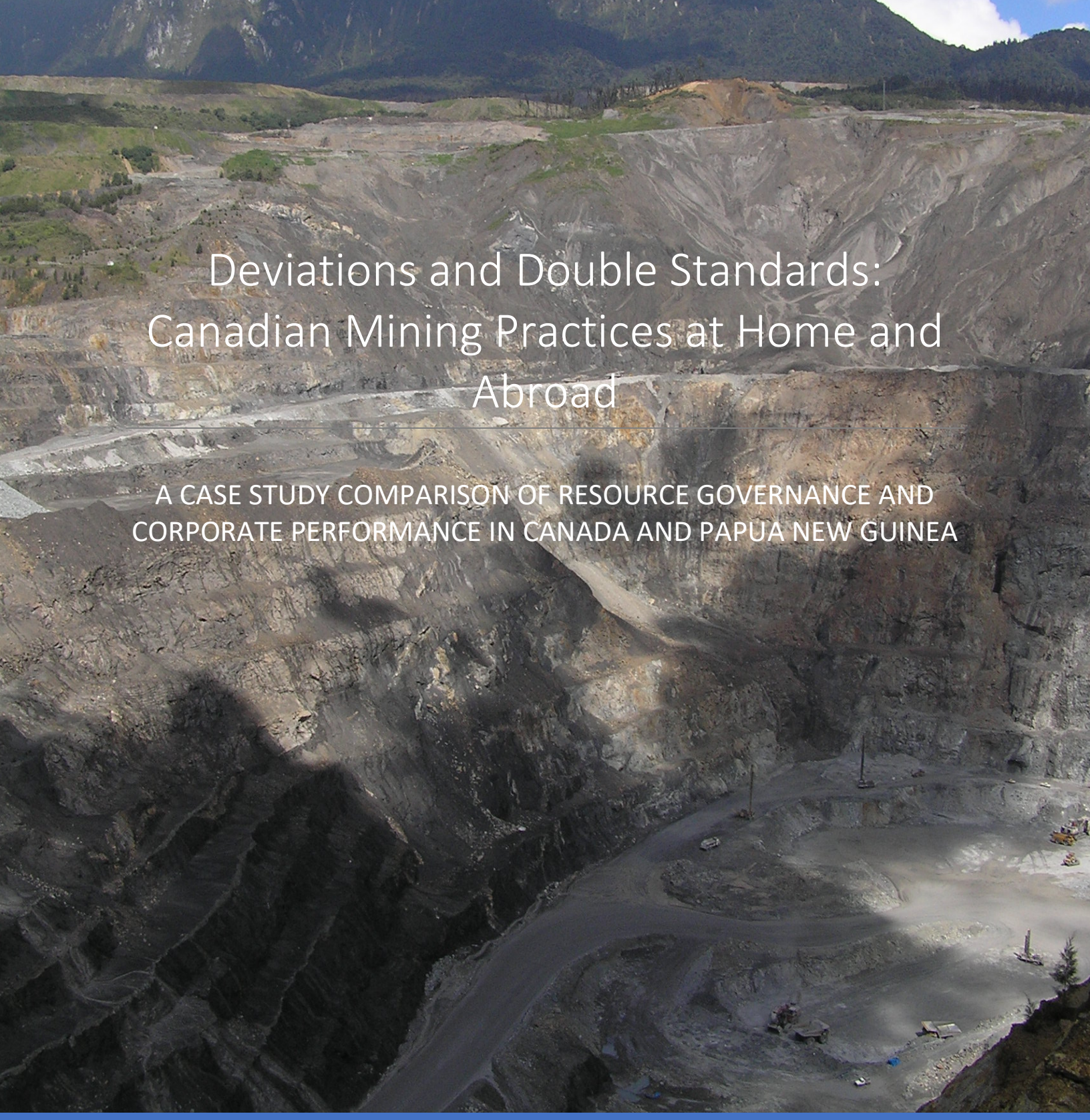

Deviations and Double Standards: Canadian Mining Practices at Home and Abroad

A CASE STUDY COMPARISON OF RESOURCE GOVERNANCE AND CORPORATE PERFORMANCE IN CANADA AND PAPUA NEW GUINEA

PETER A. ALLARD SCHOOL OF LAW

INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC | OCTOBER 2018

Cover photo: Porgera Gold Mine in Enga province, Papua New Guinea, owned and operated by Barrick Gold Corporation. Photo credit Richard Farbellini.

Acknowledgements & Methodology

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Information for this report was collected from a wide range of government and industry documents, human rights reports, academic scholarship, and reputable news sources, as well as interviews with regional and thematic experts. Research included a detailed examination of publicly available laws, regulations, and policies relevant to the permitting and environmental assessment regimes in both PNG and Canada. Primary research was conducted via video and phone calls with stakeholders in PNG and mining and permitting experts in Canada. Where possible statements were verified with parties who are either knowledgeable or directly engaged in the case studies cited.

Opinions expressed in the report are those of the authors and should not be attributed to other parties. The report does not represent the official position of the Allard School of Law or the University of British Columbia. Reporting of events is based on publicly available information and should not be taken as allegations of guilt against any individual persons or corporate entities. Versions of events in the report are subject to additional facts and verification.

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Table of Contents

Definitions

APD	Asset Protection Division
BC	British Columbia
BCEAA	British Columbia *Environmental Assessment Act*
CEAA	*Canadian Environmental Assessment Act, 2012*
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPA	Conservation and Environment Protection Authority
CESCR	UN Committee on Economic, Social and Cultural Rights
DMPGM	Department of Mineral Policy and Geohazards Management
DSM	Deep Sea Mining
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EIR	Environmental Inception Report
EITI	Extractive Industries Transparency Initiative
FPIC	Free, Prior, and Informed Consent
IBA	Impact Benefit Agreement
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IEL	International environmental law
MEM	Ministry of Energy, Mines and Petroleum Resources (British Columbia)
ML	Mining Lease
MNC	Multinational Corporation
MOU	Memorandum of Understanding
MRA	Mineral Resource Authority
MRDC	Mineral Resources Development Company
PNG	Papua New Guinea
SML	Special Mining Lease
STD	Submarine Tailings Disposal
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	UN Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change

Executive Summary

Canadian mining companies have come under fire in recent years for their role in major human rights violations associated with their operations—particularly those carried out in developing nations. Recent news coverage and cases in Canadian courts have highlighted specific examples of abuse, including but not limited to: slavery and forced labor at Bisha gold mine in Eritrea, owned by Nevsun Resources (headquartered in Vancouver)[1]; violence against unarmed protesters in Guatemala at Escobal silver mine, owned by Tahoe Resources (founded and incorporated in British Columbia)[2]; sexual violence against local women at the hands of security personnel hired by Hudbay Minerals (headquartered in Toronto) and its subsidiaries for a nickel mining project in Guatemala[3]; and gang rapes against women and other violence carried out by security personnel at the Porgera mine in Papua New Guinea, owned and operated by Barrick Gold Corporation (headquartered in Toronto).[4]

These cases are reported to be the tip of the iceberg in relation to human rights violations associated with Canadian mining operations, to the point where growing notoriety in this area has led to international condemnation, impacting Canada's reputation for human rights and environmental compliance.[5]

Despite the transnational nature of modern extractive companies' operations, Canada has thus far been reluctant to regulate the behaviour of its companies in its overseas operations, either through transparency laws that could help eliminate forced labor and trafficking in corporate

[1] Canadian Centre for International Justice, Nevsun Resources (Canada/Eritrea), accessed 22 July 2018, online:<https://www.ccij.ca/cases/nevsun/>; Alex McKeen, "Vancouver-based mining company granted Supreme Court appeal in 'conscripted labour' case", The Star Vancouver (22 June 2018), online: < https://www.thestar.com/vancouver/2018/06/22/vancouver-based-mining-company-granted-supreme-court-appeal-in-conscripted-labour-case.html >.

[2] Canadian Centre for International Justice, Tahoe Resources (Canada/Guatemala), accessed 22 July 2018, online:< https://www.ccij.ca/cases/tahoe/>; Susan Taylor, "Court sets Canada as jurisdiction for Guatemalan suit against Tahoe", Reuters (27 January 2017), online:<https://www.reuters.com/article/guatemala-mining-tahoe-resources-idUSL1N1FG1VN>.

[3] Suzanne Daley, "Guatemalan Women's Claims Put Focus on Canadian Firms' Conduct Abroad", The New York Times (2 April 2016), online: <https://www.nytimes.com/2016/04/03/world/americas/guatemalan-womens-claims-put-focus-on-canadian-firms-conduct-abroad.html>; Suzanne Daley, "Outcry Echoes Up to Canada: Guatemalans Citing Rapes and Other Abuses Put Focus on Companies' Conduct Abroad", The New York Times (3 April 2016) at A1.

[4] Human Rights Watch, *Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine* (New York: HRW, 2010) [Gold's Costly Dividend].

[5] See, e.g.: Justice & Corporate Accountability Project, "The 'Canada Brand': Violence and Mining Companies in Latin America", (Toronto: Osgoode Hall Law School, 2016), online: <https://justice-project.org/the-canada-brand-violence-and-canadian-mining-companies-in-latin-america/> [Canada Brand], a recent report documenting troubling incidents of violence associated with Canadian mining companies in Latin America and citing 44 deaths and hundreds of injuries and "criminal" incidents as "the tip of the iceberg" (at 5). See also Concluding Observations on the sixth periodic report of Canada, UNHRC, 2015, UN Doc CCPR/C/CAN/CO/6 [HRC Observations], in which the Human Rights Committee of the United Nations (UN) expressed concerns "about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations, and about the inaccessibility to remedies by victims of such violations."

supply chains,[6] or by hearing complaints and providing remedies for its corporations' alleged human rights violations, regardless of where the violations occur. This double standard of enforcement depending where crimes committed by a Canadian entity occur has allowed Canadian companies to continue to benefit from lax regulatory regimes abroad, extracting sizable profits while causing environmental and social harms on a scale rarely seen in Canada itself.

This study aims to elucidate this double standard by undertaking a summary comparison of the regulatory regime for extractive companies operating in Canada versus that of a representative foreign jurisdiction—in this case, Papua New Guinea (PNG), where Canadian companies have engaged in multiple mining projects and are currently operating today.[7] While recognizing the various struggles and environmental and social harms associated with extractive projects within Canada, the analysis nevertheless finds that outcomes are likely to differ when extractive operations move forward in jurisdictions with substantially different levels of rule of law, transparency, public accountability, and corruption. The report provides an overview of the regulatory regime in both PNG and Canada, highlighting various case studies from each jurisdiction to help illustrate characteristic features of both operating theaters. It also provides a brief overview of relevant international standards in this area, focused on environmental law and norms relating to consent and consultation of affected communities as well as corporate responsibility. The following is a brief overview of the case study findings.

Papua New Guinea

The PNG regulatory regime is generally characterized by weak institutions and endemic corruption. PNG mining regulations are often out of date or publicly inaccessible and are reportedly ill-enforced. In this climate, mining companies have been able to avoid public scrutiny and the need for costly and timely environmental assessment and consultation requirements, resulting in a myriad of environmental disasters. Meanwhile, forced evictions and in-migration caused by mining operations have resulted in social breakdowns, adverse health effects, and loss of land and livelihood. Violence and lack of access to justice, already systemic problems in PNG, are exacerbated by the presence of mines with unaccountable security forces. The basic human rights of women and girls have been especially vulnerable to derogation and continue to be abused within areas managed and supported by mining companies.

Canadian mining companies have engaged PNG communities only to the extent required of them by the State—which is to say, very little. Consultation has fallen well short of anything resembling free, prior, and informed consent (FPIC). Even on those occasions where a mining company might attempt to comply with best practices and international norms, it is likely to face significant obstacles in PNG. Stakeholder identification can be problematic, as shown in the community engagement efforts at Porgera and Misima,[8] with very few benefits, if any, devolving to local communities or indigenous groups. The world's first commercial deep sea mine operation,

[6] See: In the Dark: Bringing Transparency to Canadian Supply Chains, Allard International Justice and Human Rights Clinic (Vancouver: Allard School of Law, June 2017).
[7] This comparative study could likewise be done for numerous other jurisdictions such as Guatemala or Peru, which may be considered for future follow-up analyses.
[8] See discussion below at sections II.A.2 and 3.

run by Canadian company Nautilus Minerals, has largely been acknowledged (including by Nautilus itself) as an "experimental" venture, and is taking place in PNG's waters despite extensive civil society opposition – further evidence of the unresponsive nature of the governance regime in PNG.

Canada

The Canadian regulatory regime is characterized by relatively strong rule of law, in which constitutional rights protections for indigenous groups provide a foundation for the engagement of potentially affected communities. Generally, the federal project assessment process relies on science-based decision-making and incorporates legal requirements for indigenous and public consultation. Despite these features, the framework has come under fire for recent changes that have eroded transparency and respect for indigenous rights. Commentators have expressed concern regarding accountability and regulatory capture, which leaves much to discretionary decision-making and places less emphasis on science-based project assessment, particularly with respect to the provincial resources sector in British Columbia. This flawed model often allows developers to proceed in the face of clear abuses to indigenous rights.

Nevertheless, indigenous populations in British Columbia have been able to exert some influence over resource developers proposing projects in their traditional territories by leveraging their constitutional Aboriginal rights. This has resulted in the prevalence of private community benefits agreements between developers and indigenous communities that seek to secure their consent for proposed developments through guarantees of training, business contracts, economic benefits, and environmental protections. Such agreements have been closely tied to the environmental assessment process and may influence the government assessment of the project's adequacy. While community benefits agreements have been shown to be problematic, in some circumstances they have contributed to the process of gaining FPIC from the community for the development.[9]

Overall, the regulation of Canada's resources sector is anchored by its rule of law and is generally held to account by a highly engaged civil society. Strong democratic institutions underwrite this accountability, although changes weakening the environmental assessment regime and the potential for regulatory capture remain serious concerns.

Summary

Extractive operations in Canada face higher and more effective public and governmental oversight, leading to less egregious and widespread violations of human rights when they do occur. Conversely, high levels of corruption, a murky regulatory regime, and lack of enforcement in PNG decrease the power of civil society and indigenous communities to meaningfully participate in projects affecting them and increase the likelihood that grave abuses will occur.

[9] For a detailed discussion of the issues arising from these agreements see: *infra* Section II.B.4.

It is our hope that this analysis can assist communities on the ground, governments attempting to improve their regulatory regimes and attract responsible investment, and corporations looking to create sustainable and rights-respecting business ventures. Civil society, affected communities, and indigenous peoples implicated by the activities of multinational resource companies can demand better regulations, consultation and consent provisions in line with international law and best practices, and further, can demand benefits equivalent to those negotiated by groups in states with stronger regulatory frameworks, such as Canada. That being said, there must be some acknowledgement of the realities of the extractive industry's record on these issues, and the difficulty in overcoming its substantial social and environmental externalities in any jurisdiction. Efforts should be made to reduce the risk of human rights and environmental violations and increase community engagement, including through the incorporation of FPIC and the right to veto potentially destructive projects affecting indigenous territories.

It is time to close the accountability gap that exists between extractive industry operations in the Global North and Global South. Better practices can and should be universally adopted. Until extractive activities are held to the same standards across all regions, actors who continue to take advantage of regulatory disparities can expect to face increased scrutiny and accountability on the global stage.

I. Introduction

In the past four decades, the meteoric rise in global demand for minerals, transnational corporate power, and capital-intensive resource extraction technologies has created a surge of transnational extractive operations across the world.[10] As multinational corporations (MNCs) expand their reach, they reinforce what has become the standard paradigm in the extractive industry: a company headquartered in a developed ("home") state with multiple operations in developing ("host") states across the globe.[11]

"Home" states have taken varied stances towards the operations of MNCs – from policies encouraging corporate compliance with voluntary norms to the enactment of transparency laws – but are ultimately incentivized towards non-regulation, with even the most powerful states increasingly unable to control the activities of transnational business.[12] Together with global trends of economic liberalization and deregulation, this confluence of power has manifested in a "governance gap", within which multinational corporations operate with relative impunity.[13] Mining sites, particularly those in developing 'host' nations, have become hotbeds for extreme

[10] Suzana Sawyer & Edmund T Gomez, "Transnational Governmentality in the Context of Resource Extraction" in Suzana Sawyer & Edmund T Gomez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (London: Palgrave MacMillan, 2012) at 8 [*Sawyer & Gomez*].
[11] United Nations Development Program, "From Wealth to Wellbeing: Translating Resource Revenue into Sustainable Human Development" *2014 National Human Development Report: Papua New Guinea* (Port Moresby: UNDP, 2014) at 8 [UNDP Report].
[12] Penelope Simons & Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage (New York: Routledge, 2014) at 6–8. International financial institutions have injected another dimension into regulation of MNCs that finds its source in completely different policy agendas: *Ibid.*
[13] *Ibid* at 9–11.

violations of human rights, with power imbalances between mining actors and affected communities creating the conditions for significant environmental, social, and economic harms, which often have the most severe impact on indigenous peoples.[14] While there are significant problems associated with extractive projects occurring across the globe, the most egregious allegations of human rights violations – for example, those rising to the level of torture, sexual violence, and forced labour – have typically arisen out of host jurisdictions with weak regulatory regimes and poor domestic human rights records.[15] Companies and their subsidiaries operating in such jurisdictions have been accused of human rights abuse and environmental destruction on a scale rarely seen in their home nation operations.

This has been particularly true of Canadian companies, which hold a preeminent position in the industry, accounting for nearly 31% of global exploration expenditures and more than 50% of the world's publicly listed exploration and mining companies.[16] Rather than being perceived as a pioneer of socially responsible business practices in this industry,[17] however, Canadian foreign mining operations have been linked to shootings, gang rape, forced labour, environmental destruction, and entrenched poverty.[18] Mining companies have abandoned projects after making massive environmental missteps, leaving the cleanup to the host.[19] Canadian companies Hudbay Minerals and Tahoe Resources are associated with grievous violence and abuse in Guatemala, and are being subject to legal proceedings in Canada.[20] Vancouver-based Nevsun Resources is currently litigating in the Canadian court system to avoid responsibility for the slave labour it allegedly employed in its mine in Eritrea.[21] Toronto-based Barrick Gold recently refused to give an audience to two women who travelled halfway around the world to share their traumatic experiences at the hands of Barrick employees at Porgera Gold mine in Papua New Guinea.[22]

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[14] See e.g.: James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, 6 July 2012, Human Rights Council, 21st session, A/HRC/21/47.

[15] See e.g., footnotes 1–4.

[16] See Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad, Global Affairs Canada, Government of Canada, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>. See also Canada Newswire, "Canada a Global Leader in Mining Exploration, Innovation and Diversity: PwC Report" (10 July 2017) online: <www.newswire.ca/news-releases/canada-a-global-leader-in-mining-exploration-innovation-and-diversity-pwc-report-633629853>.

[17] See former International Trade Minister Ed Fast's statement on the "Canada Brand": "Canada is a world leader in sustainable technology, and in environmentally, ethnically and socially responsible business practices. That is the 'Canada Brand'—it is how we are known throughout the world": Shawn McCarthy, "Ottawa Vows to Protect 'Canada Brand' with Social Responsibility Policy" *The Globe and Mail* (14 November 2014) online: <perma.cc/U3YD-QYXM>.

[18] See UNHRC, *Concluding Observations on the sixth periodic report of Canada*, 2015, UN Doc CCPR/C/CAN/CO/6 at para 6 [HRC Concluding Observations for Canada 2015].

[19] See e.g., Placer Dome's operation of Marcopper mine in the Philippines, where a massive tailings impoundment failing "buried the Boac river under 3 million tons of toxic mine waste". Placer Dome then sold its holdings to a local partner: Stewart Kirsch, "Litigating Ok Tedi (Again)" *Cultural Survival* (September 2002) online: <www.culturalsurvival.org/publications/cultural-survival-quarterly/litigating-ok-tedi-again>.

[20] See *Choc v Hudbay*, 2013 ONSC 1414; *Garcia v Tahoe Resources Inc*, 2017 BCCA 39; Elizabeth McSheffrey, "Raids, Incarceration and Decimated Indigenous Land Stains Canada's Reputation in Guatemala" The National Observer, 6 December 2017, online: <www.nationalobserver.com/2017/12/06/news/raids-incarceration-and-decimated-indigenous-land-stains-canadas-reputation>.

[21] See *Araya v Nevsun Resources Ltd*, 2015 BCSC 2164, 260 ACWS (3d) 761.

[22] Elizabeth McSheffrey, "Mining Violence Survivors Demand Justice in Toronto" *National Observer*, 25 April 2017, online: <www.nationalobserver.com/2017/04/25/news/mining-violence-survivors-demand-justice-toronto>.

Canadian mining companies operating within Canada, while still subject to criticism, have maintained significantly better track records in avoiding egregious violations of rights and in negotiating more meaningful impact and benefit agreements with local and indigenous communities.

This report undertakes an in-depth investigation into the mechanisms that allow for the ongoing double standard that exists between domestic and international practices. It compares the Canadian regulatory regime for extractives with a representative host country regime; in particular, it analyses practices in Papua New Guinea (PNG), a country rich in natural resources and home to many past and current Canadian mining operations. It focuses on relevant aspects of the regulatory frameworks from both Canada and PNG, as well as specific, illustrative examples of major mining projects in each country.

The PNG case study begins with an overview of the laws and regulations currently comprising extractive governance in the country, focusing on elements such as transparency, enforceability, and corruption. It looks in turn at Barrick's Porgera gold mine and Nautilus's Solwara 1 deep sea mining operation, to highlight some of the difficulties inherent in the PNG regulatory regime, as well as some of the culpable behaviour by corporate actors demonstrating a failure to abide by international law and best practices. The Canadian case study follows, with a similar investigation of Canada's domestic extractive regulatory regime. It looks specifically at three examples of extractive projects in Canada: the Mount Polley mine (to demonstrate differences in the accountability process in the aftermath of an extractive environmental disaster), the Brucejack gold mine (where community impact benefit agreements were successfully negotiated), and the New Prosperity mine (where the project did not proceed due to the efforts of civil society and indigenous groups). The country case studies are followed by a section discussing the international law and standards that are particularly relevant, including the fundamental tenets of environmental law and indigenous rights, as well as emerging corporate best practice.

Ultimately, this report suggests that Canadian MNCs operating abroad are still applying the standards of least resistance and are taking advantage of the institutional and regulatory weaknesses of host nations. Many Canadian MNCs have not yet become the "good corporate citizens" they purport to be. Nevertheless, the movement towards corporate accountability for Canadian mining companies has accelerated with increasing pressure from civil society, NGOs, governments, and individual litigants. The achievement of meaningful accountability for these actors may come not only from international standard-setting and the promotion of voluntary regulatory compliance, but also through the pursuit of increased transparency and civil accountability in effective domestic courts. Regardless, moves towards universally enforced human rights standards for extractive operations are accelerating, while global tolerance for double standards in an increasingly interconnected world wanes.

II. Findings

A. Papua New Guinea

1. Background

Papua New Guinea is home to over seven million people, separated geographically into four regions and over 600 islands, and politically into 22 provinces, 89 districts, and 313 local level governments.[23] There are more than 600 tribes and 839 indigenous languages (comprising some 12% of the world's total languages).[24] PNG has been labeled one of seventeen "mega bio-diversity" hotspots, hosting 8% of the world's total known biodiversity and a "bewildering array of diverse natural ecosystems".[25] The vast majority of the population is indigenous, depends on subsistence agriculture, and faces challenges of persistent poverty and social inequality.[26]

PNG communities have a close connection to the land, which informs their culture, their livelihoods, and their way of life.[27] As one landowner once explained, "Land is marriage – land is history – land is everything. If our land is ruined our life is finished."[28] Partially due to this cultural integration, customary land tenure laws have survived recent colonial history.[29] Unfortunately, these laws have largely been unable, particularly in recent years, to prevent land grabbing or protect the rights of traditional, indigenous occupiers of the land; although traditionally more than 97% of PNG land was used by indigenous peoples, in the words of one commentator, presently "there is barely a square kilometer of PNG that is not covered by one or more extractive leases."[30]

PNG's extremely diverse peoples, cultures, and bioregions constitute a far different social, economic, and political context than what exists in regions similar to Canada. Regulatory decision-makers in PNG's capital, Port Moresby, have the unique challenge of navigating a developing post-colonial country, with limited infrastructure and extensive natural resources, through an increasingly centralized global mining industry.[31] The national and provincial governments often

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[23] US CIA, The World Factbook: Papua New Guinea, online: <www.cia.gov/library/publications/the-world-factbook/geos/print_pp.html>; UNDP Report, *supra* note 11 at 1–2.
[24] *Ibid*.
[25] UNDP Report, *supra* note 11 at 64–65.
[26] *Extractive Industries and Sustainable Development*, UNDP, online: <www.pg.undp.org/content/papua_new_guinea/en/home/operations/projects/democratic_governance/extractive-industries-and-sustainable-human-development.html>.
[27] Ronald May, *State and Society in Papua New Guinea: The First Twenty-Five Years* (Melbourne: ANE U Press, 2001) at 273 [May, *State and Society*].
[28] *Ibid*, citing a prominent member of the Panguna landowners group during the Bougainville crisis.
[29] Tim Anderson, *Land and Livelihoods in Papua New Guinea* (North Melbourne: Australian Scholarly Policy, 2015), online: <https://tim-anderson.info/wp-content/uploads/2017/03/LLPNG-DIGITAL-FULL-2017-1.pdf> at 10–11.
[30] Phil Shearman, "The Chimera of Conservation in Papua New Guinea and the Challenge of Changing Trajectories" in *Conservation Biology: Voices from the Tropics*, 1st ed, Navjot S Sodhi, Luke Gibson, & Peter H Raven, eds (West Sussex: John Wiley & Sons, 2013) 197 at 200 [*Shearman*].
[31] UNDP Report, *supra* note 11 at 8. The Constitution grants PNG landowners formal property rights over land that they have traditionally lived on and used. The customary law that governs land ownership "is a form of collective and inalienable title; it cannot be sold, but rather, may be opened up to transactions, including leases, through

have limited interaction with local communities, and when they do, it has historically been perceived as exploitative.[32] A lack of friendly or familial ties between local communities has at times translated into open conflict when mining operations have exacerbated scarce resources and inter-group competition.[33]

The extractive industry has dominated the economic development of PNG since the State's independence in 1975. In 2016, the extractive sector accounted for over a quarter of PNG's GDP and represented 42% of GDP growth.[34] As such, the national government has significant interest in continuing to transform its natural resources into national revenue.[35] Transnational mining companies have taken advantage of this fact by leveraging PNG's need for resource extraction revenues into massive exports into lucrative markets.[36] Despite the inherent and increasing volatility of commodity prices in the global marketplace,[37] PNG continues to rely heavily on mining ventures to develop its economy.[38] Incredibly rich in natural resources,[39] PNG has also been heavily studied as a prototypical example of a "resource-cursed" state.[40]

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mechanisms such as land registration": "Breaking New Ground: Investigating and Prosecuting Land Grabbing as an International Crime", Allard International Justice and Human Rights Clinic (Vancouver: Allard School of Law, February 2018) at 14.

[32] May, *State and Society*, *supra* note 27 at 52. The resulting model of governance has been termed "micronationalism", in which a "varied collection of movements" and disparate groups "disengage from the wider economic and political systems imposed by colonial rule". *Ibid* at 48–49. Instead, groups tend to politically and culturally identify with the members of their tribes and the land they own, leading to a "localized form of identity politics" and conception of the land as "a form of social capital" that binds people together. UNDP Report, *supra* note 11 at 59. The system is premised on the concept of the "wantok" (tok pisin for "one talk") as the primary social and political unit within PNG, in which people related by language and ethnicity will band together. This concept also reinforces the concept of micronationalism, since the wantoks constitute a form of social security (in which they will care for their own health and education) and political allegiance.

[33] Shearman, *supra* note 30 at 199. Where historical divides have been known to exist between neighbouring communities, evidence has shown the stratification and breakdown of social norms, competition for resources and opportunities, and massive in-migration have created or exacerbated enmity between groups, up to and including violent civil conflict as seen in Bougainville: UNDP Report, *supra* note 11 at 60; Susanne Bonnell, "Social Change in the Porgera Valley" in Colin Filer, ed*, Dilemmas of Development: the Social and Economic Impacts of the Porgera Gold Mine, 1989–1994* (Canberra: ANU E Press, 1999) at 26 [*Bonnell*].

[34] According to a 2005 World Bank study, PNG ranked 3rd of 152 countries in subsoil minerals: Papua New Guinea Extractive Industry Transparency Initiative: Report for 2016 (Ernst & Young, 2017) at 25–26 [PNG EITI Report 2016].

[35] Due to high operating costs in PNG, the national government will often offer tax concessions in order to compete in the extractive industry and attract mining companies: Helen Rosenbaum, "The Socio-Political and Regulatory Context for Sea Bed Mining Papua New Guinea", The Deep Sea Mining Campaign, 2016, online:<http://www.deepseaminingoutofourdepth.org/wp-content/uploads/DSMC-PNG-Report-on-Deep-Sea-Mining.pdf>, at 15 [Rosenbaum (2016)].

[36] *Ibid*.

[37] UNDP Report, *supra* note 11 at 8.

[38] "MRA Annual Report: PNG to Continue its Dependence on Foreign Mining" *Papua New Guinea Mine Watch* (1 February 2016) online:<ramumine.wordpress.com/2016/02/01/mra-annual-report-png-to-continue-its-dependence-on-foreign-mining>.

[39] According to a 2005 World Bank study, PNG ranked 3rd of 152 countries in subsoil minerals: PNG EITI Report 2016, *supra* note 34 at 25.

[40] PNG was one of six countries that Richard Auty studied to define the phenomenon of the resource curse: Auty, RM, "Sustaining Development in Mineral Economies: The Resource Curse Thesis" (London: Routledge, 1993). Because taxes derived from extractive companies constitute a rent—i.e., a revenue that is derived while providing no measurable benefit to the wealth of the nation—they are a reliable and low effort method of supporting national

It is questionable whether the lucrative mining operations that have dominated PNG's geographical and economic landscape in the last 45 years have in fact benefited its people.[41] For over 30 years, both extractive companies (including Canadian ones) and the PNG national government have promoted the expansive production of mineral exports, yet there have been few discernible improvements in local infrastructure, social services, education, and health.[42] In terms of social progress, PNG ranks 154th of 188 countries on UNDP's Human Development Index, with two thirds of the population classified as "working poor" or below the poverty line.[43] PNG has been criticized for, *inter alia*, high levels of violence against women,[44] inequality and discrimination against women and indigenous peoples under the law,[45] failures in providing access to justice, failure to protect indigenous rights against extractive leaseholders, failure to adequately address the HIV epidemic, abuse and lack of training on the part of police, and insufficient regulatory frameworks.[46] Further, corruption remains a pressing issue: in 2017, PNG ranked 135th out of 180 countries on Transparency International's corruption index.[47] The legitimacy and motivations of the highest government officials have been the subject of significant concern in recent years.[48]

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economic growth. And, as one commentator observed, "leaders of rentier states can ignore their citizens because they have resource rents for income instead of citizen taxes", and accordingly "focus their capacity building on the resource sectors" rather than a broader economy. This allows them to keep taxes low, discouraging citizen unrest and citizen involvement in national politics, which in turn inhibits the development of a broad-based economy and robust democracy: Robert G Boutilier, "Raiding the Honey Pot: The Resource Curse and Weak Institutions at the Project Level" (2017) 4:1 The Extractive Industries and Society 310 at 311.

[41] See e.g. UNDP Report, *supra* note 11 at 2–4.

[42] Even where advances in infrastructure and social services have been noted, they have advanced far below comparable rates in surrounding nations. They have also generally been applied unevenly across groups of people and increased social inequality. Despite an economy that has grown 6.5% per annum since 1996, poverty levels remain relatively unchanged: UNDP Report, *supra* note 11 at 3–4.

[43] UNDP, *Human Development Report 2016,* online: <hdr.undp.org/en/countries/profiles/PNG>.

[44] The Special Rapporteur on violence against women reports "epidemic levels" of rape and sexual assault in PNG that constitute "a major threat to social stability and economic development": HRC, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequence*, *Mission to Papua New Guinea*, 18 March 2013, UN Doc A/HRC/23/49/Add.2 at para 27.

[45] HRC, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequence*, *Mission to Papua New Guinea*, 18 March 2013, UN Doc A/HRC/23/49/Add.2.

[46] HRC, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*, 7 March 2016, UN Doc A/HRC/WG.6/25/PNG/2 at para 71 [OHCHR Compilation].

[47] Transparency International Corruption Perceptions Index 2017, online: <www.transparency.org/news/feature/corruption_perceptions_index_2017>.

[48] See Ronald May, *Papua New Guinea in 2016: Growing Civil Frustration* (2017) 57:1 Asian Survey 194. See also the 2010 suspension of Prime Minister Somare on a corruption allegation: Liam Fox, "Former PNG PM Somare Named as Recipient in Singapore Money Laundering Case" *ABC News* 2 September 2016, online: <www.abc.net.au/news/2016-09-02/former-png-pm-somare-implicated-in-singapore-money-laundering-c/7810080>. Current Prime Minister Peter O'Neill was served with an arrest warrant in 2014 by PNG's anti-corruption body. In 2016, the three top anti-corruption officers were suspended, and recently, the PNG Supreme Court dismissed the charges: Eric Tlozek, "PNG Supreme Court Dismisses Warrant for Peter O'Neill's Arrest over Corruption Allegations" *ABC News* (14 December 2017) online: <www.abc.net.au/news/2017-12-15/pngs-supreme-court-quashes-arrest-warrant-for-pm-peter-oneill/9263744>.

The following sections will set out two very distinct aspects of PNG's extractive regulatory framework: first, the policies and legislation of the State (the regime as it exists on paper); and second, the administration and enforcement of those laws, also understood as the lived realities of PNG communities affected by mining operations.

2. Policies & Legislation

Throughout its policies and laws, the PNG national government repeatedly calls for promotion of sustainable natural resource development for the benefit of all peoples.[49] For instance, the PNG constitution creates national goals and directives, which call for the protection of basic human rights and for PNG's natural resources and environment "to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations."[50] The constitution later clarifies that although the National Goals are non-justiciable; it is the duty of all governmental bodies to give effect to them as far as lies within their respective powers.[51] The *Environment Act 2000* specifically lays out matters of national importance which include the preservation of traditional cultures, sources of clean water and food, areas of significant biological diversity and rare species, and the ability for land-owners to maintain control of their land.[52] The customary landowner laws of PNG provide that the State must obtain consent of local communities before issuing leases for resource development.[53] Progressive policy strategies have detailed the government's plan to achieve a more diverse economy and a sustainable future.[54] Unfortunately, the regulatory framework as a whole, as it is currently implemented—including primary and subsidiary legislation, administrative structures and processes, decision-makers, and common practices—does little to forward this progressive agenda.

Obtaining a Mining License

Under the current mining laws, transnational mining companies seeking to operate in PNG must comply with the processes set out in the *Mining Act 1992* and the *Environment Act* to obtain a Mining Lease (ML) or Special Mining Lease (SML).[55] The development of a major mining operation requires the explicit authorization of the head of state via the *Mining Act*.[56] While other

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[49] PNG, *Constitution of the Independent State of Papua New Guinea*, c 1; *National Strategic Plan Taskforce: Papua New Guinea Vision 2050*, Government of Papua New Guinea (2009), online: <actnowpng.org/sites/default/files/png%20version%202050.pdf>; Department of National Planning and Monitoring, *National Strategy for Responsible Sustainable Development for Papua New Guinea*, 2nd ed (2014), online: <www.planning.gov.pg/images/dnpm/pdf/StaRS.pdf>; PNG Draft Offshore Mining Policy (2013).
[50] PNG Constitution, *supra* note 479, Preamble.
[51] *Ibid* at art 25.
[52] PNG, *Environment Act 2000*, No 64, s 5 [*Environment Act*].
[53] Anderson, *supra* note 29 at 24–25.
[54] Most prominently *Vision 2050* and *Strategic Vision 2010–2030*, *supra* note 49.
[55] PNG, *Mining Act 1992*, No 20 (1992) [*Mining Act*]. Special Mining Leases are required for large scale mining operations, which also require a Mining Development Contract. Additionally, the *Mining Act* provides for the issuance of the following licenses: Exploratory License (s 24); Alluvial Mining Lease (s 52); Lease for Mining Purposes (s 70); Mining Easement (s 80).
[56] *Ibid*, s 33.

agencies provide additional easements and oversight,[57] discretion to approve rests with the authorities identified in the *Mining Act*, and ultimately, with the Prime Minister and the Minister of Mining. The key government bodies in regulating these processes are Cabinet Ministers, the Mineral Resource Authority (MRA), the Conservation and Environment Protection Authority (CEPA), the PNG Chamber of Mining and Petroleum, and the Department of Mineral Policy and Geohazards Management (DMPGM). Knowledge about the persons who occupy these roles, as well as their subsidiary panels and boards, is not widely published.[58]

The *Mining Act* vests ownership of all subsurface and marine natural resources in the State.[59] It regulates the exploration, development, infrastructure, transportation, and legal rights relating to mineral extraction. It creates a scheme largely based on discretionary application of powers created under the Act, exercised by the Minister for Mining, the Director of Mining, and the recommendations of the Mining Advisory Board, which consists entirely of personnel appointed by either the Director or the Minister. The Minister and the Director have ultimate discretion over the granting of exploration licenses and mining leases,[60] which create exclusive rights to occupy and do everything necessary to the land for its operations.[61] An application for a mining lease must include a survey, proposal for operations, technical and financial statements,[62] and an environmental impact assessment or statement (EIA or EIS).[63]

The *Mining Act* has been criticized for its focus on promoting development and relative lack of substantive provisions for protection of communities and of landowners' rights.[64] It gives the State ownership of all minerals within customary lands[65] and allows it to contract directly with the company.[66] In doing so, the national government can legally modify revenue laws—for example, to make tax exemptions and concessions[67]—with specific mining projects, the details of which are governed by contract law and are not disclosed. The *Mining Act* contains scant mention of consultation with local stakeholders and nothing at all addressing indigenous rights or concepts

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[57] See e.g. *Mining (Safety) Act and Regulation 1977*; *Customs Act 1951* (c 101); *Public Health (Sanitation and General) Regulation 1973* (c 226G).

[58] As discussed further below, these organizations, their interactions, and their processes all suffer from a lack of transparency: Interview with Bismarck Ramu Group, 21 March 2018 [*Interview with BRG*].

[59] *Mining Act*, *supra* note 55, s 5. This is a highly contentious law that does not accord with conceptions of land rights in rural communities, which understands the subterranean resources—and anything else underground—to belong to the corresponding owners on the surface: UNDP Report, *supra* note 11 at 60. See also the autonomous region of Bougainville's attempts to reform this law: Asia Pacific, "Mining, Law, and War: Bougainville's Legislative Gamble" (2016), online: <journals.sagepub.com/doi/pdf/10.1177/1037969X1604100116>.

[60] *Mining Act*, *supra* note 535, ss 20, 33, 38.

[61] *Ibid*, s 41.

[62] *Ibid*, s 42(b).

[63] *Environment Act*, *supra* note 52, s 51.

[64] See e.g. Jeffery Elapa, "Mining Laws in Need of Review" *Post Courier* (27 November 2017) online: <ramumine.wordpress.com/2017/11/28/mining-laws-in-need-of-review>; Blue Ocean Law & the Pacific Network on Globalization, *Resource Roulette: How Deep Sea Mining and Inadequate Regulatory Frameworks Imperil the Pacific and its Peoples*, online: <cer.org.za/wp-content/uploads/2016/08/Resource-Roulette-Deep-sea-Mining-and-Inadequate-Regulatory-Frameworks.pdf> at 35 [Resource Roulette].

[65] Section 5, *supra*; such provisions are common in other jurisdictions such as in Canada, where constitutional jurisdiction over mineral resources is granted to the provincial Crown, except where Aboriginal Title is proven.

[66] Section 18. This occurred with the Ramu Nico mine so that the state could offer MMC significant tax concessions. See PNG EITI Report 2016, *supra* note 34 at 81.

[67] See e.g. the national government's contract with MCC with respect to Ramu mine, *below*.

of FPIC. There are no provisions reflecting any substantial environmental concerns, and the precautionary principle[68] plays no part whatsoever in the described decision-making process. Once an interest has been granted, the *Mining Act* gives broad powers to the company to use the land to the extent it requires in order to fulfil its mandate.

Case in Point: The Solwara 1 Application Process

In 1997, Nautilus Minerals received the first of its dozens of exploration licenses for various tenement locations in the Bismarck and Solomon Seas. In 2011, Nautilus possessed 51 licenses covering an area of more than 108,000 km^2 and had applied for another 89,000 km^2.[69] Instead of first developing an offshore mining operation permitting framework, the government applied the onshore processes of the *Mining Act 1992*.[70] PNG legislators are reportedly in the process of developing an offshore mining policy, which has still not been passed into law. Some commentators have observed that PNG "seems to do mining first, and makes laws afterwards."[71] In contrast, other nations who have contemplated seabed exploitation have developed legal frameworks prior to contemplating exploration.[72]

In 2006, Nautilus commenced exploratory drilling in hundreds of locations to collect samples.[73] Later that year, Nautilus submitted a Notification of Preparatory Work on Level 2 and 3 activities to the Department of Environment and Conservation (DEC—the predecessor to CEPA).[74] An Environmental Inception Report was submitted and approved within 3 months.[75] As a Level 3 project, Nautilus was required to submit an EIS, which they did in October 2008. In April 2009, a Mining Warden held a hearing for the lease.[76] Despite a reportedly overwhelming negative response from people attending the hearing,[77] DEC issued the final Environmental Permit in December 2009 for a term of 25 years.[78] In January 2011, Nautilus was

[68] See: *infra* Section III.B.
[69] Helen Rosenbaum, *Out of Our Depth: Mining the Ocean Floor in Papua New Guinea* (2011) at 12–13 [Out of Our Depth].
[70] Rosenbaum (2016), *supra* note 35 at 13.
[71] Resource Roulette, *supra* note 64 at 29.
[72] See e.g. New Zealand, *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012*, No 72 (2012); Tonga, *Seabed Minerals Act 2014*, No 10, online: <http://faolex.fao.org/docs/pdf/ton143350.pdf> ; Cook Islands, *Seabed Minerals (Prospecting and Exploration) Regulations 2015*, online: <www.seabedmineralsauthority.gov.ck/PicsHotel/SeabedMinerals/Brochure/2015Tender/Seabed%20Minerals%20_Prospecting%20and%20Exploration_%20Regulations%202015_2.pdf>; Fiji, *International Seabed Mineral Management Decree 2013*, No 21, online: <www.paclii.org/fj/promu/promu_dec/ismmd2013351>; Tuvalu, *Seabed Minerals Act 2014*, online: <tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/2014/2014-0014/TuvaluSeabedMineralsAct_1.pdf>.
[73] Out of Our Depth, *supra* note 69 at 16.
[74] *Ibid.*
[75] Nautilus Minerals Niugini Ltd, *Environmental Impact Statement: Solwara 1 Project* (Coffey Natural Systems, 2008) [Solwara 1 EIS].
[76] Out of Our Depth, *supra* note 69 at 16.
[77] Interview with BRG, *supra* note 58.
[78] Out of Our Depth, *supra* note 69 at 16.

granted a twenty year mining lease for Solwara 1.[79] Public opposition has continued throughout the approval process and exists to this day.[80]

Given the highly experimental nature of deep sea mining (DSM) and potentially severe ecological consequences,[81] PNG does not appear to have utilized the full potential of its legislation to ensure the protection of local communities. While the Director of Environment has wide latitude to impose conditions on the operation, there is no evidence that any meaningful constraints were placed on the company.[82] Civil society organizations have commented that the rigour applied in the approval process was "questionable", and that it ultimately "failed to protect the health of the marine environment, the livelihoods and well-being of coastal communities, and fisheries of national and regional economic importance".[83]

Environmental Protections in National Legislation

CEPA is responsible for administering the permitting process set out in the *Environment Act*. This process provides for a multi-tiered assessment of environmental impacts, using both a director and a panel of appointed persons with experience in environmental matters. Under the legislation, companies wishing to obtain a mining lease must: complete an Environmental Inception Report (EIR), to include potential environmental and social issues; complete an EIS, to include proposed courses of action to mitigate such issues; and initiate a formal process of stakeholder consultation.[84] Any approved proposal may also have to comply with conditions such as taking actions to mitigate potential damage, preparing audits and reports, conducting baseline studies prior to commencing operations, or rehabilitating an affected area.[85] The Director assesses the EIS, can refer the EIS to other bodies for additional assessment, and makes the report available for public review.[86] If the Director rejects the EIS, an appeal is available to the company. If the Director accepts it, he passes it to the Environmental Council for assessment and recommendation to the Minister.[87] Overall, the *Environment Act* possesses many of the same characteristics and processes as its Canadian counterpart, which in theory has the capability of supporting a robust system of checks and balances.

Other parts of the legislative regime are cause for more concern. Upon closer inspection, there is ample potential for conflict of interest and undue influence in terms of revolving doors and

[79] *Ibid*.
[80] The most notable recent example being the legal proceedings launched by citizens concerned by the project with the assistance of the Center for Environmental Law and Community Rights (CELCOR): "World First Mining Case Launched in PNG over Nautilus' Solwara 1 Experimental Seabed Mine" *Asia Miner News* (3 January 2018) online: <www.asiaminer.com/news/latest-news/9139-world-first-mining-case-launched-in-png-over-nautilus-solwara-1-experimental-seabed-mine.html#.WsFTNWYZP-Y>.
[81] *Ibid* at 18–21.
[82] Especially considering the speed with which the approval process was moved through the system, the lack of scientific rigour in the EIS, and disingenuous consultation efforts that resulted from the process. Rosenbaum (2016), *supra* note 35.
[83] Out of Our Depth, *supra* note 69 at 16.
[84] *Environment Act*, *supra* note 52, ss 52, 53, and 55.
[85] *Ibid*, s 66.
[86] *Ibid*, s 55–57.
[87] *Ibid*, s 56.

lack of independence between and within agencies. For example, the Director of Environment is also the Chairperson of the Environmental Council, and presumably wields considerable influence over the secondary consideration of an EIS.[88]

Another area of concern is the *Environment (Water Quality Criteria) Regulation 2002* provision, which permits the dumping of toxic wastes into PNG's rivers and coastal waters.[89] Such activities have been banned in other countries for decades.[90] On this authority, the mines at Ok Tedi and Porgera discharge mine tailings into local rivers, creating "mixing zones" that span 200 and 150 kilometres, respectively.[91]

Public Consultation Requirements in National Legislation

Based on customary laws of land ownership, corporations operating in PNG should face a heavy burden of consultation and negotiation in order to obtain access to mining sites, similar to Canadian constitutional protections for aboriginal land rights.[92] In reality, however, Canadian mining companies operating in PNG obtain access to traditionally owned lands with relative ease and limited, if any, community consultation.

Public consultation is only minimally discussed in PNG legislation. A state official called a warden has the power to accommodate hearings over objections to mining applications.[93] Wardens also supervise the requirement to set out compensation agreements with landholders prior to the approval of a lease.[94] Typically, public commentary will be sought prior to the granting of an exploratory licence,[95] though it is not clear what effects such comments might have. Prior to the approval of a Special Mining Lease, the Minister may convene a "development forum" with

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[88] *Ibid*, s 17.
[89] PNG, *Environment (Water Quality Criteria) Regulation 2002*, No 28 (2002) at ss 3–4. The regulation provides that in the absence of other laws to regulate the conduct, riverine and submarine tailings disposal is permissible.
[90] Resource Roulette, *supra* note 64 at 31. There are only three areas that practice riverine tailings disposal in the world: two of them are Porgera and Ok Tedi and the third is on the Indonesian side of the island of Papua: Gold's Costly Dividend, *supra* note 4, at 74. In their 2003 Final Report on the Extractive Industry, the World Bank (WB) agreed with the call to ban of riverine tailings disposal, citing the extensive environmental harms and stating that "no WB-supported mine should use riverine tailings disposal" (at 56): World Bank Extractive Industries Review (2003), online: <openknowledge.worldbank.org/bitstream/handle/10986/17705/842860v10WP0St00Box382152B00PUBLIC0.pdf?sequence=1> at. At least three major transnational companies have made public statements not to use riverine disposal in the future (at 31). The report also recommends that STD "should not be used until balanced and unbiased research, accountable to balanced stakeholder management, demonstrates its safety".
[91] Mining and Critical Ecosystems: Mapping the Risks, World Resources Institute (2003), online: <https://www.ifc.org/wps/wcm/connect/da7df1804bac169da8d7bc54825436ab/06.6+Volume+VI+-+6+Mining+%26+Critical+Ecosystems+-+Mapping+the+Risks%2C+Extractive+Industries+Review+Report.pdf?MOD=AJPERES>.
[92] UNDP Report, *supra* note 11 at 60.
[93] *Mining Act*, *supra* note 55, s 105.
[94] *Ibid*, ss 108, 154–58.
[95] UNDP Report, *supra* note 11 at 21.

persons he considers representative of the developer, the landholders, and the national and provincial governments. What this means in practice, as discussed below, is highly variable.[96]

The relationships between the public, the national government, and extractive companies are further shaped by various laws that derogate from established best practices with respect to governance and transparency. For example, the *Mining Act* allows the national government to acquire a participating interest of up to 30% in the mining project—a right the government has consistently exercised.[97] This practice is increasingly used by host nations to become directly involved in mining operations as a means to promote "resource nationalism" and exert greater control over strategic economic outcomes.[98] While arguably economically beneficial, this practice remains problematic for multiple reasons. First, in creating a vested financial interest, even need, in ensuring the continued operation of the mining site, the national government effectively abrogates the ability to regulate the industry impartially.[99] Second, the acquisition is normally conducted through payment of "sunk costs" (paying a share of the project's historic costs) with the prospect of receiving a share of future profits. In the case of Solwara 1, this has amounted to the national government effectively "paying Nautilus's bills" with a $118 million USD equity stake which it funded through a bank loan, thereby increasing its already substantial sovereign debt and worsening its poor credit rating[100]; meanwhile the prospect of earning any profit through future dividends from Nautilus's high-risk experimental venture becomes increasingly unlikely.[101]

PNG's legislative framework has received mixed reviews and been labeled "maturing".[102] Since 1998, the Department of Mineral Policy and Geohazards Management has been developing new laws to revise the *Mining Act*. Changes to the *Mining Act*, Sustainable Mining Development Policy, and Offshore Mining Policy may significantly alter the landscape of the legislative regime and help guide resource development in a more sustainable direction.[103] Presently, there remain issues to be addressed by law reform, including provision for sufficient control or review of discretionary decisions, independence amongst regulatory and decision-making bodies, transparency, and sufficient control mechanisms to emphasize social and environmental impacts. More critically than law reform, however, are the adequacy of governance and the administrative institutions themselves.[104] The following section explores concerns about implementation and

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[96] Some observers note that in practice, these development forums are sites of negotiation of benefit agreements between the company, the national and provincial governments, and the land-holders. The company tends to play a minimal role, suggesting that the true bargain is struck between the government and the identified local stakeholders. See Colin Filer, "Introduction" in Colin Filer, ed*, Dilemmas of Development: the Social and Economic Impacts of the Porgera Gold Mine, 1989–1994* (Canberra: ANU E Press, 1999) at 3 [Filer].

[97] *Mining Act*, *supra* note 55, s 16A.

[98] UNDP Report, *supra* note 11 at 8. See also Barrick's involvement with the government of Tanzania, in which the government sought an interest in the venture. They bargained for a 16% free carry interest: Omar Mohammed, "Barrick Strikes $300 Million Deal with Tanzanis in Acacia Fight" *Bloomberg* (19 October 2017) online: <www.bloomberg.com/news/articles/2017-10-19/barrick-agrees-to-pay-tanzania-300m-in-acacia-tax-dispute>.

[99] Interview with BRG, *supra* note 58.

[100] Resource Roulette, *supra* note 64 at 28-29.

[101] See discussion of Solwara 1, *infra*.

[102] Alexandra Blood, "Approvals and Regulation in Papua New Guinea" *AusIMM Bulletin* (December 2015) online: <www.ausimmbulletin.com/feature/approvals-and-regulation-in-papua-new-guinea>.

[103] See UNDP Report, *supra* note 11 at 39–40.

[104] *Ibid* at 23.

enforcement of PNG's legislation, and how this has both affected and been taken advantage of by MNCs operating in PNG.

3. Problems Associated with Implementation of the Regulatory Regime

While PNG has generated significant revenue from decades of mining operations, much of the benefit has been concentrated in certain privileged groups, led to heightened conflict, and made little lasting positive change for most people.[105] In fact, communities around mines have reported being worse off than before the project began.[106] The interests of mining companies and the officials within the national government have consistently taken precedence over those of indigenous communities.[107] This section will describe the way the law is applied in PNG in four parts, addressing: (1) transparency and administrative processes; (2) systemic problems of implementation, enforcement, and accountability; (3) what environmental regulation looks like in reality; and (4) whether consultation actually exists.

Transparency and Procedure

In PNG, decisions and processes with respect to mining projects are hidden by a critical lack of transparency. There is a general lack of available information about how decisions are made, the conflicts and interests of the individuals making the decisions, and the substance of the decisions themselves.[108]

At times, it appears that the process is an arbitrary one, based on motivations unrelated to the national goals articulated in the *Environment Act*, or that a decision has been made prior to the engagement of any processes whatsoever, including EIAs or community consultation.[109] This notable lack of procedural structure is in stark contrast to the Canadian requirements of administrative decisions.[110] There is considerable opportunity for corruption to enter into the process, with reports of officials and lawmakers being swayed with direct payments and other forms of bribery into approving various resource projects.[111]

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[105] This is effectively the manifestation of the resource curse: the revenues derived from resource extraction projects have increased corruption, violence, and civil strife, and done little to alleviate poverty and social inequality. See discussion from UNDP Report, *supra* note 11.
[106] Filer, *supra* note 96 at 6. See also generally Gold's Costly Dividend, *supra* note 4.
[107] Interview with BRG, *supra* note 58.
[108] Resource Roulette, *supra* note 64 at 29.
[109] See e.g. Out of Our Depth, *supra* note 69 at 28, where interviewees at CEPA described their disillusionment with political control over their work, including reports of DEC secretaries signing off on EISs without allowing staff time to assess them.
[110] Compare the CEAA process, *infra*.
[111] Resource Roulette, *supra* note 64 at 30. One commentator refers to "ridiculously corrupt" officials and "epidemic levels of corruption" that exist on the part of the national government, where ministers will make decisions completely unconnected to the requirements of the law. Interview with BRG, *supra* note 58.

Similarly, the implementation of laws in PNG has proven to be flexible, bending along with the needs of the government and corporations.[112] Mining companies have reportedly written their own policies governing the mining operations and oversight of environmental standards.[113] In one instance occurring in 2010, PNG's national legislature actually amended the *Environment Act* to allow regulators to exempt proponents from legal liability from environmental destruction and adverse health effects.[114] This act sent a clear signal to civil society, MNCs, and PNG citizens that, in assessing the balance between development of natural resources and sustainable benefits for future generations, the national government was willing to sacrifice fundamental rights and the health of its citizens in order to push the extractive agenda.[115]

The inception of the PNG Extractive Industries Transparency Initiative (EITI) program[116] has provided a window into the true relationship between mining companies, the national and provincial governments, and local stakeholders[117]—one that evinces a high level of dysfunction. The flow of money between parties is particularly illuminating. According to the 2016 EITI report,

> There are four principal channels by which communities benefit economically from mining projects, other than through employment and procurement: Royalties, Infrastructure Development Grants, Special Support Grants, and the Public Investment Program. The benefits for a particular project are agreed in a development forum with relevant stakeholders, including the State, company, provincial government, local level government and landowners, and set out in a Memorandum of Agreement. These agreements are not publicly disclosed.[118]

The lack of disclosure is problematic in its own right. More troubling, however, is the fact that inquiries as to the flow of funds between government and industry reveal significant discrepancies.[119] Multiple extractive companies do not pay income taxes, group taxes, or royalty

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[112] See the 2010 amendments to the Environment Act to facilitate the agreement for the Ramu nickel mine, *infra*.
[113] Shearman reports allegations that MCC's lawyers actually wrote the amendments to the law to allow tailings dumping into coastal waters off the coast of Madang: Shearman, *supra* note 30 at 202; see also *Resource Roulette*, *supra* note 64 at 30.
[114] At the time, Prime Minister Somare defended this measure as necessary to ensure the success of the Ramu Nickel mine. The amendment was passed as a direct response to a group of landowners seeking an injunction to stop coral blasting to lay STD pipes. This blatant use of legislative power to shut down a concerted effort of the stakeholders in Madang evoked significant protest and media attention, in response to which the state reportedly issued an order prohibiting people from discussing this matter any further on pain of being charged with contempt of court: Jamie Kneen, "Support for Mining Over Democratic Principles in Papua New Guinea" *Mining Watch Canada* (18 July 2010) online: <miningwatch.ca/blog/2010/7/18/support-mining-over-democratic-principles-papua-new-guinea>.
[115] One commentator refers to this legislative act as "prostituting one's country for international capital": Shearman, *supra* note 30 at 201. This amendment was later repealed by the subsequent government under Prime Minister O'Neill.
[116] The EITI is a global initiative to increase transparency in the extractive industries by producing annual reports disclosing revenues and processes: <eiti.org>. Its value is qualified somewhat by its voluntary nature and the fact that states retain control over what information is disclosed.
[117] PNG EITI Report 2016, *supra* note 34.
[118] *Ibid* at 5.
[119] *Ibid* at 122–29.

payments – amounts that account for more than half of national revenue streams.[120] Moreover, even when funds are set aside, ostensibly for the benefit of local communities, they are managed by the state-run Mineral Resources Development Company (MRDC), which has been reported to pressure local communities into compliance with mining proponents' interests while providing few actual benefits to communities.[121]

Conflicts of interest abound throughout the PNG government structure,[122] revealing collusion between a circle of high-level ministers and foreign mining companies.[123] As mentioned above, the increasingly popular method of strategic investment through purchases of an equity stake in the mining operation itself also represents a conflict of interest.[124] This problematic alignment of state and company interest cannot be overstated: the State cannot be an effective regulator, especially in the context of such a non-transparent governance model, if it has a vested interest in controversial operations going forward despite community protest. Conflict of interest is ubiquitous amongst PNG government agencies, even outside the decision-makers themselves. In the context of the mining application process, both CEPA and the MRA are financed through cost recovery from resource projects; thus they have a vested financial interest in pushing a project ahead rather than delaying it.[125] Moreover, corruption amongst high-level ministers is of perennial concern.[126] Various decision-making bodies suffer from a "revolving-door" policy in which some individuals move through agencies with conflicting mandates. To provide one such example, the Mining Minister who approved the Mining Lease for Solwara 1 later oversaw Nautilus's EIA as the Minister of Environment—and also has reported ties to the logging industry.[127]

The lack of publication and availability of documents is another significant barrier to transparency. Attempts to obtain copies of reports, decisions, and even laws have been met with confusion and resistance.[128] In fact, even staff members at CEPA and the MRA have shown a lack of knowledge and ability to produce basic procedural documents.[129] The Solwara 1 project has come under fire from local communities for not disclosing key documents from the approval process—to the point where a group of citizens has initiated court proceedings in order to gain access to information about the project.[130]

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[120] *Ibid*. For example, in negotiating with MCC for the Ramu mine the national government conceded a 10-year "tax holiday", in which the company would pay no taxes. This deal effectively concedes the rights of landholders—who will receive no royalty payments—to the foreign mining operation free of charge for reasons not available to the public: Highlands Pacific, "Announcement: Ramu Project – State Agreement Signed" (10 August 2006) online: <www.highlandspacific.com/_literature_5259/State_Agreement_Signed>.

[121] Interview with BRG, *supra* note 58.

[122] See e.g. UNDP Report, *supra* note 11 at 23–24, citing the systemic politicization and unaccountable nature of the bureaucracy.

[123] Interview with BRG, *supra* note 58.

[124] *Supra* note 120.

[125] Rosenbaum (2016), *supra* note 35 at 6, 21.

[126] May, *supra* note 25. See also Interview with BRG, *supra* note 58.

[127] Resource Roulette, *supra* note 64 at 30.

[128] See e.g. Rosenbaum (2016), *supra* note 35 at 20, 23, 26-27. Neither CEPA nor the Minister for the Environment appears to publish decisions online. At the time of writing, CEPA does not appear to have an online presence where any material can be accessed with respect to its supervisory role.

[129] Interview with BRG, *supra* note 58.

[130] See CELCOR case, *supra* note 103.

PNG's participation in the EITI has demonstrated some resolve to increase confidence in PNG's extractive industry. However, after four annual reports, there is little evidence of implementation of recommendations with respect to publishing government documents and decisions for critical review and public benefit.[131]

Accountability, Enforcement, and Access to Justice

The UN High Commissioner for Human Rights has recently commented that although PNG has some "exemplary laws and policies in place to protect human rights . . . they are reportedly often not enforced".[132] He pointed out human rights abuses specifically caused by the operations of the extractive industry, including "unacceptable" mining leases resulting in violations of land rights and forced evictions.[133] He also attributed abject poverty, acute levels of malnutrition, systemic gender-based violence, and police brutality nationwide, to the absence of enforcement and accountability.[134] Corruption, the absence of strong rule of law, and weak democratic processes/institutions make it exceedingly difficult for civil society actors to engage and influence political decision-makers.

In practice, there is little promise of access to justice in PNG for the harms generated by extractive operations. Victims of unlawful behaviour are hesitant to go to the police for help.[135] Complaints submitted to public authorities about the human rights and environmental impacts of mining operations have gone largely unheeded.[136] National enforcement mechanisms have little consistency in the lives of most people in PNG. The judicial system is largely inaccessible, forcing most grievances before customary village courts.[137] When extractive-industry injustices do come before the courts, judicial efficacy is often undermined by the ability of the national government to suspend judges and to simply ignore or otherwise circumvent court orders.[138] As evidenced by

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[131] PNG EITI Report 2016, *supra* note 32 at 15.

[132] Stefan Armbruster, "UN Calls Out PNG Over Litany of Human Rights Abuses" *SBS News* (9 February 2018) online: <www.sbs.com.au/news/un-calls-out-png-over-litany-of-human-rights-abuses>.

[133] *Ibid*.

[134] *Ibid*.

[135] See e.g. Gold's Costly Dividend, *supra* note 4 at 53.

[136] There have been significant public outcries following the approval of the Ramu Nico mine in Madang and the deep-sea mining proposal in Manus Basin. Over a thousand local landowners launched a decade-long legal battle in opposition to the Ramu mine and the impact it would have on the local environment and in turn on the livelihoods of the some 30,000 local fishermen. In 2011, the National court accepted that the operation would be an environmental disaster but dismissed the application. An appeal to the Supreme Court was rejected: Mohamed Hassan, "PNG's Raum NiCo Mine: An Environmental Time Bomb?" *Pacific Media Centre* (8 November 2012) online: <www.pmc.aut.ac.nz/articles/pngs-ramu-nico-mine-environmental-time-bomb>.

[137] CEDAW, *Concluding Observations for Papua New Guinea*, 30 July 2010, UN Doc CEDAW/C/PNG/CO/3 at para 17 [CEDAW Concluding Observations for PNG 2010]. In such courts, it is the customary law and not the national law that rules—customary law that tends to discriminate against women and reinforce gender stereotypes: at paras 17 and 25. See generally Jean G Zorn, "Customary Law in Papua New Guinea Village Courts" (1990) 2:2 Contemporary Pacific 279.

[138] See e.g. Global Witness, *The People and Forests of Papua New Guinea Under Threat: the Government's Failed Response to the Largest Land Grab in Modern History: Briefing* (November 2014) online: <www.globalwitness.org/en/campaigns/land-deals/papua-new-guinea-one-biggest-land-grabs-modern-history>. See

the Porgera gold mine, police forces in PNG can be unreliable, as well as subject to reports of abuse or ineffectiveness, as well as conflicts of interest.[139] With respect to the epidemic of violence against women, police are especially untrustworthy.[140] Commenting on these deficiencies in its 2010 Concluding Observations on PNG, the Committee on the Elimination of Discrimination against Women noted that the State does not have an effective legal complaints mechanism outside of the police, particularly for women.[141]

In instances where the judiciary has stepped in, its court orders have often been ignored. In 2014, the National Court ordered Ok Tedi to stop dumping waste tailings in the Ok Tedi and Fly rivers—an order that would have effectively shut down the mine.[142] The Prime Minister called the potential loss of the mine's income "horrendous"[143], and Ok Tedi continues to operate to the date of this publication. Similarly, following a campaign by local landowners whose trees were being harvested without their consent, the PNG Supreme Court ruled in 2016 that a Special Agriculture Business Lease for logging in East Sepik Province was invalid, declaring operations there illegal.[144] Following this ruling, PNG's National Forest Board granted a new licence under a different process with a different group of landowners to the same foreign logging company, and the same forest continues to be cleared.[145] Government departments issuing legally questionable 99-year leases that strip generations of local land ownership have been the rule, rather than the exception, with at least 12% of customary land in PNG now alienated through the SABL system.[146]

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also Liam Cochrane, "PNG Prime Minister Peter O'Neill Sacks Attorney General for Opposing Attempts to Change Constitution" *ABC News* (17 June 2014) online: <www.abc.net.au/news/2014-06-18/png-attorney-general-sacked/5531198> [*Global Witness*].

[139] See e.g. the alleged rape and unlawful confinement by police officers: Hilary Beaumont, "Houses Burned, Women Raped" *Vice News* (30 March 2017) online: <news.vice.com/en_ca/article/bjd4pm/violence-escalating-at-notorious-mine-co-owned-by-canadian-company-locals-say>.

[140] See Gold's Costly Dividend, *supra* note 4 at 46, reporting that "[f]ear of sexual harassment and violence by police inhibits effective functioning of the justice system since victims are often afraid to report crimes to police." The report also cites the Special Rapporteur on Torture's report that PNG police officers would "frequently arrest women for minor offences with the intention of sexually abusing them." Police in Porgera and other resource operations are often directly paid, housed, and/or fed by mining or logging entities. *Ibid* at 10. See also Australian Conservation Foundation/CELCOR, "Bulldozing Progress: Human Rights Abuses and Corruption in Papua New Guinea's Large Scale Logging Industry", accessed 22 July 2018, online: <https://d3n8a8pro7vhmx.cloudfront.net/auscon/pages/1153/attachments/original/1467021323/ACF_Bulldozing_Progress.pdf>.

[141] CEDAW Concluding Observations for PNG, *supra* note 137 at paras 19–20.

[142] Liam Cochrane, "PNG Court Orders Ok Tedi to Halt Dumping Waste" ABC News, 26 Jan 2014, online: <www.abc.net.au/news/2014-01-26/an-png-court-orders-ok-tedi-to-halt-waste-dumping-in-river/5219838>.

[143] "Papua New Guinea's Ok Tedi Copper Mine Operating Normally" Reuters, 29 Jan 2014, online: <www.reuters.com/article/oktedi-copper/papua-new-guineas-ok-tedi-copper-mine-operating-normally-idUSL3N0L32B920140129>.

[144] Johnny Blades, "Loggers Still Operating on PNG Lease Despite Court Ruling" Radio New Zealand, 22 February 2018, online: < www.radionz.co.nz/international/pacific-news/351026/loggers-still-operating-on-png-lease-despite-court-ruling>.

[145] *Ibid*.

[146] Shearman, *supra* note 30 at 200. See also Global Witness, *supra* note 138, citing the decision of the National Executive Council directing the Department of Lands to stop issuing SABLs due to their exploitative nature and direct threat to community land interests. The Department has continued to issue SABLs since that time: PNG National Executive Council, Decision No 184/2014: Ministerial Committee on SABL, available online: <actnowpng.org/content/full-nec-decision-sabl-land-grab>.

Realities of Environmental Regulation

With respect to environmental harm and the mining industry, PNG mines have been held up globally as an example of industry "worst" practice.[147] The UN Development Programme (UNDP) maintains that environmental impacts of the extractive-intensive economy in PNG have had the most damaging effect on sustainable human development.[148] The effects of poor decision-making, management, and weak regulation persist for decades and beyond.[149]

The disaster at the Ok Tedi mine has consistently demonstrated the extent to which environmental concerns are measured against other interests.[150] Researchers have concluded that the conditions in PNG preclude mining in an environmentally sound way: heavy rainfall, steep terrain, and a seismically unstable land base make PNG the highest ranked country in difficulty to manage tailings "by a wide margin."[151] In 2002, in what by all accounts appears as an attempt to escape from liability for environmental damage, the corporation BHP Billiton exchanged its interest in the mine to the national government for legal immunity.[152] In 2008, a river scientist who had worked at Ok Tedi called the build-up of sulfur-laden mine waste in downstream floodplains "a nightmare waiting to happen".[153] In 2013, the national government nationalized the mine, a decision called a "lack of good faith" by BHP and a "slap in the face" to local landowners, as the State had unilaterally seized the mine's assets and subjected the funds meant to benefit the community to political manipulation.[154]

This theme of national government pushing a project forward despite their own ostensible regulatory regime—and indeed, despite national interests identified in the *Environment Act*—persists. The Ramu Nickel mine in the Madang province was and continues to be known for its heavy use of Submarine Tailings Disposal (STD), a process which annually dumps 5 million tonnes of waste tailings into coastal waters under the pretext that waste can be contained in a single ocean layer and that with enough mixing, the effects will be diffuse and minimal.[155] Despite

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[147] UNDP Report, *supra* note 11 at 66.
[148] *Ibid*.
[149] See e.g. the Ok Tedi riverine tailings disposal and subsequent environmental disaster and conflict: *Ibid*.
[150] There, the Australian proponent's EIS was approved in spite of being extremely limited in scope. A second EIS was later funded but it was only delivered a year after the construction had begun. Two years later, a land slide destroyed the tailings containment dam, dumping all the contained waste into the Ok Tedi and Fly rivers, creating an immense dead zone in a river that was previously identified as a biodiversity hotspot—an effect that is still felt and indeed growing to this day: Schoenberger, *Environmentally sustainable mining: The case of tailings storage facilities*, Resources Policy 49 (2016) 119 at 121 [Schoenberger].
[151] *Ibid*.
[152] Liam Fox, "PNG Government Takes Control of Ok Tedi Mine, Repeals Laws Protecting BHP from Legal Action over Pollution" *ABC News* (19 September 2013) online: <www.abc.net.au/news/2013-09-19/png-government-takes-control-of-png-ok-tedi-mine/4967004> [*Fox*].
[153] Anna Salleh, "PNG Warned of Environmental Mining Disaster" *ABC News* (6 September 2008) online: <www.abc.net.au/news/2008-09-06/png-warned-of-environmental-mining-disaster/501510>.
[154] Fox, "PNG Government Takes Control of Ok Tedi", *supra* note 152.
[155] See IMO, Scientific Group of the London Convention, "Riverine and Sub-Sea Disposal of Tailings and Associated Wastes from Mining Operations around the World: The Need for Detailed Assessment and Effective Control", submissions by Greenpeace International, IMO Doc LC/SG 31/INF.14, 14 March 2008 [Greenpeace Report], citing a "substantial cause for concern to the marine environment", a "paucity of data on composition of tailings", and an impossibility to "describe or predict the scale of impacts" (at 4). See also Mineral Policy Institute,

significant pushback from local stakeholders and civil society,[156] the national government signed an agreement with the Chinese mining company without consulting any local stakeholders, giving extensive rights, including that of STD, to the company in exchange for an equity stake. The government also disregarded the opinion of its National Fisheries Authority who, in reviewing the Ramu EIS, concluded that the project was "unsustainable socially, economically and environmentally and cannot be allowed to proceed".[157] The national government also approved the project without hearing the results of the study it commissioned to determine the effects of the tailings.[158] Greenpeace observes that STD occurs routinely off the coast of developing countries by companies headquartered in developed countries, where such disposal methods would be politically unacceptable.[159] Riverine tailings[160] and deforestation[161] constitute other major threats to the natural environment that are largely dismissed in deference to the interests of resource extraction.

In recent years, Canadian company Nautilus Minerals has taken advantage of the precarious regulatory regime and operator-friendly environment in PNG to pursue the world's first commercial deep sea mine. The Solwara 1 deep sea mine project, explored in depth below, has been pushed through without a law dealing with offshore mining, proper intergovernmental coordination,[162] or an environmental management plan,[163] despite the potential for serious environmental harm.

Environmental Risks Associated with Submarine Tailings Discharge in Astrolabe Bay, Madang Province, Papua New Guinea (NSW: MPI, 1999): the viability of STD is premised on the ability to keep waste in a contained bathyal layer where no risk of upwelling and mixing exists. In Astrolabe Bay, where Ramu mine dumps its waste, such upwelling is "highly likely", causing toxic exposure to ecosystems and marine life along the coast and in multiple ocean layers. This is in addition to the smothering of benthic (floor-dwelling) species that is under-studied. The World Bank Extractive Industry Report further indicates that "almost all STD operations worldwide, whether disposing at shallow depths or in the deep sea, have had problems, including pipe breaks, wider than expected dispersal of tailings in the sea, smothering of the benthic organism (although this is predicted) and loss of biodiversity, increased turbidity, introduction to the sea and marine biota of metals and milling agents (chemicals, such as cyanide, detergents, and frothing agents)".

[156] See Mining Watch Canada & Project Underground, *STD Toolkit: The Ramu Nickel Cobalt Mine—a Disaster in the Making?* by Philip Shearman (2002), online: <miningwatch.ca/sites/default/files/04.STDtoolkit.PNG_.pdf>.

[157] Mohamed Hassan, "PNG's Ramu NiCo Mine: An Environmental Time Bomb?" Pacific Media Centre (8 November 2012) online: <www.pmc.aut.ac.nz/articles/pngs-ramu-nico-mine-environmental-time-bomb>.

[158] "A Brief History of the Ramu Nickel Mine and the Submarine Tailings Disposal Issue", Act Now! For a Better PNG.

[159] Greenpeace Report, *supra* note 155 at 1 (Annex).

[160] Riverine tailings are covered in domestic legislation as internal waters. Dumping mine tailings into rivers and streams causes increased sedimentation, turbidity, flooding, contamination of floodplain sediments, and in the case of the water systems downstream from the mines at Porgera and Ok Tedi, the burial of large swaths of tropical lowland rainforests and mangroves with a veneer of waste, causing dieback of vegetation on a large scale: Bernd G Lottermoser, *Mine Wastes: Characterization, Treatment, and Environmental Impacts*, 3rd ed (Heidelberg: Springer, 2010) at 229–33.

[161] See generally Shearman, *supra* note 30.

[162] The Fisheries Ministry reported concern about impact on fish stocks but it did not disseminate this information to the public: Resource Roulette, *supra* note 64 at 30.

[163] Deep Sea Mining Campaign, *Physical Oceanographic Assessment of the Nautilus EIS for the Solwara 1 Project*, by John Luick (2012) [Luick Report].

Not all deficiencies of regulation are due to poor regulatory practice; some are due to a lack of capacity. Funding and staffing at CEPA (as with the previous Department of Environment and Conservation) have been consistent problems, with CEPA lacking sufficient resources to monitor foreign companies' activities, leading some to describe mining operations in PNG as "self-regulating".[164] With respect to Toronto-based Nautilus, questions have arisen as to how CEPA could adequately oversee off-shore mining activities when the government does not have access to a functional fleet of sea-going vessels.[165] Ultimately, "much of the environmental governance with the extractives sector [in PNG] resides with the corporations themselves."[166]

Realities in Consultation

The government's close relationship to foreign mining companies[167] tends to manifest in superficial and insufficient consultation with communities, where it occurs. Public hearings likewise rarely seem to be aimed at procuring true consent.[168] Meanwhile, distrust of government and companies by local communities whose desires have not been taken seriously has become commonplace.[169] There is often little opportunity for community members to directly engage with the company, and no leverage for them to negotiate benefits since companies already enjoy the support of the national government.[170]

The conflicts of interest described above play out very clearly in consultations. State officials and company representatives often attend public hearings to ensure the project goes forward.[171] Regarding consultations for the Solwara 1 project, for example, some community members have expressed an inability to differentiate between agents of the company and those of the national government.[172] Others have called this process "role confusion" on the part of the government, in which state agents abdicate their role as representatives of the people.[173] In a recent warden's hearing regarding Solwara 1, all but two community members present expressed their desire for the project to be stopped, with only two abstentions, who were reportedly ward councillors courted by the company.[174]

Moreover, in PNG stakeholder identification can prove to be an insurmountable challenge when negotiating benefit agreements. The highland region surrounding Porgera mine is home to

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[164] The PNG Minister for Environment and Conservation's statement that he was unable to fulfill his responsibilities to manage resources and regulate projects due to lack of funding and human capacity, especially in comparison to the resources available to the resource sector: Out of Our Depth, *supra* note 69 at 27.
[165] Resource Roulette, *supra* note 64 at 31.
[166] UNDP Report, *supra* note 11 at 65.
[167] Some commentators have described the government as being "in bed" with foreign mining companies, and having comparatively little regard for the interests of its peoples: Interview with BRG, *supra* note 56. See also Fox, "PNG Government Takes Control of Ok Tedi", *supra* note 149.
[168] See: Rosenbaum (2016), *supra* note 35 at 7-8, 22.
[169] *Ibid* at 37; Interview with BRG, *supra* note 58.
[170] Interview with BRG, *ibid*.
[171] *Ibid*. See also Rosenbaum (2016), *supra* note 35 at 22;
[172] Resource Roulette, *supra* note 64 at 29.
[173] Interview with BRG, *supra* note 58.
[174] *Ibid*. The hearing took place in March of 2018.

the Ipili people, whose society is based on a form of cognatic kinship, meaning that individuals trace their ancestry through all four grandparents.[175] As a result, identifying the nature and extent of relationships amongst clans and competing groups can be problematic. In the case of Porgera, this led neighbouring peoples to seek a stake in the Porgera inflow of money.[176] In such an environment, mining companies face significant challenges in coordinating infrastructure and benefit agreements and are unlikely to be able to do so without inducing social conflict.[177]

Stakeholder Identification Challenges: Placer Dome and Misima Mine

Even where extractive companies aim to promote local development through cash inflows and infrastructure, they tend to ignore "the webs of existing relations in [PNG] communities that ensure economic security, enforce reciprocal duties, and regulate relations with the broader socio-political environment"[178] that exist in PNG, leading to adverse outcomes. A case in point is Canadian company Placer Dome's[179] gold mining operation on Misima Island.

Placer Dome's gold mining operation on Misima Island was a major adjustment for the local communities, who had previously depended upon subsistence and cash crop farming. Mine construction began in 1988, creating a workforce that totaled about 10% of the entire population of the island.[180] An influx of foreign workers, banks, entrepreneurs, and government officials significantly changed the composition and culture of the island.[181] The company made substantial efforts to mitigate some of the damage done by the presence of the mine,[182] including proposed royalty and compensation payments for the leaders of mine-affected local clans[183] and a beneficial trust fund for future generations.[184] It also attempted to provide economic opportunities and

[175] Bonnell, *supra* note 33 at 23.
[176] *Ibid*. See also Emma Gilberthorpe & Glenn Banks, "Development on Whose Terms?: CSR Discourse and Social Realities in Papua New Guinea's Extractive Industries Sector" (2012) 37 Resources Policy 185 at 191 [*Gilberthorpe & Banks*].
[177] *Ibid.*
[178] *Ibid*.
[179] Placer Dome Incorporated was a mining company based out of Vancouver, British Columbia, with extensive gold mining operations across the world. In 2006, the company was purchased by Toronto-based Barrick Gold, signaling Barrick's rise to the world's largest gold mining company. See: CBC News, "Placer Dome Accepts Barrick's Sweetened $10.4B US Takeover Bid" (22 December 2005) online: <www.cbc.ca/news/business/placer-dome-accepts-barrick-s-sweetened-10-4b-us-takeover-bid-1.518970>.The company's greatest notoriety came from the Marcopper Mine disaster in the Philippines, from which the company retreated, leaving the clean-up to others. See Kirsch, *supra* note 18. Placer Dome also faced human rights allegations during its operation of the gold and copper mine at North Mara, Tanzania, before Barrick took over: Geoffrey York, "Barrick's Tanzanian Project Tests Ethical Mining Policies" *The Globe and Mail*, (29 September 2011, updated 26 March 2017) online: <www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188>.
[180] Boutilier, *supra* note 40.
[181] *Ibid* at 315.
[182] *Ibid*.
[183] *Ibid*.
[184] *Ibid*. The trust was designed to address the issue of cash injections fueling civil strife and violence.

training programs for local workers, and installed a large hydro-electric generator into the mine-created lake to supply electricity to the island.[185]

Despite these efforts, Placer Dome encountered various difficulties with respect to stakeholder identification. Competing local groups claimed to represent those affected by the mine. Although significant consultation and genealogical studies were undertaken, conflict broke out between clans on either side of the mountains that were home to the mining site.[186] Political posturing and clan rivalries caused considerable confusion, delays, and inequities in the distribution of benefits brought by the mine.[187] Many of the benefits flowed to those who were able to seize opportunities and manipulate the framework to their advantage, as well as disproportionately to comparatively small landowner groups,[188] while imbalances were created between "men and women, youth and the elderly, locals and non-locals, and among different ethnic groups."[189] After some business failings and the closure of the mine, much of the surrounding infrastructure fell into disrepair.[190] Although the efforts of Placer Dome at the level of the extraction site to invest in local communities helped to mitigate some of the worst effects of the resource curse,[191] the inherent difficulties posed by stakeholder identification and by divisive mining operations remained substantial.

While the hope of legislative reform remains on the horizon, the administration of the law with respect to extractive operations have left the people of PNG with little to show in terms of development and social advancement. Instead, most evidence points to an increase in social division, wealth inequality, violence, and civil unrest, exacerbated by the actions of extractive

[185] *Ibid*; The company also helped the local workers union to gain certifications to Australian standards in various trades and made the local communities beneficiaries to a tax credit scheme negotiated with the national and provincial governments.
[186] *Ibid*.
[187] *Ibid*. The problems associated with direct cash flow into disaggregated communities is not new. The World Bank notes that "payments to communities are fraught with trouble and may easily lead to political instability: World Bank, *Mining Royalties: A Global Study of Their Impact on Investors, Government, and Civil Society*, by James Otto et al (Washington: The International Bank for Reconstruction and Development, 2006) at 207.
[188] Julia Byford, *Too little too late: Women's participation in the misima mining project*, (2003), The World Bank, online:<http://siteresources.worldbank.org/INTOGMC/Resources/336099-1163605893612/byfordtoolittletolate.pdf> [*Byford*].
[189] Botta, N.A., McFaul, S. and Xavier, A. "Economic diversification and mine closure: An analysis of the Misima Mine case", (2014) Proceedings of Mine Closure Solutions, Infomine, online:<http://static1.1.sqspcdn.com/static/f/1535489/25088509/1403300319623/Misima+Final+Paper+>, 7.
[190] Boutilier, *supra* note 40 at 315–17.
[191] *Ibid* at 315-319. The corporation was involved in educating local stakeholders about the legal and administrative requirements of the trust fund, provided programs to local tradespeople and entrepreneurs, actively sought out the best way to distribute benefits, were open to change when information surfaced about clan issues, and actually seemed invested in the lives of the rural communities. Other factors undoubtedly played a role in the relatively benign result of Misima mine, such as the fact that the island was insulated from excessive influx of population, and the short duration of the mine's life: *ibid* at 317. Other effects of the mine's operation were more negative, such as the mine's use of STD, inflation, the limiting of women's opportunities, and the effects of the mine closure and the breakdown of vital services on local communities. See *supra* note 175; Byford, *supra* note 188; and Stephanie Elizah, "Misima People Regret Life after Mine Closure" *Papua New Guinea Mine Watch* (13 September 2010) online: <ramumine.wordpress.com/2010/09/13/misima-people-regret-life-after-mine-closure>; and David Hughes et al., "Ecological impacts of large-scale disposal of mining waste in the deep sea", Scientific Reports 5 (2015) online: <https://www.nature.com/articles/srep09985.pdf>.

companies, which are a far cry from industry best practice. The following sections will look at specific Canadian mining companies operating within the PNG regulatory regime. At Porgera gold mine, we will examine Barrick's behaviour and the corporation's response to increased scrutiny. At the Solwara 1 DSM venture, we will examine how Nautilus has been able take advantage of a state susceptible to regulatory capture to brush off concerns from civil society and independent scientists over environmental and indigenous impacts.

4. Case Study: Barrick Gold and Porgera Mine

Canadian mining corporation Placer Dome began exploration operations that eventually became Porgera Gold Mine in 1989. In 2006, Barrick Gold purchased the interest and took over operations. Porgera mine's gold production peaked at 1.4 million ounces in 1992—making it the third largest gold producer at the time.[192] In 2016 during a period of reduced output, Porgera still produced approximately 500,000 ounces of gold.[193] Since its inception, but especially since Barrick's takeover, the operation has come under increased scrutiny for adverse effects on the environment and the human rights of local community members. This section will focus on the extent to which Barrick perpetuated these violations and was able to largely escape liability for them because they were committed in PNG.

Rule of Law

The absence of legal accountability at Porgera mine is well documented. Located as it is in the northwest portion of the mountainous highlands, it is thoroughly disconnected logistically and politically from the national government. The operations of the mine have produced increased levels of violent conflict, sexual violence, forced eviction, and detrimental health effects, first documented by local group Akali Tange Association in 2005.[194] Police forces forcibly moved landowners from their homes and razed homes in the effort to secure the land subject to the Special Mining Lease.[195] As recently as last year, PNG mobile police forces operating within Barrick's area of lease committed a raid of the village of Wangima, raping women and burning houses to the ground. [196] Barrick denies knowledge or responsibility for the raid; however, the 2017 raid

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[192] Gilberthorpe & Banks, *supra* note 176 at 190.
[193] PNG EITI Report 2016, *supra* note 34 at 67. Even in its final stages, this equates to just over 1% of the total global output in 2016: World Gold Council, "Gold Mining Map", accessed 10 May 2018, online: <https://www.gold.org/about-gold/gold-supply/gold-mining/gold-mining-map>.
[194] Akali Tange Association, *The Shooting Fields of Porgera Joint Venture; Now a Case to Compensate and Justice to Prevail*, 2005, online: <https://miningwatch.ca/sites/default/files/ATA_Case_Documentation.pdf>. See also Gold's Costly Dividend, *supra* note 4.
[195] Amnesty International, *Undermining Rights: Forced Evictions and Police Brutality Around Porgera Gold Mine, Papua New Guinea* (London: Amnesty International, 2010), online: <www.amnestyusa.org/wp-content/uploads/2017/04/asa340012010eng.pdf>.
[196] Mining Watch Canada, "Village House Burnt Down – Again – at Barrick Mine in Papua New Guinea; Violence Against Local Men and Women Continues Unabated" 28 March 2017, online: <miningwatch.ca/news/2017/3/28/village-houses-burnt-down-again-barrick-mine-papua-new-guinea-violence-against-local> [*Mining Watch Canada, Village House*].

constitutes the third such reported incident of a violent police raid burning down homes in Wangima village and attacking villagers (with other raids occurring in 2009 and 2014).[197]

The presence of the mine has had a negative impact on family cohesion, availability of food and water, traditional clan discipline, and law and order writ large.[198] Barrick ignored studies, including one it commissioned in 2006 from consultants URS, suggesting that households within the SML area be relocated in order to avoid dangerous living conditions associated with loss of access to land for food security and potable water due to the mine's operation.[199] As operations continued, the local population increased drastically as people sought to access potential economic opportunities arising from the mine; meanwhile, the land available for living and subsistence decreased, causing a toxic environment where local landowners were "living like rats"[200] and could no longer sustain themselves.[201] Prior to the mine's operation, some villagers in the area practiced alluvial mining, panning for gold in the waterways of Porgera to supplement incomes derived largely from subsistence agricultural practices.[202] Following the mine's development, the waterways around the mine became heavily contaminated, leading to a number of people drowning in the mine's waste and to the "excessive use of force by mine security against locals in, or near, the waste flows, even when they were not seeking gold."[203] A much smaller number of illegal miners organize violent raids on the mine's open pit operation, stockpile, or underground areas.[204]

To protect, in part, against such "illegal miners"—failing to distinguish between the panners and the raiders[205]—Barrick employs an Asset Protection Division (APD), a quasi-police force recruited largely from the local population. The APD has committed systematic brutal gang rapes of local women and girls, some of whom were simply passing through the mine's territory.[206] The victims were often brutally beaten and degraded, and did not report the incidents to police or company officials for fear of reprisal.[207] These acts of brutality and violence against women have ignited social outrage and media backlash against Barrick for its complicity and lack of oversight

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[197] *Ibid.* See also Tamara Morgenthau, "Investigation Needed into Alarming Reports of Raid on Village Near Barrick Gold Mine in Papua New Guinea", EarthRights International, 6 June 2017, online: <https://earthrights.org/blog/investigation-needed-into-alarming-reports-of-raid-on-village-near-barrick-gold-mine-in-papua-new-guinea/>.

[198] Filer, *supra* note 96 at 6. Although, it should be noted that some of these issues were nationwide concerns at the time of the mine's initial operations: see Bonnell, *supra* note 33 at 21–22.

[199] See, e.g., Porgera Landowners Association, Akali Tange Association, & MiningWatch Canada, *Request for Review Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises: Specific Instance Regarding: The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea*, 1 March 2011, online: <https://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf>, 5-7 [OECD Complaint].

[200] Gold's Costly Dividend, *supra* note 4 at 33.

[201] *Ibid*.

[202] *Ibid* at 31.

[203] Catherine Coumans, The 'Shooting Fields of Porgera Joint Venture': An Exploration of Corporate Power, Reputational Dynamics and Indigenous Agency, forthcoming.

[204] *Ibid* at 39–41.

[205] According to Human Rights Watch, the victims of almost all the abuses described in its report were the illegal miners who pose the least threat of violence or danger to the mine. *Ibid* at 39.

[206] Gold's Costly Dividend, *supra* note 4 at 46–47.

[207] *Ibid*.

of these security personnel.[208] Despite this public outcry, sexual violence has continued against the women and girls within the special mining lease area controlled by Barrick.[209]

Gender Norms and Sexual Violence in PNG

Gender inequality is systematic and poses enormous challenges in Papua New Guinea.[210] According to Human Rights Watch, PNG "is one of the most dangerous places in the world to be a woman, with the majority of women experiencing rape or assault in their lifetime and women facing systemic discrimination."[211] The Committee on the Elimination of All Forms of Discrimination against Women further reports that women and girls occupy a marginalized position within PNG culture, with various practices and customs perpetuating discrimination and inequality across many areas of public life, including "polygamy, bride price, 'good' woman stereotypes, the traditional view of 'big man' leadership and the custom of including women as part of compensation payment." [212]

Family and sexual violence against women and girls is estimated to be higher in PNG than it is anywhere else in the world outside of an active conflict zone.[213] It is considered socially acceptable for husbands to physically discipline their wives through beatings and rape, and a high number of men voluntarily admit to having participated in gang rape.[214] The intense social stigma attached to female rape victims can "ruin lives and lead to further violence in the home", and husbands have frequently been known to disavow survivors.[215]

Victims of gender violence have extremely limited access to justice in PNG. The customary law of the village courts tends to reinforce cultural norms rather than protect women against violence.[216] Access to justice is further limited by poverty, difficulties with physical access to or distance from courts, lack of legal aid, and lack of information about legal rights.[217] If claimants manage to appear before the State's legal system, they encounter resistance to recognizing sexual assault as a crime, and in fact must prove their case by adducing corroborating evidence, a practice that has traditionally aligned with cultural views that women are inherently untrustworthy.[218]

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[208] *Ibid* at 14.
[209] See: Mining Watch Canada, Village House, *supra* note 196.
[210] Special Rapporteur at para 11, citing the UNDP Gender Inequality ranking as 140th out of 146 countries as well as one of the world's highest maternal mortality rates.
[211] *Papua New Guinea, Events of 2016: Women's and Girls' Rights*, Human Rights Watch, online: <https://www.hrw.org/world-report/2017/country-chapters/papua-new-guinea>.
[212] CEDAW Concluding Observations, *supra* note 137 at para 25.
[213] Medecins Sans Frontiers, "Return to Abuser Gaps in Services and a Failure to Protect Survivors of Family and Sexual Violence in Papua New Guinea" [2016] Medecins Sans Frontiers March 2016 at 19 [MSF Report].
[214] In one study, approximately 60% of male interviewees indicated they had participated in gang rape: Special Rapporteur's Report at para 27.
[215] Gold's Costly Dividend, *supra* note 4 at 50.
[216] Village courts tend to emphasize a community's internal justice through such measures as compensation payments, avoiding criminal sanctions and allowing for increased repeated violence: MSF Report at 46–47.
[217] CEDAW Concluding Observations, *supra* note 137 at para 17.
[218] Jean G Zorn, "The Paradoxes of Sexism: Proving Rape in Papua New Guinea Courts" (2010) 17:58 LawAsia J 17 at . Zorn points to several instances in which a judge dismisses a complainant's case because of the unsatisfactory

Within this climate, Barrick has contributed to both the perpetration of severe human rights violations against the women and girls in communities around Porgera mine, as well as lack of access to justice and sufficient remedies.

Human Rights from the Company's Perspective

Placer Dome, the original mine owner, initially made efforts to create opportunities for local employment and social improvement around the Porgera mine.[219] The company funded construction of new schools, health facilities, roads, bridges, and an airstrip.[220] For a time, injections of cash, employment, and trade opportunities created benefits for some communities of the Porgera Valley.[221] Revenue streams inevitably caused stratification in communities, massive in-migration from other areas, and contributed to a situation of general breakdown of traditional forms of social control.[222] Over time, tensions overtook clan relationships, with different vested interest groups emerging; disputes became the norm and violence increased markedly as new social lines were drawn and prejudices fueled.[223] By the time Barrick took over, the mine's presence had impacted a generation of local people.

Barrick's response to the various human rights allegations has evolved over time. When initially confronted with evidence of sexual violence and forced dislocation by local civil society groups such as the Akali Tange Association, the company's reaction was one of denial.[224] Since then, various international efforts, NGO investigations, and civil society actions have led Barrick to acknowledge the adverse effects of the mine on the local communities.[225] Barrick initially noted that several hundred households were "impacted by mining activities to an unacceptable degree, specifically, where there [wa]s a risk of geotechnical, health or other safety impacts."[226] At the same time, however, Barrick has been careful to attribute the cause for the violence outside of its

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nature of the complainant's testimony (*State v Rau* [1997] PGNC 1, NI509, PacLII <www.paclii.org/pg/cases/PGNC/1997/1>; *State v Sopane* [2006] PGNC 45, N3024, PacLII <www.paclii.org/pg/cases/PGNC/2006/45>), the fact that she did not cry for help during a rape (*State v Lahu* [2005] PGNC 97, N2851, PacLII <www.paclii.org/pg/cases/PGNC/2005/161>), lack of immediate reporting, or sexual history of the complainant (*State v Seigu* [2005] PGNC 98, N2852, PacLII <www.paclii.org/pg/cases/PGNC/2005/98>).

[219] Filer, *supra* note 96 at 5–6.

[220] *Ibid*.

[221] Bonnell, *supra* note 33 at 25–26.

[222] UNDP Report, *supra* note 11 at 62.

[223] Bonnell, *supra* note 33 at 25–26.

[224] Gold's Costly Dividend, *supra* note 4 at 62.

[225] Included among these are the Human Rights Watch investigation into systemic sexual violence (See Gold's Costly Dividend, *supra* note 4), Amnesty International's investigation into forced evictions (See Undermining Rights, *supra* note 192), EarthRights International's awareness campaign and legal efforts to assist victims (See *Barrick: Security Guards for World's Largest Gold Mining Company Rape and Kill Locals in Papua New Guinea*, EarthRights International, online: <https://earthrights.org/case/barrick/#media>), an investigation by the Columbia and Harvard Law School human rights clinics into Barrick's remedy mechanism for Porgera, entitled Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned*, November 2015, online: <http://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf>, [*Righting Wrongs*], as well as MiningWatch Canada's persistent documentation of human rights harms on the ground, leading in part to the filing of the 2011 OECD Complaint (See: OECD Complaint, *supra* note 199).

[226] Gold's Costly Dividend, *supra* note 4 at 34.

organization, emphasizing the role of local perpetrators,[227] the culture of violence in PNG,[228] and even human rights NGOs[229] in the abuse. Barrick's attempts to head off public outcry have increased since that time with various corporate social responsibility initiatives.[230] Presently, the company has a Human Rights Code, regular reports on human rights issues, and a public commitment to respecting social, cultural, and environmental rights within their operations, in accordance with international law. While these signs are positive, the continued human rights violations at Porgera are cause for skepticism.[231] The remedial framework for compensating victims of sexual violence at the hands of PJV employees, discussed below, is one such area of concern.

Despite any positive steps that Barrick may have taken, there remains a question of whether the responses have been more rooted in substance or appearance. Until 2010, Barrick consistently refused to disclose key data that would allow independent assessment of the environmental harms caused by Porgera's riverine tailings disposal.[232] Barrick was also a vocal opponent to Bill C-300, a Canadian law proposed in 2010, which would have provided a small degree of government oversight of Canadian mining companies operating abroad.[233] When prompted by the UN OHCHR to have an independent group—selected after consultation with all stakeholders—analyze the remedial framework (while the remedial program was still ongoing), the company instead hired a consultancy group to prepare a report that commends Barrick for its actions and condemns its most vocal opponents.[234] This supposedly independent report has been criticized for justifying small payouts to victims based on a comparison to average income—a method that, as one NGO bluntly points out, would make it "cheaper to rape poor women".[235]

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[227] In January of 2011, Barrick fired six employees for their involvement in criminal activities: Gold's Costly Dividend, *supra* note 4 at 68.

[228] Barrick's founder, Peter Munk, is reported to have called gang rape a "cultural habit" in PNG: Geoffrey York, "Barrick's Tanzanian Project Tests Ethical Mining Policies" *The Globe and Mail*, 29 September 2011, updated 26 March 2017, online: <www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188>.

[229] EarthRights International, "Many Valuable Lessons from Barrick's Remedy Framework: 'It's Cheaper to Rape Poor Women' Should Not Be One of Them" by Marco Simons (2016) online: <https://earthrights.org/blog/many-valuable-lessons-from-barricks-remedy-framework-its-cheaper-to-rape-poor-women-should-not-be-one-of-them> [ERI]; Catherine Coumans, "Barrick Consultant Delivers Biased Report on Inequitable Remedy Mechanism for Rape Victims" (MiningWatch Canada, 2016), online: <miningwatch.ca/sites/default/files/response-to-enodo-report-review-of-porgera-remedy-mechanism-march_2016.pdf> [MWC Response to Enodo Report].

[230] Human Rights Watch reports that in 2010 Barrick engaged in "frank and substantive dialogue" and "promised to take several meaningful steps to address . . . serious human rights abuses": Gold's Costly Dividend, *supra* note 4 at 63.

[231] See e.g. Martyn Namarong, "Police Target 'Illegal' Activities at Barrick's Porgera Mine: Houses Razed but No Arrests" *Papua New Guinea Mine Watch* (28 March 2017) online: <ramumine.wordpress.com/2017/03/28/police-target-illegal-activities-at-barricks-porgera-mine-houses-razed-but-no-arrests>.

[232] Gold's Costly Dividend, *supra* note 4 at 76.

[233] *Ibid* at 84.

[234] Yousuf Aftab, *Pillar III in the Ground: An Independent Assessment of the Porgera Remedy Framework* (Enodo Rights, 2016) [Enodo Report]. See also: MWC Response to Enodo Report, *supra* note 229.

[235] ERI, *supra* note 229.

Barrick's response has also been influenced by public perception of the environmental damage wrought by the riverine tailings disposal in Porgera.[236] In 2008, Norway's pension fund's Council of Ethics recommended divesting all of Barrick's stock, citing high probability of severe health and environmental damage, as well as transparency concerns in environmental reporting.[237] As awareness spreads about the abuses at Porgera, ramifications such as investor loss and litigation costs will likely continue to accrue. The fact that human rights violations have persisted at Porgera mine indicates that Barrick's cultivation of an image and aura of respect for the environment and the people of PNG has not translated into improved realities on the ground. Forced evictions, violent raids, police brutality, sexual assaults, and beatings remain issues around the mine.[238]

Remedies and Civil Liability for Porgera's Human Rights Harms

Barrick has enjoyed relative security against civil claims or other remedial measures. Victims have indicated their fear of reprisal for the submission of complaints, and attempts to access remedies for these harms have largely been unsuccessful. One woman who survived a gang rape at the hands of APD personnel reported the following: "I was scared to lay a complaint—I did not know if they are doing this on the order of the company. Maybe if we go there [to the police station] they will just lock us up."[239]

In 2012, in response to public outcry following multiple NGOs and media outlets publishing evidence of the rapes that occurred at Porgera mine, Barrick launched a remedial program to compensate victims of sexual violence suffered at the hands of the APD.[240] The program lasted for two years and provided "compensation" to approximately 119 sexual assault victims.[241] It is important to note that this program was very narrowly tailored, focusing on victims of sexual violence by mine security alone, and leaving out many women who had experienced sexual violence by mine contractors and police operating under a Memorandum of Understanding (MOU) between the mine and the PNG State – as well as men and other victims of violence perpetrated by Porgera personnel or contractors.[242] In order to access potential remedies, the framework also required the victims to sign away their legal rights to bring any claims against the

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[236] For more see: Catherine Coumans, Placer Dome Case Study: Porgera Joint Venture, April 2002, online: <https://miningwatch.ca/sites/default/files/pd_case_study_porgera_0.pdf>, "Porgera is one of the few mines left in the world owned and run by a major mining company that still uses and justifies the direct discharge of mine wastes into a river system. Major companies such as Western Mining Corp., BHP, and Falconbridge have all committed not to use "riverine disposal" at their mines".

[237] Norway, Council on Ethics Government Pension Fund – Global: Annual Report 2008, online: <nettsteder.regjeringen.no/etikkradet-2017/files/2017/02/etikkradet_engelsk08-1.pdf>. The report specifically identifies riverine tailings disposal as a determinatively unacceptable practice.

[238] Namarong, *supra* note 231.

[239] Gold's Costly Dividend, *supra* note 4 at 53.

[240] Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned*, November 2015 [*Righting Wrongs*].

[241] *Ibid*.

[242] Catherine Coumans, Do No Harm? Mining industry responses to the responsibility to respect human rights, 5 Apr 2017, Canadian Journal of Development Studies / Revue canadienne d'études du développement 38:2, 272-290, online: <https://www.tandfonline.com/doi/abs/10.1080/02255189.2017.1289080>.

company in any jurisdiction.[243] The remedy framework and its implementation continue to be widely criticized for failing to address the gravity of the harms suffered, the application of a one-size-fits-all remedy, and the confusion generated in the implementation process itself.[244] Many victims report feeling insulted by the meager compensation package as representative of the harms they had suffered.[245] Participants typically were not provided with the resources or counsel to fully understand and consent to the contracts they entered.[246] The 119 women have since appealed for UN intervention in their fight to obtain fair remedies from Barrick.[247]

Outside of PNG, however, the capacity for justice increases. When a group of 11 individuals threatened to bring civil claims against Barrick in the US with the help of NGO EarthRights International, they managed to settle out of court for reportedly four times the total amount of the final payment given within the remedy framework.[248] One of the greatest problems with the remedy program was the *quid pro quo* nature of exchanging a small money payout for legal indemnity against future claims, in the context of a gross power imbalance between Barrick and the claimants.[249] Many claimants were unaware of their legal rights and felt compelled to sign the waiver.[250] In the meantime, the fact that a small group of victims who were in the position to receive advice from an international human rights NGO were able to achieve some measure of justice outside of the PNG context demonstrates the likelihood of a different standard of accountability if such abuses were to happen in North America.[251]

Overall, the Porgera case study indicates that Barrick does not appear to apply the same human rights and environmental standards in PNG as it would be required to adhere to in its home country.

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[243] Righting Wrongs, *supra* note 240, at 25.
[244] *Ibid*.
[245] The typical cash payout under the remedial framework was approximately 20,000 Kina or 8,000 USD: Enodo Report, *supra* note 234 at 105. Barrick later 'topped up' the 119 with another 30,000 kina. Coumans/Response to Enodo Report, supra note 226, at 7-8.
[246] Earth Rights International, "Barrick: Security Guards for World's Largest Gold Mining Company Rape and Kill Locals in Papua New Guinea", accessed 27 February 2018, online: <earthrights.org/case/barrack> [ERI, "Security Guards"].
[247] "119 Indigenous Women Demand Justice from Barrick Gold at UN Forum in Geneva", MiningWatch Canada, News Release, 16 November 2016, online: <https://miningwatch.ca/news/2016/11/16/119-indigenous-women-demand-justice-barrick-gold-un-forum-geneva>.
[248] ERI, "Security Guards", *supra* note 241; Karen McVeigh, "Canada Mining Firm Compensates Papua New Guinea Women after Alleged Rapes" *The Guardian*, 3 April 2015, online: <www.theguardian.com/world/2015/apr/03/canada-barrick-gold-mining-compensates-papua-new-guinea-women-rape>. The 'top-up' of 30,000 additional kina provided by Barrick to the 119 original claimants occurred after this settlement (meaning that the 11 women represented by EarthRights actually received ten times the amount of the initial remedy settlement, before the top-up). See Coumans, *supra* note 240.
[249] Bartering for a waiver in a non-judicial grievance mechanism is against the principles of the exercise in the first place: Response to Enodo Report, *supra* note 227 at 10.
[250] *Righting Wrongs*, *supra* note 240.
[251] In Canada, for example, civil wrongs have been compensated far in excess of the amounts provided by Barrick. The average compensatory amounts given to sexual abuse survivors of the Indian Residential School was about 120,000 CAD: Bill Curry, "Cost to Redress Native Residential School Abuse Set to Pass $5-Billion" *The Globe and Mail* (18 November 2011) online: <www.theglobeandmail.com/news/politics/cost-to-redress-native-residential-school-abuse-set-to-pass-5-billion/article4251765>.

5. Case Study: Nautilus Minerals and the Solwara 1 Project

Background and Overview of Deep Sea Mining

"*Why here? . . . Why doesn't Nautilus experiment in Canada's oceans?*"[252]

Canadian company Nautilus Minerals, headquartered in Toronto, Ontario, has attempted to initiate the first commercial DSM venture to obtain valuable minerals located on the seabed in and around hydrothermal vents. It has done so in the midst of a "gold rush" for transnational mining companies to obtain licenses for exploration and preliminary seabed mining in territorial and high seas.[253] The Solwara 1 Project is located about 30 km off the coast of New Ireland and 50 km from the coast of East New Britain. Despite the lack of an appropriate legal framework to regulate DSM and limited knowledge as to its economic and operational feasibility, Nautilus is projecting Solwara 1 to be operational in 2019.[254] It submits that the project will bring widespread benefits to PNG, including jobs, training, and revenue streams.[255]

The Solwara 1 project is, above all, an experiment.[256] It was designed to be the pioneering operation of DSM, where the feasibility of harvesting minerals from the deep sea bed would be attempted for the first time.[257] Because it seeks to operate in such a novel environment, there is a dearth of research as to the adverse effects that will flow from the venture. Scientists and advocacy groups warn of the physical destruction of hydrothermal vents, upon which countless unknown benthic species depend for survival, and vast sediment plumes altering the physical and chemical composition of the sea bed ecosystem and water column.[258] Effects of exploratory drilling and preliminary operations have already been felt: local community members report a decrease in shark catch, connected to an important cultural practice; noticeable increase in murky waters near the shore, inhibiting diving; and an increase in dead fish washing up on the shores of New Ireland and East New Britain.[259] Among others, DSM poses significant risks in terms of marine and onshore

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[252] Rosenbaum (2016), *supra* note 35 at 11.

[253] The Metal Mining Agency of Japan has begun operations in the Okinawa trough in August 2017: "Japan Successfully Undertakes Large-Scale Deep-Sea Mineral Extraction" *Japan Times* (26 September 2017) online: <www.japantimes.co.jp/news/2017/09/26/national/japan-successfully-undertakes-large-scale-deep-sea-mineral-extraction/#.WpXmQ2YZP-Y>. The Chinese government continues to research DSM in international waters, while Neptune Minerals is exploring the Kermadec Sea mounts off the coast of New Zealand: Out of Our Depth, *supra* note 90 at 26.

[254] Nautilus Minerals, Press Release 2018–11, "Nautilus Announces Preliminary Economic Assessment for its Solwara 1 Project", 27 February 2018, online: <www.nautilusminerals.com/irm/PDF/1973_0/NautilusAnnouncesPreliminaryEconomicAssessmentforitsSolwara1Project>.

[255] *Ibid*.

[256] Nautilus itself conceded that the company does not intend to complete pre-feasibility or feasibility studies before commencing mining at Solwara 1. They intend the operation itself to be the testing ground for DSM technology and operation feasibility: Out of Our Depth, *supra* note 66 at 8, citing Nautilus Annual Information Form (2015).

[257] Rosenbaum (2016), *supra* note 35 at 6.

[258] Luick Report, *supra* note 163.

[259] Resource Roulette, *supra* note 64 at 33.

processing pollution, toxic spills, and coral reef acidification, potentially disrupting both fishing and tourism—as well as possible climate effects.[260]

Despite these risks, the Canadian company—who publicly commits to ensuring zero harm to people and maintaining environmental care[261]—and the PNG national government are pushing forward with the project in the face of vocal resistance from local stakeholders, NGOs, and even other government departments.[262] This section will set out the environmental assessment process, the consultation efforts, and other contributing factors that have influenced the way Nautilus's operation has unfolded.

Environmental Assessment

Independent analyses have criticized the Solwara 1 EIS for its lack of rigorous analysis, for omitting data that would not support the feasibility of the project, and for not creating an environmental management plan.[263] In short, the EIS has been assessed as "unacceptable by scientific standards."[264] It ignores potential damage to vertical water columns above the extraction sites, which could prove toxic to marine life[265]—and presents noise and metal pollution as nuisances rather than threats to the ecosystem.[266] Given the overriding lack of knowledge about hydrothermal vents and the species that depend on them,[267] the damage that may be wrought on the ecosystem is not given sufficient weight.[268] Scientists have warned that such a pioneering project with unknown potential effects should only be attempted "with exceptional deliberation and caution."[269]

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[260] Out of Our Depth, *supra* note 69 at 20–21. Lisa Levin et al., *Hydrothermal Vents and Methane Seeps: Rethinking the Sphere of Influence*, 3 Frontiers Marine Pol'y 1,14 (2016); Cindy Lee Van Dover et al., *Biodiversity Loss From Deep-sea Mining*. 10 Nature Geosci. 464, 464–65 (2017); Dmitry M. Miljutin et al., *Deep-Sea Nematode Assemblage Has Not Recovered 26 Years After Experimental Mining of Polymetallic Nodules (Clarion-Clipperton Fracture Zone, Tropical Eastern Pacific)*, 58 Deep Sea Res. I 885, 886 (2011).

[261] Nautilus Minerals, "About Us", accessed 27 February 2018, online: <cares.nautilusminerals.com/IRM/content/default.aspx>.

[262] In 2012, the National Fisheries Authority of PNG called for a ban on sea-bed mining: Resource Roulette, *supra* note 64 at 34.

[263] Luick Report, *supra* note 163.

[264] *Ibid* at 3.

[265] See: Kristi Birney et al., Potential Deep-Sea Mining of Seafloor Massive Sulfides: A Case Study in Papua New Guinea 39, online: <http://www.bren.ucsb.edu/research/documents/ventsthesis.pdf>.

[266] Luick Report, *supra* note 163 at 20; see also Daniel O.B. Jones et al., *Biological Responses to Disturbance from Simulated Deep-sea Polymetallic Nodule Mining*, 12 PLoS ONE, Feb. 2017, at 18; Diva J. Amon et al., *Insights into the Abundance and Diversity of Abyssal Megafauna in a Polymetallic-nodule Region in the Eastern Clarion-Clipperton Zone*, 6 Science Rep., July 2016, at 1, 6–8.

[267] See, e.g.: Megan Miner, *Will Deep-sea Mining Yield an Underwater Gold Rush*?, Nat'l Geographic (Feb. 3, 2013), online: <https://news.nationalgeographic.com/news/2013/13/130201-underwater-mining-gold-precious-metals-oceans-environment/>; *see also* Cinzia Corinaldesi, *New Perspectives in Benthic Deep-sea Microbial Ecology*, 2 Frontiers Marine Sci., Mar. 2015, at 1; and *Deep Sea Ecology: Hydrothermal Vents and Cold Seeps,* World Wildlife Fund, online:<http://wwf.panda.org/our_work/oceans/deep_sea/vents_seeps/>.

[268] Richard Steiner, *Independent Review of the Environmental Impact Statement for the Proposed Nautilus Minerals Solwara 1 Seabed Mining Project, Papua New Guinea* (2009) at 2 [Steiner Report].

[269] *Ibid* at 1–2.

For its part, Nautilus has defended the report on the basis that it met the required standards of the DEC and created mitigation plans for anticipated environmental and social issues.[270] In contrast, however, Nautilus's Annual Information Form acknowledges significant risk and gaps in knowledge, using similar facts but considering largely financial risk.[271]

The contrast between the EIS conducted by Nautilus and the reviewing literature is stark and revealing. The EIS speaks of the potential for adverse effects as "moderate" and "reversible".[272] Evidence shows that DSM has an almost certain risk of species extinction and severe disruption of an unknown scale to multiple ecosystems.[273] Scientific review has labeled the EIS analysis as a scientifically weak attempt at "greenwashing", with "serious omissions and flaws".[274] With no environmental management plan in place, it is impossible to assess the viability of mitigation measures.[275] Yet the DEC and, ultimately, the Minister for the Environment, approved the EIS nevertheless, without appearing to publish any reasoning justifying the lack of these standard preconditions.

Consultation Efforts

The Solwara 1 project is an example of how a Canadian company has dealt with issues of consultation and benefit-sharing in PNG. There is a sharp divide between what Nautilus and the government consider to be adequate consultation and what community members believe—and, as the legal analysis section will show, what the international standards are.

In its materials, the Toronto-based company does not refer to international standards or best practices for consultation. Rather, it maintains that the consultation process it has followed more than meets the regulatory standard required by PNG legislation.[276] Nautilus reports that it held numerous hearings, workshops, and briefings with government, communities, and other stakeholders,[277] documenting the concerns that were noted and proposing responses to each issue

[270] Solwara 1 Project, Nautilus Cares, Nautilus Minerals, online: <http://cares.nautilusminerals.com/irm/content/solwara-1-project.aspx?RID=339>.
[271] Nautilus Minerals Inc, *Annual Information Form for the Fiscal Year Ended Dec 31, 2015* (16 March 2016) at 51–56.
[272] Nautilus Minerals Niugini Limited, *Environmental Impact Statement Solwara 1 Project: Volume A, Main Report*, Coffey Natural Systems (2008) at 9–26 [*Nautilus EIS*].
[273] *See, e.g.*, Cindy Lee Van Dover et al., *Biodiversity Loss from Deep-Sea Mining*, Nature Geosci. 1, 1 (2017); Andrew J. Gooday et al., *Giant Protists (Xenophyophores, Foraminifera) Are Exceptionally Diverse in Parts of the Abyssal Eastern Pacific Licensed for Polymetallic Nodule Exploration*, 207 Biological Conservation 106, 114–15 (2016); Adrian G. Glover & Craig R. Smith, *The Deep-Sea Floor Ecosystem: Current Status and Prospects of Anthropogenic Change by the Year 2025*, 30 Envtl. Conservation 219, 231 fig.3 (2003).
[274] Luick Report, *supra* note 163 at 4, 9.
[275] Steiner Report, *supra* note 268 at 2.
[276] Nautilus EIS, *supra* note 272 at 3-6, 4-1, 4-10–4-11.
[277] *Ibid* at 4-5–4-9.

raised.[278] It plans to continue the process through regular distribution of materials, maintenance of a website, discussions with stakeholders, and development of mitigation programs.[279]

Despite these claims, criticism of the consultation process persists. Biennial consultation meetings carried out since 2008 are co-funded by Nautilus and the PNG national government, and have at times been carried out by members of the MRA.[280] Besides conflating government and corporate interests, these meetings have taken the form of "progress updates . . . rather than actual consultation."[281] While Nautilus maintains they have reached more than 30,000 people over the course of their preparations, some commentators doubt the efficacy of these meetings.[282]

Academics have noted that companies in PNG tend to underestimate the social and cultural requirements to obtain a "social license to operate".[283] One possible explanation lies in the coercive approaches sometimes used by MNCs to assess community support. For instance, Nautilus circulated a survey regarding community needs, asking whether respondents wanted the project to go ahead. 88% of those surveyed responded "yes", causing Nautilus to hold up this fact as a consultation victory. However, it became clear in a subsequent report that villagers had been given the impression that saying "no" would lead them to miss out on community benefits or possible revenue-sharing agreements.[284]

There is ample evidence to suggest that, in the case of Solwara 1, no such social license has been granted. Community opposition has been substantial, as evidenced by the activities of the East New Britain Anti-Seabed Mining Coalition, a 24,000-signature opposition petition delivered to the government in 2012, a 2014 petition of 1.2 million members of the PNG Evangelical Lutheran Church, and student protests and vocal participation in public forums.[285] Instead of specifically addressing the concerns of coastal indigenous communities and the potential for environmental harm however, Nautilus dismissed such complaints as "one or two people who jump up and down" and a "handful of professional activists", [286] insisting instead that they have broad public support and continuing to reinforce their CSR agenda by funding public toilets and vaccination programs.[287] This position is further undermined by several reports of forums in which locals were very clear with their opposition, yet company representatives later maintained that they were supportive,[288] of one-way communication sessions, or of information sessions being cancelled in order to avoid conflict.[289] Civil society commentators also report that some clan or

[278] *Ibid* at 4–10.
[279] *Ibid* at 4–11.
[280] Resource Roulette, *supra* note 64 at 29.
[281] *Ibid*.
[282] Helen Davidson & Ben Doherty, "Troubled Papua New Guinea Deep-Sea Mine Faces Environmental Challenge" *The Guardian*, 11 December 2017, online: ≤www.theguardian.com/world/2017/dec/12/troubled-papua-new-guinea-deep-sea-mine-faces-environmental-challenge> [*Davidson & Doherty*].
[283] Filer, *supra* note 96.
[284] Rosenbaum (2016), *supra* note 35 at 8, 28.
[285] *Ibid*.
[286] Davidson & Doherty, *supra* note 282.
[287] Such efforts should be qualified by the fact that the communities did not ask for public toilets and in fact their provision has violated various cultural norms and taboos: Interview with BRG, *supra* note 56.
[288] See Rosenbaum (2016), *supra* note 35 at 38-39.
[289] *Ibid*.

provincial leaders have been promised individual benefits to secure their support, and that their purchased assent is being used to represent the whole community.[290]

In short, Nautilus's approach to consultations appears to be "fuelling resentment and opposition",[291] and does not resemble free, prior, and informed consent. In response to the flurry of criticism Nautilus faced from its flawed EIS and lack of FPIC, the company initiated separate negotiations with provincial governments to secure political ownership of the company's plans to fund a number of community development initiatives. A 'community development fund' was established as a mitigation measure that would pay two kina for each tonne of ore that it extracts (approximately 0.79 CAD or .62 USD). Even this attempt to engage stakeholders was viewed as a paltry effort.[292] In contrast to the concept of impact benefit agreements discussed in depth below, the belated community development fund is more accurately characterized as a mitigation measure to secure political support, rather than a bilateral benefit-sharing agreement.[293]

Costs, Conflicts, & Enforcement with Respect to Solwara 1

Both the national government and Nautilus have sunk massive costs into the Solwara 1 operation, in an investment the World Bank has deemed "the riskiest of all mining ventures."[294] Despite PNG's heavy investment, ostensibly with the goal of increased revenue, this project has little prospect of even covering the costs of the operation; rather, it is seen as an experimental project to test the technology, the environment, the policies, and the economics of deep sea mining.[295]

As noted above, the government's various conflicts of interest come to bear on this project in a profound way. When the PNG government purchased an option for a 15 to 30% equity stake in the project, it became a joint partner in the enterprise. It is no surprise, then, that government officials attended consultation meetings in much the same function as Nautilus officials: to placate concerns and exercise control.[296] CEPA and the MRA also cannot escape the reality that their mandates and financial wellbeing are tied up in moving applications forward, not delaying or questioning them.[297] Oversight capabilities are also called into question when provincial government officials and staff must tread lightly with any critical comments about the project while accompanying Nautilus on tours because they lack expert knowledge and fear getting sued.[298] The PNG government possesses limited capacity to effectively monitor its substantial

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[290] Interview with BRG, *supra* note 58; Resource Roulette, *supra* note 64 at 32.
[291] Rosenbaum (2016), *supra* note 35 at 37.
[292] Colin Filer & Jennifer Gabriel, "How Could Nautilus Minerals get a Social License to Operate the World's First Deep Sea Mine?" (2016) Marine Policy, online: <dx.doi.org/10.1016/j.marpol.2016.12.001> at 6 [*Filer & Gabriel*].
[293] *Ibid*.
[294] Resource Roulette, *supra* note 64 at 28.
[295] Filer & Gabriel, *supra* note 292 at 1. See also Cardno, *An Assessment of the Costs and Benefits of Mining Deep-Sea Minerals in the Pacific Island Region: Deep-Sea Mining Cost-Benefit Analysis* (Suva, Fiji: Pacific Community, 2016).
[296] See Resource Roulette, *supra* note 64 at 29; Out of Our Depth, *supra* note 69 at 51.
[297] Out of Our Depth, *ibid* at 7.
[298] *Ibid* at 51.

maritime area, with few patrol boats and a limited naval presence.[299] Given that Solwara 1 operations will take place 1600m below the ocean's surface,[300] PNG will very likely be unable to effectively monitor the operation, resulting in potentially greater environmental damage and underreported mineral take.[301]

Nautilus faces increasing economic challenges to launch Solwara 1. Investors have shied away from the controversial media coverage and uncertainty surrounding the feasibility of the project.[302] The Solwara 1 venture highlights issues of transparency, conflicts of interest, and the willingness of the State to bend laws to suit the timelines of proponent companies—issues which would likely not emerge were the operation in Nautilus's home jurisdiction of Canada. PNG citizens are aware of this double standard and have specifically expressed their concern of being treated like guinea pigs;[303] hence the call for Nautilus to test its costly experiment home in Canadian waters.[304]

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[299] A 2013 PNG Defence White Paper states: "There is currently a critical lack of PNGDF ships and maritime surveillance capability. The existing maritime capability of *four patrol boats* and *two Landing Craft Heavy* (LCH) ships are *insufficient to maintain effective surveillance and control of PNG's 2.4 million square kilometres of Economic Exclusive Zone (EEZ)*. The patrol boats are too small to be effective for prolonged patrols and the LCH vessels of 1948 vintage, are obsolete. The lack of maritime capability has created significant security gaps along PNG's maritime border resulting in illegal border violations; illegal fishing; trafficking of drugs, small arms and light weapons; poaching and piracy. This has caused the loss of millions of Kina in illegal fishing and poaching of resources, and has severely affected National Security" (emphasis added). The Defence White Paper 2013, 'Defending PNG's Prosperity', The Independent State of Papua New Guinea (2013), online: <https://web.archive.org/web/20161125045438/http://www.pngdefence.gov.pg/images/publications/defence_white_paper_2013.pdf>. See, e.g.: Julie Bishop, PNG in line for new Australian patrol boat, The Guardian (14 August 2017), online: <https://www.radionz.co.nz/international/pacific-news/337145/png-in-line-for-new-australian-patrol-boat>. PNG's patrol boats tend to be second-hand vessels donated by Australia; Minister for Defence – Defence Minister welcomes the commissioning of HMPNGS Lakekamu (4 December 2014), Australian Government Web Archive, online: <http://webarchive.nla.gov.au/gov/20141215060037/https://www.minister.defence.gov.au/2014/12/04/minister-for-defence-defence-minister-welcomes-the-commissioning-of-hmpngs-lakekamu-4-december-2014>.

[300] Solwara 1 Project, Nautilus Cares, Nautilus Minerals, online: < http://cares.nautilusminerals.com/irm/content/solwara-1-project.aspx?RID=339>.

[301] Resource Roulette, *supra* note 64 at 7.

[302] See, e.g.: Investor withdraws from PNG seabed mining project, Radio New Zealand (8 May 2018), online: <https://www.radionz.co.nz/international/pacific-news/356912/investor-withdraws-from-png-seabed-mining-project>; Investor alert: Deep sea mining project in last-ditch search for capital Banks and other investors warned to steer clear, BankTrack & Deep Sea Mining Campaign (25 Oct 2017), online: <https://www.banktrack.org/news/investor_alert_deep_sea_mining_project_in_lastditch_search_for_capital>; Jon Copley, Who Are Some of the Investors & Contractors Involved in Developing the World's 1st Deep-Sea Vent Mine?, U. of S. Hampton (Oct. 5, 2015), online: <http://moocs.southampton.ac.uk/oceans/2015/10/05/ventmining_shareholders_contractors/>; Major Shareholders, Nautilus Minerals, Apr. 8, 2016, online: <http://www.nautilusminerals.com/irm/content/majorshareholders.aspx?RID=273>.

[303] Sajithra Nithi, World-first PNG seabed mining project forges ahead; miners express confidence about commodity prices, ABC News (10 Dec 2016), online: <http://www.abc.net.au/news/2016-12-10/world-first-png-seabed-mining-project-forges-ahead/8107934>; Davidson & Doherty, *supra* note 282.

[304] Out of Our Depth, *supra* note 69 at 51.

6. Summary

Mining companies hold a powerful position in their relationship with the PNG government. Due to PNG's need for multi-national corporate actors to support its resource-dependent economy, PNG's regulatory regime functions largely to facilitate the expediency of mining operations rather than criticize substandard processes and mitigation measures. As a result of the lack of rule of law, independent and impartial decision-making, and access to justice, operating within PNG's mining regulatory framework involves significant risks associated with departing from best practice and the guidance of international law.

Canadian corporations have been among those foreign companies who have taken advantage of the comparatively lax regulatory regime to operate differently than they otherwise would in Canada. Barrick and Nautilus each push a public personality as good corporate citizens whose operations bring wealth and opportunity to PNG. Yet the presence of serious environmental harms, increased violence, civil resistance, and ineffective consultations with affected communities indicates a failure on the part of these actors to follow through with their rhetoric and establish best practices in their operations. The way these actions measure against international legal norms will be discussed further below.

B. Canada

1. Background

Canada is home to rich mineral resources and is considered a leading country in the extractives sector.[305] Currently, the Canadian mining industry is valued at $30 billion USD, with expected annual growth of 2.3% forecast between 2018 and 2021.[306] Reported spending on mining activities directly accounted for 3.4% of Canadian GDP in 2016,[307] and the country saw $1.25 billion USD in expenditures on mineral exploration activities (with precious metals accounting for 60% of this spending).[308] Many of the world's multi-national mining corporations make their home in Canada. A total of 57% of global public mining companies are listed on the TSX and TSX Venture stock exchanges in Toronto, accounting for 40% of the equity capital raised globally for mining in 2016.[309] One of Canada's most significant and active resource sectors is located in the province of British Columbia (BC), where major coal, natural gas, and precious mineral deposits are found. Because of BC's level of resource development, this section summarizes both the federal and British Columbian permitting regimes.

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[305] BMI Research, *Canada Mining Report Q2 2018* (London: Business Monitor International Ltd, 2018) at 7.
[306] *Ibid*.
[307] Natural Resources Canada, "Key Facts and Figures on the Natural Resources Sector" (14 August 2017), online: <http://www.nrcan.gc.ca/publications/key-facts/16013>.
[308] Natural Resources Canada, "Canadian Mineral Exploration – Information Bulletin, March 2017", (28 March 2017), online: <http://www.nrcan.gc.ca/mining-materials/publications/17762>.
[309] Mining Association of Canada, *Facts and Figures of the Canadian Mining Industry – F&F 2016*, online: <http://mining.ca/sites/default/files/documents/Facts-and-Figures-2016.pdf>; Mining Association of Canada, "Mining Facts" (2016), online: <http://mining.ca/resources/mining-facts>.

Although the Canadian regulatory regime enjoys relative transparency and oversight compared to developing states with weaker rule of law, it has been criticized for its deficiencies in accountability, especially at the provincial level.[310] While Canadian mining companies suffer a poor international reputation for their lack of human rights compliance internationally, major concerns have also been directed at their operations in Canada, especially in the province of British Columbia.[311]

Over the past decades the Canadian provincial and federal governments have gone through significant development of their permitting regimes, resulting in enhanced environmental regulatory requirements and a focus on sustainability and participation by the public, interested stakeholders, and indigenous communities.[312] Environmental assessment has become one of the most significant aspects of permitting a major mine development, involving considerable public engagement and government oversight. The federal government's obligations to consult and accommodate Canada's indigenous populations have resulted in a great deal of public scrutiny during the permitting of a proposed mine development.[313]

Nonetheless, many issues persist, due to enforcement gaps in the provincial and federal regulatory systems.[314] These issues include a lack of transparency and accountability which mirror those evident in the PNG regulatory system. Concern around these issues is especially focused on proposed mine developments due to their potential for expansive and long-term significant impacts to the environment and local communities.[315] However, the relative safety and stability in Canadian society means that the public is highly engaged in demanding transparency and accountability for federal and provincial decision-makers, with a higher likelihood of influencing

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[310] MiningWatch Canada, "What Green Economy? New OECD Report Finds Canada Worst of G7 on Recycling, Minerals Efficiency" (19 December 2017), online: <http://www.miningwatch.ca/news/2017/12/19/what-green-economy-new-oecd-report-finds-canada-worst-g7-recycling-minerals>; OECD, *OECD Environmental Performance Reviews: Canada 2017*, (Paris: OECD Publishing 2017) at 96 [*OECD Performance Review*].

[311] Amnesty International, "Mining and Human Rights in BC: Mt Polley disaster", online: <https://www.amnesty.ca/our-work/issues/business-and-human-rights/human-rights-at-mt-polley-mine>; Dave Dean, "75% of the World's Mining Companies Are Based in Canada" (9 July 2013), Vice News, <https://www.vice.com/en_ca/article/wdb4j5/75-of-the-worlds-mining-companies-are-based-in-canada>.

[312] Penny Becklumb & Tim Williams, "Canada's New Federal Environmental Assessment Process (Background Paper)" (28 August 2012), Library of Parliament 2012-36-E at 1; Denis Kirchhoff, Holly L Gardner & Leonard JS Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013) 4:3 Intl Indigenous Pol J 1 [*Kirchhoff et al*]; Robert B Gibson, "In full retreat: the Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2013) 30:3 Impact Assessment and Project Appraisal 179 [*Gibson*]; Also see: Kirk Lambrecht, "Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada" (Regina: University of Regina Press, 2013) [*Lambrecht*]; and Natural Resources Canada, "The Minerals and Metals Policy of the Government of Canada" (2017), online: <https://www.nrcan.gc.ca/mining-materials/policy/8690#fwd>.

[313] Lambrecht, *ibid*; According to some commentators, the development of Canada's environmental regulatory regime has strived to achieve clarity, neutrality, a clear mandate, a process that is open, transparent, and fair, predictability, and accountability for decision-making, but this certainly has had varying degrees of success. *Ibid* at 38–39, citing Neil McCrank, *Road to Improvement*, (2008) Indigenous and Northern Affairs Canada at 5–6.

[314] Kirchhoff et al, *supra* note 312 at 2–6, 10; Gibson, *supra* note 309 at 179–180; And see the case study on the Mount Polley Mine in section III.B.4 below.

[315] Auditor General of British Columbia, *An Audit of Compliance And Enforcement of the Mining Sector* (Victoria: Office of the Auditor General of British Columbia, May 2016) at 5 [*Auditor General*].

the outcomes; there is also less chance of extractive projects degenerating into violence and conflict along the level of that seen in less democratic regimes like PNG.

2. Policies and Legislation

The Canadian regulatory regime is generally perceived to be favourable to mining given the industry's large stake in the national economy.[316] Regulatory laws at both the federal and provincial jurisdictions attempt to balance the interests of economic development with those of groups impacted by mining activities. Generally, Canada's mining regulation is supported by a stable foundation of rule of law; the strength of the regime however, is determined by the political will of various government administrations and their policy agendas to effectively regulate extractive industries. The previous federal government, led by Stephen Harper's Conservative party, stripped away significant regulatory processes from the federal environmental assessment regime while leaving more decisions to ministerial discretion.[317] Furthermore, some provincial permitting regimes are at risk of regulatory capture, raising the prospect of further deterioration of extractive regulation in Canada.[318]

In recent years, civil society has raised concerns about Canada's federal Environmental Impact Assessment (EIA) regime following legislative changes implemented in 2012 severely limited the scope of projects subjected to assessment. Nonetheless, transparency is generally promoted throughout the Canadian regulatory system, with laws and policies available online for review. This transparency has been identified as an essential component of an effective regulatory regime and enables Canadian civil society to engage in lively democratic debate on the balance between regulation and development.

Accountability in the Canadian regulatory regime is generally upheld through provisions outlined in the laws themselves, where enforcement, and in some cases punitive measures, are clearly stated and accessible to the public. Regulatory accountability is also supported through the Canadian legal system where most discretionary decisions made by regulators and government ministries are subject to the principles of fairness (including guarantees of the independence of decision makers) and reasonableness. Despite this systemic accountability, public concern with how the Canadian regulatory system manages mining's impacts on the environment and indigenous rights persists and is discussed in more detail below.

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[316] Natural Resources Canada, "Canada's Positive Investment Climate for Mineral Capital: Information Bulletin, November 2014" (January 2015), online: <www.nrcan.gc.ca/mining-materials/publications/8782>.
[317] Shawn Mccarthy, "Budget bill gives Harper cabinet free hand on environmental assessments" (26 March 2017), *The Globe and Mail*, online: <https://www.theglobeandmail.com/news/politics/budget-bill-gives-harper-cabinet-free-hand-on-environmental-assessments/article4105864/>; Carl Meyers, "Panel recommends overhaul of Harper-era environmental assessment regime" (05 April 2017), *National Observer,* online: <https://www.nationalobserver.com/2017/04/05/news/trudeau-government-appointed-experts-propose-meddle-harpers-legacy>.
[318] OECD Performance Review, *supra* note 310 at 96.

Relevant Constitutional Principles

Under Canada's constitutional framework the provinces have legislative authority over lands and natural resources while the federal government has authority over aspects of the economy, trans-boundary issues, and indigenous peoples, among other areas.[319] Environmental protection is an area of overlapping jurisdiction between these two levels of governments.[320] This allocation of powers means that the authorization of a major mine requires engagement with both levels of government through numerous provincial and federal laws.[321]

Within this framework, major mine proposals generally attract a high degree of regulatory scrutiny. Support for institutional transparency, administrative fairness, and accountability at both the provincial and federal levels is generally provided through public access to records, statutory appeals, review by the courts, and public monitoring bodies. Accountability is further supported through strict procedural fairness standards established in laws and under Canadian administrative law principles.[322]

Indigenous Peoples of Canada

Canada is home to a diverse array of indigenous societies with distinct cultures, histories, and languages, who have practiced traditional ways since time immemorial. Indigenous communities inhabit traditional territories that collectively encompass the country's lands and waters. As of 2016, there were 1.67 million indigenous peoples in Canada, representing 4.8% of the country's population.[323] Each indigenous nation is culturally distinct, and many have close ties to their traditional lands and waters, where rich traditions and complex societies developed for millennia prior to European contact in the 16th century.[324]

Canada's indigenous peoples are identified collectively as Aboriginal peoples (First Nations, Métis, or Inuit) in the Canadian constitution, which governs their access to specific rights

[319] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985 Appendix II, No 5 ss 91(10), 92(13), 92A; See: Peter W Hogg, *Constitutional Law of Canada,* 2015 Student Edition (Toronto: Carswell, 2015) for a detailed assessment of Canada's constitutional framing of the natural environment; Also see: *R* v *Crown Zellerbach Canada Inc*, [1988] 1 SCR 401, where the federal Peace, Order and Good Government power can be found to apply to activities which otherwise would be classified under a provincial head of power.

[320] The Environmental Law Centre (Alberta) Society, *Environmental Assessment & the Canadian Constitution: Substitution and Equivalency*, (Edmonton: Alberta Law Foundation, 2014) [*Environmental Law Centre (Alberta)*]; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River Society*].

[321] Environmental Law Centre (Alberta), *ibid.*

[322] The duty of fairness applies to any decision made under statutory authority, including decisions on permit applications under provincial and federal statutes. In the mining context, see: *Pacific Booker v. British Columbia (Environment)*, (2013 BCSC 2258), where the British Columbia Ministry of Environment was found to have breached the duty to give reasons when assessing a permit application and making a negative recommendation.

[323] Statistics Canada, *Aboriginal Peoples Highlight Tables,* 2016 Census (Ottawa: Statistics Canada, 2017).

[324] Aboriginal Affairs and Northern Development Canada, "First Nations in Canada" (2 May 2017), online: <https://www.aadnc-aandc.gc.ca/eng/1307460755710/1307460872523>.

and entitlements.[325] These rights are communal and tied to the use of lands for traditional purposes, and in some cases represent exclusive rights to resources.[326] Historic and modern treaties exist between several Aboriginal communities and the federal government that outline specific rights and encompass much of eastern and central Canada.[327] Many Aboriginal groups have no such relationship with the Canadian government and have continually asserted title to their traditional territories that encompass large geographic areas. This is predominately the case in the westernmost province of British Columbia, where over 232,000 Aboriginal people reside,[328] including over 200 First Nations from over 60 distinct ethnic groups.[329]

Canada's relationship with its indigenous peoples has been marred by its colonial history, which has seen the implementation of racist policies and laws marked by violence, resettlement, and cultural disenfranchisement.[330] Federal legislation enacted in the 19th century called the *Indian Act*[331] targeted the resettlement and management of Aboriginal peoples to alienate them from their traditional lands. The "rigidly paternalistic"[332] *Indian Act* continues to be a primary source of government control over the lives of Aboriginal peoples despite its numerous revisions, and has contributed to what the UN Special Rapporteur on the rights of indigenous peoples described as "devastating human rights violations", due to:

> *[The] banning of expressions of indigenous culture and religious ceremonies; exclusion from voting, jury duty, and access to lawyers and Canadian courts for any grievances relating to land; the imposition, at times forcibly, of governance institutions; and policies of forced assimilation through the removal of children from indigenous communities and "enfranchisement" that stripped indigenous people of their aboriginal identity and membership.*[333]

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[325] Constitution, 1982, *supra* note 319 s 35(1). There are currently over 630 registered First Nations in Canada, see: Indigenous and Northern Affairs Canada, "Indigenous Peoples and Communities" (04 December 2017), Online: <http://www.aadnc-aandc.gc.ca/eng/1100100013785/1304467449155>.

[326] See: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 [*Tsilhqot'in*], where the content of Aboriginal Title was defined to include beneficial use of natural resources.

[327] Currently, there are 70 historic treaties, written primarily in the 19th century, representing over 600,000 First Nations people, and 24 modern treaties and self-government agreements having been negotiated from 1975-onward. See: *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya,* UNHRC, 27th Sess, Annex, Agenda Item 3, UN Doc A/HRC/27/52/Add 2 (2014) at 3 [*Special Rapporteur*].

[328] "Indigenous People" (2018), online: Government of British Columbia <https://www2.gov.bc.ca/gov/content/governments/indigenous-people>.

[329] Robert J Muckle, *The First Nations of British Columbia*, 3nd ed (Vancouver: UBC Press 2014) at 27, Appendix 2.

[330] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 1 [*TRC Summary Report*]: "the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada."

[331] *Indian Act*, RSC 1985, c I-5 [*Indian Act*]

[332] Special Rapporteur*, supra* note 327 at 4.

[333] *Ibid*.

Historically, Canada's colonial activities isolated communities from their resources, severely limiting their ability to sustain traditional culture.[334] During the expansion of European influence, the Canadian government's racist policies were most strongly embodied in the Indian Residential School system, where indigenous youth were transferred to be assimilated in Euro-Canadian society through a system of indoctrination and cultural isolation,[335] leading to major human rights violations and trauma that continues today.[336] In his 2014 report, the UN Special Rapporteur on the rights of indigenous peoples noted that the human rights issues afflicting Canadian indigenous peoples were reaching crisis levels, stating that indigenous people in Canada "[suffer] distressing socioeconomic conditions […] in a highly developed country."[337] These conditions persist today, and are further punctuated by inadequate levels of federal education funding, housing crises, and uncertain outcomes of government actions.[338]

Renewed efforts towards reconciliation for past harms have occurred over the past 20 years in Canada, culminating in commitments of the Canadian government to address the needs of its Aboriginal population and to implement the United Nations Declaration on the Rights of Indigenous Peoples,[339] as well as the formation of the Truth and Reconciliation Commission,

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[334] *Ibid*, indicating that "[in] some locations, Canada negotiated Treaties with First Nations; in others, the land was simply occupied or seized. The negotiation of Treaties, while seemingly honourable and legal, was often marked by fraud and coercion, and Canada was, and remains, slow to implement their provisions and intent."

[335] TRC Summary Report, *supra* note 330 at 130; In 2010 the Prime Minister of Canada issued an apology to survivors of the Indian Residential School system, stating that its policy objectives were "based on the assumption that aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as was infamously said, 'to kill the Indian in the child'". See: Indigenous and Northern Affairs Canada, "Indian Residential Schools Statement of Apology - Prime Minister Stephen Harper" (15 September 2010), online: <http://www.aadnc-aandc.gc.ca/eng/1100100015677/1100100015680>; Such activity has been declared a "cultural genocide": Sean Fine, "Chief Justice says Canada Attempted 'Cultural Genocide' on Aboriginals" (28 May 2015, Updated 25 March 2017), *The Globe and Mail,* online: <https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>; TRC Summary Report, *supra* note 330 at 1: "States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next."

[336] This includes some of the worst levels of poverty: Ryerson University Chair in Indigenous Governance, "First Nations Poverty in Canada" (2018), online: <https://www.ryerson.ca/chair-indigenous-governance/research-projects/ongoing/first-nations-poverty-in-canada/>; access to employment and education: Shauna MacKinnon, *Decolonizing Employment: Aboriginal Inclusion in Canada's Labour Market* (Winnipeg: University of Manitoba Press, 2015) at 37–39; Special Rapporteur, *supra* note 327 at 15–23; violence against women and girls: Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence against Indigenous Women in Canada* (Ottawa: Amnesty International, 2009); and disproportionate levels of incarceration: Julian V Roberts & Andrew A Reid, "Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story" 2017 59:3 Can J of Criminology and Crim Jus 313 at 314; Special Rapporteur, *supra* note 327 at 32: noting that Canada's indigenous people represent only 4% of the total population but compose 25% of the prison population.

[337] Special Rapporteur, *ibid* at 15.

[338] *Ibid* at 34–37.

[339] Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (03 August 2017), online: <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958#a2>; Justin Trudeau, Prime Minister of Canada, "Government of Canada to create Recognition and Implementation of Rights

whose mandate was to inform about the history of, and abuses within, the Indian Residential School system.[340] Currently, Aboriginal groups in Canada actively assert their constitutionally guaranteed rights through litigation, the Canadian regulatory regime, and the pursuit of self-determination through modern treaties and self-government agreements. It remains unclear, however, how these rights will ensure ownership and access to natural resources within Aboriginal traditional territories. Indigenous rights as defined in international law remain largely unacknowledged by the Canadian government and are not represented in environmental regulatory regimes.[341]

Obtaining a Mining Lease in British Columbia

In Canada, a mining lease is the final authorization issued by provincial ministries required to operate a mine.[342] The following section provides an overview of the process of securing a project's mining lease, which involves approvals from both federal and provincial regulatory bodies with varying standards of assessment. The overview provided in this section will focus on the provincial and federal approvals required to obtain a mining lease in British Columbia.

In British Columbia, the holder of a mining lease has exclusive rights to the mineral resources in the tenure area, but must pay mineral royalties to the province.[343] Prior to being awarded the lease, a major mining project must prepare an Environmental Impact Statement (EIS) for assessment under the federal *Canadian Environmental Assessment Act, 2012* (CEAA) or the BC *Environmental Assessment Act* (BCEAA) to obtain an Environmental Assessment (EA) certificate.[344] After being granted an EA permit, the project may then file an application for joint review under the British Columbia *Mines Act*[345] and *Environmental Management Act.*[346]

Framework" (14 February 2018), online: <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>.

[340] The stated purpose of the TRC is to "[guide and inspire] Aboriginal peoples and Canadians in a process of reconciliation and renewed relationships that are based on mutual understanding and respect."; The TRC final report made 96 calls to action, representing recommendations for Canadian government and society to address systemic issues for indigenous people in child welfare, education, language and culture, health, the justice system, and reconciliation. See: Truth and Reconciliation Commission of Canada, "What is the TRC?" online: <http://www.trc.ca/websites/trcinstitution/index.php?p=10>; As of 19 March 2018, it has been reported that a total of 25 of the recommendations are either in progress or completed, 25 recommendations have proposed implementation projects, while 44 recommendations remain unaddressed. See: Canadian Broadcast Corporation, "Beyond 94: Truth and Reconciliation in Canada" (26 March 2018), online: <https://newsinteractives.cbc.ca/longform-single/beyond-94?&cta=1>.

[341] Tsilhqot'in, *supra* note 326.

[342] The British Columbia Ministry of Energy and Mines defines an authorization as "permits, licences or approvals for activities required by legislation."

[343] See: RSBC 1996, c 293, s 10 [Mines Act] s 42(4) where the provincial Chief Gold Commissioner must issue a lease if the recorded holder has met all of the permit requirements.

[344] SC 2012, c 19 [*CEAA*].

[345] Mines Act, *supra* note 343 at s 10.

[346] SBC 2003 c 53.

The development of a major mine site can require more than 30 authorizations,[347] of which the EA certificate is the most substantial and significant, without which the project cannot pursue other permitting activities.[348] Applications under these laws are largely awarded at the discretion of the British Columbia Ministry of Energy, Mines and Petroleum Resources (MEM) and the federal and provincial environmental assessment regimes, discussed in more detail below. Permitting decisions are generally informed by the comprehensive studies required to support each application, which typically include detailed remediation, health, and environmental management plans.[349] Varying requirements for science-based assessments and public and Aboriginal consultation inform the permitting decisions.

The province of British Columbia is entitled to a mineral royalty rate of 2% on net proceeds and 13% on net revenue.[350] Under the provincial *Mines Act*,[351] mine operators are required to contribute to a reclamation fund to support the maintenance and environmental safety of the mine site following its closure.[352] However, the provincial reclamation security fund currently has a $1.26 billion CAD deficit with respect to the total outstanding liability of mines in the province.[353] This is a contentious issue in the province, and British Columbia's reclamation security program is currently under review.[354] The lack of corporate accountability for remediating the impacts of mining operations is especially concerning viewed in light of the clear conflict of interest issues arising from MEM's dual role as both the authorizer and promoter of the provincial resources sector.[355] This conflict of interest is similar to what exists in PNG, where the Mineral Resource Authority is both the principle regulatory body and an agent of the State in matters of mineral development.[356]

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[347] See: Annex A for a list of commonly required mine authorizations; This large number of authorizations is primarily due to the numerous operations undertaken in developing a mineral resource. These includes: the preparation of the mine site, developing road access and transmissions lines, establishing a mine camp, and developing a mineral processing facility and tailings site. For a comprehensive list of authorizations required under the British Columbia provincial permitting regime, see: Ministry of Energy and Mines, *Proponent Guide to Coordinated Authorizations for Major Mine Projects* (Victoria: Province of British Columbia, 2013) at 2 [*MEM, Proponent Guide*].

[348] See: CEAA, *supra* note 344, ss 6–7; *Environmental Assessment Act,* SBC 2002, c 43 [*BCEAA*], s 8.

[349] See Annex A for a list of typical authorizations required for a major mining project and the relevant laws governing them.

[350] *Mineral Tax Act*, RSBC 1996, c. 291.

[351] *Supra* note 343.

[352] *Ibid* ss 10, 12; BC Mining Code, ss 10, 12; BC Ministry of Energy, Mines and Petroleum Resources, "Securities", online: <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/permitting/reclamation-closure/securities>.

[353] Ministry of Energy and Mines, *Annual Report of the Chief Inspector of Mines* (Victoria: Ministry of Energy and Mines, 2016). Annual reports by the British Columbia Chief Inspector of Mines provides a summary of the currently held provincial reclamation security and proponents of active mines are required to submit annual reclamation liability reports.

[354] Auditor General, *supra* 315.

[355] See the case study of the Mount Polly Mine in section III.B.4 below for a more detailed assessment of this issue in British Columbia.

[356] PNG, *Mineral Resource Authority Act 2005*, No 18, s 5.

Environmental Impact Assessment

In Canada, EIA is considered an essential planning tool for considering the potential environmental, human, economic, and social risks of proposed developments.[357] A proposed major mine development in Canada must undergo a comprehensive federal environmental assessment study under *CEAA* in order to secure its environmental assessment certificate.[358] There are two classifications of comprehensive reviews under this regime: those administered by the Canadian Environmental Assessment Agency (the Agency) itself, and those administered by a review panel.[359] In both cases the comprehensive study process includes requirements for public participation in the review and implementation of the proposed mine's environmental monitoring programs.[360]

Alternatively, the federal Minister of Environment and Climate Change may allow a provincial EIA process to substitute the *CEAA* review entirely if satisfied that it will sufficiently consider certain factors and that the provincial agency will submit an environmental assessment report to the minister.[361] This substitution process raises concerns that a provincial regime may include weaker requirements for the regulator to consider certain factors, leaving greater room for decision-maker discretion and resulting in less public transparency.

EIA in Canada proceeds with two main tests: the primary assessment of a project's environmental impacts, and the secondary determination of whether those impacts are justified in

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[357] Oldman River Society, *supra* note 320 at 37, 71, where La Forest J stated: "Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. […] As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development." Also see: *MiningWatch Canada v Canada* (Fisheries and Oceans), [2010] 1 SCR 6.

[358] Regulations Designating Physical Activities, SOR/2012–147; CEAA, *supra* note 344; *Reviewable Project Regulation*, BC Reg 40/2009; Under the current law the comprehensive study may be assessed in conjunction with the British Columbia *Environmental Assessment Act*.

[359] CEAA*, supra* note 344, s 38(1); *Comprehensive Study List Regulations,* SOR/94-638, Part V; Canadian Environmental Assessment Agency & Canadian Environmental Assessment Agency, "Canadian Environmental Assessment Act: An Overview: Part 2. Introduction to the Four Types of Environmental Assessment", (16 January 2012), online: <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/canadian-environmental-assessment-act-overview-part-2-introduction-four-types-environmental-assessment.html>; Review panels may be used if there is a perceived uncertainty about the project's environmental effects or the presence of significant public interest.

[360] Canadian Environmental Assessment Agency, "Canadian Environmental Assessment Act: An Overview" (10 August 2016), online: <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=0DF82AA5-1&offset=3#p5>.

[361] Revisions to the Canadian environmental assessment regime in 2012 introduced a process substitution rule whereby if the provincial environmental assessment regime is deemed capable of adequately assessing a reviewable project, the *CEAA* review will be substituted entirely by the provincial EIA process. This will except the project from the EIA requirements of *CEAA*, and in some circumstances may subject a proposed development to a less stringent review process. However, where a federal EIA has been substituted for a provincial process the federal Minister of Environment and Climate Change must still determine whether a project's impacts are justified or not. See: Canadian Environmental Assessment Agency, "Canadian Environmental Assessment Act, 2012" (06 July 2016), online: <https://www.canada.ca/en/environmental-assessment-agency/corporate/acts-regulations/legislation-regulations/canadian-environmental-assessment-act-2012.html>; in the province of British Columbia, some circumstances may allow for EIA assessments to undergo joint review by both the Agency and the BC Environmental Assessment Office (BCEAO).

light of the project's public benefit. Project developers are generally required to submit an EIS,[362] which will include a project-specific assessment of potential environmental, social, cultural, and economic impacts based on extensive baseline studies that characterize the existing conditions.[363] The EIS submission also requires the development of comprehensive environmental management plans.[364]

Decision-makers in a *CEAA* comprehensive study generally rely on science-based assessments of potential project impacts.[365] For major mining projects undergoing an assessment by expert review panel, members will be appointed by the Minister of Environment and Climate Change on a discretionary basis. The Minister's mandate requires that panel members are unbiased, free from conflict, and knowledgeable or experienced in the relevant environmental, social, and economic effects of the proposed project.[366] In principle, this allows the panel to apply their specialized knowledge to assess a project's EIS against environmental thresholds, the concerns of affected Aboriginal communities, and concerns of the public.[367] This process is intended to "encourage an open discussion and exchange of views" [368] through the use of public hearings. In practice, however, the regime has had varying degrees of success, especially in the context of oil and gas development.

Factors that the decision-makers are required to consider are expressly stated in *CEAA*, which provides an element of public accountability by ensuring that legal challenges can be mounted against decisions that do not abide by the requirements.[369] Further accountability is also

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[362] See: *CEAA*, *supra* note 344, ss 43(1)(e), 52(4).

[363] Baseline studies allow for the measurement of change to conditions that are expected to occur as a result of the project's construction, operation, and decommissioning. BC Ministry of Energy and Mines & BC Ministry of Environment, *Joint Application Information Requirements for Mines Act and Environmental Management Act Permits* (Victoria: BC Ministry of Energy and Mines, 2016) at 11; The British Columbia *Mining Act* and *Environmental Management Act* require a minimum of 12 to 18 months of baseline data for Meteorology and climate, Geology, Topography, surface drainage features and natural hazards, Groundwater and surface water quality and volume, Sediment quality, Fisheries and aquatic resources, Vegetation and wildlife, Current land status and land use, and Archaeology and current cultural use.

[364] Mine management plans provide direction to management and mine staff for the safe operation of the project, while monitoring plans provide for continual observation and management of mine discharges and other environmental risks identified during the proposed mine's assessment.

[365] This has been contended as untrue by some parties following the 2012 changes to the *CEAA* review process; see commentary in Section III.B.3 below.

[366] *CEAA*, *supra* note 344, ss 38(2) s 42(1), (2)(d); Canadian Environmental Assessment Agency, "Canadian Environmental Assessment Act: An Overview: Part 1 Introduction to Federal Environmental Assessment" (16 January 2012), online: <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/canadian-environmental-assessment-act-overview-part-1-introduction-federal-environmental-assessment.html> [*CEAA Overview*].

[367] Under ss 19(1), (3) of *CEAA* the required factors to be considered by the panel include: environmental effects including any cumulative environmental effects that are likely, the significance of these effects, comments received from the public, the project's purpose and alternatives means of carrying out the project, the results of independent regional studies commissioned by the Minister, the community knowledge of local Aboriginal groups, and any other factors the panel or Minister deems relevant.

[368] CEAA Overview, *supra* note 366: "A review panel allows the proponent to present the project to the public and explain the projected environmental effects. It also provides opportunity for the public to hear the views of government experts about the project."

[369] CEAA, *supra* note 344 s 52(1).

secured through conditions attached to EA certificate approvals, which will often focus on environmental management planning and Aboriginal consultation. In principle, this serves as an enforcement measure that is intended to protect against "box checking" permitting.

Despite efforts to increase accountability, a significant amount of decision-maker discretion over the weighing of a proposed project's potential impacts is embedded in the federal and provincial review process. This discretion leaves the efficacy of public participation in the project review process somewhat unclear.[370] This decision-making framework can be unpredictable and allows for the possibility that unpopular projects will be approved without due consideration for their perceived impacts on the public and Aboriginal communities.[371] Nevertheless, the Canadian federal EIA process still possesses significant legislated accountability and public transparency procedures in comparison to less developed regimes.

CEAA, 2012 and Weakening Federal Accountability

The federal Canadian environmental review process is not without its problems. In 2012 a major overhaul of federal environmental assessments was implemented through an omnibus bill, including significant changes to *CEAA*.[372] These changes came at a time when the Canadian Conservative party[373] was downgrading public spending and attempting to encourage economic stimulation by accelerating resource exploitation projects.[374]

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[370] Denis Kirchhoff & Leonard JS Tsuji, "Reading Between the Lines of the 'Responsible Resource Development' rhetoric: the Use of Omnibus Bills to 'Streamline' Canadian Environmental Legislation" (2014) 32:2 Impact Assessment and Project Appraisal 108 at 110 [*Kirchoff & Tsuji*]; This issue of discretion is also relevant to the project triggering an environmental assessment, which under CEAA, 2012 became subject to a greater deal of Ministerial discretion: Also see Meinhard Doelle, "CEAA 2012: The End of Federal EAs as we Know It?" (2012) 24:1 J of Env L and Prac 1 at 4 [*Doelle*].

[371] Kirchoff & Tsuji, *ibid* at 110; For example, the Site C Hydroelectric project received federal and provincial approvals despite vocal opposition from sections of civil society, a number of impacted Indigenous groups, and the Union of BC Indian Chiefs: Geordan Omand, "Federal approval for Site C dam draws criticism from First Nations, advocacy groups" (01 August 2016), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/british-columbia/site-c-dam-federal-approval-1.3703527>; Justin McElroy, "B.C. government to go ahead with Site C hydroelectric dam project" (11 December 2017), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/british-columbia/site-c-dam-decision-1.4435939>.

[372] Kirchhoff & Tsuji, *supra* note 370: "An omnibus bill is a single document that is accepted or rejected through a single vote by a legislature. Omnibus bills package together several measures into one, covering a number of diverse and often unrelated topics"

[373] The federal Conservative Party in Canada is generally characterized by fiscally conservative policies that favour economic growth over public initiatives.

[374] Kirchoff et al, *supra* note 312 at 108. This widely-criticized policy shift was likely influenced by economic uncertainty spurred by the 2008 global financial crisis. See: Kirchhoff & Tsuji, *supra* note 370: indicating that the manner in which the regulatory changes were introduced within the federal budget bill, rather than normal legislative processes, "[undermined] the transparency and accountability of the policy-making process"; Westcoast Environmental Law, *Failing Grade: New Federal Approach to Environmental Assessment Leaves Canadians at Risk and Without a Voice*, online: <www.wcel.org/sites/default/files/publications/Report%20Card%20June%2020%202012%20Legal%20Analysis%20Report.pdf>; Eamon Mac Mahon, "HEADWATERS: Reduced federal oversight leaves a critical resource exposed" (25 March 2017) The Globe and Mail, online: <"www.theglobeandmail.com/news/national/under-pressure-water-management-in-a-new-politicalera/article27512244/>. This "retreat from regulation" has been cited by

The 2012 legislative changes affected *CEAA* and a number of related laws and regulations, and have been generally considered to restrict the scope of environmental assessment while weakening protections for fish habitat, waters, and species at risk.[375] After 2012, the scope of the *CEAA* assessment was significantly narrowed, requiring fewer projects to be subjected to an EIA, while focusing assessment criteria on a more limited set of environmental issues and tightening timelines available for public comment.[376] This has effectively reduced information available to the public during the EIS review.[377]

Allowing greater discretion in the *CEAA* assessment process has resulted in less transparency, accountability, and public and Aboriginal consultation. These concerns are especially evident in the project substitution process introduced in 2012 in which provincial environmental assessment regimes could be used to substitute a comprehensive *CEAA* review.[378] In British Columbia, this is problematic, as the law governing environmental assessment is significantly less procedurally robust, transparent, and accountable than *CEAA,* through its heavy reliance on discretionary decision-making.[379]

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commentators as a common response to the global financial crisis in 2008 seen in major mining jurisdictions in the world, see: Ciaran O'Faircheallaigh, "Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements" (2015) 132 J Bus Ethics 91 at 92 [O'Faircheallaigh].

[375] *Ibid* at 111–113; These restrictions primarily came due to the introduction of project lists that restrict the number of projects that are to be subjected to environmental assessment, and issues with scoping for upstream and downstream impacts of a reviewable project. This scoping issue was highlighted in *MiningWatch Canada v. Canada*, 2010 SCC 2 where it was determined that the assessment process must only assess the discrete components of the project, not its upstream or downstream impacts.

[376] Doelle, *supra* note 370 at 4: this issue is primarily tied to an overall reduction in the number of projects that are subject to environmental assessment under *CEAA* due to changes in how an assessment is triggered, but this specific issue has not affected assessments for major mine projects generally and is beyond the scope of this analysis.

[377] Some commentators have reported that this has mostly resulted in an offloading of environmental monitoring requirements to be conducted in follow-up to the EA permit, rather than concurrently with the submission of a project's EIS, see: Brynn Roach & Tony R Walker, "Aquatic monitoring programs conducted during environmental impact assessments in Canada: preliminary assessment before and after weakened environmental regulation" (2017) 189:3 Environ Monit Assess 1 at 9; The ad hoc nature of review panel assessments has also been criticized and calls for a permanent quasi-judicial review commission have been made. See: Martin Papillon & Thierry Rodon, *Environmental Assessment Processes and the Implementation of Indigenous Peoples Free, Prior and Informed Consent: Report to the Expert Panel Reviewing Federal Environmental Assessment Processes*, online: Expert Panel Review of Environmental Assessment Process <http://eareview-examenee.ca/view-submission/?id=1490634598.8387> [*Papillon & Rodon*].

[378] This may be done if the federal Minister of Environment and Climate Change believes the provincial regime is a satisfactory replacement for the federal assessment.

[379] *BCEAA* is considered to simply be a framework law, outlining what the provincial decision-makers must factor in their assessment, compared to *CEAA* which contains more concrete and significant processes. However, as of 2018 the British Columbia provincial government has announced plans to revitalize the *BCEAA* review process, stating its goal to enhance public confidence, pursue reconciliation with Aboriginal groups, and protecting the environment. As of March, 2018 the provincial government is undertaking consultations with Aboriginal groups and the public to solicit input on the scope of any proposed changes to the *BCEAA* regime, however, what this actually means in reality is currently unclear. See: BC Environmental Assessment Office, "Environmental Assessment Revitalization", online: <http://www.eao.gov.bc.ca/revitalization>.

Bill C-69: Proposed Changes to Federal Environmental Assessment

As a baseline, Canadian rule of law allows for civil society to pursue legislative and policy changes through democratic processes. In February 2018, the Canadian government, led by the federal Liberal party, proposed legislation to revise the federal environmental assessment process.[380] Bill C-69[381] aims to address many of the shortcomings of the 2012 changes to the *CEAA* regime, making key amendments to the *Navigable Waters Act* and the *Canadian Energy Regulator Act*, and proposing a new *Impact Assessment Act*.[382] The proposed *Impact Assessment Act* will replace the *CEAA* framework and include significant changes to the EIA planning process, including the assessment process itself and other areas of the current regime.[383]

Discretionary decisions by the federal government are still required under the proposed framework, but with further clarity as to what factors must be considered – directly addressing concerns that greater decision-maker discretion reduces public transparency in the process. Generally, these proposed amendments have been considered an improvement over the previous *CEAA* regime due to the mandated early planning phase that includes requirements for Aboriginal and public input into a proposed project's design, enhanced requirements to consider project alternatives, and strengthened statutory decision-making criteria, including sustainability considerations.[384] However, the proposed *Impact Assessment Act* also has significant flaws, some of which reflect those of the current CEAA regime.[385] The proposed regime also fails to directly incorporate key articles from the United Nations Declaration on the Rights of Indigenous Peoples, which raises questions as to the Canadian government's commitment to its implementation.[386] A

[380] John Paul Tasker, "Ottawa to scrap National Energy Board, overhaul environmental assessment process for major projects" CBC News, online: <https://www.cbc.ca/news/politics/liberal-environmental-assessment-changes-1.4525666>.

[381] *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st sess, 42nd Parl, 2018 (First Reading, 8 February 2018).

[382] *Ibid*, Part 1–3.

[383] Meinhard Doelle, "Bill C-69: The Proposed New Federal Impact Assessment Act (IAA)" (9 February 2018), Dalhousie University (blog), online: <https://blogs.dal.ca/melaw/2018/02/09/bill-c-69-the-proposed-new-federal-impact-assessment-act/>; these changes appear to address issue with compressed project review timelines for consultation that emerged following the 2012 changes to *CEAA*.

[384] *Ibid*; Canadian Environmental Law Association, "The Federal Government's Proposed Impact Assessment Act: Some Forward Progress, but Changes Needed to Ensure Sustainability" (8 February 2018), online: <http://www.cela.ca/newsevents/media-release/impact-assessment-act-some-forward-progress> [*CELA*].

[385] CELA, *ibid.* See: MiningWatch Canada, "Bill C-69: New Federal Environmental Review Laws Fall Short of Promises" (9 February 2018), online: <https://miningwatch.ca/blog/2018/2/9/bill-c-69-new-federal-environmental-review-laws-fall-short-promises>, indicating that while Bill C-69 attempts to encourage public transparency, there are concerns that the bill is merely an exercise in "box checking" to satisfy political commitments to consider climate change, indigenous rights, and sustainability that has not applied a rigorous analysis to the existing environment assessment process. And warning: "[The] worst outcome for both sustainability and democracy would be a process that gives the government adequate credibility […] to allow it to make and enforce decisions that may have nothing to do with sustainability and evidence, or climate commitments, or environmental protection, or Indigenous peoples' rights and livelihoods.",

[386] Some of these issues include limitations on the inclusion of projects requiring assessment, and the provincial equivalency process whereby a provincial environmental assessment regime can substitute the federal process (which in cases like British Columbia has weaker transparency and accountability controls due to the highly discretionary nature of the assessment). Concerns have been raised that many of the recommendations submitted by

coalition of environmental NGOs have reviewed Bill C-69 and given it a "C-" rating for its failure to ensure a commitment to sustainability, regional and strategic assessment, and meaningful public participation.[387]

Despite Bill C-69's flaws, its review, including a mandated public consultation period, and indeed the development of the Bill itself, reveals a functioning democratic process that ensures access to public decisions and legislative transparency, as opposed to regimes where regulatory laws are not easily accessible and accountability for their review does not factor into government decision-making.

British Columbia Environmental Assessment

Because constitutional authority over the environment is divided between the federal and provincial governments in Canada, British Columbia also has an environmental assessment regime distinct from the federal *CEAA* process. The provincial *Environmental Assessment Act* (BCEAA)[388] provides for an EIA process overseen by the BCEAO that acts in concert with the federal review process. A proposed mining project triggers the requirement for a provincial EIA within this regime alongside the federal *CEAA* regime, which may substitute or be submitted alongside a federal assessment under *CEAA*.[389]

NGOs and other commentators have expressed major concerns about how British Columbia conducts the assessment of environmental impacts and the enforcement of permit requirements.[390] Under *BCEAA,* the BCEAO's assessment of a project is not required to include science-based considerations.[391] Instead, regulatory decisions are mainly left to the discretion of the ministry or the BCEAO to determine what environmental factors are relevant for a given assessment. This lack of legislated guidance for decision-makers makes it difficult for the public to directly challenge decisions through judicial processes.[392] Furthermore, public consultation is

the Expert Panel established by the Minister of Environment and Climate Change to assess the major issues with the existing environmental assessment regime have not been incorporated in Bill C-69, such as supporting independence for review panels by not allowing members of regulatory bodies to be appointed to panels. See: CELA, *ibid*; Expert Panel Review of Environmental Assessment Process, "Submissions Received", online: < http://eareview-examenee.ca/submissions-received/> [*Expert Panel Review*].

[387] MiningWatch Canada, "Making the Mid-Term Grade:
A Report Card on Canada's Proposed New Impact Assessment Act" (March 2018), online:
<http://miningwatch.ca/sites/default/files/2018-03-29-midtermreportcard-iaact-final.pdf>.

[388] *Environmental Assessment Act,* SBC 2002, c 43 [*BCEAA*].

[389] *Reviewable Projects Regulation,* BC Reg 370/2002, Part 3.

[390] MiningWatch Canada, "Top 40 Mining Reforms for BC" (31 January 2013), online:
<https://miningwatch.ca/blog/2013/1/31/top-40-mining-reforms-bc>; MiningWatch Canada, "Submission for BCs Mining Code Review" (30 September 2016), online: <https://miningwatch.ca/publications/2016/9/30/submission-bcs-mining-code-review>.

[391] See: *Ibid* where there the language

[392] This is relevant to Canada's administrative law principles, wherein a discretionary decision can be challenged based on its lack of reasonableness. However, reasonableness is difficult to measure when the legislation in question does not provide clear requirements for decision-makers and leaves too much to their own judgement. This is the case with the *BCEAA*, which unlike *CEAA*, gives broad discretionary powers to the BCEAO to review projects as they deem appropriate, with little public transparency.

not mandated under *BCEAA* itself but is left to the discretion of the BCEAO.[393] Final justification of a project in light of its potential environmental impacts is also reserved for the BC Minister of Environment and Climate Change on a project-by-project basis. According to many commentators, this lack of transparency and overreliance on discretionary decision-making constitute a flawed provincial regulatory regime.[394]

3. Accountability and Enforcement

Accountability and enforcement is a critical component of a functioning regulatory regime. Without measures to hold decision-makers to account and enforce permit requirements on developers, a regulatory regime is merely a hollow statement of principles. Accountability for decision-making in the Canadian regulatory regime is typically secured through an engaged civil society that scrutinizes and comments on government decisions, laws, and policies.[395] Public review is often facilitated through various offices, such as ombudspersons, provincial auditor generals, and through soliciting representatives.[396] Such accountability processes in Canada demonstrate a relatively robust rule of law.[397]

Accountability

Environmental assessments through *CEAA* are guided by the law's statement of specific environmental factors that must be considered in the decision-makers' assessments. In principle, this legislative transparency allows the public to challenge findings through judicial processes because they can clearly see what the requirements are for regulators.[398] The *CEAA* review process

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[393] *Public Consultation Policy Regulation,* BC Reg 373/2002, s 4.

[394] Robyn Allan, *Toward Financial Responsibility in British Columbia's Mining Industry* (Union of British Columbian Indian Chiefs, 2016) at 18–19; Allison Franko et al, "Mount Polley: A call for improved coordination and transparency in compliance monitoring and enforcement for mines in BC", IRES working paper series, no 2015-08, online: <https://open.library.ubc.ca/cIRcle/collections/graduateresearch/42591/items/1.0076565>; See further discussion in Section III.B.4 below.

[395] Freedom House, "Freedom in the World 2017: Canada Profile" (2018), online: <https://freedomhouse.org/report/freedom-world/2017/canada> [*Freedom House*], Indicating that "Canada has a strong history of respect for political rights and civil liberties, and has espoused a broad conception of social welfare. While indigenous peoples still face discrimination and other social and political problems, the government has acknowledged and made some moves to address these issues."

[396] World Bank, World Governance Indicators, 2016, online: <http://info.worldbank.org/governance/wgi/#reports>; As of 2016, Canada ranked in the 96th percentile in its public Voice and Accountability metric, which "captures perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media." This ranking is based on the estimated aggregate indicator for these characteristics compiled by the Natural Resource Governance Institute and Brookings Institution and the World Bank Development Research Group.

[397] Freedom House, *supra* note 395, ranking Canada's rule of law highly, with consideration for the judiciary's independence, the prevalence of rule of law in civil and criminal matters, the civilian control of police, protection from political terror, unjustified imprisonment, exile, or torture, and whether laws, policies, and practices guarantee equal treatment of various segments of the population.

[398] Administrative law in Canada ensures that most discretionary permit-related decisions are open to appeal or judicial review by the relevant affected parties; If the decision-maker is of the opinion that a project is likely to

is also informed by the decision-maker's consultation with government agencies, expert bodies, the public, and potentially impacted Aboriginal communities.[399]

Public accountability is also supported by ensuring that final discretion to permit or deny a project's EA certificate is reserved to the federal Cabinet.[400] This means that no single ministry or decision-maker who is directly connected to promoting resource development industries in Canada can make a final determination on the project's justification.[401] It also ensures that no single minister has ultimate authority to authorize a project that is likely to result in significant environmental harm.[402]

According to MiningWatch Canada,[403] effective accountability in the Canadian EIA process can be measured based on its "[demonstration] to the public what the result of their participation is, how their input has been considered, and what criteria and priorities have been

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result in significant impacts to the environment or Aboriginal rights, the justification of its impacts can only be invoked by the Federal Cabinet.

[399] Canadian Environmental Assessment Agency, "Canadian Environmental Assessment Act: An Overview: Part 1 Introduction to Federal Environmental Assessment" (16 January 2012), online: <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/canadian-environmental-assessment-act-overview-part-1-introduction-federal-environmental-assessment.html>.

[400] Canadian Environmental Assessment Agency, "Federal Environmental Assessment Process by Agency Diagram" (6 July 2016) online: <http://www.ceaa.gc.ca/default.asp?lang=en&n=AB55D9CC-1>.

[401] CEAA, *supra* note 344 ss 47, 54: This decision will be informed by the panel's report and other discretionary factors and will determine if the project's impacts are justified. The review panels report must include the panel's "rationale, conclusions and recommendations, including any mitigation measures and follow-up program", as well as summaries of public comments. See: *CEAA*, *supra* note 344 ss 31(1)(a), 43(1)(d); The panel's report must also set out recommendations regarding its findings; The *CEAA* review process has been criticized as "embedding scientific risk-analysis in a political, value-based decision of risk management" resulting in a form of technocratic decision-making that competes public values against facts. However, for the purposes of this analysis the panel review process is considered only for its procedural qualities. See: Mary Grindley*, Discretion and judicial review under the Canadian Environmental Assessment Act case study of a panel review* (York: ProQuest Dissertations Publishing*,* 2009*)*.

[402] CEAA*, supra* note 344 s 47(2): In some cases, such as in the review of the New Prosperity Mine (outlined in Section III.B.4 below), the review panel will send the proponent's EIS back with comments requiring additional information. This outcome will also be the case in the British Columbian EIA regime, for example, see the recent denial of an BCEAA certificate for the Ajax Mine: West Coast Environmental Law, "BC rejection of Ajax Mine illustrates why stronger environmental laws needed" (14 December 2017), online: <https://www.wcel.org/media-release/bc-rejection-ajax-mine-illustrates-why-stronger-environmental-laws-needed>; Alternatively, the submission may be directed toward another relevant authority with specific expertise for reassessment if significant environmental effects are identified to specific ecological components such as fish habitat, as with the review of the Sisson Project in the province of New Brunswick: Canadian Environmental Assessment Registry, "Sisson Project (Tungsten and Molybdenum Mine)", Canadian Environmental Assessment Agency, online**:** <https://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=63169>. If the review is conducted by an expert review panel, a submission of findings will be made to the Minister of Environment and Climate Change who, with authority of the Federal Council, will administer the justification test for the project by determining whether the project's potential impacts are justified, and have final discretion whether or not to award the environmental assessment certificate.

[403] MiningWatch Canada is a pan-Canadian civil society organization focused on irresponsible mineral policies and practices in Canada and around the world. For more see MiningWatch Canada, "About Us", online: < miningwatch.ca/about>.

employed."[404] In cases where the public is denied or restricted access to the permitting decision-making process for a project, the open public review of that decision-making process is likely to occur to assess its efficacy. This is what occurred in British Columbia following the Mount Polly Mine disaster in 2014 discussed below, where the BC Auditor General reported on significant lack of accountability and transparency built into the mine permitting and enforcement process managed by MEM.[405] The OECD also reported on the issue of British Columbia's enforcement of environmental regulations, indicating that "operators who violate the law are given repeated warnings and opportunities to return to compliance, but never face real sanctions, even for clear and dangerous violations".[406]

While these concerns raise serious questions about how British Columbia's MEM can serve the public interest while simultaneously promoting and regulating the mining industry – also suggesting some form of regulatory capture – the level of public engagement with the issue highlights access to political processes free from threat of suppression and violence. Such public engagement is visible federally as well, where in 2016 the federal Liberal government convened a public panel to formally review the *CEAA* environmental assessment process following its revision in 2012.[407] The panel focused on restrictions to the scope of public engagement throughout *CEAA* assessments that have reduced the perceived access to the decision-making process, especially for affected Aboriginal communities.[408] For instance, a lack of public transparency regarding a project's Follow-up Programs[409] has left many commentators crying foul in the face of significant gaps in the enforcement of EA permit conditions.[410]

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[404] MiningWatch Canada, *Comments on the Government of Canada Discussion Paper on the Review of Environmental and Regulatory Processes* (Ottawa: MiningWatch Canada, 2017) at 4 [*MWC, Comments*].
[405] For a discussion of this process see the assessment of the Mount Polley mine assessment below.
[406] OECD Performance Review, *supra* note 310 at 96, citing Auditor General, *supra* note 315.
[407] Expert Panel Review, *supra* note 386; Margo McDiarmid, "Short timelines for environmental assessments not working, says expert panel" (5 April 2017), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/politics/environmental-assessment-expert-panel-1.4056423>: "The panel travelled to 21 cities and received 800 submissions, 300 of them produced by Indigenous people."
[408] Melissa Gorrie, "PART 1 Environmental assessment law reform: Follow-up and monitoring + compliance and enforcement = key" (25 October 2016), EcoJustice, online: <https://www.ecojustice.ca/part-1-environmental-assessment-law-reform-follow-up-and-monitoring-compliance-and-enforcement-key/> [*EcoJustice, Law Reform*]; The stated purpose of the Follow-up Program mechanism under *CEAA* is to allow proponents to verify the accuracy of the environmental assessment and determine the efficacy of mitigation measures. See: Canadian Environmental Assessment Agency, *Operational Policy Statement: Follow-up Programs under the Canadian Environmental Assessment Act,* online <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=499F0D58-1&pedisable=true>.
[409] Melissa Gorrie, "PART 1 Environmental assessment law reform: Follow-up and monitoring + compliance and enforcement = key" (25 October 2016), EcoJustice, online: <https://www.ecojustice.ca/part-1-environmental-assessment-law-reform-follow-up-and-monitoring-compliance-and-enforcement-key/> [*EcoJustice, Law Reform*]; The stated purpose of the Follow-up Program mechanism under *CEAA* is to allow proponents to verify the accuracy of the environmental assessment and determine the efficacy of mitigation measures. See: Canadian Environmental Assessment Agency, *Operational Policy Statement: Follow-up Programs under the Canadian Environmental Assessment Act,* online <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=499F0D58-1&pedisable=true>.
[410] Specifically, a lack of information on how the enforcement of follow-up programs actually work in practice and how follow-up program requirements are not required to be publicly available (unless they are integrated in a project's EA certificate conditions). See: EcoJustice, Law Reform, *ibid*, indicating that this has made the public review of a project's actual environmental impacts difficult and has created a dearth of useful information for future EIAs of similar projects.

Enforcement

Enforcement for regulatory decision making is generally secured through legislative compliance mechanisms. Typically, an EA permit issued under *CEAA* will be accompanied by a list of comprehensive conditions designed to ensure operator compliance with mitigation and monitoring plans and continuing consultations. Relevant transparency provisions have been incorporated in legislation, and public reviews of the regulatory system are supported by lively academic debate and a highly informed and engaged civil society.[411] Under *CEAA*, compliance and enforcement measures support transparency through public disclosures on the Agency's website.[412] These disclosures include:

1. Annual summaries of site inspections by enforcement officers;
2. Information submitted to the Agency by the proponent regarding schedules, plans, and annual reports;
3. Warnings and other documents issued by enforcement officers;[413]
4. Injunctions issued by the Ministry;[414]
5. Charges brought as a result of contravening permit requirements; and,
6. Any other information considered publicly relevant by the agency, such as fines and prohibitions due to the permitted project violating its permit conditions.[415]

The efficacy of these compliance and enforcement mechanisms are supported by the separation between the Ministry of Environment and Climate Change and the natural resources industry (in contrast to the British Columbian provincial regulatory regime, where the mandate of MEM is to both promote and regulate the resources industry[416]). The Mount Polley Mine case

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[411] For example, the Canadian *Access to Information Act*, RSC 1985, c A-1, guarantees public access to information held by federal ministries; According to Freedom House's 2017 Freedom in the World report, Canada ranks highly in its civil liberties, supported by a free and independent media, academic freedom within an educational system that is free of extensive political indoctrination, and a general freedom of open discussion and debate, see: Freedom House, *supra* note 395.

[412] Canadian Environmental Assessment Agency, "Compliance and Enforcement Policy for the Canadian Environmental Assessment Act, 2012" (21 February 2018), online**: <**https://www.canada.ca/en/environmental-assessment-agency/corporate/compliance-promotion-enforcement/compliance-enforcement-policy.html#_Toc22> [*CEAA, Compliance*].

[413] Canadian Environmental Assessment Agency, "Enforcement Actions", online: **<**https://www.canada.ca/en/environmental-assessment-agency/corporate/compliance-promotion-enforcement/enforcement-actions.html>, where all current posting of all actions issued by enforcement officers are publicly displayed.

[414] CEAA, Compliance, *supra* note 412: According to the Ministry of Environment and Climate Change, injunctions can include court orders to "refrain from doing an act that, in the court's opinion, may constitute or be directed toward the commission of the offence; or do an act that, in the opinion of the court, may prevent the commission of the offence."

[415] *Ibid*.

[416] BC Ministry of Energy, Mines and Petroleum Resources, "Compliance Oversight", online: <http://mines.nrs.gov.bc.ca/compliance-oversight>; BC Ministry of Energy, Mines and petroleum Resources, *Recommendations from the Auditor General's Report on Mining*, online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/health-and-safety/code-review/mp_ag_recommendationstable_february2017.pdf>

study demonstrates how public due diligence and policy review in the face of the failure of provincial regulators to avert a major environmental disaster has helped identify latent issues with the British Columbian regulatory framework.

Case in Point: Mount Polley Mine

Mount Polley is an active gold and copper mine located in the Caribou region of central British Columbia, owned by the Canadian company Imperial Metals. In 2014, the mine's tailings dam breached, releasing 10 billion litres of tailings into the Quesnel Watershed.[417] The incident was the largest tailings dam collapse in Canadian history – considered an environmental disaster and regarded as a major failure of the provincial MEM regulators.[418] A regional state of emergency was declared due to reported impacts on health and fish stocks from the reduction in water quality, particularly within numerous Aboriginal communities in the region.[419]

Following the disaster, investigations were conducted by the provincial government, an independent review panel, and MEM itself. These found that Imperial Metals did not adequately address geotechnical and water management risks inherent in the tailings dam design, failing to meet best practice standards.[420] Despite these findings, the province of British Columbia opted not to file charges against Imperial Metals.[421] Furthermore, no liability has been assigned for the disaster in the courts, and litigation between the potentially responsible parties and the provincial government is still ongoing.[422]

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[417] These tailings contained 4.5 million cubic metres of silt composed of nickel, arsenic, lead, selenium, and copper into Quesnel Lake and local rivers. See: Amnesty International, *A Breach of Human Rights: The Human Rights Impacts of the Mount Polley Mine Disaster, British Columbia, Canada* (London: Amnesty International, 2017) [*Amnesty International, Mount Polley*]; CBC News, "Mount Polley mine tailings spill: Imperial Metals could face $1M fine" (6 August 2014) Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/british-columbia/mount-polley-mine-tailings-spill-imperial-metals-could-face-1m-fine-1.2728832>.

[418] This punctuated the fact that MEM already had a poor track record of enforcing permit requirements. See: Schoenberger, *supra* note 150 at 124; BC Ministry of Energy and Mines, *Decision and Reasons for Decision of the Chief Inspector of Mines on whether to submit a Report to Crown Counsel to assess if charges should be laid and a prosecution commenced for contravention of the Mines Act* (Victoria: MEM 2015); CBC News, "Mount Polley Mine tailings pond breach called environmental disaster" (4 August 2014), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/british-columbia/mount-polley-mine-tailings-pond-breach-called-environmental-disaster-1.2727171>.

[419] Janis Shandro et al, *Health impact assessment of the 2014 Mount Polley Mine tailings dam breach: Screening and scoping phase report*, (First Nations Health Authority, 2016).

[420] BC Ministry of Energy, Mines and Petroleum Resources, "Mount Polley Tailings Breach" online: <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/further-information/directives-alerts-incident-information/mount-polley-tailings-breach>.

[421] Gordon Hoekstra, "NDP to probe lack of B.C. charges in Mount Polley dam failure" (4 August 2017), Vancouver Sun, online: <http://vancouversun.com/news/local-news/premier-horgan-calls-it-disturbing-no-charges-filed-in-mount-polley-disaster>; Camille Bains, "No B.C. charges in Mount Polley dam collapse as federal investigations continue" (3 August 2017), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/british-columbia/mount-polley-investigation-ndp-1.4233234>; Jackie McVicar, "Three years on, Mount Polley disaster a painful reminder of never-ending horror" (7 August 2017), Amnesty International, online: <https://www.amnesty.ca/blog/three-years-mount-polley-disaster-painful-reminder-never-ending-horror>.

[422] In August 2017 private parties, including indigenous activists filed private charges under the *Mines Act* and *Environmental Management Act*, motivated by the remedied harms caused by the disaster to indigenous lands and

Imperial Metals was subsequently allowed to submit a revised water management plan, after which MEM approved the mine's reopening in 2016, despite the strong objection of local communities and Aboriginal groups.[423] While the mining company conducted its required community consultation under the new water management plan, it was not possible for any of the consulted groups to monitor Imperial Metals' integration of community concerns into the design of the new tailings facility due to MEM's lack of procedural transparency.[424] In this case, the company and the provincial regulator appear to have prioritized mining activities over the environment and public concern.[425]

The BC Auditor General, Carol Bellringer, conducted an assessment of regulation compliance and enforcement of MEM following the Mount Polley disaster.[426] Her report revealed

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rights. The charges claimed that the Mount Polley operators failed to uphold their permit requirements relating to effluent discharges among other significant claims. However, in January the charges were stayed by the provincial prosecution service: MiningWatch Canada, "Indigenous Advocate Seeks Justice - Files Charges against Imperial Metals Over Biggest Mining Spill in Canada" (4 August 2017) online: <https://miningwatch.ca/news/2017/8/4/indigenous-advocate-seeks-justice-files-charges-against-imperial-metals-over-biggest>; Gordon Hoekstra, "B.C. government stays charges in Mount Polley private prosecution" (30 January 2018), Vancouver Sun, online: <http://vancouversun.com/business/local-business/b-c-government-stays-charges-in-mount-polley-private-prosecution>; CBC News, "Province halts private prosecution against Mount Polley tailings spill" (30 January 2018), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/canada/british-columbia/bev-sellars-private-charges-mount-polley-stay-of-proceedings-1.4511305>.

[423] BC Ministry of Energy, Mines and Petroleum Resources, "Permit: Approving Work System and Reclamation Program (23 June 2016), online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/directives-alerts-info/mount-polley-incident-page/m-200_mount_polley_2016-06-23_permitamd_return_full_ops_tsf.pdf>; Amnesty International, Mount Polley, *supra* note 417 at 15; According to Imperial Metals' consultation report, which was a requirement for amending their water management permit under the *Environmental Management Act*, they conducted six community meetings and received 144 public comments regarding their application, however it is not clear that any comments were actually implemented. See: Mount Polley mining Corporation, *Public Consultation Report: Mount Polley Mine Long Term Water Management Plan* (28 February 2017), online: <https://www2.gov.bc.ca/assets/gov/environment/air-land-water/spills-and-environmental-emergencies/docs/mt-polley/p-o-r/public_consultation_report_mount_polley_mine_ltwmp.pdf> [*Mount Polley Consultation Report*]; In addition to concerns voiced by affected communities during consultation for the amendment, community objection took the form of formal opposition by the community of Likely Chamber of Commerce and NGOs including Concerned Citizens of Quesnel Lake, and local members of First Nation Women Advocating for Responsible Mining. See: Mining Watch Canada, *Submission to BC Ministry of Environment: Mount Polley Mine Permit Application for Long Term Water Management Plan & Discharge into Quesnel Lake* (Ottawa, MiningWatch Canada, 2016) at 6.

[424] See: Mount Polley Consultation Report*, ibid*; Douglas Hill, *Memorandum Re: amendment applications- jobs #355246, 353164, and 35170* (7 April 2017) Environmental Protection, Mining Operations, online: <www2.gov.bc.ca/assets/gov/environment/air-land-water/spills-and-environmental-emergencies/docs/mt-polley/p-o-r/2017-04-07_rfd_polley_signed.pdf>

[425] Carol Linnitt, "Mount Polley Mine Disaster Two Years In: 'It's Worse Than It's Ever Been'" (4 August 2016), Desmog Canada, online: <https://www.desmog.ca/2016/08/04/mount-polley-mine-disaster-two-years-it-s-worse-it-s-ever-been>.

[426] Auditor General*, supra* note 315. The BC Auditor General is an independent body appointed by provincial legislators, whose mandate is to "audit the government reporting entity consisting of ministries, Crown corporations and other organizations controlled by, or accountable to, the provincial government. This includes school districts, universities, colleges, health societies and health authorities." The role of the Auditor General is to report on the efficacy of government at fulfilling its responsibilities. See: Office of the Auditor General of BC, "About Us", online: <http://www.bcauditor.com/about-us>.

major issues with the province's permitting regime, citing weak regulatory oversight evidenced by a finding that the Mount Polley tailings dam was not built or operated according to the design that was actually approved.[427] The Auditor General reported "major gaps in resources, planning and tools. As a result, monitoring and inspections of mines were inadequate to ensure mine operators complied with requirements."[428] A lack of public transparency regarding the environmental risks of permitted mining projects and MEM's ongoing oversight of the mining sector[429] was compounded by a prohibitively short timeline for project review by affected Aboriginal groups.[430] Importantly, the Auditor General found that MEM lacked appropriate measures to limit conflicts of interest given its mandate to actively promote the provincial mining industry as well as ensure its regulation.[431]

In light of these findings, the BC Auditor General's report made seventeen recommendations to address MEM's regulatory capture issue, primarily focused on the ministry's monitoring and enforcement practices. In total, sixteen of these recommendations were adopted by MEM, who implemented amendments to the Mining Code of BC. However, a key recommendation targeting the need to separate the regulatory and promotional mandates of the ministry by moving compliance and enforcement to an independent government agency was not directly implemented.[432]

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[427] Auditor General, *supra* note 315 at 8.

[428] *Ibid* at 3; Further, the report found that "almost every one of our expectations for a robust compliance and enforcement program within the MEM and the [BC Ministry of Environment] were not met." Furthermore, the report indicated that "MEM had sole responsibility for making sure MPMC completed and maintained the dam as designed and while it could have compelled the company to comply, it failed to do so." Also see: Amnesty International, Mount Polley, *supra* note 417 at 11.

[429] The report condemned the two ministries for lacking transparency, indicating that they "have not publicly disclosed the limitations with their compliance and enforcement programs, increasing environmental risks, and government's ability to protect the environment", Auditor General, *ibid*.

[430] Schoenberger, *supra* note 150.

[431] Auditor General, *supra* note 315 at 6; Regulatory capture results when government and legislators promote the interests of private industry over the concerns of the public when creating and enforcing laws and regulations; Amnesty International, Mount Polley, *supra* note 417 at 14, stating: "Donations totalling over $400,000 by Imperial Metals and its major shareholders to the incumbent BC Liberal Party, as well as a $1million private fundraiser for the BC Lib"

[432] Instead, MEM appears unwilling to directly address the implications of its policy to both regulate and promote the mining industry in British Columbia: BC Ministry of Energy, Mines and Petroleum Resources, *Response from Government to Auditor General of BC, 2016: An Audit of Compliance and Enforcement of the Mining Sector,* online: <https://news.gov.bc.ca/files/Government_responds_to_OAG_report_An_Audit_of_Compliance_and_Enforcement_of_the_Mining_Sector.pdf> at 5; In a press release, MEM heralded its own efforts to implement the recommendations and its consultation with impacted Aboriginal communities. This response appeared pandering to the public, especially in light of the Auditor General's report and public outcry against the disaster: BC Ministry of Energy, Mines and Petroleum Resources, "British Columbia now a global leader on mine tailings storage regulations" (3 August 2016) online: <https://news.gov.bc.ca/releases/2016MEM0018-001393>; This has caused commentators to conclude that this represented MEM's failure to implement the core recommendation from the Auditor General. See: Amnesty International, Mount Polley, *supra* note 417 at 12, stating that the "[Minister of Energy and Mines] rejected the finding that MEM is unable to separate compliance and enforcement duties from promotion. Instead, the Minister set up a Compliance and Enforcement Board within the Ministry to 'address the need for greater integration between the Ministries as well as with the Environmental Assessment Office.'"

While the Mount Polley disaster highlights serious accountability issues of the regulatory regime in British Columbia, the subsequent public review demonstrates some degree of due diligence and democratic accountability in the Canadian regime. The Auditor General demonstrated a process of public review intended to hold government regulators accountable and included a high level of civil society engagement.[433] This review may have also influenced the mining industry itself, which seems to have responded to the new social and political pressures to promote transparency in public consultations.[434] However, given the lack of movement from MEM to directly address the issue of regulatory capture, it remains uncertain how and whether this issue will be remedied in British Columbia.

4. Transparency and Consultation

Public Consultation

A key component of regulatory transparency is public access to information, including follow-up monitoring programs and regulatory compliance actions.[435] Here, meaningful public participation in the review process entails "sufficient time and resources to gather and analyze information as well as to share and discuss [that information]."[436] Importantly, this means that project plans must be capable of being meaningfully changed in response to public input.[437]

Generally, the Canadian public has been very active in the project review process, often influencing the outcome of a project's environmental, social, and economic impact assessments. Public engagement is facilitated by transparency built into federal laws like *CEAA*, and formal public and indigenous consultation activities throughout the provincial review and federal environmental assessment processes. However, tension remains between decision-making bodies and local stakeholders, indigenous groups, and the wider public regarding mine permit authorizations.

Public and Aboriginal engagement embedded in the British Columbia joint review process for a major mining project incorporates public comments through a number of administrative

[433] The act of the Auditor General making recommendations to MEM has allowed civil society to engage in the issue and measure the provincial regulator's performance, which has been supported by a new provincial government that has made commitments to review the provincial permitting process in light of the lack of clear accountability for this disaster. See: Ainslie Cruickshank, "No charges in Mount Polley disaster, but review coming: Minister" (19 February 2018), Metro News, online: <http://www.metronews.ca/news/vancouver/2018/02/19/no-charges-in-mount-polley-disaster-but-review-of-environmental-assessment-coming-minister.html>.

[434] David Bursey & Sharon Singh, "Managing environmental risk in British Columbia" (December 2016) Can Mining J 7: indicating that increasing MEM's transparency may be in the best interest of both the mining industry and the public, concluding that "changes to the regulatory tools are necessary to sustain public trust, especially following recent high profile mining incidents."

[435] MWC, Comments, *supra* note 404.

[436] *Ibid*.

[437] *Ibid,* where MiningWatch Canada indicates that: "early engagement is important precisely to ensure that key decisions and determinations are not made before the public can be have a say, and crucially, that the involvement of the public can actually change the outcome of the process."

boards,[438] which may be composed of members of relevant provincial government agencies, local community governments, and Aboriginal communities that monitor the proposed project.[439] Generally, these administrative boards are intended to engage affected groups while addressing procedural issues that arise within the regulatory regime.

Federally, a major mining project's federal EA application under *CEAA* has more extensive public engagement requirements.[440] Federal government policies indicate that the review process must support meaningful public participation through notification, reasonable timing, access to information, transparent results, financial support, and coordination between jurisdictions.[441] These requirements are supported through the publication of relevant documents on the project registry website which publicly displays all key communications between the project proponent, the Agency, and the public.[442] The public project registry catalogues all information produced at public hearings, news releases, proponent submissions, public comments, and all relevant documents produced by the panel.[443]

The public may also directly engage the federal *CEAA* review process by making submissions on the project registry within designated public comment periods.[444] The *CEAA* provides funding to support the participation of individuals, non-profits, and Aboriginal communities interested in participating in federal environmental assessments.[445] In principle, the public review of proposed mining developments in Canada allows for the hearing of public concerns and gives potentially affected parties an opportunity to fully scrutinize a developer's

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[438] Additionally, applications for a Mining Lease must be advertised for public comment on the proponent's website for 30 days following its submission. Ministry of Energy and Mines, *Health, Safety and Reclamation Code for Mines in British Columbia* (Victoria: Ministry of Energy and Mines, 2017) at Part 10.2.1–10.2.2 *of the Code*; There are additional public notification requirements under the *Environmental Management Act* for other proposed mine-related activities from the project. See: *Public Notification Regulation,* BC Reg 202/94.

[439] MEM, Proponent Guide, *supra* note 347 at 4, MEM states that "The coordinated authorization process is meant to improve consistency, eliminate overlap and duplication in process and information requirements by the various natural resource agencies"; The advisory committee is called a Mine Review Committee, and is meant to satisfy the statutory requirement for the creation of a regional advisory committee under the *Mines Act*, RSBC 1996, c 293, s 9; This includes the Major Mine Permitting Office, Regional Mine Development Review Committees, and a project-specific Mine Review Committee. See: British Columbia, "Mine Permitting", online: <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/permitting>.

[440] CEAA, *supra* note 344 s 19(1)(c) requires that comments from the public be considered in the assessment process.

[441] Canadian Environmental Assessment Agency, "Public Participation in Environmental Assessment under the Canadian Environmental Assessment Act, 2012" (March 2018), Annex 1, online: <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/public-participation-environmental-assessment-ceaa2012.html> [*CEAA, Public Participation Guide*].

[442] CEAA, *supra* note 344, s 78(1).

[443] Canadian Environmental Assessment Agency Government of Canada, "Canadian Environmental Assessment Registry - Registry Home Page", (2018), online: <http://www.ceaa-acee.gc.ca/050/index-eng.cfm>.

[444] *Ibid*; Requirements for posting on the agency website are found under CEAA, *supra* note 344 ss 9, 12, 14, 17, 27, 31, 32, 37, 38, 40, 54–55; The comment periods for a major mine project will include approximately 120 days for public review broken up between different phases of the assessment. public review will occur at the publishing of the following project milestones for the designated review periods: Project description (20 days), draft Environmental Impact Statement guidelines (30 days), Environmental Assessment by a review panel (30 days by hearings), and potential Decision Statement Conditions (30 days).

[445] CEAA, *supra* note 344 s 57; CEAA, Public Participation Guide, *supra* note 441.

regulatory submissions, including their EIA, mine lease permit, and all remediation, health, and environmental management plans.[446]

However, following changes to the *CEAA* regime implemented in 2012 that compressed project review timelines, commentators have raised concerns regarding limits imposed on public access to the review process.[447] Environmental assessment decisions now include only 20 days for public comment, while the entire assessment must be completed within a shortened timeline of either 365 days or two years, depending on the type of assessment required.[448] Shorter review timelines have raised concerns that the window to review the regulator's findings on the project's potential impacts will be restricted.[449] Some commentators have indicated that panel reviews are now "little more than information gathering processes for key federal regulatory decisions",[450] in part due to the fact that panels can be composed of simply one member.[451] The outcome of these changes to effectively limit public access to the environmental assessment process has been "[a reduction of] opportunities for meaningful public and Aboriginal participation."[452]

Indigenous Rights and Consultation

Canada's Aboriginal people possess some constitutionally protected rights,[453] including rights established through historic and modern treaties between the government of Canada and Aboriginal groups, as well as the right to pursue traditional practices such as harvesting, hunting, and performing cultural activities.[454] In most cases, these rights do not transfer ownership of natural resources from the provincial government to Aboriginal groups, and there are currently

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[446] CEAA, *supra* note 344 s 19(1)(b); The review will also include close consultation with the Department of Fisheries and Oceans Canada and the Ministry Transportation Canada to address potential issues under the *Fisheries Act, Migratory Birds Convention Act, Navigation Protection Act,* and the *Species at Risk Act*, as well as other relevant provincial and federal ministries and agencies.

[447] Kirchhoff & Tsuji, *supra* note 372; And see Note 450.

[448] *Ibid* at 7; The panel review process has also suffered a restriction in mandate and must be completed within two years. See: *Ibid* at 10.

[449] *Ibid* at 110; Following the 2012 changes to *CEAA,* during panel review access to the review process is also restricted by the panel's discretion to determine who an "interested party" in an assessment will be. This means that there is an onus on the public to convince the panel that they are sufficiently affected or have sufficient expertise to engage with the review process. This process has been found to effectively exclude the public from providing input to the early stages of project planning.

[450] *Ibid* at 9.

[451] *Ibid*; *CEAA*, *supra* note 344 s 42(1).

[452] Kirchhoff & Tsuji*, supra* note 372; In the 2016 review of the 2012 changes to *CEAA*, the Canadian federal government review panel determined that public consultation requirements were unsatisfactory. This was primarily tied to a sense that public participation was not meaningful to the decision-makers, and a lack of easy access to information. See: Government of Canada, *Expert Panel Report Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Canada, 2018) at 2.4.1 [*Expert Panel Report*].

[453] Constitution, 1982*, supra* note 319 s 35: the rights include established and emerging Aboriginal Rights defined in Canadian courts, and in international law.

[454] *Ibid*; *Delgamuukw, supra* note 326; Title to lands and resources for Aboriginal peoples is a developing right within this framework and may include a right to the exclusive use of Aboriginal traditional territories. Although Aboriginal Title is protected under s 35 of the Constitution, it has only recently been fully defined in key cases such as *Delgamuukw, ibid;* Tsilhqot'in, *supra* note 326.

limited opportunities for Aboriginal communities to manage and develop resources within their traditional territories.[455]

Rights held by Aboriginal people impart a duty on the federal and provincial governments to consult and possibly accommodate affected Aboriginal communities when undertakings such as a major mine development are proposed.[456] The required consultation spans a spectrum between simple notice of a project to "deep consultation" that requires the integration of an affected Aboriginal community in the regulatory review process.[457] Consultation activities with Aboriginal communities affected by proposed development projects are mandated in the permitting process at both the provincial and federal levels. However, no requirements for FPIC from these communities exist in Canadian law. According to the UN Special Rapporteur on the rights of indigenous peoples, FPIC should be required as a "general rule" for all extractive projects in Canada.[458] Despite this, true community consent is not required in the currently mandated consultation processes of the Canadian regime.[459]

The Canadian government's duty to consult takes on a great degree of importance in the context of British Columbia mining development due to the high number of Aboriginal communities asserting rights to lands that collectively comprise the province.[460] The British Columbia joint review process currently requires the project developer to consult affected

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[455] *Megan Davis*, Identity, Power, and Rights: The State, International Institutions, and Indigenous Peoples in Canada, in Suzana Sawyer & Edmund Terence Gomez (eds), *The Politics of Resource Extraction*, (London: Palgrave Macmillan 2012) [*Davis*].

[456] This requirement is triggered when the government becomes aware of asserted or proven Aboriginal rights claims potentially impacted by a development. See: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida].

[457] *Ibid*; Despite Supreme Court of Canada ruling on the consultation requirement, a major point of criticism from Indigenous peoples in Canada is the lack of a requirement for consent. The federal government can decide to approve a project despite significant impacts to Indigenous peoples if it deems the project to be in the public interest. This is the motivation behind the push for the implementation of UNDRIP and the requirement for free, prior, and informed consent for project development in Canada.

[458] Special Rapporteur, *supra* note 327 at 98.

[459] Furthermore, under Canadian constitutional law, if the government believes that the public interest warrants impacts on Aboriginal communities, it can proceed to legally impact those rights. See: *R v Sparrow*, [1990] 1 SCR 1075 and *R v Gladstone*, [1996] 2 SCR 723, where an infringement of an Aboriginal right can be justified by the government if there is 1) a compelling and substantial objective, and 2) the government meets its fiduciary obligations to the affected community. This issue is clearly demonstrated in the Site C hydroelectric dam project, where the project has been allowed to proceed in the fact of strong indigenous outcry: Amnesty International, *Point of No Return: The Human Rights of Indigenous Peoples in Canada Threatened By the Site C Dam* (London: Amnesty International, 2016).

[460] In British Columbia, the joint review process requires early and ongoing Aboriginal consultation activities, which are overseen by a consultation advisor who reports on all consultation activities conducted during the project's permitting process. The British Columbia joint review process is overseen by a Mine Review Committee, composed of government agencies, Aboriginal communities, and local governments constituted on a project-by-project basis. Aboriginal engagement activities by government ministries themselves may take the form of strategic agreements to integrate Aboriginal decision-making into the project review process. This provincial engagement may include Shared Decision Making Agreements. Strategic Engagement Agreements establish a Government-to-Government Forum to consolidate engagement between the Province and a First Nations group and establish a mutually designed comprehensive consultation process with the First Nation.

Aboriginal communities throughout all phases of the permitting process.[461] It also requires companies to negotiate Revenue Sharing Agreements with affected Aboriginal communities.[462] The stated purpose of these engagement activities is to represent community interests, identify community knowledge holders, and to broadly identify Aboriginal interests and issues that must be addressed in the application.[463]

At the federal level, the *CEAA* review for a major mining project includes requirements for consultation with potentially affected Aboriginal groups throughout the permitting process.[464] Consultation provides an opportunity for Aboriginal communities to provide information on potential impacts to health, socio-economic conditions, cultural heritage, and traditional land use practices.[465] Consultation must be conducted by the project proponent directly, and separately by the Agency's assessment panel, often taking the form of public hearings. The Agency considers consultation "an important part of good governance, meaningful policy development and informed decision-making."[466] Changes to the *CEAA* review process occurring in 2012 have likely weakened guarantees of Aboriginal consultation for major mine developments by shortening timelines project reviews, thereby limiting the capacity of many remote Aboriginal communities to participate in environmental assessments.[467]

While the project assessment process has been described as "inherently consultative",[468] it remains deeply problematic for many Aboriginal communities who feel a lack of control over what

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[461] MEM, Proponent Guide, *supra* note 347.
[462] *Ibid* at 11–12; Reconciliation Agreements pursue broad reconciliation objectives with First Nations including commitments to pursue resource revenue sharing, economic development opportunities and socio-cultural initiatives. As well, there are Economic and Community Development Agreements which are revenue sharing agreements that provide a share of mining tax revenue to First Nations and ensure First Nations support for a new mine or mine expansion. These agreements also establish a consultation process for the project.
[463] *Ibid* at 15.
[464] *Canadian Environmental Assessment Act, 2012*, 2012, SC [*Canadian Environmental Assessment Act, 2012*], s 24: "the responsible authority must ensure that the public is provided with an opportunity to participate in the environmental assessment of a designated project."
[465] *Ibid,* s 105(g); This requirement is unique to Canada and is a part of consultation and accommodation activities given the presence of established or asserted Aboriginal rights and title, as mandated in jurisprudence of the Constitution, 1982, *supra* note 319 s 35, as relating to Aboriginal rights; See also: Delgamuukw *supra* note 326, and Haida, *supra* note 456.
[466] Canadian Environmental Assessment Agency Government of Canada, "Canadian Environmental Assessment Registry - Additional Information", (30 July 2015), online: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=102017> at 15.
[467] Kirchoff et al, *supra* note 312 at 6, indicating that this is the result of the new maximum 365-day timeline for a *CEAA* agency assessment and a 24-month timeline for a panel review. Also see: Expert Panel Report, *supra* note 452 at 2.4.1; These restricted timelines are likely to make it more difficult for remote or isolated Aboriginal communities to effectively participate due to logistical issues. See: Kirchhoff et al, *ibid* at 6, 10; The 2016 federal review of the changes to *CEAA* implemented in 2012 found that Aboriginal communities are insufficiently informed about projects, often being presented with details too late and given insufficient time to review and respond to project information. As a result, the panel has recommended that Aboriginal groups be involved from the beginning of the planning process for large development projects.
[468] Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at 48.

development occurs within their traditional territories.[469] This includes a limited ability to meaningfully withhold consent – an issue closely tied to the recognition and treatment of indigenous rights in Canada.[470] Without a legislated veto power or policies implementing requirements for FPIC, Aboriginal communities have become deeply engaged in the permitting of projects in an attempt to leverage their rights and interests against regulators and developers. This leverage has often manifested through blockades, public advocacy campaigns, and court challenges, leading in some cases to accommodation by mining companies.[471]

Indigenous Benefits and Community Consent

In Canada the federal and provincial governments have a duty to consult and accommodate Aboriginal groups that may be affected by major mining projects. Government agencies may delegate some consultation activities to the project developer in fulfilling this duty.[472] In fact, provincial regulatory regimes and federal assessments under *CEAA* generally require project developers to directly engage potentially affected Aboriginal communities and to consider their rights and interests.[473]

When engaging affected Aboriginal groups it is common for project developers to pursue private benefits agreements to gain community consent for the project.[474] These agreements are private contracts negotiated on a project-by-project basis, commonly called Impact Benefit Agreements (IBA).[475] IBAs establish obligations for each party that serve three main purposes:

1. To accommodate Aboriginal interests by creating economic opportunities and ensuring economic benefits for affected communities;
2. To address socio-economic and environmental effects of a project that the community believes are not adequately addressed through government regulation; and,
3. To secure community consent and support for a project.[476]

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[469] However, the current federal government's efforts to restructure environmental assessment promises so that "decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence" and that "Indigenous peoples will be meaningfully consulted and where appropriate, impacts on their rights and interests will be accommodated." The effects of this policy on indigenous rights in Canada remain to be seen. See: Government of Canada, *Environmental and Regulatory Reviews: Discussion Paper*, online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>.

[470] The lack of a veto has been tied to issues with Canada not implementing UNDRIP. This has been most strongly evident in forestry and oil and gas activities, but also see the discussion of the New Prosperity project.

[471] See: MEM, Proponent Guide, *supra* note 347, at 24.

[472] Norah Kielland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements*, Publication No. 2015-29-E, Ottawa: Library of Parliament, 2015 at 3 [*Kielland*]; Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Government of Canada, 2011) at 19.

[473] Sandra Gogal, Richard Riegert & JoAnn Jamieson, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43:1 Alberta L R 129 at 140.

[474] Kielland, *supra* note 472.

[475] Ibid.

[476] Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexus Canada, 2017) at 124 [*Hanna*].

While not expressly required, benefits sharing agreements like IBAs are considered best practice in Canada and have become a pillar of federal and provincial resource development policies.[477] From the developer's perspective, benefits sharing agreements are seen as a way to hedge uncertainty through the approval process and as part of corporate social responsibility practices.[478] From the Aboriginal community's perspective, these agreements are negotiated to ensure accommodation of Aboriginal interests and to address the social risk inherent in a major mine development.[479] IBAs have the potential to assure indigenous communities that their interests and needs will be attended to by the developer, beyond what may be recognized in the regulatory review process.

The subject matter of an IBA is negotiated directly by the community and the developer, and can be quite broad, but will always be focused on a community's needs.[480] Matters for negotiation of an IBA in Canada can include:

- Developer access to traditional territories;
- The establishment of management and implementation committees for phases of the project;
- Environmental protection and monitoring guarantees;
- Information sharing;
- Revenue sharing guarantees;
- Education funding;
- Management of heritage resources;
- Dispute resolution;
- Employment and training opportunities for community members; and,
- Business and contracting opportunities.[481]

[477] Kielland, *supra* note 472 at 4; In some Canadian provinces or territories, benefits sharing agreements are in fact mandatory for major mineral development, whereas in other they are encouraged as best practice, see: Jason Prno, *Assessing the Effectiveness of Impact and Benefit Agreements from the Perspective of their Aboriginal Signatories*, Thesis, Masters of Arts (Guelph: University of Guelph, 2007) at 113. An alternative but similar form of agreement with Aboriginal communities is called an Accommodation Agreement, which is typically pursued by the Canadian government when overseeing major development projects. Like IBAs, Accommodation Agreements are negotiated on a party-by-party basis between the affected Aboriginal community and the government. Outside of Canada, private benefits negotiations with indigenous communities arise in the laws and regulatory structure of other jurisdictions outside of Canada. In Australia, negotiations of benefits agreements are supported by the *Native Title Act 1993,* s 33; (Under the law, entitlements are calculated based on the profit or income derived from the production of the project. which encourages private negotiations that must calculate entitlements for groups holding title to affected lands). This law supports the process of negotiation between a proponent and the indigenous title holders that must be undertaken in good faith, see: Native Title Act, s. 31; However, there is a reported variety of outcomes for communities pursuing such agreements in Australia under the Native Title Act 1993, highlighting some core issues with the IBA negotiation process discussed below. See: O'Faircheallaigh, *supra* note 374 at 100; Support for benefits agreements and the legal guidance for fair process appears to exist in the Philippines, where *The Indigenous Peoples' Rights Act of 1997*, Philippines (Rep Act No 8371), s.57 grants priority rights to indigenous peoples for developing and exploiting resources in their traditional territories. This means that non-indigenous developers must first secure a written agreement with the rights holding indigenous community before commencing resource development activities.

[478] Kielland*, supra* note 472.

[479] Courtney Riley Fidler, *Aboriginal Participation in Mineral Development: Environmental Assessment and Impact and Benefit Agreements* (2008) Masters Thesis, University of British Columbia at 30.

[480] Natural Resources Canada, Agreements Between Mining Companies and Aboriginal Communities or Governments, online: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/files/pdf/abor-auto/aam-eac-e2013.pdf>.

[481] Hanna, *supra* note 476 at 133.

The provision of economic benefits for an Aboriginal community engaged in IBA negotiations may include the creation of a joint venture between the project developer and a community-controlled company that may provide labour, machinery, and services to the proposed project.[482] Best practice indicates that for Aboriginal community joint ventures to be effective they must be able to influence the proposed project's development plan, ensure that the community is involved in the project's decision-making, and employ business managers who are external to the venture.[483]

Many Canadian Aboriginal groups pursue private agreements with extractive companies as an opportunity to develop infrastructure and social services.[484] For the developer, such agreements may support a positive outcome for a project's environmental assessment if they are viewed as proactive mitigation measures. Without gaining community consent through an IBA, a developer faces a great deal of uncertainty as they proceed through the project permitting process, especially if the project is controversial or if the public perceives that it will significantly impact local communities.

Private benefits sharing agreements may also provide greater control over land use planning and give indigenous communities more influence in determining the outcome of a project's regulatory review.[485] In Canada, there is support for the idea that Aboriginal engagement with projects proposed within their traditional territories allow for "symmetry" between a desire to encourage community economic growth and the preservation of distinctive cultural heritage.[486] If negotiated in good faith, securing IBAs with affected communities may fulfil the requirements of FPIC and thereby promote indigenous rights as envisioned in UNDRIP.[487]

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[482] Some commentators indicate that joint ventures create more successful partnerships between an Aboriginal community and project developer, and that they represent industry best practice in Canada. See: Davis, *supra* note 455.

[483] *Ibid*. The success of such joint ventures seems to depend on the capacity for Aboriginal governments to organize their communities and manage the business operations.

[484] *Ibid* at 5.

[485] This may involve the incorporation of independent community studies to identify perceived impacts and assist in the scoping of the project's potential impacts. See: Hanna, *supra* note 476; Davis, *supra* note 455 at 240.

[486] Davis, *ibid* at 234.

[487] *Ibid*; Expert Panel Report, *supra* note 452; Support for this form of negotiation in Canada is underlined by the principles in UNDRIP that speak to indigenous self-determination. Currently indigenous rights identified in UNDRIP are not formally recognized in Canadian law, and much activity in engaging indigenous self-determination and FPIC have come from private developers pursuing Aboriginal support for their projects through IBA negotiations, and not directly from the government of Canada. See: Tim Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples" (2 August 2016), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272> [*CBC UNDRIP*]; However, despite efforts to implement the full scope of indigenous rights under UNDRIP through the proposed Bill C-262 (which would fully recognize UNDRIP in Canadian law), it remains unclear how principles such as FPIC would actually function in the Canadian regulatory system. See: John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration" (21 November 2017), Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>. Nevertheless, the Canadian government has stated that "[i]ndigenous Peoples have a right to share in the economic benefits from resource development on their traditional territories in accordance with their own needs, laws, cultures and interests." Expert Panel Repor*t, supra* note 452 at 2.3.5;

Despite the potential benefits of IBAs and joint ventures, there are problems associated with large mining developers negotiating IBAs with indigenous communities. These can include entrenchment of indigenous communities in the resource economy, alienation of traditional culture, consolidation of political power with select community members,[488] disproportionately limited access to economic opportunities for women,[489] and pressure for communities to accept a project's benefits despite resulting environmental degradation.

The uneven capacity and expertise of the two negotiating parties can also result in a lack of transparency in the negotiation process that can make assessing the implementation and efficacy of the agreement impossible.[490] Under the current *CEAA* regime, IBAs in Canada are typically negotiated prior to the completion of the project's environmental assessment publicly identifying the full spectrum of its potential impacts.[491] Where benefits sharing agreements are pursued prior to the completion of a project's EIA, they may not support FPIC in Canada.[492] Because of this, it has been recommended that "[t]o be considered as an expression of FPIC, IBA negotiation should be as transparent as possible and should not preclude deliberation in the community [following the completion of EIAs]."[493]

For private agreements between indigenous communities and developers to be effective and fair, there must be a stable and accountable regulatory regime that will enforce permitting requirements on a company inclusive of considerations for indigenous rights. Without such enforcement guarantees, companies will not have sufficient incentive to engage an affected community and the community will lack leverage to negotiate favourable terms. In Canada, a project developer's accommodation efforts have the potential to result in successful outcomes for the affected Aboriginal communities, mainly due to Canada's constitutional affirmation of Aboriginal rights, the presence of demarcated and recognized Aboriginal groups within discrete territories, and strong regulatory accountability.

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[488] Dwight Newman, *Consultation and Economic Reconciliation*, in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) at 217.

[489] C Fidler & M Hitch, "Impact and Benefit Agreements: A contentious Issue for Environmental and Aboriginal Justice" 2:35 Environ J 49.

[490] Kielland, *supra* note 472; this is connected to confidentiality provisions usually included in benefit agreement contracts. Confidentiality has been cited as a main concern with IBAs due to uncertain distribution of benefits within communities, and a limited ability for other communities to learn from existing IBAs.

[491] Papillon & Rodon, *supra* note 377: here, concerns have been raised regarding the ability for Aboriginal communities to provide full and genuine consent in an IBA negotiation due to their lack of access to information during the project's assessment.

[492] See: *Ibid.*

[493] *Ibid,* indicates that the duty to secure FPIC rests with the government, and it may be difficult to ensure that FPIC was actually granted by the community given the opaque nature of IBA negotiations. Similar issues have been noted in other jurisdictions such as Australia, where the uneven bargaining power of communities has resulted in a variation in the substantive benefits gained under different IBAs. This has resulted in a wide range of economic benefits and guarantees of environmental management for affected communities, despite the presence of legislation guiding the IBA negotiation process. See: O'Faircheallaigh, *supra* note 374 at 100.

5. Case Study: New Prosperity Mine

The New Prosperity Mine illustrates how the current *CEAA* panel review process assesses a major mining project where the Canadian developer, Taseko Mines Ltd, failed to effectively consider Aboriginal interests in its required consultations, and did not obtain community consent for the project.

The New Prosperity project is a proposed open pit gold and copper mine located near the community of Williams Lake, within the traditional territory of the Tsilhqot'in and Secwepemc First Nations.[494] The project is owned by Canadian company Taseko Mines Ltd, which possesses numerous mining properties at various stages of operation in British Columbia, and has published a policy committing to respect Aboriginal rights and engage communities potentially affected by its projects.[495]

An independent review panel was convened for the project's 2014 *CEAA* review.[496] The panel's findings indicated that affected Aboriginal groups maintained "strong opposition" to the project, which would result in significant impacts to these groups, including to the "current use of lands and resources for traditional purposes" and their cultural heritage.[497] Major issues were found with the project's design, which proposed to dispose mine fill into Teztan Biny (Fish Lake) and Y'anah Biny (Little Fish Lake), effectively destroying both lakes and fish stocks traditionally used by local Aboriginal communities. The panel's report shows that these projected impacts were likely to persist despite Taseko's redesign of the project area and its operational practices.[498] As a result of these findings, the federal Minister of Environment rejected the project.[499]

The *CEAA* panel's review demonstrated discrepancies between its findings and Taseko's claims regarding the project's potential impacts to Aboriginal communities.[500] The panel found

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[494] Canadian Environmental Assessment Agency Government of Canada, "Canadian Environmental Assessment Registry - Additional Information", (26 February 2014), online: *Backgrounder Propos New Prosper Gold-Copp Mine Proj* <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98460>.

[495] Taseko, "Properties", online: <https://www.tasekomines.com/properties>; Taseko, *Aboriginal Policy* (14 February 2017), online: <https://www.tasekomines.com/assets/docs/pdf/aboriginal-policy_february17.pdf>.

[496] Taseko's attempts to develop the New Prosperity mine have failed through two separate *CEAA* submissions. The project's EIS was rejected in 2010 and again in 2014. The 2010 application failed due to a finding of significant environmental effects to fish habitat, Aboriginal traditional uses, and to wildlife species. Following this, Taseko undertook a redesign of the project to address these issues and submitted a new application under *CEAA,* reframing the project as New Prosperity. See: Canadian Environmental Assessment Agency, "Government of Canada Response to the Report of the Federal Review Panel for the Taseko Mines Limited's Prosperity Gold-Copper Mine Project in British Columbia" (02 November 2011), online: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=46183>.

[497] Canadian Environmental Assessment Agency, *Report of the Federal Review Panel New Prosperity Gold-Copper Mine Project* (Ottawa: Canadian Environmental Assessment Agency, 2013) at ix [Review Panel Report].

[498] See the panel's conclusions and recommendations at: *Ibid* at 251–56.

[499] Canadian Environmental Assessment Agency Government of Canada, "Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012", (26 February 2014), online: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98458>.

[500] Canadian Environmental Assessment Agency Government of Canada, "Canadian Environmental Assessment Registry - Additional Information", (26 February 2014), online: *Decis Statement Issued Sect 54 Can Environ Assess Act 2012* <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98458>; These impacts were not found

that there were likely to be significant impacts to the current use of lands and resources by Aboriginal communities despite Taseko's indication that no such impacts would occur.[501] In making this finding, the panel relied on consultations it undertook with the Tsilhqot'in First Nation during the project review phase, which indicated that the Aboriginal group had intensively used the Fish Lake area and considered it integral to maintaining their traditional way of life.[502]

Overall, it appears that there was a significant disconnect between Taseko and the affected Aboriginal communities. Taseko's EIS application discounted indigenous rights and input and imposed its own perspective on the project's potential impacts to Aboriginal rights.[503] It is unclear to what extent Taseko consulted the Tsilhqot'in and Secwepemc First Nations. According to the review panel's decision statement, "[t]he Tsilhqot'in had indicated that they would be willing to meet with Taseko for discussions only if Taseko would agree to consider not going ahead with [the proposed New Prosperity mine] as an option."[504] However, it is clear that the company did not seek to obtain the prior consent of the communities, likely because the Tsilhqot'in would not have supported any plan to develop the Fish Lake area.[505] Conversely, the *CEAA* panel accorded submissions from the affected communities, demonstrating a level of deference in its decision-making process.[506]

Work on the New Prosperity property was halted as a result of this negative *CEAA* review. However, Taseko continued to pursue provincial permits following the negative *CEAA* outcome despite the clear lack of consent from potentially impacted Aboriginal communities. In 2017 the Tsilhqot'in Nation filed for an injunction at the British Columbia Supreme Court against a *Mining Act* permit issued by the British Columbia MEM that allowed further exploratory drilling at the New Prosperity property.[507] This permit was declared to be illegal by federal compliance officers

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to be justified, and accordingly the Canada Minister of Environment refused to issue the project's environmental permit; See: *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 s 52(4); This section allows the Governor in Council to determine that, despite a finding of the potential for significant adverse impacts, the project is otherwise justified or not justified in the circumstances.

[501] Review Panel Report*, supra* note 497 at 168; Taseko's EIS indicated that their own research showed only infrequent historical use, and no evidence of current use of the Fish Lake area and asserted that there was little possibility of actual impacts from the project to the Tsilhqot'in First Nation.

[502] *Ibid* at 170; Other contested issues between the parties included impacts on traditional hunting and trapping activities near the project, and general concerns of contamination from mine waste affecting other traditional practices, see: *ibid* at 174–187.

[503] *Ibid* at 197. "For the same reasons, the Panel is convinced the changes to the environment caused by the Project, including the long term presence of the mine, the permanent loss of Little Fish Lake (Y'anah Biny) […] and the permanent change to the landscape, would interfere substantially with the spiritual and cultural connections that the Tsilhqot'in have with the area."

[504] *Ibid* at 171.

[505] *Ibid* at 202, and see *ibid* at 172, where the Secwepemec indicated that Taseko did not engage them on the issue.

[506] In its final decision statement, the Government of Canada indicated its policy position that "wishes to see resource projects developed, however, it must balance the economic benefits of projects with responsible resource development." See: Review Panel Report, *supra* note 497 at 3; Following the decision Taseko filed two separate challenges to the ruling but failed to convince the Federal Court that the *CEAA* panel's decision was unfair. See: *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1099, where Taseko appealed the Minister's findings on procedural fairness grounds, but the Federal Court found that Taseko was provided a high degree of procedural fairness during the panel review.

[507] This permit allowed the clearing of significant amounts of forest and numerous exploratory drilling sites near Fish Lake, see: Friends of MiningWatch, "Tsilhqot'in Nation Seek Injunctions from BC Supreme Court to Stop

under *CEAA*; furthermore, a Tsilhqot'in Nation chief stated that "in applying for this permit, Taseko Mines have acted like bullies who have no respect for Indigenous rights and title, or the rule of law."[508]

The fact that permits were issued by the province and Taseko was permitted to continue exploratory work on a project that failed to receive its required environmental approval to proceed clearly demonstrates a gap in the realization of indigenous rights at the provincial level in Canada. Although access to public review processes through the courts remains available for the affected communities, they often face obstacles such as limited resources and the significant expense of pursuing judicial options in seeking justice.

6. Case Study: Brucejack Gold Mine Project

The Brucejack Gold Mine Project is an example of a successful environmental assessment application for a proposed mine development in British Columbia, where Aboriginal consultation activities were found to be adequate overall. The project, owned by Canadian company Pretium Resources, is a gold and silver underground mine located in a remote mountainous area of northwestern British Columbia.[509]

The Brucejack project was awarded provincial and federal authorizations in 2015, including an EA certificate from a coordinated assessment under *CEAA* and the *BCEAA*.[510] According to the Agency, the project's EIA was conducted with coordination between five other federal agencies and the assessment decision was prepared with input from the Nisga'a Nation–an indigenous group signatory to a treaty with Canada that secures specific rights and accommodations by the federal government within Nisga'a territory.[511]

(Again) Taseko Mines" (31 July 2017), MiningWatch Canada, online: <https://miningwatch.ca/news/2017/7/31/tsilhqot-nation-seek-injunctions-bc-supreme-court-stop-again-taseko-mines>. Canadian Environmental Assessment Agency, "From Canadian Environmental Assessment Agency to Taseko Mines Limited re: Application of the s 6 prohibition under the Canadian Environmental Assessment Act, 2012" (28 July 2017), online: <http://www.ceaa-acee.gc.ca/050/evaluations/document/119705>.

[508] TŝIlhqot'in National Government, "Tsilhqot'in Seek Injunctions from BC Supreme Court to Stop Taseko Mines Ltd. Drilling in Tsilhqot'in Territory" (31 July 2017), online: <http://www.tsilhqotin.ca/PDFs/Press%20Releases/2017%2007%2031%20TNG%20Media%20Release%20-%20Injunction%20Hearing%20BCSC%20Taseko%20Drilling%20Program.pdf>.

[509] The project is projected to produce 16 million tonnes of minerals over a 22-year lifespan, see: Canadian Environmental Assessment Agency, "Decision Statement Issued Under Section 54 of the Canadian Environmental Assessment Act, 2012" (30 July 2015) online: <https://www.ceaa.gc.ca/050/document-eng.cfm?document=102018> [*Brucejack Decision Statement*].

[510] British Columbia, Environmental Assessment Office, "Brucejack Mine" online: <https://projects.eao.gov.bc.ca/p/brucejack-gold-mine/detail>.

[511] Canada, Canadian Environmental Assessment Agency, "Canadian Environmental Assessment Registry - Additional Information" (30 July 2015) online: <www.ceaa-acee.gc.ca/050/document-eng.cfm?document=102017> [*Brucejack EA Report*]. Accommodation by the federal government is required under the Nisga'a Final Agreement, which includes requirements for the engagement of the Nisga'a Nation in environmental assessments within their territory: *Nisga'a Final Agreement*, Nisga'a First Nation, Canada & British Columbia, 27 April 1999 at 155–58.

During the project's EIA, comments were received from the Nisga'a Nation, Tahltan First Nation, Tsetsaut/Skii km Lax Ha communities, and the Métis Nation of British Columbia regarding their concerns with a number of the project's environmental and socio-cultural impacts.[512] These indigenous groups conducted a review of the project description, Pretium's EIS submission, and submissions from the reviewing agencies themselves.[513] Key concerns included the project's health-related impacts and its effects on traditional hunting, trapping, fishing and gathering activities conducted near the project site.[514] These issues were communicated to Pretium and subsequently influenced changes to the project's design and impact mitigation plans.[515] The project's assessment also identified where Pretium considered potential impacts to Aboriginal or Treaty rights, including potential impacts on Aboriginal health and socio-economic conditions,[516] current traditional land use practices,[517] and cultural heritage.[518]

According to the Agency's assessment, Pretium conducted early engagement directly with the affected communities and provided opportunities to comment on draft technical documents.[519] Engagement by Pretium also included entering an IBA with the Nisga'a Nation to provide job and contracting opportunities, education, training, and financial payments; similar agreements were pursued with the Tashlan and Tsetsaut/Skii km Lax Ha nations.[520] The Agency indicated that Pretium's consultation efforts, including their engagement in IBA negotiations were a factor in the positive assessment of the project, stating:

> *[Pretium] has committed to continuing engagement with Aboriginal groups, by reviewing and responding to their comments, discussing the potential effects of the Project on Aboriginal rights and interests, mitigating or accommodating these effects, and pursuing other engagement activities as may be required by the federal government*.[521]

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[512] Brucejack EA Report, *ibid.*
[513] *Ibid* at 15–16; According to the Agency: "the Agency and the B.C. Environmental Assessment Office, conducted joint consultation throughout the EA, shared consultation information (including comments received from Aboriginal groups) and ensured that Aboriginal groups were provided with responses to comments and issues raised throughout the process."
[514] See *ibid*.
[515] *Ibid* at Chapter 6.
[516] *Ibid* at 42.
[517] *Ibid* at 47.
[518] *Ibid* at 51; The Agency's assessment report clearly demonstrated that the projects effect and mitigation measures proposed by both Pretium and the Aboriginal communities were considered alongside the Agency's assessment for each key component of the project.
[519] *Ibid* at 18.
[520] News Release 15-6, "Pretium and Nisga'a Nation Sign Brucejack Project Cooperation and Benefits Agreement" (2 April 2015) online: <www.pretivm.com/news/news-details/2015/Pretivm-and-Nisgaa-Nation-Sign-Brucejack-Project-Cooperation-and-Benefits-Agreement/default.aspx>. And see: *ibid* at 103, stating that these negotiated agreements were reported to "address the barriers [Nisga'a, Tahltan and Tsetsaut/Skii km Lax] community members face with respect to gaining higher levels of education and skill attainment… and ensure that the necessary facilities and programs are available for individuals to take advantage of Project opportunities"
[521] Brucejack EA Report, *supra* note 511 at 18.

Participation by the Aboriginal communities and the Nisga'a Nation in the Agency-led consultation process was facilitated through federal government participation funding,[522] intended to support the communities' active engagement with the project by transmitting concerns regarding the project to the federal government.[523] According to the Agency, important components of the Agency consultation program included "review of the project description, development of the EIS Guidelines, review of the EIS, and opportunities to comment on drafts of the EA Report and conditions"[524]–as well as ensuring Aboriginal groups were provided with responses to their comments throughout the review process.[525]

A number of conditions were attached to the project's approval under *CEAA*. These included over 20 requirements targeting Pretium's ongoing Aboriginal and public consultation requirements and 13 requirements concerning Aboriginal health, cultural heritage, and traditional land use raised through the consultation.[526] These conditions were intended to create enforceable obligations for Pretium and integrate specific Aboriginal concerns, such as providing full transparency on all phases of the mine's implementation.[527]

A positive assessment by the regulatory agencies does not mean that the development of a major mine will not result in lasting impacts to indigenous rights and the environment. Here, however, the assessment of the Brucejack Gold Mine project demonstrated a level of transparency in the review process that allowed the affected communities to understand the project and its impacts.[528] The decision-maker's considerations were clearly reported, and they demonstrated where the Agency and proponent were accountable for the results of consultation with the affected Aboriginal communities. The project's *CEAA* review thus resulted in a positive outcome, likely due in-part to consultation by the proponent and the Agency that appears to have been collaborative and transparent.

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[522] Canadian Environmental Assessment Agency "News Release: Brucejack Gold Mine Project – Federal Funding Available" (6 June 2013), online: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=89793>. According to the project assessment report, approximately $50,000 CAD in funding was provided to the Nisga'a Nation and $10,500 CAD in funding was provided to the Metis Nation BC to assist in their review and commentary on the project. No funding was requested by the Tahltan or Tsetsaut/Skii km Lax Ha communities: see Brucejack EA Report, *supra* note 511 at 15.

[523] Brucejack EA Report, *ibid* at 15.

[524] *Ibid* at 15.

[525] This included the mandatory consideration of the Nisga'a Nation's draft Economic, Social and Cultural Impact Assessment Guidelines, and an independent impact assessment conducted by the Nisga'a Nation. See: ERM Rescan, *Brucejack Gold Mine Project: Nisga'a Economic, Social, and Cultural Impact Assessment Report. Prepared for Pretium Resources Inc. Ltd.* (Vancouver: ERM Consultants Canada, 2014).

[526] Brucejack Decision Statement, supra note 509; these conditions are subject to compliance and enforcement efforts by the Agency and may result in penalties if breached.

[527] See: *Ibid*, Condition 6.1.

[528] It is also important to note that the positive outcome in the project's assessment does not indicate total community consent; it is unclear how this assessment would have resulted if any of the affected communities directly opposed the project. The possibility remains that the project may have been approved regardless. This is a problematic issue that overshadows the Canadian *CEAA* assessment process as a whole.

7. Summary

The EIA regimes in Canada are generally considered to be pro-development and require significant public engagement to ensure that the principles of environmental stewardship and respect for indigenous rights are protected and enhanced, rather than eroded. However, while the provincial and federal regulatory regimes in Canada are certainly not without failings, they operate in the context of relatively strong rule-of-law and public accountability. Transparency is often built into regulatory laws and policies, and projects are subject to continual public accountability through the systematized public review of the EIA process. Where the overall strength of Canada's regulatory system has fluctuated with changing political climates, an engaged domestic civil society has been able to scrutinize laws and policies and act accordingly to effect change through democratic processes.

Canada's commitment to reconciling past harms to its indigenous populations is also reflected in the consultative approach adopted by its regulatory regimes. While the current approach, connected to Canada's constitutional framework, is flawed, Canadian mining companies are still obliged to engage potentially affected indigenous communities and will in many cases seek to gain their consent prior to developing a project. This often includes the provision of direct community benefits and indigenous groups' stake in the permitting and development of the project. In principle, this regime has created considerably more leverage for indigenous peoples compared to jurisdictions where mining developers have no incentive to meaningfully engage or accommodate indigenous communities, let alone incorporate indigenous input into the planning and development of a project.

Nevertheless, Canada has a long way to go to ensure the implementation of its international commitments to indigenous rights and reconcile its colonial harms. Currently, the permitting process of major projects in provinces like British Columbia does not clearly demonstrate a commitment to accommodate indigenous rights and land interests. The recognition of indigenous resource rights, implementation of UNDRIP, and full incorporation of FPIC for major mine developments is currently lacking. However, Canada's indigenous populations are becoming increasingly politically engaged and economically self-sufficient by leveraging their constitutional rights, allowing them to exact concessions from developers as they navigate the regulatory system.[529]

Finally, the Canadian regulatory regime is backed by the country's relatively stable legal system. Access to justice and support for administrative review by parties affected by a mining development is substantially more available in Canada than in PNG. While there remain problematic issues in accessing judicial review for affected communities – including a more restrictive federal environmental panel review process and a lack of procedural transparency in provinces like British Columbia – civil society continues to press public bodies to remedy these deficiencies.

[529] Paul Kapelus, "Mining, Corporate Social Responsibility and the 'Community': The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi" (2002) 39:1 J Bus Ethics 275.

III. International Legal Standards & Best Practices Analysis

A. Introduction

A body of international law regulates the issues raised in this report and constitutes widespread acceptance of principles of behaviour and best practice. Canada and PNG are both parties to multiple multilateral treaties that form this basis for international standards of practice in human and environmental rights.[530] This section focuses on environmental and indigenous rights as particularly relevant in the area of extractive industry, as well as obligations placed upon corporations, and assesses both Canada and PNG in light of their legal obligations and track records.

It bears mentioning that transnational mining operations have impacted many other fundamental, established rights beyond environmental norms, including the right to life,[531] the right to be free from cruel, inhuman or degrading treatment or punishment,[532] the right to be free from slavery, servitude, and/or forced labour,[533] the right to work and to the means of subsistence,[534] the right to self-determination,[535] the right to non-discrimination under the law,[536] the right to an adequate standard of living,[537] and the right to the highest attainable standard of health,[538] among others.

In practice, mining operations have been hotbeds for violations of these human rights. In Guatemala, Tanzania, Chile, and Argentina for example, Canadian mining companies have been involved in human rights abuses similar to those found at Porgera mine, the violence and destruction of which clearly implicated the rights to health and security of the person. Employees under the control supervision of Hudbay Minerals are alleged to have committed shootings, killings, and gang rape against indigenous peoples near Hudbay's Fenix open-pit nickel mine in Guatemala.[539] Barrick Gold's operations at North Mara in Tanzania have been plagued with

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[530] Notably, the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976, accession by Papua New Guinea 21 July 2008) [ICCPR], the International Covenant on Economic Social and Cultural Rights, 16 December 1966, 993 UNTS 2 (entered into force 3 January 1976, accession by Canada 19 May 1976, accession by Papua New Guinea 21 July 2008) [ICESCR], the Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratification by Canada 10 December 1981, accession by Papua New Guinea 12 January 1995) [CEDAW], and the UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994, ratification by Canada 7 November 2003, ratification by PNG 14 January 1997) [UNCLOS].
[531] ICCPR, *ibid* at art 6.
[532] *Ibid* at arts 6 and 7.
[533] *Ibid* at art 8.
[534] CEDAW, *supra* note 530 at art 11; ICESCR, *supra* note 530 at art 6.
[535] ICCPR, *supra* note 530 at art 1; ICESCR, *ibid* at art 1.
[536] ICCPR, *ibid* at art 26; CEDAW, *supra* note 530 at art 11.
[537] CEDAW, *ibid* at art 14; ICESCR, *supra* note 530 at art 11.
[538] ICESCR, *ibid* at art 12.
[539] See e.g. *Choc v Hudbay*, 2013 ONSC 1414 at para 4, [2013] OJ No 3375. See also Ashifa Kassam, "Guatemalan Women Take on Canada's Mining Giants over 'Horrific Human Rights Abuses'" *The Guardian*, 13 December 2017,

shootings, police violence, sexual assault, and environmental disaster,[540] while its Pascua Lama project on the Chilean-Argentine border has been shut down, at least for now, due to extensive environmental harms.[541] Violence against women and indigenous activists are disturbingly common threads in areas surrounding mining operations.[542]

The right to life and the right to be free from cruel, inhumane or degrading treatment are foundational tenets of human rights, constituting jus cogens norms[543] and accepted customary international law[544] — as are prohibitions of violence against women and sexual violence.[545] Yet, despite the codification of jus cogens norms, fundamental rights continue to be violated at extractive sites worldwide.

Environmental and indigenous rights norms can be used to create a regulatory regime that aims to reduce and prevent commission of these jus cogens violations. These other areas of international law help to inform the well-established jus cogens norms and elucidate how these laws can work in tandem to protect rights and prevent environmental degradation. The following sections provide a brief overview of these standards and an assessment of Canada and PNG under them, in light of the factual findings of this report.

B. Environmental Rights Standards

Mining has an especially powerful effect on the natural environment. "Solutions" are often best practices for mitigation rather than courses of action that are in fact sustainable. In this way, mining companies and state regulators tend to see environmental damage as an acceptable corollary to a highly desirable industry. Beyond its effects to the natural environment as a whole, environmental damage is also a fundamental source of human rights abuse and a barrier to

online: <www.theguardian.com/world/2017/dec/13/guatemala-canada-indigenous-right-canadian-mining-company>.

[540] Geoffrey York, "Barrick's Tanzanian Project Tests Ethical Mining Policies" *The Globe and Mail*, 29 September 2011, updated 26 March 2017, online: <www.theglobeandmail.com/report-on-business/rob-magazine/barricks-tanzanian-project-tests-ethical-mining-policies/article559188>.

[541] Chile fined Barrick $11.5M USD as sanction for the water contamination and cyanide spills: "Chile Orders Barrick to Permanently Close Pascua Lama Surface Facilities" *Financial Post*, 18 January 2018, online: <business.financialpost.com/commodities/mining/chile-orders-barrick-to-permanently-close-pascua-lama-surface-facilities>.

[542] See discussion of Porgera mine at Section II.A.3.

[543] Jus cogens norms are peremptory norms that are considered so fundamental that they are binding on all states regardless of national treaty ratification status: *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, at art 53, entered into force 27 January 1980. Examples of settled jus cogens norms are the prohibition against slavery and torture. These norms are important in that they import an element of vertical normativity into the international legal regime. Whether a norm has taken on a jus cogens character is a legal determination assessed on a case by case basis.

[544] Customary international law (CIL) is a primary source of international law: Statute of the ICJ, art 38(1)(b). It is the body of law that binds all states unless they can show persistent objector status. The premise of CIL is *usus*, or state practice, and *opinio juris*, or the belief that it is legally binding. If *usus* and *opinio juris* reach a point of being extensive and virtually uniform, they will be considered an operating norm of CIL: *North Sea Continental Shelf Case*, 1969 ICJ 3 at para 74.

[545] CEDAW, *supra* note 530, General Recommendation 35 at para 2.

sustainable social development.[546] International environmental law (IEL) can help governments, MNCs, and civil society navigate the mining industry in a way that fosters development in a balanced manner to advance the interests of all stakeholders. It also places obligations on governments to abide by a number of binding legal principles and to ensure their enforcement, whether carried out by private or other actors. Similarly, MNCs can and should adopt environmental best practices as established by international law to mitigate potential damage and limit their liability and risk of reputational damage and negative public perceptions.

As described in the case studies above, dramatic environmental damage has occurred in both Canada and PNG as a direct result of extractive operations. The regulatory and practical requirements to address, remediate, and prevent future occurrences depend significantly on the ability to hold corporations and government to account. Without strong regulatory guidance, best practices erode quickly. This section will set out some key features of international environmental law that inform this discussion: the obligation to protect and preserve the environment, the principle of transboundary harm and the precautionary principle, and the requirements and adequacy of an environmental impact assessment. Within the context of the case studies above, these key norms are particularly relevant to riverine and STD and DSM, which represent two increasing and novel threats to the environment with potentially severe consequences that cannot be properly understood without an accurate assessment of comprehensive geophysical and biological data.[547] International norms show that at the very least, such practices require significant independent study prior to implementation in order to ensure mitigation of the most harmful effects.

Compared to other areas of international law, IEL is a younger field that has tended to evolve out of crisis management.[548] Its norms increasingly inform how to think about attributing responsibility to harms caused by the extractive industry, both to the natural and the human environment.

1. Relevant Norms of IEL

The protection of the environment is built on the fundamental ecological premise that everything is connected to everything else, and the fundamental legal norm that the environment is an asset belonging to humankind to be safeguarded for all people and future generations.[549] Key norms that inform this analysis include the obligation to protect and preserve, the precautionary principle, the principle against transboundary harm, the law against marine waste dumping, and the "polluter pays" principle. This section will examine in brief how Canada, PNG, and Canadian mining companies measure up to current international norms and best practices.

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[546] See UNDP Report, *supra* note 11 at 66.
[547] See Greenpeace Report, *supra* note 155.
[548] See e.g. Tim Stephens, "Disasters, International Environmental Law, and the Anthropocene" in *Research Handbook on Disasters and International Law*, Susan C Breau & Katje LH Samuel, eds (Cheltenham: Elgar Publishing Ltd, 2016) 153.
[549] *Report of the United Nations Conference on the Human Environment*, 12 June 1972, UN Doc A/CONF.48/14/Rev.1 at Principle 2 [*Stockholm Declaration*].

International environmental law on the obligation to protect and preserve derives from the United Nations Convention on the Law of the Sea (UNCLOS), the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention)[550] (and its 1996 associated Protocol),[551] the UN Framework Convention on Climate Change,[552] and the Convention on Biological Diversity, among others.[553] These international instruments focus on the oceans, climate change, and biological conservation issues. The United Nations Framework Convention on Climate Change (UNFCCC), its associated protocols, and related conventions[554] reinforce the prevailing global commitment to protect the environment as a legacy of all peoples and generations.[555] For its part, UNCLOS explicitly provides that "states have the obligation to protect and preserve the marine environment."[556] Specifically, states have the right to exploit natural resources only in accordance with this duty and must "prevent, reduce, and control pollution" that is produced so as not to harm, directly or otherwise, the environment outside of their jurisdiction.[557] Corporations too, are impacted by these UNCLOS provisions through the "cooperation clause", which requires states to work with international organizations to formulate region-specific practices and procedures to ensure the protection of the environment.[558] With respect to PNG, such organizations include the regional UNDP and the World Bank, who have both enjoined the national government to enforce environmental standards on foreign mining companies.[559]

The precautionary principle holds that actors should not use the absence of scientific knowledge as an excuse to avoid taking mitigating measures where there are threats of serious or irreversible environmental harm.[560] Particularly with respect to the seas, there is growing evidence that the precautionary principle has developed into a norm of customary international law, and would therefore be binding on both Canada and PNG.[561]

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[550] *Convention on the Prevention of Marine Pollution by Dumping of Wasters and Other Matter*, 29 December 1972, 1046 UNTS 120 [London Convention].
[551] *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wasters and Other Matter, 1972*, 7 November 1996, 1046 UNTS 120 (amended 2006) [London Protocol].
[552] 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994, ratification by Canada 4 December 1992, ratification by PNG 16 March 1993) [UNFCCC].
[553] 5 June 1992, 1760 UNTS 79 (entering into force 29 December 1993, ratification by Canada 4 December 1992, ratification by PNG 16 March 1993) [CBD].
[554] Prominently the Kyoto Protocol and the Paris Agreement.
[555] UNFCCC, *supra* note 552 at Preamble, art 3.
[556] UNCLOS, *supra* note 530 at art 192.
[557] *Ibid* at arts 194–96.
[558] *Ibid* at art 270–73.
[559] UNDP Report, *supra* note 11 at 70.
[560] The precautionary principle is codified in the UNFCCC, *supra* note 552 at Art 3; the *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (vol I) / 31 ILM 874 (1992) at Principle 15 [*Rio Declaration]*; and the London Protocol, *supra* note 551 at Art 3.
[561] See: Seabed Disputes Chamber Advisory Opinion at para 135; Resource Roulette, *supra* note 64 at 55. See also *European Communities Hormones* cases (WTO), in which the European Communities argued for the precautionary principle to be customary law in general. Neither the Panels nor the Appellate Body took a stand on the issue: Antonio Cassese, *International Law*, 2nd ed (Oxford: Oxford University Press, 2005) at 490 [*Cassese*].

Transboundary harm is similarly an accepted principle of general international law,[562] which holds that a State cannot make use of its territory in a way that damages the environment of other States or areas beyond their national jurisdiction.[563] This concept has been formalized in jurisprudence from the International Court of Justice (ICJ), in which the Court has held that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond their control is now part of the corpus of international law relating to the environment."[564] More recently, in the 2010 Pulp Mills judgment, the Court connected the principle against transboundary harm with the conduct of environmental impact assessments as due diligence requirements of the overarching general international law obligation to protect and preserve.[565]

The "polluter pays" principle is another important norm of IEL that helps guide the attribution of responsibility for environmental harms. Its premise is that the agent doing the damage should bear the cost.[566] This principle bears particular relevance to transnational mining companies, since harms visited upon local indigenous peoples and environments are typically a direct result of the mining operations[567] – as well as on the concepts of corporate accountability, discussed below.

2. Environmental Impact Assessments

Environmental impact assessment is a crucial and practical application of the precautionary principle. UNCLOS directs that "[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities . . . and shall communicate reports of the results".[568] The ICJ in the Pulp Mills case also recognized the critical role of EIAs in the context of significant adverse impact in a transboundary context.[569] The requirement for adequate environmental assessment can be characterized as a due diligence requirement that, if breached in form or substance, could form the basis of civil liability.

The purpose of environmental assessment is to "impose on decision makers specific obligations to study the environmental consequences of a proposed activity, disclose the predicted impacts to the public, and consult those potentially affected", with the implicit assumption that environmentally sound decisions will emerge from "approaches that are information-rich, open and participatory."[570] However, the structure and implementation of any given regulatory scheme

[562] It has also been codified in the CBD, *supra* note 553.
[563] Cassese, *supra* note 561 at 488; *Ibid* at art 3.
[564] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 1996 ICJ 226 at 241–42.
[565] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay) 2010 ICJ 14 at para 204 [*Pulp Mills Case*].
[566] Rio Declaration, *supra* note 560 at Principle 16.
[567] See: discussion on Ramu mine, Porgera mine, above.
[568] UNCLOS, *supra* note 530 at arts 205, 206.
[569] Pulp Mills Case, *supra* note 565 at para 204.
[570] *Ibid* at 19.

and EIA can allow for significant deviation from this underlying function.[571] Projects that, through procedural strength, draw on core international norms and guiding principles of relevant environmental treaties such as those mentioned above, as well as national legislation, previous panel reports, and intervenor submissions, [572] have been found to be in line with international law, as opposed to EIAs that are purely regulatory and describe environmental goals in broad terms that offer little substantive guidance for both the conduct of the EIA and the institutional review and approval process.[573]

C. Indigenous Rights

Historically, indigenous peoples throughout the world have suffered injustices that have primarily arisen from the colonial taking of lands and resources.[574] This has resulted in the subdual of traditional societies and cultures, and the limiting of access to traditional lands and resources leading to reduced opportunities for indigenous communities.[575] The colonial histories of countries such as Canada and PNG have left their indigenous populations vulnerable to further social and cultural degradation and predominantly unequipped to engage in economic opportunities. This disposition has increased the severity of potential impacts to indigenous communities from resource development projects, which often implicate issues of traditional society and culture and the ownership of natural resources.[576]

Although limited in number, international legal standards do form the basis on which to assess challenges faced by indigenous people facing proposed mining development in both PNG and Canada. The ideas supporting the development of indigenous rights have deep roots in international human rights. However, since the adoption of the Universal Declaration of Human Rights[577] in 1948, indigenous rights have been slow to formally crystalize in international law.[578] Currently, protections for indigenous rights in international law are supported by a number of treaties and declarations, underpinned by an increased push by indigenous peoples for self-

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[571] Neil Craik, Meinhard Doelle, & Fred Gale, "Governing Information: A Three Dimensional Analysis of Environmental Assessment" (2012) 90:1 Public Administration 19 at 35 [*Craik*].
[572] *Ibid* at 33.
[573] *Ibid* at 35.
[574] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 at preamble [UNDRIP].
[575] *Ibid*.
[576] S. James Anaya, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Extractive Industries and Indigenous Peoples, 32 Ariz. J. Int'l & Comp. L. 109 (2015), online: <http://scholar.law.colorado.edu/articles/33>.
[577] 10 December 1948, 217 A (III).
[578] Asbjørn Eide, "The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters & Rodolfo Stavenhagen, eds, *Mak Declar Work U N Declar Rights Indig Peoples* (Copenhagen: IWGIA, 2009) 32 [*Eide*]. See: ILO Convention 107: Concerning Indigenous and Tribal Populations, 1957; however, the characterizations of indigenous culture and society in this instrument is problematic in that it envisioned indigenous peoples as unintegrated. The multi-lateral treaty sought to establish labour standards through the assimilation of indigenous populations into the state framework. See: Indigenous Foundations, "ILO Convention 107" (2009) First Nations Study Program, online: <http://indigenousfoundations.arts.ubc.ca/ilo_convention_107/>.

determination and control over their natural resources over the past decades.[579] This effort culminated in the adoption of the United National Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[580]

UNDRIP provides the clearest, most comprehensive statement of indigenous rights in international law.[581] Although UNDRIP was formed as a non-binding declaration, its broad ratification by countries with strong indigenous populations demonstrates a growing global consensus that indigenous communities must be accorded self-determination and treated with dignity.[582] The principles outlined in UNDRIP were informed by more direct sources of indigenous rights found in the International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples,[583] in which signatory states must recognize:

> the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.[584]

Through these principles, the Convention requires adequate consultation with indigenous communities, conducted in good faith, and their free participation of all levels of government decision-making and policies when governments are considering measures that may impact them (such as approving project permits).[585] According to the Special Rapporteur on the rights of

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[579] Eide, *ibid* at 37.
[580] UN Document A/61/L.67 12 September 2007 [*UNDRIP*].
[581] UN Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System*: Fact Sheet No. 9/Rev.2 (New York and Geneva: United Nations, 2013) at 4 [*UNOHC*, *Indigenous Peoples*].
[582] This is supported by a push for "cultural deference" to indigenous communities. See: *Ibid* at 5; Siegfried Wiessner, "Indigenous Self-determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples" in Elvira Pulitano, ed, *Indig Rights Age UN Declar* (Cambridge: Cambridge University Press, 2012) at 34.
[583] UN Human Rights Office of the High Commissioner, *Leaflet No 8: The ILO and Indigenous and Tribal Peoples* (New York and Geneva: United Nations, n.d.): According to the UN High Commissioner of Human Rights, additional support for indigenous rights in the ILO can be found in other treaties that target social ills that often plague indigenous communities. These include prohibitions on the use of both underage labour and forced labour, establishing equal employment opportunities, and providing accesses to vocational training. See ILO conventions: *The Forced Labour Convention,* 1930 (No. 29; The Discrimination (Employment and Occupation) Convention, 1958 (No. 111); *The Rural Workers' Organizations Convention*, 1975 (No. 141); *The Human Resources Development Convention*, 1975 (No. 142); *The Minimum Age Convention,* 1973 (No. 138); and *The Worst Forms of Child Labour Convention*, 1999 (No. 182).
[584] ILO, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, Geneva, 76th ILC session preamble, art 5 (entered into force: 5 Sep 1991) [*ILO 169*]: which provides a basic framework for recognizing the inherent social, cultural, and spiritual values of indigenous communities; Also see: *ibid* art 4, requiring state protection for indigenous community institutions, property, labour, cultures, and environment; *ibid* art 14, protecting the right to ownership of lands that are traditionally occupied; and *ibid* arts 20–23, protecting the right to equal and fair employment opportunities. Despite concerns that the ILO Convention may be seen as a continuation of the culture of paternalism over indigenous peoples, generally it can be argued that the convention is an important tool that helped frame the establishment of Indigenous-driven rights instruments, especially the UN Declaration on the Rights of Indigenous Peoples. However, the treaty is currently only binding on 23 countries, excluding Canada and PNG.
[585] *Ibid* art 6; The right to be consulted is also engaged in *ibid* arts 15, 17, 22, 27, and 28, while participatory rights are engaged by *ibid* arts 2, 5, 6, 7, 15, 22, and 23. However, these articles fall short of the "consent and control" that indigenous groups argued for during the development of the treaty. Consequently, there remains no veto mechanism

indigenous peoples, a policy framework is required that directs the government's duty to consult towards gaining "genuine input and involvement at the earliest stages of project development" by affected indigenous people.[586]

Following these principles, UNDRIP calls for the further development of indigenous self-determination and rights, further supporting the principle that States should obtain FPIC from potentially impacted indigenous people prior to approving projects that may impact their lands and resources.[587] Indigenous rights to traditional lands are understood to be integral to the survival of indigenous societies, largely due to the special relationship many indigenous communities have with their land that also defines their cultural identity. According to UNDRIP, FPIC is intended to preserve respect for cultural traditions and customs,[588] conserve the environment,[589] and support a right to redress and compensation.[590] FPIC requires full community consent – without coercion or manipulation and with full knowledge of the risks and impacts – from an affected indigenous community, prior to the start of an undertaking.[591]

Further support for the principle of FPIC can be found in binding international instruments, including the International Convention on the Elimination of Racial Discrimination (ICERD).[592] In 2009 the UN Committee on Economic, Social and Cultural Rights (CESCR) further expanded on the concept of FPIC in its General Comment No 21,[593] holding that "the strong communal dimension of indigenous peoples' cultural life […] includes the right to the lands, territories and

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for indigenous populations. See: Indigenous Foundations, "ILO Convention 169" (2009) First Nations Study Program, online: <http://indigenousfoundations.arts.ubc.ca/ilo_convention_169/>; John B Henriksen, *Research on Best Practices for the Implementation of the Principles of ILO Convention No 169: Case Study 7,* (Paris: Programme to Promote ILO Convention No. 169, 2008) at 21; Eide, *supra* note 578 at 37. The convention also supports a perspective that seeks "greater autonomy for indigenous peoples, recognition of their collective control over land and natural resources, directed at supporting indigenous societies. See: ILO 169, *supra* note 584 art 7.

[586] Special Rapporteur, *supra* note 327 at 98.

[587] *UNDRIP, supra* note 580 art 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."; FPIC is specifically called for in relation to forced relocation of indigenous communities (*ibid* art10) and for the development of state laws and decisions that may impact indigenous rights (*ibid* art 19).

[588] UNDRIP*, supra* note 580 art 11.

[589] *Ibid* at art 29.

[590] *Ibid* at art 28.

[591] Here, FPIC is closely tied to broader indigenous rights outlined in *UNDRIP* to life, health, access to traditional lands and resources, and a safe environment. Additional rights underlying FPIC include equality, political participation, culture, religion, development and education, and access to justice. See UNDRIP, *supra* 580 arts 13, 25–26.

[592] ICERD has been ratified by both PNG and Canada; In 1997 the Committee on the Elimination of Racial Discrimination General Recommendation No 23 called on states signatory to ICERD to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources". The committee called for 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." See: Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997).

[593] Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of everyone to take part in cultural life* (Forty-third session, 2009), UN Doc E/C.12/GC/21 [*CESCR*].

resources which they have traditionally owned, occupied or otherwise used or acquired."[594] Here, the CESCR indicates that this right supports the need for States Parties to respect FPIC in matters that affect these aspects of traditional life.[595]

D. Corporate Best Practice

Over the past decades increasing focus has been paid to the operational impacts of MNCs as they have increased in number and influence as the predominant force driving the global economy, with significant ability to leverage political and social power.[596] The responsibility of MNCs to account for the socio-cultural, economic, and environmental impacts that their operations produce for local communities, especially in the developing world, has grown considerably.[597]

1. Human Rights Performance

The increasing global focus from MNCs on best practice has in many cases resulted in corporations voluntarily adopting and implementing international human rights norms.[598] However, this shifting corporate culture brings concerns that self-regulated resource developers will not adequately address the needs of local communities in which they operate beyond what is economically sound. This concern has resulted in the development of international codes of conduct intended to regulate corporate activity through the lens of international human rights. Some of these codes of conduct include the UN Global Compact,[599] the Voluntary Principles on Security and Human Rights,[600] and the UN Guiding Principles on Business and Human Rights (the Guiding Principles).[601]

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[594] *Ibid* at 36.
[595] *Ibid* at 37.
[596] David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 Va J Int'l L 931 at 933; See: Damiano de Felice, "Business and Human Rights Indicators to Measure the Corporate Social Responsibility to Respect: Challenges and Opportunities" (2015) 37 HR Q 511.
[597] Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge University Press, 2012).
[598] Corporate attitudes toward social responsibility have changed significantly over the past four decades. Major corporations have increasingly included broad considerations for stakeholder wellbeing in their decision-making and developed Corporate Social Responsibility codes of practice. This shift has been motivated by changing dynamics between the international private and public regulation of corporate activities, where private regulation has gained a greater capacity for collaborative rulemaking, mutual influence, and the potential for developing competitive advantages. In this environment, MNCs have increasingly focused on best practice and taken guidance from international soft law instruments. See: Damiano de Felice, "Business and Human Rights Indicators to Measure the Corporate Social Responsibility to Respect: Challenges and Opportunities" (2015) 37 Hum Rts Q 511 and Martijn W Scheltema, "Assessing Effectiveness of International Private Regulation in the CSR Arena" (2014) 13 Rich J Global L & Bus 263 at 70–74.
[599] "The Ten Principles of the UN Global Compact" online: <https://www.unglobalcompact.org/what-is-gc/mission/principles>.
[600] "What Are the Voluntary Principles?" online: <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.
[601] UNHRC, 17th Sess, Annex, Agenda item 3, UN Doc A/HRC/17/31 (2011) [*UNGP*].

The Guiding Principles are the most recent and significant contribution to the area of business and human rights. The 31 principles are intended to guide governments and corporations to respectively protect and respect human rights, and to provide remedies to injured parties.[602] The key principles that apply to corporations include consideration for respecting human rights norms,[603] proactively avoiding causing or contributing negative human rights impacts,[604] developing a human rights policy,[605] and the open communication of human rights impacts.[606]

While codes like the Guiding Principles are non-binding on the companies that adopt them, they represent best practice for MNCs to ensure basic standards across a variety of global industries that interact with human rights.[607] It is common for MNCs to adopt one or several of these codes. Though the application of codes of conduct are generally a positive step indicating an understanding by MNCs of the importance of protecting human rights, questions remain about their actual implementation on a project-by-project basis. MNCs operating in both Canada and PNG have adopted codes of conduct, but their actual performance on the ground has been questionable.[608] This leads to concerns about the use of codes of conduct simply as a marketing exercise to satisfy public concern and entice shareholders. Because of this, a number of prominent monitoring organizations research and publish information on MNC human rights performance. This information assesses compliance with codes of conduct through indices, reporting standards, certification schemes, and ethical ratings.[609]

Due to the potential for creating broad and serious impacts for indigenous communities, it is important for MNCs operating in the developing world to implement a human rights code of conduct based around existing international laws, best practices, and resources like the Guiding Principles. The implementation of such a code of conduct must be done in good faith and with full transparency. To ensure that efforts are directed at actual community needs, full engagement with potentially affected communities must occur with the goal of obtaining FPIC.

Furthermore, it is important for MNCs operating in countries with weak public institutions and government accountability to consider directly engaging with indigenous communities that are potentially impacted by their projects in order to receive direct and genuine community consent. This should include the negotiation of private benefits-sharing agreements directly with impacted indigenous communities, and not through government-sponsored third parties, especially in countries such as PNG where there is weak accountability for government regulators. Such agreements can complement government-derived regulatory processes and ensure that developers

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[602] *Ibid* at 6.
[603] *Ibid* at 13; Guiding Principle 12.
[604] *Ibid* at 14; Guiding Principle 13.
[605] *Ibid* at 15; Guiding Principle 16.
[606] *Ibid* at 20; Guiding Principle 21; Each of these principles are backed by a requirement for establishing a due diligence process under Guiding Principles 15(b) and 17.
[607] Ruth Pearson and Gill Seyfang, "New Hope of False Dawn? Voluntary Codes of Conduct, Labour Regulation and Social Policy in a Globalizing World" (2001) 1:1 Global Social Pol'y 49.
[608] Human Rights Watch, *Gold's Costly Dividend Human Rights Impacts of Papua New Guinea's Porgera Gold Mine* (New York: Human Rights Watch, 2010); Amnesty International, *Undermining Rights: Forced Evictions and Police Brutality Around the Porgera Gold Mine, Papua New Guinea* (London: Amnesty International, 2010).
[609] Damiano de Felice, "Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities" (2015) 37 Hum Rts Q 511 at 513–514.

are directly engaged with potentially impacted stakeholders. Benefits sharing negotiations must correctly identify stakeholders, be fair, and address community concerns in the manner that the community prefers. MNCs must ensure that negotiations are not one-sided and provide communities fair opportunity to influence the design and implementation of the proposed development.

2. Environmental Protection

Various sources compose the fabric of corporate environmental obligations with respect to MNC mining operations. The Stockholm Declaration first established the obligation to preserve and protect the environment as a shared responsibility of States, international organizations, and individuals.[610] The emergence of MNCs has opened debate as to whether they should fall into one category or form an additional one; however, the prevailing view of corporations is that they take on the characteristics of an individual with respect to legal liability[611]—a norm that is increasingly important as litigants take transnational mining corporations to civil court.

Critically, these responsibilities are not meant to be equal, but rather distributed according to capacity.[612] It would therefore fall to entities with more technological and material capital to play a greater role in ensuring international norms are respected. This has been recently reflected in the Seabed Disputes Chamber's declaration that the obligation to protect the marine environment is an *erga omnes*, or universal, obligation.[613] As IEL develops and reacts to the increasingly volatile changes in the natural environment, the obligation to protect and preserve takes on additional importance and legal relevance for MNCs.

E. Country Assessment on Fundamental Environmental Law and Indigenous Rights Principles

1. Canada

Environmental Law

Canada's response to environmental harms has been mixed. On the one hand, clear procedural requirements, accessible information, and relative robust democracy and presence of the rule of law have produced a certain level of accountability. Civil society is engaged, has comparative access to justice, and influences government policy and the standard practices of mining companies with respect to environmental and indigenous interests. While the Mount Polley mine spill clearly indicates that environmental disasters can and do happen in Canada, the State's

[610] Stockholm Declaration, *supra* note 549 at Principles 4, 24, and 25. See also: Cassese, *supra* note 561 at 491.
[611] See e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, s 1.
[612] Stockholm Declaration, *supra* note 549 at Principles 9, 10, 20, and 23, and elaborated on in the Rio Declaration (1992).
[613] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber Case No 17, 1 February 2011 at para 180.

reaction also demonstrates that actors in Canadian civil society can raise effective protest and exercise processes of democratic accountability. The State also showed through its rejection of the 2010 Taseko mine bid that it can and will deem the potential for environmental harm to be of more importance than a mining project, a finding that supports the precautionary principle.[614]

Canada is a party to the UNFCCC, the Paris Agreement, UNCLOS, and the London Protocol. It no longer practices STD.[615] It has made overtures of adhering to the polluter pays principle.[616] It regularly reports to the UN on matters of environmental performance and policy in accordance with UNFCCC and the Paris Agreement.[617]

Transparency is viewed as an essential aspect of effective public consultation, which is required throughout the EIA process in Canada. The publication of detailed project design information and pertinent communications between a project proponent and the regulatory bodies in an online registry is essential to ensure indigenous communities have sufficient information to provide detailed and informed feedback to regulators. The *CEAA* project registry and British Columbian MEM website, while imperfect examples, support relatively transparent public access to information when viewed in comparison to the dearth of information available in PNG. Government funding for public engagement throughout the project review process is essential, especially where affected communities are remote or difficult to access.

On the other hand, there are clear concerns with regulatory capture and enforcement at the provincial level. British Columbia's response to the Mount Polley disaster suggests that the province still prioritizes mineral development and industry interests over accountability and the public interest. Granting Imperial Metals a second opportunity while not filing charges for the massive damages caused signals British Columbia's willingness to tolerate this type of corporate behaviour. That the corporation has yet to pay for the damages it caused is a clear violation of the polluter pays principle. The incident also shows dysfunction within the regulatory framework, where lack of enforcement from the regulator demonstrates a level of incapability incompatible with international standards.

With respect to environmental assessment, the case of Taseko Mine in British Columbia demonstrates the effects of a relatively procedurally robust EIA. The company's attempt to develop New Prosperity mine faltered at the federal level due to a finding that the project would result in adverse impacts to indigenous rights and fish and wildlife habitats. This finding by the

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[614] CEAA, *supra* note 344.
[615] Canada was a pioneer in the field of Submarine Tailings Disposal. Following the Jordan River mine environmental assessment in the 1990s, however, STD stopped being practiced in Canada: Mining Watch Canada, Submarine Tailings Disposal Toolkit (2002). The 1996 London Protocol effectively removes STD as an option, in part because it permits only inert, inorganic materials to be dumped: London Protocol, *supra* note 551 at Annex 1 para 1.
[616] Environment and Climate Change Canada, "Overview of the Existing Substances Program", accessed 28 July 2018, online: <https://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=EE479482-1&wsdoc=08911AB8-D8D7-B548-3C28-9A134BD20ED1>. See generally, Canada, "Environmental Codes of Practice", online: <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/guidelines-objectives-codes-practice/codes-of-practice.html>.
[617] *Ibid*.

CEAA review panel was in direct conflict with Taseko's submission, which indicated that no residual impacts would occur. Panel-led public hearings and consultation with affected indigenous communities allowed input from stakeholders and rights-holders which informed the panel's adverse finding.[618]

This example stands in contrast to the EIA of Nautilus' Solwara 1 project. In both circumstances, project proponents appeared to have replaced the findings of affected indigenous communities with their own assessment of the project's impacts, without sufficient consideration for perceived impacts to traditional culture and harvesting; and both proponents attempted to wield national regulatory tools to suppress local rights holders' objections. However, in the Canadian example this strategy was proven ineffectual due to public access to the process built into the *CEAA* framework and the ability for public and indigenous input to influence the decision-makers' rationale.

Despite positive outcomes for rights holders in the EIA process, there remain significant disparities between the Canadian regime and IEL standards. Changes to the regime implemented in 2012 raise concerns about a reduction in public participation and transparency through the EIA process and do nothing to support Canada's commitments to implement UNDRIP. Currently proposed revisions to the law are intended to strengthen public participation and indigenous rights considerations, particularly in the early stages of project design. However, some commentators indicate that the current government's policy risks a soft response to these issues.[619] For Canada to maintain its rule of law and ensure the consistency of its regulatory structure with international obligations, it must ensure that meaningful public participation and transparent access to decision-making information and monitoring data is secured in the EIA legislation.[620]

Indigenous Rights

The current regulatory climate for indigenous people in Canada is one of mixed outcomes. On one hand, the principle of FPIC is not formally recognized and there is a continued need to support transparent consultation activities through the EIA process. On the other, there is growing capacity for indigenous communities to negotiate benefits sharing agreements with project proponents and governments; however, this is not without its difficulties.

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[618] See the project registry for a list of stakeholder and indigenous community input during the panel review process: *Prosperity Gold-Copper Mine Project,* Canadian Environmental Assessment Agency, online: <http://www.ceaa-acee.gc.ca/050/documents-eng.cfm?evaluation=44811>.

[619] Mining Watch, Comments on the Government of Canada Discussion Paper on the Review of Environmental and Regulatory Processes, at 4.

[620] *Ibid;* The Government of Canada relies on the definition of public participation developed by the International Association of Public Participation, being "To involve those who are affected by a decision in the decision-making process. It promotes sustainable decisions by providing participants with the information they need to be involved in a meaningful way, and it communicates to participants how their input affects the decision." See: Expert Panel Report, *supra* 452 at 2.4

Following Canada's initial status as objector to UNDRIP, the country agreed to begin implementing its provisions in 2016.[621] However, while the current Liberal government has made policy commitments to fully implement UNDRIP and FPIC in Canadian law, the full scope of indigenous rights under UNDRIP has yet to be realized.[622] The current regulatory system in Canada is a poor host for important principles such as FPIC, and it is not clear how the government's recent commitment will implicate regulatory laws.[623]

It remains important for the Canadian regulatory regime to respect FPIC in the context of proposed mining developments within indigenous territories due to their potential to create broad socio-economic, environmental, and cultural impacts. Governments and MNCs must pursue policies that seek to obtain FPIC prior to the development of a proposed project in the traditional territories of indigenous communities. To ensure that FPIC is respected through the regulatory process, it is necessary for input from indigenous communities to be integrated in the decision-making process early in the EIA process.[624]

Although indigenous communities still struggle for full realization of their rights in Canada, they have some rights secured within the country's constitutional framework that ground their claims to traditional territories. Furthermore, commitments by the federal government to reconcile colonial harms have supported a strengthening foundation from which claims to indigenous land- and resource-based rights are based. This has resulted in incentives for developers to directly engage and accommodate claims to territories surrounding the project. Although FPIC has not formally been implemented in the Canadian regime, the leverage created for Aboriginal communities through Canada's constitutional framework and regulatory laws and policies has allowed an indigenous voice to engage in the review and permitting of major mine projects.

Although there is significant need for further growth of indigenous rights in Canada, the country's relatively strong rule of law has supported the development of indigenous land-based rights that impose firm obligations on the resources industry to engage and accommodate. Often, where the rights of impacted indigenous communities are engaged by a proposed mining development, a developer will engage in private negotiations with these impacted communities. In principle, the benefit agreements that result from such negotiations seek to hedge uncertainty for

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[621] CBC UNDRIP, *supra* note 487.

[622] See: John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration" Canadian Broadcasting Corporation, online: <http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>. However, despite efforts to implement the full scope of indigenous rights under UNDRIP through the proposed Bill C-262, which would fully recognize the declaration in Canadian law, it remains unclear how principles such as FPIC would actually function in the Canadian regulatory system.

[623] See: Papillon & Rodon, *supra* note 377. The currently proposed Bill C-69, discussed in Section III.B.3 above, proposed to implement FPIC policies through the establishment of a new Impact Assessment Board, however commentators have indicated this implementation remains vague. According to the the Expert Panel assigned to assess the federal EIA in preparation for Bill C-69 "FPIC should ideally be an integral part of decision-making at every level of government activities, from legislation and policy development to strategic review and project specific assessment."

[624] See: Papillon & Rodon, *supra* note 377 at 2.3. The expert report to the Government of Canada on FPIC in the EIA process, where it is proposed that "Indigenous representatives could play in drafting the directives (terms of reference) that determine the scope of specific EA and that specify the elements that the proponent has to include in the EIS."

proponents by gaining community support for the project in return for economic and social benefits negotiated for the impacted communities. Although this process remains somewhat controversial given its notable drawbacks,[625] a regulatory regime that provides a foundation from which indigenous communities may leverage their position against proponents may contribute to equitable results for the communities.[626]

This leverage is derived from the Canadian government's duty to consult and accommodate indigenous communities with claims to land and resource rights. However, for community benefits to remedy the impacts of resource development, they must be negotiated with the community's full knowledge of potential impacts, the community must be organized, and the regulatory regime must be sufficiently transparent to allow access to decision-making information relevant to the full scope of the project's design and impacts.[627] This transparency is a necessary component for an IBA agreement to satisfy the need for community FPIC.

2. Papua New Guinea

Environmental Law

Although Papua New Guinea ostensibly endorses the obligation to preserve and protect in its national legislation,[628] the actions and policies of the national government do not sustain this position. Its acceptance of the Solwara 1 EIS and willingness to bend the law to facilitate the Ramu mine development demonstrate the State's clear prioritization of developing its extractive sector over any obligation towards sustaining the environment. Underlying the State's position is an obvious lack of consideration for the precautionary principle. This is especially clear in the State's position on the viability of the Solwara 1 project: by not only permitting but supporting and participating in an experimental mining operation, the extent of whose effects is unknown, the national government abandons all pretence of adhering to the precautionary principle. The State's decision to push through the Solwara 1 venture despite repeated warnings about the high likelihood of extirpation or extermination of unknown quantities of benthic species is also in direct contravention to the Convention on Biological Diversity.[629] This violation is especially notable given PNG's incredibly rich biodiversity.[630]

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[625] See discussion on benefit agreements in Section III.B.5 above. Key concerns include: the potential for significantly asymmetrical capacity to negotiate between an indigenous community and large corporation, which can lead to corporations overpowering communities' ability to leverage their interests. This can lead to pressure for communities to accept a project's benefits despite is resulting environmental degradation.

[626] See: Expert Panel Report, *supra* note 452 at 2.3.5. IBAs are implicitly supported by the current Canadian federal government's policies, which states that IBAs have the potential to support FPIC.

[627] See: Davis, *supra* note 455; Papillon & Rodon, *supra* note 377.

[628] Constitution; Environment Act 2000 specifically sets out that the Director may grant a permit when he is satisfied that the proposed activity will not contravene any international legal obligations: s 65(1)(c).

[629] Art 8 describes the specific requirements to regulate, promote, and protect biological diversity and threatened species.

[630] PNG possesses 8% of the world's total known biodiversity: UNDP Report, *supra* note 11 at 64.

Both STD and DSM are regulated by international law. The London Protocol explicitly invokes the precautionary principle and has been interpreted in a way that effectively prohibits the practice of STD.[631] Riverine tailings disposal is covered by the London Protocol; PNG's implementing legislation, however, expressly exempts mining wastes from the definition of "dumping", and in so doing undermine the purposes of the Protocol.[632] UNCLOS obliges States to regulate seabed mining so as to prevent, reduce, and control pollution, and specifically provides that such regulation "shall be no less effective than international rules, standards and recommended practices and procedures."[633]

In PNG, EIAs have been conducted in a manner dictated by corporations, lacking scientific rigour.[634] The government's failure to protect environmental interests or the livelihoods of local communities suggests that these EIAs were meant to fulfill a procedural check rather than out of any desire to take international obligations seriously. Legislation does not set requirements for the standardization of practices that would assist in achieving a measure of objectivity in the EIA process. There have been overtures for a more focused and regional requirement for specific fundamentals of EIAs—including those that Nautilus neglected to do, such as baseline studies and environmental management plans.[635] CEPA is tasked with overseeing the process, but is systemically fettered by conflicts of interest, political pressure, and lack of resources. In sum, the procedurally weak system of environmental assessment in PNG breaches PNG's obligation to protect and preserve the environment as well as adhere to the precautionary principle.

Indigenous Rights

In assessing the strength of indigenous rights protection in PNG, there is an apparent gap in the enforcement of national laws in the provincial communities. PNG government policies are focused on large-scale economic planning and prioritize engagements with foreign mining corporations that tend to short-change local communities. This is most evident in national laws that pit economic development agendas against the interests of provincial communities. Currently, consultation is insufficiently addressed in regulatory laws—only minimally required when an exploratory license is granted. While the laws provide some opportunities for consultation and state wardens may convene community hearings regarding contentious projects, there is no real guidance or specificity as to how, when and to what degree such consultation should be conducted.

These minimal consultation requirements prior to the approval of a Special Mining Lease demonstrate no obvious transparency that would enable meaningful public participation. The lack of transparency is also evident in the establishment of a "development forum" for consultation with developers and government intermediaries, which does not appear to permit engagement by affected traditional landholders. Thus, weak legislative provisions for consultation in PNG leaves

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[631] The Protocol generally prohibits dumping except in certain circumstances, such as when the waste materials are inert and inorganic, a description that would never apply to mine tailings: Bernhard Dold, "Submarine Tailings Disposal (STD)—A Review" (2014) Minerals 642 at 649–50. PNG has ratified and implemented the London Convention and Protocol: PNG, *Marine Pollution (Sea Dumping) Act 2013*, No 37, s 1.
[632] *Ibid*.
[633] UNCLOS, *supra* note 530 at art 208.
[634] Luick Report, *supra* note 163; Schoenberger, *supra* note 150.
[635] Hannah Lily, "A Regional Deep-Sea Minerals Treaty for the Pacific Islands?" (2016) 70 Marine Policy 220 at 223.

foreign mining proponents with insufficient incentives to directly engage indigenous communities affected by their projects.

It should be noted that while similar themes exist in the regulatory systems of both Canada and PNG, the actual implementation and enforcement of the regimes varies. This implementation gap is evident when considering the community consultation programs for the Solwara I project in PNG in contrast to those of the New Prosperity project in Canada. In both cases it can be argued that, while the developer consulted with affected indigenous communities, it was done for the purposes of "box checking", in effect imposing the respective projects' goals on the communities and indicating to the regulators that no impacts would result to traditional cultures and land use. In both cases, community consent was not secured. In the Canadian regime, consultation assurances in the *CEAA* review process allowed the regulator to hold community hearings that revealed significant concerns for the proposed project's impacts to indigenous rights, contrary to the developer's claims. This consultation appears to have influenced the decision-making process, contributing to a negative finding in its EIA. No such engagement by the regulator is mandated in PNG.

Currently in PNG the sharing of project benefits may either be formulated through state wardens who act as middlemen to negotiate the access to project benefits with landholders, or negotiated directly between the developer and the affected communities.[636] However, despite the fact that the population of PNG is predominantly indigenous, rights for indigenous communities have not sufficiently crystalized to provide strong obligations or incentives for foreign mining proponents to engage and accommodate their interests. This leads to concerns that "where a discourse of indigenous rights has not infused the logic of [indigenous peoples' identity], colonial legacies of racism gloss over the relationship of [state and corporate] entities with indigenous peoples", often resulting in "the legal, regulatory, and civic manipulation of indigenous peoples and their potential interests".[637]

This regulatory manipulation appears to be a reality in PNG, where the regime does not sufficiently support indigenous rights by empowering communities with information to assist in their engagement with developers. When developers do directly engage impacted communities to develop benefits agreements, the asymmetrical negotiating strength of the parties often results in the developer overpowering indigenous interests.[638] Without the capacity for indigenous communities to effectively negotiate their position against a proposed mining development directly, the outcome of development is likely to "debilitate, neutralize, and depoliticize indigenous peoples"[639] by taking their voice out of the project review process. It is difficult to say whether benefits agreements such as IBAs can constitute true community FPIC in PNG without a regulatory system that provides communities with all necessary decision-making information and engages them in the project assessment process at an early stage.

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[636] This government activity is imbedded in the regulatory regime, where project royalty programs are negotiated through provincial governments–where the state has an equity stake, a percentage is usually hived off between the landowners and the provincial government, the funds of which are managed by the MRDC.
[637] Sawyer & Gomez, *supra* note 10.
[638] Interview with BRG, *supra* note 58.
[639] *Ibid*.

3. Canadian Corporations

In the context of their PNG operations, Canadian companies Nautilus and Barrick do not appear to consider themselves bound by broader international laws to protect and preserve the environment, act in a precautionary manner, or protect against transboundary harm. Barrick continues to employ mixing zones in its riverine tailings disposal because PNG permits it to do so. The lessons learned from Ok Tedi have not been applied by Barrick, as it continues to flood the Porgera river with waste. This is consistent with Barrick's global track record, which has seen the company directly causing massive environmental harms in the course of their mining operations, only to deny or deflect responsibility.[640]

Nautilus has forcefully pursued the development of DSM operations despite numerous warnings from civil society and scientists that its EIS failed to address significant environmental concerns. STD and DSM both have the potential to cause overwhelming damage, with DSM in particular possessing the potential to cause extreme and irreversible damage with respect to climate change and biodiversity.[641] Nautilus's EIA, and others conducted in PNG, have the potential to be so underdeveloped procedurally as to be overwhelmed by politics.[642]

[640] At their Pascua-Lama project on the Chile-Argentine border, multiple toxic spills have occurred resulting in sanctions from both host states and causing a loss of investor confidence in the project. Barrick president Kelvin Dushnisky is reported as saying that the leaks posed no threat to the environment: Sunny Freeman, "Barrick's Bad Day: Shares Fall 10% as Investor Confidence Shaken by Third Cyanide Spill at Argentine Mine" *Financial Post* (25 April 2017) online: <business.financialpost.com/business/barricks-bad-day-shares-fall-10-as-investor-confidence-shaken-by-third-cyanide-spill-at-argentine-mine>. In May of 2009, a spill from a tailings pond caused the surrounding environment to become heavily polluted by arsenic and other heavy metals, including drinking and grazing waters. Barrick alleged that people were stealing the lining of the tailing dam and destroying pipes: News Release, "Dangerous Levels of Arsenic Found Near Tanzania Mine" *Mining Watch Canada* (17 November 2009) online: <miningwatch.ca/news/2009/11/17/dangerous-levels-arsenic-found-near-tanzania-mine>.

[641] CL Van Dover et al, "Biodiversity Loss From Deep-Sea Mining" (2017) 10:1 Nature Geoscience 464–65. David Stauth, "Hydrothermal Vents, Methane Seeps Play Enormous Role in Marine Life, Global Climate" (2016) Oregon State University, online: <oregonstate.edu/ua/ncs/archives/2016/may/hydrothermal-vents-methane-seeps-play-enormous-role-marine-life-global-climate>.

[642] Craik, *supra* note 571 at 35.

IV. Conclusion & Reflections

The human rights of individuals affected by extractive activities across the world deserve equal protection. It is impossible to effectively promote human rights and environmental safeguards without recognizing that a double standard exists with respect to law and rights enforcement in developed states, and the developing areas where mining operations are increasingly located. In general, the model of outsourcing environmental and social externalities to poorer, developing communities while transferring wealth gained through resource extraction elsewhere continues to dominate the global extractive industry.

Until Canada takes steps to address this reality by exercising control and accountability over its own corporations, regardless of the location of their operations, it will fail to assume a position of leadership and falter in its international legal obligations. Similarly, MNCs headquartered in Canada and elsewhere who continue to take advantage of weak regulatory regimes will expose themselves to greater risk, censure, and liability on the global stage. Although corporate social responsibility initiatives are a promising first step, it remains to be seen whether they are more than just window dressing – an exercise in PR rather than a desire to avoid complicity in gross human rights violations and environmental destruction.

Given the complex, cross-jurisdictional, and interdisciplinary nature of the issues addressed in this report, we provide the following points for consideration by governments, corporate actors, communities, and civil society, in lieu of formal recommendations:

- FPIC is an established international norm and best practice which has been deemed particularly relevant and essential in the area of resource extraction. It should be sought in all cases where indigenous peoples are likely to be adversely impacted by major extractive or development activity (regardless of the actual site of such activity);

- In addition to national regulations and environmental laws, States are bound by a wide variety of international environmental laws to respect and protect their environment, prevent and reduce pollution, prevent transboundary harm, apply the precautionary principle, exact remedies and mitigation measures from polluting actors, and prevent and mitigate actions affecting climate and biodiversity;

- Indigenous peoples are afforded unique protections and a special relationship with the State; in the extractive arena, this extends not only to FPIC but to freely negotiated impact benefit or revenue sharing agreements, as well as the right to veto proposed projects that impact indigenous territories;

- Although all States should make efforts to improve their legislation in line with international law and best practices, enforcement remains a key concern everywhere, but especially in less democratic and/or weak regimes; MNCs should make realistic assessments of the likelihood that human rights and environmental violations will occur in certain operating theatres and adjust their operations accordingly;

- Similarly, companies should undertake assessments to determine whether their activities in particular regions would contribute to or exacerbate civil conflict or social tensions, consulting relevant experts and CSOs in advance of beginning any operations;

- Where violations and/or environmental degradation resulting from extractive activity have occurred, all efforts must be made to accept responsibility, remediate local environments, and provide adequate restitution and access to justice to victims.

Although extractive operations continue to carry with them great risk and impacts to communities and the environment, the findings of this report indicate that they can nevertheless be executed more responsibly and in compliance with international law. It is our hope that this report will serve to bolster the efforts of communities attempting to exact accountability and justice from more powerful actors in their midst, while encouraging those powerful actors to take concrete steps towards reform in the aim of becoming good citizens and responsible participants in the global economy.