Institutionalizing the responsibility to respect the rights of Indigenous peoples in corporate environments

Confidential Master's thesis by:

Toyah Rodhouse

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Research Master Regional Studies,

Faculty of Spatial Sciences,

University of Groningen

The data used in this thesis is confidential, and therefore this thesis is not to be available beyond the purposes of assessment of this thesis.

Contact Details

Student: Toyah Rodhouse
Faculty of Spatial Sciences, University of Groningen
PO Box 800, 9700 AV Groningen, THE NETHERLANDS
Phone: +31619452857
Email: t.s.g.h.rodhouse@student.rug.nl

Supervisor: Prof. Frank Vanclay
Department of Cultural Geography
Faculty of Spatial Sciences, University of Groningen
PO Box 800, 9700 AV Groningen, THE NETHERLANDS
Phone: +30-50 363 8657
Fax: +30-50 363 3901
Email: frank.vanclay@rug.nl

Confidential
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Abstract

Problem Definition and research objectives
In international law, increasingly, pressure is being put on corporations to adhere to international human rights standards. At the same time Indigenous peoples' rights have become incorporated in binding and non-binding international legal instruments. The major concern for corporations revolves around what these two developments imply for the way they do business, as over the past few decades these corporations have increasingly been encountering Indigenous peoples in their business activities. The main research question this thesis intends to answer is*:* How do international norms and expectations about Indigenous peoples' rights influence corporations? This question will be addressed via a case study of Royal Dutch Shell.

The research objectives are:

I) To establish the requirements set in international human rights law with regard to Indigenous peoples;
II) To identify the different pressures and mechanisms through which requirements instituted by international norms on Indigenous peoples might influence corporations;
III) To gather information about current pressures experienced, and practices and policies implemented, in relation to Indigenous peoples at selected operations in which Shell is involved in Alaska, Australia, Canada, Iraq and Russia.

Case study design and methodology
Royal Dutch Shell has been experiencing external expectations to engage with Indigenous communities in a manner that is consistent with the internationally acknowledged Indigenous peoples' rights. At present, Shell's on-the-ground engagement with Indigenous communities is covered by general community engagement principles set out in Shell's internal Control Framework. However, the implementation of this framework is influenced by national legislation, local cultural traditions, social routines and other local dynamics. Particularly with regard to Indigenous communities, different interpretations of the requirements and guidance set in the framework lead to an inconsistent and incoherent application, which combined with the lack of supervision and oversight by Shell's Global SP Discipline Team subsequently exposes Shell to (social) business risks.

Combined with the rising external pressures to comply with Indigenous peoples' rights, the inconsistent application of the Control Framework on the issue of Indigenous engagement for the Global SP Discipline Team has created the urge to articulate a clear and coherent response. Preferably, this response is translated into a global strategy covering broadly applicable guidance for on-the-ground employees. As part of the Master's thesis project, research was undertaken to provide Shell's Global Social Performance Discipline Team with the needed information for the development of such a business-wide Indigenous peoples' strategy.

This study is built on a comparative analysis of multiple operations fully or partly ventured by Shell. The research concentrates on regional approaches and involves both a within-case analysis and a cross-case comparison of the collected data. The research was carried out as a desktop study. Data was collected through reviewing documents that are relevant to Shell in its interactions with Indigenous peoples, including internal policy and guidance documents and external covenants, declarations and company websites. Interviews with employees in several of Shell's Social Performance professionals

represent the key source of information; they are supplemented by extensive literature review and by observations conducted during a four-month internship and the weeklong Global Shell Indigenous Peoples Framing Workshop in Calgary in November 2013.

Main results

There is a large diversity in the manner in which Shell operations engage with Indigenous communities. Dependent on the region, the type of engagement activities undertaken by Shell's SP personnel can be located on a 'continuum of engagement'. The left side of the continuum represents one-directional information sharing, while on the right side of the continuum one can find forms of community involvement and participation in business activities and decision-making. The level of formalization and documentation, and the intensity and duration of the relationship between the company and the community differs significantly along this continuum.

Overall, for Shell Indigenous community engagement is part of risk management: the Global Social Performance Discipline Team is part of Non-Technical Risk, the department that is involved in identifying and managing all risks that are not related to technical aspects of the business. Also, on-the-ground practitioners feel that engagement involves compliance with national laws, impact mitigation and management, establishing a 'social licence to operate', or to control reputational risk.

In general, the primary trigger for regional Shell employees to consider Indigenous peoples' rights derives from host state regulatory pressures. Employees working within the boundaries of states with restrictive Indigenous rights regulations feel clear pressure to implement strict operational Indigenous engagement policies that often translate into participation or even consent for the community; Shell employees working in areas where Indigenous rights are less regulated mention experiencing insecurity due to the lack of such regulation. In these regions, specific policies on Indigenous peoples are absent or less developed and often no clear boundaries between Indigenous communities and other stakeholders exist.

Other regulatory pressures put on corporation via home state extraterritorial law do not directly influence Shell's on-the-ground engagement policies and practices. The extraterritorial mechanisms through which corporations could be bound to uphold the international rights of Indigenous peoples are still in a juvenile state. Finance requirements on upholding such rights, while well-matured, often do not influence Shell employees because the company is not dependent on external funding for its projects. However, in the one instance in which the company was bound by the IFC Performance Standards via its joint venture partner, the international standard of Free, Prior and Informed Consent was formally and publicly adopted.

Furthermore, Shell's projects that had a high visibility and received much (international) NGO and media attention often had more stringent engagement practices in place – resulting in formal agreements or commitments. Also, for these projects engagement activities were monitored and archived.

Major internal determinants for the design and implementation of Shell's local Indigenous engagement approaches are the (insufficient) knowledge, experience and influence of the SP practitioners and the inadequate understanding and awareness of Indigenous issues throughout the business – in particular at the level of business operation management.

Answering the research question

How do international norms and expectations about Indigenous peoples' rights influence corporations? A key factor of importance in how institutions comprising of norms and expectations are diffused

towards the corporate environment is the multinational character of TNCs and the phased approach through which norms are externally and internally diffused. Many TNCs tend to have a corporate structure that is designed towards regional flexibility; in other words, the control mechanisms of TNCs are often built on the assumption that compliance with national legislation is key to the business. At Shell, for example, on-the-ground practitioners repeatedly stated not to see value in a global approach to Indigenous engagement, as this would limit the regional flexibility needed to comply with different national legal systems. For on-the-ground SP personnel, national legislation was still the most important standard to determine whether the company had in place 'respect for Indigenous rights'. FPIC was not known or seen as inapplicable.

At the moment, the company experiences global normative pressures to adhere to Indigenous peoples' rights. While promising initiatives have been undertaken amongst others by the IFC, there is not yet a solid international framework that is capable of translating these pressures into the need for compliance, particularly when TNCs are of a size that makes them independent of external funding or industry pressuring. This does not mean that normative pressures are of no influence. Increasing international attention for controversial oil extractives projects have led Shell and other extractives companies, for whom reputational damage is a significant potential business risk, to conduct more stringent and formalized engagement activities.

The transnational and decentralized nature of TNCs implies that (international) norms and expectations on Indigenous peoples' rights influence TNCs on different levels: on a global level, they create a level of awareness, cautiousness and anticipation, while at the local or regional level they might or might not be felt by the company via implementation in legislation and regulation and via media and NGO attention. Consequentially, operating units will be in different phases of adoption and implementation – where some operations may have commitments on FPIC, others have adopted other international or local standards, and yet again others might not have any standards in place at all.

Interestingly, it is the transnational nature that can cause a contradiction in our modern world in which pressures increasingly have an international character: on the one hand, there is a need to maintain regional flexibility while on the other hand there is a call for more consistency in responding to these internationally set pressures. Particularly with regard to Indigenous peoples' rights, in many countries still a sensitive topic, the gap between international pressure and on-the-ground behavior is visible.

However, it is also the decentralized structure that can solve this contradiction. Locally held institutions on Indigenous engagement, highlighted as 'best practices', are shared with other, less regulated, areas. Internally, through the bottom-up and interregional diffusion of such 'best practices', Indigenous peoples rights and standards for engagement become embedded in corporate guidance, policies and procedures. At the same time, the corporation diffuses its own adopted and adjusted standards externally, thereby contributing to international society as a norm entrepreneur or norm leader.

List of Abbreviations

AEWC	Alaska Eskimo Whaling Committee
ANCSA	Alaska Native Claims Settlement Act
ATCA	US Alien Torts Claim Act
BOM	Business Opportunity Management
CAA	Conflict Avoidance Agreement
CEAA	Canadian Environmental Assessment Agency
CERD	Committee on the Elimination of Racial Discrimination
CLO	Community Liaison Officer
CSR	Corporate Social Responsibility
ECOSOC	Economic and Social Council
EIA	Environmental Impact Assessment
EIR	Extractives Industries Review
EPFI	Equator Principles Financial Institution
ESHIA	Environmental, Social and Health Impact Assessment
FLNG	Floating Liquefied Natural Gas Project
FPIC	Free, Prior and Informed Consent
FPICon	Free, Prior and Informed Consultation
HSSE&SP	Health, Safety, Security, Environment and Social Performance
IBA	Impact Benefit Agreement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILO	International Labour Organization
IPP	Indigenous Peoples Plan
IPDP	Indigenous Peoples Development Plan

NGO	Non-governmental Organization
NTA	native Title Act
NTRB	Native Title Representative Bodies
OECD	Organization for Economic Cooporation and Development
OHCHR	Office of the High Commissioner for Human Rights
OP/BP 4.10	World Bank Operational Policy and Bank Procedures 4.10
PT/NTR	Project & Technology / Non-Technical Risk Management
RAIPON	Russian Association of Indigenous Peoples of the North
RAP	Reconciliation Action Plan
SDA	Shell Development Australia
SIMDP	Sakhalin Indigenous Minorities Development Plan
SPP	Social Performance Plan
SIP	Social Investment Plan
SP/GDT	Social Performance Global Discipline Team
SME	Subject Matter Expert
SRSG	Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises'
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
WCD	World Commission on Dams

Contents

Chapter 1: Introduction

For a large part of the twentieth century human rights obligations have been addressed solely at states. During the 1990s, however, international law advocates made a deliberate shift towards non-state actors (Bob, 2005): it had become clear that transnational corporations [hereinafter TNCs] were increasingly responsible for human rights abuses, and whether or not they could be held accountable for abusive activities was a question that triggered much debate both in international society and academic research (Schmitz and Sikkink, 2002; Bob, 2005). After several attempts, of which the most well-known are the UN Norms in 2005, a 'UN Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' [hereinafter SRSG] – Professor John Ruggie – was appointed to provide clarification on the responsibilities of corporations with regard to human rights. In the 2008 'Protect, Respect and Remedy Framework', Ruggie differentiated between the State's duty to protect against human rights abuses and the corporate responsibility to respect internationally and domestically set human rights, while he also urged for more effective remedy for human rights abuses (Ruggie, 2008). The Ruggie Framework laid the groundwork of the UN Guiding Principles on Business and Human Rights [hereinafter UNGP], which was endorsed by the UN Human Rights Council in 2011. Following upon the UNGP, a plurality of international actors – e.g. the Organization for Economic Cooperation and Development (2011), the International Finance Corporation (2012), the European Commission (2011), the International Council on Mining and Metals (ICMM, 2009 and 2012), and the global oil and gas industry association IPIECA (2012a) – have introduced human rights responsibilities for corporations into a growing plethora of instruments, guidance documents and codes of conduct (Weitzner, 2012; Vanclay, 2014).

In the 1990s the focus within the human rights doctrine also expanded from more traditional approaches envisioning the 'human being' or the individual as the necessary object of human rights to approaches that claimed the applicability of human rights for groups or collective entities (Jones, 1999). It has been said that the right to self-determination, entailing that *'human beings, individually and as groups, are equally entitled to be in control of their own destinies'* (Anaya, 2009: 187), particularly is such a right that can hardly be seen apart from its collective application. Anaya mentions in an earlier work that:

> *'Although self-determination presumptively benefits all human beings, its linkages with the term peoples in international instruments indicates the collective or group character of the principle. Self-determination is concerned with human beings, not simply as individuals with autonomous will but more as social creatures engaged in the constitution and functioning of communities'* (Anaya, 2004: 77).

It is in light of self-determination that Indigenous rights have been advocated their right to determine their own (economic) development path (Hanna and Vanclay, 2013).

Thus, in short, two synchronized developments have occurred in the realm of international law; increasing pressure has been put on corporations to adhere to international human rights standards, while at the same time Indigenous peoples' rights have become incorporated in binding and non-binding international legal instruments. This thesis is written at the intersection of these two developments.

Over the past few decades, TNCs and Indigenous peoples have been increasingly encountering each other. This is particularly true for those companies active in the oil and gas industry, as the search for new resources has instigated the exploration and development of lands and territories that continue to be occupied by Indigenous peoples (IPIECA, 2012b). Conflicts between Indigenous peoples and the

resource exploitation industry often arise as a consequence of the unclear demarcations of indigenous territories, or of a lack of legal recognition of these. Also, divergent beliefs of land and resource management between the community and the corporation, or different perceptions on what is considered appropriate compensation for land and resource development are potential sources of dispute. Such conflicts impose considerable corporate risks (Davis and Franks, 2011), which may already be sufficient stimulants in themselves for corporations to respect and uphold Indigenous rights and to engage in appropriate consultation processes. Potentially acting in contrast with current international law adds to the experiencing of risk by corporations as, clearly, such behaviour would not easily be accepted by human rights advocates, consumers, and international society.

Under the UNGP, corporations have become subject to certain human rights obligations (UNHRC, 2011). What the UNGP does not explicate, however, are the actual requirements companies need to comply with in order to meet the rising expectations considering corporate 'respect' for Indigenous peoples' rights. Principle 12 of the UNGP mentions the responsibility of business enterprises to respect all internationally recognized human rights, *'understood, at a minimum, as those expressed in the International Bill of Human Rights'* (UNHRC, 2011: 13). In a commentary note to Principle 12, Ruggie adds that, depending on the circumstances, additional standards should apply for the human rights of individuals belonging to specific sub-groups of the population that may have experienced or are potentially vulnerable to adverse human rights impacts. Indigenous minorities can and have been framed in terms of such sub-groups that have suffered from marginalization and discrimination (Anaya, 2004; Sawyer and Gomez, 2012). Under the UNGP, therefore, Indigenous peoples require special attention (Kemp and Vanclay, 2013). What constitutes such special attention, i.e. how such 'special attention' could be operationalized, is not specified by the Guiding Principles.

The question remains whether the increasing attention to Indigenous peoples' rights will influence corporations, and if so, how corporations anticipate on these potential obligations by developing and implementing strategies that incorporate emerging Indigenous rights expectations.

The main research question this thesis intends to answer is: How do international norms and expectations about Indigenous peoples' rights influence corporations? The main research question will be addressed via a case study of Royal Dutch Shell.

The research objectives are:

I) To establish the requirements set in international human rights law with regard to Indigenous peoples;
II) To identify the different pressures and mechanisms through which requirements instituted by international norms on Indigenous peoples might influence corporations;
III) To gather information about current pressures experienced, and practices and policies implemented, in relation to Indigenous peoples at selected operations in which Shell is involved in Alaska, Australia, Canada, Iraq and Russia.

Research justification

The justification for this Master's thesis is two-fold. Firstly, this thesis contributes to existing literature by grasping on the implications of the increasing Indigenous engagement expectations for corporations. Although much research has been undertaken with the intent of clarifying one or the other of two key current separate developments – one being the increasing business responsibility for human rights, and the other being the evolving Indigenous rights doctrine – little academic research has focused on developing theories to describe the intersection of these two developments. Secondly,

in terms of the theoretical contribution, this thesis offers a first framework to generalise the process via which Indigenous peoples' rights are diffused to corporate environments.

The remainder of this thesis will attend the above listed objectives in sequential order. In the following section the research design and methodology are elaborated on. The third chapter discusses the nature and content of Indigenous peoples' rights, while the fourth and fifth chapter provide a theoretical framework that describes how (human rights) institutions emerge and diffuse through international society Furthermore, in chapter five, a case is made for envisaging Free, Prior and Informed Consent as such an institution in international society.

Chapter six offers an overview of the results of the data collection and within-case analysis, while in chapter seven a cross-case analysis is undertaken to find both general pressures, tendencies and relationships and regional differences and outstanding cases.

In the last chapters of this thesis, the coherence between theory and practice is critically reflected on. First, do the results of the case study analysis fit within the theoretically based model? What are the strengths and weaknesses of the model, and do the results indicate the need for new research directions? Chapters nine presents a discussion of the conducted research. Finally, in the concluding chapter of this thesis, the main research question is answered.

Chapter 2: Research design & Methodological approach

Introducing the case study: Indigenous engagement by Royal Dutch Shell Petroleum B.V.

Royal Dutch Shell [hereinafter Shell] has been experiencing external expectations to engage with Indigenous communities in a manner that is consistent with the internationally accepted rights of Indigenous peoples. For Shell's Social Performance Global Discipline Team [hereinafter SP/GDT], this has created the urge to articulate a clear and coherent response, which preferably could be translated into globally applicable guidance for its different operational sites. At the time of writing, the SP/GDT experienced that designing such globally applicable guidance on Indigenous peoples was a challenging task.

The minimum standard used to regulate engagement with Indigenous communities by Shell operations is given by the general community engagement principles established in Shell's mandatory Health, Safety, Security, Environment & Social Performance [hereinafter HSSE&SP] Control Framework. Additional guidance is given in Shell's Social Performance Handbook. However, with more than 100,000 employees working in operations spanning 90 countries across five continents, the implementation of the Control Framework is influenced by national law, local cultural traditions, social routines and other such local dynamics. This creates risks of a globally inconsistent application of the Control Framework and a possible loss of supervision and control by Shell's SP/GDT. Both in terms of the company's assumed ethical responsibility and in terms of risk management, this is seen to be an undesirable development. To increase the level of consistency among different local operations, Shell aims at developing an Indigenous peoples' strategy to be implemented in, or to be complementary to, the HSSE&SP Control Framework. As part of the Master's thesis project, research was undertaken to provide needed information to Shell's SP/GDT for the development of such a business-wide Indigenous peoples' strategy.

Methodology

This study is built on a comparative case study analysis of various operations fully or partly ventured by Shell. The advantages of selecting cases that are part of the same multinational environment are various. The SP personnel of these operations can be expected to experience similar top-down pressures from Shell's corporate management to comply with internal compliance frameworks, while also all have equal access to the corporate guidance materials and expertise.

This research concentrates on regional approaches. The regions included in the research were selected based on a variety of factors. For one, regions were only considered if Indigenous communities potentially were present within the zone of impact of Shell's operations in that area. Second, as the SP/GDT had pointed towards the existence of information gaps in particular regions as compared to others, cases were selected according to a certain level of 'polarization' (Eisenhardt, 1989: 537). The dimension on which the regions were compared was the extent to which a well-developed Indigenous engagement policy was embedded in the regional approach. Initially, seven regions of differing size and geography were selected and categorized in three broad groups: regions of whose Indigenous engagement policies and practices the SP/GDT already had considerable knowledge were Alaska, Australia, and Canada; one region in which the team was certain of the existence of Indigenous engagement activities, but unsure about the content of these, was Russia. At last, three regions were identified in which the likelihood of Shell's operations impacting on Indigenous communities was identified, but for which the team was uncertain whether particular Indigenous engagement policies were designed or adopted. These regions were Brazil, Colombia and Iraq. After a first round of inquiry consisting of telephone interviews with Shell's regional SP managers, it became apparent that none of

the Shell operations in Brazil or Colombia were directly or indirectly impacting on or communicating with Indigenous communities. Therefore, these regions were excluded from further research.

The analysis of the data gathered involved both a within-case analysis, in which a detailed descriptive analysis was given for each region, and a cross-case comparison based on the type of pressures experienced and the policies and practices implemented in the specific regions (Eisenhardt, 1989). The next level of analysis revolved around comparing the results of the within-case analyses and the cross-case comparison with the model developed on the basis of neo-(institutional) theory.

Research methods

The research was largely carried out as a desktop study; data was collected through systematically reviewing relevant corporate documents, participatory observation techniques and 30 telephone – or face-to-face interviews with HSSE&SP professionals working either on an operational, regional or international level. Included in the systematic literature review were confidential documents provided by Shell, such as Social Performance Plans [SPPs], Social Investment Strategies [SISs], and Environmental, Social, and Health Impact Assessments [EIAs, SIAs, or ESHIAs]; publicly available documents from the global and local websites of Shell and Shell operated ventures, as well as of groups and organizations opposing Shell's development projects; relevant academic literature; and overarching industry association documents (both ICMM and IPIECA).

The interviews with Shell's SP professionals represent the key source of information. Employees in various positions within Shell and from different regions have been interviewed. The focus of the interviews with the different employees depended on their current function and/or their previous role and experience within the company. Four interview guides were developed to cover the key questions for each type of role and function: Although the guides were quite extensive, the form of the interviews was largely informal, and could best be described as conversational and flexible. The first guide contained questions for regional SP management; the interviews with regional SP managers were mainly intended to identify local Shell operations where issues with Indigenous peoples were recognized, and to establish potential gaps for their region with regard to the requirements for Indigenous engagement as prescribed by the HSSE&SP Control Framework. The key questions for SP regional management thus revolved around, among others: the identification processes within the region for native, tribal or Indigenous communities; the existence of regional or local Indigenous peoples strategies or policies; the appointment of IP authorized persons or internal or external IP experts; the interpretation of 'respectful engagement' as mentioned in the HSSE&SP Control Framework; the usefulness of the Framework and the SP Handbook; familiarity with FPIC and the corporate opportunities and difficulties for FPIC implementation

The second interview guide was developed for operational SP practitioners and as such was designed to enable the identification of corporate impacts on Indigenous communities, local practices and policies concerning Indigenous peoples, the challenges and opportunities of engagement, the usefulness of the Control Framework and the SP guidance, and the awareness of the SP personnel of international expectations and FPIC. As these interviews were expected to form the key source of information, all interviews were scheduled for at least an hour and the guide consisted of 50 key questions. Dependent on the context and the answers given, questions were in- or excluded from the interview. Additional to the questions asked to regional SP personnel, the guide also included questions as, for example, what sort of impacts the operation had on the communities and whether these were different from the impacts on other local communities; what mitigation or grievance mechanisms the operation had in place; the extent to which the operation had in place strategies or policies to enhance positive impacts on Indigenous communities; how the asset communicated with

impacted communities and whether a different engagement policy or strategy for Indigenous communities was in place; the extent to which such policies or strategies were based on consultation, participation and involvement, or consent and the extent to which engagement was seen as a continuous process; whether the asset made use of additional internal expertise for the dealings with Indigenous issues; what arrangements had been made to ensure transparency of information sharing; and what were the attitudes of involved stakeholders such as governments, regulators, and societal actors.

The third interview guide consisted of questions for the general HSSE&SP management team. These questions revolved primarily around the input factors necessary for the development of an Indigenous peoples' strategy, and how such a strategy could be incorporated in the Control Framework. At last, the fourth guide concerned legal and communications staff that did not have direct dealings with the HSSE&SP Control Framework nor with Indigenous peoples, but due to their position were likely to have noticed the emergence of international expectations on corporate Indigenous engagement.

A last method of data collection was participatory observation. For a period of four months, meetings, conference calls and workshops of the SP/GDT were attended. Also, data was collected during the week-long Global Indigenous Peoples Framing Workshop in Calgary in November, 2013. The Workshop was organized by Shell's SP/GDT to establish consensus on the internal direction of Shell's Indigenous peoples' strategy. I was asked to present the intermediary results of this research on the first day of the Workshop, and to participate in an advisory position on the remaining days. Applying participatory modes of observation has enriched and supported the information already gathered: to the extent that triangulation provides stronger substantiation of constructs (Eisenhardt, 1989), the observations done during the four-month internship and the Global Indigenous Peoples Framing Workshop have confirmed the tendencies and relationships highlighted in the interviews.

Ethical considerations

All interviewees received a request for their participation, and the interviews were only conducted with prior confirmation (informed consent) of the respondents. Also, prior to the interview the respondents were made aware of the recording device and were asked to consent to recording the interview.

In respect of the privacy of the interviewees and with consideration of their position within the corporation and the sensitiveness of the issue, the decision was made not to publicize the list of key informants, nor to name the interviewees in any of the documents that are a result of this research. For the purpose of validation of the information shared here, a list of the names of the interviewees is available should it be required.

This research further involved interviewing employees with different cultural backgrounds; many of Shell's on-the-ground community liaison officers are members of Indigenous communities themselves. Thus, it was necessary to be aware of the different cultural opinions these employees might have with regard to the company, its activities and its environment. Also, these employees might have a very intricate position within the company: in many instances they serve as a bridge between company and community. They represent the company's interests in their communities, but also represent the community's needs and concerns in the company. This research was undertaken with the continuous awareness of this intricate position and the cultural differences; interview protocols were adjusted to specific regional environments and discourses, and much room was allowed for the community liaison officers to share information on their community's culture, traditions, government structures, needs and future ambitions.

Part I: Business and Indigenous peoples' rights – Theoretical foundations

Chapter 3: International expectations with regard to Indigenous peoples' rights

3.1 Indigenous peoples' rights and the extractives industry

Over the past few decades, corporations in the extractive industry have increasingly been searching for new resources in remote areas that, although they seem 'empty', are in many instances already inhabited, used, claimed and governed according to the customs of Indigenous communities (Amongst others, Haalboom, 2012; Bebbington, 2012; Bebbington and Bury, 2013; Bridge, 2004; IPIECA, 2012b). The arrival of explorative or extractive activities in these areas generates severe potential adverse risks and increases uncertainty regarding the continuance of Indigenous lives, lands and livelihoods (O'Faircheallaigh, 2013, Yakovleva, 2011). Indigenous peoples are especially vulnerable to marginalization and the destruction of their traditional subsistence livelihoods, mainly because they are highly dependent on the land and resources needed and degraded by the extractive industries. The perspective on land and resources held by governments and industry – i.e. that land is under the sovereign control of the government, who determines the scope and development of it – is in many instances diametrically opposing that of Indigenous communities, to whom land is often non-saleable and owned collectively through Indigenous title or customary Indigenous law (Laplante and Spears, 2008). As such, land is the major subject of dispute between Indigenous peoples, national governments, and the extractive industry (ICMM, 2009; Sawyer and Gomez, 2008).

Extractive activities stir disputes even more than other industrial activities, as they tend to leave a deeper environmental impact. The negative impacts stemming from large-scale extractive activities are multiple, and include, among others: a severe loss of biodiversity and natural wildlife; a physical impact of the extraction on the landscape which is often irreversible or entails large clean-up expenditures; leakages or spills of oil and gas; the diminishing availability of natural resources such as water, previously at the disposal of the community, but now becoming scarce to such extent that the community's use of these is no longer possible; the building of access roads which leads to the attraction of further economic development and processes of urbanization; and an influx of workers, which alter local social structures and relationships, may trigger racial and ethnic tensions, threaten local cultures by the introduction of (western) habits, and introduce illnesses previously unknown in that area (Laplante and Spears, 2008; O'Faircheallaigh, 2006 and 2013, Vanclay and Esteves, 2011).

Overall, the damages and threats created by exploitation result in a serious disruption of Indigenous livelihoods and, successively, Indigenous rights (Gilbert, 2010). Positive impacts, such as the creation of employment opportunities and the improvement of local infrastructure may vanish once the project is over (Laplante and Spears, 2008). Often Indigenous residents in an area under concession do not know what form a project might take, nor whether it will have implications for their resource use, the value of their land, or their family's future work and educational opportunities (Laplante and Spears, 2008). What is clear, though, is that extractive industry projects are almost always very long-term, complex, and capital intensive projects, and that currently Indigenous communities do not tend to benefit quite as much as governments or the extractive industry due to the unequal distribution of the costs and benefits of a project over time (Laplante and Spears, 2008).

Most contestation of Indigenous peoples in relation to these economic development pressures centers on issues of inclusion in decision-making, participation, co-management, consideration of customary land ownership, and access to culturally relevant sites and resources (Yakovleva, 2011). More than anything, local communities are concerned with *'questions of control over their own destinies, both in*

relation to the state and in terms of the management of projects, the flow of benefits, and the limitation or redistribution of mineral impacts' (Ballards and Banks, quoted in Laplante and Spears, 2008: 76). This is also reflected in the conclusions of the World Bank's Extractive Industries Review in the early 2000s, which stated that *'many grievances from communities and especially from Indigenous peoples living near extractive industries projects relate to their claims to their right to participate in, influence, and share control over development initiatives, decisions and resources are ignored'* (Salim, quoted in Laplante and Spears, 2008: 77-78).

Hence, while the extractive industry must address the negative impacts of their activities, they must also bear responsibility for certain features of the social and physical environment in which they operate if they want to avoid community opposition (Laplante and Spears, 2008). In this regard, one of the main points of interest for the extractive industry has been the promotion of Indigenous peoples rights, and in particular of Free, Prior and Informed Consent, by international organizations (Yakovleva, 2011). Indigenous rights advocates have been phrasing the right to FPIC not only as effective realization of the right to self-determination, but also as legally constructed on the right to equal treatment, usage of land, the right to cultural integrity, and the right to property. As such, FPIC has come to serve as an umbrella concept and respecting FPIC is increasingly becoming a prerequisite for respecting Indigenous rights at large.

Before describing the ways through which the extractives industry experience pressures to respect implement Indigenous peoples' rights, this chapter will first describe the specific nature of this particular subset of human rights.

3.2 Defining 'Indigenous peoples'

Although the term 'Indigenous peoples' is universally applied, there is no global consensus on a single meaning of it. This is not only due to disagreement within and between states but also is the preference of many Indigenous peoples (Meijknecht, 2002-03). A precise definition could become a disadvantage rather than an advantage as it might lead to the exclusion of certain Indigenous groups from the broad variety of communities that are currently considered to be Indigenous. In this sense, a definition too strict could serve as an excuse for governments not to recognize or accept the presence of Indigenous peoples within their boundaries. What is feared by many Indigenous communities is that such a definition might reify Indigenous identity and entitlements in too narrow and rigid terms. And, while bestowing certain rights on Indigenous peoples provides many groups a degree of self-sufficiency, the manner in which this is done can be divisive and undermining (Niezen, 2003; Saywer and Gomez, 2012). Hence, a legal definition of Indigenous peoples is neither necessary nor desirable; for the purpose of this thesis, however, a working definition is practical.

Despite their differences, what can be said is that many Indigenous communities share in common marginalization, discrimination, dispossession and neglect (Saugestad, 2001). One working definition that accounts for these elements is the comprehensive and oft-cited description of Indigenous peoples given by Cobo (1986), also repeated in the UN 2004 Background Paper on the Concept of Indigenous Peoples. In Cobo's opinion, Indigenous peoples could at best be described as

> *'Indigenous communities, peoples and nations and those which, having a historical continuity with pre-invention and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, at the basis of*

their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems' (Cobo, 1986: add. 1-4).

This description of Indigenous peoples includes special attachment to land as a primary marker, which is further consolidated with elements of historical continuity and pre-colonial ancestry, (self) identified distinctiveness and a strong sense of self-identity, non-dominancy within current society, and the wish for cultural preservation (Gilbert, 2007a; Niezen, 2003).

Often compared with each other are Indigenous peoples and minority groups. Differentiating between them is not always appropriate nor simple. In some instances, for example in the Asian and African context, it has been suggested that the term 'minorities' would be more appropriate and practical than the somewhat vague concept of 'Indigenous peoples' (Kenrick and Lewis, 2004). However, there are also considerable differences. First, while Indigenous peoples claim historical continuity to the land, which derives from their ancestors and is manifested by their occupation and use of (parts of) their ancestral lands, minorities often do not have such connections. Second, although the social, economic and political non-dominancy within the majority society is a characteristic often common to both type of groups, 'distinctiveness' for minorities is derived from their ethnic, religious, or linguistic nature, while Indigenous peoples, although recognized as distinct from the majority based on those elements as well, are also accepted as different due the their unique ways of subsistence. In terms of Indigenous peoples, distinctiveness is both objective and subjective; the peoples should identify themselves as Indigenous, but should also be recognized as such by others. What is more, an individual who identifies him- or herself as part of an Indigenous group should also be accepted by that group as a member (Kenrick and Lewis, 2004). Furthermore, while the primary aim of Indigenous peoples has been to continue to develop as a distinct people, which reflects a separatist perspective, the claim of minority groups has been to gain *de facto* and *de jure* equality with the majority and, preferably, to integrate within dominant society, a claim which reflects an integrationist point of view (Sawyer and Gomez, 2012).

Besides its theoretical use, a differentiation between Indigenous peoples and minority groups has a legal purpose: whether a group is identified as a minority or an Indigenous community has different legal consequences under human rights law. While Indigenous peoples have successfully claimed human rights based on the corporate nature and identity of the community, i.e. on a corporate conception of the rights they are entitled to as a group, the claim of minority groups, as reflected in the wordings of several instruments dealing with the rights of cultural minorities, has largely been derived from the shared but individualistic interests of the different members of the minority group, i.e. on a collective conception of group rights (Wiessner, 2011; Jones, 1999).

Although the differences between Indigenous peoples and minorities seem to indicate the existence of quite clear-cut boundaries between the two groups, in fact no such dichotomy exists. Often, Indigenous peoples and minority groups comprise *'distinct but overlapping categories subject to normative considerations'*, while '*in many instances, Indigenous and minority rights intersect substantially'*(Anaya, 2004: 100).

3.3 Identifying Indigenous peoples' rights instruments

'Indigenous rights' refer to the moral and legal rights to which Indigenous peoples claim entitlement. The ILO was the first international organization to draw attention to and recognize Indigenous peoples' rights and their collective nature. In 1957, the ILO adopted Convention No. 107 Concerning the Protection and Integration of Indigenous, Tribal and Semi-tribal Populations (ILO, 1957). This Convention followed a strong 'integrationist' or 'assimilative' approach and was aimed at prompting

the ‘absorption’ of Indigenous peoples by the dominant societies (Sawyer and Gomez, 2012). At the time, the main justification for this approach was to ensure that all members of society were entitled to equal treatment, without distinction of any kind such as Indigenous origin. However, this approach received serious criticism after the assimilative policies and practices of, among others, Canada and Australia were condemned as being culturally ignorant, inhumane and aimed at ‘stealing a generation’ or ‘civilizing the Indian’ (Sawyer and Gomez, 2012). In 1989, the Convention was revised and re-emerged as ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries. Currently, ILO No. 169 is the only legally binding instrument that specifically incorporates the rights of Indigenous peoples. Although only a limited number of UN member-states have signed up to the Convention – to date, only twenty-two member states have officially ratified the Convention –many of the member states that did ratify Convention ILO No. 169 are from Latin America and the Pacific, a region that has a recent history with Indigenous peoples’ rights violations (www.ilo.org), and it is promising that these countries are now signing up to ILO No. 169.

Equally important at the international level is the UN Declaration on the Rights of Indigenous Peoples [hereinafter: UNDRIP], which was adopted by the UN Human Rights Council [hereinafter UNHRC] in 2006, and which passed the UN General Assembly on September 13, 2007 (UN General Assembly, 2007). Already in 1982 the Sub-Commission constituted a Working Group on Indigenous Peoples to complete a Draft Declaration reflecting the nature and status of Indigenous Peoples’ rights. The outcome of the Working Group’s efforts, the subsequent UN Draft Declaration, has been controversial and debated over for more than two decades before the UN General Assembly adopted it in 2007. Only four countries with a significant number of Indigenous peoples present within their territories – the US, Canada, Australia, and New Zealand – voted against the Draft Declaration, while eleven states – among which were Colombia, Nigeria and Russia – abstained. The argument of the four states that voted against the UNDRIP was that the level of autonomy for Indigenous peoples as acknowledged in the UNDRIP would undermine their own sovereignty. Furthermore, they claimed that the UNDRIP might override existing human rights obligations, even though the Declaration itself explicitly gives precedence to such existing international human rights in its article 46 (UN General Assembly, 2007: art. 46). For a time, Canada, the US, Australia and New Zealand also justified their opposition of the UNDRIP by claiming that many of the states that did sign on to the Declaration did not appear to uphold the minimum standards proclaimed by it. Over 2009 and 2010, all four countries reversed their positions and have endorsed the UNDRIP (Corntassel and Bryce, 2011; Hanna and Vanclay, 2013).

As a fundamental principle in international law, declarations cannot enforce legally binding obligations upon their signatories. However, as with the UNDRIP, declarations are often funded on strong moral values and built on preceding international principles of law. From this perspective, declarations might have a positive influence on the development of norms of customary international law. Accordingly the UNDRIP in itself, though not binding, is a reflection of the growing consensus *‘concerning the content of the rights of Indigenous peoples, as they have been progressively affirmed in domestic legislation, in international instruments, and in the practice of international human rights bodies*’ (OHCHR, 2007). However, Stavenhagen as the United Nations Special Rapporteur on the situation of human rights and the fundamental freedoms of indigenous peoples from 2001 to 2008, also argued that as clearly the international community was not yet prepared to enter into any type of binding obligation regarding Indigenous peoples’ rights, it would be too early to categorize the UNDRIP as customary international law (OHCHR, 2007).

3.4 The nature of Indigenous peoples' rights

The right to self-determination

Contemporary formulations of Indigenous peoples' rights are frequently said to have derived from the long-standing peremptory norm of self-determination (Anaya, 2004; Hanna and Vanclay, 2013). The construct of self-determination is inextricably linked with propositions of human equality and freedom and as such, it cannot be seen separate from most other human rights norms (Anaya, 2004). Although self-determination is a human rights construct presumptively designed to benefit all human beings, it is not a construct that is concerned with individuals as autonomous and independent human beings. Rather, self-determination concerns human beings as *'social creatures, engaged in the constitution and functioning of communities'* (Anaya, 2004: 77): it is said to be a human right for 'people'.

In the spirit of decolonization, many have used the term 'people' in a sense of '*a limited universe of narrowly defined, mutually exclusive communities entitled to a priori the full range of sovereign powers, including independent statehood'* (Anaya, 2004: 77). States have been resisting to refer to any such right that could be interpreted as the right to independent statehood, while also the inappropriate association with decolonization as the only relevant context in which self-determination applies has constituted the lacking affirmation by, and consensus among governments on Indigenous self-determination (Anaya, 2004; Scheinin, 2004). However, as Scheinin (2004) and others have argued, Indigenous peoples who are ethnically, linguistically, geographically and/or historically distinct from the majority of society, qualify as 'peoples' under notions of public international law, and ought to be entitled to the right of self-determination as a people.

The right to self-determination is, among others, laid down in ILO No. 169. Article 7 of this convention explicitly references to this right, stating: *'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use'* (ILO, 1989: art. 7.1). The UNDRIP also incorporates the right to self-determination, phrasing it as the right of Indigenous peoples to *'freely determine their political status and freely pursue their economic, social and cultural development'* (UN General Assembly, 2007: art. 3).

The right to self-governance

Self-governance is the overarching political dimension of self-determination. The right's core consists of the idea that government is to function according to the will of the people governed (Anaya, 2004). In the particular context of Indigenous peoples, notions of democracy and cultural integrity have been jointly interpreted as creating a *sui generis* right to self-governance. This right includes not only localized autonomy but also upholds that Indigenous peoples should be involved in different levels of government, as such involvement would be the only way to ensure their effective participation in decisions affecting them (Anaya, 2004).

The right to self-governance is mentioned in both ILO No. 169 and the UNDRIP. The latter declares in its article 20 that *'Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions'* (UN General Assembly, 2007: art. 20.1), while ILO No. 169 in article 6 proclaims that states,

> '*[I]n applying the provisions of this Convention … shall … consult the peoples concerned … in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'*,

While states should also

> '[e]*stablish means by which these people can freely participate … at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them'* (ILO, 1989: art. 6.1).

The right to development

The International Covenant on Economic, Social, and Cultural Rights [hereinafter: ICESCR], which is part of the International Bill of Human Rights, affirms a range of social and economic rights and corresponding state duties to ensure that 'everyone' equally enjoys the benefits of economic development (UN General Assembly, 1966a: Part III). Emphasized in the ICESCR are rights to health, education, and an adequate standard of living. Linked with those rights is the right to development, which has been deemed to extend to both peoples and individuals. In December 1986, the UN General Assembly, with an overwhelming majority, adopted the Declaration on the Right to Development (UN General Assembly, 1986). The Declaration defines the right to development as

> *'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'*(UN General Assembly, 1986: art. 1.1).

Within the legal space created by the Declaration on the Right to Development, a special category of entitlements has emerged with regard to Indigenous peoples. These specific Indigenous rights and obligations are aimed at remedying two related historical processes that have left most Indigenous communities in economically disadvantaged positions. The first is the plundering of Indigenous peoples' traditional lands and resources over time, a process that has impaired Indigenous economies. The second is the political process of discrimination which has tended to exclude Indigenous community members from receiving social benefits generally available in the states within which they live (Sawyer and Gomez, 2012).

To rectify the economically disadvantaged position in which many Indigenous communities are currently in, special entitlements with regard to the right to development are included in the Indigenous peoples' rights instruments. The UNDRIP states that

> *'Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development'* (UN General Assembly, 2007: 2).

Article 20.1 and article 21.1 of the Declaration elaborate on the elements that need to be included within the specific context of the Indigenous right to development, i.e.

> *'Indigenous peoples have the right to maintain and develop their political, economic, and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'* (UN General Assembly: art. 20.1), and *'Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions'* (UN General Assembly, 2007: art. 21.1).

The non-discrimination norm

A minimum condition for the exercise of self-determination and the right to development is the absence of official policies or practices that discriminate against individuals or groups. This is particularly relevant in the context of Indigenous peoples, as they often have been treated adversely on the basis of their cultural differences. The non-discrimination norm, particularly viewed in light of self-determination, goes beyond ensuring for Indigenous individuals the same civil, economic and political freedoms accorded to others, or the same access to the state's social welfare programs. It also

upholds the right of Indigenous communities to maintain and freely develop their cultural identity. The non-discrimination norm, in its most fundamental nature, prescribes that *'Indigenous peoples and individuals have the right to belong to an indigenous community or nation'* and that they *'have the right to be free from any kind of discrimination, in the exercise of their rights, in particular based on their Indigenous origin or identity'* (UN General Assembly, 2007: art. 9).

The cultural integrity norm

Closely interlinked with the norm of non-discrimination are values of cultural tolerance and integrity. Cultural integrity has been formulated in general terms in article 27 of the International Covenant on Civil and Political Rights [hereinafter: ICCPR], which is the twin covenant of the ICESCR. Article 27 affirms that persons belonging to '*ethnic, linguistic or religious minorities… in community with other members of their group'* have the right to *'enjoy their own culture, to profess and practice their own religion and to use their own language'* (UN General Assembly, 1966b: art. 27). Although the provisions of article 27 are applicable to all cultural minorities, as mentioned above Indigenous peoples and minorities cannot be differentiated based on a strict dichotomy, but instead often comprise distinct but overlapping categories. In many instances, therefore, Indigenous and minority rights intersect substantially, particularly on issues of non-discrimination and cultural integrity. Consequentially, the cultural integrity norm as embodied in article 27 of the ICCPR has been the basis of several decisions favoring Indigenous peoples by the UNHRC and the Inter-American Commission on Human Rights. Both bodies have held the right to contain *'all aspects of an Indigenous group's survival as a distinct culture, understanding culture to include economic and political institutions, land use patterns, language and religious and spiritual practices'* (Anaya, 2004:104).

ILO No. 169 provides for governments that they *'shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity'* (ILO, 1989: art. 2). In the UNDRIP, the cultural integrity norm is incorporated in article 11(1), and prescribes that '*Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect, and develop the past, present and future manifestation of their cultures'* (UNDRIP, art. 11).

Indigenous rights to land, property and resources

Within the Indigenous peoples' rights framework, the rights to own the lands that Indigenous communities have traditionally been using and occupying– also named customary land rights – are controversial. Historically, colonial jurisprudence, particularly in the Americas, often did invoke property precepts to acknowledge that Indigenous peoples had rights to the lands they used and occupied prior to the emergence of colonial societies (Gilbert, 2007b). That doctrine, however, did not value Indigenous cultures or recognized the importance of Indigenous peoples' continuous relationships with their lands. In the colonial era, consequently, Indigenous peoples' land rights were based on western conceptualizations and were treated as exchangeable for cash or other assets. In other instances, particularly in Africa, Australia and Asia, Indigenous peoples were framed as being 'uncivilized' peoples: unorganized, dispersed, and primitive. The lands and territories which they occupied and the resources they used were considered to be '*terra nullius'*, i.e. 'no man's land' (Gilbert, 2007a).

Already in 1975 the International Court of Justice expressed its disapproval of the *terra nullius* doctrine. The ICJ, in an advisory opinion requested by the UN General Assembly, questioned whether at the time of colonization, the territories of the Western Sahara, which were periodically used by nomadic Indigenous communities, could be considered *terra nullius*. The ICJ considered whether the nomadic tribes that at that time lived in the concerned territories were to be regarded as occupiers of

their lands, or whether the territory could be regarded as empty (Gilbert, 2007a). The ICJ found that the concerned territories were under control of nomadic but organized societies and therefore could not be considered as *terra nullius*, or open to acquisition by other states. Hence, the ICJ recognized that the nomadic (Indigenous) tribes did have traditional legal ties with the concerned territories (ICJ, 1975: at paras. 75-83).

This recognition of the existence of legal ties between Indigenous peoples and their traditional lands was echoed in a UNHRC General Comment on the implementation of article 27 of the ICCPR, in which the UNHRC emphasized that

> *'[T]he enjoyment of the right to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority'* (UNHRC, 1994: at para. 3.2.).

In other words, in this provision of General Comment No. 23, the UNHRC recognizes that territories, lands and resources are key to the preservation of Indigenous culture and, by implication, to Indigenous self-determination. The UN Human Rights Committee also has repeatedly decided on cases in which the Indigenous plaintiff claimed an alleged breach of article 27 of the ICCPR (Bankes, 2010). One of the most influential decisions of the UN Human Rights Committee was done in the *Lubicon Lake Band v. Canada Case*, in which the Lubicon Cree Band claimed that it had an Aboriginal title on a piece of land in the Peace District of Alberta (UN Human Rights Committee, 1990). For their life sustenance, the members of the Band were to a great extent dependent on their ability to access wildlife and other resources present within this territorial land. When the Province of Alberta issued multiple resource dispositions on these lands, the Band claimed that the effects of these activities on wildlife populations were such, that they influenced their ability to sustain their Indigenous lifestyle and culture. In its conclusion, the Committee stated:

> *'There is no doubt that many of the claims presented raise issues under article 27… Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate'* (UN Human Rights Committee, 1990: at para 32.2-33).

However, under article 27 of the ICCPR, no duties can be imposed on states to recognize the land- or resource rights of Indigenous communities (Bankes, 2010). While the state does have the obligation to ensure that neither its actions nor those of others deprive Indigenous peoples of the opportunity to enjoy their culture, article 27 does not contain any references to the right of property. Thus, article 27 cannot act as a basis for Indigenous land rights; at most, as Martin Scheinin suggests, article 27 could serve as a basis for customary usage rights, i.e. '*for purposes of compliance with Article 27, it is sufficient to secure the use of Indigenous lands'* as opposed to the securing of property rights (Scheinin, 2004: p. 7).

The only specific and internationally binding instrument considering traditional land and resource rights of Indigenous peoples is ILO No. 169. In article 13(1) of the Convention, the relationship of Indigenous peoples with their land is linked with Indigenous culture; ILO No. 169 proclaims that governments, *'shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories… which they occupy or otherwise use, and in particular the collective aspects of this relationship'* (ILO 1989:art 13.1). According to ILO No.

169, Indigenous land and resource rights are of collective character and include a combination of possessory, usage and management rights. Article 14(1) of ILO No. 169 affirms that

> *'The rights of ownership and possession of* [Indigenous peoples] *over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities*' (ILO, 1989: art. 14.1).

Article 15, further requires states to safeguard Indigenous peoples' rights to the natural resources present within their territories, including their right '*to participate in the use, management and conservation' of the resources*' (ILO, 1989: art. 15.1). What is more, ILO No. 169 adds that Indigenous peoples *'shall not be removed from land which they occupy', unless under prescribed conditions and as an 'exceptional measure'* (ILO, 1989: art. 16). Convention No. 169 affirms that Indigenous peoples, as a collective entity, are entitled to an ongoing relationship with the land and natural resources based on traditional patterns of use and occupancy.

Nevertheless, the Indigenous right to ownership of land as opposed to usage or management of the land is still very much contested. In its 2001 landmark decision, the Inter-American Court on Human Rights attempted to clarify the content of Indigenous ownership rights in the case of *Mayagna Awas Tingni Community v. Nicaragua*. The Court had to consider whether communal Indigenous title was protected under article 21 of the American Convention on Human Rights (Bankes, 2010) – a binding document for those states that have accepted the jurisdiction of the Inter-American Court. In its decision, the Court affirmed the collective rights of the Indigenous community to own their lands and natural resources; in the Court's opinion, the Indigenous community's relationship with their territories was based on structures of collective ownership and sharing, established by the customary laws of the community. The Court continued:

> *'[T]he State violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated and titled'* (Inter-American Court on Human Rights, 2001: para. 153).

After this ruling, the Court has consistently emphasized the state's duty to delimit, demarcate and title Indigenous and tribal lands as well as the state's duty to refrain from actions that 'would affect the existence, value, use or enjoyment' of these lands (Bankes, 2010). One of the more recent decisions of the Court on the issue of Indigenous ownership has been in the *Saramaka case* (Bankes, 2010). In this case, the Court concluded that the State had damaged the environment, which had had a negative impact on lands and natural resources traditionally used by members of the Saramaka community. Also, by not allowing the Saramaka to effectively participate in the decision-making process, the state had violated the property rights of the Saramaka people under article 21 of the American Convention (Inter-American Court of Human Rights, 2007: *supra note* 169, at para 154).

Native or Aboriginal title rights

National attempts at establishing a legal doctrine that recognizes Indigenous peoples' historical rights over land and resources are increasingly phrased in terms of 'Aboriginal' or 'native' title. Developed within the jurisprudence of common law, particularly by Australian and Canadian courts, native title recognizes that Indigenous peoples have rights which exist through Indigenous customary law, and which pre-date colonial legal systems (Gilbert, 2007b). In the 1992 *Mabo and others v. Queensland case*, the High Court of Australia established that

> *'Common law native title is a communal native title and the rights under it are communal rights enjoyed by a tribe or other group… since the title preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom'* (High Court of Australia, Mabo v. Queensland (2), 1992, Deane and Gaudron JJ, at para. 58).

Thus, Indigenous titles are collective titles that describe the community's right to use and enjoy their historical territories. Likewise, the Canadian courts have affirmed that native title relies on pre-colonial Indigenous customs (Gilbert, 2007b). The use of native title has gradually become more international and several (common) law courts have referred to it when dealing with Indigenous peoples' land rights (Gilbert, 2007b).

Despite the common law recognition of native title, in practice it remains difficult for Indigenous communities to claim such title rights. In Australia, the legal recognition of these rights relies on evidence that the Indigenous community has been able to maintain its traditional use of the territories throughout the colonial era. The burden of proof has been put on Indigenous communities to show evidence of such continuous traditional use of lands. To successfully claim native title in Australia, a community must 1) prove the existence of historical customary laws; 2) prove the observance of these laws in the present; and 3) establish that a connection between these two has been maintained over time. In Canada, to successfully claim Aboriginal title, the Indigenous practice must be an integral part of the Indigenous culture, and must continue to be exercised today (Gilbert, 2007b). The Supreme Court of Canada has rejected a more 'frozen' approach, among others in the *Delgamuukw case*, acknowledging that *'some degree of change in the content of an indigenous practice over the period of time since colonization does not render that practice ineligible for legal recognition and protection'* (Connolly, 2006: 33). At the same time, however, the Supreme Court stated in *Delgamuukw* that if Aboriginal communities *'wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so'* (Supreme Court of Canada, Delgamuukw v. British Columbia, 1997: at para 131). Despite these limitations set on Aboriginal title, the Canadian legal system has been one based on the acceptance of change, while the Australian system has been oriented more towards static interpretations of Native Title.

The rights to participation, consultation and consent

Recognizing and extending economic self-determination for Indigenous communities has, as described, not led to the granting of full land – or property rights (Masaki, 2009). Rather, Indigenous peoples seem to have acquired a broad mixture of usage, participation and consultation rights (Ward, 2011). Participation rights are fundamentally embedded in article 27 of the ICCPR. In the UNHRC General Comment No. 23 on article 27 of the ICCPR, states are recommended to accept the positive duty to *'ensure the effective participation of members of minority communities in decisions that affect them'* (UNHRC, 1994: at para. 7). The scope of this recommendation could include Indigenous minorities.

Within the Indigenous rights context, the first legal recognition of specific Indigenous participation rights is given by ILO No. 169 (ILO, 1989). Article 6 of ILO No. 169 calls upon governments to consult with Indigenous communities in cases where proposed measures might affect the community directly (ILO, 1989: art. 6.1); also, in measures that could potentially have an impact on the community, the government is obliged to establish means through which Indigenous peoples could freely participate in all levels of the political and administrative decision-making processes. In article 7, Indigenous self-determination and the right to exercise control over development are explicitly connected to the right of Indigenous peoples to *'participate in the formulation, implementation and*

evaluation of plans and programmes for national and regional development that may influence them directly' (ILO, 1989: art. 7.1). Article 7 further requires governments to participate and cooperate with Indigenous peoples as to improve their standard of life, work, health and education, to ensure that Indigenous peoples are involved, when appropriate, in impact assessments of planned development activities that might affect them; and to take measures for the cooperation and participation of Indigenous peoples in environmental management activities (ILO, 1989: art. 7).

While participation and consultation rights have encouraged governments to include the interests of Indigenous communities in decision-making procedures, effective self-determination involves a process that ultimately seeks to endow Indigenous peoples with a right to grant or withhold consent for all major development activities on their lands (Colchester and Ferrari, 2007; Hanna and Vanclay, 2013). One of the most phrased provisions of ILO No. 169 is article 6.2, which contains that '[t]*he consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'* (ILO, 1989: art. 6.2). Article 6.2 does not obligate states to obtain consent, but rather argues that the intention for states to enter into consultation processes must be to obtain such community agreement. Under ILO No. 169, consent is made obligatory in article 16.2 which focuses on resettlement issues (ILO, 1989: art. 16.2). Although ILO No. 169 was only ratified by 22 countries, increasingly consent has been adopted by other international human rights organizations as well.

Although consent was introduced and promoted as a human right precept, at the end of the 1990s consent became increasingly adopted by other international organizations as well. Around that time the World Commission on Dams released its 'Dams and Development: A New Framework for Decision-making' report (WCD, 2000), in which the Commission introduced the term Free, Prior and Informed Consultation [hereinafter: FPICon]. The Report was presented to the World Bank Board in the early 2000s, which was only a few years before the World Bank's 'Extractive Industries Review', a review that among other things evaluated the consultation and participation processes of projects involving mining and exploration activities (EIR, 2004). Both documents recommended the Board to adopt consent as a prerequisite for development projects on lands inhabited or used by Indigenous communities. The Board, however, seemed ill at-ease with the potential legal application of consent, and therefore preferred to adopt the standard of FPICon resulting in broader community support (Cariño and Colchester, 2010; Hanna and Vanclay, 2013). The International Finance Corporation, the private sector arm of the World Bank, included in its Performance Standards the precondition that consultations needed to be understood as good faith negotiations with and informed participation of Indigenous peoples towards the successful outcome of negotiations (Cariño and Colchester, 2010: 425; IFC, 2006). Following upon ongoing international developments on the issue the IFC updated its Performance Standards in 2012 to require consent rather than consultation (IFC, 2012).

In the 2007 UNDRIP the UN explicitly includes the Free, Prior and Informed Consent [hereinafter FPIC] of Indigenous peoples. The meaning of the right to FPIC is contained within its phrasing: it is the right of Indigenous communities to make free and informed decisions about the development of their traditional lands and resources, prior to the advancement of any activity that would directly or indirectly alter or influence these lands and resources (Ward, 2011). The UNDRIP explicitly calls for FPIC in the case of relocation, disposal of hazardous waste within Indigenous territories, in any development project for mineral, water or other resources, or in any administrative or legislative policy that might affect Indigenous lands, territories, resources, culture, or subsistence livelihood (UN General Assembly, 2007: art. 10, 19, 29 and 32). FPIC has been increasingly implemented by other human rights bodies. For example, the Committee on Economic, Social and Cultural Rights, the supervisory body of the ICESCR, has referred to the participation rights of Indigenous peoples as

including consultation with the goal of obtaining FPIC in its concluding observations to both Colombia and Ecuador (CESCR, 2008a and 2008b), while more recently, the Committee has interpreted article 15 of the ICESCR, which outlines the right to participate in cultural life, as to include the right of Indigenous Peoples to FPIC in its General Comment No. 21 (CECSR, 2009).

In the Inter-American System of human rights, the Courts have consistently recognized the collective rights of Indigenous peoples to FPIC in any large-scale development project that might impact their survival as Indigenous peoples (Ward, 2011). Within this system, FPIC has been articulated through several landmark cases both by the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. In the case of *Mary and Carrie Dann v. United States*, the Commission built on the Court's ruling in *Awas Tingni* and argued that the State, in this particular case, had failed *to 'fulfill its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent'* (Inter-American Commission on Human Rights, 2001, supra note 7, at 76) by extinguishing the traditional land rights of the Western Shoshone tribe through legal and administrative procedures in which the community was not involved. The Commission recognized that any determination of Indigenous land rights needed to be based on '*fully informed consent of the whole community, meaning that all members be fully informed and have the chance to participate'* (Ward, 2011: 62-63).

It should be emphasized that the instruments in which FPIC is included represent a mixture of both binding and non-binding human rights sources; often, the concept of FPIC is included in the general comments or recommendations of supervisory bodies which themselves have no official legal standing but rather enjoy a reputation of expertise (O'Flaherty, 2006; Ward, 2011). Interestingly, what is currently occurring particularly within the Inter-American human rights system is that Courts and human rights supervisory bodies are codifying FPIC in jurisprudence even though the concept is still far from accepted as customary international law. FPIC is still evolving, but human rights bodies seem to share the opinion that the already existing normative legal framework gives a certain degree of precedence to the concept, and various authors (Anaya and Williams, 2001; Stavenhagen, 2009; Deruyttere, 2004) have expressed the expectation that instruments proclaiming FPIC, such as the UNDRIP, will become accepted as customary law over time.

Chapter 4: Institutional theory, international norms and business

This chapter will elaborate on how international norms such as Indigenous peoples' rights emerge and what their potential influence is on corporate actors. Within academic research it has been particularly constructivist theory from which attempts have been undertaken to explain such a process.

4.1 The emergence of human rights norms: the 'Lifecycle of Norms' Theory

Indigenous peoples' rights, as all human rights, regulate behavior and enforce a standard of appropriateness. In this sense, human rights are highly normative, inter-subjective and socially constructed ideas, and their power is derived from the extent to which there exists a common understanding across actors and within communities on their appropriateness (Schmitz and Sikkink, 2002). Inappropriate or norm-breaking behavior generates disapproval or stigma while appropriate or norm-conforming behavior is rewarded with praise, or once a norm is highly internalized, with a lack of response as the behavior is taken for granted (Finnemore and Sikkink, 1998). Actors accord to human rights only if they feel that these rights define the appropriate standards to regulate their actions. March and Olsen (1998; 2005) depict this type of rationale as the Logic of Appropriateness. According to those authors, *'human actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas'*(1998: 951). From a constructivist perspective, thus, human rights are standards or norms that regulate choice and behavior, but also construct the social identities and interests of actors.

Within constructivist theory, there seems to be general agreement on norms being '*standards of appropriate behavior for actors with a given identity'* (Katzenstein, 1996; Finnemore, 1996) i.e., as being *'intersubjective beliefs leading to collective expectations about proper behavior, defined in terms of rights and obligations'* (Dashwood, 2005: 983). Closely intertwined with the concept of a norm is the construct of 'institution'. An institution can be defined as a *'relatively stable collection of practices and rules defining appropriate behavior for specific groups in specific situations'* (March and Olsen, 1998: 948). Thus, the major difference between norms and institutions is aggregation: whereas norms constitute single standards of behavior, institutions are concerned with the ways in which norms are structured together and interrelate (Finnemore and Sikkink, 1998; Lamrad, 2013). The process of the emergence and diffusion of norms is well-elaborated on, among others in the 'lifecycle of norms' theory as developed by Finnemore and Sikkink (1998). Following these authors, norm influence can best be understood as a three-stage process. The first stage is termed 'norm emergence' and involves norm entrepreneurs bringing to the fore new norms. The second stage involves the cascading or broad acceptance of norms, while the third stage is characterized by the internalization of these norms. Each stage is characterized by different actors, motives and mechanisms of influence. The first two stages are divided by a 'tipping-point', which is the moment at which a critical mass of relevant norm followers has adopted the norm (Finnemore and Sikkink, 1998).

Norm emergence is characterized by the attempts of norm entrepreneurs to persuade a critical group of norm leaders to embrace a proposed norm. As 'meaning managers' (Lessig, 1995), norm entrepreneurs call attention to issues, or even establish new issues, by employing a discourse that 'names, interprets and dramatizes' such issues (Finnemore and Sikkink, 1998: 896-897). Entrepreneurs frame issues in such a manner that new discourses arise that establish other ways of conversing about and understanding the issue at stake. In constructing their frames, entrepreneurs are forced to compete with firmly embedded alternative norms, frames and interests.

For an emergent norm to move towards the second stage, often it must become institutionalized in relevant international law, in guidance documents of multilateral organizations and in bilateral foreign treaties and relations (Finnemore and Sikkink, 1998). Such institutionalization helps clarify what exactly the norm prescribes, what behavior would constitute a breach, and what sanctions would follow on such norm-breaching behavior. Norm cascade is characterized by processes of imitation and socialization: through emulation (of heroes), praise (for behavior that is in accordance with the norm) and ridicule (for abusive or deviating behavior) norm-breakers are induced to become norm-followers. Motives for adopting the norm are often related to issues of legitimization, conformity and esteem (Finnemore and Sikkink, 1998). Once the norm has been cascaded throughout society, norm internalization occurs: the norm has become taken-for-granted and is commonly accepted (Finnemore and Sikkink, 1998).

Emergent norms do not self-evidently complete the lifecycle; often, norms fail to reach a tipping point when less than one-third of state-actors is supportive of the normative content of the proposed concept. Also, when 'critical states', i.e. '*those states without which the achievement of the substantive norm goal is compromised'* reject the norm, norm cascade is unlikely to occur (Finnemore and Sikkink, 1998: 901). Why do some norms become cascaded and internalized, while others are rejected? Often, norms begin as domestic norms before being brought onto the international stage. Norms brought to the fore by states that are widely seen as successful are more likely to become prominent (Finnemore and Sikkink, 1998). Adjacent to the status of the norm entrepreneur, the successfulness of a norm is also said to be determined by the intrinsic qualities of the norm itself. Arguments supporting this claim are either related to the formulation of the norm (Franck, 1992; Legro, 1997), or to the issues it addresses (Boli and Thomas, 1997; Keck and Sikkink, 1998). Those stressing that the formulation of the norm is critical argue that clear and specific norms are more likely to survive as opposed to those norms that are formulated in an ambiguous or complex manner. Scholars focusing on the content of the norm suggest that norms that make universalistic claims have more potential than localized or particularistic norms (Finnemore and Sikkink, 1998).

Keck and Sikkink (1998) argue that two categories of norms are particularly effective: norms involving *'bodily integrity and prevention of bodily harm for vulnerable or 'innocent' groups, especially when there is a short causal chain between cause and effect'* and *'norms for legal equality of opportunity'* (Sikkink, 1998: 520). Norms associated with these broader objectives tend to speak to aspects of current belief systems that exceed specific cultural or political contexts. Rather, they proclaim notions that seem to resonate with ideas of human dignity common to most cultures, and therefore will be most likely to provoke the empathy of norm leaders and followers (Keck and Sikkink, 1998). At last but not least, the relationship between emergent norms and already existing norms may also influence the likeliness of the norm becoming influential. This is often the case within international law, where the power of persuasiveness of a norm is explicitly linked to the fit of that claim within the existing normative legal framework (Finnemore and Sikkink, 1998).

There is one major critique on the 'Lifecycle of Norms' theory: the model does not explicitly include other actors than states as subjects of norm influence (Dashwood, 2005 and 2007; Florini, 2000; Lamrad, 2013; Stone, 2004). Dashwood (2005; 2007), for example, claims that many companies are increasingly engaged in dialogue and learning around issues of corporate responsibility and human rights. She states that, *'inasmuch as states operate in a normative environment, it is reasonable to expect that companies must also be responsive to shifting societal norms about acceptable corporate behaviour'* (Dashwood, 2005: 984). Lamrad (2013: 149) contemplates that '*societies consist of actors, including market actors, who shape, and are shaped by, norms that are reconstructed through interactions'*. Also, the model discounts the role of firms vis-à-vis nongovernmental organizations

[hereinafter NGOs] as norm entrepreneurs; firms are perceived to be *'self-interested, instrumental actors'*, while NGOs are seen as *'disinterested entities acting on principled beliefs'* (Dashwood, 2007: 129-130). This perspective has proven to be overly simplistic.

4.2 Business and the diffusion of normative institutions

Several authors have developed models that include corporations as non-state actors in norm diffusion. This work, however, rarely involves human rights norms. Studies in which the diffusion of norms and norm-induced behavior within and among corporations are included often revolve around corporate social responsibility [Hereinafter: CSR] and stem from neo-institutional perspectives (Maon et al., 2009). The construct of CSR is well-matured (Carroll, 1999), and research on the institutionalization of this concept within business environments is quite extensive. Although CSR is not a human rights construct per se, and some authors have argued strongly against any such envisioning of the construct (Welford, 2002; Campbell, 2006), for the purpose of understanding the interconnections between corporations and evolving global norms the CSR literature might provide useful insights.

Rather than concentrating on single norms, the focal point of institutional research is the institution, here defined as: *'routines, beliefs, norms, cultural rules or ideas that create collective meaning'* (Schultz and Wehmeier, 2010: 11; Campbell, 2004). Neo-institutionalists emphasize institutional pressures (either social, political, economic or cultural) imposed on organizations within an overarching organizational field, and underline the extent to which these pressures influence organizational practices and structures (Delmas and Toffel, 2004). Organizations adopt practices *'they believe their institutional environment deems appropriate or legitimate'* (Campbell, 2004: 18). This process, *'by which a given set of units and a pattern of activities come to be normatively and cognitively held in place, and practically taken-for-granted as lawful'* (Meyer et al., 1994: 10), is called institutionalization. The organizational field, or institutional environment, does not only comprise of corporative organizations; it is comprised of all organizations that *'constitute a recognized area of institutional life, [including] key suppliers, resource and product consumers, regulatory agencies and other organizations that produce similar services or products'* (DiMaggio and Powell, 1983: 148). The argument behind organizational institutionalism is that isomorphism is likely to occur within organizational fields, independently of whether it is functional: for the acceptance of certain norms, ideas or practices, more important than functional imperatives are legitimization processes and the tendency for institutionalized organizational structures to be taken for granted (Hoffman and Ventresca, 2002).

In the literature, it is generally agreed on that institutionalization is driven by three isomorphic pressures: coercive, mimetic and normative isomorphism (Campbell, 2004; Delmas and Toffel, 2004; DiMaggio and Powell, 1983; Dingwerth and Pattberg, 2009; Guler et al., 2002; Schultz and Wehmeier, 2010; Scott, 2001). Coercive isomorphism refers to pressures for homogeneity deriving from political or regulatory bodies (Guler et al., 2002). Regulatory pressures originating from the state and other influential governmental organizations are the most direct mechanism of coercive diffusion. Multinational corporations are the second type of organizations that may put coercive pressures on smaller enterprises, partner organizations and suppliers in the foreign host countries in which they operate (Guler et al., 2002). Mimetic isomorphism explains the process in which smaller firms mimic or adopt practices from more successful and/or leading firms within the same organizational field; pre-eminently, this is a process of persuasion driven either by motives underlying the urge to improve competitiveness (Schultz and Wehmeier, 2010) or by the need for stronger cohesiveness and interconnectedness (Guler et al., 2002). Cohesive relationships are highly important for mimetic isomorphism, as these interconnections allow organizations to go through a common process of

learning and understanding; cohesive ties provide the channels through which information and knowledge is transferred and through which imperatives to adopt similar patterns of behavior are generated (Guler et al., 2002). What is more, cohesive relationships are also fundamental to institutionalization as through these relationships, organizations observe each other to understand what practices are considered ethically acceptable in their social system. This results in normative pressures on corporations to adopt those practices, norms and beliefs that are ethically approved by others; in other words, the cohesiveness within a particular organizational field stimulates the members of that field to follow a Logic of Appropriateness rather than a Logic of Consequence. This is further triggered by the amount of formal training and professionalization within the field: professionalization is often based on the sharing of social rules, norms, and knowledge base (Scott, 2001; Dingwerth and Pattberg, 2009).

Extensive and applied studies have been undertaken on how institutional isomorphic pressures are experienced by corporations, and how such pressures lead towards the adoption and implementation of international normative institutions in corporate environments. One approach has been the work of Bernstein and Cashore (2007) on Non-State Market-Driven Governance Systems [hereinafter: NSMDs]. NSMDs are characterized by the fact that norms and rules are established by the (corporate and NGO) members of the particular NSMD instead of by government and state actors. Concentrating on the Forest Stewardship Council as an example of a well-functioning NSMD, Bernstein and Cashore (2007) develop a model called 'the three phases of NSMD Governance'. Similar to Finnemore and Sikkink, Bernstein and Cashore identify three phases through which norms emerge and come to influence. Phase one involves initiation of the process and is characterized by a convergence of the strategic interests of a small group of corporations and NGOs. Although still in the initial phase, certification systems gain recognition quickly and create a degree of abstract economic benefits, either because they provide a social license to operate and/or because participating will impart corporations with the reputation of being environmental stewards (Cashore et al., 2007). Although states are not included as members in NMSD systems, the authors do recognize that firms operating close to, or at the requirements of the certification system will be the first to join, while such 'on-the-ground' behaviour is first and foremost directed by prescriptive government regulations.

The second phase concerns gaining widespread support. This phase is characterized by a 'conundrum': to appeal to firms that did not join in the initial phase, certification programmes must either increase market incentives or limit behavioural requirements (Bernstein and Cashore, 2007). However, NGO members, having seen that firms can actually meet the set requirements, will demand an increase of standards. Hence, based on a Logic of Consequence, there is a divergence in the strategic interests of the different members of the NSMD. Overcoming or oscillating this divergence can only take place when the emergent norms are shared by all, and a Logic of Appropriateness rather than a Logic of Consequence influences the rationales of the members. In the second phase, therefore, non-member firms are persuaded to adopt the emergent norms by rewarding 'best practices' and increasing global consistency– thus, as Finnemore and Sikkink framed it, by increasing legitimization and conformity (1998). In the last phase, named political legitimacy, the NMSD is considered a legitimate authority. The emergent norms are accepted by – and implemented in a broad political community.

Maon et al. (2009) propose a framework for designing and implementing CSR that includes a stage of 'sensitizing'. In this stage, internal and external groups and individuals are attempting to sensitize top management levels of corporations to become aware of CSR issues (Maon et al., 2009). Once such awareness is raised, the challenging task for management is to 'unfreeze' and 'unlearn' past practices within the organization. Threats to the stability of the corporation, or fear of change, are major barriers to the development of new and sustainable business practices; 'unlearning' or uncovering long-held

and unchallenged assumptions about what is the appropriate behavior for the organization is critical for corporate acceptance of change. In the moving stage, the organization develops a new set of assumptions, while in the third stage, this new cultural assumptions are 'refreezed' as to deeply embed CSR-oriented cultural values within the organization (Maon et al., 2009).

Schultz and Wehmeier have emphasized the importance of communication in adopting international CSR standards (2010). They contemplate that communication is the means that drives each stage of institutionalization. Therefore the adoption and implementation of institutions can better be understood as a process of 'translation' rather than 'diffusion'; translation, according to Schultz and Wehmeier (2010: 12), *'connotes an interaction that involves negotiation between parties and reshap[es] what is finally institutionalized'*. Building on the concept of CSR, they construct a model that adds communication processes to the institutionalization of CSR on three different organizational levels (Schultz and Wehmeier, 2010).

On the macro-level one can find the institutional environment of the corporation. Institutionalization at this level is a complex system built on different external expectation and conditions. In many instances, a corporation experiences external pressures from more than one institution within its organizational environment. Incorporating the external pressures for CSR involves a process of translating the concept; on the meso-level, a reiterated version of the institution becomes integrated in corporate culture. On the micro-level, internal members of the organization translate, interpret and implement the corporate translation of the normative institution according to their personal values and organizational positions. Thus, the individuals within the organization also redesign the institution by their practices and implementation of the rules. When the corporate version of the institution becomes publicly communicated, the initial notion of CSR as prescribed by the external expectations is changed by the process that has occurred within the organization (Schultz and Wehmeier, 2010). In this model, the corporation fulfills several roles in the dissemination of institutions. First, it is the critical subject of targeted expectations and conditions, i.e. it is a norm follower. However, the individuals within corporations are also norm translators, and as such they have an important role as 'meaning managers' or entrepreneurs. Corporate individuals are capable of establishing new issues, changing discourses by which these issues are discussed and interpreting the particular implications of these issues. In other words, within this model, corporations are actors capable of 'framing' the emergent norm while at the same time being the actor critical for the implementation of the norm.

Delmas and Toffel (2004) similarly argue that institutional forces are translated or transformed as they permeate the corporate boundaries due to a process of filtering and interpretation by managers. In their view, multinational organizations are subject to institutional pressures at different levels of the company stemming from multiple organizational and societal fields. The filtering and interpretation of sets of institutionalized practices and norms materializes based on the firm's unique history and culture (Delmas and Toffel, 2004). The authors identify as most obvious stakeholders to influence the firm various government bodies as they have the capacity to form legislation and to enforce regulations; they contend that coercive isomorphism is one of the strongest forces driving institutional diffusion. Other pressures they identify stem from other multinationals that act as key agents in cross-national policy diffusion (mimic or coercive isomorphism), customers who demand stricter quality management requirements, strong environmental activist groups, and local communities who can impose coercive pressures on companies through their voting power in local and national elections, through environmental activist movements and through filing civil lawsuits (Delmas and Toffel, 2004).

The authors continue with differentiating between firms within the same industrial field, and the level of institutional pressures they perceive to be subject to. Multinational corporations are often held to higher standards for socially and environmentally responsible behavior, as they are not only subject to pressures from their home country, but also from stakeholders present in foreign countries (Zyglidopoulos, 2002; Delmas and Toffel, 2004). Also, the extent to which firms are visible to the rest of society often determines the amount of pressure they are under, while corporations with historically poor social or environmental performances are more likely to be subjected to scrutiny (Delmas and Toffel, 2004). Thus, firm and plant characteristics can affect the level of institutional pressure exerted. Moreover, firm and plant characteristics also influence managers' perceptions of institutional pressures. . Delmas and Toffel accord that the firm's historical social and environmental performance is key to managers' perceptions of institutional pressures. Managers in corporations whose images have suffered from previous social or environmental accidents may be more sensitive to institutional pressures than other companies (Delmas and Toffel, 2004). Furthermore, institutional pressures are exerted at different levels of a corporation and actors within the organization channel these pressures to different subunits, each of which frames these pressures according to their role and function within the company. As a consequence, pressures are managed according to the frames that are given to them by different units, which can be either *'as an issue of regulatory compliance, human resource management, operational efficiency, risk management, market demand or social responsibility'* (Delmas and Toffel, 2004: 215). Hence, the internal organization and the hierarchical and vertical relationships between different units of the firm matter as they influence the perception and translation of institutional pressures.

4.3 Towards an understanding of the corporate institutionalization of international human rights norms

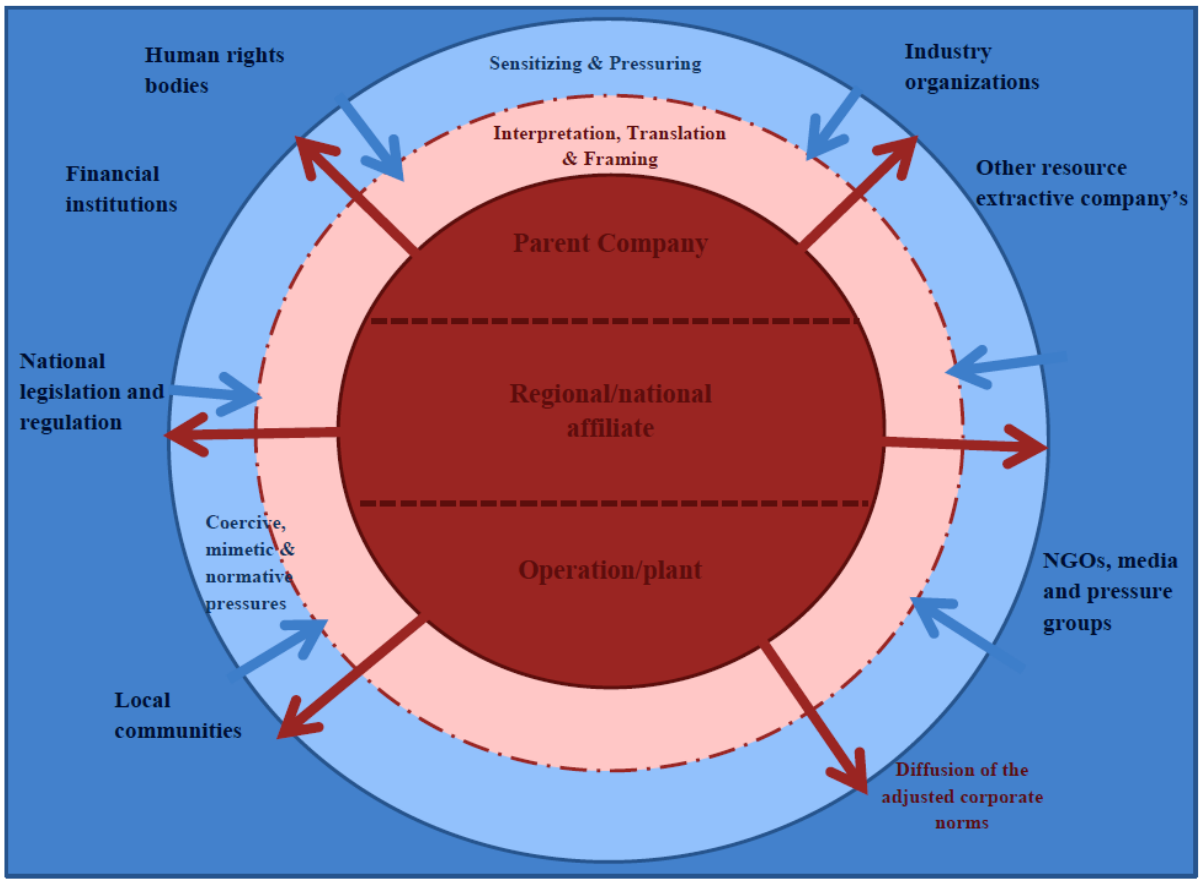
The studies listed above include various elements and relationships that might be relevant for the development of a theory that effectively describes how international Indigenous rights pressures influence the corporate domain. First, all models described above identify different institutional pressures, be they coercive, mimetic or normative and external or internal, on corporate actors. The models find that these pressures work differently on the various levels of the corporation: local, national, regional or global. The level of entrance within the organization, i.e. what sectors of the business are first made aware of the international constructs, influences the manner in which the norm or institution is introduced, filtered, interpreted, translated, framed, or given shape by the corporation and its employees. Furthermore, the TNC is not a stand-alone actor: it is part of an organizational field comprising other TNCs, NGOs, regulatory agencies and institutions, and consumers. Institutionalization occurs through the dynamic interplay between all these actors that together comprise the organizational field or environment.

TNCs adopt norms or institutions only if they are convinced that these define the appropriate standards to regulate their actions. In other words, a Logic of Appropriateness is applied rather than a Logic of Consequence. Nevertheless, the discourse that is used to stimulate TNCs to adopt certain norms or institutions centers on the profits that are to be gained once the corporation complies with the new construct. In the initiation phase, motives could be to gain recognition and to strengthen a certain reputation, to receive a social license to operate, or to create a degree of relative economic advantage. For norm followers, motives to adopt the norm or institution could be either be legitimization or conformity. In the last phase, in which the norm or institution is fully internalized and commonly accepted, disregarding the norm would mean incompliance and thus might have legal consequences. According to some authors, the role of management in initiating the adoption and implementation of norms or institutions is crucial: for emerging norms to be effectively incorporated into the business

environment, management must assure the 'unfreezing' and 'unlearning' of past practices, and challenge existing assumptions about what is appropriate behavior for the corporation. This is further triggered by the level of professionalization in the field, a process through which social rules, norms and knowledge base are shared within disciplines and among organizations.

Most models link the processes of translating, framing, filtering and interpretation to both the external context – the nature of the outside stakeholders, and regional and national regulatory pressures – and the internal context – the existing corporate culture, the corporation's history, the influence of management, the structure of existing communication mechanisms, the characteristics of the firm versus the characteristics of the plant, and the role of the individual. Also, in most of the models mentioned, the corporation is involved in a process of reiteration, feedback and diffusion: by translating, adjusting, implementing, evaluating and communicating norms, corporations effectively become actors capable of influencing both the shaping of norms as the adoption of these norms by others; in this sense, corporations can fulfill all roles – entrepreneur, leader and follower – described in the 'lifecycle of norms' of Finnemore and Sikkink. Figure 1 depicts the model that I propose to incorporate the different relationships and processes identified above.

Figure 1. The corporation and its institutional environment for human rights pressures



Chapter 5: The extractives industry and the institutionalization of Indigenous consultation and consent

5.1 Envisioning FPIC and PFICon as internationally evolving institutions

In terms of Indigenous peoples' rights, the advocacy for Indigenous participation, consultation and consent rights can be viewed as an institutional pressuring for the establishment of new routines and patterns concerning Indigenous engagement. These activities are given normative preference as they are underlined by constructs of equality, self-determination, self-governance, non-discrimination and cultural integrity. Free, Prior and Informed Consent, in this sense, is not only a human right, a philosophy underlying conduct with regard to engagement, or an instrument or tool used to create legitimacy; FPIC is an institution comprising of underlying normative values, beliefs and ideas that create collective meaning and establish routines and practices with regard to Indigenous populations.

Increasingly, the activities and routines that give shape to proper FPIC processes are recognized and included in a plethora of interweaving policy and guidance documents. Vanclay and Esteves (2011) describe that FPIC-compliant engagement process ought to be:

> *(i) free – meaning that there must be no coercion, intimidation or manipulation by companies or governments, and that should a community say 'no' there must be no retaliation; (ii) Prior – meaning that consent should be sought and received before any activity on community land is commenced and that sufficient time is provided for adequate consideration by any affected communities.; (iii) Informed – meaning that there is full disclosure by project developers of their plans in the language acceptable to the affected communities, and that each community has enough information to have a reasonable understanding of what those plans will likely mean for them, including of the social impact they will experience; and (iv) Consent – meaning that communities have a real choice, that they can say yes if there is a good flow of benefits and development opportunities to them, or they can say no if they are not satisfied with the deal, and that there is widespread consent in the community as a whole and not just a small elite group within the community* (Vanclay & Esteves, 2011: 6-7).

Additional to those responsibilities identified by Vanclay and Esteves (2011), authors have highlighted practices prior to commencing engagement, during the engagement, and after engagement is concluded in a formal agreement or a withholding of consent (Lehr and Smith, 2010; Colchester and Ferrari, 2007). Responsibilities identified as necessary prior to commencing engagement with Indigenous communities are, among others: 1) the responsibility to ensure that the community involved has granted consent to enter into actual engagement (Lehr and Smith, 2010); 2) the responsibility to ensure that the community is able to prepare properly for the engagement and has the resources and assistance needed for meaningful engagement. If resources and assistance are not sufficiently present, the engaging party must ensure these are at the community's disposal (Lehr and Smith, 2010; Campbell, 2012); 3) the responsibility to guarantee that the community is fully informed on their rights and responsibilities, and that informational and power asymmetries are eliminated (Goodland, 2004; Campbell, 2012); and 4) the responsibility to ensure that the decision-making systems of the community are adequate for participation in meaningful consultation. If this is not the case, the engaging party should try to strengthen the community's decision-making systems. At a minimum, the engaging party should refrain from pushing through its own decision-making procedures and timeframes (Campbell, 2012; Colchester and Ferrari, 2007; Esteves et al., 2012). For a successful implementation of the responsibility to respect Indigenous consent, the engaging parties must establish a full understanding of the current community's decision-making and leadership structures, customary law, and the position of the community vis-à-vis other local groups. Such

knowledge can adequately be gained through the conducting of a thorough Social Impact Assessment (Campbell, 2012; Esteves et al., 2012), in which the Indigenous community is involved (Colchester and Ferrari, 2007; Hanna et al., 2014).

These responsibilities continue to exist during the lifespan of the operation. Contemporary understandings on community consent are that engagement according to FPIC must be an ongoing process (Hanna and Vanclay, 2013), of which official Indigenous consent is merely the formalization. The agreement which is consented to by the community needs to be renegotiated for any activity that might significantly alter the context and terms of this agreement (Lehr and Smith, 2010; Hanna and Vanclay, 2013). Thus, according to these and other authors, FPIC can *'best be understood as a formalized, documented and verifiable social license to operate'* (Lehr and Smith, 2010:7).

New institutions rarely enter a normative vacuum: rather, they are constituted on previous normative principles and emerge in '*a highly contested normative space'* (Finnemore and Sikkink, 1998: 897). The first attempts of Indigenous rights' entrepreneurs to stimulate the institutionalize consent were contested. The rejection of the World Bank Board of full FPIC and its adoption of the standard of FPICon instead at the beginning of the twentieth century reflects the initial unease of international organizations with the construct of consent. The World Bank was not the only organization that chose to adopt FPICon: over the course of the last decade, international organizations such as the IFC, the ICMM and IPIECA have openly adopted the principle of FPICon. FPICon fitted more neatly in the liberal market thinking that was dominant in business in general at that time: as with FPIC, the concept revolves around the intentions of the consulting actors to engage in consultation processes and to work towards the free and informed participation of Indigenous communities (Voss and Greenspan, 2012). The discourse used to frame FPICon includes 'meaningful consultation', 'engaging with Indigenous peoples', 'free and informed participation', and 'social license', while the intent of such consultations ought to be the 'broad community support' or the granting of a 'social license to operate'. However, as opposed to FPIC, promotors of FPICon feel withholding support or community agreement does not per se have to result in the immediate stalling or stopping of project development activities.

The more recent emergence of consent as a prerequisite for development of Indigenous lands goes beyond FPICon. Although debated, FPIC is increasingly interpreted as the right of communities to reject development projects and correspondingly the extractive industry will have to accept that they may have to stop further developing the project, even though they possess state-sanctioned rights of access and extraction (Laplante and Spears, 2008; Hanna and Vanclay, 2013). The discourse of FPIC differs from the discourse of FPICon: framing of FPIC occurs through use of 'free choice', 'community involvement', 'negotiation', 'flow of benefits' 'deal' 'iterative and ongoing', 'right to veto', and 'widespread consent' (Voss and Greenspan, 2012). These wordings reflect more clearly the principles of equality and self-determination. As such, FPIC as compared with FPICon, has a stronger connection with other Indigenous rights.

At the moment, FPIC and FPICon are two different institutional constructs that co-exist within the same institutional environment. Although FPIC has more recently emerged and in some ways could be said to build on FPICon, those who have adopted FPICon are not self-evidently ready to adopt FPIC: repeatedly, many have stated not to see the operational value of consent. The level of internalization of both constructs is different: FPICon seems more firmly embedded within corporate international environments. While FPIC is more often adopted in human rights environments. Nevertheless, more recently what has been observed in the corporate world is a 'tipping-point', a moment in time at which critical actors such as the IFC, the ICMM and several nation-states publicly and explicitly exchange the concept of FPICon for FPIC. Attempts to routinize the best practices based on FPIC are

undertaken throughout the extractives industry (Campbell, 2012). At the same time, however, the concept still presents numerous definitional, legal, and procedural challenges for states, corporations and Indigenous communities; it is built on rather vague concepts such as consent, right to veto, good faith and representation – concepts that continue to be interpreted differently by different actors and in different regional contexts (Cariño and Colchester, 2007; Colchester and Mackay, 2004; Lehr and Smith, 2010). As a consequence, many governments, organizations and states continue to prefer the construct of FPICon above FPIC.

Considering these issues and challenges, it would be premature to describe FPIC as a '*relatively stable collection of practices and rules defining appropriate behavior of specific groups in specific situations'*. Nevertheless, as highlighted by the increasing attempts for codification, formalization and routinization of the construct, as well as by the recognition for the construct by critical actors within international society and within the extractives industry, it may well be said that FPIC is an emerging international human rights institution that seems to be reaching a crucial 'tipping point'. Though not yet fully internalized, FPIC as an institutional construct is already influencing the behaviors and attitudes of the extractives industry towards Indigenous peoples; and though FPIC in itself might not always be mentioned, the discourse of FPIC is increasingly applied in the corporate domain.

To effectively understand how FPICon and FPIC as institutions might alter corporate practice, the next step involves identifying the environment in – and the mixture of institutional pressures through which TNCs experience the need to adopt and conform to Indigenous participation, consultation and consent rights. Although the next sections elaborates on these pressures individually, seemingly assuming a strict demarcation between coercive, mimetic and normative pressures, in practice, it is not always possible to make such a distinction; often pressures are experienced at the same time and there is significant overlap in terms of pressure groups and the values and practices they strive for. In many instances it is the accumulation of multiple pressures that over time motivates corporations to adjust their practices and policies. Thus, while for theoretical purposes the different pressures are described individually, for a thorough understanding of the process of institutionalization it is essential to acknowledge that the actual strength of institutionalization theory lies in explaining organizational change as a consequence of a multitude of pressures.

5.2 Coercive regulatory pressures on business to adopt Indigenous consultation and consent norms

This section describes three mechanisms through which legal and regulatory pressures to adopt and implement Indigenous consultation and consent rights are set on corporations: 1) host state regulation; 2) home state extraterritorial law; and 3) Lending requirements of financial institutions.

Host state responsibility and corporate compliance

The doctrine of host state responsibility is based on the assumption that corporations do not have direct duties or responsibilities stemming from human rights law, but that such direct responsibilities lie with the host state – i.e. the state in which transnational actors are operating while their base is in another country (Chirwa, 2004). Host state responsibility is derived directly from those covenants and treaties of which the particular state is a signatory party. As many provisions of the UDHR have become part of customary law, these as well are seen to entail direct human rights obligations for states. In the case of international human rights law, the most important legally binding obligations are laid down in the twin covenants, the ICESCR and the ICCPR.

Article 2 of the ICCPR, for example, contains that *'each State party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'*, while State parties should also

> *'undertake to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant … where not already provided for by existing legislative or other measures'*(UN General Assembly, 1966b: art. 2).

The duty to remedy for human rights abuses is laid down in ICCPR art. 3(a), by which each State party to the Covenant commits itself *'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'* (UN General Assembly, 1966b: art. 3(a)).

Within the doctrine of host state responsibility, corporate accountability for human rights violations arises when the host implements human rights obligations in nationally binding legislation (Chirwa, 2004). States remain responsible for preventing human rights violations, for regulating and controlling private actors, and for providing effective remedies in those instances prevention and protection has failed. If states refrain from developing and implementing such preventative and protective regulations, they are legally accountable for the human rights infringements that occurred within their jurisdiction. The legislation implemented by the state – often embedded in national constitutions or documents of such status –is of such a nature that corporate non-compliance would result in serious repercussions: either the TNC loses its legal license to operate, or it faces high judicial and restoration costs. In those states where international human rights norms are constitutionally or otherwise legally enshrined, therefore, host state-based territorial responsibility provides a clear and coherent framework to regulate corporate behavior and to establish corporate compliance.

As described in the previous chapters, Indigenous peoples' rights are increasingly among those human rights that become implemented in national jurisprudence, legislation and regulation. Domestic courts of countries that have ratified ILO No. 169 – among others Peru, Mexico, Bolivia, Ecuador and Columbia – increasingly cite the Convention in court cases that concern the rights of Indigenous peoples (Campbell, 2012). Countries such as the Philippines, Malaysia and Peru have already developed national legislation on (aspects of) FPIC and other Indigenous rights for development activities that affect the lands and territories of Indigenous peoples (Campbell, 2012). Considering the five regions included in this thesis– Alaska, Australia, Canada, Iraq and Russia – all but Iraq have incorporated specific provisions concerning Indigenous peoples' consent and consultation rights.

Home state-based extraterritorial responsibility and corporate accountability

Another mechanism through which legal pressures are set on corporations to restrict their actions in terms of human rights infringements is the increasing use of home state extraterritorial legislation. The general argument is that home states, bearing in mind the limitation of 'non-intervention' in foreign state matters, ought to assume responsibility for non-state actors such as corporations that operate overseas if they exercise a form of 'effective control' on the affiliate company (Ruggie, 2007); in these instances, the obligation to prevent human rights violations can, and increasingly is extended extraterritorially (Ruggie, 2007). At the moment, there is no specific international law that obliges states to assure human rights observance by private actors operating in overseas territories. In spite of this reality, some legal scholars have phrased arguments containing that corporate non-compliance with human rights overseas could implicate home state liability under international law (McCorquodale and Simons, 2007).

Proposals for legislation to deal directly with overseas corporate behavior have been made in several common law jurisdictions (Kinley and Tadaki, 2003-04). In general, although these new forms of legislation were intended to give plaintiffs from developing countries an opportunity to circumvent absent, incapable, unjust or corrupt domestic legal systems, and to offer them a potential forum through which they could bring to the fore their claims, the limitations of the proposed systems were of such a nature that fair and just trials against TNCs seem still far from a reality (Kinley and Tadaki, 2003-04).

There is one exception: the US Alien Tort Claims Act [hereinafter: ATCA]. Originally, the ATCA empowers US district courts to hear civil claims of foreign citizens for injuries caused by actions that are in violation of the present-day law of nations or a treaty of the United States (Supreme Court of the United States, 2004: 30-31). The US Court of Appeals had already in 1980 resolved whether private actors such as corporations could be subject to such suits. In the case of *Filartiga v. Pena-Irala* (1980), the Court deviated from the traditional assumption that only states were accountable for violating human rights, and claimed that individuals – in this case state officers – could also be held liable if they were personally and directly responsible for human rights violations (Salazar, 2004). In the case of *Kadic v. Kardadzic*, the Court adjudicated non-state actor violations of *jus cogens* norms which by definition could not be derogated by any organ of society (Salazar, 2004). In the case of *Doe v. Unocal*, the ATCA was seen convenient for cases in which TNCs were acting upon the fulfillment of state compliance (Salazar, 2004). For the US district court to assume *ratione personae*, or personal jurisdiction on foreign operations of TNCs, the parent corporation should either be located in the US or should have sufficient business presence there (Kinley and Tadaki, 2003-04). The court verifies if international law on the issue exists, whether the US recognizes the applicable law by treaty membership or whether the alleged violation is a breach of customary international law, and whether the defendant violated that specific law (De Feyter, 2001).

The growing jurisprudence of ATCA litigation demonstrates the Act's potential to expose corporate violations of human rights; examples of cases litigated in the US under the ATCA which include corporate actors are, among others: *Kiobel v. Royal Dutch Petroleum*, *Sarei et al. v. Rio Tinto*, *Bowoto v. Chevron Corp* and the abovementioned *Doe v. Unocal* (Graetz and Franks, 2013). Several cases have involved Indigenous communities demanding compensation and reparation for violations to their Indigenous rights. These notably include the class-action case held by Indigenous communities from Ecuador against Texaco-Chevron, Indigenous peoples from West-Papua going to court against Freeport, and Indigenous communities from Papua-New Guinea suing Rio Tinto (Gilbert, 2012). No corporation has been found liable yet; as Williams and Conley (2005: p. 86) note: *'the kind of jus cogens claims that are cognizable against private actors under the ATCA target only the most egregious behaviour, such as genocide, piracy, hijacking, summary execution, slavery or war crimes'*, while the greater part of Indigenous rights violations by companies is of less severe nature. Kinley and Tadaki recognize that *'the courts' restrictive interpretation of human rights that fall within the category of the 'law of nations' and which thereby establish actionably grounds under the act … almost wholly excludes economic, social and cultural rights which are most prone to abuse by TNCs'* (Kinley and Tadaki, 2003-04: 940). Nonetheless, increasingly lawsuits against TNCs are taken up, and even if they are dismissed eventually, they still cause significant reputational damage and millions of dollars in defense costs (Graetz and Franks, 2013). For these reasons, these lawsuits represent the very real possibility that corporations either are legally or publicly held to account for international Indigenous rights violations (Kinley and Tadaki, 2003-04).

In terms of the ATCA's objective of holding corporations accountable for their human rights violations overseas, the Act is said to suffer from a number of other limitations. First, the use of the

ATCA is limited by the 'state action requirement'. In general, non-state actors can be held liable under the ATCA only where they have acted in concert with state officials, or with significant state aid, unless in cases of the above mentioned *jus cogens* norms (Kinley and Tadaki, 2003-04). Second, the courts need to be able to establish *ratione personae* over foreign defendants: the court must determine whether or not there are sufficient connections between the foreign affiliate against which a lawsuit has been issued, and the forum jurisdiction. The jurisdictional rule of *forum non conveniens* can be seen as a third limiting factor to the application of the ATCA. The *forum non conveniens* principle gives a court the discretion to refuse to hear a case where it may be more appropriately tried in another legal forum, when this is in the interests of all parties and of justice. The doctrine has historically been used by TNCs to avoid liability when faced with litigation in their home states concerning actions taken overseas. The principle is also effectively used to shield parent companies from responsibility for any violations committed by their overseas subsidiaries and sub-contractors (Kinley and Tadaki, 2003-04). A fifth limitation is created by the procedural obstacles following upon the enactment of an ATCA suit: until 2006, the courts had not decided in any case that an award or compensation for the victims was justified, while twenty had been dismissed for procedural obstacles and only three were settled.

Although not always successfully adopted or implemented, clearly home states are increasingly anticipating on incorporating some form of responsibility for non-state actors that operate overseas. For TNCs, therefore, it is important not only to bear in mind the regulatory and legal environment of the host states in which it operates, but also that same environment in its home state. In other words, through the development of extraterritorial legislation, for a corporation to be compliant it must focus on an additional, often more stringent, legal dimension. Whether or not this is already relevant for Indigenous peoples' rights, which many governments have not yet implemented in their national legislation, is an area that would need more research.

The regulatory power of financial institutions and their role in the institutionalization of corporate human rights obligations

A last mechanism that could potentially oblige TNCs to adopt norms of Indigenous consultation, participation and consent is constructed on the standards set by international financial institutions (Campbell, 2012; Laplante and Spears, 2008). In the case of Royal Dutch Shell, the corporation is not reliant on external financial investment: only in those instances where a direct supplier or joint venture partner has committed itself to some form of loan obligation is the corporation confronted with the requirements set by financial institutions. The standards most commonly referred to within the context of Indigenous peoples are 1) the World Bank's Operational Policy Bank Procedures 4.10 [hereinafter: OP/BP 4.10]; 2) the IFC's Performance Standards; and 3) the Equator Principles.

On a general level, the World Bank's OP/BP 4.10, developed in 2006 and revised in 2013, serves as an example for other multilateral development institutions for human rights issues that need to be observed when issuing loans (World Bank, 2013). In the OP/BP 4.10 specific recommendations concerning Indigenous peoples' rights are incorporated. The Bank recognizes in the OP/BP 4.10 *'that the identities and cultures of indigenous peoples are inextricably linked to the lands on which they live and the natural resources on which they depend'* (World Bank, 2013: at para. 2); subsequently, the Bank recognizes that development projects *'expose indigenous peoples to different types of risks and level of impacts … including loss of identity, culture and customary livelihoods, as well as exposure to disease'* (2013: at para 2). Borrowers of the Bank are required to engage in *'free, prior and informed consultation … at each stage of the project and particularly during project preparation',* while financing is only provided where such consultations result in *'broad community support to the project by the affected Indigenous Peoples'* (World Bank, 2013: at para. 1 and 6.c). The World Bank does not

directly issue loans to private actors but instead is mostly involved in delivering finance for publicly initiated development projects. The OP/BP 4.10, however, might still be significant for TNCs in those contexts in which public actors are bound to incorporate the procedures while private actors are involved as (executive) partners.

Following the 2006 OP/BP 4.10 of the World Bank, other financial institutions have increasingly recognized Indigenous consultation, participation and consent rights. The Inter-American Development Bank, for example, has adopted 'prior and informed consent' in case of involuntary resettlement of Indigenous peoples in 1998 (Deruyttere, 2004). The IFC, in its initial Sustainability Framework, which encompasses the IFC Performance Standards, held that projects in which the IFC invests must avoid or 'minimize, mitigate or compensate for' any adverse impacts on Indigenous communities (IFC, 2006). Furthermore, the corporate project developer was to engage in a process of consultation and informed participation. In January 2012, the IFC substantially revised the Performance Standards to include full FPIC of Indigenous communities for projects that could adversely impact Indigenous lands, resources, or cultural heritage, or involve the relocation of Indigenous peoples from their traditional lands (IFC, 2012: PS7at para. 11, 13-17). In the view of the IFC, FPIC ought to be *'based on good faith negotiations between the client and the affected Indigenous communities', while it 'builds on and expands the process of Informed Consultation and Participation described in Performance Standard 1'* and *'does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree'* (IFC, 2012: at para 12).

In 2002, together with the IFC a small number of private finance institutions recognized the need for a common and coherent set of environmental and social requirements to manage non-technical risks within the lending sector. The voluntary set of standards that was subsequently developed was launched in 2003 as the Equator Principles (Ubillus and Wong, 2008). During the next years, the Equator Principles were revised several times, with the most recent revision in 2013. This version comprises 10 principles addressing various social and environmental risks. The Equator Principles apply to all new projects with total project capital costs of $10 million or more (Ubillus and Wong, 2008). This may seem high, in the extractive industries there are hardly projects that do not cross this line. In addition, the Equator Principles Financial Institutions [hereinafter: EPFIs] also apply the Principles to all projects involving an expansion or upgrade of existing operations, where changes in scale or scope may create significant adverse environmental or social impacts (Retrieved from: http://www.equator-pprinciples.com/index.php/about-ep/about-ep). Currently, there are 80 EPFIs in 34 countries that have adopted the principles; overall, these EPFIs cover more than 70 percent of all international project finance debt in emerging markets (Ubillus and Wong, 2008). The EPs make specific reference to Indigenous peoples:

> *'Projects affecting indigenous peoples will be subject to a process of Informed Consultation and Participation, and will need to comply with the rights and protections for indigenous peoples contained in relevant national law … consistent with the special circumstances described in IFC PS7 … projects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent'* (The Equator Principles III, 2013).

The implementation of FPIC into lending and investment standards demonstrates the construct's potential impact on private sector development. International financial institutions effectively serve as intermediaries between human rights bodies and business: though they do not have the power to develop legal human rights standards, through the adoption of emerging rights norms they significantly determine the scale and scope of these norms for private actors (Campbell, 2012).

Although the Performance Standards and the Equator Principles III may be limited in their application to those corporations that seek finance for new projects by the EPFIs or the IFC, as the concept becomes increasingly standardized for specific types of projects, particularly in the extractives industry, corporations operating within these industries can no longer ignore the Indigenous demands for FPIC. Even if alternative finance is used and the host state does not require FPIC, due to the increasing routinization within the industry, the evolving codification of FPIC in international declarations, conventions and jurisprudence, the emerging of consultation, participation and consent rights in national legislation and the increasing opportunities for extraterritorial law, a *de facto* veto by the affected communities against a development project of a TNC can no longer be easily put aside (Campbell, 2012).

5.3 Mimetic isomorphic pressures on business to adopt Indigenous peoples' rights norms

Mimetic isomorphism is the process in which firms mimic or adopt practices of other more successful, proactive or leading firms within the same industry. This process is driven either by motives of relative competitiveness (Schultz and Wehmeier, 2010) or by the need for stronger cohesiveness throughout the industry (Guler et al., 2002). Mimetic pressures to adopt human rights obligations can be expected from industry organizations – of which in the extractive resource industry the main are ICMM and IPIECA – and proactive or 'norm leading' TNCs.

Industry organizations as norm leaders: ICMM and IPIECA

Already in 2001, the ICMM published a document named 'Mining and Indigenous Peoples: Case studies' (ICMM, 2001), in an attempt to provide information on environmental, health and related matters influencing the mining industry. In the document, the ICMM recognized that management of community issues was becoming increasingly significant within the sustainable development discourse, and acknowledged that particularly within the mining sector, community consent was a critical factor in ensuring the continuing success of operations. Thus, the publishing of the case studies was a first attempt to *'facilitate the awareness of the trend towards enhancing the indigenous community component of the social, economic and environmental responsibility of the present and future global mining industry'* (ICMM, 2001: iii). Increasing attention for Indigenous peoples by the ICMM culminated in an independent 'Mining and Indigenous Peoples Issues Review' in 2005. The reviewer identified a high level of convergence in the issues experienced by industry, Indigenous peoples and other stakeholders; also, the Review highlighted the progressing view of the ICMM on the relevance of Indigenous consultation, stating that

> *'successful mining and metals operations require the support of the communities in which they operate now, and in the future, to ensure continued access to land and resources. Relationships between mining and metals operations and their local communities, including Indigenous communities, should be founded on respect, meaningful engagement, and mutual benefit'* (Render, 2005: 5).

In 2006, the ICMM instituted a Sustainable Development Framework and issued a Draft Position Statement on Mining and Indigenous Peoples Issues. In this Draft Position Statement, the ICMM noted that its members *'may… seek the consent for [their] activities as part of a process of gaining and maintaining broad community support'* (Laplante and Spears, 2008). In 2008, the ICMM issued a finalized 'Mining and Indigenous Peoples Position Statement'. As part of the obligatory Sustainable Development Framework, the ICMM members are required to implement the provisions laid down in the Statement. This statement obliges ICMM members to

> *'make explicit number of their commitments in this are … including to: respect the rights and interests of Indigenous Peoples as defined within applicable national and international laws … engage with potentially affected Indigenous Peoples during all stages of new development projects/mining activities* [and] *seek agreement with indigenous Peoples, based on the principle of mutual benefit'* (ICMM, 2008: 2).

Engagement and consultation with Indigenous peoples ought to be undertaken in '*a fair, timely and culturally appropriate way throughout the project cycle'* (ICMM, 2008: 3). Furthermore, the ICMM requires its members to engage with communities based on '*honest and open provision of information, and in a form that is accessible to Indigenous Peoples'* (ICMM, 2008: 3). The 2008 Position Statement is superseded by the 2013 ICMM position statement. The most significant change is the mentioning of FPIC: the 2013 Position Statement explicitly sets out ICMM's approach to FPIC, stating that the members have a commitment to work to obtain the consent of Indigenous peoples (ICMM, 2013). In the view of the ICMM,

> *'FPIC comprises a process, and an outcome. Through this process Indigenous peoples are (i) able to freely make decisions without coercion, intimidation, or manipulation; (ii) given sufficient time to be involved in project decision making before key decisions are made and impacts occur; and (iii) fully informed about the project and its potential impacts and benefits. The outcome is that Indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision making processes while respecting internationally recognized human rights, and is based on good faith negotiations'* (ICMM, 2013: 2).

FPIC applies to all new projects, or any alterations to existing projects, that are likely to have a severe impact on Indigenous communities and the lands they use or occupy. The meaning given to FPIC by the ICMM does not differ much of those attempts to define FPIC within the human rights- and academic discourse. The ICMM's Position Statement shows that FPIC is 'on the radar screen' of the mining industry. At the same time, it indicates that the industry is increasingly accepting its responsibility to obtain consent, and that it is significantly influenced by external international pressures to do so.

The oil and gas industry has been less willing to publicly acknowledge responsibility for consent. IPIECA, the industry's representative group for environmental and social issues, has participated in various international roundtables to discuss the role of the extractives industry in the upholding of Indigenous rights; however, it was only in 2012 that the group released a public document on the issue with its 'Indigenous Peoples and the Oil and Gas Industry: context, issues, and emerging good practice' (IPIECA, 2012b). The document does not put forth an official position on Indigenous engagement nor on FPIC. Rather, it lists the existing international regulations and policies and provides a compilation of best practices and case studies offered by its members. There are no specific recommendations given, nor obliged policies or practices set forth for the IPIECA industry members. The somewhat lagging response of IPIECA on FPIC points out that among the extractives industry uncertainty remains regarding whether it is the responsibility of the corporation to obtain consent (Lehr and Smith, 2010). The industry has articulated its concerns, particularly in those cases where FPIC could be in conflict with national laws, regulations, or political agendas. Many IPIECA members have noted that in though practice the engagement processes they conduct are often aimed at achieving consent, they are uncomfortable releasing a public commitment to FPIC as this would impose considerable risks: it would decrease their business opportunities in highly valuable concessions when in those instances consent is withheld (Lehr and Smith, 2010).

Mimetic pressures from corporate actors: risk management, corporate codes of conduct and public commitment

Despite the reserved attitude of IPIECA members towards incorporating FPIC, increasing exposure to public claims of corporate Indigenous peoples' rights infringements has signaled to all that are operating within the extractives industry that it might well be in the corporate interest to consider the social impact of their operations on Indigenous communities. Extractive industry projects are particularly vulnerable to community conflict and opposition, as they are often long-term, complex, and capital intensive projects that have a severe impact on their environmental surroundings (Laplante and Spears, 2008). For extractive industry corporations, moving to other, less controversial, areas is often not an option. As a consequence, non-technical risk management has emerged as a particular subfield in the oil and gas sector. Risks that a corporation ought to manage correctly are, among others, breakdowns or delays in production due to blockades, work stoppages, lawsuits, public campaigns, and other forms of community opposition (Laplante and Spears, 2008). Davis and Franks (2011), identify loss of productivity due to delay, decreasing opportunity costs from the inability to pursue future projects or expansion or sale of existing projects, and staff time devoted to managing the conflict, as the most important costs stemming from community conflict. Issues that might cause such community opposition, according to Davis and Franks, are, among others: pollution, access to and competition over resources, community health and safety, resettlement, consent and consultation and the distribution of benefits (Davis and Franks, 2011). From a competitive perspective, those corporations that best manage their non-technical risks have a major economic advantage compared to other, less well performing corporations.

A significant aspect of risk or impact management is managing the relationships between corporation, community and society; part of this entails managing the public image or reputation of the corporation. Nowadays, it is hard to find a TNC or MNC that does not have in place a publicly available corporate code of conduct – a development that according to some can best be described as unavailing 'code' fatigue' (Kinley and Tadaki, 2003-04). The critics point out that most of the codes are merely *'paying lip service to their stated objectives'*, rather than constituting *'concrete steps towards lasting human rights protection'* (Kinley and Tadaki, 2003-04: 955). The principal concerns are on the self-regulatory nature of these codes and their lack of ability to put any real pressure on corporate executives (Ward, 2003). There are few means by which voluntary codes may become legally enforceable (Ward. 2003), but generally they are conceived as having limited legal backing (Kinley and Tadaki, 2003-04). Nevertheless, these corporate codes do possess a non-legal, norm-making capacity that can affect corporate behavior. Informal social norms established and applied by MNC actors *inter se* are capable of shaping the behavior of other non-state actors through direct implementation of these norms in obligatory partnership and other business agreements.

Some extractive companies have started to incorporate Indigenous peoples' consultation guidelines in their voluntary codes of conduct (Jenkins and Yakovleva, 2006). Others have even gone as far as acknowledging international conventions and declarations such as the ILO No. 169 and the UNDRIP to express their respect for Indigenous peoples' rights (Yakovleva, 2011). Voss and Greenspan (2012), commissioned by Oxfam America, developed a Community Consent Index that elaborates on the public positions of large oil, gas and mining companies on FPIC. The corporate commitments show that the positions of the large oil, gas and mining companies have not changed on the issue of FPIC.

Three corporations – ExxonMobil, Talisman and Total, mention FPIC in publicly available sources (Voss and Greenspan, 2012). ExxonMobil does assert that its approach is consistent with the IFC revised Performance Standards, and further mentions the ILO No. 169 and the UNDRIP. However the corporation also admits that currently, its approach is to fulfill a process of Free, Prior and Informed

Consultation rather than to obtain consent. Talisman states that the corporation ought to incorporate the principle of FPIC, with consent being interpreted as meaning that Talisman will 'endeavor to obtain and maintain the support and agreement' of the Indigenous community (Voss and Greenspan, 2012). Total also acknowledges international schemes such as the ILO No. 169, the UNDRIP and World Bank standards, and further contemplates that Indigenous peoples therefore have the right to prior consultation, and the right not to be moved without their consent. The discourse applied by the other oil and gas corporations – BP, Chevron, Imperial Oil and Statoil – primarily revolves around 'engagement, 'free, prior and informed consultation', 'dialogue' and 'long-term, stable relationships' (Voss and Greenspan, 2012).

5.4 International normative pressures for institutional isomorphism

The Guiding Principles on Business and Human Rights

In 2005, after the rejection of the much contested 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (Weisbrodt and Kruger, 2003) by the UN Office of the High Commissioner (Arnold, 2010; ICC/IOE, 2003, Mantilla, 2009), the UN Secretary General appointed John Ruggie as the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (Mantilla, 2009). The mandate of the SRSG was, among others, to identify and clarify standards of corporate responsibility and accountability, to elaborate on the role of states in regulating TNCs and to clarify the implications of concepts such as 'complicity' and 'sphere of influence' for transnationally operating corporations (Arnold, 2010). In 2008, Ruggie presented to the UNHRC his Framework for Business and Human Rights, which consisted of three pillars: the first was the state's duty to protect against human rights abuses by corporations; the second consisted of the corporate responsibility to respect human rights; and the third established the need for effective remedies in case corporate human rights abuses had occurred (Ruggie, 2008). The Framework instituted the basic principles upon which the 2011 UNGP were constructed (UNHRC, 2011).

The UNGP concur that *'[n]othing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights'* (UNHRC, 2011: 1). Accordingly, it remains the obligation of states to *'protect against human rights abuse within their territory and/or jurisdiction by third parties'* (UNHRC, 2011, Principle 1: 3); hence, it is only the state that is required to take appropriate steps to *'prevent, investigate, punish and redress such* [human rights] *abuse through effective policies, legislation, regulation and adjudication'*. Business enterprises hold the responsibility to respect human rights: they should *'avoid infringing on the human rights of others and should address adverse human rights impact with which they are involved'* (UNHRC, 2011: Principle 11: 13). Principle 11 of the UNGP, in which the responsibility to respect is embedded, accentuates the global nature of human rights; independent of the national or regional contexts in which business enterprises operate, the responsibility to respect human rights, *'understood, at a minimum, as those expressed in the International Bill of Rights'* (UNHRC, 2011: Principle 12: 13) *'exists over and above compliance with national laws and regulations'.* In line with principle 11 and 12, principles 13 to 24 describe how the responsibility to respect ought to be implemented in existing or new business practices. Principle 13 enumerates on the requirements of business enterprises to avoid causing or contributing to adverse human rights impacts, and to mitigate adverse human rights impacts if they do have occurred (UNHRC, 2011: Principle 13: 14). Principles 15 and 16 establish the basis for the implementation of the corporate commitment to accept the responsibility to protect in corporate policies, while Principles 17 and 19 elaborate on procedures to identify potential corporate

human rights impacts through due diligence procedures and impact assessments (UNHRC, 2011: 15-22).

The discourse of community engagement is first introduced in Principle 18(b), which stipulates that the process through which business enterprises should identify potential adverse human rights impacts involves *'meaningful consultation with potentially affected groups and other relevant stakeholders'* (UNHRC, 2011: Principle 18(b): 19). The subsequent principles on the corporate responsibility to respect summarize procedures for mitigation and remedy of corporate human rights abuses and for the monitoring, evaluating and reporting of corporate policies and practices originated to avoid such abuses.

The UNGP is not completely uncontested (Cragg, 2012; Wood, 2012; Bishop, 2012). For some scholars, the voluntary nature of the Principles, and subsequently the lack of enforcement mechanisms, has left the responsibility to ensure and enforce respect for human rights with host state parties, and therefore does not hold any additional value other than what is already laid down by the traditional doctrine of host state responsibility. However, as Ruggie replies, the UNGP was never intended to constitute new legal obligations for corporations (Ruggie, 2014). Rather, he contemplates: *'the issue for me has never been about international legalization as such; it is about carefully weighing what forms of international legalization are necessary, achievable, and capable of yielding practical results'* (Ruggie, 2014: 5). Thus, the Principles were intended to clarify the issue in a manner that would achieve broad consensus. Notwithstanding the voluntary nature of the UNGP, the principles have shown to hold a large degree of normative power: the Principles are widely adopted and implemented by national governments, international organizations, and an increasing number of business entities (among others: OECD, 2011; EC, 2011; IFC, 2011; Oxfam International, 2013).

Indigenous peoples' rights under the UNGP

The UNGP affirms the corporate responsibility to respect at a minimum those human rights 'expressed in the Bill of Rights' and further contemplates that in the implementation of the Principles particular attention should be given to the rights and needs of *'populations that may be at heightened risk of becoming vulnerable or marginalized'* (UNHRC, 2011: 1). With regard to Indigenous peoples, by far the most significant provision in this respect is article 27 of the ICCPR that confirms that persons belonging to *'ethnic, linguistic or religious minorities … in community with other members of their group',* have the right to *'enjoy their own culture, to profess and practice their own religion and to use their own language'* (UN General Assembly, 1966b: art. 27). Both the UNHRC and the Inter-American Commission on Human Rights have broadened the scope of article 27, stating on various occasions and in various documents that the right to cultural integrity involves an understanding of culture that includes economic and political institutions, territorial integrity, and effective participation and consultation.

Though the UNGP does not introduce the principle of FPIC, and even uses the phrase of 'meaningful consultation' rather than the language of consent, there is still sufficient ground to assume that FPIC might be among those Indigenous rights that ought to be respected by business enterprises. The SRSG, in his commentary on Principle 12, sustains such a claim affirming that

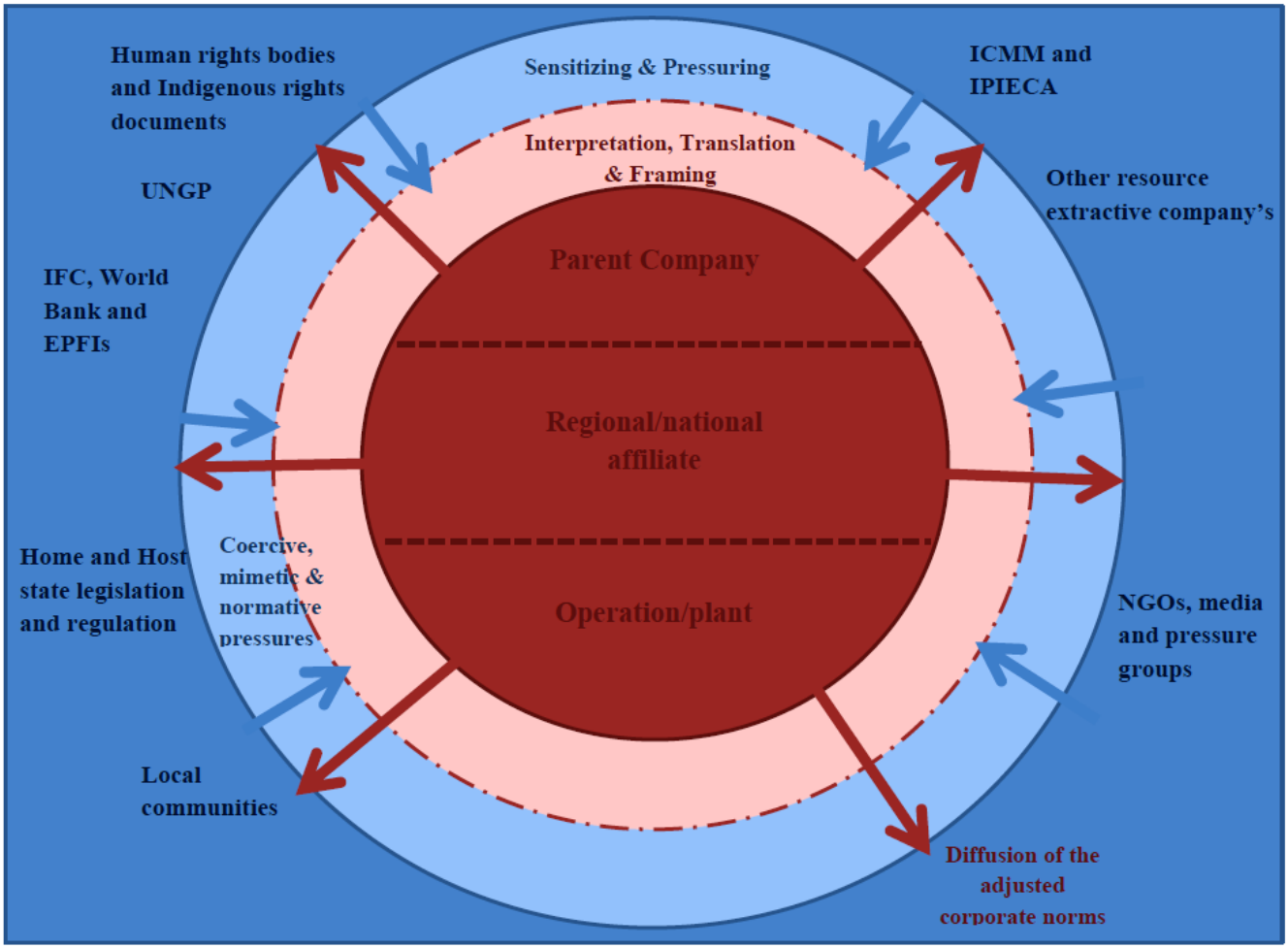
> *'depending on circumstances, business enterprises may need to consider additional standards … In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples, women, national or ethnic, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families'* (UNHRC, 2011: 14).

The UNDRIP, with its provisions on FPIC and consent, is the most descriptive UN instrument on the rights of Indigenous peoples and would most certainly fall under the additional standards mentioned by the SRSG.

5.5 Towards a model for institutionalizing consultation and consent in the extractives industry

Based on the pressures and actors described above, the draft model proposed in chapter one can be specified to explain in particular the increasing institutionalization of FPIC in the extractives industry. Figure 2 shows the conceptual model that is developed based on the norms, actors, processes and pressures identified.

Figure 2. The corporation and its corporate environment – the diffusion of Indigenous peoples' rights in the corporate domain.



Part II: Indigenous engagement and Shell

Chapter 6: Within-case analyses: Shell's local Indigenous engagement

6.1 Shell Alaska's engagement policies and practices considering Native Alaskan communities

In former projects Shell carried out in Alaska[1], the corporation encountered a range of problems with Indigenous communities; more recently, in the artic areas of Russia and Canada, the intricacies of engaging with particularly vulnerable and highly ecosystem-dependent artic native communities were again underlined. Thus, when Shell re-entered Alaska in 2005, there was a broad recognition by corporate management for the need to engage Native Alaskan communities early in the business process. Strengthening this point of view was that Shell's presence in the Arctic Alaskan region was and continues to be seen as highly controversial; active public campaigning by environmental NGOs has increased the already existing negative feelings of communities against oil drilling. The 'Indigenous argument', i.e. the claim that the extractives industry is infringing on local communities' quality of life and traditional livelihood is often used as a supplementary rationale to ground objections against extractive projects within the arctic region (Bryant, 2002). Consequentially, following upon its re-entrance in Alaska in 2005, the company faced strong global environmental activism and received a large share of negative media attention. This has resulted in a close monitoring of Shell's impact on – and communications with Indigenous communities by (environmental) NGOs.

The objections proliferated by environmentalists, NGOs and public media initially enlarged the existing fears and concerns of the local native communities. This complicated Shell's attempts for engagement with the Indigenous communities in a constructive manner in the first few years of Shell's presence: communities were rarely open for communication, and were mainly negatively oriented towards Shell and its employees. One of the major fears of the Inupiat communities concerned the influence of the extractives industry on the sustenance of their whaling traditions. As communication and engagement was rejected by most communities, Shell faced considerable difficulties in appropriately acting on these concerns. The SP team present at that time did not have the adequate experience nor community networks needed for appropriate engagement.

Acknowledging its weaknesses, Shell construed an advisory team consisting of SP staff members who had gained experience with Indigenous engagement issues both in Sakhalin and Peru. The assignment of the support team was to assist in the establishment of (culturally) appropriate native community engagement practices. The first difficulties the team faced were how to identify all relevant stakeholders and communities and how to thoroughly apprehend the interconnectedness and relationships within and between the 600 Indigenous communities that were identified within the (future) zones of impact. Because of the multi-layered structure of the Alaskan Native Claims Settlement Act[2] [hereinafter: ANCSA] framework, with regional and communal corporations, village

[1] Already in 1991 the company halted exploration in Alaska as they faced an outlook of sustained low oil prices. In 1996, all of Shell's Chukchi Sea leases were relinquished to the US government, and in 1997 the company officially announced its retreat from Alaska. In 1998 Shell sold its last remaining asset in Alaska, the Cook Inlet platforms. In 2001, Shell returned to Alaska and bid on 13 leases in the North Slope Area wide lease sale. From 2005 and onwards, Shell is actively executing exploration programs and seismic studies, as well as applying for permits to proceed.

[2] The Alaskan Native Claim Settlement Act (1971) divided Alaska into twelve distinct geographic areas and required Alaskan native communities within these areas – including Indian, Eskimo and Aleut tribes – to create regional and communal corporations for the purpose of obtaining benefits from the traditionally native lands and from the natural resource exploitation on these lands. By extinguishment of their claims over nearly 360 million acres of land, the Indigenous communities of Alaska received title to approximately 45 million acres of land and

and state government bodies, and the influential Alaska Eskimo Whaling Commission [hereinafter: AEWC], it was difficult to ascertain who held what type of power, responsibility and accountability. The various 'hats' worn by community members increased the difficulties for the consultation team to ascertain whom to address and when.

Also, there was a clear difference in community capacity and level of understanding between different communities considering their ability to grasp the full potential project impacts, which created additional complications. The team in Alaska recognized the need to increase its internal knowledge about the community structures. They hired a number of local people that already had a certain level of experience with Indigenous community engagement in Alaska. One of the people hired was an Inupiat woman herself, who initiated many of the first conversations with the communities in Alaska. The company visited most of the remote villages, doing nearly 500 'consultations', in order to capture the needs and expectations of the Native communities, to understand their concerns and to establish insights for Shell Alaska on how to design mitigation. Consultation in this process was largely focused on sharing of information; there was explicit room for answering all possible questions present within the communities. As Shell Alaska was in an early stage of business development, many questions about the end product could not be answered. Nevertheless, Shell has been able to provide some clarity and continues to build a meaningful relationship with most of the Inupiat communities.

Although the multi-layered structure initially increased the complexity of engagement, it has had the advantage of legitimately offering the Inupiat communities a seat at the negotiation table. As rights to land and resources are granted to communal and regional corporations, the Inupiat speaking for these native corporations had a large influence in Shell's decision-making. Also, as the Alaska Eskimo Whaling Commission had significant weight in all levels of political and social life, including in communal and regional corporations, state and federal government bodies and international environmental forums, the body is considered by Shell as one of the most important stakeholders; specifically, what this has meant for the Inupiat communities is that there has been a corporate recognition for the need to include subsistence whaling in negotiations and engagement. One example of this is that Shell stopped their business activities during the whaling season. Other measures are accommodated in Conflict Avoidance Agreements between Shell and the AEWC, and revolve around Indigenous involvement in monitoring, for instance through subsistence advisors in local communities and through the Marine Mammal Monitoring and Mitigation Program[3]. The structure that is created by the regulatory framework and the Conflict Avoidance Agreements is highly reflecting Shell's commitment to inclusive engagement with the purpose of building a partnership. Being mindful of all different organizations, involving them in a timely manner, creating opportunities for the community members to participate, and above all: listening to all concerns and using the feedback given by them is how Shell Alaska envisions respectful engagement. For example, in 2005, all Shell vessels at that time going up into the Arctic seas were red. The Inupiat whale hunters stated that this colour would distract and deter the whales, which would therefore have a negative impact on their hunting activities. Shell Alaska was requested to paint the vessels blue; in order to establish long-term and meaningful relationships, the company granted this request. This manner of mitigation is less formalized, but is still very important in the context of respectful engagement.

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payments totaling $962.5 million via the regional and communal corporations (Anaya and Williams, 2001). All Native Alaskans were made a shareholder of these corporations (Hirschfield, 1992).

[3] Subsistence Advisors check on a daily basis whether Shell's planned activities interfere with the communities' subsistence activities; the Marine Mammal Monitoring and Mitigation program includes vessel based Protected Species Advisors (PSOs). These are mostly Indigenous whaling captains, who have authorization to ramp down or stop work of a particular vessel/rig if they judge that a potential impact on a marine mammal may occur.

The other dimension of Shell Alaska's engagement with Indigenous communities is social investment. From the beginning, the company has undertaken small-scale community investment programs in capacity building, education and Inupiat language preservation. Also, the company is directing $5 million per year to research focusing on that what local communities think will be important to understand how potential development could impact subsistence activities. Making use of a budget called the Workforce Development Money, Shell Alaska has sponsored, among others, the First Alaskans Institute, the Alaska Process Industry Career Consortium, and two community colleges. These organizations aim to improve the educational level of the Indigenous population, in particular on (technical) knowledge and science. According to the interviewees, these investment programs highlight both an interest in the communities, and a corporate understanding of the need to enhance local capacity building for both the community and the company. The educational projects are currently yielding results and the company is able to employ technically skilled local community members. The interviewees are showing a common element of pride for what is now mutually achieved. Social investment here does not solely serve as a philanthropic activity; in the Alaskan context, it is the striving for a common goal that has brought together the views of both actors, created mutual awareness and understanding and has strengthened the relationship between company and community.

6.2 Shell Development Australia's history with Aboriginal engagement in Australia

Shell's history in Australia goes back to the start of the 20th century, when the company entered the country as a major distributor of bulk fuel and lubricants. The infrastructure needed to supply fuel and lubricant throughout Australia was non-existent at the time, as a result of which Shell got involved in mapping many unknown territories and creating infrastructure that linked different parts of the country while expanding its retail and refining activities throughout Australia. Shell has been searching for and exploring energy resources in Australia since 1939[4]. At the moment of writing, Shell had upstream operations in Australia's Liquefied Natural Gas industry, maintaining a substantial exploration portfolio off the coasts of Western Australia and the Northern Territory. The company also had coals seam interests in Queensland. Downstream, both in the refining and chemicals business, the company had been outsourcing, restructuring and selling many of its business units and infrastructure. However, Shell still had terminals covering almost the entire coastal line of Australia, and two operating refineries, of which the Geelong refinery was for sale at that time.

Considering Shell's history and position in Australia's extractives industry, interactions between the company and Aboriginal communities are likely to have occurred. However, not much of this was documented as it has only been for the last twenty years that Aboriginal communities and their culture started to be acknowledged by government and society, and subsequently by business. This acknowledgement was closely tied to the judicial and legal system in Australia. In the nineties, mining companies such as Rio Tinto were taken to court because they were damaging land which was claimed through Native Title, or were infringing upon Indigenous traditional livelihood and culture[5].

[4] Shell was awarded its first Australian exploration concession in 1939 in the southern Queensland's Great Artesian Basin. Active exploration began in 1940; however, this did not lead to any significant results. Much of Shell's exploration since then has been oriented towards offshore gas and oil fields, with offshore petroleum exploration by Shell starting in 1967 in the Otway Basin. The first big gas discovery was in 1971 in North Ranking.

[5] Since the 1990s Aboriginal communities have increasingly been acknowledged in jurisprudence on large-scale resource development projects on the grounds provided by the Aboriginal Land Rights (Northern Territory) Act which was passed by the Northern Territory Supreme Court in 1976. This Act created a special form of land title, i.e. communal inalienable freehold title, to be held by land trusts and managed by statutory authorities called

For a long time, Shell did not feel any pressure to engage with Aboriginal communities: its refineries were already in place and mostly located in urbanized areas. However, Shell's business in Australia had shifted more towards upstream activities from the beginning of the twenty-first century and onwards, which increased both the internal and external need for an Aboriginal engagement strategy. Two facilities in Australia did have some level of Aboriginal interaction: the Prelude Floating LNG, located in the Browse Basin nearly 475 kilometres north-northeast of Broome; and the downstream Geelong refinery Southeast of Adelaide. From the interviews, it became clear that no real engagement with Aboriginal people had taken place at the Geelong refinery:

> *'So, our downstream business has been in Australia for about hundred years, but actually we haven't really done a proper engagement, or any kind of benefit… or… any real kind of engagement whatsoever with our indigenous communities*',

and

> '*With our downstream refineries like Geelong, they did have Community Action Groups, but they didn't specifically go and look for the Indigenous representatives. If they happened to be Indigenous, so be it, but it wasn't actually a sign that we actively sought to engage with Indigenous people*' (SP advisor SDA).

Noteworthy, though, the Geelong refinery was developing an initiative to provide training and business opportunities for local Aboriginal people, specifically in the area of seed propagation and land rehabilitation and management.

Until recently, Shell Development Australia [hereinafter SDA] lacked a real engagement strategy. The SDA SP manager states that '*until we launched the RAP, we never engaged with Indigenous communities, we never had a relationship with them'*. However, developments pushed the business to adopt an Indigenous Engagement strategy, or at least to develop guidance on the issue. For that reason, SDA has implemented a Reconciliation Action Plan (RAP) for the period of August 2011 till December 2012. RAP II has started in March 2013[6]. The RAP resulted in an incremental change in the manner that SDA engaged Aboriginal communities. Within the RAP, the focus is on positive impact enhancement, workforce creation and social investment. Furthermore, SDA's social investment strategy is linked to 'education, health, or environment themes with an emphasis on the disadvantaged'. As many Indigenous Australians face social and economic disadvantage, a number of SDA's investments are specifically aimed at Indigenous people and/or include Indigenous partners[7].

Land Councils. The Commonwealth Native Title Act (1993) [hereinafter: NTA] provides for the protection and recognition of Native Title to land of Aboriginal communities. Once granted a native title determination, there is an acknowledgement of the community's history on the land, as well as of the specific cultural right to continue traditional practices on it. The act gives a right to continuous use of the land as determined by the community's traditional and historical use of it; it does not actually give the community ownership of the land (O'Faircheallaigh, 2006)

[6] In RAP I, specific goals were set to guide engagement with Aboriginal communities. These included goals for the identification and consolidation of current Indigenous community engagement and development activities; the implementation of an Indigenous Engagement Strategy by operating sites and projects; the appointment of RAP Champions – volunteering employees that increase cultural awareness at their own operation or project; and the encouragement of all lines of business in Australia to promote reconciliation and implementation of Indigenous issues in their business. RAP II continues on RAP I, although the focus is on implementing the necessary leadership structure and an Indigenous Peoples Policy, as well as setting requirements for the implementation of an Indigenous Peoples Plan within the major Shell installations and projects at the end of 2014.

[7] Through the Australian Indigenous Mentoring Experience university student volunteers act as mentors for Indigenous students, with the aim of improving their Y10 and Y12 completion rates and their access to tertiary education. SDA is also involved with the Kimberley Land Council in documenting the traditional knowledge of

Other efforts of SDA include, among others, its membership in the Australian Indigenous Minority Supplier Council, which seeks to facilitate the integration of Indigenous businesses into the supply chain of private sector corporations and government agencies.

As part of RAP II an Indigenous Peoples Policy is currently developed, which would set nationally applicable standards for community engagement with Aboriginals. The approach SDA wants to pursue with its RAP and IP Policy is to integrate engagement activities within peoples' present roles. This starts with the Social Performance advisors, incorporating the Indigenous piece in their Social Performance plans and activities for their specific operation. Also, RAP champions are present in every location to identify certain Indigenous peoples' activities and to raise awareness around Aboriginal Australians.

Although Shell Development Australia for long did not have any operations for which they legally had to comply with specific Indigenous regulation, they decided to adopt the RAP to be proactive; this has already proved its business value. As one of the interviewees mentions:

> *'However, now there's actually a real business need for it, because we couldn't get a lot of our business licenses if we couldn't prove to the government that we'd actually engaged with external parties, and a lot of those are Aboriginal people … and we just got a mining contract with Rio Tinto to provide a ridiculous amount of fuel, and in that tender evaluation in that contract Rio was like 'what are you doing to close the life expectancy gap between Indigenous and Non-Indigenous Australians?' and 'We're not going to look at tenders if you can't prove to us that you're actually looking to actively improve the local content from the Indigenous community' … so we would not have gotten that fuel supply contract if we did not have our RAP'*.

Prelude FLNG: on-the-ground Indigenous engagement

According to SDA, the Prelude Floating LNG is the only facility having a direct impact on Aboriginal communities at the moment. The SP team has identified several zones of involvement for the facility: the first is Perth, where training programs for the LNG are organized in cooperation with a technical college specifically oriented towards Aboriginal people. Impact here is seen as mainly positive. The second zone of impact is Broome, which is used as a transit hub for employees from and towards the facility. The facility is nearly 475 kilometres offshore, and therefore it is difficult for helicopters to fly to the facility and come back on one tank of fuel. Since this is a HSE requirement, it is necessary for the helicopters to refuel on a peninsular piece of land North of Broome. This creates another zone of impact, especially considering that that particular area is for 95% under Aboriginal Title. The land that is used as an airstrip is claimed by the Djarindjin community. The fourth zone of impact is in Darwin. Here, Shell has located its supply base. As much onshore gas processing infrastructure and equipment is already present, Shell's additional impact in Darwin is considered minimal.

As soon as it became clear that Shell's helicopters would have to make an intermediate landing at Djarindjin, the social performance team urged for an elaborate Social Impact Assessment which would involve community participation. However, the Business Opportunity Management [hereinafter: BOM] at that time did not think a Social Impact Assessment was one of his priorities:

> '*It's been unfortunate; our impact assessment didn't really go as planned. We could not get any tractions with the BOM on our project, nor with the leadership team at the time, to do any Social Performance work … the worst part is that it is actually done in our execute phase here, which is,*

Ngurrarea people using digital media. Other initiatives, for instance the Geelong Refinery's Limeburners Link Initiative, have a general focus (in this case training in conservation and land management), but does include some indigenous participants.

> *that's the worst time to do an Impact Assessment. We initially wanted to do an IA in 2009, and we literally lobbied and lobbied and lobbied, but we couldn't get anyone to give us funding to do an impact assessment or just even to understand what an impact assessment was'* (SDA/SP employee).

Thus, the SP team felt it was being incapable of conducting a proper impact assessment. When an impact assessment was finally approved in 2012 because of general unease to be non-compliant with the HSSE &SP Control Framework, the SP team only received a small amount of funding and a very strict timeline for the execution of the SIA. The project by then was already in the execute phase. What was more, the timing of the assessment converged with the active campaigning and protesting against a nearby onshore gas project called Browse. Because of the sensitivities surrounding the Browse project, the SP team couldn't do any form of community involvement or surveying. Overall, the team feels that the impact assessment was *'not our best piece of work at all and we're quite disappointed by it … it's not a proper impact assessment'*. Consequently, because the company lacked any real community engagement in the past, the team is now experiencing difficulties with the involvement of the communities in Shell's business activities. Djarindjin is a very isolated community, and reaching it is challenging as you need to pass through unsealed roads. The village of Djarindjin is divided in two communities, one of which is Djarindjin and the other is Lombadina. Originally, both sides are related to each other; however the community has split in two during the fifties over an argument and has never been reunited. The air strip is on land with Native Title given to the Djarindjin part of the community.

Although it is no longer possible to mitigate the business design or infrastructure, the SP team is looking at opportunities for an extension of the airstrip towards a viable commercial airport, used by several extractives companies operating in the Browse Basin. Engagement focuses on positive impact enhancement and social investment. The Lombadina community is less interested in contact with the company. Also, they are less well-organized, while the Djarindjin community has an Aboriginal Corporation that acts as a municipal council. Nevertheless, the SP team continues to make regular visits to both groups and tries to communicate its (positive) impacts and investments to the both of them. Engagement here has taken the form of information sharing, consultation, capacity building and social investment. The interests of the community are primarily focusing around jobs, the opportunities for development of the air strip, and Shell's intentions to support local issues around drugs, drinking and domestic violence. Engagement is still in a preliminary phase in which building genuine relationships and trust are most important. The relationships the SP employees are establishing will be at the foundation of the Indigenous Peoples Plan for the Prelude LNG that the team is currently developing.

6.3 Shell Canada, First Nations and Aboriginal engagement

In order to satisfy the consultative requirements set by the Canadian (provincial) governments[8], Shell Canada has employed a range of methods following an Early, Often and Ongoing approach when

[8] The protection of existing Aboriginal 'titles and rights' is established in the Canadian *Constitution section 35(1)* in 1982. Section 35 (1) outlines that Canada has a Constitutional obligation to enter into a consultation whenever Aboriginal rights may be infringed upon (Canadian Constitution Act,1982: section 35, art. 1). In the 1990s, several court decisions – among others the Court's decisions in *Sparrow* (1990) and in *Delgamuukw* (1997) – have declared the necessity of government to consult with Aboriginal communities in those cases where their activities or land management decisions may infringe upon Aboriginal or Treaty rights (Natcher, 2001). The duty to consult is allocated to provincial and territorial governments. In Alberta, one of the provinces in which Shell has a large presence, consultation is regulated according to the *Alberta First Nations Consultation Policy on Land Management and Resource Development* (Government of Alberta, 2005, 2013a and 2013b).

consulting with Aboriginal communities. Dependent on the severity and duration of the impact and the legal and strategic position of the Indigenous community, the company is involved in information sharing, consultation, participation or partnering with the Aboriginal bands present in their zone of impact. Thus, if Aboriginal communities are ranked as 'tier 1' stakeholders – meaning high impact, strong legal position – Shell Canada develops an Aboriginal Consultation Action Plan which is part of a broader Stakeholder Engagement Strategy. Nevertheless there is no standard approach in working with Aboriginal communities: engagement requires knowledge about the Aboriginals' people history, their priorities and their legal relationships in Canada, and this does differ per community. Hence, plans should allow for cultural, historical and legal flexibility.

Much of Shell's approach is based on the experiences gained in the Oil Sands project in Alberta. The requirements for consultation by project proponents in Alberta are strict and elaborate. The Albian Oil Sands mines therefore have a history of more than twenty years with sharing information, consulting and involving First Nation communities and negotiating impact benefit agreements. During the start-up of the project, the company managed to build long-term relationships and trust with its neighbouring Aboriginal communities. In the mid-1990s, agreements were negotiated with a focus on broad environmental responsibilities of the company and short-term material benefits for the communities. The sole purpose of the early agreements between Shell and the First Nation and Metis communities was to have these groups remove any regulatory objections they might have, so the project would proceed. However, as construction and operationalization began, it became obvious that the agreements were not rigorous enough, burdening the company with obligations either too specific or too broad. Renegotiations of these contracts occurred on a yearly basis. As the current Lead of the Canada Consultation and Indigenous Relations team and former manager Social Performance and Aboriginal Consultation of the Oil Sand projects, explains:

> *"These agreements were not very rigorous contracts, they've got… I don't know if lawyers were involved in all of them… and they really had that really short-sided view… nobody was thinking about implementation or on ten years down the road, or twenty years down the road. They were commitments that responded to issues that were important to the Aboriginal group at the time. And they were either really really specific, and they might say 'Shell will give Aboriginal group X 2000 dollars a year for the child care center', or they would be as broad as to say 'Shell will mitigate the environmental impacts from the Jackpine Mine'. … and so we would needed to negotiate what those agreements meant and what those commitments were every year*".

By agreeing to commitments as broad as the latter one, the company had created severe risk management issues and therefore a thorough reshaping of the early agreements could no longer be postponed. Also, two new projects, the Jackpine pipeline expansion and the Peace River mine project, were already assessed and evaluated by the regulatory process and benefit agreements for those project needed to be set in place. The company identified the need for a new structure for consultation which could also be applied to these new projects. The structure of agreements that was developed, *the sustainable model*, dealt with two important issues: first, the company had to make sure certain

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With this policy, based in Alberta's Aboriginal Policy Framework, the government of Alberta recognizes and respects the treaties and the lands set aside as First Nation reserve lands, while also acknowledging its responsibility to bring around meaningful consultation (Government of Alberta, 2005). In British Columbia, a province in which Shell is increasingly involved, there is a large precedence created by several court cases, providing for an extensive obligatory framework for governments. The government recognizes that negotiating in good faith is the best means to develop 'New Relationships' with Aboriginal communities. Based on this, consultation is guided by the *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* (British Columbia, 2010).

accountability mechanisms were in place, and second, the agreement should have to lead to long-term, sustainable relationships. To establish accountability, the agreements

> *"… created a new structure of creating a revenue stream, and that would be paid into a trust, a First nations trust, and then there would be identified broad categories of allowable expenditures. And it was up to the First Nations to spend this money on whatever purpose they saw fit within the boundaries of those categories. And those were very broad categories. We were trying to give more autonomy to the First Nations, be less paternalistic… and then on the backhand, making sure that we had a reporting mechanism.'*

The establishment of long-term relationships was accomplished by constituting a series of committees, in which both the company and the community held representative positions. A joint implementation committee created ties between business management and senior community leaders, and hence was called a 'Chief-to-Chief' meeting. Adopting the discourse and wording of the communities created a common understanding to enhance cooperation. Sub-committees were, among others, an environment committee, handling issues around the use of traditional knowledge, environmental monitoring and environmental management; and a Business Alliance committee, looking at business opportunities, and Skills and Employment training committees. For the already existing projects all earlier agreements were invalidated[9], while for the new projects agreements were reached using the new sustainable structure. At present, the sustainable model is increasingly being applied to all agreements with strategic communities that are important to Shell Canada. Sustainability Agreements are reached in projects in the Peace River area, as well as in the Fort John area in BC and in the LNG project on the BC west coast.

A uniform and coherent approach to working with Aboriginal Peoples in Canada

Shell Canada's growth profile, combined with the increasing requirements springing from case law and government policy, was translated by the company into the need for standardization of consultation processes. As one of the employees working for Shell Canada within the field of Indigenous engagement describes:

> *"If we were to manage growth and environment, and if we wanted to manage this well, we needed to come together and start to standardize processes, how we did the work, how we engaged… you know, we were negotiating agreements in different places without the communication back and forth. We had to ensure consistency. … so the old teams disappeared, we consolidated old people, and we hired new people. And so that was in June 2012."*

A new Consultation and Indigenous Relations team was established and is now responsible for consultation with First Nations in assets throughout Canada, supporting other NTR factions or BOMs, in case an agreement is found needful. In this position the team is very important for creating a bridge between business management and Social Performance and NTR, initiating cultural and commercial awareness to both sides. Interviewees mention the persistence of 'the cowboy stuff', pointing at BOMs and managers that act under high pressure to go through the Operational Realisation Process as quick as possible. They push for instant results and quickly signed agreements rather than for long-term relationships, and thus they often overlook the complexity that comes with Aboriginal community engagement. As the company will be present for thirty to forty years, the role of the Consultation and Indigenous Relations Team to point out the importance of a long-term, stable relationship to BOMs

[9] With one of the neighbouring First Nation communities, the Athabasca Chipalan First Nation, Shell found it impossible to arrange a Sustainability Agreement; the community did not want to enter into new negotiations unless 1.2 billion dollars was paid to them.

and leadership is experienced as highly important. This can become a stressful position, as one of the interviewees mentions:

> '*So what happens is, there are many players, there are internal clients which is a BOM, there is the environment, land engineers, drilling people, they are all involved in the process. So what happens is we have to manage that respectful part internally. … And what happens is we have to manage that relationship as well, so you're constantly bombarded with direction from several people'.*

And:

> *'Absolutely, the cowboy stuff, it happens, because they want to have their stuff done, right? We appreciate that. But we also say you've got to be open … It's not about missing targets, it's about being nervous about missing the targets that the BOMs and the cowboy types get nervous about. Because they're like: 'get it done', right? Get me my agreement, while I think, no, you have to get a relationship. You're gonna be there for thirty or forty years, you have to create a relationship that's ongoing'* (Employee Unconventionals Shell Canada).

To smoothen the relationship between SP employees and business management, and to create the sharing of knowledge to both sides of the business, the Consultation and Indigenous Relations team organizes Lunch & Learns in which different BOMs explained the business to the newer members of the team. Also, one of the team members is developing an online course, which is intended to focus on Aboriginal awareness, cultural understanding and risk management. Thus, the mutual sharing of knowledge and information instigates the integration of Indigenous engagement throughout the business.

To further a coherent approach for working with Aboriginal communities throughout Canada, the team has also developed a Shell Approach to Working With Aboriginal Peoples in Canada. Looking at the learning lessons in the Albian Oil Sands context, the company developed five principles or statements on how to work with Indigenous peoples in Canada. This document is now seen as the foundation of every engagement undertaken by the team. The Aboriginal Approach and the Sustainability Agreements are complementary risk mitigation tools: the approach clarifies the overarching values Shell Canada wants to uphold whenever consulting with Aboriginal communities, while the agreements allow for flexibility based on the differences present in communities and projects.

The new structure, consisting of the Aboriginal Approach, local Indigenous CLOs, local SP managers, the Consultation and Indigenous Relations Team, and the Sustainability Agreements, has created more coherency and serves as an example for other regions both internally as externally; Shell is increasingly seen as the 'Operator of Choice', and is often used as a good example for other companies. In particular, hiring Indigenous employees has been an advantage for Shell Canada: the consultationists, having lived in reserves themselves, being part of the communities and fully understanding the issues at stake, have been able to stimulate Shell's reputation as a culturally respectful neighbour.

Despite the many advantages, the new structure is not yet without its flaws. The Consultation and Indigenous Relations Team does not always become involved in community consultation: for assets and projects where only a small impact on the community is expected, the old structure is still in place. Thus, the local Social Performance advisors sometimes feel as if they are still 'on their own', and are not sufficiently involved in the current developments. In their opinion, having a nationalized consultation team creates several disadvantages that need fixing before promoting the structure to other regions or companies. For one, as agreements are confidential, the Consultation and Indigenous

Relations team, being responsible for negotiating the agreements, is the only group that is aware of the content of the agreements, while the SP personnel in the field is often not included nor informed:

> *'The problem is, that Linda's team, who is responsible for the actual agreement, knows what is in them, but we as SP people already in the field, don't. We're told when an agreement is wishful, but they negotiate. For me, personally, I don't think money is the solution. There are a lot of issues involved here. For example, you create disparities between the First Nations communities and other local communities present in the area.'* (local SP advisor Shell Canada).

Many First Nations communities have updated communication mechanisms with one another. Hence, the local SP advisors face situations in which community leaders are better informed than they are.

Compared to other Indigenous tribes and communities, the First Nations are relatively sophisticated. To be sure, there are different levels of education and resilience within communities as well as between communities, with some of them still having a very traditional lifestyle. However, once negotiations begin, they tend to be supported both by internal and external (legal) expertise. The content of 'confidential' agreements is shared with other communities, and for that reason some First Nation communities claim a strong position during negotiations. This can both ease the negotiations process and hinder it, as many communities value their interests and claims more than is found reasonable by the company. The substantial material benefits agreed on in the Sustainability Agreements negotiated with particular First Nation communities create inaccurate expectations with other groups that are less impacted or have less legal standing. Furthermore, some SP advisors question whether an agreement should be at the centre of the relationship the company tries to build with the community. In their opinion, constructing a relationship characterized by monetary values is not stimulating trust and respect. Sometimes a situation is created in which disparities between First Nation communities and other local communities arise in the area, which in the long run might affect the community negatively.

At last, the local SP advisors feel that the role of the CLO is not always recognized nor acknowledged. CLOs are part of the communities for a longer period of time, they build relationships based on years of involvement and close contact. The Consultation team, being a new resource, does not yet have the same level of familiarity with a community. Thus, it is experienced that Shell has to start from scratch over and over again. With the institutional memory of less sophisticated communities being low, building relationships is conceived as being an almost impossible struggle.

6.4 Shell's engagement strategies in Iraq

For Shell Iraq, how it operates in the area is heavily determined by the consequences of the post-war environment for its security, safety, community relations and asset integrity. When the Iraqi Ministry of Oil awarded Shell, Petronas and Missan[10] a 20-year contract to develop the Majnoon field in January 2010, the need for a robust security approach was immediately identified. A strong link was found between good social performance and maximization of local content and a stable and manageable security situation. Present within the area impacted by the oil development industry in Majnoon are groups that show a strong resemblance to M'adan or Marshi communities. At the moment, Shell Iraq does not have active engagement with Marsh Arabs as a group since they don't

[10] Missan Oil Company is an oil and gas company owned by the Republic of Iraq. It has its origin in the South Oil Company and is specifically set up to develop the country's oil field in conjunction with international oil and gas companies.

identify themselves as such[11]. An employee of Shell Iraq's Environmental team involved in Majnoon mentions that '*In fact, if you go into a community and say 'I'd like to speak to your Marsh Arabs', they'll stone you out the villages. It's not something that is talked about*'. Also, both society and government are disclaiming the specific rights that these communities could have as a consequence of their Indigeneity. The Marsh Arabs are still very much discriminated throughout society, and giving any special attention to them as a group would not be accepted by other tribes[12]. The Majnoon operation does indirectly impact communities that by external experts would be seen as M'adan peoples, and with the Majnoon expansion ahead this impact is likely to increase and become more tangible.

Engagement with M'adan communities is organized through the operation's Social Performance Plan and general stakeholder engagement practices. Compared to other operations included in this report, national regulation is less determinate for the format of its engagement policies and practices. The major reason for this is, apart from the disclaiming of indigeneity by government, that the company is not allowed to be involved in any land purchases in Iraq since the *2006 Investment Law* prohibits the owning of Iraqi land by any foreign investors. Shell cannot get involved in permits and land acquisition. Any such activities are undertaken by its state-owned partner, the South Oil Company, at Shell's request.

The Iraqi government does not acknowledge any traditional or historical claims to land ownership. In Iraq, nearly 96% of all arable lands are owned by the government (USAID, 2005). Many occupied lands are state-owned property, in which the government has granted limited occupation rights over the land. The occupier can obtain a 'life estate', or a 'leasehold estate'[13], however the underlying fee continues to remain with government. In all cases, government has the right to terminate both kinds of rights, although they do have to pay an amount of compensation dependent on the type of land rights and the full fee value of the property. In short, the government at any moment has the right to acquire land for the exploitation or distribution of oil and gas. The assessment of land is undertaken by them, and they also provide an offer for compensation. Concerns have been expressed about the possibly forceful estrangement of Iraqi people and communities of their land, specifically from a human rights perspective. There is an appeal process; however, this tends to be around setting the amount of compensation rather than on whether or not the individual, family or community had any historical or cultural ties to the land and thus should have some form of access. Even so, as Shell is not involved in

[11] Despite their distinctiveness, it is unlikely that individuals belonging to the M'adan group will identify themselves as being Indigenous at the moment. For one, Iraq is a tribal society, and all communities tend to identify themselves with specific sub-tribes of Iraqi society rather than with Iraq as a whole. The M'adan do not consider themselves as a unique and differing sub-group within society; rather, they identify themselves as members of particular Iraqi tribes within a specific area. What is more, within Iraqi society, there is a strongly negative cultural assumption about the Marsh Arabs. Marsh Arabs are predominantly Shi'a Muslims, a religious subgroup that was not favoured by the Baghdad government under Saddam Hussein (Human Rights Watch, 2002; Saleh, 2012).

[12] The processes of marginalization, exclusion and discrimination have left the Marsh Arabs with a reputation of being poor and uneducated while in other cases they are associated with unrest, smuggling, and theft. Because of this social stigma, distinctiveness and positive discrimination would not be easily accepted by the other Iraqi tribes. The recent Iraqi government has refrained itself from developing protective measures for the M'adan tribes, despite the fact that they are very vulnerable groups from a social and communal perspective.

[13] In Iraq, there are different estates in property. The right of Alezmah is an interest in a property in which the government held the fee but granted the 'Grantee' the right to use the land and to lease, sell or mortgage that right. The right of Alezmah would last for a lifetime and is inheritable if obtained prior to 1932. The right of Tasaruf is a the right to a leasehold estate that can be held in perpetuity. The leasehold estate is provided with a covenant restricting the land exclusively to the uses specified by the government in the original grant.

any of these steps, they do not influence the manner in which land is acquired, nor does land acquisition have an impact on the operation's engagement activities.

Considering the highly sensitive societal structure, the SP team present in Majnoon identified in an early stage the importance of equal treatment. Since some tribes have shown aggressive and violent behaviour in the past, an indication of preferential treatment by Shell of certain communities can destabilize safety and security for the company and its employees. The current social performance approach, based on social impact management, delivery of local benefit and social investment, is targeted at those communities that encounter the company on a daily basis. The basic premise for the SP team therefore was an equal treatment of all stakeholders:

> *'We are not going to distinguish between groups, like 'we're not going to engage with you because you haven't declared yourself as Indigenous' that's not how it works. … I mean, the whole definition of a stakeholder is the people that have an interest or an influence in what you are doing. … So, that's the approach to stakeholder engagement. It's not about whether a group is Indigenous or not. That's really, not in my opinion, a factor. … If we found that a particular Indigenous group needed a different methodology, we would use that. But I don't think that's the case … there's not a massive distinction, actually'.*

This point of view is also reflected in the vision of respectful engagement as reflected by Shell's staff in Iraq; that is, all stakeholder engagement, irrespective of the social status or Indigeneity of the involved stakeholder, needs to be done with respect. Within this approach, it is the ESHIA process that provides the tools for community engagement, such as stakeholder engagement plans, or public consultation and disclosure plans. The role of the Community Liaison Officer has proven crucial in this process. The Social Performance Manager for the Middle-East and North Africa at that time, states that:

> *'My CLO was highly influential. He went to the markets and listened and talked, however without explicitly saying he was working for us. It was very important for us at the time to keep a low profile and not to intervene too much with the communities there. So the CLO, through him we identified the real issues and impacts. If the company would become too closely involved, it could become tricky for us, for our security'.*

The fact that the CLO was of local origin provided both an opportunity to ascertain the true impacts of the company on the communities, and established a certain level of legitimacy to the engagement process. In Iraq, it is important that *'Iraqi's are talking to Iraqi's'*, as their lineage and Iraqi origin gives them a certain 'rightful' and respectful position in the conversation.

Within the different tribes, the attitude towards the company generally is positive as long as instant benefits from the oil exploration are assured. Shell Iraq does not have any contractual agreements for its community involvement, and investment is on a voluntary basis in order to prevent any suspicion or unmanageable expectations. Corporate investment in societal projects is done on a general level, making available health care and technical education for a broader part of the population. Through its cooperation with other organizations such as the United Nations Development Programme, the company has been able to increase capacity, keep a low profile, and gain a certain amount of legitimacy, developing projects around local content, job creation and procurement.

As mentioned, at the moment Shell Iraq is considering an expansion of the operation to the northern part of the oil field. When Majnoon will expand, the project will have more direct impacts on the traditional livelihood of the Marshi communities in the Hawizeeh Marshes. These are particularly vulnerable groups, with a very traditional livelihood based on fisheries and small-scale herding. The

Majnoon operation did not develop an Indigenous Peoples Development Plan as to avoid societal and political difficulties. Instead, they have linked traditional livelihood to the preservation of biodiversity through the implementation of ecosystem services in a Biodiversity Action Plan. The Hawizeeh Marshes are nominated as a RAMSAR area and are part of a UNEP programme to preserve and rehabilitate the unique marshland environment. Developing the Northern area of Majnoon will require an environmentally responsible approach to oil exploitation. By implementing community aspects in an environmental perspective, sustainable and social development of the area can be guaranteed. An ecosystem services approach offers the opportunity to incorporate the protection and preservation of Indigenous elements within a larger ecologically oriented strategy. Particularly in Iraq, where engaging with M'adan communities is socially discouraged, and positive discrimination of these communities can actually lead to safety issues both on behalf of the corporation and on the side of the community, focusing on ecology and thereby respecting and preserving Indigenous livelihood and culture is a new approach through which corporations might accord to international expectations.

6.5 Shell's Indigenous engagement in Russia: regional differences

As the Russian Arctic region contains considerable oil and gas deposits, the country is of strategic importance to Shell. At the moment, the company is among the largest international investors in the Russian economy, with companies and joint ventures operating in exploration, production, lubricants, chemicals, retail and more. Considering Indigenous engagement, two operations are of particular interest: Sakhalin Energy and Salym Petroleum Development[14]. Sakhalin Energy is developing oil and gas fields off the coast of Sakhalin Island. It is the first Russian offshore oil and gas production site, and as it is located in an Arctic environment prone to earthquakes. National and international concerns arose considering the potential impact of the project on whaling migration patterns, and more generally on the unique Arctic biodiversity in case of an oil spill. From the beginning, the project had a high level of international exposure; non-governmental organizations were highly concerned about the environmental disruption and damage the project was believed to cause, and were following closely all developments involving an environmental or Indigenous element. Salym, on the other hand, was a much smaller project, in a more concentrated area. Also, this operation is onshore and overall less environmental impact was expected. Considering the strong regional focus of Russia's Indigenous peoples' legislation[15], when one would compare Sakhalin with Salym, in the first region Indigenous peoples do not have very well-regulated, formal rights. Opposed to this, in Salym the Indigenous rights are much more prescriptive, and the team actually had to negotiate and reach an agreement to be compliant with the law. In some ways, this has complicated engagement in Sakhalin, as much was

[14] Sakhalin Energy is a joint venture of Shell, Gazprom, Mitsui and Mitsubishi, while Salym Petroleum Energy is a joint venture with of Shell and Ivikhon, a Russian oil company.

[15] In Russia the recognition and protection of Indigenous peoples' (land) rights is established in the 1993 Russian Constitution. Article 69 of the Constitution prescribes that *'The Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation'* (Constitution of the Russian Federation, 1993: art. 69). The Constitution in article 71 and 72 lists those matters over which the Federation has single jurisdiction and responsibility, and those matters over which it shares jurisdiction with the eighty-nine regional authorities. Accordingly, the jurisdiction of the Federation includes the protection of the rights of 'national minorities'; at the same time, the Federation shares responsibility and jurisdiction over the protection of the rights of 'ethnic minorities' (Constitution of the Russian Federation, 1993: art. 71 and 72). Areas of joint jurisdiction, according to article 72 of the Constitution, include *'issues of possession, use, and management of the land, mineral resources, water and other natural resources', 'protection of the environment and ecological safety', 'protection of historical and cultural monuments',* and *'protection of the original environment and traditional way of life of small ethnic communities'* (Constitution of the Russian Federation, 1993: art. 72). Dependent on the number of Indigenous peoples present within their boundaries, and the level of organization among Indigenous villages, the regions move in different pace to implement protective Indigenous rights (Osherenko, 2000-01).

open for interpretation. Thus, the main differentiators between the two operations concerning Indigenous engagement are: 1) the level of potential environmental impact; 2) the level of international attention; and 3) the requirements set by regional legislation.

Community engagement practices and policies of Sakhalin Energy

When Sakhalin Energy started the construction of Sakhalin II, many Indigenous groups[16] in the area expressed concerns for the subsistence of their livelihood and asked for an evaluation of Shell's Environmental, Social and Health Impact Assessment. Most of the communities were highly dependent on reindeer pasturing and fisheries, and some had already claimed to experience severe damage to the rivers, bays, reindeer pastures and forests as a consequence of the operation's activities. Although the operation's SP management was already involved in the development of social investment opportunities and social impact management, the perceived impact on communities was small, with only five Indigenous communities being temporarily influenced in their reindeer migration activities due to construction. Consequently, engagement primarily took place with the small group of Indigenous stakeholders that were identified as living within the zone of impact. This approach was no different from that of other oil and gas companies in the region. However, in the case of Sakhalin, while many Indigenous communities felt unacknowledged and overlooked. The oil and gas industry, and particularly Sakhalin Energy, faced massive local protests and demonstrations in 2005. The protests were backed up by the Sakhalin Association of Indigenous Peoples of the North, the Russian Association of Indigenous Peoples of the North (RAIPON), Green Patrol, Sakhalin Environment Watch and Greenpeace, which were all actors that had a large international network and considerable media influence. On January 20, approximately 250 protesters held a meeting on the sacred ground of Nivkh; the protests intensified on January 23 and June 29, when the groups blockaded the roads leading towards Sakhalin energy. Meanwhile, national and international support for the Indigenous protestors increased. Petitions were sent to involved government agencies and international funders, and Sakhalin Energy received questions from various regulatory agencies about its environmental impact assessment and its Indigenous engagement considering mitigation of the consequences for the communities.

In response Sakhalin Energy decided to redesign its engagement process, involving, among others, the Regional Council of Authoritative Representatives of Sakhalin Indigenous peoples, RAIPON, Indigenous representatives in the Sakhalin regional government and independent Indigenous representatives. After several rounds of consultation, it became clear that the major concerns of the Indigenous communities revolved around their economic development. Sakhalin Energy decided to adopt a development plan oriented towards Indigenous communities. The structure of the Sakhalin Indigenous Minorities Development Plan [hereinafter SIMDP] was developed in cooperation with the regional government, the Regional Council of Authoritative Representatives and three executive committees which all involved a certain level of Indigenous participation. The SIMDP was signed in 2005 and was designed as such that it needs to be renewed every 5 year. The SIMDP structure incorporates iterative engagement, with new consultation rounds for every 5-year revision of the SIMDP. Mid-term reviews are executed by external experts, Indigenous representatives and sociologists to ensure commitments by both sides are upheld. A final review is undertaken by the end of each term.

Furthermore, the company has created an Indigenous People Unit, consisting of only Indigenous peoples, that is made responsible for SIMDP implementation and all Indigenous issues that might arise

[16] Amongst others, Indigenous groups near Sakhalin are Nivkh communities, a Nogliki settlement, the Sakhalin Evenks, the Sakhalin Nanai community, the Sakhalin Nanaytsy community and the Uilta community.

as a consequence of the company's activities and projects in Sakhalin. Also, they serve as company ambassadors. Reporting back is done through the company's CLO and the head of the Unit to the regional SP Manager.

New negotiations for SIMDP II were initiated in 2010. This second Plan (2011-2015) was developed in compliance with the principle of Free, Prior and Informed Consent. The Regional Council of Authoritative Representatives, previously a NGO formed by selected Indigenous community members, held an election to choose its own representatives to increase the legitimacy of the body. Through two consultation rounds with both the newly elected Regional Council and a varied representation of members from different Indigenous communities, goals for the SIMDP II were decided upon. At the final hearing, the Indigenous people representatives officially gave their consent.

Like the SIMDP I, the SIMDP II focuses on capacity-building, benefit-sharing and mitigating potential impact. What has been changed is that the decision-making power around budget al.location of social investment and local content in the SIMDP II is vested in the Social Economic Council, a body again consisting solely of elected Indigenous peoples. Sakhalin Energy does not interfere unless there is a grievance of any sort. The grievance mechanism of Sakhalin Energy is developed in accordance with the Ruggie Framework principles: after participating in an UN-conducted test for the possibilities of implementing the Ruggie Framework the company was recommended to design a special grievance procedure for Indigenous communities. This procedure now involves the Regional Council of Authoritative Representatives, the Indigenous representatives of the Sakhalin government, and Sakhalin Energy discussing the appropriateness of all received Indigenous complaints and potential mitigation or compensation measures. However, the grievance mechanism is rarely used for impact mitigation: the SP team has found that Sakhalin Energy does not have a direct negative impact on any Indigenous communities apart from the impacts of fear and concern. In order to effectively minimize the communities' fears, Sakhalin Energy has developed an information sharing system involving the Regional Council. Plans that will seriously alter the contextual environment in which SIMDP II was constructed, for example in the case of business enlargement, are communicated to the Council which on its turn informs the communities in the area. The same mechanism is used in case of oil spill risks. Up till now, the team has not received any expressions of dissatisfaction with this mechanism. For that reason, the existing grievance mechanism is primarily used to ventilate issues with the distribution of social investment funds or to express dissatisfaction about the use or quality of the materials given to the communities in line with the investment programs.

Community engagement practices of Salym Petroleum Development

The Salym project has been developing oil fields in a remote sub-Arctic area of West Siberia. From the beginning, the team conducted an impact assessment following the ESHIA process. Several tribal (Indigenous) communities were identified within the zone of impact, and the issues involved considered primarily land allocation and use. Because the SP team present recognized the need for specific knowledge of and experience with Indigenous issues, they asked an external contractor to do an extensive part within the ESHIA process on Indigenous legislation. As such, the team was able to anticipate on regional regulatory requirements in an early stage of the project. The regional legislation required the operation to consult and negotiate to obtain an agreement with the impacted communities. Several consultation rounds where set up in which all impacted stakeholders, including Indigenous peoples, had the opportunity to ask questions and give feedback. Questions of the Indigenous peoples revolved around land use and resettlement, passing through and hunting on the company's property and disturbance of traditional livelihoods by the business' activities. The consultation rounds resulted in several points of feedback, however, in the opinion of the SP team, none of it was of such a nature that the company had to adjust its business design or rethink its business decisions. After

consultations, the concerns expressed by the Indigenous neighbours were sufficiently answered for and further Indigenous engagement was implemented in a general Stakeholder Engagement Action Plan.

Engagement now concentrates around benefit sharing rather than impact mitigation. The company developed several social investment programs. Some of these are specifically aiming at Indigenous communities, for example a medical care program set up to support accessibility of health care for Indigenous communities in remote areas. Other programs have a more general aim, increasing education and local content in the entire region. In these programs, a specific Indigenous element was implemented to ensure a form of positive discrimination that would help offset any existing disparities between Indigenous and non-Indigenous communities. While developing benefit sharing and compensation structures, one issue identified by the Salym SP team was the lack of a clear and transparent compensation mechanism. In general, the oil and gas industry in Russia has often applied vague and unfounded measures of compensation or benefit sharing. One of the interviewees mentions that ordinary compensation in those days was often translated by government and industry actors into giving away snow mobiles, luxury goods and even alcohol. The industry was obligated by law to engage, but the obscurity and vagueness around appropriate measures for benefit sharing and compensation led to corruption both at the side of the government and the industry. As Shell had in place stringent anti-corruption guidelines, the Salym team recognized the need for a more transparent and honest compensation and benefit-sharing mechanism for Indigenous communities. Salym was the first Russian venture to offer such a mechanism.

Chapter 7: Cross-case analysis – general trends and relationships and key differences in Shell's local engagement approaches

7.1 Determinants of and (institutional) drivers for Shell's regional Indigenous engagement approaches

In recent years, Shell's SP/GDT integrated Environmental, Social and Health Impact Assessments in the business operationalization process. As a consequence, whether or not community engagement is undertaken is strongly determined by the potential adverse impacts of the operation or plant on the community. Although the severity, duration and likelihood of occurrence of an adverse impact is seen as important for the type of mitigation or compensation measures considered, it is the fact that Indigenous communities are located within the zone of impact, i.e. that they are stakeholders with a direct interest in the business that triggers an Indigenous consultation process.

Once an Indigenous consultation process is triggered, five factors influence how this process is designed, who is involved, and what outcomes are considered. Foremost, it is the presence or absence of a national regulatory framework that determines the position of the company vis-à-vis the community and the position and power of the community in negotiations. Second, though there was only one case in which Shell had to comply with finance requirements, this did result in the company adopting and committing to FPIC. Third, the presence or absence of skilled and experienced SP personnel, culturally aware CLOs and the level of friction with the BOM are mentioned as being crucial to the fulfilment of engagement processes and relationship-building with a community. A fourth factor is the amount of international and national NGO and media attention that is given to the proposed or developed project. The community's capacity to effectively respond to the company's engagement efforts is the last factor of influence identified.

Notably, the existence of the HSSE&SP Control Framework and the guidance of the SP Handbook are mentioned only three times (in the cases of Majnoon, the Prelude Floating LNG in Australia and Salym) as having contributed to the development of the current Indigenous approach.

Regional and national regulatory pressures

The national and regional regulatory context in which the company conducts its business is seen as the most important factor shaping consultation. Interviewees working in regions where specific regulations regarding Indigenous peoples exist – such as Canada, Alaska, and Australia – considered that this is the first and foremost determinant for their engagement approach. In Canada and Alaska, where Indigenous land rights or native title rights are acknowledged in jurisdiction and legislation, the relationship of the community vis-à-vis the corporation is much more formalized; although in Australia similar jurisdiction exists, Shell did not consider Aboriginal issues its concern until its relative recent entering of the upstream industry in the region.

In those regions with strong protective regulation towards Indigenous peoples, such as Alberta, British Columbia, Alaska and Salym, consultation, participation and consent rights are incorporated into mandatory engagement procedures. In Canada, regulation has created a so-called 'continuum of engagement': dependent on the historic land and usage rights of the community and the expected impact on the community of the proposed business activities, the corporation is obliged to implement engagement activities ranging from information sharing to actual involvement in decision-making and consent. In Salym, official Indigenous consent is a prerequisite for the continuance of business development and in Alaska no business decision can take forth without an agreement with the AEWC

and the regional and communal corporations. In some cases, regulation also sets standards for records management, monitoring, evaluation and benefit sharing.

This contrasts strongly with those regions in which such regulation is absent; nevertheless, the lack of requirements for engagement is considered of equal weight for the eventual consultation design as the presence of such mandatory standards. Although the corporation is less bound to conduct particular modes of engagement, what does and does not constitute a corporate breach of Indigenous rights is hard to accomplish. The boundaries between what is appropriate and what is not become more blurred, as can be seen in the case of Iraq. Here, respecting Indigenous rights by incorporating specific Indigenous consultation rights would neither be appropriate nor efficient: in fact, the intricate politics and tribal and societal structures combined with the lack of government regulation and the weak position of the M'adan Arabs within the country has resulted in the experiencing of a high level of sensitiveness on behalf of the corporation. As a consequence, Shell Iraq has decided to refrain from specific Indigenous engagement and prefers to treat the M'adan as one of many stakeholders. Negative impacts are mitigated through an ecosystem services approach. On the one hand, the absence of strict requirements have introduced complexity, sensitivity and ambiguity; on the other hand, however, the space created by the lack of regulation has also generated incentives for the company to develop innovative mechanisms for the incorporation of the protection of Indigenous subsistence and livelihood in the ESHIA process.

Regulatory pressures via finance requirements

There was only one case where regulatory pressures were set by an international actor: the Sakhalin Energy project, being a joint venture between Shell and Gazprom, is partly financed by the IFC. Consequentially, the operation had to be consistent with the norms and procedures set by the IFC PS7. Interestingly, this was also the only case that had officially adopted FPIC. In none of the other cases was an international organisation mentioned or was a direct reference made to FPIC.

The influence and expertise of Shell's SP personnel: professionalization and business integration

The ability and experience of the operational SP employees, Community Liaison Officers and the IP authorized persons are recognized by nearly all employees as crucial for the development of appropriate engagement procedures. Interviewees find that the manner of engagement is closely related with the team's ability to identify Indigenous communities prior to – and during development activities. If the involved SP team is not experienced with nor knowledgeable on IP issues, there is a risk of misidentifying communities that might well fit the characterization of Indigenous. According to a Senior SP Specialist working in Project & Technology – which is one of the first departments involved after exploration has turned out successful – the capability to correctly identify Indigenous peoples is often missing in the BOM Team. The sub-section of P&T involved in the assessment of social, economic, health and security impacts of business prior to business development is Non-Technical Risk, or NTR. Within P&T/NTR, expertise on Indigenous rights is acknowledged to be essential, and one of the issues the team has identified is the lack of such knowledge and expertise within the different lines of business; in the development and operationalization of resource projects, it often occurs that different BOM teams succeed each other without sharing information about the communities involved. What is more, if at the beginning of the development process expertise is lacking, succeeding BOM teams will have to make up arrears while this is not always possible in the case of Indigenous engagement. Many practitioners point to the importance of the BOM in recognizing the need for a proper and early SIA. In various cases in Canada and in the case of the Prelude FLNG in Australia, conflicts about the prioritization of Indigenous engagement activities between the business development team and the Social Performance team are identified.

Consequently, the level of influence of the SP personnel on the stance of business management towards Indigenous issues is crucial to the early involvement of Indigenous peoples.

In all operations involved, the (local) CLOs were essential for Shell: the CLOs themselves were often members of Indigenous communities, and their knowledge of the Indigenous history, culture, governance structures, present 'hot issues' and appropriate communication within the community granted the company a thorough cultural understanding. Despite the contextual structure – whether engagement was formalized, legalized and regulated or not – the CLOs also allowed for a certain legitimization process. In the case of Iraq, the commissioning of a CLO effectively allowed the corporation to collect information without being noticed; in this sense, the CLO allowed for an integration of the business within existing societal structures. In Alberta, British Columbia and Alaska the use of local CLOs has opened communications with communities that in the past did not want any dealings with Shell. Thus, CLOs have also performed the role of facilitators. At the same time the employment of local community members is an illustrative case for others in the community of the corporation's goodwill: it shows the community that the corporation is willing to make an effort to understand and incorporate their needs and aspirations.

Normative pressures stemming from international and national media attention

Notably, in those operations in which considerable national and international media attention was given to (environmental aspects of) the proposal or operationalization of the project – the Albian Oil sands in Canada, Sakhalin Energy in Russia, and Alaska – Shell has shown a clear willingness to lay down specific corporate responsibilities towards its neighbouring Indigenous communities. Also, in all these cases, the company strongly promoted its social investment programmes to enhance or stimulate positive impacts.

Shell's Social Performance is very much focused on minimizing potential business risks; the HSSE&SP division is specifically developed to effectively minimize all non-technical risks through consistent use of policies and requirements. The corporate culture and history with high-risk projects such as in Nigeria have made the business aware of the consequences of reputational damage stemming from the insufficient mitigation of environmental, social and human rights impacts on local communities. Already, some NGOs are specifically targeting Shell, trying to alter the public – and consumer opinion by connecting community engagement with environmental impacts. Interestingly, in the three cases in which international attention was high, consultations resulted in some form of formal agreement. Also, in all these cases, engagement does not only involve consultation, but also more participatory forms such as active involvement in monitoring (Alaska and Canada's Sustainability agreements), land reclamation (Albian Oil Sands), or benefit-sharing (Canada's Sustainability agreements and Sakhalin's SIMDP II).

External pressures from community capacity

The capacity and adaptability of the community is mentioned various times as a distinctive feature of specific on-the-ground engagement processes. The community's fear of losing its subsistence livelihood is considered a negative impact in every project. Dependent on the level of education and the legal and political acknowledgement of the community by government and society, the community is able or unable to be consulted properly and to participate or to be involved in decision-making around the project. The lack of primary education is often hindering local procurement and local content initiatives.

Adaptability also involves the capacity of the community to lift on the economic development that is brought to the area by the extraction of resources. Although it is seen as one of the major goals of the

company, often Indigenous communities are not capable of benefiting from the development of their lands and resources. One case that differs in this instance is the Fort McKay First Nation community that is traditionally situated in the area that now covers the Athabasca Oil Sands fields. This First Nation community has been able to construct several business initiatives to support oil extraction activities and over the years has become one of the Albian Oil Sands' major business partners. Unfortunately, the opposite is often true for other Indigenous communities. For example at the Prelude FLNG in Australia: although there are opportunities to develop a commercial air strip which would benefit the Djarindjin part of the community, both due to an educational backlog and a lack of legal recognition of Aboriginal land rights, the Lombadina part of the community is likely to stay behind. In some Canadian First Nation reserves, community leadership has shown to be corrupt by which the entire community loses its capacity to progress; and any attempt to involve the community through social investment or local procurement proves ineffective. And in Iraq, adaptability has a strong external dimension: it might well be that the lack of adaptability of a community is caused by (dis)connectedness or discrimination and marginalization from which a backward position has evolved. This is particularly true in the case of Iraq.

Internal pressures: Shell's HSSE&SP Control Framework and the SP Handbook

Shell's global Indigenous engagement vision has been given shape by the mandatory requirements laid down in the Control Framework. Concerning Indigenous peoples, the Framework establishes that once Indigenous communities are identified within the zone of impact, the operation is required to involve an SME on Indigenous peoples[17] to assist in the design of an appropriate, meaningful and respectful engagement process. Furthermore, the operation is to develop an Indigenous Peoples Plan (IPP) or an Indigenous Peoples Development Plan (IPDP). Additional guidance on Indigenous engagement processes is given in the SP Handbook, as well as a more elaborate clarification of the design of an IPP or IPDP.

The SP Handbook is largely based on the experiences of Shell in Peru, Sakhalin and Alaska. The majority of the regional SP managers was involved in at least one of these projects. While the SP Handbook itself did not always come up in the interviews as being important for on-the-ground engagement, in nearly all interviews the respondents referred to these previous experiences as providing valuable learning lessons. In the cases of Majnoon, Sakhalin and the Prelude FLNG, the interviewees mention either that they had used the SP Handbook in the design of the consultation process, or they named elements from their consultation strategy that had a direct linkage with the guidance given in the Handbook, such as a Stakeholder Engagement Action Plan.

When asking the interviewees whether they think the engagement framework thus far created by Shell is sufficient, most state that they believe the general level of the framework is necessary to ensure regional flexibility. The different regional and national structures, legislations, regulations, and societal expectations make a more prescriptive framework unworkable. Regional flexibility is wanted more than rigorous global corporate guidance. Representative is the opinion of a member of the Canadian consultation team, who claims: *'I would say the broadness of the framework creates room for a regional interpretation, which is empowering and enabling for us here in Canada'*. Another employee also states that *'you can't classify Indigenous peoples as one group. I think the handbook is something you look at for guidance… it defines your work techniques. It's your base. And I think it is flexibility then that we need'.*

[17] Within Shell, the SME on Indigenous peoples is Linda Jefferson; Rita Sully (SME on Cultural Heritage), David Atkins (SME on community engagement) and Jan Grobler (SME on Land and Resettlement) are also involved in various projects in which an Indigenous element is identified.

The need for regional flexibility is recognized in Shell's global corporate standards as well. The Business Principles and the Control Framework both explicitly preference the regional focus, stating that all Shell assets and operations are obligated to comply with existing (national) laws and regulations. Thus, the current culture within the company is bended towards regional flexibility and local execution, leaving much of the decisiveness, responsibility and accountability with the operational Social Performance managers.

Remarkably, on-the-ground practitioners in general tend to have less familiarity with Shell's Control Framework and the SP Handbook. With the exception of Iraq and Australia, of which the regional SP managers at that time were closely involved in the development of the SP Handbook, in the other regions the interviewees state not to know for sure whether their community engagement activities are compliant with the Control Framework. For example, one of the interviewees in Alberta states that he does not really have a *'solid handle on global knowledge'*, and that *'to be quite honest with you, the internal framework and SP guide that's out, we're not totally familiar with those. I am not, there are probably a few around the team that are, but I am not'*. In Alaska, one of the interviewees admits not to know exactly whether the team is compliant with the framework, as *'actually, I don't really read into it* [the HSSE&SP Control Framework]. *I don't know … I couldn't say that what we do is the same or different and in what ways*'. In some instances, for example in Canada, the reason why the SP personnel might be less familiar with the Manual and Handbook could be that the strong regional strategy has a more prominent place in the on-the-ground engagement. In other instances, however, the expertise of specialized Indigenous engagement teams has replaced the SP Handbook in the process of developing an engagement approach.

Mimetic isomorphic pressures

The existence of mimetic pressures by industry organizations or other extractive industry corporations was rarely acknowledged by the interviewees. Only in one region were mimetic pressures identified: one of SDA's (Australia) SP advisors mentions that

> *'… we just got a mining contract with Rio Tinto to provide a ridiculous amount of fuel, and in that tender evaluation in that contract Rio Tinto was like 'what are you doing to close the life expectancy gap between the indigenous and non-indigenous Australians?', and 'we're not going to look at any tenders if you can't prove to us that you can prove that you're actually looking to actively improve the local content from the Indigenous community. …. And if we didn't have that* [the RAP], *we know now, that we definitely wouldn't have gotten that fuel supply deal'.*

In none of the other cases were other corporations seen to pressure Shell to tighten its responsibilities towards Indigenous communities. On the contrary, in many regions Shell was considered by its employees as an example and a norm leading company for its competitors and business partners. A former employee of Sakhalin Energy for example recalls:

> *'Sakhalin is a famous case in Russia. We share experiences with other companies … we hold presentations, for example we did one for a gold mining company, and one for two big Russian Oil companies. The World Bank sees us as a good example, and we have won numerous awards. I know that one of the projects operated by Total, Yamal LNG, has said to follow the approach of Sakhalin'.*

In Canada, one of the interviewees states that

> *'Shell has a pretty good reputation around, because we're actually the best consultationists, being there, talking to the people, understanding the issues, those kind of things. And Shell does that, for the most part, pretty good.'*

.2 Shell and Indigenous rights on participation, consultation and consent

Shell's stance towards Indigenous engagement and FPIC

Shell's external stance towards Indigenous engagement is most clearly formulated in its publicly available 'Working with Indigenous people' statement and in a chapter of its 'Comprehensive guide to offshore oil and gas development' called 'Co-existing with subsistence cultures'. In the first document, Shell states that the new challenges in energy *'can only be realised if sustainable development is taken seriously'*, while for that to happen, the process *'must begin by listening to these communities and moving ahead carefully'* (Shell: 1*)*. The company then aims to minimize its impacts while optimize the sharing of benefits that will support the communities in preserving the subsistence livelihood. In the process of impact minimization and benefit sharing, communities are involved; as Shell states, *'we want to build relationships that will allow community members to share their views and concerns with us as we move forward'*.

This point of view is repeated in the document Shell published to share its thoughts externally on 'Co-existing with subsistence cultures'. In this document, the corporation acknowledges that *'now, more than ever, it is essential to interact and communicate with stakeholders to identify and address risks, opportunities and the needs of the people'* (Shell Alaska: 3). The corporation highlights the importance of gaining trust and using the knowledge of local communities. Interestingly, Shell does not mention the term Indigenous peoples in these documents, but instead prefers the term 'subsistence cultures'. On the corporate website, again the company repeatedly refers to 'neighbors' or 'local communities' instead of explicitly mentioning Indigenous peoples as specific stakeholders for its operations.

Internally, Shell's stance towards Indigenous engagement and FPIC can best be described as 'sitting on the fence', striving to be 'in the middle of the pack' rather than at the forefront of new developments. A large part of HSSE&SP management believes that it is certain that FPIC will influence Shell's policies and practices. Although FPIC remains a soft law requirement at the moment, Shell is very much aware of the reputational risks that could follow from not conforming with internationally emerging norms and institutions. Ideally, corporate management would like to see that the company is compliant with the norms set by FPIC, without explicitly supporting FPIC: *'when it becomes obligatory, or when we are asked to conform to it, we must be able to simply connect the dots and easily adopt it. FPIC should be for all engagement we undertake, for all the communities we work in'* (member Global SP/GDT).

Concerns about the applicability of the concept for Shell are also brought to the fore. Mutually shared feelings about the lack of information concerning what is potentially expected of the company are substantiated by the insecurity around what response would best suit Shell's interests. As some point towards a position statement, others prefer an implicit accordance to FPIC. In their opinion, consent doesn't fit within the existing Framework, and thus the company needs to have some sort of practical response to the issue. The issue of consent is still very much controversial for Shell's employees; consent is seen as conflicting with state sovereignty; as giving the right to veto to some but not to all; and as complicating consultation and participation because consent would remove the incentive for communities to enter into an engagement process.

The SP practitioners, having a more national or local perspective, contemplate that the necessary regional flexibility would be infringed upon if a global strategy on FPIC and/or consent were to be developed. Some do feel that FPIC has the potential to increase discrimination, inequality, and conflict within societies; and some feel that Shell, while being a good neighbour, has the obligation to treat all

vulnerable and local communities the same - offering them the same opportunities and mitigating the impacts on them through the same mechanisms. Mostly, the national or regional circumstances and the personal experiences colour the stance of the SP practitioners. One of the interviewees working in Iraq mentions:

> *'I mean, consent is a difficult word, right? The implication of that word is that communities have a right to consent, the right to veto and say no, and the ability to say no… here, they follow the Iraqi law, they follow it to the letter of the law. And the letter of the law in Iraq is actually fairly transparent; it is perhaps not very fair, or...it is not something you would describe international best practice, but it is really transparent. But the reality is, there is no Free, Prior and Informed Consent in this instance. The government has the right to acquire land for oil and gas purposes… So, I think, yeah... Free, Prior and Informed Consent... I don't know where it is anywhere. Especially for oil and gas projects, because the resources tend to be owned by the government.'*

One of the other interviewees from Alaska reflects an opposite stance: 'S*hell's engagement in Alaska would come very close to the actual practices prescribed by FPIC. The communities have the right to veto. FPIC is implementable within Shell… But I am talking about the specific Alaskan context.'*. In Canada, where FPIC is seen to be inconsistent with national standards, the concept is defined by one employee as: '*a bunch of words on a piece of paper'*, while another employee describes it as a '*normative approach that, and I think unintentionally, waters down to disrespecting Indigenous Peoples aspirations and histories wherever they exist in the world'*.

Sakhalin Energy is the only operation at the moment that has publicly committed itself to the FPIC principles. However, even here, the regional scope is recognized. SP staff members previously responsible for the venture's Indigenous engagement express their doubts for a global Shell Approach towards the concept. Non-mandatory guidance on the topic would be appropriate though, as some SP members will come across situations in which they could have to apply FPIC principles in the nearby future.

Overall, the SP practitioners in the field see more value in a uniform and high standard for engagement to make sure not to differentiate between people, and to obviate issues around consent. In short, two different thoughts can be identified throughout the company: for one, there is a high desire, particularly within global SP management to comply with international standards on engagement and treatment of Indigenous peoples. On the other hand, there is an interest in not engaging different groups of people differently and to maintain regional flexibility. FPIC is seen as inapplicable in the Shell context because the corporation recognizes only few situations in which it could actually be used, while it is not in line with the company's more general corporate aims, and does not fit within existing national regulatory frameworks.

International regulatory pressures and soft law requirements

International expectations and soft law requirements are, if known at all by practitioners on-the-ground, not seen as having a direct influence on on-the-ground engagement. On-the-ground practitioners stated to have little knowledge of international developments, although regional management showed some knowledge of international treaties, declarations and soft law developments such as the ILO 169, the UNGP and the UNDRIP when asked about. The SMEs showed to be most knowledgeable on the issue, as they were keeping track of international developments and expressed concerns around how to adjust to and incorporate such developments within Shell.

Operationalizing participation and involvement

Increasingly, particularly in those regions with restrictive national regulation, Shell is involving indigenous communities in business development, impact assessment and mitigation activities. For one, as mentioned above, in some of these regions the corporation has been articulating community commitments through (renewable) agreements; the CAAs in Alaska, the Sustainability Agreements in Canada, and the SIMDP in Sakhalin are examples of such renewable and iterative agreements. The common feature of these agreements is that they have been developed through negotiation and participation of the Indigenous communities. They articulate the commitments of Shell to mitigate and compensate for specific impacts, as well as the commitments of the community in acknowledging the company's presence and granting a 'social license to operate'. Generally, these type of IBAs also include a section on social investment and the sharing of potential revenues.

Involvement of Indigenous communities does not stop after negotiations have culminated in an IBA. In those regions in which a form of IBA is reached, often Indigenous members of the communities are given a role or position in mitigation activities, benefit sharing allocation or environmental management and reclamation. In Sakhalin, committees are composed with Indigenous representatives to discuss the allocation of corporate social investment funding; in Alaska, Shell has been employing Inupiat community members and their traditional knowledge for environmental monitoring programs; and in Canada, participation and involvement of Indigenous communities occurs through mitigation and investment committees, and in some locations also through environmental preservation and reclamation schemes. In an attempt to better anticipate on the changing concerns, fears and interests of Indigenous communities, in some projects Shell has adopted an Indigenous peoples specific grievance mechanism. Most illustrative is the mechanism in Sakhalin. Indigenous communities are often different from non-Indigenous communities with regard to the access they have to technology, education and knowledge of extractive business processes. Indigenous peoples specific grievance mechanisms therefore might be different in terms of entrance, treatment and resolving. In Alaska the grievance mechanism is more restrictive in the sense that when communities feel the corporation is acting in violation of the CAA, they have the possibility to put a halt to these non-negotiated adverse business activities immediately. Although Shell is experimenting with Indigenous peoples specific grievance mechanisms in Sakhalin and Alaska, there has not yet been a widespread acceptance of such systems in other regions.

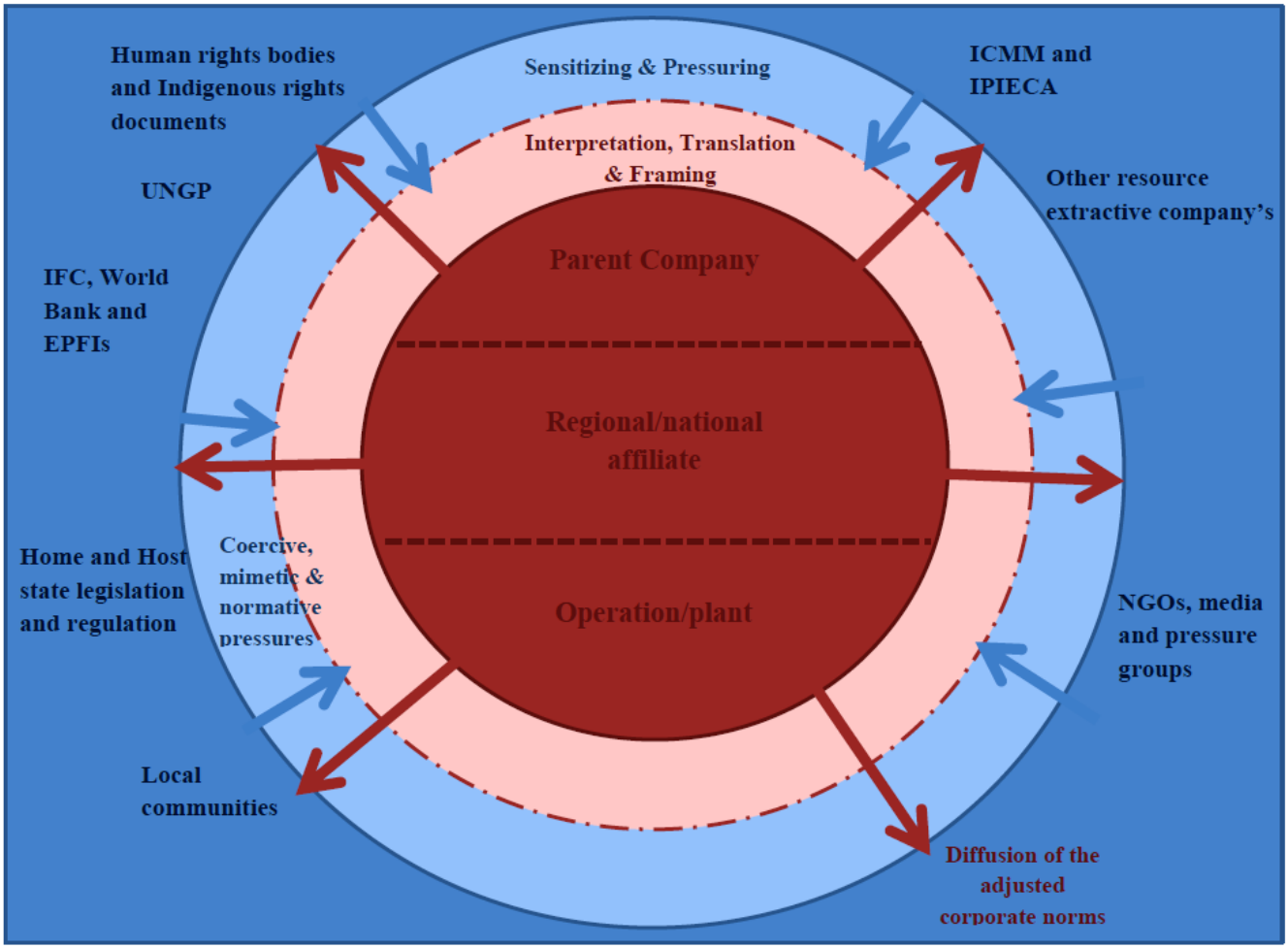
Improving local content and incorporating an Indigenous element into procurement is a common goal throughout the company. However, what is not common yet is the creation of partnership structures that enable a form of Aboriginal ownership. One example is the Mackenzie Gas project in Canada. Here, Aboriginals are given a direct voice in the development of the project with a seat on the Board of the project, and participation in all project committees, through the creation of the Aboriginal Pipeline Group. The Group was funded by means of a risk free borrowing opportunity. Thus, Aboriginal ownership was created in a major, multi-billion dollar project, which would ensure the communities a constant form of benefit sharing, while also created an immediate incentive for the communities to cooperate with the other project proponents. Aboriginal ownership has also shown beneficial in the Fort MacKay community, although this was not a specific Shell targeted development. In the case of Australia's Prelude FLNG, attempts to establish some future form of Aboriginal ownership are crystallized through the development of a commercial airstrip owned and operationalized by the Djarindjin community.

Part III: Reflections

Chapter 8: The institutionalization of consultation and consent in the corporate domain revisited

At the end of Chapter five a model to describe the institutionalization of Indigenous peoples' rights was introduced. This model is depicted here as Figure 3. In this model, a plurality of norm leaders and entrepreneurs stimulate TNCs to adopt respect for Indigenous peoples rights, and in particular FPIC(on), through a process of sensitizing and pressuring; through positive and negative coercive, mimetic and normative pressures corporate actors are compelled or coerced into adopting certain standards for Indigenous engagement. The corporation, on the other hand, through a process of interpreting, translating and framing, incorporates and adjusts the norm as to suit its corporate aims, interests and strategies. Such norm adjustment occurs at all levels of the corporate organization, just as pressures are set on the macro-, meso- and micro-levels of the corporate environment as well. While in this case, the TNC is treated as a norm follower, due to the trans-boundary nature of the activities of TNCs and the often large-scale economic power that such actors possess TNCs consciously or unconsciously also perform the role of norm entrepreneurs; i.e. TNCs often do diffuse the adopted and adjusted form of the initial international norm and as such feed the development of new international norms.

Figure 3. The corporation and its corporate environment – the diffusion of Indigenous peoples' rights in the corporate domain.

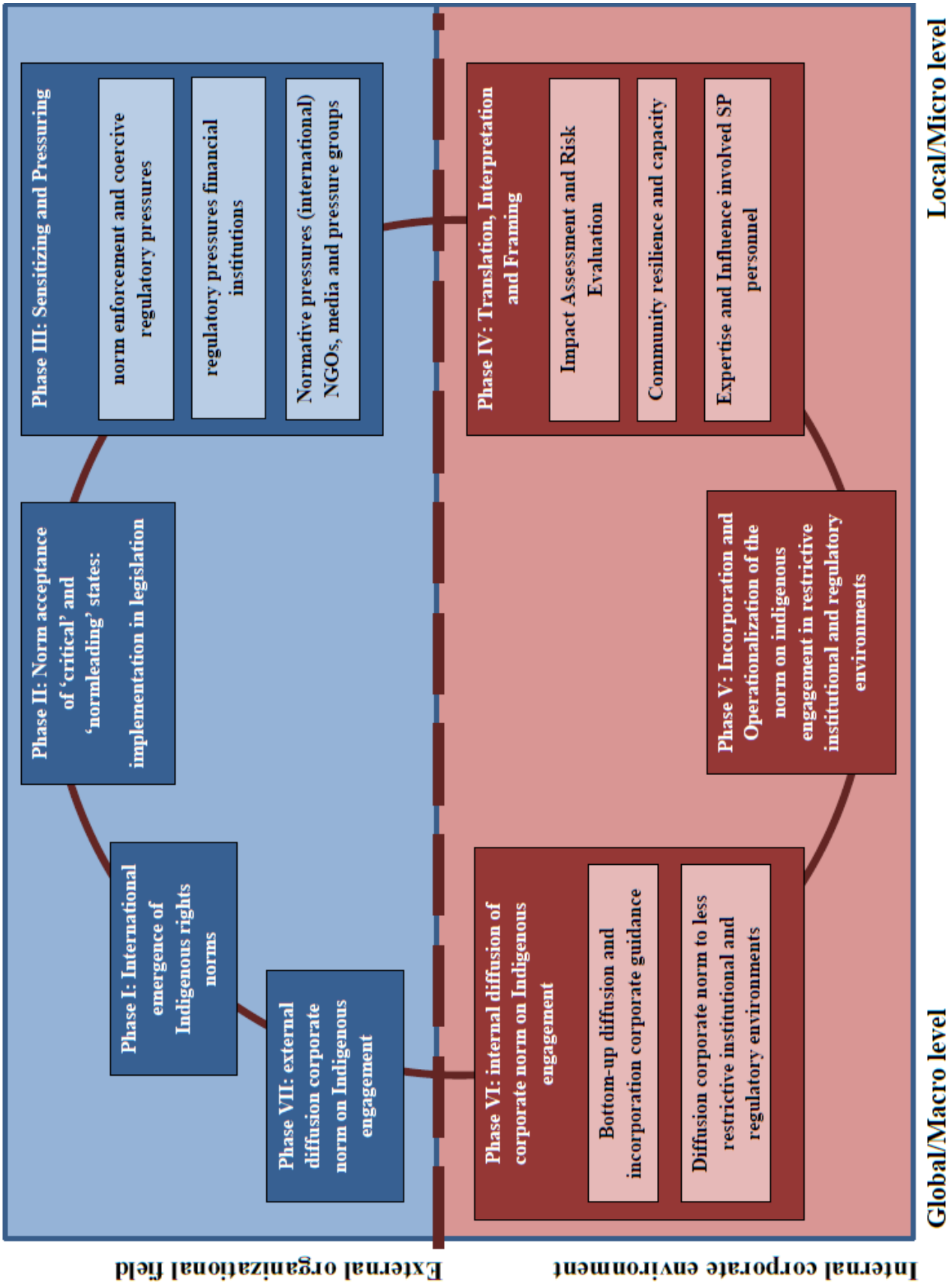


When one would compare the above described model with the results of the within- and cross-case analyses of Shell's regional Indigenous engagement approaches, some elements that showed to be of importance in the case studies are missing in the theoretical model; these, respectively, are: 1) the significance of impact assessment and risk evaluation procedures on an operational level in the interpretation and translation of norms on Indigenous engagement, and the adequate expertise and influence of the SP employees on the ground for the undertaking of a proper assessment of corporate impacts and risks on Indigenous communities; 2) the diffusion of international norms between the different organizational levels present within the corporation, and the corporate preference for a bottom-up structure that allows for regional flexibility; 3) the key importance of host state legislation and regulation for the design of the engagement process; 4) the experienced pressures coming from media and NGO attention, leading to more formalized engagement processes; 5) the key importance of the IFC Performance Standards in distributing FPIC once external lending is needed; and 6) relevance of incorporating different stages or phases to describe the institutionalization of norm on Indigenous engagement as to be able to differentiate between regional approaches.

Figure 4 displays the adjusted model for the institutionalization of norms on Indigenous engagement. The model presented describes institutionalization of these norms as a circular process; the phases through which norms are transferred are either internal or external; subsequently, the model is divided into two segments, one being the external institutional environment and the other being the internal corporate environment. In the external institutional environment, norms are brought to the fore and emerge as standards in international society. Increasingly, they are accepted by critical and norm-leading states, regulatory agencies and finance institutions and implemented in national regulation and legislation. As such, the initial norm is transformed into a regulatory pressure on TNCs, and combined with other pressures set on the corporate actor this prompts the norm to go into the next phase; through impact assessment and risk evaluation procedures, the corporate actor assesses the potential influence and relevance of those these norms and stakeholders directly and indirectly pressuring the corporation and through a system of prioritizing the interests of these stakeholders, the corporation is translating, interpreting and framing the values these stakeholders uphold and promote.

The capability of the involved SP team to asses and prioritize stakeholder values and interests, and to effectively translate and incorporate these into corporate strategy, policy and practice is a key characteristic of this phase; also, the capability of the community to efficiently pressure the corporation and to bring its interests and values to the corporation's attention is an important element of sensitizing and pressuring. In the fifth phase, the norm is implemented in the regional internal corporate environment, while the following phase includes the diffusion of the norm towards other corporate management levels and corporate actors operating in less restrictive environments. The pressures for norm adoption in these regions are primarily internally and stem from the corporate preference for more coherency and consistency within the organization. In most instances, after the norm is internally communicated and adopted throughout the business, an external vision, strategy or commitment is communicated. However, it might well be that such external communication is already initiated at the regional or local level (as can be seen in the case of Sakhalin Energy); in these cases, diffusion of the corporate institution through phase VI and VII appears at the same time. While the norm has been made suitable for the corporate environment, and has been interpreted and translated at several corporate levels, it is likely to differ from the initial norm promoted by international norm entrepreneurs. Consequentially, the corporate norm distributed to the external institutional environment will initiate a process of public evaluation and adjustment of the expectations set on the TNC, while the initial norm as well might be altered after best practices are established.

Figure 4. Shell and its corporate environment – the diffusion of Indigenous peoples' participation, consultation and consent rights



Chapter 9: Discussion

9.1 Discussion of the research results

This section offers a discussion of the thesis results by means of the research objectives, and will formulate specific answers to each objective. For each objective, a critical reflection is given on the methods and concepts used, the processes of data collection and analysis, or potential limitations of this research.

Research objective I – To establish the requirements set in international human rights law with regard to Indigenous peoples.

Indigenous peoples' rights and requirements

Indigenous peoples' rights are laid down in a variety of international and regional instruments. At the moment, the ILO Convention No. 169 is the only legally binding instrument that specifically concerns the rights of Indigenous peoples. The Convention is binding for those states that have signed and ratified it. Not-binding, but equally important at the international level is the UNDRIP: although the Declaration cannot enforce any obligations on its signatory states, it is founded on strong moral values and built on preceding international principles of law; it is most likely that future customary international law involves some of the provisions laid down in the current UNDRIP. What is more, increasingly existing human rights documents such as the ICCPR are analyzed on their applicability in an Indigenous context. The UN Human Rights Council, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and several national courts such as the Supreme Courts in the U.S. and Canada and the High Court of Australia have advised and judged in favor of such interpretation, and have thereby furthered the internalization of Indigenous rights in international and national jurisprudence.

Rights that have been framed in terms of Indigenous peoples include: the right to self-determination, the right to self-governance, the cultural integrity norm, the non-discrimination norm, the right to development, the right to property and ownership, the right to participation and consultation, and the right to FPIC. In general, the main argument brought forward by Indigenous peoples advocates is that (economic) self-determination, self-governance and self-chosen development is pointless unless supported by participation and consent rights; this point is picked up by human rights bodies and increasingly has a basis in international law. In the UNDRIP, explicit reference is made to the Free, Prior and Informed Consent of Indigenous peoples. The UNDRIP calls for FPIC in the case of relocation (UN General Assembly, 2007: art. 10), disposal of hazardous waste within Indigenous territories (UN General Assembly, 2007: art. 29), in any development project for mineral, water or other resources, or in any administrative or legislative policy that might affect Indigenous lands, territories, resources, culture, or subsistence livelihood (UN General Assembly, 2007: art. 19 and 32). FPIC has been increasingly implemented in a mixture of both binding and non-binding human rights sources by other human rights bodies such as the Committee on Economic, Social and Cultural Rights and the Inter-American Court and Commission. Consent, and more specifically FPIC, has also been adopted by other international organizations such as the World Commission on Dams, the ICMM and the International Finance Corporation. Thus, although FPIC is a still evolving human rights norm with no official legal standing yet, human rights bodies seem to share the opinion that the already existing normative legal framework gives a certain degree of precedence to the concept.

FPIC as an international institution

Institutions, being defined as '*routines, beliefs, norms, cultural rules or ideas that create collective*

meaning' (Campbell, 2004), are stimulated or promoted by entrepreneurial actors that pressure others within their institutional environment. In this thesis, the argument is made that FPIC and FPICon can be seen as such international emerging institutions. Although the construct of FPIC has little official legal standing yet, it has been recognized to hold strong normative value. FPIC is constructed on international human rights precepts such as Indigenous self-determination, the universally accepted right to equal treatment and the non-discrimination norm, and the right to property. At least on the part of state responsibility, there seems to be growing consensus within international human rights jurisprudence that FPIC means, at a minimum, that a state must engage in good faith consultations with Indigenous peoples prior to any development activities on the lands that the community has traditionally used or occupied (Ward, 2011). This is highlighted particularly by the increasing attempts for codification, formalization and routinization of the construct in international law. Indigenous rights advocates have been effective in phrasing the right to FPIC not only as effective realization of the right to self-determination, but also as legally constructed on the right to equal treatment and the non-discrimination norm, the right to cultural integrity, and the right to property. Currently, particularly in evolving international jurisprudence, FPIC has come to serve as an umbrella concept for these international rights (Tauli-Corpuz et al., 2010; Hill et al. 2010). Furthermore, the concept is increasingly associated with an emerging body of best practices, which is translated into tools and instruments for stakeholder engagement, while attempts are undertaken to globally routinize these best practices (Campbell, 2012). Clearly, FPIC represents a collection of rules and norms, an accumulation of beliefs and cultural rules and ideas which define appropriate behavior for specific groups in specific situations.

At the same time, the concept of FPIC still presents numerous definitional, legal, and procedural challenges for states, corporations and Indigenous communities. It is built on rather vague concepts such as consent, consultation, right to veto, good faith and representation – concepts that continue to be interpreted differently by different actors and in different regional contexts. Considering these issues and challenges, it would be premature to describe FPIC as a 'relatively stable collection of practices and rules defining appropriate behavior of specific groups in specific situations'. Although FPIC is not yet fully internalized and 'taken-for-granted', there is still a clear development visible. Many organizations are moving away from the standard of FPICon, and increasingly the obligation to obtain consent is laid down in legal frameworks and has become part of the requirements of state and private actors.

As Finnemore and Sikkink (1998: 897) state: *'new norms never enter a normative vacuum but instead emerge in a highly contested normative space'*. Therefore, it could be argued that it is specifically the contestation of FPIC, and the controversy surrounding the norms and practices that form its foundation, that is actually an important part of the process of institutionalization. The process through which emerging institutions are challenging existing and slowly, are incrementally gaining more legitimacy, and finally reach a tipping point after which they are commonly accepted is exactly what Finnemore and Sikkink would expect in highly-contested ones normative spaces. While it may well be said that FPIC is a still evolving international human rights institution, FPIC as an institutional construct is already influencing the behaviors and attitudes of extractive TNCs towards Indigenous peoples, who increasingly are accepting some form or responsibility for community participation and consultation processes.

Consequentially, I have chosen to define FPIC not as a single instrument, philosophy or human right, but as a developing institution that comprises all these elements; FPIC, as I have tried to establish in this thesis, is a construct founded previous international law precepts, given shape by modern normative conceptions, and materialized through the operationalization of tools, best practices and

instruments developed by several international organizations. Other scholars, however, have focused on singular dimensions of FPIC. Hanna and Vanclay, for example, phrase FPIC as a human rights (2013) or have argued that the construct can best be envisaged as a philosophy. Yet again others have expressed that FPIC is a procedure, a guide to ensure meaningful engagement.

Research objective II – To identify the different pressures and mechanisms through which international norms and expectations on Indigenous peoples' rights might influence corporations.

Theories on the diffusion of international norms

A review of the literature on norm diffusion and institutionalization showed that traditionally, international human rights norms are seen to emerge in a three-stage process: 'norm emergence', 'norm cascade' and 'norm internalization' (Finnemore and Sikkink, 1998). Detrimental in these traditional norm diffusion models, however, is the exclusion of business as an actor influenced by and influencing international norms. Neo-institutional research has attempted to fill this gap by incorporating norm dissemination into business and organization research. Rather than concentrating on single norms, institutional research focuses on '*routines, beliefs, norms, cultural rules or ideas that create collective meaning'* (Campbell, 2004). Institutionalization describes the process '*by which a given set of units and a pattern of activities come to be normatively and cognitively held in place, and practically taken-for-granted as lawful'* (Meyer et al., 1994: 10). The argument made by organizational institutionalists is that isomorphism will occur independently of whether this is functional or efficient: for the acceptance of certain international norms or practices, more important than functional imperatives are legitimization processes and the tendency for institutionalized organizational structures to be taken for granted (Hoffman and Ventresca, 2002). Organizational isomorphism is generally seen to be driven by three types of pressures: coercive, mimetic and normative isomorphic pressures (Campbell, 2004; Delmas and Toffel, 2004; DiMaggio and Powell, 1983; Dingwerth and Pattberg, 2009; Guler et al., 2002; Schultz and Wehmeier, 2010; Scott, 2001). These pressures can both be exerted by external and internal actors.

Studies that have aimed at the development of models to describe the institutional pressures on corporate organizations with regard to specific international norms have mostly emerged in the area of CSR (Maon et al., 2009). The scholars discussed in this thesis have identified several elements and relationships that help explain the role of business in the evolvement and diffusion of global norms, or the role of global norms in the changing of corporate cultures and strategies. For one, the models developed all take into account the various levels on which pressures are exerted; also, the models identify processes of filtering, interpretation, translation and framing as conducted by corporate employees. Some scholars highlight the role of management in this process: it is key for the acceptance of new international norms to 'unfreeze' and 'unlearn' past practices and to challenge existing assumptions about what is appropriate behavior for the corporation. Most models link these processes of translating, framing, filtering and interpretation to both the external context – the nature of the outside stakeholders, and regional and national regulatory pressures – and the internal context – the existing corporate culture, the corporation's history, the influence of management, the structure of existing communication mechanisms, the characteristics of the firm versus the characteristics of the plant, and the role of the individual. Also, in most of the models mentioned, the corporation is involved in a process of reiteration, feedback and diffusion: by translating, adjusting, implementing, evaluating and communicating international (human rights) norms, corporations effectively become actors capable of influencing both the shaping of norms as the adoption of these norms by others; in this sense, corporations can fulfill all roles described in the 'lifecycle of Norms' of Finnemore and

Sikkink: dependent on the factors described above, they can become norm entrepreneurs, norm leaders or norm followers.

Theoretical applicability of CSR literature for human rights institutionalization

The research from which the theoretical foundation for this thesis is derived is largely constituted in the field of CSR, mainly because research on the diffusion of human rights norms towards the corporate domain is nearly absent. However, as has been pointed out in previous research, CSR and FPIC are quite dissimilar constructs. First, the company and its responsibilities traditionally has been kept apart from the public domain (Wettstein, 2012) while human rights almost by definition have been treated as a matter for states. Also, the non-compulsory nature of CSR (Wettstein, 2012) contrasts strongly with the imperative and binding nature of human rights obligations (Campbell, 2006). In the words of Welford (2002, p.2) 'the economics of globalization emphasizes (not surprisingly) competition, capital investment, free trade, growth and the transformation of markets. These do not sit easily alongside the priorities for activists keen promote the rights of people, including women, minority groups, Indigenous populations and children'. In short, the theoretical and normative foundations of CSR and FPIC are found to differ. The question that remains is whether it is possible to assume that the diffusion of a human rights precept as FPIC occurs along the same lines as the diffusion of a construct as CSR.

The results of the case studies indicate that there are differences between the institutionalization of international norms on Indigenous engagement as opposed to CSR. The model did not completely fit the case studies and therefore alterations were needed, as described in section 6.1. The key difference can be found in the type of pressures experienced by corporations: in the case of CSR, these pressures are for a large part mimetic. The opportunities for relative competitive advantage combined with the supply chain pressuring and norm leadership of large TNCs within their own institutional environment have been crucial for the large-scale implementation of CSR in the corporate domain. For FPIC and FPICon, on the contrary, mimetic pressures were largely absent. The main pressure experienced by corporate actors stems from national regulations; as such, these pressures are more often coercive rather than dependent on voluntary incorporation. In the case of FPIC or FPICon, particularly in the oil and gas sector, there is less self-regulation in the industry, and norm entrepreneurs generally are governments and not-for-profit organizations instead of corporate actors. Adoption of FPIC of FPICon therefore is mainly occurring in strictly regulated national environments. Corporations at the moment do not see the 'business case' for embracing FPIC publicly; this might even threat their economic interests in less restrictive environments, or in those environments in which FPIC is interpreted as the right to withhold consent (Hanna and Vanclay, 2013). The missing business case for the adoption of FPIC is confirmed in current academic literature: thus far, business literature has remained vague on the why and how of achieving a corporate human rights-based approach (Wettstein, 2012).

Thus, the constructs of CSR and FPIC are not only different in terms of their nature and theoretical foundation, but also in terms of institutional entrepreneurs and pressures. However, this does not imply that the CSR literature cannot be used as a basis on which research on the institutionalization of FPIC and FPICon can be grounded. Similarities between the two constructs are also identifiable: for one, both constructs can be seen as international institutions; second, both constructs prescribe normative standards as to regulate the behavior of (corporate) actors; and third, for extractives corporations, both constructs are related to stakeholder and non-technical risk management and reflect certain external pressures that could lead to reputational damage if the company refuses to uphold them. The initial theoretical framework based on relationships and elements identified in CSR literature proved useful in establishing a general model, while the results of the case studies allowed for further specification and exclusion of those elements that showed to be irrelevant.

Research objective III: To gather information about current pressures experienced, and practices and policies implemented, in relation to Indigenous peoples at selected operations in which Shell is involved in Alaska, Australia, Canada, Iraq and Russia.

Coercive regulatory pressures for FPIC, consent and consultation

In the theoretical part of this thesis, different institutional pressures that might be exerted on non-conforming actors as to stimulate norm-compliant behavior are listed. In the field of business and human rights, the primary pressures recognized are host state regulatory coercive pressures; governments and regulatory bodies exert pressure on TNCs operating within their boundaries by implementing corporate restrictions and obligations with regard to Indigenous engagement.

From the case studies it became clear that host state regulatory pressures are the main determinants of local corporate Indigenous engagement strategies. Interestingly, none of the regions included in this research had explicitly incorporated FPIC. As mentioned above, it might be argued that in Australia and Alaska, FPIC is at best conceived as implicit. Also for some regions in Canada, this might be the case. However, none of the regions or nations had strict regulations to guarantee the Indigenous right to FPIC. It would have been of added value to this research to incorporate a region in which FPIC is acknowledged by law – for example the Philippines or Brazil – to see whether the local corporate position on the construct would have been different from others in Shell.

Other coercive pressures identified in the literature were 1) the home state extraterritorial law (Ruggie, 2007); and 2) the finance requirements set by international financial institutions (Cambell, 2012; Laplante and Spears, 2008). When looking at the case studies, home-state extraterritorial law did not seem to have impacted the corporate policies, practices and strategies on Indigenous engagement directly. Considering the opportunities for extraterritorial law and the enforcement of a corporate FPIC, it seems as if the developments are still very much in a juvenile state. Momentarily, the liability of States for FPIC is increasingly acknowledged; however, the responsibilities of corporate actors herein are at the moment still ill-defined.

With regard to the regulatory pressures set by international financial institutions, there was only one operation in which this seemed to have influenced Shell's engagement policies or practices. Shell is not dependent on external funding for projects fully developed and owned by the company. In the case of Sakhalin Energy, a joint-venture, there was a direct compliance issue in relation to the IFC Performance Standards: because Shell's joint-venture partner was bound by the requirements as a result of the financial loan granted to the corporation for the development of the operation. A preliminary conclusions would be that smaller and medium-sized companies within the extractives industry, who are dependent on external funding, are more likely to experience stronger pressures for compliance with FPIC via finance institutions. However, to be able to make any concrete statements on this, more research on the institutionalization of FPIC to smaller and medium-sized companies.

Mimetic isomorphic pressures for FPIC, consent and consultation

Potential mimetic isomorphic pressures for FPIC could be exercised both by industry organizations such as IPIECA and by large (competitor and partner) corporations. However, the case studies showed that in general, Shell did not experience any pressuring from these actors. For one, this could be caused by the overall reservations in the oil and gas industry towards the concept of FPIC. Particularly global level employees state that they would feel uncomfortable with Shell publicly expressing its support for FPIC and consent for Indigenous communities, while its competitors have not yet taken steps to do so as well. This attitude can best be described as wanting to be 'in the middle of the pack'.

A second potential explanation for the lack of experiencing mimetic pressures could be, as was derived from the interviews conducted on a local level, that Shell employees consider the company a leader on engagement at the moment; rather than being influenced or pressured by other corporate or industry actors, the employees consider Shell the norm leader or entrepreneur with regard to (Indigenous) community engagement.

To validate either one of these contentions, one would need to research the position of Shell both vis-à-vis its competitors and within the overall industry association IPIECA. However, considering the time constraints and information availability, this research was unable to effectively substantiate such a leadership position for the corporation. The research, therefore, does not include any data collection on the position of Shell in IPIECA, nor on the ways in which other corporations envision Shell and how they rank Shell's position on Indigenous engagement within the oil and gas industry.

Normative pressures stemming from (international) media and NGO attention

Notably, in those operations in which considerable national and international media attention was given to (environmental aspects of) the proposal or operationalization of the project – the Albian Oil sands in Canada, Sakhalin Energy in Russia, and Alaska – Shell has shown a clear willingness to lay down specific corporate responsibilities towards its neighbouring Indigenous communities. In other cases, such as the Prelude FLNG in Australia, media attention has had a significant negative impact on the efficiency of the company's social performance activities.

Normative pressures for FPIC, consent and consultation

The international business and human rights paradigm has increasingly shifted towards the acknowledgement of corporate responsibilities for human rights. The SRSG's 'Protect, Respect and Remedy' Framework and subsequent UNGP on Business and Human rights are the most concrete efforts undertaken thus far in defining what these responsibilities should entail. With regard to Indigenous Peoples, the UNGP clarifies that corporations should give particular attention to the rights and needs of 'populations that may be at heightened risk of becoming vulnerable or marginalized (UNHRC, 2011: 1). Although the UNGP itself does not mention FPIC nor consent, and even uses the wording of 'meaningful consultation' rather than the language of consent, this thesis has argued that there is sufficient reason to believe that the normative pressures exerted by the UNGP and its promoters is among those Indigenous rights that ought to be respected by corporations.

However, such a position is far from controversial; the UNGP does not specifically mention any specific Indigenous rights or engagement requirements for corporate enterprises. It has been argued that the scope of the UNGP is too broad to sufficiently incorporate respect for Indigenous peoples rights; the form of – and requirements for Indigenous engagement and consent or consultation procedures for corporations are not addressed and as such, corporations are left in insecurity on what respect for Indigenous rights entails. Considering all these ambiguities, it is even possible to argue that the development of the UNGP is effectively a type of normative pressure for corporations to adopt Indigenous rights responsibilities?

Within Shell, the UNGP nor the UNDRIP were seen as relevant for on-the-ground Indigenous engagement. On an international level, however, the potential implications for the UNGP were extensively explored and discussed. In particular, a GDT/SP Sustainable Development/human rights advisor was appointed to establish how human rights due diligence procedures, as well as appropriate prevention and mitigation measures for human rights infringements, were to be consistently integrated into Shell's business practices. In this process, particular interest was given to Indigenous peoples and their rights, as a consequence of which the internship position on which this thesis is based was

created. Thus, Shell's GDT/SP showed an awareness of the UNGP, and recognized that these principles would change the ways in which they conduct business. Furthermore, the team reacted on this contention by researching and developing specific corporate human and Indigenous rights procedures. As such, although the pressures deriving from the UNGP for adopting FPIC are at best indirect, in my perception Shell itself acknowledged experiencing normative pressures for adopting Indigenous engagement rights after the establishment of the UNGP. Therefore, the UNGP is included in the framework describing the institutionalization of FPIC, FPICon and consent.

Case study selection

With regard to the case studies, two issues can be identified that might have had an impact on the results of this research. For one, the cases were selected within the same corporate environment, namely that of Shell. The advantage of doing so was, that certain elements could be assumed similar, for example the level of top-down global guidance and governance. However, the results might have been different if the research was carried out in another TNC, or if a cross-corporate design was used. Second, all case studies were undertaken in the same four-month period. However, while developing a model describing the institutionalization of norms on Indigenous engagement towards the corporate domain, the importance of a phased approach was highlighted. The results of this research reflect Shell's Indigenous engagement approaches at one moment in time. For a proper understanding of the ongoing and iterative process of institutionalization, a comparison between the current status of Shell's Indigenous engagement and its status after a specified period of time – for example one year, or five years) is needed; only then would become clear what the directions of norm diffusion within the corporation effectively are, and who are the major norm entrepreneurs.

10.2 Areas of further research

The diffusion and institutionalization of FPIC

One direction in which more research is needed is on the diffusion and institutionalization of FPIC within the corporate domain. This thesis made a first attempt as there was little academic research to build on. The model developed in this thesis now needs to be tested for its generalizability: will applying the model in different environments result in similar conclusions?

One of the results of this thesis indicated that such diffusion is a multi-stage process, in which in each stage the corporation performs different tasks and roles. In the time spent within Shell as part of the internship I was able to identify different stages of the diffusion process in which the company's operating units were in. However, particularly with regard to the external diffusion of internally adjusted institutions, this research lacked the time and resources to fully investigate the roles the company can perform. For a better understanding of the process, it might be interesting to repeat this research after a specific period of time within Shell, or to conduct this research over a longer time span. Also, research is needed within different corporate contexts: one of the limitations of this research was that the cases selected were all projects or ventures operated or owned by Shell. The results might have been different if this research was undertaken in a different corporate environment, for example in smaller, non-western, or more centralized corporations. To fully test the applicability of the model developed, similar research is needed both in other corporate environments within the extractives industry and in different industry sectors.

The usefulness and applicability of FPIC for corporations in less regulated regions

The cross-case comparison showed that ventures operating in strictly regulated regions are more likely to have in place Indigenous engagement practices that come close to international expectations around FPIC. In less regulated areas, the 'business case' or strategic value of implementing far-reaching

engagement requirements is less established. Although in theory many benefits of applying FPIC in those regions can be identified, such as a stronger social license to operate, better risk management, more coherency, and a more consistent overall corporate approach, in practice these opportunities are rarely recognized. For extractives industry corporations, currently the 'business case' for FPIC is much more constructed on compliance with legal standards and long-term cost savings. Whether or not the opportunities of an FPIC-approach can be materialized in less regulated regions is a question that needs further research.

Successfulness of FPIC implementation via IFC Performance Standards

One of the preliminary conclusions made in this research is that smaller and medium-sized companies within the extractives industry, who are dependent on external funding, are more likely to experience stronger pressures for compliance with FPIC via finance institutions. However, to be able to make any concrete statements on this, more research on the institutionalization of FPIC in medium-sized companies in the extractives industry who are reliant on IFC finance

The possibilities of corporate FPIC

At the moment, FPIC is increasingly implemented in CSR standards. One of the difficulties that arises here is, that CSR standards are often based on voluntary implementation. FPIC as a public soft law instrument is often not enforceable, specifically not in the private law context in which corporations operate. The question that now needs to be answered is, whether FPIC requirements for corporations are similar to those set for states. In other words, are corporate FPIC processes similar to governmental FPIC processes?

Some authors have already pointed out that in a corporate environment, once a legal concession is granted, FPIC is rarely seen as meaning a 'right to veto' (Lehr & Smith, 2010). Why would a corporation stop its exploration or construction activities if it has a legal claim on the lands on which its activities are taking place? Consultation, participation and cooperation are seen as adequate tools to achieve a social license to operate and to minimize potential societal opposition risks to the business. In other words, the activities conducted under the denominator of corporate FPIC are often rooted in terms of economic profitability, competitive advantage and risk management. What would be the intrinsic value of FPIC, if consent is no part of it? Unless a mechanism can be developed in which the right to FPIC is guaranteed by corporations, rather than a mechanism through which corporations can 'tick the boxes', FPIC is likely to be watered-down. In terms of academic research, one of the major challenges for the Indigenous peoples and Business field is to establish the preconditions of such a mechanism.

Corporate respect for Indigenous peoples' rights through an ecosystem services approach

One of the findings in the within-case analysis was that in regions in which the Indigenous population is not recognized, or even discriminated and marginalized, a concrete corporate Indigenous peoples approach might have an adverse effect on the position of Indigenous communities within dominant society. In these situations FPIC seems ill-suited, and corporations face the challenge of upholding Indigenous subsistence rights without being capable of conducting thorough engagement processes. In Majnoon, Shell implemented specific Indigenous indicators in its ecosystem services management approach. Though promising, more research would have to point out to what extent Indigenous rights are truly protected under such an approach. The corporation might be able to preserve Indigenous subsistence and cultural integrity, however, there is no participation, involvement, consultation or consent. It is unclear whether the corporation actually respects the community's right to self-determination and self-governance.

Chapter 10: Conclusion

This thesis revolved around the institutionalization of respect for Indigenous peoples' rights in the corporate environment. By addressing the main research question – How do international norms and expectations about Indigenous peoples' rights influence corporations? – via a case study of Royal Dutch Shell, the intention was to establish a theoretical model that could describe how corporations anticipate on normative constructions as institutions by adoption, translation, implementation and diffusion.

As such, this Master's thesis attempted to contribute to existing literature by developing a model that covers the process of how increasing Indigenous engagement expectations present within international society influence or even transform corporations. Though much theoretical research has been done with the intent of describing how corporations respond to the increasing responsibility to respect human rights in general, little model-building has occurred around the diffusion of specific Indigenous peoples' rights to the corporate domain. In other words, while much research has been undertaken on the practical implementation of Free, Prior and Informed Consent by non-state actors, this literature does little to generalise results into a model or theory.

This research has shown that in order to answer the research question, it is necessary to take into account the multinational character of TNCs and the phased approach through which norms are externally and internally diffused. Many TNCs tend to have a corporate structure that is designed towards regional flexibility; in other words, the control mechanisms of TNCs are often built on the assumption that compliance with national legislation is key to the business. At Shell, for example, on-the-ground practitioners repeatedly stated not to see value in a global approach to Indigenous engagement, as this would limit the regional flexibility needed to comply with different national legal systems. FPIC was not known or seen as inapplicable.

At the moment, companies experience international normative pressures to adhere to Indigenous peoples' rights. However, there is not yet a solid international framework – through law, finance or industry regulation – that is capable of translating these pressures into the need for compliance. Large TNCS are often not reliant on external funding or on other business partners, and overall the industry culture is oriented towards national compliance and risk management. Bluntly speaking, what this means is that as long as extractives companies do not have to commit to FPIC by law or finance or industry requirements, they will refrain from doing so. Also, there is not yet a strong case to see FPIC as a risk management tool - FPIC is seen as increasing threats to the business rather than an opportunity to manage project risks. For that reason, at the moment the route via which pressures for FPIC or other standards of Indigenous engagement have most influence on corporate behavior is still through those instruments that have a mandate to ask for compliance: in other words, via stringent national legislation, mandatory industry regulation and finance requirements.

This does not mean that normative pressures are of no influence. Increasing international media and NGO attention for specific oil extractives projects have led other extractives companies to conduct more stringent and formalized engagement activities. The fear of reputational damage combined with the need for compliance has created a range of diverse and localized approaches.

The transnational and decentralized nature of TNCs thus implies that (international) norms and expectations on Indigenous peoples' rights influence TNCs on different levels: on a global level, they create a level of awareness, cautiousness and anticipation, while at the local or regional level they

might or might not be felt by the company via implementation in legislation and regulation and via media and NGO attention. Consequentially, operating units will be in different phases of adoption and implementation – as was the case with Shell, where one operation had committed itself to FPIC, others had adopted the standard of Free, Prior and Informed Consultation or Early, Often and Ongoing engagement and yet again others did not have any standards in place at all and were operating on an ad hoc basis.

Interestingly, decentralized corporate structures thus can cause a contradiction in our modern world in which pressures increasingly have an international character: on the one hand, there is a need to maintain regional flexibility while on the other hand there is a call for more consistency in responding to these internationally set pressures. Particularly with regard to Indigenous peoples' rights, which is in many countries still a sensitive topic, the gap between international pressure and on-the-ground behavior is visible.

However, it is also the decentralized structure that can decrease this gap: locally held institutions on Indigenous engagement, highlighted as 'best practices', are shared with other, less regulated, areas. Internally, through the bottom-up and interregional diffusion of such 'best practices', Indigenous peoples rights and standards for engagement become embedded in corporate guidance, policies and procedures. At the same time, corporations act as norm entrepreneurs and norm leaders in those instances in which they communicate on their adopted and adjusted institutions to external stakeholders.

Final remarks

In the 21st century, respecting Indigenous rights is not just a moral imperative; it is a business necessity to avoid financial risks stemming from reputational damage and negative publicity, operational delay due to social unrest, legal challenges and compensation amounting to billions of dollars and the loss of a (social) licence to operate. As companies are operating more often in remote areas in the world and are applying increasingly intensive measures of exploitation, the risk of negatively impacting on Indigenous communities has become part of the everyday concerns of extractives companies.

What is striking is that even though business is closely tracking the development of Indigenous rights in hard, soft and customary law, and is recognizing that compliance with these rights will be expected from them in the near future, few steps are being taken to publicly embrace Indigenous rights, and in particular Free, Prior and Informed Consent. While Shell does not want to be the last to follow, it definitely does not want to be the first in line to announce its willingness to respect a community's right to give consent. After all, being the leader of the pack can be dangerous, and FPIC entails as many threats as it offers opportunities to the business. Clearly, there are arguments supporting such a stance: giving away consent is a thing no government will do, so why bother as a company? And, the veto of one community should not stop the economic development of the rest of society. And, is it actually the company's job to provide consent, or is it a state matter that should have been dealt with long before the company got involved? In the end, oil companies like to contemplate that they are in the business of producing oil after all, and this does not include becoming a nation's social safety net. The company should not have to take over state responsibilities.

One might wonder whether strategically, this is the smartest stance for Shell to take. Shell has experienced that being associated with environmental destruction and maltreatment of communities can cause long-lasting reputational damage. In the last years, the company has been struggling, and continues to do so, with severe community and NGO opposition. The following examples relate to

Shell's corporate conduct in Nigeria and reflect well why the company should perhaps consider making a stronger commitment to respecting human rights.

In 2002, under the ATCA, Royal Dutch Shell was sued in US federal court by the wife of Barinem Kiobel, a MOSOP activist who campaigned against the environmental damage caused by oil extraction in the Ogoni region of Nigeria. Kiobel was illegally detained in 1994, was kept in military custody, and eventually executed (together with other local activists). The suit brought against Shell alleged that the company allowed company property to be used for the attacks, and that they had paid Nigerian soldiers. The plaintiffs therefore claimed that Shell was complicit in the commission of torture and extrajudicial killing. Shell vigorously argued that the court had no jurisdiction to hear the case. Eventually, after years of trial, the US Supreme Court considered in 2013 that it indeed did not have jurisdiction under the ATCA to consider the matter. Nevertheless, the Kiobel vs. Shell case drew much public attention and resulted in strong disapproval of Shell's behavior and legal tactics. In a special issues brief on the case, John Ruggie stated that:

> *"Should the corporate responsibility to respect human rights remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself? Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests? Or would the commitment to socially responsible conduct include an obligation by the company to instruct its attorneys to avoid such far-reaching consequences where that is possible? And what about the responsibilities of the company's legal representatives? Would they encompass laying out for their client the entire range of risks entailed by the litigation strategy and tactics, including concern for their client's commitments, reputation, and the collateral damage to a wide range of third parties?"*(Ruggie, 2012: 6)

In other words, Shell's efforts to strengthen its position as a socially responsible corporation, or as 'good neighbor' of the community, is questioned after the multinational has repeatedly argued against the applicability of a law that remedies human rights abuses. Following up on Ruggie in *Forbes*, journalists started to question how a company can maintain it has a commitment to CSR when it continues *'to seek to gut a law that brings human rights victims a remedy for harm'* (Mehra and Shay, 2012).

At the time of research, five court cases involving Nigerian farmers and the Milieudefesie v. Shell's local Nigerian subsidiary SPDC and Royal Dutch Shell again drew attention to Shell's conduct in Nigeria. This time, the court did assume personal jurisdiction, and in the case of Ikot Ada Udo the Nigerian subsidiary was held accountable for the environmental and societal damage stemming from the oil spills (Rechtbank Den Haag, 2010; 2013a; 2013b; 2013c). International NGOs and human rights activists expressed strong disapproval of the Court's decision to discharge the parent company, as internationally, broadly the opinion held was that the company in fact was complicit, and it was now time it would pay for it.

In January 2015, for the first time Shell made a settlement of £55 million to compensate an affected community in the Bodo area of the Niger Delta, in which two major oil spills occurred. *'An important victory for the victims of corporate negligence'*, as Amnesty International and the Centre for Environment, Human Rights and Development proclaimed (Amnesty International, 2015). According to Director of Global Issues at Amnesty International, Audrey Gaughran, *'Shell knew that Bodo was an accident waiting to happen. It took no effective action to stop it, then made false claims about the amount of oil that had been spilt'* (Amnesty International, 2015). Expressing the view of many human

rights and environmental NGOs, Gaughran further mentioned that '*Oil pollution in the Niger Delta is one of the biggest corporate scandals of our time. Shell needs to provide proper compensation, clear up the mess and make the pipelines safer, rather than fighting a slick PR campaign to dodge all responsibility'*.

In other words, Shell might have taken large steps to include social risk management in its Social Performance, the international institutional environment does not seem to feel that these steps are appropriately regulating its corporate conduct. And, while Shell might prefer to be in the 'middle of the pack' with regard to its human rights and CSR policies, one could question whether the company even has the opportunity to pick its own position on the issue. After all, community stakeholders and non-profit associations have already placed Shell at the fore, using the corporation and its behavior in Nigeria as 'worse case example' and stigmatizing the corporation in other areas in the world. Its conduct, among others in the pristine Arctic areas of Russia and Alaska, is under major scrutiny and control by external watchdogs. The abovementioned cases show that Shell cannot afford any more reputational damage due to (perceived or real) malfunctioning on social, human rights and environmental issues. What is more, if Shell wants to turn public opinion around, it can also not afford an awaiting stance with regard to respect for human rights.

FPIC might not yet be legally binding for corporations. However, as society influences the law just as the law influences society. In the 21st century, respecting FPIC is not just a moral imperative. It is an emerging societal expectation with the potential power to incrementally change the way companies do business. And particularly for Shell, a proactive stance towards FPIC might be the best strategic option the company has at its disposal to ensure continuous and broad support for its corporate conduct.

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