler communities) under the control of seven regulatory boards[188] which are composed of 50% nominated representatives of the land claim groups, and 50% from the federal and territorial governments.[189] This system is unique in Canada,[190] and the Act is notable in its recognition of indigenous knowledge as a basis for decision-making alongside western science, and in its provision for monitoring and review of the cumulative impacts of proposed developments on the region as a whole, including effects on important factors for indigenous cultural survival, such as wildlife harvesting, the social and cultural environment or on heritage resources.[191]

The Crown's duty to consult is delegated to two of the regulatory bodies under the MVRMA, the Mackenzie Valley Review Board (MVRB) and the Mackenzie Valley Land and Water Boards (MVLWBs).[192] MVLWBs regulate land use permits and water licences in the region, including on private, Crown and indigenous land. The process of permitting projects is briefly as follows: The proponents apply to the MVLWBs who conduct an initial review process, which may include expert input and public hearings. If they consider that projects will have a significant environmental impact or that there are sufficient community concerns, they refer the project to the MVRB for a detailed environmental assessment.[193] About 5% of cases

[187] ibid.The MVRMA was negotiated through a coordinating group made up of the Government of Canada, the GNWT, and the Gwich'in, with the Sahtu acting as observers. It has since been amended to accommodate a new agreement with the Tlicho, in 2005, and was amended again in 2013 with the Devolution legislation - which transferred surface and subsurface resources rights in relation to large parcels of land to ownership of GNWT from Federal Govt of Canada. Canada retains ownership of legacy contaminated sites, the Norman Wells Proven Area, Federal Parks, and reserves.

[188] These are the Mackenzie Valley Land and Water Board; the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and Wek'eezhii Land and Water Board (for Preliminary screening and regulatory oversight); the Mackenzie Valley Environmental Impact Review Board; and the Sahtu Land Use Planning Board, and Gwich'in Land Use Planning Board.

[189] 'Mackenzie Valley Resource Management Act 2016 Workshop Summary Report' (n 185). 'MVLWV Engagement and Consultation Policy' (Mackenzie Valley Land and Water Board 2013) <https://mvlwb.com/sites/default/files/documents/wg/MVLWB%20Engagement%20and%20Consultation%20Policy%20-%20May%2015.pdf> accessed 21 February 2021.

[190] 'Mackenzie Valley Resource Management Act 2016 Workshop Summary Report' (n 185)., 4.

[191] MVRMA (n 184), s146 and s111.

[192] Such delegation is permitted by law, where the administrative tribunals have the power and authority to fulfil the duty, including to ensure procedural fairness and the power required to ensure accommodation where necessary. See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (n 76) and *Clyde River (Hamlet) v. Petroleum Geo-Services Inc* (n 67).

[193] 'About Us' (*Mackenzie Valley Review Board*) <https://reviewboard.ca/about> accessed 21 February 2021. The MVRB is also capable of requiring an EIA where it has concerns, even where this is not mandated by the law. One example in the McTavish Arm of Great Bear Lake mineral exploration project, several Sahtu agencies expressed concerns, but the Sahtu Land and Water Board concluded that there would be no significant adverse environmental impact and recommended land permit to go ahead. The MVRB conducted its own screening and ordered an EIA to be undertaken. Dokis (n 96)., location 3339.

referred to the Land and Water Boards are determined to require an in-depth Environmental Assessment, which addresses both the impact on the environment 'as well as the social, economic and cultural well-being of Aboriginal peoples and their way of life.'[194] Both direct and indirect impacts are considered.[195] Through a process of consultation meetings, submissions, technical reviews, and public hearings, the Board takes a decision on the likely level of impacts and mitigation strategies, and can either recommend the project for approval, rejection, or a higher-level assessment called an 'Environmental Impact Review'. The Review Board also mandates follow-up mechanisms to monitor compliance with its decisions, which usually include the establishment of monitoring bodies including indigenous representation.[196]

The objective of the MBMRA system is to 'guarantee consultation and participation, by providing significant say to Aboriginal groups in the land, water, and environmental management decision making process.'[197] The MVRB and the MVLWBs follow guidelines on consultation and engagement, which are based on Canada's domestic legal framework on the duty to consult.[198] Once the environmental assessment process is complete, the MVRB make a recommendation to the relevant Federal and/or territorial government ministers, who will take the decision as to whether the duty to consult has been adequately discharged, and who may invite further comment from indigenous groups on the content of the MVRB's report, before making a decision. In practice, this gives the MVRB considerable power to influence whether, and under what conditions, development takes place. The MRVB has generally approved the projects that come before it, albeit with conditions.[199]

Within this system, the MVLWBs and MVRB are 'administrative tribunals' that are regulated and operate in accordance with Canadian, rather than indigenous law.[200] Crown consultation occurs through pre-application and post- application processes, and the Boards are

[194] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (PlanIt North Inc 2020) <https://slwb.com/release-final-report-resource-co-management-mackenzie-valley-workshop-2020> accessed 21 February 2020., 10.; Under the MVRMA, the Guiding Principle of EIA is 'the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley'. (MVRMA (n 184) s.115.

[195] Alan Ehrlich, 'Cumulative Cultural Effects and Reasonably Foreseeable Future Developments in the Upper Thelon Basin, Canada' (2010) 28 Impact Assessment and Project Appraisal 279.

[196] E.g. 'Land Rights' (n 183).; 'Snap Lake Environmental Monitoring Agency' <https://www.slema.ca/> accessed 21 February 2021.

[197] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (n 194).Workshop Report, 7.

[198] 'MVLWV Engagement and Consultation Policy' (n 189).

[199] The Assembly of First Nations referenced the MVRB in their submission to EMRIPs' Study on FPIC, noting that the Board had approved (albeit with conditions) most of the projects that came before it. 'Submission of the Assembly of First Nations (AFN) on Free Prior and Informed Consent (FPIC) for the Expert Mechanism on the Rights of Indigenous Peoples' (Assembly of First Nations 2018) <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx> accessed 21 February 2021.

[200] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (n 194)., 4.

empowered to assess whether adequate consultation has taken place to discharge the Crown's duty to consult.[201] Innes has commented that the system is designed to produce 'procedural justice', by ensuring that the process of consultation is fair. He distinguishes this from 'substantive justice', which refers to whether the outcome of the process and the laws that are applied to reach that decision is fair in the context.[202] Furthermore Innes has stated that despite the emphasis of procedural over substantive justice, 'several important elements of UNDRIP and FPIC are fulfilled by the Mackenzie Valley co-management system.'[203] However, as Dokis has observed in her study of consultation in the Mackenzie Valley, different peoples' standards of what is reasonable and fair differ, and in this case it is the state's view that is key.[204]

In addition, the Canada's case law on consultation, land claim agreements in the region, such as the Sahtu Dene and Metis Comprehensive Land Claim Agreement (SDMCLCA), also require consultation such that proponents provide sufficient information in reasonable time, and give 'full and fair consideration' of Aboriginal people's views.[205] However, although the goal of consultation has been said to be FPIC, there is no requirement for consent to be obtained. The SDMCLCA gives aboriginal title to 41,437km^2 of land, including 1813km^2 of subsurface including subsurface minerals. On this basis, according to case law discussed above, the requirements for consultation (at least with the Sahtu Dene) must be at the higher end of the consultation spectrum, including accommodation and even where impacts are severe, consent. Nevertheless, in line with the exceptions for consent for projects substantially in the public interest, the regulatory framework and practice of the Boards does not consider consent a requirement for decisions to proceed with projects.[206] As one participant of a 2020 workshop reviewing the co-management of the Mackenzie Valley put it: 'Dene-Canada is supposed to be a treaty relationship, but this administrative process, is it fair? They only want to consult and accommodate – and do what they were going to anyway. Business as usual.'[207]

In discharging the government's duty to consult, the MVLWB/MVRB Guidelines recognise traditional knowledge as being equal to western scientific knowledge, and emphasise the

[201] ibid., 6.
[202] ibid., 8.
[203] ibid., 9.
[204] Dokis (n 96).
[205] 'Sahtu Dene and Metis Comprehensive Land Claim Agreement (6 September 1993)' <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/sahmet_1100100031148_eng.pdf> accessed 21 February 2021. ('SDMCLCA'), Section 2.1.1.
[206] Dokis (n 96).
[207] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (n 194)., 14. Another participant noted their 'frustration that the co-management system can seem like a façade for companies and government to go ahead with their plans in spite of Indigenous opposition' (at 42).

importance of meaningful dialogue and engagement in accordance with the MVLWB's principles of shared responsibility between the Proponent, Canada, NWT, Aboriginal govts/organisations and Boards; appropriate disclosure - including the provision of information in adequate time and in appropriate languages, respect for culture and traditions, inclusiveness- for example engaging with youth, women, and elders), and acting with reasonableness and in a spirit of cooperation. [208] The MVRB have published specific guidelines on how companies should incorporate traditional knowledge into their applications - requiring that indigenous consent be gained for any written record of traditional knowledge - as well as guidelines on how to evaluate the socioeconomic impact of projects on indigenous communities, including traditional economies. These guidelines highlight the need for developers to engage early with indigenous communities, and constantly throughout the process. They also stress the importance of reporting traditional knowledge with an understanding of its context and cultural sensitivity, observing community protocols and policy on the use of traditional knowledge, as well as the need to develop relationships based on respect and free, prior and informed consent.[209]

However, workshops reviewing the functioning of co-management in the Mackenzie Valley have highlighted a number of concerns with the process, including difficulties in securing adequate participant funding to engage in the consultation processes;[210] the need for better incorporation of traditional knowledge and science in decision-making; difficulties in ensuring all necessary information is available and understandable to participants;[211] the lack of respect for the right to informed consent;[212] and view that indigenous worldviews still take a back seat in practice.[213] Participants also commented that some indigenous groups - the Metis, Dehcho, Akaitcho - are underrepresented; the timescales are often too short to allow full participation of communities; and that the system still seems to favour industry.[214] The process is also considered to be proponent-driven,[215] with lack of understanding from project proponents on the history of the region and culturally appropriate ways to communicate, often focusing on indigenous government organisations which can amplify divisions in the communities.

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[208] 'MVLWV Engagement and Consultation Policy' (n 189).
[209] 'Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment' (Mackenzie Valley Review Board 2005) <file:///C:/Users/annab/Downloads/MVReviewBoard_Traditional_Knowledge_Guidelines.pdf> accessed 21 February 2020.
[210] 'Mackenzie Valley Resource Management Act 2016 Workshop Summary Report' (n 185)., 27.
[211] ibid., 28.
[212] Stephanie Poole, a member of the Lutsel K'e/Kache Dene First Nation who works for the NWT Treaty #8 Tribal Corporation, commented that she 'would like to see the MVRMA respect the rights of indigenous peoples including their right to informed consent'. ibid., 30.
[213] ibid., 32.
[214] ibid., 33.
[215] Dokis (n 96).

Criticism of the MVRMA system has also noted that developments in the early stages of project planning undermine the negotiating power of communities during subsequent consultation processes. Participants in the 2020 workshop noted that federal government must consult before administering resource rights to 'shift the dynamics of early engagement'. Once resource rights have been granted, in order to gain access to indigenous land, proponents require permission by the relevant indigenous land corporation, who usually require an impact benefit agreement to be signed in advance. Dokis has noted that in Sahtu territory this closed-door process usually occurs without community consultation, because of the high number of requests for access and 'consultation fatigue', and does not result in communities receiving an equal share of the proceeds, nor do the financial proceeds help to compensate for the impacts on traditional livelihoods.[216] Additionally, participants in a 2020 workshop noted that they were required to sign confidentiality agreements, which undermined a free consultation process.[217] Furthermore, once proponents have signed an IBA, the project design is well determined and they tend to assume that consent has been given. This prevents indigenous communities from being able to significantly alter the project during subsequent public consultation during the EIA.[218]

Armitage has argued that the MVRB has demonstrated evidence of deliberative learning that seeks to change worldviews and values, and in so doing, has managed to transform power relations within the environmental assessment process.[219] However, others take a far less optimistic view. White argues that formal, written and rules-bound processes do not reflect Aboriginal values or decision-making practices that tend to favour oral communication and egalitarian structures, and that it is practically impossible to translate some elements of Aboriginal knowledge into English. Such concerns prevent proper intercultural dialogue, instead requiring that indigenous participants adapt to western bureaucratic processes. [220] Such processes can remove the political nature of discussions, turning them into a bureaucratic process.[221] Dokis goes even further, arguing that

[216] ibid.
[217] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (n 194).,17-18.
[218] Dokis
[219] Derek R Armitage, 'Collaborative Environmental Assessment in the Northwest Territories, Canada' (2005) 25 Environmental Impact Assessment Review 239.
[220] Graham White, 'Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards' (2006) 59 Arctic 401.;
[221] Patricia Fitzpatrick, A John Sinclair and Bruce Mitchell, 'Environmental Impact Assessment Under the Mackenzie Valley Resource Management Act: Deliberative Democracy in Canada's North?' (2008) 42 Environmental Management 1.

> *current participatory resource management practice in the Sahtu have legitimated and entrenched non-local forms of land tenure, decision making, governance and economies,. … a form of cooptation in which the voices and general metaphysics of the Sahtu Dene people are reduced to "stories" that may appear as evidence in transcripts but are not take seriously in decision making processes.*[222]

Consequently, she argues that the Sahtu Dene are

> *'made complicit in resource development decisions through the very act of participation … in part because there is an underlying assumption among corporations, govt, and regulatory institutions of the inevitability of the expansion of market economics, that wage labour will always overtake other ways of making a living, and that money is more valuable than anything else.'*[223]

Her perspective is mirrored by Mason Mantla, Tlicho citizen and participant in the 2020 workshop, who stated 'the NWT regulatory system is inherently colonial, and that Indigenous People have little choice but to participate within it. The system was build using western perspectives as a base, with those working within the system trying to apply traditional knowledge. *Why is it not the other way around with traditional knowledge as the foundation*?[224]

7.5 Analysis

The illustrative examples used in this chapter have been chosen to show what might arguably be a 'best case scenario' for a multiculturalist model of FPIC. The consultations take place over a number of years, and are connected with the environmental and social impact assessment that takes place prior to project approval. The absence of prescriptive legislation on consultation in Canada has allowed a significant degree of variation and flexibility in the way that the duty to consult is implemented, so that it can be adapted to the specific concerns and institutional frameworks of the communities involved. This chapter has provided examples of how indigenous communities are asserting a degree of agency through innovative structures and institutions, so that environmental and social impact assessments are informed by indigenous knowledge as well as western scientific expertise. As a result of this engagement, indigenous communities are successfully widening the scope of what is

[222] Dokis (n 96)., 40.
[223] ibid., location 3677.
[224] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (n 194)., 40.

assessed prior to project approval, participating in baseline assessments, developing design alternatives and ensuring their involvement in monitoring mechanisms. Indigenous communities are also leveraging consultations on specific projects to open up wider discussion with the state on how the region should be developed long-term, in line with indigenous principles and land management strategies.

At first glance then, it appears that this chapter has presented an optimistic view of the multiculturalist approach to FPIC. It is certainly much better than projects being approved with little or no consultation at all. However, it is doubtful whether even these relatively progressive examples of consultation are sufficient to support a deep understanding of self-determination that is required for reconciliation. This is because the examples in this chapter ultimately substantiate Coulthard's concern that state-centric administrative negotiation processes will be unable to fundamentally transform the relationship between indigenous peoples and the state. In all these examples, the state retains its over-arching authority and decision-making power. Furthermore, the difficulties in recognising indigenous laws and knowledge on an equal basis inherently puts indigenous peoples at a disadvantage within the process, requiring them to work within state-designed procedures and to express themselves in terms that are credible to the state. As such, these apparently positive examples demonstrate the limits of the multiculturalist approach in enabling indigenous self-determination.

Importantly for this thesis, these illustrative examples are consistent with a multiculturalist definition of FPIC as a duty to consult with a view to achieving agreement, rather than a duty to obtain consent. In all three examples, indigenous consent is not a deciding factor in the state's decision on whether or not to proceed with projects. Therefore it is the state, not indigenous peoples, who have the final say on how indigenous land will be used. Whilst indigenous communities may leverage innovative mechanisms to expand the amount and type of information available for the state to consider in its decision-making, they do not have any meaningful control over the outcome, or even an equal say in the final decision. There may be tentative evidence in these examples to suggest that by leveraging innovative mechanisms, indigenous communities can increase the scope of the information available to state decision-makers and thus increase the likelihood that the final decision will be acceptable to the communities in question. However, this indirect influence over the outcome does not represent real self-determination or a transformation of power relations vis-a-vis the state. Under the multiculturalist model of FPIC operating in Canada, the future of indigenous communities and their lands remains at the mercy of decisions made by state officials.

Furthermore, where the state did decline to approve projects to which indigenous peoples withheld consent, it did so on the basis of its own cost-benefit calculation of environmental and social risk, according to its own logic. For example in the Ajax case, the indigenous community challenged the rationale of the state's conclusion that the project would have severe impacts on SSN cultural heritage whilst having insignificant environmental effects. The division of social and environmental risk in this way was 'simply irreconcilable' according to the SSN's way of thinking. As the Ring of Fire case in particular shows, the logic used by state officials to make these decisions is changeable, as political and economic trends influence the approach of the government of the day.

The dominance of state-centric logic in decision-making mirrors the concerns of Coulthard that dialogic processes will favour the state, because they will be carried out in the terminology and logic of the state, undermining indigenous identity and negotiating power. Consequently this thesis has argued that epistemic justice is key to operationalising FPIC in a way that supports self-determination and is truly reconciliatory. The examples in this chapter illustrate the difficulty of ensuring epistemic justice within the multiculturalist framework of FPIC. Despite the fact that in all the examples the process recognised the value of indigenous knowledge, in each case there is criticism from indigenous participants that western scientific knowledge remains prioritised and that the process itself is technical and bureaucratic, and often inconsistent with indigenous cultural traditions. As one aboriginal participant of a MVRB consultation process explained, '*The opportunity is provided to participate… but that participation is conditional on people being able to act like western bureaucrats, and that is the real problem*.'[225] This may be compounded by an inability of state officials to recognise their own specific epistemic location – as Nadasdy has observed, Euro-Canadian frameworks for evaluating environmental impact data are viewed as being 'culture-free', whereas indigenous views seen as being rooted in culture.[226]

Furthermore, both the Ajax and Ring of Fire cases give insight into some of the difficulties that indigenous communities face within the FPIC process, which stem from an apparent unwillingness to re-examine the imbalance of power between indigenous peoples and the state by giving indigenous peoples the chance to make a free decision on their future. For example, indigenous communities may need to fend off repeated applications for projects even after their consent has been withheld; 'divide and rule' tactics challenge the unity of

[225] Fitzpatrick, Sinclair and Mitchell (n 221)., 13.
[226] Paul Nadasdy, 'Reevaluating the Co-Management Success Story' (2003) 56 Arctic 367.; Paul Nadasdy, 'The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice' (2005) 47 Anthropologica 215.

indigenous communities; piecemeal development strategies are employed to break contentious developments into more palatable stages; and provincial legislation reduced environmental protections in order to speed the permitting process. Such examples support Young's concern that the duty to consult does not meaningfully support self-government, but instead is intended as a bureaucratic process to ensure that development projects are eventually approved.[227]

Furthermore, there is an overriding expectation that indigenous communities will behave in a manner that is perceived as reasonable to non-indigenous actors in the process. The comments of Doug Ford, and of Alan Coutts, the CEO of Noront Resources, support Coyle's observation that indigenous communities are expected to behave in a manner that is 'reasonable' - which is interpreted by non-indigenous actors as negotiating some modifications to projects, but not doing anything that would cause undue delay or that is intended to stop the project outright. This, as Hamilton and Nichols note, restricts indigenous peoples' options within the consultation process and undermines their ability to express their self-determination as they see fit.[228] As will be discussed in Chapter 8, the state's view on what constitutes reasonable and unreasonable behaviour from indigenous communities can have consequences for that community's relative negotiating power within an FPIC dialogue.

In addition to the right to freely consent and to have that consent respected, self-determination can also be expressed by exercising control over how the FPIC process is designed and put into practice. As the legal framework in Canada stands, there is no systemic mechanism to ensure that indigenous communities are included in the design and administration of the consultation process.[229] All three of these cases are notable and indeed celebrated because the indigenous communities wielded an unusual degree of agency within the process of consultation and impact assessment. In both the Ajax and Ring of Fire examples, the innovative mechanisms developed as a result of ongoing resistance by the indigenous communities together with NGOs and civil society, and is a credit to the strength of indigenous community leaders and institutions. The legislative framework, whilst providing enough leeway for these processes to evolve, did not by any means encourage their development.

The Mackenzie Valley Review Board provides an example of a system that attempts to construct a co-management relationship based on recognition of indigenous government and rights to land. However, even in this case dialogue mechanisms must operate within the

[227] Young (n 103).
[228] Hamilton and Nichols (n 35).
[229] Coyle (n 34).

constraints of the state's legal architecture, scientific technical approach, and commitment to state development paradigms. Consequently even this most progressive of multiculturalist approaches to FPIC requires, as Coulthard has noted, indigenous laws and knowledges must ultimately express themselves within the terms of a colonial system. The Mackenzie Valley case also draws attention to the difficulties of constructing nation to nation relations within a multiculturalist and capitalist system. As Dokis has argued, land claim agreements have been used by governments to integrate indigenous communities into the market economy, by transforming spiritual relations to land 'into the language of property law and craft capitalist subjects who are compelled to treat their land as a commodity.'[230] The inability of a co-management system to fully respect FPIC (in terms of the right to say 'no') even on land held with aboriginal title is deeply concerning. As Innes commented, 'Not all resource management issues are best managed by a co-management framework. In certain cases, the rights holder should be the sole decision maker, for example when the resource is fully in their territory….Co-management is, at best, a compromise'.[231]

Finally, the three examples also suggest that utilising independent, expert panels may help to overcome the historic lack of trust between indigenous peoples and the state and build confidence in the FPIC process. In the Ajax and Ring of Fire examples, the indigenous communities requested that the federal EIA be carried out through a Joint Review Panel, in which an independent panel of experts undertakes the most thorough form of assessment, including public hearings. In both cases, the government instead decided to use the less stringent Comprehensive Study process, in which the CEA Agency undertakes the assessment itself, to the displeasure of the indigenous communities involved. Indeed, under the Mackenzie Valley Resource Management Act, if the Minister responsible for taking a decision about the project intends to reject the recommendations of the MVRB, then an independent review panel is established by the MVRB to reassess the project before the Minister takes the final decision. This tentatively supports a greater role for intermediaries in the state-indigenous relationship.

7.6 Conclusion

This thesis postulates that the practical realisation of the right to indigenous self-determination is a prerequisite to reconciliation. As Stacey has commented in relation to Canada, 'if indigenous rights and title are to promote reconciliation, it must be shaped and informed by

[230] Dokis (n 96)., location 3745.
[231] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (n 194)., 4.

the extent to which consultation increases Crown accountability to Indigenous peoples and allows Indigenous peoples to act as sovereign, politically autonomous nations.'[232] This chapter has suggested that although Canada's unique legal framework on the duty to consult professes to respect indigenous peoples as distinct and pre-existing societies, in fact it remains trapped in the sovereignty/self-determination conflict that was discussed in Chapter 3. Furthermore, the approach that the Courts and state practice have taken to resolving this conflict in relation to FPIC mirrors the multicultural approach discussed in Chapter 5. In interpreting FPIC through the lens of the duty to consult and accommodate, indigenous peoples in Canada are treated as sub-state minority groups rather than self-determining peoples. Consequently the underlying assumption that the state has legitimate authority over indigenous peoples, laws and lands, remain unchallenged, and the colonial relationship between the state and indigenous peoples continues.

This chapter has also deliberately explored three illustrative examples at the deeper end of the consultation spectrum, that arguably demonstrate a best-case scenario for the multicultural approach to FPIC. However, even these relatively progressive examples suggest the validity of Coulthard's concern that state-centric administrative negotiation processes will inherently disadvantage indigenous peoples by failing to recognise their laws, knowledge and ways of being on an equal basis. Ultimately, the state retains a firm hold over the process of FPIC, as well as over whether a project will proceed in the absence of indigenous consent.
The next Chapter will use mediation and negotiation theory to explore how these inherent limitations of the multicultural model of FPIC work to undermine indigenous negotiating power within the consultation process. It also suggests how the use of mediators might help ameliorate imbalances of negotiating power, build trust in the process, increase epistemic justice, and improve the opportunities for self-determination.

[232] Richard Stacey, 'Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?' (2018) 68 University of Toronto Law Journal 405.

Chapter 8: The potential for mediation to increase indigenous negotiation power during FPIC consultations

8.1 Introduction

This thesis has argued that two very different interpretations of FPIC have emerged. The first, proposed by indigenous people and their supporters, emphasises indigenous self-determination and the need for states to obtain indigenous consent as a 'general rule' prior to the approval of extractive projects on indigenous territory. However, the interpretation adopted by states interprets FPIC through the lens of human rights based multiculturalism, and views FPIC as only an objective to be aimed for as part of a process of democratic participation rather than a requirement to be achieved. Chapters 6 and 7 showed how this multiculturalist approach is defining the implementation of FPIC in Peru and Canada, and limiting its potential to be a force for reconciliation in the countries.

Central to this analysis is the continuation of colonial hierarchies of power within the multiculturalist model, that reinforce the ultimate control of the state over land, resources and decision-making processes. The case studies have highlighted many of the ways that maintaining this hierarchy of power affects FPIC consultation processes. They have argued that multiculturalist FPIC consultations are dominated by state legal systems, knowledge systems and bureaucratic processes that privilege Eurocentric worldviews over indigenous ones. Indigenous rights are defined and adjudicated by the state, according to its own legal principles. Indigenous communities are excluded from full participation in decision-making as a result of a lack of funding, scientific advice, legal expertise and capacity, in the face of 'consultation fatigue'. The negotiation positions and strategies of indigenous peoples are judged to be 'reasonable' or otherwise, by reference to their conformity with state law and normative standards, and often indigenous communities are seen as 'dogs in the manger', standing in the way of beneficial economic development. Politically sensitive issues are dealt with through channels that purport to be 'neutral', but whose effect is to remove the politically sensitive nature of the issues at stake.

On a practical level, indigenous people are presented in FPIC consultations with pre-designed projects, at a stage in the project when substantial changes are considered no longer to be possible. Timescales are often insufficient to permit proper contemplation of the project in accordance with indigenous cultural practices. Indigenous communities must navigate consultation processes designed by the state rather than in partnership with the indigenous communities concerned. Issues that are considered inextricable in indigenous worldviews are siloed into Eurocentric categories, and traditional knowledge is given less weight than technical data. Most importantly, indigenous communities have no 'right to say no'. Given this reality, it is unsurprising that FPIC consultations are often undertaken in an atmosphere of distrust.

All these factors result in a systemic disadvantage to indigenous peoples within the FPIC consultation process. Consequently, this chapter examines the potential for mediation as a strategic tool to help mitigate some of the impact. The first section provides some information on why western mediation can be considered a suitable process for FPIC consultations, and some important caveats. It then evaluates the potential contributions of three models of mediation: rights-based, interests-based and narrative mediation.

Ledeyet has noted that recognising the need to obtain indigenous consent is viewed by many as an inversion of the existing imbalance of power within consultation processes, in a way that gives indigenous peoples unfair power over the state.[1] Consistent with the conceptualisation of consultation as a negotiation, this chapter reinterprets the obligation to 'consult in order to obtain consent' as a duty to forge consensus. This is consistent with the approaches of authors such as Hamilton and Nicholls,[2] who have argued for a 'duty to negotiate' in the Canadian context, or of Ortiz,[3] Coyle[4] and Ilizarbe[5] who argued that consultation norms should be shifted towards 'consensus' and away from binary notions of 'consent'. Viewed in this way, the principle of consent is not a unilateral veto in either direction, but a recognition of the need to build relationships and work together to find a resolution that both sides can accept. This reformulation fundamentally challenges the legitimacy of either side presuming the greater power within the relationship, and could help to move beyond a multicultural interpretation of

[1] Dominique Leydet, 'The Power to Consent: Indigenous Peoples, States, and Development Projects' (2018) 69 University of Toronto Law Journal 371.
[2] Robert Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56 Alberta Law Review 729.
[3] Alejandro Santamaría Ortiz, 'La consulta previa desde la perspectiva de la negociación deliberativa' [2016] Revista Derecho del Estado 227.
[4] Michael Coyle, 'Shifting the Focus: Viewing Indigenous Consent Not as a Snapshot But As a Feature Film' (2020) 27 International Journal on Minority and Group Rights 357.
[5] Carmen Ilizarbe, 'Intercultural Disagreement: Implementing the Right to Prior Consultation in Peru' (2019) 46 Latin American Perspectives 143.

FPIC consultation towards a more inter-cultural, nation-to-nation understanding of what FPIC entails.

8.2 Mediation as a suitable process for negotiations between indigenous peoples and the state.

8.2.1 A brief comparison of western mediation and indigenous peacemaking

Within western legal systems, mediation is a voluntary form of 'alternative dispute resolution' in which an independent third party facilitates a confidential dialogue process to enable the disputants to negotiate a mutually beneficial settlement of their dispute. Mediation is used in a wide variety of contexts - for example civil and commercial disputes, family disputes and employment disputes - and may be either voluntarily instigated, or increasingly, may be court-mandated.[6] Additionally, mediation has been used to help settle disputes between different communities, in international conflicts between states, and in conflicts relating to different ethnocultural groups, environmental issues and climate change.[7] It is usually a structured and semi-formal process viewed as a cost-efficient means of resolving disputes which respects the self-determination of the parties, and (in some cases) seeks to enhance the relationship between them by building trust and respect.[8] Because the outcome is not imposed on the parties from an external source of authority, mediation has been described as a 'bottom-up' and 'anti-authoritarian' process.[9] An influential advocate of mediation, Lon Fuller, argued that mediation has the 'capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.'[10]

Whilst in western legal systems mediation is viewed as an 'alternative' to litigation, in many traditional and indigenous societies consensus-building approaches are considered the primary means to resolve disputes, and 'today indigenous communities practice their own indigenous dispute resolution processes, western forms of ADR, and the Indigenized Western

[6] Marjorie Mantle, *Mediation: A Practical Guide for Lawyers* (Edinburgh University Press 2017) <http://ebookcentral.proquest.com/lib/city/detail.action?docID=5013836> accessed 30 October 2020.
[7] Alexia Georgakopoulos, *The Mediation Handbook: Research, Theory, and Practice* (Taylor & Francis Group 2017) <http://ebookcentral.proquest.com/lib/city/detail.action?docID=5050260> accessed 30 October 2020.
[8] Robert A Baruch Bush and Joseph P Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 Ohio State Journal on Dispute Resolution 1.; Luísa Brandão Bárrios, 'European Mediation and Indigenous Mediation' (2020) 115 Teisė 134.
[9] Michal Alberstein, 'The "Law of Alternatives": Conflict Resolution as the Art of Reconstruction', *Studies in Law, Politics and Society*, vol 70 (2016).
[10] Lon L Fuller, 'Mediation--Its Forms and Functions' (1970) 44 Southern California Law Review 305. 325.

ADR systems'.[11] Whilst many indigenous conflict resolution practices[12] may have some similarities to western mediation, the two have important distinctions that stem from underlying values of reciprocity and relationship. According to Victor, indigenous peace making usually occurs within the community, and involves ceremonies, story-telling, 'saving face', recounting of facts, speaking of emotions, prayer and spirituality. Additionally, the processes tend to be more flexible than western models, involving cyclical understandings of time, qualitative measurement of success, and a people-focused (rather than solutions-focused) approach.[13] The peace-making process may take a good deal of time so that everyone can express themselves sufficiently for healing to occur. Victor observes that the 'Indian time' that has been so maligned in western culture as time-wasting and laziness, is valued in indigenous communities as waiting for when the time is right - i.e., when the relationship is sufficiently developed and sufficient trust exists to deal with the conflict.[14]

As Sauvé noted in a study of mediation with the Guugu Yimithirr in a community justice programme in Queensland, Australia, 'the aboriginal conceptualisation of what 'mediation' means bears little resemblance to the 'western' model,' and these differences stem from opposing views about 'relating generally and community specifically.'[15] Suave argues that western mediation's emphasis on achieving an agreement is too simplistic for aboriginal participants, who are seeking a transformation of relationship, spirit and heart at a much deeper level than a solutions-oriented agreement. What requires 'settling', in the indigenous view, are not the issues at hand, but the transformation of relationship - resulting in reconciliation with oneself, with the other disputants, and with the community at large. Such a description emphasises the importance that indigenous peacebuilding places on respect, relationships, community, interconnectedness and reciprocity.[16]

[11] Brandão Bárrios (n 8). 135. According to Bárrios, '"Indigenous Dispute Resolution Processes," are intuitive, time-tested and pre-colonial forms and systems of dealing with community problems by coming up with a consensual, communal solution.'

[12] Whilst it is problematic to generalise across different indigenous traditions and assume homogeneity or an essentialist ideal of indigenous societies, patterns have been observed in how indigenous societies often differ from western cultures. For example, Martinez identifies seven dimensions of difference: the approach to individuality; holistic perspectives on life and nature; the concept of time; societal organization and kinship ties; guardianship vs ownership of land; leadership; and the principle of reciprocity. Miguel Alfonso Martinez, 'Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations, First Progress Report Submitted by Mr. Miguel Alfonso Martinez, Special Rapporteur' (UN Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities 1992) E/CN.4/Sub.2/1992/32.

[13] Carlo Osi, 'Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation' (2008) 10 Cardozo Journal of Conflict Resolution 163.; Wenona Victor, 'Alternative Dispute Resolution in Aboriginal Contexts: A Critical Review' (Canadian Human Rights Commission 2007) <https://www.chrc-ccdp.gc.ca/eng/content/alternative-dispute-resolution-aboriginal-contexts-critical-review> accessed 16 November 2020.

[14] Victor (n 13). 27.

[15] Madeleine Sauve, 'Mediation: Towards an Aboriginal Conceptualisation' (1996) 3 Aboriginal Law Bulletin 10. 10.

[16] Osi (n 13).

8.2.2 Precedents for the use of mediation in dialogues between indigenous peoples and states

Mediation has been described as a 'logical tool'[17] for use to resolve disputes that arise during consultation processes. Coyle argues that mediation 'offers the possibility of enhancing communications between the participants and ensuring that the dialogue occurs in an atmosphere of respect for all parties' views on the conflict.'[18] Furthermore, he suggests that mediation is particularly useful in enabling agreements where 'multiple normative orders' come into play, because it does not require the parties to agree on the norms themselves. Instead, mediation can assist the parties to find solutions which are consistent with both sides' normative values and laws.

There is precedent for mediation being used between indigenous peoples and states in stakeholder engagement mechanisms and on conflicts relating to natural resource management and intellectual property rights.[19] Indigenous movements have themselves advocated for mediation as a tool for resolving land and resources disputes with states.[20] EMRIP's Follow up report on Indigenous peoples, decision making and the extractives industry recognises the use of mediation within grievance mechanisms in the extractives industry, recommending that they should be culturally appropriate, rights-based, and should take into account traditional indigenous mechanisms such as justice circles where indigenous peoples ask for these.[21] 'In the mining sector, mediation is included in ICMM's guidance on resolving

[17] Coyle, 'Shifting the Focus' (n 4)., 372.
[18] ibid., 372.
[19] For example, the UN FAO has released guidance on 'Negotiation and Mediation Techniques for Natural Resource Management' for practitioners working on participatory natural resource management and rural livelihood projects; the Department of Political Affairs (DPA) and the Environmental Cooperation for Peacebuilding initiative of the United Nations Environment Programme (UNEP), have released guidance on 'Natural Resources and Conflict: A Guide for Mediation Practitioners', and the ICOM-WIPO Art and Cultural Heritage Mediation process has been developed to resolve conflicts over cultural heritage, and is open to states, museums, indigenous peoples and individuals. See Antonia Engel and Benedikt Korf, 'Negotiation and Mediation Techniques for Natural Resource Management' (Food and Agriculture Organization of the United Nations 2005) <http://www.fao.org/3/a0032e/a0032e00.htm#Contents> accessed 16 November 2020.; 'Natural Resources and Conflict: A Guide for Mediation Practitioners' (United Nations Department of Political Affairs and United Nations Environment Programme 2015). 'ICOM-WIPO Art and Cultural Heritage Mediation' <https://www.wipo.int/amc/en/center/specific-sectors/art/icom/index.html> accessed 16 November 2020.
[20] See 'Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, 6-8 December 2000' (Tebtebba Foundation 2000).; Joji Cariño, 'Indigenous Peoples Addressing Land and Resource Conflicts' in Victoria Tauli-Corpuz and Joji Cariño (eds), *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development* (Tebtebba Foundation 2004). Augusto Willemsen Diaz, 'Outside Intervention' in Victoria Tauli-Corpuz and Joji Cariño (eds), *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development* (Tebtebba Foundation 2004).
[21] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Fifth Session 9-13 July 2012 'Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on the extractive industries' (30 April 2012) UN Doc A/HRC/EMRIP/2012/2., para 28(d).

local-level grievances,[22] and in their good practice guide on indigenous peoples and mining.[23] Mediation of company-community disputes is also provided by the IFC's Compliance Advisor Ombudsman;[24] and the OECD's National Contact Points dispute resolution process,[25] and the World Bank has also recommended mediation and alternative dispute resolution, including traditional dispute resolution methods, when engaging with indigenous peoples.[26] Mediation has also been used in relation to the settlement of land claims in Canada,[27] and in relation to a company-community dispute that occurred in around 2002, in relation to the Tintaya Antapaccay mine in Peru.[28]

Mediation is also finding its way into the realm of FPIC consultation. In 2008, the Supreme Court of British Columbia in *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*[29] agreed to the Hupacasath First Nation's application for an independent mediator to be appointed to assist with an ongoing process of FPIC consultation and accommodation. In the *Haida* case, the Supreme Court of Canada recognised the value of third-party involvement in consultation processes, stating that where there is a requirement for deep consultation with indigenous peoples, 'the government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.'[30] The National Centre for First Nations Governance have also recognised mediation as a tool in consultation processes to assist in reaching agreement,[31] and have advised that 'Court

[22] 'Handling and Resolving Local-Level Concerns and Grievances' (ICMM 2019) <https://www.icmm.com/website/publications/pdfs/social-and-economic-development/191210_publication_grievance-mechanism.pdf> accessed 19 November 2020.

[23] ICMM, *Indigenous Peoples and Mining: Good Practice Guide* (2nd edn, ICMM 2015) <https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9520.pdf> accessed 19 November 2020.

[24] 'Office of the Compliance Advisor/Ombudsman : How We Work : Ombudsman' <http://www.cao-ombudsman.org/howwework/ombudsman/> accessed 19 November 2020.

[25] 'National Contact Points for the OECD Guidelines for Multinational Enterprises - OECD' <http://www.oecd.org/investment/mne/ncps.htm> accessed 19 November 2020. See Cathal M Doyle and Andrew Whitmore, *Indigenous Peoples and the Extractive Sector: Towards a Rights Respecting Engagement* (Tebtebba, PIPLinks and Middlesex University). 99-104 for a discussion of OECD National Contact Points in relation to indigenous peoples' rights.

[26] Luis Felipe Duchicela and others, 'Indigenous Peoples Development in World Bank-Financed Project: Our People, Our Resources Striving for a Peaceful and Plentiful Planet. Case Studies Report.' (World Bank Group 2015) <http://pubdocs.worldbank.org/en/707481444854126688/WB-IP-Report-Sept-28-2015-final-version.pdf> accessed 19 November 2019.

[27] Michael Coyle, 'Addressing Aborginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future - Part II' (2005) 31 Queen's Law Journal 796.

[28] Brooke D Barton, 'A Global/Local Approach to Conflict Resolution in the Mining Sector: The Case of the Tintaya Dialogue Table' (Master of Arts in Law and Diplomacy Thesis, Tufts University 2005) <https://dl.tufts.edu/concern/pdfs/c247f3984> accessed 19 November 2020.; Caroline Rees, 'Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges' (John F Kenney School of Government, Harvard University 2010) Corporate Social Responsibility Initiative Working Paper No 56.

[29] *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests),* 2008 BCSC 1505.

[30] *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511, 2004 SCC 73., para 44.

[31] 'Project Report to the National Centre for First Nations Governance: First Nation Consultation Framework' (Hill Sloan Associates Inc 2008) <http://www.fngovernance.org/resources_docs/First_Nation_ConsultationFramework.pdf> accessed 19 November 2020.

supervision over court-ordered consultation, accommodation and mediation processes between the Crown and First Nations is now a standard remedy in cases challenging Crown decisions on the basis that aboriginal or treaty rights have not been accommodated.' Furthermore, where consultations do not result in agreement with the Crown, the NCFNG has advocated for new decision-making processes including 'mediation and/or an independent and specialized tribunal consisting of both First Nation and Crown representatives.'[32]

In addition to the mediation of disputes that arise in FPIC consultation, the practice of engaging a facilitator to guide the consultation process is also becoming established. Facilitation is closely related to mediation, in that it involves a facilitator assisting two or more parties to communicate constructively and work together productively, through the establishment of dialogue process, identifying issues for discussion, and managing areas of tension.[33] In Peru, the Prior Consultation Law and Regulatory Decree requires all FPIC consultations to be managed by a trained facilitator, registered by the Vice-ministry of Interculturality.[34] In the corporate sector, private consultancy firms are now advertising services as 'neutral facilitators' to help both private and public entities achieve the consent of indigenous peoples.[35] Additionally, in a workshop evaluating co-management in the Mackenzie Valley, Innes referred to the frequent disagreements that arise in FPIC consultation processes, including between different indigenous participants, and spoke of 'a need to do dispute resolution to arrive and a fair and reasonable result'.[36]

8.2.3 The need for urgent action as well as caution

In the light of these developments, it is important to consider the potential role of mediators within FPIC consultation processes, and their possible impacts on both the process and the outcome.

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[32] Maria Morellato, 'The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights: Research Paper for the National Centre for First Nations Governance' (Blake, Cassels & Graydon LLP 2008) <http://www.fngovernance.org/ncfng_research/maria_marletto.pdf> accessed 19 November 2020.

[33] Janice M Fleischer and Zena D Zumeta, 'Preventing Conflict through Facilitation' (*Mediate.com*, December 1999) <https://www.mediate.com/articles/zenandflei.cfm> accessed 19 November 2020.

[34] Ley No 29785 - Ley del Derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) 2011.; Decreto Supremo N° 001-2012-MC 2012, Art 28; Resolución Viceministerial 001-2012-VMI-MC 2012.; For a detailed description of the role of facilitators, see Ministerio de Cultura, 'Derecho a La Consulta Previa: Guia Metodologica Para La Facilitacion de Procesos de Consulta Previa' (Ministerio de Cultura 2015).

[35] 'Implementing FPIC Successfully: A Core CCCS Service' (*Cross-Cultural Consulting Services*) <http://crossculturalconsult.com/services/fpic/> accessed 19 November 2020.

[36] 'Resource Co-Management in the Mackenzie Valley Workshop 2020: Engagement and Consultation' (PlanIt North Inc 2020) <https://slwb.com/release-final-report-resource-co-management-mackenzie-valley-workshop-2020> accessed 21 February 2020., 11.

Many scholars and practitioners have questioned whether mediation is appropriate for disputes which involve a conflict of rights.[37] Furthermore, EMRIP has noted that 'consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples.'[38] It has been noted that in cases where human rights are concerned, introducing confidential mediation processes to resolve complaints could act against the public interest by undermining procedural fairness, and preventing transparency and public disclosure of the outcome.[39] Furthermore, participants who are socio-economically disadvantaged or who have a limited understanding of their rights could be put at a disadvantage, further entrenching systemic injustices.[40] Thus consensus-based approaches such as mediation must be deployed with awareness of the potential to undermine indigenous rights, particularly where power disparities are in play. Nevertheless, FPIC consultation as put forward in UNDRIP is, in itself, an exercise in reaching agreement and could equally be criticised in the same way. Mediation at least provides the opportunity for independent third parties to intervene in the process where differences in negotiating power are threatening to negatively affect indigenous rights.

In proposing mediation as a tool for FPIC consultation, it is recognised that some indigenous people resent attempts to shoe-horn traditional methods of peace-making into a western paradigm, viewing it as another attempt to force 'Anglo' or western culture and legal systems on to indigenous peoples, in the name of progressive 'modernisation' of indigenous practices which are still deemed to be backwards or inferior.[41] Kahane and Bell flag the risk that attempts

[37] Owen M Fiss, 'Against Settlement' (1984) 93 The Yale Law Journal 1073.; Harry T Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 Harvard Law Review 668.; Robert A Baruch Bush and Joseph P Folger, *Promise of Mediation: The Transformative Approach to Conflict* (Jossey Bass; 2004). 13-15; Baruch Bush and Folger (n 8).; Lorna McGregor, Rachel Murray and Shirley Shipman, 'Should National Human Rights Institutions Institutionalize Dispute Resolution?' 41 Human Rights Quarterly 32.

[38] UNHRC, 'Final Report of the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples' (17 August 2011) UN Doc A/HRC/18/42, para 27.

[39] It is noted that consultation processes take place under different degrees of confidentiality, but are largely public processes. The case studies from Peru and Canada generally demonstrated that documents such as reports, environmental impact assessments, correspondence, transcripts of meetings and meeting minutes are available in the public domain, and the parties comment on the process in the media. However, certain processes relating to or running alongside the consultation may be confidential, such as the negotiation of the Matawa Framework Agreement in the Ring of Fire case, or the communities' 'internal discussion' meetings in the Peruvian cases. Furthermore, it is recognised that consultation processes should not be widely open for attendance by the general public or mining companies, but should only involve third parties such as technical advisors or an Ombudsman who are there in a supporting role. As a voluntary and flexible process, mediation permits the parties to agree together what should remain confidential and *without prejudice*, and what can be disclosed into the public domain. In cases that concern human rights issues, the involvement of an Ombudsman may serve as a safeguard to ensure that legal rights are not eroded or prejudiced by confidentiality terms.

[40] Heather M MacNaughton, 'The Role of Mediation in Human Rights Disputes' in Patrick A Molinari and Ronalda Murphy (eds), *Doing justice: dispute resolution in the courts and beyond* (Canadian Institute for the Administration of Justice = Institut canadien d'administration de la justice 2009).

[41] Matt Arbaugh, 'Making Peace the Old Fashioned Way: Infusing Traditional Tribal Practices into Modern ADR' (2012) 2 Pepperdine Dispute Resolution Law Journal., Craig Jones, 'Aboriginal Boundaries: The Mediation and Settlement of Aboriginal Boundary Disputes in a Native Title Context' (2002) 2 National Native Title Tribunal Occasion Papers Series 1.

to construct hybrid models of dispute resolution will continue 'the project of colonization by adopting only those aspects of indigenous knowledge, values and processes that do not conflict with Western values and laws.'[42]

The following analysis, which is based on western mediation theory, is proposed with the crucial proviso that specific mediation processes must always be designed with indigenous communities, and implemented with their continued consent. To avoid the pitfalls of imposing western or colonial hybrid models of mediation on indigenous people, appropriate models of mediation must be designed from the ground up, with a specific conflict or context in mind, and in conjunction with the indigenous peoples involved. In order to respect indigenous self-determination and autonomy, any external mediator should be invited by the proper indigenous authorities.[43] Additionally, there is evidence of successful mediation processes that include a team of mediators, some of whom are external to the conflict, and some of whom hold positions of respect within the community itself.[44] The design of the process must give consideration to a range of issues, including the nature of the dispute, the needs of the parties and their existing relationships, cultural difference, gender, power imbalances, trust-building and how emotion is treated within the process. Furthermore, it is imperative that the mediators recognise the changing nature of culture and avoid stereotypical generalisations which will obscure the real experiences and perceptions of the participants.[45]

The proposal that mediations be co-designed by indigenous peoples and states is consistent with UNDRIP's provisions on the co-design of grievance mechanisms[46] and procedures for the recognition and adjudication of land rights[47] that require joint design of processes which respect indigenous laws and customs. It could also be utilised to help fulfil the requirements of Article 40, which states that

> *Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective*

[42] David Kahane and Catherine Bell, 'Introduction' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press 2005). 2.
[43] Diaz (n 20).
[44] Paul Wehr and John Paul Lederach, 'Mediating Conflict in Central America': (1991) 28 Journal of Peace Research 85.; John Beaucage, Alicia Kuin and Paul Iacono, 'Anishnabe N'oon Da Gaaziiwin: An Indigenous Peacemaking- Mediation Nexus' (2018) 16 Fourth World Journal 49.
[45] Rebecca Ratcliffe and Catherine Bell, 'Western ADR Processes and Indigenous Dispute Resolution (Draft Paper)' <https://www.coemrp.ca/wp-content/uploads/2015/12/Final-Western-DR-Systems-.pdf> accessed 19 November 2020.
[46] UNDRIP, UNGA Res 61/295 (13 September 2007)., Arts 11.2; 12.2.
[47] Ibid., Art 27.

> *rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*[48]

Furthermore, dispute resolution systems which reflect indigenous values are thought to be more likely to be perceived as legitimate, and consequently any agreements arising from them are more likely to endure.[49]

However, it is extremely possible that state officials will be more familiar with western mediation practices than indigenous peace-making, and therefore may be more open to including it in state-designed FPIC processes. Whist there is a need to continue to advocate for the state to design dialogue processes in conjunction with indigenous peoples and to observe indigenous consultation protocols, there is also a need to take urgent steps to address power imbalances in the way that FPIC is currently practiced. On this basis, this chapter will evaluate three different models of mediation, that are informed by western theories of negotiation and dispute resolution, in order to assess their potential to mitigate the imbalances of power that are at play.

8.3 Rights-based mediation

8.3.1 FPIC consultations as fora in which rights are negotiated

FPIC consultations have been described as being largely about 'negotiation of rights' in a space of legal pluralism, in which state law, indigenous legal frameworks and international norms, in addition to the 'raw law' of forcible coercion, all come into play.[50] FPIC consultations can therefore be conceived of as fora in which the meanings of rights are contested within the context of historically-rooted power asymmetries and cultural politics.[51] Building on Sally Engle Merry's work on vernacularisation of rights, and the decolonial work of Santos and Rodriquez Garavito, Flemmer has concluded that consultation processes are 'asymmetric arenas of struggles over rights' in which top-down approaches to rights clash with bottom-up

[48] Ibid, Art 40.
[49] Jones (n 41).; Coyle, 'Shifting the Focus' (n 4).
[50] Marilyn Machado and others, 'Weaving Hope in Ancestral Black Territories in Colombia: The Reach and Limitations of Free, Prior, and Informed Consultation and Consent' (2017) 38 Third World Quarterly 1075.; See also Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005). Rachel Sieder, '"Emancipation" or "Regulation"? Law, Globalization and Indigenous Peoples' Rights in Post-War Guatemala' (2011) 40 Economy and Society 239.; Viviane Weitzner, '"Nosotros Somos Estado": Contested Legalities in Decision-Making about Extractives Affecting Ancestral Territories in Colombia' (2017) 38 Third World Quarterly 1198.
[51] Machado and others (n 50).

interpretations of the law. Her work in Peru, and that of Rodriguez Garavito in Colombia,[52] observed that indigenous and state participants made reference to the same legal standards (for example ILO C169 and UNDRIP) but with vastly different interpretations of their meaning. According to Flemmer, the outcome of the epistemic struggle between the different interpretations of normative standards will determine the result of the consultations.[53]

However, for indigenous peoples the notion that their inalienable rights can be negotiated, particularly through fora in which the balance of power is against them, is often unacceptable. For example, in the Corrocohuayco case study presented in Chapter 6, the indigenous communities of Espinar demanded FPIC consultation in relation to the mine's expansion, but made clear that their rights are non-negotiable. In a press release, the community representative stated:

> *This process [of FPIC consultation] is not understood as a negotiation, because our rights are not negotiated, the rights are to be respected and guaranteed, that is the obligation of the government and it is our obligation to defend them. We are not willing to allow our rights to be violated once again. There have been more than 30 years of constant abuses against us, by the mining companies and the State itself.*[54]

However, the analysis in Chapters 3 and 5 as well as the case studies in Chapters 6 and 7 show that in practice, state have overwhelming control over how indigenous rights – including their rights to self-determination, land and FPIC - are defined and under what conditions they may be restricted. This casts doubt on the likelihood that indigenous peoples will be able to win the 'epistemic struggle' referred to by Flemmer, in order to influence the outcome of FPIC consultations.

8.3.2 The case against rights-based mediation

In 'evaluative' or 'rights-based' mediation, the mediator provides an early evaluation to each party of the strength of their legal position, in order to bring the parties to settle their dispute. Such an approach can help to reduce power imbalances where one party is more familiar with

[52] César Rodríguez-Garavito, 'Ethnicity.Gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields' (2011) 18 Indiana Journal of Global Legal Studies 263.
[53] Riccarda Flemmer, 'Stuck in the Middle: Indigenous Interpreters and the Politics of Vernacularizing Prior Consultation in Peru' (2018) 23 The Journal of Latin American and Caribbean Anthropology 521.
[54] 'Espinar: comunidades retoman el diálogo con el Estado sobre la consulta previa' (*Observatorio de Conflictos Mineros en el Perú*, 29 April 2019) <http://conflictosmineros.org.pe/2019/04/29/espinar-comunidades-retoman-el-dialogo-con-el-estado-sobre-la-consulta-previa/> accessed 20 November 2020.

the law or has greater access to legal advice,[55] as is often the case in FPIC consultations. However, this section argues that such an approach is disadvantageous in the context of FPIC consultation, and may reinforce existing power disparities, particularly where indigenous peoples are not content with the legal framework that is being applied. Given that FPIC consultation tends to be regulated by top-down legal frameworks which are based in state-centric rather than indigenous legal principles, the mediator's definition of rights is likely to be firmly rooted in the state's interpretation of the law. Such an intervention would not assist in developing an intercultural dialogue based on epistemic justice, and would be likely to reinforce existing power disparities.

Critics have also argued that the focus of rights-based mediation on legal positions are inappropriate in the context of serious human rights violations, and in other cases may result in zero-sum calculations that reduce the likelihood of collaboration and imaginative solutions.[56]

In a review of the mediation of human rights disputes at the British Columbia Human Rights Tribunal and the British Columbia Human Rights Commission, McNaughton acknowledges the criticisms of mediation of human rights violations and argues that safeguards can address many of these concerns. These include 'ensuring that participants can make informed, uncoerced and voluntary decisions that do not undermine statutory rights; avoiding processes that delay adjudication; and enhancing accessibility for all parties' as well as ensuring access to information and legal or technical advice, ensuring that mediators are qualified to carry out their role, and requiring monitoring and review processes to remain in place.[57] McNaughton argues in favour of mediation in human-rights disputes, including reduced legal and enforcement costs, less stress, faster resolution of complaints, privacy, greater flexibility in deciding remedies, and increased control for participants over the process - resulting in greater acceptance of the final resolution. In her view 'human rights disputes, which frequently involve human misunderstandings of rights, obligations and relative positions in society, are ideally suited to a mediated resolution.'[58]

However, this thesis takes the position that it is not a *misunderstanding* of rights that is central to the conflict between indigenous peoples and states, but the existence of *different understandings*. In this case, a straight-forward application of conventional rights-based

[55] Doing Justice: Dispute Resolution in the Courts and Beyond; Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project Philip Bryden and William Black, 'Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission's Early Mediation Project' (2004) 37 U.B.C. Law Review 73.
[56] Rees (n 28).
[57] MacNaughton (n 40). 3.
[58] ibid.

mediation would likely focus on educating indigenous peoples as to the rights that the state has set down. Where these are contested, for example because they do not recognise indigenous legal systems, this is unlikely to reinforce existing power disparities and will be unlikely to result in sustainable agreements that are viewed as being legitimate by the indigenous people concerned.

8.3.3 A role for mediators in broadening the conceptualisation of rights

Rees has argued in the context of human rights disputes between companies and communities that there is a role for mediators in helping to broaden the conceptualisation of rights, and to apply them in a culturally appropriate manner. This, she argues, is particularly suitable for those rights that are 'qualified', which may relate to land, and social and economic rights (as opposed to 'unqualified' rights such as the right to life, or freedom from torture). She argues that when 'rights' are construed broadly and not limited to black-letter legal interpretations, mediation processes allow communities the power to decide for themselves how their rights should be realised in their own context, in ways that are meaningful to them. Additionally, where remedy is concerned, mediations that include discussion of rights *and* interests allow for a flexible approach to deciding on remedies which best fit the communities' own interests and sense of justice - for example remedies which take into account their needs for sustainable livelihoods, or to access cultural and religious sites, the need for apologies or firm assurances that the violations will not reoccur in future. According to Rees, mediation offers a space to understand the different perceptions of justice[59] and remedy that go beyond financial compensation, or the relatively narrow alternatives (for example, injunctions or punitive damages) available to the courts. Furthermore, she argues that mediations can empower communities to determine outcomes and so contribute to human dignity.[60]

Such an approach might increase the ability of indigenous peoples to achieve culturally appropriate outcomes in consultation, and to meaningfully impact the proposed project in ways that support indigenous self-determination. Mediation offers a means for a third party to step in where power disparities are resulting in agreements that are inconsistent with, or which undermine, indigenous rights. Furthermore, the focus on rights leads to certain risks that the negotiations may break down, if the indigenous peoples and states concerned cannot agree

[59] For a discussion of the different understandings of justice between the state and indigenous communities, see for example Michael Giudice, 'Asymmetrical Attitudes and Participatory Justice In-Print Symposium: The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right' (2006) 4 Cardozo Public Law, Policy, and Ethics Journal 15.; Meredith Gibbs, 'Justice as Reconciliation and Restoring Mana in New Zealand's Treaty of Waitangi Settlement Process' (2006) 58 Political Science 15.
[60] Rees (n 28).

on the specific indigenous rights that should be consulted, the content of the rights, the strength of the indigenous peoples' claim to those rights, how the project should be altered to mitigate their infringement, or the right of the state to proceed in the absence of indigenous consent. Mediation provides an opportunity to work through these differences and find a way forward.[61]

8.4 Interests-based mediation

From the above analysis, it seems that a purely rights-based approach to mediation would do little to address power imbalances in FPIC consultations, unless mediators can find ways to open up narrow definitions of rights to include both indigenous and state perspectives. One way of doing this - and a method suggested by authors such as Rees and Coyle[62] - is to encourage the parties to negotiate on the basis of interests.

Whilst developed for business negotiations, the interests-based approach to negotiation has suffused much of the writing on grievance mechanisms for dealing with disputes between states or companies, and local communities including indigenous peoples, as well as stakeholder engagement literature. [63] The language of interests has also permeated the conceptualisation of prior consent in the Canadian Courts - the seminal *Haida* judgement discussed in Chapter 7 refers 27 times to the need to balance aboriginal and societal

[61] Michael Coyle, 'From Consultation to Consent: Squaring the Circle?' (2016) 67 University of New Brunswick Law Journal 235. 238. Coyle comments: 'However, it has become clear in recent years that more direction is required to avoid continuing conflicts over the adequacy of consultation in individual cases. At present, the Crown and Indigenous communities are required to listen to and consider each other's views in good faith. But if, in good faith, they seriously disagree about the strength of the community's rights claim or about the severity of a project's impacts, in a real sense the consultation process will fail. It will fail as a mechanism for consensus-building, it will fail as a reliable vehicle for facilitating decisions about resources on traditional lands, and it will fail as a process aimed at helping to achieve reconciliation between Indigenous peoples and the state.'

[62] Rees (n 28).; Michael Coyle, 'Negotiating Indigenous Peoples' Exit from Colonialism: The Case for an Integrative Approach Discourse and Negotiations across the Indigenous/Non-Indigenous Divide' (2014) 27 Canadian Journal of Law and Jurisprudence 283.

[63] For example, the IFC's CAO states that mediation is a 'win-win' approach which attempts to protect the rights and interests of both communities and companies. The ICMM's guidelines for mining companies and indigenous peoples states 'It is important to note that the mediator's role is not necessarily to reach a consensus agreement, but to ensure each party sees its best interests most clearly and can decide on an efficient outcome whereby the greatest shared value can be realized.' ICMM IP guidelines p92 The FAO's guidance on stakeholder engagement draws from Fisher to advise practitioners to help stakeholders such as indigenous peoples focus on mutual interests rather than positions. The Program on Negotiation at Harvard Law School has developed training modules on interest-based negotiation of indigenous land rights for government and company representatives. See 'Office of the Compliance Advisor/Ombudsman : How We Work : Ombudsman' (n 24).; ICMM (n 23). 92.; 'Negotiating Indigenous Land Rights' (*PON - Program on Negotiation at Harvard Law School*, 2 October 2017) <https://www.pon.harvard.edu/daily/teaching-negotiation-daily/negotiating-indigenous-land-rights/> accessed 21 November 2020.

'interests'[64], as well as ILO C169's provision on consultation, CERD's Recommendation XXIII and UNDRIP itself.[65]

This section will draw from negotiation theory, particularly that relating to the 'integrative', 'interest-based' or 'win-win' model of negotiation, to examine how imbalances in negotiating power impact on both the outcome and process of FPIC consultation.[66] It then goes on to examine the extent to which this kind of mediation might help in balancing the negotiating power of states and indigenous peoples during the FPIC consultation process.

8.4.1 Understanding the impact of negotiating power within FPIC consultations

Coyle has observed that in negotiations between indigenous peoples and states, strong negotiation power may trump public interest or rights, undermining justice.[67] According to negotiation theory, power within a negotiation is 'the relative capacity of each party to influence the negotiation outcome'.[68] This may be influenced by a variety of things, including access to information and expertise; negotiation strategies and tactics; whether or not arguments are based on mutually recognised norms and therefore seen to be rational and persuasive; social status; even the parties' relative determination to achieve negotiating goals.[69] The impact of such factors on the parties' relative ability to influence the outcome of negotiation depends on

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[64] *Haida Nation v British Columbia* (n 30). Coyle, 'From Consultation to Consent' (n 61)., 252.

[65] International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) (C169 – Indigenous and Tribal Peoples, Art 15(2) :

> *In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their* ***interests*** *would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands*. (Emphasis added.)

CERD, General Recommendation XXIII: Indigenous Peoples (18 August 1997) UN Doc CERD/C/51/misc 13/Rev 4., para. 4(d) calls on states to

> *Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'. The preamble to the Declaration states: 'Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular,* ***their right to development in accordance with their own needs and interests***. (Emphasis added.)

[66] Michael Coyle, 'Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand' (2011) 24 New Zealand Universities Law Review 596. This analysis draws on the approach taken by Coyle in his assessment of how negotiating power operates in the resolution of indigenous treaty claims in Canada and Australia

[67] ibid.

[68] ibid. 602.

[69] ibid. See also Roger Fisher, 'Negotiating Power: Getting and Using Influence' (1983) 27 American Behavioral Scientist 149.; Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an Agreement without Giving In* (Second Edition, Random House Business Books 1999).; Robert S Adler and Elliot M Silverstein, 'When David Meets Goliath: Dealing with Power Differentials in Negotiations' (2000) 5 Harvard Negotiation Law Review 1.; Rebecca J Wolfe and Kathleen L Mcginn, 'Perceived Relative Power and Its Influence on Negotiations - ProQuest' (2005) 14 Group Decision and Negotiation 3.

the relationship dynamic between them, and how they each perceive both the subject matter and their negotiation counterpart.[70]

FPIC consultations often occur in an atmosphere of distrust, and as the case studies in Chapters 6 and 7 exemplified, indigenous communities are disadvantaged by a lack of access to information, inadequate translation of documents and discussions into indigenous languages, lack of institutional support on negotiation strategies and their legal rights, and lack of access to technical expertise. Additionally, indigenous representatives' views may not be seen as persuasive by state officials if they are couched in the language of indigenous worldviews, rather than the technical and legal arguments recognised by the state. Indigenous communities are often of a low socio-economic status, particularly compared with the state officials who sit across the negotiating table, and often have little control over the design of the process, or the appointment of facilitators who (in two of the Peruvian case studies) displayed bias in carrying out their role. Dokis has reported that in the Mackenzie Valley, community members felt intimidated even asking questions during consultation processes, due to the technical nature of the discussion.[71] All these factors will significantly reduce the negotiating power of indigenous groups in FPIC consultations, and reduce their chances of meaningfully affecting the outcome.

In addition to these disadvantages for indigenous communities, the greatest predictor of each parties' negotiating power is considered to be whether or not they hold a strong alternative to a negotiated agreement - something that is usually decided by factors external from the negotiating table.[72] If a party's Best Alternative to a Negotiated Agreement (BATNA) is acceptable to them, they will feel able to walk away from negotiations, and less inclined to make painful compromises in order to come to agreement. Conversely, if a party's BATNA is weak, they will have a strong interest in finding any agreement that is preferable to their BATNA. Thus the relative difference in the strength of parties' BATNAs determines their respective negotiating power.[73] In addition, the relative negotiating power of the parties is also affected by their Worst Alternative to a Negotiated Agreement (WATNA) - defined as 'is a

[70] Ilizarbe (n 5).
[71] Dokis
[72] David A Lax and James K Sebenius, 'The Power of Alternatives Or the Limits to Negotiation In Theory' (1985) 1 Negotiation Journal 163.; Wolfe and Mcginn (n 69).
[73] Fisher, Ury and Patton (n 69). 101-111.; James K Sebenius, 'BATNAs in Negotiation: Common Errors and Three Kinds of "No"' (2017) 33 Negotiation Journal 89.

general term for the consequences of not reaching an agreement.'[74] The worse a party's WATNA, the more incentive a party will have to enter into an agreement.

In a FPIC consultation under the legal frameworks of Peru or Canada, the state's BATNA to actually achieving consent will often be to demonstrate that an appropriate degree of consultation has taken place, and then to proceed with the project if desired. On the other hand, the BATNA for indigenous communities is likely to be a process of long-term political resistance, possibly accompanied by years of costly legal proceedings to prevent, amend or delay the project. Similarly, the WATNA for states is likely to be the risk of disruption to the project and legal proceedings (on the assumption that the community are able to fund them), the chance that a court may order that the consultation process be re-run to ensure it meets legal standards, and the need to manage any reputational impacts of conflict with the indigenous community.[75] On the other hand, the WATNA for indigenous peoples is the decimation of their lands and way of life, criminalisation and violent conflict with security forces, and a court finding against them in legal proceedings should the consultation be found to be adequate in the eyes of the law.

From this perspective, it becomes clear that as it currently stands, states have far better BATNAs and WATNAs, and therefore hold superior negotiating power in the consultation process. Whilst failure to agree may result in serious inconvenience for states, there is far greater incentive for indigenous communities to accept what agreements are possible, to prevent the worst impacts of proposed projects on their lands and perhaps gain a degree of financial benefit sharing or compensation. This imbalance in negotiating power may act as a considerable disincentive for states to engage seriously with indigenous concerns, particularly on complex and contentious issues. As Fisher and Ury state: 'If your BATNA is fine, and negotiation looks unpromising, there is no reason to invest much time in negotiation.'[76]

Whereas alternatives to a negotiated agreement establish 'the baseline for possible settlements',[77] they do not determine the specific outcomes of the negotiation. Instead, they establish the 'zone of possible agreement' or ZOPA - i.e. the space between each sides'

[74] Moty Cristal, 'Negotiating under the Cross: The Story of the Forty Day Siege of the Church of Nativity' (2003) 8 International Negotiation 549. 561.; John Wade, 'Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions' (2001) 13 Bond Law Review Article 12.
[75] FPIC consultations are often accompanied or interspersed with indigenous political and/or physical resistance, which has the effect of increasing the reputational impacts and security considerations contingent on failing to reach agreement, thus worsening a state's WATNA and conferring a degree of negotiating power on the indigenous group.
[76] Fisher, Ury and Patton (n 69). 172.
[77] Coyle, 'Transcending Colonialism?' (n 66). 602.

BATNAs or 'bottom line' for the negotiation, within which it is better for both parties to find an agreement, than walk away from discussions.[78] Inside this zone, there are a range of options depending on the situation, and the outcome will depend on the 'interaction and intensity' of the preferences of each side - where one side has a very strong preference for a particular outcome, negotiating power (or leverage) is conferred on the other side.[79] In a consultation, such preferences may relate to the high cultural and spiritual significance of a particular site that indigenous communities want to preserve, the need to preserve a vital means of subsistence, or the preference for suitable land over financial compensation on the part of indigenous communities. On the part of the state, it may relate to the preference to reduce construction costs and time, or the imperative to secure a national development project that will achieve economic and political objectives. Whilst the precise preferences and objectives will differ across consultations, it could be suggested that indigenous preferences may generally be more fixed and intensely held, with fewer means by which to achieve them. For example, the preservation of an important cultural site or means of subsistence may require specific solutions, whereas there may be many ways of limiting project costs. This analysis suggests that, again, indigenous peoples may find themselves at a disadvantage in influencing the precise agreement that is ultimately forged within the ZOPA.

8.4.2 An explanation of the transformative role of consent through the lens of negotiation theory

The analysis of FPIC consultation through negotiation theory poses some conceptual challenges for FPIC consultation; such a marked imbalance of negotiating power calls into question whether the consents that are obtained from indigenous peoples during consultation processes could ever be considered to be 'freely' given.[80] Additionally, evidence has shown that in negotiations in which the parties perceive larger power imbalances, the weaker party is likely to resort to more adversarial negotiating tactics, and there is reduced potential for

[78] The concept of a ZOPA was first put forward by Howard Raiffa in his monograph Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press 1982). See also James K Sebenius, 'Howard Raiffa: The Art, Science, and Humanity of a Legendary Negotiation Analyst' (2017) 33 Negotiation Journal 283. Richard Pennington, 'The Two Faces of Negotiation' (2017) 57 *Contract Management; McLean* 64.

[79] Coyle, 'Transcending Colonialism?' (n 66).

[80] For examples of how economic imperatives and the use of the threat of or actual violence by states constrains the ability of indigenous communities to give free consent, see for example Rodríguez-Garavito (n 52). Elisabet Dueholm Rasch, 'Citizens, Criminalization and Violence in Natural Resource Conflicts in Latin America' [2017] European Review of Latin American and Caribbean Studies / Revista Europea de Estudios Latinoamericanos y del Caribe 131.; Machado and others (n 50).; Almut Schilling-Vacaflor and Jessika Eichler, 'The Shady Side of Consultation and Compensation: "Divide-and-Rule" Tactics in Bolivia's Extraction Sector' (2017) 48 Development and Change 1439.; Alexander Dunlap, '"A Bureaucratic Trap:" Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico' (2018) 29 Capitalism Nature Socialism 88. Gisela Zaremberg and Marcela Torres Wong, 'Participation on the Edge: Prior Consultation and Extractivism in Latin America' (2018) 10 Journal of Politics in Latin America 29.

finding collaborative and creative solutions.[81] This undermines any potential for FPIC consultations to promote positive relationships between the state and indigenous peoples.

The analysis above also demonstrates why it is so important that states recognise a duty not only to consult, but to obtain consent from indigenous peoples. The legislative framework that regulates consultation processes sets the negotiation power of the state and indigenous peoples.[82] Recognition of indigenous consent would radically transform both the BATNAs and their WATNAs within the negotiation, and would create significant leverage for indigenous peoples to be able to influence the outcomes of FPIC consultation processes and widen the ZOPA to encompass a far greater range of possible solutions. Under a legal framework that recognised the need to obtain consent, the state's BATNA would likely be the need to come back to the negotiating table to agree significant accommodations to the project in order that consent be achieved. In a worst-case scenario, the project may not proceed at all. For indigenous communities under a consent framework, a BATNA is likely to be that the project does not proceed, or that they come back to the negotiating table to discuss improvements to the scheme. At worst, the state could ignore the need for consent and proceed with the project, but the indigenous community would have a far greater chance of legal proceedings finding in their favour, were the standard of consent (rather than consultation) to be applied.

A requirement for the state to not only seek but to obtain consent fundamentally shifts the balance of negotiating power to a much more level footing, enabling the communities to freely consent not out of fear of the alternatives, but out of a more genuine choice having considered their own priorities for development. However, as Chapter 5 showed, for this very reason states were unwilling to accept this obligation in Article 32 of UNDRIP, preferring to interpret FPIC within the multiculturalist paradigm.

8.3.3 The role of interests-based mediation to mitigate imbalances in negotiating power

Chapters 6 and 7 highlighted that indigenous communities were often unable to shape the outcome of FPIC processes to a meaningful degree. The previous two sections have explained, from the point of negotiation theory, why this is the case. 'Facilitative' or 'interests-based' forms of mediation may help to mitigate the impacts of negotiating power disparity,

[81] Peter H Kim, Robin L Pinkley and Alison R Fragale, 'Power Dynamics in Negotiation' (2005) 30 The Academy of Management Review 799.
[82] Hamilton and Nichols (n 2). "Consultation" is a form of negotiation...It is a negotiation, however, in which the bargaining power of the parties remains titled by the legal doctrine governing the proceedings.' at 756.

enabling indigenous peoples greater capacity to shape the outcome of discussions within the ZOPA.

The 'interests-based' approach to mediation is based on Fisher and Ury's seminal work, 'Getting to Yes: Negotiating Agreement without Giving In'.[83] In order to overcome differences in the parties' relative BATNAs (and therefore differences in negotiating power), Fisher and Ury advocate a method of 'Principled Negotiation', with four key strategies. First, the negotiators must 'separate the people from the problem', attempting to overcome ego and emotional responses, practicing perspective-taking, and viewing the other party as a negotiating partner rather than an adversary. The second principle is a 'focus on interests', in which the parties identify the needs and interests which underlie their original bargaining positions, remaining future-focused rather than dwelling on past events, and being open to investigating different ways in which their interests could be met. The third principle is to 'invent options for mutual gain', in which the parties brainstorm different 'win-win' solutions which could meet both their stated interests. The key to reconciling interests is for the parties to trade options which are low-cost to them, but of high value to the other side. Finally, where their interests directly conflict, the parties 'use objective criteria' to evaluate the different options. These criteria are agreed jointly, based on (for example) scientific evidence, legal precedent or professional standards. There is an onus on each participant to justify the standards they deem appropriate, and to keep an open mind.[84] In a mediation, the mediator can utilise various tactics to help the parties apply these principles within their negotiation.

This interests-based negotiation approach is often incorporated into what is known as 'facilitative' mediation processes.[85] This technique is widespread and entails the mediator acting as a neutral and independent third party, who controls the process of the mediation, but not the outcome. The mediator may develop a process which begins with an opening stage, in which the mediator helps the parties to agree the rules and objectives of the mediation; an information-finding stage, in which the mediator helps the parties 'reality test' their own positions, understand the underlying issues of the dispute, and brainstorm options; a negotiation and bargaining stage, in which (perhaps together with experts) the parties negotiate solutions; and a settlement or closing stage, in which the agreement is recorded or next steps discussed should an agreement not have been made.[86] The mediator works with

[83] Fisher, Ury and Patton (n 69).
[84] Mantle (n 6). Carole J Brown, 'Facilitative Mediation: The Classic Approach Retains Its Appeal' (2003) 4 Pepperdine Dispute Resolution Law Journal 279.
[85] Brown (n 84).
[86] Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook*, vol Second edition (OUP Oxford 2016).,144-237.

the best interests of both parties in mind, in joint and individual sessions, helping them to clarify their interests and the consequences of failing to reach agreement, broadening the range of possible options and eliminating from discussion non-specific demands or those that are emotional or otherwise counter-productive to agreement.[87]

The interest-based model of mediation provides two theoretical means in which disparities of negotiating power can be moderated as states and indigenous peoples negotiate inside the ZOPA to agree specific consultation outcomes. The first is to encourage the agreement of objective norms by which to evaluate options for settlement where their interests cannot be reconciled, instead of reverting to positional bargaining which will disadvantage the weaker party.[88] On this basis, Coyle has advocated for indigenous peoples and the state to employ interest-based strategies in the negotiation of land agreements in Canada,[89] arguing that 'relying on objective norms of fairness to resolve disputes rather than the underlying power relations of the parties seems particularly important in the context of indigenous claims against the state.'[90] However, he acknowledges that in indigenous-state negotiations, this could prove problematic because the choice of norms agreed upon by the parties may simply reflect existing power relations affecting how claims are framed, as well as assessed.[91] Nevertheless, he argues that mediation may still be well suited in cases where multiple normative orders are at play, because it is sufficient 'after sharing those diverse normative understandings, for the parties to agree on an outcome that is compatible with norms of each'.[92] The interests-based approach could therefore be adapted to assess each proposed option against dual criteria to ensure that they comply with the norms of both indigenous peoples and states, bringing a greater degree of epistemic justice to the process.

A second benefit to facilitative approaches is that the mediator is said to control the process,[93] and can use this role to ensure that different cultural values are included within the design of the dialogue, and ensuring that FPIC consultations are carried out in a manner that is 'culturally appropriate'.[94] Fisher and Ury argue that their general principles are generally applicable and adaptable to different contexts. However, they addressed the difficulties of cross-cultural negotiation, recommending that negotiators should consider the values,

[87] Susan S Silbey and Sally E Merry, 'Mediator Settlement Strategies' (1986) 8 Law & Policy 7.
[88] Fisher, Ury and Patton (n 69).
[89] Coyle, 'Negotiating Indigenous Peoples' Exit from Colonialism' (n 62).
[90] Coyle, 'Transcending Colonialism?' (n 66).
[91] ibid., 616.
[92] Coyle, 'Shifting the Focus' (n 4)., 372.
[93] Tony Bogdanoski, 'The Neutral Mediator's Perennial Dilemma: To Intervene or Not to Intervene' (2009) 9 Queensland University of Technology Law and Justice Journal 26.
[94] *Case of the Saramaka People v Suriname* Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No 172 (28 November 2007)., para 133.

perceptions and behavioural norms of their negotiating counterparts, and make efforts to 'get in step' with them, adjusting the timescales, formality of the negotiation process, the venue, negotiating teams and the mode of communication accordingly. Furthermore, they warn against stereotyping, warning that negotiators must respect the culture of their negotiating partners whilst paying attention to the personal characteristics of individual negotiators. These words of advice mirror international guidance on FPIC consultation, in which it is recognised that processes of consultation should be culturally appropriate.

8.4.3 Limitations of the interests-based approach

Despite its positive attributes, various authors have highlighted the challenges of applying interest-based models of negotiation to cross-cultural situations. These include a perception of rights as a 'barrier to solutions'; limitations in accommodating cultural difference; and the inability to overcome the structural power disparities which define the ZOPA – even potentially entrenching existing imbalances by maintaining a fallacy that the mediator is neutral in relation to systemic hierarchies of power.

Rees observes that interest-based models of mediation may lead to the perception of human rights as a 'barrier to solutions', and suggests that a combined approach incorporating both rights and interests is more appropriate in the context of company-community mining disputes: 'The interplay of rights and interests in dispute resolution is not a zero-sum equation. Rather they may be mutually supportive, with interests closely informing the experience of human rights in practice and suggesting how balances between competing rights can best be struck.[95]

Furthermore, it has been suggested that as a western framework, interests-based mediation is not appropriate for disputes concerning indigenous peoples. It has been argued that interest-based methods assume that individuals' prime motivation is material self-interest, rather than a deeper need for the recognition of and respect for their cultural identity[96] Furthermore, its individualist theoretical framework presumes autonomy of individuals, conceiving of conflicts as private matters distinct from the wider cultural context.[97] Consequently, some authors have argued that problem-solving approaches that attempt to 'separate the people from the problem' are unlikely to produce lasting settlements in conflicts

[95] Rees (n 28). 22.
[96] Baruch Bush and Folger (n 37).
[97] Baruch Bush and Folger, 2004

that relate to issues of identity.[98] or where collectivist cultures prioritise relationships above problem-solving.[99] - as is often the case in FPIC consultation. Coyle has identified this as an issue in the use of interest-based negotiation between indigenous peoples and the state, arguing that the relationship between the two is a fundamental part of the 'problem' that must be solved, and must be considered alongside more practical, substantive issues in dispute.[100]

Coyle has argued that although interest-based mediation is rooted in western culture, this does not mean that it is fundamentally incompatible with indigenous approaches nor would it automatically place indigenous negotiators at a disadvantage. Instead, he argues in support of the interest-based approach for state-aboriginal negotiations, 'provided that the process is developed jointly and in a manner that respects indigenous values'.[101] One way that mediation could help to ameliorate relationships is to better integrate cultural values into the interest-based mediation process. Drawing from Hofstede's work on cultural difference, Barkai proposes that mediators take steps to manage a number of 'cultural dimension interests' that may impact on how the parties communicate, frame the issues in dispute, and make decisions in the negotiation.[102] For example, people from different cultures may communicate more or less directly, value individual or group-based methods of decision-making, favour aggressive or collaborative negotiation tactics, or place different emphases on the time needed to build relationships and rapport.[103] Mediators that are trained to manage these differences may be valuable in ensuring that consultation processes are culturally appropriate, allow adequate time for building relationships and group decision-making processes, and are not de-railed by differences in the negotiating approach of state officials and indigenous communities.

Whilst the use of interest-based, facilitative approaches to mediation may have some merit in FPIC consultations, in particular mitigating some of the perils of cross-cultural communication and helping the parties to apply principled negotiation techniques to develop win-win options and alternatives, it is limited in its ability to overcome entrenched power disparities. Because

[98] Allan Edward Barsky, 'Cross-Cultural Issues in Community Mediation: Perspectives for Israel' (2000) 12 Jewish Political Studies Review 83.; Jay Rothman and Marie L Olson, 'From Interests to Identities: Towards a New Emphasis in Interactive Conflict Resolution' (2001) 38 Journal of Peace Research 289.; Victor (n 13). Kevin Avruch, 'Toward an Expanded Canon of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic' (2006) 89 Marquette Law Review; Baruch Bush and Folger (n 8).
[99] Kevin Avruch, 'Toward an Expanded Canon of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic' (2006) 89 Marquette Law Review 567.; David Kahane, 'Dispute Resolution and the Politics of Cultural Generalization In Theory' (2003) 19 Negotiation Journal 5.
[100] Coyle, 'Negotiating Indigenous Peoples' Exit from Colonialism' (n 62).
[101] ibid. 303.
[102] John Barkai, 'Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution' (2007) 8 Pepperdine Dispute Resolution Law Journal 403.
[103] ibid.; John Barkai, 'What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1434165 <https://papers.ssrn.com/abstract=1434165> accessed 30 October 2020.;

it is focused on the generation of win-win options in the ZOPA, interest-based mediation has limited ability to overcome the primary source of power differences in negotiation - the relative difference in the parties' BATNAs, which are generally fixed by external factors. Consequently, whilst interest-based negotiation may have potential to improve the chances of a better agreement for indigenous peoples within the established hierarchy of power, it does not offer the chance to overcome the structural power hierarchy itself.[104] This seems to be supported by O'Faircheallaigh's analysis of Impact Benefit Agreement negotiations between indigenous communities and mining companies, which concluded that structural factors - as opposed to negotiation tactics - are decisive in determining negotiation outcomes.[105]

Fisher and Ury recommend that parties in a weak negotiating position seek to improve their BATNA.[106] The ability of indigenous communities to apply political pressure on the state outside of the negotiations is a factor which could impact on the BATNAs of both parties, by increasing the reputational and financial costs to the state of failing to reach agreement. This could explain O'Faircheallaigh's finding that community organising was key to indigenous peoples improving their negotiation outcomes,[107] and Machado et al's observation that the strength of indigenous political organisations was 'the most significant variable' in consultations resulting in tangible benefits for the communities in their study.[108] However, within top-down legal frameworks of consultation that do not require consent, there is a limit to how much indigenous communities are able to realistically enhance their BATNA.

Additionally, it has been argued that the theoretical conceptualisation of mediators as unbiased or impartial is a fallacy in practice, and that mediation could even entrench existing power disparities.[109] Studies have shown that mediators have an impact on the outcome agreements, for example through the use of subtle tactics to pressure the parties into compromise based on their own perceptions of the parties and their positions, or by imposing

[104] Coyle, 'Negotiating Indigenous Peoples' Exit from Colonialism' (n 62). Coyle argues that for interest-based approaches to be successful, 'an integrative orientation would need to influence the formation of central government mandates as well as the tactics of their negotiating teams.' 301.
[105] Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (1st edition, Routledge 2015).
[106] Coyle, 'Transcending Colonialism?' (n 66).; Coyle, 'Negotiating Indigenous Peoples' Exit from Colonialism' (n 62).
[107] Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (1st edition, Routledge 2015).
[108] Machado and others (n 50). 1088.
[109] Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?' (2001) 10 Social & Legal Studies 505.; Katherine Chalkey and Martin Green, 'In the Context of Mediation, Is Safeguarding Mediator Neutrality and Party Autonomy More Important than Ensuring a Fair Settlement?' (2016) 8 International Journal of Law in the Built Environment 161.

the substantive norms by which options are evaluated.[110] The decisions that the mediator makes, for example pertaining to the venue, who may be present with the participants, control of the agenda and timings, or the use of authoritative references or experts, will all be taken in the context of the mediator's own understanding of the world, and will likely give advantage to one or other party.[111] Furthermore, it has been argued that mediators' own pre-existing cultural understanding of the world will inevitably have an impact on their ability to manage harmful cultural stereotypes and interpretative frameworks that replicate wider societal discrimination against disadvantaged groups within the mediation process.[112] These questions highlight the importance of the indigenous party having influence over the choice of mediator, and raises the possibility of employing indigenous mediators either instead of, or alongside, non-indigenous ones.[113]

8.5 Narrative Mediation

Whilst interest-based mediation may have some potential, it also has its limitations for cross-cultural dialogue. This section analyses the potential contribution of narrative mediation, which focuses more explicitly on the impact of cultural discourse in creating, sustaining and resolving conflict. In contrast to rights-based and interests-based methods, which are described as methods of finding solutions to specific disputes, narrative mediation is a 'transformative' technique which focuses on the long-term relationship between the parties.[114]

8.5.1 FPIC consultations as a 'discursive clash'

As has been discussed above, various authors have highlighted the role of FPIC consultations as sites in which the meaning of rights is contested.[115] Rodriquez-Garavito has described FPIC consultation as a 'a discursive clash, in which claims and different kinds of knowledge,

[110] James R Coben, 'Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values beyond Self-Determination and Neutrality' (2004) 5 No. 2 Cardozo Journal of Conflict Resolution 65.; Bogdanoski (n 93).; Baruch Bush and Folger (n 8).;).; Keith William Diener and Shazia Rehman Khan, 'Thwarting the Structural and Individualized Issues of Mediation: The Formalized Reflective Approach' (2016) 26 Southern Law Journal 137.
[111] Isabelle R Gunning, 'Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations' (2004) 5 No. 2 Cardozo Journal of Conflict Resolution 87.; Susan Oberman, 'Mediation Theory vs. Practice: What Are We Really Doing - Re-Solving a Professional Conundrum' (2005) 20 Ohio State Journal on Dispute Resolution 775.; Christopher Harper, 'Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation' (2006) 2006 Journal of Dispute Resolution 595.
[112] Gunning (n 111).; Oberman (n 111).
[113] Beaucage, Kuin and Iacono (n 44).
[114] Harper (n 111).
[115] Flemmer (n 53).; Machado and others (n 50).; Martin Papillon and Thierry Rodon, 'From Consultation to Consent : The Politics of Indigenous Participatory Rights in Canada' (*The Prior Consultation of Indigenous Peoples in Latin America*, 16 August 2019).

based on radically distinct epistemological roots, get crossed'. Furthermore, indigenous scholars have pointed to the way that narratives (i.e. the stories that are ingrained in a culture and that shape the way that individuals within that culture understand the world) play a role in perpetuating colonial hierarchies of power. Maori scholar Linda Smith, points to the ingrained nature of the colonial conflict story when she writes: 'The 'talk' about the colonial past is embedded in our political discourses, our humour, poetry, music, storytelling, and other common sense ways of passing on both a narrative of history and an attitude about history'.[116] Gagnon has pointed to the significant effects of narrative on the wellbeing of indigenous people, arguing in relation to Canada that popular discourse on the perceived need to 'civilise' aboriginal peoples in the 19th century and on economic and social development in the 21st century demonstrate the same mechanisms of contempt, positioning the indigenous people inferior, attacking their (or their social groups') honour, physical and social integrity, with resulting damage to their self-esteem and self-confidence.[117]

In order to counter these impacts, Alfred and Corntassel call attention to the need to de-centre the colonial narrative: '[T]here is a danger in allowing colonization to be the only story of Indigenous lives. It must be recognized that colonialism is a narrative in which the Settler's power is the fundamental reference and assumption, inherently limiting Indigenous freedom and imposing a view of the world that is but an outcome or perspective on that power.'[118] Corntassel and T'lakwadzi have called for the 'restorying' of the narrative of Canadian history, in ways that challenge the state's narratives of colonization and reconciliation by asserting indigenous narratives about the same events.[119] Narrative mediation provides a framework within which the parties to a conflict can explore their different stories about their relationship and work together to construct a shared narrative.

8.5.2 The principles of narrative mediation and their relevance to FPIC consultation

Narrative mediation was developed by Winslade and Monk, inspired by narrative family therapy and in response to feminist, indigenous and other critiques of interest-based models as rooted in western ideologies.[120] It is used primarily to resolve family disputes, employment

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[116] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd edn, Zed Books 2013)., 29.
[117] Mathieu Gagnon, 'Contempt No More' (2014) 27 Canadian Journal of Law and Jurisprudence 197.
[118] Taiaiake Alfred and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40 Government and Opposition 597. 601.
[119] Jeff Corntassel and Chaw-win-is T'lakwadzi, 'Indigenous Storytelling, Truth-Telling, and Community Approaches to Reconciliation' (2009) 35 English Studies in Canada 137.
[120] John Winslade, 'Mediation with a Focus on Discursive Positioning' (2006) 23 Conflict Resolution Quarterly 501. For information on rights-based and feminist critiques of mediation, see Sara Cobb and Janet Rifkin, 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16 Law & Social Inquiry 35.

disputes, but it has also been used in disputes involving indigenous people in the USA, Canada, Hawaii, Australia and New Zealand,[121] including in the negotiation of native title disputes in Australia.[122] Whilst Winslade and Monk are non-indigenous, Jarratt has argued that its emphasis on narrative is complementary to the emphasis on story-telling in indigenous peace-making.[123]

Rather than focusing on the satisfaction of interests, narrative mediation aims to bring about 'the construction of a respectful and equitable relational context that can serve as the basis of an ongoing relationship'.[124] The role of the mediator in narrative mediation is to help the parties reassess narratives in which they view themselves as being in conflict with one another, and develop together an 'alternative story' of collaboration which is incompatible with the continuation of conflict. The process is focused on the relationship between the parties, beginning with each party meeting separately with the mediator, and then coming together in a joint session. Unlike interest-based mediation, the conversation does not begin with an analysis of the nature of the problem, but with the parties speaking about what they hope to accomplish from the meeting, in terms of their values and ideals. By employing the nine 'hallmarks',[125] the mediator helps the parties to articulate how they would like to better relate to one another in future, and prompts the parties to identify any instances of positive interactions in the past, however small, from which to build such a relationship. The mediator then explores with the parties the ways in which this positive relationship is being hindered by the continuation of the conflict. Through attention to 'discursive positioning' in the dialogue,

[121] John Winslade and Gerald D Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey Bass 2000). 65. Brian Jarrett, 'The Future of Mediation: A Sociological Perspective' (2009) 2009 Journal of Dispute Resolution 49.
[122] Jones (n 41).
[123] Jarrett (n 121).
[124] Winslade (n 120). 511.
[125] ibid. The nine hallmarks are as follows:

- People use stories and draw on discourse to both express and construct their realities.
- Avoid 'essentialist' understandings which attribute a person's actions or emotions to a core part of their being rather than being a product of their cultural context.
- Engage in 'double listening' in which the mediator tries to identify unspoken values or desires that support the alternative narrative of relationship.
- 'Externalise' the conflict, by speaking about it as if it were a third party.
- View the conflict as a restraint, holding the parties back from achieving the relationship that they want to enjoy.
- Listen for 'discursive positioning' to reveal the cultural assumptions and power dynamics underlying the dialogue.
- Identify 'openings to an alternative story' by bringing attention to behaviours and attitudes which contradict the conflict story. This could include moments in which the parties acknowledge a feeling of regret or remorse; moments in which they express good intentions, or events that have occurred that demonstrate a capacity for relating better and working together.
- Build on these openings, joining different events together and asking the parties if there are others, to construct a new story of cooperation.
- Document progress. This does not refer to a formal agreement between the parties, but takes the form of a letter from the mediator summarising the meeting and quoting specific utterances of the parties to shore up the alternative relationship.

the mediator helps to open up possibilities for the parties to more frequently position each other in a positive light.

Furthermore, by reframing 'rights' or 'interests' as 'perceived entitlements', narrative mediation questions underlying cultural assumptions that have been taken for granted as objective reality, 'opening them to scrutiny, debate and challenge.'[126] This may be particularly useful in cases in which the indigenous community disputes the legitimacy of state law or its sole authority over the FPIC consultation process.[127] The objective of the mediation is therefore not an agreement, but the development of an ongoing relationship that can navigate future conflict. According to the theory of narrative mediation, the success of any agreement that is reached will depend on whether it is supported by a narrative of relationship which can influence the parties actions after the mediation has ended.[128] This stands in contrast to a rights-based analysis which may view the long-term success of agreements as being a function of the perceived legitimacy of the process, or an interest-based approach which places emphasis on the extent to which the agreement meets the respective needs of the parties.

Crucially, narrative mediation does not aim to sweep stories of conflict under the carpet, but suggests that these important conflict stories can coexist with an alternative narrative of cooperative relationship. The mediator encourages the parties to 'externalise' the conflict, as if it were a separate character in the story that has harmed both sides - although not necessarily to the same degree. On this basis, grievances can be discussed in a way that shifts the conversation away from blame, and towards what can be done to repair the damage, whilst recognising the very real negative impacts of the conflict. In doing so, it aims to strengthen the narrative of cooperation so that future interactions between the parties are less likely to end in further conflict.

This approach, which may be seen to absolve perpetrators of abuse of responsibility, could be considered problematic in cases of rights abuse and may be conceptually unacceptable to some indigenous people. However, in cases where indigenous groups are open to it, this

[126] Narrative mediation theory challenges the usefulness of the concept of 'interests', rejecting the essentialist assumption that individuals' needs are equal and arise innately, independent of societal conditioning. Winslade and Monk argue that 'interests' are not innate, but are a product of the cultural context that the individual inhabits. For example, state officials may assert that the public interest, in terms of economic development, is of paramount concern, whereas indigenous peoples might prioritise the need to protect the land. Instead of discussions about interests, Winslade favours a more open discussion on how various discourses and cultural assumptions have influenced the parties' feeling of entitlement to a particular outcome. This process questions assumptions that have been taken for granted as objective reality, 'opening them to scrutiny, debate and challenge.' ibid., 509.
[127] For further discussion of legal pluralism in prior consultation processes see Machado and others (n 50). Rachel Sieder and Anna Barrera Vivero, 'Legalizing Indigenous Self-Determination: Autonomy and Buen Vivir in Latin America' (2017) 22 The Journal of Latin American and Caribbean Anthropology 9.; Weitzner (n 50).
[128] John Winslade and Gerald Monk, *Practicing Narrative Mediation*, vol 2 (John Wiley & Sons, Inc 2008).

approach may enable indigenous people to discuss past grievances within the consultation process and to gain recognition of their suffering in a way that states will be more likely to accept. At present, states often use their control over the process to entirely exclude discussion of grievances, resulting in dissatisfaction with the process or the breakdown of dialogue.[129] Furthermore, an approach that does not centre blame and punishment may be considered consistent with some indigenous peace-making processes.[130] In any case, mediation does not prevent indigenous peoples from pursuing justice in other fora.

In the narrative approach, the achievement of FPIC is not held up as the sole objective of the consultation process. Instead, success is based on whether or not the dialogue improved or jeopardised the relationship, and whether appropriate procedures are in place to continue dialogue so that the parties can work together in future to create a positive and shared relationship story. This could bring in wider engagement with issues of reparation, redress, social and economic needs, and help connect individual FPIC consultations with wider institutional change, as Schilling-Vacaflor and others have advocated.[131] Such an approach also helps to reinforce the practice of FPIC as an iterative and ongoing process, that must be continually revisited. This may include specific actions within the mediation to ensure proper records of discussions and agreements that reflect the statements of both sides (as opposed to one-sided reports undertaken by state officials), mechanisms and timetables for follow up of agreements made, and a greater understanding of how FPIC contributes to the long-term relationship between the indigenous community and the state.

8.5.3 The impact of narrative mediation on power relations

Narrative mediation theory analyses the continual construction of power within negotiations through the parties' use of discourse and discursive positioning within the negotiation dialogue. These features could have benefits in the context of FPIC consultation. The discussions which occur between indigenous peoples and the state in FPIC consultation processes do not only concern indigenous rights and interests, but also the matter of the preservation of indigenous values and identity.[132] In contrast to the interest-based approach whose effectiveness in the

[129] Schilling-Vacaflor and Eichler (n 80).; Weitzner (n 50).
[130] Arbaugh (n 41).
[131] Maria A Guzman-Gallegos, 'Conflicting Dilemmas: Economic Growth, Natural Resources and Indigenous Populations in South America' (NOREF Norwegian Peacebuilding Resource Centre 2014). Almut Schilling-Vacaflor and Riccarda Flemmer, 'Conflict Transformation through Prior Consultation? Lessons from Peru' (2015) 47 Journal of Latin American Studies 811.
[132] Jerry Mander and Victoria Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (New Expanded Edition, University of California Press 2007).; Coyle, 'Transcending Colonialism?' (n 66).

context of identity conflicts is questioned,[133] the narrative approach has been said to be most effective 'when the issues in dispute involve threats to social values, shared beliefs, social identity, and cultural meaning'.[134]

In analysing power relations between the parties, narrative mediation theory takes a constructionist approach, inspired by the work of Foucault,[135] who viewed power not as a static commodity vested in certain people or structures, but as a component of relationships, which is able to be produced, transmitted and reinforced - but also exposed and undermined - through individuals' use of discourse. This approach both gives credit to the idea that individuals can use their influence through their use of discourse, but also recognises that - due to dominant discourses which reinforce discrimination - some individuals will find it easier to wield discursive power than others.[136] Gunning argues that the domination of narratives which benefit powerful groups within society often weakens the position of participants from disadvantaged groups within the mediation itself. This is because they need to justify themselves with reference to negative stereotypes, and have fewer positive positions to take up within the dominant meta-narrative. Furthermore, their own meta-narratives may not be recognised by the other party to the mediation, resulting in a lack of understanding or insufficient weight being placed on their negotiating stance.[137] This was particularly evidenced in the Peruvian case study, but also in the case of Canada - indigenous peoples may be positioned as 'barriers to development' by predominant narratives in politics and the media, and may themselves view states as untrustworthy. Furthermore, indigenous forms of knowledge and legal systems may be dismissed as less persuasive than those of the state. These pre-existing narratives can be expected to impact on the way that parties express themselves in a negotiation, and also how they respond to the statements of the other.

From this theoretical perspective, power is evidenced and wielded through the parties' use of 'discursive positioning'. Winslade and Monk argue that in order to reveal and better manage the power dynamics at play, explicit attention should be drawn to the way in which meaning is negotiated and constructed during dialogue between the parties.[138] Discursive theory[139] argues that the parties to a dialogue take up 'discursive positions' in relation to an existing discourse

[133] Baruch Bush and Folger (n 8).
[134] Jarrett (n 121).
[135] E.g. Michel Foucault, *Power-Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed, Harvester Press 1980)., cited in Winslade and Monk (n 128).
[136] Winslade and Monk (n 128). 112.
[137] Gunning (n 111).
[138] For an overview of discursive positioning in narrative mediation, see Winslade (n 120).
[139] Bronwyn Davies and Rom Harré, 'Positioning: The Discursive Production of Selves' (1990) 20 Journal for the Theory of Social Behaviour 43.

during conversations, and in so doing, offer the respondent a position or positions from which to respond. For example, one person saying 'I am only trying to be reasonable' has the effect of positioning them on the side of logic, temperance and virtue, whilst also implicitly placing the respondent in the position of being 'unreasonable' - emotional, illogical or otherwise behaving in a difficult manner. The respondent is therefore placed in a position which is viewed - at least in western society - as behaving in a way that is illegitimate, reducing their discursive power and requiring them to justify their reasonableness from a disadvantageous position of being labelled 'unreasonable'.

Hamilton and Nicholls observed discursive positioning at play in the *Haida Nation* case, in which Chief Justice McLachlin stated: 'As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.'[140] Hamilton and Nicholls point out that the assumptions of the Supreme Court regarding the Crown possessing a thick form of sovereignty and title over aboriginal lands, will determine the bounds of what is considered 'reasonable' when assessing aboriginal claims and indigenous communities' behaviour during a consultation process. The authors also demonstrate this process at work in the *Ktunaxa Nation* case, when the Supreme Court determined that the Ktunaxa Nation's decision in adopting an absolute position against any development on a site of great spiritual importance was 'unreasonable'. Thus 'If an aboriginal claimant chooses to speak the language of inherent jurisdiction, shifting the relationship to a nation-to-nation basis, their claim is presented as being 'unreasonable' and so it falls on tin ears.'[141]

Within consultation processes, state requirements for arguments to be based in 'facts' and 'science' could place indigenous representatives in a weak discursive position when seeking to use oral history or indigenous worldviews as a justification for their demands, or if they express themselves in emotional rather than logical terms.[142] According to Winslade, discursive positioning can result in patterns of dialogue which entrench conflict further unless alternative narratives can be constructed. Indeed, Pichler et al reported on a community dialogue table in the mining sector in Peru failed because whilst the company involved viewed it as a dispute over financial resources, the community sought proper recognition of their suffering. Consequently, the two sides viewed one another as behaving unreasonably and

[140] *Haida Nation v British Columbia* (n 30), para 42.
[141] Hamilton and Nichols (n 2). 749.
[142] Victor (n 13). 78-81.

failing to take the process seriously and in good faith.[143] In the meta-consultation on Peru's Regulatory Decree discussed in Chapter 6, the state and indigenous representatives accused one another of betrayal and bad faith when talks broke down after the first stage, due to their differing understandings of the purpose of the consultation and the negotiating history that had preceded it.[144] In a study of a FPIC consultation in Mexico, Dunlap observed that the Mexican state used discursive strategies, such as describing opposition to the project as an 'insurgency', to undermine the indigenous community's public standing and reduce support for their cause.[145]

The role of the mediator within this dynamic is to help the parties make 'discursive shifts', which move the parties away from narratives of conflict and towards a collaborative relationship.[146] The mediator therefore takes an active role in shaping the dialogue so that it deconstructs underlying assumptions that reinforce power hierarchies and conflict narratives. For example, Cobb observed that the first person to speak in a mediation establishes narrative control, and determines the dominant discourse to be used within the dialogue. From her research she concluded that in 75% of mediations, the discourse used by the first speaker influences the outcome of the discussion.[147]

The case studies in Chapters 6 and 7 indicate that the state overwhelmingly controls the terms of the discussion within a FPIC consultation process. In the Peruvian case studies, the regulated process for consultation requires that the state representatives be the first to speak,

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[143] Melanie Coni- Zimmer, Annegret Flohr and Andreas Jacobs, 'Claims for Local Justice in Natural Resource Conflicts: Lessons from Peru's Mining Sector' in Melanie Pichler and others (eds), *Fairness and Justice in Natural Resource Politics* (1st edn, Routledge 2016) <https://www.taylorfrancis.com/> accessed 22 November 2020. Coni-Zimmer, Flohr and Jacobs have illustrated the importance of recognition in resolving local community conflicts over mining. They analysed a state-organised dialogue table to resolve a local conflict over mining between the community of Ilo, in the Moquegua Region of Peru, and Southern Copper Corporation mining company. Their study concluded that the different understandings of justice between the community and the company involved were instrumental in the failure of the dialogue mechanism to resolve the conflict. Using Nancy Fraser's distinctions of three types of justice claim - redistribution, recognition and representation - they noted that whilst many resource-based disputes are viewed by those in positions of power as being about "greed" or claims for redistribution of financial wealth, the local communities often perceive the conflict in terms of justice claims for recognition (for example of a community's suffering through apology and taking steps to ensure that violations do not continue in future) and representation (for example, in decision-making power through consultation processes). Where the two parties in a dialogue have different ideas about how justice is required to be fulfilled, they may view each other as behaving irrationally, ignoring sensible offers to resolve the conflict, and failing to take the process seriously and in good faith. Thus offers of social contributions under a benefits-sharing arrangement may be viewed by the community as insufficient to satisfy claims for recognition of past grievances through compensation.

[144] Ilizarbe (n 5).

[145] Alexander Dunlap, 'Counterinsurgency for Wind Energy: The Bíi Hioxo Wind Park in Juchitán, Mexico' (2018) 45 The Journal of Peasant Studies 630.; Dunlap 2019;

[146] For an example of how mediators elicited a discursive shift from a rights-based framing of a conflict to one that explored the parties' different understandings and expectations of correct social behaviour, see Sally Engle Merry, 'Culture, Power, and the Discourse of Law' (1992) 37 New York Law School Law Review 209.

[147] Sara Cobb, 'A Narrative Perspective on Mediation. In J. P. Folger & T. S. Jones (Eds.), (Pp.). Thousand Oaks, CA: Sage.' in Joseph P Folger and Tricia S Jones (eds), *New directions in mediation: Communication research and perspectives* (Sage). cited in Winslade and Monk (n 128). 54.

setting the terms of the dialogue with reference to the Law on Prior Consultation, and describing the purpose of the consultation as being to provide information on the proposed measure, assess how it will directly impact on indigenous rights, and consider ways to avoid or mitigate these impacts. Similarly, in the case of Canada, consultation is framed as a process in which to consider the impacts of a project on established s35 rights, and to make reasonable accommodations if required by the law. The EIA process developed by the state establishes the terminology to be used and scope of the impacts to be addressed. Cobb's study suggests that such a process design would put indigenous communities at an immediate disadvantage. On the other hand, if consultation processes were to be understood as a means of establishing whether and how a proposed project could be delivered in a way that respects indigenous self-determination and the wellbeing of the land, the parameters of the dialogue may likely shift, with consequent shifts in the consultation outcome itself.

In view of this analysis, in order to mitigate the greater negotiation power of the state, a narrative mediator might choose to use their control of the process to enable indigenous communities to set the terms of the dialogue, or use their own discursive power to frame consultation in a consensual manner. Additionally, a narrative mediator could intervene in dialogue to highlight the parties' underlying assumptions, beliefs and desires, so that they can be made visible and potentially challenged or deconstructed. The mediator could also draw attention to attempts by the parties to use discursive positioning to assert power over the other side as well as emphasising instances of positive discursive positioning that support the alternative relationship story. These methods are intended to encourage the parties to make discursive shifts towards a more collaborative relationship.[148]

8.5.4 How narrative mediation could support meaningful inter-cultural dialogue

Studies of FPIC consultations - such as those in Chapters 6 and 7 and in the work of other authors - indicate that they have tended to marginalise indigenous knowledge and rely heavily

[148] Winslade and Monk (n 128). 50. One important strategy the narrative mediator can use to disrupt established power relations is that of deconstructive questioning, in which the mediator asks questions that explicitly draw out the parties' unexpressed culturally-held beliefs and assumptions, which are contributing to the continuation of conflict. This helps to 'externalise' the conflict, as discussed above, bringing the conversation away from personal blame and into the realm of cultural values and narratives, enabling explicit discussion of the different ways that the parties see the world - as well as the areas of overlap. This exercise can help to diffuse difficult conversations, and to identify opportunities to build a relationship on shared values, or demonstrate respect for difference. The mediator can also listen out for the moments during dialogue in which the parties are seeking to position themselves more favourably in relation to the other, and ask a question about a specific word that has been used to do so. In so doing, the attempt to utilise discursive positioning as a means of asserting power can be called out, and the parties have an opportunity to establish a different discursive position from which to continue the conversation.

on technical scientific terms and state-centric legal standards. Consequently, FPIC consultation is generally failing to foster intercultural dialogue.[149] In contrast, the non-essentialist conceptualisation of culture in narrative mediation theory encourages 'border thinking' - in which alternative ways forward for the future are discovered through the complexity and the gaps between cultural identities - and encourages a dialogue more akin to the transmodern, intercultural approach proposed by decolonial thinkers such as Dussel.[150]

At a theoretical level, narrative mediation recognises the complexity and fluid nature of culture and identity, rejecting cultural essentialism and the idea that cultures are closed units and an individuals' culture of birth is an essential part of their nature. Instead, it views individuals as being influenced by many cultural narratives, some of which are more dominant, and some of which may even be contradictory.[151] Following the constructionist view, it also views culture as a performative action, in which individuals associate themselves more closely with different narratives at different times. Thus, individuals can simultaneously hold different identities, and identify more strongly with one or another of them dependent on context. Each of these identities draws on a different set of cultural narratives and discourses, and individuals may align themselves more closely with different identities at different stages of the negotiation. Taking a more complex view of culture and identity is said to help make progress in disputes 'frozen by a unitary analysis of cultural differences.'[152] As John Borrows stresses, indigenous culture is not fixed: 'indigenous peoples are traditional, modern, and postmodern.'[153]

Narrative mediation views different knowledge systems as valuable to the process of establishing relationships for the future. Referring to an employment-based mediation involving Maori participants, Winslade, Monk and Cotter observed that 'Narrative mediation in this context needs to invite forward the local knowledges that are indigenous to the community and needs to treat them as valuable resources to be drawn on in the process of finding a way forward.'[154] Such an approach could help to centre indigenous knowledge as a source of solutions to project design challenges in the FPIC process, as well as a framework for evaluating different options. In seeking not just to manage cultural difference (as in the

[149] Flemmer and Schilling-Vacaflor (n 10); Machado and others (n 50)., Roger Merino, 'Re-Politicizing Participation or Reframing Environmental Governance? Beyond Indigenous' Prior Consultation and Citizen Participation' (2018) 111 World Development 75.; Ilizarbe (n 5).
[150] Enrique D Dussel, 'Transmodernity and Interculturality: An Interpretation from the Perspective of Philosophy of Liberation' (2012) 1 TRANSMODERNITY: Journal of Peripheral Cultural Production of the Luso-Hispanic World <http://escholarship.org/uc/item/6591j76r> accessed 19 February 2015.
[151] Winslade and Monk (n 128). -109.
[152] ibid. 107.
[153] John Borrows, 'A Separate Peace: Strengthening Shared Justice' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press 2005)., 348.
[154] Winslade and Monk (n 128)., 200.

interests-based approach) but to constructively engage with it, narrative mediation offers a route to develop what Pearce and Littlejohn have referred to as 'transcendent dialogue', in which the parties commit to try to recognise and understand difference.[155] This approach moves away from insistence that one or other party accommodates the cultural norms of the other, or even the goal of mutually influencing one another's values. Instead, the question becomes 'how can I understand the moral order and social reality that leads you to think that way?'.[156]

Another important contribution of the narrative approach is its recognition of the non-neutral status of any chosen mediator. Recognising the limitations of the interest-based approach in assuming that the mediator can be neutral or objective, Gunning and Harper argue that mediators should abandon the pretence of impartiality, and strive for an 'activist' model of mediation in which the mediator seeks to ensure both procedural and substantive justice and fairness.[157] This activist approach may provide a response to the comments of Innes in relation to FPIC processes in Mackenzie Valley that they provide procedural fairness, but not substantive fairness.[158] The pursuit of substantive justice requires mediators to take on a 'reflective neutrality', recognising their own biases and seeking to manage them, as well as actively intervening to ensure principles of equality and protection of the vulnerable.[159]

Whilst the calls for self-reflection and the duty to uphold substantive fairness sounds beneficial at first, in the context of state-indigenous dialogues the question arises - whose notion of fairness and justice is to be enforced by the mediator? Such an approach, particularly were the mediator to be from a non-indigenous background, is likely to impose non-indigenous ways of thinking onto the parties, undermining the importance of indigenous knowledge and legal systems. Furthermore, ascribing an activist role for the mediator is thought by some to be problematic in itself, as it may undermine the self-determination of the parties and disempower them from finding their own resolution.[160]

In narrative mediation, the mediator is not conceived of as a neutral party, but as an active participant with the parties to resolve the conflict, positioned discursively within the dialogue

[155] W Barnett Pearce and Stephen W Littlejohn, *Moral Conflict: When Social Worlds Collide* (1st edition, SAGE Publications, Inc 1997).
[156] Julie Macfarlane, 'Commentary: When Cultures Collide', *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press 2004).
[157] Gunning (n 111).
[158] 2020 report 8
[159] Diener and Khan (n 110).
[160] Bush and Folger 2004; Tony Bogdanoski, 'The Neutral Mediator's Perennial Dilemma: To Intervene or Not to Intervene' (2009) 9 Queensland University of Technology Law and Justice Journal 26.

as it unfolds. It is important for the mediator to consider his own epistemic location, and to be continually curious and open-minded about their own opinions and beliefs, as well as those of the parties.[161] Furthermore, in view of his non-neutral status, the narrative mediator does not take charge of the design of the mediation, as a facilitative mediator would normally do. Instead, narrative mediation defers to the parties on how they would like to manage procedural issues.[162] This approach may provide more opportunity for consultation processes to be designed in 'conjunction with indigenous peoples concerned', in the manner of Article 27 of the Declaration.[163] Furthermore, this awareness of the mediator's own bias may result in a degree of curiosity and scepticism that can help the parties to explore their own cultural assumptions and expectations together.

Whilst the concept of a mediator acting in a non-neutral manner may be controversial for western audiences, there are precedents within indigenous peace-making for disputes being mediated by third parties who are not wholly independent and impartial. Suave describes how certain indigenous peace-making processes are overseen by a 'peacemaker' who is usually a respected elder, chief or other community leader, who will likely have lifelong relationships with the parties in dispute with the community as a whole.[164] The peacemaker draws on his knowledge of the parties and their lives, and acts as a teacher, healer, bearer of indigenous wisdom and traditional knowledge.[165] They will often make suggestions or directions to the parties, with a view to transforming the relationships and the individuals in the conflict, bringing about reconciliation and personal or spiritual growth.[166] Furthermore, Harper has argued that business-like, formal practice of western mediation has 'strayed too far from its roots'; what began as a community-based forum to achieve reconciliation, peace, empowerment and justice became subsumed into adversarial justice systems and competitive commercial contexts, losing its reconciliatory essence in the haste for quick, cost effective solutions.[167] He argues that models of mediation that focus on transforming relationships, and in which the

[161] Winslade and Monk (n 128). 113. Drawing from Foucault's work on governmentality, Winslade and Monk argue that the mediator is in a position of governing, or exerting a degree of control over, the lives of the parties to the mediation, for example in intervening in discourse in order to help establish a new relationship or agreement for the future. This understanding means that it is not as important to ask 'whether the mediator is neutral with regard to the content of the dispute, but from which discursive position the mediator will work. What moral stance will inform the mediator's work? And how transparent will that stance be?' These questions require the mediator to consider his 'epistemic location', accept that there are likely to be limits to his ability to understand the experiences and viewpoints of people who operate from within different cultural narratives, and to be continually curious and open-minded about their own opinions and beliefs, as well as those of the parties.
[162] ibid. 201.
[163] UNDRIP, UNGA Res 61/295 (13 September 2007)., Art 27.
[164] Sauve (n 15).; Victor (n 13).
[165] Osi (n 13).
[166] Sauve (n 15).
[167] Harper (n 111)., 595.

mediator takes an activist role, will better support community empowerment, justice and healing. Narrative mediation is one such model.

8.6 Conclusion

This thesis has argued that the conceptualisation and implementation of FPIC through a multicultural model (as opposed to a nation-to-nation model) has a limited potential to bring about indigenous self-determination, and hampers reconciliation between indigenous peoples and the state. In particular, the general reluctance of states to embrace consent, rather than a consultation standard, and the top-down regulation of FPIC consultation processes that permits states to control the content of indigenous rights and the process and scope of FPIC consultations has left indigenous peoples in a relatively weak position to protect their rights and achieve their own priorities for development. In this context, this chapter has used negotiation and mediation theory to argue that mediation holds potential for improving the negotiating power of indigenous peoples and implementing FPIC in a more intercultural way.

The analysis of PFIC through the lens of mediation and negotiation theory prompts a shift in the understanding of its purpose. Rather than aiming for a consent, which may be conceived by the parties as constituting a unilateral veto, this chapter has argued that the principle of FPIC consultation should be seen as conferring a duty to forge *consensus*. This reframing of the duty could help to reposition FPIC outside of the multicultural model, and encourage the adoption of a nation-to-nation implementation of FPIC consultation that would better support indigenous self-determination and reconciliation between indigenous peoples and the state.

Consultation processes can be conceived as negotiations of rights in an asymmetric and non-neutral space. Rights-based mediation, applied in its strictest sense, is likely only to replicate existing power disparities by reinforcing the state's legal interpretation of indigenous rights and the duty to consult. However, there is potential for mediation to open up a discussion that asks how rights can be interpreted more broadly, to better reflect indigenous legal understandings and worldviews. 'Interests-based' or 'facilitative' mediation may present one way of doing this. An analysis of FPIC consultation through this lens suggests that this kind of mediation may help indigenous peoples assert greater negotiating power in developing options and alternatives that will shape the content of any consensus reached. Thus, it would help indigenous communities to have a more meaningful opportunity to shape projects proposed by the state on their land. Furthermore, a mediator who is sensitive to cross-cultural communication challenges could help to avoid FPIC consultations breaking down due to misunderstandings.

However, integrative negotiation theory suggests that the range of options for settlement, or 'ZOPA' is established by the parties' best and worst alternatives to a negotiated agreement. These alternatives are generally determined by wider structural features, such as the legal framework of consultation, particularly states' ability to proceed without indigenous consent in the vast majority of cases. Furthermore, the interests-based approach would need to ensure that the objective standards used to evaluate options do not reinforce existing power disparities. This analysis has highlighted both the limitations of the interests-based approach, as well as the crucial need for states to recognise indigenous consent if they are serious about reconciliation. Without a consent standard enshrined in law, the ability of indigenous communities to freely give their consent is called into doubt, and their ability to determine their own priorities for development is greatly undermined.

Narrative mediation theory offers a complementary analysis of power within FPIC consultations. By attending to the way that states and indigenous peoples draw from underlying cultural stories about the conflict, and their use of discursive positioning to assert power, a narrative mediator can help to expose power dynamics and help guide the parties towards a new story of collaboration from which to build a relationship. This approach values the contributions of both parties' epistemic perspectives as a source of solutions, and as such could help to counterbalance the marginalisation of indigenous knowledge within FPIC consultation, fostering epistemic justice and a more genuine intercultural dialogue. Narrative mediation also recognises the ability of individuals to simultaneously hold multiple conflicting narratives and identities, which could help reduce stereotyping and existentialist assumptions within the negotiation process, and requires that the parties design the process together, giving indigenous peoples a greater degree of control of the FPIC consultation process. However, the open acknowledgement of the mediator as taking an active role in shaping the dialogue may be unacceptable, particularly to states more used to facilitative styles of mediation.

The use of mediation in FPIC consultation processes is already happening, to a limited degree. This Chapter provides an argument in favour of adoption of mediation in FPIC consultation processes – particularly interests-based and narrative styles, which could be used in tandem to attempt to moderate the structural imbalances of power faced by indigenous peoples within the FPIC consultation process. However, the use of mediation is subject to some important caveats.

Crucially, mediation must be designed and implemented with the full consent and participation of the indigenous community concerned. Additionally, mediation may not be suitable for all cases, particularly those concerning violations of unqualified rights, such as the right to life. Safeguards should be put in place (again, through jointly-designed institutions or mechanisms) to ensure that mediated outcomes do not erode indigenous rights, prevent transparency, or constrain the ability of indigenous people to seek justice in other fora. However, if introduced on a voluntary basis and designed in partnership, mediation offers a variety of complementary tools to highlight, challenge and potentially shift imbalances of power between indigenous peoples and states within the consultation process, whilst fostering a deeper intercultural connection.

Chapter 9: Conclusion

9.1 Introduction

This thesis set out to examine whether FPIC can support reconciliation between indigenous peoples and the state in multicultural societies, focusing on the implementation of FPIC as enunciated by UNDRIP in relation to extractive projects on indigenous territories. It has approached this question from a theoretical and a practical perspective, in order to shed light on the theoretical assumptions that underlie both the developing international norm of FPIC as well as consequences of these assumptions on how FPIC is being put into practice. Deeper understanding of this topic will, it is hoped, provide insights into how to improve the future implementation of FPIC. Insights of this kind are particularly important in view of the facts that conflict over resource extraction continues unabated,[1] and that there is a growing sense of frustration that FPIC – as currently implemented – is not living up to its promise as a means of reducing conflict and enabling indigenous peoples to realise their right to self-determination.[2]

As will be discussed below, the conclusions of this thesis indicate that this disillusionment concerning FPIC is, in part, due to a lack of attention to the continuing unresolved issue of how indigenous peoples and states can navigate their respective claims to self-determination and sovereignty. This thesis has argued that this longstanding question was not resolved by the adoption of UNDRIP, despite three decades of negotiation, but rather remains a live issue that is being constantly renegotiated on a case-by-case basis during FPIC consultations. It indicates that whereas indigenous peoples have tended to emphasise their right to self-determination, states have adopted a multiculturalist approach to FPIC that fundamentally misunderstands the central claims of indigenous peoples. Indigenous peoples fought hard for international recognition of FPIC in UNDRIP's text, even in a compromise form, and it would be a great loss if the lack of engagement with the divergent ways that indigenous peoples and

[1] 'Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples' (Indigenous Peoples Major Group for Sustainable Development 2019).
[2] UNPFII, Sixth Session 14-25 May 2007 'Report on the sixth session' (25 May 2007) UN Doc E/2007/43 E/C.19/2007/12.; UNHRC Thirty Ninth Session 10-28 September 2018 'Free, prior and informed consent: a human rights-based approach Study of the Expert Mechanism on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/62; Doyle (n 34).; Claire Wright and Alexandra Tomaselli (eds), *The Prior Consultation of Indigenous Peoples in Latin America* (1st edn, Routledge 2019).

states are conceptualising FPIC by indigenous peoples and states were to undermine the opportunity that it undoubtedly presents for enabling constructive dialogue.

9.2 Thesis conclusions

This research adopted a decolonial theoretical framework. Chapter 2 examined the merits of postcolonial and decolonial writing for research on matters relating to indigenous peoples, and selected decolonial writing as the main theoretical framework of this thesis, due to its engagement with indigenous philosophies and a history of colonialism in the Americas. It also highlighted key methodological implications of taking a decolonial approach, particularly in relation to ensuring epistemic justice.

Chapter 3 argued that at the root of the conflict between indigenous peoples and states lies an unresolved issue of how state sovereignty, territorial integrity and political unity can coexist with indigenous peoples' right to self-determination. It traced the developments in international law that have exemplified the various ways that this question has been (unsatisfactorily) answered over the course of five centuries. It concludes that UNDRIP has been unable to resolve the fundamental tension, instead replicating it within its recognition of indigenous peoples' right to internal self-determination, within the boundaries and political authority of the existing state. The interpretation of this right to self-determination through the lens of human rights was a strategic move by the indigenous movement to ease this recognition, but came at a cost. A human rights framing the right to self-determination has the potential to tame its unique political nature, and risks conflating it with economic, social and cultural rights that are already protected by human rights law.

Chapter 4 examined Kymlicka's model of human rights based multiculturalism, which remains a prevalent and influential strategy adopted by liberal states and institutions to reduce intrastate conflict and promote human rights. In keeping with a decolonial approach, it drew on the critiques of indigenous political philosophers to examine further the problems that treating indigenous peoples as special minorities within the overall authority of the state could pose for the task of reconciliation. It concluded that human rights based multiculturalism is unable to significantly alter the hierarchies of epistemic, political and economic power that indigenous peoples have been struggling against for so long. It also presented some examples of how indigenous ideas of citizenship could help to transform the relationship between indigenous peoples and the state.

From this theoretical analysis, Chapter 5 turned attention to the focus of this thesis: FPIC in the context of mining projects on indigenous territory. Through an analysis of UNDRIP's provisions on land rights and the heavily contested Article 32, Chapter 5 demonstrated two very different interpretations of FPIC have emerged from Article 32's ambiguous compromise text. Indigenous people and their supporters interpret FPIC in the light of the right to self-determination, as a means to assert indigenous peoples' control over their territories and their future development as peoples. On the other hand, states have conceptualised FPIC as special procedural mechanism for including indigenous people in participatory democracy on a basis of equality with non-indigenous citizens. Crucially, whilst indigenous peoples understand the normative framework to require states to obtain FPIC 'as a general rule' in the case of extractive projects, states generally view FPIC as an objective of consultation that is not required to be achieved, except perhaps in the most extreme cases. Due to the privileged position of states in international law, and their *de facto* control over how FPIC is being put into practice, the view of FPIC espoused by states will determine how FPIC develops as an international norm.

Drawing on the analysis in Chapters 3 and 4, as well as the work of decolonial authors, it was argued that this multiculturalist framing of FPIC constitutes a doubling down on a paradigm of human rights based multiculturalism that reinforces the conceptualisation of indigenous peoples as 'multicultural citizens' rather than 'citizens plural'. Consequently, if implemented in accordance with this approach, FPIC will be unlikely to be effective in promoting deep forms of reconciliation because it maintains existing hierarchies of epistemic, political and economic power. The differing views of states and indigenous people on such issues as indigenous self-determination, land rights and citizenship suggest there remains significant work to be done in unpicking divergent narratives and understanding how they impact the relationship between states and indigenous peoples today.

The next chapters of this thesis focused on how the adoption of a multiculturalist approach to FPIC is defining the practical implementation of FPIC in Peru and Canada.

Chapter 6 analysed Peru's development of the Law on Prior Consultation and the three illustrative examples of FPIC consultations under this legal framework. It concluded that the state's approach to FPIC is in line with the multiculturalist interpretation of FPIC outlined in Chapter 5. The prescriptive legal framework maintains state control of the process, and the consultations that do occur are taking place at the 'narrow and shallow' end of the spectrum and do not require consent to be obtained. The analysis of the meta-consultation on prior consent and the illustrative examples seem to indicate a pattern of dialogue which fails to be

truly inter-cultural in nature, instead heavily on the state's framing of indigenous rights and the view of prior consultation as a rigid state-controlled administrative process which confers only limited opportunities for indigenous peoples to influence the outcome.

In particular, the Peru case study underlines the importance of consulting at an early stage, when the outcomes of consultation have a meaningful chance of being reflected in the design of the project or measure in question. It also highlights the need for attending to bias within the process, whether in the behaviour of facilitators, or the willingness of the state to ensure full translation and to respond to all questions raised. Public narratives of indigenous peoples as barriers to development, rushed processes and the use of violence to quell opposition have been highlighted as some of the challenges that indigenous peoples face in asserting their rights through the FPIC process. However, as the Corrocohuayco illustrative example showed, indigenous peoples are leveraging the legal framework that does exist to insist that the state engages more fully with indigenous concerns at an earlier stage in the process. Nevertheless, the way that FPIC is being implemented in Peru, in a way that is tightly regulated and controlled by the state, is not capable of prompting significant transformations of epistemic, political or economic power imbalances.

Chapter 7 analysed FPIC in the Canadian context. Analysis of the case law reveals that underneath a veneer of respect for a nation-to-nation relationship, the duty to consult in Canada is also reminiscent of a multicultural approach to indigenous rights, in which the authority of the state over indigenous peoples' lives and territories remains unchallenged, and Eurocentric legal principles and worldviews are privileged above those of indigenous peoples. Canada's legal framework on FPIC allows for more flexibility and variation in the way that FPIC consultations are conducted, and the illustrative examples in this chapter were chosen to present a best case scenario under the multiculturalist approach. The Canadian approach to consultation has led to novel institutional arrangements, such as parallel impact assessments conducted by indigenous governments, indigenous governments conducting the impact assessment as project proponent, or playing a role alongside state officials in managing land and administering the assessment process. However, even in these best-case scenarios, there remained the familiar criticisms of FPIC as a de-politicised bureaucratic process, which did not require consent to be obtained, or suitably address existing epistemic, political or economic hierarchies of power.

One particular feature of the multiculturalist approach to FPIC that has been observed is that it prioritises procedural fairness over substantive fairness. Whilst it is certainly true that indigenous peoples had little control over the outcome of FPIC consultations which were

determined by the state according to its own rationale and logic, it was also evident that the procedures were also far from fair, prioritising western processes and knowledge. The many flaws identified in the multiculturalist implementation of FPIC in Peru and Canada have significant consequences for indigenous bargaining power and their ability to influence the outcome.

Given that states are largely in control of implementation of FPIC and seem intent on adopting the multiculturalist approach, what can be done to mitigate power imbalances within the process? The first, and obvious answer is for states to agree to obtain indigenous consent prior to approving projects on their lands. Whilst indigenous peoples and their supporters will no doubt continue to demand this, such an agreement may be a long way off. For this reason, Chapter 8 took a pragmatic look at how mediation might be a useful tool to improve both procedural and substantive fairness in FPIC consultations as they currently exist.

Chapter 8 evaluated three models of mediation for their suitability and usefulness in FPIC consultations. The right-based model presented concerns, due to its likely exclusion of indigenous legal systems and understandings of rights. However, the interests-based model showed more promise, particularly for enabling indigenous peoples greater influence over the outcomes agreed during the FPIC process. However, it can do little to overcome the systemic power imbalances that largely determine the range of possible outcomes, and may even reinforce them through the assumption of mediator neutrality. Narrative mediation may offer a more transformative approach, in focusing on the long-term relationships as opposed to one-off expressions of consent, and inculcating a greater aware of the perils and opportunities of epistemic difference.

The use of mediation in prior consultation processes is already happening, to a limited degree. The analysis in Chapter 8 supports the wider adoption of mediation in prior consultation processes, subject to some important caveats - it must be designed and implemented with the full consent and participation of the indigenous community concerned, subject to safeguards that ensure indigenous rights are not undermined, and may be unsuitable for some cases, particularly where there have been violations of unqualified rights. The mediation tools discussed in this thesis are non-indigenous in origin, and therefore it is for indigenous communities themselves to decide whether they are consistent with their own dispute resolution approaches. However, it has been suggested by several authors, including indigenous authors, that mediation may be consistent with indigenous peace-making processes, and could be adapted into bespoke processes jointly designed between indigenous peoples and the state.

9.3 Implications for developing a reconciliatory approach to FPIC

This thesis has concluded that FPIC, as interpreted and implemented according to a multiculturalist approach, has significant shortcomings as a tool for reconciliation because it is unable to sufficiently transform epistemic, political and economic imbalances of power between indigenous peoples and the state. Nevertheless, it also reveals some avenues for improving FPIC's reconciliatory potential.

The first condition would be the adoption, in law, of the requirement for agreement (or consensus) between indigenous peoples and the state before projects can proceed. As has been discussed in Chapter 8, in the absence of a requirement for consent, indigenous peoples suffer from an imbalance of power that will severely restrict their ability to influence the outcome of prior consultation processes. Furthermore, the consensus approach implicitly recognises a horizontal, rather than vertical, relationship between indigenous peoples and the state. Framing the requirement for 'consent' in the UNDRIP as a duty to negotiate, agree, or forge consensus, has the advantage of improving indigenous peoples' negotiating power whilst at the same time, reconceptualising the relationship between indigenous peoples and the state as one of equals and collaborators and emphasising the need for agreements that will support reconciliation in the long term.

This approach is consistent with the approaches of authors such as Hamilton and Nicholls,[3] who have argued for a 'duty to negotiate' in the Canadian context, or of Ortiz, Coyle and Ilizarbe who argued that consultation norms should be shifted towards 'consensus' and away from binary notions of 'consent'.[4] Viewed in this way, the principle of consent is not a unilateral veto in either direction, but a recognition of the need to build relationships and work together to find a resolution that both sides can accept. Indeed, both the 'general rule' approach and the multiculturalist approach view FPIC in terms of whether it is the state, or indigenous peoples, who will have the final say on whether a development may go ahead. Reformulating FPIC as a duty to forge consensus fundamentally challenges the legitimacy of either side presuming the greater power within the relationship, and could offer a means of moving beyond a multicultural interpretation of prior consultation towards one that builds a more equal 'nation to nation' relationship.

[3] Robert Hamilton and Joshua Nichols, 'The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult' (2019) 56 Alberta Law Review 729.
[4] Alejandro Santamaría Ortiz, 'La consulta previa desde la perspectiva de la negociación deliberativa' (*Revista Derecho del Estado*, 15 June 2016); 'Shifting the Focus: Viewing Indigenous Consent Not as a Snapshot But As a Feature Film in: International Journal on Minority and Group Rights Volume 27 Issue 2 (2020)'.; Ilizarbe (n 64).

Second, it may be necessary to move away from the concept of multiculturalism as a rationale for FPIC, and give greater emphasis to the need for 'intercultural' dialogue.[5] Intercultural discussion, by definition, requires that indigenous epistemologies and worldviews are valued equally with those of the state. Currently, this research and many other studies indicate that this is not the case in practice. Mediation techniques present one possible option for encouraging the collaborative redesign of the consultation process to better reflect indigenous peace-making, legal frameworks, knowledges and ways of seeing the world. Mediation theory offers insights into how to smooth communication problems across cultural divides, but also to help parties appreciate how their own cultural narratives impact on their own behaviours, expectations and negotiation positions. This ability to encourage self-reflection and awareness of the impact of different cultural narratives may help prior consultations to be resilient in the face of disagreements - for example over the relevance of past grievances to the consultation.

Finally, the analysis of indigenous critiques of multiculturalism suggests that there is a need to have a broader conversation about the nature of citizenship and the duty of governments and citizens towards the natural world. The climate crisis and the COVID-19 pandemic have recently brought the consequences of an economic system that does not account for its cost to the natural environment into sharper focus on the global stage.[6] For decades, the indigenous movement has been sounding the alarm, and has been an active participant in global dialogues on biodiversity, climate change and the sustainable development goals, and indigenous people are calling for their epistemic perspectives and experience to be given more weight in the search for sustainable solutions to the world's challenges.[7] This research raises questions about how such conversations can be engaged at the national level. Whilst prior consultation may help mitigate the impacts of specific projects instigated by the state in the name of economic and social development, it remains, ultimately a 'safeguard' or a 'defence', unable to shift the systemic cause of many infringements of indigenous rights - an economic model that depends on extraction and views the natural world as a resource, rather than a responsibility.

[5] For example, Dussel, 'Transmodernity and Interculturality' (n 205).
[6] 'Biodiversity and the Economic Response to COVID-19: Ensuring a Green and Resilient Recovery' (OECD 2020).; *Making Peace With Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies* (United Nations Environment Programme 2021).
[7] Priscilla Claeys and Deborah Delgado Pugley, 'Peasant and Indigenous Transnational Social Movements Engaging with Climate Justice' (2017) 38 Revue canadienne d'études du développement 325.; Jérémie Gilbert and Corinne Lennox, 'Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development' (2019) 23 The International Journal of Human Rights 104.

9.4 Generalisability and the need for future research

This thesis has focused on prior consultation in the context of multicultural states, with a geographical focus on Canada and Peru, drawing from literature that has explored FPIC consultation mainly in Canada and Latin America. As Webley has noted, it would not be appropriate to make the claim that the conclusions of research based on specific small-scale case studies is capable of universal generalisation.[8] The conclusions of this thesis are therefore most applicable to the countries in question, although many empirical studies of prior consultation in Latin America have also set out similar criticisms of prior consultation's flawed procedures and inability to transform power imbalances or end conflict between indigenous peoples and the state.[9] This suggests that the conclusions may also apply further afield, in countries that have experienced European colonisation and currently take a similar human rights based multicultural approach to questions of indigenous peoples' rights. However, as Kingsbury has noted, African and Asian countries may take a different approach to the conceptualisation of the place of indigenous peoples in national society, and therefore this research may not be as applicable in these contexts.

There are many potential avenues for further research. Deeper engagement between liberal multicultural theories and indigenous political theories could provide new notions of sovereignty and self-determination, and help to redefine the relationship between indigenous peoples and the state outside of the entrenched self-determination/sovereignty conflict as currently understood by international law and enshrined in UNDRIP. In particular, this thesis suggests that these different bodies of work could be engaged to develop on the normative ideal of negotiation and consensus. In order to develop the possibility of co-management of land and power sharing, it would be useful to gather further examples of co-management of land between indigenous peoples and states to illustrate the variety of alternatives as well as the challenges and successes of these models. Initiatives such as the World Bank's National Indigenous Peoples Development Plans could be evaluated from the indigenous perspective, to understand their potential as an avenue for a deeper discussion between indigenous peoples and states on national priorities for development.

In relation to prior consultation, the theoretical analysis of mediation's potential should now be tested in practice, through detailed case studies of the use of mediation in prior consultation

[8] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).
[9] Rodríguez-Garavito (n 55).; Riccarda Flemmer and Almut Schilling-Vacaflor, 'Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia's and Peru's Extractive Industries' (2016) 37 Third World Quarterly 172.; Acuna (n 679).

processes. Integrative negotiation theory and discourse analysis could be employed in analyses of specific prior consultation meetings, to better understand the dynamics of power within the conversations that take place. More research would also be useful on indigenous protocols for prior consultation and the development of hybrid models, to understand the differences between state-centric approaches and indigenous ambitions for the implementation of prior consultation, and how these can be reconciled.

Finally, this thesis has argued that there is a role for dispute resolution tools such as mediation to help integrate prior consultation with the resolution of historic grievances and human rights abuse, as well as to promote epistemic justice and greater respect for indigenous knowledge and worldviews.[10] Further research is needed to understand how the implementation of FPIC can respond to the imperative to ensure that 'any process of reparation and reconciliation must be approached from an indigenous perspective'.[11] Additionally, it may be useful to investigate how institutions can be developed to support dispute resolution within the prior consultation process, and to bring a greater degree of accountability and transparency in the way that it is being implemented. In 2000, indigenous representatives from across the world called for an 'Independent International Commission of Indigenous Peoples for Mediation and Conflict Resolution … to promote and defend the rights of indigenous peoples and to expose and denounce aggression and abuses of the rights of indigenous peoples in different parts of the world.'[12] It may be constructive to examine the potential of different existing institutional models, for example exploring national conflict resolution mechanisms or international institutions such as the Office of the Compliance Ombudsman of the IFC, that provides mediation for disputes concerning social and environmental impacts of IFC-funded projects.[13]

9.5 Final thoughts

This thesis has been written by its non-indigenous author with a view to critiquing the current approach to interpreting and implementing FPIC in order to expose its 'fragile architecture' so that it may fulfil its reconciliatory potential. In proposing these conclusions, the author acknowledges that indigenous people are the experts and leaders of their own struggles for

[10] 'Conflict, Peace and Resolution' (United Nations Permanent Forum on Indigenous Issues 2016) <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/backgrounderC1.pdf> accessed 21 February 2021.
[11] UNHRC Expert Mechanism on the Rights of Indigenous Peoples Twelfth Session 15-19 July 2019 'Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation' (2 September 2019) UN Doc A/HRC/EMRIP/2019/3/Rev.1, para 72.
[12] 'Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, 6-8 December 2000' (n 255)., para 1.
[13] 'Office of the Compliance Advisor/Ombudsman : How We Work : Ombudsman' <http://www.cao-ombudsman.org/howwework/ombudsman/> accessed 21 February 2021.

self-determination. It is hoped that the analysis and particularly the proposals for how mediation could mitigate power imbalances may be useful to those who are at the forefront of protecting indigenous rights.

It is intended that in engaging indigenous author's writing on reconciliation, multiculturalism and FPIC, this thesis learns from, rather than appropriates, the wisdom of indigenous authors who have painfully experienced the effects of colonisation in a way that is unimaginable to a British academic. In completing this thesis, the author recognises the debt of gratitude that is owed to indigenous writers for their intellectual and emotional efforts which are primarily intended for the benefit of an indigenous audience. Indeed, one of the most important effects of this thesis has been that it has initiated a process of 'unlearning'[14] in the mindset of its author - which remains an ongoing work-in-progress. It is hoped that this thesis contributes to the growing recognition of western researchers and practitioners that their own epistemology is inherently limited, contextualised, and one amongst many alternative ways of viewing the world. In engaging across epistemologies, we can more clearly see our own strengths and weaknesses, and stand in support of the social movements - many of which are from the global south - who engage with international law to seek justice on their own terms.

[14] Tlostanova (n 211).

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